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# BRANDEIS

*A Free Man's Life*

BY ALPHEUS THOMAS MASON



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To the Memory

of

Bernard Flexner

## Acknowledgments

WORK on this book began early in 1940 when Justice Brandeis authorized its preparation and gave me full access to his public papers and documents. He also made available memoranda, diaries, notebooks, and personal correspondence. Brandeis had a natural archival bent and enjoyed filing significant materials. He began to gratify this trait as early as 1875, and by 1900 the habit was firmly fixed and fully indulged. The results are unique in the length of the period covered and in the formidable mass of papers accumulated.

Justice Brandeis's relatives, friends, colleagues and co-workers have lent me letters and documents, prepared memoranda, and discussed his career. To Mrs. Brandeis I am under a very special obligation. She made available letters and other material and was unfailingly responsive to any and all calls for help. The Justice's younger daughter, Elizabeth Brandeis Raushenbush, supplied the letter written by Samuel D. Warren on the occasion of her parents' engagement and permitted the use of the letter she herself wrote her father when he retired from the Court. Informal talks with her in July 1940 gave me many insights into her father's character and work.

There had been occasional interviews with the Justice since 1933; after 1940 these became more frequent. During his last years he seemed mellower, more relaxed. July 22-31, 1940, I saw him each day at Chatham. Laying aside his habitual reserve, he reminisced on various episodes. At morning and afternoon sessions he would often talk for an hour or more. Mrs. Brandeis was on guard to conserve his diminishing resources, but as the days passed the Justice himself decided when the session must end. Sometimes he would escape for an unscheduled talk in the little room at the back of the cottage, where I was examining papers. During these memorable days there was hardly a phase of his long career not touched upon, with illuminating comment on his heritage, his motivating creed, his likes and dislikes. He talked freely but never at random, intent, as always, to illustrate an idea or point a moral.

Substantial assistance came from Louis B. Wehle, the Justice's nephew; Josephine and Pauline Goldmark, his wife's sisters; Edward F. McClennen and Jacob Kaplan, his former law partners; Miss E. Louise Malloch, his former secretary; Mrs. Alfred Brandeis, his sister-in-law; the Misses Fanny and Adele Brandeis, his nieces; Paul Freund and Willard Hurst, former law clerks; Mrs. Florence Boeckel and Mrs. Josephine January, close friends of the family; A. A. Berle, Sr., a co-worker in Boston public campaigns; Charles C. Burlingham of the New York Bar, a friend since law-school years; the late Richard W. Hale of the Boston Bar; and the late Joseph B. Eastman of the Interstate Commerce Commission.

Besides using the roomful of Brandeis papers at the University of Louisville, and numerous other sources friendly and unfriendly to the Justice and his work, I have worked through official records, reports, and pamphlets, scores of files of magazines and newspapers bearing upon his career. The effort has been to cover the entire field and to present the subject in a spirit of impartiality. In this endeavor many others have co-operated: George W. Alger, Beulah Amidon, F. F. Baldwin, Roger W. Baldwin, Jacob Billikopf, Raymond P. Brandt, Clarence S. Brigham, H. I. Brock, Robert W. Bruère, Clyde S. Casady, Lelia E. Colburn, Charles Townsend Copeland, John H. Cramer, Mrs. Jacob De Haas, Judd Dewey, Felicia Deyrup, Irving Dilliard, Justice William O. Douglas, Abram G. Duker, Lincoln Filene, Edward C. Finney, Abraham Flexner, Justice Felix Frankfurter, Elisha M. Friedman, Benjamin Goldstein, August Gutheim, Arthur D. Hill, Frederick M. Kerby, Paul Kellogg, Pennell C. Kirkbride, the late Louis E. Kirstein, Fola La Follette, Morris S. Lazaron, Max Lerner, Judge Louis E. Levinthal, Judge Julian W. Mack, Max Meyer, Richard Neuberger, George Wharton Pepper, Gifford Pinchot, James Morgan Read, Edward A. Richards, James L. Richards, Charles G. Ross, George Rublee, Mrs. Morris Saval, Harry A. Slattery, Mrs. Joseph B. Speed, Kenneth M. Spence, the late Harlan F. Stone, Robert S. Szold, Thomas E. Waggaman, Herbert White, and Robert W. Woolley.

The resources of various libraries have been freely and fully at my disposal. Grateful recognition is due to Miss Pearl Weiler, Librarian, and J. N. Lott, Jr., Dean, University of Louisville Law School, for supplying material from the Brandeis collection; to Mr. Malcolm O. Young, Reference Librarian, Princeton University, for innumerable services; and to Miss Katharine Brand, Special Custodian, Woodrow Wilson papers, Library of Congress, for making accessible the relevant documents in that collection.

Financial help, without which this book could not have been written, came from various institutions—The Rockefeller Foundation, Princeton University, and the Palestine Economic Corporation.

Princeton University students, graduate and undergraduate, have given me stout assistance in library exploration, in checking sources, and other tasks involved in a large research project. For this I am especially indebted to John Brigante, Frank Gray, and J. W. Peltason. Several undergraduates, writing senior theses under my supervision on various phases of Brandeis's public career, have done work of distinction and at the same time given this biography considerable help. Among these are Henry Lee Staples, Jr., John Pryor Furman, and Samuel Warren Seeman.

After the book was in manuscript and still in the plastic stage, I had the editorial assistance of Prof. Walter Lincoln Whittlesey of Princeton and Mr. William Miller of New York. Professor Whittlesey gave more than skillful editorial help. For his unfailing sympathy, suggestion, and inspiration, this book owes an unpayable debt. In preparing the manuscript for the printer the author is heavily obligated to Miss Jerry Heringman of The Viking Press for revisions, corrections, and uncanny detection of discrepancies.

Throughout the years since 1934, the author's wife, Christine Este Mason, has tolerantly borne the brunt of his struggle to understand and portray Brandeis, and has given assistance which no words of acknowledgment can adequately express.

A. T. M.

*Princeton*

*March 11, 1946*

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# Brandeis

A FREE MAN'S LIFE



## Profile

WRITING his mother from Harvard Law School in March 1878, William E. Cushing sketched a fellow-student: "My friend Brandeis is a character in his way—one of the most brilliant legal minds they have ever had here. . . . Hails from Louisville, is not a college graduate, but has spent some years in Europe, has a rather foreign look and is currently believed to have some Jew blood in him, though you would not suppose it from his appearance—tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The professors listen to his opinion with the greatest deference. And it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday. A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friends said: 'Go and ask Brandeis—he knows everything—perhaps he will know where your book is.' He went and asked. Said Brandeis, 'Yes, go into the auditors' room, and look on the west side of the room, on the sill of the second window, and you will find your book.' And it was so." \* <sup>1</sup>

Famous at twenty-one years, and to the end of his days, Louis Dembitz Brandeis is among the most controversial public figures of our time. He was a great lawyer, uncommonly effective both as advocate and counselor. He was a great judge. But relentless curiosity and ardor for seeing things whole broke down the conventional barriers of his profession, drove him beyond the law into life itself, forcing him to see that no man, no group, can lay exclusive claim to truth. In working up his cases, whether private or public, he seized every opportunity to probe more deeply than the immediate litigation seemed to require. Often that was how he won his cases—by putting the human before the legal element. Thus he often roused personal enmity and baffled both friend and foe. His opponents started by hating his tactics and ended by hating the man himself. Like Lincoln, he

\* All bibliographic references will be found at the end of this volume.

was bitterly despised, greatly loved, and also profoundly misunderstood. "Lonely is the man who understands," or, as Emerson says, "To be great is to be misunderstood."

All agree that Brandeis's achievements are remarkable, but as to the nature of his talents, as to the mainspring of his life and work, opinions are varying and contradictory. Some corporation heads and their "lawyer adjuncts" still see in him Machiavellian duplicity, see in his pose as champion of the people a device to gain notoriety and large fees.<sup>2</sup> Others in business and finance find him a dangerous radical, bent on destroying established institutions. Still others praise his crusading humanitarianism, his sacrifice of personal ambition to help the poor. Observers of more practical idealism see him as a dreamer. To other men he is an ingenious pioneer, dealing systematically and objectively with our complicated pecuniary culture, using the techniques of science to discover the sources of power in our society, and the methods of controlling that power for the public good. Some of his acts give credence to each of these verdicts.

Brandeis rarely failed to shift his position when the ground he was standing on went soft. Critics, as usual, leveled against him the charge of inconsistency. How, some still ask, could he score financial success as a big corporation lawyer only to become so fierce an opponent of bigness, monopoly, and the money trust? How, they inquire, could he serve corporations—his clients—and then battle them in the name of that vague entity—the people? How, with his heralded liberalism, could he maintain so lucrative a law practice and die a multimillionaire? And since he did, in fact, make a fortune during the period 1879–1907, the reasons for his *volte-face* were suspect. Why would he support a man at one time and later oppose him, defend a corporation and later prosecute it, simultaneously advise and oppose big business? <sup>3</sup> Plausibly enough, his enemies saw him as a bandwagon demagogue.

Each of these queries has a kernel of truth, making it easy for his enemies to accuse Brandeis of subordinating his principles to his purse. He was most conspicuous in the public eye when monopoly seemed to many the practicable solution for business depressions. Brandeis disagreed. He sought to block the trend toward bigness and monopoly as inimical to efficiency, individualism, true *laissez faire*, and democracy, as heading the nation precisely in the direction capitalists professed their desire to avoid—state socialism. Then he was fiercely denounced as playing both ends against the middle in an effort to line his own pocket. When he endorsed the social and economic value of trade unionism, and at the turn of the century pronounced the correction of irregular employment our most urgent task, spokesmen for labor claimed him as their own while corporation magnates

labeled him an obstreperous agitator, inciting class hatred, inspiring false hopes. When, on the other hand, he argued in favor of the manufacturer's right to fix the price of trade-marked articles, or advocated the incorporation of unions, industrialists figuratively patted him on the back, while trade unionists turned hostile.

The evening of his judicial career came in the decade when Roosevelt's New Deal was to win for all men the more abundant life, the four freedoms, everywhere in the world. While strongly sympathizing with such noble purposes, Brandeis expressed doubt whether grandiose plans and a few fallible planners could achieve these commendable goals. He continued to voice unfaltering faith in little men and little institutions, while erstwhile friends accused him of clinging to obsolete views, of wishing to turn the clock back.

It seems not to have occurred to Brandeis's critics that inconsistency such as his may have resulted from his methods, his power to grow, from capacity to live and learn, from ability to win wider knowledge from broader experience. Critics did not see that his shifts of position were vitally related to that independent strength of mind manifest throughout his career—that persistent refusal to hunt with the pack. Experience taught him the fallacy of seeing any socio-political issue or proposed remedy as an absolute, in terms of black and white.

When theoretical molds are applied to particular situations, they seldom fit. Therefore the stand he took, after inquiry, was often unexpected. Since he had discredited Taft's conservation policy in 1910, it was assumed he would do it again later the same year when Taft's Department of the Interior again came under fire. Yet he refused, since examination of the facts failed to support the charges. Since he had opposed advanced railroad rates in 1911, it was expected he would do the same in 1914; yet it was the big shippers, not the railroads, he then opposed. Since he had associated himself with progressive Republicans, it was thought that he would join the Progressive Party; yet he came out for Wilson and the Democrats. In each case, facts, not abstract theory, determined his position. Only a man literally free from all political and financial obligation could act as Brandeis did.

America to him was the freest country on earth, yet even here men were only partially and relatively free. The worker whose best effort barely wins a livelihood is not free. Those who go through life in aimless search for pleasure, who live solely to impress others or to win their approval, are not free. The corporation executive whose thought is merely of profit and more profit is thereby enslaved. The lawyer whose life is spent showing corporations how they can evade the law is himself enchained. The poli-

tician bent on office and power is not his own man but his electorate's or his party's.

Brandeis began his career determined to create in his own circumstances the prerequisites for independence and freedom of action. He shied off from an attractive partnership with his brother-in-law and from establishing himself near his family. Success must be won independently. He deliberately achieved financial security for himself and his family; he sought out worth-while social contacts, built up professional and social prestige lest personal isolation hamper his quest for the good life.

To be really free, a man must be clear of physical appetite and passion, uncramped by social convention, immune to accepted dogmas and creeds. Brandeis saw freedom menaced by one's possessions as much as by financial dependence, endangered by security as well as insecurity, by power as well as weakness. No man is free, he said, if ambition masters him; all power-seekers are themselves enslaved. In time he discovered that by engaging in specific public causes he enjoyed a keen sense of duty done, of liberation—an enlargement of his own liberty.

It cannot be said that Brandeis was moved by an inner compulsion toward some perfectionist utopia; nor can he be considered solely as a champion of the underdog. His public activities were invariably undertaken on the initiative of others or grew out of his day-to-day law practice. He was neither blind to, nor neglectful of, corporate property rights. His career has been conspicuously identified with crucial social conflicts chiefly because so many able lawyers in his day actually were adjuncts of great corporations; they had lost sight of their opportunity, renounced a great obligation, "to protect *also* the interests of the people."<sup>4</sup> These interests Brandeis made his own.

Legal practice had become increasingly involved with business and finance, with relations between competing railroad systems, between great trusts and their consumers, between employers and employees—all rivaling in magnitude the affairs of state. Therefore the lawyer, Brandeis felt, must also be the statesman. Earlier in our history the legal profession had been approved as "a brake on democracy," "a ring in the nose of Leviathan." But Brandeis could not go along with this idea. Modern statesmanship, he held, required that lawyers redress the balance between corporate power and political democracy in favor of the latter. By leading the battle against human exploitation, lawyers could inform and temper popular protest, moderate political action. Only thus could a capitalist-democracy be preserved and kept on its path of progress "within the broad lines of existing institutions."

Viewing Brandeis in some such way as this, one may perhaps discover



more consistency in his life and work, an integrated achievement true to its own purpose, as well as a closer kinship between the things he sought to win for his fellow-men and the growth he so arduously achieved for himself.