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A UNION OF THE SPIRIT

THE JEWISH TRANSFORMATION OF LOUIS BRANDEIS

ALAN LEE BERG

Thesis submitted in partial fulfillment of
the requirements for the Degree of Master of Arts
in Hebrew Letters and Ordination

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DIGEST

This thesis is an examination of the Jewish evolution and transformation of Louis Brandeis. The thesis examines the early Jewish influences in Brandeis's life as well as Brandeis's Jewish activities during this period. The central focus of the thesis is the pivotal role that Brandeis's involvement in the 1910 garment worker's strike had in the transformation of Brandeis's Jewish identity. The thesis, further, examines Brandeis's genius for social and legal innovation. A factor which was to prove decisive in the ultimate solution of the 1910 strike.

It is my contention that a transformation, a significantly heightened level of awareness and committment as a Jew, occurred for Brandeis as a result of his activities in the garment worker's strike. Brandeis's innovation, the preferential union shop, was the key to the solution of the strike. Brandeis began to realize in 1910 that a unique relationship existed between his Jewish and his American identity and that these two aspects of his character were in harmony with one another.

Brandeis was committed to a progressive capitalistic America. He sought a society where the economic structure would be a source of individual enrichment and an ever-developing sense of humanity. It was to this end that he applied his innovative skills.

The thesis, then, traces Brandeis's development as a Jew and his development as a social-legal innovator. These two developments would complement each other in 1910 and both would emerge significantly stronger. Each, in fact, gaining strength from the other.

The thesis traces Brandeis's Jewish family influences. It examines

Brandeis's Jewish life while he was at Harvard and living in Boston. This includes a profile of Boston's attitudes towards Jews. Attitudes which were to be of importance to Brandeis.

Brandeis as a social-legal innovator is examined from the vantage point of his revolutionary brief in the case of Muller vs. Oregon. The case is placed in its historical context and the influence that the brief has had on the legal community is discussed.

The garment worker's strike is dealt with from the point of view of management and from that of labor. The situation before Brandeis entered the picture is described. Why Brandeis was called in and the role that he played in its solution is analyzed.

My conclusion is that Brandeis, until 1910, experienced a progressive, though low-profile, Jewish evolution; but that his involvement in the strike was to effect his Jewish self-awareness to such a degree as to cause a transformation of his identity as a Jew. A transformation that was a necessary prerequisite for his leadership in the Zionist movement. A transformation that also, because of its unique interplay with innovation through law, would yield strength to Brandeis's belief in using law as a means whereby a more progressive economic and social order might be obtained.

To Lynn

for making each day of the year

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CHAPTER I

"Our Dilemma"

"If a man breaks away,
can he not return?" (Jeremiah 8:4)

If Louis Dembitz Brandeis had merely been a great lawyer and Supreme Court Justice, if he had merely been among the most important of early Zionists, if he had merely been a source of profound social and economic progress; his life would provoke intense interest and probing research. As his life would have it, Brandeis was all of these things; and they would only serve as chapter headings. The details of each aspect of his life and his contributions being as important and as great in number as is his stature among Jews and among Americans.

Brandeis is not simply a figure in history to whom homage is paid in passing. In a recent New York Times column Anthony Lewis wrote, "Many consider Louis Brandeis the outstanding intellect among all Supreme Court Justices. He was also a great Jew, a man of burning idealism and a Zionist when not everyone was."[1]

Brandeis is seen here as he was: an outstanding American and a great Jew. His commitment and contribution to American life and to Jewish life were not only distinguished but distinctive as well. They were separate. That is to say, Brandeis was not a great American because he was a prominent Jew who lived in America, nor was he a great Jew because his contributions to America were those of a dedicated Jew. He made distinctive, yet equally important contributions to both the Jewish

and American worlds.

There is a problem here, a dilemma. Brandeis became a dedicated Jew relatively late in life. This is not to say that there were no Jewish inputs earlier. These inputs were there, but they were not central to Brandeis's early life. During those earlier years, it was Americanism, as defined on his own terms, which was central to Brandeis's life. And yet, at a certain point in his life Brandeis developed a strong self-identity as a Jew and a passion for Zionism.

Brandeis's Judaism was not inconsistent with his Americanism. One might ask how it could be that in the early part of this century a Judaism whose primary emphasis was Zionism could have been consistent with an equally strong Americanism. This was, however, the case with Brandeis:

> As with every seminal figure, those who follow must take the pains to disentangle the various threads . . . , while granting the place of the great man in the history of his time. So it has been with Freud, Marx and Darwin. It is no exaggeration to say that Brandeis deserves a place in this company, and he demonstrates that consistency is not a hobgoblin of great minds.[2]

Why did Judaism, with whatever emphasis, Zionistic or otherwise, become prominent in Brandeis's life and at such a late date? In confronting this question Harold Ticktin, an attorney himself, has written, "At a mature age, each (Uriel da Costa, Theodor Herzl and Brandeis) underwent a 'Jewish conversion' which led them to extensive involvement with Judaism in a manner totally unpredictable from the circumstances of their 'pre-Jewish existence.'"[3] Ticktin finds some reason for the "Jewish conversion" of da Costa and Herzl. Concerning Brandeis, however, he concludes:

> . . . but for . . . Brandeis we strain to see the crucial change only to find a plank page.[4]

and he adds:

> And though a huge body of literature by and about Brandeis has accumulated during some seventy years since he first came into national prominence, to this day we are still dubious as to exactly how Brandeis trod the road to Damascus . . . Despite the fact that Brandeis's words are spread upon the open record, in all his careers as lawyer, reformer, Supreme Court Justice and Zionist, we know no more today about his "conversion" than when he emerged full blown, as did Minerva from Jupiter's head, as a world Zionist leader.[5]

How, then, did Brandeis undergo what Ticktin has called a "conversion" to a Jewish interest? The fact is that the change in emphasis in Brandeis's life towards that of a stronger Jewish identity was not as surprising as it might appear. The seeds for such a blossoming were planted early in Brandeis's pre-Zionist life. Further, an event occurred in 1910 that served as a catalist, bringing to full flower Brandeis's self-identity as a Jew and which led to his active role as a Zionist.

That event was a strike in the garment industry in New York City. The relationship of Brandeis to the strike and to the parties involved, both mangement and labor, was to prove to be of great importance. Brandeis's contribution to the ultimate solution of the strike turned out to be essential. The solution also served as a landmark in the development of a progressive orientation towards labor in the United States. More important, however, was the effect of the strike on Brandeis. It affected his Jewish awareness as had nothing else previously. This study will examine the development of Brandeis's Jewish identity. It will deal with the early Jewish elements in Brandeis's life, but most extensively with the garment worker's strike. What was the strike about? What was Brandeis's role in the strike? What was the effect that Brandeis's involvement with the strike was to have upon Brandeis's Jewish identity?

The path that Brandeis followed from his home in Louisville, Kentucky to his activity in the garment worker's strike is also important to our investigation. What was the role of Harvard and of Boston in the shaping of Brandeis as a Jew who would become an important Zionist?

There will be one other major focus: Brandeis as a social-legal innovator. This aspect of Brandeis's legal personality was, as we shall see, essential to the role he played in the garment worker's strike. Muller vs. Oregon and Brandeis's role in that case will be our focal point here.

The breakthrough in his thinking which found expression in Muller vs. Oregon was further developed in the garment worker's strike, and subsequently reached its optimal expression in his Supreme Court decisions. It represented a radical orientation towards the interrelationships between economic development and society.

The development of the Jewish identity of Louis D. Brandeis was complex. Our goal, and our dilemma, is to understand how it occurred.

CHAPTER II

"Beginnings"

In 1915 Brandeis was to write: "The suffering of Jews due to injustices continuing throughout nearly twenty centuries is the greatest tragedy in history. Never was the aggregate of such suffering larger than today. Never were the injustices more glaring."[6] This statement reflects an intense concern for Jews, a sensitivity to the depth of their anguish.

One might assume, upon reading such an impassioned statement, that its author felt an intense identification with the Jews and their plight. This obviously was true of the Brandeis who wrote The Jewish Problem: How To Solve It, from which the above passage is quoted. Brandeis, however, was neither born with such sensitivity, nor did he show any evidence of it in the early years of his life. The lack of a concern for matters Jewish in those early years is as striking as it is surprising. In the published volume of his correspondence during this period of his life, Ticktin has written:

> One may scan some six hundred pages of letters in Letters of Louis D. Brandeis, . . . and not a single reference will be uncovered pointing to the likelihood of Brandeis's ultimate romance with Zionism. The picture which emerges . . . is one of total assimilation into the American dream . . . Brandeis's early life seems a triumph of "pure" over "hyphenated" Americanism.[7]

Brandeis's roots, however, are not quite so simply explained. His may have been a "pure" Americanism, but Brandeis cannot be perceived to have been a "pure" American. Brandeis was born on November 13, 1856 in Louisville, Kentucky. His parents Adolph and Fredericka Dembitz Brandeis

have been described as "cultivated Bohemian Jews."[8] Such a description overlooks why his parents came to America. Adolph and Fredericka Brandeis were, ". . . two members of a clan of interrelated Bohemian-Jewish immigrants who had fled Europe in the wake of the unsuccessful revolutions of 1848."[9]

Neither Adolph nor Fredericka Brandeis were personally involved in the 1848 revolution, but this was not because of a lack of sympathy, but rather of circumstance, for Adolph Brandeis was stricken with typhoid fever when the revolution broke out.[10] The Brandeis' came to America out of a fear of the repercussions which followed the 1848 debacle. "The Jews of Bohemia . . . were subjected to fiercely anti-Jewish riots the moment the Czech, Moravian, and Slovakian uprisings began in March of 1848."[11] The Brandeis' were among those, ". . . many thousands of German liberals and German Jews who left their native lands forever, convinced that constitutionalism was destined to remain a dead issue."[12]

There can be found advocates of the Frankist movement at some point on both sides of the Brandeis family. But in both of these families, the wives remained orthodox in practice.[13] His mother, "remained a firm believer in deism, yet a rationalist. Her personal identification with Jewry was cultural, rather than sectarian."[14] The heritage in the Brandeis household, though it may have included the association with Christianity that may have been passed on by Frankist grandfathers as well as some very definite freethinking, seems to fit into a pattern described by Simon Dubnow:

> In the end those Jews to whom any form of religion is alien will prefer to remain within the Jewish fold rather than embrace another faith. The enlightened among us, who in the main tend toward rationalism and scientific positivism, will not betray the covenant of Abraham out

> of conviction and submit to the yoke of another religion for the simple reason that, if the principles of the Jewish religion, which are so closely related to rationalism do not suit them, the symbols and mysticism of Christianity surely will not do so.[15]

The Jewish atmosphere of the Brandeis household was one of an awareness of a Jewish identity, a lack of anxiety accompanying that awareness; but at the same time an indifference to religious practice. Louis Brandeis's youth consisted of ". . . no formal religious observance, no nationist leanings, no racial-cultural interests such as a knowledge of Hebrew and the Talmud."[16] Brandeis was never known to attend synagogue services or to participate in any other religious observances.[17]

Brandeis's family, then, can be described as a Jewish family that did not practice Judaism; but whose relationship to Judaism was not hostile. It was simply passive. The main concern of the family was family.

> The family was unusually close, and one of the most consistent characteristics of Louis Brandeis would be his intense family loyalty--not merely his immediate family, but obscure cousins and distant aunts and uncles would always find in him a sympathy and a friendship and a concern that would last until death.[18]

The strongest Jewish influence in Brandeis's early life was an uncle. His name was Lewis Naphtali Dembitz. Brandeis was quite close to his uncle and could not but have been aware of the fact of his uncle's strong attachement to Judaism. We find that for Brandeis:

> The only throwback to tradition was Brandeis's uncle Lewis Naphtali Dembitz (1833-1907) who reverted back to strict orthodoxy at the age of thirteen after making acquaintance with an orthodox classmate at boarding school in Prague. Uncle Lewis later developed into the Jewish scholar of the South and became an early American Zionist. Brandeis was fond of his uncle, and this affection may have planted seeds of sympathy for Zionism.[19]

Uncle Lewis Dembitz spoke and read Hebrew and Arabic. He was, "Profoundly versed in the culture of Judaism, he had mastered its history,

ritual and theology."[20] He was, by profession, an attorney. Lewish Dembitz had a profound influence upon Louis Brandeis. ". . . it was largely admiration for this brilliant uncle that inspired Louis Brandeis to study law. In Lewis Dembitz's honor Louis cnanged his middle name of David to Dembitz."[21]

The importance of the relationship of Louis Brandeis to his uncle should be seen for the intense relationship that it was. It occurred at a time when family ties are primary in one's life. When we read that, "The families of the Brandeis brothers and Lewis Dembitz were a closely knit, idealistic, intellectually self-reliant group,"[22] it is not simply of families sharing a neighborhood; but of community and growth. And when we read that, "Lewis Dembitz was a lawyer of uncompromising integrity. His extreme moral fastidiousness kept not a few clients from his door,"[23] the importance of the relationship between the lawyer that Brandeis was to become and his uncle becomes apparent.

One may, therefore, assume that the role that Judaism played in the life of this respected and beloved uncle was well known to his nephew. The mention of Lewis Dembitz's name was to occur at a most propitious moment later in Louis Brandeis's life:

> . . . (Jacob) deHaas asked if Louis Dembitz Brandeis was related to Louis Dembitz, whom deHaas described as a 'noble Jew.' Louis D. Brandeis said he was, and asked deHaas to explain what he meant. DeHaas immediately launched into an explanation of Zionism and his story so interested Louis D. Brandeis tnat the two men left the station and returned to the house for lunch and a longer conversation,[24]

This encounter in 1912 was quickly followed by Brandeis's active entry into the Zionist movement. Lewis Dembitz's influence on Louis Brandeis, thus, was professional, moral, and in the direction of Judaism.

There was another dimension to their relationship and that can only be expressed in Brandeis's own words. In 1879 Brandeis wrote to his sister Amy, "In honor of Uncle Lewis [']s birthday I send you a few lines that you may carry to him my congratulations. I wish he were here to tone me up a little, as I feel particularly useless on this summery day."[25]

CHAPTER III

"Harvard and Boston"

> Jewish Boston is young, despite appearances. It contains an unusually large percentage of well-educated and intellectually prominent Jews. Its Jewish facilities, educational, philanthropic, religious and commercial, include some of exceptional excellence. Boston also has its bevy of Jewish institutions, . . . which continue to sustain the populace in body and mind if not always in heart and soul.[26]

This description of Jewish Boston was written about the Boston of 1970. It is a picture of a Jewish community so developed that its infrastructure must rival that of any community anywhere in the United States. It appears to have an inward strength and deep roots. Indeed, it does have inward strength, but its roots are not as deep as one might assume. The Boston that Brandeis found when he came to Harvard in 1875 was not a center for Jews or Jewish thinking. Jews lived in Boston, but:

> Boston was the last city in the Northeast to become a major Jewish center. Although there were Jews in Boston from the mid-seventeenth century, the first signs of a formal Jewish community did not appear . . . until the mid-nineteenth century, when the first synagogues and communal institutions were established. As late as the 1890's, however, the entire Jewish population of Boston did not exceed 5,000, most of them German, largely Reform, and generally prospering. In the absence of a significant number of their Landsleit, . . . relatively few of the Eastern European Jews who began flooding the Atlantic ports in the 1880's had been attracted to it.[27]

The Boston of 1875 had a positive attitude towards Jews. "Hebrew had long been a staple in the Harvard College curriculum, and from 1630 on many Bay State residents had prided themselves on their learning in Hebraic studies."[28] This situation may strike the reader as unusual. Yet, there was an understandable, if not unique reason for this area's

absence of anti-Semitism and surprisingly strong feeling for Hebraic learning. "This lack of anti-Semitism can be traced at least in part to the old analogy of the Jews and the Puritans, each a 'chosen people, one the inhabitors of the original Zion, the other the founders of a Zion in the Wilderness.'"[29]

An interesting aspect of the positive attitude that existed towards the Jews is that New England, and especially Boston, was not an area especially known for its tolerant views. The middle of the nineteenth century had seen great reaction towards "outsiders." We find, however, that "Jews had been in large measure exempt from the nativist sentiments of the 1840's and 1850's in New England, and their 'genius' had been defended in a number of scholarly and sympathetic histories. Even Henry Adams, who later held near-hysterical racist views, in 1880 had drawn a flattering portrait of Jews in his novel Democracy."[30]

By the turn of the century the situation of the Jews of Boston was to change radically. We would then see a recognizable pattern that would include an end to the perceived sharing of a "chosen People" consciousness between the Bostonian and the Jew. "Anti-immigrant feeling had reached a climax after the turn of the century, and anti-semitism, both genteel and vulgar, was more common in Boston than the supposed Puritan veneration of the Hebrews."[31] This did not occur, however, until relatively late in the life of the Boston Jewish community, and the level of tolerance that we find up to this point in Boston was considerable and was to have serious ramifications for Louis Brandeis. As we will discover, it was important to Brandeis's career that there did exist a tolerant attitude towards Jews in Boston. Aside from the Puritanical influences, there was another reason for the favorable attitude towards the Boston Jews. We find that:

> Part of this tolerance may have been due simply to the lack of large-scale Jewish immigration to Boston. What little there had been consisted mainly of German Jews who had come before the Civil War, and who had assiduously worked at assimilation. They had been fairly successful, and, indeed, had provided a model to which proper Boston could point with pride. They had greatly admired Solomon Schindler, the rabbi of the leading Reform temple, and the Brahmins had flocked to hear his assimilationist sermons.[32]

This, then is the Boston where Brandeis came to live, to study, and to grow. A city where the proper Bostonian was quite comfortable with proper Hebrews. A city with doorways, and perhaps even gateways, through which Jews could walk with dignity; not being noticed or pointed out as Jews. And it was the proper Bostonian who opened his door to Louis Brandeis.

Brandeis entered Harvard at the age of eighteen. His preparation for law school followed ". . . basic preparation in the Louisville system and the Annen-Realschule in Dresden."[33] This is not to suggest that Brandeis had any specific preparation for law before Harvard. Nor was this seen as necessary by the standards of the time. Brandeis did not appear to be hindered by the lack of formal law education. A classmate of Brandeis, Philip Alexander Bruce wrote of Brandeis:

> We were members of the same law class at Harvard university about 1877. That class contained at least two hundred young men who had graduated very high in the different New England colleges, and who had been led by their unusual ability and culture to adopt law as their profession. I think it would be admitted by every surviving member of that class, however distinguished, that Mr. Brandeis, although one of the youngest men present, had the keenest and most subtle mind of all.[34]

Brandeis's life at Harvard, though noted for his excellent record as a student, did not reveal any concern with things Jewish. This is not surprising. Uncle Lewis Dembitz was a world away, involved in his career in the Midwest, and Brandeis was little concerned with anything but the secu-

lar law that he was studying.

The intensity of his enthusiasm for his work at Harvard crowded out all other interests. In 1876 he was to write to Otto A. Wehle, a law partner of Lewis Dembitz,

> You have undoubtedly heard from others of my work here, how well I am pleased with everything that pertains to the law, yet my own inclination would prompt me to repeat the same to you, though at the risk of great reiteration. My thoughts are almost entirely occupied by the law and you know: Wovon das Herz voll ist u.s.w. (When the heart is full, etc.)[35]

The enthusiasm which Brandeis brought to his studies, coupled with his extraordinary legal talents, made for his notable achievements at Harvard.

Success as a student, however, was only one element shaping Brandeis as a proper Bostonian. Brandeis's social success in Boston was another. It was at this point that the attitude of the proper Bostonian towards Jews and the attitude of Proper Bostonian Jews to their "proper" counterparts in the late 1870's and in the 1880's proved to be crucial for Brandeis's career as a lawyer.

Brandeis moved swiftly, gracefully, and easily into the finest and most important social circles in Boston. Two factors facilitated this entry:

> A very eligible bachelor during the 1880's, he had been a frequent guest in the "best of homes," and his success at the bar had won him membership in some of the city's most exclusive social citadels--the Union, Exchange, Union Boar, and Dedham Polo clubs. Moreover, he had been named to the committee to visit the Harvard Law School, a prestige group comprised of those who met not only legal but social criteria as well.[36]

There is little doubt that Brandeis had found his way into that strata of Boston society that would be of the greatest value to his career. But this easy access was not all Brandeis's doing. "The important point

regarding Brandeis is that he had come to Boston just in time. A good part of his later fame and effectiveness would rest upon his entry into the right circles; access might have been denied him had he arrived in Boston only a few years later."[37]

Brandeis had easy access because proper Boston was not concerned about his Jewishness. This attitude towards Jews was to change and the reason for the change was to have little to do with Jews, even with Jewish immigration. The element that was to precipitate the change was economic. Boston had been the center of financial leadership in the United States. After the Civil War, however, "Financial leadership of the country had moved to New York with the rise of the great banking houses there."[38] The same puritanical strain that had resulted in tolerance for Jews in the New England area resulted in an unwillingness to use money in the new ways that the post-Civil War era required. This declining role as the financial center of the United States occurred at the same time as the new immigration inundated Boston. These new immigrants created "new demands for mobility from below."[39]

The social position of the old elite of Boston was, thus, threatened both by pressure from below and by a real decline of economic power. Their solution was one of reaction. They formed themselves into:

> . . . a hereditary caste. . . Seeking continuity over change, the Brahmins erected the symbols of a hereditary society--old schools, old clubs, English-sounding streets and residences, double names and so on. Moreover, . . . the multiplication of trusts to protect family fortunes indicated that Boston's elite had also sost its economic daring.[40]

Brandeis made his entrance into the Boston social scene before this social protectionism occurred. It was thus not so much Brandeis's attitude towards Jews that opened the all-important doors to the Boston social elite.

When this hereditary-oriented stratification began to occur the doors slowly closed. Few, if any, new Jews would climb to the top of Boston's social ladder with such ease as had Brandeis. Indeed, the doors were in time to close altogether.

Brandeis was not to be unaffected by the change in the social order:

> Brandeis could not avoid, however, the resentments generated by the new stratification. Some of the "pure-blooded" members of his club, already succumbing to caste-consciousness, resented his presence, and his daughters remembered that although they were enrolled in the best private school in the city, the teachers always were asking which of the students came from the "old" families.[41]

As the level of awareness of caste-consciousness rose among the Boston elite and as the doors to their world closed, Brandeis turned to matters of Jewish interest. This is not to suggest that Brandeis's involvement was intense or that there was a direct and equal reaction on Brandeis's part to each action on the part of the Brahmin social community; only that Brandeis did begin to be concerned with Jewish life and problems once the doors began to close. And that by the time that the doors had closed completely Brandeis had developed into a committed Zionist.

Brandeis was involved, to varying degrees, with Jewish charities in Boston. He had made a practice of, "small gifts to Boston Jewish charities . . ."[42] There is nothing in this, however, to suggest any major committment. In 1895, however, Brandeis became a charter subscriber to the Federation of Jewish charities,[43] a movement which was to play a great role in the subsequent growth of the American Jewish community. "It began with the organization in 1895 of the Federated Jewish charities of Boston--a federation in the specific sense of the term, for it was an organization of local agencies, societies, and institutions."[44] Brandeis,

then, was a charter subscriber of this seminal organization. He also supported the Hebrew Industrial school in Boston.[45]

The seeds of Brandeis's Zionist enthusiasms are difficult to find; the roots, however, are more apparent. The earliest references are two seemingly insignificant items. The first was his reading ". . . something of the Zionist leader Theodor Herzl from an article in the North American Review."[46] This occurred while Brandeis was visiting Milwaukee in 1893. The second is almost as elusive as the first. In 1897 Brandeis was reading of the first Zionist Congress at Basle. It was reported in a memorandum from Stephen S. Wise that Brandeis, upon reading of the Basle Congress, said to Mrs. Brandeis, "Now there is something to which I could give myself."[47]

Certainly Brandeis's life in Boston, at this point, did not include any kind of intense Zionism. His Zionist interest was very slow in building. Even as late as 1910:

> . . . he is said to have participated in a meeting at the home of the New York banker Jacob Schiff to discuss the plight of European Jews. He left this meeting a discouraged man, but a little later a Jewish fraternity had showed him pictures of agricultural work in Palestine which lifted his spirit. Occasionally thereafter he noted references to the history of Zionism, yet it was not until 1911 that he sent a small contribution in reply to a particularly moving appeal on behalf of Jewish émigrés.[48]

Brandeis had started, after the turn of the century, to be somewhat more public in his Jewish concerns. He still, at this time, had personally never belonged to any synagogue or temple; but his perception of himself as a member of the Boston Jewish community had become stronger. In 1903 Brandeis, ". . . gave one of the dedication speeches at the opening of the enlarged Mr. Sinai Hospital . . ."[49] By 1905 we see a marked change; for on the occasion of the 250th anniversary of the first settlement of Jews in the United States, "Brandeis praised the contributions

made to America by people of 'Jewish blood,' . . ."[50]

This speech, a public utterance of high-profile, was a major move for Brandeis. Not only did he speak publicly about Judaism, but he spoke out of a sense of pride. In this speech Brandeis stressed the fact that the high ideals of citizen participation so dear to a democracy were first proclaimed by the Jews. Further, he declared that Thanksgiving day, the day on which his speech was being delivered, was an appropriate time to celebrate anniversary of the Jews coming to America.[51] The fact that Brandeis was becoming intimately concerned with the role of Jews in the United States and the plight of Jews generally can be seen in a letter which Brandeis sent to his father shortly after he delivered the speech:

> Dear Father: I enclose manuscript of the substance of what I said at the New Century Club banquet, out of the celebration apropos the 250th Anniversary of the Jews. I am inclined to think there is more to hope for in the Russian Jews than from the Bavarian and other German. The Russians have idealism and reverence.[52]

It is clear that Brandeis was developing a new kind of Jewish consciousness. He was becoming more aware and more public. There is a subtle quality suffusing this letter. Brandeis is keenly aware of a vital difference distinguishing German from the Russian Jews. Here was Brandeis the classic example of the German Jew who had been remarkably successful in secular America; a man who had found easy entrance into a respected profession and into the proper social circles; a man whose own Jewish identity had not as yet become pronounced; a man who, except for compassion and respect for a dear uncle and occasional concerns for Jewish problems, had become to all intents and purposes the proper Bostonian. And this Brandeis now finds hope in the Russian Jews! They, and not the German Jews have idealism and reverence.

And so here we find that the seed has begun to take root--a root that was to find good soil in the 1910 garment worker's strike when in dealing with both German and Russian Jews he was impelled to blend his own sense of idealism and reverence with that already deeply imbedded in his Jewish heritage.

The key to Brandeis's success in the garment worker's strike was his ability to integrate his personal idealism with a vision of progressive and economic development. It is essential, therefore, to examine more fully Brandeis's concerns, skills, and innovative ideas which made such an integration possible.

CHAPTER IV

"The Law, the Lawyer, and Social Change"

Many of the same forces that led to stratification and reaction among the Brahmins of Boston were at work in differing ways throughout the country. The post-Civil War era was a period of great economic growth. A growth that would have important long-range consequences for the country; but which created significant short-range problems. It was an era that challenged a Brandeis to transform the problems into progress. In doing so Brandeis was to develop an approach to social problems without which he could never have resolved the garment worker's strike. The event which was to initiate the flowering of Brandeis's Jewish identity.

The first decade of the 20th century in the United States was a time of rampant capitalism, capitalism which even the capitalists themselves understood only vaguely. The relative situation of the capitalist and the worker in this new world is described by Dr. Ellis Rivkin as follows:

> The dilemma of the capitalist classes is mirrored in their reaction to the rise of the industrial proletariat. This proletariat was the child of industrial capitalism. The antagonism between worker and industrialist, rooted in the drive of the capitalist for profit and the worker for subsistence, led to bitter and intense conflict, and to exploitation.[53]

Brandeis entered law school and became a lawyer at a time when the relationship of the worker to the capitalist system was not clearly perceived. The men who placed their mark upon this new era sought to use any means possible to protect their sources of profit and to keep that profit flowing. The workers, as well as the state were simply instruments

to serve the profit-seeking ends of the entrepreneurs. It was a time of chaotic growth.

> The era that opened with Appomattox saw an economic growth unparalleled in human history, but a growth whose benefits were unequally distributed. While 'captains of industry' like Andrew Carnegie and John D. Rockefeller, or just plain thieves like Jon Fisk or Daniel Drew, raked in millions of dollars, farmers saw their markets restricted, and urban laborers lived in horrid slums at bare subsistence levels.[54]

Nothing seemed more natural for these "captains of industry" than to use every means at their disposal to accumulate wealth. They attempted to use--and misuse--the government and the courts to advance their cause. Legislatures and the courts protected the inviolability of property and of contract--including the freedom of workers to sell their labor power at the going market rate. The various branches of federal, state and local government tended to regard these principles as sacrosanct. The time for humane legislation and court decisions had not yet arrived. As Melvin Urofsky notes, ". . . reaction by the courts to social welfare programs and labor legislation was not a case of unconscious, ignorant rejection, but a deliberate program to establish permanently the propertied bias."[55]

Although the working man was looked upon as raw labor power, a shift in the climate of opinion was becoming perceptible as the whole fabric of worker-capitalist relationships underwent radical structural change.

> As the economy shifted to mass production, the informal problem-solving techniques of the past were no longer adequate. No longer were workers skilled artisans who knew their employer personally and strove toward the same goal. No longer was competition largely a matter of tiny competitive units absorbing a small share of the market.[56]

Creative minds and humane hearts were impelled to search for constructive solutions to these pressing problems.

Brandeis understood the nature of the problems of this industrial age. He understood the new situation of the worker. He possessed a creative mind and a humane heart. He brought a unique definition of democracy to describe the worker's situation:

> We must also remember that we are working here in America upon the problem of democracy, and we cannot successfully grapple with the problem of democracy if we confine our efforts to political democracy. American development can come on the lines on which we seek it, and the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy.[57]

Brandeis was aware of the relationship between economics and politics. This, of course, is important and Brandeis stated the problem clearly. Brandeis's contribution, however, was not that he understood the problem, but rather, that he was able to do something about it.

Brandeis believed that it was possible to bring about progressive change. He developed an innovative approach to his courtroom activities; and, in doing so he accomplished two things: he successfully facilitated social change without inhibiting economic growth, and he established in his own mind that one could solve modern problems with innovative solutions. An element essential to his success in the garment worker's strike.

Brandeis's contribution took place within the framework of a specific case: Muller vs. Oregon (208 U.S. 412 1908). The case actually involved a simple issue. The state of Oregon recently passed a law which permitted women to work a ten-hour day. This law was contested on the grounds that it conflicted with one of the rights held to be sacred at this time: the right of a worker to freely enter into a contract with an employer. The point here being that if a woman was restricted in the number of hours she was permitted to work, she was restricted in her absolute freedom to contract for her labor power. The point of the Oregon law, of

course, was that a ten-hour working day was the limit of what the state considered to be a humane working day. The right to contract was considered to be guaranteed by the Fourteenth Amendment. The test case was brought by an employer, vis a vis a laundry worker, and against the state of Oregon for its ten-hour law.[58]

This legislation was paralleled by similar legislation in several other states. The outcome of the Muller case would, therefore, be of national importance. A precursor to the current citizen lobbies was the National Consumer's League. The League was led by Mrs. Florence Kelly and Josephine Goldmark, the sister of Brandeis's wife.[59] Mrs. Kelly and Miss Goldmark hoped to get the most skilled legal mind in the country to defend, on behalf of the Oregon state's attorney, the state of Oregon. They sought out Joseph H. Cholate. Cholate declined their invitation to take the case on the grounds that he could not see any reason why "a big husky Irishwoman should not work more than ten hours a day if she and her employer so desired."[60] This same lawyer later went on to describe the income tax as "a communist march on private property."[61]

Once they had been turned down by Cholate, they turned to Brandeis as the logical choice. Brandeis agreed with the proviso that he be formally invited by the state of Oregon to act on its behalf. Once the invitation had been offered, Brandeis began his work on what was to be later described as a "revolutionary social and economic brief."[62]

It was this brief that revealed Brandeis's innovative mode of problem-solving. The innovation was quite simple, but, by the standards of 1908, not at all apparent. What Brandeis did was to draw on factual social data to argue his case. Scientifically processed data was counter-

posed to legalistic reasoning; empiric reality to abstract legal categories and principles.

Brandeis had stated, "A judge is presumed to know the elements of law, but there is no presumption that he knows the facts."[63] Brandeis covered the legal part of the brief in a few pages. His sister had gathered the "economic and social data showing the evil of long hours and the possible benefits from legislative limitation. . ."[64] The final brief contained "two pages of legal citations and over one hundred pages of labor statistics."[65] In January 1908, Brandeis appeared for his oral presentation. The dramatic nature of that occasion is described by Alfred Lief, "In the silence of this solemn chamber the dry bones of legalism rattled; a dead hand tried to shut the court against the living world. Brandeis swept aside these archaisms and produced a picture of the hazards of modern industrialism."[66] Brandeis was concerned that the court would not pay any attention to so detailed a brief. A month later, however, the court upheld the Oregon law and the presiding judge even went so far as to mention Brandeis by name in his decision--a rare departure from judicial precedent.[67]

The revolutionary nature of what Brandeis had done by introducing social facts into the courtroom cannot be exaggerated. The brief itself, by any measure, was revolutionary. "For decades, reformers, lawyers, and scholars have lauded Brandeis's 'radical' brief, . . ."[68] But of even greater importance was the contribution that Brandeis had made to law, to constitutionalism in this country. ". . . the real brilliance of the Brandeis brief lay in its attempt to harmonize the law with the need for social progress. The great strength of the law is its proximity and relevance to life, and in 'Muller' Brandeis prodded the law into the

first step on the road back to that relevance."[69] The great need of the law to be prodded at this time and the importance of this case in bringing that about was expressed by Felix Frankfurter:

> At a time when our constitutional law was becoming dangerously unresponsive to drastic social changes, when sterile clichés instead of facts were deciding cases, he insisted . . . that law must be sensitive to life. And he preached by works more than by faith. By a series of arguments and briefs he created a new technique in the presentation of constitutional questions. Until his famous brief in Muller vs. Oregon, social legislation was supported by the courts largely 'in vacua'--as an abstract dialectic between "liberty" and "police power," unrelated to a world of trusts and unions, of large scale industry and all its implications. In the Oregon case, the facts of modern industry for the first time, adequately marshaled before the court. It marks an epoch in the disposition of cases presenting the most important constitutional issues. (Emphasis mine)[70]

Brandeis was to bring this same approach to his work on the Supreme Court. Frankfurter was to write of Brandeis's Opinions, "They reveal an organic constitutional philosophy which expresses his response to the deepest issues of society."[71]

The Muller case eventually reached the Supreme Court. The Court upheld the constitutionality of the Oregon law and de facto affirmed similar laws in other states.[72] The case was clearly a victory for a new kind of social progress in a new industrial era.

It is clear that Brandeis was very pleased with the decision in the Muller case. It was a victory for those reformist ideals with which Brandeis closely identified. It is important, both for an understanding of this case and the garment worker's strike, that Brandeis's concept of reform be seen for what it was. Brandeis was from the tradition of ". . . the leaders of past reformist causes (who) had not been lower-class radicals, but middle and upper-class professionals and businessmen . . ."[73]

Brandeis did not consider himself to be a radical, but rather, a conservative:

> In this milieu, therefore, to be a reformer was to be a conservative in the Burkean sense of the word, with a belief that the best way to preserve society was to build upon whatever was good and useful, and improve whatever was bad.[74]

This was the reformist framework from which Brandeis perceived himself to be working. This is exemplified by a letter he wrote to Henry Morgenthau, Sr. in 1906. Speaking of some prominent bankers Brandeis wrote, "All of these gentlemen ought to understand that true conservatism involves progress, and that unless our financial leaders are capable of progress, the institutions which they are trying to conserve, will lose their foundation."[75] Brandeis's approach to and positive feeling for reform did not arise out of hostility to the capitalist system but rather, out of a deep committment to the spirit of free enterprise.

> He frequently tried to impress upon the businessmen with whom he came into contact that the preservation of free enterprise rested not on ruthlessly crushing those who opposed them, but by recognizing their legitimate grievances, and then cutting the ground out from under them by correcting these ills voluntarily.[76]

Brandeis was, therefore, pleased with the kind of reform that Muller vs. Oregon exemplified because the economic system that Brandeis supported and the ideals that Brandeis believed to be implicit in that system, would, thereby, be enhanced.

Not only was this a victory for reformist ideals, but it was also a personal victory for Brandeis. On February 26th Brandeis sent to Edward Filene a copy of an editorial that had appeared the previous day in the New York Evening Post. The editorial said that the decision in Muller vs. Oregon was "A victory of vast importance for men and women workers through-

out the country."[77] The editorial praised Brandeis's unique preparation of the case. It supported the decision on both economic and on moral grounds and concluded by stating that the decision would, ". . . hearten those workers throughout the Union who are endeavoring to save to the country its working men and women."[78]

What is important for our thesis is that Brandeis was successful in Muller vs. Oregon in demonstrating how innovative thinking could solve the problems of the new economic era and in establishing a causal relationship between social and economic phenomena. Brandeis found not only personal and professional success in such solutions, but also harmony with his philosophic stance. Brandeis had long recognized that a unique relationship existed between social and economic problems, but it was his brief in Muller vs. Oregon that hit upon a method whereby, through the courts, positive steps could be taken to enhance that relationship on a broad level:

> The triumph of Muller is that the Court began to recognize what Brandeis had always preached: that the life of the law lay not in dusty precedents or in syllogistic reasoning; that the society would not be saved by trying to freeze one moment in its history; but that the law and social needs had to go together.[79]

The garment worker's strike was to serve as the key to the flowering of Brandeis's Jewish identity. If Brandeis was to have success in dealing with that strike certain elements would have to be present. Brandeis would have to have a positive and progressive attitude towards both the worker and his employer; as well as the system that brought them together. This he found in his "conservative" free-enterprise philosophy. Brandeis would have to be convinced that the problems of the new economic era could be solved by innovative thinking. This he proved in Muller vs. Oregon. And

finally, Brandeis would have to bring to his work in the strike a compassion for the human beings involved. This compassion had developed with his slowly growing awareness of the historical plight of the Jews. It would remain for the strike to bring Brandeis to a full awareness of the seminal role.

The success of Muller vs. Oregon, then, was an essential key in Brandeis's Jewish evolution.

CHAPTER V

"The Garment Workers' Strike"

On October 7, 1941, Justice Felix Frankfurter stood at Brandeis's graveside. He began his oration with the following words:

> Two dominant sources of our culture are Hebraism and Hellenism. They express the intellectual and moral impulses of man. Not often have these two streams of Western civilization been so happily fused as they were in the great man whom we are bidding farewell.[80]

On October 23 of that same year, The Modern World in St. Louis said of Brandeis, "He rejected the attitude of those who desire that Jews should stay in the background and should not aspire to rise in the professions."[81] Similar trubutes could be found in every newspaper and journal in the United States. The important point about all of these tributes is that they viewed Brandeis as simultaneously Jew and American. This is remarkable when one considers that the magnitude of his contribution to United States Constitutional law--the kind of contribution which might have been expected to overshadow any other.

Lest one attribute these accolades to the exaggeration of eulogies, he need only turn back to the celebration of his seventy-fifth birthday, while he was still sitting on the Supreme Court. Greetings poured in from all over the land. They, like the eulogies stress the fusion of Jew and American. Thus, Herbert Hoover, then President of the United States, wrote to him:

> Mrs. Hoover and I wish to be early in conveying to you our warmest congratulations on your seventy-fifth birthday. It is not necessary for us to remind you of the many satisfactions which have crowned your public service and that you reflect a heart and mind which have made the nation your debtor.

> Even during your service as a member of the highest court in the land you have found time to give service to the advancement of the Jewish homeland and I have no doubt this has brought happiness and comfort to thousands.[82]

It was not the public world alone that acknowledged Brandeis's special contribution. No less a leader in Jewish affairs than Stephen S. Wise also wrote on the occasion of Brandeis's birthday in 1932:

> In thinking of the seventy-fifth birthday anniversary of Justice Brandeis I go back to the custom and speech of the Psalmists, "This is a day which the Lord hath made. Let us be glad and rejoice in it." The day that gave Brandeis to this country and to this people ought to be a day of high rejoicing.
>
> . . . who can think of Louis Brandeis without rising to the hope that something of his own spiritual quality might pervade the leadership of American Israel.[83]

Herbert Lehman, then Lieutenant-Governor of New York, stated the character of Brandeis when he simply said, "He is both a great American and a great Jew."[84]

It is clear that the leadership of this country, both Jewish and civic, had come to accept and take pride in Brandeis as a Jew and as an American. Jewish qualities were not merely ascribed to Brandeis. By 1916, Brandeis had become a public, articulate, and proud spokesman for the Zionist movement and for Judaism. Brandeis's attitude and compassion for Jews, as well as his own pride as a Jew, can be seen in the following passage which is taken from an address given at a conference of the Menorah Societies in 1916:

> Is not the Jews' indomitable will--the power which enables them to resist temptation and, fully utilizing their mental capacity, to overcome obstacles--is not that quality also the result of the conditions under which they lived so long? To live as a Jew during centuries of persecution was to lead a constant struggle for existence. That struggle was so severe that only the fittest could survive. Survival was not possible except where there was a strong will--a will both to live and to live as a Jew.[85]

Between the end of the first decade and the middle of the second decade of this century, Brandeis had clearly gone through an identity transformation in so far as his attitude towards Jews and Judaism were concerned. It wasn't until 1905 that Brandeis had associated himself as a Jew with any major public activity. Yet at the end of 1912, Brandeis was involving himself in Zionist activities. Something must have happened in those intervening years that set the stage for the meeting with Jacob deHaas in 1912, which sparked his Jewish consciousness and which drew him to the Zionist ideal.

There was indeed a pivotal event which proved to be the watershed. That event was the 1910 garment worker's strike.

The 1910 garment worker's strike was one in a series of labor upheavals which shook this country in the first decade of this century. It was thus no isolated event. It was of such importance that it came to be known "in the history of Jewish labor as the 'Great Upheaval.'"[86] Its importance does not lie in the fact that it involved as many people as it did; but rather, that it was overcome, and that it was overcome in a progressive way.

And it was Brandeis who was the way finder. In order to understand how and why Brandeis was able to do what he did in the 1910 strike, it is essential that we take into account Brandeis's involvement in the 1907 strike. Three Boston unions--Pressers Local 12, Skirt and Cloakmakers Local 13 and the Cloak and Suit Cutters Local 26--had gone on strike "as an answer to blacklisting of union members established by a new manufacturers' association."[87] There were two thousand workers involved in the strike and their demands included a fifty-hour work week and full recognition of the union.

The full recognition of the union was the nut of the issue for Brandeis. As the attorney for the manufacturers' association, Brandeis had participated in a conference between union and management which had taken place after a number of the smaller employers had accepted the union demands. This conference had proved fruitless. The major reason for this failure stemmed from the fact that "The very principle of the 'closed shop' was abhorrent to Brandeis."[88] No comporomise could be reached, and the strike was finally abandoned.

Brandeis's role in this strike, however, had a profound impact:

> His first contact with a labor organization, though as an adversary, proved a unique experience for the future reformer. When Brandeis was called in to negotiate a settlement in the great cloakmakers' strike in New York, 1910, the background of labor's insistence on union recognition was no longer unfamiliar to him.[89]

The encounter with labor in 1907 had given Brandeis a greater understanding of the problems which labor was facing. It also left him with a greater compassion for the plight of the workers in the face of powerful combinations of employers. Without this understanding and compassion, Brandeis would have been unable to play the constructive role that he did in the strike of 1910.

The background of the 1910 strike is as complex a social configuration as is likely to be found. It is possible, nonetheless, to dissect it, and examine its important components.

In the first decade of this century there had occurred a great expansion of industry and commerce. This was accompanied by "increasing competition and the lowering of labor standards."[90] New York was the scene of this great transition. The large majority of garment producers were relatively small manufacturers whose economic survival was dependent

on their ability to produce goods as cheaply as possible. As the market expanded, many of the small manufacturers became large-scale operators. The worker was especially hard-hit by the changes in technology which went hand in hand with growth. For example, "The installation of electric power and the inauguration of new machines only meant that the workers, . . . had to pay for the supplies, for the repair of the machines and for electicity, all at exhorbitant rates that amounted to 3 1/2 percent of their earnings."[91] The greatest problem was the sub-contracting of work; which was followed by sub-contracting. This led to a demoralized worker. A worker whose income averaged 15 to 16 dollars a week before expenses!

The situation of the worker and the need for improved conditions was not totally disregared by society. It was simply viewed from a different perspective than that of the worker himself. In 1905 the University of Missouri did a study of the clothing industry in New York. The study reacted to the plight of the garment worker with the following alternatives:

> Society can if it wishes reduce the total amount of sweating by insisting that a minimum of conditions shall be maintained. It can for example insist that all workers shall be employed for a definite number of hours a day at wages that will permit the worker to enjoy a normal standard of living, but in doing so we must not blind our eyes to the fact that enormous numbers will be excluded from industry and that the numbers of the unemployed will be increased and these must be supported with a diminished income.92

This would appear to be a compassionate and sophisticated response to the problem. The study, however, concluded with a statement that relegated the problem of poor working conditions to that of ". . . a necessary stage through which such classes must pass to higher things."[93]

The worker found little comfort in being reassured that he was going through a necessary stage--even though time was to prove that it was indeed a stage and not a permanent cul-de-sac. Historical perspective did not put bread on his table, nor mitigate the anguish of his day-to-day life. The system of sub-sub-contracting, whereby a ". . . chain of bosses left the worker helpless, and reduced wages to a pittance," was only the worst aspect of the workers' problem.[94] The worker, in addition, lived in a world where every part of his life was dominated by the problems of his industry.

> The evils of the system were many: long hours, night-work, homework, irregularity of payment, charges for thread and electricity, disregard of Sundays and holidays, unsanitary conditions, blacklisting of active union men. A common sight was a worker in the evening carrying a sewing machine and a bundle to his tenement for the few additional cents he would make in overtime, often with the help of wife and children.95

It is not as if the workers had, up to this point, been passive. For twenty-five years there had been every kind of strike. Such strikes inevitably brought in their train a large amount of irresponsible violence and gangsterism, a fact which did not help the image of the worker who was committed to progress through unionism.

Feeling in favor of a general strike had been mounting for two years previous to the actual breakout of the strike. In 1910, the International union, holding its convention in Boston, endorsed the strike by a vote of 55 to 10.[96] The strike committee decided that the strike had to be well organized if it were to be successful. The strike began on July 7. It was preceeded by a mass meeting on June 28 at Madison Square Garden, and by a referendum among the workers. 40,000 people attended the meeting at the Gardens and the referendum to strike was passed by a vote

of 19,000 to 600. There was little question that there was great support for the strike. A major problem, however, was the fact that the union had only a total of £1,680.90 in its treasury.

The chief demands of the workers were:

1. A 40 hour work week.
2. Minimum wages for week workers and minimum rate on the basis of 75 cents an hour for piece work.
3. Abolition of payments by the workers for supplies and electricity.
4. Abolition of sub-contracting.
5. All prices to be settled by a work committee before work begins.
6. Only union members to be employed
7. Equal division of work.[97]

The union leaders had a clear understanding of the economic problems that were to be settled and they, without question, had the support of the workers. It was also apparent that the only power that they had was in the support of these workers. The size of their treasury reflected the fact that they were literally bankrupt in other areas. This committment of the workers would be essential if the strike was to succeed. There simply was no other power base.

The strike commenced on Thursday, July 7. The workers sought to keep management off balance and to avoid the possibility of mass arrests. The strike began, therefore, at 2:00 in the afternoon. The workers were constantly reminded by their leaders that the success of the strike depended on their ability to maintain self-discipline and public order. The 2:00 starting time was an attempt to begin on the proper footing. The strike began successfully and it was immediately clear that it had the workers' support.

Worker and employer now confronted each other. After the strike it would be written about Brandeis: "He discovered during those hot days in August that he was a Jew. He recognized his own passion for justice as an identical spirit in the two camps."[98] Who was management and who was labor in this 1910 confrontation? "Employers and workers alike were predominantly Jewish immigrants from Germany, Hungary, Austria, Poland and Russia."[99]

The members of both camps were Jews. Approximately 85 percent of the workers were Jews. The other 15 percent were largely of Italian origin. When the strike was announced, the strike call was written in English, Yiddish, and Italian.[100]

The large number of Jews involved in the garment industry, and particularly in the labor activities, was viewed at the time as an accident of history. A commonly accepted view, before the strike, was the following:

> There is nothing in the nature of the manufacturing processes that appeals particularly to the Jews. At the time that they entered the clothing industry they were the lowest grade of immigrants and their particular circumstances and conditions were powerful factors in causing them to come to this country.101

The syntax used in this study, for example the emphasis on the "mettle of this race," clearly dates the study. It was, however, written shortly before the beginning of the labor-management confrontation and it places the Jews directly in the center of the garment industry. It also attempts a sociological perception. The following, then, is of value as much because of the time it was written, as it is for its content.

> To-day they (Jews) control both the commercial and technical processes of production. The commercial processes present problems worthy of the mettle of this race and it is not improbable that this branch of industry will

> continue in their hands. In recent years, however, still lower grades of immigrants have come in and these have been gradually displacing the Jews in the technical processes. . . But despite these tendencies there is every idication that for some time to come the controlling force in the technical processes will be the Jewish worker.[102]

There is a very important point here. The garment industry, though it was largely dominated by Jewish management and workers, was viewed by those educated sections of society of which Brandeis was a part, as an industry where Jews happened, by historical circustance, to work. It was not seen primarily as a Jewish industry. The labor problem was similarly viewed as a labor problem not as a Jewish problem, even though the workers and the employers were Jews. When therefore Brandeis recognized the significance of the Jewish aspects of the strike along with the labor-management struggle, he became aware of the fact that he was a Jew, involved with Jews. There was no reason, other than Brandeis's own Jewishness, that made the factor of Jews vs. Jews a vital element in seeking a constructive solution for workers and employers alike.

Until the workers went on strike, the manufacturers had felt no great need to organize themselves to ward off the workers' complaints. "It was not until July 7, 1910, when they were faced with the general strike, endorsed by both International and Joint Board leaders, that the employers formed their Cloak, Suit and Skirt Manufacturers Association."[103]

Management and labor now stood, organization vs. organization, confronting one another with growing hostility. When management received the list of labor's demands they immediately focused on that problem which was to test Brandeis's skills to the breaking point. This was the workers' demand for a closed union shop. The response of management was adamant, ". . . the newly-formed Cloak, Suit & Skirt Manufacturers' Association replied that they would not enter a conference unless the union waived its

demand for recognition, a closed shop, and a collective agreement."[104] The manufacturers published advertisements stating their case and they accused outside agitators of precipitating the strike.

Labor considered the demand for the closed shop to be essential. All other issues could be dealt with in one way or another. Management considered the closed shop to be a closed issue. They were not willing to discuss it. It quickly became apparent that this was the issue that would make or break the strike. Neither side was prepared to give an inch. Labor wanted the closed shop. Management would not even talk to labor, if the closed shop was on the agenda. It was when this cul-de-sac was reached that Louis D. Brandeis was brought on the scene.

A. Lincoln Filene, a large retail distributor of wearing apparel--the Filene of the famous Boston department store--was a close friend of Brandeis. He was quite naturally concerned with the strike because of its impact upon his business.[105] Filene had a reputation as a reformer. Strike leaders had asked a social worker by the name of Dr. Henry Moskowitz to contact Filene and to ask him to serve as mediator in the dispute.[106] Filene's response was to try to bring in his friend and attorney. Filene's understanding of the role that Brandeis could play in a settlement of the strike is revealing. On July 18 Filene wrote to his brother:

> I am going over with the idea of seeing some of the leaders among the employers' organizations and try to get them to secure Brandeis to represent them. If I fail in impressing them of the value of this, it is my intention to get Gompers to secure Brandeis. It does not seem to me to make very much difference which side gets him so long as one side gets him. I think he will succeed in bringing about an adjustment much better than is presently possible.[107] (Emphasis mine)

Filene understood that Brandeis was the one man who could bring some kind of solution to this confrontation. When Filene approached Brandeis to

involve himself in the strike, Brandeis refused. It was once again, as had been the case with the 1907 strike, the issue of the closed shop that bothered Brandeis. Brandeis's response to Filene is set down by Brandeis himself: "I told him that I would have nothing to do with any settlement of the strike involving the closed shop. That I did not believe in it and that I thought it was unAmerican and unfair to both sides."[108] The irony of this is that Brandeis came out of the 1907 strike with a distaste for the closed shop, even though he believed that the worker had just grievances--the very two elements which were to prove essential for the solution that Brandeis was to devise.

Filene went to New York without Brandeis, where he met with Henry Moskowitz who was later to serve as an advisor to New York Governor Alfred E. Smith and with Meyer Bloomfield. Bloomfield was also a reformist oriented lawyer. They found the situation to be hopelessly deadlocked. Bloomfield came up with a suggestion which he sent to Brandeis:

> Said to Lennon (co-chairman of the strike committee) and to Dyche (International Union representative) that there was only one open door--to take a big man like Brandeis and empower him . . . to confer with both sides and draw up a fair basis of negotiations. Both responded heartily and suggested that I invite Mr. Brandeis and come with him for a private talk.[109]

It was under these circumstances, as a referee, that Brandeis agreed to come to New York and try to do something about the strike. It was not simple persuasion that led to Brandeis's involvement, but rather Brandeis ". . . was attracted to the struggle by the opportunity to put into practice some of the ideas he had developed about labor-management relations over the preceding fifteen years: industrial self-government, mechanisms for settling disputes peacefully, and a spirit of equality and cooperation by both sides."[110] On July 24, Brandeis wrote to his brother

Alfred, ". . . I was called to New York Saturday P.M. to try to settle the New York Garment Workers' strike. I am trying to bring the parties into conference It remains to be seen whether my power was as futile as that of the French King and his 40,000 men."[111]

The immediate response to Brandeis's coming in was one of apprehension, especially on the part of the strikers. They were aware of his work in the 1907 strike and were not pleased.

> Brandeis' past as the attorney for the Boston cloak manufacturers who had crushed the strike there by an injunction followed him like a shadow, though he himself had shed his violent opposition to the union shop and looked upon his own proposal merely as a convenient bargaining point.112

Brandeis's position in the dispute, however, was one of neutrality. He was not the representative of either group. His task was to get the two sides together and to get them talking to one another.

Brandeis's basic strategy with both groups was to convince them that if they began talking, a solution would present itself. Using this tack he approached the General Strike Committee and convinced them to waive the demand for a closed shop. They were to give their demands to Brandeis and he would present them to Manufacturers' Protective Association. He then sent these demands to Julius Henry Cohen, the attorney for the Manufacturers' Association, along with the following letter:

> I enclose you herewith a proposal of the Joint Board of Cloak and Shirt Makers Unions of New York, signed by me as attorney for the conference, with a view to settlement of grievances. This paper is a copy of the proposal submitted to you this afternoon embodied in the letter of authorization to me, signed by officers of the Unions. All of these officers understand fully that under this proposal the closed shop is not a subject which can be discussed at the conference.113

Brandeis had told the Union that the closed shop would not be avoided. It would be "subject to the discussions in the negotiations."[114]

It appeared that it would now be possible to initiate negotiations. On the day that the meetings were to begin, the manufacturers, believing that they were strengthening their bargaining position, published this statement:

> Louis D. Brandeis came here from Boston on Saturday and consented to act for the strikers without compensation. Mr. Brandeis has acted as attorney in more than a score of strikes, in the majority of instances, acting for the employers. His opposition to the closed-shop idea is well known, and in retaining him, the strikers tacitly waived their demand for the closed shop in the cloak suit and skirt trade. The complete withdrawal of the demand was made later upon the advice of Brandeis as a preliminary step to the arrangement of the conference.115

In this statement the manufacturers were guilty of two major errors. The first was that Brandeis was not the attorney for the workers, he was a neutral arbitrator. Secondly, by publishing this statement the manufacturers succeeded in engendering anger and distrust on the part of the Union towards Brandeis. They were unsure if Brandeis would treat their claims with integrity. They were concerned that he had deceived them by his assurances of absolute neutrality. The Union, through its president, Abraham C. Rosenberg, responded that they had neither retained Brandeis as their attorney, nor had they given up their demand for a closed shop.

It was thus not until July 28th that the parties again agreed to a meeting. The terms of the meeting were basically the same as those agreed upon before the furor of the preceeding days. The attorney for management, Julius Cohen, described the sessions:

> In that very hot July, we sat on two sides of a table in the Metropolitan Life Building day after day in earnest effort to arrive at an agreement.
>
> By his conciliatory tactics, Brandeis aided greatly. We reached a point where everything on the agenda seemed to be cleared satisfactorily. Then Meyer London, counsel for the union, and John B. Lennon, secretary of the American Federation of Labor said in substance: 'Having

> happily agreed on adjustment of all grievances, there is left only the matter of the methods to be employed for enforcing the agreement.' And both of them asked for the closed shop.116

Brandeis's approach had been to establish a progressive atmosphere by dealing with the most minor issues first and then proceeding to the more serious issues. This seemed to have worked well; but the unavoidable problem of the closed shop had to be confronted and when it was brought up it looked like everything accomplished up to that point would fall apart. There did not appear to be any solution to the problem of the closed shop. No one had a solution. Except Brandeis!

"On the East Side the word 'preferential' slipped into the Yiddish vocabulary; bearded old men used it in excited discussions after synagogue services and in coffee shops."[117] The preferential union shop. This was Brandeis innovation; his solution to a seemingly unsolvable problem. The idea of a preferential union shop, though it would appear to be a compromise between two diametrically opposed positions, was a revolutionary concept for its time. As befitting the legally oriented mind of Brandeis, the preferential shop was a complex, but direct approach to the problem. It is important to understand all of the nuances of what exactly the preferential shop was. The best explanation of this innovation can be found in a letter written by Henry Cohen to Meyer London. Because of the importance of this innovation, I quote from Cohen's letter at some length:

> The manufacturers cannot, of course, surrender the control and management of their factories to the Union. In agreeing to this declaration, the Union indicates that it assents. The manufacturers cannot coerce anyone into joining the Union, to this the Union assents. The manufacturers cannot supervise the Union's business. The Union does not ask that they should. But the manufacturers can let it be known that they are in sympathy with the Union, and that as between a Union man and a non-Union man of equal ability to do the job, they will employ the Union man. They cannot

> ask each man seeking a job to show his Union card, nor agree to collect the Union dues. On the other hand, they can and will (if this declaration be accepted) announce to all of their employees that they believe in the Union and that all who desire its benefits should share in its burdens.
>
> In signing this declaration, the union does not seek the 'closed shop' as it is understood by the manufacturers. They seek the 'union shop' by which they mean, a shop where the majority of the men employed are union men, and where the employer is known to be in sympathy with the union. It is not intended that the employer shall not be free to pick and choose his workers. But it is intended that if in bad faith, he discriminates against union men or fails honestly to give preference to union men, then he is not conducting a 'union shop.' It is done experimentally (emphasis Conen's), for it has never been done in this or any other industry. . . . but the manufacturers can and will declare in appropriate terms their sympathy with the union, their desire to aid and strengthen the union, and their agreement that as between union men and non-union men of equal ability to do the job, they will employ the union men.118

Brandeis had accomplished something that had never been done in this or any other industry. He had done, as he did in the Muller vs. Oregon case, something that had become his personal art. He solved a social problem with the development of innovative legal techniques.

The initial reaction to Brandeis's proposed solution, the preferential union shop, was not positive. The manufacturers' official position was that they favored the solution, but that they were acting "against the better judgement of counsel."[119] The reaction of the union was not nearly as conciliatory. The general reaction of the worker was given expression in the Jewish Daily Forward which called the Brandeis plan, "a non-union shop with honey."[120]

It had appeared that the strike was well on its way to settlement and the fact that it had not been settled with the preferential shop caused tensions to rise considerably in the community. The fact was that the

strike was settled. All that remained was for the union men to do what management had already done: accept the constructive potential inhering within the new solution. It would, necessarily, require a brief passage of time for the solution to be accepted. During this period of adjustment, as tensions rose, the more prominent Jews of New York becam anxiously concerned. They wanted to intervene for several reasons. Firstly, it was not pleasant for the social-minded wealthy Jews to have to deal with the adverse publicity brought about by the daily conflicts involving Jewish workers on the picket lines.[121] Secondly, was the fact that these wealthier Jews were aware of the suffering that the strike was causing in Jewish homes. The average strike pay for a married man was two dollars, and for a single man, one dollar, a week. All of this led Jacob Schiff and Louis Marshall to become involved in the strike.[122]

Brandeis observed something that was taking place for the first time: wealthy Jews involved in a labor struggle. And he saw this as working to the benefit of labor. Though these wealthy Jews were conservative by nature, they were using their position and influence to prod the manufacturers into a more conciliatory posture.

The meetings between representatives of management and labor continued. The continuing length of the strike heightened tensions and increased pressure on both sides to accept the compromise settlement. Finally a basis for the acceptance of Brandeis's solution was found. Not surprisingly, it was found by Brandeis. During the course of one of the meetings, a union representative by the name of Louis Gorden was making a speech in Yiddish and he used the word "Forshteyer." Brandeis interrupted him:

"Forshteyer, a spokesman? I have an idea; you want a

> single representative for the workers of the shop. Why not have the shop committee headed by a chairman? I believe that I can convince the employers that the shop committee needs a spokesman. That spokesman, the chairman, can easily become the voice of the union in the shop."123

The idea of a union spokesman for a shop was, of course, implicit in the nature of the preferential shop. What was necessary was some means whereby the preferential shop could be made palatable to the union. The idea of a union spokesman thus solved the problem.

Only one problem now remained. How to gain acceptance for the new agreement from the union membership. It ultimately was reduced to a matter of semantics. Henry Cohen suggested that the agreement be called a "treaty of peace." The union representative suggested that it be called a "collective agreement." Louis Marshall made the suggestion that was to be accepted. It was to be called the "Protocol of Peace."

On September 1, 1910, the agreement was presented to the executive board of the strike committee. The following day the two hundred shop chairmen voted to accept it. On September 2, the agreement was signed.[124] A new era in labor relations had begun. A major obstacle to the economic and social development of the United States had been removed--by Brandeis!

CHAPTER VI

"Some Conclusions"

There is little question as to the reaction of the garment industry to the settlement of the strike. What is interesting is the special perception we find present in that reaction. ". . . the (garment) industry in New York was so elated over its period of peace that it hailed the protocol as a beacon for the rest of the country and took pride in the fact that the experiment began in an 'immigrant industry' consisting mostly of Jews."[125]

Brandeis reacted to the strike in a similar way. After it was over Brandeis seized every opportunity to hail the preferential shop, as signaling a new era in trade unionism. A more specific interest, however, is the impact that the involvement in the strike had on Brandeis's self-identification as a Jew. As Urofsky succinctly puts it:

> Braneis had, until this time, known mainly the upper-class Jews of German origin; now, for the first time, he came into contact with the masses of East European Jewry. Their idealism fired his imagination. Compared to the paternalistic labor relations that characterized the New England mills, the garment industry was a model of democracy. Workers and bosses shouted at each other in Yiddish, and on one occasion he heard a shop operator denounce his employer with a quotation from Isaiah: "It is you who have devoured the vineyard, the spoil of the poor is in your houses. What do you mean by crushing my people, by grinding the face of the poor? says the Lord of Hosts."[126]

The Jewish aspects of the strike were apparent to Brandeis. He found himself confronted with "Jewishness." Brandeis found his heart and his goals not in labor, not in management, but in the conflict between brother and brother. Thrust into the arena, Brandeis emerged with a new self-image.

It was, at one and the same time, American and Jewish. Because of the strike he came to realize that to be a Jew was to be committed to the highest ideals of American democracy. "It was a delight (for Brandeis) to witness the understanding Jewish bosses and Jewish workers displayed of each other's problems. In all his previous labor activity he had not encountered such tolerance flavored with a moral quality."[127] These Jews were to have an influence on his life for which no previous parallel could be found. "The successful socially conservative Jews whom he had casually met during his life had not aroused in him any sense of spiritual kinship."[128]

Brandeis was deeply affected by his experience with these New York Jews. Because of them he turned his mind to a serious consideration of his own Jewishness. It was not simply that he was impressed with them as Jews. He became impressed with the Jewish aspect of his own identity.

Brandeis believed that there was a portion in America's vineyard for everyone. The problem of his era was now to make the vineyard fruitful and how to share the vintage fairly. Brandeis came forward with an innovative solution. Whether it was the scientific brief which he devised in the Muller case, or the concept of the preferential shop which he developed for the garment worker's strike; the solutions were ingenious.

Innovation per se, however, was not enough. It had to be coupled with a vision of what it was that America was all about. Was it a country where the needs of man would be subservient to the economic system, or was it a country where humanity was to be the ultimate achievement of an ever-more efficient, wealth producing economy. Brandeis was committed to the second of these two visions. He saw the possibility of a progressive industrial system, of an enlightened capitalism. He saw law

as the instrument to reform the system in such a way as to make the system more durable. Today. we take such a belief in the role of law for granted. In Brandeis's day, this was shockingly novel.

There is a fascinating element to Brandeis's Jewish evolution. He was the son of Jews who had sympathized with and fled from a revolution in Europe. He grew up in a home that respected, but was not very committed to Judaism. His major Jewish influence had been an uncle who had also influenced his career choice. By circumstance of history, he had moved into non-Jewish circles in Boston that would have been closed to him just a few years later. Here he responded only in a token way to Jewish obligations, however important some of these may have been. And yet, where did this man rediscover his own Jewishness?; in a revolution led by Jews in America.

And so the garment worker's strike was the take-off point for Brandeis's Jewish odyssey. Not long thereafter Brandeis was to have that fateful meeting with deHaas that was to bring Brandeis to leadership in the Zionist movement. When this occurred, he was accused by some Jews of not being involved in a truly Jewish cause. How different the attitude today! Others charged that Brandeis was only using Zionism to serve his own political ambitions. At the time of his Supreme Court nomination, however, it was evident to all that his Jewish identity was real.

Brandeis brought to his Jewish identity that same integrity that had always distinguished him. He developed a vision of the Jew's place in America. "He came to the conviction that only as a Jew . . . could he and other Jews completely play their part as Americans."[12c] It is clear that his vision was shaped by the events of 1910. ". . . Brandeis came to believe that for America's sake the Jew must fortify and enrich American

life by a passion for social justice, a tradition of spiritual adventure, essentially Jewish, and, to Brandeis's mind the profoundest need of American democracy."[130] Brandeis's vision is not unique. He believed that Jews brought a special vision to America. To be a light to this nation.

The question is not whether Brandeis was a Jew first or an American first. Nor is it in which arena he made his most important contributions. Brandeis's Jewishness complemented his Americanism; America provided the best of all homes for his Jewishness. It was only fitting that the law should have been the keystone to his life. For the law has always been the hallmark of the Jewish people. His contributions to the quality of American life have been matchless. As Americans and as Jews, we still sit at his feet and drink in his words.

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