# *The Conservatism of Mr. Justice Brandeis*

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CONSTITUTIONAL historians rank Louis Dembitz Brandeis as one of the great figures among the many who have sat on the United States Supreme Court. Indeed, if John Marshall is "the great chief justice," Brandeis may fairly be called "the great appellate judge." His methods and criteria for resolving the conflicts among legislative prerogatives, judicial powers, and constitutional restraints have come to be the accepted norms in modern legal thought and practice.[1]

Almost equally accepted is the designation of Mr. Justice Brandeis as a liberal, and his place in the pantheon of modern liberal demigods is firm and secure. As early as 1927, Charles Ross of the *St. Louis Post-Dispatch* noted that Holmes and Brandeis constituted "a separate liberal chamber" of the Court.[2] Throughout the 1930's, the bright young men and women who flocked to Washington to help build and manage the New Deal apotheosized the elderly jurist as their resident liberal saint. At his weekly open house they poured out their problems to him, listened to his counsel, and came away refreshed and confirmed in their devotion to liberal causes.[3] Nor was this attitude limited to the young bureaucrats of the many New Deal agencies. Franklin Roosevelt also placed Brandeis in a special and revered position, calling him "Isaiah," and noting upon the justice's retirement that "I have come to think of you as a necessary and very permanent part of the Court . . . . The country has needed you through all these years."[4]

Legal scholars and historians also regard Brandeis as a liberal. In 1941 Robert H. Jackson listed Brandeis as one of "the intellectual leaders of recent liberalism in the United States." C. Herman Pritchett in an analysis of the so-called "Roosevelt Court" called Brandeis and Holmes the spiritual fathers of the Court's liberalism. Not only was Brandeis a liberal, Max Lerner argued, but he stood out from his fellow liberals in his unique ability to understand the details of a problem and by his genius in devising workable solutions.[6] Moreover, although Oliver Wendall Holmes is often linked with Brandeis as epitomizing modern judicial liberalism, Samuel J. Konefsky and others have suggested that Holmes was essentially a social conservative whose liberalism rested upon his philosophical skepticism. It was Brandeis, they argue, who helped to turn Holmes into a true liberal and spurred him on to write some of his greatest dissents, a view shared as early as the 1920's by Chief Justice William Howard Taft and by Holmes himself.[7]

The problem, however, lies in the definition of the word "liberal," and conversely of "con-



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servatism." In the broadest sense "liberal" means "free from prejudice; open-minded; candid." The *Oxford English Dictionary* goes on to define liberal as "free from bigotry or unreasonable prejudice in favor of traditional opinions or established institutions; open to the reception of new ideas or proposals of reform; favorable to constitutional changes and legal or administrative reforms tending in the direction of freedom or democracy." Conservatism, however, is narrowly defined as "characterized by a tendency to preserve or keep intact or unchanged." But these qualifications lead to the first problem in dealing with Brandeis' liberalism. While certainly open-minded and free from narrow prejudices, a firm believer in extending democracy and freedom, and receptive to new ideas, he was also an ardent supporter of tradition, a man who did not believe in change for change's sake, but only when necessary for growth and survival. This is the man who stubbornly resisted moving the Supreme Court from its basement quarters in the Senate wing of the Capitol into its current facilities, who would not use the large and sumptuous office provided for him there, and who refused to use a telephone!

Moreover, any assessment of Brandeis' liberalism also encounters the problem of what liberalism means in our time: If by liberalism, we understand a growing reliance on government to take over more and more societal functions, to do that which was formerly an individual's responsibility, to assume the burdens of social management and restraint, we should recall Brandeis' belief that democracy "substitutes self-reliance 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."[8]

If by liberalism, we mean the continued growth of a large centralized government, we must remember that Brandeis stood unalterably opposed to such a trend. In 1924 he wrote to his brother Alfred: "History teaches, I believe, that the present tendency toward centralization must be arrested, if we are to attain the American ideals, and that for it must be substituted intense development of life through activities in the several States and localities."[9] If by liberalism, we mean the elevation of sentiment and compassion over reason and principle, regardless of the cost, we should not forget that Brandeis literally rejected the claims of a widow, an orphan, and a workingman in order to uphold a strict construction of the full faith and credit clause.[10] And if by liberalism, we mean a moral code based on relativism rather than on fixed and immutable ideals, we should bear in mind Dean Acheson's recollection of the Justice's response when Professor Manley Hudson of the Harvard Law School declared that "Moral principles were no more than generalizations from the mores or accepted notions of a particular time and place." Acheson reports what happened next:

> The eruption was even more spectacular then I had anticipated. The Justice wrapped the mantle of Isaiah around himself, dropped his voice a full octave, jutted his eyebrows forward in a most menacing way, and began to prophesy. Morality was truth; and truth had been revealed to man in an unbroken, continuous, and consistent flow by the great prophets and poets of all time. He quoted Goethe in German and from Euripedes via Gilbert Murray. On it went—an impressive, almost frightening glimpse of an elemental force.[11]

Was Brandeis then a conservative? If by conservatism we mean, as Disraeli once declared, a movement which "discards Prescription, shrinks from Principle [and] disavows Progress," then the answer is no. If we mean an unyielding attachment to the past, without cognizance of the forces of change, such as often marked the Four Horsemen of the Right—Butler, Van Devanter, McReynolds, and Sutherland—then the answer is no again. If we mean a disregard of human suffering for the sake of abstract principles of economics, then the answer is certainly no. Yet when Sidney Hillman, after a visit with the jurist in the 1930's, remarked, "Mr. Justice, I think you are a conservative," Brandeis replied with



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equanimity, "I have always so regarded myself."[12]

These descriptions of liberalism and conservatism may seem distorted, yet they do tend to reflect popular conceptions and misconceptions of these movements in the last fifty years. The early and limited steps of the progressives in utilizing the state to redress social ills picked up momentum during the New Deal, and became a galloping nightmare in the 1960's, with the federal bureaucracy seemingly involved in every aspect of our lives. While the specter of big government frightened many people, the so-called "conservative" response appeared equally unappealing—a seeming end to social welfare programs and an apparent disregard for the social and human problems with which the liberals from Roosevelt through Johnson thought they were trying to deal.

Absent during those years was something which today makes Louis Brandeis' life and thought so appealing to liberals and conservatives alike—a sense of balance, an awareness of the complexities and inconsistencies of modern society, a passion for social justice which centered upon individual opportunity and responsibility. More than any other jurist in this century, Brandeis understood the dilemma of modern liberalism. While the state might now be necessary in dealing with the problems generated by an industrial society, the growth of governmental activities inherently restricted individual freedom.[13]

Louis Brandeis came to social and political maturity in that period of ferment called the Progressive Era. His philosophical outlook, developed in the last decades of the nineteenth century, remained consistent throughout his career both as a reformer and as a jurist. He had, as Paul Freund suggested, "a mind of one piece," but his was not the consistency of the small-minded. In all he did and wrote, he maintained a firm belief in the values of Jeffersonian America. He sought to rebuild a social fabric torn apart by the forces of modernism. But Brandeis did not reject progress. He was willing to try new modes of social and political organization, but insisted that experiments be carefully thought out and demonstrated in a small arena before attempting to apply them across the full spectrum of society. His favorite maxim came from Goethe: "It is in the small detail that one shows himself the master."

He admired and proclaimed the greatness of individual achievement, but never at the expense of the larger society; similarly, no social progress was worthwhile if it caused too great a restriction of individual liberty and opportunity. For many people Brandeis' social thought was anachronistic, a futile attempt to turn back the clock; yet no man may more accurately be called the prophet of modern society. Perhaps only now, in light of excesses of which he warned, can we begin to appreciate the lessons he tried to teach.

All too often Brandeis' social thought has been reduced to the phrase "the curse of bigness." Granted, he opposed bigness in many areas, especially in industry and government. Even the United States, he once warned, "is too big a force for good. Whatever we do is bound to be harmful. We have bitten off more than we can chew."[14] Yet Brandeis' arguments have frequently been misunderstood; he has been charged with wanting to Balkanize America, with ignoring the curse of smallness, with failing to appreciate the benefits of efficiency.

Closer examination of his career immediately shows the fallacy of this line of argument. He was a leading exponent of Frederick Winslow Taylor's theories of scientific management, and declared that if American railroads adopted Taylor's ideas they could save one million dollars a day.[15] Brandeis realized that there could be economies of size, and did not object to such benefits *per se*. He did reject the simplistic notion current—then as now—that bigness equated directly to efficiency; more important, he asked for an examination of the costs of the supposed savings. "The economies of monopoly," he explained, "are superficial and delusive. The efficiency of monopoly is at best temporary. Undoubtedly competition involves waste. What human activity does not? The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it



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more efficient than absolutism. So it is with competition." "We risk our whole system," he warned, "by creating a power which we cannot control."[16]

Latter-day liberals were slow to learn this lesson, that man's creations, even those erected with the highest of ideals and the purest of motives, if allowed unbridled growth would soon expand beyond man's ability to control them. "Man's work often outruns the capacity of the individual man," he wrote, and his faith in democracy began and ended with his faith in the individual man.[17]

Another aspect of Brandeis' progressive faith, one which marked him off from the Darwinian conservatives and even from Holmes, was his belief that men, and especially the individual man, could learn from experience, could benefit from education, and thus be able to improve society. Where Holmes was willing to allow social experimentation despite the fact that he did not believe reforms could ever succeed in changing society, Brandeis endorsed them from a profound conviction that man can indeed better his lot.

This faith in education was an integral part of the Brandeisian credo, stretching from his early days as a reformer throughout his career on the high court.[18] While working on the plan for savings bank life insurance in Massachusetts, he wrote that even "if we get tomorrow the necessary legislation, without having achieved that process of education we could not make a practical working success of the plan."[19] The Brandeis brief, that most revolutionary development in modern constitutional advocacy, was at heart nothing more than an educational tool. "A judge is presumed to know the elements of law," he had written, "but there is no presumption that he knows the facts."[20] He and his successive law clerks would labor endlessly writing and rewriting an opinion, and then Brandeis would frequently say, "We have made it convincing; now what can we do to make it instructive."[21]

The elements of Brandeis' political philosophy were rooted in the soil of progressivism, which as John Morton Blum and others have shown was conservative in nature, looking backward toward an idealized past rather than forward to a brave new world.[22] But while Brandeis also yearned for a simpler era, he resolutely faced up to the problems of a modern society which no longer had a homogeneous population nor a consensual basis for determining public policy. He recognized the need for state intervention, and he saw its dangers as well. In his more than five hundred opinions delivered over twenty-three years on the Court, he attempted to instruct his countrymen in how they might deal with both the benefits and drawbacks of the new order.

Essential to understanding any social problem was knowledge of the facts. It was his mastery of detail, his ability to marshall and make sense out of a mass of data, which had made Brandeis one of the great lawyers of his time. It had also made him an extremely effective reform leader, since he planned his attack with a firm understanding of the relation between the ills to be remedied and proposed solutions. The idea of charging blindly ahead, of attacking a social problem before learning all of the myriad aspects of both problem and solution horrified him. Reform, like law, had to proceed out of the facts.

This attention to detail and this drive to understand the situation marked Brandeis the judge as much as it had Brandeis the lawyer. A dissenting opinion delivered during his first months on the Court set the pattern for years to come. In *Adams v. Tanner*, he protested the Court's overturning a state statute regulating private employment agencies without even enquiring into the conditions which had led to its enactment. "The judgment," he lectured his brethren, "should be based upon a consideration of relevant facts, actual or possible—*ex facto jus oritor*. That ancient rule must prevail in order that we have a system of living law. . . . What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection?" He then went on to justify the law, not in narrow legal terms, but as a legitimate response to a real social problem, which he also described in great detail, employing some fifteen pages of labor statistics.[23]



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The Brandeis brief had been transposed into *U. S. Reports*, and the results disturbed not only conservatives, but some of Brandeis' friends as well. Holmes, for example, considered partisan documentation out of place in a judicial opinion, while Roscoe Pound and Harold Laski suggested that Brandeis show greater restraint. "If you could hint to Brandeis," Laski prodded Holmes, "that judicial opinions aren't to be written in the form of a brief it would be a great relief to the world."[24]

But such critics missed the significance of what Brandeis was attempting to do. Where Holmes was merely satisfied if challenged legislation seemed reasonable, Brandeis had to be convinced of the correctness of the response as it applied to the problem. He did not favor as an abstract principle the use of governmental powers; big government was a real threat to both societal and individual freedoms, an evil to be avoided at all costs. The power of the state, therefore, should only be exercised when there was a legitimate need and in a measured and proper manner. The explication of why a state chose a particular course of action was necessary not only to convince the conservatives, but to point out to reformers the proper way to go about their business.

"Remember," he told a group of social workers, "that progress is necessarily slow; that remedies are necessarily tentative; that, because of varying conditions, there must be much and constant enquiry into facts . . . and that always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—and the main factor—in real betterment."[25] When contested measures exceeded the bounds of reason, when they involved too great a usage of governmental power, Brandeis had no qualms in rejecting them. Franklin Roosevelt may have been surprised that Isaiah had joined in killing the NRA, but anyone who had studied the justice's professed beliefs could hardly have seen him voting any other way.

Was Brandeis guilty, therefore, of injecting his personal biases into his decisions, just as did those conservatives from Stephen Field on down who have been the target of so much scholarly criticism? Certainly in his dissents in the *Quaker State Cab Company* case and in *Liggett v. Lee*, there is no doubt that Brandeis' ardent defense of the state laws accurately expressed his political prejudices as well as his legal opinion.[26] Do we, however, excuse Brandeis' defense of his beliefs because we agree with him, while we condemn a Sutherland or a McReynolds because we do not share their views?

Certainly, by now, few lawyers still hold with Mr. Justice Roberts' assertion that when a law is challenged, all the Supreme Court does is "lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former."[27] Long ago Holmes noted that the prejudices of judges played an important role in determining constitutional policy, and Jerome Frank later reminded us that merely by donning the silk robe judges did not cast away their individuality, their experience, or their ideas. After so many years of being the people's advocate, Brandeis could hardly transform himself into the legal computator described by Roberts.

Moreover, Brandeis cannot be accused of opposing reforms with which he did not agree. No better example can be found of this open-mindedness than in *New State Ice Company v. Liebman*, where the great advocate of competition defended the state's creation of a monopoly. Brandeis may or may not have agreed with the reasoning behind the Oklahoma statute, that in a depression it was necessary to limit certain types of business for the public benefit. He did recognize, however, that the state was attempting to deal with the depression in a new and experimental manner, that under the federal system it had that right, and he appealed to his brethren to allow the political system to be innovative and adaptive. He declared:

> This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have the power to do this, because the due process clause has been held by the Court applicable to



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> matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[28]

"If we would guide by the light of reason, we must let our minds be bold." Here in one of the most daring and eloquent phrases in our entire constitutional literature is the key to Brandeisian liberalism, the marriage of boldness and reason. Not a cool rationality afraid of venturing into new and uncharted waters, nor a blind bravery foolishly charging ahead without benefit of thought. We must dare, we must try new things, we must allow for experimentation even if we do not know what the ultimate results will be; but we must always proceed from logic, from knowledge of the facts. Before making a leap of faith, plant both feet firmly on the solid ground of reason.

The *New State Ice* case also displays another facet of Brandeis' political philosophy, one which seems to be coming back into fashion these days. Brandeis was a federalist, a true believer in the partnership and equality of local, state, and federal jurisdictions. "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."[29]

Here is an answer to part of the dilemma of modern liberalism, how to restrain the power of the state while using it for socially desirable ends. For Brandeis, the answer lay in the nature of the American system, a sharing of powers and responsibilities, the opportunity to isolate one part from the whole and then let that state try the experiment. If it failed, then no one else would be hurt; if it succeeded, then others could benefit from the experience. During the 1930's he proudly pointed to the Wisconsin program of unemployment compensation, not only because his daughter and son-in-law had a hand in devising it, but because it demonstrated the flexibility and innovativeness of the system at its best.[30] Much of Brandeis' unhappiness with the New Deal stemmed from his belief that the national government was intruding too heavily on the prerogatives of the states, preventing them from assuming their rightful share of responsibilities and duties. Rather than make use of the states as social laboratories, Washington insisted on launching one experiment after another on a national scale. When some of these efforts failed, as they were bound to do, the liberal response frequently was to mount an even larger campaign, based on the fallacy that bigger was better and more efficacious, an idea which Brandeis had campaigned against all of his life.

In the last decade the conservatives have consciously or unconsciously echoed the ideas of this liberal hero—big government is dangerous to our liberties, the state has taken over too many of the individual's responsibilities, the federal government must allow the states greater leeway and authority in deciding social policy. Let us hope that the conservatives will not make the same mistake as the liberals, forgetting that Louis Brandeis called for balance and moderation, that he wanted boldness of vision to go in hand with reason, that respect for the individual and his rights must always be weighed against the good and welfare of the entire society.

If this concern for individual rights and opportunities seems closer to conservative rather than liberal views, there is one area where just the opposite is true, and that is civil liberties. Modern conservatives want the single person to be free from governmental interference. But conservatives desire to recreate a consensual social fabric and value order and continuity; as a result they appear to place a lower priority on protecting the articulation of unpopular views. Here is where modern liberals can surely claim Brandeis as one of their own, for during his nearly quarter century of service on the Supreme Court, he, like Jefferson, was an unremitting foe of any form of tyranny over the minds of men.

The issue of free speech first confronted the Court as a result of World War One; Holmes' doctrine of "clear and present danger" was first enunciated in the *Schenck* case in 1919, and



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later clarified in the *Abrams* decision.[31] Because of Holmes' pithiness, of his skeptical nature which *a priori* refused to discount the merit of any idea, we tend to overlook Brandeis' equally important role in attempting to build safeguards around constitutional affirmations of civil liberties. Some scholars have suggested that Holmes defended the views of men like Schenck and Abrams because he found their ideas patently unconvincing, and therefore not dangerous. Indeed, in his classic dissent in the *Abrams* case he referred to "the surreptitious publicity of a silly leaflet" exposing a "creed of ignorance and immaturity." We overlook this passage because of the moving eloquence of his summation, a paragraph which Max Lerner characterized as "the greatest utterance on intellectual freedom by an American ranking in the English tongue with Milton and Mill."[32] Brandeis, like Holmes, had little use for the practical value of generalizations, and if there is one generalization which has played a long and confusing role in constitutional litigation, it is the "clear and present danger" doctrine. The Brandeisian dissents contain hard-headed appraisals of the facts in an effort to protect the individual against the state, while at the same time recognizing that under certain conditions limitations upon civil liberties, as upon economic liberties, are necessary.

The first speech case in which Brandeis, rather than Holmes, wrote the dissenting opinion is *Schaefer v. United States* (1920); in it he undertook the arduous task of turning Holmes' apothegm into a constitutional doctrine. "Clear and present danger," he declared, was "a rule of reason," and the responsibility of juries and then of the appellate courts was to ensure that it not be misused. "Like any other rule for human conduct it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty."[33]

In the *Schaefer* case, and a week later in the *Pierce* decision, Brandeis, with Holmes concurring, attempted to provide that calmness which had been so notably absent during the wartime hysteria. He insisted, moreover, that feelings evoked during crisis should not be allowed to distort the real meaning of "clear and present danger."[34] In *Gilbert v. Minnesota* (1920), for example, Holmes joined the majority in upholding Gilbert's conviction under a state sedition law for a speech attacking American participation in the war. Mr. Justice McKenna, who obviously had the Holmesian doctrine in mind, declared: "The Nation was at war with Germany, armies were recruiting, and the speech was discouragement of that."[35]

Brandeis not only went to pains to see if a real danger existed, but recognized that the wording of the state law was such as to interfere with discussion of unpopular ideas even in peacetime. The teaching of opposition to war, forbidden in one provision of the statute, he condemned as invading "the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, or conscience or of conviction, and teach son or daughter the doctrine of pacifism." He conceded that in times of emergency, the government "may conclude that suppression of divergent opinion is imperative, because the emergency does not permit reliance upon slower conquest of error by truth." But to abridge freedom of speech involved a far greater danger, that of curtailing those rights essential to citizen participation in public affairs.[36]

The judicial arena was not the only scene of Brandeis' involvement in protecting and defending unpopular opinions. When Zechariah Chafee faced attack by reactionary alumni at Harvard Law School, Brandeis quietly but quickly came to his defense. "You did a man's job," he wrote to Chafee, assuring him that "the persecution will make it more productive. By such follies is liberty made to grow, for the love of it is re-awakened."[37] We now have evidence, through the opening of the Brandeis-Frankfurter correspondence, that throughout the 1920's Brandeis helped to finance Frankfurter's work in defending unpopular causes, especially the *Sacco and Vanzetti* case.[38] Freedom of expression was not an abstract ideal, but an essential of democratic society, to be cherished, defended, and fought for.

Nor was public expression of ideas Brandeis'



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only concern. We should recall that Brandeis was the co-author of the right of privacy,[39] and this included not only the right to be free from public prying but from governmental inquisitiveness as well. How contemporary, and how conservative, is the relevance of Brandeis' comment in the *Olmstead* case that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." The framers of the Constitution, he wrote:

> undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone . . . . To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[40]

Even more relevant is Brandeis' assertion in another wiretapping case that this "dirty business" had to be stopped "in order to protect the Government. to protect it from illegal conduct of its officers. To preserve the purity of its courts."[41] Brandeis saw, as did few others at the time, the degrading effects such activities could have not only on the individual but upon a state which perpetrated them.

Strikingly, Brandeis penned some of his most eloquent opinions in defense of civil liberties. We do not normally think of Brandeis, as we do of Holmes, as a literary master. If asked to characterize Brandeis the jurist, we think of his insistence upon gathering and explicating facts, of his desire to relate law to life, and above all, as one of the greatest legal craftsmen ever to sit on the high court. Yet in his defense of freedom no one, not even Holmes, ever presented so forceful an appeal as did Brandeis in the *Whitney* case, a statement which led Professor Chafee to describe Brandeis as one of the "strongest conservators of Americanism." Though often quoted, it is still worth recalling:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.[42]

Yet does Brandeis' great devotion to freedom of expression justify our placing him in that school of jurisprudence, led by Justices Black and Douglas, for which the First Amendment held an exalted and protected position, and for which all restrictions on freedom of speech were *a priori* unconstitutional? Certainly there are anticipations of such a doctrine in the writings of Brandeis as well as of Holmes. If freedom is indivisible, then one can make out a case for the need to negate all infringements upon this most precious of freedoms.

But here again we cannot hold Brandeis accountable for the excesses of his alleged disciples, for in the protection of the individual from the state, as in the necessity for state intervention on behalf of the individual, he at all times adhered to the Greek ideal of balance. Holmes saw the test of abuse fairly simply: one does not cry "fire" in a crowded theater. For Brandeis, who really developed "clear and present danger" into a constitutional doctrine, the issues were much more complex. While he began with the assumption that the burden of



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proof regarding the danger of certain actions or utterances lay with the state, he never denied that a state had the power to preserve its integrity, and that to do so might involve—and legitimately so—the temporary restrictions of basic rights. Granted, the degree and imminence of threat to society would have to be very great, but limits existed even on liberty, otherwise it degenerated into license.

That Brandeis was a great man and a great jurist is at this point beyond cavil; those who opposed his nomination to the United States Supreme Court in 1916 have been all but forgotten, depicted by history as small-minded bigots of little vision. Yet Brandeis has suffered the fate of many great men; his followers and those who claimed to be his disciples have taken his doctrines and carried them to lengths which he never considered. As the pendulum of contemporary events swung to the left, Brandeis' justification of the state's right to attempt to resolve social problems and his defense of individual freedoms were remembered and magnified and exalted. On the other hand, his caveats on the dangers of big government, his pleas for balance, his insistence that individual responsibility underlies true democracy—these have been forgotten. We must be careful in trying to reevaluate Brandeis in our times that we do not go to the opposite extremes, that all we see is a man leery of governmental activity and experiment, one who could acknowledge the right of the state at times to suppress dissent.

The meaning of Louis Brandeis' life and work today is that he, perhaps more than anyone else to sit on the Supreme Court in this century, attempted to deal with the dilemma of modern society, the latent tensions between the need for the state to act and the resulting restrictions on individual freedoms. Liberals have moved toward further governmental activity as a remedy for all social problems, while conservatives have concentrated their reactions on apparent limitations placed upon the individual. Both sides have lacked that sense of balance which Brandeis valued so highly.

Somewhere or other, balance, moderation, perspective, and the other values which made up the Brandeisian *Weltanschauung* seem to have been misplaced. I am always struck, when reading his letters and articles and opinions, how prescient he was. He feared the excesses of big government and of big business, he warned about degradation of the environment, he alerted us to the dangers of government invading our privacy, he called on us to remember that individuals had obligations as well as rights, and he urged us time and again to remember that man, if he overreaches himself, will be overwhelmed by his creations. But the most lasting part of the Brandeisian legacy is his recognition that only by avoiding the excesses of both rampant statism and unbridled individualism can both the society and the individual enjoy the full benefits of our democratic system.*

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# *S. L. Frank and His Teachings: An Appreciation*

SERGEI LEVITZKY

THIS PAST YEAR witnessed the hundredth anniversary of the birth of one of the greatest modern Russian philosophers, Simon Ludvigovich Frank. He was born on January 29, 1877, in Moscow, of Russian-Jewish parents. His father was a physician, his grandfather a Rabbi. In the beginning Frank did not intend to be a philosopher. After graduating from high school, he enrolled in the law faculty of Moscow University. But a brief involvement in revolutionary activities and an ensuing exile delayed his academic career. He graduated from the university in 1901.

During his youth Frank experienced two ideological passions: Marxism and, later, Nietzscheanism. But the "sectarian character" of Marxism soon repelled him. In Nietzsche he valued not so much the teaching on the superman but rather "the atmosphere of spiritual life." This acquaintance with Nietzsche awakened his philosophical interests. He became a philosophical idealist and then a Christian philosopher. (He converted to Christian Orthodoxy in 1912.) In 1909 he took part in a celebrated symposium, *Vekhi* (*Milestones*), for which he published an article unmasking the spiritual nihilism of the leftist branch of the Russian intelligentsia. In 1908 he married his student Tatiana Barzeva. The marriage was happy, and they had several children. In 1914 he wrote his first major work, dealing with the problems of epistemology, *The Object of Knowledge*, which brought him recognition. For a few years he was a professor of philosophy at the University of Saratov. But, in 1922, along with a large group of scholars, he was exiled from the U.S.S.R.

Since Frank knew German fluently, he chose to emigrate to Berlin. Here he wrote a number of articles, among them "Religion and Science" and "A Fall of Idols," dealing with the spiritual crisis of the Russian intelligentsia. In 1930 his book on social philosophy, *The Spiritual Foundations of Society*, appeared. In 1939 his *magnum opus*, *The Unfathomable*, was published. In this latter book he outlined his philosophical creed in grand style. The persecution of Jews in Hitler's Germany forced his family to emigrate to France in 1937. But there he soon found himself in a country under German occupation. Even one denunciation would have been enough to have him arrested and deported. Yet, almost by a miracle, Frank survived. Soon after the end of World War II he moved to London to live with the family of his married



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