

The Lawyer

By

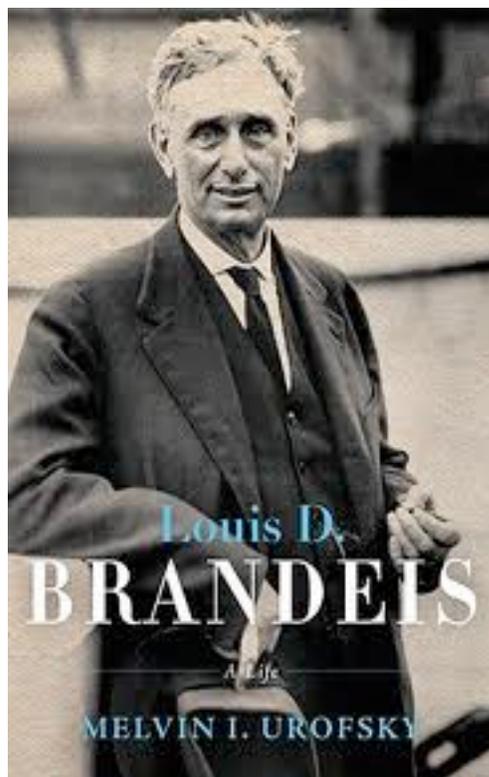
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Louis D. Brandeis: A Life by Melvin I. Urofsky 756 pp. Pantheon (2009) ¹

A specter is haunting the nation. Theodore Dreiser's Frank Algernon Cowperwood; the financier, the titan, "perfectly calm, deadly cold," selling stock he did not own. As the banker, he was entrusted with other people's money. "[L]ike a spider in a spangled net, every thread of which he knew, had laid, had tested, he surrounded and entangled himself in a splendid, glittering network of connections, and he was watching the details." ²

At the turn of the twentieth century we were enveloped by the brazen cockiness of the "money trust;" banks and financial institutions too big to be governed by any form of regulation we had developed or any moral or ethical imperative that acted as a constraint. The insidious harm to stockholders, small depositors, workers, families, and communities was not a factor to be weighed. Government stood largely to the side.

The financial institutions and bankers who formed the money trust — J.P. Morgan, John D. Rockefeller, and Charles Mellen were only the largest and most notorious; Charles Tyson Yerkes, Chicago's villainous and defiled streetcar magnate was the model for Dreiser's Cowperwood — had looked to the legal profession and the judiciary to ensure their protection.



"The leaders of the Bar," lawyer Louis Brandeis said in 1905, "with rare exceptions, have been ranged on the side of the corporations, and the people have been represented, in the main, by men of very meager legal ability. [T]his condition cannot continue."

Brandeis disputed and shunned the conventional wisdom of the lawyer's role. He acted *pro bono publico* before agencies of government and in the media. He challenged with devastating results

railroad and banking interests. He became, as a practical matter, “the first great lawyer...who had a social conscience.”³

It had been, at first, a lonely journey. The moral justification for corporate conduct or, more appropriately, the ease of dismissing it as even relevant, was embedded in the rhetorical presumptions of policy and law. The “virtue” of the market forces — unfettered in their exercise and manipulated to disproportionately serve only a few men — was touted tenaciously in and out of government but always abstractly, detached from the reality of how it worked and what it yielded in special privilege for those who knew little of honest work. “Rich men are essential even to the well-being of the poor,” United States Supreme Court Justice Henry Billings Brown said in 1893; a position confirmed by Brown’s colleague, Justice David Brewer. “It is the unvarying law,” Brewer wrote, “that the wealth of the community will be in the hands of the few.” During a House congressional hearing in 1912 and 1913 — on the “concentration and control of money and credit” and how, in its relationship to the “great life insurance companies,” “panics” had been composed, averted, and created to increase profit — factors of morality and ethics were dismissed as relative to the deliberate importance of making money. “You are asking me a moral question,” one financier testified, “and I am answering you a stock exchange question.” The committee’s counsel, Samuel Untermyer asked: “There is no relation between a moral question and a stock exchange question?” Answer: “Sometimes.” Untermyer and committee chair, Congressman Arsene Pujo of

Louisiana exposed even that modicum of pretense.⁴

The context was created. Brandeis understood the values and mind-set that permeated it. He mastered the intricacies of the financial manipulations. He insisted that a moral duty tempered the obligation of anyone engaged in the corporate enterprise. With a methodical directness and substantively-informed care he demonstrated the “curse of bigness” — corporations too big to be managed efficiently, gouging the public with excessive costs and poor service, glorifying the absence of scruples, repressing individual liberty and the small business entrepreneur, producing unhealthy food, unsafe products, squalor in company towns, and inefficient and dangerous transportation.⁵

At base, Brandeis was the model; the precedent; the intellectually thorough, imperturbable dragon slayer; the “People’s lawyer.”

Brandeis sought, through the remainder of his life as a lawyer and Supreme Court justice, to pierce the intellectual flabbiness of “free-market” presumptions and the disquieting harm they had done. President Franklin Roosevelt called Brandeis “Isaiah,” the prophet. Harvard law professor Alan Dershowitz considers Brandeis “the greatest legal personage in American history.” He was to me and other men and women educated in law in the mid 60s and early 70s the model to be learned: how to use the law and policy and morality and ethics to guide your

conduct and shape jurisprudence and, most importantly, to show an informed, reasoned and harshly-chiseled irreverence for those corporate interests that failed to fulfill a public duty. At play was an imperative, more personal than collective; a purposefulness about law and policy and action for a public good that waxed discernibly throughout the nation. In Congress, Senator Lee Metcalf (Montana) took on the utility and railroad industry; Senator Warren Magnuson (Washington) sought to give power to the Federal Trade Commission to combat corporate abuse of consumers; Congressman Wright Patman (Texas) confronted and exposed David Rockefeller and other banking leaders for their role in the Penn Central bankruptcy; and Senators Edmund Muskie (Maine) and Henry Jackson (Washington) recognized the failure of corporate America to deal with air and water pollution and environmental degradation. Citizens groups and students emerged – joining Ralph Nader in a sweeping, intense iteration in his life – with a fierceness of purpose, undeterred by some notion of “too big to fail” or too big to govern. At base, Brandeis was the model; the precedent; the intellectually thorough, imperturbable dragon slayer; the “People’s lawyer.”⁶

Melvin Urofsky, professor of law and public policy and a professor emeritus of history at Virginia Commonwealth University, brings the distinctive epoch of the early twentieth century to the fore in *Louis D. Brandeis: A Life*, the first, thoroughly engaging and easily readable Brandeis biography in twenty-five years. Despite the availability of considerable archival records, family recollections, and Brandeis’ writings, correspondence and court papers,

Urofsky’s task was made difficult by the modest diarist reflections that could give a deeper insight into Brandeis’ thinking. Nonetheless, Brandeis emerges about as whole as a mortal (Urofsky) can examine (in 756 pages) of a person of such prolific and powerful writing and practical and enduring action.

Brandeis was born in Louisville, Kentucky (his remains are within the grounds of the University of Louisville Law School). His parents had fled the conservative upheavals in Austria-Hungary in 1848. He was Jewish, a fact that tempered the depth of his commitment to Zionism and the founding of Palestine on a solid footing; and a reality that, in ways both subtle and crass, emboldened some of the opposition to his nomination by President Wilson to the Supreme Court in 1916. He went to Harvard Law School. He chose, early on, to remain in Boston where his practice and reputation prospered. His law review article on “The Right to Privacy,” written with his law partner Samuel Warren in 1890, presaged in principle the “right” that emerged formally in the law decades later. His prescience and persistence in exposing within the life insurance industry the ugly disdain for working people who depended on its protection ensured the application of sound actuarial and business principles to correct the manipulation and abuse.

Urofsky explores these works and actions with an insightful critique; working through the soundness of Brandeis’ economic analysis and assumptions and identifying, in the end, the moral underpinning for Brandeis’ view.⁷

“There are thousands of men...who could have performed for the New Haven stockholders...better than did Mr. Morgan...[and] Mr. Rockefeller.”

Brandeis entered upon the national scene. Here emerges his most memorable battle – against J.P Morgan, John D. Rockefeller and their harsh control and manipulative despoiling of the New Haven Railroad. It was Brandeis’ comfort with irreverence –well founded on facts and law – that is so penetrating and valuable. The “decline of the New Haven...teaches a lesson of national importance,” he said. “There are thousands of men in America who could have performed for the New Haven stockholders...better than did Mr. Morgan...[and] Mr. Rockefeller.” In the end, Brandeis proved right and then prophetic. The railroad merged, and then merged again to become the Penn Central. It became the largest railroad in the nation. It went bankrupt.⁸

He also was no longer alone. A like mentality and commitment to act emerged almost uniquely. The Pujo investigation and Untermeyer’s persistence had its effects. They exposed the “speculative enterprises” that benefited the CEOs and the related importance of the impenetrable private clearinghouses (especially in New York). The national banks refused to produce documents. The Taft administration acknowledged its failure to engage in the most elementary oversight. “Brandeis followed the Pujo hearings closely,” Urofsky explains, met

with Untermeyer, and finalized his series published first in *Harper’s Weekly* beginning in November 1913 and then later in book form: *Other People’s Money, and How the Bankers Use It.*⁹

The corporate shroud was pierced. The depth of actual ownership and control of major utilities, transportation, natural resource industries, and banking institutions was revealed. In *A Preface to Politics* (1914) and *Drift and Mastery* (1914), Walter Lippmann – who knew, admired, and supported Brandeis, and who historian Ronald Steel described as “the nation’s greatest journalist” – characterized the new form of financial man he feared now controlled other people’s money: Men “interested in production...as brute exploitation.” “[T]here is in everyday life,” Lippmann wrote, “a widespread rebellion against the profit motive. The rebellion is not an attack on the creation of wealth. It is, on the contrary, a discovery that private commercialism is antiquated...mean, and unimaginative.” Such men have ensured the “life-sapping direction of the commercialist;” acted the “usurper” rather than the “craftsman, the inventor, and the industrial statesmen.”¹⁰

To Brandeis and Lippmann the corporate venture was no longer “private sector;” a rhetorical genre of conduct that led bankers and financiers to imperil the nation’s confidence and culture with a sense of impunity. They had denigrated the prospect that large aggregates of capital would be placed, as Lippmann hoped and Brandeis sought, in “men [and women] interested in production as a creative art;” people who acted with integrity of purpose and an essential thread of moral duty to the public.¹¹

Proper corporate conduct, Lippmann wrote in terms rarely heard today, required a “degree of loyalty.” He explained later: “[T]he head of a business big enough to make of him a public character must be judged as such.” And in a way that resonated in various epochs in our history — as it did in the 60s and early 70s — big business “must be held to the standards of a public enterprise.” The public “will have renounced its rights and neglected its own vital interests” if it allowed the private sector to neglect that duty, even momentarily. Brandeis did not.¹²

The collective effort only highlighted the need for more transparency, truth telling, and regulation. With the election of Woodrow Wilson — a campaign in which Brandeis played a central role — a new institution was created: The Federal Reserve Bank. In 1914, the Federal Trade Commission was established to prohibit “unfair or deceptive acts or practices in or affecting commerce.” Its public purpose was largely preemptory — to weed out wrongdoing before it caused irreparable public harm and not merely to watch as the public suffered and then take solace in after-the-fact prosecutions that never right the wrongs committed among the families deceived. The rationale for later enactments also was begun: the Securities and Exchange and Glass-Steagall Acts of 1933, and the Public Utility Holding Company Act of 1935.¹³

“Lying and sneaking are always bad,” Brandeis told his niece, Fannie, “no matter what the ends. I don’t care about punishing crime, but I am implacable in maintaining standards.” Urofsky puts Brandeis’ position this way: “[T]he demand for honesty, for

adherence by everyone to the same legal rules, the abhorrence of the trimmer, the faithfulness to a moral system — these qualities are not to be dismissed lightly. The very faults that Brandeis detailed in the ‘new economics’ of the twentieth century are akin to the practices that many modern industrial leaders claim are part of the ‘new economics’ of the twenty-first century.” They have been presumed by some — at AIG, Lehman, Citigroup, Goldman Sachs, J.P. Morgan, Washington Mutual, and in Congress and the White House — to be commonplace and acceptable, but they “are no more admirable today than they were one hundred years ago.” In fact, in some circumstances - we await the reasoned, persistent boldness of the prosecutor and courts - such conduct may be criminal.¹⁴

Throughout the book, Urofsky brings us squarely to today; smack into our inability to purge through reason, punishment or an elevated model of civic responsibility the mind-set and values that, once again, haunt the nation and give a renewed life to the specter in the opening years of the twenty-first century. The Cowperwoods still sit contently on Wall Street and other venues throughout the nation, cloaked brazenly in a professed ignorance of what they have done and its consequence (as they tell it), or sullied by a remarkable incompetence (as seems irrefutable) or, in their private moments surrounded by counsel, cowered with unease in a stark criminality that, at least in fiction, befell Cowperwood, albeit not for long enough or to convey a lesson that endured.¹⁵

Even after he had been on the United States Supreme Court for eighteen years, his principles and experience in life still embedded deeply,

Brandeis recognized an elementary truth in a powerful dissenting opinion that resonates today. “The prevalence of the corporation in America,” Brandies wrote in *Ligget v. Lee*, “has led men of this generation to act, at times, as if the privilege of doing business in corporate form was inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestrictive use of the corporate mechanism as if these evils were the inescapable price of civilized life, and hence to be borne with resignation.” Louis Brandeis made clear, in his life and in the law that no one has to accept such a price.¹⁶

Professor Melvin Urofsky has given a new generation of people the opportunity to know Brandeis.

¹ This book review was written in 2009 for publication in the Georgetown Public Policy Review until its editors decided to devote the entire issue to “health care.” Except for minor additions the review remains unchanged. The reasons for apprehension about corporate conduct in America also remain unchanged.

² Theodore Dreiser, *The Financier*, Harper and Brothers: New York (1912), citations from New American Library ed: New York (1967), 140-141; Neil Thomas Proto, *To A High Court, The Tumult and Choices that Led to United States of America v. SCRAP*, Hamilton Books, A member of the Rowman & Littlefield Publishing Group: Maryland (2006), 138-139; available on Amazon.com as eBook.

³ Alpheus T. Mason, *Brandeis: A Free Man’s Life* (Viking Press: New York, 1946), 101 (lawyers), 105 (“social conscience”); *Louis D. Brandeis, A Life*, 200 (“What the bankers leave undone, their lawyer minions supply.”), 202-206 (Harvard speech).

⁴ *Brandeis: A Free Man’s Life*, 101-103; “Report of the Committee Appointed Pursuant To House Resolution 429 and 504 To Investigate The

Concentration Of Control Of Money And Credit,” United States House of representatives, Report No. 1593; 62d Cong. 3d Sess. (submitted by Mr. Pujo), Government Printing Office: Washington, D.C. (February 28, 1913), 47.

⁵ *Louis D. Brandeis, A Life*, 300-326.

⁶ *Louis D. Brandeis, A Life*, 692 (“Isaiah”); “The Practice,” by Alan M. Dershowitz. *New York Times Book Review*, September 25, 2009 (review of *Louis D. Brandeis, A Life*); *To A High Court*, 6-12, 53-57, 166, 175, 237-238 (analysis of the time period and Brandeis); see also www.ToAHighCourt.com (photo gallery); Also, for example, during this time period the Public Interest Research Group, NRDC, Environmental Defense Fund, Public Citizen, Action for Children’s Television, Center for Auto Safety, Common Cause and numerous other national, neighborhood, local, and regional organizations were formed; *Brandeis, A Life*, 154, 227 (the People’s lawyer).

⁷ *Louis D. Brandeis, A Life*, 3, 754 (Louisville), 98-102 (“Right to Privacy,” 4 Harvard Law Review 193 (1890)), 155 (life insurance).

⁸ *Brandeis: A Free Man’s Life*, 199-120 (New Haven Railroad); *Louis D. Brandeis, A Life*, 181-200 (New Haven Railroad); *To A High Court*, 34, 57, 61, 194, 116, 120, 137-138 (Penn Central bankruptcy).

⁹ *Brandeis, A Life*, 321-323; *Other People’s Money and How Bankers Use It*, Frederick D. Stokes: New York (1914); “Vanderlip [chairman of the Clearing House Association] Attacks the Money Inquiry,” *New York Times* (June 11, 1912); “Untermeyer Fears for Money Inquiry,” *New York Times*, (June 3, 1912); See also, Charles R. Geisst, *Wall Street, A History*. Oxford University Press (2004 ed.), 129-136. (“The Pujo hearings were one of the later factors behind the passage of the Federal Reserve Act.”)

¹⁰ Walter Lippmann, *A Preface To Politics*, Mitchell Kennerly: New York (1914), citation from University of Michigan Press: Ann Arbor, Michigan (1965 ed.), 49-50; Walter Lippmann, *Drift and Mastery, An Attempt to Diagnose the Current Unrest*, Mitchell Kennerly: New York (1914), citation from Prentice Hall: Englewood, New Jersey, ed. (1961), 27-34, 147 (loyalty); *The*

Essential Lippmann, A Political Philosophy for Liberal Democracy (edited by Clinton Rossiter and James Lare, Vintage Books; New York, 1965 ed.), 388-390; Ronald Steel, *Walter Lippmann, The American Century*, Atlantic Monthly Press Book, Little Brown and Company: Boston (1980), xvi.

¹¹ *A Preface to Politics*, 49-50; *Louis D. Brandeis, A Life*, 188 (Brandeis on John Murray Forbes).

¹² Extracted from *Drift and Mastery*, reprinted in *The Essential Lippmann*, 389-391; "The Strike at General Motors," *Today and Tomorrow*, *New York Herald Tribune* (January 7, 1937), 397.

¹³ *Wall Street, A History*, 34, 142, 231-233, 241-242 (role of Brandeis and Pujo Committee); *Louis D. Brandeis, A Life*, 323.

¹⁴ *Louis D. Brandeis, A Life*. 182, 188; see also, "Suit Accuses Well Fargo of Steering Blacks to Subprime Mortgages in Baltimore," *New York Times* (July 7, 2009); authority of Financial Crisis Inquiry Commission to recommend prosecution to the Department of Justice or any appropriate state attorney general (Sec. 5., Fraud Recovery and Enforcement Act of 2009, Pub. L. 111-21, 23 Stat. 1617(2009)) *Cuomo v. Clearing House, LLC, et al.*, 557 U.S. __ (decided April 28, 2009), wherein the court may have provided authority for state prosecution; but see also, "2 Bear Stearns Fund Leaders Are Acquitted," *New York Times* (November 11, 2009). The weakness of the prosecutions, the absence of the Brandeis ethic of corporate responsibility on the Supreme Court, and the seeming comfort derived from the meaningless Senate hearing where the transitory verbal lashing after the corporate harm has been done is substituted for the serious investigation of wrongdoing remains the rule.

¹⁵ *The Financier*, 351 (conviction affirmed), 422 (pardon).

¹⁶ *Ligget v. Lee*, 288 U.S. 517, 548(1933) (Brandeis, J., dissenting in part.)