

"The Law Is a Rule for Men to Live By"

BASIC CREED OF A MODERN LIBERAL

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I BELIEVE it was Emerson who said that institutions are but the lengthened shadows of individuals. It is my purpose to speak of Mr. Justice Brandeis, the man under whose lengthened shadow we gather tonight.

The last decade of Justice Brandeis' life was saddened. Relapse of whole peoples, under fascist influence, into a course of torment and plunder deeply offended his sense of justice, as it offends that of all right-thinking men. But to him it was more than abstract injustice. He saw the Jew, again as of old, on the rack of persecution in Europe and saw those of his own stock become refugees from resurgent barbarism.

Flight from home itself is bad enough, but these were in flight with no destination. It seemed that everywhere those who had first gotten to free land had closed the door to later migrations. Everywhere people had lost their old self-confidence in the presence of strangers and were too preoccupied with their own fears and troubles to extend any general right of sanctuary. The world's livable spots seemed preempted, frontiers were all closed, and the days of easy migration were no more.

In these circumstances Justice Brandeis' foresighted interest in a Jewish National Home in Palestine was strikingly vindicated. While "ancient historic connection" no doubt stirred his sentiments, very practical considerations had guided his efforts. He had gone to that old and neglected land and had seen the work of men and women who had returned there. He saw them building new cities, establishing new industries, draining swamps and watering the desert and making the countryside to prosper again. There, at least was a land with capacity to absorb refugees, and there was opportunity for their resettlement. There he wanted those of his blood to have opportunity to renew their national existence and to resume their modern culture on its ancient foundations.

Papers and speeches in which he outlined this vision and pleaded this cause recently have been collected and published. It would be sheer presumption for me to attempt addition to what he made complete or interpretation of what he made so clear. In a foreword to that book a discriminating Judge says that Justice Brandeis is "the moral symbol of Zionism throughout the world, notwithstanding the judicial insula

tion of his life." If I could help you to penetrate this judicial insulation, the qualities of the man would be the strongest buttress of the cause he championed.

The great work of his life, to which all else was prelude, was as a Justice of the United States Supreme Court. The character of such work is, to laymen, obscure and elusive. It does not lie on the surface, nor does it thrust itself upon lay attention. Even for lawyers, unless they follow the work of the Court closely, it is difficult to appraise. A Justice officially expresses himself in the technical language of the law, and he is as remote from the lay world as if he wrote in a dead language. When he speaks for the Court, his opinion is depersonalized by the necessity of adapting it to the several minds for which he speaks. While legislators may act as they want to act, judges often act as statutes tell them to act and render judgments that are the law's judgments rather than their personal ones. Oftentimes, too, the judge is legally bound to base his conclusions on facts as they are decided by someone else. As a result he appears to approve a good deal that in truth he has no say about.

Then, too, in many fields of law where there is no controlling legislation, judges must usually submit to the guidance of precedents. Justice Brandeis never carried regard for precedent to a worship of them. But he did accept, as all judges should, certain traditional restraints on personal judgment. Laymen often fail to see why this should be. The law is, after all, a rule for men to live by. They must have some way to find out how they should behave in order to avoid liabilities and punishments and troubles with the law. When there is no known rule except the personal will of the judge one happens to come before, one can never know how to conduct himself. Bentham said that judges, when they assume to make the law, do it "just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it." I think we must agree that there is uncomfortable truth in this criticism of judicial law-making, and that it is to be avoided so far as possible consistently with the view that law is a living and progressing body of learning.

The device by which judicial action is made at all predictable is the precedent. It is the doctrine that a court will give a word or phrase in a contract or statute the same meaning tomorrow that it did yesterday, that it will resort to the same principles to fashion future judgments that it employed in past ones. Of course, even at its best the endless variation in the facts of cases makes any prediction from precedent an imperfect one. But in its absence, or before judges with no regard for the true function of the precedent, there is no law but that day's opinion of the judge who perhaps accidentally gets the case. Brandeis, it seems to me, came near the golden mean in his attitude toward the precedents. He examined them patiently and followed them in the absence of grave reasons for a departure. If he departed, as he never feared to do, he paid his profession the respect of a searching, candid, and unequivocal opinion giving his reasons.

I often hear it said of Brandeis as if it characterized his life's work, "He was a great dissenter." Let me warn you against this popular but badly mistaken standard of appraisal. Dissenting opinions, of course, have a way of better pleasing those who read as well as those who write them. They are apt to be more individual and colorful. Opinions which must meet the ideas of many minds may in comparison seem dull and undistinguished. In the past few years a dozen, or perhaps a score, of really important decisions of the Supreme Court have been overruled. In consequence, minority opinions won belated vindication. The drama of a high court reversing itself has news value, and some have come to regard dissent as something worthy in itself.

Brandeis had no such delusion. It is not the number of his dissents, but the quality of his dissenting opinions, that is outstanding. The fact is that of the dissents that have been written in the history of the Court only a trifling proportion have later become law. The same is true of the dissenting opinions of individual Justices. In judicial thinking as elsewhere two good heads will average better results than one, and time more often vindicates majority opinions than minority ones.

The great work of Brandeis was done, not in opposing the Court, but in leading it. He was its spokesman in many difficult and complicated problems which covered the wide range of issues that come before it. It was for the Court that he wrote the greater number of his five hundred and twenty-eight opinions. They interpret the great life-giving clauses of the Constitution, pioneer in administrative law, deal with the law of public utilities, patents, monopolies and restraint of trade, labor relations and civil rights. In these he patiently gathered up the facts of record, examined the arguments of counsel, reconciled the views of his associates, and set forth the conclusion of the Court in clear, illuminating and unadorned language.

It was this constructive type of work on the Court for which his career at the bar peculiarly fitted him. His work as a lawyer was constructive, practical and bold. He pioneered in fields lawyers seldom entered and more rarely were distinguished in, and always he was building—building—building. I shall not dwell on these early activities. In them Woodrow Wilson with singular vision detected the making of a constructive jurist. He named lawyer Brandeis to the Supreme Court, fostered the nomination through a stormy confirmation, and gave to his country Mr. Justice Brandeis.

The period of his service began June 5, 1916, and ended by retirement February 13, 1939. In that almost quarter century unprecedented things came to pass. The United States went through the ordeal of one world war and stood on the precipice overlooking another. Between the two we harvested crops planted by a century of industrial revolution—speculation, extravagance, and inflation, with its aftercrop of depression, deflation and disaster. Paul Freund, one of the closest friends of the Justice, has recorded that when Brandeis was asked in the dark days of 1933 whether he believed the worst was over, he answered almost cheerfully that "the worst had happened before 1929."

This period of rapidly fluctuating price levels and economic chaos, of social unrest and upheaval, of political transition and experimentation, brought to his Court an unprecedented grist of difficult problems. Some of them the Court did not meet too well. On important occasions he was a vigorous and sometimes solitary dissenter. In earlier days he was sometimes joined by Mr. Justice Holmes, and later by Mr. Justice Cardozo, Mr. Justice Stone and Chief Justice Hughes. The message to Congress in which President Roosevelt proposed to reorganize the Court brought on some of the most critical moments of its long and not always tranquil history. Brandeis had protested some, though not all, of the decisions that had aggrieved the President and many others. In general the attack in the Court fight was against decisions that he had opposed in the Court. But while he was always ready to struggle within the Court, he would have no hands laid upon the institution from the outside. It mattered not that the outside hands would in the main uphold his views and would rebuke those with whom he had long and often disagreed. Brandeis valued its independence of decision even more than rightness of decision. He joined with Chief Justice Hughes in a letter to Senator Wheeler

which did more than any one thing to turn the tide of the Court struggle.

I mention this because it revealed the man. I suppose perhaps eighty-five per cent of those who followed and revered him were in the camp of the President. I think ninety-five per cent of those who disliked or scorned him were in the opposition. But Brandeis did not determine his principles by counting heads. He simply thought his friends were wrong and his foes for once were right, and that was an end of the matter for him. He believed with all the intensity of his being that the country needed the institution he served, and that a court of courage, character and independence could exist only in an atmosphere of freedom from political pressures. But he believed the Justices maintain it by self-restraint and open-mindedness, by unbiased, patient and accurate application of the law, and by freedom from political ambition or partisanship.

The handiwork of his opinions measured up to this standard. He mastered completely the facts of his case, respecting facts for the stubborn things that they are. He set them forth with fidelity to the record and with unbiased emphasis. He analyzed them in the light of research, not only in the law, but in economics, science and history. As Mr. Freund, who served as his law clerk, tells us, when he had finally completed the many revisions of an opinion he said, "The opinion is now convincing, but what can we do to make it more instructive?" And instructive his opinions are. When one comes upon an opinion by Brandeis, it is like finding bedrock upon which it is safe to build.

He was not an ornamental writer. Clarity and simplicity were his aims, and so well did he achieve them that style never steals attention from the substance. He did not have the apt and cutting phrase that Holmes wielded so devastatingly. But while Holmes illuminated a subject like a flash of lightning, Brandeis illuminated it as does the noon-day sun—steadily, evenly, completely. Chief Justice Hughes summed up his workmanship by describing him as "the master of both microscope and telescope. Nothing of importance, however minute, escapes his microscopic 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."

Justice Brandeis greatly influenced many young men. He found time in some way to cultivate their acquaintance. His modest home on Sunday afternoon often gathered those who wanted to see him or to whom he had extended an invitation. He would draw them into conversation, fortify their courage if he found it failing. He saw life as it was lived by aspiring young men. He gave no encouragement to those who came to whine over their bruises. He sought no easy way to lift even men he liked into positions they had not earned. He did not tell every lad he could do great things, but he made them all feel they could be useful things, and urged them to do well whatever task they had in hand. He urged them after enlarging their experiences and broadening their viewpoints to go home, to fill places in their own communities.

Brandeis has been called a reformer, and he had the passion for betterment that lies at the root of reform. But he never went off on any plan for making men into angels. His aim was only to make better men, and content if only a little better. Crusader, some called him, and he had the zeal, the consecration and the courage of one. But he stuck to practical jobs and left windmill-tilting to those whose emotions outrun their judgment. Friend of the poor and champion of the disadvantaged he was, but always he planned ways for them to help themselves and never sought to relieve them of work or responsibility, which he thought to be great

educators. He was in no sense a collectivist or believer in centralized control of life or of industry.

Brandeis was labelled as a "liberal," and labels are tyrannical things. Because Brandeis had been a liberal in politics, many expected him as a judge to sustain all that was done in the name of liberalism. Those reckoned without knowledge of his high concept of his judicial office. He feared and distrusted large, unconfined and irresponsible power, whether in private or public hands. He would never accept it as wholesome merely because found at the time being put to good use by good hands. He knew that the powers which evil men misuse are often acquired because lodged in the hands of men on the argument that they were good men.

In the "Hot Oil" case and the N.R.A. case he joined in striking down as unconstitutional acts of Congress sponsored by the Administration and identified with its program of economic recovery. Although few were more sympathetic with debtors in the depression, he concurred in holding unconstitutional state legislation which deprived the creditor of all effective remedy, and wrote the opinion holding the Frazier-Lemke Act for the relief of farm debtors unconstitutional. In the Tennessee Valley Authority litigation, while he agreed that the Act was constitutional, he would have refused to decide the point because he thought it not properly presented. Later he would have refused judgment sustaining the old age benefit provisions of the Social Security Act as constitutional, because he thought the procedure was not appropriate, but being overruled, he joined in holding the Act constitutional. In all of these matters he refused to yield his ideas of what was constitutional or as to appropriate procedures because of his political sympathies with the causes involved.

What was the general philosophy of this man? It is safer to seek it from his own words. Many admirers have tried to make Brandeis over in their own image. What he stood for is perhaps better and more shortly stated in his famous letter to Robert Bruere than anyone could do for him. Hence, I quote at length that I think could wisely be the basic creed of the modern liberal:

"Refuse to accept as inevitable any evil in business (e.g., irregularity of employment). Refuse to tolerate any immoral practice (e.g., espionage). But do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society (as by State Socialism). And do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression.

Seek for betterment within the broad lines of existing institutions. Do so by attacking evil in situ; and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions there must be much and constant inquiry into facts . . . and much experimentation; and that always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—an the main factor—in real betterment.

This development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy—and who shall be worthy of respect. Improvement in material conditions of the worker and ease are the incidents of better conditions—valuable mainly as they may ever increase opportunities for development.

The great developer is responsibility. Hence no remedy

can be hopeful which does not devolve upon the workers' participation in responsibility for the conduct of business; and their aim should be the eventual assumption of full responsibility—as in cooperative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.

But democracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedient to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only where the process of perfecting the individual is pursued. His development is attained mainly in the processes of common

living. Hence the industrial struggle is essentially an affair of the church and its imperative task."

Such was the philosophy, such the tough fibre of his mind, such qualities which make his work pre-eminent among the many powerful men of his time.

These are the qualities he brought to guidance and advocacy of a national home in Palestine for his people after centuries of exile, dispersion and persecution. What true American would not rejoice to see fulfillment of Brandeis' vision that men of his stock should resurrect the life and culture of the people of the Bible in that little land where our faith was founded? If the stock of Brandeis is of one fibre with him, their modern oppressors will find, as the Egyptian taskmasters found of the Children of Israel, that "the more they afflicted them, the more they multiplied and grew."