

Commencement Address given by
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A Gift to the Class of 1978

I have never been to a law school graduation -- even my own. There used to be a widely shared consensus that after completing the labors of Hercules one should depart at the earliest possible moment. But in these times and at this school I detect such irrelevant if not unseemly sentiments as fellowship with and affection for your comrades, your faculty, and the school itself. That law schools can celebrate this kind of end and beginning seems to me a good thing. But, not having heard what others have said, I have no idea of what is appropriate.

I should imagine that the temptation is almost irresistible to talk about that awesome, almost palpable abstraction which we call the legal profession. First of all there is its size and accelerating rate of growth: almost half a million lawyers, one to every 530 Americans, with firms of 500 or more, making the American Bar Association the largest professional organization in the world. These figures help explain why such labels as "The Adversary Society" and "The Litigious Society" have been pinned to our door.

A second approach is to talk about the emerging shape of things to come -- the growth of legal services and public interest practice; the challenge of delivering legal service to the middle class; the future of legal education, standards for admission to the bar, specialization, organization of the bar; arbitration, no fault, ombudsmen, neighborhood courts, paralegals -- and so on.

Third, there is the smorgasbord of stereotypes and legendary qualities eagerly associated with the legal profession. Take your pick. There is the criticism of technique run riot -- pettifoggery, dilatory maneuver, the hired gun. There is the criticism of establishmentarianism -- the high cost of justice, the unequal access to justice, the serving of the status quo and its institutions. There is the criticism of professionalism -- incompetence. And there is the criticism of ethics -- the crooks in high places.

I find all of these subjects so weighty as to be depressing at a beginning like Commencement. If we think too much about the size and growth of the profession, we shall begin to think and act as ciphers. Similarly, if we muse over the future shape of the profession, we may well conclude that it is on the verge of changes greater than any which have attended it in the past 500 years. But having done that, we may well be seized with a feeling of futility as we try to envisage our own role in it.

Finally, if we brood over being the focus of harsh criticism, we overlook the perspective of history. Lawyers in the abstract have nothing going for them. They generally are called upon by people who have some kind of problem, if not crisis or disaster; they have only a 50 percent chance of prevailing over the other fellow's lawyer; and they charge for their services. From the very beginning of this republic, as Perry Miller has noted in "The Legal Mind in America", "Americans were the most litigious people in the world, as well as the most contemptuous, or at least distrustful, of the lawyers they employed." It is only the individual lawyer in the flesh who is respected, liked, and absolutely trusted in the major issues of life.

All of these themes -- the proliferation of lawyers and gigantism in the law firms, the imminence of pervasive changes in the profession, and the level of public criticism -- are enough

to provoke in all of us, and particularly in the law graduate, an identity crisis. What does it mean to be a lawyer in today's world? What purpose will you try to serve? What kind of life-and-law style should you try to fashion?

This kind of question, I suspect, is among those things that distinguish your generation from mine. We didn't ask it -- or if we did we didn't ask it so insistently as you -- for the simple reason that we intuitively knew the answers. For the answers had been supplied in the form of our unconscious role models. U. S. District Judge Charles Joiner, formerly a law teacher, in a recent article in the ABA Journal, has developed the thought that whereas the law students of thirty years ago had, somewhere in their family, a lawyer and possibly a plan to practice with that relative, today's students come from the brightest of the bright, of widely varied backgrounds, who are attracted to the law as an instrument of social change rather than as a conservative profession. Unlike their more traditional, family influenced predecessors, the students of today have had no unofficial mentor in the home, no role model to show by example what lawyering is, how ethical problems are dealt with, and how one actually approaches the entire range of decision making. Judge Joiner would repair this lack by having some courses taught by a team consisting of the academic full time teacher assisted by a practitioner or judge. The latter would supply the role model which otherwise has dropped out of sight.

I distill another lesson. If in simpler times we were intuitively reassured and guided in shaping our professional, civic, and personal roles by the models supplied from the lawyers in our families and communities, why should you not gain helpful reassurance and guidance from consciously selected role models?

When I think of "the profession" in the large, the Code of Professional Conduct in the abstract, or the "practice of law" in general, I get no sense of lift, direction, or conviction. But when I meet, see, hear, or read about an admirable lawyer or judge, the memory enters my bones and becomes a part of my value and aspiration system. One who has a prominent place in my own pantheon is Louis Dembitz Brandeis, After all too long a time I have recently reread biographies of him and rediscovered how well he serves as a role model relevant to these times.

During his long and productive life, he exemplified three clusters of qualities worth the consideration of anyone who is about to enter on four or more decades of being a lawyer. The first group is strictly professional; the second has to do with the lawyer as citizen; and the third concerns important matters of life style.

To begin with, Brandeis, for thirty-eight crowded and distinguished years, was a practicing lawyer. Although tempted, he had refused an offer to join the Harvard Law School faculty. So often do the brightest young graduates harbor the desire to teach that it is healthy to enlist a role model from one who made it in the pit. As a lawyer, Brandeis exemplified a desire to achieve excellence in legal craftsmanship. Leaving aside his extraordinary qualities of mind, which were far beyond the reach of most of us, we are struck by his painstaking work habits. He would prepare his cases thoroughly, troubling himself to know everything possible about the field in which he found himself. The 100 page factual "Brandeis brief" in Muller v. Oregon was not only innovative, but hard work -- as was his oral argument where, as the result of intense preparation, he marshaled and presented complex data so that, to quote his sister-in-law and research aide, his argument "had all the spontaneity of a great address because he had so mastered the details that they fell into place . . . in a consummate whole."

As a Justice, Brandeis' instinct for his craft remained just as keen. His former clerk and now distinguished professor, Paul Freund, has written, "Shakespeare, it is said, never blotted a line, while Anatole France liked to have eight proofs and Balzac as many as twenty-seven.

Holmes and Cardozo belonged to the school of Shakespeare; Brandeis to that of Balzac and Anatole France", putting his draft opinions through dozens, sometimes scores of revisions.

Another former clerk, William Hurst, puts this quality of craftsmanship in its right perspective: "The pervading stress on craftsmanship", he wrote, "[was] not merely the pride of work of a good technician, but the master draftsman's identification of his own dignity as a person and human being with the doing of master work, insisting always upon the highest standards of performance not so much as a matter of the guild standards as of one's own self-respect and fulfillment."

But thoroughness did not mean endlessness to Brandeis. He had an acute sense of the importance of time, rising early, making every minute (whether or work or relaxation) count, meeting appointments on the dot of the scheduled hour, and husbanding his and his clients' time. As Dean Acheson wrote in "Morning and Noon", "mere hours spent at a desk did not impress him When he found himself reading sentences over again, he knew that, worse than wasting time, he was missing the point of what he read." The Brandeis view of time was perhaps best put in these words, that he looked on time "as a stock held in trust . . . - meaning no mere time-saving adage from Poor Richard's Almanac, but . . . the feeling of holding a trusteeship for one's stock of time and mental and physical energy, that one should put it to account for a good purpose,"

Perhaps most important of all his professional qualities was one he in large part invented and contributed to the profession. Lawyers had generally been called in by clients to deal with crises or problems, by giving legal advice or supplying their services as an advocate. Brandeis found himself gravitating toward a role in which his advice was an ongoing service, his practice being in preventive law, combining business and legal judgments, and having in mind the broad, long-run interests of all the parties to the problem. His interest was in problem solving and his best service to his client was often in being lawyer to the situation. As he advised a junior associate in 1893, "The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counselor at law."

Craftsmanship in the sense of self-respect and fulfillment; sensitivity to time as a trust; and the ability to see a problem in the broadest perspective -- are these not as valid for the lawyer of tomorrow as they were at the turn of this century?

The next cluster of qualities has to do with citizenship, and the notion that a lawyer has a public dimension beyond that of many other professions. One of Brandeis' favorite quotations was a passage from Pericles' Funeral Oration: "An Athenian spends himself in the service of the city as if his body were not his own, and counts his mind most his own when it is employed upon her business." With this spirit in the marrow of his bone, he might have been a political activist and was once sorely tempted. Instead, he found himself opening doors throughout his life to works of broad significance -- saving bank life insurance, the protocol for labor relations in the garment trade, the cooperative movement, the Palestine Economic Corporation. These and many other initiatives sprang from his inextinguishable flame of moral indignation, the quality that led President Roosevelt, in writing Justice Brandeis, to use the salutation, "Isaiah".

Brandeis' mode of instigating social change was to work with what he had. In this sense he was a Burkeian, a gradualist, and pragmatist. He had a knack for financial analysis. To this he added a lively curiosity and genuine interest in "men of affairs". The result was that he understood his clients, their opponents, and the enterprises in which they were engaged more deeply than did they. Thus, understanding "the system", he was able to forward reforms that proved feasible, durable, and successful. In other words, he worked within the establishment

without being captured by it.

A sense of citizenship, reliable springs of moral indignation, and a capacity to improve on institutions -- these, too, are a goodly heritage.

Finally, Brandeis has some things to say to us about the way we structure our lives. In my view they are as timely as the day after tomorrow. The first quality in this cluster is his insistence of limiting the time he devoted to work. He learned this lesson the hard way. So addicted was he to studying and reading in his law school days that he came to the point where the print on the page blurred, the world turned a shadowing gray, and he was forced to rely on classmates, who read to him. One of these was his future partner and lifelong friend, S. D. Warren, Jr.

Ever since then he made time for rest, for time with his family, for vacation. He devoted an hour for reading each morning to his two daughters; he would leave his office regularly at 5 for horseback riding or rowing on the Charles River; the family would spend week-ends on the outskirts of Boston; he would take a vacation whenever he found he could not look forward to work with pleasure. He once wrote Dunbar, one of his juniors:

"A book keeper can work 8 or 10 hours a day and perhaps 12, year in - year out, and possibly his work may be always good (tho' I doubt it). But a man who practices law, who aspires to the higher places of his profession must keep his mind fresh. It must be alert and be capable of meeting emergencies The bow must be strung and unstrung . . . there must be time for that unconscious thinking which comes to the busy man in his play."

This philosophy is encapsulated in his famous statement, made in 1940, shortly before he died: "I soon learned that I could do twelve months' work in eleven months, but not in twelve."

A second attitude with peculiar relevance to living in today's world is Brandeis' attitude toward bigness. While he associated with the phrase "curse of bigness", his posture was not so much anti-bigness as, to use a lawyer's term, putting the burden of proof on anything big to justify itself in terms of efficiency and the price paid for it in the sacrifice of other qualities. Professor Freund prefers to discuss this range of Brandeis' thought as "diffusion of responsibility". In any case, when it came to advising young lawyers where to practice, the Justice had drawn a clear balance. Freund tells of a young Justice Department official making a farewell call on the Justice and asking advice whether he should stay in Washington or go to New York. "The Justice's counsel", according to Professor Freund, "was his familiar one: take your training and talents back to the service of your own community, your hinterland, and lead a full life there. To which the unhappy friend answered plaintively, 'But Mr. Justice -- Fargo, North Dakota!'" Somehow I have the suspicion that his advice today to you would, if anything, be not only the same but louder and even more clear.

To end our analysis of Brandeisian values that hold meaning for the lawyer of tomorrow, we come to that one to which indeed he gave its name almost 90 years ago. "The Right to Privacy", which he wrote with Warren in 1890, articulated an analytical basis which has foreshadowed much recent case and statutory law. But privacy was not just a field of scholarly endeavor. It was part of his own personal credo. One of his law clerks described it as "his jealous guardianship of his own privacy - no niggardly husbanding of resources, but rather, I think, a sense of personal dignity which would not be consistent with an easy opening of doors to everyone who knocked." In the half century which lies ahead of you, the preservation of privacy in a crowding world will be a key to the preservation of sanity, wisdom, and happiness.

So in terms of life style, Brandeis, with his zealous safeguarding of time for self and family, his distrust of elephantiasis in institutions, and his prophetic outlining of a "right" of

privacy, speaks to all of us . . . and particularly you.

At the end of my volume of Alpheus Mason's "Brandeis: A Free Man's Life", is my notation in pencil, "Finished - noon - Feb. 18, 1947 FC". I had just finished my final law school exams. Our first child had been born 18 days previously. And I was about to return to the state of Maine to see what life and law held in store for me. Although I was not conscious of either seeking or finding a role model, in retrospect it is clear that this is what Brandeis became for me. In him there was almost a classical Greek balance between the advocate and the arbiter, the private and the public, the intellect and the emotions, work and play.

There is one final balance he struck. As a Jew, conscious of man's inhumanity to man, particularly in the late 1930's, he had to be a realist. But at the same time he remained stubbornly an optimist. In recommending the Justice to your company, I close with Dean Acheson's remarks at Brandeis' funeral -- exactly two months before Pearl Harbor. Brandeis' time on the Court almost precisely spanned the period between the two wars, what Acheson called "The desert years of the human spirit," But as for Brandeis, said Acheson, "In a time of moral and intellectual anarchy and frustration he handed on the great tradition of faith in the mind and spirit of man which is the faith of the prophets and poets, of Socrates, of Lincoln. * * * And so today, whatever dark days may lie ahead, the memory of the Justice will be a voice always saying to us, 'Lift up your hearts.'"