Brandeis on Democracy

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Louis Dembitz Brandeis was known to millions of Americans as the "People's Attorney." As such, he was the paradigm for today's public interest lawyers and groups: independent citizens who voluntarily assume responsibility for representing the people when they are confronted by large, wealthy, and sometimes capricious institutions, whether private or public. He is widely credited with helping formulate the fact-based sociological jurisprudence that has become the major methodology utilized by American courts and that is explained and evident in the judicial opinions included in this volume.

Brandeis was fortunate to attend Harvard when Christopher Columbus Langdell was dean and was beginning to revolutionize the way law was taught in the United States. Throughout much of the country's history, those who wished to "study" law read the few treatises available, talked with and listened to lawyers as much as possible, and spent a good deal of time in court watching the proceedings. Even law schools, still in their infancy when Brandeis was at Harvard, featured lectures by professors on the principles of evidence, contracts, torts, and such. Students were not encouraged to ask questions but were sent to specialized scholarly treatises. It was Langdell's radical belief that law was created as cases were decided rather than on the basis of abstract principles and that students should read the cases that grew out of particular historical moments and caused the law to develop as it had. He saw law as a "science" that reflected "the ever-tangled skein of human affairs," and considered classroom discussion of cases the best way to learn the doctrines law gradually had come to embody. Brandeis was sufficiently impressed to describe Langdell's innovation in "The Harvard Law School," an article he wrote for Harvard's Green Bag in 1889, and it underlay his own understanding of the origins and function of the law.

There were other ways in which Brandeis's conception of the attorney's role was untraditional. He resembled many lawyers in setting out
to make money, and he proved to be a master at it. This is clear from the roughly $73,000 he earned each year and from his becoming a millionaire while in his forties. His emphasis on making money did not stem from a desire for material goods, however; he was well known for the frugality and modesty with which he and his wife lived. Even when he was just beginning practice in Boston, his desire for economic security was accompanied by a sense that law should provide room for creativity and self-fulfillment as well. He realized that independent wealth left him free to pick and choose his clients. "I would rather have clients," he said, "than be somebody's lawyer." By having clients he not only meant that he would pick his cases but that he, rather than his usually much older clients, would decide what their legal problems were and what would be the best way of handling them. Although he enjoyed litigation, he was pleased if his knowledge of his clients' affairs enabled them to minimize the need to go to court.

Brandeis insisted on knowing more than the specifics of a case both so that he could best represent his clients and because each case was a potential step in the development of law. He understood that law is society's way of dealing with the need for rules and for certainty. It reflects the values that a society considers so central that it puts behind them the coercive power of the state. As society and laws became more complex, the average citizen was less likely to know the law. Hence the demand arose for people who specialized in knowledge about the laws and the way they applied to specific situations—specialists called lawyers. He took his specialization seriously, learning constantly from his private and public practice, and used the lessons to develop what he eventually articulated as the role of the lawyer and the way law should be interpreted in a democratic society.

LETTER TO WILLIAM H. DUNBAR, FEBRUARY 2, 1893

Oliver Wendell Holmes, who served on the United States Supreme Court from 1902 to 1932, predicted in 1921 that the changed economy generated by rapid modernization and the growth of huge businesses would make "the man of statistics and the master of economics" the successful lawyer of his day. Brandeis agreed. Having learned from Dean Langdell that the law was a dynamic entity reflecting the society in which it developed, Brandeis emphasized the need lawyers had for facts: facts that clients might mistakenly think were irrelevant to the
matter at hand. Thus lawyers had to investigate their clients' businesses for themselves. Brandeis added that the lawyer had to be well aware not only of the society from which the law had sprung but of the psychology of the clients who sought to turn it to their advantage. He put his advice into a letter to a young associate who was not doing as well as Brandeis thought he might. The advice, of course, reflects Brandeis's own approach to private practice. Dunbar eventually became a full partner and an influential Boston attorney.

For some time I have intended to lay before you my views in regard to your professional life—and what it is necessary for you to do in order to attain that degree of success to which your abilities and character clearly entitle you.

Cultivate the society of men—particularly men of affairs. This is essential to your professional success. Pursue that study as heretofore you have devoted yourself to books. Lose no opportunity of becoming acquainted with men, of learning to feel instinctively their inclinations, of familiarizing yourself with their personal and business habits, use your ability in making opportunities to do this. This is for you the indispensable study—as for another the study of law—or good habits of work are the missing desideratum.

The knowledge of men, the ability to handle, to impress them is needed by you—not only in order that clients may appreciate your advice and that you may be able to apply the law to human affairs—but also that you may more accurately and surely determine what the rules of law are, that is, what the courts will adopt. You are prone in legal investigation to be controlled by logic and to underestimate the logic of facts. Knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. He must know, must feel "in his bones" the facts to which they apply—must know, too, that if they do not stand the test of such application the logical result will somehow or other be avoided...

Knowledge of decisions and powers of logic are mere hand-maidens—they are servants not masters. The controlling force is the deep knowledge of human necessities... The man who does not know intimately human affairs is apt to make of the law a bed of Procrustes. No hermit can be a great lawyer, least of all a commercial lawyer. When from a knowledge of the law, you pass to its application the need of a full knowledge of men and of their affairs become even more apparent. The
duty of a lawyer today is not that of a solver of legal conundrums; he is indeed a counsellor at law. Knowledge of the law is of course essential to his efficiency, but the law bears to his profession a relation very similar to that which medicine does to that of the physicians. The apothecary can prepare the dose; the more intelligent one even knows the specific for the most common diseases. It requires but a mediocre physician to administer the proper drug for the patient who correctly and fully describes his ailment. The great physicians are those who in addition to that knowledge of therapeutics which is opened to all, know not merely the human body but the human mind and emotions, so as to make themselves the proper diagnosis—to know the truth which their patients fail to disclose and who add to this an influence over the patients which is apt to spring from a real understanding of him [sic] . . .

Your duty is as much to know the fact as law—to apply from your own store of human experience the defects in the clients' statements and to probe the correctness of those statements in the light of your knowledge. That knowledge must also enable you to determine the practical working of the advice you are to give . . . Again acquaintance with men and knowledge of them is essential to the expedition of business, and impressing and satisfying the clients.

Your law may be perfect, your knowledge of human affairs may be such as to enable you to apply it with wisdom and skill, and yet without individual acquaintance with men, their haunts and habits, the pursuit of the profession becomes difficult, slow and expensive. A lawyer who does not know men is handicapped . . .

But perhaps most important of all is the impressing of clients and satisfying them. Your law may be perfect, your ability to apply it great and yet you cannot be a successful advisor unless your advice is followed; it will not be followed unless you can satisfy your clients, unless you impress them with your superior knowledge and that you cannot do unless you know their affairs better than they because you see them from a fullness of knowledge. The ability to impress them grows with your own success in advising others, with the confidence which you yourself feel in your powers. That confidence can never come from books; it is gained by human intercourse . . .

Clients want support—if they did not they would rarely be clients . . .

A man who practices law—who aspires to the higher places of his profession—must keep his mind fresh. It must be alert and he must be
capable of meeting emergencies—must be capable of the tour de force . . . The bow must be strung and unstrung; work must be measured not merely by time but also by its intensity; there must be time also for the unconscious thinking which comes to the busy man in his play.

TWO SPEECHES TO LAWYERS

There was virtually no tradition of lawyers taking cases in the public interest, without fee, until Brandeis began doing so. As he points out in "The Opportunity in the Law," many of the influential members of government in the United States’ early days were lawyers, and the assumption that lawyers and public matters were linked was taken for granted. Alexis de Tocqueville noted in Democracy in America (1835), "If I were asked where I place the American aristocracy, I should reply without hesitation . . . that it occupies the judicial bench and the bar . . ." This may be because, as de Tocqueville commented and Brandeis repeated, the adoption of a written constitution as the basic instrument of government and law seemed to put a premium on the special knowledge lawyers were assumed to have.

That had changed by the late nineteenth century. There were still lawyers, working in their communities, who knew their clients by their first names and who were turned to for advice in matters that went beyond the law. The fastest-growing segment of the legal profession, however, and the wealthiest, was made up of lawyers using their skills and knowledge for the benefit of the huge corporations that had grown up with the end of the Civil War and the burgeoning of industrialization and urbanization in American life. Whole new areas of highly specialized commercial and regulatory law developed. The lawyers who mastered them found themselves in demand not for their ability to litigate after corporations had made decisions but for the advice they could give corporations about how legally to do the things that would maximize their profits and keep them out of court. Attorneys became hired economic advisers to big business, frequently ignoring ethical considerations or any professional obligation to the public as their employers raced to increase profits. Such lawyers discussed not law but techniques for protecting concentrations of private property. It was a development that Brandeis, the "people’s attorney," deplored. "What the lawyer needs to redeem himself is not more ability or physical courage," he told the Harvard Law Review Association in 1907, "but
the moral courage in the face of financial loss and personal ill-will to stand for right and justice ... We feel today that the lawyer belongs to another and is no longer a free man." That, to Brandeis, was a devastating indictment.

His speeches to lawyers emphasized a number of themes, including the need of a democratic state for the particular skills he found among them. He worried that the growing control of law by special interests was alienating the average person from the legal and political systems. His experiences advising his clients about business matters, his meetings with union leaders, his appearances before legislative bodies, and his wide reading enabled him to analyze the growing gap between the legal profession and the rest of society.

The cogency of his analysis did not endear him to many members of his profession, and it is doubtful that all the lawyers in his audiences took the words in his speeches on "The Living Law" and "The Opportunity in the Law" to heart. They were remembered, however. In 1912, when he was campaigning across the country for Woodrow Wilson, Brandeis wrote to his wife, "I am meeting here and there men who heard my lecture to the Law Students at Fogg Museum or at Brooks House years ago and say it wholly changed their point of view." One member of the audience upon whom the "The Opportunity in the Law" certainly made an impression was Felix Frankfurter, who was present as a Harvard Law School student.

"The Opportunity in the Law," 1905

I assume that in asking me to talk to you on the Ethics of the Legal Profession, you do not wish me to enter upon a discussion of the relation of law to morals, or to attempt to acquaint you with those detailed rules of ethics which lawyers have occasion to apply from day to day in their practice. What you want is this: Standing not far from the threshold of active life, feeling the generous impulse for service which the University fosters, you wish to know whether the legal profession would afford you special opportunities for usefulness to your fellowmen, and, if so, what the obligations and limitations are which it imposes. I say special opportunities, because every legitimate occupation, be it profession or business or trade, furnishes abundant opportunities for usefulness, if pursued in what Matthew Arnold called "the grand manner." It is, as a rule, far more important how men pursue their occupation than what the occupation is which they select.
But the legal profession does afford in America unusual opportunities for usefulness. That this has been so in the past, no one acquainted with the history of our institutions can for a moment doubt. The great achievement of the English-speaking people is the attainment of liberty through law. It is natural, therefore, that those who have been trained in the law should have borne an important part in that struggle for liberty and in the government which resulted. Accordingly, we find that in America the lawyer was in the earlier period almost omnipresent in the State. Nearly every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer. DeTocqueville, the first important foreign observer of American political institutions, said of the United States seventy-five years ago:

"In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers, consequently, form the highest political class . . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution."

For centuries before the American Revolution the lawyer had played an important part in England. His importance in the State became much greater in America. One reason for this, as DeTocqueville indicated, was the fact that we possessed no class like the nobles, which took part in government through privilege. A more potent reason was that with the introduction of a written constitution the law became with us a far more important factor in the ordinary conduct of political life than it did in England. Legal questions were constantly arising and the lawyer was necessary to settle them. But I take it the paramount reason why the lawyer has played so large a part in our political life is that his training fits him especially to grapple with the questions which are presented in a democracy.

The whole training of the lawyer leads to the development of judgment. His early training—his work with books in the study of legal rules—teaches him patient research and develops both the memory and the reasoning faculties. He becomes practised in logic; and yet the use of the reasoning faculties in the study of law is very different from their use, say, in metaphysics. The lawyer's processes of reasoning, his logi-
Louis D. Brandeis, Trouble-Maker

By

Judson C. Welliver

What manner of person is Brandeis, the lawyer-businessman who gives two-thirds of his time to the service of the people who has introduced the idea, the significance, the possibilities of scientific efficiency to this country? Mr. Welliver answers this question in the excellent sketch that appears below.

W

HO is the most useful citizen of this town?" I asked about a year ago, being in Boston. Nine men answered. Six named as many different candidates, the other three named Louis D. Brandeis.

I knew Mr. Brandeis somewhat, his career a good deal, so I asked seven men, including some of the first nine:

"Who is the most troublesome man in Boston?"

Five named five different people; the other two, with notable unction and promptitude, answered:

"Louis D. Brandeis!"

I'm inclined to think that the plurality winner in both contests was accurately picked. If you wonder why the same man should win on both sides, that's easy. Louis D. Brandeis took up, organ-

One of the numerous articles about Brandeis in his role as "the People's Attorney." (University of Louisville Archives)
cal conclusions, are being constantly tested by experience. He is running up against facts at every point. Indeed it is a maxim of the law: Out of the facts grows the law; that is, propositions are not considered abstractly, but always with reference to facts.

Furthermore, in the investigation of the facts the lawyer differs very materially from the scientist or the scholar. The lawyer's investigations into the facts are limited by time and space. His investigations have reference always to some practical end. Unlike the scientist, he ordinarily cannot refuse to reach a conclusion on the ground that he lacks the facts sufficient to enable one to form an opinion. He must form an opinion from those facts which he has gathered; he must reason from the facts within his grasp.

If the lawyer's practice is a general one, his field of observation extends, in course of time, into almost every sphere of business and of life. The facts so gathered ripen his judgment. His memory is trained to retentiveness. His mind becomes practised in discrimination as well as in generalization. He is an observer of men even more than of things. He not only sees men of all kinds, but knows their deepest secrets; sees them in situations which "try men's souls." He is apt to become a good judge of men.

Then, contrary to what might seem to be the habit of the lawyer's mind, the practice of law tends to make the lawyer judicial in attitude and extremely tolerant. His profession rests upon the postulate that no contested question can be properly decided until both sides are heard. His experience teaches him that nearly every question has two sides; and very often he finds—after decision of judge or jury—that both he and his opponent were in the wrong. The practice of law creates thus a habit of mind, and leads to attainments which are distinctly different from those developed in most professions or outside of the professions. These are the reasons why the lawyer has acquired a position materially different from that of other men. It is the position of the adviser of men.

Your chairman said: "People have the impression to-day that the lawyer has become mercenary." It is true that the lawyer has become largely a part of the business world . . . The ordinary man thinks of the Bar as a body of men who are trying cases, perhaps even trying criminal cases. Of course there is an immense amount of litigation going on; and a great deal of the time of many lawyers is devoted to litigation. But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters, and mainly in busi-
ness affairs. In guiding these affairs industrial and financial, lawyers are needed, not only because of the legal questions involved, but because the particular mental attributes and attainments which the legal profession develops are demanded in the proper handling of these large financial or industrial affairs. The magnitude and scope of these operations remove them almost wholly from the realm of "petty trafficking" which people formerly used to associate with trade. The questions which arise are more nearly questions of statesmanship. The relations created call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated. The questions appear in a different guise; but they are similar. The relations between rival railroad systems are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to commoners or dependents. The relations of public-service corporations to the people raise questions not unlike those presented by the monopolies of old.

So some of the ablest American lawyers of this generation, after acting as professional advisers of great corporations, have become finally their managers. The controlling intellect of the great Atchison Railroad System, its vice-president, Mr. Victor Morawetz, graduated at the Harvard Law School about twenty-five years ago, and shortly afterward attained distinction by writing an extraordinarily good book on the Law of Corporations. The head of the great Bell Telephone System of the United States, Mr. Frederick P. Fish, was at the time of his appointment to that office probably our leading patent lawyer. In the same way, and for the same reason, lawyers have entered into the world of finance. Mr. James J. Storrow, who was a law partner of Mr. Fish, has become a leading member of the old banking firm of Lee, Higginson & Co. A former law partner of Mr. Morawetz, Mr. Charles Steele, became a member of the firm of J. P. Morgan & Co. Their legal training was called for in the business world, because business has tended to become professionalized. And thus, although the lawyer is not playing in affairs of state the part he once did, his influence is, or at all events may be, quite as important as it ever was in the United States; and it is simply a question how that influence is to be exerted.

It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of hold-
ing a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.

The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations.

Such questions as the regulation of trusts, the fixing of railway rates, the municipalization of public utilities, the relation between capital and labor, call for the exercise of legal ability of the highest order. Up to the present time the legal ability of a high order which has been expended on those questions has been almost wholly in opposition to the contentions of the people. The leaders of the Bar, without any preconceived intent on their part, and rather as an incident to their professional standing, have, with rare exceptions, been ranged on the side of the corporations, and the people have been represented, in the main, by men of very meagre legal ability.

If these problems are to be settled right, this condition cannot continue. Our country is, after all, not a country of dollars, but of ballots. The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed, through the respect for law, as the excesses of democracy were curbed seventy-five years ago. There will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the abler lawyers is essential.

For nearly a generation the leaders of the Bar have, with few exceptions, not only failed to take part in constructive legislation designed to solve in the public interest our great social, economic and industrial problems; but they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of common weal. They have often advocated, as lawyers, legislative measures which as citizens they could not approve, and have endeavored to justify themselves by a false analogy. They have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where
he acts for private interests against the public, as it is in litigation between private individuals.

The ethical question which laymen most frequently ask about the legal profession is this: How can a lawyer take a case which he does not believe in? The profession is regarded as necessarily somewhat immoral, because its members are supposed to be habitually taking cases of that character. As a practical matter, the lawyer is not often harassed by this problem; partly because he is apt to believe, at the time, in most of the cases that he actually tries; and partly because he either abandons or settles a large number of those he does not believe in. But the lawyer recognizes that in trying a case his prime duty is to present his side to the tribunal fairly and as well as he can, relying upon his adversary to present the other side fairly and as well as he can. Since the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make such a decision as justice demands.

But when lawyers act upon the same principle in supporting the attempts of their private clients to secure or to oppose legislation, a very different condition is presented. In the first place, the counsel selected to represent important private interests possesses usually ability of a high order, while the public is often inadequately represented or wholly unrepresented. Great unfairness to the public is apt to result from this fact. Many bills pass in our legislatures which would not have become law, if the public interest had been fairly represented; and many good bills are defeated which if supported by able lawyers would have been enacted. Lawyers have, as a rule, failed to consider this distinction between practice in courts involving only private interests, and practice before the legislature or city council involving public interests. Some men of high professional standing have even endeavored to justify their course in advocating professionally legislation which in their character as citizens they would have voted against.

Furthermore, lawyers of high standing have often failed to apply in connection with professional work before the legislature or city council a rule of ethics which they would deem imperative in practice before the court. Lawyers who would indignantly retire from a court case in the justice of which they believed, if they had reason to think that a juror had been bribed or a witness had been suborned by their client, are content to serve their client by honest arguments before a legislative committee, although they have as great reason to believe that their client has bribed members of the legislature or corrupted public opinion. This confusion of ethical ideas is an important reason why the Bar does
not now hold the position which it formerly did as a brake upon democracy, and which I believe it must take again if the serious questions now before us are to be properly solved.

Here, consequently, is the great opportunity in the law. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. The industrial world is in a state of ferment. The ferment is in the main peaceful, and, to a considerable extent, silent; but there is felt to-day very widely the inconsistency in this condition of political democracy and industrial absolutism. The people are beginning to doubt whether in the long run democracy and absolutism can co-exist in the same community; beginning to doubt whether there is a justification for the great inequalities in the distribution of wealth, for the rapid creation of fortunes, more mysterious than the deeds of Aladdin's lamp. The people have begun to think; and they show evidences on all sides of a tendency to act. Those of you who have not had an opportunity of talking much with laboring men can hardly form a conception of the amount of thinking that they are doing. With many these problems are all-absorbing. Many workingmen, otherwise uneducated, talk about the relation of employer and employee far more intelligently than most of the best educated men in the community. The labor question involves for them the whole of life, and they must in the course of a comparatively short time realize the power which lies in them. Often their leaders are men of signal ability, men who can hold their own in discussion or in action with the ablest and best-educated men in the community. The labor movement must necessarily progress. The people's thought will take shape in action; and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution. Nothing can better fit you for taking part in the solution of these problems, than the study and preeminently the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably unequalled. There is a call upon the legal profession to do a great work for this country.

"The Living Law," 1916

The history of the United States, since the adoption of the Constitution, covers less than 128 years. Yet in that short period the American
ideal of government has been greatly modified. At first our ideal was expressed as, "A government of laws and not of men." Then it became, "A government of the people, by the people, and for the people." Now it is, "Democracy and social justice."

In the last half century our democracy has deepened. Coincidentally there has been a shifting of our longing from legal justice to social justice, and—it must be admitted—also a waning respect for law. Is there any causal connection between the shifting of our longing from legal justice to social justice and waning respect for law? If so, was that result unavoidable?

Many different causes contributed to this waning respect for law. Some related specifically to the lawyer, some to the courts and some to the substantive law itself. The lessening of the lawyer's influence in the community came first. James Bryce called attention to this as a fact of great significance already a generation ago. Later criticism of the efficiency of our judicial machinery became widespread. Finally, the law as administered was challenged—a challenge which expressed itself vehemently a few years ago in the demand for recall of judges and of judicial decisions . . .

The challenge of existing law is not a manifestation peculiar to our country or to our time. Sporadic dissatisfaction has doubtless existed in every country at all times. Such dissatisfaction has usually been treated by those who govern as evidencing the unreasonableness of law-breakers. The lines, "No thief e'er felt the halter draw with good opinion of the law," express the traditional attitude of those who are apt to regard existing law as "the true embodiment of everything that's excellent." It required the joint forces of Sir Samuel Romilly and Jeremy Bentham to make clear to a humane, enlightened, and liberty-loving England that death was not the natural and proper punishment for theft. Still another century had to elapse before social science raised the doubt whether theft was not perhaps as much the fault of the community as of the individual.

In periods of rapid transformation, challenge of existing law, instead of being sporadic, becomes general. Such was the case in Athens, twenty-four centuries ago, when Euripides burst out in flaming words against "the trammelings of law which are not of the right" . . . Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic, and social ideals? In other words, is
not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?

Since the adoption of the Federal Constitution, and notably within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known to history. Widespread substitution of machinery for hand labor (thus multiplying hundred-fold man’s productivity), and the annihilation of space through steam and electricity, have wrought changes in the conditions of life which are in many respects greater than those which had occurred in civilized countries during thousands of years preceding. The end was put to legalized human slavery—an institution which had existed since the dawn of history. But of vastly greater influence upon the lives of the great majority of all civilized peoples was the possibility which invention and discovery created of emancipating women and of liberating men called free from the excessive toil theretofore required to securing food, clothing, and shelter. Yet while invention and discovery created the possibility of releasing men and women from the thraldom of drudgery, there actually came with the introduction of the factory system and the development of the business corporation, new dangers to liberty. Large publicly owned corporations replaced small privately owned concerns. Ownership of the instruments of production passed from the workman to the employer. Individual personal relations between the proprietor and his help ceased. The individual contract of service lost its character, because of the inequality in position between employer and employee. The group relation of employee to employer, with collective bargaining, became common; for it was essential to the workers’ protection. Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property. Early nineteenth-century scientific half-truths like "The survival of the fittest," which, translated into practice, meant "The devil take the hindmost," were erected by judicial sanction into a moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the
acts void. Also in other countries the strain upon the law has been great during the last generation; because there also the period has been one of rapid transformation; and the law has everywhere a tendency to lag behind the facts of life. But in America the strain became dangerous; because constitutional limitations were invoked to stop the natural vent of legislation. In the course of relatively few years hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guaranties of liberty or property. Small wonder that there arose a clamor for the recall of judges and of judicial decisions and that demand was made for amendment of the constitutions and even for their complete abolition. The assaults upon courts and constitutions culminated in 1912. They centered about two decisions: the Lochner case [Lochner v. New York, 1905], in which a majority of the judges of the Supreme Court of the United States had declared void a New York law limiting the hours of labor for bakers; and the Ives case [Ives v. South Buffalo Ry. Co.], in which the New York Court of Appeals had unanimously held void its accident compensation law.

Since 1912 the fury against the courts has abated. This change in the attitude of the public toward the courts is due not to any modification in judicial tenure, nor to amendments of the constitutions, but to the movement, begun some years prior to 1912, which has more recently resulted in a better appreciation by the courts of existing social needs.

In 1895 the Illinois court held [Ritchie v. People] that the eight-hour law for women engaged in manufacturing was unconstitutional. In 1908 the United States Supreme Court held in Muller v. Oregon that the Women's Ten-Hour Law was constitutional. In 1910 the Illinois court held the same [Ritchie v. Wageman]. The difference in decision in the two Ritchie cases was not due to the difference between a ten-hour day and an eight-hour day; for the Supreme Court of the United States has since held (as some state courts had held earlier) that an eight-hour law also was valid; and the Illinois court has since sustained a nine-hour law. In the two Ritchie cases the same broad principles of constitutional law were applied. In each the right of a legislature to limit (in the exercise of the police power) both liberty of contract and use of property was fully recognized. But in the first Ritchie case the court, reasoning from abstract conceptions, held a limitation of working hours to be arbitrary and unreasonable; while in the second Ritchie case, reasoning from life, it held the limitation of hours not to be arbitrary and unrea-
sonable. In other words—in the second Ritchie case it took notice of those facts of general knowledge embraced in the world's experience with unrestricted working hours, which the court had in the earlier case ignored. It considered the evils which had flowed from unrestricted hours, and the social and industrial benefit which had attended curtailed working hours. It considered likewise the common belief in the advisability of so limiting working hours which the legislatures of many states and countries evidenced. In the light of this evidence as to the world's experience and beliefs it proved impossible for reasonable judges to say that the Legislature of Illinois had acted unreasonably and arbitrarily in limiting the hours of labor.

Decisions rendered by the Court of Appeals of New York show even more clearly than do those of Illinois the judicial awakening to the facts of life.

In 1907 . . . that court held that an act prohibiting night work for women was unconstitutional. In 1915 . . . it held that a similar night-work act was constitutional . . . the court holding valid the second compensation law (which was enacted after a constitutional amendment), expressly considered the facts of life, and said:

"We should consider practical experience, as well as theory, in deciding whether a given plan in fact constitutes a taking of property in violation of the constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss."

The court . . . realized that no law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied. But the struggle for the living law has not been fully won. The Lochner case has not been expressly overruled. Within six weeks the Supreme Judicial Court of Massachusetts, in supposed obedience to its authority, held invalid a nine-hour law for certain railroad employees. The Supreme Court of the United States which, by many decisions, had made possible in other fields the harmonizing of legal rights with contemporary conceptions of social justice, showed by [a] recent decision . . . the potency of mental prepossessions. Long before, it has recognized that employers "and their operatives do not stand upon an equality"; that "the legislature being
familiar with local conditions, is primarily the judge of the necessity of such enactments." And that unless a "prohibition is palpably unreasonable and arbitrary, we are not at liberty to say that it passes beyond the limitation of a state's protective authority." And in the application of these principles it has repeatedly upheld legislation limiting the right of free contract between employer and employee. But in the Adair case, and again in the Coppage case [Adair v. U.S., 1908; Coppage v. Kansas, 1914], the Supreme Court declared unconstitutional a statute which prohibited an employer from requiring as a condition of his securing or retaining employment, that the workman should not be a member of a labor union, refusing to recognize that Congress or the Kansas Legislature might have had good cause to believe that such prohibition was essential to the maintenance of trade unionism, and that trade unionism was essential to securing equality between employer and employee. Our Supreme Court declared that the enactment of the anti-discrimination law which has been enacted in many states was an arbitrary and unreasonable interference with the right of contract.

The challenge of existing law does not, however, come only from the working classes. Criticism of the law is widespread among business men. The tone of their criticism is more courteous than that of the working classes; and the specific objections raised by business men are different. Business men do not demand recall of judges or of judicial decisions. Business men do not ordinarily seek constitutional amendments. They are more apt to desire repeal of statutes than enactment. But both business men and working-men insist that courts lack understanding of contemporary industrial conditions. Both insist that the law is not "up to date." Both insist that the lack of familiarity with the facts of business life results in erroneous decisions . . . What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task. And, indeed, the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier of accomplishment than that of endowing men, who lack legal training, with the necessary qualifications.

The training of the practicing lawyer is that best adapted to develop men not only for the exercise of strictly judicial functions, but also for the exercise of administrative functions, quasijudicial in character. It breeds a certain virile, compelling quality, which tends to make the possessor proof against the influence of either fear or favor. It is this quality to which the prevailing high standard of honesty among our
judges is due. And it is certainly a noteworthy fact that in spite of the abundant criticism of our judicial system, the suggestion of dishonesty is rare; and instances of established dishonesty are extremely few.

The pursuit of the legal profession involves a happy combination of the intellectual with the practical life. The intellectual tends to breadth of view; the practical to that realization of limitations which are essential to the wise conduct of life. Formerly the lawyer secured breadth of view largely through wide professional experience. Being a general practitioner, he was brought into contact with all phases of contemporary life. His education was not legal only; because his diversified clientage brought him, by the mere practice of his profession, an economic and social education. The relative smallness of the communities tended to make his practice diversified not only in the character of matters dealt with, but also in the character or standing of his clients. For the same lawyer was apt to serve at one time or another both rich and poor, both employer and employee. Furthermore—nearly every lawyer of ability took some part in political life. Our greatest judges, Marshall, Kent, Story, Shaw, had secured this training. [Alexander] Hamilton was an apostle of the living law.

The last fifty years have wrought a great change in professional life . . . The term "corporation lawyer" is significant in this connection. The growing intensity of professional life tended also to discourage participation in public affairs, and thus the broadening of view which comes from political life was lost . . . The judge came to the bench un­equipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented the cases to him. For a judge rarely performs his functions adequately unless the case before him is adequately pre­sented. Thus were the blind led by the blind. It is not surprising that under such conditions the laws as administered failed to meet contem­porary economic and social demands.

We are powerless to restore the general practitioner and general par­ticipation in public life. Intense specialization must continue. But we can correct its distorting effects by broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today. "Every beneficent change in legislation," Professor Henderson said, "comes from a fresh study of social conditions and social ends, and from such rejection of obsolete laws to make room for a rule which fits the new facts. One can
hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy.'"

ORAL ARGUMENT IN STETTLER V. O'HARA, 1914

Muller v. Oregon (1908) was the occasion for the first "Brandeis brief," a term that has come to denote legal arguments relying heavily on factual material to demonstrate that a law is or is not reasonable and that it therefore does or does not fit within the mandate given to governmental bodies by the Constitution. Traditionally, briefs had been compilations of legal citations and earlier decisions and had emphasized that courts should follow existing law. Brandeis, however, wanted to make the point that innovative laws also could be valid. The brief he and Josephine Goldmark put together gave short shrift to legal citations, confining them to a mere two pages. Instead, it included over 100 pages of factual information from the United States and European countries to demonstrate that it was not unreasonable to believe that excessive hours of labor were detrimental to the health of women and their families. All of Brandeis's exhortations in the speeches printed earlier in this chapter came together: his insistence that lawyers had to represent the public as well as the privileged, as he did here, without fee; his belief that law had to change along with and be based upon societal facts; and his analysis of the differences industrialization had made in life and should make in the law. The brief also reflected his conviction that the Constitution had to be interpreted so as to allow legislative experimentation in the light of new societal circumstances and that it was the lawyer's function to delineate those circumstances.

When the Court upheld the law, requests for copies of the brief poured in from all over the country. Illinois reenacted a women's maximum hours law that the Court had struck down in 1895, and Brandeis successfully defended it in court. He and Goldmark went on to assemble material for similar cases, and they were working on a brief defending Oregon’s law setting maximum hours for men when Brandeis was named to the Supreme Court. At that point Felix Frankfurter joined Goldmark as the National Consumers' League team in the case.

The recitation of facts that made the briefs convincing makes them unwieldy reading, and so they are omitted in favor of Brandeis's oral argument in Stettler v. O'Hara, defending the Oregon minimum wage statute for women. Although what follows is only part of Brandeis's
presentation, it gives some feeling of his style and his emphasis on facts. The reaction of Chief Justice Edward Douglass White and, presumably, some of the other justices, is apparent from an account by historian Charles Warren. Writing to Felix Frankfurter, Warren, who was at the oral argument, reported, "each side had its time extended. Then the Court gave Brandeis an additional half hour, and when the time was up, Chief Justice White said: 'Mr. Brandeis, your time is up but we will consider that the clock has stopped and you may continue.' The Clerk of the Court told me later that he never recalled such a thing ever before being done by a Chief Justice."

One more preliminary note should be added. Brandeis has been criticized for his brief in Muller v. Oregon (and, by extension, in Stettler), which depicts women as weak, dependent, subordinate, and in special need of protection by the state. In fact, the depiction was a tactical move, and by the time of Muller he had actually become a suffragist. Brandeis deliberately held back some of the data that Goldmark, his sister-in-law and an official of the National Consumers' League, had unearthed during the brief's preparation. What it showed was that a worker's being adversely affected by excessive hours of labor had nothing to do with the worker's sex. That, however, was not a conclusion that would have helped Brandeis's argument before the Court. But he understood that the data could be used to encourage maximum hours laws for both men and women, and successfully urged the Russell Sage Foundation to publish all of her findings.

By the time he argued Muller, Brandeis had become aware of the equal value and responsibility of women as citizens. Speaking of them and of his goal of industrial democracy, he said, "I learned much from them in my work. So from having been of the opinion that we would advance best by leaving voting to the men, I became convinced that we needed all the forces of the community to bring about this advance."

He had worked with strong women such as labor organizer Mary Kenney, Jane Addams, and his social activist sister-in-law Pauline Goldmark, in addition to Josephine Goldmark. By 1910 Brandeis had added his voice to those openly calling for women's suffrage, telling audiences at Boston's Tremont Temple and Fanueil Hall that watching the women with whom he worked had convinced him that women should be given the vote. His daughter Susan spent a year after graduation from Bryn Mawr campaigning for women's suffrage. When President Franklin Roosevelt named Frances Perkins as his Secretary of Labor,
Brandeis wrote that she was "the best the U.S. affords" and that "it is a distinct advance to have selected a woman for the Cabinet."

For the first time, questions affecting minimum-wage laws are before this court. It may be helpful, therefore, if I discuss briefly the nature of these laws and state their origin and history. Counsel for the plaintiffs described the minimum-wage laws of Oregon, Wisconsin, Minnesota, Colorado, California, and Washington, as compulsory laws. It would be more accurate to call them prohibitory laws. They do not compel any employer to employ any person. They do not compel any employer to contribute to the needs of any person. They only prohibit him from employing women at a wage which is less than the living-wage. The laws would not prevent his employing a woman to whom no wage whatever was paid, and who was living wholly upon her independent income or was supported wholly by someone else. The Oregon minimum-wage law prevents his employing for wages a woman who receives less than a living-wage, in the same way that other laws would prevent a person from employing as an engineer someone who lacked the training necessary to entitle him to a certificate or license from the proper authorities, or as they would prevent him from employing as an elevator-tender someone under the age of eighteen or twenty-one...

The justification of that restriction may be read in the statute itself. It lies in three facts or conclusions drawn from facts. The first is, that wages which are not sufficient to support women in health, lead both to bad health and to immorality; hence they are detrimental to the interests of the state. The second proposition is, that women need protection against being led to work for inadequate wages. And the third proposition is, that adequate protection can be given to women only by way of prohibition; that is, by refusing to allow them to work for less than living-wages. Those are the three propositions which are, in substance, either expressly stated in recitals of the act, or necessarily deduced from its language and provisions.

On what do those propositions rest? They rest upon facts ascertained through an investigation into the conditions of women in industry actually existing in the state of Oregon. And the results reached in this Oregon investigation are confirmed by numerous investigations made in other states and countries by the United States Bureau of Labor. What these results are I have endeavored to set forth in my brief. In it
you will find three hundred and sixty-nine extracts which present the facts from various publications bearing upon this subject . . .

Three important events contributed to the enactment of [minimum wage] legislation [in nine states]. One was the passage, by Great Britain, of its minimum-wage law in 1909.

The second event which called this subject specifically to the attention of Americans was the publication, in 1910 and 1911, by the Federal Bureau of Labor, of the results of its investigations into the labor of women and children in the United States, a monumental work, filling nineteen volumes and describing with great detail the wages and conditions of women in industry in the United States. The third event was the report of the Massachusetts Commission on the Minimum Wage of 1912, which was followed by the law enacted there in the same year . . .

Let us consider now the situation in the state of Oregon early in 1913, and see what induced its legislature to enact the law in question.

The first thing the people of Oregon did was to ascertain . . . that in the state of Oregon, whatever might be the case elsewhere, a majority of the women to whom the investigation extended, were working for a wage smaller than that required for decent living.

The next inquiry was what happened to women who worked for wages smaller than the minimum cost of decent living. It was found that in Oregon a large number of such women were ruining their health because they were not eating enough. That was the commonest result. They scrimped themselves on eating, in order to live decently in other respects or in order to dress and hold their jobs. Those that ate enough, roomed under conditions that were unwholesome, or they were insufficiently clothed. Besides those who lacked these ordinary necessaries of life, the investigators found another class of women whose wages were inadequate but who supplied themselves with the necessities by a sacrifice of morality. They found that in a large number of cases, the insufficient wage was supplemented by contributions from "gentlemen friends" . . .

The third subject of inquiry concerned the inference to be drawn . . . the legislature found that in Oregon, if women did not have wages sufficient to maintain them in health and in morals, detriment would result to the state in two ways. In the first place, degeneration would threaten the people of Oregon, because unhealthy women would not as a rule have healthy children. In the second place, unhealthy or immoral women would impose upon the community, directly or indirectly,
heavy burdens by the development of ever-larger dependent classes which would have to be supported by taxpayers.

Such are the results which the legislature found would flow in Oregon from women working at less than living wages, results which affect vitally not only the present but also future generations . . .

It was not necessary to invent a new remedy because elsewhere in the world four different remedies had been tried for curing the prevalent social disease—wages insufficient to support working women in decency.

The first of these remedies was what might properly be called a voluntary remedy. The voluntary remedy for wages inadequate to sustain life in decency is education—education, economic and ethical . . . In course of time it might be possible so to extend the system of education as to make every employer in the State of Oregon recognize that he is doing something both economically and ethically wrong, when he employs women at less than living-wages. Employers might be convinced so thoroughly of these truths that the practice would be abolished. But the legislature of Oregon apparently decided that there was not time to await the fruits of this process of education; that meanwhile disaster would come to the state. For people have been as slow to recognize the wrongs of low wages as they have been slow in recognizing—or at least delinquent in acting upon—the great truth that "the wages of sin is death."

So the legislature of Oregon concluded that this voluntary remedy of education was not sufficient to meet these needs; and it turned to a consideration of compulsory remedies . . .

Then Oregon looked about the world and found the application of still another remedy, a remedy that seemed more promising. Her legislators considered the system which had been in force for eighteen years in Victoria, which had been gradually adopted by the other Australian colonies and by New Zealand, and which had been applied there with such extraordinary success that it was adopted in Great Britain in 1909. This legislation undertook to prohibit by law under threat of fine or imprisonment, the employment of persons at less than living-wages, instead of resorting merely to education or to trade unionism, or to publicity, as a means of eradicating the evil . . .

The legislators of Oregon recognized that they too must make an experiment. They rejected the three other remedies proposed and, in looking about for another, found this fourth remedy, compulsion by prohibition, instead of compulsion by publicity under law or the com-
pulsion through trade-union organization under law, or mere educational processes; and they declared: "We will prohibit the employment of women at less than living-wages as we now prohibit their working more than ten hours; as other states prohibit their working at night, or without adequate opportunity for meals, or at certain industries which experience has shown are especially deleterious to health."

Thus Oregon concluded to follow the lead of a commonwealth of English-speaking free people who had made the experiment, entering upon it with much trepidation and with as much doubt as some now feel as to the wisdom of this experiment which is discussed today . . .

It was in the light of this wide experience, the experience of the old as well as of a new world, that the people of Oregon, outraged at the conditions which they found to exist in their midst, and stimulated by the reports of the Bureau of Labor of the United States describing the conditions that attended women's work elsewhere, concluded to try this remedy that had proved effective in Australia and Great Britain.

Oregon adopted this remedy for the same reason that the several Australian colonies adopted it and, later, England adopted it—because they found that the apprehensions of the wise men of business who had opposed it, were unfounded; that they had misjudged the human factors, and that, contrary to the prophecies of the opponents, important beneficent results were obtained.

If the three hundred and sixty-nine extracts from reports and other publications which appear in my brief, are examined, it will be found that few of those who describe the successes of this legislation, think it will bring the millennium. They say merely: "We have made advances; and the particular things which were apprehended from the enactment of these laws, did not come to pass" . . .

One hundred and twelve years ago, in 1802, the first factory-act was passed, limiting the employment of children in the textile mills. There is hardly an economic or social argument now urged against minimum-wage laws which you cannot find raised against that act in the parliamentary debates and in the contemporary literature of England. Yet the condition then was this: Children of five or six years, and in some instances even children of four, were at work in the textile mills from fifteen to sixteen hours a day. It took twenty-five years to raise the age limit for children to nine years. Today, in the State of Ohio, girls may not work in manufacturing establishments before they are sixteen, nor boys before they are fifteen; the permissible working-hours are reduced
to eight, and work after six or seven o'clock in the afternoon is prohib-
ited...

Does that seem a revolutionary doctrine? Does it seem revolutionary
for the legislature of Oregon to pass a minimum-wage law when it
knows the conditions in Oregon to be such that degeneration of the
people, and heavy burdens upon the taxpayer and upon the industry of
the commonwealth, must necessarily result if women are permitted to
continue to be employed at less than living-wages? The Supreme Court
of Oregon, likewise knowing something of local conditions, held that it
was not.

Let me, at this point, discuss for a moment the question of constitu-
tionality...

The test of constitutionality which this court has laid down was
this: whether this court can see that the legislature had reasonable
cause to believe that the act in question would produce the desired
result or had a reasonable relation to it; or whether this court could see
that the legislature of the State had no reasonable cause to believe that
the act would produce such a result and that it was an arbitrary exercise
of power. In only a very few instances has there been occasion to apply
the test with the result of annulling a State law. The burden of proof
must always be upon those who undertake to attack the law...

In answer to the question, whether this brief contains also all the
data opposed to minimum-wage law, I want to say this: I conceive it to
be absolutely immaterial what may be said against such laws. Each one
of these statements contained in the brief in support of the contention
that this is wise legislation, might upon further investigation be found
to be erroneous, each conclusion of fact may be found afterwards to be
unsound—and yet the constitutionality of the act would not be affected
thereby. This court is not burdened with the duty of passing upon the
disputed question whether the legislature of Oregon was wise or un-
wise, or probably wise or unwise, in enacting this law. The question is
merely whether, as has been stated, you can see that the legislators had
no ground on which they could, as reasonable men, deem this legisla-
tion appropriate to abolish or mitigate the evils believed to exist or appre-
prehended. If you cannot find that, the law must stand...

The real test, as I conceive it, is, "Is there an evil?" If there is an evil,
is the remedy, this particular device introduced by the legislature, di-
rected to remove that evil which threatens health, morals, and welfare?
Does it bear a reasonable relation to it? And in applying it, is there any-
thing discriminatory, which looks like a purpose to injure and not a purpose to aid? Has there been an arbitrary exercise of power?

Laws prescribing a minimum wage differ in no respect in principle from those other laws affecting wages just referred to. Indeed, they do not differ from still other acts held valid by this court, which declare void provisions in wage agreements designed to protect the employee; such as the acts preserving the right of recovery for accidents, although the employee has solemnly agreed to surrender that right in electing to take benefits from a railroad relief society.

No such distinction as that suggested exists in fact. Living-wages are most intimately connected with the occupation in which the wage-earner is engaged. The legislature interferes for the protection of women because it has found that the alleged law of supply and demand does not, in fact, operate—or if it does, it works destructively. The legislature interferes to protect health, safety, morals, and the general welfare in connection with this wage relation of employer and employee, just as it interferes with the conditions under which the employee may live, in prescribing how tenements must be constructed to insure health and safety . . .

In any or all this legislation there may be economic and social error. But our social and industrial welfare demands that ample scope should be given for social as well as mechanical invention. It is a condition not only of progress but of conserving that which we have. Nothing could be more revolutionary than to close the door to social experimentation. The whole subject of woman's entry into industry is an experiment. And surely the federal constitution—itself perhaps the greatest of human experiments—does not prohibit such modest attempts as the woman's minimum-wage act to reconcile the existing industrial system with our striving for social justice and the preservation of the race.