Louis D. Brandeis Reappraised

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Louis D. Brandeis is, or until recently was, a secular saint of American culture. His success as muckraker and litigator during the Progressive Era, his crusades for Zionism and for Woodrow Wilson's New Freedom, and his twenty-three years of distinguished service on the Supreme Court—all of these gained him a degree of honor matched by only a handful of Americans. As one of his daughters wrote him in 1939, on the occasion of his retirement from the Court at the age of eighty-three, "Measuring my words, I do not see how any one person could have done more than you have done." When Brandeis died two years later, the obituaries and tributes assumed a tone of reverence, even awe. At that moment, and for the next forty years, his place in the American pantheon seemed secure, as solid as that of Washington or Lincoln.

Yet by the 1980s, a number of scholars had begun to raise troubling questions about Brandeis's career. The Berkeley historian Richard Abrams showed that Brandeis's fabled victory in the New Haven railroad fight (1906–13) had rested on a series of mistaken premises about the future of New England's economy. A little later, the Israeli scholar Allon Gal asserted in his well-researched book, *Brandeis of Boston*, that some of the crusades Brandeis undertook in the "public interest" were based primarily on Brandeis's psychological reactions to rising anti-Semitism in Boston. In 1982, the political scientist Bruce Allen Murphy created a public uproar with his flawed but provocative volume *The Brandeis-Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*. Murphy's book, sensationalized by his publisher almost to the point of misrepresentation, did show beyond much doubt that Brandeis had engaged in activities he would not have condoned in other members of the Court. Finally, I suggested in 1984 in my own book, *Prophets of Regulation*, that Brandeis misunderstood the forces underlying the rise of big business and consistently advocated economic policies that were certain to reduce consumer welfare.

Taken together, these works touched on some of the most important themes of American historiography: the role of lawyers in American life (Brandeis having been perhaps the greatest litigator the country has yet produced); the adversarial relationship between government and big business (unique in the United States, among democratic market economies); and the underlying nature of reform during the Progressive Era (when Brandeis became famous as the "People's Lawyer"). At the same time, these books and others provided new clues to some lingering questions about Brandeis's character and personality. What social forces, for example, had combined to transform an obscure young Southerner, who had quietly adopted the Brahmin style of life and had practiced in Boston for twenty-five years as a conventional commercial lawyer, into the famous *Brandeis*, a notorious muckraker and feared opponent of what he called the "curse of bigness"? Why, after a lifetime of disregarding his own Jewishness, had Brandeis in his middle fifties suddenly embraced his ethnicity and become

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an ardent Zionist? And why, once he had taken his seat on the Supreme Court, had he pursued political activities that almost certainly amounted to serious judicial improprieties?

Brandeis's career as a practicing lawyer, which began in 1878 and ended with his appointment to the Supreme Court in 1916, coincided almost precisely with the rise of giant corporations in America. Brandeis watched the business revolution as it developed, tried his best to understand it, and found it, on the whole, hostile to his own central values of autonomous individualism. For that reason he fought it, and in his crusades against the "curse of bigness," he was a formidable champion.

Several elements of his background shaped Brandeis's individualistic values. Eight years before his birth in 1856, his Bohemian Jewish parents had fled Europe during the suppression of the democratic movements of 1848. Settling in Louisville, Kentucky, the family prospered in the grain merchandising business but suffered setbacks during the depression of the 1870s. Louis Brandeis, an intellectually gifted child, was educated at the German and English Academy in Louisville and later, when the depression in America drove the family temporarily back to Europe, at the Annen-Realschule in Dresden. He entered Harvard Law School in 1875, at the age of eighteen, and made a phenomenal record. Because he finished the standard course of study at Harvard before he reached twenty-one, a special ruling was required to allow him to graduate. A year later, in 1878, a fellow student wrote a letter to his mother describing the young Brandeis:

> He graduated last year from Law School and is now taking a third year here—was the leader of his class and one of the most brilliant legal minds they have ever had here—and is but little over twenty-one withal. Hails from Louisville—is not a College graduate, but has spent many years in Europe, has a rather foreign look, and is currently believed to have some Jew blood in him, though you would not suppose it from his appearance—Tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The Profs. listen to his opinions with the greatest deference, and it is generally correct. There are traditions of his omniscience floating through the School. One I heard yesterday—A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friends said—Go and ask Brandeis . . .—he knows everything—perhaps he will know where your book is—He went and asked. Said Brandeis—"Yes—go into the Auditor's room, and look on the west side of the room, on the sill of the second window, and you will find your book"—And it was so.

Thus the Brandeis literature began as hagiography, and it continued in that vein for a hundred years. In many respects it resembles the Lincoln literature, and indeed the two men are often compared: Kentucky origins, self-made success, even physical resemblance—their craggy, quizzical features, disorderly hair, jug ears, deep-set bright eyes.

Substantial biographies began to accumulate long before Brandeis's death, and in the years afterward there came a flood of writing, nearly all of it elaborating on the established legend. Despite this wide coverage, a few mysteries, such as those mentioned above, continued to puzzle scholars. The answers came only when Brandeis's personal papers were made fully available. In 1971, thirty years after his death, the first two volumes of his collected letters appeared, and by 1978 the remaining three volumes. For a number of scholars, these papers constituted a treasure. Their publication represented an event that would illuminate the history of American Zionism, American reform, and the character and career of Brandeis himself. It was thought that the collected letters might force open the last unknown chambers of his life.

What they in fact showed was that Brandeis had been less a man of thought than of action. None of the letters conveyed the impression of a deep conceptual intelligence. In them appeared little evidence of reflection, none of rumination: no agonizing over one's proper role in life or relationship with God, no self-doubt on any score. Instead, the letters depicted a quick, confident, and often rigid mind preoccupied with some immediate practical task; a controlled, carefully managed life with no wasted motion, little humor, and no frivolity. Brandeis seemed to have no time for literature, no sense of the power of language. Unlike his fellow jurists Holmes, Hand, and Cardozo, he has no entry in Bartlett's *Familiar Quotations*.

In these respects Brandeis stands closer to

Washington than to Lincoln. In contrast to the papers of Lincoln, with their characteristic reflectiveness and love of the fine phrase, Brandeis's letters, like those of Washington (who was forever requisitioning this many horses or that many hogsheads of flour), show an engrossing preoccupation with the details of specific pressing tasks. Brandeis held himself aloof from other men, encouraged veneration, and became impossible to know well. As Harold Laski once remarked, he was "not quite human in his contacts." Didactic and moralistic, Brandeis liked to instruct his wife, daughters, and others around him as to how they should live. For both his intimates and the outside world, he cultivated a particular image for himself, and he shaped his behavior in service to that image. As the editors of his letters put it in a sentence that might have been written about Washington, "Brandeis's towering strength rested on his own recognition of that strength. . . . He understood how to behave like a symbol." Today, we understand something of what that symbol represents. Brandeis's life, and particularly his antimodern ideology, throws into high relief the clash between traditional American individualist values and the opposing tendencies of modernization in Western society.

Brandeis himself detested the accoutrements of modern life. He despised telephones and automobiles. He never went shopping, even for his own clothes. In his recreation he abjured team and spectator sports in favor of solitary pursuits such as canoeing. During his years on the Supreme Court, one of his law clerks recalled, Brandeis employed no secretary or typist. Instead he sent longhand drafts of his opinions directly to the printer, then revised from galley proofs, sending successive revisions back for resetting, often the six or seven times. Despite his reputation as "People's Lawyer," Brandeis was no consumer advocate in the present-day sense. He often denounced consumers for their complicity in the rise of big business, calling them "servile, self-indulgent, indolent, ignorant."

However accurate his view of consumers may have been, in the end Brandeis's emphasis on the "curse of bigness" proved to be an illogical principle on which to base realistic remedies for the ills of modern life. Given the stark fact of a world population measured in several billions, the idea of a "curse of bigness" becomes an aesthetic construct more than an analytical or prescriptive one. Certainly it is of little help in shaping economic policy. In the case of business organizations, bigness is indeed a curse for some industries (leather, apparel, food service); but for others (steel, oil, automobiles), it represents not only a virtue but an inevitability. Recent research in many disciplines—history, economics, sociology, business administration—has clearly identified clusters of industries at both ends of a long scale measuring the size of typical companies in each industry. The results of this research show remarkable uniformity from one country to another: the United States, Britain, Germany, France, Japan, and other democratic market economies. Nevertheless, numerous private entrepreneurs and public officials, particularly in the United States, have tried to move industries around on this scale. They have endeavored to make naturally small business large or naturally large business small. They have had little success.

For all Brandeis's brilliance, this inherent diversity of industries eluded him, just as it eluded many later critics and crusaders. The reason in his case, and often in theirs as well, was that the implicit but transcendent test, the hidden litmus, has been not economic efficiency, nor even political liberty and social justice, but instead an aesthetic preference for small size: hence the "curse" of bigness. Granted that the danger of centralized power is no illusion. But in the world as it actually is, the remedy cannot be found in breaking up all large organizations or in sending urban masses back into the countryside. As the experience of the Cultural Revolution in China and the drastic deurbanization movement in Cambodia suggests, decisive decentralization may not be intrinsically democratic. It may instead require totalitarian methods. And this, of course, represents a precise negation of the individualist premises from which the Brandeisian analysis begins.

Although the economic and political issues at stake here are still often framed as a simple choice between bigness and smallness, as they nearly always were framed by Brandeis himself, the argument so stated cannot be settled. It cannot even be moved beyond its logical development as of the beginning of the twentieth century. Yet even then the reasons

for its bankruptcy as an economic argument were already evident. They were evident in the subtle political alignments of that era that pitted the champions of small producers and shopkeepers, represented by Brandeis, against the champions of consumers and big business, represented by such writers as Herbert Croly and Walter Lippmann. In this sense, Brandeis was less the People's Lawyer than the small businessman's lawyer. In no real sense can he be considered the consumer's lawyer, because he was forced to defend high prices as a means of defending small business.

Imagine a secular saint from one of the principalities Brandeis himself admired and often cited in his denunciations of America's "curse of bigness"—Palestine (Israel), say, which is about one-seventieth the size of the United States in population; or Denmark, which is about one-fortieth. Imagine that from such a tiny national platform comes a denunciation of "the curse of smallness." And imagine that a philosopher of the aesthetic of bigness somehow evolves into a saint of Israeli or Danish culture. The oddness of it all catches the peculiar potency of an anti-bigness tradition in the one country with by far the largest economy and largest business enterprises in the world. In inquiring into the career of Louis Brandeis, then, perhaps we can better understand some of the ironies of our culture: the adversarial relationship between government and big business, and the distinctive role played by lawyers in American life.

After graduation from law school, Brandeis associated himself in practice with Samuel D. Warren, a classmate whose wealth and family connections provided a ready clientele as well as entrée into Boston social circles. Brandeis himself, with all his brilliance and his new Harvard connections, was yet a young Jew from Louisville, while Boston remained one of the most snobbish and ingrown of American cities. As a social outsider, he could afford no false steps. "I wish to become known as a practicing lawyer," he wrote Warren. "I wish to wait particularly for your letter giving the results of your examination of the prospects of a young law firm and more particularly your own prospects of securing business through your social and financial position." The firm of Warren and Brandeis enjoyed immediate success, in part because its first client was the paper manufacturing company owned by the Warren family.

Brandeis's continued prosperity depended not on the Warren connection but on his own drive and ability. Both were of the highest order. At Harvard, where he compiled what is still the best record in the law school's history, he had written of his "desperate longing for more law," and of the "almost ridiculous pleasure which the discovery or invention of a legal theory gives me." He referred to the law as his "mistress," holding a "grip on me" that he could not break. This passionate attachment served him well, as he became one of the most effective litigators in American history. He had all the requisite talents, all highly developed: the persistent inquisitiveness, the quick study, the sympathetic style, the skepticism, the love for combat.

In addition, he had two even more useful qualities. The first was a remarkable ability to convey a sense of the rightness of his client's cause. As one of his partners put it, "The prime source of his power was his intense belief in the truth of what he was saying. It carried conviction." The second quality was the very close attention he gave to the care of clients. "Cultivate the society of men—particularly men of affairs," Brandeis once advised a young associate in his firm. "A lawyer who does not know men is handicapped. . . . Every man that you know makes it to that extent easier to practice, to accomplish what you have in hand." Brandeis himself took great pains to know men. During his early years in Boston, he kept a small notebook in which he listed the names of everyone he met at social gatherings. Gradually he accumulated dozens of thick scrapbooks on all sorts of personal, legal, and political subjects. "Perhaps most important of all," he emphasized to his young associate, "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."

Brandeis's careful development of his lawyerly skills reflected a characteristically shrewd management of his own career. "Know thoroughly each fact," he remonstrated in a memorandum to himself on the practice of law.

"Don't believe client witness. Examine documents. Reason; use imagination. Know bookkeeping—the universal language of business: know persons. Far more likely to impress clients by knowledge of facts than by knowledge of law. Know not only specific case, but whole subject. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all facts and law that surround." Brandeis's emphasis on facts became a minor legend in itself, an important part of the sociological jurisprudence he advocated later in his career. "It has been one of the rules of my life," he once told a newspaper reporter, "that no one shall ever trip me up on a question of fact." Brandeis advised the young associate in his firm that the person "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." No American lawyer has ever been more capable of the tour de force than was Brandeis himself.

As a practicing lawyer, Brandeis focused on particular cases and controversies, not on general principles of economic development. Whereas the professional economist tends to think in generalizations and seek methods of accommodating varying points of view to one general policy that will promote overall economic growth, Brandeis sought victory for his client's interest at the expense of all others. One prominent member of the Boston bar wrote of Brandeis's intense competitiveness: "He fights to win, and fights up to the limit of his rights with a stern and even cruel exultation in the defeat of his adversary." As a busy attorney, Brandeis went rapidly from case to case, on a schedule set not by his own choice but by the dockets of courts and commissions. He became, as trial lawyers must, a quick expert on many different subjects: now railroads, now trusts, now conservation, now banking, now labor, now retailing. Of necessity, the expertise so rapidly acquired seldom ran very deep.

An outsider and a Jew, Brandeis did not attract the largest clients available to Boston law firms. These were the major banks and insurance companies, the railroads headquartered in the city, and the huge new manufacturing firms arising from the reorganizations and mergers of the period. His typical clients were not giant corporations, but small- and medium-sized manufacturers of boots, shoes, and paper, along with prominent Jewish wholesalers and retailers such as the Hechts and the Filenes. Following his own advice, Brandeis came to know these clients intimately. He impressed them with his factual knowledge of their businesses, and they employed him as counselor and advisor on a wide range of legal and business problems. Ultimately, this work on their behalf made him a millionaire. In turn, Brandeis also became identified politically with their interests; and much of the content of his later compaigns as "People's Lawyer"—particularly his approach to industrial bigness and the antitrust question—can be traced back to the problems and interests of these clients.

The most striking thing about Brandeis's triumphs as People's Lawyer was his almost extrasensory instinct for the winning ground. Here, time after time, he showed himself capable of the tour de force. He won his cases repeatedly, often against heavy odds; and the reputation for winning, in turn, became the essential element of an emerging Brandeis mystique. The uncanny ability to find the winning ground, a talent present in many great lawyers, reached in him an extremely pronounced form, as several of his best-known cases show. Four of these were *Muller v. Oregon* (1908, the case that made the "Brandeis brief" famous), the New Haven Railroad affair (1906–1913), the Ballinger-Pinchot controversy (1910), and the so-called Advance Rate Case before the Interstate Commerce Commission (1910). Together these episodes made him a celebrated national figure—made him *Brandeis*. In each, he deftly shifted the dispute away from his clients' weak points and onto novel ground. On all four occasions, he caught the opposition by surprise and emerged victorious.

The most revealing of the four was the Advance Rate Case before the ICC. This dramatic episode began in 1910, when American railroads petitioned for an across-the-board increase in freight rates. The railroads alleged that their costs had risen rapidly because of much higher labor rates and the inflationary pressures that had begun to plague the American economy. Shipping interests hired Brandeis to oppose the railroads' petition, and he embraced their cause with great vigor. He

identified them with the entrepreneurial firms he had long represented in Boston, some of which were significant shippers chronically involved in New England rate controversies. Also, Brandeis's father, a Louisville merchant, had dealt regularly with railroads, and Brandeis's brother Alfred was one of that city's major shippers of grain.

The national railroads, on the other hand, were sprawling interstate business giants. Several employed more than 100,000 persons, and the industry as a whole was widely regarded as unduly wealthy and powerful. If there was a "curse of bigness," American railroads were among the most cursed institutions in the world. Their request in 1910 for the rate increase was neither well timed nor well managed. Indeed, the very idea of a jointly requested across-the-board increase for all railroad corporations (the profitable along with the unprofitable) and for all items of cargo (money-makers and money-losers) seemed to reflect a political arrogance that had characterized the industry since the 1850s. Yet in retrospect it is clear that the railroads did need a rate increase. Their costs were rising rapidly and their roadbeds were deteriorating under the pressures of heavy traffic. The railroads' attorneys and financial officers presented a strong case before the ICC for a rate increase, buttressing their argument with page after page of persuasive statistical analysis.

Brandeis's response, breathtaking in its boldness, completely confounded opposition lawyers. First, he conceded that the railroad companies needed more money. But then he insisted that the proper source lay not in higher rates for shippers but in lower internal operating costs for the companies themselves. As his most telling point, Brandeis impressed on the commissioners the "fact" that the railroads were operating inefficiently. The companies, he said, were ignoring "scientific management," a series of new techniques associated with such efficiency experts as Frederick Winslow Taylor, Harrington Emerson, and Frank Gilbreth (the same Gilbreth later immortalized in *Cheaper by the Dozen*, written by two of his children). With the help of several efficiency experts whom he put on the witness stand, Brandeis spun out, day by day, a tale of miracles, of fantastic gains that would accrue from the railroads' conversion.

> Scientific management [said Brandeis] differs from that now generally practiced by the railroads, much as production by machinery differs from production by hand. . . . Under scientific management nothing is left to chance. All is carefully prepared in advance. Every operation is to be performed according to a predetermined schedule under definite instructions, and the execution under this plan is inspected and supervised at every point. Errors are prevented instead of being corrected. The terrible waste of delays and accidents is avoided. Calculation is substituted for guess, demonstration for opinion. The high efficiency of the limited passenger trains is sought to be obtained in the ordinary operations of the business. The same preparedness is invoked for industry which secured to Prussia her victory over France and to Japan her victory over Russia.

As if these remarkable results were not enough in themselves, Brandeis promised one final miracle. With his unerring sense for the winning ground, he elicited from witness Harrington Emerson an assertion that, under scientific management, the nation's railroads could save "at least $1,000,000 a day." This million-dollars-a-day slogan was taken up and broadcast throughout the country by newspapers. Cited again and again during the rate hearings, it took on a life of its own. Ultimately it seemed to be made true by virtue of endless repetition. Once more, Brandeis won his case. The ICC refused to give the railroads an additional penny.

Later on, railroad men, and some disinterested analysts as well, concluded that Brandeis's rabbit-from-the-hat promise of miraculous savings had simply dazzled and misled both the ICC and the public. Subsequent events in the railroad industry all but proved that scientific management had much less relevance for transportation and other service industries than it had for manufacturing. Brandeis himself gave little mention to scientific management during a second rate case that he conducted for the ICC only a few years later, in 1914. By that time the efficiency craze had begun to wane, the railroads were in deep trouble, and "at least $1,000,000 a day" had become old hat. And by the time of the war emergency of 1917–18, the railroads had fallen into such desperate financial straits that the federal government temporarily took over the entire industry. After a brief study, the government instituted by fiat very large across-the-board rate hikes of about

the size of the combined increases the railroads themselves had requested in the years between 1910 and 1918.

In January of 1916, President Wilson nominated Brandeis to a seat on the United States Supreme Court. That nomination, which came as a surprise to nearly everyone concerned, touched off a national furor. Brandeis's reputation at the time was comparable to that of, say, Ralph Nader or Jesse Jackson in our own day. In addition to this, there had never yet been a Jewish member of the Court, and Wilson's action occasioned both open and covert expressions of anti-Semitism. Still more opposition came from Brahmin Boston, which had turned against Brandeis during the long controversy over the New Haven railroad. The most serious chorus of objection, however, issued from legal organizations. Seven former presidents of the American Bar Association sent a joint protest to the Senate, urging that the appointment be rejected: "The undersigned feel under the painful duty to say to you that in their opinion, taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States." The confirmation fight, which went on for five months, became one of the year's most newsworthy events. In the end the defense, bolstered by Wilson's ringing affirmation of Brandeis's merits, carried the day. The nomination clinched Wilson's own claim to progressive credentials, and the event itself ultimately became a cause célèbre in the history of American liberalism.

Once on the bench, Brandeis surprised his critics with his wisdom and judicial depth. He made a great judge, one of the most distinguished in American history. It was almost as if, having spent his entire previous career hurrying from one case to another and necessarily spreading himself too thin, he now at last enjoyed the time for the kind of reflection essential in thinking through his positions.

The hallmark of Brandeis's years on the Court proved to be his commitment to judicial restraint. In a period when the Court majority routinely overturned economic regulatory legislation as inconsistent with the Fifth or Fourteenth Amendment, Brandeis passionately opposed such activism. With single-minded consistency, he took the position that judges must allow legislators wide latitude and freedom to experiment. (He excepted only laws designed to limit civil liberties; there he threw off judicial restraint and voted to rule the legislation unconstitutional.) Always he appealed primarily to "the facts." Rapid industrialization, he argued, had produced unprecedented dislocations. If governments were denied the power to regulate industrial conditions, then the social fabric was going to split apart. Whether the case before the Court had to do with child labor, wages and hours, workmen's compensation, or railroad regulation, Brandeis held that judges must not arrogate to themselves undue authority to overturn legislative action. Relying time and again on the same kind of sociological jurisprudence that he himself had pioneered as a trial lawyer, he pointed to actual economic conditions as affording legislators a reasonable and not arbitrary basis for passing regulatory laws. In one dissent after another, Brandeis presented long, heavily footnoted opinions citing official statistics, reports of inspections, and academic studies from many disciplines. He conceived his role to be not only that of judge, but also of educator. Working his clerks as if they were graduate students searching for facts as well as legal precedents, he urged them to find and use any source that would bring new information to bear on issues before the Court.

In most of this, Holmes, his fellow "Great Dissenter," usually joined. But Holmes took a different approach to the same goal. Abjuring Brandeis's multitudinous facts and footnotes, the older man preferred to reason deductively. "Holmes," the legal scholar Samuel Konefsky writes, "contented himself with short statements as to why in his judgment the governmental action complained of was not 'unconstitutional.'" Brandeis, on the other hand, "invariably undertook the more arduous task of seeking to persuade that the measure was entirely necessary and 'constitutional.'" Harold Laski made the same point: "Holmes was a liberal by negation, [Brandeis] by positive affirmation." In this Brandeis contributed an important methodological innovation, and it is here that his great significance as a judge lies. As the years went by, the Court majority gradually began to accept the Brandeis way of looking at things. The culmination of this shift, which amounted to a sea change in American jurisprudence, came in the case

of *Brown vs. Board of Education of Topeka* (1954), some fifteen years after Brandeis's own retirement from the Court.

In cases having to do with business, Brandeis nearly always arrayed his copious "facts" in support of an individualistic, decentralized economy. Despite his impartiality in most other matters, he continued his campaign against the "curse of bigness," evidencing a powerful preference for the interests of small producers, wholesalers, and retailers over those of consumers. Several of his best-known opinions demonstrate this preference vividly: *American Column and Lumber Co., et al. v. U.S.*, 1921; *Quaker City Cab Company v. Pennsylvania*, 1928; *Liggett v. Lee*, 1933. As Max Lerner once commented, Brandeis did not make "too ascetic a dissociation between his views of public policy and his opinions." Brandeis's Court colleague Harlan F. Stone asked him to temper his partisanship in opinions on economic cases; and Holmes confided to a friend, "I told him once that when he had strong economic convictions I thought that he sometimes became the advocate and ceased to be detached—but it isn't often."

Because modern America could not return to the decentralist utopia of Brandeis's imagination, a nice irony suffuses many of his judicial opinions. It is the irony of using modern means to serve anti-modern ends. It matches the earlier ambivalence of Brandeis's innovative use of mass public pressure as a device to beat back the tide of the business revolution. Again Laski, musing on the riddle of Mr. Justice Brandeis, catches both the irony and the principle behind it: "His criterion for all action is an ethical individualism. I take him to be intellectually, as to ends, a romantic anachronism, but as to methods a really significant figure in the Court."

The contrast between Brandeis's anti-modern philosophy and his forward-looking jurisprudence provides still another index of why, overall, it is impossible to understand the meaning of his life, including even his years on the bench, without recognizing that at bottom he was an advocate, a champion of causes. During his long career as a professional litigator, his business was the winning of cases, and this is exactly where he excelled. His habit of victory is what makes him such an appropriate national symbol, since the entire advocacy system is so basic to the American polity, and even to the country's temper, as to be a defining characteristic throughout.

This has been true from the beginning of the American Republic. Lawyers such as Adams, Otis, Henry, Hamilton, Jefferson, and Madison led the Revolution. From 1790 to the present, nearly all judges have been lawyers, and so have about two-thirds of all U.S. Senators, one-half of the members of the House, and two-thirds of federal regulatory commissioners. None of this seems strange to most Americans, but in fact the government of no other country in the world is nearly so dominated by lawyers. Perhaps the most revealing index of all is the much lower number of lawyers in other major market economies. In 1977, the *New York Times* reported startling differences among countries, with the United States at one extreme:

Country	Lawyers per one million population
Japan	89
West Germany	449
United Kingdom	588
Canada	703
United States	1,981

This dramatic disproportion might be taken as symptomatic of many different characteristics of American culture. One is that entry into the legal profession has been open, without the guild-like restrictions that prevail elsewhere. Another is that many American lawyers forgo practice and instead enter into politics, manage businesses, teach, or engage in a variety of other pursuits. Many who do practice do not often litigate. In general, law as a career in America has been a way of keeping one's options open.

Whatever else it may mean, however, several points about the predominance of lawyers remain clear. As we all know, Americans have been more litigious than have citizens of other countries. They have been ready to sue at the drop of a whiplash and less likely to resolve differences through informal processes of consensus. They have been sensitive to due process and fond of pursuing appeals to courts of last resort. This deep trait of American culture has had profound effects on the history of government-business relations. Many lawyers, steeped in proceedings emphasizing ad-

versarial advocacy, have defined the relationship between government and big business as another ongoing public battle in which one side must win and the other lose. This has become clearer than ever in an age of "public interest" lawyers such as Ralph Nader.

Louis Brandeis, as one of the first American lawyers routinely to take his cases beyond the courtroom and into the mass media, cultivated public opinion as systematically as he did a jury. Because he conceived his role to be that of champion, he went out his way to find a good fight and involve himself in it. Once the fight started, Brandeis displayed marvelous inventiveness in finding novel routes to victory. This is what made him such a splendid advocate and what gave such an air of anticipation—almost an expectation of surprise—to so many of his cases. As one senator said of Brandeis during the Supreme Court confirmation hearings, "He seems to like to do startling things and work under cover. He has disregarded or defied the proprieties. . . . He is of the material that makes good advocates, reformers, and crusaders, but not good or safe judges." The senator erred only in the prediction that Brandeis would make a poor judge.

In his crusade against bigness, Brandeis combined an intense moral passion with a compelling drive for victory; and the result gave his analysis an inflammatory tone more appropriate to the media to which he turned than to the courtroom from which he had come. "We are confronted in the twentieth century, as we were in the nineteenth century with an irreconcilable conflict," he wrote in 1911 in a newspaper article. "Our democracy could not endure half free and half slave. The essence of the trust is a combination of the capitalist, by the capitalist, for the capitalist." On another occasion he spoke of "the free soil upon which private monopoly has encroached." His fervor led Brandeis, as it had led the anti-slavery abolitionists before him, to advocate drastic solutions. "For their by-products shall you know the trusts," he declared; and he insisted that the only way to eliminate the by-products was to eradicate giant companies altogether, to rip them out root and branch. He brought to bear, as a great advocate would, every piece of artillery that stood even a remote chance of hitting the target. He denounced big businesses for their price-cutting, exploitation of labor, gulling of investors, and promotion of conspicuous consumption. Much as he had drawn in his earlier cases on every weapon that would contribute to victory, much as he had shifted the argument to any terms that would rout the enemy, so he was compelled to include any and all arguments in his battle against bigness. Given his task, he had no choice but to argue that big business became big only through unfair methods. Positing bigness to be unnatural, he was forced to discover illegitimate means of its evolution. Only there would he find the winning ground.

In our own long retrospect, it is clear that giant firms did indeed threaten the atomistic commonwealth Brandeis wanted America to become. It is equally clear, however, that these companies were not necessarily hostile to the values he saw as damaged through their "by-products." It might have reassured Brandeis to see into the future and to know that a very large number of industries (most, in fact) are of such an underlying economic character that they stand little chance of becoming big businesses. It did reassure him in the 1930s to see securities legislation bring an end to frenzied finance and achieve new protection for investors. Brandeis's old age was gladdened too by the New Deal's Wagner Act, which gave explicit federal protection for the right of workers to organize.

But as these events occurred, and as the rise of big business appeared in every market economy in the world, they constituted a step-by-step demolition of the Brandeis brief against bigness. They demonstrated that it was not bigness per se that had brought certain abuses, and that bigness raised no barrier to their abolition. In fact, for resolving some abuses, bigness held powerful advantages: it was far easier for the government to enforce legislation such as the Wagner Act against one huge corporation like General Motors or U.S. Steel than against thousands of small sweatshops. Only the mistaken idea that these "by-products" derived from a single root cause made them part of the antitrust question at all. As the political scientist Louis Hartz once remarked, "We think of the trust as an economic creation of American history, and we fail to see that it was just as much a psychological creation of the American Progressive mind." Brandeis's thinking reflected this tendency of

the period. In this sense as in others—his moralism, his fixation on the redemptive value of "facts"—he may be seen as a man of his time.

He did not, however, stand in the forefront of his time as an economic thinker. Of those who did, a number of contemporary academics (Richard Ely, Charles Van Hise, John Bates Clark) expressed remarkably prescient insights into the organizational revolution going on in the business world. So did several journalists. Perhaps the shrewdest critic of Brandeis's antibigness-ethic was Walter Lippmann of the *New Republic*. Lippmann, who in 1916 stood forth as the most eloquent defender of Brandeis's nomination to the Supreme Court, had earlier derided the nominee's crusade against bigness. More than thirty years younger than Brandeis, Lippmann saw that the real business revolution lay not in size but in organization and administration. As Lippmann wrote in his book *Drift and Mastery* (1914), the conduct of business was passing from shopkeepers and foremen "into a hierarchy of managers and deputies, who, by what would seem like a miracle to Adam Smith, are able to cooperate pretty well toward a common end." They were doing it, moreover, "in the first generation of administrative science," with no tradition to guide them. "The real news about business," Lippmann continued, "is that it is being administered by men who are not profiteers. The managers are on salary, divorced from ownership and from bargaining." They stood outside the old Smithian model, immune from petty haggling. "The motive of profit is not their personal motive. That is an astounding change."

Lippmann went on to say that the Brandeisian preoccupation with bigness directed all discussion to a dead end. Quoting Brandeis's remark that even the best organizations depend on one man, Lippmann wrote: "In this statement, you will find, I believe, one of the essential reasons why a man of Mr. Brandeis's imaginative power has turned against the modern trust. He does not believe that men can deal efficiently with the scale upon which the modern business world is organized. He has said quite frankly, that economic size is in itself a danger to democracy. This means, I take it, that American voters are not intelligent enough or powerful enough to dominate great industrial organizations." Brandeis's suggestion that corporations be limited by law to a certain size, concluded Lippmann, simply could not work. "Say today that one unit of business is impossible, tomorrow you may be confronted with an undreamt success. Here if anywhere is a place where negative prophecy is futile."

In the last analysis, Lippmann was right. Brandeis's fixation on bigness as the essence of the problem doomed to superficiality both his diagnosis and prescription. It meant that in his own thinking he was led irresistibly away from the organizational issues, where the real revolution lay. (The largest organization in which he himself ever worked full-time was the United States Supreme Court.) It meant that he must argue against vertical integration and other innovations that enhanced productive efficiency. It meant conversely that he must favor cartels and other loose horizontal combinations that protected individual businesses from competition, but that also raised prices and lowered output, thereby diminishing consumer welfare. It meant that he must promote retail price-fixing as a means of protecting small wholesalers and retailers, even though consumers again suffered. It meant, finally, that he must become in significant measure not the People's Lawyer but the spokesman of retail druggists, small shoe manufacturers, and other members of the petite bourgeoisie. These groups, like so many others throughout American history, sought to use the power of government to reverse economic forces that were threatening to render them obsolete. In Brandeis they found an effective champion.

On each of these crucial points, Brandeis's aversion to bigness simply overwhelmed his analytical powers, great though they were. Whenever he approached a conceptual breakthrough, he shrank from taking the next step. Such a step would have shown him that, in order to reach a mature understanding of the new business system, he would have to separate the political issue of bigness from the economic issue of efficiency. This he was never willing to do.

To return, finally, to the recent decanonization of Brandeis: based on my own experience and that of other Brandeis scholars, I am convinced that it came not from any debunk-

ing tendencies of our time, nor from any national turn to the Right. Instead, it came from a careful examination of the primary sources. As I undertook to read the published Brandeis correspondence, to explore the voluminous Brandeis materials now available at the University of Louisville, and to look at the recently collected microfilms of Brandeis's speeches, legal briefs, and congressional testimony, I had no idea that I would discover him to have been so wrong in so many aspects of his economic thought. I believe that other scholars, writing on other aspects of his career, had the same kind of experience. Because it had been so long since anyone had looked with a careful analytical eye at the primary sources, the legend of Brandeis had grown essentially without reference to the historical record; or, in the case of some otherwise good recent biographies, such as those by Melvin Urofsky, Lewis Paper, and Philippa Strum, the legend persisted because the most pertinent questions about the available economic evidence went unasked.

The principal usefulness in rethinking the career of Brandeis lies in what it can tell us about the nature of business-government relations in the United States and the role of lawyers in managing those relations. Here Brandeis, and much of the legal profession in general, typifies the tendency of American public policy in the twentieth century to try to win some imagined contest between business and the American people. But when apparent victories against business do come, the result is often to throw out the baby with the bathwater: to reverse not only the objectionable consequences of a market economy but also the beneficial social forces deriving from overall economic growth.

A brief comparison with recent Japanese economic history will clarify my point. In most respects, Japan is not an attractive model for emulation. Japanese society as a whole is ethnocentric and often illiberal. Yet in its national economic strategy, Japan has much to teach Western nations. Ever since the departure of the American Occupation forces in 1952, the Japanese have pursued a strategy of exploiting and accelerating market forces instead of ignoring or retarding them. In both business and government, well-trained cadres of executives and bureaucrats follow routine policies of carefully analyzing technological and market trends both in Japan and in major export markets such as the United States, and of then accelerating their own industries' adaptations to these trends. The Japanese have allocated expertise, capital, and other resources to those industries with the greatest potential for growth (electronics, semiconductors), while simultaneously denying resources to industries that the elite government ministries regard as low-growth (textiles). The Americans, by contrast, have acted to slow down these shifts. We have not precisely discouraged high-growth industries so much as we have helped other, ailing industries—paying in what economists call "opportunity cost" with resources that might have been more productively employed in high-growth sectors. Through generous but sometimes misconceived unemployment and welfare laws, our policy has also tended to paralyze the remarkable labor mobility that once loomed so large in American economic successes.

All this relates to Louis D. Brandeis in that he symbolizes uncommonly well our characteristically adversarial relationship between government and big business. This relationship appears vividly in the tangles of twentieth-century antitrust policy and in such episodes as the mismanagement by both government and big business of the oil crises of the 1970s. It also appears in the frequent unwillingness of legislators to act on the clear economic principle that insulation of economic interest groups from market forces usually produces anti-competitive and anti-consumerist results, even when it is small business that is being insulated.

The sources of our adversarial relationship derive not from lawyers alone but also from a trait common to many American intellectuals and to the broad populist tradition alike: a powerful disinclination to persist in hard economic analysis that may lead away from strong ideological preference. Because of the small-is-beautiful ethos shared by so many Americans, this fact has been sometimes difficult to grasp, even for the most thoughtful and disinterested observers. After three generations of experience with the business system—experience that Brandeis himself did not have—many American intellectuals still have difficulty disentangling their aesthetic predispositions against business from their otherwise

democratic economics. And in an age of severe industrial challenge from abroad—specifically from the Japanese, who have ample problems of their own but who do not share this particular prejudice—it may be an issue that we cannot evade, that we must address directly.

Of course, what's good for business, whether big or small, is not always good for everybody. But sometimes it is, and we ought to learn better how to tell the difference. If we do, then we shall profit from Brandeis's great example of advocacy. All we must do is redefine the client. It must be the national interest and not that of some narrow group. With this small adjustment, tied to the needs of our own time, there is no reason why Louis D. Brandeis need be decanonized at all. Instead he might endure as he has endured: an authentic American hero, a properly revered symbol of individualism, integrity, self-reliance—and a genius at the art of winning.

A Distant Cry

LUCY SHAWGO

Walking the ravine edge,
He smoked and listened for the distant bird
Whose night cries he'd come to know,
Sensing at the same time the way
The lighted rooms cut his shadow from the house.
Even so he could almost catch
The thick sweetness of the cream
She'd be touching to her face right now
And count with her the movements of the brush
Down her long, brown hair.
He remembered the periods of their love
When he'd done this stroking for her.
Now, heavy with another child,
She'd wait only for him to bathe the boys.
Then he and she would lie, pretending sleep,
With her roundness pressed against his back
Until, her breathing calm,
He'd go outside again for smoking
And wondering whether the night bird
Shrieked loneliness or lament.

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