THE OPPORTUNITY IN THE LAW

BY

Louis D. Brandeis

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Louis Dembitz Brandeis (/ˈbrændaɪs/; November 13, 1856 – October 5, 1941) was an American lawyer and associate justice on the Supreme Court of the United States from 1916 to 1939. He was born in Louisville, Kentucky, to Jewish immigrant parents from Bohemia, who raised him in a secular home. He attended Harvard Law School, graduating at the age of twenty with the highest grade average in the law school's history.

Brandeis settled in Boston, where he founded a law firm (that is still in practice today as Nutter McClennen & Fish) and became a recognized lawyer through his work on progressive social causes. Starting in 1890, he helped develop the "right to privacy" concept by writing a *Harvard Law Review* article of that title, and was thereby credited by legal scholar Roscoe Pound as having accomplished "nothing less than adding a chapter to our law". He later published a book titled *Other People's Money And How the Bankers Use It*, suggesting ways of curbing the power of large banks and money trusts, which partly explains why he later fought against powerful corporations, monopolies, public corruption, and mass consumerism, all of which he felt were detrimental to American values and culture. He also became active in the Zionist movement, seeing it as a solution to antisemitism in Europe and Russia, while at the same time being a way to "revive the Jewish spirit."

When his family's finances became secure, he began devoting most of his time to public causes and was later dubbed the "People's Lawyer." He insisted on serving on cases without pay so that he would be free to address the wider issues involved. The *Economist* magazine calls him "A Robin Hood of the law." Among his notable early cases were actions fighting railroad monopolies; defending workplace and labor laws; helping create the Federal Reserve System; and presenting ideas for the new Federal Trade Commission (FTC). He achieved recognition by submitting a case brief, later called the "Brandeis Brief," which relied on expert testimony from people in other professions to support his case, thereby setting a new precedent in evidence presentation.

In 1916, President Woodrow Wilson nominated Brandeis to become a member of the Supreme Court. However, his nomination was bitterly contested, partly because, as Justice William O. Douglas wrote, "Brandeis was a militant crusader for social justice whoever his opponent might be. He was dangerous not only because of his brilliance, his arithmetic, his courage. He was dangerous because he was incorruptible. . . [and] the fears of the Establishment were greater because Brandeis was the first Jew to be named to the Court." He was eventually confirmed by the Senate by a vote of 47 to 22 on June 1, 1916,—21 Republican Senators and one Democratic Senator (Francis G. Newlands of Nevada) voted against his nomination—and became one of the most famous and influential figures ever to serve on the high court. His opinions were, according to legal scholars, some of the "greatest defenses" of freedom of speech and the right to privacy ever written by a member of the Supreme Court.

Address to the Harvard Ethical Society
May 4, 1905

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

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

institutions, said of the United States seventy-five years ago:

> **"In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers, consequently, form the highest political class . . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution."**

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

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

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

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

The ordinary man thinks of the Bar as a body of men who are trying cases, perhaps even trying criminal cases. Of course there is an immense amount of litigation going on; and a great deal of the time of many lawyers is devoted to litigation. But by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters …