



Department of Justice

"A 'BRANDEIS BRIEF' ON 'OTHER PEOPLE'S MONEY':
THE 'LIVING LAW' IN THE 1990S"

AN ADDRESS

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INAUGURAL LOUIS D. BRANDEIS LECTURE

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It is a great privilege -- and an even greater intellectual challenge -- to inaugurate this lectureship, which you establish today in honor of Justice Louis D. Brandeis. I say so, particularly, because Justice Brandeis possessed such an awesome and all-encompassing legal mind. For any lawyer to stand even briefly in his stead and attempt to encompass his far-reaching legal thought is a forbidding and audacious exercise.

Yet that is, only in part, my charge today. Over his long career, Louis Brandeis employed his formidable intellect as an unstinting advocate of free men's democracy -- and the adversary of every compromised or corrupt private interest. He was early called the People's Attorney -- often rising alone in court, serving without fee, in the public interest. And as such, he once greatly, and rightly, embarrassed everybody from the Attorney General right up through President William Howard Taft in a case of wrongful dismissal -- the Pinchot-Ballinger controversy. One can almost feel his intense, blue-eyed, courtroom stare -- ready to ensnare any erring counsel -- even as one risks assessing Brandeis's own enduring contributions to the law and to the Republic.

But before paying tribute to the man's mind, let me pay homage to his roots. He is, of course, your native son, and you do right by him with today's installation. Louisville is clearly where he gained the impeccable demeanor that went with his courtroom probity. Born here on November 13, 1856, he was raised

and schooled here, until he left Louisville at age sixteen. First for Europe -- and a Grand Tour with his family -- and then to go to Harvard Law School. But his youth had already stamped him indelibly a Kentuckian. We can thank the German and English Academy of Louisville and the Louisville Male High School for that, as well as for his only degrees before law school. At both schools, he consistently earned grades of "6" -- "5" was "excellent," but "6" was deemed a performance "without fault."

That standard of perfection is what Brandeis always strove to achieve, thereafter. His brilliant record at Harvard Law School has never been matched, though he often suffered from eye strain amounting to temporary blindness -- and technically could not graduate as valedictorian since he wasn't yet twenty-one. On Commencement morning, the trustees voted to suspend that rule.

He carried this same perfectionism into his innovative courtroom arguments on public issues, creating a new form of legal documentation known as the "Brandeis Brief." He not only knew the law like the back of his hand. He reached that same hand deep into the vat of social and economic facts which the law had customarily shunned. What he grasped, and held up before the court, was reality. He forced the judiciary out of its often sterile, legalistic thinking, and obliged the forging of new decisions based on what he called "the Living Law."

His mastery over courts, commissions, all public fora was so dominant that his briefs set emerging public policy throughout the Progressive Era. He rose as the People's Attorney -- before pro bono publico practice was in vogue -- in the cause of competition, the rights of labor, of banking insurance, conservation of resources, public lands, and a host of other public endeavors. Often his tactics infuriated opposing interests. He dug after every weakness in their frontal defenses, his incisive intellect tunneling under a massive wall of prerogative. And he deftly used the ever-aggressive press to send up a public howl whenever needed. But the result was almost invariably a victory for the public interest. His paradox is that he made common cause against social injustice when there was often nobody else around to raise or support such causes. In succinct praise, commission reports or court judgments were said to have been "Brandeized."

Finally, in 1916 -- after a bitter battle over his nomination by President Woodrow Wilson -- he took his place on the United States Supreme Court. There he often joined Justice Oliver Wendell Holmes in the great dissents that were the seeds of the Court's modern grappling with our Bill of Rights.

His individual accomplishments were so myriad that it is difficult to single out any one cause celebre to trace as a legal text for our own times.

As a former governor, it would be tempting for me to concentrate on Brandeis' characterization of the states as "laboratories of democracy [trying] novel social and economic experiments without risk to the rest of the country" -- as so many of today's current state leaders are doing. But I resist the temptation. Nor do I choose to discourse on any of a number of tantalizing questions which derive from the opinions rendered by this distinguished jurist from his seat on the High Court.

Instead I have chosen to examine the fight that Brandeis carried on throughout his life against the misuse of other people's money and the abuse of privilege within sacrosanct institutions that deliberately keep themselves closed off from public scrutiny. I do so because I believe that fight speaks clearly to some of the excesses and abuses of the recently-completed roaring 80s, and the financial penalties we will all be paying during these uncertain 90s.

I.

Let me start with reference to Brandeis's decade-long battle (1905 to 1914) against the New Haven Railroad for its alleged monopolistic abuses.

Most of the controversy revolved about the railroad's attempts to take over the Boston & Maine line -- a finally successful manipulation, as it turned out. But later the merger became embalmed in financial collapse -- a prospect foretold by

Brandeis' astute public accountancy. His analysis of the transaction -- and his forewarnings against the merger -- were grounded in his perception that the J. P. Morgan-controlled New Haven sought its sister road, not to expand service, but to milk out of the Boston & Maine its worthwhile assets. Sound familiar from the 80s?

Out of this experience came what Brandeis styled three "inexorable rules" violated by those behind the New Haven's machinations.

First, the fundamental law of business which has recognized the need of competition as an incentive to efficient action.

Although throughout the 80s anti-trust was rumored to have all but ceased to be a function of the Department of Justice, I am proud to say it remains in pronounced and effective operation -- even reaching out to take action against multi-national conspiracies in restraint of trade.

Second, that fundamental law of human nature which recognizes the limitations of man, namely, that there is a limit to the amount or number of things any man or body of men can accomplish or do well. How many airlines can one man run, except into the ground -- especially when they turn out to be bankrupt Eastern, collapsing Continental, and troubled Texas Air? How can another efficiently own and operate TWA while trying to take over

Texaco? What Trumpery is it to glitz up an air shuttle and crowd too many gambling casinos along a boardwalk, all emblazoned with your own name?

Third, the law of arithmetic by which two and two will always make four, despite reports of CEOs and financial advisers who insist on stretching it into five. And that, from junk bonds to the S & L crisis, is the simplest, but most flagrant, violation by the past decade's merchants of greed.

For all the expansiveness of the 80s, hear Brandeis's words on what drives real enterprise in a truly burgeoning economy. "There is great strength in serving with singleness of purpose one master only. There is great strength in having time to give a business the attention which its difficult problems demand. And tens of thousands more Americans could be rendered competent to guide our important businesses. Liberty is the greatest developer."

II.

But Brandeis did not only take his case against monopoly and financial malfeasance into the courts. He also took it before the public.

He became a spokesman, even a polemicist. One of his great friends was his editor, Norman Hapgood, a leading muckraker of that day. In 1912, Hapgood had just lost the editorship of

Collier's. So Brandeis bought him Harper's Weekly. In fact, Brandeis bought the magazine over lunch -- for \$100,000 -- from, of all people, a Morgan partner named Thomas W. Lamont. He then contributed to Harper's Weekly his most famous series of articles from 1913-14. Their title -- Other People's Money.

That's right. Full title -- Other People's Money--and How the Bankers Use It. Over seventy-five years ago, Brandeis was warning about the mishandling of other people's money by over-privileged, overbearing, even corrupt financial overlords. In that age of trust-busting, Brandeis saw the ultimate monopolistic threat in what he called the Money Trust. He warned against misuse of funds -- deposited by the public -- but entrusted to bankers who had interlocking connections with industry, investment houses, the whole web of the financial system.

"The control of capital," Brandeis wrote, "is, as to business, what the control of water supply is to life. The economic menace of past ages was the dead hand which gradually acquired a large part of available lands. The greatest economic menace of today is a very live hand--those few able financiers who are gradually acquiring control over our quick capital."

Brandeis saw such control over quick -- that is, live and circulating -- capital as a public trust. And he felt the bankers were not respecting that trust.

"They exercise their power regardless of that trust, ignoring the square deal, and it amounts practically to their playing the industrial game with loaded dice. . . .By controlling the money of other people at the same time that they are engaged in industrial and other occupations, they suppress competition and get other advantages by means that are illegal."

Prophetic words. . .that apply so justly to the insider trading we experienced during the 80s, that fit so well, for example, the financial empire Michael Milken built in billions for himself alone. The same Mr. Milken will soon face sentencing for self-admitted criminal activities that helped enhance his corrupt "control over our quick capital."

But how much more prophetic -- and deeply ironic -- when such words are applied to the Savings & Loan crisis. The S & L rip-off artists surely ignored the square deal, and just as surely used other people's money to play the junkbond game, the shopping mall game, the land flip game and every other real estate shell game with the same loaded dice. We are presently facing the largest financial disaster in American history grounded in the betrayal of public trust by flagrant self-dealing in "other people's money."

To the extent that this betrayal of trust has been fraudulent and criminal, we are prosecuting wrong-doers at the

fastest pace justice will allow. Let me give you the latest roll of dishonor -- as of the end of August -- on crime in the suites of these S & L's.

Among CEOs, chairmen-of-the-board, and presidents: 55 indicted, 45 convicted, and only three acquitted (one of whom was convicted in another case). Extending that record down through directors and bank officers, there have been, additionally, 97 indicted, 86 convicted, and again, three acquitted. Overall, more than 300 federal convictions for thrift fraud have been obtained in the last two years. And 77% of those sentenced have gone to prison. Much more will follow as we apply the skills of a recently-doubled force of investigators and prosecutors.

But to the extent that this betrayal of trust has not been criminal, has been instead irresponsible or stupid or incautious, we are faced with a different dimension of public disservice. Most of the risks these high-flying entrepreneurs took were, after all, covered by government insurance. Those who deposited \$100,000 --or put up many block deposits of \$100,000 -- are to be reimbursed for their losses -- at a cost of \$2000 from every taxpayer in the land. Such insurance was even part of Brandeis's plan to protect other people's money. Yet here it was used to part other people from their money, so as to protect the S & L scams.

How could this happen? Something has gone terribly awry. It isn't simply the sharp rise in White Collar Crime alone, reprehensible as that is. It is something much deeper, more threatening, that Brandeis himself realized lay at the very root of the harms caused by monopoly and financial malfeasance -- indeed, behind most of the wrongs that plague mankind's efforts to create a just society.

III.

In his famous briefs -- even in his private comments -- Brandeis seldom named knaves. Instead, he pointed out flaws. His whole intent was to cure these flaws -- especially those in the financial system that sapped its efficiency, limited its free markets. True, he sometimes raised the spectre of socialism, but only as a bugaboo to affright his hidebound opponents. He believed in freedom as the guarantor of social and economic justice -- freedom as the only condition in which men and women could speak for themselves, do for themselves, and thrive.

And for Brandeis, the great, subtle enemy of freedom was servility. The servile were those who enslaved themselves to various masters, for whatever riches and eminence, and did not respond to the flaws in the system. If they did not exploit these flaws, they acquiesced, claimed not to perceive -- even protected such flaws from exposure.

You will recall that Justice Holmes -- Brandeis' great friend -- said, in a famous Memorial Day speech, that "as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Holmes bore three wounds from the Civil War as his proven share of passion and action. But Holmes never did share quite as much in the social passion and reformist action that constituted the life lived by his brother Justice Brandeis.

Brandeis knew -- from having been much in affairs, like the New Haven clashes -- the evils that time-servers would excuse and blindly abide. How much we could have used his insights during the 80s, how well they might have helped us to recognize the flaws in the system, for example, that brought on the S & L crisis. Here, too, men failed to say what they must have known was the true case because of the power to which they were subject.

Well into the middle of the decade, it has been noted, we might have recouped the S & L losses for something in excess of \$100 billion. But even at that late date, servility prevailed. Bank officers, even independent accountants, failed to forewarn of business calamity. With some outstanding but rare exceptions, regulators followed the exact letter of the new deregulations -- even as they saw the fiscal outlines of true disaster forming. Some even denied the situation. Eventually, even members of

Congress set aside the warnings of those few brave regulators who voiced their concerns -- in many cases, it appears, to appease the powers upon which they, in turn, depended for campaign contributions. So many were subject to so much power, and the price of their collective servility now promises to mount as high as \$500 billion.

Brandeis confronted this kind of officious appeasement throughout his career, and attacked it to his own cost. When he was nominated to the Court, he faced a barrage of disapproval from lifelong detractors in the so-called "establishment." One of his staff constructed a chart of their multiple interconnections. It looked like a web of power woven by a Boston Brahmin house spider. But only upon confirmation did he write to a friend and judge that "the existence of such servility is a menace to democratic institutions and ideals."

Brandeis knew that true integrity is always a stand-up act, and that even in the interests of other people's money, you may sometimes have to stand alone. More than his briefs, or his courtroom triumphs, this is the human imperative he laid upon those of us who pursue the rule of law in this democracy.

"No one but a fanatic can be sure that his opinions -- political, economic, or social -- are correct," he wrote. "But no man, be he reactionary or progressive, ought to doubt that

free thought and free speech are necessary in a democracy; and that their exercise in things public should be encouraged. My opponents throughout long years practically refused to discuss publicly or privately with me the measures under consideration. For opposing arguments they substituted attacks upon reputation. And the community permitted them to do so almost without a protest. This seems to me the fundamental defect. Our task in Massachusetts is to reconstruct manhood," he said.

The terms have somewhat altered, and more than manhood needs reconstruction in Massachusetts these days. But I would leave you with that echoing admonishment from Justice Brandeis. Too few were aware enough, or willing enough, to pay it heed during the 80s. Now it reverberates into the 90s -- to become our nemesis if we do not re-open our democracy, hunt down the flaws in the system, and write our own "Brandeis Briefs" on the Living Law to correct them. This is no time for servility. We need, particularly from our rising lawyers, a "Brandeized" diligence over "other people's money," and over the integrity and vitality of our nation's institutions and the long heritage he helped so brilliantly to build.