The Liberalism of Justice Brandeis

PAUL A. FREUND

We know quite well what Woodrow Wilson thought of Louis D. Brandeis. The President's steadfast and spirited support of his nominee for the Supreme Court will stand as a model of imagination and courage in high office. What Brandeis thought of Wilson is much less a matter of public record. In 1924, President Edwin Anderson Alderman of the University of Virginia invited a number of distinguished persons to express their judgment of Wilson and his legacy. Among those solicited was Brandeis, and he replied in a letter which ended with a characteristic Brandeisian concern for the proprieties: "It is better that I should not be quoted." After thirty years history may properly supplant protocol, or so at least historians can be expected to agree. Brandeis wrote to President Alderman under date of May 11, 1924:

Norman Hapgood has shown me his letter to you. With the views which he has expressed I agree, in the main.*

There may be added:

1. Perhaps the most extraordinary achievement of Mr. Wilson's first administration was dissipation of the atmosphere of materialism which had enveloped Washington for at least forty years — and probably since Lincoln's days. The rich man — the captain of industry — was distinctly at a disadvantage. One breathed the pure, rarefied air of mountain tops.

2. Mr. Wilson knew not fear.

3. He should be judged by what he was and did prior to August 4, 1918, the date of the paper justifying the attack on Russia. That was

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This essay was originally delivered as an address at a meeting of the American Historical Association in St. Louis, on December 28, 1956.

* Hapgood had written in praise of Wilson's position on the trusts, on banking, on the war aims, and on the appointment of Brandeis, and, critically, of Wilson's policy toward Soviet Russia.

the first of his acts which was unlike him; and I am sure the beginning of the sad end.

It is significant that Brandeis chose to put his judgment of Wilson in moral terms. For Brandeis was first and last a moralist — a moralist and a lawyer. The inner daemon which drove him from one harsh encounter to another, struggling against wilfulness and inertia all about him, was a passion for the moral life, the life that is free to develop character through the exercise of responsibility. But this intense concern does not mark the full measure of Brandeis, for he was, as we have said, both a moralist and a lawyer. He was concerned about ways and means as well as ends. As a lawyer he labored for a social order that would be more hospitable to the development of men's freedom, and by processes that would in themselves not be immoral. It is by virtue of his devotion to this threefold standard — the moral life, the moral order, and moral processes — that we have ventured to call Brandeis a liberal. The conservative may be just as attached to the ideal of the moral man, but he is more inclined to accept as the unalterable human condition moral man in an immoral society. The radical may be just as attached to the cause of fashioning a more hospitable moral order, but he is less anxious about the morality of the procedures. At least this is the analysis one would tender if one fancied oneself a liberal. The labels really are of no moment. Certainly they were of none to Brandeis himself. Once after a conversation Sidney Hillman said to him in a tone of surprise: "Mr. Justice, I think you are a conservative." The Justice replied blandly: "I have always so regarded myself."

The label does not matter, but the contents do. It will be seen that we have used the term liberal in much the same sense as Professor James Garfield Randall did in writing of Lincoln as "the liberal statesman."* The resemblance, both physical and spiritual, is striking — more striking, it might be said, than that between Brandeis and Wilson. Others have felt this kinship. In a letter to Brandeis in November, 1936, Alvin Johnson wrote: "I would not

* James Garfield Randall, *Lincoln, The Liberal Statesman* (New York: Dodd, Mead, 1947).

like to tell you how often, when apparently baffled and beaten in an enterprise not my egoistic own, and I have felt that it was time to take my own ease, your face has risen before my mind, yours and Lincoln's. For you two seem to me the two most serenely implacable democrats in all history." Serene and implacable democrats they were, and more. Both were moralists and lawyers, and in Lincoln's case, it has seemed to us, a leading clue to his thinking is that he thought like a lawyer.* However that may be, Lincoln and Brandeis were both lovers of freedom who insisted that freedom could be secured only within principles of order, of structure and process, of which the Federal system is a design to be cherished. Both were simple men, but both respected the complexities of living problems, distrusted panaceas, turned naturally to the shaping of ideas through working institutions, and turned up their collars against windy sloganeering. Both were humanitarians and compassionate men, but both were decidedly of William James's tough-minded, and not his tender-minded, breed.

Just how tough-minded, unsentimental, and morally deep-cutting Brandeis was — how different from the bleeding heart or the good grey judge of popular legend — may be suggested by two or three random remembrances. During the dark days of the depression a lady asked him anxiously whether he thought the worst was over. "Oh, yes," he answered cheerfully, "the worst took place in the days of prosperity before 1929." This is oral history, which perhaps not even Allan Nevins has made respectable among professionals. Fortunately, in some correspondence with Harold Laski that has just recently been made available the writer came across this passage from Brandeis, written in 1932: "The widespread suffering, the economic helplessness and the general dejection are appalling; and most painful the absence of any sense of shame on the part of those primarily responsible for existing conditions. But the process of debunking continues; and if the depression is long continued — which seems likely — America will gain much from her experience." When a visitor during the depression wrung his hands and

* Not all lawyers do: surely there is no such clue to the thought of Franklin Delano Roosevelt.

bewailed the plight of young people unable to find work, Brandeis remarked: "There is one thing that any able-bodied young man can do to earn a living — he can join the army." Had the comment come from someone else, it would be put down to callous inhumanity; coming from Brandeis, who drove himself unsparingly in the cause of his fellow men, the remark showed rather his annoyance at the doughy sogginess of mere lamenting, which had neither the tang of moral indignation nor the nourishment of a constructive idea. To think of Brandeis as a shining white knight riding off to every call of distress is to confuse the prophet Jeremiah with the all-American boy.

This account has been general and episodic. It is time to look more closely at Brandeis' philosophy in his years of practice and on the bench. A key to any public philosophy is the concept of power. Brandeis, whose zeal for a more just social order required him to espouse the power of the state, profoundly distrusted power. But the paradox is only skin-deep. He would not, we feel sure, have thought that Lord Acton was refuted by Lord Radcliffe in the latter's recent lectures on "The Problem of Power."* The answer to the paradox does not lie in Lord Radcliffe's contrast of power for good ends and in good hands with power for harm. The structure of power itself, Brandeis would have maintained, is dangerous. The paradox is resolved rather by approving and enlisting that power which is self-liquidating or is a pilot plant, while resisting that power which concentrates the decision-making process in a few hands which must be wiser and more knowledgeable than those that are controlled. Thus, the difference between regulated competition and regulated monopoly was for Brandeis fundamental in the New Freedom of 1912. In the New Deal some exercises of power were Brandeisian in nature, like the Public Utility Holding Company Act, which by forcing the simplification of holding-company systems served to make supervision of operating companies more manageable and to make the corporate structures at last intelligible to their owners. That is self-liquidating power. Other New Deal measures, like the N. R. A., were decidedly un-Brandeisian in their assump-

* Cyril John Radcliffe, *The Problem of Power* ("The Reith Memorial Lectures," 1951 [New York: Macmillan, 1952]).

tion that the public authorities could wisely intervene in the multifarious problems of business management. It is not surprising that Brandeis, who believed that no man should be a director in more than one corporation, suggested that the N. R. A. should have been set up as an object lesson in the Federal Office of Education.

His view of power was an aspect of his philosophy of responsibility: that responsibility is the great developer of men, and that the sound limit of responsibility in even the wisest men is soon reached. He was fond of quoting from Goethe: "Care is taken that the trees do not scrape the skies." And again from Goethe: "Self-limitation is the first mark of the master."

In the modern world the principle of insurance is closely entangled with the problem of responsibility, and it is illuminating to observe Brandeis' attitude to insurance. Here again we face a paradox. He believed that the insurance principle is overextended, and yet he counted as his most solid achievement at the bar his fathering of savings-bank life insurance in Massachusetts. Again the paradox dissolves. Savings-bank life insurance, by making available to wage earners a limited amount of insurance, gave them a measure of security and so of freedom, but beyond this it served as a demonstration — here is power used as a pilot plant — that men of ordinary position could compete in the business of insurance with the captains of finance. The overextension of insurance, on the other hand, occurred in fields where responsibility for fault was thereby obscured, notably in the field of fidelity insurance. To insure against the default of trusted employees was, in Brandeis' view, an abomination, for it relieved management of the responsibility for judging character. To be sure, fidelity insurance made it possible for relatively untried men to find positions of trust that might not otherwise be open to them, and this was a Brandeisian end; but the means to that end involved too great a moral loss. Unemployment insurance he treated in a similar vein. Its function in cushioning the shock of unemployment was useful, but was secondary to the effect on the employer; only if the system were geared to a plant-by-plant reserve or a strong merit-rating scheme would it serve the purpose of inducing business to regularize employment. Otherwise a moral end would be served by an amoral or an immoral means.

As a judge his preoccupation with structure and process showed itself in his concern for a working Federal system which would preserve the values of experiment, diversity, and the diffusion of responsibility. Hence his strong support of cooperative federalism: interstate compacts, Federal tax-and-credit devices, and the full faith and credit clause. He saw in the resources of political cooperation the same promise of development through shared responsibility, the same answer to the challenge of sheer size, that he found in the cooperative movement in the economic sphere.

On the bench as at the bar, sentimentality was excluded as a debilitating drain on energies that had to be marshalled for a more constructive, more inclusive task of rescue and reform. Perhaps one illustration will make the point. The Federal Employers Liability Act gives to railroad employees a somewhat liberalized right of recovery for injuries on the job. A great number of cases under the act have been brought to the Supreme Court, many of them cases in which the court of appeals had set aside, on the evidence, verdicts for the employees. Despite the human appeal of these cases, Brandeis never allowed himself to regard them as the proper business of the appellate jurisdiction of the Supreme Court. But when the question arose whether the federal act had superseded state workmen's compensation laws as applied to railroad employees, his interest was intense. The Supreme Court's decision that the state laws were superseded provoked one of his strongest and most thoroughgoing dissents. Here was an issue of distribution of power on which the Court was needlessly accelerating the march to national uniformity.

Believing as he did that America is not simply Washington, still less that it is New York, he regularly advised young men in the capital not to overstay their time, to go back to their "hinterland." On one occasion, a young man who listened to this advice replied: "But I have no hinterland. I'm from New York City." The Justice answered imperturbably: "That is your misfortune." Brandeis' image of America was the spiritual counterpart of the military tactic which builds fortified strong points to secure defense in depth.

We have stressed the uncompromisingly moral quality of Brandeis' thought. In fact, the whole enterprise of judging is, or should be, an exercise in ethical thinking of the most demanding

LOUIS D. BRANDEIS

Late Associate Justice of the United States Supreme Court

kind. Let us borrow an analysis of ethical thought from the Harvard philosopher C. I. Lewis and apply it to the judicial function. Right action, as the philosopher puts it, involves three elements: a just result, and means which are technically proper and prudentially sound. Too many observers of the Court's work are ready to pass judgment on the basis of the first element alone — the end result. We can illustrate the complexity of the problem and the sensitivity of Brandeis' mind to the other considerations of rightness by referring to one of his opinions — not one which is included in college anthologies, but one on which he lavished his utmost care and which serves as well as any to reveal the complexity of the ethical judgments which courts are called upon to make. The International News Service was copying news reports of the Associated Press and distributing them to International's subscribers. The A. P. sued to enjoin the piracy. On the face of it the cause of justice seemed to lie with the Associated Press. Not only that, but the case provided an opportunity to advance the law by establishing that the category of property is not static, that news is entitled to the same protection as more tangible and traditional kinds of property — a progressive view that might have been expected to appeal to Brandeis, who in another case was prepared to extend the category of unlawful searches and seizures to wiretapping. A majority of the Court did grant the relief sought by the A. P., but Brandeis disagreed. He believed, in terms of our analysis, that there were prudential and technical considerations given insufficient weight by the majority in the calculus of rightness. To protect the A. P., he argued, would entrench an organization dominant in the dissemination of news, whose own restrictive bylaws — as they then were — limiting membership in the association may have impelled the wrongful conduct of the I. N. S. To grant an injunction would be an act of imprudence unless the Court were prepared to enforce upon the A. P., in return, the obligations of a public utility, and this the Court could not do in the case before it and in the absence of legislation. The larger prudence and the technical role of the Court overweighed the superficial morality of the majority's result. The opinions in this case, reported in Volume 248 of the United States Reports, can be commended to historians and other commentators who wish to

perfect their knowledge of how to read and judge Supreme Court decisions.

We have said that Brandeis' inner daemon was his passion for the moral life. In fact, he was possessed by a second daemon, a passion for craftsmanship. It was a second daemon, but surely a twin. For craftsmanship was the warrant which Brandeis gave to himself that his work was right and could honorably be exposed to the verdict of history. His major opinions went through dozens, even scores, of revisions. Take infinite pains, said Michelangelo, to make something that looks effortless. Brandeis undertook to deal with every argument of the losing side, and if a petition for rehearing was filed in one of his cases he felt a sense of failure, though the writer never understood why the intransigence of counsel should be a fault attributed to the judge.

So deeply did he feel that the authority of the Court must come from the intrinsic strength of its work and not from the trappings or imprimatur of power, that he strongly disapproved the construction of the new Supreme Court building. A marble palace, he thought, would not be conducive to the spirit of humility befitting those whose title to govern rests on the power of reason. When the edifice was completed — the story is that the construction was pursuant to one of those five to four divisions within the Court — Brandeis simply declined to set foot in the office allotted to him; he continued to work at home, while the office was used as an exhibition place for visitors to the Court. His wife, being of slightly softer fibre, permitted herself to be shown through the suite. But she quickly regained her moral austerity, for on returning home she announced: "They showed me the running ice water and the shower bath — two things my husband never uses!"

But we must not close on so frivolous a note. There is one final paradox to be asserted: Brandeis, unsurpassed in his mastery of the facts of our industrial civilization, deeply immersed in its operations, speaks nonetheless with the voice of another age. The year 1956* was the centennial of two disparate events which seem to symbolize

* The year 1956 marked the centennial of Brandeis, who was born in Louisville, Ky., on November 13, 1856, and died in Washington, D. C., on October 5, 1941.

more faithfully than Brandeis the time into which we have been born. We refer to the birth of Sigmund Freud and the invention of the Bessemer process for making steel. Freud was by no means the inventor of the irrational, and his own work is an application of reason itself; but from his analyses has sprung the cult of the irrational and the irresponsible. Bessemer did not invent the giant machine, but his discovery may be viewed as a portent of the mechanization which has overtaken us. It was precisely against irresponsibility and worship of bigness and the machine that Brandeis set his face. The contest is an unequal one: all that he or his kind can bring to it is a moral tradition which on some occasions we profess to be conserving and a legal method which in some quarters we purport to teach and practice.

Not only is the struggle an unequal one; there are those who have lately insisted that this admixture of moralism and law is exactly the source of our blunders and failures in the conduct of foreign relations. George Kennan, for example, has argued forcefully that we have relied on large moral platitudes and the naive trust of lawyers in paper documents — to which Hans Morgenthau adds that lawyers trained in the case-by-case approach cannot be expected to perform the kind of planning and long-range strategy required for an effective foreign policy. If these criticisms are valid, they cannot be confined to one aspect of government; they would be equally true of domestic as of foreign affairs. The writer suspects that the critics have in mind a stereotype of a lawyer as a mere mouthpiece and draftsman. It is true that a lawyer without vision or purpose is one of the hollow men, the stuffed men, as a moralist without practical resourcefulness is a beautiful but ineffectual angel. The fusion of the two in Brandeis is the best answer the writer knows to the critics of lawyers as statesmen.

The value of the study of history, as the Dutch historian Peter Geyl has recently reminded us, is not to make us clever for another time, but wise for always. That is the meaning, is it not, of all great teachers. It is the final meaning, we suggest, of the life of one who by fusing law and the moral life gave new depth and promise to both.