

LOUIS D. BRANDEIS

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The quarter century between 1890 and 1915 saw in the United States the emergence of a phase of national life in which the dominant role was taken by the power of capital evolving in many manifestations through industry and the control of natural resources. The nation had reached the geographical limits of its expansion and was settling into the intensive development and organization of its economy. As the imaginations of its captains swept back horizons, massive conceptions took shape. Here was a world in itself, holding open the greatest opulence of nature to the swift, the strong and the skilful. In the mounting crescendo came aggregations of economic interest, interlocking controls over money and industry, monopolistic establishments and rumblings of labour conflict.

Into this economic maelstrom there entered as a lawyer at Boston the late Louis D. Brandeis, whose biography has recently been given to us.* He had been born at Louisville, Kentucky, in 1856. His father was a Bohemian Jew and his mother of German extraction. Their families had sought the freedom and opportunities of America from the social and political repressions of Central Europe of the late 40's. The father, a man of energy and enterprise, had by 1856 become well established in business, the fortunes of which grew until the early 70's when the collapse in the South following the Civil War carried all with it. Their life was rich in cultural values and marked by intellectual self-reliance; and the business judgment, powers of persuasion and dominant sense of duty to his fellowmen later exhibited by the son seem to have been a true inheritance from his parents.

After a somewhat irregular education, young Brandeis entered the Harvard Law School in 1875. Up to that time he had shown high promise and this promise was heightened by a record in the law school that up to the year of his death had not been equalled. Soon after graduation he was admitted to the practice of law at St. Louis, Missouri, but the stimulating life at Cambridge, in the association of such men as Langdell, Ames, Bradley, Barrett Wendell, as well as within the influence of the educational genius of Eliot, had gripped him and in 1879 he accepted an offer of partnership in Boston with a classmate, Warren, a man of character and ability, of a family of business

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and wealth. During the next ten years the association realized its most sanguine hopes and 1890 found Brandeis in an acknowledged position among the leaders of the bar of Massachusetts.

In that year the Homestead labour riots at the Carnegie steel plant signalized a strife of interests that remains in violent welter today. The degree of preparation in the legal mind to receive that onset can be gauged by the language of an eminent lawyer, who afterwards attained high office in the United States, when he heard on July 7th, 1894, that thirty of the pullman strikers had been killed by federal troops, "Though it is a bloody business, everybody hopes it is true"; and the next day: "They have only killed six of the mob as yet. This is hardly enough to make an impression." In the previous year, in an address before the American Bar Association, Supreme Court Justice Brown had declared that "one has but to consider for a moment the immediate consequences of abolition of large private fortunes to appreciate the danger that lurks in any radical disturbance of the present social system"; and Justice Brewer of the same court before the New York State Bar Association, "It is the unvarying law that the wealth of the community will be in the hands of the few". He thought "the attempt to give to the many a control over the few, a step toward despotism". He urged lawyers and judges to be on guard against this threat. Some months earlier the court had declared the Income Tax law unconstitutional. A majority saw the tax as "but the beginning of an assault against capital, as communism on the march".

There was nothing illogical or startling in these views; they followed as corollaries from the premises of American social doctrine then prevalent: here was democracy where all men were equal and possessors of natural, legal, rights; the exercise of those rights was beyond the restraints of man; the new assertions were invasions of ordained privacies; and those repelled were enemies. What was at issue was whether the hour had come "when mind power with all its acquisitions is to be subject to the demands of hand power".

The acquisitions of mind power were being extended. The concentration of control over money was one of them; there were the savings of the masses in banks and in life insurance, and there was industrial enterprise in which to put the savings to work. The issue and purchase of securities and the furnishing of capital by banking institutions furnished opportunity to draw more of the industrial life of the nation within the nets of the money-changers; and by means of the mechanism of incorporation

and interlocking directorates large segments of the country's economy were brought under the domination of monopolistic groups. Within that jungle these groups fought both common enemies and themselves: but with increasing frequency the voice of community of interest came to be heard above the din and to point the safer roads to preservation. Perhaps unconsciously but nonetheless certainly the leaders looked upon their field in terms of empire, as unbounded sway over limitless possibilities. It was implied in the angry rebuke reputed to have been given by Pierpont Morgan to a legal adviser who had suggested a clash with law in a proposed action, "I don't know as I want a lawyer to tell me what I can't do; I hire him to tell me how I can do what I want to do".

Brandeis had been so successful, chiefly as a business or "corporation" lawyer, that he had been able to amass a fortune as early as 1895. This was done as part of a life plan. He had determined from the beginning to be financially independent, not to be the "hired" lawyer of any person; and his abilities were easily equal to the task. At the same time he had impressed the highest industrial and banking circles in Massachusetts with those abilities and at this period few, if any, of the accepted objectives of the circles within which he moved were beyond his reach.

But such a sterile complacency was not for him. Here was a self-directing intelligence, instinct with a social imperative. His vision was that of a community of free men whose faculties should have accorded them the widest scope for expression and whose initiative, courage and enterprise diffused throughout the land should be basic for the material life of the nation. But he saw also that evil was the excess of the good; that virtues unchecked could pass into vices; that the democratic life was an unceasing adjustment in the counterbalancing of instinctive tendencies; that equally there must be the diffusion of responsibility; and that the successful maintenance of that form of government required first the will to that generalized equilibrium, a realistic appreciation of actualities and the application to them of the rational process. It was a pragmatic *modus operandi* under which within the general framework each situation called for its own treatment. There was no place for a sugar-coated ethic of business; the unit in such a granular society must be the self-respecting and self-disciplining man and the award to him of that recognition must be written into the texture of controls.

The simple but fundamental doctrine of democracy so enunciated would remain doctrine unless translated into action

through effective method; and method was the great contribution to social engineering made by Brandeis. Primarily it was the search for facts, their collation, analysis, classification, significance; not only the immediate and visible, but the remote and invisible: then followed the application of rational resourcefulness on the principle that nothing in the body of economic matter was beyond statement and amendment in terms of reason. The impact of his mind on a subject was like the burst of illuminating streamers; and when he had finally marshalled the amassed data it seemed as if they carried their own dialectic with them.

This was fundamentally a judicial method; his sensitive and penetrating insight saw the conflicting interests as factors in social effects: and evil effects, toward the ends he postulated, were evil from whatever side they might arise. He saw the vice of the excesses of economic power and monopoly toward not only the public and labour but as well toward private enterprise; what he sought was the regulation of competition; giantism, ruthless but inefficient, was the enemy to be destroyed. His advocacy of the incorporation of unions was rejected by Gompers as a Greek gift; and his leadership of opposition to monopoly of the transportation of New England aroused the hatred of vested establishment.

He was occasionally unconvincing in solution. It is of some interest that as arbitrator in the garment makers strike of 1910 he faced the issue of the closed shop. His suggestion was a "preferential shop" in which the employer agreed to "prefer" members of a union in employment. But the mechanism was not inaptly described as an "open shop with honey" and it suffered an early and predestined demise. Other positions were questionable. He defended the "tying" clauses of shoe machinery leases to shoe manufacturers on the ground that as all machines were sold at the same price to all shoe manufacturers, large and small, competition among the latter was promoted: there were good and bad monopolies and this was a case of good. He dissented from a majority decision which held that furnishing advice by means of a central agency of a large group of lumber manufacturers, based on statistics of members' operations, to reduce production, followed by action at once raising prices, was a violation of the Sherman Act: again, he argued that the effect of the scheme, to place all members in possession of reliable market information, was beneficial on balance to competition and therefore legitimate.

In the middle 90's he began a series of extraordinary services in advocacy on concrete issues in which broad public interests

were involved, before courts, legislatures and administrative tribunals. During the next twenty years they covered a range that included public transportation, gas, light and power utilities, civic reform in relation to public franchises, industrial life insurance, trusts, corporate money control and investment, state social experiments, conservation of the nation's resources, interstate railway rates. In all this work, gratuitous, on the principle, as he put it, that he could not accept fees for the persuasion of public opinion, he was distinguished by what at times exasperated both sides, his judicial realism. In the clash of public and private interests he saw only this to be achieved, that equilibration of economic and social forces most calculated to serve the democratic objective; and whether adjustment was called for on one side or the other was an indifferent consideration.

He thus acquired a tremendous grasp of the workings of large-scale business and the practices and experience of public bodies. In the renewed application for rate increase by the railways in 1913, his assistance was sought by the Commission itself. On the original application in 1911 he took the interesting line that the carriers, bearing the onus of showing the proposed rates to be reasonable, should establish the efficiency of their own administration as part of that proof. In the course of this contest he suggested that the railways, through the adoption of scientific management, could save a million dollars a day in expenses. Treating this as the exaggeration of irresponsible counsel, a number of western presidents proposed by telegram that if he could make good his claim by practical suggestions he could name his own terms of engagement. But they did not know their man, and his telegram in reply requesting an appointment, at which such suggestions could be made, was never answered. In the later hearings, too, the fundamental fairness of his judgment was again demonstrated. He conceded a much larger surplus to the railways than counsel for shippers; and he accentuated the annoyance of the latter by assailing the drain on revenues in furnishing special services chiefly to large shippers. Through these powerful performances Brandeis took on in the public mind the proportions of a modern Hercules.

By 1916 he had become undoubtedly the most discussed, admired and hated counsel in the United States, and his nomination for the Supreme Court by President Wilson in that year was the occasion for an astonishing demonstration of protest. We in this country are sometimes startled by the methods and processes developed in the United States Senate in its function of inquiry and not least so in relation to confirmation of nominees

to public office. But publicity is, after all, the ultimate safeguard in a democracy and a certain degree of toughmindedness is necessary not only to the investigation of candidates for high public office but also to sound judgment in the incumbents themselves. In this we are but following the dictum of Churchill: that nothing should be allowed to interfere with the rancour and asperity of personal opinion.

The main charges against him finally reduced themselves to unethical practices and unreliability in his professional capacity, nasty charges no doubt. In a petition of fifty-five of the leading citizens of Boston, including President Lowell of Harvard, it was alleged that his general reputation was such that he did not enjoy public confidence and that he had neither temperament nor capacity for such an office. Then seven of the leading lawyers of the nation, each of whom had served as president of the American Bar Association, headed by Taft and Root, presented that "he was not a fit person" to be a member of the high court. After three months of inquiry, the committee by a vote of ten Democrats to eight Republicans recommended approval and among those voting against it were Borah and Sutherland, who afterwards became his colleague on the Court. In the words of counsel who had directed this opposition, "It is true that nothing unethical has been proved against Mr. Brandeis. . . the trouble with Mr. Brandeis is that he never loses his judicial attitude towards his clients". The allegations against capacity were ridiculous. The contest lay really in the field of his social philosophy, and so engrossed were all parties in this that Dean Pound was constrained to recall to the committee the fact that he was also a "very great lawyer". But the spectacle presented was a good example of how easily high-minded persons become the victims of their own unconscious assumptions and with what alacrity an offended majesty can transmute figments into facts and give them a label in ethics.

The written constitution of the United States, as well as those of the individual states, by express provisions, secures to the individual citizen certain fundamental rights, within the areas of which he is protected from legislative encroachment. This, of course, is a departure from the conception of the sovereignty of Parliament which in the British dominions lies at the basis of their polity. The former, speaking generally, conceives sovereignty in law to reside in the people and prescribes fundamental limitations upon coercive action which only the people themselves by the procedure of constitutional amendment can modify. For instance, there are the requirements of what are

known as "due process" and "full faith and credit", provisions which, broadly, ensure to the individual the observance of the traditional modes of legal procedure and a consistency in effect throughout the country of juridical pronouncements. There are as well guarantees of security of contract and of religious freedom. Obviously the definition of the limits of these areas must be made by some tribunal. At the same time we must remember that the legislative investment of the national government is specific and that the residue of governing power remains with the individual states. Now in such a constitutional set-up no function can carry greater significance to the life of the nation than that of the power and the responsibility of determining the limits both between the jurisdictional spheres of the national and the state governments and the lines between the individual and government; and it is the impact of judicial decision upon legislative action and social measures in these fields that brings the Supreme Court into such immediate and vital public interest and discussion. It can be seen, also, that the complex elements necessarily present in the judicial process and the susceptibility to differences in emphasis placed by the individual judges upon these elements resulting from their intellectual structures must inevitably result in a wide variation of judicial attitudes and approaches and not infrequently widely different and contradictory conclusions. The constitution becomes specifically what the court at any period may declare it to be; and since amendments should deal with broad social rules and not concrete objectives — of the latter of which prohibition was a good example — the court must necessarily be able to modify or reverse its own previous adjudications. Its functioning in this aspect recalls Arnold's lines, "and as the world on the bank, so is the mind of the man". The effect of this at times strikes Canadian lawyers as extraordinary, such as for instance the reversal in 1943 of the previous decision of 1940 upholding the power of a state to require of every school child a salute to the American flag. But considering all factors involved, no Canadian lawyer, certainly not this one, will presume to offer critical comment on it.

The court is thus exposed to the searching light of public criticism to an extent unknown in British judicial administration and one effect is to lead to examination of the backgrounds and the intellectual properties of the individual members. For these primary purposes the important consideration is the capacity of the individual mind to effect what might be called a regress of its self-consciousness whereby predilections, sympathies, beliefs, prejudices and attitudes become elements to be taken into account

and, so far as they may be suspected of influencing the view of desirability or the reverse in the legislative content, modified within the framework of the interpretive rule adopted. But the members of the court are simply human beings, and this ideal conception of a mind dissociating itself from elements of its own dynamic structure can be effective only within narrow limits. Decision rests ultimately upon sound social judgment and, considering the variables that enter into this, our surprise should perhaps be not so much at the relatively infrequent cases of disagreement as at the much greater weight of agreement.

To such questions Brandeis eagerly brought his original and ingenious mind. His first principle was that law must deal with actualities and it was in and upon them that his powers worked. Here was his special field, on which he had battled in the front lines; and from that experience he brought to the court an equipment in knowledge, analytical perception and judgment, acquired, organized, fashioned and sharpened in the actual welter and strife of those realities, such as was possessed perhaps by no other member of the court.

He had known his older colleague Holmes from his first years in Boston and between them there had always been a mutual respect; but, although in the difficult questions that arose on the avalanche of social legislation of the 20's and 30's they were generally in agreement in result, they were, in fact, essentially different in their attitudes and approaches to such questions. To Holmes social ferment and change were natural and inevitable and time or particular incidence of no special significance. He did not, in many respects, sympathize with the enthusiasms of did modern New England reformer and generally viewed such zeal and efforts with a tolerant skepticism. But he looked upon judicial action as presumptuous which opposed the course of legislation unless it ran unquestionably counter to constitutional safeguard. Brandeis, on the other hand, believed that society could be fashioned by the organized power of human reason, and with the fervor of a crusader he continued the dedication of his abilities to that end.

A review in any detail of his judicial work would not bear a great deal of interest for Canadian lawyers. Although his diction bears the mark of literary sensibility, it has not, in general, the flashing incisiveness of that of his colleague Holmes. But there is one passage on freedom as a principle inhering in the essence of the democratic process in which he combined such richness of analysis and unfolding, and artistry of understanding and expression, that it should be reproduced here:

"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. They believed that freedom to think as you will and to speak as you think are means indispensable to the discover and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

When in 1921 President Harding appointed Taft Chief Justice, Brandeis was brought into an association with one who had once used this language: "It is one of the deepest wounds that I have had as an American and a lover of the Constitution and a believer in progressive conservation that such a man as Brandeis could be put in the court. He is a muckraker, an emotionalist for his own purpose, a socialist. . . a man who has certain high ideals . . . of great tenacity of purpose and, in my judgment, of much power for evil." Those who feared either the existence or obtrusion of personal feelings on the part of Brandeis were unacquainted with his character, and in 1923 the Chief Justice confided to a common friend: "You can imagine the thoughts with which I approached a close association with him when I became chief. You may not know how close and satisfactory that association has been. I am worried about the way he overworks himself. It is not only the personal friendship. It is that I do not see how we could get along without him." It is unnecessary to observe that Brandeis had not changed. The

psychological maturity of this man, himself incapable of personalities, is admirably shown, too, in the manner in which he summed up the action taken by President Lowell: "As I have thought over the recent struggle I find myself not only without animosity, but almost without indignation at the attacks of those who were active in endeavouring to defeat my confirmation. . . . Men like A. Lawrence Lowell who have been blinded by privilege, who have no evil purpose, and many of whom have distinct public spirit, but whose environment—or innate narrowness—have obscured all vision and sympathy with the masses. In every society there must be some who are abnormal, and some who are blinded by privilege. One cannot properly feel even indignation at either. They are rather subjects for sympathy. But we must seek steadily to nullify their influence, and limit their numbers."

Although he entered fully into the enjoyment of social life and its amenities—he could even "tell a good story and had an infectious laugh"—and notwithstanding the multitudinous professional contacts and the prodigality with which he gave his time and powers to questions of public concern, an unyielding reserve kept inviolate the sanctuary of his inner spirit. It was part of his conception of the social order, and it made him appear aloof and isolated. It is striking that he should have copied down in his early years in Cambridge this passage from Emerson's *Self-Reliance*, "It is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of a crowd keeps with perfect sweetness the independence of solitude". He kept that course "unshaken of motion". The part he played was in the application of principle, but principle is neutral and respects no person and at times toward individuals he appeared harsh and almost ruthless. Aggressive with the weapons of fact and reason, and allowing no consideration of personal relation to enter, he bewildered fanatics for causes as an enigma, as contradictory, as "everything by starts and nothing long"; they were of course incapable of appreciating disinterested action shaped consistently by adherence to a highly developed conception of society and government.

To the private work of his profession, the tremendous public tasks he took on and later his heavy judicial obligations, he added interest and activity of a most multiform character. No appeal to him in any legitimate public cause went unheeded. He was at one time foremost in the cause of Zionism and his wise advice was ever sought in the highest councils of that movement. He became the confidant of presidents and of leaders in all fields of action. Such a full life with its deep but disciplined enthusiasms

was made possible only by the application to himself of the rules of economy he made universal, and there was no waste in time, thought or action.

In his chosen arena, he was the happy warrior. To a rapacious curiosity, untiring industry in collecting data, organizing and absorbing them, a flare for modern means of effective public persuasion, he added zest and a strategical sense that towered over the whole battleground. No person of his time attained to such mastery of technique in the process of making effective by persuasion the rational accommodation of conflicting social interests.

That the life of such a man in the social texture in which it was written is of interest to Canadians and in particular to Canadian lawyers cannot be doubted, and we are greatly indebted for the biographical re-creation of it which Mr. Mason has given us. He has brought to his task a critical detachment and selectivity, a sense of the significant and an artistic method that give authenticity to absorbing word portraiture. No one can peruse the record of the thoughts and deeds of Brandeis without sensing his great qualities; Mr. Mason does not ask us to believe that his subject was wholly a perfect creation; but it was a man who perceived the revelation of the great text of life in broad perspectives and read its message deeply: and it is Mr. Mason's achievement that he has enabled us to behold such an intelligence and personality in all its lineaments.

THE INDEPENDENCE OF SOLITUDE

Only when you have worked alone, — when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will, — then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought. (Mr. Justice Holmes).