

**Brandeis.** By Lewis J. Paper.<sup>1</sup> Englewood Cliffs: Prentice-Hall, Inc. 1983. Pp. 442. \$18.95.

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There are longer books about Louis D. Brandeis.<sup>3</sup> There are ones with more interpretative flair.<sup>4</sup> And ones that have stirred more passionate controversy.<sup>5</sup> But it will be a very long time before someone writes a more concise and consistently interesting biography of "the people's attorney" than Lewis J. Paper, a Washington, D.C. lawyer, whose varied career has included teaching positions at Harvard, legislative counsel to Senator Gaylord Nelson, and associate general counsel to the Federal Communications Commission. With economy, good judgment, and a fine historian's instinct for the significant, Paper brings to life the man and his era in a compelling narrative that examines Brandeis's impact upon the legal profession, big business, labor, politics, Zionism, and the Supreme Court during the first half of the twentieth century.

Brandeis's entire public life, this volume makes clear, represented a sustained, powerful dissent against the basic contours of American life in the years from the Civil War to Pearl Harbor. During these years, a nation of farmers and independent producers became a nation of giant corporations, factory workers, and white-collar bureaucrats. A middle-class culture rooted in the values of thrift, self-denial, and delayed gratification gave way to the new ethics of a consumer society—spending, self-indulgence, "buy now, pay later." A system of decentralized political authority, anchored in the small towns, villages, cities, and states of the union, disintegrated under the impact of these new economic forces and the aggrandizement of fiscal and administrative controls by the federal government. The results were indeed paradoxical. Most citizens experienced a higher standard of material comfort, but an erosion of personal authority over economic and

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3. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946).

4. M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971).

5. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982).

political decisions. Along with greater economic security, underwritten by the corporate sector and the modern welfare state, came a greater capacity for manipulating and dominating human behavior. Brandeis usually believed that the costs of twentieth-century "progress" outweighed the benefits. Like the ancient Hebrew prophet Isaiah, he warned his countrymen that they had strayed far from the path of righteousness into the thickets of moral decay and cultural decline.

Brandeis's social vision was rooted in the republican ideology which traced its origins to John Locke and which inspired Tom Paine, Thomas Jefferson, and other eighteenth-century radicals. According to this theory, the personal control of productive resources was an absolute prerequisite to human freedom and the survival of democratic societies. The ideal social type was therefore the yeoman farmer, the self-employed artisan, and the small shopkeeper, all of whom enjoyed a large measure of economic independence. Such economic independence, Jefferson argued, made democracy possible because only those who were not dependent upon the will of others for a living could make free and responsible decisions in the political arena. Classical republicans also believed that too much social progress—especially in the form of wealth and material possession—led to "overcivilization," the decline of virtuous living, and the destruction of democracy.

It was this classical republican ideology which infused most of the important social movements and political crusades of nineteenth- and early twentieth-century America. It encouraged the Jacksonian assault upon monopolies and the Second Bank of the United States. It fueled the crusade to stamp out demon rum; and to eradicate the South's peculiar institution, which perpetuated both an extravagant lifestyle and the unjustified domination of one person over another. Classical republicanism was a critical ingredient in the thinking of Abraham Lincoln. It inspired the Homestead Act, the early trade union movement, and the socialist vision of Eugene Debs. It lay behind the passage of the Sherman Anti-Trust Act and the formation of the Populist Party as well as the New Freedom of Woodrow Wilson, Huey Long's Share-the-Wealth gospel, and the Port Huron Statement of Students for a Democratic Society in 1962. Classical republicanism is our most venerable and durable protest against the disruptions generated in American life by unchecked technological innovation, urbanization, industrialization, and the spread of bureaucracy—in short, against the modernization of the social order under capitalism.

Louis Brandeis, the intellectual heir to Paine and Jefferson, was its most eloquent spokesman in the first four decades of this century.

Classical republicans such as Brandeis became the true conservatives in American life during the twentieth century, ever resisting the temptation to accept as inevitable the consolidation of business enterprise, the hegemony of consumerism, and the rise of a powerful, benevolent, and intrusive federal government. It was Brandeis, not Samuel Insull, who refused to invest in other than low-yield railroad bonds. It was Brandeis, not Henry Ford, who refused to own an automobile or even ride in one until the traffic drove his buggy off the streets of Washington, D.C. It was Brandeis who lived a Spartan life in his apartment in Stoneleigh Court without even a tablecloth on the plain wooden dining room table and who vacated the premises when commercial shops took over the ground floor. When dining with the Brandeises, remarked Judge Julian Mack, one ate before and after. Justice Benjamin Cardozo often poked fun at his colleague's "peculiar" ways—the shabby furniture, the sparse food, the small quarters. Far more than Coolidge, he remained the Puritan in Babylon.

Perhaps no figure in our public life has pursued a social vision with such consistency and tenacity as Louis Brandeis. Whether as a practicing attorney, a presidential adviser, or a justice on the Supreme Court, he seldom wavered from the conviction that the unchecked excesses of capitalists would doom the economic system, that big business represented a dire threat to the society, that all social institutions should be tailored to the intellectual and moral limitations of the human species, and that power, whether economic or political, should remain decentralized in the states and local communities.

Beginning with his efforts to secure the adoption of a "sliding-scale" for the rates charged by the Boston Gas Light Company in 1905, Brandeis argued that capitalists were entitled to earn only those profits generated by honest effort, prudent investment, and organizational efficiency. These concerns led him to oppose the buccaneering financial plans of Charles Mellen and J.P. Morgan with respect to the New Haven Railroad, to fight against the general rate increases sought by the nation's carriers before World War I, and to work as a justice for the overthrow of the rule in *Smyth v. Ames*,<sup>6</sup> which guaranteed utilities a profit on the basis of the so-called "reproduction value" of their properties.

His opposition to "the curse of bigness" inspired Brandeis's

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6. 169 U.S. 466 (1898).

attack on the life insurance industry, his successful crusade to adopt savings bank life insurance in Massachusetts (which he regarded as the greatest triumph of his career), his endorsement of retail price-maintenance laws to protect small companies from the ravages of competition, and his powerful dissent in *Liggett v. Lee*,<sup>7</sup> which argued for the constitutionality of a state law taxing chain stores at a higher rate than independently-operated drug stores. "[B]y the control which the few have exerted through giant corporations," he wrote, "individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened . . . the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men . . . only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty."<sup>8</sup> Tom Paine could not have said it better.

Throughout his public life, Brandeis rejected corporatist solutions to America's economic and social problems, whether represented by Theodore Roosevelt's New Nationalism in 1912, or the initial programs of the New Deal under FDR in the 1930's. Instead of regulating monopoly, as T.R. proposed, Brandeis urged vigorous enforcement of a revamped antitrust law and heavy taxes to reduce the size of corporate units. Instead of curbing production, legitimating cartels, and enriching the already prosperous, as the second Roosevelt advocated with the National Recovery Act and the Agricultural Adjustment Act, Brandeis recommended a massive public works program financed through progressive taxation and more direct federal aid to the victims of the depression, especially sharecroppers and the unemployed. Skeptical about the capacity of any Brains Trust to run the nation from Washington and frightened by the specter of unchecked presidential power, Brandeis urged most of the young lawyers who came to the capital to return to their home states, advocated an administrative solution for unemployment compensation that retained considerable state autonomy, and worked to limit executive authority in cases such as *Humphrey's Executor v. United States*.<sup>9</sup> He regarded as his greatest judicial victory the burial of *Swift v. Tyson*,<sup>10</sup> which

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7. 288 U.S. 517 (1933) (Brandeis, J., dissenting).

8. *Id.* at 580.

9. 295 U.S. 602 (1935).

10. 41 U.S. (16 Pet.) 1 (1842), *overruled*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

had permitted federal judges to ignore the common law of the various states for over a hundred years.

Even in the twilight of his life, as the possibilities of implementing his social vision became more and more remote, Brandeis seldom despaired of success or modified his point of view with respect to business or government. At the same time, he saw in the Zionist movement and the creation of a Jewish homeland in Palestine the opportunity to fashion a new society more in conformity with his classical republican ideals. "[O]ur main task must be to make fine men and women in Palestine," he wrote, "and . . . it will be desirable to correct there, so far as possible, those distortions of character and mind which too much commercialism, enforced by separation from the land many centuries, has entailed."<sup>11</sup> In Palestine, he hoped, Jews might build a society based upon economic democracy and broad citizen participation in decision making, a society untouched by giant corporations, conspicuous consumption, and bureaucracy.

Brandeis was generous with his personal fortune. He gave millions of dollars to family and friends, to the Zionist cause, to the Harvard Law School, and to the University of Louisville. He was somewhat less generous with his emotions. He was not a warm, gregarious, or sympathetic person. Prophets seldom are. His devotion to various progressive causes drove his wife, Alice, to a nervous breakdown. Even with his two daughters, whom he adored, Brandeis remained the stern moralist rather than the loving father. His numerous law clerks, who included Dean Acheson, Henry Friendly, David Riesman, James Landis, and Paul Freund, looked upon him with awe and devotion. Whether they liked him was another matter.

Paper explores each significant milestone in Brandeis's career with insight and full mastery of the relevant sources, both published and unpublished. He is especially adept at explicating the technical dimensions of railroad finance, the insurance industry, and complex legislative proposals such as the Clayton Anti-Trust Act and the Federal Trade Commission Act. With respect to issues of constitutional law, he eschews pedantry and tedious analysis in favor of a clear statement of the policy choices that confronted Brandeis and his brethren. He has not written a hagiography. The Brandeis who emerges on these pages was simultaneously courageous and opportunistic, pragmatic yet stubborn, tolerant but also self-righteous. He seldom doubted the rectitude

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11. Letter from Brandeis to David Lubin (September 29, 1918), *reprinted in* LETTERS OF LOUIS D. BRANDEIS 356 (M. Urofsky & D. Levy eds. 1971-1978).

of his own judgments, even when others pointed out the ethical problems of representing both the Equitable Life Insurance Company and its policyholders or several members of the Warren family who represented antagonistic interests. Nor did he often see his many opponents as motivated by other than greed, ignorance, or a lust for power. It was a modern day Savonarola who told his brother during the height of the Pinchot-Ballinger controversy: "In the fight against special interests we shall receive no quarter and may as well make up our minds to give none. . . . The man with the hatchet is the only one who has a chance of winning in the end. . . . [E]very attempt to deal mercifully with the special interests during the fight simply results in their taking advantage of the merciful."<sup>12</sup>

With the exception of a single irritating habit, Paper also displays a powerful and absorbing prose style. Too many chapters begin with the same dramatic device:

"Poor Gilbert Stuart. It was a sad way to end up."<sup>13</sup>

"The men at the stockyards didn't catch on at first."<sup>14</sup>

"James Hazen Hyde really enjoyed the insurance business."<sup>15</sup>

"All Clarence Cunningham wanted to do was to make some money."<sup>16</sup>

"Louis Marshall sensed that he was losing ground."<sup>17</sup>

"The people at the General Electric laboratories in Schenectady, New York, could not have been happier."<sup>18</sup>

This technique grabs our attention initially, but we soon grow weary of its repetition from chapter to chapter. On the other hand, this is a small price to pay for a volume which should remain a landmark in Brandeis scholarship for a long, long time.

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12. L. PAPER, *BRANDEIS* 127 (1983).

13. *Id.* at 20.

14. *Id.* at 69.

15. *Id.* at 80.

16. *Id.* at 112.

17. *Id.* at 259.

18. *Id.* at 307.