

# WorldView

BRANDEIS INTERNATIONAL BUSINESS SCHOOL

Published as part of a yearlong celebration to commemorate the 150th birthday of Louis D. Brandeis

## Brandeis on Business

Justice Louis D. Brandeis's  
Commentary on Business  
and Society

*Louis D. Brandeis*



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### ABOUT THE BRANDEIS INTERNATIONAL BUSINESS SCHOOL

The Brandeis International Business School is a pioneering professional school dedicated to teaching and research in global finance, management and economic policy. IBS responds to the growing need for international vision and expertise by preparing exceptional and diverse individuals from around the world to become principled leaders of global companies and public institutions. IBS teaches cutting-edge theory, immerses students in international experiences, and connects them to best practice in business and policy. This learning experience transforms the way our graduates view the world, and helps them develop insights to chart its future.

## INTRODUCTION

INTRODUCTION: PETER A. PETRI<sup>1</sup>

Louis Brandeis is most remembered for his commitment to individual rights; he was the “people’s attorney.” But Brandeis’s career before his appointment to the Supreme Court was largely spent in commercial law, and he developed a strong interest in economic systems and the practice of business. He was not a trained economist or manager, but he wrote widely on economic issues and the new “science of management.”

This issue of WorldView provides a brief introduction to Brandeis’s thinking on business and economics by highlighting some of his interesting and strongly held positions. It features three articles: Brandeis’s famous essay “Business—A Profession,” a sweeping, optimistic perspective on how business can address a wide range of social problems; a sample of quotations from other Brandeis works, compiled and annotated by Simon Sherrington, the Director of Strategic Planning at Brandeis International Business School (IBS); and an essay by the prominent judge and legal scholar Richard Posner, comparing the views of Brandeis and his long-time friend and collaborator on the bench, Oliver Wendell Holmes. Posner’s essay was the centerpiece of a colloquium organized by Professor Ben Gomes-Casseres at IBS on April 21, 2004. This thoroughly stimulating paper, along with commentary by Professor Michael Sandel ’75 of Harvard University, sparked a lively discussion confirming the currency of Brandeis’s thought and his ability to generate insights and controversy even today.



Honored with Brandeis’s name, Brandeis IBS is interested in—and inspired by—Justice Brandeis’s legacy. To be sure, this is a complex legacy. Some of what Brandeis wrote is timely and even prescient. For example, his views on privacy and financial disclosure are frequently cited today, not as historic concepts, but as guidelines for policy. But it is also true that some parts of Brandeis’s writing appear dated. We seek therefore to understand not merely what Brandeis said—often addressing the problems of his day—but to learn how he approached problems. Much has changed in the century since his time, in the structure of our economic system as well as our understanding of its strengths and weaknesses, yet it is possible and profitable, with appropriate extrapolation and judgement, to transpose many of Brandeis’s views into the contemporary era.

Brandeis’s overall opinion of business was favorable and even enthusiastic: he saw enterprise as a creative and productive force in a democratic society. As a champion of individual rights, he supported freedom in economic decision making as vigorously as in the political arena. He called this “industrial democracy” and envisioned it covering the rights of employers, employees and consumers. A wide range of his positions and opinions—from the regulation of anti-competitive business practices to the need to make unions legally accountable for anti-business actions—are derived from this basic view. Brandeis and Holmes fundamentally agreed on the value of economic freedom—this parallel forms the

<sup>1</sup> Peter A. Petri is the Carl J. Shapiro Professor of International Finance at the Brandeis International Business School. He served as the founding dean of the School from 1994 to 2006.



basis of the Posner essay—and while they disagreed on important detail, they often collaborated on opinions developing this concept. Brandeis believed strongly in the ability of the law to shape behavior and the incentives embedded in the economic system, so he was optimistic that the shortcomings of a largely free economic model, as he saw them, could be fixed with appropriate legal constraint.

Brandeis's interest in business was also complementary and perhaps even subordinate to his progressive social views. He wanted business to function efficiently in order to serve social interests; he wanted business to provide not merely products, but also opportunities for the advancement of as many people as possible. And while he recognized that private enterprise and economic freedom were essential for efficiency, he did not believe that unregulated markets would always promote social goals. He was concerned about the tendency of business to grow and become less benign, a condition he called the "curse of bigness." He argued that government should check this tendency, so that industrial democracy, properly defended, could evolve into a system based on the cooperation of employers and employees.

The governance of business, a subject as timely today as it was in his day, was Brandeis's most important passion. As Sherrington's survey shows, Brandeis covered many strands in this field and anticipated contemporary concerns. He criticized opaque accounting practices and inadequate disclosure of financial results, and opposed conflicts of financial interest in the governance of companies. He worried about the high compensation of senior officers, although executive compensation in his time was far below that today. And he was deeply troubled by interlocking corporate boards, the role of bankers in corporate governance, "self dealing" by officers and companies with related businesses, and the provision of financial advice by those with interests in securities markets. It is remarkable how many of these problems have reappeared on today's reform agenda.

Brandeis was, fundamentally, a social engineer. He was not shy about inventing and proposing new institutions to achieve social goals. Interestingly, aside from regulation, he did not usually favor government solutions ("Government does not yet grapple with the duties it has assumed, and should not extend its operations at least until it does.") His curiosity and creativity ranged widely. He created an important financial product—savings bank life insurance—that survives to this day; supported the adoption of scientific approaches to management; enthusiastically promoted business schools; and had ideas on countless issues including pensions, leisure, hours of work, privacy and, of course, legislative experimentation.

In short, Brandeis viewed business not just as a way of making a living, but as a profession that yields intellectual rewards and confers social responsibilities. He saw business as a creative enterprise with the potential for making discoveries and finding new ways to solve problems, much like science or engineering. And he believed that the profession of business required principles; the integrity of the owner or manager was essential to making business truly productive, in the sense of being efficient and making contributions to society. He often praised entrepreneurs who lived up to this high standard by building successful companies with scrupulous honesty. But he felt that many businesses—especially the large trusts of his day—did not meet his test, but instead derived profit at the expense of consumers and smaller companies.

Philanthropy appears, from time to time, as another important virtue in Brandeis's writings, but not one that would make up for improper business practices. He had little good to say about John D. Rockefeller, for example, despite the fortune he left to foundations and universities. The great achievement, in Brandeis's view, lay in practices that built enterprises of enduring value, without compromise in behavior toward competitors, customers, or workers.

The economic perspective most often associated with Brandeis today is his opposition to big business. This is also the most difficult part of his legacy; the scale of enterprise has grown substantially since his time, and legal and economic thinking has largely abandoned the regulation of size in favor of the regulation of anti-competitive behavior. Are Brandeis's views less relevant today than in his time, and if so, what has changed? What can be extracted from his writings that could still guide policy today?

Brandeis justified his objection to "bigness" with two arguments: as firms became larger, they (a) became inefficient, and (b) adopted anti-competitive practices. These problems would interact, since large firms that are inefficient are likely to resort to anti-competitive practices to remain profitable.

The hypothesis that size causes inefficiency has not been confirmed by historical and empirical developments. The evolution of communications and data processing since Brandeis's time have made it possible to control and manage larger systems. The growth of companies has not been accompanied by proportional growth in management hierarchies and associated coordination costs; rather, "leaner" management models have allowed decisions to be delegated to lower management levels. At the same time, there appear to be (or have emerged) significant economies of scale in many industries, including in retailing, a sector that Brandeis singled out as especially attractive for small-scale firms. With strong economies of scale, efficiency becomes a positive attribute of size.

At the same time, the fact that large firms continue to succeed (and of course, to fail, from time to time) has not meant an end to small enterprise. Entrepreneurial activity remains vigorous today and there is often a symbiotic relationship between small and large firms. New firms often arise by "spinning out" talent and ideas from large firms, and are powerfully motivated by the prospect of eventually selling themselves to a large firm. To be sure, smaller enterprises are not uniformly distributed across the economy. Waves of consolidation sweep through various industries from time to time, even as the overall distribution of firms by size, at least in the United States, remains reasonably stable. In this context, would Brandeis have maintained his opposition to large firms, or would he have come to terms with their positive economic role, and focused instead on regulating their negative social side-effects?

Battles on "bigness" continue. Today's Walmart controversies, for example, would feel very familiar to Brandeis. Walmart's prices cannot be matched by smaller stores. But the advantages of price competition, provided that it is based on true efficiencies in sourcing and distribution, are now more widely accepted than they were in Brandeis's day, even if the net result is consolidation. The contemporary critique of Walmart therefore tends to focus on issues such as the inadequate provision of health insurance to employees. In the United States, government does not offer health insurance and various other important social services, and does not require firms to do so either. At the same time, competition drives firms—including the highly visible Walmart—to reduce social benefits, in effect passing some costs of uninsured workers on to emergency safety nets. Brandeis, the prescient social engineer, advocated "portable" systems of social insurance in such cases (singling out especially the case of pensions) and would have presumably favored public provision or regulation of health insurance as well.

Brandeis's concern that large firms would exploit market power has been addressed by some of the regulatory measures that he championed. He already saw, and helped to strengthen, some of the laws that underlie this effort. Many large companies have been

broken up by government, from the railroad cartels and Standard Oil to AT&T. To be sure, competition is suppressed from time to time by new large firms, so the issue continues to resurface in legal debate and practice. (One of Judge Richard Posner's prominent assignments on the bench was to mediate the case involving Microsoft's violation of antitrust laws.)

But the ground is shifting here too. Legal regulations have been displaced or amplified by international competition. Even the largest companies—including the now only “big-two” U.S. automobile manufacturers—cannot thwart foreign competition through the exercise of market power. Technological advances also undercut market power. In a world of global competition and rapid technological change, there is less reason to worry about scale than there was in Brandeis's day. At the same time, the regulatory challenges involved in addressing unfair competition have become more complex as companies compete across many jurisdictions. In any case, the side-effects of concentration are now widely understood, and are seen—as Brandeis would have wished—as a routine problem of regulatory policy, rather than as a fundamental weakness of the capitalist system.

Thus, what we can best extract from Brandeis's passionate assault on size is not the general “curse of bigness,” but the need for vigilance to protect competition, with emphasis on the interests of small investors, consumers and companies. The problems faced by competition today are different than those of his time, but Brandeis would not be surprised that they continue to require intervention. Judging from the targets he chose then, Brandeis today would surely take on issues such as the misreporting of financial information, executive compensation, self-dealing, high fees in mutual funds and other investment companies, and offshoring based on weaker protections of labor and the environment abroad. We imagine that Brandeis would remain a proponent of business, but would champion “responsible leadership” that includes scrupulous integrity at a minimum, and also a commitment to solving social problems in health, education and the environment.

Brandeis found the practice of management especially interesting and he was strongly attracted to the then new scientific management movement. This was the era of Frederick Winslow Taylor's pathbreaking studies of efficiency (*The Principles of Scientific Management*, 1911) and the founding of the first business schools (Dartmouth in 1900 and Harvard in 1908). Brandeis felt that the revolution in management knowledge would accelerate, and that business schools would provide the means to develop and transmit this new science. Management science, in turn, would usher in not only greater productivity, but also the potential to share the fruits of economic progress more fully between labor and capital.

Some of this optimism was justified, some not. The growth of business schools certainly lived up to his expectations. Today they represent the second largest field of graduate professional education in the United States (after education), conferring some 140,000 master's degrees in business annually. There has been a corresponding explosion in business research and in popular writing to translate its findings into recommendations for managers. Has this increased business efficiency? Productivity has risen substantially since Brandeis's time, and has taken a new leap in recent years. Conventional innovation deserves most of the credit for this, but improvements in management practice such as “lean manufacturing” and “process reengineering” are now widely adopted and no doubt help. There is also accumulating evidence that new management and financial “technologies” are helping to dampen economic cycles and to reduce the average level as well as volatility of unemployment. While Brandeis's hopes for shared decision making on the job have not

been fully realized, work places have become less hierarchical and the conditions of work (in the wealthier countries at least) have substantially improved.

Brandeis would certainly welcome today's discussion of the “social responsibility” of business. As “Business—A Profession” eloquently shows, he saw management as a socially meaningful undertaking. He would have likely appreciated the pressure on businesses to justify their contributions not just to shareholders but to stakeholders and society at large, and he would have applauded executives who took special initiatives to promote environmental protection, education, and other social causes. But the debate on the role of business continues; while the market encourages many companies, especially those that have highly visible consumer brands, to pursue social goals, many experts still question whether a “dual bottom line” is a meaningful, or even desirable, alternative to the pursuit of profits in much of the modern economy.

Given Brandeis's interest in business schools, it may seem surprising that Brandeis University's business school is a recent addition to the University's academic portfolio. The University conferred its first graduate degrees in economics in 1989 and launched the Graduate School of International Economics and Finance (GSIEF) in 1994. (As GSIEF's expertise expanded into business subjects, the School was renamed the International Business School in 2003.) To be sure, the University is young, and the challenge of competing in the world of professional schools must have seemed daunting in its early decades.<sup>2</sup> But given the University's progressive culture, investments in business and economics may have also appeared less compelling than in other fields. Such views contributed to the failure of a proposal for a new business school in the mid-1980s. But Brandeis's own writings show that creative management and a deep commitment to social goals can be reinforcing. In the event, the University “home grown” programs in these fields—the Lemberg Program in International Economics and Finance and eventually GSIEF and IBS—developed constructive interactions with many parts of the academy, and today IBS enrolls more than 400 graduate students from around the world in distinctive, internationally recognized programs.

We imagine that Brandeis would have been pleased with this outcome. IBS's commitment to “training responsible leaders for the global economy” reflects the goals he set for business and business education. Addressing the implications of the great social challenge of our time—the globalization of economic activity—would have also likely appealed to his curiosity and forward-looking interests. And he would have been surely pleased with the School's diversity and commitment to international cooperation.

The Brandeis International Business School proudly celebrates the legacy of this giant of American thought and public life. We understand clearly that a business school established in his name must be more ambitious than a typical school; our job cannot stop with training effective practitioners, no matter how successful they become. Rather, we seek, as Brandeis did, to understand the social challenges of our time, and to contribute to their solutions. And like Brandeis, we regard business education as a significant tool for honing powerful, creative skills in the service of society.

<sup>2</sup> Brandeis University also does not have a law school, but it did establish a school on social policy, the Heller School for Advanced Studies in Social Welfare, in 1954.

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 BUSINESS—A PROFESSION
 

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 BUSINESS—A PROFESSION: LOUIS D. BRANDEIS<sup>1</sup>

Each commencement season we are told by the college reports the number of graduates who have selected the professions as their occupations and the number of those who will enter business. The time has come for abandoning such a classification. Business should be, and to some extent already is, one of the professions. The once meagre list of the learned professions is being constantly enlarged. Engineering in its many branches already takes rank beside law, medicine and theology. Forestry and scientific agriculture are securing places of honor. The new professions of manufacturing, of merchandising, of transportation and of finance must soon gain recognition. The establishment of business schools in our universities is a manifestation of the modern conception of business.

The peculiar characteristics of a profession as distinguished from other occupations, I take to be these:

**First.** A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.

**Second.** It is an occupation which is pursued largely for others and not merely for one's self.

**Third.** It is an occupation in which the amount of financial return is not the accepted measure of success.

Is not each of these characteristics found today in business worthily pursued?

The field of knowledge requisite to the more successful conduct of business has been greatly widened by the application to industry not only of chemical, mechanical and electrical science, but also the new science of management; by the increasing difficulties involved in adjusting the relations of labor to capital; by the necessary intertwining of social with industrial problems; by the ever extending scope of state and federal regulation

of business. Indeed, mere size and territorial expansion have compelled the business man to enter upon new and broader fields of knowledge in order to match his achievements with his opportunities.

This new development is tending to make business an applied science. Through this development the relative value in business of the trading instinct and of mere shrewdness have, as compared with other faculties, largely diminished. The conception of trade itself has changed. The old idea of a good bargain was a transaction in which one man got the better of another. The new idea of a good contract is a transaction which is good for both parties to it.

Under these new conditions, success in business must mean something very different from mere money-making. In business the able man ordinarily earns a larger income than one less able. So does the able man in the recognized professions—in law, medicine or engineering; and even in those professions more remote from money-making, like the ministry, teaching or social work. The world's demand for efficiency is so great and the supply so small, that the price of efficiency is high in every field of human activity.

The recognized professions, however, definitely reject the size of the financial return as the measure of success. They select as their test, excellence of performance in the broadest sense—and include, among other things, advance in the particular occupation and service to the community. These are the basis of all worthy reputations in the recognized professions. In them a large income is the ordinary incident of success; but he who exaggerates the value of the incident is apt to fail of real success.

To the business of to-day a similar test must be applied. True, in business the earning of profit is something more than an incident of success. It is an essential condition of success; because the continued absence of profit itself spells failure. But

<sup>1</sup> From *Business—A Profession* published by Hale, Cushman and Flint, 1933. An address delivered at Brown University Commencement Day, 1912. Originally published in "System," October, 1912.

while loss spells failure, large profits do not connote success. Success must be sought in business also in excellence of performance; and in business, excellence of performance manifests itself, among other things, in the advancing of methods and processes; in the improvement of products; in more perfect organization, eliminating friction as well as waste; in bettering the condition of the workingmen, developing their faculties and promoting their happiness; and in the establishment of right relations with customers and with the community.

In the field of modern business, so rich in opportunity for the exercise of man's finest and most varied mental faculties and moral qualities, mere money-making cannot be regarded as the legitimate end. Neither can mere growth in bulk or power be admitted as a worthy ambition. Nor can a man nobly mindful of his serious responsibilities to society, view business as a game; since with the conduct of business human happiness or misery is inextricably interwoven.

Real success in business is to be found in achievements comparable rather with those of the artist or the scientist, of the inventor or the statesman. And the joys sought in the profession of business must be like their joys and not the mere vulgar satisfaction which is experienced in the acquisition of money, in the exercise of power or in the frivolous pleasure of mere winning.

It was such real success, comparable with the scientist's, the inventor's, the statesman's, which marked the career of William H. McElwain of Boston, who died in 1908 at the age of forty-one. He had been in business on his own account but thirteen years. Starting without means, he left a fortune, all of which had been earned in the competitive business of shoe manufacturing, without the aid of either patent or trademark. That shows McElwain did not lack the money-making faculty. His company's sales grew from \$75,957 in 1895 to \$8,691,274 in 1908. He became thus one of the largest shoe manufacturers in the world. That shows he did not lack either ambition or organizing ability. The working capital required for this rapidly growing business was obtained by him without surrendering to outside investors or to bankers any share in the profits of business: all the stock in his company being owned either by himself or his

active associates. That shows he did not lack financial skill.

But this money-making faculty, organizing ability and financial skill were with him servants, not masters. He worked for nobler ends than mere accumulation or lust of power. In those thirteen years McElwain made so many advances in the methods and practices of the long-established and prosperous branch of industry in which he was engaged, that he may be said to have revolutionized shoe manufacturing. He found it a trade; he left it an applied science.

This is the kind of thing he did: In 1902 the irregularity in the employment of the shoe worker was brought to his attention. He became greatly impressed with its economic waste, with the misery to the workers and the demoralization which attended it. Irregularity of employment is the worst and most extended of industrial evils. Even in fairly prosperous times the workingmen of America are subjected to enforced idleness and loss of earnings, on the average, probably ten to twenty per cent of their working time. The irregularity of employment was no greater in the McElwain factories than in other shoe factories. The condition was not so bad in shoe manufacturing as in many other branches of industry. But it was bad enough; for shoe manufacturing was a seasonal industry. Most manufacturers closed their factories twice a year. Some manufacturers had two additional slack periods.

This irregularity had been accepted by the trade—by manufacturers and workingmen alike—as inevitable. It had been bowed to as if it were a law of nature—a cross to be borne with resignation. But with McElwain an evil recognized was a condition to be remedied; and he set his great mind to solving the problem of irregularity of employment in his own factories; just as Wilbur Wright applied his mind to the aeroplane, as Bell, his mind to the telephone, and as Edison, his mind to the problems of electric light. Within a few years irregularity of employment had ceased in the McElwain factories; and before his death every one of his many thousand employees could find work three hundred and five days in the year.

Closely allied with the establishment of regularity of employment was the advance made by McElwain in introducing punctual delivery of

goods manufactured by his company. Shoes are manufactured mainly upon orders; and the orders are taken on samples submitted. The samples are made nearly a year before the goods are sold to the consumer. Samples for the shoes which will be bought in the spring and summer of 1913 were made in the early summer of 1912. The solicitation of orders on these samples began in the late summer. The manufacture of the shoes commences in November; and the order is filled before July.

Dates of delivery are fixed, of course, when orders are taken; but the dates fixed had not been taken very seriously by the manufacturers; and the trade was greatly annoyed by irregularities in delivery. McElwain recognized the business waste and inconvenience attendant upon such unfulfilled promises. He insisted that an agreement to deliver on a certain day was as binding as an agreement to pay a note on a certain day.

He knew that to make punctual delivery possible, careful study and changes in the methods of manufacture and of distribution were necessary. He made the study; he introduced the radical changes found necessary; and he so perfected his organization that customers could rely absolutely upon delivery on the day fixed. Scientific management practically eliminated the recurring obstacles of the unexpected. To attain this result business invention of a high order was of course necessary—invention directed to the departments both of production and of distribution.

The career of the Filenes of Boston affords another example of success in professionalized business. In 1891 the Filenes occupied two tiny retail stores in Boston. The floor space of each was only twenty feet square. One was a glove stand, the other a women's specialty store. Twenty years later their sales were nearly \$5,000,000 a year. In September, 1912, they moved into a new building with more than nine acres of floor space. But the significant thing about their success is not their growth in size or in profits. The trade offers many other examples of similar growth. The pre-eminence of the Filenes lies in the advance which has been made in the nature, the aims and the ideals of retailing, due to their courage, initiative, persistence and fine spirit. They have applied minds of a high order and a fine ethical sense to the prosaic and seemingly

uninteresting business of selling women's garments. Instead of remaining petty tradesmen, they have become, in every sense of the word, great merchants.

The Filenes recognized that the function of retail distribution should be undertaken as a social service, equal in dignity and responsibility to the function of production; and that it should be studied with equal intensity in order that the service may be performed with high efficiency, with great economy and with nothing more than a fair profit to the retailer. They recognized that to serve their own customers properly, the relations of the retailer to the producer must be fairly and scientifically adjusted; and, among other things, that it was the concern of the retailer to know whether the goods which he sold were manufactured under conditions which were fair to the workers—fair as to wages, hours of work and sanitary conditions.

But the Filenes recognized particularly their obligations to their own employees. They found as the common and accepted conditions in large retail stores, that the employees had no voice as to the conditions or rules under which they were to work; that the employees had no appeal from policies prescribed by the management; and that in the main they were paid the lowest rate of wages possible under competitive conditions.

In order to insure a more just arrangement for those working in their establishment, the Filenes provided three devices:

**First.** A system of self-government for employees, administered by the store co-operative association. Working through this association, the employees have the right to appeal from and to veto policies laid down by the management. They may adjust the conditions under which employees are to work, and, in effect, prescribe conditions for themselves.

**Second.** A system of arbitration, through the operation of which individual employees can call for an adjustment of differences that may exist between themselves and the management as to the permanence of employment, wages, promotion or conditions of work.

**Third.** A minimum wage scale, which provides that no woman or girl shall work in their store at

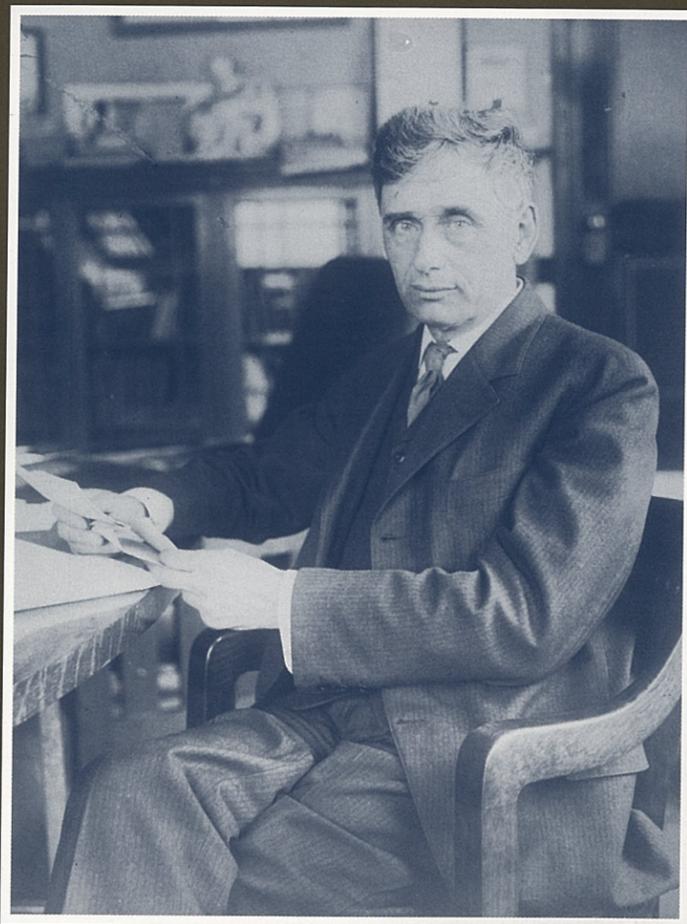
a wage less than eight dollars a week, no matter what her age may be or what grade of position she may fill.

The Filenes have thus accepted and applied the principles of industrial democracy and of social justice. But they have done more—they have demonstrated that the introduction of industrial democracy and of social justice is at least consistent with marked financial success. They assert that the greater efficiency of their employees shows industrial democracy and social justice to be money-makers. The so-called "practical business man," the narrow money-maker without either vision or ideals, who hurled against the Filenes, as against McElwain, the silly charge of being "theorists," has been answered even on his own low plane of material success.

McElwain and the Filenes are of course exceptional men; but there are in America to-day many with like perception and like spirit. The paths broken by such pioneers will become the peopled highways. Their exceptional methods will become accepted methods. Then the term "Big business" will lose its sinister meaning, and will take on a new significance. "Big business" will then mean business big not in bulk or power, but great in service and grand in manner. "Big business" will mean professionalized business, as distinguished from the occupation of petty trafficking or mere moneymaking. And as the profession of business develops, the great industrial and social problems expressed in the present social unrest will one by one find solution.



## BRANDEIS ON BUSINESS— IN HIS OWN WORDS



### BRANDEIS ON BUSINESS—IN HIS OWN WORDS: LOUIS D. BRANDEIS<sup>1</sup>

Louis Brandeis saw business from many sides. He was fascinated by its mechanics and how innovative management techniques could improve efficiency and productivity. He observed that the leadership qualities of individuals could make all the difference between a venture's success or failure. He offered thoughts on how employers and employees could work cooperatively to resolve difficult business issues. He was passionate about the need for moral rectitude in its conduct.

At another level, he was equally, if not more, interested in the capacity of business to transform society and the lives of its members. His view was that it could be a catalyst for human development and welfare, and an arena where the participatory democracy that characterized American politics could be emulated to the common good. His disenchantment with the closed business practices of his day was tempered by optimism that things were moving in the right direction: he believed that a change was in prospect that could ultimately unleash the full force of America's rich human resources.

Brandeis's strongly held convictions on business and its role in society did much to inform his judicial opinions—to a greater extent than was common in his time—and helped shape his legal legacy. The quotes and accompanying annotations that follow, however, do not set out to analyze the technicalities of Brandeis's legal judgments; these fall beyond the scope of this review. They seek, rather, to illuminate his thinking as a commentator who possessed an unusual range of insights into the social and business issues of his time, many of which remain relevant in our own.

#### BUSINESS LEADERSHIP AND ETHICS

Brandeis saw business as an honorable profession. He held that it was incumbent on individuals to conduct themselves in accordance with the highest standards of morality and business practice. He often expressed the view that business should not just be about making money, but should also be pursued as a service to the community. He went so far as to predict that in the "new world of business" the primary incentive would no longer be profit, but the drive to achieve professional success.

He believed that in order to flourish, whether financially or in terms of benefit to the community, businesses depended critically on individuals and their personal attributes. This led him to conclude that the size to which a business might grow and remain effective was practically limited by the leadership capacities of its CEO: one person could only do so much.

Brandeis accordingly had the greatest respect for self-made individuals who worked for higher ends than "mere accumulation or lust for power." He particularly admired entrepreneurs for their vision and independence, and contrasted their energy and innovation with the stifling influence of the big financiers, who gave up on their clients when times were rough.

Indeed, some of Brandeis's strongest invective was reserved for the managers of the financial services industry of his day. His catalog of their wrongdoing has a familiar ring in the post-Enron world: excessive salaries, misuse of corporate funds, political manipulation, fraudulent bookkeeping, and schemes to conceal poor investments from shareholders.

On the whole, however, Brandeis does not seem to have believed that the business leaders of his time were by nature dishonest. He considered that their actions were a product of the system in which they operated and that it was there that deficiencies

<sup>1</sup> Edited and annotated by Simon R. Sherrington, Director of Strategic Planning at the Brandeis International Business School.

needed to be addressed. He nevertheless cautioned against believing that these were susceptible to simplistic legislative solutions or a swing towards state socialism. Brandeis was wary of the oppressive potential of such changes.

In the end, Brandeis was not pessimistic. He had confidence that the resources of the ordinary American would enable the country to rid itself of the oligarchies that dominated the economy, opening the way for a new burst of business innovation and responsible leadership.

*To me the word is Service. Money-making will become incidental to Service. The man of the future will think more of giving Service than of making money, no matter what particular kind of Service it happens to be. It will become a distinction worth striving for to give the best Service, whether you are conducting a retail shop or a great railroad. It naturally follows that those who give the best Service will make money, because success must be profitable, yet Service, and not money-making, will be the end. Though the work of greatest artists may command the highest prices, their incentive has not been money. It has been the desire to achieve professional success. That will be the spirit of business in the future.*

*The Curse of Bigness, An Interview, p. 40*

*Man's work often overcomes the capacity of the individual man; and, no matter what the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise, not only financially to the owners, but in service to the community. Organization can do much to make concerns more efficient. Organization can do much to make larger units possible and profitable. But the efficiency even of organization has its bounds; and organization can never supply the combined judgment, initiative, enterprise, and authority which must come from the chief executive officers. Nature sets a limit to their possible accomplishment. As the Germans say, "Care is taken that the trees do not scrape the skies."*

*The Curse of Bigness, Competition, pp. 116-117*

*Refuse to accept as inevitable any evil in business (e.g., irregularity of employment). Refuse to tolerate any*

*immoral practice (e.g., espionage). But do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society (as by State Socialism). And do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression.*

*The Curse of Bigness,  
Letter to Robert W. Bruere, p. 270*

*[The Chicago, Burlington & Quincy railroad]—one of Boston's finest achievements—was the creation of John M. Forbes. He was a builder; not a combiner, or banker, or wizard of finance. He was a simple, hardworking business man. He had been a merchant in China at a time when China's trade was among America's big business. He had been connected with shipping and with manufacturers. He had the imagination of the great merchant; the patience and perseverance of the great manufacturer; the courage of the sea-farer; and the broad view of the statesman. Bold, but never reckless; scrupulously careful of other people's money, he was ready, after due weighing of chances, to risk his own in enterprises promising success. He was in the best sense of the term, a great adventurer. Thus equipped, Mr. Forbes entered, in 1852, upon those railroad enterprises which later developed into the Chicago, Burlington & Quincy. Largely with his own money and that of friends who confided in him, he built these railroads and carried them through the panic of '57, when the "great banking houses" of those days lacked courage to assume the burdens of a struggling ill-constructed line, staggering under financial difficulties.*

*Under his wise management and that of the men whom he trained, the little Burlington became a great system. It was "built on honor," and managed honorably. It weathered every other financial crisis, as it did that of 1857. It reached maturity without a reorganization or the sacrifice of a single stockholder or bondholder.*

*Other People's Money, A Curse of Bigness, pp. 176-177*

*Such is the power which the American people have intrusted to the managers of these large [life insurance] companies. How has it been exercised? Substantially as all irresponsible power since the beginning of the world:*

*selfishly, dishonestly, and in the long run, inefficiently. The breaches of trust committed or permitted by men of high financial reputation, the disclosure of the payment of exorbitant salaries and commissions, the illegal participation in syndicate profits, the persistent perversion of sacred trust funds to political purposes, the co-operation of the large New York companies to control the legislatures of the country—these disclosures are indeed distressing; but the practice of deliberate and persistent deception of the public which the testimony discloses, though less dramatic, is even more serious. Talleyrand said, "Language was made to conceal thought." George W. Perkins would teach us that "Bookkeeping was made to conceal facts." Consider for a moment his situation. An important member of the most famous banking firm in America, and next to the Rothschilds the most famous in the world, confesses this:*

*The New York Life company, of which he is the vice-president, held on December 31, 1903, an investment taken through his firm, J. P. Morgan & Co., of \$4,000,000 in bonds of the International Mercantile Marine. It was a poor investment. It was deemed unwise to make known to the insurance departments and to present and prospective policy-holders the fact that so large an investment in these unfortunate securities was held by his company (and doubtless also how much they had depreciated in market value).*

*Perkins, the vice-president of the New York Life company, and at the same time a member of J. P. Morgan & Co., goes through the form on December 31, 1903, of selling \$800,000 of these bonds to his firm at par, and then on January 2, 1904, re-transferring the same to the insurance company at par and interest. This was done in order that the officers of the company might under oath present to the insurance departments of the several States and countries an official statement which would show that the insurance company did not at the close of the year 1903 hold as many of these bonds as was the fact, and that the value of those held was par (which was not the fact).*

*Again, Perkins confesses that in order to prevent the company's exclusion from Prussia by reason of holding among its investments a large amount of stocks, entries were made in the books of account showing a sale of these stocks. The fact is that the stocks were not actually sold, but that their ownership was concealed;*

*and that in order to account on the books for the proceeds of this fake sale, two minor employees of the company—one of them a colored messenger with a salary of \$600 per year—were made to give their notes for \$3,357,000 with the stock as collateral; and the notes were then represented among the assets. The original purpose of this elaborate system of fraud may have been merely to deceive the Prussian government; but with a degree of thrift rare in the management of these companies, it was used also to deceive our own insurance commissioners and the policy-holders. The New York Life had the effrontery up to the time of Perkins's examination to declare in extensive advertising that it held no stocks whatever.*

*Business—A Profession, Life Insurance, pp. 125-127*

*The existing evils are not to be explained by the presence in office of dishonest or selfish men. The causes which produce these rank abuses are general in their operation. The flagrant dishonesty and selfishness of the managers of the three leading New York [life insurance] companies are the result, not the cause, of the abuses. Men of character may for a time protect other companies in large part from like abuses, but the main cause of the evils disclosed lies in the system, rather than in the men.*

*Business—A Profession, Life Insurance, p. 140*

*But there is no occasion for alarm. The American people have as little need of oligarchy in business as in politics. There are thousands of men in America who could have performed for the New Haven stockholders the task of "one who guides, superintends, governs and manages," better than Mr. Morgan, Mr. Baker and Mr. Rockefeller. For though possessing less native ability, even the average business man would have done better than they, because working under proper conditions. There is great strength in serving with singleness of purpose one master only. There is great strength in having time to give to a business the attention which its difficult problems demand. And tens of thousands of Americans could be rendered competent to guide our important businesses. Liberty is the greatest developer. Herodotus tells us that while the tyrants ruled, the Athenians were no better fighters than their neighbors; but when freed, they immediately*

*surpassed all others. If industrial democracy—true coöperation—should be substituted for industrial absolutism, there would be no lack of industrial leaders.*

*Other People's Money,  
The Oligarch Inefficient, pp. 207-208*

*President Wilson has said wisely:*

*"No country can afford to have its prosperity originated by a small controlling class. The treasury of America does not lie in the brains of the small body of men now in control of the great enterprises... It depends upon the inventions of unknown men, upon the originations of unknown men, upon the ambitions of unknown men. Every country is renewed out of the ranks of the unknown, not out of the ranks of the already famous and powerful in control."*

*Other People's Money,  
The Oligarch Inefficient, p. 223*

## THE NEW SCIENCE OF MANAGEMENT

In the essay "Business—A Profession" (quoted in full above), Brandeis argued that the longstanding distinction between the professions and business should be abandoned. The establishment of business schools in universities was evidence that business was taking its place beside the "learned professions," together with scientifically based disciplines, such as engineering and agriculture. One of the reasons for this was that the increasing complexity and scope of the business world required a scientific approach. It was no longer good enough to be shrewd; success in business demanded "new and broader fields of knowledge."

In Brandeis's day, "scientific management" had a narrower application than "management" does in ours, connoting organizational efficiency in the work place. For Brandeis, however, the techniques of scientific management were not just about maximizing profit. A key measure of their success was the extent to which they improved the lot of the worker, increasing his self-respect and enabling his development. The financial gains that flowed from more motivated workers were to Brandeis of lesser

importance. He did, though, observe that a motivated, fulfilled worker was also a more productive one.

For Brandeis, although its ostensible aim was greater efficiency, scientific management was intimately linked with the development of "industrial democracy." The resulting gains in productivity—which he placed on a par with the Industrial Revolution—would be instrumental in satisfying demands for the better wages, hours and working conditions that were fundamental to the life of citizens in a democratic society. To achieve all this, however, it was necessary to win the confidence of the worker that profits were in fact being distributed equitably.

Brandeis acknowledged that there were also dangers in the application of scientific management, from which workers needed to be protected. He was aware that it would meet resistance from both workers and union representatives, not least because of the way particular employers chose to implement it. Convinced of the benefits of scientific management, however, Brandeis saw the issue as one of persuading both employers and workers that there was gain in its proper application.

*Scientific management seeks to do for industry systematically and comprehensively in conserving effort, materials and capital, what heretofore has been done sporadically and partially. Its engineers refuse to recognize that there is any legitimate sphere in industry for ignorance or lack of skill. Ignorance and unskilfulness necessarily spell waste,—and waste is sinful, whether it be due to lack of training, of selection, of equipment or of planning.*

*Business—A Profession,  
Organized Labor and Efficiency, p. 40*

*The introduction of scientific management in business has, wherever applied, made regularity of employment its prime aim. It could not be otherwise; because irregularity is the most potent cause of waste, not only of labor, but of plant and of capital. The existence of irregularity of employment is one of the greatest reproaches to modern business. It proves that the management has not done its part; and the very essence of scientific management is to relieve the workingman from these*

*conditions and hardships which arise from the failure of the management to do its duty.*

*Business—A Profession,  
Organized Labor and Efficiency, pp. 45-46*

*The social gains to the workingman through scientific management are greater even than the financial. He secures the development and rise in self-respect, the satisfaction with his work, which in almost every line of human activity accompany great accomplishment by the individual. Eagerness and interest take the place of indifference, both because the workman is called on to do the highest work of which he is capable, and also because in doing this better work, he secures appropriate and substantial recognition and reward. Under scientific management, men are led, not driven. Instead of working unwillingly for their employer, they work in co-operation with the management for themselves and their employer in what is a "square deal."*

*Business—A Profession,  
Organized Labor and Efficiency, pp. 48-49*

*Fortunately a new necessity has intervened; the awakened social sense of the community, with its longing for a truer democracy. This great ethical movement for real brotherhood of man reinforces the demand of the workingman for wages, hours and conditions which will permit of his living according to those higher standards essential to life, health and the performance of the duties of citizenship in a democracy. These new and increasing demands have created a new necessity for economy in production. And scientific management comes prepared to relieve that necessity by a revolution in industry comparable only to that effected in the transition from hand labor to machinery.*

*Business—A Profession,  
Organized Labor and Efficiency, pp. 38-39*

*I take it that this science of management is nothing more than an organized effort, pursued intensively, to eliminate waste. The efficiency experts tell us how this may be done. The experts make the individual detailed study, which is an essential of the elimination of waste. But, after all, the fundamental problems are social and*

*industrial. You cannot eliminate waste unless you secure the co-operation of the worker, and you cannot secure his co-operation unless he is satisfied that there is a fair distribution of profits.*

*The Curse of Bigness, Industrial Democracy and Efficiency, Efficiency Systems and Labor, p. 48*

*Each and every one of the purposes which apostles of scientific management set before themselves tends to improve the condition of the workingman. But in applying the principles of scientific management to a business, there are dangers to the workingman against which he should be protected; and for this he needs a proper representation.*

*So that as I view the problem, it is on the one hand that of making the employer recognize the necessity of the participation of representatives of labor in the introduction and carrying forward of the work, and on the other hand that of bringing to the workingman and the representatives of organized labor the recognition of the fact that there is nothing in scientific management itself which is inimical to the interests of the workingman, and that what seemed hostile was surely the individual practices of certain employers who applied scientific methods of management.*

*Organized labor now has a great opportunity. Since scientific management rests upon fundamental principles of advance in man's productivity—determining what the best way of doing a thing is instead of pursuing a poor way—complete co-ordination and organization of the various departments of business, scientific management of our businesses, is certain to come. Those who oppose its introduction altogether are pursuing a course foredoomed to failure. If organized labor takes a position in absolute opposition, instead of taking the position of merely opposing unless it is given its proper part in the introduction of this system and the conduct of the business under it, organized labor will lose its greatest opportunity and will defeat the very purpose for which it exists.*

*The Curse of Bigness, Industrial Democracy and Efficiency, Efficiency Systems and Labor, pp. 49-50*

## LABOR AND INDUSTRIAL DEMOCRACY

Brandeis had much to say about the working life of the ordinary American, for whom he had an instinctive sympathy. He saw that conditions had been much improved in his lifetime as a result of mechanization and accompanying increases in productivity. He felt nonetheless that a fair distribution of the profits of industry would not come about without further productivity gains, achieved as a result of scientific management techniques implemented in cooperation with the workforce.

Brandeis believed that the taking of responsibility was fundamental to the worker's personal development and welfare. He favored extensive participation by the employee in the conduct of business and advocated a high degree of worker control. Brandeis saw this as part of the ongoing progress towards a full industrial democracy, which in his view lagged behind its political counterpart. America had demonstrated that popular rule had succeeded in the political arena, now it must apply the principle to industry, liberating its abundant human resources and talent.

Brandeis admired the achievements of the trade unions and the principles on which they were built. He believed that, in the context of growing industrial democracy, they were vital to the future prosperity of the country. While he had no illusions about their past abuses and felt that future unreasonable demands should be strongly resisted, he thought it essential that they be recognized as the workers' representatives and engaged in constructive dialog.

Brandeis was also interested in the impact of working conditions on the physical and mental well-being of Americans. Leisure was necessary to give people opportunities for development outside their working lives. While he conceded that there might occasionally be good business reasons for maintaining long working hours, in the main he thought that a shorter working week led to healthier, more mentally agile workers and greater productivity.

He was acutely aware of the vulnerability of the ordinary worker. He held in high regard industrialists who were able to assure their labor force continuity of employment. He displayed what today

would be regarded as an unjustified optimism that, with proper management, unemployment can be wholly eradicated.

The provision of pensions was in Brandeis's view a necessary business expense and should be an integral part of workers' wages. He had no strong position on how the costs should be divided between the employer and employee, but he was certain that a "comprehensive financial provision" was essential, both for the health of the economy and for society at large. He also insisted that pensions should not be jeopardized if workers changed companies. The "pension system" should grant the ability to roll pensions over as a right.

*We hear a great deal about inequality in the distribution of wealth or the profits of industry. Such inequality exists, but it is clear that even if there were a perfectly fair distribution, our ideals could not be attained unless we succeeded in greatly increasing the productivity of man. Perhaps the greatest evil attendant upon this existing inequality is that it tends to discontent, which in turn discourages effort and therefore impairs productivity. Such progress as we have made in improving the condition of workingmen during the last century, and particularly during the last fifty years, has been made possible by invention, by the introduction of machinery, through which the productivity of the individual man has been greatly increased. The misfortune is that when this method of increasing the productivity of man was introduced, labor did not get the share of the increased profit to which it was entitled. With the advent of the new science of management has come the next great opportunity for labor; and it seems to me of the utmost importance, not only that this science should be developed and should be applied as far as possible, but that it should be applied in co-operation with the representatives of organized labor, in order that labor may through this movement get its proper share in the proceeds of industry.*

*The Curse of Bigness—Industrial Democracy and Efficiency, Efficiency Systems and Labor, p. 48*

*Labor must not only be convinced of the industrial truths—which scientific management is disclosing—but must also be convinced that those truths are*

*consistent with what may be termed human truths. Is the greater productivity attained clearly consistent with the health of the body, the mind, and the soul of the worker? Is it consistent with industrial freedom? Is it consistent with greater joy in work, and generally in living? These are questions which must be answered in the affirmative, and to the satisfaction, not of a few merely, but of the majority of those to be affected.*

*Business—A Profession, Efficiency by Consent, pp. 54-55*

*The great developer is responsibility. Hence no remedy can be hopeful which does not devolve upon the workers participation in responsibility for the conduct of business; and their aim should be the eventual assumption of full responsibility—as in co-operative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.*

*The Curse of Bigness, Letter to Robert W. Bruere, p. 270*

*In my judgment, we are going through the following stages: We already have had industrial despotism. With the recognition of the unions, this is changing into a constitutional monarchy, with well defined limitations placed about the employer's former autocratic power. Next comes profit sharing. This, however, is to be only a transitional, half-way stage. Following upon it will come the sharing of responsibility, as well as of profits. The eventual outcome promises to be full grown industrial democracy.*

*As to this last step the Socialists have furnished us with an ideal full of suggestion.*

*The Curse of Bigness, Industrial Democracy and Efficiency, How Far Have We Come on the Road to Industrial Democracy?—An Interview, p. 47*

*The civilized world today believes that in the industrial world self-government is impossible; that we must adhere to the system which we have known as the monarchical system, the system of master and servant, or, as now more politely called, employer and employee. It rests with this century and perhaps with*

*America to prove that as we have in the political world shown what self-government can do, we are to pursue the same lines in the industrial world.*

*The Curse of Bigness, Industrial Democracy and Efficiency, Industrial Co-operation, p. 35*

*Must not this mean that the American who is brought up with the idea of political liberty must surrender what every citizen deems far more important, his industrial liberty? Can this contradiction—our grand political liberty and this industrial slavery—long coexist? Either political liberty will be extinguished or industrial liberty must be restored.*

*The Curse of Bigness, Industrial Democracy and Efficiency, Big Business and Industrial Liberty, p. 39*

*So much for the past: what shall the future be? What should you do to make it an era of peace and prosperity? The answer involves a discussion of certain broad principles which, in my opinion, should govern the relations of employer and employee in all branches of industry, though in their application they would, like every rule, be subject to exceptions more or less temporary, dependent upon the peculiar facts of the individual case.*

*First. Prolonged peace and prosperity can rest only upon the foundation of industrial liberty. The peace which employers should seek is not the peace of fifty years ago, when the employers were absolute masters of the situation. The peace which the employees should seek is not the peace of mediæval guilds, with their numberless restrictions. Industrial liberty must attend political liberty. The lead which America takes in the industrial world is no doubt due to our unbounded resources; but of these resources none are so great as the spirit and the ability incident to a free people. We lead the world industrially, not so much because the resources of nature are unbounded, as because the faculties and aspirations of men are comparatively unfettered. The prosperity of New England—this poor rich country—is ample evidence of this. We must have, therefore, for the development of our industries, as for the development of our citizens, the highest degree of liberty attainable. Industrial democracy should ultimately attend political democracy...*

*Second. The right of labor to organize is recognized by law, and should be fully recognized by employers. There will be in most trades little probability of attaining the best conceivable conditions unless in some form a union of the employees exists... We must not forget the merits of unionism in our righteous indignation against certain abuses of particular unionists...*

*Third. Employees are entitled to be represented by union officers... One hears little now of employers arbitrarily refusing to deal with the chosen representatives of union employees. But, of course, recognizing that union officers are the proper representatives of the employees in any matter requiring consideration by the employer does not mean yielding to union demands, any more than recognizing a customer means conceding his demands...*

*Fourth. Employers and employees should try to agree. A very able man, who taught the law of partnership at Harvard, once asked the class, "What shall be done if a controversy arises between partners?" The students suggested one legal remedy after another,—a receiver, an injunction, a dissolution. "No," said he, "they should try to agree." In the most important sense, employer and employee are also partners. They, too, should try to agree; and the attempt made in a properly conducted conference will generally be successful...*

*Fifth. It is necessary that the owners or the real managers of the business should themselves participate in the conferences, partly because the labor problem requires the best thought available and the most delicate treatment, and partly because the employees feel better satisfied and are apt to receive better treatment when they are dealing with the ultimate authority and not with an intermediary. Such conferences are necessarily time consuming, but the time cannot be better spent. They are as instructive to the employer as to the employees. We must remember that there are no short cuts in evolution...*

*Sixth. Lawless or arbitrary claims of organized labor should be resisted at whatever cost. I have said that it is essential in dealing with these problems that the employer should strive only for the right. It is equally as important that he should suffer no wrong to be done*

*unto him. The history of Anglo-Saxon and of American liberty rests upon that struggle to resist wrong—to resist it at any cost when first offered rather than to pay the penalty of ignominious surrender. It is the old story of the "ship money," of "the writs of assistance," and of "taxation without representation." The struggle for industrial liberty must follow the same lines...*

*Business—A Profession,  
The Employer and Trades Unions, pp. 15-24*

*Modern civilization affords no instance of enlightened self-sacrifice on so large a scale as that presented when great bodies of men calmly and voluntarily give up steady work, at satisfactory wages and under proper conditions, for the sole reason that the employer refuses the recognition of their union, which they believe to be essential to the ultimate good of the workingmen. If you search for the heroes of peace, you will find many of them among those obscure and humble workmen who have braved idleness and poverty in devotion to the principle for which their union stands.*

*And because the trade unions have accomplished much, and because their fundamental principle is noble, it is our duty, where the unions misconduct themselves, not to attack the unions, not—ostrich-like—to refuse to recognize them, but to attack the abuses to which the unions, in common with other human institutions, are subject, and with which they are afflicted; to remember that a bad act is no worse, as it is no better, because it has been done by a labor union and not by a partnership or a business corporation. If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness; if their demands are unreasonable or unjust, resist them; but do not oppose the unions as such.*

*Now, the best friends of labor unions must and should admit that their action is frequently hasty and ill-considered, the result of emotion rather than of reason; that their action is frequently arbitrary, the natural result of the possession of great power by persons not accustomed to its use; and that the unions frequently ignore laws which seem to hamper them in their efforts, and which they therefore regard as unjust. For these defects, being but human, no complete remedy can be found; but the incorporation of labor*

*unions would, among other things, tend in some measure to correct them.*

*Business—A Profession,  
The Incorporation of Trades Unions, pp. 89-91*

*The American standard of living demands not only a high minimum wage, but a high minimum of leisure, because we must meet also needs other than material ones.*

*The welfare of our country demands that leisure be provided for. This is not a plea for indolence. Leisure does not imply idleness. The provision for leisure does not contemplate working less hard. It means ability to work not less, but more—ability to work at something besides bread-winning—ability to work harder while working at bread-winning, and ability to work more years at bread-winning. We need leisure, among other reasons, because with us every man is of the ruling class. Our education and condition of life must be such as become a ruler. Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence.*

*Business—A Profession, Hours of Labor, p. 29*

*Although the reduction of the hours of labor is clearly desirable, it may, as already stated, be impossible, on account of competition or other cause, to grant the reduction at a particular time in a particular business. But in my opinion employers are apt to exaggerate the resulting loss of earnings, at least in the long run. Greater freshness, better health and mental development that go with shorter hours may be relied upon within reasonable limits to make up, in many businesses at least, in part, for a shortening of working time, where the employer receives, as he should, the full co-operation of the employees to secure the largest possible production.*

*Business—A Profession, Hours of Labor, pp. 34-35*

*Unemployment is as unnecessary as disease epidemics. One who says in this intelligent age that unemployment is necessary or unavoidable is like one a generation ago who would have continued to insist that epidemics were, if not necessary and divinely imposed, at least inevitable.*

*The Curse of Bigness, Industrial Democracy  
and Efficiency, An Interview, p. 41*

*From the point of view of the workingman the expense of providing old age pensions is a part of the daily cost of living. He should contribute while able to work to a fund which will sustain him when he ceases to earn. From the point of view of the employer, the expense of providing old age pensions is a part of the current expense of his business. He should pay as he goes the accruing cost of retiring employees who will become superannuated. If the wage is insufficient to enable the workingman to provide himself with a pension, it is not a living wage. So far as the cost of the old age pension is paid by the employer for the employees' benefit, it is in substance a part of the wage. So far as such a payment by the employer is for insurance against that waste and inefficiency in his establishment which would result from retaining superannuated employees, and for protection against that discontent which would result from discharging the superannuated without providing for them financially, it is a part of the business expense. Since the cost of making old age provision is thus either a part of the employees' daily cost of living or of the employer's daily business expense, it should be treated as a current expense, and may be likened to the premium for fire or accident insurance. Whether in the adjustment of relations between the employer and the employee this current cost of providing old age pensions should be borne wholly by the employer, or wholly by the employee, or jointly by both, is an open question; but European and American experience makes it clear that under our present industrial system some comprehensive financial provision for the superannuated worker is essential to social if not to industrial solvency. To neglect such a requirement is as dangerous as it is for the manufacturer to ignore the depreciation of his machines.*

*For the protection of the wage-earner it is obviously necessary that the right to a pension shall not depend upon his being in the employ of a particular concern. If his right to an annuity is dependent upon his remaining in a particular employ he loses all protection whenever he ceases to be so employed, whether he leaves voluntarily, or is discharged, or in case the concern discontinues business by failure or for other cause.*

*Business—A Profession, Our New Peonage:  
Discretionary Pensions, pp. 74-76*

## THE CURSE OF BIGNESS

Brandeis was by instinct mistrustful of size in business. He believed that growth beyond a modest scale was invariably the result of aggressive M&A activity rather than productivity, and led to undesirable levels of market control and financial muscle, the latter too often concentrated in New York. For him, big business was embodied in the "trusts," cartels of large industrial interests.

Brandeis was not only ambivalent about the origins of big business; he was also convinced that large enterprises were inclined to be inefficient. This was partly because they were unmanageable, but also because the nature of their growth inhibited innovation and eliminated the stimulating effects of external competition. He observed that the economies of scale promised in corporate prospectuses seldom materialized. Thus he considered that limits should be placed on corporate size.

He believed in particular that large banking concerns played a part in impeding industrial development, instrumental as they were in financing the trusts. Nearly every enterprise that had made a "contribution to our comfort and prosperity" had been initiated without their involvement. The banks simply stepped in and took over after the brave business pioneer had done the heavy lifting.

As noted in the section on Business Leadership and Ethics above, for Brandeis the capacities of individuals were critical throughout business. He believed that the optimal size of companies was critically dependent on what their CEOs could manage. Any amount of underlying organization could not compensate if they were overstretched. While modern technology might have caused him to revise his assessment of what an individual might achieve, Brandeis would doubtless have had strong views on the viability of the massive media conglomerates of our time.

Typically, Brandeis's concern for the welfare of the American worker fed into his discomfort with the concentration of industrial power. In a foreshadowing of current disquiet, Brandeis expressed the worry that the cartels might shift their manufacturing operations overseas to take advantage of lower wages,

transferring American employment, technical know-how and advanced equipment off-shore.

*Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put.*

*Other People's Money, A Curse of Bigness, p. 163*

*... A limit must be placed upon the size of the company. A company may, of course, be too small to be a safe or an efficient and economical unit; but it is clearly in the interest of the insured that the company be not allowed to expand beyond the point of greatest efficiency. It is clearly in the interest of the whole people that it be not allowed to expand beyond the point of danger arising from concentration of quick capital in the hands of a few individuals. The constitutional right to so limit the size of insurance companies is undisputed.*

*Business—A Profession, Life Insurance: The Abuses and the Remedies, pp. 152-153*

*The successful, the powerful trusts, have created conditions absolutely inconsistent with these—America's—industrial and social needs. It may be true that as a legal proposition mere size is not a crime, but mere size may become an industrial and social menace, because it frequently creates as against possible competitors and as against the employees conditions of such gross inequality, as to imperil the welfare of the employees and of the industry.*

*The Curse of Bigness, Shall We Abandon the Policy of Competition?, p. 107*

*It is, of course, true that the unit in business may be too small to be efficient. The larger unit has been a common incident of monopoly. But a unit too small for efficiency is by no means a necessary incident of competition. It is also true that the unit in business may be too large to be efficient, and this is no uncommon incident of monopoly. In every business concern there must be a size-limit of greatest efficiency. What that limit is will differ in different businesses and under varying conditions in the same business. But whatever the business or organization there is a point where it would become too large for efficient and economic management, just as there is a point where it would be too small to be an*

*efficient instrument. The limit of efficient size is exceeded when the disadvantages attendant upon size outweigh the advantages, when the centrifugal force exceeds the centripetal.*

*The Curse of Bigness, Competition, p. 116*

*The history of American trusts makes this [that monopoly is not an essential condition of the greatest efficiency] clear. That history shows:*

*First. No conspicuous American trust owes its existence to the desire for increased efficiency. "Expected economies from combination" figure largely in promoters' prospectuses; but they have never been a compelling motive in the formation of any trust. On the contrary, the purpose of combining has often been to curb efficiency or even to preserve inefficiency, thus frustrating the natural law of survival of the fittest.*

*Second. No conspicuously profitable trust owes its profits largely to superior efficiency. Some trusts have been very efficient, as have some independent concerns; but conspicuous profits have been secured mainly through control of the market—through the power of monopoly to fix prices—through this exercise of the taxing power.*

*Third. No conspicuous trust has been efficient enough to maintain long, as against the independents, its proportion of the business of the country without continuing to buy up, from time to time, its successful competitors.*

*These three propositions are also true of most of the lesser trusts. If there is any exception, the explanation will doubtless be found in extraordinary ability on the part of the managers or unusual trade conditions.*

*And this further proposition may be added:*

*Fourth. Most of the trusts which did not secure monopolistic positions have failed to show marked success or efficiency, as compared with independent competing concerns.*

*Business—A Profession, Trusts and Efficiency, pp. 207-208*

*J. P. Morgan & Co. declare, in their letter to the Pujo Committee, that "practically all the railroad and*

*industrial development of this country has taken place initially through the medium of the great banking houses." That statement is entirely unfounded in fact. On the contrary nearly every such contribution to our comfort and prosperity was "initiated" without their aid. The "great banking houses" came into relation with these enterprises, either after success had been attained, or upon "reorganization" after the possibility of success had been demonstrated, but the funds of the hardy pioneers, who had risked their all, were exhausted.*

*Other People's Money, Big Men and Little Business, p. 135*

*The fact that industrial monopolies arrest development is more serious even than the direct burden imposed through extortionate prices. But the most harm-bearing incident of the trusts is their promotion of financial concentration. Industrial trusts feed the money trust. Practically every trust created has destroyed the financial independence of some communities and of many properties; for it has centered the financing of a large part of whole lines of business in New York, and this usually with one of a few banking houses.*

*Other People's Money, Big Men and Little Business, p. 152*

*On September 9, 1909, less than twelve years after Mr. Harriman first became a director in the Union Pacific, he died from overwork at the age of 61. But it was not death only that had set a limit to his achievements. The multiplicity of his interests prevented him from performing for his other railroads the great services that had won him a world-wide reputation as manager and rehabilitator of the Union Pacific and the Southern Pacific.*

*Other People's Money, A Curse of Bigness, p. 169*

*... a unit too large to be efficient is no uncommon incident of monopoly. Man's work often outruns the capacity of the individual man; and no matter how good the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise—not only financially to the owners, but in service to the community. Organization can do much to make*

concerns more efficient. Organization can do much to make larger units possible and profitable. But the efficacy even of organization has its bounds. There is a point where the centrifugal force necessarily exceeds the centripetal. And organization can never supply the combined judgment, initiative, enterprise and authority which must come from the chief executive officer. Nature sets a limit to his possible achievement.

*Business—A Profession, Trusts and Efficiency, pp. 223-224*

But the trusts have not been the cause of our heavy export business; nor are they essential to its continuance or future development. And it should be borne in mind that the great trusts carry, in their huge resources and the volume of their business, also an element of danger to our export trade. Many of them have already established factories in foreign countries from which they supply a part, at least, of their foreign trade. This is true of the Standard Oil Company, of the Harvester Company, of the Shoe Machinery Company and of many others. The establishment of these foreign factories has been due, in large measure, to the existence of foreign tariffs or to the requirements of foreign patent laws. But it has been due, in part, also to a lower cost of production abroad, resulting from the lower wages paid there. We have been able, in many lines, to produce goods at lower cost in America than foreigners do abroad, in spite of paying higher wages; because of greater superiority in management or the introduction of advanced machinery and labor-saving devices. But is it not possible that our able business managers, transferring to foreign countries American business organization, machinery and methods, may be able to produce with low-priced foreign labor goods for the foreign trade more cheaply abroad than at home? And, in such event, would they not be led to develop their foreign factories instead of those at home, and the export trade suffer accordingly? Such a course might bring great gains to the American capitalists, who are the stockholders of the trusts; but the American workingmen would lose.

*Business—A Profession, Trusts and the Export Trade, pp. 241-242*

## THE REGULATION OF BUSINESS

Brandeis's attachment to the market economy was a qualified one. He believed that unregulated competition bore the seeds of its own destruction and hastened the ultimate domination of monopolies. For him "survival of the fittest" meant setting up the system so that the most efficient, rather than the most powerful, survived. While Brandeis did not think that competition could be artificially generated by means of legislation, he felt that price fixing and other illegal practices that smothered competition could be controlled.

He was especially concerned about the powerful insurance industry and the immense influence that it wielded in American life through its control of vast amounts of "quick capital." In this case, Brandeis favored regulation through state, rather than Federal, legislation. He believed that oversight by the states would offer better protection to the citizen, and saw in Federal regulation the danger of centralization of government and, paradoxically, the risk of an increase in corporate power. Neither form of supervision, however, would be adequate unless it was also efficient.

Brandeis noted that, if abuses continued and the public did not regain confidence in the insurance industry, there would be pressure for the state to take the business over. He was, nonetheless, wary of being "swept farther towards socialism," and opposed bigger government on the grounds that it did not even manage its existing business well.

*Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. We have long curbed physically the strong, to protect those physically weaker. More recently we have extended such prohibitions to business. We have restricted theoretical freedom of contract by factory laws. The liberty of the merchant and manufacturer to lie in trade, expressed in the fine phrase of caveat emptor, is yielding to the better conceptions of business ethics, before pure-food laws and postal-fraud prosecutions. Similarly, the right to competition must be limited in order to preserve it. For excesses of competition lead*

*to monopoly, as excesses of liberty lead to absolutism. The extremes meet.*

*The issue, therefore, is: Regulated competition versus regulated monopoly. The policy of regulated competition is distinctly a constructive policy. It is the policy of development as distinguished from the destructive policy of private monopoly.*

*... One has heard of late the phrases: "You can't make people compete by law." "Artificial competition is undesirable."*

*These are truisms, but their implication is false. The suggestion is not that traders be compelled to compete, but that they be prevented from killing competition. Equally misleading is the phrase, "Natural monopolies should not be interfered with." There are no natural monopolies today in the industrial world. The Oil Trust and the Steel Trust have been referred to as natural monopolies, but they are both most unnatural. The Oil Trust acquired its control of the market by conduct which involved flagrant violations of law. Without the aid of criminal rebating, of bribery and corruption, the Standard Oil would never have acquired the vast wealth and power which enabled it to destroy its small competitors by price cutting and similar practices.*

*The Steel Trust acquired control not through greater efficiency, but by buying up existing plants and ore supplies at fabulous prices. It is believed that not a single industrial monopoly exists today which is the result of natural growth. Competition has been suppressed either by ruthless practices or by an improper use of inordinate wealth and power. If the law prohibiting such practices is clearly defined and enforced, as it is the purpose of the La Follette Bill to accomplish, no similar Trust will arise in the future.*

*The Curse of Bigness, Shall We Abandon the Policy of Competition?, pp. 104-105*

*The sole effect of a Federal law [to regulate the life insurance industry] would be—the purpose of the Dryden bill may have been—to free the companies from the careful scrutiny of the commissioners of some of the States. It seeks to rob the State even of the right to protect its own citizens from the legalized robbery to which present insurance measures subject the citizens, for by the terms of the bill a Federal license would*

*secure the right to do business within the borders of the State, regardless of the State prohibitions, free from the State's protective regulations.*

*Business—A Profession, Life Insurance, p. 142*

*Doubtless the insurance departments of some States are subjects for just criticism. In many of the States the department is inefficient, in some doubtless corrupt. But is there anything in our experience of Federal supervision of other departments of business which should lead us to assume that it will, in the long run, be freer from grounds of criticism or on the whole more efficient than the best insurance department of any of the States? For it must be remembered that an efficient supervision by the department of any State will in effect protect all the policy holders of the company wherever they may reside. Federal supervision would serve only to centralize still further the power of our Government and perhaps to increase still further the power of the corporations. Supervision alone—whether State or Federal—will not suffice to correct existing abuses in the life insurance business.*

*Business—A Profession, Life Insurance, pp. 144-145*

*Despite your or my protest, the extension of government activity into fields now occupied by private business is urged on every side. Of all services which the community requires, there is none in which the State could more easily engage than that of insuring the lives of its citizens. Stripped of the mysteries with which it has been surrounded, and the misleading devices by which it has been permeated, the business of life insurance is one of extraordinary simplicity. To conduct it successfully requires neither genius nor initiative, and if pursued by the State does not even call for the exercise of any high degree of business judgment. The sole requisites would be honesty, accuracy, persistence and economy.*

*Business—A Profession, Life Insurance, pp. 155-156*

*In my opinion the extension of the functions of the State to life insurance is at the present time highly undesirable. Our Government does not yet grapple successfully with the duties which it has assumed, and should not extend its operations at least until it does. But whatever and however strong our conviction against the extension*

of governmental functions may be, we shall inevitably be swept farther toward socialism unless we can curb the excesses of our financial magnates.

*Business—A Profession, Life Insurance, p. 158*

... We have in the United States many other great aggregations of assets: in manufacturing, mining and commerce, the Steel Trust, the Oil Trust, the Beef Trust; in transportation, the Northern Pacific-Great Northern combination, the Pennsylvania system and the New York Central system. Even in combinations like these our people recognize a menace to our welfare and our institutions. But between the vast combinations of capital in manufacturing or transportation and the accumulation of capital by the insurance companies there is this marked difference—the capital of the manufacturing, of the mining, and of the railroad companies is, in the main, permanently invested in lands, buildings or machinery, in rails, bridges or equipment, or it is required for operating their properties. The capital of the life insurance companies, on the other hand, is mainly free capital. The huge manufacturing and transportation companies, great and powerful as they are, are directly dependent for their prosperity upon the prosperity of the country and the service which they render from day to day to the people. Furthermore they are constant borrowers.

... The assets of the life insurance companies are substantially in the absolute control of the managers. Their officers know (except as to new business) with mathematical certainty approximately how much money they will be required to pay out each month for years to come; because the whole insurance business rests upon stability in average death rates. The insurance company may use most of its capital without danger of its being called by those for whom it is held.

*Business—A Profession, Life Insurance, pp. 119-122*

When such facts are considered, it becomes obvious why the financiers who control these great insurance companies with their huge quick capital exercise a predominating influence over the business of the country. The economic menace of past ages was the church—the dead hand, which gradually acquired a large part of

all available lands. The greatest economic menace of to-day is a very live hand—these great insurance companies which are controlling so large a part of our quick capital.

*Business—A Profession, Life Insurance, p. 124*

## BUSINESS GOVERNANCE

Brandeis took great interest in the influence and motivation of corporate directors, anticipating many of the issues that today comprise the field of business governance. In particular, he was concerned by failings in judgment, conflicts of interest, short-termism, lack of transparency, and poor accounting practices.

He believed that, with the best will in the world, the judgment of those with a conflict of interest could not but be clouded. The example he gives from his era is that of the “banker-director” issuing securities as a company director and then buying them as a banker. Brandeis feared not least for the small investors, who trusted their bankers to give impartial advice on the equities they purchased. There is little doubt that he would have been deeply suspicious of brokers offering equity analysis.

Brandeis prescribed remedies for the ills of the corporate world, a number of which are familiar enough today: avoiding conflicts of interest by prohibiting officers of a corporation from holding positions in other companies; cleaning up book-keeping practices and making them transparent; demanding accountability of members of boards; and limiting the size of companies to ensure their optimal efficiency.

Interestingly, Brandeis was also uneasy about the widespread, casual holding of stock. He saw dangers in companies pandering to the interests of stockholders and pursuing short-term gain. Nonetheless, he believed that, given the right information, investors could exercise a benign influence on business practices, for instance in rooting out excessive compensation—he would have well understood the modern concept of socially responsible investing. Openness on the part of companies and their bankers would also enable the small

investor both to make wise investment decisions based on a realistic assessment of the risks involved, and to judge whether the commission being asked was fair.

This section ends with what may be Brandeis’s most celebrated quote, championing transparency—sustained by continual vigilance—as the key to the proper conduct of both business and society at large.

*To exercise a sound judgment in the difficult affairs of business is, at best, a delicate operation. And no man can successfully perform that function whose mind is diverted, however innocently, from the study of, “What is best in the long run for the company of which I am director?” The banker-director is peculiarly liable to such distortion of judgment by reason of his occupation and his environment.*

*Other People’s Money, The Oligarch Inefficient, p. 204*

*The banker should be detached from the business for which he performs the banking service. This detachment is desirable, in the first place, in order to avoid conflict of interest. The relation of banker-directors to corporations which they finance has been a subject of just criticism. Their conflicting interests necessarily prevent single-minded devotion to the corporation. When a banker-director of a railroad decides as railroad man that it shall issue securities, and then sells them to himself as banker, fixing the price at which they are to be taken, there is necessarily grave danger that the interests of the railroad may suffer—suffer both through issuing of securities which ought not to be issued, and from selling them at a price less favorable to the company than should have been obtained. For it is ordinarily impossible for a banker-director to judge impartially between the corporation and himself. Even if he succeeded in being impartial, the relation would not conduce to the best interests of the company. The best bargains are made when buyer and seller are represented by different persons.*

*Other People’s Money, Banker-Management, pp. 196-197*

*But the objection to banker-management does not rest wholly, or perhaps mainly, upon the importance of*

*avoiding divided loyalty. A complete detachment of the banker from the corporation is necessary in order to secure for the railroad the benefit of the clearest financial judgment; for the banker’s judgment will be necessarily clouded by participation in the management or by ultimate responsibility for the policy actually pursued. It is outside financial advice which the railroad needs.*

*... Such a detached attitude on the part of the banker is demanded also in the interest of his other customers—the purchasers of corporate securities. The investment banker stands toward a large part of his customers in a position of trust, which should be fully recognized. The small investors, particularly the women, who are holding an ever-increasing proportion of our corporate securities, commonly buy on the recommendation of their bankers. The small investors do not, and in most cases cannot, ascertain for themselves the facts on which to base a proper judgment as to the soundness of securities offered. And even if these investors were furnished with the facts, they lack the business experience essential to forming a proper judgment. Such investors need and are entitled to have the bankers’ advice, and obviously their unbiased advice; and the advice cannot be unbiased where the banker, as part of the corporation’s management, has participated in the creation of the securities which are the subject of sale to the investor.*

*Other People’s Money, Banker-Management, pp. 197-200*

*... Further to protect the funds of the [life insurance] companies and to prevent their being used directly or indirectly to advance the private or other interests of officers, provision should be made to prohibit the executive officers from engaging in any other business or holding office in any other business corporations. Treasury safeguards also should be adopted to prevent payments without properly authorized warrants.*

*... Methods of accounting should be introduced which would compel the entry of all transactions in a single prescribed set of books, and the submission to the directors at all meetings of reports showing in detail the condition and the operations of the company. In such reports the cost of every department of the business*

and every kind of business transacted should be clearly determined and disclosed, and likewise the condition, character and result of each investment. Publicity as to the policyholders also is essential to insure the proper conduct of the business by officers and directors.

... The board of directors must be composed of men who recognize the proper function of life insurance companies, and who, like the trustees of our savings banks, recognize the sacred trust involved in their control; men who are willing to give to the companies the time and attention required for the proper performance of a director's duty; men who, having the sole responsibility for the management of the company, will not delegate to the executive officers or committees powers which the board alone should exercise.

*Business—A Profession, Life Insurance,*  
pp. 151-152

... There is no such thing... as an innocent stockholder. He may be innocent in fact, but socially he cannot be held innocent. He accepts the benefits of a system. It is his business and obligation to see that those who represent him carry out a policy which is consistent with the public welfare. If he fails in that, so far as a stockholder fails in producing a result, that stockholder must be held absolutely responsible, except in so far as it shall affirmatively appear that the stockholder endeavored to produce different results and was overridden by a majority. Of course, stockholders may be innocent if they have been active and have been outvoted; but stockholders cannot be innocent merely by reason of the fact that they have not personally had anything to do with the decision of questions arising in the conduct of their business. That they have personally selected gentlemen or given their proxies to select gentlemen of high standing in the community, is not sufficient to relieve them from responsibility. As a matter of course, most stockholders do have very little to do with the management and in these great corporations they have practically nothing to do. It is largely the financial interests who determine policies and the practical results. But the stockholder is morally responsible although he has actually nothing to do with the management, because he cannot justify himself in being a stockholder unless he assumes the obligations which

go with stockholdership; and stockholdership is practically partnership in the establishment so far as concerns the questions now under consideration.

*The Curse of Bigness, Industrial Democracy and Efficiency, On Industrial Relations,* p. 75

The wide distribution of stock, instead of being a blessing, constitutes, to my mind, one of the gravest dangers to the community. It is absentee landlordism of the worst kind. It is more dangerous, far more dangerous than the absentee landlordism from which Ireland suffered. There, at all events, control was centered in a few individuals. By the distribution of nominal control among ten thousand or a hundred thousand stockholders, there is developed a sense of absolute irresponsibility on the part of the person that holds that stock. The few men that are in position continue absolute control without any responsibility except that to their stockholders of continuing and possibly increasing the dividends.

Now, that responsibility, while proper enough in a way, may lead to action contrary to the public interest.

*The Curse of Bigness, Industrial Democracy and Efficiency, On Industrial Relations,* p. 77

Compel bankers when issuing securities to make public the commissions or profits they are receiving. Let every circular letter, prospectus or advertisement of a bond or stock show clearly what the banker received for his middleman services, and what the bonds and stocks net the issuing corporation. That is knowledge to which both the existing security holder and the prospective purchaser is fairly entitled. If the bankers' compensation is reasonable, considering the skill and risk involved, there can be no objection to making it known. If it is not reasonable, the investor will "strike," as investors seem to have done recently in England.

*Other People's Money, What Publicity Can Do,*  
pp. 101-102

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman... But there should be a further call upon

publicity for service. That potent force must, in the impending struggle [against the Money Trust], be utilized in many ways as a continuous remedial measure.

*Other People's Money, What Publicity Can Do,* p. 92

## PRIVACY

Brandeis thought that it was periodically necessary to review the protection the law offered in light of changing circumstances. As time passed, it had become necessary to construe "property" as covering more intangible possessions. His writings anticipate the need to revise the concept of property as the complexity of the economy and technology increases.

Brandeis's thinking also foreshadows the very modern debate about the safeguarding of personal information. He recognized that a fast-changing world demanded a rethinking of the privacy of the individual and the means used to protect it from new and damaging forms of intrusion.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.

*The Curse of Bigness, The Law, The Right To Privacy,*  
with Samuel D. Warren, p. 291

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in

its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone, the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

*The Curse of Bigness, The Law, The Right To Privacy,*  
with Samuel D. Warren, p. 289

...Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, good-will, trade secrets, and trade-marks.

*The Curse of Bigness, The Law, The Right To Privacy,*  
with Samuel D. Warren, pp. 290-291

Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential

*to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.*

*The Curse of Bigness, The Law, The Right To Privacy, with Samuel D. Warren, p. 292*



Despite all the changes that have taken place since his time, today's business environment would not have been such unfamiliar territory to Louis Brandeis. There is no doubt, however, that his reactions to what he saw would have been mixed.

He would have been disappointed that some of his admonitions seem to have been ignored. Corruption, conflicts of interest, and poor judgment still take similar forms; corporations built on M&A activity continue to expand beyond manageable size; advances in technology have allowed our privacy to be laid bare to the

data-miners and marketers; the employment prospects and financial future of the individual have become increasingly vulnerable to a market that he would have considered dangerously uncontrolled.

On the other hand, Brandeis would have been gratified to see that progress has been made in directions he would have thought desirable: the science of management has taken firm root and business is regarded as a worthy profession (and taught at a university that bears his name); much of industry has embraced as a norm innovation and participation on the part of the employee; and the entrepreneur has received recognition as a dynamic force in a business world where "small and agile" are widely seen as virtues.

While much of his writing was in the service of campaigns whose details have long been forgotten, Brandeis's broad insights touch on many of the social and business issues that remain of concern to us. They continue to impress by their scope and prescience.



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## BRANDEIS AND HOLMES, BUSINESS AND ECONOMICS, THEN AND NOW



### BRANDEIS AND HOLMES, BUSINESS AND ECONOMICS, THEN AND NOW: RICHARD A. POSNER<sup>1</sup>

*This Article attempts to explain the views about business of Brandeis and Holmes. The Article analyzes why their economic thinking differed as it did; to what extent it comports with a modern understanding of economics; and how Holmes and Brandeis could have been such close allies when their economic theories differed as fundamentally as they did. Finally, the Article addresses the consequences and current significance of, if any, the theories of Brandeis and Holmes, with particular though not exclusive reference on the one hand to antitrust law and on the other hand to the current crisis of corporate governance.*

Although my main aim in writing this paper was to discuss Louis D. Brandeis's rather neglected views about business, I have found it impossible to think about his views separately from those of Oliver Wendell Holmes, his close ally on the Supreme Court; hence the dual focus of this paper. I shall try to explain what Brandeis's and Holmes's views about business were, and why they differed as they did; to what extent they comport with a modern understanding of economics; how Holmes and Brandeis could have been such close allies when their economic theories differed as fundamentally as they did; and what consequences and current significance, if any, their theories retain, with particular though not exclusive reference on the one hand to antitrust law and on the other hand to the current crisis of corporate governance. That is an ambitious agenda, and so my touch will in places be quite light.

I shall be critical of Brandeis's economic thinking, and I fear lest my criticisms be misunderstood as implying a disparaging view of his place in American legal history. He is undoubtedly a great figure in American law, but for reasons unrelated to his economic thinking. Foremost may be his role as the creator of the concept of a legally protected right of privacy, in his famous article with Samuel Warren (1890) on the right of privacy (perhaps the single most celebrated article in the history of American law) and in his equally famous dissent in the *Olmstead* (1928) wiretapping case. He also

played a fundamental role in shaping the law of federal jurisdiction, culminating in his justly famous decision in the *Erie R.R.* (1938) case. He was the author of notable free-speech dissents as well. And he was also the inventor of the "Brandeis brief," which is to say a brief that argues policy as well as technical law, and does so with a wealth of empirical data, and of the closely related social-science-saturated judicial opinion (a kind of "Brandeis brief"). Although not usually described as a legal realist, Brandeis did more than any other judge to make it respectable for judges to base judicial decisions on economic and other social-science data; he made empiricism a respectable methodology of judicial decision making.

But my aim in this paper is not to conduct a general survey of Brandeis's significance and accomplishments; it is merely to examine his views of business and economics, which I approach first through Holmes's economic theory. Holmes's biographers and commentators tend almost unanimously to believe that the biggest thing in his intellectual development was his service in the Civil War. My own view is that the most important influence on Holmes's intellectual development was *The Origin of Species*, published while he was an undergraduate at Harvard. Darwin's great work is all about competition for limited resources. For in the theory of natural selection it is competition that drives evolution and has made human beings what we are. The analogy of social and economic

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benefits the monopolist's workers as well (and thus deregulation has been found to result in lower wages in the deregulated industries). He thought that the trusts were prone to engage in predatory pricing against their small competitors, but we now know that such pricing is rare, just as we now know that he was wrong to suppose that interlocking directorates and tying agreements were effective methods of monopolization.

An especially pronounced feature of Brandeis's economic thinking, and one with resonance today in light of the recent corporate scandals, is a moralistic strain that had him constantly preaching the social responsibility of business, as in his early essay "Business—A Profession" (Brandeis, 1912).

Given the profound differences in economic orientation between Brandeis and Holmes, how is one to explain the fact that they were such close allies on the Supreme Court? There are several answers: Holmes had a principled, and Brandeis a political, dislike for the Supreme Court's invalidating of "progressive" state legislation (by which I mean legislation designed to implement the agenda of Progressivism—a movement that Brandeis had been a leader of before he joined the Supreme Court). Holmes's Darwinism and Brandeis's progressivism converged on a belief in a free market in ideas and opinions. And neither believed in strict antitrust laws, though for diametrically opposed reasons. Holmes thought they interfered with the law of the economic jungle, while Brandeis thought they were the law of the jungle. These antithetical views could dictate identical outcomes, for example in regard to resale price maintenance—Holmes couldn't see why if a producer wanted to fix his resale prices he shouldn't be allowed to do so—and also in a series of cases in which the Justice Department sued to prevent competing producers from exchanging information in order to reduce the violence of competition. For Brandeis such exchanges were a good thing, because a likely alternative would be mergers that enabled the industry to internalize the information exchanges. For Holmes they were just another form of jungle competition, akin to symbiosis, an anthill, or other examples of cooperative behavior within or between species the better to survive in the struggle with still other species.

Brandeis's most famous antitrust opinion came in the *Chicago Board of Trade* (1918) case, which upheld a rule of the Board of Trade that forbade members of the Board to negotiate price after the Board closed for the day. Only very large traders, mainly grain elevators, were in a position to transact off the Board, as it were, so the rule curtailed their power, which was just the kind of thing Brandeis liked. There is an economic argument for trying to concentrate all transactions in a single market: the more buy and sell offers that are pooled, the likelier are the prices at which sales are made to reflect the fullest information about value; the offers are a richer sample of value estimates. But Brandeis did not make that argument.

It has to be said that from the standpoint of modern economic thought, and even the best economic thought of the time, Holmes and Brandeis were not good economists. Holmes did have the prescience to believe that economists had an important potential role to play in the law; in particular, he had intimations that cost-benefit analysis could be used to make the law an engine of efficiency. But he had no grasp of economic theory. Nor did Brandeis, whose mistakes moreover were more numerous because he was more convinced than Holmes that he understood the economic system. One of his most famous economic opinions is his dissent in *New State Ice Co. v. Liebmann* (1932), in which the majority invalidated an Oklahoma statute that made the ice business a regulated monopoly. Brandeis argued that competition in the ice industry would be ruinous and that the Great Depression had been caused by excessive competition that had resulted in overproduction. These arguments were consistent with his belief that competition must be regulated, but had no basis in economic theory or business reality. The severity of the Great Depression was the result, most economists believe, of deflationary policies adopted by the Federal Reserve Board.

Before joining the Supreme Court, Brandeis had exposed and inveighed against numerous financial and other business scandals, and so it is natural to ask whether a dose of Brandeisian moralizing about business, or even a reminder of the concerns that he expressed about the financial skulduggery of big business, might inform our response to the recent spate of corporate scandals. That is the final

question that I address, along with the parallel question of how Holmes might have reacted to the scandals.

The scandals involve such things as:

- Inflation of corporate assets by the transfer of assets at inflated prices to so-called special purpose entities, and conflicts of interest when corporate executives are paid for managing the controlled entities.
- Failure of accounting firms to audit their clients carefully, perhaps owing to conflicts of interest inherent in the fact the clients pay the audit fee and to the further fact that they may also be paying their auditor for consulting services.
- Lavish issuance of stock options to corporate executives, a practice that may have caused management to become unduly preoccupied with, and desirous of manipulating, short-term fluctuations in stock prices.
- Failure to treat the value of stock options as a corporate liability, that is, to expense them.
- Failure to disclose in the company's financial statements the cost of nonpecuniary benefits to officers, including retired officers, such as use of company aircraft and residences.
- Failure to disclose loans by corporations to their officers, or the subsequent forgiveness of the loans.
- Inadequate supervision of management by boards of directors.
- The practice of investment banks of allocating IPO shares to individuals who can steer lucrative underwriting work to the bank: alleged to be a form of commercial bribery.

The list is not exhaustive.

The common element in the scandals is enrichment of corporate officers by the provision to them (self-provision, that is) of corporate benefits concealed from or inadequately disclosed to the corporation's nominal owners, the shareholders. The critics' premise is that these benefits would be smaller if there were full disclosure. The charge, in other words, is corporate looting by insiders.

There are four questions to consider in analyzing the scandals. The first is whether they represent an increase in the level of corporate misconduct in America. The second is the gravity of the social, as

distinct from private, costs that the misconduct inflicts. The third is the underlying causes of the misconduct. And the fourth is what if anything government should do to reduce its incidence.

Has corporate misconduct become more common since the mid-1990s, a period characterized by a dramatic stock market boom followed by an equally dramatic bust (though both boom and bust were heavily concentrated in hightech stocks; the stock market as a whole is almost back to where it was at the height of the boom)? Such a sequence might indeed lead to an increase in corporate misconduct of the kinds outlined above. When a corporation's stock is rising rapidly to unprecedented heights, concern with diversion of profits to officers is likely to diminish. The diversion will not seem consequential and the officers can claim with greater or less plausibility that the rise is due, in part anyway, to their efforts and so a greater reward is justified on incentive grounds. Then, when the bust occurs, the officers have an incentive to employ tactics designed to delay the fall in the value of their companies' stock and buffer the impact of the inevitable fall on their personal wealth.

This is a more plausible explanation than that business ethics declined over this period. If anything, one would suppose business ethics a superior good in the economist's sense of a good the demand for which increases with income.

Given diminishing marginal utility of income, additional income to a person who is already wealthy buys only a small increment in utility, which is therefore more likely to be offset by the guilt or shame created by a breach of ethics. But it would be a mistake to rely on business ethics to deter misconduct. Business attracts and rewards people who derive above-average utility from income, which they are reluctant to sacrifice in favor of behaving ethically unless the expected cost of unethical conduct is substantial as a consequence either of legal sanctions or market sanctions.

But now what are the costs to society as a whole of corporate misconduct? One might think that "looting" by corporate officers would merely redistribute wealth from the shareholders to the officers, with the result that the size of the social pie would be unchanged. But the prospect of such "loot" would convert the expected gains to costs,

as officers expended resources—the equivalent of the cost of burglar tools—to obtain the loot. Granted, the rational would-be corporate looter will expend resources on obtaining loot only up to the point at which marginal cost equals marginal revenue; if marginal cost is sharply rising, total cost may be a small fraction of total revenue. As a further complication, this one cutting the other way, potential victims of corporate looting have an incentive to incur costs to prevent themselves from becoming victims; for example, they may accept a lower expected return from investments that are less likely to be plundered. That investors might be deflected from corporate stock to types of investment that yield a lower social return is one of the principal economic harms that corporate looting could cause. In sum, the spate of corporate misconduct undoubtedly imposed costs on society, though they are smaller than the amounts of money that changed hands. The largest costs may have been those resulting from ill-considered reforms, and these costs are ongoing.

As for the causes of the recent corporate misconduct, they are essentially just one—that shareholders (and for different reasons most creditors) have very limited incentives to monitor officers. The benefits are modest and the costs great because of information costs. The modern economic literature calls the problem of the conflict of interest between shareholders and management the problem of “agency costs,” and the term is illuminating. The management, the officers, are legally the agents of the shareholders; they are paid to serve the shareholders’ interests as if they were their own (that is, they are “fiduciaries” of the shareholders). But agents and their principals have in fact divergent interests, so that if the costs to principals of monitoring agents’ behavior are high and the benefits low, the agents may be unfaithful agents and divert to themselves income (broadly defined—it need not be purely pecuniary) that rightfully belongs to their principals.

The law has sought to minimize agency costs by such devices as requiring that a corporation have a board of directors elected by the shareholders to oversee (nominally to control) the officers, that the corporation hire independent auditors to certify the accuracy of the corporation’s financial disclosures, and that it make certain disclosures to

shareholders, and that its officers have legally enforceable fiduciary obligations to the shareholders. In addition, securities analysts employed by brokerage houses and investment banks monitor the corporations in which their customers invest, as do banks and other major creditors. But the corporate officers largely control the information disclosed to all these monitors. The directors are particularly vulnerable because they devote only a small fraction of their time to the company; and if they are inside directors (that is, full-time employees of the firm) they have a conflict of interest, while if they are outside (independent) directors they have less access to information about the company. Moreover, except for law enforcement agencies and private plaintiffs, and the plaintiff’s securities bar, the officers to a considerable extent control the monitors. They influence the selection of outside as well as inside directors; they hire and pay the auditor and dangle consulting contracts in front of auditors who also offer consulting services; and they influence analysts’ reports by steering underwriting fees to investment banks whose analysts give their companies glowing reports.

Anyone familiar with Brandeis’s pre-Supreme Court writings on business ethics, which I earlier dismissed as journalistic and unreadable, will have a sense of *déjà vu*. For the financial scandals that he exposed and denounced bear a more than passing resemblance to the recent scandals. And here I sense at last a legitimate aspect to Brandeis’s hostility to big business. Financial scandals are facilitated by the scale and complexity of modern corporate enterprises. The larger the corporation, the more difficult the problem of control, or, in current economic lingo, the greater the agency costs. So Brandeis was on to something. And he was surely correct as well that disclosure is the key to preventing fraud. It is in *Other People’s Money* that we read: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman” (Brandeis, 1914, p. 92). He was acutely conscious of conflicts of interest in business and rightly critical of business ethics.

He would doubtless have favored increased regulatory controls over business, as well as of efforts through exhortation to sharpen the conscience of businessmen. Yet now as then, the case for an

increase in regulatory controls can be questioned, as I will try to show with reference to my earlier list of scandals:

- *Inflation of corporate assets by transferring assets at inflated prices to special purpose entities.* This is a form of fraud, when the inflation is concealed from investors in the entity or from shareholders and prospective shareholders in the transferor corporation, who are fooled into thinking that the assets and hence the corporation are worth more than they are. But fraud was deterred to a considerable extent by the law as it stood before the spate of additional regulations promulgated in the wake of the recent scandals. Not completely deterred; because of the cost of legal remedies, it is rare that the optimal level of a particular form of illegal activity is zero. The prosecution of the Enron executives suggests that adequate legal tools are in place to deal with such conduct. It would be a mistake to forbid all asset transfers to “special purpose entities” (the genus of which the Enron transfers were a species) because such transfers confer genuine economic benefits, namely the disintermediation of debt. It might be possible, invoking what in tax law is called the “substance over form” doctrine, to forbid such transfers when they have no economic purpose but are merely designed to shift corporate debt from one pocket to the other in the hope that investors will find it difficult to locate the second pocket.

The role of accounting firms as monitors (“police”) serving to protect shareholders against fraud must be considered, however, which brings me to—

- *The failure of accounting firms to audit their clients carefully, owing to conflict of interest: the clients pay the audit fee, and also pay accounting firms for consulting services.* The separation of auditing from consulting, something that Arthur Andersen had largely done before the Enron scandal, seems a relatively low-cost measure (the Sarbanes-Oxley Act, the centerpiece of the recent reforms, forbids a firm to provide both auditing and consulting services to the same client at the same time). The Andersen breakup, which preceded by several years the collapse of the auditing firm that emerged from the breakup, suggests that the economies of scope from combining

auditing and consulting under the same roof are not great. Whether a prohibition of the combination is necessary may be doubted, however, since with the collapse of Enron investors are likely to penalize any corporation that buys consulting services from its auditor. However, it is hard to see who other than the audited firms are likely to pay the auditor, which means that the fundamental conflict of interest remains.

Fortunately, the terrible fate of Arthur Andersen suggests that legalmarket remedies for auditor negligence/fraud are considerable; they could be strengthened by removing the “duty” (*Ultramares Corp. v. Touche*, 1931) limitation of New York and a number of other states’ law that prevents members of the investing public from suing auditors of the corporations they invest in, the theory being that the auditors have not assumed a duty of care toward the investors. And again it is important to recognize that a goal of zero fraud could not be attained without a disproportionate expenditure of resources.

- *Lavish issuance of stock options, which is alleged to cause management to become unduly preoccupied with stock price.* At the same time, stock options do tend to align managerial compensation with firm performance. Their efficacy and appropriateness, as well as their magnitude and their net impact on the value of the firm, will now receive greater market scrutiny.
- *Failure to treat the value of stock options as a corporate liability.* It is difficult to believe that this can make much of a difference. The information is public, albeit in the footnotes; now, at least, analysts are sensitive to the problem. There are also uncertainties about valuing options, but the market should be able to straighten these uncertainties out.
- *Failure to disclose the cost of nonpecuniary benefits to officers, such as use of company aircraft and residences.* Again, in light of recent scandals, analysts, underwriters, and directors will be insisting on such disclosure.
- *Failure to disclose loans by corporations to their officers, or the subsequent forgiveness of the loans.* Ditto.
- *Inadequate supervision of management by the board of directors.* This is difficult, maybe

impossible, to change much, because of managerial control of information, because of the limited time that directors devote to their work as directors (which of course is a factor in the asymmetry of information between managers and directors), and because independent directors who are too critical of management will find it difficult to be reappointed or appointed to other boards

- *The practice of investment banks of allocating IPO shares to individuals who can steer lucrative underwriting work to the bank.* This does seem like commercial bribery and hence fraud, and can be outlawed, but again the recent scandals may bring it to a halt anyway.

*Pace Brandeis*, I do not put much store in efforts to raise business ethics, presumably by courses in ethics taught in business schools. After a number of lawyers were implicated in the Watergate scandal during the Nixon Administration, law schools were required to institute courses in legal ethics. No one supposes these courses had any effect. Ethical violations are committed not out of ignorance but because the costs are slight.

The costs become significant only if the ethical violations are transformed into violations of law. And people cannot be talked out of greed.

The lessons of the scandals, in short, are first that most experts in corporate governance and corporate finance, including economists and regulators as well as lawyers, underestimated the amount of corporate misfeasance and the size of agency costs; second that most of the correction must be left to the market, which is a potent source of incentives and constraints for corporate managers; and third that major changes in law are probably unnecessary (and could be counterproductive), once it is accepted, realistically, that the optimal level of managerial misconduct is not zero, owing to costs of using the legal process. At least these are the lessons I draw; many economists would think me too pessimistic about the potential of legal and administrative regulation to prevent future corporate scandals. Brandeis would surely have disagreed with the second and third points (and Holmes would as surely have agreed with them); too bad he isn't here to debate them.



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