THE OPPORTUNITY IN THE LAW

BY

Louis D. Brandeis

Louis Dembitz Brandeis

(ca. pre-1916)

FOREWORD

BY

Douglas A. Hedin
Editor, MLHP

An admirable attribute of the bar is its ability to engage in self-criticism that does not cross the line into cynicism. One famous critique was given by Louis D. Brandeis, then a prominent Boston lawyer, to the Harvard Ethical Society at Phillips Brooks House, Cambridge, Massachusetts, on May 4, 1905.

He contended that "the leading lawyers in the United States" had become captives of their corporate clients, that they had lost their independence to give advice that also considered the public's interest. He noted that the status of legal profession had fallen in the last half-century or more, a slide that could be reversed if the bar seized the "opportunity" to protect the "interests of the people":

> **Accordingly, we find that in America the lawyer was in the earlier period almost omnipresent in the State. Nearly every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer.**
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> **. . . .**
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> **It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer," and far too little of the "people's lawyer."**

> **The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.**

He then turned to the question on the table: lawyers' ethics. He argued that lawyers who represented corporations had an ethical duty to consider the "public weal" when lobbying or testifying against legislation intended to protect the public. It was a controversial proposition, but understandable in context. He spoke during the Progressive Era when countless federal, state and municipal "reform" laws that addressed social and economic problems were offered, debated and some even enacted over vociferous objections by corporations and their lawyers, who then tested those laws in court.

Melvin Urofsky, a particularly insightful Brandeis biographer, heard a "moralistic tone in this important talk" that reflected the way Brandeis advised his own corporate clients. He writes:

> **As a lawyer, Brandeis had attempted to serve the best interests of his clients by asking them to act in a moral manner. If in fact they did not have right on their side, then they should settle. When dealing with their workers, they should remember that they held much greater power than those who labored for them and so were obliged to treat them fairly. . . .**
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> **In invoking the notion of a people's attorney, he also made clear that dealing with the public required a different set of ethical considerations from those needed by a lawyer who spoke for one private client against another. Private clients had specific and legitimate priorities in protecting their property and investments and the return on those investments to shareholders. The public, however, had different priorities. Government is established not to make a profit but to protect its citizens and**

> **to provide services unavailable from the private sector. As such, in a conflict between private and public, a lawyer had to give greater weight to the claims of the government. This did not mean that the government would always be right, or that there might not be or statutory restrictions on the government's actions. It did mean that in the ethical universe of a lawyer, one always had to treat the public good and the private good differently, something that few layers at the time did.** [1]

To Brandeis, the complex affairs of large financial and industrial enterprises raised "nearly questions of statesmanship. The relations created call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated." But corporate lawyers could not rise to the level of "statesmen" because they were subservient to their clients, unable to consider the public interest. Another interpretation was given eighty years later by William Rehnquist, Associate Justice of the U. S. Supreme Court, in a talk, later edited into an article, on "The Lawyer-Statesman in American History." He identified Thomas Jefferson, Alexander Hamilton, James Madison, and John Marshall in the "Founding Period" and Abraham Lincoln, Stephen Douglas, William Steward and Salmon Chase in the "Civil War Period" as examples. He noted, as Brandeis had, that this type had become almost extinct, and offered an explanation based on changes in the practice of politics:

> **Why did the lawyer-statesman virtually disappear in the century following the Civil War? I think it was in part because the Nineteenth-Century legal training and experience, unlike those of the Twentieth Century, taught skills that were transferable in their entirety to the stump speeches and**

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[1] **Melvin I. Urofsky, *Louis D. Brandeis: A Life* 205-206 (Pantheon Books, 2009).**

printed tracts that were the staples of Nineteenth-Century political campaigns and debates. It is fairly obvious that with the coming of mass communications—first the big circulation newspapers, then radio, and finally television—that the practices of an earlier time changed dramatically. Political debates and campaigns have been transformed from forensic battles into marketing events.

. . . .

I feel bound to add my own view that the demise of the lawyer-statesman has been brought about not only by the change in political campaigning, but by changes in the legal profession. Certainly, legal education takes far more time today, and demands much more from the student, than it did in the times of Hamilton or Lincoln (even Douglas was able to avoid seven years of legal education in New York). But whether its greater length and depth necessarily prepare one better for public office may be fairly debated.

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The manner in which the profession is organized today, at least in large cities, also militates against lawyers spending a great deal of time in political activity of any sort, whether it is running for office themselves or writing speeches and position papers for others. One suspects that Alexander Hamilton, Abraham Lincoln, and William Seward—successful lawyers all—did not worry to the same extent as do their present-day counterparts about the number of hours they billed during a particular week. Law is surely a more lucrative profession for those who practice it now than it was then, but one cannot help wondering whether its contribution to the political life of the nation has not been sadly diminished in the process.

> **Let me say in conclusion that I do not mean to stand as a sort of Cassandra bewailing the passing of the "good old days." The legal profession is alive and well today, and serving a far greater number of people than were ever served by the profession during the Nineteenth Century. Political campaigns are still hard fought, and it may well be that the average voter senses even more keenly than did his Nineteenth-Century counterpart what the issues are and how they affect him. Discussion of important ideas is also very much alive today, in any number of newspapers, periodicals, and televised discussions. The only change is that today we look to three different places for these things, whereas in the days of Jefferson and Lincoln they were all embodied in the lawyer-statesman.[2]**

The target of Brandeis' criticism was the elite of the urban business bar, which was a minority of the profession. In 1905, the United States was undergoing the difficult transformation from being largely rural and agricultural to an urban and industrial nation. Many lawyers in big cities made marginal livings by providing services to clients in their neighborhoods and many also lived and practiced in small towns; possessing a strong sense of civic obligation, they became Brandeis' ideal lawyer: the independent "advisor of men" or, even better, the advisor of their communities.

Brandeis' talk was published first in 1914 as a chapter in a collection of his articles and speeches, *Business: A Profession*. It is posted below. It is complete, though reformatted. ◊

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[2] William H. Rehnquist, "The Lawyer-Statesman in American History," 9 *Harvard Journal of Law & Public Policy* 537, 554-557 (1986) (footnotes omitted). His article was "adapted from an address given on 6 May 1985 before the University of Chicago Law School chapter of the Federalist Society or Law and Public Policy Studies."

THE OPPORTUNITY IN THE LAW

Louis D. Brandeis

I assume that in asking me to talk to you on the Ethics of the Legal Profession, you do not wish me to enter upon a discussion of the relation of law to morals, or to attempt to acquaint you with those detailed rules of ethics which lawyers have occasion to apply from day to day in their practice. What you want is this: Standing not far from the threshold of active life, feeling the generous impulse for service which the University fosters, you wish to know whether the legal profession would afford you special opportunities for usefulness to your fellow-men, and, if so, what the obligations and limitations are which it imposes. I say special opportunities, because every legitimate occupation, be it profession or business or trade, furnishes abundant opportunities for usefulness, if pursued in what Matthew Arnold called "the grand manner." It is, as a rule, far more important *how* men pursue their occupation than *what* the occupation is which they select.

But the legal profession does afford in America unusual opportunities for usefulness. That this has been so in the past, no one acquainted with the history of our institutions can for a moment doubt. The great achievement of the English-speaking people is the attainment of liberty through law. It is natural, therefore, that those who have been trained in the law should have borne an important part in that struggle for liberty and in the government which resulted. Accordingly, we find that in America the lawyer was in the earlier period almost omnipresent in the State. Nearly every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer. DeTocqueville, the first important foreign observer of American political institutions, said of the United States seventy-five years ago:

> **"In America there are no nobles or literary men, and the people are apt to mistrust the wealthy;**

> **lawyers, consequently, form the highest political class . . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution."**

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

The whole training of the lawyer leads to the development of judgment. His early training—his work with books in the study of legal rules—teaches him patient research and develops both the memory and the reasoning faculties. He becomes practised in logic; and yet the use of the reasoning faculties in the study of law is very different from their use, say, in metaphysics. The lawyer's processes of reasoning, his logical conclusions, are being constantly tested by experience. He is running up against facts at every point. Indeed it is a maxim of the law: Out of the facts grows the law; that is, propositions are not considered abstractly, but always with reference to facts.

Furthermore, in the investigation of the facts the lawyer differs very materially from the scientist or the scholar. The

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

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

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

Your chairman said: "People have the impression to-day that the lawyer has become mercenary." It is true that the lawyer has become largely a part of the business world. Mr. Bryce said twenty years ago when he compared the America of 1885 with the America of DeTocqueville:

> **"Taking a general survey of the facts of to-day, as compared with the facts of sixty years ago, it is clear that the Bar counts for less as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent, than it did."**

And in reviewing American conditions after his recent visit Mr. Bryce said:

> **"Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class."**

That statement was made by a very sympathetic observer of American institutions; but it is clear that Mr. Bryce coincides in the view commonly expressed, that the Bar had become commercialized through its connection with business. I am inclined to think that this view is not altogether correct. Probably business has become professionalized as much as the Bar has become commercialized. Is it not this which has made the lawyer so important a part of the business world?

The ordinary man thinks of the Bar as a body of men who are trying cases, perhaps even trying criminal cases. Of course there is an immense amount of litigation going on; and a great deal of the time of many lawyers is devoted to litigation. But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters, and mainly in business affairs. In guiding these affairs industrial and financial, lawyers are needed, not only because of the legal questions involved, but because the particular mental attributes and attainments which the legal profession develops are demanded in the proper handling of these large financial or industrial affairs. The magnitude and

scope of these operations remove them almost wholly from the realm of "petty trafficking" which people formerly used to associate with trade. The questions which arise are more nearly questions of statesmanship. The relations created call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated. The questions appear in a different guise; but they are similar. The relations between rival railroad systems are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to commoners or dependents. The relations of public-service corporations to the people raise questions not unlike those presented by the monopolies of old.

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

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

Mr. Bryce, in discussing our Bar, said, in his "American Commonwealth":

> **"But I am bound to add that some judicious American observers hold that the last thirty years have witnessed a certain decadence in the Bar of the great cities. They say that the growth of the enormously rich and powerful corporations willing to pay vast sums for questionable services has seduced the virtue of some counsel whose eminence makes their example important."**

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

Such questions as the regulation of trusts, the fixing of railway rates, the municipalization of public utilities, the relation between capital and labor, call for the exercise of legal ability of the highest order. Up to the present time the legal ability of a high order which has been expended on those questions has been almost wholly in opposition to the contentions of the people. The leaders of the Bar, without

any preconceived intent on their part, and rather as an incident to their professional standing, have, with rare exceptions, been ranged on the side of the corporations, and the people have been represented, in the main, by men of very meagre legal ability.

If these problems are to be settled right, this condition cannot continue. Our country is, after all, not a country of dollars, but of ballots. The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed, through the respect for law, as the excesses of democracy were curbed seventy-five years ago.

There will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the abler lawyers is essential.

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

The ethical question which laymen most frequently ask about the legal profession is this: How can a lawyer take a case which he does not believe in? The profession is regarded as necessarily somewhat immoral, because its members are supposed to be habitually taking cases of that character. As a practical matter, the lawyer is not often

harassed by this problem; partly because he is apt to believe, at the time, in most of the cases that he actually tries; and partly because he either abandons or settles a large number of those he does not believe in. But the lawyer recognizes that in trying a case his prime duty is to present his side to the tribunal fairly and as well as he can, relying upon his adversary to present the other side fairly and as well as he can. Since the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make such a decision as justice demands.

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

Furthermore, lawyers of high standing have often failed to apply in connection with professional work before the legislature or city council a rule of ethics which they would deem imperative in practice before the court. Lawyers who would indignantly retire from a court case in the justice of which they believed, if they had reason to think that a juror had been bribed or a witness had been suborned by their client, are content to serve their client by honest arguments before a legislative committee, although they have as great

reason to believe that their client has bribed members of the legislature or corrupted public opinion. This confusion of ethical ideas is an important reason why the Bar does not now hold the position which it formerly did as a brake upon democracy, and which I believe it must take again if the serious questions now before us are to be properly solved.

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

fit you for taking part in the solution of these problems, than the study and preeminently the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably unequalled. There is a call upon the legal profession to do a great work for this country. ■

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