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Few men in American history have had greater impact on so many different areas of our life than did Louis Dembitz Brandeis (1856–1941). He was a successful and innovative lawyer at a time when the practice of law was changing; he took his legal acumen and applied it to reform, and showed future reformers how they could defend new legislative ideas before the courts. Appointed to the United States Supreme Court in 1916 by Woodrow Wilson, he was responsible for advances in jurisprudence that include the bases for the modern doctrines of free speech and privacy. Finally, in his tenure as head of the American Zionist movement he articulated a rationale that continues to inform relations between Israel and American Jewry.

THE LAWYER

After study at the Harvard Law School and a short stint in St. Louis, Brandeis joined his law school classmate Samuel D. Warren to open what was to become one of the most successful firms in Boston. Prior to the Civil War, lawyers usually practiced alone and had to be generalists, handling everything from land deeds to wills to criminal matters and contracts. People usually did not go to see a lawyer until after an event had happened, such as "He said he would sell me a horse but delivered a mule." By the 1870s, however, as American entrepreneurs built factories, mills, and railroads, it became too expensive to wait until after a problem occurred to call in a

* Virginia Commonwealth University. I have not provided comprehensive citations to support the conclusions reached in this essay. Supporting references may be found in the relevant portions of Melvin I. Urofsky, *Louis D. Brandeis: A Life* (Pantheon 2009). Readers interested in sampling Brandeis's own words might also consult *Brandeis on Democracy* (Philippa Strum ed., U. Press of Kan. 1995).

lawyer. A businessman did not want to spend thousands of dollars and then discover that he might be in violation of a law. So business owners began going to a lawyer before the fact, saying in effect "I want to do X. Is there a problem? If so, how can we deal with it?"

The most successful attorneys at this time were those who understood business, and could advise their clients not only about the law but about business matters as well. Brandeis's father had been a successful wholesale grain distributor in Louisville, Kentucky, and from his early years Louis heard his father talk about business matters, and how problems could be resolved. In practice, whenever Brandeis took on a new client, he would go to that person's factory or store (the Filene Brothers were one of his earliest clients) to see what they did and how the business operated. He tried to learn as much about the client's business as possible. "Why should they come to me," he once said, "unless I know as much if not more about their business as they do?"

A good example of this commitment to understanding his clients' business is when the shoe manufacturer William McElwaine came to see Brandeis. A man who had worked his way up from poverty, McElwaine took pride in the fact that he paid his workers well and treated them fairly. Now there were some rough times, and he needed to reduce wages. His workers, however, threatened to strike if he did. He asked Brandeis to look into the matter.

Brandeis went to the plant, spoke with the workers, and discovered that while they did indeed earn good wages when they worked, they only worked about thirty weeks a year. Orders came in bunches, and when there were many orders the men did well. But once orders fell off, the plants closed until new orders came in. So while the men earned good wages when they worked, if one averaged their earnings over fifty-two weeks it came to very little.

He then called McElwaine in and told him his workers had a legitimate complaint because of the irregularity of their work. McElwaine protested that that was always how the shoe business had been run. Brandeis then laid out a plan that would bring in orders on a more regular basis, thus providing the men with almost a full year's employment. McElwaine agreed to try

it; the plan proved successful, and within a few years the entire shoe industry had adopted it.

Although he himself was a generalist (his law partner said that he believed the only area Brandeis had never practiced in was criminal law), he nonetheless recognized that clients were demanding a higher level of expertise in multiple areas than one person could provide. In Boston Brandeis led the way in creating the new law firm, one with multiple partners, each a specialist in specific areas of the law. There is a certain irony in this as Brandeis always opposed bigness, yet this innovation eventually grew into the modern law firm with branches around the world and hundreds of lawyers in the practice, each specializing in a particular field.

Brandeis prospered in his practice. In the 1890s, when most lawyers in the country made $5,000.00 or less, he earned $50,000.00—at a time when there were no federal or state income taxes. Having done well, he now wanted to do good.

THE REFORMER

Brandeis lived during a time of great economic and social transformation, and as usual in such times, there were excesses that created problems. While industrialization and urbanization both led to a higher standard of living for many people, the workers in factories, mines, and mills were paid poorly and treated horribly. Groups that are known collectively as Progressive reformers sought to ameliorate the worst aspects of industrialization through protective legislation, conservation, and laws aimed at reining in the powers of big business.

Like most reformers, Brandeis started locally, which for him meant local issues in Boston, and then went onto the Massachusetts and national stages. Aside from the fact that he had great organizational powers—he is often credited with creating the first citizens lobby—he believed that in order for a reform to succeed, its proponents not only had to understand the problem and what had caused it, but they had to propose a workable solution. Perhaps his most famous accomplishment—he always thought it the most useful thing he had done—involved the creation of savings bank life insurance, in response to the licensed thievery known as "industrial insurance" sold by

the big companies. Brandeis not only came up with the idea, he organized a large citizens lobby to work for it, and personally saw it through the legislature. Unlike some reformers, Brandeis did not see politics as a dirty business. He believed that it was how the people, if properly educated, could choose and implement forward-looking social and economic policies.

Another area where he is given great credit is acting on behalf of public interest groups, including agencies such as the Interstate Commerce Commission, without a fee. The notion of *pro bono publico*—for the public good—was relatively unknown at the time, and many people thought that Brandeis had some ulterior motive in not charging certain groups for his services. Now, of course, pro bono work is a part of every firm's business, something on which the legal profession prides itself.

It was while doing pro bono work that Brandeis developed a unique legal brief, one that still bears his name. In *Lochner v. New York*,[1] the Supreme Court had struck down a New York State statute that limited the number of hours that bakery workers could put in during a day, on the grounds that such a law did not meet the criteria of the state's police power authority, in that it did not protect the health, safety, or welfare of its citizens. When Brandeis agreed to defend an Oregon law that set maximum hours for women workers in certain industries, he decided that he needed to show the court the facts of industrial life. His brief consisted of two pages of legal citation, and over a hundred pages of excerpts from factory and medical reports, government documents, and similar materials to prove that long hours of labor had a detrimental effect on the health of women. The justices unanimously agreed in *Muller v. Oregon*,[2] and ever since then reform groups have submitted "Brandeis briefs" whenever they need to defend new and innovative laws.

In 1912 Brandeis met Woodrow Wilson, and played an important role in the presidential campaign and afterwards. The great biographer of Wilson, Arthur S. Link, called Brandeis the "intellectual architect" of the New Freedom. Where Theodore Roosevelt wanted to regulate big business through the countervailing power of big government, Brandeis proposed that

1. 198 U.S. 45 (1905).
2. 208 U.S. 412 (1908).

the government set up fair rules of competition. To effect this idea, Wilson proposed the Federal Reserve banking system, the Clayton Antitrust Act, and a bill creating the Federal Trade Commission. Brandeis had an important role in the drafting of each of these measures.

THE ZIONIST

Even while he was engaged in reforms in both Boston and Washington, Brandeis became interested in Zionism, the movement to create a Jewish homeland in Palestine. There has been a great deal of speculation about why an assimilated public figure who had no connections to organized religion would suddenly become so involved. Some have speculated that it was because of his uncle, Lewis Dembitz, the only Jewishly observant member of his family, who was an early supporter. I think it had more to do with Brandeis's idealism. He believed that in Palestine one could create the small-unit society that the United States had once been, a society without the curse of bigness: no big industry, no big government, but a democracy that would be close to and responsive to the people.

Most of the three million Jewish immigrants who came to the United States from Russia and eastern Europe after 1880 had no desire to live in Palestine; they wanted to become Americans. What Brandeis had to do once he accepted leadership of the movement in 1914 was two-fold. He had to create an organizational apparatus that would be able to help the *yishuv*—the Jewish settlement in Palestine—and influence the American government to adopt policies in favor of a Jewish homeland, and he also had to come up with an ideological program that made it possible for these immigrant Jews to be good Americans as well as Zionists.

He solved the first problem by relying on what he had learned about organization in his Progressive reforms, and brought in like-minded and capable lieutenants such as Stephen Wise, Felix Frankfurter, and Julian Mack. From a loose coalition of different groups that in 1914 numbered less than 12,000 members, Brandeis created the Zionist Organization of America that in 1918 boasted 180,000 men and women. The ZOA played a leading role in providing relief to Jews in war-torn Europe as

well as Palestine, and perhaps even more importantly, helped to influence Woodrow Wilson to endorse the British Balfour Declaration, announcing that there would be a Jewish homeland in Palestine after the war.

Ideologically, Brandeis argued that the basic tenets of Judaism and Americanism were one and the same—democracy, individual freedom, and social justice—and these were the ideals of the Zionist movement. Brandeis looked not to the priestly part of Judaism, the various rules and regulations, but to the prophets, who declared that God wanted justice for the oppressed. He then made the following leap of faith—for Jews to be good Americans, they had to be good Jews, and to be good Jews, they had to become Zionists.

Brandeis, who always admired idealism, saw the Jewish settlement in Palestine in idealistic terms, especially after a visit there in 1919, and he imbued American Zionism with this same view. This has been both a strength and weakness of American support for Israel—the pride and admiration of what Israelis have done in the desert, but also an inability to fully understand why Israel at times must act in a less than idealistic way.

THE JUDGE

In January 1916 Brandeis gave a talk to the Chicago bar entitled "The Living Law" in which he declared that judges needed to know not just the law, but the facts of economic life. They had to evaluate measures that came before them not in some abstract manner, but in light of the very real social and economic conditions facing the people that the legislature had tried to ameliorate. Much of the antagonism against the judiciary, he declared, grew out of the fact that judges had opposed common-sense reform measures without any understanding of their purpose.

A few weeks later, Woodrow Wilson named Brandeis to the Supreme Court, a move that triggered the longest and one of the most bitter confirmation fights in American history. While some of the opposition may have resulted from his being the first Jew to be named to the high court, conservatives rallied against him because they believed him to be a radical, one who had no respect for big business and believed that the courts had

other functions than to protect private property. By this definition, Brandeis could certainly be considered radical, although he always saw himself as a conservative. Finally, in June 1916, after Wilson invoked party discipline, the Senate confirmed the nomination.

Once on the Court Brandeis quickly allied himself with Oliver Wendell Holmes, Jr., against the dominant conservative majority. During the 1920s liberals applauded when they saw that a decision had come down with "Holmes and Brandeis dissenting." But the two men had very different rationales for their actions. Holmes had no use for reform measures, but he believed that unless there was a clear constitutional prohibition, legislatures could enact whatever they wanted, no matter how ill-considered he thought they might be. Brandeis, on the other hand, did believe in reform, and he would support programs that he personally disagreed with, because he believed the people's representatives should be encouraged to experiment in trying to solve problems.

The two great legacies of Brandeis's tenure on the Court are certainly his ideas concerning free speech and privacy, and it is not too much to say that he laid down the bases for today's jurisprudence in those areas.

Modern free speech jurisprudence begins with the cases challenging the Wilson Administration's Sedition Act in 1919. In the first case, *Schenck v. United States*,[3] Brandeis joined Holmes's opinion that in wartime speech could be suppressed if it provided a clear and present danger to a governmental interest. This actually was an improvement over the older Blackstonian notion that speech with a bad tendency could be punished. Brandeis later said that at the time he "thought at the problem, not through it." Both he and Holmes changed their minds soon after *Schenck*, and in *Abrams v. United States*,[4] Holmes articulated a more speech-protective position, arguing that ideas should be freely disseminated to see which ones could win out in the market of ideas. While this certainly fit in with Holmes's philosophical bent, it provided little guidance for lower-court judges, and did not explain the relationship of the First

3. 249 U.S. 47 (1919).
4. 250 U.S. 616 (1919).

Amendment's protection of free expression to a constitutional democracy.

Brandeis made that link in his celebrated concurrence (joined by Holmes) in *Whitney v. California*.[5] He always believed that in a democracy the most important position was that of "citizen." But in order for a person to enjoy the benefits of a free society, he or she had to meet certain responsibilities. These civic obligations involved making informed decisions on matters of public policy, by participating in governmental actions (such as testifying at legislative hearings), and by voting. But in order for a voter to make an informed judgment on a candidate or a program, he or she had to have information, and this meant information on all sides of an issue. Unpopular opinions, no matter how radical, could not be silenced, because the informed citizen needed to know those views, to evaluate them, and then either accept or reject them. Free speech did not exist just so political philosophers could debate, but to educate citizens so they could make informed decisions on policies and candidates. It is this interpretation of the First Amendment's Speech Clause that underlies today's speech-protective jurisprudence.

Brandeis first became interested in privacy when he was a lawyer, and his partner Sam Warren complained of the press covering his and his family's social life. Warren and Brandeis wrote an article on privacy that appeared in an 1890 issue of the *Harvard Law Review*,[6] and it helped to shape the private law of privacy for the next sixty years. (It was, until 1946, the most cited law review article in history.) With that article as background, Brandeis argued, in *Olmstead v. United States*,[7] that there was a constitutional right to privacy—the right, as he put it, to be left alone.

Roy Olmstead had been convicted of bootlegging through evidence secured by a warrantless tap on his phones. He claimed this violated his Fourth Amendment rights, but a majority of the Court said since there had been no physical intrusion into the house, there had been no violation of his rights. Brandeis wrote

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5. 274 U.S. 357 (1927).

6. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

7. 277 U.S. 438 (1928).

one of his most famous dissents in this case, arguing that (1) a phone tap did violate the Fourth Amendment, since the Framers had intended that people should be secure in their houses from any form of search without a warrant, and (2) the Constitution guaranteed a right to privacy, the right, he declared, most prized by civilized people. On both instances Brandeis's view prevailed. Congress excluded evidence secured by a warrantless tap in federal prosecutions, and the Court in the 1960s extended this coverage to the states. In a decision that completely vindicated Brandeis's views, Justice Potter Stewart noted that the Fourth Amendment protects people, not places.

The acceptance of a constitutional right to privacy took longer to be accepted. Some judges and scholars believed that since the word "privacy" is not specifically mentioned in the Constitution, the right does not exist. Even so, in 1965 the Court began to embrace the idea in the landmark decision of *Griswold v. Connecticut*,[8] and since then the notion had become part of our constitutional jurisprudence.

In every poll of historians and legal scholars that "ranks" the justices, the top three choices are almost always the same—first, of course, is the great chief justice, John Marshall, followed by Holmes and Brandeis. It is a position that Brandeis most surely deserves.

8. 381 U.S. 479 (1965).