ADVANCE SHEET – June 10, 2022

President's Letter

The lead article in this issue is of my own composition, and is designed to string together and cause readers to recall some of the more notable prose of Mr. Justice Brandeis.

George W. Liebmann

The Longest Day Times Two

Each June, at least here in the Northern Hemisphere, we commemorate and celebrate two days that hold claim to being the Longest Day. The first, June 6, commemorates the Allied invasion of France on June 6, 1944. The title derives from a 1959 book by Cornelius Ryan which was in turn made into a 1962 film of the same name. As a boy growing up I remember my father, who participated in numerous "days at the beach" of his own during the War, only in the Pacific, would always begin every June 6th with the simple question of "Well, you know what today is?"

On a sunnier, happier note, June 21st is, of course, by merit of being the first day of summer, also the longest day. Beaches, picnics and families, enjoying and realizing that long days can in fact be a good thing. In the fall of my years, rapidly accelerating toward the winter (does anyone know how to slow things down), I get the chance to revel in and enjoy these days, not just my own, but those of my family. We bought a sandbox for our granddaughter to play in when she is over the house (our own children always loved playing in the sand) and watching her play, along with a few of my daughters who apparently still "enjoy the magic," was more fun than I can describe. I hope the same for all of you these long days of summer, family, friends and memories.

Now, of course, even in the summer work needs to get done. To get it done quickly and efficiently, so you can get to your own sand, might I suggest a trip to the Bar Library. We have the books, the computers, just about anything a lawyer might need. A multitude of legal resources for a fraction of the price you are going to access them anywhere else seems to be a wise course of action to pursue. With downsizing going on around town, might this not be an ideal time to think about cost cutting measures? Might this not be an ideal time to think of the Library?

Take care and I look forward to seeing you soon.

Joe Bennett

Brandeis Revisited

Twenty years ago, I concluded a book about six Victorian and Edwardian period social reformers (Six Lost Leaders, Lexington Books) with the observation that "The failure of Marxism, 'the God that failed,' as Kenneth Clark and others have noted, has inspired no replacement save for an unheroic materialism, or more accurately, consumerism. This will not satisfy people in hard times; it certainly will not satisfy the young. Our subjects did not conceive of society as an egalitarian feedlot, nor did they regard individual accumulation as the chief end of man, though they did not despise the profit motive and were at least moderately orthodox in their economics. Their focus was on the workplace and the polis; on providing individuals with satisfying social roles and a deepened conception of citizenship. These purposes should be at the center of politics in our time."

On observing the antics of the young folk of all races who responded to the COVID crisis by re-enacting the sterile demands of 1968, the late Melvin Sykes, who had lived through the Depression, observed to me at a luncheon: "when are they going to rediscover Brandeis?". To date, they have not, but they should.

Brandeis was essentially a twentieth-century Jeffersonian, who sought to render the Jeffersonian ideal of a polity of self-sufficient yeoman farmers relevant to modern society. Although some, including a distinguished former law clerk, the sociologist David Riesman, regarded him merely as a clever fixer and advocate, he was a good deal more than that. He was an exponent of decentralization in both the public and private sector. In the public realm, he was quite explicit that efficiency was not the highest value. In the private economy, he urged that the atomization he favored foster efficiency, though it is doubtful that he really believed this: social and political values were paramount. He defended and fostered welfare state institutions and labor unions, but his sympathy for labor had definite limits. Though he fostered and helped design and defend minimum wage, workmen’s compensation, unemployment compensation and old age pension laws, his sympathy had its limits: he was an opponent of the closed shop, enjoyed by today's teachers' unions, and of compulsory arbitration.

His attacks on trusts and monopolies have almost entirely been cast into the discard, under the influence of the "consumer welfare" theories of Robert Bork and others. A century after his attack in *Other People's Money* on concentration in banking, the Glass-Steagall Act, the greatest victory of his influence, has been repealed and a unanimous Supreme Court, led by Justice Brennan, effectively abolished all state usury laws. Amazon and Facebook have been allowed to achieve near monopolies even over organs of communication; there are only two or three significant newspapers in the country; banking and book publishing are each in the hands of five giant organizations.

Only in the public sector do his ideals retain some influence. His restoration to the States of private tort and commercial law in Erie v. Tompkins (1938) retains some viability; the influence of his dissenting opinion in the Myers case on the later Humphrey's Executor case has helped preserve some independence for the federal regulatory agencies against promoters of a "unitary executive" and his free speech opinions, notably his concurrence in Whitney v. California (1927), have helped prevent direct suppression of speech by the state, though his lessons have not been effectively transmitted to school and college bureaucracies and their students.

Nonetheless, it is worth reviewing the more striking expressions of his social values, at least as a reproach and example to those who today write about public affairs.

His dissent in the Florida chain store tax case, Liggett v. Lee (1933) may still impress the young in this age of a proletarianized work force of warehouse employees and baristas:

"There is a widespread belief that the existing unemployment is the result in large part of the gross inequality in the distribution of wealth and income which large corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big businesses but through the courage, the energy and the resourcefulness of small men; that only by reclaiming from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome, and that only through the participation of the unknown many in the responsibilities and determinations of businesses can Americans secure the moral and intellectual development which is essential to the maintenance of liberty."

Brandeis' views as to the effect of economic concentration on distribution of income are not retrograde. Similar observations were made by Thomas Piketty and, in an earlier time, by Bertrand Russell in Power: A New Social Analysis. There is an irrefutable statistic: the share of wage-earners in gross national income declined from 52% in 1970 to 43% in 2019.

His defense of free political expression relies both on individual and social interests: "Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrines; that the

greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured only through fear of punishment for its infraction; that it is hazardous to discourage, thought, hope, and inspiration; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law...the argument of force in its worst form...It is the function of speech to free men from the bondage of irrational fears."

His classic statement on the separation of powers in his dissenting opinion in the Myers case (1926) was embraced in the opinion of Justice Sutherland in the Humphrey's Executor case in 1935 as it relates to the federal administrative agencies: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

As for federalism, as he declared in the Erie case (1938): "There stands the Constitution of the United States which recognizes and prescribes the authority and independence of the States--independence in their legislature and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Interference with either, except as thus permitted, is an erosion of the authority of the State and, to that extent, a denial of its independence. Law does not exist without some definite authority behind it...the authority and only authority is the State...the voice adopted by the State as its own should utter the last word."

Although it is properly thought that the Court of the New Deal era eroded property rights, Brandeis wrote two notable judgments in their defense: the Louisville Joint Stock Bank case (1935) on the rights of mortgagees and landlords that could not be impaired without recourse to eminent domain; and Thompson v. Consolidated Natural Gas (1937), limiting impairment of subterranean oil and gas rights through slant drilling.

His rhetoric still lives; the fragmentation of both public and private power should have appeal to a generation increasingly conscious of what a kindred spirit, the French political philosopher Simone Weil called The Need for Roots—"the need for each individual, in some sphere, to exercise the power of command."

In Tocqueville's memorable words: "It would seem as if the rulers of our time sought only to use men in order to make things great; I wish that they would try a little more to make great men; that they would set less value on the work and more upon the workman; that they would never forget that a nation cannot long remain strong when every man belonging to it is individually weak, and that no form or constitution of social polity has as yet been devised to make an energetic people out of a community of pusillanimous and enfeebled citizens."

George W. Liebmann

LEGAL SPECTATOR & MORE

Jacob A. Stein

The Magazine Group
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30 GOLDEN RULES

Recently I participated in a series of long, drawn-out negotiations. There were periods when there was nothing to do but wait for responses to cell phone calls to principals hiding out, so it seemed, all over the world. After the third day I brought with me several books giving advice on how to negotiate.

These books contain common-sense observations on human nature that were known a thousand years ago, together with sociological studies of how people behave during a negotiation, and complicated mathematical formulae attempting to capture human cynicism and the techniques of used-car salesmen and stockbrokers in algebraic equations flecked with x's, and n's, and $E=mc^2$. I remain unconvinced that algebra can catch a liar.

During one of the breaks I asked co-counsel whether he reads books or attends courses in negotiation. He said he does not. He knew there was much to be learned, but his habits were

formed by years of give-and-take, and it was too late for him to try and learn new tricks. I think that is where I am.

When I act as a mediator and one or both of the parties to the negotiation shows signs of having taken a course in the art of negotiation, I know I am in for trouble. The course shows through and slows things down. But things go rather well if I know the lawyers and they put aside technique. In a private meeting with each side, I often can get to the issues without the rain dance.

We are told lawyers must not engage in misrepresentation. But negotiation is of the marketplace with its exaggerations and disparagements. It is far away from solemn statements made under oath subject to the penalties of perjury.

George Washington, in his March 30, 1796, message to the House of Representatives, caught the spirit. Although he referred to foreign negotiations, what he said applies to many domestic negotiations:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and, even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions, which may have been proposed or contemplated, would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

It has been said that a good negotiator must have the hide of an elephant. The patience of Job. The cunning of Machiavelli. A mask for a face. The resourcefulness of Casanova. The nerve of a bandit. And the concentration of a card cheat. On occasion I

have had the feeling such a person was sitting across from me at the conference table.

We all learn the rules of the game by experience. Here are the thirty golden rules experience has taught me:

- Patience, patience, and more patience. Persistence, persistence, and more persistence.
- Don't negotiate in a hurry.
- If knowledge is power, you lose power when you talk and gain power when you listen. Be a dangerous listener. Don't interrupt.
- Get used to being told "no." Saying "no" often leads to getting to "yes."
- "No" may mean "maybe," "not at this time," "not exactly."
- At the conference table, don't be clever, be useful.
- Know when to suspend to let time bring a better setting.
- Avoid repeating your best points.
- Avoid having your client available at the table.
- Keep something in reserve. Your adversary may be doing just that.
- Once there is agreement on the main issues, immediately settle the details, including the precise language of the closing documents.
- Have an associate take notes.
- Have in mind what your next move is if the negotiation fails.
- Know what your adversary really wants: prestige, to look good to his principal, to get home before seven o'clock, to catch a plane, to delay so he will be better prepared at some later date?
- Identify what you can give away without affecting what you really want.

- Determine how payment is to be made: all cash, periodic payments, or personal guarantees?
- Use emotion only as a device. Separate yourself from the case. Indignation and sarcasm are to be used, if at all, with care.
- When a document is presented, read it line by line, noting the date, who received copies, and whether it refers to other writings. Is it the original?
- When the session is over, identify all your papers, and put them in order before leaving the room. Make sure that your adversary has none of your papers.
- What you say casually may be turned against you at a crucial time.
- "In the range of" means the lower figure.
- Don't correct every mistake of fact when asserted by your adversary. Reserve as many as you can for later use.
- Don't deal in absolutes. Beware of standing on principle.
- Patience, patience, patience.
- Make up your mind what you want before the negotiation begins.
- Don't be afraid of leaving something on the table.
- Although everything is off the record, nothing is off the record.
- When you obtain a concession, write it down. Don't ask that it be repeated. It will be modified.
- A bully is to be met with dignity and infinite resources of silence interrupted by an occasional undisputed fact.
- And, above all, not too much zeal and always patience, patience, and more patience. What's the rush?

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of Legal Spectator from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the Legal Spectator, originally appeared in the Washington Lawyer, the American Scholar, the Times Literary Supplement, the Wilson Quarterly, and the ABA Litigation Section's publication. I want to thank former Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the Advance Sheet.