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The Legacy of Louis Dembitz Brandeis, People's Attorney

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## The Legacy of Louis Dembitz Brandeis, People's Attorney

PHILIPPA STRUM

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Thou hast heard men scorn the city, call her wild  
Of counsel, mad; thou hast seen the fire of morn  
Flash from her eyes in answer to their scorn!  
Come toil on toil, 'tis this that makes her grand.  
Peril on peril! and common states that stand  
In caution, twilight cities, dimly wise—  
Ye know them; for no light is in their eyes!  
*Go forth, my son, and help.*<sup>1</sup>

Louis Dembitz Brandeis was known to millions of Americans as “the People’s Attorney.”<sup>2</sup> A lawyer with a highly successful private practice, he is widely credited with creating the foundation for the law of privacy in the United States<sup>3</sup> and helping formulate the sociological jurisprudence that has become the major methodology utilized by American courts.<sup>4</sup> His legal abilities were formally recog-

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My thanks to Shmuel Ben-Zvi for his wise editorial advice. Abbreviations used in the footnotes are as follows: LDB: Louis Dembitz Brandeis; FF: Felix Frankfurter; BP: Brandeis Papers, University of Louisville; FF-HLS: Frankfurter Papers, Harvard Law School; and FF-LC: Frankfurter Papers, Library of Congress.

1. Euripides, *The Suppliant Women*. This excerpt was sent to LDB by his law partner Samuel Warren in 1890 and, according to Alpheus Mason, Brandeis “drew enduring inspiration” from it. Warren to LDB, n.d., BP, Clippings I; Alpheus Thomas Mason, *Brandeis: A Free Man’s Life* (New York: 1956), p. 95.

2. According to Jacob de Haas, LDB first became known as the People’s Attorney “in 1896 when he appeared without retainer for the citizens of Boston in the first big fight” over the Boston railway, discussed below. Jacob de Haas, *Louis D. Brandeis: A Biographical Sketch* (New York: 1929), p. 42. Brandeis was publicly involved in the fight as early as 1893 (see Walter H. Reynolds to LDB, February 21, 1893, quoted in Mason, *Brandeis*, p. 106), so de Haas may not have gotten the date precisely right. In any event, the sobriquet was in general use by the early years of the twentieth century.

3. Samuel D. Warren, Jr., and LDB, “The Right to Privacy.” *Harvard Law Review*, 4 (1890–1891), 193–220; *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (dissenting); Roscoe Pound to Sen. William E. Chilton, 1916, FF-LC Box 127.

4. Roscoe Pound to Sen. William E. Chilton, 1916, FF-LC Box 127; Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, Mass.: 1984), chs. 8, 15; Melvin I. Urofsky, *A Mind of One Piece: Brandeis and American Reform* (New York: 1971), ch. 2.

nized in his appointment to the United States Supreme Court.<sup>5</sup> His preferred role, however, was that of the unpaid representative of “the People.” He was the paradigm for today’s public interest lawyers and groups: independent citizens who voluntarily assume responsibility for representing the people when they are confronted by large, wealthy and sometimes capricious institutions, whether private or public. Central to Brandeis’s legacy, in addition to a generalized concern for the public welfare, are distrust of a system of corporate capitalism characterized by large concentrations of wealth and power, the belief that democracy cannot work without active citizen participation, and an expansion of the conception of the lawyer’s tools to include sociological and economic data in addition to knowledge of the law.

Brandeis’s conception of the attorney’s role was never traditional. He resembled many lawyers in setting out to make money, something that was particularly important to him as the son of a businessman whose fortune had dissolved and as a former student who had to proctor examinations and tutor other students in order to pay for law school.<sup>6</sup> He was anxious about finding and keeping clients. Included in a memorandum he jotted down for himself, entitled “The Practice of The Law,” is the note, “Far more likely to impress clients by knowledge of facts than by knowledge of law.”<sup>7</sup> Brandeis proved to be a noble citizen, but he also was a master at impressing clients and making money. This is clear from the roughly \$73,000 he earned each year and from his becoming a millionaire while in his forties.<sup>8</sup>

But even when he was just beginning practice in Boston, his desire for economic security was accompanied by a sense that law should provide room for creativity and self-fulfillment as well as an income. “I would rather have clients,” he said, “than be somebody’s lawyer.”<sup>9</sup> By having clients he not only meant that he would pick his cases but that he, rather than his usually much older clients, would decide what their legal problems were and what would be the best way of handling them. A prerequisite for understanding their problems was information about their entire enterprise, and he advised a young associate, “Knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. . . . The controlling force

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5. A. L. Todd, *Justice on Trial* (New York: 1964).

6. Strum, *Brandeis*, pp. 13, 24–25.

7. LDB, “The Practice of the Law,” BP, NMF 85–3.

8. Mason, *Brandeis*, pp. 103, 691.

9. Quoted by Ernest Poole, “Brandeis,” in LDB, *Business—A Profession* (Boston: 1914), pp. 1–li.

is the deep knowledge of human necessities. . . . The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counsellor at law.” He likened a good lawyer to the “great physicians” who “know not merely the human body but the human mind and emotions . . . know the truth which their patients fail to disclose and who add to this an influence over the patient which is apt to spring from a real understanding of him.”<sup>10</sup> His emphasis on making money did not stem from a desire for material goods: he was well known for the frugality with which he lived. Rather, he realized that independent wealth left him free to pick and choose his clients. He insisted that the way he dealt with their problems had to be morally correct as well as efficient. Although he enjoyed litigation, he was pleased if his knowledge of his clients’ affairs enabled them to minimize the need to go to court.<sup>11</sup>

Brandeis had an additional reason for wanting to know more than the specifics of a case. Each case was a potential step in the development of law. He understood that law is society’s way of dealing with the need for rules and for certainty. It reflects the values that a society considers so central that it puts behind them the coercive power of the state. He had learned at Harvard Law School that law was a dynamic entity in need of constant updating to deal with new societal phenomena. As society and laws became more complex, the average citizen was less likely to know the law. Hence the demand arose for people who specialized in knowledge about the laws and the way they applied to specific situations—specialists called lawyers. The United States of the late nineteenth and early twentieth centuries had not yet turned its attention to matters of civil liberties and civil rights. It was caught up in economic development and the evolution of a form of capitalism far more complicated than the one that existed during the country’s early years. It was therefore logical to Brandeis that the people most likely to require a lawyer’s services would be found in the world of business, and his clients were in fact small manufacturers and merchants.

Brandeis assumed that the law was good because there was an ongoing and dynamic interaction between law and the socioeconomic circumstances that he had urged his young associate to learn about. His years at Harvard had been spent studying the law as it

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10. LDB to William H. Dunbar, February 2, 1893, FF-HLS.

11. Enjoying litigation: LDB to Alfred Brandeis, October 31, 1884, Melvin I. Urofsky and David W. Levy, *Letters of Louis D. Brandeis* (Albany, N.Y.: 1971–1978), I:66; to Alfred, March 21, 1887, BP, M 2–4.

was: a legal system that reflected the dominance of private property and was designed to protect it. Everything he had learned there and in his early years as a practicing attorney suggested that capitalism was good for society and that the societal phenomena resulting from capitalism were adequately and appropriately dealt with by the laws of the various states. There was no reason for him to think that the law as it *was* differed from the law as it *should be*, or that there was any discrepancy between representing capitalists and serving the larger society. Economic development, justice and the laws went hand in hand.

During the last two decades of the nineteenth century, Brandeis established both a thriving law practice and the beginnings of a related career in the public arena. He opened his Boston law office in 1879. By the early 1890s he had ventured into the public sphere but without committing a great deal of time or thought to it. He lectured to a Unitarian Sunday school class about the necessity for taxation, to a state insurance committee about the need to value policies uniformly for tax purposes, and to another state legislative committee against women's suffrage. He spoke out against a proposed temperance law that he considered unenforceable, in favor of a law that would have limited the impact of lobbies on the Massachusetts legislature, and for better treatment of Boston's poor people. His law practice led him to appear before legislative bodies on behalf of paper manufacturers who were fighting unsuccessfully against a municipally created monopoly over disinfecting the rags that were used in making paper and as the representative of various clients opposing a national protective tariff.<sup>12</sup> He relished his role as a private attorney and occasional actor in the public sphere. He assumed that citizen involvement was necessary to keep all organizations, political and economic, honest, because greedy or uninformed people inevitably would attempt to misuse the political or the economic system. He also assumed that there was nothing intrinsically wrong with either system; law and twentieth century capitalism were both good and complementary.

In 1892, however, Brandeis underwent a transforming experience. He was completing the notes for the course on business law that he had been invited to teach at the Massachusetts Institute of Technology. He had put together a series of lectures demonstrating that the common law had evolved along with industry and commerce. One

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12. Strum, *Brandeis*, pp. 54–57.

morning he picked up his newspaper and learned of the violence that had erupted at the Carnegie steel works in Homestead, Pennsylvania, when Carnegie decided not to renew its contract with the steel workers and refused to deal with a union. Labor organizer Mary Kenney, who had been in Homestead during the weeks before the strike, had described to Brandeis the walls the company was building around the steel mill grounds—walls with apertures for guns. The company clearly was expecting violence and helped precipitate it by slashing wages as soon as the contract expired. The workers responded by going out on strike. Henry Clay Frick, Carnegie's manager, hired Pinkerton guards to protect strikebreakers and sailed them up the Ohio River. The strikers, dug in on the bank of the river, would not permit the Pinkertons to land, and the Pinkertons began to fire their Winchesters. The steelworkers suffered most of the casualties in the ensuing battle. Brandeis later remembered his reaction to the news from Homestead: "I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles. Those talks at Tech marked an epoch in my own career."<sup>13</sup>

Brandeis realized that "human affairs in their manifold relations" as they existed in Homestead were not mirrored by the law. He was appalled at "that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages" and began to think seriously for the first time about "the relations of labor to industry."<sup>14</sup> He began revising his notes to cover the "legal relation of labor and capital," convinced that if law was a truly moral and dynamic entity, corresponding to changing social conditions, the law of the twentieth century had to keep pace with the new phenomenon of highly concentrated capital. Horace Kallen commented subsequently that the Homestead strike forced Brandeis to choose between legalism and morality. Brandeis may have rejected legalisms, but he refused to choose between law and morality; he insisted that the two be combined. Homestead taught him that all Americans were not equal under the law, there being no meaningful equality between Carnegie and his workers. It was a major challenge to his belief system, and he began to confront it.<sup>15</sup>

13. Quoted in Levy S. Richard, "Up from Aristocracy," interview with LDB in *The Independent*, July 27, 1914, BP, Clippings II; see Alfred Lief, *Brandeis: The Personal History of an American Ideal* (New York: 1936), pp. 39–40.

14. Richard, *ibid.*

15. Original lectures and impact of Homestead: Lief, *ibid.*; Allon Gal, *Brandeis*

His former partner Samuel Warren challenged him in a different way. Brandeis was still a beginning lawyer, and whatever doubts he may have had about the workings of the corporate system, his public career might well have been limited to an occasional public pronouncement or an appearance before a legislature or court when his clients' interests were at stake. Warren, however, thought that Brandeis was made for better things. In 1891 Warren wrote to him, "Consider whether or not you will direct your course toward public life. I think you are fitted for it. This would not mean to seek office or place, but to command the leisure for public service as opportunity presents."<sup>16</sup>

Shortly thereafter, Brandeis said, "my important public work" began.<sup>17</sup> The occasion was his successful battle, lasting from 1893 to 1902, against the attempt of the Boston Elevated Railway to acquire a monopoly over Boston's transportation system. The Boston Elevated assumed that Brandeis was working for Lee Higginson & Company, a Boston brokerage and banking firm. It was not an illogical assumption: Higginson was a rival of J. P. Morgan & Company, which held an interest in the Boston Elevated. Higginson's wife had been among the first Boston socialites to welcome Brandeis's new bride, the Brandeises had been guests at the Higginson home, and Brandeis had ties through public-interest organizations to a number of members of the Higginson family. But, as Brandeis wrote indignantly to the chairman of the Elevated, "I have been retained by no person, association or corporation, directly or indirectly in this matter, and I have opposed it solely because I believe that the bill, if passed, would result in great injustice to the people of Massachusetts."<sup>18</sup>

At the same time, Brandeis was continuing to learn about the difficulties inherent in the capital/labor relationship that he had begun

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*of Boston* (Cambridge, Mass.: 1980), pp. 56–58. Notes for both sets of lectures are in the Brandeis Papers at Brandeis University. Horace Kallen, *The Faith of Louis D. Brandeis, Zionist* (New York: n.d.), p. 7.

16. Warren to LDB, July 28, 1891, quoted in Mason, *Brandeis*, p. 95. Warren had left the firm after his father's death to manage the family business.

17. LDB to Edward F. McClenen, BP, NMF 76–2.

18. Mrs. Higginson; LDB as Higginsons' guest: Mason, *Brandeis*, p. 103. LDB's ties to Higginson's brother and son, particularly in the Public Franchise League: LDB to Arthur Aaron Maxwell, April 24, 1900, BP, NMF 2–5; LDB to Morton Prince, May 18, 1900, BP, NMF 2–5. See also Irving Katz, "Henry Lee Higginson vs. Louis Dembitz Brandeis," *New England Quarterly*, 41 (1968), pp. 67–81. LDB denying ties to Lee Higginson: LDB to Albert Enoch Pillsbury, May 20, 1897, BP, NMF 76–2.

#alienation

to see in the Homestead strike. In 1902 his client William H. McElwain, who became “one of the largest shoe manufacturers in the world,” was confronted with bad times and called Brandeis in when his employees refused to accept what McElwain considered to be a reasonable and necessary pay cut. Brandeis went to the plant and found that the employees were paid well when they worked, but their work was seasonal and they earned nothing when no work was to be had. He was amazed that McElwain did not know how much his workers earned each year and could give him only the average wage for a working day. “I abhor averages,” Brandeis said. “A man may have six meals one day and none the next, making an average of three per day, but that is not a good way to live.” Seeking more information, Brandeis turned to John Tobin, the head of the International Boot and Shoe Workers’ Union, who was acting as the striking workers’ representative, and heard the same story of high but sporadic wages. McElwain sought to end the impasse by suggesting that the workers be paid on a piecework basis; Tobin wanted wages calculated on the basis of time worked. Brandeis rejected both ideas and instead proposed a detailed system that would enable the work to be spread out during the year to prevent irregularity of employment. The two sides agreed, the system was put into effect, and it worked.<sup>19</sup>

Brandeis  
thought it  
was possible  
to have a  
synthesis

Among the lessons Brandeis gained from the McElwain situation was that, when they each understood the facts, both labor and capital could behave reasonably, as he believed McElwain and Tobin had done. It was to the McElwain experience that he referred when he said that he gradually came to realize that “many things sanctioned by expert opinion and denounced by popular opinion were wrong.”<sup>20</sup> In Brandeis’s world unionization was considered an evil—in fact, unions were illegal. Once again, it was clear to Brandeis that the law failed to reflect societal realities. A second and related lesson was that, as he had earlier seen in the Homestead strike, the result of inequality of power was human suffering: in the absence of unions, employees were at the mercy of employers. A third lesson was that

19. LDB and largest shoe manufacturer: “Business-A Profession,” address at Brown University Commencement, 1912; published in *System, the Magazine of Business*, 11 (October 1912), reprinted as “Business-the New Profession,” in LDB, *Business*, pp. 1, 6–9, in which LDB describes the experience. The McElwain incident is also described in LDB, “Interview,” *New York Times Annualist*, January 27, 1913, p. 36, reprinted in LDB, *The Curse of Bigness*, ed. Osmond K. Fraenkel (New York: 1934), p. 41. Cf. Edward A. Filene, “Louis D. Brandeis, As We Know Him,” *Boston Post*, March 4, 1916.

20. LDB, Interview, *New York Times Annualist*, supra n. 14.



a lawyer seeking a rational solution for such situations had to understand the totality of the situation, not merely the limited facts or immediate goals that were brought to him by his clients. Lawyers who viewed the law only through the lens of the corporation could not see the whole situation, nor were they free to act fairly and wisely, curbing the excesses of the wealthy when that was necessary.

Homestead and the situation that had existed at the McElwain factory showed Brandeis the glaring discrepancy between the law and what Oliver Wendell Holmes had recently referred to as the “felt necessities” of the times.<sup>21</sup> Brandeis loved being a lawyer; he also believed in justice. He would not give up either his profession or his beliefs, and so he accepted the responsibility of trying to bring the two together. He recognized that doing so at the behest of clients might interfere with his freedom to operate on behalf of what he believed was the larger public interest. And he knew that if the public was to be his client, he would earn no fee.

When Brandeis won the fight over Boston's public transportation system, his friend Edward Filene urged him to present a bill to the Associated Board of Trade, one of the Boston businessmen's groups that had been his nominal clients during the fight. Brandeis demurred, according to Filene, saying that “he never made a charge for public service of this kind; that it was his duty as it was mine to help protect the public rights; and . . . that he resolved early in life to give at least one hour a day to public service, and later on he hoped to give fully half his time.”<sup>22</sup> Exactly when he made this resolution is unknown. At first he donated his fees for public service activities to charity. The next step was his decision to take no fees.<sup>23</sup> As public work began to consume a major part of his working hours, however, he decided that his involvement was unfair to the people in his law firm, whose incomes were based on the firm's profits. He announced that he would consider himself the firm's client whenever he took on a public service matter that interfered with his working hours, and that he would bill himself accordingly. This led, for example, to his paying the firm \$25,167.32 for the hours he spent over six years while he was fighting the merger of the New Haven Railroad and the Boston & Maine Railroad. In another instance, he both reim-

whoah. this guy was totally crazy, by which I mean he was committed to fairness even w/ his own employees

21. Oliver Wendell Holmes, *The Common Law* (Boston: 1881), p. 1.

22. Edward McClennen, “Louis D. Brandeis as a Lawyer,” 33 *Massachusetts Law Quarterly* 33 (September 1948): 24.

23. LDB to E. Louise Malloch, November 4, 1907, BP, NMF 1-H-1; Mason, *Brandeis*, p. 180, citing LDB to FF, February 26, 1916.

bursed his firm for his hours and paid court costs when he represented a consumer group.<sup>24</sup> Eventually, he estimated that he devoted half his working hours to unpaid public causes. A journalist asked him about this unusual behavior. “Some men buy diamonds and rare works of art,” Brandeis replied; “others delight in automobiles and yachts. My luxury is to invest my surplus effort . . . to the pleasure of taking up a problem and solving, or helping to solve it, for the people without receiving any compensation.”<sup>25</sup>

This paragraph is SO FREAKIN Important. It tells us one of the most important lessons we need to learn: that “concentrated capital” provides access to legal support, to private armies (which meant power over employees), and to votes (which meant legislation in the favor of the companies, not in the favor of the workers). If you don't get anything else from this article, try to get this.

Brandeis's determination to act without fee was based on his realization, first, that it was no longer only businesses that needed lawyers and, second, that many of the people and entities needing lawyers could not afford them. The concentrated wealth that had become a hallmark of successful American corporations in the late nineteenth and early twentieth centuries had major effects on the people. Groups like the J. P. Morgan-backed syndicate behind the Boston Elevated Railway and the Carnegie steel company had access to huge amounts of capital with which they could buy votes in state legislatures, or private armies, or the services of talented attorneys. Consumers and workers had no such resources.

This violated Brandeis's notion of democracy, which to him meant the individual's control over his or her life. He believed passionately in liberty as the birthright of everyone. Democracy implied the freedom of human beings to run their lives in ways that would be most psychologically and intellectually fulfilling to themselves. Free individuals organized democratic governments so they could make their own choices about the political and economic matters that affected their joint lives. The goal of democracy was the good of the individual.

Brandeis believed he was doing no more than the duty he owed to the democratic ideal when, in order to prevent the Boston Consolidated Gas Company from watering its stock and charging excessive rates, he taught himself about the economics of utility rates and persuaded Massachusetts to enact a sliding scale law that permitted utility companies to pay their shareholders higher dividends as their rates to the public decreased.<sup>26</sup> His immersion in the problems presented by the life insurance industry, which charged industrial work-

24. Mason, *Brandeis*, p. 180.

25. Luxury: LDB interview in *American Cloak and Suit Review*, January 1911, p. 159, reprinted in LDB, *Bigness*, p. 266.

26. LDB, “How Boston Solved the Gas Problem,” *The American Review of Reviews*, 26 (November 1907), pp. 594–598, reprinted in LDB, *Business*, pp. 93–108; Strum, *Brandeis*, pp. 67–72.

ers high premiums for minimal coverage, resulted in his invention of the alternative system of savings bank life insurance.<sup>27</sup> His sense of duty involved him in a decade-long war with the New Haven Railroad monopoly that gave the company control over railroad rates throughout New England and as far west as Chicago and Milwaukee. Brandeis lost many battles with the New Haven but won the war, demonstrating as he did so not only that the company had been overcharging the public but that a banker-run railroad system and overconcentration of capital and power inevitably resulted in inefficiency and economic loss.<sup>28</sup>

Brandeis's investigation of the money trust was another example of his activities on behalf of the public. His findings were a major factor in President Woodrow Wilson's establishment of the Federal Reserve system.<sup>29</sup> Wilson's antitrust policy, including the creation of the Federal Trade Commission, the broadening of the Interstate Commerce Commission's powers, and passage of the Clayton Antitrust Act, was Brandeis's doing.<sup>30</sup> His wide-ranging reading and investigations culminated in his advocacy of regularity of employment, legalization of unions, unemployment insurance, old age pensions, industrial profit sharing, worker management, conservation of land and natural resources, public ownership of land in Alaska—and these are but some of the issues to which he gave his attention.<sup>31</sup> He produced a steady stream of articles and lectures and testified regularly before legislative bodies.<sup>32</sup> He advised not only Wilson and President Franklin Roosevelt but innumerable members of Congress—all in the name of the public good.<sup>33</sup>

this guy did everything! we should all thank him for all these great things we have in our life! wow

27. LDB, "Wage-Earners' Life Insurance," *Collier's*, 37 (September 15, 1906), reprinted in Alpheus Thomas Mason, *The Brandeis Way* (Princeton, N.J.: 1938), pp. 311–325; Mason, *Brandeis Way*, passim; Strum, *Brandeis*, pp. 74–93.

28. Henry Lee Staples and Alpheus T. Mason, *The Fall of a Railroad Empire* (Syracuse, N.Y.: 1947); Mason, *Brandeis*, pp. 177–214.

29. LDB, *Other People's Money and How the Bankers Use It* (New York: 1914); H. Parker Willis, *The Federal Reserve System* (New York: 1923), passim; Strum, *Brandeis*, pp. 209–211.

30. Arthur S. Link, *Woodrow Wilson and the Progressive Era* (New York: 1954), passim; Melvin I. Urofsky, "Wilson, Brandeis and the Trust Issue, 1912–1914," *Mid-America*, 49 (January 1967) 7, passim; Strum, *Brandeis*, pp. 196–223.

31. Strum, *Brandeis*, pp. 94–113, 140–144, 159–195, and 372–405; Alpheus T. Mason, *Bureaucracy Convicts Itself* (New York: 1941), passim.

32. Many articles and lectures are collected in LDB, *Bigness*; LDB, *Business*; LDB, *Other People's Money*; see also the list in Roy Mersky, *Louis Dembitz Brandeis, 1856–1941: A Bibliography* (New Haven, Conn.: 1958).

33. Nelson Dawson, *Louis D. Brandeis, Felix Frankfurter, and the New Deal* (Hamden, Conn.: 1980); Link, *ibid*; Strum, *Brandeis*, pp. 377–390.

Brandeis gradually became convinced that the well-being of American citizens, and American democracy itself, were seriously threatened by concentrations of capital. Fortunately, he believed, the majority had recourse to the vote. He, like Jefferson, considered an educated, enlightened electorate crucial if democracy was to work; hence the emphasis both men placed on the educational system. But the education of citizens in a democratic state was not merely a schoolroom activity; it was a lifelong process, depending in part upon a free press that would expose the citizenry to ideas and mobilize them when their liberties were endangered. The press alone was insufficient, however; the concerns and ideas that it conveyed had to be articulated by public-spirited citizens who had the leisure and knowledge to monitor the government and the economic processes that affected everyone. Brandeis had a strong sense of noblesse oblige. The careers or inheritances that provided better-educated people with the time for public affairs carried with them the special obligation to keep the society free and just for other citizens. The duty of those who had learned the ways of the law was to use their knowledge for the benefit of all.

wow. imagine this. the idea that those who receive a great education and have the opportunity to make money have a moral DEBT aka RESPONSIBILITY to the public. They must be good stewards. This is rare if not totally nonexistent in our society today!

Brandeis's vision of the ideal lawyer, as well as his deeply felt need to be free, led him to scorn attorneys who made themselves servants of corporations, thereby not only confining themselves to a knowledge of nothing more than their clients' wishes but, far worse, both trading their freedom for salaries and hurting society by doing so. In 1905, addressing the Harvard Ethical Society on "The Opportunity in the Law," he expressed regret that while in the early United States "nearly every great lawyer was . . . a statesman; and nearly every statesman, great or small, was a lawyer," attorneys no longer held "a position of independence, between the wealthy and the people, prepared to curb the excesses of either." In the early twentieth century, Brandeis continued, too many lawyers had turned their backs on the people in order "to become adjuncts of great corporations."<sup>34</sup> He remained a believer in a system of privately owned property, although not in the form of huge corporations and trusts, and had no objection to lawyers working for businesses. But if the businesses were engaged in activities antithetical to the public interest, then the proper place of the lawyer was on the other side.

Okay! Great Job ! You have read enough! Now stop reading and fill out the worksheet or write up your own reactions and notes! (the rest of the article gets dry; it has less juice for us to squeeze out and learn from).

It was extremely unusual, in 1905, to find a lawyer condemning other practitioners for becoming adjuncts of corporations. Brandeis's

34. LDB, "The Opportunity in the Law," delivered at Phillips Brooks House on May 4, 1905; reprinted in LDB, *Business*, pp. 314–331.

speech reflected the distinction he had begun to make between the people and corporations, between the people and the wealthy. He was gradually reaching the conclusion that wealthy corporations were not good for the people and that lawyers had a particular responsibility to do something about the situation.

It was a romantic and idealistic vision. It was also a highly democratic one. Brandeis simply assumed that with good will, which he did not necessarily count on finding, and a great deal of effort, which he demanded from himself and all his colleagues in public causes, democracy could be made to work. The effort he was best equipped to expend lay in the area of the law, so he became a lawyer for the public. In doing so, he defined a lawyer as more than someone who knew enough to represent a client in a specific situation and whose only clients were the individuals or groups who paid fees. The good lawyers were well-informed people who understood the workings of society and used their knowledge on behalf of their ultimate clients, the people.

Brandeis's role in the development of sociological jurisprudence, which may be defined roughly as the theory that law does and should reflect changing social realities and that the Constitution should be interpreted accordingly, was reflected first in the landmark *Muller v. Oregon* brief and later in his opinions as a Supreme Court justice.<sup>35</sup> Acceptance of the doctrine of sociological jurisprudence necessarily altered the lawyer's function. No good lawyer could argue for or against a law without understanding the social situation that had caused it to be enacted. Thus knowledge of the law was a necessary but insufficient precondition for fulfilling the job of an attorney. Oliver Wendell Holmes agreed, saying that "for the rational study of the law . . . the man of the future is the man of statistics and the master of economics"—although, when Brandeis joined Holmes on the Supreme Court, Brandeis's insistence upon knowing all the facts of a situation prompted Holmes' famous complaint to Frederick Pollock:

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35. *Muller v. Oregon*, 208 U.S. 412 (1908). The brief was reprinted as Louis D. Brandeis, assisted by Josephine Goldmark, *Women in Industry* (New York: n.d.). Opinions as a justice: see, e.g., *South Western Bell v. Public Service Commission*, 262 U.S. 176, 289 (1923) (concurring); *Olmstead v. United States*, 277 U.S. 438, 371 (1928) (dissenting); *St. Louis and O'Fallon Railway v. United States*, 279 U.S. 461, 488 (1929) (dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 287 (1932) (dissenting); *Liggett v. Lee*, 288 U.S. 517, 533 (1933) (dissenting); Felix Frankfurter, "Mr. Justice Brandeis and the Constitution," in Frankfurter, ed., *Mr. Justice Brandeis* (New York: 1972).

Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said "you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is."

But, Holmes told Pollock, he had no intention of following Brandeis's advice, because "I hate facts."<sup>36</sup> Brandeis loved facts, information, data, all of which he collected throughout his life. Today's public interest lawyers, who routinely immerse themselves in societal facts, are among the recipients of the Brandeis legacy.

It seems apparent even to one untrained in psychoanalysis that Brandeis's career as the "People's Attorney" had a psychological component and was a major element in the sense of self-fulfillment he radiated. He approached the public sphere with energy and delight; it was, as he said, his "luxury," and he clearly revelled in it. That is not to negate the importance of the work. And it should be noted that Brandeis was not willing to leave the work to the elite. There is no question that, initially, he was an elitist. Even when he became convinced that unions were necessary, he placed his faith in union leaders rather than the rank-and-file worker. He said in 1905, "Democracy is only possible, industrial democracy, among people who think; among people who are above the average intelligence." He also stated that those with the "greatest ability and intelligence" should contribute the most in responsible leadership of the society.<sup>37</sup> It was in fact his elitist view of democracy that led to his sense of obligation about public work. His public work, however, altered his ideas about democracy, and particularly about who should participate in democracy.

Perhaps the greatest alteration in Brandeis's thinking about the linkage among democracy, the law, and the role of the attorney as opposed to other citizens occurred in 1910, when he was called upon to arbitrate the New York garment workers' strike. His involvement resulted in another crucial transforming experience.

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36. Statistics: Oliver Wendell Holmes, "The Path of the Law" in Holmes, *Collected Legal Papers* (New York: 1921; New York: Peter Smith, 1952), p. 166. Facts: Holmes to Pollock, Mark DeWolfe Howe, *The Holmes-Pollock Letters* (Cambridge, Mass.: 1941), II:13-14.

37. LDB, address before the Filene Co-operative Association, May, 1905, published in *Filene Association Echo*, May 1905, reprinted as "Industrial Co-operation" in LDB, *Bigness*, pp. 35-37. Greatest ability: LDB in *Boston Herald*, June 14, 1905, quoted in Mason, *Brandeis*, p. 123.

Brandeis had been wrestling with the way to bring Jeffersonian democracy into the industrial sphere, a method by which industrial workers could be as economically free and therefore as independent as the farmers of the Jeffersonian era. He had learned that more people were capable of governing their lives than he originally thought. The women he met in public life—Jane Addams, Florence Kelley, Mary Kenney, his sister-in-law Josephine Goldmark, who was his partner in the brief submitted under his name in *Muller v. Oregon*—had convinced him that women were as entitled to the vote and as qualified to hold office as were men.<sup>38</sup> But he knew he was dealing with unusually capable women, as most of the men in his world were unusually capable. If he championed political and economic democracy, did he not have to believe that men and women who were not among the elite were equally able to govern themselves? Could the average worker really be a full partner in a political or economic democracy? He had no answer, in part because he had little occasion, before 1910, to meet the average worker.

Most of the garment workers he encountered during the strike were Jewish immigrants from Eastern Europe, as were their employers. This was a group totally unknown to Brandeis, whose family came from the Austro-Hungarian Empire and whose clients and colleagues in Boston were mainly Jews with a background similar to his, or Boston Brahmins or other non-Jews. Suddenly he found himself meeting “unskilled” laborers who astonished him with their intelligence, rationality, openness to democratic procedures, tolerance for each other’s viewpoints, sense of equality, and knowledge. He realized he had discovered the citizens of his ideal democracy, the workers who could quiet his remaining doubts about the democratic potential of the working class. He was impressed when he heard a disgruntled worker thundering at his employer in the words of 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 God of hosts.

Here was no paucity of erudition, no lack of democratic precepts, no inability to grasp economic truths. Brandeis was so enchanted that he spent his evenings relaxing with the workers’ negotiating com-

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38. Lief, *Brandeis*, pp. 183, 210; Strum, *Brandeis*, pp. 128–130.

mittee and, even though he had supposedly given up alcohol years before as unnecessary, drinking beer with them while he recounted stories of the federal Pinchot-Ballinger hearings.<sup>39</sup>

Perhaps his mental picture of workers from that time on was of the literate, articulate Jews he found in the garment industry; perhaps his theories of industrial relations were postulated on the assumption that such workers were the norm; perhaps his intellectual sympathy for the worker was reinforced by the emotional tie that he, who had placed no importance on his Jewishness, was surprised to find himself feeling for these fellow Jews. Whatever the case, Brandeis had no difficulty imagining them as the citizens of a democratic state, with rights as well as responsibilities, fighting if necessary for the leisure time during which they could both fulfill themselves and immerse themselves in the democratic process. His attitude toward political democracy and economic democracy dovetailed. He came to believe first that corporations should share their profits with their workers, then that workers should play a role in the decision-making process of the corporations for which they worked, and eventually that the future lay in worker-owned companies.<sup>40</sup> Brandeis was determined to help save American democracy by working to transform the American economic system. The citizen of a democratic community, whether that community was a state or a worker-owned corporation, had responsibilities as well as rights. Foremost among the responsibilities was informed participation on behalf of the community, precisely the function Brandeis performed in his role as the People's Attorney.

The example of Brandeis lay before the organizers of two of this country's most important public interest groups, the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). He was already recognized as one of the nation's great attorneys when the former was founded in 1909 and was a member of the Supreme Court when the latter was organized in 1920. He was not immediately involved in either; rather, his influence lay in the model he presented and in his numerous connections to their personnel. The first was to be found both in the cases he litigated without fee and his role as a founder,

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39. Worker and Isaiah (the quote is from Isaiah 3:3): Milton R. Konvitz, "Louis D. Brandeis," in *Great Jewish Personalities in Modern Times*, ed. Simon Noveck (Washington, D.C.: 1960), p. 300. Giving up alcohol: LDB to Alfred, BP, Addendum, Box 1, folders 1-3 and folders marked 1910-1928; BP, M 2-4; interview with Mary Kay Tachau, June 12, 1980.

40. Strum, *Brandeis*, pp. 159-195.



cofounder, or active participant in public interest organizations such as the Election Laws League, the Public Franchise League, the Good Government Association and its Aldermanic Association, the Municipal Transportation League, the Savings Bank Insurance League, the Industrial League, the Advisory Committee of the National Municipal League's Municipal Taxation Committee, the Civic Federation of New England, the National Committee of Economic Clubs, the People's Lobby, and the American Jewish Congress.<sup>41</sup>

A key personal connection was his protege Felix Frankfurter, perhaps his closest friend and certainly his closest professional colleague. Frankfurter was one of the ACLU's founders, activists and volunteer attorneys as well as a member of the NAACP's legal advisory committee.<sup>42</sup> The name most closely associated with the ACLU, however,

41. Boston groups: Mason, *Brandeis*, chs. 7, 8; Strum, *Brandeis*, ch. 5. American Jewish Congress: Melvin I. Urofsky, *American Zionism from Herzl to the Holocaust* (Garden City, N.Y.: 1975), ch. 5.

42. Frankfurter as ACLU activist: Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: 1990), p. 67. FF and NAACP: H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: 1981), p. 71; Richard Kluger, *Simple Justice* (New York: 1976), p. 115. The Brandeis influence on and overlap in ACLU and NAACP personnel was extensive. Brandeis urged Mordecai W. Johnson, the first black president of Howard University, to upgrade its law school, for example, and it was Charles Houston, one of the students whom Felix Frankfurter "saw intimately" and who spent an extra year at Harvard studying under Frankfurter for the degree of Doctor of Juridical Science, to whom Johnson gave the job. Kluger, pp. 125, 116. The first Brandeis-style brief the NAACP submitted, in *Shelley v. Kraemer* (334 U.S. 1 [1928]), the case in which the Supreme Court struck down private restrictive covenants, was written by Houston. Kluger, pp. 253–254. Houston also sat on the board of the ACLU, as did such other NAACP leaders as James Weldon Johnson, Thurgood Marshall, Roy Wilkins and Robert L. Carter. Walker, p. 68. Nathan Margold, the former Harvard Law School student who taught at Harvard after his graduation and whom Brandeis unsuccessfully tried to keep in a teaching career, worked out the NAACP's ultimately successful strategy to overturn the separate but equal doctrine. Margold and LDB: LDB to FF, February 11, 1928, February 29, 1928, March 29, 1928, and April 21, 1928, in Melvin I. Urofsky and David W. Levy, "*Half Brother, Half Son*": *The Letters of Louis D. Brandeis to Felix Frankfurter* (Norman, Okla.: 1991), pp. 320, 324, 329, 330–331. NAACP strategy: Nathan Margold, "Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the N.A.A.C.P.," Margold Papers, Library of Congress, NAACP Papers, Container 200; also in New York City 42nd St. Library. ACLU attorney Walter Pollak, a Harvard Law School graduate about whom LDB wrote to FF, appeared before the Supreme Court in *Gitlow v. United States* (268 U.S. 652 [1925]), in which the Court extended the First Amendment's right of speech to the states, and in which LDB joined Holmes' notable dissent agreeing with the extension but objecting to the Court's upholding of Gitlow's con-

is that of Roger Baldwin. Baldwin's father was a client of Brandeis's, and shortly after Baldwin graduated from Harvard College he had sought Brandeis's advice about whether he should follow his father's path into the world of business or Brandeis's path into the world of public service. Brandeis "promptly, gently and firmly," according to Baldwin, steered him into a social work job in St. Louis, where Brandeis had begun his legal career.<sup>43</sup> One result of Baldwin's involvement in public service was the formation of the National Civil Liberties Bureau and its successor, the ACLU. Baldwin was a major force in its creation, the founder who devoted the greatest amount of time to it, and its executive director from 1920 to 1950.<sup>44</sup>

Brandeis's knowledge of and approval of the ACLU, and his continuing relationship with Baldwin, are evident from some of his letters to Felix Frankfurter. In one, Brandeis mentioned a project undertaken by the Scripps-Howard newspapers at his behest, documenting the extent of government spying on citizens. Brandeis heartily disapproved of what he referred to as "government espionage," calling the people who undertook it "government prostitutes." He suggested the researcher seek information in the ACLU's files. In another letter he counselled the ACLU to take up the cause of Chinese residents in the United States. In a third he mentioned agreeing with Baldwin about illegal police interrogations.<sup>45</sup> The ACLU has honored Brandeis's legacy: its national office and 50 affiliate branches now represent the public interest without fee in some 6,000 cases a year, many handled by volunteer attorneys.<sup>46</sup>

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viction. He also represented the ACLU in *Whitney v. California* (274 U.S. 357, 372 [concurring] [1927]), the occasion for LDB's famous concurrence expounding the importance of speech to a democratic society and expanding the "clear and present danger" doctrine. LDB to FF (about Pollak): March 21, 1916, FF-HLS. ACLU attorney Osmond K. Fraenkel edited the articles by LDB that were reprinted as *The Curse of Bigness*. Longtime ACLU Board member Dorothy Kenyon, later a municipal judge, was one of LDB's correspondents about civil liberties matters. (LDB to FF, October 16, 1932, "Half Brother," p. 501.) When the ACLU's recent past president, Norman Dorsen, now a professor of law at NYU, graduated from law school, he clerked for Judge Calvin Magruder, who had been Brandeis's first law clerk.

43. Baldwin quoted in Walker, p. 32, citing Baldwin in the *New Leader*, October 18, 1941.

44. On organizing the ACLU: Walker, ch. 2.

45. LDB to FF, May 21, May 25, and September 26, 1927, FF-HLS; October 16, 1932, "Half Brother," p. 501. The term "government prostitutes" is in LDB to FF, February 4, 1927, "Half Brother," p. 272. Relationship with Baldwin: LDB to FF, September 6, 1921, FF-LC.

46. Figure supplied to author by Ira Glasser, ACLU executive director.

Most of the more recently established public interest groups were organized by lawyers who learned something about the People's Attorney in law school and were taught the sociological jurisprudence for which he must be given major credit. Brandeis believed law professors, with their secure incomes, had a particular responsibility to take on unpopular but important causes. He wrote that "one of the important by-products" of Frankfurter's intense involvement in the Sacco-Vanzetti case "is the assertion by Law School professors of the Law Schools' prerogative as guardians of law & justice." He was pleased when law professors at Yale and other universities joined Frankfurter in arguing that Sacco and Vanzetti should be retried because their first trial had not been fair.<sup>47</sup> His insistence that law school faculty, students, and law reviews had an obligation to speak and write about issues of public importance runs throughout his letters to Frankfurter.<sup>48</sup> He would no doubt be delighted to learn of the numerous law school professors who today routinely take on public interest work and of the "clinics," now in existence at many law schools, in which advanced students provide representation for public causes such as civil liberties, civil rights and environmental concerns. Brandeis wanted nonlawyers as well as lawyers to be involved in public affairs.<sup>49</sup> He urged democratic responsibility upon contemporaries who were educators in other disciplines, social workers, journalists, researchers. Their current counterparts, who spend substantial number of hours attempting to make the legal and political

47. LDB to FF, May 2, May 9, May 21, 1927, "*Half Brother*," pp. 289, 291, 292.

48. Among the things LDB mentioned to Frankfurter that he thought faculty members or contributors to law reviews should write about were government cancellation of naturalization (LDB to FF, September 16, 1923, FF-LC), limitations on the rights of Japanese immigrants to citizenship and land ownership (November 20, 1923, FF-HLS), workman's compensation laws (February 25, 1924, October 15, 1926, and March 16, 1928, FF-HLS), equal taxation of intrastate and interstate commerce (June 15, 1918, FF-HLS), wiretapping (June 15, 1918, FF-HLS), illegal police action (June 15, 1929, FF-HLS) and excessive fees received by railroad lawyers and bankers (January 6, January 26, and February 2, "*Half Brother*," pp. 449, 451, 453). Other such letters, too numerous to be cited individually, can be found throughout "*Half Brother*."

49. Brandeis urged Frankfurter to interest non-lawyer academicians and journalists in, e.g., tax exemptions of charitable organizations (December 21, 1926, FF-HLS), "the departures in practice from the American ideals of liberty & equality" (July 9, 1927, FF-HLS), unemployment (March 29, 1928, FF-HLS), the difference between wholesale and retail prices (February 2, 1931, "*Half Brother*," p. 452), and salaries paid to officers of banks, utilities and other large corporations (July 12, 1921, "*Half Brother*," p. 496).

process respond to the perceived needs of “the people,” also are walking a path illuminated by him.

By the time he left private practice for the Supreme Court in 1916, Brandeis’s view of democracy had become far from elitist. Democracy is a complicated concept. For many it means no more than rule by the majority. The American Constitution implicitly defines it as majority rule with protection for individual rights. Some of the analysts of democracy have defined it, variously, as a system in which the people choose among competing policy makers, a system which provides for the balancing of interest groups in the policy-making process, and a system in which there is relative equality of access to policy makers.<sup>50</sup> Brandeis regarded democracy as both process and goal: a process by which all human beings would develop. He wrote in his well-known 1922 letter to Robert Bruere that the “development of the individual is . . . 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.”<sup>51</sup> His conception of democracy was a dynamic one, in keeping with his fondness for the words of Matthew Arnold taught to Brandeis by his wife: “Life is not a having and a getting; but a being and a becoming.”<sup>52</sup>

Along with Jefferson, Brandeis found it impossible to imagine that the freedom for full development could exist when individuals were economically dependent. That is why economic democracy had to accompany political democracy; that is why anyone working on behalf of the public interest had to be concerned about economic as well as political rights. Brandeis rejected noblesse oblige for citizenship participation and worker participation. He wrote in 1912 that “what America needs is not that we do anything for these our fellow-citizens, but that we keep open the path of opportunity to enable them to do for themselves.”<sup>53</sup> He added the following in his letter to Bruere:

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50. Joseph Shumpeter, *Capitalism, Socialism, and Democracy* (New York: 1942); David Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: 1951); Ira Katznelson and Mark Kesselman, *The Politics of Power* (New York: 1987).

51. LDB to Henry Bruere, February 25, 1922, BP, NMF 15.

52. LDB to Alice Goldmark, October 27, 1890, Mason, *Brandeis*, p. 94. The lines are from Arnold’s *Culture and Anarchy*.

53. LDB, “The Regulation of Competition against the Regulation of Monopoly,” address given to the Economic Club on November 1, 1912 and printed in the *New York Times*, November 2, 1912; reprinted in LDB, *Bigness*, p. 110.

The great developer is responsibility. Hence, no remedy can be hopeful which does not devolve upon the workers' participation in, responsibility for the conduct of business. . . . This participation in and eventual control of industry is . . . an essential of obtaining justice in distributing the fruits of industry.

Again, the emphasis is on the individual: democracy "is possible only where the process of perfecting the individual is pursued." But individualism goes hand in hand with community, for the development of the individual "is attained mainly in the processes of common living."<sup>54</sup>

Brandeis saw each one of his fights on behalf of the public as one in which it was important for the public to be involved, in part because public support was necessary for victory and in part because that was his vision of democracy. He bombarded friends and acquaintances with letters virtually demanding their active participation; he wrote to prominent citizens, legislators and journalists, asking for support. He viewed the press as a major weapon in the battle for democratic reform, and he made certain that at least a large part of it was in his camp. In the fight against the Elevated, for example, he sent marching orders to Edward Filene, then head of the Public Franchise League's Publicity Bureau:

Have editorials and similar notices in various papers, particularly the Springfield Republican, the Worcester Spy, and the Pittsfield papers. . . . Have the labor organizations repeat their protest. . . . Have personal letters written to members from the Metropolitan District, particularly from Boston, by their constituents, and have these persons ask for seats in the House during the debate. . . . We rely upon you for hard work.<sup>55</sup>

He followed the same procedure in lobbying for passage of the first savings bank life insurance law, in creating the Savings Bank Life Insurance League, in tireless efforts to warn the nation of the dangers of the trusts and of bigness, in campaigning for Woodrow Wilson, and particularly in his role as head of the Zionist movement. He sent

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54. *Supra*, n. 51.

55. Letters to supporters: see, e.g., LDB to James R. Carter, March 24, 1900; to Laurence Minot, April 16, 1900; to Morton Prince, May 18, 1900; to Carter, January 28, 1901; to Minot, February 15, 1901; to Charles R. Saunders, June 4, 1901; to Morton Prince, June 6, 1901; all BP, NMF 2-5. Asking others for support: to Jerome Jones, March 24, 1900; to Edward A. Clement, April 18, 1900; to Arthur A. Maxwell, April 24, 1900; to John E. Parry, May 6, 1901; to William Schofield, May 27, 1901; to Guy W. Currier, June 8, 1901; all BP, NMF 2-5. Letter to Edward Filene: June 1, 1901, BP, NMF 2-5.

off a torrent of letters and urged others to send more; he virtually became a contributing editor first of *Collier's Weekly* and then of the *Survey* and of *Harper's Weekly*; he gave scores of interviews to journalists who would help in the educational process. Working the press was a tactic he followed, albeit more subtly, during the New Deal. Informed participation was a crucial component of democracy; public education preceded informed participation.<sup>56</sup>

The most important aspects of Brandeis's legacy as a public attorney perhaps can be summed up as follows: he began by assuming that lawyers, like others of relatively high status in society, had an obligation to shoulder the responsibilities of governing. This meant taking on public causes without thought of monetary gain. And had he done nothing more than provide the citizenry and so many lawyers who followed him into the service of the public with the model of lawyer as public citizen rather than lawyer as hired gun, he would have accomplished much. But he went further, becoming quite certain that democracy meant participation in their government by *all* citizens. His example is not simply one of an attorney in public life—a model that, as he correctly noted, had existed since the early days of the United States—but of a human being passionately committed to both political and economic democracy, to justice, to humanity. Brandeis, as Alvin Johnson commented, was an “implacable democrat.” Donald Richberg added that to Brandeis, “democracy is not a political program. It is a religion.”<sup>57</sup> His legacy lies in that intensity of commitment, in his zest for public service, his conviction that action on behalf of one's fellow human beings is fun as well a moral imperative, his refusal to abandon principles, his optimistic insistence that well-meaning human beings could solve all the problems that faced their society.<sup>58</sup> Dean Acheson called Brandeis an “incurable op-

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56. See LDB, *Other People's Money* (originally written as articles for *Harper's Weekly*); *Letters*, volumes 1–3; Mason, *Brandeis Way*, passim; Strum, *Brandeis*, pp. 83, 84, 199–202, 250, 297, 376. When LDB was on the Court, two scholars have noted, he “was very nearly a member of [the *New Republic's*] editorial staff *in absentia*.” David W. Levy and Bruce Allen Murphy, “Preserving the Progressive Spirit in a Conservative Time,” *Michigan Law Review*, 78 (1980), p. 1282.

57. Johnson quoted in Alexander Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (Cambridge, Mass.: 1957), p. 163. Donald R. Richberg, “The Industrial Liberalism of Mr. Justice Brandeis” in Frankfurter, ed., op. cit., p. 137.

58. Public service as fun: LDB had spoken in 1905 about the duty of the “citizen of a free community” to take the responsibility of citizenship, “something that bears with it at times heavy burdens” but that was to be taken “not lightly but joyously.” LDB, “Industrial Co-operation,” *supra* n. 37, p. 37.

timist.”<sup>59</sup> He was an optimist, not a utopian: there is an important difference between the two. That he did not expect serious problems to be amenable to quick fixes is clear from his saying, twenty years after he invented savings bank life insurance, that it had not been sufficiently tested to be introduced in states other than Massachusetts. He knew it was impossible to be certain of the correctness of solutions without preliminary and continuing experimentation.<sup>60</sup>

American society today is overwhelmed by what sometimes seems an endless array of almost insoluble problems that threaten its very nature and continued existence: homelessness, poverty, destruction of the environment, worsening racism, technological and human assaults on privacy. If Brandeis's legacy is to be taken seriously, concerned citizens have no option but to roll up their sleeves and get busy—not just in solving problems but in convincing the people that they will be free only when they are involved in policy-making. For Brandeis did not really consider voluntary participation in public life a luxury, if luxury means something that may be enjoyed but can easily be given up. Participation in public affairs was a responsibility. Unless people accepted it, both they and their democracies would suffer. The People's Attorney expected democracies to be populated by Public Citizens. That is both his legacy and his challenge.

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59. Dean Acheson, *Morning and Noon* (Boston: 1965), p. 102.

60. LDB to Elizabeth Brandeis Raushenbush, April 8, 1926: “It is my hope . . . that no other state will try anything very like Savings Bank Insurance for some years to come. It will be better for all that Mass. should have become thoroughly permeated with S.B.I. before it is tried anywhere else.” *Letters*, V: 216.