

Vanderbilt Law Review

Volume 37

Issue 4 *Issue 4 - Symposium: The Winds of Change in Wills, Trusts, and Estate Planning Law*

Article 6

5-1984

Book Review: Louis D. Brandeis and the Progressive Tradition; Brandeis

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Recommended Citation

Paul Brickner, Book Review: Louis D. Brandeis and the Progressive Tradition; Brandeis, 37 *Vanderbilt Law Review* 1041 (1984)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol37/iss4/6>

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BOOK REVIEW

BRANDEIS. By Lewis J. Paper. Englewood Cliffs, N.J.:Prentice-Hall, Inc., 1983. Pp. 442

LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION. By Melvin I. Urofsky. Boston, Mass.: Little, Brown and Company, 1981. Pp. vi, 183.

*Reviewed by Paul Brickner**

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 no way of seducing them into "respectability". No network of corporate affiliations or retainers or directorships could tempt him or still his voice.¹

Louis Dembitz Brandeis always enjoyed a good fight. He fought many battles during his professional career in both private law practice and on behalf of public interest causes throughout the country. Brandeis fought in the courtroom, in the legislature, in newspapers, and in the congressional arena. In 1916 during the most important battle of his career—his fight for Senate confirmation of his nomination by President Wilson to the Supreme Court of the United States—custom and tradition compelled Brandeis to stand silent. He, however, did not remain idle, but worked diligently behind the scenes to gather information for his supporters to use in rebutting the charges leveled against him during the con-

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1. Douglas, Book Review, N.Y. Times Book Rev., July 5, 1964, at 3. (reviewing A.L. TODD, *JUSTICE ON TRIAL* (1964)). Justice Douglas, who succeeded Brandeis on the Court, clearly admired Brandeis for the very reasons he stated that the "Establishment" feared him.

firmation hearings.

Brandeis' combative spirit revealed itself early in his own writings. Not far into his professional career, Brandeis was offered a teaching position at Harvard Law School that his European-born parents urged him to accept. He chose to remain in private practice because, as he explained to his brother, "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."²

Brandeis' bellicose nature, which epitomizes that of the trial attorney, provides a key to understanding his personality and life. Biographies of Brandeis read like a series of pugilistic encounters. Brandeis, "the people's attorney," always seemed ready to undertake another worthy public cause even before the ashes had cooled on his last battleground. In a profession that suffers from a split personality—wishing to settle disputes quietly over lunch almost as often as it wishes to settle them belligerently at trial—his pugilistic readiness for long contests accounted for a major portion of the animosity that he engendered in many of his contemporaries. In retrospect, one must conclude that his combative nature was responsible, to a significant degree, for his accumulation of enemies in the wake of every cause that he espoused.

Early in his career, however, Brandeis was not insensitive to the benefits of the social and business connections of his law partner, who once referred to Brandeis as "more Brahmin than the Brahmins."³ At thirty-five, Brandeis saw the light that transformed him into the champion of the workingman and caused him to leave the camp of the Brahmins. The death of workers in the Homestead strike of 1892 precipitated his conversion. It was this "converted" Brandeis that the "Establishment"⁴ later feared. Despite his affinity for the common man, Brandeis valued the free enterprise system and protected the right of shareholders to a fair return on their capital as much as the rights of laborers.⁵ In his own lucrative law practice Brandeis earned over two million dollars before assuming his place on the Supreme Court.⁶

2. L. PAPER, *BRANDEIS* 27, 79 (1983) (refers to Brandeis as a "tenacious fighter"); M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 6 (1981).

3. M. UROFSKY, *supra* note 2, at 4.

4. L. PAPER, *supra* note 2, at 38.

5. M. UROFSKY, *supra* note 2, at 27.

6. *Id.* at 9.

In 1962 Henry J. Friendly, the distinguished judge of the United States Court of Appeals for the Second Circuit, included Brandeis on his list of the four greatest American judges of the first half of the twentieth century,⁷ along with Holmes, Cardozo and Learned Hand. Today, more than twenty years after Judge Friendly made his selection, we still turn to Brandeis' opinions for wisdom, guidance, and direction in the law.⁸ Additional research into this great jurist's life, therefore, not only provides interesting reading, but also is essential for an understanding of the development of the law in the twentieth century. Two recent biographies, Professor Melvin I. Urofsky's *Louis D. Brandeis and the Progressive Tradition* and Lewis J. Paper's *Brandeis*, are important additions to the Brandeisian library.

Paper's book carries the subtitle "[a]n intimate biography of one of America's truly great Supreme Court justices." Paper, however, does not address directly the question of Brandeis' greatness. Instead, Paper leaves the reader to draw conclusions about Brandeis' stature and rank from the book's comprehensive study of the Justice's life and achievements. Paper's volume provides detailed information about Brandeis' upbringing, childhood, and family and a thorough analysis of the legal aspects and technicalities of Brandeis' work as an attorney and as a Justice.

Paper effectively relates Brandeis' warm and supportive family as an important element in Brandeis' later success. "Your visit, dear Louis, was like a flaming meteor's flight," Brandeis' mother once wrote. "You brought me joy and happiness and before I could really believe that you were with me, you disappeared again."⁹ Moreover, Brandeis' uncle, Lewis Dembitz, a prominent member of the Kentucky bar, inspired young Louis to pursue a career in law.¹⁰

Urofsky's biography, on the other hand, is designed for the casual reader, the layman, and the student. Urofsky has succeeded

7. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOKLYN L. REV. 6, 6-7 (1962).

8. In 1983 a cumulative tabulation appeared in the *American Bar Association Journal* that included Brandeis among the all time judicial giants. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462 (1983).

9. L. PAPER, *supra* note 2, at 43. Brandeis so revered his uncle Lewis that he changed his own middle name from David to Dembitz. Lewis Dembitz was a deeply religious man who translated two books of the Bible into English. Although Brandeis was totally irreligious, Jewish leaders later invoked the name of Lewis Dembitz to recruit Brandeis into the Zionist movement. See 5 ENCYCLOPEDIA JUDAICA *Dembitz* 1487-88 (1971); L. PAPER, *supra* note 2, at 202.

10. See *infra* note 23.

in distilling into a slender volume the essence of Brandeis as "people's attorney," family man, Zionist, advisor and confidant of Presidents Wilson and Franklin Roosevelt, and Associate Justice of the United States Supreme Court. Urofsky does a modest amount of editorializing which will grate on conservative readers—but his observations are often astute and his concluding remarks are superb.

Both books relate one anecdote in the early life of Brandeis that occurred in Germany while Brandeis was a student at the Annen-Realschule in Dresden. Young Louis had enrolled at the school while his family was on an extended visit to Europe. One night when Brandeis returned to his quarters, he found himself locked out. He whistled for a friend to let him in, and the police reprimanded him for this behavior. Brandeis later recalled the incident: "This made me homesick. In Kentucky you could whistle . . . I wanted to go back to America, and I wanted to study law."¹¹

Brandeis' career was so varied that any biography necessarily will include a panoramic view of the United States from the years preceding the Civil War until this country's entry into World War II. Both biographies initially focus on Brandeis' early reformist activities.

Both books detail Brandeis' first major reform effort. In 1897 Brandeis unsuccessfully opposed the grant of a charter amendment to the Boston Elevated Railway Company that gave it virtually perpetual franchise rights to desirable public transportation routes. Brandeis quickly put his experience to use in another Boston transit fight over the Boston Elevated's proposal for construction of a subway that would be turned over to city control. The city then was to grant the Boston Elevated free and exclusive use of the subway for fifty years. Brandeis successfully fought this attractive sounding proposal by organizing an effective public relations campaign that stressed the need for community control over public transportation and by securing the governor's veto of the legislation.

Each author also discusses Brandeis' challenge to the 1903 request of the Boston Board of Gas and Electric Light Commission for legislation to permit the consolidation of eight separate gas companies. Brandeis stepped into this battle because he believed that the price that the utility intended to place on the stock of the combined company was too high and would result in correspondingly excessive gas rates for consumers. He opposed, however, pub-

11. L. PAPER, *supra* note 2, at 13; M. UROFSKY, *supra* note 2, at 2.

lic ownership of utilities. As a solution, Brandeis secured an intriguing formula for gas rates that permitted an increase in profits in exchange for consumer price reductions. This sliding scale formula worked so well that in a short time Boston had the lowest gas rates of any major city in the country and the company had increased its profits and declared higher dividends. Despite this result Brandeis won the lasting animosity of consumer zealots who felt that he had not pressed hard enough for the public. In 1916 these same consumer advocates would oppose his Supreme Court nomination.

Paper devotes a separate chapter to Brandeis' participation in the New York, New Haven and Hartford Railroad fight. The railroad attempted to expand, in contravention of an 1874 Massachusetts law, by purchasing stock in other railroads through holding companies. The railroad was a major blue chip investment of the day whose stock was held widely by prominent institutions, individuals, and families. Brandeis created a storm by questioning the accuracy of the company's financial statements and business practices. Brandeis proposed legislation to require that the New Haven dispose of the Boston & Maine Railroad stock that it had purchased. Urofsky, while not furnishing as much detail, notes that the New Haven case provided a forum for Brandeis to articulate his philosophical animosity towards big business and helped establish Brandeis as a nationally known figure.

The term "Brandeis brief" originated with Brandeis' appearance before the United States Supreme Court in *Muller v. Oregon*.¹² Instead of basing his arguments solely upon the law, Brandeis prepared for the Court a lengthy brief that included statistical analysis, sociological and medical data, and other "nonlegal" sources in support of his argument that the State of Oregon had acted constitutionally in passing legislation to limit the number of hours a day that an employer could require a woman to work. This case, which continues to have a vital role in present day law and legal literature, bolstered the steadily growing national reputation of Brandeis.

The reformer and "people's attorney" skirmishes that Brandeis undertook not only made him a publicly known figure, but also provided him with an in depth working knowledge of numerous industries and governmental regulatory agencies. This knowl-

12. 208 U.S. 412 (1908). See Friesen & Collins, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 472 (1983).

edge served him well during his term on the Supreme Court.¹³ Indeed, his expertise in utility rate and regulatory practices was so great that Chief Justice Taft, once a strong opponent of Brandeis' nomination to the high court, took the unusual step of calling upon Brandeis to lead a Saturday discussion on regulatory law to prepare the Justices for the *Southwestern Bell Telephone* case that was pending before them.

The two works most markedly differ in their depth of coverage. In many respects Urofsky's brevity promotes clarity and reader interest. Despite the excellent quality of the writing Paper's book at times is so detailed and factually overloaded that the reader may find the book tedious and may lose sight of the larger picture that Paper is attempting to develop. Urofsky provides only a thumbnail sketch of the early life of Brandeis and then more fully develops his main theme: Brandeis as a part of the progressive tradition. Paper, however, interweaves family milestones, using them effectively to enhance reader interest by injecting a human element.

Brandeis' life and career are well suited for chronological development by biographers—the approach taken by both authors. As a result, no significant difference appears until the two authors diverge in discussing the judicial career of Justice Brandeis. Because Urofsky writes of Brandeis in terms of the progressive tradition, he does not address many of the Justice's cases that are important to lawyers but are of only limited interest to those attempting to understand the American system of government, progressivism, and the "New Deal."¹⁴

Paper and Urofsky both discuss Brandeis' opposition to "bigness," whether it be big business, big government, big educational institutions, or big banking establishments. Paper notes on several occasions that Brandeis had little or no factual basis for some of his opinions on bigness. Neither author, however, comes to grips with, or even grapples with, the origin of Brandeis' feelings. One can argue that Brandeis' fighting nature caused his *carte blanche* opposition to bigness. In our society, just as in the time of David and Goliath, a fighter must take on someone larger than himself or be considered a bully rather than a courageous adversary. Thus, Brandeis could fight his prolonged contests and skirmishes with a

13. Freund, Louis Dembitz Brandeis, in *MR. JUSTICE* 112 (A. Dunham & P. Kurland eds. 1956).

14. For example, Urofsky does not discuss *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), one of Brandeis' most significant opinions.

clear conscience because he equated bigness with an abuse of power. Brandeis' contemporaries must have viewed his near total opposition to bigness as outmoded during the days of the Great Depression. Big business had become an accepted part of society and the New Deal had started to create big government. Although Franklin Roosevelt respected Brandeis, sought his counsel, and referred to him as "Isaiah,"¹⁵ he did not always accept Brandeis' opinions. Certainly a book of Paper's scope would have benefited from an exploration of the origins of Brandeis' opposition to bigness.

Both authors also discuss the active role that Brandeis played in the Zionist movement. Few readers will be familiar with the Zionist movement in America between the two world wars. Urofsky does a far better job than Paper in describing Zionism and Brandeis' important role in the movement. Here the reader again will welcome Urofsky's brevity and clarity. Urofsky's discussion of Zionism demonstrates his ability to explain new material to the uninitiated, a gift of superior educators. Brandeis also had enemies among his own Jewish people. Paper tells the reader that "one" Judah Magnes publicly attacked Brandeis at a 1916 Zionist meeting, saying that the Jewish people would repudiate the leadership of Brandeis. Although he tells us that Magnes later apologized, Paper fails to identify Magnes as a prominent San Francisco-born rabbi active in Zionism.¹⁶ Paper quotes Zionist, Chaim Weizmann, as bitterly attacking Brandeis: "Old Brandeis [,] . . . hidden behind his judicial robes, is capable of the vilest intrigues and tricks worthy of the lowest type of American politician."¹⁷ Paper, however, fails to tell his readers that Chaim Weizmann, in addition to being a scientist and a Zionist, later became the first President of the State of Israel.¹⁸

Another intriguing aspect of Paper's book is his treatment of the relationship between Brandeis and Chief Justice Taft. Often, one easily can identify reasons why two individuals do not get along. The origins of a good relationship between two former rivals of differing backgrounds and philosophies, however, can be exceptionally difficult to detect. In the case of Brandeis and Taft, Brandeis bitterly criticized Taft's role in the Ballinger-Pinchot Affair,¹⁹

15. L. PAPER, *supra* note 2, at 2; M. UROFSKY, *supra* note 2, at 158.

16. 11 ENCYCLOPEDIA JUDAICA *Magnes* 716-18 (1971).

17. L. PAPER, *supra* note 2, at 318.

18. THE NEW COLUMBIA ENCYCLOPEDIA *Weizmann* 2952 (1975).

19. The Ballinger-Pinchot Affair concerned Alaskan coal mining claims and a decision

while Taft was the lead signator to a letter by seven former presidents of the American Bar Association who opposed the appointment of Brandeis to the Supreme Court.²⁰ Unfortunately, Paper has chosen to refer to President Taft as a liar for his part in the Ballinger-Pinchot Affair.²¹ Had Paper researched the life and character of William Howard Taft more deeply, he would have been less likely to have labeled him in that manner.²² Brandeis and Taft, at least, were able to put distant events into their proper perspective. Despite their past differences the two men had an amicable relationship on the Court—a fine tribute to the character of each.²³ Paper's book suffers from some minor flaws,²⁴ but these flaws do not detract materially from its worth. Paper has produced

to fire a Department of Interior employee. President Taft approved of this decision. L. PAPER, *supra* note 2, at 17.

20. L. PAPER, *supra* note 2, at 231-32; M. UROFSKY, *supra* note 2, at 116.

21. L. PAPER, *supra* note 2, at 17, 129.

22. Taft was so fair-minded and endowed with judicial temperament that one individual quipped, "The trouble with Taft is that if he were Pope he would think it necessary to appoint a few Protestant cardinals." K. UMBRETT, *OUR ELEVEN CHIEF JUSTICES* 399 (1938). Other writers have sided with Taft's honesty and with his explanation of the Ballinger-Pinchot Affair. See H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT*, 512-13 (1939). Another Brandeis biographer, however, called Taft a liar. A. LIEF, *BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 169 (1936). See also A. MASON, *BRANDEIS: A FREEMAN'S LIFE* 73-74 (1946) (classic work describes the affair in a non-accusatory manner).

23. A. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 199-203, 264, 301 (1964). Another possible explanation for the good working relationship of the two justices may be the memory of Brandeis' uncle, Lewis Dembitz. Brandeis' uncle may have helped heal the wounds and helped promote amity on the Court. Brandeis probably mentioned to Taft that his uncle studied law under Judge Timothy Walker, a founder of the University of Cincinnati Law School. As a former Dean of that law school, Taft was proud of the heritage of Judge Walker as a legal educator. No doubt, Taft valued Lewis Dembitz as a distinguished alumnus of his law school. In a sense, Dembitz may have provided a sentimental tie to each, thereby, serving as a bridge between the two men. Dembitz's memory well may have helped to heal the wounds of past differences that otherwise might have left Taft and Brandeis at eternal odds. See *supra* notes 9 and 11. See also Rutter & Wilson, *The College of Law: An Overview 1833-1983*, 52 *CIN. L. REV.* 311-13, 319 (1983).

24. Some additional mistakes include: in writing of the landmark *Muller* case, Paper makes reference to someone named "Do," without letting the reader know if he is referring to Florence Kelley, head of the National Consumer's League or to Josephine Goldmark, Brandeis' sister-in-law, or to some other person; Paper incorrectly reports that Benjamin Cardozo was three years old at the time his father resigned from the New York State bench on the eve of impeachment; Cardozo was only one year old at the time. *Our Corrupt Judges*, *N.Y. Times*, May 2, 1872, at 8, col. 1; see also Brickner, *Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge*, 11 *OHIO N.U.L. REV.* 1 (1984). Paper will offend some readers by needlessly displaying his political biases. In one chapter heading he quotes the lyrics to a popular Simon and Garfunkel song—"The elephants are kindly but they're dumb." Moreover, he fails in twice quoting Alger Hiss, a law clerk to Justice Holmes, to identify Hiss as a convicted perjurer. Paper seems to follow a double standard by describing Taft as a liar while failing to mention Hiss' perjury conviction.

an excellent book and has rendered the profession an invaluable service by preserving many memories and recollections of Justice Brandeis. The book's major contribution may be its massing of the available information on Brandeis to provide a picture of both his career and family life.

Urofsky has captured the essence of Brandeis in his excellent and informative volume. Urofsky often demonstrates a fine facility for clarifying points and positions with meaningful factual details. His book reveals the depth of scholarship that one would expect from a co-editor of the five volume collection of Brandeis' letters.²⁵ He recognized the importance of the relationship between Brandeis and Frankfurter and devoted an entire small chapter to their efforts to promulgate their views as described by Bruce Murphy.²⁶ For a concise but telling biography of Brandeis, from the "people's attorney" to one of the Supreme Court's "nine old men", Urofsky's book is an excellent choice.

25. *LETTERS OF LOUIS D. BRANDEIS* (M. Urofsky & D. Levy eds. 1971-1978).

26. Urofsky wrote with the benefit of Murphy's dissertation, but wrote prior to the publication of Murphy's book on the two men which generated newspaper headlines. *See M. UROFSKY, supra note 2, at 175. See also B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982).

