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Looking Back on Louis Brandeis on His 150th Birthday

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By ADAM COHEN

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In 1908, Louis Brandeis turned American law on its head with the “Brandeis brief.” The Supreme Court was in the midst of the notorious *Lochner* era, in which a pro-business majority routinely struck down laws protecting workers’ health and safety. Brandeis was defending an Oregon law that limited women’s workdays to 10 hours. It seemed likely the court would rule, as it just had in a similar case, that maximum-hours laws violated employers’ “right of free contract.”

In his brief, Brandeis devoted just two pages to legal analysis. He spent more than 100 pages setting out statistical and sociological data on the harm that long workdays did to women. His use of facts and sociological arguments was both shocking and enormously successful. The court upheld Oregon’s law, 9 to 0.

Brandeis, whose crusades against insurance companies and banks earned him the title “the people’s lawyer,” was born 150 years ago this week [November 2006]. He has many claims to fame: champion of the New Deal, first Jewish Supreme Court justice, creator of the legal doctrine of privacy. But it is Brandeis’s insistence on injecting facts and real-world analysis into the law that is his most lasting achievement, and one that resounds especially strongly today, when “reality-based” logic is so embattled.

Brandeis was born in Louisville, Ky., shortly before the start of the Civil War. As a Southerner and the son of a small merchant, he grew up with a Jeffersonian mistrust of big business. He entered Harvard Law School in 1875, and after graduating first in his class, remained in Boston to practice law. As a young lawyer, he co-wrote an article for the *Harvard Law Review*, “The Right to Privacy,” that Roscoe Pound, dean of the law school, would later say “did nothing less than add a chapter to our law.”

Brandeis was drawn to social causes. His first major victory was blocking a company from securing a monopolistic right to operate Boston’s subway system. Later, as special counsel to the Interstate Commerce Commission, he took on the railroad barons, insisting that they should not get rate increases “so long as the vicious system of interlocking directorates makes it impossible to know how much of the money is honestly and efficiently spent.”

And he fought for workers. The Brandeis brief may not look particularly progressive by contemporary standards. It emphasizes women’s feeble physical condition compared with men’s, and quotes such authorities as a cotton mill machine operator who told a Senate committee, “I have noticed that the hard, slavish overwork is driving those girls into the saloons.” But the brief was perfectly calibrated for the Supreme Court of its day. In appealing to the justices’ paternalistic concern for women, it found a chink in the court’s pro-business armor.

Brandeis was so enamored of facts and real-world consequences that he found himself moonlighting as a journalist. He wrote a fine series of muckraking articles on the “money trusts” for Harper’s Weekly, which were later published as the book “Other People’s Money and How the Bankers Use It.”

When President Woodrow Wilson nominated Brandeis to the Supreme Court in 1916, conservatives worried that he would inject radical new ideas into the law. He did, on subjects ranging from civil liberties to workers’ rights. (In 1937, he was part of the five-member majority that finally ended the Lochner era by upholding a state minimum wage law.) But it was his methodology, as much as his end results, that shook up the legal world. To Brandeis, every opinion — even on a subject as mundane as whether a state can require ice sellers to get a permit — was a chance to hold forth on the case’s practical importance.

For Brandeis, raw data was always key. Oliver Wendell Holmes, his distinguished senior colleague, once complained that Brandeis “drove a harpoon into my midriff by saying that it would be for the good of my soul to devote my next leisure to the study of some domain of fact — suggesting the textile industry.” Holmes protested, “I hate facts,” but grumpily took a government report along with him on his summer vacation.

The Brandeis brief today bears the truest mark of a transformative idea: as radical as it was in its time, today it looks thoroughly conventional. Generations of litigators were quick to adopt its approach. The civil rights lawyers in *Brown v. Board of Education* prevailed in large part because of their Brandeisian briefs that presented social science data on the effect of segregation on black children.

...[Brandeis’] greatest lesson was that — as he wrote in a famous dissent, excoriating the majority for not letting government do more to battle the Great Depression — “in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.”

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Brandeis, Zionism and Anti-Semitism

Louis Brandeis showed little interest in Jewish affairs until the turn of the century when a combination of his professional work and a changing political climate caused him to change his mind. He was introduced to Zionism by Jacob de Haas, an English Zionist. He became active in Zionist affairs during the First World War, serving as Chairperson of the Provisional Executive Committee for General Zionist Affairs.

Brandeis resigned his official position when he was appointed to the Supreme Court, but continued to try to influence President Woodrow Wilson to support the Zionist cause. In 1937 he appealed to President Roosevelt to oppose the British partition scheme of 1937.

Louis Brandeis was the first Jewish Justice of the Supreme Court. One of his colleagues, James McReynolds, known for his anti-Semitism, refused to speak to Brandeis or even recognize him. He would leave the bench was Brandeis was speaking.

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QUOTES FROM LOUIS BRANDEIS

Compiled by Lynne Michels



America has believed that in differentiation, not in uniformity, lies the path of progress. It acted on this belief; it has advanced human happiness, and it has prospered.

Experience teaches us to be most on our guard to protect liberty when the government's purposes are beneficent.

Fear of serious injury alone cannot justify oppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.

I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live.

If we desire respect for the law, we must first make the law respectable.

If we would guide by the light of reason we must let our minds be bold.

If you would only recognize that life is hard, things would be so much easier for you.

In the frank expression of conflicting opinions lies the greatest promise of wisdom in governmental action.

Men long for an afterlife in which there apparently is nothing to do but delight in heaven's wonders.

Most of the things worth doing in the world had been declared impossible before they were done.

Neutrality is at times a graver sin than belligerence.

Organization can never be a substitute for initiative and for judgment.

Our government... teaches the whole people by its example. If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning but without understanding.

The logic of words should yield to the logic of realities.

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

The most important political office is that of the private citizen.

The world presents enough problems if you believe it to be a world of law and order; do not add to them by believing it to be a world of miracles.

There are no shortcuts in evolution.

Those who won our independence... valued liberty as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

To declare that in the administration of criminal law the end justifies the means to declare that the Government may commit crimes in order to secure conviction of a private criminal would bring terrible retribution.

We are not won by arguments that we can analyze, but by tone and temper; by the manner, which is the man himself.

We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both.

(Source: www.brainyquote.com)

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