

Law as an Instrument of Social Policy—The Brandeis Theory

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LAW AS AN INSTRUMENT OF SOCIAL POLICY — THE BRANDEIS THEORY

THE life-span of Louis Brandeis covers a modern revolution in legal thinking. When he was born, in 1856, law was taught by textbook and apprentice methods. Taney had not yet delivered the Dred Scott decision. Story, a decade earlier, had been able to continue his teaching at Harvard between trips to Washington to take part in sessions of the United States Supreme Court. The recognized authorities were Blackstone and Kent. Law was said to be declaratory of right, and the function of the judges was to apply the law found in statutes and previous decisions. Before Mr. Justice Brandeis died, in 1941, Harvard Law School graduates, trained in case analysis, had become leaders in legal criticism and experimentation. The United States Supreme Court had survived grave challenges to its authority. Law had become, largely through the Brandeis influence, what one of his biographers has described as "essentially an instrument of social policy."¹

It was seventy years ago that Louis Brandeis graduated from Harvard Law School, with the reputation of having received the highest marks ever given there. He had barely turned twenty-one, but he had already had a taste of the then fashionable German education and had found it wanting. The intellectual climate at Harvard was for him more stimulating. C. C. Langdell, on becoming Dean six years before Brandeis entered, had introduced the case method of teach-

¹ MASON, *BRANDEIS AND THE MODERN STATE* 230 (1933); see LERNER, *MR. JUSTICE BRANDEIS* 35 (Frankfurter ed. 1932) and HAMILTON, *id.* at 182.

ing and started a controversy in legal education which carried over well into the twentieth century. Oliver Wendell Holmes, Jr., trained under the old faculty, had preceded James Bradley Thayer in lecturing on constitutional law in the new; was editing the *American Law Review* and the twelfth edition of Kent's *Commentaries*; and was spending his leisure moments in "twisting the tail of the cosmos" with William James.² In 1881 he was to deliver and publish a series of Lowell Lectures under the title of *The Common Law*, which was to become one of the classics of jurisprudence. Roscoe Pound became a student in the Law School in 1889. Brandeis, enjoying thoroughly the friendly rivalry of such intellectual giants, not only developed a successful practice in corporation law during the decade following his graduation in 1877-8, but he also showed his appreciation of what Harvard Law School had done for him by founding the Harvard Law Association in 1886,³ designed to expand the school from a local law school to a national institution, and by helping to inaugurate the *Harvard Law Review* in 1887, as the first of that long line of distinguished law school reviews which have been so very influential in advancing criticism and scholarship in American law. By 1891, Brandeis' reputation for high legal attainments was so well established in Boston that he was invited to give a course in Business Law at Massachusetts Institute of Technology.

In 1891 the industrial revolution, which had been growing all through the nineteenth century, reached a crisis in America, culminating in the Homestead Strike at the Pittsburgh steel mills. The impact of the great Dock Strike in England two years earlier, in which Cardinal Manning had undertaken to intervene;⁴ the challenge presented by the organization of the Knights of Labor in this country, and Cardinal Gibbons' defense of their right to organize, when he was in Rome to receive the red hat and to consult regarding the founding of The Catholic University of America;⁵ and the issuance of the great Encyclical Letters of Pope

² BENT, JUSTICE OLIVER WENDELL HOLMES 57 (1932).

³ BRANDEIS, BUSINESS—A PROFESSION xii (new ed. 1933).

⁴ KENT, 9 CATHOLIC ENCYC. 608, and bibliography (1910).

⁵ GIBBONS, I A RETROSPECT OF FIFTY YEARS 186-209 (1916).

Leo XIII, including that "On the Condition of the Working Classes" in 1891, indicate the depths to which the Christian world was moved in its regard for human personality and justice. Harvard, too, recognizing that strong forces were at work which demanded attention, read the Encyclicals⁶ but was not convinced Pope Leo's proposals would avail. To what extent Louis Brandeis was informed of the Papal program at that time is not known, although after he became a Supreme Court judge in Washington, he is said to have spent many a Thanksgiving Day discussing the principles of the Encyclicals with Monsignor John A. Ryan of the Catholic University Faculty.⁷

Rivalling the Church's program in attracting attention in intellectual circles were the claims of socialism. The successive convulsions in Europe, especially in France and Italy, though remote, could not be entirely ignored politically or culturally in this country, but the literature growing out of or giving rise to them was written in foreign tongues. Not so the works of the Fabians in England. Eventually H. G. Wells, George Bernard Shaw, and the Webbs became topics of daring parlor conversation in the wealthiest homes. Louis Brandeis was one of the first of the Harvard intellectuals to investigate their claims.⁸ Their conclusions about state ownership of property as a substitute for private ownership never won his adherence, but the reasonableness of their methods stimulated him to undertake investigations of his own. Saddened by the bloodshed at Pittsburg, resulting from efforts of human beings to overcome at any cost, oppression and injustice in the economic sphere, he put aside all preconceptions based upon his capitalistic environment, and inaugurated a new technique of fact-finding in connection with the administration of justice, which not only caused him to rewrite his M.I.T. lectures in 1895, but which eventu-

⁶ PEABODY, *JESUS CHRIST AND THE SOCIAL QUESTION* 45-6 (1904); ROYCE, *Pope Leo's Philosophical Movement and Its Relation to Modern Thought*, *FUGITIVE ESSAYS* 408-429 (1920).

⁷ DILLIARD, *MR. JUSTICE BRANDEIS*, *GREAT AMERICAN* 98 (1941), citing 87 CONG. REC. 3040 (1941).

⁸ LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 85 (1936).

ally was to bring him fame as the originator of a novel type of legal brief, first introduced into the United States Supreme Court in the Minimum Wage Case⁹ and known as the "Brandeis Brief."

"I think it was the affair at Homestead," he once wrote, "which first set me thinking seriously about the labor problem. It took the shock of that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages, to turn my mind definitely toward a searching study of the relations of labor to industry. . . . I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles. Those talks at Tech marked an epoch in my own career."¹⁰

Unlike the eighteenth century, which had given rise to legal arguments against tyranny, culminating only as a last resort in recourse to arms in the American Revolution,¹¹ the nineteenth had been marked by excessive reliance on force and the claims of absolutism. In jurisprudence, Bentham had thought of law as an instrument of force by which planned reforms were to be effectuated. In philosophy, the dichotomy between speculation and practice attempted by Kant, and the concentration on abstractions proposed by Hegel, had drawn increasing numbers of America's ablest thinkers away from the realism of their legal foundations. Through the writings of John Stuart Mill and Herbert Spencer, an altruistic interest in social reform became fashionable, but because of the idealistic turn given to what had become for the most part a materialistic foundation, the interest of the intellectuals in "the greatest good of the greatest number" was largely speculative and unrealistic. The law, functioning most successfully for prosperous litigants, while continuing to protest its devotion to the cause of justice, had tended to equate order not with justice but with the *status quo*, and to lend its support to the coercion of the rebellious.

⁹ *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 (1908).

¹⁰ L. D. B. to L. S. Richard, *THE INDEPENDENT* 130 (July 27, 1914), quoted in MASON, *BRANDEIS AND THE MODERN STATE* 26 (1933); see also LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 85 (1936).

¹¹ McILWAIN, *THE AMERICAN REVOLUTION* (1923).

Louis Brandeis, surrounded by such an intellectual climate, nevertheless refused to be drawn away from the realities of the common law system by the contemporary materialistic-idealistic speculations which captivated the brilliant mind of his friend Holmes. Instead, Brandeis even through the years they both served on the Supreme Court, continually tried to persuade Holmes to replace his speculative questionings with an insatiable concern for the facts of life, and particularly, in this era, for the facts in the economic sphere. Though never quite successful, it was perhaps due in part to Brandeis' arguments, that Holmes, at least as early as 1897,¹² lent his support to the recognition of the need for social considerations in the law. By that time Brandeis, in his M.I.T. lectures, had already indicated the innovations in the training of lawyers which were henceforth to be associated with his name: the study of labor law and of the use of the equitable remedy of injunction in labor disputes; the limitation of monopolies, the analysis of patent rights held by corporate entities, and the curbing of unfair trade practices; and the advancement of administrative tribunals and fact-finding agencies, as developed by the Interstate Commerce Commission,¹³ and by the State of Wisconsin, in part through the influence of his friends, Senator LaFollette¹⁴ and President Van Hise of Wisconsin University. The expansion of the principle of judicial notice in the law of evidence to include compilations of documented facts, which resulted in the Brandeis Brief, was an innovation as important in its implications for the growth of the common law as the introduction of equity, of mercantile law, or of canon law principles on adoption or wills, had been in earlier days. Brandeis' devotion to realities, and to their place in the common law system, notwithstanding the philosophically unrealistic jurisprudential speculations with which he was surrounded, held him closer than many of his ablest associates to the sound foundations of the living law.

¹² Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); COLLECTED LEGAL PAPERS 184 (1920).

¹³ LLOYD, *WEALTH AGAINST COMMONWEALTH* 19 (1894).

¹⁴ THE BRANDEIS GUIDE TO THE MODERN WORLD 281 (Lief ed. 1941); LIEF, BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 206, 489-491 (1936).

Protesting more than once that he had no philosophy of law and subscribed to no theoretical system, he nevertheless devised a jurisprudential pattern of thought which has had immense influence on the ablest young men who have entered the legal profession during the first half of the twentieth century. "I have no rigid social philosophy," he declared at one time, "I have been too intense on concrete problems of practical justice."¹⁵ Elsewhere he explained, "I have no general philosophy; all my life I have thought only in connection with the facts which came before me."¹⁶ It was this emphasis on facts, on the concrete as distinguished from those abstractions which had led so many of his contemporary jurists away from the realities of the common law foundations, which gave the decisive character to the Brandeis theory.

Brandeis thought of law as an instrument, a device, or a system of devices, through which greater justice could be effected in the lives of men. Because of its significance in the lives of human beings, law was to him both art and science and worthy of the highest effort possible. He did not, however, spin out theories to which he would coerce men to conform, as so many of the absolutists among "economic planners" who have misunderstood his leadership have attempted to do. By his resolute rejection of speculations in the abstract, he implied a repudiation not only of the Kantian separation of mind from body, but also of the Cartesian emphasis on thought to the subordination of existence. In other words, Brandeis would not have said, "I think, therefore you ought," with Kant, any more than he would have said, "I think, therefore I—and you—exist," with Descartes. On the contrary, had he formulated his philosophy in an aphorism, he would have been more likely to say, "I am and you are, and therefore I think." His approach was objective rather than subjective. For that reason, it was closer to the realism of the common law than much of the thinking of his contemporaries and followers. Unhappily it was listened to for the most part by men who, in being less reso-

¹⁵ *BRANDEIS, BUSINESS—A PROFESSION* iii (new ed. 1933).

¹⁶ *THE BRANDEIS GUIDE TO THE MODERN WORLD* 209, 428 (Lief ed. 1941).

lute in rejecting the abstract, were more conditioned by the prevailing subjectivism of contemporary American philosophy than by objective realism. Among those trained to think of logic as an instrument of inquiry in the John Dewey school,¹⁷ the Brandeis concept of law as an instrument of social policy has been understood as a weapon for absolutist regimentation instead of a rational approach to life's problems designed to appeal to each and every person endowed with human reason.

Louis Brandeis' first field of specialization in the law comprised the rules of evidence. He lectured on evidence at Harvard Law School¹⁸ and it was out of his mastery of that subject that he expanded the principle of judicial notice to cover wider knowledge of the facts of life as ascertained and documented through fact-finding investigative agencies. The Brandeis Brief was essentially a contribution to the law of evidence. No less important was his constant insistence on the facts in every aspect of his thinking. It was the objectivity of his search for facts—for evidence—which gives distinctive character to his significance for jurisprudence. "Out of the facts grows the law," he told the Harvard Ethical Society in 1905.¹⁹ On the other hand, "Law," he said, "has everywhere a tendency to lag behind the facts of life."²⁰ The practical effects of this, in America, he added, were that "the strain became dangerous, because constitutional limitations were invoked to stop the natural vent of legislation."²¹ With the wisdom of legislation he was not concerned, feeling that in a democracy the people who expressed their views through their representatives were entitled to careful consideration. What did concern him was the attitude of the courts in attempting to apply preconceived opinions in their interpretations of legislation covering factual situations. In the *Burns Baking Company* case occurs one of his strongest statements about the importance of facts:

¹⁷ Rooney, *Law and the New Logic*, 16 PROC. AM. CATH. PHILOS. ASS'N 197-199 (1940).

¹⁸ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 26 (1936).

¹⁹ BRANDEIS, BUSINESS—A PROFESSION iii (new ed. 1933).

²⁰ BRANDEIS, THE CURSE OF BIGNESS 319 (Fraenkel ed. 1934).

²¹ *Ibid.*

Unless we know the facts on which legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary, or capricious. Knowledge is essential to understanding and understanding should precede judging. Sometimes, if we would guide by the light of reason we must let our minds be bold.²²

The method which he devised to persuade the courts of the inadequacy of their concepts was consciously inductive. "In the past," he notes, "the courts have reached their conclusions largely deductively from preconceived notions and precedents; the method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts."²³ The persuasiveness of his utilization of facts as argumentation²⁴ was so effective that in less than ten years from the time he introduced the now famous "Brandeis Brief" he could tell the Chicago Bar Association in a no less famous address entitled "The Living Law"²⁵ that

The court reawakened to the truth of the old maxim of the civilians, *Ex facto jus oritur*. It realized that no law, written or unwritten, can be understood without 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 yet been fully won.²⁶

The following year, in one of his first dissenting opinions after his appointment to the Supreme Court, he still found it necessary to say:

Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.²⁷

Since he felt that "the earlier attitude of the judges was due to their theorizing on the subject instead of drawing in-

²² THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 98 (Lief coll. 1930).

²³ BRANDEIS, BUSINESS—A PROFESSION iv (new ed. 1933).

²⁴ MR. JUSTICE BRANDEIS 175 (Frankfurter ed. 1932).

²⁵ Title, but not method, apparently borrowed from Erlich's Seminar of Living Law at Czernowitz, described in PAGE, PROC. ASS'N AM. LAW SCHOOLS (1914).

²⁶ THE BRANDEIS GUIDE TO THE MODERN WORLD 165 (Lief ed. 1941).

²⁷ Dissent in *Adams v. Tanner*, 244 U. S. 590, 597, 61 L. ed. 1336, 1344; THE BRANDEIS GUIDE TO THE MODERN WORLD 65 (Lief ed. 1941).

ferences from existing facts" ²⁸ one of his biographers says of him that "he urged his companions of the conference rooms to slough off the shackles of precedents which no longer could apply because of new facts arising since the first enunciation of a rule" with the comment that "modification implies growth; it is the life of the law." ²⁹ By 1921, he was able to write, though still in a dissenting opinion:

The change in the law by which strikes were once illegal and even criminal and are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of the common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization. When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised.³⁰

Nor was his influence in the new direction confined only to the courts. Through his life-long interest in legal education and by means of his close association with Harvard Law School, he was instrumental in effecting a far-reaching change in the training of law students. A biographer tells us that

George W. Kirchwey of the Columbia Law School discussed with him the need of constructive work to restore respect for the law. This led to definite conclusions involving an extension of the functions of law schools, and he convinced the authorities at Harvard that legal education should be socialized; lawyers should not merely learn rules of law but their purpose and effect on the affairs of men. For this they must study the facts—human, industrial, social—to which laws were to be applied.³¹

It may perhaps be noted here as well as anywhere that Mr. Justice Brandeis has not been particularly fortunate in his biographers and commentators. Often they seem to have read into his opinions, official and unofficial, their personal preconceptions of law and government, derived less from the sound Anglo-American legal system—which, even by the

²⁸ THE BRANDEIS GUIDE TO THE MODERN WORLD 285 (Lief ed. 1941).

²⁹ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 429 (1936).

³⁰ Dissent in Duplex Co. v. Deering, 254 U. S. 443, 479, 65 L. ed. 349, 362 (1921).

³¹ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 429 (1936).

pragmatic test, has worked well enough to have survived many challenges—than from the theorizing of European writers who, to say the least, have been faced with situations and facts quite different in many respects from those prevailing in America. So here, the word “socialized” has an unfortunate connotation in connection with the advancement of “socialism.” If it be understood in that sense, it is as far as anything could be from Mr. Justice Brandeis’ views.³² He was interested in the welfare of the people and to that cause he may properly be said to have been concerned with social interests, but he was definitely opposed to state ownership of property, which is fundamental to socialism, and his efforts in the economic sphere were constantly spent in support of private enterprise, and of wider distribution of goods through increased consumption, based primarily upon an adequate living wage.

If the term “socialized” be used to refer to what has come to be known as the “sociological school of jurisprudence,”³³ a distinction must still be made between Dean Pound’s contributions and those of Justice Brandeis to that school and its place in legal education at Harvard. Mr. Justice Holmes, in the *Harvard Law Review* for 1897, had suggested that the training of lawyers and judges be such as to lead “them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down be justified,”³⁴ but with Mr. Justice Holmes so great an emphasis was put on “social advantage” that individual rights were subordinated unduly, at least in theory, to the welfare of society. With Dean Pound, the sociological school of jurisprudence was underwritten with a broad idealistic philosophical foundation which was quite foreign to Mr. Justice Brandeis’ concern with concrete facts. In view of what Mr. Lief says about Justice Brandeis’ discussion with Mr. Kirchwey of Columbia Law School, it seems likely that Dean

³² THE BRANDEIS GUIDE TO THE MODERN WORLD 164 (Lief ed. 1941) (gives his views on nationalization of land).

³³ *Id.* at 165.

³⁴ *Path of the Law*, 10 HARV. L. REV. 457, 468 (1897); COLLECTED LEGAL PAPERS 184 (1920); *cf. Ideals and Doubts*, 10 ILL. L. REV. 1 (1915); COLLECTED LEGAL PAPERS 307 (1920); but for criticism see Rooney, *Pluralism and the Law*, 13 NEW SCHOLASTIC 305 (1939).

Pound's article on "The Need for a Sociological Jurisprudence"³⁵ as well as the lectures he gave at about the same time at Columbia Law School, which were published in the *Harvard Law Review* under the title of "The Scope and Purpose of Sociological Jurisprudence,"³⁶ may have had considerable significance with respect to his appointment as Story Professor at Harvard Law School in 1911 and as Dean in 1916. A careful analysis of Dean Pound's writings, in comparison with Justice Brandeis', discloses so great a contrast in their treatment of the essentials of the common law system, however, as to indicate little in common with respect to method. The differences which characterize the intellectual achievements of the great leaders of what has been loosely referred to as the "sociological school of jurisprudence"—Holmes, Brandeis, Cardozo, and Pound—provide as fascinating a field for analysis as can be found in contemporary American thought.

More than the others, Mr. Justice Brandeis places faith in human reason. Mr. Justice Frankfurter puts it this way:

All men have some ultimate postulates by which they wrest a private world of order from the chaos of the world. The essential postulate of Mr. Justice Brandeis is effective and generous opportunity for the unflinching operation of reason. He is not theory-ridden himself and would not impose theories on others.³⁷

Similarly, I. Dilliard notes that "his faith in the human mind and in the will and capacity of the people to understand and grasp a truth never wavered or tired."³⁸ Justice Brandeis himself declared that "we need more minds, not fewer,"³⁹ and at another time he said of the people that "they must think; democracy is only possible, industrial democracy, among people who think, among people who are above the average intelligence . . . it is earned by effort . . . there is no effort . . . so taxing to the individual as to think, to analyze fundamentally."⁴⁰

³⁵ GREEN BAG (Oct. 1907); PROC. AM. BAR ASS'N (1907).

³⁶ 24 HARV. L. REV. 591-619 (1911); 25 HARV. L. REV. 140-168 (1911).

³⁷ MR. JUSTICE BRANDEIS 117 (Frankfurter ed. 1932).

³⁸ DILLIARD, MR. JUSTICE BRANDEIS, GREAT AMERICAN 125-6 (1941).

³⁹ CURSE OF BIGNESS 185 (Fraenkel ed. 1934).

⁴⁰ *Id.* at 36.

His faith in the human mind was the basis for Justice Brandeis' continual interest in education. Of some who misunderstood his efforts in this regard, a biographer says, "They had failed to grasp the fact that education itself 'is an essential element' of the Brandeis plan; they had not seen that in a democracy the work of enlightenment must go on continuously even though its results are slow, discouraging."⁴¹ All stages are covered in his pleas for education. He speaks of "the enlightenment which comes with the necessary thinking that trade-union agitation compels."⁴² His concern with law schools has already been mentioned. With respect to the improvement of the courts he says, "What we must do in America is not to attack our judges but to educate them."⁴³ At another time he suggests that "instead of amending the Constitution I would amend men's economic and social ideals."⁴⁴ He was particularly concerned about the effects of physical exhaustion from excessive working hours upon the necessary education of the people, saying in this connection:

For the attainment of such an education, such mental development, it is essential that the education shall be continuous throughout life, and an essential condition of such continuous education is free time; that is, leisure; and leisure does not merely imply time for rest, but free time when body and mind are sufficiently fresh to permit mental effort.⁴⁵

In fact, as Walton Hamilton puts it, he had a faith in intellectual procedures which yielded place only to a ruling passion for social righteousness.⁴⁶ His conviction that knowledge brings not only power⁴⁷ but virtue is reminiscent of Socrates,⁴⁸ for knowledge with him was desired less for its own sake than for its potentialities in the solution of those new problems which arise from new situations. As Mr. Justice Frankfurter says,

⁴¹ MASON, *THE BRANDEIS WAY* 298 (1938).

⁴² *BRANDEIS, BUSINESS—A PROFESSION* 18 (new ed. 1933).

⁴³ *BRANDEIS, BUSINESS—A PROFESSION* liv (new ed. 1933); *THE BRANDEIS GUIDE TO THE MODERN WORLD* 122 (Lief ed. 1941).

⁴⁴ *THE BRANDEIS GUIDE TO THE MODERN WORLD* 66 (Lief ed. 1941).

⁴⁵ *BRANDEIS, BUSINESS—A PROFESSION* 33 (new ed. 1933).

⁴⁶ *MR. JUSTICE BRANDEIS* 189 (Frankfurter ed. 1932).

⁴⁷ *BRANDEIS GUIDE TO THE MODERN WORLD* 127 (Lief ed. 1941).

⁴⁸ *MR. JUSTICE BRANDEIS* 124 (Frankfurter ed. 1932).

All his work has been, and is intended to be, chiefly educative. Problems with him are never solved. Problems to him are merely stages in the continuous processes of civilization. And so we find his insistence on difficulties, on the necessity for continuity of effort, on sustained interest, on the need of constant alertness, to the fact that the introduction or the invention of new forces may beget new difficulties.⁴⁹

For Mr. Justice Brandeis, thinking is both influential and inventive, but objective rather than partisan. "Problems of the trade," he says, are "not problems of one side or another of a controversy."⁵⁰ "Some of these questions," he points out, "are very difficult questions; they are questions which call for the inventive faculties, questions which involve experiments, questions which compel deep thinking."⁵¹ Elsewhere he refers to invention in broader terms: "To secure social advance we must regard the field of sociology and social legislation as a field for discovery and invention . . . we must rely upon all America (and the rest of the world) for our social inventions and discoveries . . ."⁵² The process of social invention he proposes for the law is the process of trial and error which has proven fruitful in the physical sciences. In one of his later dissenting opinions he says: "The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences is appropriate also in the judicial function."⁵³ And in another dissenting opinion he says, "In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."⁵⁴ Perhaps the most famous formulation of his thought on experimentation occurs in his dissenting opinion in *New State Ice Co. v. Liebman*, where he says,

⁴⁹ BRANDEIS, BUSINESS—A PROFESSION lx (new ed. 1933).

⁵⁰ CURSE OF BIGNESS 84 (Fraenkel ed. 1934).

⁵¹ *Ibid.*

⁵² THE BRANDEIS GUIDE TO THE MODERN WORLD 281 (Lief ed. 1941).

⁵³ Dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405, 76 L. ed. 815, 823 (1932); THE BRANDEIS GUIDE TO THE MODERN WORLD 169 (Lief ed. 1941).

⁵⁴ Dissent in *DiSanto v. Pennsylvania*, 273 U. S. 34, 37, 71 L. ed. 524, 527 (1927); THE BRANDEIS GUIDE TO THE MODERN WORLD 169 (Lief ed. 1941).

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.⁵⁵

The argument which he submitted to the United States Supreme Court in the Minimum Wage Case touches further upon experimentation and the United States Constitution. After pointing out that Canadian minimum wage legislation had been given effect through experiment carried on under a government without the specific constitutional limitation here invoked, he goes on to say,

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 inventions. 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—itsself 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.⁵⁶

⁵⁵ 285 U. S. 262, 310, 76 L. ed. 747, 771 (1932).

⁵⁶ *THE CURSE OF BIGNESS* 68-9 (Fraenkel ed. 1934).

One of his commentators makes a point about his views on experimentation with specific reference to the Constitution which merits quotation here:

Lest the revolutionary character of the Brandeis influence and the Brandeis philosophy and ideals be placed in the wrong perspective, it should never be forgotten that a starting-point with him is always that our constitution is an inspiration, elastic enough, if wisely interpreted, to permit all needed growth; that slow, patient and studious experiment is better than sweeping and abstract theory; and that large, violent theoretical change is to be shunned.⁵⁷

He had learned from his professor of constitutional law, James Bradley Thayer, his biographers tell us, that "the Constitution has ample resources within itself to meet the changing needs of successive generations."⁵⁸

In acknowledging that "the field of social invention is a field higher than that which presents itself in the mechanized world,"⁵⁹ Mr. Justice Brandeis feels that "when we know that the evil exists which it is sought to remedy, the legislature must be given latitude in experimentation."⁶⁰ The question which the court should ask in reviewing legislative action of the states is whether an evil exists. "If there is an evil," he says, "is the remedy, this particular device introduced by the legislature, directed to remove that evil which threatens health, morals, and welfare . . . an arbitrary exercise of power?"⁶¹ By thus giving broad scope to experimentation in the "political and social laboratories" of the forty-eight states,⁶² Mr. Justice Brandeis hopes to encourage creative thinking of the highest type within the legal sphere—thinking which stops not with the invention of a legislative device but only with its employment in the mechanism of justice. As Walton Hamilton says of him,

As with all creative effort, it is not the device, but the skilled use of the device, not the procedure, but the procedure suited to the occasion, which reveals the craftsman . . . The key to the judicial tech-

⁵⁷ OTHER PEOPLE'S MONEY xxiv (1932).

⁵⁸ MR. JUSTICE BRANDEIS 53 (Frankfurter ed. 1932); cf. MASON, BRANDEIS AND THE MODERN STATE 111 (1933); LEVY, OUR CONSTITUTION: TOOL OR TESTAMENT 248 (1941).

⁵⁹ THE BRANDEIS GUIDE TO THE MODERN WORLD 78 (Lief ed. 1941).

⁶⁰ THE CURSE OF BIGNESS 65 (Fraenkel ed. 1934).

⁶¹ *Id.* at 68.

⁶² THE BRANDEIS GUIDE TO THE MODERN WORLD 281 (Lief ed. 1941).

nique of Mr. Justice Brandeis is not far to seek He knows that usages employed in the process of judgment are inventions contrived to serve ends of justice; he regards them as instruments to be employed rather than as compulsions to be obeyed; and as conditions change and common sense gives way to its better, he would keep them alive by fresh contact with reality The very conception of the instrumental character of the mechanism of justice makes the intellectual views of the man dominant in the opinions of Mr. Justice Brandeis.⁶³

The reason Justice Brandeis was concerned that experimentation and inventive thinking be fostered and encouraged in the legal world was because he believed that "the aspirations of the people must have adequate legal expression."⁶⁴ He went on to say that the whole industrial world is in a state of ferment and that the people are beginning to doubt whether political democracy and industrial absolutism can coexist in the same community. The people's thought would take shape in action, he felt, if given proper opportunity, and "it lies with our lawyers to say in what lines that action shall be expressed; wisely and temperately, or wildly and intemperately; in lines of evolution or in lines of revolution."⁶⁵

Since the most insistent problems in the modern world affecting the common welfare are found in the sphere of corporate management and labor relations, Justice Brandeis' greatest concern was the adaptation of legal rules to fit the facts of industrial life. The lawyers' task in correcting the evils of industrial absolutism he considered similar to their earlier task with respect to political absolutism. Since the advanced state, to some extent through the efforts of lawyers, is now no longer absolutistic but instead guarantees political freedom under constitutional and democratic forms, its assistance should be used in some way, he feels, to help the workers to attain democracy in industry since that would be in the public interest. And he carried the analogy between political and industrial democracy even further when he said, In order that collective bargaining should result in industrial democ-

⁶³ MR. JUSTICE BRANDEIS 182-3 (Frankfurter ed. 1932).

⁶⁴ BUSINESS—A PROFESSION IV (new ed. 1933).

⁶⁵ *Id.* at lvi.

racy it must go further and create practically an industrial government—a relation between employer and employee where the problems as they arise from day to day . . . may come up for consideration and solution as they come up in our political government.⁶⁶

The modern private corporation has grown so gigantic that it has become a danger to society, a power divorced from its myriad stockholders, shirking moral responsibility, and is in effect a threat to the state itself, an actual state within a state.⁶⁷ An unfortunate element in the situation, he felt, lay in the fact that "the civilized world today believes that in the industrial world self-government is impossible; that we must adhere to the system which we have known as the monarchical system."⁶⁸ One way to correct the situation is by way of limitation of corporate size through legislative action by the state.⁶⁹ Another is to secure to the workingman "not only a voice but a vote, not merely a right to be heard, but a position through which labor may participate in management."⁷⁰ It is the sharing of responsibility, when it comes, that will indicate full-grown industrial democracy.⁷¹ Since democracy implies rule of the people, "the end for which we must strive," he says, "is the attainment of rule by the people, and that involves industrial democracy as well as political."⁷²

Through democracy, both political and industrial, greater liberty is possible. Since lawyers have traditionally worked for liberty, their obligation to further democracy, industrial as well as political, is fundamental to their profession, in Mr. Justice Brandeis' mind. At one time he said,

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 the struggle for liberty and in the government which resulted.⁷³

⁶⁶ THE CURSE OF BIGNESS 78-9 (Fraenkel ed. 1934); THE BRANDEIS GUIDE TO THE MODERN WORLD 134 (Lief ed. 1941).

⁶⁷ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 329 (1936).

⁶⁸ THE CURSE OF BIGNESS 35 (Fraenkel ed. 1934).

⁶⁹ *Id.* at 80.

⁷⁰ *Id.* at 83.

⁷¹ THE BRANDEIS GUIDE TO THE MODERN WORLD 94 (Lief ed. 1941).

⁷² THE CURSE OF BIGNESS 73 (Fraenkel ed. 1934).

⁷³ BUSINESS—A PROFESSION 330 (new ed. 1933); THE BRANDEIS GUIDE TO THE MODERN WORLD 174 (Lief ed. 1941).

Elsewhere he ties the function of law and industrial liberty into the whole Anglo-American legal tradition, when he says, The history of Anglo-Saxon and of American liberty rests upon that struggle to resist wrong—to resist it at any cost when first offered rather than to pay the penalty of ignominious surrender. It is the old story of the “ship money,” of “the writs of assistance,” and of “taxation without representation.” The struggle for industrial liberty must follow the same lines.⁷⁴

The value of liberty is repeatedly stressed by Mr. Justice Brandeis in such terms as these:

We set out with the principle, . . . the fundamental policy of the Anglo-American people, that liberty should not be restricted except in so far as required, for the public welfare, health, safety, morals, and general public conditions. . . . The liberty of each individual must be limited in such a way that it leaves to others the possibility of individual liberty.⁷⁵

And, again:

What are American ideals? They are the development of the individual for his own and the common good, the development of the individual through liberty, and the attainment of the common good through democracy and social justice. Our form of government, as well as humanity, compels us to strive for the development of the individual man.⁷⁶

But, in order to attain the necessary degree of liberty, political democracy, for Justice Brandeis, is insufficient without industrial democracy, and the right to manage one's own economic affairs. In 1911 he declared that

Politically, the American workingman is free—so far as law can make him so Men are not free while financially dependent upon the will of other individuals. Financial dependance is consistent with freedom only where claim to support rests upon right, not upon favor.⁷⁷

It is because “we want to have the workingman free; not to have him the beneficiary of a benevolent employer,”⁷⁸ that Justice Brandeis looks to the law to break down privi-

⁷⁴ BUSINESS—A PROFESSION 24 (new ed. 1933); THE BRANDeis GUIDE TO THE MODERN WORLD 131 (Lief ed. 1941).

⁷⁵ THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDeis 377 (Lief coll. 1930); THE BRANDeis GUIDE TO THE MODERN WORLD 290 (Lief ed. 1941).

⁷⁶ BUSINESS—A PROFESSION 366 (new ed. 1933).

⁷⁷ *Id.* at 59.

⁷⁸ MASON, THE BRANDeis WAY 159 (1938).

lege and strengthen rights in order that it may properly command respect.⁷⁹

In view of the unrest in this country, in view of the widespread feeling that law is something different for the rich than for the poor, it is of the utmost importance that men should not trifle with the law, . . . that they should look upon it as a standard to be lived up to; and that they should recognize that the law is supreme over man, and in this republic, exists for all men alike.⁸⁰

It is the small man who needs the protection of the law, he feels, "but the law becomes the instrument by which he is destroyed."⁸¹ This situation "is largely the result of unwise, man-made privilege creating law," he says,⁸² and therefore the legislatures and the courts cannot "sit idly by while through concentration and utilization of economic power, strong-willed industrialists make over our civilization."⁸³

Although he looks to the law for help, Justice Brandeis does not place full reliance upon legislation to effect the necessary change. "I have grave doubt," he says, "as to how much can be accomplished by legislation, unless it be to set a limit upon the size of corporate units."⁸⁴ Furthermore, since "remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression," he believes we should "seek for betterment within the broad lines of existing institutions . . . constant inquiry into facts . . . and much experimentation."⁸⁵ "We should not regulate anything by law except where an evil exists which the existing forces of unionism or otherwise (employers' associations, consumers' cooperatives, etc.) are unable to deal with."⁸⁶

In accordance with his faith in human reason, Justice Brandeis places greater reliance on self-government than he does on legal instrumentalities, no matter how ingeniously

⁷⁹ See LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 257 (1936); *THE BRANDEIS GUIDE TO THE MODERN WORLD* 193 (Lief ed. 1941) (Law must be respectable).

⁸⁰ *THE BRANDEIS GUIDE TO THE MODERN WORLD* 166 (Lief ed. 1941).

⁸¹ *MR. JUSTICE BRANDEIS* 133 (Frankfurter ed. 1932).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ MASON, *BRANDEIS AND THE MODERN STATE* 79 (1933).

⁸⁵ *OTHER PEOPLE'S MONEY* xxiv; *THE BRANDEIS GUIDE TO THE MODERN WORLD* 51 (Lief ed. 1941).

⁸⁶ MASON, *THE BRANDEIS WAY* 36 (1938).

devised. Liberty is self-wrought, largely self-imposed, he feels, and "freedom cannot be conferred by decrees of government."⁸⁷ Elsewhere he points out that "democracy exists only as the people take upon their own shoulders the responsibility for their own welfare."⁸⁸ The fundamental cause of the wars lay not so much in economic ambitions and treaty violations as in "the longing of the people for self-government, for self-expression; and the mistaken belief on one side or the other that this self-development justly requires the subjection of other peoples."⁸⁹ With self-government, democracy goes hand in hand. As he expresses it,

Democracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only when the process of perfecting the individual is pursued. His development is attained mainly in the processes of common living.⁹⁰

So consistent is he in his conviction about the necessity of self-government that he believed the country should go back to the concept of federation, letting each state reach for self-development and evolve its own sound policy.⁹¹ He felt that NIRA, purporting industrial self-government, actually surrendered control of production, of prices and trade practices, to a small group of big corporate employers, to the destruction of all competition.⁹² He held that widely distributed stock ownership, whether or not among employees, had the effect of destroying moral responsibility on the part of those who profited from a corporation's activities.⁹³ The New Deal, in spite of its adoption of many of his devices and sugges-

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 297.

⁸⁹ *THE CURSE OF BIGNESS* 268 (Fraenkel ed. 1939).

⁹⁰ *Id.* at 270.

⁹¹ LIEF, BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 470 (1936).

⁹² MASON, *THE BRANDEIS WAY* 80 (1938).

⁹³ *THE CURSE OF BIGNESS* 169 (Fraenkel ed. 1934); *THE BRANDEIS GUIDE TO THE MODERN WORLD* 238 (Lief ed. 1941); LIEF, BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 453 (1936).

tions, tended, he felt, toward a centralization of governmental power⁹⁴ which was undesirable in its effect on human personality.

His concern for self-government is based upon his confidence in the capacity of men to do more in the interests of justice than they usually have been permitted to do through faulty organization of human energies. Good government established through laws which adequately meet the capacities of men would not limit but would encourage men to utilize their powers. "The margin between that which men naturally do and which they can do is so great," he says, "that a system which urges men on to action, enterprise and initiative, is preferable in spite of the wastes that necessarily attend that process."⁹⁵ Elsewhere he relates this need for development to the United States Constitution, when he says,

The "right to life" guaranteed by our Constitution is now being interpreted according to demands of social justice and of democracy as the right to *live*, and not merely to exist. In order to live, men must have the opportunity of developing their faculties, and they must live under conditions in which their faculties may develop naturally and healthily.⁹⁶

One of the reasons Justice Brandeis is convinced of the necessity of a living wage for all is his belief that financial independence is essential to the proper development of character. "It is in the proper spending of the dollar," he says, "that both men and women can best show their efficiency."⁹⁷ After pointing out that "half a century ago nearly every American boy could look forward to becoming independent as a farmer or mechanic, in business or in professional life,"⁹⁸ he notes that under modern industrial conditions, "at least twenty-one of the twenty-four hours are devoted to *subsistence* and a small fraction of the day is left for *living*."⁹⁹ Such a situation indicates an inverted sense of values in which property is served to the detriment of humanity instead of its benefit.

⁹⁴ DILLIARD, MR. JUSTICE BRANDEIS, GREAT AMERICAN 59 (1941).

⁹⁵ THE CURSE OF BIGNESS 116 (Fraenkel ed. 1934).

⁹⁶ THE BRANDEIS GUIDE TO THE MODERN WORLD 66 (Lief ed. 1941).

⁹⁷ *Id.* at 294.

⁹⁸ BUSINESS—A PROFESSION 71 (new ed. 1933).

⁹⁹ *Id.* at 30.

"Property is only a means," he says. "It has been the frequent error of our courts that they have made the means an end. Correct that error, put property back into its proper place, and the whole social-legal conception becomes at once consistent."¹⁰⁰

By securing to each individual financial independence and the right to participate in the making of the laws under which he lives not only in the political sphere but also in the industrial, men can best achieve the fullest development of their powers. It is in "obedience to the laws which the people make for themselves in a business, and not the laws which are made for them and in the making of which they have no part,"¹⁰¹ that real democracy is achieved. Democracy, industrial as well as political, is therefore the end toward which Mr. Justice Brandeis looks in his efforts for social justice. He puts it this way:

We must bear in mind all the time that however much we may desire material improvement and must desire it for the comfort of the individual, that the United States is a democracy, and that we must have, above all things, men. It is the development of manhood to which any industrial and social system should be directed. We Americans are committed not only to social justice in the sense of avoiding things which bring suffering and harm, like unjust distribution of wealth, but we are committed primarily to democracy. The social justice for which we are striving is an incident of our democracy, not the main end. It is rather the result of democracy—perhaps its finest expression—but it rests upon democracy, which implies the rule of the people. And therefore the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy.¹⁰²

In the development of democracy and self-government, not uniformity but differentiation is desirable. "What we want," Justice Brandeis says, "is not a dominant race or races, not uniformity, but what Felix Adler expressed as 'the utmost differentiation of the type of culture, the utmost variety and richness in the expression of fundamental human faculties.'" ¹⁰³ Elsewhere he says, "Democracy rejected the

¹⁰⁰ THE BRANDEIS GUIDE TO THE MODERN WORLD 231 (Lief ed. 1941).

¹⁰¹ THE CURSE OF BIGNESS 35 (Fraenkel ed. 1934).

¹⁰² THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 382 (Lief coll. 1930).

¹⁰³ THE BRANDEIS GUIDE TO THE MODERN WORLD 313 (Lief ed. 1941); DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 221 (1929).

proposal of the superman who should rise through the sacrifice of the many; it insists that the development of each individual is not only a right, but a duty to society, and that our best hope for civilization lies not in uniformity, but in wide differentiation."¹⁰⁴

The allusion here to "a duty to society" raises a question as to whether Mr. Justice Brandeis shifted his attention somewhat from the individual man and his development toward society and the group after 1910 when he first became conscious of his racial heritage as a Jew. Belief in the Jewish religion had never been part of his upbringing, his family having drifted away from synagogue membership several generations earlier.¹⁰⁵ In coming to America, they took part from the beginning in the political and educational life around them, so that aside from family connections, their associates were mostly native Americans of German and English descent. Especially in Cambridge and Boston, where Louis Brandeis made friends in the best circles through his brilliant record at Harvard Law School, the environment was conducive to the adoption of traditional American ideals rather than to any attraction for the age-old Jewish culture. It is therefore not surprising that his early thought reflected the views he had learned in American schools and in influential American homes. This would account for the familiar ring of his concern for liberty, education, justice, independence, responsibility, and self-government under the provisions of the United States Constitution. The enlargement of his views from political to industrial democracy was a natural result of the labor troubles which grew steadily in significance during his early manhood. That he was interested in the Fabian movement in England without being influenced to adopt socialism is an indication of the soundness of his understanding of American principles of government and of the acuteness of his legal mind. When his sympathies with labor led to his appointment to arbitrate the difficulties of the garment workers in

¹⁰⁴ THE CURSE OF BIGNESS 221-222 (Fraenkel ed. 1934).

¹⁰⁵ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 16 (1936).

New York, where employers and employees both were Jewish, he is known to have developed a new interest in Jewish people and their ideas which was different from anything he had hitherto experienced.¹⁰⁶ From that time on there is observable in his writings an emphasis on society and the group which is at variance with his earlier concern with the welfare of the individual workingman. Whether he was conscious of the change of viewpoint is not quite clear, although frequently in his later writings he undertook to reconcile Jewish philosophy with American ideals by postulating that the latter were the political expression of the former's goals.¹⁰⁷ What he has to say upon this point and the implications of his thoughts about society and the individual are pertinent here.

Perhaps the strongest statement he made regarding the superiority of society to the individual was made in 1921 in his dissenting opinion in the *Duplex Printing* case, where he says:

All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community.¹⁰⁸

Elsewhere speaking of the Jews and their rights as a group, he says,

This right of development on the part of the group is essential to the full enjoyment of rights by the individual. For the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part.¹⁰⁹

An earlier statement, made in 1902, indicates a feeling even then for brotherhood in the Jewish sense as distinguished from altruism as John Stuart Mill, for example, would have described it:

The spirit which subordinates the interests of the individual to that of the class is the spirit of brotherhood—a near approach to altruism; it reaches pure altruism when it involves a sacrifice of present interests for the welfare of others in the distant future.¹¹⁰

¹⁰⁶ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 191 (1936); DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 221 (1929).

¹⁰⁷ DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 203 (1929).

¹⁰⁸ 254 U. S. 443, 479, 65 L. ed. 349, 362 (1921); SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 26 (Lief coll. 1930).

¹⁰⁹ DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 171 (1929).

¹¹⁰ BUSINESS—A PROFESSION 89 (new ed. 1933).

Ten years later he told the Young Men's Hebrew Association in Chelsea :

But the ages of sacrifice have left us with the sense of brotherhood ; that brotherhood has given us the feeling of solidarity which makes each one of us press forward with loyalty to fulfil the obligations of the brotherhood.¹¹¹

The connection between the Jewish idea of brotherhood and the American idea of justice he expresses in this way :

Our teaching of brotherhood and righteousness has, under the name of democracy and social justice, become the twentieth-century striving of America and western Europe.¹¹²

From this foundation of brotherhood, the striving for democracy derives its ethical value, he believes :

This great ethical movement for real brotherhood of man reinforces the demand of the workingman for wages, hours and conditions which will permit of his living according to those higher standards essential to life, health and the performance of the duties of citizenship in a democracy.¹¹³

In a paragraph of the address he delivered before the Menorah Society of Columbia University in 1914, he discloses that the real source of this Jewish doctrine of brotherhood with its implicit subordination of the individual to the welfare of the group is to be found in the Jewish doctrine of immortality. On this point he says :

To describe the Jew as an individualist is to state a most misleading half-truth. He has to a rare degree merged his individuality and his interests in the community of which he forms a part. This is evidenced among other things by his attitude toward immortality . . . despite our national tragedy, the doctrine of individual immortality found relatively slight lodgment among us.¹¹⁴

Perhaps the clearest indication of his personal feeling regarding immortality appears in the same address, where he incorporates a paragraph from *Ahad Ha'am* which he considers beautifully put. *Ahad Ha'am* wrote :

Judaism did not turn heavenward and create in Heaven an eternal

¹¹¹ DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 157 (1929).

¹¹² CURSE OF BIGNESS 224 (Fraenkel ed. 1934).

¹¹³ BUSINESS—A PROFESSION 38 (new ed. 1933).

¹¹⁴ THE BRANDEIS GUIDE TO THE MODERN WORLD 118 (Lief ed. 1941).

habitation of souls. It found "eternal life" on earth by strengthening the social feeling of the individual; by making him regard himself not as an isolated being with an existence bounded by birth and death, but as part of a larger whole, as a limb of the social body. This conception shifts the center of gravity not from the flesh to the spirit, but from the individual to the community; and concurrently with this shifting, the problem of life becomes a problem not of the individual, but of social life. I live for the sake of the perpetuation and happiness of the community of which I am a member; I die to make room for new individuals who will mould the community afresh and not allow it to stagnate and remain forever in one position. Where the individual thus values the community as his own life and strives after its happiness as though it were his individual well-being, he finds satisfaction and no longer feels so keenly the bitterness of his individual existence, because he sees the end for which he lives and suffers.

To this Justice Brandeis adds the comment, "Is not that the very essence of the truly triumphant twentieth-century philosophy?"¹¹⁵

The tendency to look to the future in this temporal world, rather than in another, and to work toward the immortality of the race by procreation here rather than through the resurrection of the body after this life, is so characteristic of the Jewish thought about us that it is not surprising that Jewish thinkers from Marx and Durkheim to S. Alexander and Laski should emphasize the importance of the masses, the solidarity, the collectivity, the brotherhood, in the temporal evolution of godliness and social justice even to the point of minimizing the significance of the individual. What is astonishing is the fact that an American judge like Mr. Justice Holmes could have been influenced to advocate the sacrifice of the individual to social interests¹¹⁶ to an extent greater than the Jewish Justice Brandeis with his American training, was willing to go. For Mr. Justice Brandeis there was always present an ethical factor which for Mr. Justice Holmes was irrelevant. This ethical factor took the place

¹¹⁵ LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 323 (1936); DE HAAS, *LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH* 196 (1929).

¹¹⁶ HOLMES, *COMMON LAW* 108 (1881); ROONEY, *LAWLESSNESS, LAW AND SANCTION* 119 (1937).

for Justice Brandeis of the theological virtue of hope, for he says,

The sole bulwark against demoralization is to develop in each new generation of Jews in America the sense of "noblesse oblige." That spirit can be developed in those who regard their race as destined to live, and to live with a bright future.¹¹⁷

The stress Mr. Justice Brandeis puts upon morals and ethics in his effort to restore respect for the law is almost unique among modern jurists. Most theorists about the law since Hobbes and Bentham have endeavored to separate morals from law. Even Justice Cardozo talks not about morals but about the *mores* of the community which the judge intuitively reflects in enunciating law.¹¹⁸ With Mr. Justice Brandeis, however, the notion of ethics remains a criterion outside the law by which the goodness of the law is measured. His concept of ethics is not clearly set forth but his confidence in the existence of morality is as certain as is his belief in law. Apparently his idea of morals is closely associated with his feeling for brotherhood, democracy, and the future of the race, for he says,

Precisely because I believe in this future in which material comfort is to be comparatively easy of attainment, I also believe that the race must steadily insist upon preserving its moral vigor unweakened.¹¹⁹

Elsewhere he refers to "this great ethical movement for real brotherhood of men" when speaking about "the awakened social sense of the community, with its longing for a truer democracy."¹²⁰ He notes that "there is also a law of ethics that man shall not advance his own interests by exploiting his weaker fellows or through casting burdens upon the community."¹²¹ And he relates the sacrifices required by the moral law for democracy when he says,

But democracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain

¹¹⁷ THE CURSE OF BIGNESS 229 (Fraenkel ed. 1934).

¹¹⁸ CARDOZO, GROWTH OF LAW 52-3 (1924); Rooney, *Mr. Justice Cardozo's Relativism*, 19 NEW SCHOLASTICISM 14 (1945).

¹¹⁹ THE CURSE OF BIGNESS 46 (Fraenkel ed. 1934).

¹²⁰ THE BRANDEIS GUIDE TO THE MODERN WORLD 143 (Lief ed. 1941).

¹²¹ THE CURSE OF BIGNESS 56 (Fraenkel ed. 1934).

than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only where the process of perfecting the individual is pursued. His development is attained mainly in the processes of common living. Hence the industrial struggle is essentially an affair of the Church and its imperative task.¹²²

It is because he believes America's fundamental law seeks to make real the brotherhood of man which has been the Jewish fundamental law for over twenty-five hundred years that he finds in twentieth century America the demand for social justice which is similar to the Jewish striving for effective democracy.¹²³ With the Jews, the passion for righteousness was strengthened through persecution.¹²⁴ "There is something better than peace," he says, "and that is the peace that is won by struggle."¹²⁵ Again he declares, "progress flows only from struggle."¹²⁶ Elsewhere he associates the battle for progress with freedom and "that is the only way we can advance."¹²⁷

Since struggle for freedom and justice is a moral duty for Mr. Justice Brandeis, he has no sympathy with so-called Christian resignation in the face of evil. He feels that an awakened moral sense in the social-minded intelligentsia combined with the awakened economic sense of organized labor "could break down the stupid belief that business evils, such as espionage, were inevitable ills which a Christian should bear with resignation."¹²⁸ In his brief on the Oregon minimum wage law he marvels at "the patience with which widespread evils have been borne as if they were inevitable," and adds, "how potent the forces of conservatism that could have prevented our learning that, like animals, men and women must be properly fed and housed, if they are to be

¹²² *Id.* at 270-271.

¹²³ LIEF, BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 322 (1936); DE HAAS, LOUIS D. BRANDEIS, *A BIOGRAPHICAL SKETCH* 161 (1929).

¹²⁴ *THE CURSE OF BIGNESS* 228 (Fraenkel ed. 1934).

¹²⁵ *THE BRANDEIS GUIDE TO THE MODERN WORLD* 212 (Lief ed. 1941).

¹²⁶ *THE BRANDEIS GUIDE TO THE MODERN WORLD* 179 (Lief ed. 1941); *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* 387 (Lief coll. 1930).

¹²⁷ *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* 402 (Lief coll. 1930).

¹²⁸ LIEF, BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 438 (1936).

useful workers and survive.”¹²⁹ Nearly twenty years later in his dissenting opinion in *Liggett v. Lee*¹³⁰ he speaks of “the evils attendant upon the free and unrestricted use of the corporate mechanism, as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation.” Instead of being resigned to evils, he advocates fighting them and with weapons other than prayers:

If the Survey expects to break down the stupid belief that irregularity is inevitable—one of the ills which a Christian should bear with resignation—it will have to fight with weapons other than the paternosters of princes and politicians. . . .¹³¹

The reason that he urges the invention of social weapons which will effectively correct economic injustices is because he recognizes the deadening effect of the power and control exercised by business monopolies upon life. “Those who control our trusts,” he says, “do not want the bother of developing anything new.”¹³² Instead they seek to control essential raw material in order to prevent business rivals’ access to it.¹³³ The steel trust for example, “by buying up existing plants and particularly ore supplies at fabulous prices, and by controlling strategic transportation systems” eliminated competitors. Such trusts obtain huge profits not through efficiency in production and distribution but through control of the market, a control which amounts to “the exercise by a small body of men of the sovereign taxing power.”¹³⁴ Through size alone great corporations have brought “such concentration of economic power that so-called private corporations are sometimes able to dominate the state.”¹³⁵ The evil that results is two-fold. In the first place wide diffusion of stock ownership prevents the thousands of stock-holders from exercising the supervision for which they are morally responsible over the few men who direct corporate activities.¹³⁶ On the other hand, the endeavor by combinations

¹²⁹ THE BRANDEIS GUIDE TO THE MODERN WORLD 288 (Lief ed. 1941).

¹³⁰ 288 U. S. 517, 541, 77 L. ed. 929, 940 (1933); THE BRANDEIS GUIDE TO THE MODERN WORLD 288 (Lief ed. 1941).

¹³¹ *Id.* at 83.

¹³² THE CURSE OF BIGNESS 118 (Fraenkel ed. 1934).

¹³³ *Id.* at 124.

¹³⁴ *Id.* at 109.

¹³⁵ *Id.* at 169.

¹³⁶ *Ibid.*

of superior power to close the field of competition or to restrict individual effort, takes "away from the people that protection which comes from the incentive in the individual to create."¹³⁷ From both viewpoints he points out that "neither our intelligence nor our characters can long stand the strain of unrestricted power."¹³⁸ Because he feels that "unlicensed liberty leads necessarily to despotism or oligarchy," Mr. Justice Brandeis believes that "those who are stronger must to some extent be curbed."¹³⁹

To offset the tendency toward corporate despotism and its consequent demoralizing effect upon democracy, Mr. Justice Brandeis relies upon the power of the state. "The power of the state," he observes, "exists equally whether the end sought to be attained is the promotion of health, safety, or morals, or is the prevention of fraud or the prevention of general demoralization."¹⁴⁰ Primarily the power of the state to regulate is a legislative power, although legislation may be made effective through administrative agencies or tribunals. The means used should be preventive as far as possible rather than punitive.¹⁴¹ In devising techniques through which administrative tribunals may enforce limitations and rules prescribed by the legislatures Mr. Justice Brandeis is particularly interested in novel inventions as well as in the use of well-established means like the taxing power. In the institution of the Federal Trade Commission, with which he had much to do, he was most concerned with the device known as "cease and desist orders"¹⁴² and he pointed out that the procedure "is a strictly preventive measure taken in the interest of the general public . . . it is brought to prevent . . . not the commission of acts of unfair competition but the pursuit of unfair methods. . . ." ¹⁴³ He felt that by thorough

¹³⁷ THE CURSE OF BIGNESS 118 (Fraenkel ed. 1934); THE BRANDEIS GUIDE TO THE MODERN WORLD 310 (Lief ed. 1941).

¹³⁸ BUSINESS—A PROFESSION 17 (new ed. 1932).

¹³⁹ THE CURSE OF BIGNESS 114 (Fraenkel ed. 1934).

¹⁴⁰ THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 4 (Lief coll. 1930).

¹⁴¹ THE BRANDEIS GUIDE TO THE MODERN WORLD 242 (Lief ed. 1941).

¹⁴² LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 291 (1936).

¹⁴³ THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 76 (Lief coll. 1930).

fact-finding and bringing to the attention of the public the knowledge of unfair business methods commonly used, much could be accomplished.¹⁴⁴ He told Congress that it was his belief "that by the adoption of a proper system of accounting, supplemented by proper publicity, we shall reduce to a great extent, the number of breaches of law."¹⁴⁵

Another device which interested him a great deal was the certificate of public convenience which gave rise to the famous *Ice* case.¹⁴⁶ The tax power, too, he felt should be used for the encouragement or discouragement of competition,¹⁴⁷ or anti-social evils attributable to bigness.¹⁴⁸ But in advocating legislative experimentation with such devices he did not intend to displace the courts; he wished, on the contrary, "to make them efficient instruments of justice."¹⁴⁹ He thought that efficient judicial machinery would be "even more potent as a deterrent than as a cure,"¹⁵⁰ while on the other hand, inefficient judicial machinery resulting in a failure of justice brought all law into disrepute.¹⁵¹ Since such failure was not inherent in the judicial process, he believed, but "due wholly to a surprising lack of effective legal methods and machinery"¹⁵² he felt that better methods would insure greater respect for law.

With regard to judicial legislation he said, "When a court decides a case upon grounds of public policy, the judges become in effect legislators."¹⁵³ In amplification of this view he explained at another time,

The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing prin-

¹⁴⁴ THE CURSE OF BIGNESS 141 (Fraenkel ed. 1934).

¹⁴⁵ THE BRANDEIS GUIDE TO THE MODERN WORLD 242 (Lief ed. 1941).

¹⁴⁶ THE CURSE OF BIGNESS 155 (Fraenkel ed. 1934).

¹⁴⁷ THE BRANDEIS GUIDE TO THE MODERN WORLD 33 (Lief ed. 1941).

¹⁴⁸ *Id.* at 20.

¹⁴⁹ THE CURSE OF BIGNESS 323 (Fraenkel ed. 1934).

¹⁵⁰ *Id.* at 132.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ THE SOCIAL AND ECONOMIC THEORIES OF MR. JUSTICE BRANDEIS 403 (Lief coll. 1930).

ciple to new cases, but the introduction of a new principle which is properly called judicial legislation.¹⁵⁴

From this explanation it would seem clear that his own particular device of enlarging the scope of judicial notice to include greater quantities of facts, the device which has become famous as the Brandeis Brief, is not to be considered as judicial legislation. As one of his biographers writes:

"The touch of the artist is most apparent in Mr. Justice Brandeis' creative use of judicial notice; the judgment of the court is predicated not only upon the law but also upon the matter to which it relates—the constitutionality of a statute depends upon its reasonableness. . . ." ¹⁵⁵ Of this same device another biographer recalls that "Cardozo regarded Brandeis as standing 'with the few great judges of his country and the world,' the originator of a method of solving constitutional law problems 'which, if followed, would keep the law responsive to changing human needs; in his work on the bench he has shown this method in action.'" ¹⁵⁶

Whether the agency of the state be judicial, administrative, or legislative, its functioning as an instrumentality of law will become increasingly important, he felt, in securing freedom. This implies the continued growth of governmental control. But legal control as Justice Brandeis visualizes it is not control over persons but rather control for the protection of human beings and their greater liberty.

"I can see," he says, "that the tendency is steadily toward governmental control. The government must keep order not only physically but socially. In old times the law was meant to protect each citizen from oppression from physical force. But we have passed . . . to oppression in other ways. And the law must still protect a man from things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind." ¹⁵⁷

Unlike Mr. Justice Frankfurter and Harold Laski, Justice Brandeis did not rely upon experts, even in administrative tribunals, to make the legal machine effective. On the

¹⁵⁴ THE CURSE OF BIGNESS 304 (Fraenkel ed. 1934).

¹⁵⁵ MR. JUSTICE BRANDEIS 179-180 (Frankfurter ed. 1932).

¹⁵⁶ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 452 (1936).

¹⁵⁷ BUSINESS—A PROFESSION lii (new ed. 1933).

contrary he had learned to distrust experts and to put more faith in democratic methods. "I began to see," he says, "that many things sanctioned by expert opinion and denounced by popular opinion were wrong."¹⁵⁸ But he did go along part way with Frankfurter, one of his biographers notes, on the value of a "well-equipped group who could give their time to threshing out legislative proposals and promoting those that appeared to be sound."¹⁵⁹ In other words, while he did not approve of an oligarchy of any sort even of brains, he did recognize the need of intellectual leadership in a democracy comprised of rational beings, providing that the people actually accepted it. "I agree fully," he says, "that we must have individuals to be leaders, not groups or the decision of every important question by votes; democracy is in no sense inconsistent with individual leadership; only it must be leadership by consent and the consent must be actual."¹⁶⁰

Instead of emphasizing governmental controls, no matter how carefully planned, he would minimize the incidence of government to the greatest degree possible. "The ideal," with Justice Brandeis, "is for the people to have as little need of government and the law as possible; we need government to give help, but it should be restricted to certain limits."¹⁶¹ Upon a question of morality, however, where liberty is at stake, there is no room for compromise—"industrial liberty, like civil liberty, must rest upon the solid foundation of law."¹⁶²

Uppermost in all Justice Brandeis' thinking about democracy is his reliance upon the rule of law. He is concerned lest the law fall into disrespect and he devotes his best thought to strengthening confidence in it. Repeatedly he points out that this is a government of laws and not of men,¹⁶³ and that the Jewish conception of law is embodied in the American Constitution, with its proclamation of a

¹⁵⁸ THE CURSE OF BIGNESS 41 (Fraenkel ed. 1934).

¹⁵⁹ LIEF, BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL 263 (1936).

¹⁶⁰ THE BRANDEIS GUIDE TO THE MODERN WORLD 71 (Lief ed. 1941).

¹⁶¹ *Id.* at 35.

¹⁶² BUSINESS—A PROFESSION 26 (new ed. 1933).

¹⁶³ *Id.* at 98.

government of laws.¹⁶⁴ Furthermore, he looks to the law not as a substitute for but as a reenforcement of education.

"If we were all wise," he observes, "we would not need any law. We would not need any criminal law, surely, because we know that the wages of sin is death. However, we need law as an aid to wisdom. If we could rely wholly upon education there would be little need of laws, because much legislation is designed merely to make people do that which is for their best interests."¹⁶⁵

In summary, Justice Brandeis holds that through the rule of law, freedom and justice are secured. Through justice, peace will prevail, for "peace can exist only in a world where justice and good-will reign."¹⁶⁶ And with the Jewish struggle for righteousness through law, Justice Brandeis associates the Jewish longing for truth.¹⁶⁷ Truth, knowledge, facts, law, justice, all these goals of human living are combined by Justice Brandeis in one sentence: "Justice can be attained only by careful regard for fundamental facts, since justice is but truth in action."¹⁶⁸

Notwithstanding Justice Brandeis' protests that he subscribes to no philosophical system, it is obvious that his thinking follows the lines of a fundamental pattern. He continually rethinks conclusions which had been widely accepted until his time, but his thinking is done exclusively within the boundaries prescribed by the common law. To that law he undertook to make a distinctive contribution. An appraisal of his achievement as measured by the philosophical realism basic to the common law system is prerequisite to an estimate of his significance in the history of jurisprudence.

Primary to his thought is his insistence on facts. Indeed it may be said that facts are for Justice Brandeis the *sources* of the law. In this respect facts take the place for him that nature held for Bracton and the founders of the common law. To some extent, facts and nature are interchangeable,

¹⁶⁴ DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 179 (1929).

¹⁶⁵ THE BRANDEIS GUIDE TO THE MODERN WORLD 166 (Lief ed. 1941).

¹⁶⁶ DE HAAS, LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH 179 (1929).

¹⁶⁷ *Id.* at 194.

¹⁶⁸ THE BRANDEIS GUIDE TO THE MODERN WORLD 123 (Lief ed. 1941).

since facts are determinations of nature and are based upon it. Both are objectively viewed by the mind which observes them. A distinction, however, exists between them insofar as nature exists as created by its Author quite independently of whether any human mind observes it or not. Facts, on the other hand, while based upon nature, and therefore found objectively outside mind, nevertheless are particular aspects of nature which have significance for human thought, largely because of the human element present in their observance. In an earlier day, when law was understood to comprise divine and eternal law as well as positive law, nature and natural law were customarily used to describe the order of the universe which man recognized as existing about him, whether or not he understood its functioning. The employment of the word "facts" as a substitute for "nature" or "natural law" accords more closely with modern agnosticism, which is unconcerned with the spiritual. From the standpoint of legal philosophy, the choice of "facts" in preference to "nature," makes little difference, since either "facts" or "nature," objectively observed, constitute the foundations of philosophical realism. Justice Brandeis, by relentlessly insisting on the search for facts, based his jurisprudence on the realism basic to the traditional common law.

In the Brandeis system there are, however, two elements of philosophical realism which were glossed over or ignored. The first is the nature of realism itself, for realism, precisely because it is realism, recognizes its limitations. Since truth in the mind and truth in nature are not the same, but rather are related by a correspondence or conformity of the former to the latter, the *res* or thing which exists in the mind is not the thing itself as it exists in nature but an idea of that thing formed by the mind which observes it. In other words, the table—wood, shape, and all—upon which I am writing does not physically take up time and space in my mind, but rather a likeness of it exists in my mind, similar to a snapshot but generalized to indicate not one particular table but a comparison of tables with each other and with chairs and other objects. To the extent that the human mind is involved, the fact or aspect of nature being observed is modified by the natural limitations of the human mind in comprehending

the object fully. Philosophical realism does not ignore this human factor but reckons with it, differing from other philosophical systems in measuring mind by nature, instead of nature by mind. Justice Brandeis, though master of the law of evidence, in which demonstrations of the inaccuracies of the observing mind occur frequently, fails to consider the mental element in observing facts, which a fully rounded out philosophical realism would have given him.

A second factor which differentiates the legal realism of Justice Brandeis' concern for facts from the philosophical realism of what Pollock and Maitland referred to as "the golden age of the common law,"¹⁶⁹ is the subjective element in the selection of facts. Obviously the human mind cannot cope with an unending sequence of facts, if those facts are to yield significance for the mind. There must be some organization of facts on the basis of relationship, and therefore a selection of some facts to the exclusion of others from consideration on a given subject or at a certain time, if they are to have any meaning. Philosophical realism recognizes that whenever choice or selection comes into play, a subjective element enters which again modifies comprehension of nature in the human mind. Mr. Justice Brandeis never seemed to be quite conscious of this subjective factor in fact-finding, but on the contrary betrayed what almost amounted to *naïveté* in assuming that the facts which had significance for him were the only possible facts available and that even were those facts admittedly of the utmost importance, that they would have the same significance for others as they had for him. It was almost as if, in the manner of Gertrude Stein, he had said, "a fact is a fact is a fact," depending upon repetition to make it more so.

Mr. Justice Brandeis' neglect of the mental element with respect to the sources of law did not, however, carry over into that aspect of his jurisprudence which may be called the *forms* of law. On the contrary, so convinced was he of the capacity and the duty of human reason to regulate and control the facts of life in accordance with human needs, once they are ascertained, that his philosophy of law could as

¹⁶⁹ I HISTORY OF ENGLISH LAW BEFORE EDWARD I 112 (1895).

properly be called rationalistic or intellectualistic as realistic. He had confidence in the human mind, not only in his own, but also in the minds of men in general, to face the problems of life and master them. Here again, he was unconcerned with the supernatural and the functioning of a divine intellect which the human mind observes in operation and adumbrates, and in which it may participate in giving order to a part of the universe. He accepted unquestioningly the universe as he found it, and within its limitations and conditions he undertook to use his mental powers to the fullest in making it so far as possible a better place to live. His respect for the integrity of his own mind was the foundation of his respect for the minds of others. So high was his regard for intellectual ability that he appears to have overlooked the physical and emotional drives which condition mental capacities in men generally. The basis of his confidence in democracy is to be found in his reliance on the ability of human beings to think. For both democracy and law, his abiding belief in the appeal to reason in other men was the basis of his realism.

It is in the *functioning* of law and its efficient operation that the Brandeis contribution to jurisprudence discloses its novelty. Justice Brandeis thought of law as an invention, device, or instrument, humanly conceived and humanly applied to effectuate justice. Until well along in the nineteenth century, law had been considered declaratory of right, and its rules were said to be found, not made. To Jeremy Bentham is ascribed the change in concept.¹⁷⁰ By his acceptance of the philosophy of Thomas Hobbes to the point of equating law with force, and by his adoption of philosophical positivism in his efforts to codify the positive law of England, Bentham so confused the usages of the word "law," that the way to misunderstanding has been made easier than the road to clarity. It is now common to hear it said that the judges make the law, or, that the law is what

¹⁷⁰ CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 8 (1941); MR. JUSTICE BRANDEIS 16 (Frankfurter ed. 1932); ROONEY, LAWLESSNESS, LAW AND SANCTION 90-103 (1937) (criticism of Bentham).

the judges say it is.¹⁷¹ Two centuries and more before Bentham wrote, a controversy arose in England regarding the power of Parliament to make new law.¹⁷² Before the sixteenth century, statutes, like judicial decisions, were held to be declaratory of law only. With the growth of the doctrine of the "divine right of kings" in place of the Bractonian view that "the king is under God and the Law," an arbitrariness developed in the executive which required nothing less than a revolutionary war to bring it under control. In modern times, a tendency toward the development of a theory of the "divine right of the judges" ¹⁷³ has given rise to much criticism of courts and their operation. It was the Brandeis conception of the functioning of law that judges could command respect proportionate to their adaptation of legal rules to the changing conditions of modern life. The application of his theory has at times been undertaken on a philosophical foundation of materialistic-positivism, after Bentham, or of idealistic-absolutism, after Hegel, instead of realism, with rather disastrous results. Worked out upon a realistic basis, in accordance with Justice Brandeis' own understanding of the common law, the reasonableness of his instrumentalist approach requires a new examination of the age-old doctrine that law is found, not made.

When Mr. Justice Brandeis based his theory on facts as the source of law, and looked to mind to impart to those facts some sort of legal form, he was in effect taking nature as he found it, not creating an idealistic situation which had no foundation in reality. He did not attempt to define that nature nor to speculate upon its order or laws beyond the line which separates the scientific from the metaphysical realm of thought. For the most part, he ignored the metaphysical in his thinking about facts, but he accepted it, at least implicitly, and did not deny its reality as many of his followers have done. In other words, although he did not accept the natural law, as such, nor even profess to be con-

¹⁷¹ MASON, *BRANDEIS AND THE MODERN STATE* 1 (1933); MR. JUSTICE *BRANDEIS v* (Frankfurter ed. 1932).

¹⁷² A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDING OF STATUTES Introduction (Thorne ed. 1942).

¹⁷³ ROONEY, *LAWLESSNESS, LAW AND SANCTION* 119 (1937).

cerned about it, much less to understand it, nevertheless by his unceasing search for facts and his acceptance of the capacity of human reason, conditioned by that nature of which it is a part, to give some order to nature—that is, to facts observed from nature—Justice Brandeis by implication agreed to a large extent with the natural law theorists, who, because they observe order or law in nature, declare law is found, not made by man.

To say that law is found in nature, or that natural law exists independent of anyone's mind, does not require a denial that a human mind, entrusted officially with jurisdiction, can formulate or "make" rules applicable to other human beings which will modify in some respect the understanding of the relation of man to nature. As long as the rule is a modification only and not an attempt to change or deny the unchangeable relation between human beings and that nature which surrounds them, is other than they, and yet in which they participate and form a part, the rule is not only proper to man's capacities but may be demanded of him as a rational being by his environment. To fail to utilize his reason in meeting the challenge nature offers is as reprehensible as the attempt to defy nature by going contrary to its precepts. No natural law jurist, no philosophical realist, would think of the power of the human mind as prohibited by his belief in the natural law, from formulating legal rules, some of which may derive their force from nature. On the contrary, it is the philosophical realist who acknowledges the importance of nature in the life of the human mind, who applies his intellectual powers most rationally in bettering as far as possible the conditions of human living. Neither the materialist who considers mind as a part of matter, nor the idealist who spins out day-dreams unsupported by matter, both of whom rely upon physical force to make their dreams effective, have the rational appeal of the realist who relies upon the reasonableness of his fellows to accept and apply his carefully thought out conclusions. Indeed it is the realist who holds that judgments are creative—not that they "make" truth which had no previous existence in the universe, but rather that they give a new formulation, understandable to the human mind, of a relationship already ex-

isting between mind and matter, but not before discerned and tested by observation of nature.

Much of the confusion that persists about the unchangeableness of the natural law and the changing formulas of legal rules necessitated by modifications in environment is due to an equivocal use of the word law. In one sense, all law is law to the extent that it requires obedience from all subject to its jurisdiction. There is, however, no legal system which does not distinguish between laws of greater and lesser importance. The very names by which laws are known, such as treaties, constitutions, statutes, decrees, ordinances, regulations, and so on, indicate some of these distinctions. The differences in the applicable sanctions, such as war, prison, jail, reformatory, fine, damages, injunction, revocation, mandamus, and so forth, are similar evidences. The tendency of the human mind to generalize the various forms in an effort to penetrate to the substance does not justify, however, the confusion of forms and substance in unreal abstractions as the positivists and absolutists are both accustomed to do. Because the realist derives his generalizations from particular aspects of nature and measures those generalizations by testing them back to nature, he is continually making distinctions in his concepts on the basis of individual differences. Since he habitually distinguishes between aspects of nature, he is not likely to confuse aspect and nature. In the same way the natural law jurist who bases his theory on philosophical realism, is not likely to confuse nature or natural law, which is unchanging in its relationship to mind, with those formulations of legal rules, or of judgments, which must necessarily change with man's greater knowledge of nature. In other words, for the realists, natural law is found, not made, but human law, whether positive or customary, is formulated—"made," if you will—by the creative judgments of the human mind. Another way of putting it, is that natural law, which pertains to the essence of the order of the universe of which man is a part, is unchanging in its relationship to man, although his knowledge of it changes as he becomes better informed of its nature, while human law, which is comprised of human formulations of the natural law as well as of formulations of the

essentially indifferent, can and does change in accordance with the determinations and conclusions of human choices and judgments.

Those legal rules which are essentially indifferent with respect to the natural law, and are often referred to as the morally indifferent,¹⁷⁴ are from the quantitative standpoint much more frequently encountered in human experience than are formulations of the natural law. This is largely due to the fact that man, because he is himself part of nature, and because he is also rational, is normally accustomed to go along with nature, and not likely to defy it. He has within his own person, if he is healthy, a faculty which intuitively indicates conformity of his action with natural law, for natural law is promulgated or made known to him essentially through his own nature's participation in the universal order. With respect to the rules which are morally indifferent, however, positive promulgation is necessary in order that he may be bound to observe them. It is the necessity of promulgating each specific rule for each person to whom it is applicable that gives rise to the multiplicity of laws found in the law books. The more frequently these laws are amended, repealed, or revoked, the greater the uncertainty of what constitutes existing law. Uncertainty in law is undesirable for many reasons, but as long as it concerns only the morally indifferent and does not affect the essence of the natural law, no objection is raised from the standpoint of philosophical realism. To stand by the principles may be suggested by prudence, but insofar as the natural law is not invoked and the principles have been derived from the morally indifferent, there is no compulsion to observe them on the ground of unchangeableness of law alone.

A relevant illustration of the difference between declaratory law and "law" that is "made" is to be found in the Papal Encyclical Letters on labor. In *Rerum Novarum*, the Encyclical "On the Condition of the Working Classes," issued by Pope Leo XIII in 1891, there is an insistence on the natu-

¹⁷⁴ ST. THOMAS AQUINAS, I, II SUMMA THEOLOGICA q. 100, a. 11, II, II, at q. 60, a. 5, etc., as cited in ROONEY, LAWLESSNESS, LAW AND SANCTION 24, n. 13-16 (1937).

ral right to private property essential to all men, laborers as well as capitalists. In the Encyclical, *Quadragesimo Anno*, issued by Pope Pius XI in 1931, and known as "Forty Years After," there is a direction to utilize the power of the state if necessary in order to redistribute property so that all men, laborers as well as capitalists, may have a proper share of wealth in accordance with their natural right.¹⁷⁵ Monsignor John A. Ryan noted the difference in the two documents¹⁷⁶ without however indicating the equivocal usage of the word law or explaining that the ground for the distinction between them is to be found in philosophical realism. Perhaps it should be added here that the power of the state as used in the Encyclical "Forty Years After" means that as a last resort, the force of law as authorized by a legitimate government should be invoked with penalties, if needed to secure greater justice. This should not be understood as equating law with force. On the contrary, the qualifying phrase "if necessary" is added in order to imply that law functions properly as a direction or guidance to reasonable men in order to aid them in doing what is right. This direction failing for one reason or another in its appeal to reason, may ultimately find support through legitimately applied force, force being not a first but a last resort for law. Since the doctrine of these Encyclical Letters is concerned with the proper distribution of private property, another point should be made here about the appeal to reason, which is the primary purpose of law. Because legal rules are the means used to direct people with respect to the distribution of their property, it has become common to say that law regulates property. Economists like Richard Ely and John R. Commons have written important books upon *Property and Contract*,¹⁷⁷ and upon *The Legal Foundations of Capitalism*.¹⁷⁸ With the Marxists, so closely has law become identified with property, that their revolt against private

¹⁷⁵ ST. THOMAS AQUINAS, II, II SUMMA THEOLOGICA q. 49, a. 1; ARISTOTLE, NIC ETHICS lib. I, lect. 2, and other citations quoted in ROONEY, LAWLESSNESS, LAW AND SANCTION 49 (1937).

¹⁷⁶ Ryan, *The Economic Philosophy of Thomas Aquinas*, ESSAYS ON THOMISM 239-260 (Brennan ed. 1942).

¹⁷⁷ (1914).

¹⁷⁸ (1924).

property holding implies the abolition of law. Again, as in the equating of law with force, the equating of law with property is due to an equivocal usage of the word law and to a failure to remember that law is primarily not reason in itself but an appeal to reason in human beings artfully designed to direct and guide them to act as closely as possible in conformity with the order which obviously governs the universe of which they are a part. A careful reading of the Encyclicals discloses that a philosophical realism which includes these elements lies at the foundation of the Papal doctrine.

Justice Brandeis is not explicit in distinguishing between law as an expression of the natural law and law as a regulation of the morally indifferent, but in practice, by implicitly recognizing the existence of nature in his continual search for objective facts and by devoting his intellectual efforts to the invention of legal devices directed instinctively toward the regulation of the morally indifferent, his theory of the functioning of law is closer to the basic realism of the common law system than that of many of his contemporaries and followers. It is upon the solidly grounded foundation of concrete facts that he develops his technique of fact-finding into an instrument with which to modify prevailing legal rules. In designing his instrument he carefully works within established institutions. He never denies such natural law doctrines as the right to hold private property, but on the contrary undertakes to make the law more just in its directions regarding the distribution of property. His appeal is seldom to force, save as an ultimate measure, but is on the contrary addressed most frequently to reason in devices like "cease and desist orders." Unlike so many of the "economic planners" who have attempted to imitate his success without penetrating to the roots of his strength, he refrained from the watch-words of the modern plague of "sanctionists"—"you do as I say, or else——." Instead he invented a legal instrument which effected a revolution in the administration of law without ignoring or subverting the facts which disclose the relation of man and nature. As Charles P. Curtis would explain it, Justice Brandeis was

concerned with the expansion or the extension of the coverage of legal rules, rather than with their relation.¹⁷⁹

In acknowledging that Justice Brandeis' chief contribution to modern jurisprudence lies in the instrumentalist character of his use of the fact-finding technique as applied in the administration of legal rules, a comparison with the concept distinctive with John Dewey of logic as an instrument of inquiry¹⁸⁰ is to be anticipated. Although the Dewey system was influenced in its origins by the pragmatism of William James, and Justice Brandeis was aware of the Holmes-James debates, there is nowhere to be found in the Brandeis writings any indication that the Brandeis notion of law as instrument was influenced in any way by the Dewey notion of logic as instrument. It is not Justice Brandeis but the students of his methods, who usually are students of the Dewey writings also, who tend to equate the two. The fact is, however, that the basic realism of Brandeis necessarily implies the rejection of the idealism of Dewey, since realistic logic derives its first principles of identity and contradiction from the observation of existent nature, whereas the Dewey theory of logic is derived from idealistic speculations about the non-existent or the possible. It is the Brandeis misfortune to have had his work interpreted less by philosophical realists than by abstractionists who, by reading Dewey preconceptions into their interpretations of his writings, confuse instead of distinguish the two theories.

The *sanction* of law in the Brandeis system has already been mentioned as primarily an appeal to reason and closely allied to education, with which he was greatly concerned. His belief that if you educate people in better ways of doing things you will seldom need to punish them for wrong-doing is so much closer to the foundations of the common law than the Holmes¹⁸¹ or even the Cardozo theory¹⁸² of sanction, that it is only necessary to set them out side by side to see

¹⁷⁹ CURTIS, *LIONS UNDER THE THRONE* 175 (1947).

¹⁸⁰ ROONEY, *Law and the New Logic* 16, *PROC. AM. CATH. PHILOS. ASS'N* 197, 199 (1940).

¹⁸¹ ROONEY, *LAWLESSNESS, LAW AND SANCTION* 114-136 (1937).

¹⁸² ROONEY, *Mr. Justice Cardozo's Relativism*, 19 *NEW SCHOLASTICISM* 17 (1945).

the difference. Holmes followed Bentham¹⁸³ in making the rule and the punishment correlative, by reading precepts as if they said, "either do this, or, be punished," and therefore he considered penalties as the equivalence of law. By it men are reduced to the level of animals by reliance on force as the foundation of satisfactory behavior. Brandeis, on the contrary, reads precepts as if they were expressed in the conditional form: "if you do (not do) this, you may be punished." This, instead of equating law with force, appeals above all to reason, and thereby implicitly distinguishes man from animals and less valuable forms of life. It derives neither from materialism nor absolutistic idealism, but is on the contrary essentially a realistic concept of legal sanction.

In the Brandeis system of jurisprudence, the final *purpose*, end, or goal for law is liberty. Justice is an intermediate goal toward which much profound thought is directed, but at times justice itself appears to be treated less as end than as means in achieving personal freedom. This treatment of justice is doubtless due to Justice Brandeis' disregard of any idea of justice as a supernatural virtue and his concentration on improving living conditions on this earth. For him, the just is usually the fair or the proportionate, ascertained as rationally as possible. Given a proper amount of property, talent, and education, and such things as are essential to human personality, a man is free to develop responsibility in accordance with his dignity as a man, in the Brandeis view. This thought is carried further to where he thinks that it is the function of law to use the power of the state if necessary to alleviate oppression in any form which would tend to limit man's freedom in developing his powers to the fullest. Human progress, then, may be said to consist in the advancement of liberty in the Brandeis theory.

If the question be asked, "liberty from what?" the Brandeis answer comes readily enough: "liberty from oppression, arbitrariness, tyranny"; but if the question is, "liberty for what?" the answer is less definite. Responsibility, self-development, self-government, are partial answers,

¹⁸³ ROONEY, LAWLESSNESS, LAW AND SANCTION 90-103 (1937).

accompanied by many references to the moral and the ethical, but the standard or criterion by which progress, justice, or freedom may be judged is obscure. Justice Brandeis apparently took for granted the existence of a higher law upon which a criterion of justice and morals could be based, but he omitted any formulation of his implicit assumption. His instinctive awareness of this lack is suggested by the readiness with which he welcomed the doctrine of Achad Ha'am concerning the Jewish disbelief¹⁸⁴ in personal immortality. Following his acceptance of that doctrine, which substituted better living for the group, the race, the brotherhood, on earth, in place of the Christian dogma of the redemption, he added to his goal of liberty the concept of fraternity. The secularist, if not masonic, tendency of his thinking about the end of law is suggested by his repetition of the Mazzini formula of purpose in life—to "add one's stone to the pyramid of history."¹⁸⁵ His admiration for Mazzini, Garibaldi, and Cavour, inherited from his ancestors and their friends among the "liberals of '48,"¹⁸⁶ however, never induced him to adopt the egalitarian standard established through force by the levellers of the French Revolution, in preference to the reasoned arguments for liberty which characterized the American Revolutionists. For Justice Brandeis, the call was not "liberty, fraternity, equality," but "liberty, fraternity, honor, and justice," with equality of opportunity for all.¹⁸⁷

The practical effect of the Brandeis theory of jurisprudence was an ardent advocacy of democracy. His concept of democracy was far removed from that of the abstractionists who think of democracy as a form of government for the masses who are said to be given an opportunity to participate in the decisions of the ruling oligarchy through "consensus." With this voluntarist idea of democracy, in which formal assent gives the appearance of free choice, but in reality is based not on reason but on coercion and force or pressure,

¹⁸⁴ *Id.* at 26.

¹⁸⁵ *THE CURSE OF BIGNESS* 220 (Fraenkel ed. 1934).

¹⁸⁶ GOLDMARK, *PILGRIMS OF '48* 27 (1930); LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 210, 221, 226, 239, 244 (1936).

¹⁸⁷ *BUSINESS—A PROFESSION* 27 (new ed. 1933); DE HAAS, *LOUIS D. BRANDEIS, A BIOGRAPHICAL SKETCH* 154 (1929); see *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* 111 (Lief coll. 1930).

Justice Brandeis' view had nothing in common. For him education was fundamental in order that for each person a reasoned acceptance of rules for living in common would be possible. Nor was he satisfied with the least common denominator of free acceptance. On the contrary, he believed that ways and means should be devised which would require from each person the greatest contribution to community life, intellectually and morally, of which he may be capable. Believing that responsibility should be developed and expected in every sphere of life, he extended his concept of democracy from politics to industry. Further than this, because he felt that law was basic to good government which in turn he held fundamental to industrial democracy, he was concerned that law comprehend the problems of economics in order to receive the requisite democratic assent. Recognizing that law is developed largely through the litigation of private claims, he nevertheless viewed it steadily in its broader effects on the public welfare. Continually he insisted that advocacy for private litigants should be considered less, rather than more important, than the public interest among lawyers, and he emphasized the necessity of training the ablest men as "people's counsel."¹⁸⁸ With Charles Henderson he agreed that adequate legal education embraced economics as well as politics, even going so far as to quote with approval the Henderson statement that a lawyer ignorant of economics is an enemy of the public.¹⁸⁹ For Justice Brandeis, the appeal to reason in each human being, through which sound law functions, can win acceptance only to the extent that it comprehends the actual problems of human living, and so with him law is the foundation of statesmanship in both political and industrial democracy.

The sources of strength in the Brandeis theory lie in its reliance on facts and mind and its understanding of the relation between them. Facts measure mind. The expansion of the volume of facts presented to mind is considered not only quantitatively but also qualitatively. Although the

¹⁸⁸ BUSINESS—A PROFESSION 337 (new ed. 1933); THE BRANDEIS GUIDE TO THE MODERN WORLD 176 (Lief ed. 1941).

¹⁸⁹ BUSINESS—A PROFESSION 362 (new ed. 1933); MASON, BRANDEIS AND THE MODERN STATE 29, 30 (1933).

physical essentials of human living are accorded the fullest consideration, almost to the exclusion of the spiritual, there is nevertheless implicit in the theory an appreciation of human dignity because of its intellectual powers which discloses a sense of values which is altogether sound. The acceptance of moral and ethical standards, however obscurely formulated, are indicative of this. Through the confidence placed in the reason of each person and his natural tendency toward the good when given opportunity for free choice, the theory contains the essential elements of a valid concept of democracy.

It is interesting to note some of the paradoxes through which the theory has been worked out. In spite of his protests that he has no philosophy, it is quite evident that Justice Brandeis' theory is not only realistic but systematically so. Notwithstanding his professed concern for brotherhood, group, race, and democracy, his devotion to concrete facts rather than to abstractions, results in a philosophy of law in which the individual is the object of protection. Although he discusses at length the rights of labor, the effect of his instrumentalist thinking is to strengthen small business. His effort to limit the oppressiveness of government takes shape in more government regulation, rather than less. Though his goal is liberty, justice, and peace, even in the industrial sphere, for him to live is to struggle, without ceasing.

That there are weaknesses to be found in the Brandeis theory of law is due to philosophical errors or inadequacies. One of the errors occurs in his statement that rights are derived from society.¹⁹⁰ This assertion was made in his mature years, after he had been influenced somewhat by the sociological emphasis on group activity. It is inconsistent with his efforts to protect human beings from the tyranny of the group, and marks a departure from the concrete toward the abstract or conceptualistic view. Rights, instead of being derived from society, or the state, are inherent in the dignity of human beings because they are human. To adopt the words of the Declaration of Independence, men are created with certain inalienable rights. By attributing to society

¹⁹⁰ BUSINESS—A PROFESSION 24 (new ed. 1933) ; also see p. 20, n. 87.

rather than to the Creator the power to confer those rights, Justice Brandeis insofar as he did so, abandoned the basic realism of the American legal system.

A second philosophical fault is his failure to take into account the subjective element in fact-finding, through which personal preference for one type of fact over another is prerequisite to their organization in any scientific manner. His assumption that each fact has the same significance for one man as for another is unwarranted, and to the extent that he ignored the selective factor, his realism is philosophically inadequate. The result is an inordinate concern with the economic aspects of life. Notwithstanding the attention that he gave to education, there is a utilitarian tendency in emphasis which exalts the material at the expense of the spiritual. Man needs bread to live but he cannot live by bread alone. To ignore or minimize the spiritual is to present a picture of man which is not properly balanced and therefore philosophically inadequate to that extent.

The most far-reaching philosophical error in the Brandeis theory is its agnosticism, for this is the underlying cause of the other deficiencies it displays. Justice Brandeis apparently never denied the existence of a supreme Creator of the universe; he merely professed to know nothing about Him and was too much occupied with the concrete facts which did concern him to rationalize about others equally existent. He respected religious faith in other men and expected support from religion for his deepest convictions of the right and the good.¹⁹¹ An understanding of the supernatural, however, always remained remote from his sphere of interest. To fill this gap in his thinking, of which he seemed to be subconsciously aware, he embraced the Jewish doctrine of disbelief in personal immortality, a concept which with other Jewish thinkers like Bergson and S. Alexander gave rise to the philosophical theory of emergent evolu-

¹⁹¹ MASON, *THE BRANDEIS WAY* 158 (1938) (Cardinal O'Connell); LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 102 (1936) (Rev. A. A. Berle); *THE CURSE OF BIGNESS* 271 (Fraenkel ed. 1933) (Christian Church); *THE BRANDEIS GUIDE TO THE MODERN WORLD* 96 (Lief ed. 1941); MASON, *THE BRANDEIS WAY* 156 (1938).

tion.¹⁹² In proposing a hypothesis about the nature of life in time and space, which restricts its speculations, in the words of H. G. Wells, to "the shape of things to come"¹⁹³ on this earth, it at the same time empties the concept of brotherhood of any reality based upon the fatherhood of God beyond and around time and space. As in his concept of rights in relation to society, so here again, in his concept of the purpose of life in relation to brotherhood, Justice Brandeis accepts idealistic hypotheses in place of his usual attraction for realism, and weakens his philosophical system to the extent that he does so. His agnosticism is a negative discord in what is otherwise for the most part a harmonious affirmation of reality.

In summary, Justice Brandeis' statement that he had no philosophy may be accepted if that statement is understood to mean that he adopted neither the materialistic philosophies of force nor the subjective philosophies of absolutism which have currently been postulated as desirable foundations for jurisprudence. But if his assertion be understood to deny systematic thinking about law in the philosophical sense, analysis of his writings not only disproves the statement but also discloses a philosophical foundation based on realism which follows closely the lines upon which the common law was built. Because his philosophy was unavowed, it was not fully formulated. It remained vague in some of its most important aspects, such as its purpose or end. In some other respects, perhaps because of its vagueness and lack of formulation, it adopted, possibly inadvertently, some philosophical postulates inconsistent with its basic realism. To the extent that Justice Brandeis resolutely rejected erratic philosophical speculations and held firmly to the principles of the common law, his jurisprudence has validity. The strength of the Brandeis theory is derived from the great common law tradition, whose vitality he demonstrated anew.

¹⁹² BERGSON, *CREATIVE EVOLUTION* (1911); ALEXANDER, *SPACE, TIME AND DEITY* (1920).

¹⁹³ (1933).

In this attempt to evaluate the validity of the Brandeis theory of law from the standpoint of philosophical realism, no effort has been made to appraise the legal or social implications of his personal contribution to the common law system. Indeed the device he invented, when utilized by men less sound in their mastery of the common law than he to effect changes in social policy, not only may leave much to be desired, as is usual with imitations, but it could also be dangerous in the results obtained. It is not unlike the discovery of dynamite, which may be used to tunnel through mountains in order to make the road to civilization more direct, or which, in the hands of barbarians, might be used to destroy the most noble monuments hitherto created by human thought. For example, the use of the licensing or the taxing power of the state can be not regulatory but confiscatory if employed arbitrarily or unrealistically. Potentially the instrument, if torn out of its sound foundations and welded upon either materialistic or idealistic hypotheses, can give rise to a tyranny more grievous than that once thought to be becoming encysted¹⁹⁴ in the common law, which it was designed to correct. Its value for the jurisprudence of the future depends upon the closeness of its constant relation to the basic realism of the common law system, out of which it was devised.

The purposive character of the Brandeis theory suggests a similarity with the Socratic. For Brandeis as with Socrates, knowledge not only brings power but also has virtue in its potentialities for good. The Brandeis theory suggests the Socratic in another way, too, in that it proceeds along a single line of development, without becoming systematically rounded out in all directions. Socrates devised a method of investigation which was historically the forerunner of the ampler philosophies of Plato and Aristotle. At a later time, philosophy found in Abelard an originator of a method which was to fructify in the richer systems of Alexander of Hales and Aquinas, without whom the realism of Bracton and the beginnings of the common law cannot be

¹⁹⁴ MR. JUSTICE BRANDEIS 167 (Frankfurter ed. 1932).

understood.¹⁹⁵ For the American jurisprudence of the future, Louis Brandeis has suggested a method which until now has unfortunately been for the most part mistakenly appreciated for its form instead of its substantial reality. He has opened the way for someone more adequately trained in philosophy but no less competent in mastery of the common law to perfect a jurisprudence which will underwrite a truly realistic revolution in the work of justice—not for perpetual struggle, but for eternal peace. The call for realism in the law is a call for a modern Aristotle and Aquinas.

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¹⁹⁵ ROONEY, LAWLESSNESS, LAW AND SANCTION 18, 59 (1937).

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