Louis Brandeis and Law Day

Presentation by Laura Rothstein for the Louisville Bar Association, © May 2021

The following is the full length script for the video presentation during Law Day Month.

At the end of the presentation a Bibliography of references relevant to the talk is provided. It was prepared in 2016 for the Centennial of the appointment of Brandeis to the Supreme Court.

At the beginning of each “Slide”

there is a notation of the power point content

and a description of images on that power point.

SLIDE 1

Louisville Bar Association Presentation – May 2021

© Laura Rothstein, Professor and Distinguished University Scholar, Louis D. Brandeis School of Law

Appreciation to Scott Campbell and Melvin Urofsky. Note: They had provided input on the top ten things Brandeis is noted for a 2016 publication. That “top ten” list was a starting place for this Law Day Presentation].

{Image of cover of publication: 2016 Celebrating the Centennial Justice Louis D. Brandeis U.S. Supreme Court Nomination 1916}

When I was invited to give a brief talk about Louis Brandeis as part of a series by the Louisville Bar Association in observance of Law Day, I was happy to do so. I have made it one of my missions since coming to Louisville in 2000 that members of our community should know about the extraordinary legacy of Louis Brandeis.

The challenge was how to condense connecting his connection to Law Day into a three to five minute talk.

It’s not just that Louis Brandeis has a legacy of doing and saying significant things connected to law, but it is that virtually every major thing he is known for has strong resonance in what is happening in the world today.

SLIDE 2

Origins of Law Day

US Code April 1961

Established as a celebration by the people of the United States –

* in appreciation of their liberties and the reaffirmation of their loyalty to the United States and of the rededication to the ideals of equality and justice under law ….
* for the cultivation of the respect for law that is so vital to the democratic way

Law Day, was established by an Act of Congress in 1961 to cultivate “respect for law that is so vital to the democratic way.

The Louisville Bar Association is to be applauded for creating this program to highlight the significance of Law Day. And for recognizing that Louis Brandeis should be one of those recognized as part of this month of May series.

SLIDE 3

Early influences on Brandeis –
Born in Louisville
– November 13, 1856

From his father, Louis learned about commerce and the importance of business relationships based on trust and respect.

From his mother, he learned about the arts and culture

From his uncle, Lewis Dembitz he learned about the value of law in society

{Image is Brandeis Home on Broadway}

Louis Brandeis is known for too many things to cover all of them in a short video, but the focus on respect for the law and the role of the law with respect to **equality and justice**, are reflected by the lifetime body of work of Louis Brandeis, born in Louisville in 1856 and whose roots developing his principles are found in his early years in Louisville.

His family members were key to that.

From his father, who ran the family grain merchant business, Louis learned about commerce and the importance of business relationships based on trust and respect.

From his mother, he learned about the arts and culture

From his uncle, Lewis Dembitz, a highly respected lawyer in Louisville, he learned about the value of law in society. It is notable that Lewis Dembitz is one of the founders of the Louisville Bar Association in 1876.

SLIDE 4

His principles developed in his early years in Louisville

First memories -- helping his mother serve food and coffee to union soldiers on his front lawn

 {Image is Brandeis at about age 6 or 7, with his older brother, Alfred}

His first memory is serving food and coffee to Union soldiers on his front lawn. That example of service to soldiers who were also performing service was a prelude to his becoming known as the People’s Attorney – and who set the example for all lawyers to perform unpaid service to the public.

In the interest of time, I will not be able to spend time on several of the other things that connect Louis Brandeis. To demonstrate the connection of Louis Brandeis to issues of law that were relevant both during his time as a lawyer and a justice, I will highlight the list of the Top Ten Things that Brandeis is known for – a list I created in 2016 when the law school celebrated the 100th anniversary to the Supreme Court. And I will even add a couple of things.[[1]](#footnote-1)

Before doing that, a brief timeline of the life of Louis Brandeis is useful.

SLIDE 5

After 40 years of practice

(mostly in Boston)

1916-- Nominated to the Supreme Court

(First Jewish justice)

Served until 1939 when he resigned

{Image is Louis Brandeis wearing Supreme Court robe}

As I previously noted, Brandeis was born in 1856 in Louisville.

After a long career as a very successful attorney representing individual clients, but also engaging in advocacy for many social justice issues,

He was appointed to the Supreme Court in 1916, where he became known for his insightful dissents, the viewpoint in those opinions later becoming the majority opinion.

He retired from the Court in 1938

SLIDE 6

Died October 5, 1941 at age 84

Remains and those of Alice Goldmark rest in the portico of the University of Louisville School of Law

{Image of Brandeis grave with box of Animal Crackers on it}

He died in 1941, at age 84, and his remains are buried beneath the portico of the law school at his request. This image shows a box of Animal Crackers on the grave. Students often leave coins and stones[[2]](#footnote-2) on the grave but one year a box of Animal Crackers appeared. Students know from my annual talks about Brandeis that Animal Crackers were a favorite food of Brandeis. The next day, the box was still there, but the animal crackers inside were gone – eaten by the squirrels on campus.

SLIDE 7

Connection to Law School

1997 University of Louisville School of Law re-named Louis D. Brandeis School of Law

Also in 1997

Public service requirement that all students must complete 30 hours of public service adopted.

{Image of Logo of UofL Brandeis School of Law}

{Image of front portico of the Brandeis School of Law with name Louis D. Brandeis School of Law}

In 1997, with the approval of the Board of Trustees, the law school was named the Louis D. Brandeis School of Law.

That same year, the law school adopted its public service requirement, through which all students must do at least 30 hours of public service to graduate, making us one of the first law schools in the country to adopt such a requirement.

SLIDE 8

Worker Rights

Law Day has its origins in remembering the struggles of workers for better wages and working conditions.

Worker rights was a high priority for Brandeis in his work before he went onto the Supreme Court.

{Image is portrait of Louis Brandeis at about age 32, the only painted portrait for which he is known to have sat}

But I want to specifically connect his timeless wisdom to the events we experience today – in these transformative times of 2020-2021.

The origins of Law Day connect it to worker rights, and Brandeis was known for his advocacy as an attorney on behalf of regulations to supported worker rights. This is very much a theme today under the current Presidential administration.

SLIDE 9

Dissents in Important Cases

{Image of Melvin Urofsky pictured with the cover of his book “Dissent and the Supreme Court: Its Role in the Court’s History and the Nation’s Constitutional Dialogue.”}

Brandeis was also noted for his Dissents -- which he only wrote in very selective situations – with the purpose of “teaching” future members of the Court. These dissents were so well reasoned that most of them were later adopted as the majority opinion by the Court.

SLIDE 10

{Image is the second side of the plaque outside of the Brandeis School of Law with the following quoted language:

Louis D. Brandeis – 1856-1941

Brandeis is also remembered for his commitment to donated legal services, an area in which this school has been a leader. Brandeis was also an opponent of the growing “bigness” of institutions. He also wrote that the “right to be left alone” is fundamental. Remains of his wife Alice Goldmark were placed here in 1945.}

The Brandeis name is connected to the principle that evolved through his example that all lawyers should do work for no compensation in public service.

His work was most often as an advocate for broad systemic change that would benefit not only one individual but society as a whole.

That principle is one of the four noted on the plaque outside of the law school.

SLIDE 11

The Curse of Bigness

{Image is the second side of the plaque outside of the Brandeis School of Law with the following quoted language:

Louis D. Brandeis – 1856-1941

Brandeis is also remembered for his commitment to donated legal services, an area in which this school has been a leader. Brandeis was also an opponent of the growing “bigness” if institutions. He also wrote that the “right to be left alone” is fundamental. Remains of his wife Alice Goldmark were placed here in 1945.}

Another principle noted on the plaque was his opposition to Bigness – in corporate power, in government, and other institutions – he thought a law school should be small – and would be pleased that the law school named for him as remained small. His beliefs on that issue are very timely today as institutions such as social media and internet companies have grown larger and larger.

SLIDE 12

Related to curse of bigness is quote about democracy
and concentrated wealth

*We can have a democratic society or we can have the concentration of great wealth in the hands of a few. We cannot have both.*

“If it is not a Brandeis quote, it is at least a Brandeisian one. If he didn’t say it,

 he probably could have.” Peter Scott Campbell

{Image of book cover The Quotable Brandeis, by Peter Scott Campbell}

Related to his concern about the bigness of institutions was his concern about the abuse of power by those with money. This quote which is often attributed to Brandeis, was researched by Scott Campbell, and is highlighted in his book The Quotable Brandeis, as not being able to be proven to be his, but as Scott notes: If it is not a Brandeis quote, it is at least Brandeisian.”

SLIDE 13

Responsibility of government if it is to be respected

*Our government is the potent, the omnipresent teacher…. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law. It invites every man to become a law unto himself, it invites anarchy”*

*– Olmstead v. United States* (1928)

{Image of a portrait of Brandeis painted by Robert Shetterly. With quote noted above on the portrait}

The power of government was a concern of Brandeis. This quote was chosen by artist Robert Shetterly in painting the portrait of Brandeis for his Americans Who Tell the Truth series of paintings. It was written as part of a concurring opinion in a case involving wiretapping by the government. It is certainly timely today.

*Our government is the potent, the omnipresent teacher…. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law. It invites every man to become a law unto himself, it invites anarchy”*

*– Olmstead v. United States* (1928)

SLIDE 14

Active citizenship

The most important political office is that of private citizen

{Image of book cover Active Liberty: Interpreting Our Democratic Democracy, by Stephen Breyer}

The views by Brandeis about voting evolved, and while he initially opposed women’s suffrage, he became a strong proponent of women voting, finding it a duty of all to engage in active citizenship, including voting. This quote highlights that view.

 The most important political office is that of private citizen.

And that was theme of Justice Breyer’s book. Justice Breyer was the 2004 recipient of the Brandeis Medal.

SLIDE 15

Freedom of Speech

Concurrence in – *Whitney v. California* (1927)

Including political dissent and challenging government.

{Image of book cover for Anita Whitney, Louis Brandeis, and the First Amendment, by Haij Bosmajian}

Another current issue today is free speech and free press. Brandeis was a strong proponent of free speech, including speech that questioned governmental actions.

SLIDE 16

Importance of Facts

*Knowledge is essential to understanding and understanding should precede judging.*

{Image of students sitting next to mosaic in the lobby area of the classroom wing.}

In a world of tweets, Brandeis would be troubled by today’s overwhelming information that should be given much more attention for his accuracy.

The quote “Knowledge is essential to understanding, and understanding should precede judging” is on the mosaic by Harold Berg that greets our students every day as they enter the classroom wing of the law school.

SLIDE 17

Progressivism –Use of Law for Social Change

{Images: Historical Marker “Louis D. Brandeis Home. Built in 1864, this was the boyhood home of U.S. Supreme Court Justice Louis D. Brandeis. It was here, in his formative years that Brandeis developed the democratic social philosophy that would later be reflective in his own reform activities.

Brandeis Family home on East Broadway in Louisville}

The Brandeis family home on Broadway, near the University of Louisville Medical campus, now has an historical marker, which notes the Brandeis belief that law should be the basis for social reform, a key principle in the progressive movement for achieving social justice.

SLIDE 18

Brandeis Brief – *Muller v. Oregon* (1908)

Interdisciplinary approach to addressing social policy issues

{Image: Historical Marker: Louis D. Brandeis 1856-1941. At this site rest cremated remains of U.S. Supreme Court Justice Louis D. Brandeis, who served on the Court from 1916 to 1939. His support for the Law School, now named in his honor, is best shown by the gift of his papers. He is famous for cross-disciplinary “Brandeis brief” method of arguing socially significant cases.

The historical marker in front of the law school notes that the Brandeis approach of applying an interdisciplinary perspective to social policy issues in a 1908 brief he wrote as an advocate for the Supreme Court.

This approach was later specifically adopted by advocates in preparing their arguments in the school segregation cases decided by the Supreme Court in *Brown v. Board of Education* (1954).

It has been applied at other times, including in the higher education affirmative action cases, and can provide guidance on issues of reparations for race discrimination that are being suggested this past year.

SLIDE 19

States as Laboratories of Democracy

{Image of Brandeis in Supreme Court robes}

One of the Brandeis quotes most often noted is that the states are laboratories of democracy. This philosophy expects deference to states to try policies appropriate to their states that can then serve as guides to other states about whether they work or not. He applied this principle in his Supreme Court jurisprudence.

SLIDE 20

Transparency including free press

*Sunlight is said to be the best disinfectant….*  publicity as the remedy for social injustice

{Image of mug with the quote on it}

The Brandeis quote most used (although not always with attribution to Brandeis) is that “sunlight is the best disinfectant,” which highlights his belief in free press and transparency.

SLIDE 21

Privacy -- “the right to be let alone”

{Image of Historical Marker in front of Law School with the following quote,

Louis D. Brandeis – 1856-1941

Brandeis is also remembered for his commitment to donated legal services, an area in which this school has been a leader. Brandeis was also an opponent of the growing “bigness” of institutions. He also wrote that the “right to be left alone” is fundamental. Remains of his wife Alice Goldmark were placed here in 1945.}

{Image of the first page of the Harvard Law Review article by Brandeis and Samuel Warren titled “Right to Privacy}

The 1890 Brandeis article on privacy remains one of the top ten most cited law review articles.

It argues for the right to be left alone, and still provides guidance regarding reexamination of social media and how it should be regulated as well as a number of other privacy issues.

SLIDE 22

Of the 250 Legal Milestones, two specifically mention Brandeis, but least 50 of them (20%) demonstrate the influence of Brandeis.

{Image of book cover: Michael H. Roffer: The Law Book: From Hammurabi to the Supreme Court, 250 Legal Milestones in the History of Law}

A 2015 book by Michael Roffer, suggests the 250 Legal Milestones in the history of the world. In the book, Roffer connects Brandeis specifically to two of them.

Noteworthy, however, is that a close examination of the 250 provides the insight that Brandeis had influence on about 50 of them (or 20 percent).

SLIDE 23

In a New York Times 2009 book review of Mel Urofsky’s biography on Brandeis, it was noted that if all the lawyers in US history were ranked, Brandeis would be in top five, if all Supreme Court Justices were ranked, Brandeis would be in top three “only person on both lists is Brandeis.”

{Image of book cover of Melvin I. Urofsky, Louis D. Brandeis, A Life.}

It has been noted that Louis Brandeis is unique among lawyers in American history for his status as one of the top five attorneys in the history of the United States and one of the top five judges in our history, and the only person to be on both lists.

SLIDE 24

American Prophet, by Jeffrey Rosen

Not only can we look to Brandeis for what he did during his life with respect to law

but also as a prophet for the role of law in society today.

{Image of Jeffrey Rosen with the book cover to Louis D. Brandeis American Prophet by Jeffrey Rosen}

Finally, one of the most recent books about Brandeis – Louis D. Brandeis – American Prophet -- written by Jeffrey Rosen, the President of the National Constitution Center, highlights the fact that Brandeis wisdom stands the test of time and can provide guidance for almost every current social justice issue.

We can be proud that this native of Louisville, Kentucky, is so noteworthy.

Excerpt from

BRANDEIS CENTENNIAL

Louisville Connections (2016)

(published on the occasion of the Centennial of his appointment to the Supreme Court)

© 2016

**BIBLIOGRAPHY**

Prepared by Peter Scott Campbell, faculty member at the Brandeis School of Law. He maintains a blog with current information about Brandeis. The Brandeis and Harlan Watch blog is accessible at brandeiswatch.wordpress.com.

**Works by Brandeis**

“The Right to Privacy” (co-authored with Samuel D. Warren), 4 *Harvard Law Review* 193-220 (1890).

Other People's Money, and How the Bankers Use It. (New York: Frederick A. Stokes Co, 1914.)

Business--A Profession. (Boston: Small, Maynard & Co., 1914.)

The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis. Edited by Osmond K. Fraenkel. (New York: Viking Press, 1934.)

The Unpublished Opinions of Mr. Justice Brandeis: the Supreme Court at Work. Edited by Alexander M. Bickel. (Cambridge: Belknap Press, 1957.)

The Letters of Louis D. Brandeis. 5 volumes. Edited by Melvin I. Urofsky and David W. Levy. (Albany: State University of New York, 1971-1978.)

"Half Brother, Half Son:" the Letters of Louis D. Brandeis to Felix Frankfurter. Edited by

Melvin I. Urofsky and David W. Levy. (Norman: University of Oklahoma Press, 1991.)

The Family Letters of Louis D. Brandeis. Edited by Melvin I. Urofsky and David W. Levy. (Norman: University of Oklahoma Press, 2002.)

**Notable Opinions by Brandeis**

*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (A 1936 case about the construction of the TVA dam. Brandeis wrote a concurring opinion that outlined seven rules that offered guidance to the types of cases the Supreme Court should—or should not—hear. These rules have come to be called the Ashwander Rules.)

*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (A 1938 case involving a man who was injured by a passing train. Brandeis’s opinion asserted that federal courts should adhere to state law when settling cases that arise between citizens of states.)

*New State Ice v. Liebmann*, 285 U.S. 262 (A 1932 case involving Oklahoma’s requirement that companies manufacturing ice should be licensed. The Court struck down the Oklahoma law, but Brandeis dissented, arguing that states should have the leeway to experiment to solve their problems. This opinion is the source of the famous quote which described states as the “laboratories of democracy.”)

*Olmstead v. United States*, 277 U.S. 438 (A 1928 case involving the conviction of a bootlegger based on evidence gathered from a telephone tap. The Court upheld the conviction but Brandeis dissented, arguing that the police violated the Fourth Amendment by not obtaining a warrant for the tap of private conversations.)

*Whitney v. California*, 274 U.S. 357 (A 1927 case in which the Court upheld the conviction of a woman for violating California’s law against speaking out in favor of the overthrow of the government. In a concurring opinion, Brandeis made a stirring statement on the importance of free speech.)

**Books about Brandeis**

Jacob de Haas, *Louis D. Brandeis; a Biographical Sketch*. (New York: Bloch Publishing Co., 1929.)

Alfred Lief, *Brandeis; the Personal History of an American Ideal*. (New York: Stackpole Sons, 1936.)

Alpheus Thomas Mason, *Bureaucracy Convicts Itself*. (New York: The Viking Press, 1941.)

Alpheus Thomas Mason, *Brandeis, a Free Man's Life*. (New York: The Viking Press, 1946.)

Samuel J. Konefsky, *The Legacy of Holmes and Brandeis*. (The Macmillan Company, 1956.)

Melvin I. Urofsky, *A Mind of One Piece: Brandeis and American Reform*. (New York: Charles Scribner's Sons, 1971.)

Allon Gal, *Brandeis of Boston*. (Cambridge: Harvard University Press, 1980.)

Nelson L. Dawson, *Louis D. Brandeis, Felix Frankfurter, and the New Deal*. (Hamden: Archon Books, 1980.)

Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition*. (Boston: Little, Brown and Company, 1981.)

Lewis J. Paper, *Brandeis*. (Englewood Cliffs: Prentice-Hall, Inc., 1983.)

Leonard Baker, *Brandeis and Frankfurter: a Dual Biography*. (New York: Harper & Row, 1984.)

Philippa Strum, *Louis D. Brandeis: Justice for the People*. (Cambridge: Harvard University Press, 1984.)

Nelson L. Dawson, editor. *Brandeis and America*. (Lexington: University of Kentucky Press, 1989.)

Philippa Strum, *Brandeis: Beyond Progressivism*. (Lawrence: University Press of Kansas, 1993.)

Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis*

*Dembitz Brandeis*. (Cranbury: Associated University Presses, 1994.)

Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution*. (New Haven: Yale University Press, 2000.)

*Brandeis at 150: The Louisville Perspective,* Sesquicentennial Publication prepared by the Louis D. Brandeis School of Law. (Butler Books 2006.)

Melvin I. Urofsky, *Louis D. Brandeis: A Life*. (New York: Pantheon Books, 2009.)

Melvin I. Urofsky, *Dissent and the Supreme Court: Its Role in the Court’s History and the Nation’s Constitutional Dialogue,* (Pantheon Books 2015) (includes a focus on the Brandeis dissent in the wiretapping case)

Philippa Strum, *Speaking Freely: Whitney v. California and American Speech Law (*University Press of Kansas 2015) (includes a focus on the Brandeis focus on the value of free speech)

Jeffrey Rosen, *Louis D. Brandeis: American Prophet* (Yale University Press 2016)

David Dalin, *The Jewish Justices of the Supreme Court From Brandeis to Katan: Their Lives and Legacies* (Brandeis University Press 2017)

1. This list was created in consultation with Mel Urofsky (the primary Brandeis biographer) and Scott Campbell (the law school’s own Brandeis historian). [↑](#footnote-ref-1)
2. It is the Jewish tradition to leave a stone to indicate that the person has been remembered. [↑](#footnote-ref-2)