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An Address

by

The Honorable Francis Biddle  
Attorney General of the United States

at the

Memorial Services

for

/  
Mr. Justice Brandeis

United States Supreme Court

December 21, 1942

Mr. Chief Justice and Members of the Court:

We are gathered today to honor the memory of a great American - Louis D. Brandeis. In paying our tribute to that memory we speak for the Bar and the Bench. Yet we speak too not only as lawyers, gathered to record his extraordinary contribution to the profession in which we have spent our lives, but as Americans, joined now for a moment that we may try to express what he did for our country. It is timely that at this moment we should think of Mr. Justice Brandeis in this broader sense, for those inherent values that he held dear are being desperately defended throughout the world. As we fight today we are redefining among ourselves and among those with whom we are allied the meaning and the reality of those values. If this war touches us more deeply than any war, it is to the extent that we feel the essentials of our freedom beyond the sounds of words that we and others have spoken. To ourselves we must, day by bitter day, rediscover and reaffirm what constitutes our old American faith.

Brandeis spent his life in such a continued reaffirmation. I suggest, Mr. Chief Justice, that here is a very rare and very moving thing to remember; to remember again in the years that will come after this war, terrible years, or years of hope and growth, according as we shape them. Today again men are dying for the faith they cherish; Brandeis lived for that same faith, quietly dedicated his life to the service of his country. To be sure he was too fundamentally simple to think of anything he did as a dedication. But as much as anyone I have ever known he was innately selfless. Nor was it the selflessness of a man who held off the world. Brandeis lived intensely in his world - a world where the economic struggle for power, the wretched inequalities between comfort and suffering, the failure of the accepted democratic processes to give scope to the needs of a new industrial era enlisted his heart as well as his mind.

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His preparation for his twenty-three years on this Court thus transcended his wide and varied experience in practice which had brought him to the front of his profession. But in the practice the same qualities stood forth: there was the battle for cheap insurance which led to the adoption of the savings banks insurance legislation in Massachusetts; the successful campaign for lower gas rates in Boston; the Ballinger-Pinchot investigation which resulted in centering public attention on the vital need of immediate and effective conservation programs; his chairmanship of the board of arbitration in the needle trades; his representation of the interests of consumers and workmen in many fields.

Although he was frugal and ascetic, living a life of steady concentration and immense work on the problems before him, his singleness of purpose never limited the friendly sympathy of his nature, or the curiosity of his mind. He was without prejudices, as he was without clichés. The asceticism, and his fundamentally moral outlook gave him in the eyes of many of his friends the quality of a saint. Mr. Justice Holmes felt this reverence for his younger associate. "Whenever he left my house," Holmes wrote of him in 1932, "I was likely to say to my wife, 'There goes a really good man. . . .' In the moments of discouragement that we all pass through, he always has had the happy word that lifts up one's heart. It came from knowledge, experience, courage, and the high way in which he always has taken life."

Yet Justice Brandeis had none of the mystic essence which we associate with sainthood. He was practical, realistic, patient, persistent. He brought the mind of a trained social scientist to the analysis of legal opinion and decision, a method which is beautifully illustrated in his brief in support of the Oregon law fixing a ten-hour day for women wage earners. Three pages argue the law; the other ninety-seven diagnose factory conditions and their effect on

individual workers and the public health. This approach has had a profound influence on the method of presenting arguments in cases involving social legislation, and, I suggest, on the outlook of courts to social problems. That judges today are more realistic, less given to the assumption of accepted dogmas, more mature and more curious-minded, is largely due to the influences of Brandeis. "What we must do in America," he once said, a few years before he was made a judge, "is not to attack our judges but to educate them. All judges should be made to feel, as many judges already do, that the things needed to protect liberty are radically different from what they were fifty years back. . . . In the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts."

I hesitate to suggest that Brandeis had a philosophy of life for I do not think of him primarily as a philosopher. Do not philosophers deal with generalities that take shapes of the universal and glitter above and below the realm of the restless particular? Unlike Mr. Justice Holmes, who, distrustful though he was of the essences, yet felt that the nature of man was to indulge in their formulation, Brandeis, clear in his first principles, was truly empirical in his preoccupations. While Holmes' doubts were philosophic, Brandeis' were scientific. "I have no general philosophy," he said. "All my life I have thought only in connection with the facts that came before me. . . . We need not so much reason as to see and understand facts and conditions." He believed profoundly that behind every argument is someone's ignorance, and that disputes generally arise from misunderstanding. President Wilson knew this when, after the hearings on the Justice's appointment which had lasted for three months, he

wrote Senator Culbertson, the chairman of the Judiciary Committee: "I cannot speak too highly of his impartial, impersonal, orderly and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions . . . his knowledge of economic conditions and the way they bear upon the masses of the people."

Mr. Justice Brandeis' fundamental thought running through the whole frame and direction of his efforts, was always of man - "Man (to quote Albert Lief) struggling with oppressive forces in society. Man's right to full development. The infinite possibilities in human creativeness. Man's limitations, too. But especially the breadth of national achievement which can come when energies are released." He voiced this approach many times, never more profoundly than in his testimony before the Commission on Industrial Relations in 1914, more remarkable for having been delivered extemporaneously. "We must," he told the Committee, "bear in mind all the time that however much we may desire material improvement and must desire it for the comfort of the individual, the United States is a democracy and that we must have, above all things, men. It is the development of manhood to which any industrial and social system should be directed."

That, I believe, was the chief reason why he was so deeply concerned with the growth of huge corporations as presenting a grave danger to American Democracy by what he called "capitalizing free Americans." In his dissenting opinion in Liggett v. Lee, he spoke of the "widespread belief . . . that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men. . . ."

His belief, therefore, in preserving our fundamental rights protected by the Constitution, was no matter of individual preference, however strongly felt; a free climate of thought is indispensable for the development of individual men. "Those who won our independence," he wrote in a concurring opinion in Whitney v. California, "believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

He believed in seeking "for betterment within the broad lines of existing institutions," as he once wrote Robert W. Bruère, for progress is necessarily slow, and remedies necessarily tentative. "The development of the individual is," he added, "both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy - and who shall be worthy of respect . . . The great developer is responsibility."

He believed, never doubting, in Democracy. But he knew it to be a serious undertaking which "substitutes self-restraint for external restraint." He knew also that Democracy "demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government." Its success must proceed from the individual, and "his development is attained mainly in the process of common living."

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And so Brandeis believed that every man in this country should have an actual opportunity, and not only what he termed "a paper opportunity." He was convinced that industrial unrest would not be removed until the worker was given, through some method, a share in the management and responsibility of the business. The social justice for which we are striving was for him not the end but a necessary incident of our democracy. The end is the development of the people by self-government in the fullest sense, which involves industrial as well as political democracy.

Thus holding that Democracy was based on the theory that men were entitled to the pursuit of life and of happiness, and that equal opportunity advances civilization, he saw the threat to this way of life from the opposing view that one race was superior to the other. Less than a year after the first World War had begun he expressed this fundamental difference of conception, speaking before the New Century Club in Boston, twenty-seven years ago:

"America," he said, "dedicated to liberty and the brotherhood of man, rejected heretofore the arrogant claim that one European race is superior to another. America has believed that each race had something of peculiar value which it could contribute to the attainment of those high ideals for which it is striving. America has believed that in differentiation, not in uniformity, lies the path of progress. Acting on this belief, it has advanced human happiness and it has prospered."

Today Brandeis takes his place in the moving stream of history as a great American whose life work brought nearer to fulfillment the essentially American belief in equality of opportunity and individual freedom - the dream that Jefferson, whom Brandeis once referred to as the "first civilized American," had cherished, and Lincoln, sprung from such different roots. Brandeis is in their tradition, the American tradition of those who affirm the integrity of men and women.