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New trends in thought, like the *nouveaux riches*, always have their genealogists. The search for yesterday's antecedents for today's offspring is a perennial diversion. And the New Deal is no exception.

Anyone who undertakes to talk about the New Deal from this platform owes his audience some justification. We have just experienced so brilliant an array of speakers, - most of whom as one of the presiding officers well put it, - are on the inside looking out upon the rest of us, - that the entire field has been well nigh exhausted. Yet in this matter, two considerations come to mind.

To begin with, none of these speakers was a lawyer. No doubt that circumstance impresses you as peculiarly fortunate! If so, you are caught at last. Fortunate or otherwise, it is quite possible that a lawyer's viewpoint, however open to suspicion, may perhaps contribute an emphasis that is somewhat different. Besides, it also occurs to me that a large number of this audience, for one reason or another, did not hear these talks. And that, of course, is my opportunity. Like so many of my profession, I can steal in a grand manner, and you will never find it out.

In the last few months men have miraculously appeared from institutions and learned societies from coast to coast, all eagerly and vociferously explaining those particular factors which led to the depression and those which will unerringly lead us out. The rest of us, happily less given to opinion, stand in bewilderment while we see one school of saviors grasp hopefully at solutions which another brands as leading causes for our predicament. Such befuddlement, I abandon to the tender considerations of the economists. Like
Alice as she left the mad tea party, my parting view finds them earnestly cooperating to put the dormouse into the teapot.

If we take that body of federal legislation which has been dubbed *ex cathedra* the New Deal and if we assume, without defining for the moment, that through the major part of it there runs a common thread of political theory, we may, I believe, find its antecedents clearly, even dramatically apparent in the attitudes of lonely pioneer thinkers of an earlier day. Mr. Charles Beard has recently pointed out that crises in American history have an odd way of appearing at twenty-year intervals - panics in 1873 and '93 pared off with progressive movements in 1912 and 1932. To divide history into what lawyers would call twenty-year terms renewable forever, is much too simple and impersonal an explanation. I prefer to find my antecedents in personalities rather than systems of tenure.

There are doubtless those among you who still remember President Hoover. Into whatever oblivion he may have disappeared, he left one great monument to progressive thought that deserves to be salvaged for a better fate. No one can read the report on "Recent Social Trends" without obtaining a profound respect for the grasp and vision of Mr. Hoover's Committee. Written in 1930 and made public in the fall of 1932, it portrays amazingly the spirit of the present administration. I read, for example, from its introduction:

"We may look for important developments alike in the concentration and in the devolution of social control, experiments perhaps in the direction of the self-government of various industries under central guidance, experiments in cooperation and accommodation between industry and government, especially as the larger units of industrial organization, cooperative and otherwise, become more like governments in personnel and budgets, and as governments become agencies of general welfare as well as of coercion."
But there is another antecedent, this time a single personality, whose life reflects even more dramatically the new attitude toward the function of government.

His parents came to this country from Prague back in 1848. Bohemian Jews they were, people of both culture and means. They settled in Louisville, Ky., and there it was in 1856 - 78 years ago - that the American public all unwittingly, and indifferently even had they known it, received the first small cries of Louis D. Brandeis. Educated in the public schools, with two years abroad under German educational discipline at Dresden, he entered Harvard Law School at the age of 18. His family fortune reduced after the Reconstruction period, he had to earn his way by tutoring. In spite of this he completed the three year course with high honor in two years. A few months later he entered a period of general practice in Boston which was to continue 37 years till his appointment to the Supreme Court of the United States in 1916.

His original Boston connections were with persons of wealth and position. The difference between their social outlook and that of the young Brandeis was not slow to appear, however. The shocking treatment of workers in a Boston factory, shot down by private detectives after they had gone on strike against what they deemed an arbitrary wage cut, aroused a sympathetic interest in industrial problems that has never faded. He became an adjuster in labor troubles in Boston and throughout New England, and years later was the choice of both contesting parties as arbiter in a garment workers' strike in N.Y. involving over 70,000 employees and a business of 108 million dollars annually.

His struggle for the protection of street franchises in Boston was followed by a successful fight for municipal ownership of the subways. But it was his final settlement of the gas controversy in 1905 that gave him national
recognition. The basis of the agreement in this case was the continuance of private ownership under rates governed by a sliding scale whereby the benefits of increased efficiency in management were shared both by stockholders and consumers.

Again, it was Brandeis who exposed so devastatingly the weaknesses in the financial structure of the New Haven road, defects in the investment programs of life insurance companies, fraudulent conspiracy in the Ballinger scandal, and inefficiency in railroad management - an inefficiency which accounted for their claims for high rate increases. He conceived of his function as lawyer in a light all too strange to many of his colleagues at the bar.

"Instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either," he said in 1905, "able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the corporation lawyers, and far too little of the people's lawyer. The great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect also the interests of the people."

And Brandeis, more than any man of his time, has lived this idea. Perhaps this is the reason why his appointment by President Wilson as Associate Justice of the Supreme Court was held up from January till June, 1916, while bitter and heated controversy raged on all sides. A committee of Boston lawyers urged the Senate not to confirm, misrepresenting the professional behavior of Brandeis so outrageously, so maliciously it has now been proved, as to discredit them forever before the bar they pretended to serve. President Lowell of Harvard joined in the protest, revealing then qualities which all the world was to know eleven years later in connection with the Sacco-Vanzetti case.

But where in all this do we find an attitude prophetic of today's governmental policies? The answer, I believe, is at least four-fold.
In the first place, note his solicitation for the investing public. In a magazine article in 1913 he attacked the anomalous position of the banker who participates in the creation of the securities he sells his customer. He advocated the separation of banks from their securities affiliates, and twenty years later in the Banking Act of 1933 we find this divorcement well on its way to achievement. The same year he said "Compel bankers when issuing securities to make public the commissions or profits they are receiving," and today the National Securities Act requires the registration of all securities and the filing of a schedule of "all commissions or discounts paid or to be paid directly or indirectly, by the issuer to the underwriters together with 31 other elaborately detailed types of data for the protection of the buying public.

A second point of view, prophetic of today's policies may be found in his attitude toward organized labor. He sympathized deeply with the inequality of bargaining power between labor and industry. In testifying before the House Committee investigating the U.S. Steel Corporation in 1912, he said in reference to the denial of the right of laborers to combine,

"It is a condition of repression of slavery in the real sense of the word, which is alien to American conditions."

Yet he has never been a "closed shop" advocate. Such a policy, he believes, tends toward a monopoly comparable to that of industry. It threatens a new tyranny in place of the old. But the right to form unions he believes essential to true democracy.

And note the counterpart of these views in the now famous section 7(a) of the Recovery Act:

Every code shall contain the following conditions (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing;***

(2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining or organizing a labor organization of his choosing.
This, you will notice, protects the rights of labor freely to organize. But it does not expressly give them the right to force non-union men to take out union cards. It makes no reference to the "closed shop." In fact, in two recent decisions, one of them in Cleveland, injunctions have been granted restraining strikes instituted by labor unions under the impression that section 7(a) guarantees a "closed shop." The views of Mr. Brandeis are again reflected here.

Again, his attitude toward the relations of government and industry reveals him as a believer in a controlled competitive system. It was back in the "trust busting" era of 1912 that he attacked the uncontrolled concentrations of power in a small group of corporations in turn controlled by minority stockholders exercising practical ownership out of all proportion to their legal rights. Yet it is concentrated wealth which he decries, not private property as such. It is well said by Mr. A.T. Mason in his admirable little book on "Brandeis the Lawyer and Judge in the Modern State;"

He believes so strongly in private property that he wants to see it more equitably diffused among the masses of people. He has such respect for profits that he desires to enlarge them by scientific management so the share of labor (purchasing power itself) may be increased."

He is not then a Socialist, but believes like most Americans, that individual initiative is best stimulated by private enterprise. As a Socialist organ once put it disapprovingly, "Mr. Brandeis is trying to find a way by which capitalism can be saved." But that way is not the Fascist way either. He has repeatedly shown profound distrust for absolute power. "Neither our character nor our intelligence can long bear the strain of unrestricted power" he wrote back in 1905.
So, he is not an extremist of either type, — not the sort of man we so often describe as "radical." He is but searching for new ways to utilize existing principles of government to a greater social advantage. He is thinking essentially within the framework of a capitalistic democracy.

The most dramatic instances of government control ever attempted are the National Industrial Recovery Act and the Agricultural Adjustment Act, the latter introduced in Congress just one year ago today. Basically both acts assume the continuation of capitalism. They accept the right to private property and maintain the competitive system. Private monopolies are not countenanced, in spite of the widespread belief to the contrary. Oppression of small enterprises is expressly prohibited and the policy clearly asserted "to eliminate unfair competitive practices." But still it is capitalism, though controlled as never before in a democratic state.

It may be interesting to note for a moment the types of controls set up in these two acts. They are three, really. One is the strengthening of labor's right to bargain collectively in the industrial field; another is a group of remedies placed in the hands of the government, ranging all the way from deprivation of the Blue Eagle, injunctions, submission to the Federal Trade Commission, licensing, and revocation of licenses, to fines and imprisonment. It is well known that to date only the first two have been resorted to. The Blue Eagle has been taken from code violators in several instances and but only once as far as I know, has the government resorted to injunction. This was when they successfully restrained violation of a marketing agreement last November by producers of cling peaches out in California.

The third, and most significant control is in large part self-imposed. It is a stabilization device arrived at cooperatively between industry, agriculture,
and the government. And it is in connection with this control that we find in Brandeis the fourth antecedent for the recovery program.

In 1915 he pointed out that the obligation to control industry can never be borne by the government alone. Each economic group should see to it:

"That the higher standards of that organization are lived up to by its members. There is no possible way of bringing about justice in the protection of classes, except the assumption by the class of the obligation of making the members of that class conform to proper moral standards."

It is in the embodiment of this attitude that the legislation of the present administration stands unique. Although these are only two out of some eighteen major legislative programs which together comprise the New Deal, it is unquestionably true that the Recovery Act and the "Triple A" are the broadest in their application, the most novel in their programs. They have - in them one basic common factor - cooperative government. The nation-wide network of agreements running from hundreds of thousands of industries individually to the President, - officially known as the President's Reemployment Agreements," and often mis-called the "Blanket Codes," - are balanced by other hundreds of thousands of agreements between individual farmers and the Secretary of Agriculture - agreements known, some as "Option Contracts," others as "Commodity Benefits." A second, and as it were superimposed, network of codes binding together all units of a single industry under a single set of regulations of fair competition and conditions of labor, finds its counterpart in marketing agreements between producers, and associations of producers and other agencies handling agricultural products. Together they represent a fabric of self-regulation under government supervision, such as the world has never known before.

Harold Laski has described this as "revolution by consent." The President calls it "partnership in government." In either phrase is latent a new concept, found heretofore almost entirely in the realm of commerce, - the concept of contract.
And I say "contract" advisedly, speaking as a lawyer, well knowing the traditional caution of my profession. Whether the highest courts will so describe these countless new relations is a question about which you may guess as well as I. At least three lower courts to date have expressly held the so-called "Blanket Code" to be a contract, and the Common Pleas Court of Cuyahoga County held last February that the codes, too are contracts. Certainly they have many of the attributes of contracts. The government has granted employers certain privileges, namely the use of a symbol, the Blue Eagle, with its consequent claim to popular good will, and has modified the stringency of antitrust legislation. In return for this, employers have promised each other and the government, reduced hours of labor, minimum wages, abolition of child labor and the right of labor freely to organize. Do we not have here what we lawyers mysteriously,—yet elegantly you must admit,—call a "quid pro quo"?

But not only is a commercial concept being carried over into government; a political concept is being extended to the field of industry,—the principal of subordination of individual freedom to the social good, pursuant to a government selected by and responsible to those whom it governs. We have, for the first time, a major national effort to demoralize industry.

I am not, I believe, under any illusion as to the pressure behind this great network of contracts. Public opinion, fear of governmental sanctions, and occasionally economic pressure,—all these have played their part. Yet the fact remains that this country from coast to coast is threaded with hundreds of thousands of agreements, entered into by hundreds of thousands of industrialists and agriculturists,—agreements that in theory are entirely, and in practice substantially, voluntary.

Does this look like Communism or Socialism? If so, how do you explain the continuance of private property and the right to profits?
Does this look like Fascism? If so, how do you explain a constitutional government responsive to the electorate, an executive whose powers may be revoked any day by Congress, and a people who still have the right freely to express their views of the government?

* * *

But surely I don't attribute all this to Brandeis. Not at all. So far as I know, there is not the slightest evidence of a causal relation between the views of this Boston lawyer, and the present recovery program. I claim no ancestry whatever. Some master-philosopher, envious of the erudition of the bar, - will doubtless shout his battlecry of "Post hoc, ergo propter hoc." Not a bit of it, I reply. I'll have none of your "hence." I'm just interested in "post."

Yet it is a dramatic coincidence that twenty years ago, when such views were even more unorthodox than during the Hoover regime, Louis D. Brandeis should have publicly voiced these four points of emphasis of today's program.

But the extent of the coincidence would be incomplete without reminding ourselves that it is this same man who will sooner or later be one of the nine who must together pass upon the constitutionality of this same New Deal. It is in this second capacity, that of judge, that we find the quality of mind that more than any other typifies the New Democracy.

Back in 1908 - eight years before he was appointed to the bench, - Brandeis was counsel for the state of Oregon in the now famous case of Muller v. Oregon. The issue was the constitutionality of a statute providing that no woman should work over ten hours a day in any factory or laundry. A certain laundry owner, displaying a positively sacrificial solicitude for the rights of his women employees, had argued that the statute unjustly deprived them of their sacred
right to contract free of an intermeddling government. The brief submitted by Mr. Brandeis contained two pages of legal argument, and almost one hundred of factual material having to do with the effect of long hours of labor upon the health of women. There were over ninety reports of committees, bureaus of statistics, commissioners of hygiene, and inspectors of factories. In holding the act valid, the court went out of its way to refer approvingly to the material provided by Mr. Brandeis. Here for the first time, amazing as it may seem, did the Supreme Court consciously shape a decision in the light of factual data other than that technically introduced in evidence at the trial.

In the trial of case after case, Brandeis followed this new technique. Upon his elevation to the bench he brought to the Supreme Court a knowledge and understanding of our economic system unmatched in any man of his time. His opinions like his briefs were filled with summaries of exhaustive surveys in relevant fields of economics and sociology. It was in this fashion that he handled, among many other issues, the constitutionality of a statute prohibiting employment agencies from taking fees from applicants for jobs, the validity of the so-called "yellow dog" contracts, injunctions against the right of laborers to strike, determination of a valuation as a base for computing reasonable rates for public utilities, taxation of chain stores, the legality of farmers' cooperatives, and of trade associations engaged in dissemination of trade information, and finally, the constitutionality of a statute licensing the manufacture of ice. It is interesting to note that this same technique is applied by Justice Roberts in the decision of March 5 last, holding constitutional the price fixing provisions in the New York Milk Statute. Justice Brandeis has referred to this process of thought as essentially inductive:
"Whether a measure relating to the public welfare," he has said, "is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible."

Expressed negatively, his philosophy of law is no jurisprudence of concepts, no structure of abstract thought whose symmetry it is more vital to preserve than the welfare of mankind. Call him, as Dean Pound has done, a sociological jurist. Or include him if you will among the ultra-modern school who delight in the appellation "neo-realists." Nomenclature is trivial when applied to a man who has said that he deprecates the endowment of "property with an active militant power which would make it dominant over men," who has said, "There is no logic *** except the logic of facts."

Between us we shall doubtless be of many minds as to the wisdom of this mass of legislation we call the New Deal. Never mind that. Certainly I have no competence to pass upon its fundamental economic soundness. But I do believe these things can be truly said.

We are no longer fooling ourselves into believing our predicament but a temporary maladjustment; we are not supinely waiting for the cycle that swept us down in 1929 to carry us up to those same unhealthy heights in 1939. On the contrary, we have come to realize that our national economy has in it defects that are permanent. And still more important, that the human intellect can master them. This is no defeatist attitude: it is honest, it is courageous and it is above all things realistic.

But it is not revolution. No enduring change in class relations has yet appeared. It is, on the other hand, an attempt to set up a new equilibrium between those forces that have reeked such havoc in industry and agriculture; an attempt to carry over a political democracy into the field of industrial absolutism.
It was Brandeis who thirty years ago said:

"The greatest problem before the American people in this generation is the problem of reconciling our industrial system with the political democracy in which we live."

The generation of 1895 did not face it. We must face it now.

How wrong, then, were the words of those brilliant American and British Socialist leaders, Fenner Brockway and Norman Thomas, who from this very platform have recently predicted in no uncertain terms that the Blue Eagle must soon turn black or red; that the road of national policy is inevitably sharply right or left.

No; such are the words of those who think in absolutes. Life is not all black or white; progress in government is not necessarily a break with the past, a sharp turn to the left or to the right. If we must move, as we all know we must, there is no fate driving us inevitably to Communism on the one hand, or Fascism on the other; Eagles don't need to change their colors to the red of Soviet Russia or the black of Mussolini's Italy.

Not at all. American traditions of democratic responsible government have in them the seeds of a new growth. Democracy, I believe, has the capacity to endure in a capitalistic society, provided the profit system is controlled in the interest of the masses of our people. This is the experiment upon which we have been launched for the past year. And if we succeed, as I believe we shall, America will have produced from its own traditions a new and revitalized democracy.

You who graduate here today have an unparalleled opportunity, — an opportunity of struggle and hard knocks, to be sure, but much more than that, an opportunity to play your part as educated citizens in giving new life to America's great contribution to civilization.
The road to a new industrial freedom turns neither to the right nor to the left. Far ahead, if you will but look strides the stalwart figure of Louis D. Brandeis, a pioneer of a New Democracy.