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THE BRANDEIS BRIEF

MARION E. DORO*

BIOGRAPHIC SKETCH

On February 13, 1939, Louis D. Brandeis wrote the following note to his Chief Executive:¹

Dear Mr. President:

Pursuant to the Act of March 1, 1937, I retire this day from regular service on the bench.

Cordially,
Louis D. Brandeis

With this brief, laconic statement, he ended twenty-three years on the Supreme Court of the United States at the age of eighty-two. In frail health, but still retaining the intellectual vigor he displayed all his life, he stepped down from the bench to make way for a younger member. This act in itself was characteristic of Brandeis; his respect for the Court was so great he dared not over-stay his usefulness and impair the operation of the Court. It has been said that his career on the bench was "the great work of his life, to which all else was prelude . . ."²

He was born in Louisville, Kentucky on November 13, 1856 of Bohemian-Jewish parents who had immigrated to the United States to escape the persecutions of the European revolutions of 1848. "My earliest memories," he told Ernest Poole,³

were of the war. One exceedingly painful memory is of a licking I got in school on the morning after Bull Run. I remember helping my mother carry out food and coffee to the men from the North. The streets seemed full of them always. But there were times when the rebels came so near that we could hear the firing. At one such time my father moved us over the river. Those were my first memories.⁴

At the age of sixteen he went abroad with his parents and spent the year 1872 attending lectures at the University of Vienna, and the following year he enrolled in Annen Realschule, at Dresden, Germany.

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1. Cited in numerous places. See MASON, BRANDEIS: A FREE MAN'S LIFE 633 (1946); N.Y. Times, Oct. 6, 1941.

2. Jackson, *The Law Is a Rule for Men To Live By*, in 9 VITAL SPEECHES 665 (1942).

3. From an interview published in American Magazine, Feb., 1911, and reprinted in revised form as a foreword in BRANDEIS, BUSINESS—A PROFESSION (1914).

4. At that time he was five or six years old, depending on which Battle of Bull Run he meant, July, 1861 or August, 1862.

The Brandeis family returned to the United States in 1874 because of business losses suffered during the panic of 1873. In 1875 he entered Harvard Law School, and supported himself with the aid of a small loan from his brother and by working part-time. His friends knew him as an intense, bright-eyed and hard working young man. Graduating *summa cum laude*, he received his law degree with special permission from the university authorities because he was not yet twenty-one.

During his first year out of law school he stayed in St. Louis; he soon tired of his humdrum life in the Midwest and returned to Boston in 1879. He opened a law practice with a Harvard law classmate, Samuel Dennis Warren, Jr., and there he made his residence until he moved to Washington in 1916 to take a seat on the United States Supreme Court. In his private practice he became a successful, wealthy and widely-known lawyer. He was never primarily interested in the accumulation of wealth and his family lived a very simple life.⁵

A man of conscience and great civic spirit, he gave much of his time to public service as the "peoples' attorney." In such capacity he crusaded for a better transportation system in Boston and lower service costs from the gas companies; engaged in legal disputes with various railroad companies in New England; re-organized life insurance companies and was generally active in public life. Suffice it to say that many big business interests did not look with great favor upon his forthright presentation of economic evils, his bold remedies and his growing contacts with labor leaders. In addition to these activities he made occasional appearances before congressional committees and regulatory commissions to give information on such matters as impending bills and tariff rates.

He never ceased to amaze friend and foe alike with his ability to absorb a wealth of details and facts, and present a coherent, well organized scheme of correction for a complex problem.

Most important in this "prelude" to what Jackson calls the "great work of his life" is the series of briefs prepared in defense of maximum hours and minimum wage laws which he defended during the 1907-1916 period, for the states of Oregon, Illinois, Ohio and California. These cases were the fruition of his thinking and a part of the education of Mr. Justice Brandeis. No one could know that this early career was "an apprenticeship for an opportunity."⁶

His appointment to the Supreme Court of the United States by President Wilson in 1916 ended his active participation in public causes, but he continued to use his influence in a more subtle fashion.

5. Mason points out that income from his law practice for the years 1901-15 was approximately \$1,096,489; at the time of his death his estate was valued at \$3,138,441. MASON, *op. cit. supra* note 1, at 691.

6. Lerner, *Social Thought of Mr. Justice Brandeis*, 41 YALE L.J. 1, 7 (1931).

Brandeis' advice had been sought by many prominent figures while he was a crusading "peoples' attorney"; young people flocked to him for counsel and he responded to them in every way he could.⁷ This practice did not cease when he assumed his position on the Court. His weekly afternoon teas were famous for the guests he invited and the personages he attracted. The "bright young men" came to listen, though more often than not Brandeis evoked long comments from them and in return offered his views and suggestions on problems they would bring to him. "It was all part of a plan to carry on his crusade to give his ideas force and effect on a wide front."⁸ He imparted much of his philosophy at these small social gatherings knowing full well that the Dean Achesons, the William O. Douglases, the Freunds, and the Riesmans would come into their own some day.

By the time the New Deal arrived there was a generation of men in all walks of life who had come under his influence, who had listened to his concepts of social and economic justice and read his philosophy in his Court opinions. They carried with them a lasting appreciation of his ideas, and when they went into their communities, their classrooms or their government offices, they implemented his ideas of good government as a part of their own fundamental beliefs. At the time of his death the *New York Times* commented editorially: "Inestimable is the influence he had upon younger men, especially in the law. . . . Men in all walks of life sought advice from him, even after he had become a justice."⁹ During the last few years of his life his health was frail, and the afternoon teas diminished in size and number. His friends observed that he no longer greeted them at the door, but remained seated for the afternoon while Mrs. Brandeis watched closely and saw that he did not overtax himself.

When he died on October 5, 1941, it was difficult to recall that his appointment to the Court had been hotly contested in the United States Senate for two months. No eulogy was too warm, no amount of praise seemed enough. His friends felt a deep sense of personal loss; this mystical, heroic figure was gone. But he had left a legacy "to the

7. Brandeis was always willing to give advice, especially to the young. He was apt to encourage them to remain in their local areas and make their contribution to society where they were known, accepted and happy. This, he felt, was where they could be most effective. Mason records an amusing and interesting exchange between Brandeis and Richard Neuberger, of Oregon, now United States Senator, the latter asking the former his opinion about accepting a newspaper job with a national magazine in the East. Brandeis replied:

"Dear Richard Neuberger:
Stay in Oregon.
Cordially,
Louis Brandeis."

MASON, *op. cit. supra* note 1, at 603.

8. *Ibid.*

9. *N.Y. Times*, Oct. 6, 1941.

hundreds of young men and women who had grown up under his influence"¹⁰ for he had "revived their faith that—in a world troubled by declining standards—right, justice and truth must remain the guiding principles of human conduct."¹¹

THE PHILOSOPHY OF THE BRANDEIS BRIEF

It is important to inquire about the nature of the social and economic views of Louis D. Brandeis as a means of understanding his "brief" and his consequent influence in American life. Among his critics there is general agreement that he was a liberal—but what kind of liberal? Max Lerner points out the difficulty of labelling the Brandeis philosophy, and suggests "that the student will read his own pre-conceptions into Mr. Justice Brandeis' opinions. . . ."¹² and he adds in a footnote "Mr. Justice Cardozo finds him a philosophical jurist, Frankfurter a legal statesman, Dewey a pragmatist, Cohen a lonely thinker"¹³

Brandeis sought social justice within the context of an "industrial democracy," which could be obtained only if laws were judged on the basis of the conditions which fostered them. Law should not exist for itself or be judged simply as an exercise of logic; to measure the law to fit a static structure of society was ill use of law in a dynamic society. Brandeis believed that law is properly used for the purpose of regulating relationships of men within society; he was fully aware that the relationships of men were in constant flux. "It is the nature of our law that it has dealt not with man in general, but with him in relationships."¹⁴ There is, implicit in the Brandeis philosophy, the notion that law is intended to regulate, not to hamper men in their associations. As society changes, these relationships change, and the law must be flexible enough to make these relationships productive.

One writer suggests Brandeis' liberalism lay "in an essential morality of mind"¹⁵ and this may be another way of saying Brandeis required a reasonableness of the law. Given this reasonableness he would sustain it on those grounds even when he doubted its wisdom.¹⁶ His devotion to the well being of the individual was motivated by the role of individuals in the community. Put to the choice between the interests of one man and the community, he would protect the com-

10. Remarks of Dean Acheson prior to the funeral service. Reprinted in Dilliard, *MR. JUSTICE BRANDEIS, GREAT AMERICAN* 125 (1941).

11. Response of the Honorable Harlan F. Stone, C.J., 317 U.S. at xlix.

12. Lerner, *supra* note 6, at 2.

13. *Ibid.*

14. Brandeis, dissenting in *Truax v. Corrigan*, 257 U.S. 312, 355 (1921).

15. FREUND, *ON UNDERSTANDING THE SUPREME COURT* 49 (1949).

16. Cf. Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

munity first.¹⁷ Dissenting in the *Duplex* case¹⁸ in which he upheld a boycott of a manufacturer by labor unions, he said:

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

His views were shaped by his early experience as a "peoples' attorney" and his grasp of the complexities of the growing economy was a result, not just of his experience as a public crusader, but of a keen insight and intensive intellectual application to the problems he observed. He saw about him the inequities of the rising industrial system and the hardships it imposed on the ordinary working man. The "bigness" of business, he said, was a curse, for it gave little regard to its employees. He felt the injustice of a society which would grind down its laboring classes by affording them no protection from exploitation and taking no measures to give them decent wages and working conditions, or making provisions for them when they could no longer work.¹⁹

On one occasion, he said:

Politically, the American workingman is free—so far as the law can make him so. But is he really free? Can any man be really free who is constantly in danger of becoming dependent for mere subsistence upon somebody and something else for his own exertion and conduct? Men are not free while financially dependent upon the will of other individuals. Financial dependence is consistent with freedom only where claim to support rests upon right, not upon favor.²⁰

The only means to free the working man from his status as an economic serf was to apply social intelligence to economic and industrial life. Brandeis' legal experience with the railroads, the garment manufacturers and other business enterprises made it possible for him to see a means of achieving "industrial democracy," in which the workers would have a part in determining industrial practices and a fair share in the profits.

He did not believe that making employees shareholders in a business was the solution; rather, he felt it would be more beneficial to give labor union leaders and management representatives opportunities to come together and discuss their mutual problems. Wages and working hours were a part of business over which labor had a right to exercise influence, not only because a workingman was individually affected, but because the prosperity of a whole community rested on the well being of all of them. Government intervention and influence of private organizations could effect this *rapprochement* between business and

17. *Ibid.*

18. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921).

19. Lerner, *supra* note 6, at 8.

20. BRANDEIS, BUSINESS—A PROFESSION 59 (1914).

labor; in all cases they should be cognizant of their mutual independence on each other. In later years when he sat on the Court, Brandeis did not take sides with either group; his basic aim was to achieve "industrial democracy" in which the interests of business and labor were balanced to fit the needs of society. If a business practice produced irregular employment,²¹ or if a labor practice interfered unduly with the flow of trade,²² he did not hesitate to point out the guilty party. "Corporations and trade unions may both be in the specific instance, good or bad. What determines that is not an *a priori* theory but an ethical judgment of their motivations and their consequences."²³

The broad basis from which he worked can be described as "institutionalism" or "contextualism."²⁴ What was the economic and social context in which the problem had arisen? What factors contributed to its growth? How did existing legislation remedy the evil? What had been the experience of other states or countries with the same or similar problems? These factors he measured against his concept of the good society, where men were politically and economically free, where neither business nor labor were so powerful that they could dictate terms to one another. Business must prosper, but it could not sacrifice labor to do so; decent wages and working conditions, leisure time for thought and rest were labor's due. It was not enough that the laboring man be prosperous in material goods; he should have opportunities for growth and development.²⁵

That this social doctrine was new and revolutionary in the law is illustrated by the bitter opposition to his appointment to the Court. It was feared that he would carry this lawyer's brief to the Judge's bench. This new philosophy gave little credence to the theories of "the struggle for survival of the fittest," or the traditional approach of the Court to social legislation. Brandeis' performances as a crusader and a "peoples' attorney" in defending state legislation dealing with hours and wages indicated his unwillingness to rely on legal precedents and abstract logic. The protest to his appointment was an implicit admission by his opponents that a new order was pending. "For whatever Mr. Justice Brandeis might or might not be expected to do, he could not be expected to cleave to the tradition that the whole duty of a Supreme Court Justice was to maintain a decent ignorance of the world outside the Court."²⁶ Brandeis had long before made his position clear: "No law, written or unwritten, can be understood with-

21. Cf. Brandeis' dissent in *Adams v. Tanner*, 244 U.S. 590 (1917).

22. Cf. Brandeis' opinion for the Court in *Dorchy v. Kansas*, 264 U.S. 286 (1924).

23. Lerner, *supra* note 6, at 30.

24. *Id.* at 15.

25. Douglas, *The Lasting Influence of Mr. Justice Brandeis*, 19 TEMP. L.Q. 361 (1946).

26. Lerner, *supra* note 6, at 11.

out full knowledge of the facts out of which it arises and to which it is to be applied."²⁷

THE BRANDEIS BRIEF

Traditional Role of Law

At the turn of the century the function of interpreting the law was largely regarded as a matter of logic. The Court had accepted the theories of *laissez faire* economics, and the doctrine of evolution expounded by Herbert Spencer, to such an extent that any kind of regulation of private business was considered a violation of "liberty." Only exceptional circumstances which forced the attention of the members of the Court on matters other than the logic of the law, would suffice to cause them to alter this view.²⁸

When it was recognized that political, economic and social considerations ought to be included in the process of determining the law, the legal tradition offered little means of placing such factual data before the judges. Thus decisions regarding matters of contract, in regard to labor or business regulation, were shaped by the personal philosophies of the Court members and the rigid pattern of law unleavened by knowledge of its relationship to society. Consequently the use of logic alone "resulted in proscribing any realistic test of legislative-judicial conclusions."²⁹ The questions which needed to be asked, and answered, dealt with the social consequences of the law at issue and the consequences which could be expected to follow the judicial decision.

In reference to the first question regarding social consequences of the law, by what means were the judges to obtain the background of facts which led to its enactment? Many Justices felt this was the responsibility of the legislature, that law should be passed after legislative inquiry as to its needs had been made.³⁰ Suppose, however, the Court would not accept the legislative decision that the law was needed, how could the Court obtain sufficient data to discuss the law? In a sense this was the dilemma in *Lochner v. New York*,³¹ for the use of logic produced the rule that the restriction of employer-employee rights to contract over hours of labor violated due process. Justice Peckman refused to acknowledge that the health and welfare of employees provided any basis whatever for restricting business. It was clear that the Court would not uphold such legislation, *unless* it

27. BRANDEIS, BUSINESS—A PROFESSION 355 (1914).

28. *Holden v. Hardy*, 169 U.S. 366 (1898).

29. MASON, BRANDEIS AND THE MODERN STATE 132 (1936).

30. In this respect see Justice Harlan's dissent in *Lochner v. New York*, 198 U.S. 45, 71-74 (1905).

31. 198 U.S. 45 (1905).

could be convinced that there was reasonable relationship between such regulation and the public welfare.

It is at this crucial point in the history of constitutional development that Brandeis introduced his brief as "authoritative extra-legal data"³² to provide the Court with information as to the reasonable relation of the law to the object to be regulated. He differed from the other liberals of the day in the method he used. Rather than deal in invective and generalities, he examined the social ills in detail and offered concrete plans for social legislation.³³ In effect, Brandeis was doing no more than taking cognizance of the facts of modern industrial life.

The Technique of the Brief: Muller v. Oregon, 1908

As has been stated previously, the key to the Brandeis Brief was the *factual data* he submitted to show the *reasonableness* of the specific law at issue and the *relationship* of the regulation to the *needs* of society. In the briefs he presented, as a lawyer defending social legislation in four states, there is a definite pattern which he followed to prove his point.³⁴ An analysis of these briefs and the data they include can be compiled into a single "brief" outline to illustrate Brandeis' methodology. The following construct represents the general pattern, omitting details and using the hours of labor for women as the subject.

Part First

I. Legal Argument

(Varying from two to forty pages, citing rules from supporting cases.)

Part Second

II. Legislation Restricting Hours of Work for Women

A. American Legislation

1. List of States having such legislation

B. Foreign Legislation

1. List of countries having such legislation

C. Summary of combined experience of above Legislation

III. The World's Experience upon which the Legislation Limiting the Hours of Work for Women is Based

32. MASON, *BRANDEIS AND THE MODERN STATE* 136 (1936).

33. Lerner, *supra* note 6, at 6.

34. It should be noted that in each of these cases the research used by Brandeis was provided for him by his sister-in-law, Josephine Goldmark, who was closely associated with the National Consumers' League, and who frequently brought Brandeis' attention to cases when they were pending. Felix Frankfurter participated in writing the brief for the *Oregon Minimum Wage* case.

- A. The Dangers of Long Hours
 - 1. Causes
 - a. physical difference between men and women
 - b. nature of industrial work
 - B. Bad Effect of Long Hours on Health
 - 1. General injuries
 - 2. Problem of fatigue
 - 3. Specific evil effects on childbirth
 - C. Bad Effect of Long Hours on Safety
 - D. Bad Effect of Long Hours on Morals
 - E. Bad Effect of Long Hours on General Welfare
- IV. Shorter Hours the Only Possible Protection
- V. Benefits of Shorter Hours
- A. Good Effect on Individual
 - 1. Health
 - 2. Morals
 - 3. Home Life
 - B. Good Effect on General Welfare
- VI. Economic Aspects of Short Hours
- A. Effect on Output
 - 1. Increases efficiency
 - 2. Improves product
 - B. Aids Regularity of Employment
 - C. Widens Job Opportunities for Women
- VII. Uniformity of Restriction Necessary
- A. Overtime Dangerous to Health
 - B. Essential to Enforcement
 - C. Necessary for Just Application
- VIII. Reasonableness of Short Hours
- A. Opinions of Physicians
 - B. Opinions of Employers
 - C. Opinions of Employees
- IX. Conclusion

The outline of the brief indicates the wealth of the material Brandeis presented to the court to support his very brief legal argument. The evidence he produced relied, as Jerome Frank described it, on facts that "do not involve witnesses' credibility."³⁵ It reveals a concern for the "why" legislation was passed, what it is intended to do, and the benefits, including a dollars and cents consideration, which will accrue to business and labor alike. Thus it was an intellectual inquiry whose

35. FRANK, COURTS ON TRIAL 32 (1949).

ends were social justice. It is so persuasive in content that the burden of proof placed on the opposing party in the suit is almost impossible to overcome. The simplicity and clarity of the organized evidence is an invitation to apply a pragmatic test to the reasonableness of the law, and in the final analysis it becomes an irresistible force. The Brandeis Brief, presenting as it does the evils and the remedies, makes an appeal to the sense of justice which reduces reliance on abstract logic of law as a sole criteria of its legality to an absurdity and a deception. The evidence, based on extensive research and heavily documented with expert opinion and factual data, defies the Court to return to any form of Darwinism or individualism. It qualifies the maxims of frugality, thrift, hard work, etc., on which the early American political tradition rests, and points out the injustices of a system which fosters these values but allows no rewards for those who live by them.

The first successful use of the brief before the Supreme Court of the United States came in 1908, when Brandeis argued in *Muller v. Oregon*³⁶ to sustain an Oregon law establishing a ten hour day for women employed in "any mechanical establishment, or factory or laundry." The argument consisted of two pages of the legal rules applicable to the case, and was followed by 102 pages of evidence.

The most interesting aspect of the case is that Brandeis relied on the rule of *Lochner v. New York*³⁷ to prove his point. He began by agreeing that "the right to purchase or sell labor is a part of the 'liberty' protected by the fourteenth amendment" but, he pointed out, "such 'liberty' is subject to *reasonable restraint* by the police power of the state if there is a relationship to public 'health, safety or welfare.'" Brandeis concluded that the statute was "obviously enacted for the purpose of protecting the public health, safety and welfare" and submitted "the facts of common knowledge of which the Court may take judicial notice" as proof of his argument.

The supporting evidence which followed the argument deeply impressed the Court, and Justice Brewer, who delivered the opinion, quoted extensively from it.³⁸ Asserting that the right to contract is an essential part of the protection afforded by the fourteenth amendment, Brewer pointed out that it is not an absolute right and can be restrained "in many respects."³⁹ The reader finds that Brewer, in spite of his strong *laissez faire* feelings, had come under the spell of the brief as he concluded in favor of the law on the grounds that long hours of work impair the health of women, and this in turn weakens her offspring and the health of the nation. The regulation,

36. 208 U.S. 412 (1908).

37. 198 U.S. 45 (1905).

38. 208 U.S. 412, 419-21 (1908).

39. *Id.* at 421.

he asserted, was based on a reasonable classification, since it affected not just women, but worked to the benefit of the whole country. Thus, for the first time in the history of the Court, due process was determined, not just by consideration of abstract legal concepts, but also on the basis of the social and economic implications of the law at issue.

The Technique of the Brief: The New State Ice Case

However, once Brandeis was on the Court and could no longer argue before it, he continued to use this unique approach in writing his opinions. Though none of them represented the extensive research found in the previous briefs, the methodology remained unaltered, and his footnote citations giving supporting evidence were voluminous. Following his usual fashion, he would master the facts of the case and apply his criteria:

1. What were the evils the law was intended to cure?
2. What remedies did the law provide?
3. What were the results obtained from that law, and other laws dealing with similar situations?

He would then base his decision on this analysis, and the law would stand or fall on whether or not the evidence proved it contributed to the public welfare. Brandeis never deviated from this pattern and his technique could be illustrated with any number of cases dealing with social legislation. It is difficult to choose one case out of the extensive array of the 528 decisions he wrote during his career on the Court. Perhaps the best example among these is *New State Ice Co. v. Liebmann*,⁴⁰ for it not only reveals the use of his doctrine on the Court, but reflects much of his social philosophy.

In 1931 an Oklahoma law requiring the licensing of ice companies on a certificate of public necessity was challenged by a private ice-company owner who was prosecuted for establishing an ice business without obtaining a license. The act declared that "the manufacture, sale and distribution of ice is a public business"⁴¹ and it was designed to limit the number of such businesses in order to reduce the abuses arising out of competition between public utilities. Licenses were to be issued only where the existing supply was insufficient to meet current needs. Justice Sutherland, speaking for the majority, held the law as unreasonable, arbitrary and a deprivation of the individual liberty to choose one's occupation. He declared this was a denial of protection of due process under the fourteenth amendment. Sutherland did not agree that ice business was "affected with public interest" since ice could be privately manufactured in the home by

40. 285 U.S. 262 (1932).

41. *Id.* at 271.

mechanical means and thus "it hardly will do to say that people are generally at the mercy of the manufacturer, seller and distributor of ice for ordinary needs."⁴² Continuing, he indicated: "The control here asserted does not protect against monopoly, but tends to foster it."⁴³ Furthermore he was not willing to support the legislation as an experimental activity of the Oklahoma state legislature.

Brandeis, joined by Mr. Justice Stone, dissented. He began by stating his views on business and the role of the State in dealing with the problems of business. The certificate of necessity "is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste."⁴⁴ Brandeis pointed out that free competition could be harmful to a community and that the use of such certificates by other states for other purposes considered to be public utilities was widespread and had never been successfully challenged.

He believed that classifying the manufacture of ice as a public utility "is a matter primarily for the determination of the State legislature,"⁴⁵ subject, of course, to judicial review for purposes of judging the reasonableness of the law, but not as a check on the wisdom of it.

Brandeis pointed out that the task for the Court was to determine whether the experience of Oklahoma, in dealing with the manufacture of ice, reasonably justified:

(a) The classification of that business as a public business.

(b) Giving power to the commission to prohibit creation of new plants in communities they felt were already adequately served.

Next he moved to the relevant facts with which the Oklahoma legislature had to cope. He argued:

(a) A supply of ice was necessary to "comfortable and wholesome living"⁴⁶ in the climate of Oklahoma, where its use in homes and commercial enterprises was so important that there would be serious financial losses if the supply ceased. Since ice was of such prime importance it seemed hardly arbitrary to him to declare its manufacture a business affected with the public interest.

(b) The method of manufacturing ice privately (viz: electric refrigerator) was so expensive as to be prohibitive, and the existence of such mechanical equipment was not evidence that it was widely and cheaply available.

(c) The ice business "lends itself peculiarly to monopoly"⁴⁷ because

42. *Id.* at 278.

43. *Id.* at 279.

44. *Id.* at 282.

45. *Id.* at 284.

46. *Id.* at 287.

47. *Id.* at 291.

duplication of its facilities increases cost of ice, and it cannot compensate because of an almost fixed market for it. Thus, applying a fundamental principle by which he judged business, Brandeis said that the most efficient management of the ice business was to limit it to its maximum need in any given community, rather than allow ruinous competition in which the consumer becomes a helpless victim.

Citing the benefits of the law, Brandeis said that:

(a) Since 1925, the date of the passage of the act, there had been considerable improvement in the supply and servicing of ice in the State and a general acceptance of the regulation by the ice industry.

(b) Previous experience with limited regulation of the ice business left much to be desired, and the 1925 Act was designed to correct the weaknesses of the earlier legislation. Experience had shown that the destructive competition in the business was widely felt, and the Act of 1925 was based on many years of "legislative and administrative experience in the regulation of it."⁴⁸

Thus, Brandeis felt the "measure bore substantial relation to the evils found to exist"⁴⁹ and that any attempt to strike it down would carry the effect of the Court acting as a super-legislature. It was inconceivable to Brandeis that the "Federal Constitution guarantees to the individual the absolute right to enter the ice business, however detrimental the exercise of that right may be to the public welfare."⁵⁰

He expressed his view that business affected with a public interest needs regulation according to the kind of protection needed by the public; that regulations should not be "unreasonable, arbitrary, or capricious; . . . the means of regulation selected shall have a real or substantial relation to the object sought to be obtained."⁵¹

Pointing out that "the people of the United States are now confronted with an emergency more serious than war"⁵² and that economists were searching for means to overcome the depression, Brandeis said: "But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity."⁵³ Whether the solutions offered by economists and social scientists would ultimately solve the problems of the depression,

48. *Id.* at 300.

49. *Ibid.*

50. *Ibid.*

51. *Id.* at 302.

52. *Id.* at 306.

53. *Id.* at 307-08.

Brandeis did not know. However, he felt no solution would be found if government did not take the initiative and the Court was unwilling to allow experimental projects to combat the new problems. "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."⁵⁴

Brandeis closed with a plea to support legislative experimentation as a means of finding solutions to the problems of the day and with the warning "we must be ever on our guard, lest we erect our prejudices into legal principles."⁵⁵

In essence, then, Brandeis preferred to consider a law in the light of the sociological and economic factors from which it came, rather than rely solely on the syllogisms of the fundamental law. This was the core of the Brandeis Brief and it contributed to the evolutionary progress of American law in a most productive way.

*The Application of the Brandeis Brief: Minimum Wages and
Maximum Hours Legislation*

It has been said that the layman may find the character of Brandeis' contribution to the Court "obscure and elusive. It does not lie on the surface, nor does it thrust itself upon lay attention."⁵⁶ This is true, not because his work was insignificant—far from it—but because his philosophy is so much a part of American law today that it seems impossible to imagine law devoid of concern for economic and social implications which he brought to it. Legislators and members of the judiciary were not blind or immune to the needs arising from the changes taking place in the American industrial system, but it was Brandeis who finally made articulate the economic and social factors which could no longer be ignored. The significant fact of the Brandeis Brief is that the Court accepted it as "an entirely appropriate means for buttressing the legal argument in behalf of what would be called today welfare legislation."⁵⁷

In the cases that followed the *Muller v. Oregon* decision, lawyers developed the practice of submitting voluminous briefs, with medical and scientific data to prove the necessity for the social legislation they were supporting. In 1917 another Oregon law (this time making a ten-hour day applicable to all industrial workers and requiring additional wages for overtime) was brought before the Court in *Bunting v. Oregon*.⁵⁸ By this time Brandeis was on the bench, and because he

54. *Id.* at 311.

55. *Ibid.*

56. Jackson, *supra* note 2, at 665.

57. KNOEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 88 (1956).

58. 243 U.S. 426 (1917).

had been so closely associated with the situation in that state, he disqualified himself. Justice McKenna, speaking for the Court, and incorporating Justice Holmes dissent from the *Lochner* case, made it patently clear that a reasonable relationship of public health or public safety to short hours justified limitation of the freedom of contract protected by the due process clause of the fourteenth amendment. This was of great significance because the burden of proof was now shifted to those who challenged the law, rather than resting with those who advocated social legislation.

Although the *Bunting* case touched on minimum wages, this issue was settled in *Stettler v. O'Hara*.⁵⁹ The Court divided four-to-four and thus upheld a favorable ruling of the lower court. Brandeis, who had written the brief for Oregon prior to assuming his seat on the Court, disqualified himself and Felix Frankfurter, then a professor at the Harvard Law School, argued the case before the Court. There is no question that had Brandeis cast a vote, the decision would have been five-to-four. Unfortunately, the ruling upholding a minimum wage law could not establish a controlling precedent because it came from an evenly divided Court. In the cases which followed precedent mattered little, and the Court decisions taught the object lesson of the dangers of anticipating what it would do in the future on the basis of what it had done in the past.

The matter of minimum wages came up again in *Adkins v. Children's Hospital*,⁶⁰ and once more Brandeis felt compelled to disqualify himself from the case because his daughter, Elizabeth, was a member of the commission dealing with wage rates. In a five-to-three decision, Sutherland, speaking for the Court, held invalid, as a denial of due process, a minimum wage law for women which had been passed by Congress for the District of Columbia. Implicitly repudiating the philosophy of the Brandeis Brief, he maintained that there was no connection whatever between wages women received and their health and morals. He said, in part:

It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former.⁶¹

All this, in spite of an eleven-hundred page brief, prepared by Felix Frankfurter, submitting that the effect of low wages *was* detrimental to the health and morals of women. Sutherland had incorporated "Herbert Spencer's *Social Statics*" into the Constitution, Holmes' pleas in *Lochner v. New York* to the contrary.

59. 243 U.S. 629 (1917).

60. 261 U.S. 525 (1923).

61. *Id.* at 556.

This return to the *Lochner* rule made the gains of the Brandeis Brief appear illusive. However, it gave rise to scathing dissents from Chief Justice Taft and Justice Holmes, who shared the Brandeis view on this matter and expressed themselves when he could not. Taft felt that *Muller v. Oregon* should have been controlling, that the *Lochner* decision was overruled *sub silentio* by the *Bunting* case; it was clear to him that "the evils of the sweating system and of the long hours and low wages"⁶² stood in need of correction. He continued: "But it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound."⁶³ Holmes was absolutely livid; as far as he was concerned the removal of conditions which led to poor health, immorality, etc., were within the scope of constitutional legislation, and he held the "liberty of contract" concept to scorn when it was used in so unreasonable a manner as to be held more sacred than protection of women in their employment.

Thus, the concept of the Brandeis Brief was relegated to the minority, in spite of its impressive beginning in the *Muller* case in 1908. It remained so for more than a decade by a bare majority of the ultra-conservative members of the Court, who adamantly refused to be moved from their *laissez-faire* tenets, and who held to their blind conviction that minimum wages and maximum hours were a matter of contract between employer and employee and bore no relation to the general welfare. The dispute between the majority and the minority members of the Court became so bitter as to evoke from Mr. Justice Stone the accusation:

It is difficult to imagine any grounds, other than our own *personal economic predilections*, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.⁶⁴ (Emphasis added.)

The decisions on these cases came from a deeply divided Court. The depression was reaching the depths of American economic life, and the concept of self-help which sustained the conservative group on the bench came under heavy fire. There was a growing feeling that government had a duty to help those who could not help themselves, and it was apparent that the Court would have to reconsider its concept of "liberty of contract." Economic conditions in the country made it imperative that the Court take judicial notice of the growing demands for relief from economic pressure stemming from the de-

62. *Id.* at 562.

63. *Ibid.*

64. *Morehead v. Tipaldo*, 298 U.S. 487, 633 (1936) (dissenting opinion).

pression. It finally did so in a series of cases in 1937 by a majority of one vote, as Justice Roberts moved from the conservative group into the ranks of the former dissenters.

In sustaining a Washington state law providing for a minimum wage for women and children the Court specifically overruled the *Adkins* decision and held, in the words of Chief Justice Hughes:

Liberty under the Constitution . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

....

What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?⁶⁵ (Emphasis added.)

A few years later, this was followed by the *Darby Lumber* case⁶⁶ which brought the Brandeis Brief full circle. It remained for the new majority to extend this doctrine to *all* workers, men and women alike. Justice Stone declared "it is no longer open to question" that the fixing of minimum hours was within the scope of legislative power. Although the decision turned on the commerce power, it was not without regard to the economic and social factors which made the law necessary.

CONCLUSION

In the end, the Brandeis philosophy triumphed, and the pattern set by his technique has been followed as an enlightened approach to law. This success was helped by a change of opinion on the Court in view of the needs pressed on the nation by the depression. However, Brandeis had created the foundation on which the new doctrine was built. The basic principle, of *looking at the law in the context from which it came*, has enriched American law and made it the "living" rule Brandeis so often advocated. "Contextualism" as a part of the lawyer's brief became a technique which a judge could utilize and incorporate into court decisions. Its validity remains as a concept which is universally applicable to problems other than social legislation, e.g., the recent school segregation cases. Simple in its outward appearance, it requires wisdom as well as a willingness to revise old ideas as to what is reasonable. It must be used with caution, in Brandeis' own words, "lest we erect our prejudices into legal principles."

65. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 398 *passim* (1937).

66. *United States v. Darby*, 312 U.S. 100 (1941).

