



LOUIS D. BRANDEIS'S MIT LECTURES ON LAW (1892-1894)

EDITED BY ROBERT F. COCHRAN JR.

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Reviewed by R. Mark Frey

Louis D. Brandeis was a legal giant who helped shape the law through his work both as an attorney and as a Supreme Court justice. One marvels at his intellect, his social conscience, and his accomplishments. At the same time, one wonders how and why he developed his particular perspective on the law and its place in U.S. society.

Brandeis was born in 1856 in Louisville, Ky., the son of Bohemian immigrant Jews. He graduated from Harvard Law School at 20 and established a law partnership in Boston with his law school classmate, Samuel D. Warren. The two gained prominence when they published a seminal article entitled "The Right to Privacy" in the Dec. 15, 1890, *Harvard Law Review*. In the article, they observed that "[p]olitical, social, and economic changes entail the recognition of new rights," one of which was a right to privacy.

Years later, Brandeis employed similar reasoning in his oft-cited dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), in which the Supreme Court held that a warrantless wiretap did not violate the Fourth or Fifth Amendments. He

noted that the framers of our Constitution "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—the most comprehensive of rights and the right most valued by civilized men [*sic*]. 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. And, the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." Brandeis's dissent continues to be relevant, as people today struggle over our government's anti-terrorism policies in relation to our civil liberties.

The decades of the 1890s and 1900s proved to be significant for Brandeis's professional development. His partner, Samuel Warren, left their firm for another business opportunity, and Brandeis formed a new firm with two other attorneys. As time passed, he became less interested in legal work focusing solely on clients' business needs and more interested in cases having a wider-ranging impact on society. Industrial monopolization, the growing power of large banks and trusts, workplace and labor protections, as well as pro bono work and access to legal services, increasingly drew his attention. He became involved in numerous reform efforts, spearheading opposition to monopolization of the Boston rag trade, fighting to preserve the Boston subway system, opposing restrictions on the sale of liquor in Massachusetts, and battling public corruption, all the while influencing public opinion through magazine articles and speeches.

This was the Progressive era, with its escalating concern over the unregulated power of large corporations, corruption in politics and government, and social justice. Brandeis was in the thick of many Progressive causes and became known as "the People's Lawyer." His legal work led to the development of what has become known as the Brandeis Brief, a brief relying not only on legal citations but also on information gleaned from research containing social science, medical, and economic data.

Starting in 1892, Brandeis delivered lectures on business law to undergraduates at the Massachusetts Institute of Technology

(MIT). Why would he teach while he had a thriving law practice and engaged in so many other activities? Apparently, MIT President Francis Amasa Walker was impressed by Brandeis's broad, holistic perspective of the lawyer's function ("helping clients not only to understand the law, but also to see their legal problems in light of their business situation") and invited him to teach there. According to Brandeis, MIT offered his course in business law as "an essential part of a liberal education" and because "such knowledge is of great practical value to men [*sic*] engaged in active life." Although the class was entitled "Business Law," it was not restricted to that subject alone. As was typical of Brandeis's wide-ranging perspective, he covered such other areas as legal history, legal philosophy, civil procedure, evidence, and criminal law. As recounted by one of his students, Gerald Swope, Brandeis was "quite stimulating" with lectures that "gave me a broader base [than engineering] and helped me afterwards." Swope went on to become president of General Electric from 1922 to 1939 and from 1942 to 1944, and his biographer, David Loth, noted that, at the time, business "seemed perilously like the law of the jungle if one looked at the exploits of Goulds and Vanderbilts, although these were much admired in the nineties. But Brandeis offered a different ethic, one of public service. ... He considerably broadened young Swope's understanding of the nature of business and of society itself, without converting the youngster to his own passionate belief in the dangers of corporate size."

Louis D. Brandeis's MIT Lectures on Law (1892-1894) is the first publication of those lectures, and it includes both the original and revised versions of the lectures. Editor Robert Cochran Jr. notes the difficulty of editing the book for two different audiences: readers seeking insight into one of our country's great legal minds, and historians interested in the exact text of the original lectures. Cochran believes that the former audience would be willing to sacrifice exactness for the sake of readability. He serves its interest by lightly editing both the original and revised versions of the lectures for readability, and by merging portions of the original versions into the revised versions, "to make the reading experience something like sitting in on Brandeis's lectures." Then, for

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the sake of historians, Cochran also includes other portions of the original versions of the lectures in an appendix. He explains all his editorial decisions in italicized text notes and bracketed footnotes, thereby satisfying the need of historians for accuracy. The book's appendices also include course exams and Brandeis's 1895-1896 casebook outlines.

The lectures provide much depth and insight into Brandeis's view of the law, and Cochran's excellent introductory essay provides a crucial understanding of their significance. For me, the importance of the lectures and Cochran's insights lies in showing the evolution of Brandeis's views and thoughts about the law so as to further our understanding of him as a Supreme Court justice in the years to follow. In fact, Brandeis attributed his time at MIT to helping him develop and expound upon his view of the law and its relation to society.

Initially, Brandeis saw his lectures as providing students with "a routine defense of the adequacy of the common law to deal with industrial and commercial problems." But, in a July 27, 1914, interview with *The Independent*, he noted in retrospect that the 1892 Homestead strike in Pennsylvania had caused him to reconsider his view about the adequacy of the common law.

I think it was the affair at Homestead which first set me to thinking seriously about the labor problem. It took the shock of that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages, to turn my mind definitely toward a searching study of the relations of labor to industry. ... [O]ne morning the newspaper carried the story of the [July 6, 1892] pitched battle between the Pinkertons on the barge and barricaded steel workers on the bank. I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles. Those talks at Tech marked an epoch in my own career.

Paul Freund, Brandeis's clerk during the Supreme Court's 1932-1933 term, recalled that Brandeis was deeply affected by the

Homestead strike. According to Freund in an essay about his clerkship with Brandeis, the Homestead strike revealed "the tragic mask in the human drama" and "led [Brandeis] to think hard and endlessly on the issues of freedom and responsibility, material provision and moral development, competition and the sense of community." Cochran finds this surprising because a perusal of Brandeis's MIT lectures, notwithstanding changes he made over the years while teaching there, displays little of the social activist lawyer. As a matter of fact, Cochran notes that, for progressive readers, the lectures may seem somewhat conservative.

If this is the case, then what should one make of Brandeis's contention that he underwent a conversion at the time? Cochran has, I think, correctly hit upon the likely intellectual challenge that Brandeis faced at the time he wrote and rewrote his lectures, and that is the dynamic interplay between the common law and legislation in addressing social issues. Brandeis made some changes to his lectures as he reflected upon the place of legislation in relation to the common law's limitations. Although he believed that judicial restraint was appropriate in the face of social legislation, he still had not resolved his thinking about this interplay. At that time, he still argued against government regulation of working hours because he believed that employers and employees' freedom of contract was at stake. It took several more years before he had resolved the interplay in his own mind. By 1908, for example, his thinking had progressed to the point where he successfully argued before the Court that legislation could limit women's working hours (*Muller v. Oregon*, 208 U.S. 412 (1908)). In fact, as Cochran notes, by the time Brandeis became a Supreme Court justice, he was a "staunch defender of the constitutionality of most legislation in the face of a Court that held much social legislation unconstitutional."

Notwithstanding his development and evolution as a progressive, Brandeis remained a conservative in the sense of believing that local solutions to economic and social problems were more effective than a top-down, one-size-fits-all approach. As a Jeffersonian, he believed that government could do only so much, and that states were better prepared to handle some problems. He argued, in effect, that states

should serve as laboratories for democracy. Ultimately, Brandeis's "goal was a system that enhanced individual freedom. At times he saw the threat to individual freedom coming from government, at times from business. ... [H]e came to see danger in big-business—big business, big government, and big unions—arguing that smaller units of almost everything would allow individuals to exercise greater control over their lives." The opportunity to teach at MIT afforded Brandeis time to reflect upon the law and its place in society. As Cochran has cogently noted, "such reflection went a long way in the development of the wise lawyer and Justice that Brandeis was to become."

The value of *Louis D. Brandeis's MIT Lectures on Law (1892-1894)* comes from its providing the reader a glimpse into the mind of one of our greatest Supreme Court justices and pointing to his continued relevance today in a world still mired in many of the same issues present in Brandeis's day. Brandeis's lectures and Cochran's introductory essay show the development of his thoughts and reflections on the law, but they do not tell the whole story in all its brilliance and complexity. As a companion to the *MIT Lectures*, I strongly recommend Melvin Urofsky's 2009 book, *Louis D. Brandeis: A Life* (reviewed in the March/April 2011 issue of *The Federal Lawyer*). Together, these books provide a rich description of the life of Justice Brandeis—one contemplated and lived to its fullest. ☺

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STRANGE REBELS: 1979 AND THE BIRTH OF THE 21ST CENTURY

BY CHRISTIAN CARYL

Basic Books, New York, NY, 2013, 407 pages, \$28.99.

Reviewed by David Heymsfeld

In *Strange Rebels: 1979 and the Birth of the 21st Century*, Christian Caryl gives us new insights and perspectives into the sweeping changes that have occurred in world political and economic thought since the 1970s. In a nutshell, "communist and socialist thought has faded, markets domi-