The Many Lives of Louis Brandeis: Progressive-Reformer. Supreme Court Justice. Avowed Zionist. And A Racist?

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It has to be the reader's immediate thought of how, or why, is someone even using in the same breath the name of Louis Brandeis with the concept of racism?

Introduction

Louis Brandeis within his one life lived many sub-lives. Like changing hats, he would assume different identities as he compartmentalized his life's activities, depending upon the occasion. Most photographs of Brandeis in fact depict him in different hats.[1] Although Brandeis was Jewish he did not, however, wear the hat of a Jew - the skull cap or yarmulke as a recognition of his Judaism. Until mid-life he did not create room in his life for even the recognition of being a Jew. In this metaphorical sense of different personalities being worn like different hats, Brandeis indeed wore many – that of a progressive, a so-called radical "people's lawyer" for the little man, Supreme Court Justice, and a Zionist. But did Brandeis also live the life or wear the hat of a Racist, and was that stream of thought part of his existence and personality?

The reason this question can be asked is that Brandeis was an ardent and prominent Zionist. Zionism, in turn, historically has provoked strong responses from those who opposed it. For example, on November 10, 1975 the United Nations passed Resolution 3379 which stated "[t]hat Zionism is a form of racism and racial discrimination".[2] Resolution 3379 also proclaimed Zionism was one and the same with the universally despised and unsupportable South African apartheid. At least as official and stated U.N. policy, Resolution 3379 ultimately was repealed in 1991.[3] Some

may argue, however, that Resolution 3379 still survives institutionally and systemically at the U. N., although not as any "official policy."[4]

By this calculus of equating Zionism to racism it raises the query of whether the Zionist activities of Louis Brandeis, a priori, reflected a racial bias on his part? Brandeis' life, therefore, provides a good yardstick by which to measure whether a Zionist belief alone necessarily leads someone to have a racial ideology in action or deed. For sure, Louis Brandeis does not seem to fit the caricature profile of a racist. Racism is equated with ignorance, and a closed backward looking mentality. Actually throughout his life, especially prior to being named to the United States Supreme Court, Brandeis was considered a forward, almost revolutionary political and socio-economic thinker. He was a prominent member of the late 19th and early 20th century's Progressive era. Yet, the Progressive movement, in terms of its doctrinal foundation or Louis Brandeis' implementation of it and his then so-called radical causes, did not encompass in its philosophical mainstream the idea of "civil rights" for African-Americans. Although there were a few Progressives during those years, more than 50 years after the Civil War was fought, who were leading civil rights causes, Brandeis was not one of them, except for a few tangential episodes. Thus, Brandeis' progressivism, or radicalism did not encompass a fight for equal rights of Black Americans or any other color shades of our citizens. This was, accordingly, perhaps a failure of Progressivism in general, and Brandeis specifically.[5] But was it because as a Zionist he was also a racist?

Contemporary African-American analysis of Supreme Court history on race relations generally views Brandeis in a favorable light.[6] In 1930 when the Supreme Court nomination of Judge John J. Parker was defeated, due mostly to opposition caused by his racist views, Brandeis wrote to Felix Frankfurter: "The Negro also has moved a step forward."[7] Unlike some of his fellow

Justices on the Court at the time, most notably James McReynolds, Brandeis did not possess even by his own days' standards views that could in any way be considered racially based.[8]

1. Racism and Zionism

Racism has been described as White society's discrimination or separation of individuals by color. In 1970 the Commission on Civil Rights defined "racism" as follows:

> Racism may be viewed as any attitude, action, institutional structure which subordinates a person or group because of his or their color. . . This is true of Negroes, Puerto Ricans, Mexican-Americans, Chinese-Americans, and American Indians. Specifically, White racism subordinates members of all these other groups primarily because they are not white in color, even though some are technically considered to be members of the "White race" and even to view themselves as "White."[9]

As for Zionism, the Saudi Arabian Ambassador to the U.N. at the time of Resolution 3379 in 1975 offered this definition:

> Zionism is racism because it is built on exclusivity. The Jews believe they are a superior race, a Chosen people. They believe their home should be in Palestine, the Promised Land. Since when was God in the real-estate business?[10]

The origins of Zionism as a movement, political and social, derived from the late 1800's in Eastern Europe as a response to the continued persecution of Jews.[11] It became then, in the simplest of terms, an effort to remove east European Jews from that discrimination and relocate them to a new Jewish homeland in Palestine. Western European Jews, and even American Jewry, did not necessarily all share this particular vision. During Brandeis' historical epoch in Zionist activities, numerous factions of Zionism existed.[12] There was an international movement.[13] There was also the American Zionist movement of which Brandeis became its most prominent member, and shortly after his joining the cause its most public personification.

Zionism was not entirely a religiously based Jewish cause. The Zionist movement of the late 1800's through the mid-twentieth century contained factions of socialists, Orthodox Jews, atheists, and other individuals possessing a wide variety of political, social and revolutionary agendas.[14] However, during Brandeis' lifetime his Zionist activities were principally committed towards establishing a Jewish State in what was then Palestine. Brandeis did not live to see Israel become a reality in 1948. He died on October 5, 1941.

2. Brandeis As A Jew and Zionist

Brandeis was born Jewish, but was not a religious Jew. He never went to Synagogue in pursuit of any religious beliefs. He was not Bar Mitzvahed, then the traditional ceremonial recognition of a Jewish boy's transition into manhood. At his death Brandeis again eschewed Jewish tradition and rituals. He was cremated. An urn of his ashes is buried beneath the University of Louisville law school, an educational institution which also received during the benefit of Brandeis' work and philanthropy.[15]

The Brandeis family ancestors were not religious either.[16] Brandeis is quoted as saying:

> I saw that my parents were good Jews, and yet did not associate with Jews and were different from them, and so there developed in me more appreciation for our race as a whole than for individuals.[17]

His parents came from a German background in Czechoslovakia. They immigrated to the United States in 1849 after the failed social and political Revolution of 1848. Those emigres who came from Europe at that time were often referred to as "Forty-Eighters."[18] Brandeis' forebears were children of the political beliefs behind that Revolution – commitment to civil and political liberty for all – hardly racially superior concepts. Jews, persecuted and discriminated against themselves in many sectors of Europe, were at the forefront of that revolutionary movement.[19]

When the Brandeis family history is examined it negates any affiliation with a racially separatist philosophy. Although his family came to this country during the time of slavery, both of his parents were strong abolitionists.[20] Brandeis' given middle name was David, but he changed it to Dembitz primarily to honor his uncle, Lewis Dembitz. Uncle Lewis, an influential lawyer in his own right, was also an avowed abolitionist. He was a delegate to nominate Abraham Lincoln at the 1860 Republican Convention.[21] Lewis Dembitz was also religious, an Orthodox Jew, unlike his nephew Louis. And, his Uncle Lewis was also an ardent Zionist. From the blood flowing through his veins Brandeis did not come from any racist genetic stock.

For the first half of his life Brandeis, as noted, did not even hold himself out as a Jew, and certainly not as a Zionist.[22] His first speech having anything to do with Jews did not come until 1905. This was given at the New Century Club in New York City commemorating the 250th Anniversary of Jewish Settlement in the United States.[23] He used this occasion to criticize the concept of the hyphenated American, similar to a view strongly held at the time by President Theodore Roosevelt.[24] Brandeis, as of 1905, believed in total assimilation of Jews into American society. His initial view was that being Jewish should be suppressed, and not touted as being a Jewish-American or any type of hyphenated citizen. He was for total assimilation. Later in his Zionist beliefs Brandeis would move 180 degrees from this position by saying that "assimilation is national suicide."[25]

There has never been one defining reason, according to either his biographers or historians, exactly how or why Brandeis became a Zionist.[26] By most accounts he did not become truly involved in the Zionist movement until the 1911-1912 time frame. At that time he joined the Federation of American Zionism (FAZ). Because of his national stature, prestige and notoriety

Brandeis quickly occupied positions of leadership. He basically controlled and ran that organization from 1914 until about 1921, and then again commencing in the early 1930's.[27]

Brandeis' Zionism encompassed both a theoretical and practical social and political belief. He worked for the physical establishment of a Jewish homeland in Palestine, a place where the wandering Jew could settle and be free from persecution and prejudice. Yet, Zionism was also for him was a social experiment where he theorized building an idealized Greek City-State founded upon those and Jeffersonian ideals (although it has been pointed out that slavery existed in Greek life).[28] After spending much of his professional life as a lawyer attempting to re-structure America's economic framework to coincide with his own socio-economic views, the prospect of building a new Jewish State was something which greatly attracted and motivated Brandeis.[29]

3. Zionism and The Bench

Although Brandeis is now universally regarded as a great Justice,[30] there was much doubt at the time whether he would even be confirmed. This fact in retrospect is simply hard to imagine today. One of the challenges to the Brandeis appointment was that he lacked "judicial temperament." He was also accused of being a "radical" whose mere presence would contaminate the Supreme Court.[31] Adding to this opposition, the American Bar Association officially contested his nomination. No less than seven former ABA Presidents (one of whom was also a former U. S. President and later became Brandeis' Chief Justice) wrote letters in opposition to his appointment. Brandeis was additionally criticized for being both unethical, and unscrupulous.[32] Then the nominee did not personally testify before the Senate Judiciary Committee as today, so people appeared as Brandeis' surrogates. This acrimonious opposition is a far cry from the reverence in which Brandeis is presently held.

Despite being Jewish, there seemed to be no overt anti-Semitism directed towards his Supreme Court nomination.[33] There was, for sure, likely benign anti-Semitism, but much less apparent than it was in 1912 when Brandeis was being considered for a Cabinet post by Woodrow Wilson.[34] One opponent to his Supreme Court appointment, Senator Henry Cabot Lodge, wrote that "[n]ot the slightest objection has been made to Mr. Brandeis on account of his race. I have not heard that mentioned here."[35] Brandeis, however, apparently believed his being Jewish was indeed a major factor. In a memorandum outlining the attacks against him he wrote:

> The dominant reasons for the opposition to the confirmation of Mr. Brandeis are that he is considered a radical and is a Jew.[36]

Being a Jew did not in turn also mean that the American Jewish community turned out en masse to support his nomination, despite that Brandeis would be the first Jewish Justice on the Supreme Court. Many Jews were then ultraconservative at the time, and corporate and business moguls whose economic practices and policies Brandeis attacked as the "people's attorney" in his fight against the evils of money. These Jews accordingly, like others, feared his radicalism on the nation's highest Court.[37] As William Howard Taft, a non-Jew, wrote: "I think the Jews have a right to complain that the first man selected should be of such a character."[38]

Brandeis' Zionist activities played little or no reported role in his Supreme Court fight. Although he was a Zionist, there certainly was in turn no allegation about him also being a racist. In fact, Southerners' opposition to the Brandeis appointment was based on their fear of his overturning "Jim Crow" legislation if allowed on the Court.[39] Those who fought to keep segregation of the Black from the White race clearly did not see Brandeis as one who supported the suppression of civil and political liberties of African Americans.

As we now know, Brandeis did become the first Jew on the Supreme Court. His appointment, at least in some quarters, led to the belief of a Jewish seat on the Court being created. That myth has not been widely accepted, even by other Jews.[40] It should be noted, however, at least one Jewish Justice continuously sat on the Court from 1916-1969. The importance of this first Jewish appointment can be seen by the statement of one woman waiting outside the Capitol Building - then the Court's home – to see Brandeis sworn in: "I am about to see a Jew on the Supreme Court of my country for the first time."[41]

During the years Brandeis was on the Supreme Court the prohibition against certain types of extra-judicial activities was not as well defined as today. Even so, later historical anecdotes of Supreme Court Justices playing cards at The White House[42], or Justice Abe Fortas advising Lyndon Johnson on political and other matters[43], simply would not occur today. But the real reason is current media scrutiny would not permit it. In a less media intrusive age, during Brandeis' life, there was more flexibility and an ability to avoid a great deal of public scrutiny. As such a Justice Brandeis could quietly maintain political contacts and direct communications with Woodrow Wilson on issues of Zionism.[44] This practice of talking directly to a President of the United States about Zionism continued during FDR's presidency, with whom Brandeis had a personal relationship. Thus, Justice Brandeis directly lobbied FDR after 1933 for action in response to the persecution of Jews by Hitler;[45] and, to persuade the President to speak out on moral grounds against the British for their failure to allow Jewish immigration to Palestine during the 1930's as they had earlier promised immediately after World War I.[46] Roosevelt, in turn, often solicited Brandeis' consultation on economic matters. FDR called him "Isaiah"[47], an obvious reference to Brandeis' Biblical-like wisdom. Yet Justice Harlan Stone said of Brandeis:

> He was strongly of the belief that a Justice of the Court should devote himself single-mindedly to his duties as a Justice, without undertaking to engage in any outside activities.[48]

Quite to the contrary[49] Brandeis continued his Zionist responsibilities.[50]

During World War I Brandeis met with members of the British, French and American governments about issues of a homeland for the Jews, and unlimited Jewish immigration to Palestine.[51] During the Versailles Peace Conference in 1919 he earnestly worked, mostly through intermediaries, trying to secure an Allied commitment for Jewish Statehood in Palestine. Despite these extra-judicial efforts Brandeis did attempt to keep a semblance of these political activities from the public eye by having friends and confidants do his bidding for him, particularly future Supreme Court Justice Felix Frankfurter.[52]

For an important international Zionism meeting in 1920 Justice Brandeis traveled to Europe. He was asked at that time - apparently with some consideration by him - to resign from the Supreme Court and take over the leadership of international Zionism.[53] Brandeis was even talked about and asked to be the first President of Palestine.[54] Throughout the 1920's and '30's, while on the Court, he continually worked on specific Jewish projects for Palestine such as programs involving resettlement, agriculture, communal economic cooperatives, and labor organizations.[55] And he always gave money. It is reported that between 1912 and 1939, the year he resigned from the Supreme Court,[56] Brandeis had donated over $600,000 – much more in today's dollars – "to Jewish organizations, with most of the money donated toward Zionism."[57] Just before his death he earmarked money for a playground in Palestine "to be used by Jewish, Muslim and Christian children."[58] This latter act hardly a manifestation of a belief predicated on racial superiority.

4. Brandeis' Implementation of His Zionist Beliefs

Brandeis' approach to Zionism was once stated in the following terms:

> Mr. Brandeis was characteristically concerned with the "little man." For him Zionism was a segment of the striving for the dignity of man.[59]

His entire approach to Zionism was contrary to the notion of subjugating one group of people because of color or race by the establishment of a Jewish State. This was, therefore, entirely unlike South African apartheid to which Zionism was compared by the United Nations.

At the conclusion of World War I, because of the adverse effect hostilities had on Jews in Europe, there was a wide and recognized belief - or earnest hope - that establishment of a Jewish homeland was about to occur.[60] In anticipation of this event occurring, Brandeis in 1918 formulated a social justice Code for this new Jewish State to be. When these principles are viewed it is clear that Brandeis' practice of Zionist philosophy was not racially based. His State would be based on,

> First: We declare for political and civil equality irrespective of race, sex, or faith of all the inhabitants of the land.[61]

On the explosive issue of land ownership (since Arabs feared property confiscation by the Jews), the Brandeis Code took into account existing Arab rights.

> Second: To insure in the Jewish National Home in Palestine equality of opportunity, we favor a policy which with due regard to existing rights, shall tend to establish the ownership and control by the whole people of the land, of all natural resources, and of all public utilities.[62]

Obviously, even to this day land ownership and settlement in Israel creates tension and acrimony.

Implementation of the Brandeis Zionism would create a Jewish State based upon Jeffersonian principles. It was certainly, as can be seen from his Code, not one founded upon an apartheid precept. Brandeis strongly believed, contrary to a racial exclusionary philosophy, that Jews would

live cooperatively with Arabs. Much of this view was based upon his one and only trip to Palestine which he took, while on the Court, during the Summer of 1919. Upon returning home from that journey Brandeis wrote:

> So far as the Arabs and Palestine are concerned, they do not present a serious obstacle. The conditions under which immigration must proceed are such that the Arab question, if properly handled by us, will in my opinion settle itself.[63]

American Jews, and others, thought it hypocritical of Brandeis to urge Jewish relocation to the harsh and dangerous life Palestine offered while continuing his comfortable American lifestyle.[64] One anti-Zionist Jew of the time commented:

> But our good Zionist friends prefer luxuries instead of privation. They believe that the Russian Jews should be experimented upon. Mr. Editor, if Mr. Brandeis and one hundred prominent Jews go to Palestine and live, then will their example cause thousands of others to follow suit; will the Zionists accept this challenge?[65]

Brandeis, as part of the Zionist philosophy he developed, thought Jews also should have a self-respect and self-pride in their Jewishness.[66] His views on Zionism reflected that a Jewish State must also be based on principles and a practice of self respect, pride and courage. For example, in referring to European discrimination of Jews in Austria, Brandeis described how Zionism helped to overcome prejudice:

> But Zionism gave them courage. They formed associations, learned athletic drill and fencing. Insult was requited with insult, and presently the best fencers of the fighting German corps found that Zionist students could gash cheeks quite as effectively as any Teuton, and that the Jews were in a fair way to become the best swordsmen of the university[.][67]

In reality what Brandeis preached about Zionism in establishing a Jewish self-identity was not dissimilar to the color pride of Black Power, which later developed during the 1960's although in a more militant fashion.

Despite being an avowed Zionist, in derogation to racially superior beliefs, Brandeis encouraged his closest associates such as Frankfurter to actively support the NAACP.[68] Although he was not participatory himself, Brandeis' sympathies were obviously with such organizations. Brandeis also assisted Howard University's all Black law school with financial contributions, and offered curriculum advice to its president. One Brandeis scholar has noted:

> There were few Black lawyers during Brandeis' years on the Court, and it was clear that most law schools were not likely to begin welcoming Black students. The incoming President of Howard University was advised by Brandeis in the late 1920's; 'I can tell most of the time when I am reading a brief by a Negro attorney. You've got to get yourself a real faculty out there or you're always going to have a fifth-rate law school. And it's got to be a full-time and a day school'.[69]

Additionally, Brandeis encouraged the few Harvard Law School's Black students to take cases for the NAACP.[70] Thus, according to Professor Phillipa Strum, despite the above reference to "Negro" students and second -rate law schools, it appeared beyond doubt "there is no evidence of racism on Brandeis' part; it is likely that his insistence on merit made him relatively indifferent to color."[71]

Beginning in the 1930's through to the end of his life, Brandeis began to take on a more militant view in his Zionism. With the rise of Nazism he believed seriously that a physical threat to the Jews existed from political governments espousing racial superiority. As early as March 11, 1933 Brandeis said that "the Jews must leave Germany."[72] As a natural extension of his Jewish pride based on courage and self defense Brandeis would support the establishment of a Jewish militia in Palestine, which ultimately became the Haganah or the unofficial Jewish Army.[73] He also saw no problem in Jews bypassing British blockades to effectuate illegal immigration into Palestine.[74]

5. Race Cases in The Supreme Court

During the period of 1916 through 1939 when Brandeis was a Justice the Supreme Court did not confront Civil Rights or racial equality cases to the extent it would during the 1950' and 1960's.[75] Thus, no clear line of decisions and legal reasoning exists by which to get a full understanding of Brandeis' judicial philosophy on the issue of race within the framework of constitutional law. In fact, whenever these types of cases did appear on the Court's docket the opinions were not authored by Brandeis. His votes with the majority, however, do provide some indication whether Brandeis might be considered a racist due to the fact he was also a Zionist. Even from these few decisions one cannot reach a supportable conclusion of a Brandeis racist philosophy commensurate with being a Zionist.

Race-related cases were a patchwork of decisions during the Brandeis judicial era. These cases must be looked at from the historical framework in which they were decided. For example, Black, White, African-American language was not generally used. Instead, there were references to the "Negro" or "Negroes." A jingoistic mind set is apparent from the judicial language. This was particularly true in citizenship decisions. Although some of these opinions were not penned by Brandeis, certain of them contain references such as "the Mongolian or yellow race."[76]

In criminal cases Brandeis voted with the majority in recognizing the right to a fair trial regardless of one's color. In Moore v. Dempsey[77] the appeal was by five Blacks who alleged they were convicted without due process of law "under the pressure of a mob." Justice Holmes, writing for the Court, reversed the dismissal of a *habeas corpus* petition. McReynolds and Sutherland dissented. Usually if there was a dissent in these race-based cases, it was by James McReynolds.

Powell v. Alabama[78], the famous or infamous Scottsboro case, involved nine Blacks convicted of raping two White girls in Alabama. The constitutional claim was that defendants failed to have the benefit of representation by counsel during the actual trial. The defendants were all illiterate. No lawyer was formally appointed or given an opportunity to prepare a defense on their behalf. The Court reversed the convictions finding an insufficient opportunity to obtain counsel, who was not appointed by the State until the day of trial. Powell held that the right to counsel fell within the due process protected by the Fourth Amendment. Brandeis' vote was with the majority. Butler and McReynolds dissented believing that a fair trial had been provided to the accused.

In Norris v. Alabama[79] nine Blacks were convicted of a rape in Jackson County, Alabama. The issue in this case involved exclusion of Blacks from the jury rolls. The Court reversed the convictions finding that the Alabama statute on selection of potential jurors was discriminatory against Blacks in its application. Blacks entitled to sit on the jury did meet the qualifications, but were being excluded from jury rolls which thereby eliminated any opportunity to be a juror in the first place. Brandeis voted with the majority. In Hale v. Kentucky[80], a *per curium* decision, the Court found a Kentucky statute on jury selection, as applied, also violated the Fourteenth Amendment. There the defendant claimed Blacks had consistently been excluded from participating on grand and *petit* juries. Brandeis' vote in both these cases was with the majority.

In voting rights cases Brandeis did not author any opinions. He was again in the majority upholding equal voting rights for Blacks, but without writing any specific comments.[81] For example, Nixon v. Herndon[82], invalidated a Texas statute prohibiting Blacks from voting in the Democratic primary elections. The Holmes opinion stated: "[C]olor cannot be made the basis of a statutory classification affecting the rights set up in this case."[83] Yet, in Grovey v. Townsend[84] Brandeis voted

with the majority. In this case a Black man attempted to obtain a ballot to vote at the Democratic party convention. The Court distinguished its earlier cases by finding the Democratic party a private organization which was entitled to determine their own membership qualifications. The Democratic party convention was not considered to be a State action. The argument asserted in Grovey was an inability to participate at the party convention was tantamount to not having access to vote in the general election. This was because the party convention determined who would be the candidate in the primary elections, and in a heavily Democratic area that person would be the ultimate winning candidate.

With regard to the alienage cases referred to above, Brandeis did author several opinions. Most dealt with either Japanese or Chinese litigants. His opinions in this area dealt with the contention that the Supreme Court did not have statutory jurisdiction to hear the cases.[85] In N.G. Fung Ho v. White[86] Brandeis, although conceding that Congress had the power to enact legislation to deport aliens, determined that persons of Chinese descent who could claim citizenship by evidence of their parents had entitlement under the Fifth Amendment to a judicial hearing on their claims. U.S. Ex rel. Bilokumsky v. Tod[87] also involved the deportation of one charged as an alien. The claim was that the person was advocating the overthrow of the Government and this was why the deportation occurred. Brandeis affirmed deportation on the grounds that the hearing received by the deportee was not unfair.

When not writing in other alien cases Brandeis voted with majority opinions written by Pierce Butler, a person not known for racial sensitivities.[88] Aliens trying to come and stay in America sought definitional status under the same laws that had been afforded "white persons", and in the post-Reconstruction law in 1870 "those of African nativity and descent."[89] These cases

generally dealt with an interpretation of the immigration and citizenship statutes which decisions construed these laws narrowly, sometimes with less than sympathetic consequences. In one case a Japanese-born petitioner, who had resided in the U.S. for 20 years and a Berkeley graduate, was not considered a citizen definitionally under the alien statutes. Brandeis signed off on the majority's language addressing the question of who are "free white persons":

> Manifestly, the test afforded by the mere color of the skin of each individual is impractical as that differs greatly among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunettes, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adapt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.[90]

Brandeis also went along with a harsh result in Gong Lum v. Rice[91]. In that case a Kentucky segregation statute was upheld. The decision required a Chinese student to attend a Black segregated rather than the White school. This was not a civil libertarian victory, for sure, or one where a Brandeis supporter could look to his support for the dignity of the individual. In private correspondence written at the time, however, it seems clear from those letters that, although he did not personally condone the segregation, he believed the Supreme Court was not the appropriate forum by which changes in this area should be effectuated.[92]

To the extent one might criticize Brandeis' judicial record on racial issues, it is in this area. "Jim Crow" were pervasive southern states' laws meant to exclude and segregate Blacks from all facets of society, particularly in housing and transportation.[93] Although he did vote with the majority in Buchanan v. Warley,[94] seen within certain venues to be a remarkable decision against racial discrimination[95], in other cases Brandeis failed to dissent when racial exclusions were constitutionally upheld.

Buchanan v. Warley involved a specific performance action to require the sale and purchase of a house. One interesting aspect of Buchanan is that it involved an ordinance from Brandeis' hometown of Louisville, Kentucky. This ordinance prevented home ownership and occupancy by a Black in a neighborhood when the majority of homes were already inhabited by Whites. The buyer, a Black, sought to void the contract on the grounds he could not by law inhabit the house as intended by the agreement. In Buchanan it was the White petitioner who challenged the constitutionality of the racially discriminating ordinance as a way of enforcing the contract. The Court found the law to be an unconstitutional attempt to prevent transfer of property to persons by race. Buchanan, despite its pro-civil rights result, is a case that can be just as well seen as a triumph for the sanctity of contract.[96]

Like Buchanan, the Court's view of contractual preeminence was seen also in Corrigan v. Buckley,[97] but with a different outcome. Brandeis voted with the majority. The Court in Corrigan had a private restrictive covenant as the issue which prohibited "persons of the Negro race or blood" from using, purchasing or occupying property in a neighborhood. A White plaintiff sued to enjoin another White property owner from selling his house to a Black purchaser. A lower court injunction against the sale was upheld. The Court did not find a justiciable constitutional issue instead determining the case on jurisdictional grounds that no State action was involved since this was a private covenant running with land.

Brandeis also had another opportunity to confront segregation laws from his hometown, Louisville. Brandeis has been criticized because of his vote with the majority in the case of South Covington & C St. Ry. Co. v. Kentucky.[98] In an earlier 1915 case, involving the same streetcar line before the Brandeis appointment, the Supreme Court found interstate commerce involved and did

not let stand conflicting state laws dealing with certain operational aspects of the rail transportation.[99] In that case the Court found an infringement of interstate commerce. The later 1920 case challenged a separate coach law segregating the races which applied to the streetcar line only on the Kentucky side. Kentucky sought to enforce its law of separate accommodations. The streetcar line, which traveled between Cincinnati, Ohio and Covington, Kentucky, claimed this law interfered with interstate commerce and was constitutionally prohibited because one state required separate accommodations and the other did not. This in turn impaired the rail line as it traveled between the two states. The railroad line did not want to add separate cars for the races simply because of business and operating costs, so they challenged the segregation law. The Court upheld the law, thereby ignoring an interstate commerce holding that it had applied five (5) years earlier. The majority decision concluded that the separation of coaches on the Kentucky side by race was not an unreasonable burden on the rail line.[100]

Was Brandeis' majority vote in Covington II based on his usual acceptance of State regulation over business and economic interests which should be given wide leeway in terms of the Constitution, or did he not want to overrule Plessy v. Ferguson? However, despite this vote Brandeis was very knowledgeable in this technical area of interstate commerce and would have had to see the adverse economic impact resulting from these the conflicting state laws. The interstate commerce impact could have provided a basis for a dissent, without dealing with the issue on the constitutionality of separate but equal. He knew about this area from being involved in ICC rate hearings as a lawyer, conducting investigations for the Commission, and even acting as one its arbitrators.[101] It seems odd, therefore, in this particular "Jim Crow" case that Brandeis would not say anything.[102] Another inexplicable result to the Covington II vote is that Brandeis had earlier been

involved in an ICC challenge by the NAACP to discrimination against Blacks on railroad cars in not being provided equal accommodations. Brandeis worked on that case in his usual way by gathering detailed statistics, technical data, and facts to support an argument of unequal racial discrimination in providing these separate cars. His Supreme Court appointment in 1916 ended participation in that particular project.[103]

In other miscellaneous cases Brandeis voted with the majority in New York *ex rel* Bryant v. Zimmerman[104] involving the Buffalo Chapter of the Ku Klux Klan. A member of the Klan had claimed that his equal rights and Fourteenth Amendment privileges were being violated. The New York statute required corporate organizations of over twenty people to first obtain an oath as a condition of membership, and to file certain information with the Secretary of State making it criminal not to do so. The petitioner claimed this discriminated against the Ku Klux Klan. The statute was upheld as constitutional. Another case was Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux.[105] This involved a dispute between two Masonic fraternities in Texas, one White and one Black in membership, but both known as the Nobles of the Mystic Shrine. The White Order had formed first, and the Black Order was later based upon an imitation, or so it was claimed. Injunctive relief was sought by the White Order against the Black organization. The Court found that the White version of the fraternity had acquiesced and was barred by *laches* to assert any fraud claim against the imitating Order made up of Black members. Thus, a separate and equal Black Order could co-exist with the White group. Brandeis voted with the majority.

New Negro Alliance v. Sanitary Grocery Co.[106] involved an injunction by a grocery chain against the New Negro Alliance, a union, to prevent them from circulating flyers that the stores were unfair to Black employees. The issue was whether the Norris LaGuardia Act, which prevented

injunctions against labor unions, applied only to disputes involving wages, hours, or working conditions, and not to this particular type of racially based picketing. The Court determined that the Act's protection against enjoining labor disputes included those which might arise from employment or labor discrimination based on race or color. Thus, the lower courts did not have the authority to issue an injunction against the union to stop the picketing. Brandeis again voted with the majority in this case.

The Supreme Court and Brandeis' adherence to the Plessy v. Ferguson separate but equal doctrine was seen in Missouri ex rel Gaines v. Canada,[107] but with a positive civil rights result. Here the Court ruled, as applied, that Missouri's separation of the races in educational institutions was unconstitutional. Brandeis voted with the majority. The petitioner, a Black, had applied to Missouri's law school for Whites. State law required that equal universities be provided to Blacks, including a law school. Missouri's segregated educational facility at Lincoln University, however, did not have a law school although it intended to build one. Because the school was not yet built, Missouri provided tuition for the Black applicant instead to attend an adjacent out-of-state segregated law school. The Court held for the student applicant since Missouri had not provided a law school substantially equal to that existing at the White university.

6. "Back to the Future"

It is very difficult to take a historical figure from a past era, transport them into the future. To do so with Louis Brandeis' life would be no different. Although he was a so-called progressive and reformer, in private aspects of his life Brandeis was entrenched in a 19th Century time warp. For all his lawyering and judicial efforts to advance social sciences and the law,[108] in his personal life he seemed to look backward, not forward. For one thing, he did not like modern day marvels.

Brandeis did not use the telephone.[109] He never owned an automobile -- horseless carriage -- until late in his life.[110] All his Opinions were first drafted in longhand despite having available more modern methods of print creation.[111] Guests to the Brandeis home in Washington would complain privately about the Spartan accommodations whenever they attended social events there.[112]

We mostly have only the power of words which describe Brandeis as a Lincolnesque figure.[113] Later in his Court years Brandeis would defy convention by letting his grey hair grow long and bushy, almost to the point he looked like a Biblical prophet to whom he was often referred.[114] It is therefore difficult to imagine someone like Brandeis existing today in our electronic media age where everything is seen under the scrutiny of the camera's eye. It seems Brandeis' historic stature would be minimalized by signing books at a shopping mall, or appearing on C-span's American Perspectives or America and the Courts. It is bad enough that most Americans may only know Brandeis from the one dimensional caricature of him portrayed in the Broadway and film versions of "Annie."

But what about his civil rights record and being a racist? There is simply not a lot of written materials to assess about why Brandeis was not more active in the civil rights area.[115] There is enough, however, to conclude that Brandeis was not a racist despite also being a Zionist. He was a Justice at a time when the issue of racial equality was not at the legal forefront. Yet, Brandeis' efforts in supporting workers and their economic rights would ultimately, by logic and action, have led him one day to a stronger stand on racial equality he had lived on. There was no such thing as separate but equal, and he knew it. This was the way he planned to attack racially separate rail cars before the ICC. The facts and expert data gathered by petitioners would show this same thing in Brown v. Board of Education. Is it surprising, therefore, that one strategy followed in Brown was

a social science data attack on separate but equal in education to demonstrate its inequalities and social harm by using the so-called "Brandeis brief."[116]

It has been argued, however, that Brandeis was not as sensitive to racial issues as he could have been, or what might be expected since he was a social and economic progressive.[117] But this is from a view looking backwards towards our future. Instead, he must be evaluated within the context of his own time. During Brandeis' professional life the Industrial Revolution was transforming America from an agrarian society to one controlled by machines, big business, and economic inequality of the workers. Accordingly, this is what shaped Brandeis' thoughts and actions. For the time prior to his Supreme Court tenure Brandeis' legal battles were fought against the curse of "bigness", and on behalf of economic rights for workers. Basically, Brandeis' fights were usually on behalf of the "little man," or the dispossessed in economic power terms. He was guided by principles of freedom, dignity and a strong moral precept of righteousness all undertaken to benefit the individual person. Freedom of the individual was sacrosanct.

Brandeis' philosophy and his morality were, therefore, an anathema to the concept of racism. A theoretical projection of the Brandeis intellectual and political thoughts, when overlaid on questions of race, leads to a belief in equality and opportunity for the non-White. As demonstrated here, even his Zionist beliefs were not racially exclusionary. Yet, if Brandeis failed by a generation or two to be at the head of the civil rights movement it was because the events of his time and experiences dictated different priorities. It was certainly not because he was a racist.

When his record is fully tallied any belief that Zionism as measured through the life of Louis Brandeis can be equated to racism is an unsupportable position. In the final analysis Brandeis' theoretical view of individual dignity and economic freedom did not presuppose a person's race.

Alpheus Mason's biography title of Brandeis captured it best: "A Free Man's Life." This title can also be said to be Brandeis' own expectation for everyone else's life, regardless of skin color.

END NOTES

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1. "Have bought myself a square top hat. Quite swell." Letters of Louis B. Brandeis, Vol. 1, 49 (Melvin Urofsky & David Levy ed. 1971).

2. 2400th Plenary Meeting, A/RES/3379/(XXX); www.brainencyclopedia.com/encyclopedia/u/un/un__general__assembly. (emphasis added.)

3. 74th Plenary Meeting 16 December 1991 (A/RES/46/86); 109 Christian Century 38 (1992).

4. For example, see Organization of the Islamic Conference (www.oic-un.org) (Viewed 2/4/06.)

5. Philippa Strum, Brandeis: Beyond Progressivism 142 (1993).

6. John Howard, The Shifting Wind: The Supreme Court and Civil Rights from Reconstruction to Brown, 181-183 (1999). "On matters of race and rights, Brandeis' realist judicial approach and broader, reformist social philosophy offered at least the possibility of balancing off James Clark McReynolds' known hostility to Black interests." Id. at 183.

7. "Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter, 425 (Melvin Urofsky & David Levy ed. 1991).

8. Howard, supra, Note 6, at 23, 181. McReynolds was also known to be an Anti-Semite. At times he would not talk to the two Justices on the Court who were Jewish, Brandeis and Cardozo. Alpheus Mason, A Free Man's Life 466 (1946). McReynolds would often get up and leave the Justices' conference room whenever Brandeis spoke, and referred to the latter as "the Orient." Sheldon Novick, Honorable Justice: The Life of Oliver Wendell Holmes 343 (1989).

9. Paula Rothenberg, Racism and Sexism: An Integrated Study,20 (1988).

10. Newsweek, Nov. 24, 1975, at 52.

11. Ben Halpern, A Clash of Heroes: Brandeis, Weisman, and American Zionism, 5, 40-41 (1987).

12. Paul Johnson, A History of the Jews 374-376 (1988).

13. The complexity of the various arms of Zionism and their differing agendas can be seen by contrasting Brandeis with his ultimate arch enemy, Chaim Weizmann, the man who became the first President of the State of Israel upon its formation in 1948. Halpern, supra, Note 11, at 3-8, 252-255, 266-269 (1987).

14. Id. at 83, 85-87, 90-93.

15. Louis Paper, Brandeis: An Intimate Biography of One of America's Truly Great Supreme Court Justices, 396 (1983). On the one year anniversary of his death, Brandeis' "ashes were buried beneath the porch of the Law School building" at The University. Mason, supra Note 8, at 638; Letters of Louis D. Brandeis Vol. V, 655 n. 1 (Melvin Urofsky & David Levy ed., 1978).

16. Halpern, supra Note 11, at 62-64. "Yet, authorized biographers found no more than dubious rumors of an early interest in Zionism and little if anything Jewish in his background." Id. at 62.

17. Mason, supra Note 8, at 441. Alpheus Mason's official biography with Brandeis' cooperation, "A Free Man's Life", is generally considered the best contemporary biography of the Justice. He spent hours upon hours with the Justice during his later years, and was exposed to his papers at the time. There was no strong Jewish strain in Brandeis, according to Mason. His paternal and material ancestral families had intermarried between religions. Id. at 441.

18. Philippa Strum, Louis D. Brandeis: Justice for the People, 4-6 (1983). It is generally recognized amongst most if not all of Brandeis' biographers that his liberal, if you will, progressive tendencies resulted from the political convictions held by his parents and grandparents in Europe prior to their immigration to the United States. Id. at 3-8. They were direct intellectual descendants of the Revolution of 1848 which sought to bring an end to tyranny, to open up and change discouraging economic conditions especially for the Jews. These followers of the Revolution of 1848 were vested in the ideals of liberalism and freedom. See Halpern, supra Note 12, at 65.

19. Mason, supra Note 8, at 14-15; P. Strum, supra Note 18, at 3-5.

20. P. Strum, supra Note 18, at 7.

21. Halpern, supra Note 11, at 67.

22. "As for his Jewishness, it remained open, but decidedly nebulous and inchoate." Id. at 71. At Harvard Law School there was some speculation he was believed to have "some Jew blood in him though you would not suppose it from his appearance." Id. at 72.

23. P. Strum, supra Note 18, at 229-230.

24. Mason, supra Note 8, at 442; Halpern, supra Note 11, at 96, 99. According to the Mason book in that speech "Brandeis praised the contribution made to America by people of 'Jewish blood' and went on to condemn what President Theodore Roosevelt called 'hyphenated Americanism'". Mason, supra Note 8, at 442.

25. Mason, supra Note 8, at 447.

26. P. Strum, supra Note 18, at 224-227; Strum, supra Note 5, at 100-105. (1993). This conversion is thought to be a combination of his exposure to the Jewish garment workers strike in 1910, and from discussions with a Theodore Herzl confidante who also knew Brandeis' uncle, Lewis Dembitz, as being the primary focus leading him to Zionism. Halpern, supra note 18, at 97; P. Strum, supra note 18, at 229-234.

27. See generally, Halpern supra Note 11, at 109-126; Paper, supra Note 15, at 259-274.

28. Strum, supra Note 5, at 104-108. The irony, and the inconsistency lies in the fact that the Greeks, in the city-state concept, were very class oriented. In fact, "there were slaves in Athens and in the colonies; indeed, the Athenian economy was based upon slavery. The two societies treated women as inferior." Id. at 107.

29. Id. at 114-115.

30. D. Greer Stephenson, Five Jewish Justices: A Bibliographical Essay, in The Jewish Justices of The Supreme Court Revisited: Brandeis to Fortas, 127-128 (1994). See generally Stephen Breyer, Justice Brandeis As Legal Seer, Sup. Ct. Historical Soc. Qtrly. Vol. XXV (Nov. 2004).

31. Alexander Bickel and Benno Schmidt, History of the Supreme Court of the United States: The Judiciary and Responsible Government 1910-1921, Vol. IX, at 375-377 (1984) (hereinafter Holmes Devise).

32. Id. at 379-384.

33. A.L. Todd, Justice on Trial: The Case of Louis D. Brandeis, 130-131 (1964).

34. Halpern, supra Note 11, at 158. One of the criticisms which arose, in addition to possible anti-Semitism in the Cabinet appointment, was the general belief that Brandeis was not trustworthy. To be sure, he was a skillful lawyer. But he had his shortcomings. " He seemed secretive, untrustworthy, and one never knew for whom he was really working." Paper, supra Note 15, at 178.

35. Todd, supra Note 33, at 130.

36. Mason, supra Note 8, at 491. Civil rights legal history refers to Woodrow Wilson's appointment of his Attorney General, James Clark McReynolds to the Supreme

Court "as an 'obdurate racist.'" It has also been said that "McReynolds was a racist and an anti-Semite, unloved in his time and forgotten later." Howard, supra Note 6, at 364, n.46. See generally, Albert Lawrence, Biased Justice: James C. McReynolds of the Supreme Court of the United States, 30 J. Sup. Ct. History, No. 3, 245-270 (2005).

37. M. Urofsky, Wilson, Brandeis and the Supreme Court Nomination,28 J. Sup. Hist. 152 (2003).

38. Todd, supra Note 33, at 133. The Shifting Wind refers to how even Jews denounced Brandeis, of course, not in anti-Semitic terms but as a "Socialist", a "hypocrite", a "man of infinite cunning", a "dishonest trickster." Howard, supra Note 6, at 181.

39. Todd, supra Note 33, at 211. The reference to "Jim Crow" legislation is ironic. Brandeis did not live a great deal of his life in the City of Louisville, Cincinnati, or other Mississippi River city towns in the South where this type of legislation was prominent. Henry Morganthal, a Jew himself, wrote in his journal as follows: "It seems that the Southern senators are fearful that Brandeis will change the attitude of the Supreme Court on the question of Segregation Laws of Louisville. The President advised that nothing be done at present, no labor leaders sent over, until he can look further into the matter." Id.

40. Bruce Murphy, Through the Looking Glass: The Legacy of Abe Fortas, in The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas 107 (1994).

41. Mason, supra Note 8, at 46.

42. See William Douglas, The Court Years 1939-1975, 227 (1975).

43. See generally, Joseph Califano, The Triumph and Tragedy of Lyndon Johnson (1991).

44. Halpern, supra Note 11, at 160.

45. Id. at 264.

46. P. Strum, supra Note 18, at 385-386; Urofsky & Levy supra Note 7, at 620, 623; Halpern, supra Note 11, at 264; Paper, supra Note 15, at 1-4.

47. Paper supra Note 15, at 2; Strum, supra Note 18, at 384.

48. Quoted in Mason, supra Note 8, at 584.

49. Id. at 512.

50. Id.; Halpern, supra Note 11, at 121, 123.

51. See generally Mason, supra Note 8, at 453-458.

52. See Murphy, supra Note 40, at 197, 243-144, 305-306; Daniel Danielski, The Propriety of Brandeis' Extrajudicial Conduct, in Brandeis and America 12, 19, 23 (Dawson ed. 1989).

53. Halpern, supra Note 11, at 212-214, 217; Paper, supra Note 15, at 269-271.

54. Mason, supra Note 8, at 455.

55. Halpern, supra Note 11, at 219-222, 255.

56. Brandeis resigned February 13, 1939. See The Supreme Court Justices, A Biographical Dictionary 39-48 (Melvin Urofsky ed. 1994); 317 U.S. CLXIX-CLXXXI (1942) (In Memoriam)

57. P. Strum, supra Note 18, at 225.

58. P. Strum, supra Note 5, at 111.

59. Mason, supra Note 8, at 462.

60. P. Strum, supra Note 18, at 272-273.

61. Reprinted in Mason, supra Note 8, at 454-455; Strum, supra Note 5, at 109.

62. Id.

63. Quoted in Mason, supra Note 8, at 461.

64. Mason, supra Note 8, at 444.

65. Id.

66. Halpern, supra Note 11, at 113.

67. Quoted in Id. at 449.

68. P. Strum, supra Note 18, at 332, 334. According to Professor Strum, Felix Frankfurter at the insistence of Brandeis became involved in the activities of the NAACP.

69. P. Strum, supra Note 18, at 333.

70. "Brandeis almost certainly knew about Frankfurter's work with the NAACP and his encouragement of Black students at Harvard, and Brandeis' abolitionist upbringing would

have made him sympathetic to these efforts." Id. at 332.

71. Id. at 333.

72. Id. at 596.

73. Id. at 597.

74. Halpern, supra Note 11, at 264.

75. See generally Howard, supra Note 6; Black, White and Brown: The Landmark School Desegregation Case in Retrospect, 47-88 (Claire Cushman & Melvin Urofsky ed. 2004).

76. See Gong Lum v. Rice, 275 U.S. 78, 81 (1927) (C.J. Taft writing for a unanimous Court).

77. Moore v. Dempsey, 261 U.S. 86 (1923).

78. Powell v. Alabama, 287 U. S. 45 (1932). See Howard, supra Note 6, at 223-235.

79. Norris v. Alabama, 294 U.S. 580 (1935).

80. Hale v. Kentucky, 303 U.S. 613 (1938).

81. See, e.g., Nixon v. Condon, 286 U. S. 73 (1932).

82. Nixon v. Herndon, 273 U.S. 536 (1927).

83. Id. at 541.

84. Grovey v. Townsend, 295 U. S. 45 (1935).

85. Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923).

86. N.G. Fung Ho v. White, 259 U. S. 276 (1922).

87. U.S. ex rel. Bilokumsky v. Tod, 263 U. S. 149 (1923).

88. See Howard, supra Note 6, at 261; See also Toyota v. United States, 268 U.S. 402 (1925); Webb v. O'Brien, 263 U. S. 313 (1923); Terrace v. Thompson, 263 U. S. 197 (1923).

89. Ozawa v. United States, 260 U. S. 178, 192-193 (1922).

90. Id. at 197.

91. Gong Lum v. Rice, 275 U. S. 78 (1927).

92. Strum, supra Note 18, at 332-333.

93. See generally Woodward, The Strange Career of Jim Crow, 83-87, 146-155 (1955); R. Baker, Following the Color Line, 34-35 (1906).

94. Buchanan v. Warley, 245 U. S. 60 (1917).

95. Holmes Devise, supra Note 31, at 801-804.

96. Holmes Devise, supra Note 31, at 787-819.

97. Corrigan v. Buckley, 271 U. S. 323 (1926).

98. South Covington & C St. Ry. Co. v. Kentucky, 259 U.S. 399 (1920).

99. 235 U. S. 537, 545-549 (1915).

100. 259 U. S. at 403-404. See Holmes Devise, supra Note 31, at 786-789.

101. Holmes Devise, supra Note 31, at 379-381.

102. Id. at 391; Todd, supra Note 33, at 211.

103. Holmes Devise, supra Note 31, at 784-785, n. 160. Brandeis' personal correspondence from 1914 indicated that he was not interested in pursuing a Jim Crow challenge before the ICC. See Melvin Urofsky and David Levy, Letters of Louis D. Brandeis Vol. III, 297-298, 305 (1973).

104. New York *ex rel* Bryant v. Zimmerman, 278 U.S. 63 (1928).

105. Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737 (1929).

106. New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938).

107. Missouri *ex rel* Gaines v. Canada, 305 U. S. 337 (1938).

108. See Melvin Urofsky, Louis D. Brandeis: Advocate Before and on the Bench, 30 J. Sup. Ct. Hist. No.1, 30, 42 (2005).

109. Paper, supra Note 15, at 3; Jewish Justices, supra Note 30, at 33 n. 61.

110. Paper, supra Note 15, at 1.

111. P. Strum, supra Note 18, at 354.

112. Id. at 363; Novick, supra Note 8, at 343.

113. Mason, supra Note 8, at 582; Todd, supra Note 33, at 248-249; Paper, supra Note 15, at 1.

114. Mason, supra Note 8, at 582.

115. P. Strum, supra Note 18, at 334; Strum, supra Note 5, at 142-143.

116. Cushman & Urofsky, supra Note 75, at 25, 28-29.

117. P. Strum, supra Note 5, at 142.