

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

1998

The Brandeis Vision

Donald L. Burnett Jr.

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Legal Biography Commons](#), and the [Legal Education Commons](#)

The Brandeis Vision

He gave his books, his papers, his money, his time, and, ultimately, his last remains to a law school in the community where he was born. He had a vision for legal education. Today, in Louisville, the law school believed to be America's fifth oldest in continuous operation is graced by his name, and a law review now is ennobled by his legacy.

Louis Dembitz Brandeis was born in Louisville on November 13, 1856, a son of German immigrants. After graduating from Louisville's Male High School and studying three terms at the Annen-Realschule in Dresden, Germany, he was drawn to the study of law by his uncle, Lewis Dembitz—a noted practitioner, public citizen, and scholar who eventually published the landmark treatise, *Kentucky Jurisprudence*, in 1890. Young Brandeis enrolled at Harvard Law School, where he blossomed in the intellectually charged atmosphere of case analysis and Socratic dialogue created by Professor Christopher Columbus Langdell. "Law seems so interesting to me in all its aspects," Brandeis wrote to his sister Amy, "it is difficult for me to understand that any of the initiated should not burn with enthusiasm."¹ Following graduation with the highest honors, he worked briefly at a St. Louis law firm, then returned to Boston where he established his famous partnership with Samuel Warren; together, they combined the practice of law with a love of developing the law, as evidenced by their landmark article, "The Right to Privacy."²

Brandeis's career as a practitioner extended to 1916, when at the age of nearly sixty years—a time when some might think of concluding their life's work rather than opening a new chapter—he was appointed to the Supreme Court. There he served until 1939, expounding as a jurist on two interconnected themes he had developed as a lawyer: accepting responsibility and preserving liberty. He expressed his own sense of professional

¹ Letter from Louis D. Brandeis to Amy Brandeis Wehle (Jan. 20, 1877), in 1 LETTERS OF LOUIS D. BRANDEIS 14 (Melvin I. Urofsky & David W. Levy eds., 1971-1978).

² Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

responsibility by resolving to devote the equivalent of at least one hour per day to public service, and he urged members of the bar to demonstrate “moral courage in the face of financial loss and personal ill-will to stand for right and justice.”³ This was no hollow preaching. He compensated his firm for his *pro bono* time, and his advocacy of social justice nearly deprived him later of the Senate’s confirmation of his nomination to the Supreme Court.⁴ (Once on the Court, however, his sense of judicial restraint occasionally caused him dutifully to uphold legislation that he disfavored.⁵) He also championed liberty, proclaiming individuals could grow to their full potential only when nurtured by freedom:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.⁶

Upon these themes of responsibility and liberty, Brandeis constructed his well-known arguments against the abusive power of large financial trusts⁷ and against the stultifying effects of large organizations upon human creativity.⁸ He also built upon these themes to develop his concept of the lawyer as a public citizen. Reflecting a Jeffersonian view of democracy at a community scale, and echoing of de Tocqueville’s praise of lawyers as the connectors of disparate elements in American communities, Brandeis charged the practicing bar to help society balance the assertion of individual rights with the assumption of collective responsibilities: “[I]t lies with our lawyers to say in what lines [progressive social] action shall be expressed: wisely and temperately or wildly and intemperately; in lines of evolution or in lines of revolution.”⁹ Here, in this dynamic challenge, was the source of enthusiasm

³ MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 16 (1981).

⁴ See BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 22 (1982); LEWIS J. PAPER, *BRANDEIS* 209-40 (1983).

⁵ See Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 786-87 (1957).

⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁷ See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* (1914).

⁸ See *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934).

⁹ BERNARD FLEXNER, *MR. JUSTICE BRANDEIS AND THE UNIVERSITY OF LOUISVILLE* 65 (1938) (quoting Ernest Poole, *Brandeis*, AM. MAG., Feb. 1911).

Brandeis had felt in law school. Young people drawn to the legal profession, he later said, “may rest assured that they will find in it an opportunity for usefulness which is probably unequalled elsewhere. There is and there will be a call upon the legal profession to do a great work for this country.”¹⁰

Preparing lawyers to do this “great work” occupied much of Justice Brandeis’s concern. At a personal level, he became a treasured mentor to his law clerks, whose names eventually filled a pantheon of leaders in the bar, the academy, the business community, and public office.¹¹ Dean Acheson, a law clerk destined to become Secretary of State, later recalled the Justice speaking of his clerks “with all the tenderness of a father speaking of his sons. He entered so deeply into our lives because he took us so deeply into his.”¹² More broadly, Justice Brandeis was interested in improving the institutions of legal education; indeed, his younger colleague, Felix Frankfurter, described him as “one of the few thinkers in the profession concerned with the fundamental problem of legal education.”¹³

When Harvard law dean Roscoe Pound proposed to increase enrollments at that school, Justice Brandeis objected, calling instead for smaller, better schools.¹⁴ As noted by biographer Philippa Strum, Brandeis responded “he wanted ‘not a bigger H.L.S., but 20 Harvard Law Schools.’ And he immediately set about creating one other Harvard, this one in Kentucky.”¹⁵

In 1925, having already begun a series of gifts to the University of Louisville, Justice Brandeis wrote the time had come to “build a law school of distinction.”¹⁶ Founded in 1846, Louisville’s law school already was in its eighth decade when Justice Brandeis began to invest in it. He gave the school his personal library, including many rare texts on early civil and common law; his personal papers, comprising approximately 250,000 items; and his money (even buying light fixtures when the law school was located in

¹⁰ *Id.*

¹¹ See GENE TEITELBAUM, *JUSTICE LOUIS D. BRANDEIS: A BIBLIOGRAPHY OF WRITINGS AND OTHER MATERIALS ON THE JUSTICE* 125 (1988), for an illuminating list of the Brandeis clerks.

¹² Dean Acheson, *Mr. Justice Brandeis*, 55 HARV. L. REV. 191, 191 (1941) (Address delivered at the funeral services, Oct. 7, 1941).

¹³ NELSON LLOYD DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL* 3-4 (1980).

¹⁴ See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 398 (1984) [hereinafter STRUM, *JUSTICE FOR THE PEOPLE*].

¹⁵ *Id.*

¹⁶ FLEXNER, *supra* note 9, at 70.

a downtown building, before moving to its current location on the Belknap campus in 1938). He also helped raise money from other donors; aided the school in obtaining the papers of Justice John Marshall Harlan, the “great dissenter;” arranged for the school to receive original briefs filed with the United States Supreme Court, a practice the Court still honors; and bequeathed a substantial part of his estate to the University of Louisville. After his death in 1941, his last remains—and later the remains of his wife, Alice Goldmark Brandeis—were buried unobtrusively beneath the law school’s classical portico.¹⁷

To Justice Brandeis, the University of Louisville presented an opportunity to translate his fundamental beliefs about law and policy into a new vision for legal education. His distrust of “bigness,” which had led him to reject Harvard Law School’s expansion, moved him to envision at Louisville a more intimate learning environment where the law school could “devote itself to teaching the law in a fine and helpful way.”¹⁸ Similarly, his belief that creativity flourished outside large organizations led him to predict that the states, rather than the national government, would become the principal incubators of new ideas in public policy.¹⁹ He urged universities and law schools to support this grass-roots creativity. One of Justice Brandeis’s close collaborators in Louisville, Robert N. Miller, explained the Justice’s concept of this role for legal education generally and for the University of Louisville’s law school in particular:

[A law school should] be one of the leaders of legal thought in the state . . . an influence tending to maintain the highest standards of legal and judicial thought and policy; among other services it can render, it will be ready with wise advice with regard to the new legislation which changing conditions

¹⁷ See BARBARA B. LEWIS ET AL., *SCHOOL OF LAW SESQUICENTENNIAL HISTORY AND LAW ALUMNI/AE DIRECTORY* at xvii-xxi (1996).

¹⁸ FLEXNER, *supra* note 9, at 71.

¹⁹ Thus, in his memorable dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Justice Brandeis observed:

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Id. at 311.

from time to time may require. . . . Such a school may be at the same time closely in touch with modern thought everywhere, and yet an integral part of Kentucky, –Kentuckian to the backbone. A law school which rises to the point of fully meeting the needs of its own state will find itself honored by the respectful admiration of all other states. In solving its home problems with distinction, it acquires specialized knowledge of which even the proudest institutions of other states are glad to avail themselves.

. . . .

. . . Kentucky is a state where such an aim is not too ambitious to be realized.²⁰

Drawing upon his experience as a practitioner and recognizing law is shaped significantly by societal forces, Justice Brandeis believed a lawyer's education must extend beyond the discipline of law itself:

Knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. He must know, must feel "in his bones" the facts to which they apply—must know, too, that if they do not stand the test of such application the logical result will somehow or other be avoided²¹

As a lawyer, Brandeis had pioneered this interdisciplinary approach with his "Brandeis Briefs," which wove legal arguments together with empirical evidence and with insights drawn from the disciplines of economics and sociology.²² To Brandeis, this crossing of disciplinary boundaries was not an intellectual affectation; it was a fulfillment of the lawyer's duty to master the facts.²³

Finally, as one of America's most widely recognized lawyers engaging in service *pro bono publico*, Brandeis believed that law schools should cultivate an appreciation of service as a professional obligation. In his famous address, "The Opportunity in the Law," delivered to the Harvard Ethical Society in 1905, he argued that "whole training" in law school should include not only the development of reason and judgment, but also the inculcation of a commitment to the legal profession's public trust.²⁴ He lamented that many

²⁰ FLEXNER, *supra* note 9, at 61-62.

²¹ UROFSKY, *supra* note 3, at 7.

²² See Philippa Strum, *Brandeis and the Living Constitution*, in BRANDEIS AND AMERICA 120 (Nelson L. Dawson ed., 1989).

²³ See *id.*

²⁴ See STRUM, JUSTICE FOR THE PEOPLE, *supra* note 14, at 40-41.

lawyers had neglected this trust, representing the nation's moneyed interests "while the public is often inadequately represented or wholly unrepresented."²⁵ Those words remain timely; today, the law school named for Justice Brandeis features one of the country's first five mandatory public service programs.

The University of Louisville is not yet finished responding to Justice Brandeis's ambitious agenda. As noted by the law faculty in their resolution embracing the Brandeis name, "[t]he legacy of Justice Brandeis has been an historic foundation of the School of Law and is an inspiring charter for its future."²⁶ To the elements of the Brandeis vision—collegial teaching and learning, policy development, interdisciplinary study, and an ethic of public service—it is now appropriate to add a distinguished law review bearing his name. Justice Brandeis evinced a special understanding of the importance of law reviews when, in 1917, he became the first member of the Supreme Court to cite law review articles in a judicial opinion.²⁷ He regarded law reviews, not only as avenues of discourse among scholars, but also as bridges connecting the academy with the legal profession, the judiciary, and the venues of public policy.

Building upon the scholarly foundation of its predecessor, the University of Louisville's *Journal of Family Law*, the new *Brandeis Law Journal* will serve all the purposes of a multi-subject, "mainstream" law review. It also will provide a uniquely appropriate forum for examining topics—such as ethics in public service, problems in social justice, development of public policy, issues in federalism, and interdisciplinary perspectives on law and the performance of legal institutions—that resonate with the Brandeis legacy. In all of its dimensions the *Brandeis Law Journal*, like the towering figure for whom it is named, will search for truth, pursue justice, and encourage minds to be bold. If it can be said that any legal publication has a spirit, then let the spirit of this *Journal* soar as high as Justice Brandeis's hopes for our school and our profession:

To realize the promise of America through law—that [all] might share to the limit of their capacity in the American adventure—was the end to which he devoted all his talents and his energies. In him the lawyer's genius was

²⁵ See *id.*

²⁶ Resolution of the Law Faculty, University of Louisville, Feb. 24, 1997.

²⁷ See *Adams v. Tanner*, 244 U.S. 590, 597, 603, 613 nn.1-3, 615 n.1 (1917) (Brandeis, J., dissenting).

dedicated to the prophet's vision, and the fusion produced a magnificent weapon for righteousness. In his hand the sword was fringed with fire.²⁸

Dean Donald L. Burnett, Jr.
Louis D. Brandeis School of Law
University of Louisville

²⁸ Paul A. Freund, *Memorial Tributes to Mr. Justice Brandeis, Proceedings of the Bar of the Supreme Court of the United States*, in THE BRANDEIS READER 234 (Ervin H. Pollack ed., 1956).

