LOUIS D. BRANDEIS
Jurist and Humanitarian

by
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at
MAHLER HALL
THE ANSEL and EAST 105th TEMPLE
1855 Ansel Road

The Temple Alumni Association’s
First Alumni Forum
Never has the spotlight been focused on the United States Supreme Court with such burning intensity as in the last three years; never has critical analysis of judicial opinion been as bold. Caustic satire, corrosive invective, biting, stinging words everywhere assail judicial personnel.

Judges are psychoanalyzed—their idiosyncrasies ridiculed. Their faults are pilloried, their judicial opinions guillotined, sometimes by the members of their own court. Hitherto sacrosanct, their names have been deemed insusceptible to defilement—but recent publicity has blasted old traditions, and judges of the highest court are anathematized, even as political candidates often are, with all the tempestuous license that prevails in political campaigns.

Opinions differ; some praise, others condemn; and the atmosphere is surcharged with vehemence, turbulence.

These may or may not be ominous symptoms.

But amid all these dissonances there is a singular phenomenon; you can hear a strange, sweet overtone sounding the depths of the heart and mind, growing ever deeper and deeper—its swelling crescendo so enthralling, so appealing, so convincing as to seem to be forecasting the spiritual yearning and ideals of a united people.

It is the voice of Justice Brandeis. I intended to call him the rabbi of social justice, the robed priest of democracy, the minister of humanity; he is the greatest Jew that has blossomed on American soil. But I cannot accurately use any figure of speech that ties him to any race or religion or people. He belongs to them all—for creative genius transcends racial boundary lines.

This is the world symphony that greets his eightieth birthday—the grand climacteric of
twenty years service on the United States Supreme Bench. What an amazing contrast to the ghoulish treatment of his nomination a generation ago. Then—men might well speak of the martyrdom of Justice Brandeis—today, they forecast his sanctification.

I quote the following terse typical opinions:

"A friend of Justice and of men, an ornament of the High Court of which we are so justly proud * * * his courage, his clear vision, his scholarship, his knowledge of the law have brought blessings of untold value to American lives * * * he has held aloft the torch of enlightenment and freedom * * * his distinguished services have enriched the best traditions of the American judiciary and shed lustre upon the bench he occupies * * * his words represent man's noblest and most Godlike characteristic; may God lengthen his days among us is our prayer."'

These paraphrases of eulogy (a prodigious wealth of them if there were time to quote in detail) I have picked at random from United States Senators, Governors, Presidents of Bar Associations and Colleges, from Editors, Judges, from a President of the United States, from eminent men all over our country. Christian and Jew alike have joined in the panegyrics and take pride in him. The whole world of humanity claims him as its own.

Today almost unanimous opinion elevates him to the highest pedestal as the ideal American; he is called the great crusader and indeed a veritable army in the epic march of American progress.

Yet in 1916, when President Woodrow Wilson named him for the Supreme Bench to succeed Justice Lamar, deceased—powerful enemies denounced him as a dangerous radical with a charter, reputation and temperament disqualifying him to serve in a judicial atmosphere where nothing but cold reason, they said, should dominate the mind. They claimed that it would be like putting a judicial robe on Eugene V. Debs. For two years Louis Brandeis had been a presidential adviser, helping, as President Wilson liked to say, "to sweep the cobwebs out of one's mind." But retrogressive intransigents branded him as unfit, and for months the bitter battle raged.

Years before—hundreds of liberalism in New England had enlisted the services of an extraordinary personality; Harvard trained, persuasive, indefatigable, a master legal technician, incredibly efficient in preparation, constructive, accurate, imaginative, relentless in the public interest; Louis D. Brandeis was a terrifying cross-examiner. He became known as "The People's Counsel." His fervor was religious in its intensity. In the field of social invention and social legislation and aggressive yet diplomatic technique, no one in my opinion has ever yet named his superior.

As far back as 1902, he saw the hidden heroism in many a prolonged strike and earnestly advocated humane working days and better wages; avowedly pro union in sympathy, yet in 1904 he waged a fight against the Boston Typographical Union when he found that a union could be as unscrupulous and corrupt as an employer. Later, he delved deeply and successfully fought for cheaper gas rates in Boston. From 1906 to 1912, he was immersed in the intricate problems of inflated railway rates and watered stocks in their relation to the welfare of the community and rendered unforgettable service. Still later, appearing before the Interstate Commerce Commission in a series of railroad rate cases, he explored railroad management and the expenses of operation, with the result that the public as well as the stockholders were permanently benefited.

Early in his career his searching, analytical mind evolved a system whereby the workers of Massachusetts secured insurance protection through savings bank insurance at rates far below those prevalent at the time. Out of the background of all these experiences, he came to see the dangers of economic power resulting from the enormous concentration of wealth in a few corporations. And in 1907, he espoused the cause of women workers in an Oregon laundry and wrote an exhaustive thesis upon the imperative necessity of safeguarding womanhood against excessive hours of labor if we wished not to impair the strength of our future citizens. In 1909, his searching cross-examination and exposé made the notorious Ballinger take to his heels. Soon thereafter, he arbitrated the strike of the garment workers of the east, and learned much, and became the implacable foe of those who sweated labor.
He evolved a new technique for the settlement of labor disputes; and rationalizing this economic and social problem—he concluded that in every sense it was best for the employer, and for the public in the end, that collective bargaining be practiced and a preferential unionism be recognized. How else could childhood, womanhood and manhood be saved from exploitation, reasoned he; how else could labor preserve its dignity, employment its efficiency, and bargaining be conducted upon any basis of approximate equality? If nothing but disorganization and weakness existed upon the one side, and enormous concentration of wealth and power on the other side, how could a decent social objective be attained? His philosophical mind brooded much and long on these social and economic anachronisms—so that by 1916 he had virtually sacrificed a lucrative law practice to dedicate himself unsparingly to the public weal.

He was now sixty years of age; suddenly this long and distinguished record was exposed to charges of radicalism and unprofessional conduct and dishonor. President Wilson was attacked for nominating him to the United States Supreme Court for the purpose of gaining the Jewish vote in the coming election. It was said that his appointment would be an insult to the members of the bench. Opponents cruelly waged a vulgar pogrom against him. A good name is more fragrant than perfume, says the Talmud; but they were leaving nothing to him of the sweet fragrance of his good name. Oh, yes! He had made men think. In fact, he had preached that Democracy is possible only among people who think. He had made men think when he asserted:

"Morgan has sacrificed efficiency to monopoly in the New Haven Railroad, and it has been Morganized into physical and financial bankruptcy." And his prophecy came true. He had made men think and had seen many of his reforms realized. These were sins not to be forgotten—not to be forgiven. Bitterness reached its most venomous stage when a memorial was addressed to the Senate Committee as follows:

"The undersigned feel it their painful duty to say to you that in their opinion, taking into view the reputation and professional character of Mr. Louis Brandeis he is not a fit person to be a member of the Supreme Court of the United States."

This was signed by William Howard Taft, Joseph H. Choate, Elihu Root, and Moorfield Storey.

But never a word of complaint from Brandeis. Oh, yes—he suffered while the gossip mongers and the grave diggers were making their excavations. Lawyers all over the country were showered with defamatory circulars. Every senator was bombarded. Perhaps he said to himself that it is safer to be attacked by some men than to be protected by them; perhaps he soliloquized that when certain people abuse us we should ask ourselves what description of characters it is that they admire. Thus finding consolation. Perhaps he lifted up not only his voice but his heart and prayed: "Dear God, in Thy righteousness bring my soul out of distress." But he uttered not one word in his own defense. It was freely predicted that Brandeis was beaten. But Wilson was adamant. The president set his jaw, saying: "He is the friend of all just men and a lover of the right, and he knows more than how to talk about the right—he knows how to set it forward in the face of its enemies."

Senator Walsh stated the case by saying: "The real crime of which this man is guilty is that he has exposed the iniquities of men in high places in our financial system."

Senator Ashurst epitomized the situation by saying: "If the nominee had been a person who all his life had been steering giant corporations around the law there would have been a yell of approval from the Republican side, but there has been sent in the name of a man who has consecrated his life to the poor people of this country; casuistry and all the delay that can be conjured up is resorted to."

And so, in the end, the sordid opposition was annihilated. His appointment was confirmed 47 to 22—only one Democrat dissenting.

In this connection bear in mind the fine tribute that Chief Justice Fuller of the Supreme Court paid him, when he advised a man in need of legal service, as follows:

"Go to Boston and see Mr. Louis Brandeis, as I consider him the ablest man who has ever appeared before the Supreme Court of the United States. He is absolutely fearless in the discharge of his duties."
I climax this particular narrative by recalling a misty evening long afterward when Justice Brandeis, hurrying back to his home and turning a corner, bumped into a large portly gentleman who looked up and said:

"Isn't this Mr. Brandeis? I am Mr. Taft. I once did you a great injustice, Mr. Brandeis. I am sorry."

While serving as Assistant Secretary of State in Washington, I made it a point to meet Justice Brandeis. My duties as political legal adviser of the State Department did not necessitate meeting him, but I wanted to know him. Some of his disciples, too, in Washington were anxious to have me meet him. I had written what I called the Ten Commandments of the New Deal. They felt that something in them suggested kindred interests. And at his home, the Justice introduced me to his wife. "Mamma," he said, "this is a friend of President Masaryk." And as long as I live I shall never forget the light in his eyes—the thrilling affection in his voice, when he said, "A friend of President Masaryk."

Then it came to me in a flash how much alike they were. Both Czechs, both philosophers, both brave men, both realists and idealists, both lovers of humanity.

Listen to Justice Brandeis: "The great developer is responsibility * * * hence no remedy can be helpful which does not devolve upon the workers participation in and responsibility for the conduct of business * * * We must have men above all things. It is the development of man to which any industrial and social system should be directed. * * * Man must have industrial liberty as well as good wages."

Now listen to President Masaryk: "Democracy is the political form of the human ideal. * * * In our democracy freedom of conscience and tolerance must not merely be codified but realized in every department of public life. * * * No people can be happy unless they are free and have sufficient to satisfy their material wants. * * * What does the poor farmer or worker care about his fatherland when his children are perishing morally and physically in squalid surroundings. You must not go to such persons with patriotic phrases—you must do something for them."

The recent Biography of Brandeis by Alfred Lief tells how close these two great men are. I quote:

"As early as October * * * President (Wilson) designated Brandeis to compile data * * * for use in determining the basis of eventual peace * * *. There came Thomas G. Masaryk, the Bohemian leader, whose name had been familiar to Brandeis since 1899, when Masaryk, a university professor in Prague, risked his position to defend a Jewish cobbler sentenced on a false charge of ritual murder * * *. Brandeis helped Masaryk generously and later had a hand in drawing up Czecho-Slovakia's Declaration of Independence."

I am grateful to Lief for recording this interesting historical fact.

It was Masaryk, the tall and erect—the gentle philosopher and the chivalrous knight whose eyes could blaze with fervid intelligence that bewildered his opponents, who dared to say: "Only the weak and the second rate employ the weapons of dishonor and deceit."

It was Brandeis, the gentle philosopher—the gallant knight with head always high, who imbued by the same philosophy dared to tell the truth to a business executive whom he was representing as a lawyer and to whom his conscience impelled him to say: "Your contract will mislead and injure your employees." When his client answered that he was engaged to represent him and not his employees, Brandeis replied: "Will your welfare be promoted by swindling your fellowmen who are trusting you?"—And these few words were enough.

What is really the essence of the faith this moulder of public policies, this creative innovator, this student of history and human institutions and human relations—has distilled? I give it to you in his own sublime language:

"America's fundamental law seeks to make real the brotherhood of man * * * America's insistent demand in the 20th century is for social justice." And he adds: "* * * This also has been the Jews' striving for ages * * * Persecution broadened their sympathies * * * it made them think as well as suffer. It deepened their passion for righteousness."
In this view—you see—the Constitution of necessity becomes for him a dynamic, living, breathing, human document.

A valiant defender of the Constitution—to him the essence of the Constitution is: Its capacity for adaptation to a changing world; he says, general limitations on government—like those embodied in the Due Process classes *** do not forbid the United States or the States from meeting modern conditions by regulations 'which a century ago—even half a century ago—probably would have been rejected as arbitrary and oppressive' ***: There must be power, he patiently explains, in the States and in the Nation to remodel through experimentation—our economic practices and institutions to meet changing social and economic needs. I cannot believe, he continues, that the framers *** intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the industrial arts ***. Denial of the right to experiment may be fraught with serious consequences to the Nation.

The partial crystallization of this doctrine came with the decision of the United States Supreme Court in the Minnesota Moratorium Law when, on the memorable day of the eighth of January, 1934, Chief Justice Hughes (only Sutherland, Butler and Van Devanter dissenting), delivered the opinion of the Court: 290 U. S. 442—3—

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a constitution we are expounding'."

And so Justice Brandeis has lived to see his methodology ratified by the Supreme Court. Ex}

This short address of mine must leave to the historian a complete review of his unprecedented career. He has been the inspiration of two immortal presidents. No other judge has done more to emancipate the judicial mind from intolerance, ignorance and stagnation. One reviewer claims that he is the only judge in the history of the Court who has openly espoused the cause of the common man **.

Some of you have heard my address on Maimonides; I emphasized that he made a new Talmud and brought the light of science and philosophy and superlative intelligence to penetrate and clarify revealed religion; that he identified the human soul with what he called "quality," i.e. the thought attribute in man; if you serve your highest self, your highest intelligence, you serve your God.

This appeals to me as a beautiful religion; for intellectual at its highest is humanity at its best. And it must be due to the inspiration of his great example that his people in such an exceptional degree value so highly and appreciate so enthusiastically the scholar and the great thinker.

Maimonides seems to have anticipated the New Deal by eight centuries in his eighth degree, which is: "Lastly, the eighth, and the most meritorious of all—is to anticipate charity by preventing poverty."

And now, eight hundred years later, it remained for another son of Israel by his teachings to inspire many of the ideals of the New Deal.

"Conditions change," Justice Brandeis constantly urges—and furthermore the rules evolved being merely experiments in government
must be discarded when they prove to be failures." This does not mean, however, that the Supreme Court may become a superlegislature—on the contrary, Congress is the policy-making body. But when the NRA, or any other act clearly transcends Constitutional limitations, jealous as the court must be not to usurp legislative function—such acts must be set aside.

But the atmosphere of Constitutional interpretation must be that of 20th century enlightenment, and not 18th century dogma or Bourbon reaction. Lest the Constitution die of granitic rigidity—inconceivable of living in a civilization that is ever moving on.

It was the Earl of Derby who said that Democracy is a spirit, an atmosphere—rather than a rigid pattern, and its essence is: trust in the moral instinct of the people.

Justice Brandeis throughout his career on and off the bench has maintained that faith—faith that culminates in Industrial Democracy as the pathway of progress, and the permanent road to happiness.

May I interpret his philosophy in my own language: Excessive bigness—inordinate concentration of wealth—lead not only to industrial absolutism and economic tyranny—but to inefficiency and diminishing returns. The miracles of modern technology and industry that have brought so many comforts to the common man must be preserved; the benefits of mass production are many, for they assure luxuries through cheapness to the average man that could not otherwise be obtained. They guarantee high standards of living.

But there arrives a point of excessive centralization at which decentralization would be more beneficial. I illustrate: just as educational institutions excessively large are learning that the Oxford concept of small independent but coordinated units achieve more in the realm of education than the gigantic institutions where students become numbers; so cooperative yet independent industrial enterprises win prizes in productive efficiency unattainable in a remote centralized control and absentee ownership.

The long range vision of Brandeis abhors extremes. He would agree that a well balanced economy is the ultimate desideratum. I would say that common sense distrusts anarchy, does it not, whether it be the anarchy of laissez faire or the anarchy of lawlessness. I would say that wisdom distrusts super-regimentation and the totalitarian doctrinaire, for democracy is as inconsistent with the enslavement of individual initiative and enterprise as it is inconsistent with the extinction of those civil freedoms of expression and worship that we hold so dear. Justice Brandeis would not aggrandize the State to the degradation of the individual or the submersion of his true worth. Individual invention, initiative and enterprise, when unfettered, are precious values indeed in an ideal society.

But there is a barbarism of so-called rugged individualism that Democracy cannot tolerate if it would be saved. Evils as they appear detrimental to the common good must be extirpated, and reasonable governmental regulation becomes indispensable to the public welfare. These thoughts seem to me to be implicit in his reasoning.

Of course he would agree that the line of demarcation between individual independence and governmental interference can never be strictly defined and is never easily found. But this in my view is the paramount problem of Democracy. Self discipline and governmental regulation are interdependent. They may be equal forces when there is perfect cooperation. If self discipline is greater, regulation may be less, and vice versa. Is it not the duty of government in the progressive development of society to ascertain from time to time these proper proportions measured by the ideals of justice up to which civilization has then climbed?

These are the implications of Justice Brandeis, social philosophy, in my view, according to which, peoples must be given the opportunity for self determination and self expression.

And I would emphasize that: Theodore Roosevelt’s Square Deal, Woodrow Wilson’s New Freedom are both blended in the stream of the Franklin Roosevelt or Brandeis influenced New Deal; but it is a much warmer stream; its current is much more voluminous; much swifter and more aggressive and progressive, and so far flowing as to join the great tides of humanity. The new Ship of State fires its boilers with more modern and more vitalizing fuels. It does not employ obsolete sails that become flaccid in the doldrums. Its captain wears the radiant uniform of the good neighbor, and its banner flies on high with the glad tidings: peace on earth—good will towards all peoples.
To you who are before me today, it is a glorious recollection that Justice Brandeis has been not only a philosopher and jurist and economist, but a distinguished diplomat and statesman though without portfolio. It was he who conferred with Arthur Balfour. To him President Wilson referred the final draft of the Balfour Declaration favoring a Jewish homeland in Palestine, and by him it was endorsed before it was proclaimed.

Always magnificent in performance, is it any wonder that Chief Justice Hughes said of him that he has both a telescopic and microscopic mind; that "nothing of importance escapes his microscopical examination of every problem, and through his powerful telescopic lens his mental vision embraces distant scenes ranging far beyond the familiar worlds of conventional thinking." Is it any wonder that Chief Justice Hughes declares that his equable temperament, his poise and serenity make him a delightful associate and his eminent achievements make it a high privilege to be associated with him?

Whence came this prodigious personality, this great spirit: Out of the mists of yesterday men of the type of Roosevelt and Masaryk and Brandeis come, and even men of science know not why. Because the synthesis of sciences has not yet been made, to make possible the explanation of the elusive mystery of personality. Dr. Alexis Carrel in his superb book on "Man The Unknown" does point out that men of genius in addition to their powers of observation and comprehension possess other qualities such as intuition and creative imagination. Thus they learn things and perceive relations ignored by other men. All great men, says Doctor Carrel, are endowed with intuition.

But whence come the intuition and the creative imagination: From inheritance, environment, experience, suffering? Perhaps it requires centuries and centuries of suffering to evolve such a one. Who knows?

Of this I am sure—that there is no greatness without sympathy; and there is no such thing as an understanding mind without an understanding heart. Justice Brandeis has doubtless many times felt the truth of Robert Burns' lines:

"And man whose heaven erected face
The smiles of love adorn,
Man's inhumanity to man
Makes countless thousands mourn."

But unlike Burns, his philosophy is that of optimism. This is his prophecy given years ago. You will like it. Here are his words:

"I believe that the possibilities of human advancement are unlimited. I believe that the resources of productive enterprise are almost untouched and that the world will see a vastly increased supply of comforts, a tremendous surplus out of which the great masses will be apportioned a degree of well being that is now hardly dreamed of. * * *

"We are going through the following stages; We already have had industrial despotism. * * * This is changing * * * with well defined limitations placed upon the employer's autocratic power * * *. Next comes profit-sharing. Following upon it will come the sharing of responsibility as well as profits. The eventual outcome promises to be full grown industrial Democracy."

And then, quoting the immortal Greek Euripides, he concludes:

"Wouldst thou make me weep with dreams of hope that never can be won? Deeds that were dreamed not of—will yet be done."

I add—Isaiah's prophecy:

"They shall not hurt nor destroy in all my holy mountain:
For the earth shall be full of the knowledge of the Lord,
As the waters cover the sea."

CHAPTER XI, VERSE 9.