Article

Elusive Advocate: Reconsidering Brandeis as People's Lawyer

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> If I know your sect I anticipate your argument. I hear a preacher announce for his text and topic the expediency of one of the institutions of his church. Do I not know beforehand that not possibly can he say a new and spontaneous word? Do I not know that with all this ostentation of examining the grounds of the institution he will do no such thing? Do I not know that he is pledged to himself not to look but at one side, the permitted side, not as a man, but as a parish minister? He is a retained attorney, and these airs of the bench are the emptiest affectation.
>
> —Emerson, *Self-Reliance*[1]

> I would rather have clients than be somebody's lawyer.
>
> —Louis D. Brandeis[2]

INTRODUCTION: BRANDEIS AND THE LAWYERING IDEAL

No one holds a surer place in American legal iconography than Louis D. Brandeis. And, unlike most celebrated jurists, Brandeis is almost as revered for his exploits as a lawyer as for his judicial works. Brandeis's biographers regularly call attention to the public spirit and daring he displayed as "the people's attorney."[3] Scholarly critics of mainstream legal professionalism likewise point approvingly to Brandeis's approach to the practice of law, sometimes citing it as an alternative to the crabbed and uninspiring ethic that is said to dominate American legal practice.[4] Since academic writing on lawyering has a characteristic concern with *praxis*, emphasizing norms of lawyer behavior (unlike, say, scholarship on constitutional law, whose content is mostly propositional), these paeans to Brandeis have the instructional tone

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1. RALPH WALDO EMERSON, *Self-Reliance*, *in* THE PORTABLE EMERSON 138, 144 (Carl Bode & Malcolm Cowley eds., 2d ed. 1981) [hereinafter EMERSON, *Self-Reliance*].

2. *Quoted in* Ernest Poole, *Brandeis: A Remarkable Record of Unselfish Work Done in the Public Interest*, *Foreword* to LOUIS D. BRANDEIS, BUSINESS—A PROFESSION at ix, l-li (1914) [hereinafter Poole, *Foreword*].

3. *See* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 77–95 (1946) [hereinafter MASON, FREE MAN'S LIFE]; ALPHEUS THOMAS MASON, BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE 14–39 (1933); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 30–41 (1984) [hereinafter STRUM, JUSTICE FOR THE PEOPLE]; PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 49–64 (1993) [hereinafter STRUM, BEYOND PROGRESSIVISM]; MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM 17–42 (1971) [hereinafter UROFSKY, A MIND OF ONE PIECE].

4. A notable example is DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY at xxiii, 169–74, 237–38 (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE]. I discuss the treatment of Brandeis by lawyering scholars in greater detail in Part II, especially in the text accompanying notes 83–107.

of "edifying" literature.[5] They invariably leave the reader with the message that, if she is a lawyer, she would do well to emulate Brandeis.

The reasons for Brandeis's heroic stature, the building blocks of his reputation as "the people's lawyer," are familiar. As an attorney who was both fabulously successful and deeply committed to the public interest, he is a consoling reminder that one can "do good while doing well."[6] He made a policy of refusing compensation for legal work that he thought raised "public" issues, a practice that speaks to our own sanctification of pro bono services. He is supposed to have scrutinized potential clients with a careful eye, refusing to handle cases in whose justness he did not believe and sternly commanding clients to refrain from taking manifestly antisocial positions in their legal disputes. During the Senate hearings on his nomination to the U.S. Supreme Court in 1916,[7] he faced fierce accusations that he had violated legal-ethical norms in his law practice, which is generally taken to mean that his ethical standards were superior, or at least visionary. He was the original "counsel for the situation," an appealing phrase whose provenance I will explore in some detail. His 1905 address "The Opportunity in the Law"—urging lawyers to stand "between the wealthy and the people, prepared to curb the excesses of either"[8]—is cited or excerpted in virtually every introductory casebook on professional responsibility.[9] And, most significantly, a good deal of detail adorns the account of Brandeis's heroics. In general, we have little information about the dilemmas lawyers face in their day-to-day encounters with clients and others, and the way in which they navigate those dilemmas.[10] But, largely because the 1916 hearings aired many episodes in Brandeis's lawyering career, we may learn about his lawyering methods from fact rather than myth.

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5. I use the term "edifying" in its sense of offering guidance for spiritual and moral improvement. *See* Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 503 (1995).

6. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.8, at 946 (1986) [hereinafter WOLFRAM, MODERN LEGAL ETHICS].

7. *See Nomination of Louis D. Brandeis: Hearings on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess. (1916). These hearings may also be found in 1–3 ROY M. MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1975 (1977). Subsequent citations to the nomination hearings will be to the Mersky and Jacobstein compilation.

8. Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559 (1905), *reprinted in* BRANDEIS, BUSINESS—A PROFESSION, *supra* note 2, at 329, 337 [hereinafter Brandeis, *Opportunity in the Law*].

9. *See infra* note 85.

10. *But see* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Sunday Shoes*]. One might, in addition, draw upon personal memoirs and other sources to develop historical portraits of particular lawyer-client interactions. But, because of his fame and stature, episodes in Brandeis's law practice seem almost uniquely destined for parable.

In this Article, I take a different view of Brandeis as lawyer. Most writers treating the subject have celebrated Brandeis's fierce independence from the constraining hand of powerful clients and his humanity in encouraging clients to understand their own interests as well as those of their adversaries and of society at large. But I see the same phenomena in a more ambiguous light. There was a downside to Brandeis's independent and directive approach to lawyering—an unwillingness to submit to the discipline of engagement with others (in particular, clients) that the act of representation necessarily imposes. This unwillingness was especially salient where matters of "public" import were concerned, for Brandeis's overriding priority seems to have been the integrity of his self-presentation in the public sphere. As Robert A. Burt has suggested, autonomy was not simply a lawyering ethic but was native to Brandeis's character; in his related pursuits of public interest law and political reform, Brandeis adopted a rhetorical and behavioral strategy distinguished by resistance to close identification with any group, political party, cause, or client.[11] His approach brings to mind words like "freedom," "independence," "autonomy"; it suggests his profound antipathy to acting as a mere "representative" of an anterior "interest." As a lawyer, Brandeis had numerous virtues, and he did not literally abandon or coerce clients. But his independence at times diminished client voice in a way that I would hesitate to erect uncritically into a lawyering ideal.

The aspiration to autonomy can be highly principled, and in Brandeis it accompanied an unfailing wisdom and commitment that make criticism seem almost uncivil. At first blush it may appear that Brandeisian independence is precisely what we need in a political and legal world with a diminished sense of ethical agency and autonomy. But the question of how, indeed if, one is to act in concert with others in such a world complicates the choice of Brandeis as a model for lawyering. In any relational context—and the realms of politics and lawyer-client interaction obviously qualify as such—one person's "freedom" or "autonomy" can come at a sacrifice of the power that others are able to assert. Of course, there is no easy answer to the choice between aloneness and solidarity, a choice that lies at the heart of all questions of social relations. The demands of personal and political loyalty, on the one hand, and the aspiration to self-construction, on the other, can make it difficult to know where to draw the line between autonomy and engagement. But Brandeis drew it consistently and severely at the point where engagement threatened political self-definition, and this is a crucial part of his legacy as lawyer and reformer. In the end, I am more critical than previous scholars have been of the autonomy exemplified by the most celebrated episodes in Brandeis's lawyering career; I find its impulse to be too escapist, too hostile to the spirit of

11. *See* ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 13–14 (1988) [hereinafter BURT, TWO JEWISH JUSTICES].

engagement that ought to inform one's actions within the lawyer-client relationship and in the public sphere more generally.

In isolating and exploring this trait of Brandeis as revealed in some well-known, but incompletely understood, episodes from his career in law and reform, I hope to add texture to the Brandeis image, which, notwithstanding some recent efforts to assess his life and career more critically,[12] remains heroic and two-dimensional. It is as if Brandeis's mode of autonomy in dealing with the world around him—that is, his political life—did not, like all meaningful choices, entail sacrifices and negations.[13] Brandeis's resolution of the claims made by autonomy and engagement is ultimately more edifying than the mesmerizing wisdom of his occasional speeches and comments, for we are interested in how to act, not simply in what to say or even what to believe.

Besides the light it sheds on Brandeis himself, my discussion of Brandeis's approach to lawyering in the public interest takes up more generally the ideals

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12. Brandeis's views on competitive capitalism and the "curse of bigness," which attained some currency during the New Deal but whose long-term influence has been very questionable, have been widely criticized in the last generation, most tellingly at the hands of Thomas K. McCraw. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, AND ALFRED E. KAHN 80–142 (1984) [hereinafter MCCRAW, PROPHETS OF REGULATION]; THOMAS K. MCCRAW, *Rethinking the Trust Question*, *in* REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 1, 25–55 (Thomas K. McCraw ed., 1981); Thomas K. McCraw, *Louis D. Brandeis Reappraised*, 54 AM. SCHOLAR 525 (1985). The debate on Brandeis's economic views is well summarized, together with citations to the relevant literature (and a good deal besides), in L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. L. REV. 596 (1988). *See also* Richard P. Adelstein, *"Islands of Conscious Power": Louis D. Brandeis and the Modern Corporation*, 63 BUS. HIST. REV. 614 (1989) [hereinafter Adelstein, *"Islands of Conscious Power"*]; Gerald Berk, *Neither Markets nor Administration: Brandeis and the Antitrust Reforms of 1914*, 8 STUD. AM. POL. DEV. 24 (1994); William E. Forbath, *Louis Brandeis*, *in* A COMPANION TO AMERICAN THOUGHT 87 (Richard Wightman Fox & James T. Kloppenberg eds., 1995). In addition, Brandeis's brief in Muller v. Oregon, 208 U.S. 412 (1908), long considered a landmark in the literature of "sociological jurisprudence" and constitutional advocacy, has endured some vigorous feminist criticism for its paternalist tenor and substance. *See* KATE MILLETT, SEXUAL POLITICS 88 (1970); Nancy S. Erickson, Muller v. Oregon *Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228 (1989). Skeptical accounts of Brandeis's role in specific reform episodes that had hitherto formed leading exhibits in his progressive image appear in ALBRO MARTIN, ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897–1917, at 194–230 (1971) [hereinafter MARTIN, ENTERPRISE DENIED]; JAMES L. PENICK, JR., PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR (1968) [hereinafter PENICK, PROGRESSIVE POLITICS AND CONSERVATION]; Richard M. Abrams, *Brandeis and the New Haven-Boston & Maine Merger Revisited*, 36 BUS. HIST. REV. 408 (1962) [hereinafter Abrams, *Merger Revisited*].

But this criticism, however meritorious in its own right, has done little to change the fundamental image of Brandeis as a man of wisdom and vision, from whom we can learn much of relevance to our contemporary dilemmas. In fact, exhortations to "get right with Brandeis" continue to proliferate. *See, e.g.*, BRANDEIS AND AMERICA (Nelson L. Dawson ed., 1989); STRUM, BEYOND PROGRESSIVISM, *supra* note 3; Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163; Helen Garfield, *Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival*, 69 OR. L. REV. 527 (1990) [hereinafter Garfield, *Twentieth Century Jeffersonian*]; Zacharias, *supra*.

The huge literature on Brandeis, which I will not catalog here, can largely be culled from the following sources: ROY M. MERSKY, LOUIS DEMBITZ BRANDEIS, 1856–1941: A BIBLIOGRAPHY (1958); GENE TEITELBAUM, JUSTICE LOUIS D. BRANDEIS: A BIBLIOGRAPHY OF WRITINGS AND OTHER MATERIALS ON THE JUSTICE (1988); BRANDEIS AND AMERICA, *supra*; Zacharias, *supra*.

13. "[A]ll liberations are won at a cost . . . . [A]ll choice involves negation." DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, at 16 (1975).

of lawyering and its paradigmatic function, representation. Valorization by other scholars of Brandeis's lawyerly "independence" or, in some cases, his "situational" approach to client representation has tended to assume that those ideals are themselves unproblematic. But Brandeis's manner of lawyering in the public interest suggests that neither engagement nor autonomy can serve as a comfortable resting place in our conception of the lawyer-client relationship, indeed of any relationship. What is most attractive about Brandeis is precisely what is most unsettling. I therefore hope that this Article will be of interest to students of lawyering and legal professionalism, particularly those who have been tempted to celebrate the Brandeisian traits I criticize here, as well as to those for whom Brandeis's life holds a special fascination.

Brandeis's profound sense of autonomy was not the product of an articulated ideology concerning the lawyer's proper role, but a way of being that characterized his actions in other spheres as well. Therefore I begin, in Part I, by examining Brandeis's mode of activity in a context that is related to, but distinct from, lawyering as such—his work in reform politics. Here I seek to demonstrate his antipathy to close affiliation with party, social group, warring faction, or any kind of constituency that might impair his freedom of action or self-presentation. This style of behavior was congenial both to Brandeis's temperament and to the Mugwump-Progressive political culture in which he operated, as is evidenced by his notable successes in reform. In Part II, I take up more explicitly Brandeis's lawyering in the public sphere, first describing the images of "people's attorney," "mediator," and "independent lawyer" that have traditionally attached to him and which I find too simplistic. I then proceed to a discussion of some significant legal representations undertaken by Brandeis, including his feeless work, his attempt to be "counsel for the situation," and his representation of the public, that again reflect his quest for an autonomous, self-defined voice in the public sphere. An underlying theme here is the dilemma of client *representation*—the constraints imposed by the role of representative and the desire to wriggle free of those constraints. Finally, in Part III, I reflect upon the larger issues of independence and engagement in the lawyer-client relationship. I articulate there my disagreement with some scholars who have cited Brandeis on behalf of their own lawyering visions, and I suggest why they have interpreted Brandeis in a manner congenial to those visions.

I. BRANDEIS AND REFORM POLITICS: THE POWER OF NONAFFILIATION

My focus in this Article is on the striking sense of autonomy Brandeis displayed in the lawyering situations that have drawn the most attention from scholars, and on the meaning of such autonomy for our vision of the lawyer-client relationship. Yet that autonomy formed but part of a larger pattern of nonaffiliation that Brandeis exhibited whenever he stepped into the public

sphere; it reflected an approach to political interaction, and not simply a conception of the lawyer's role. That aspiration to autonomy was not only native to Brandeis's temperament, but also highly honored by the political culture of his time. I therefore look first at Brandeis's political "style"[14] in the context of the late-nineteenth-century milieu in which he developed his basic political understandings, before turning in Part II to specific episodes in his lawyering career.

A. *Brandeis and Mugwump Political Culture*

Brandeis bore the marks of the "Mugwump," or liberal reform, culture in which he came to political maturity.[15] His biographers have at times underplayed this line of influence in favor of a more homely narrative—one in which Brandeis journeys from an aspiration to admission into Boston's staid Brahmin society, with its genteel combination of social insularity and concern for public affairs, to a more modern Progressivism, with its journalistic attention to real social conditions and its rhetoric (at least among a particular wing of Progressives) of "industrial democracy."[16] There is some truth in this narrative.[17] But preoccupation with Brandeis's early flirtations with "Brahmin" culture (an understandably arresting image given Brandeis's "outsider-ness"[18] and his later association with a more egalitarian tradition) should not obscure the importance of his relationship with the fervent liberal reformers who were more of his generation.[19]

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14. On political "style," see MICHAEL E. MCGERR, THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865–1928, at 9–10 (1986) [hereinafter MCGERR, DECLINE OF POPULAR POLITICS].

15. The term "Mugwump" usually refers to Republicans who publicly bolted the party in 1884 to vote for Grover Cleveland instead of James G. Blaine. Brandeis was assuredly one of these, but in associating him with a "Mugwump" mentality I refer to a broader segment of late-nineteenth-century political culture that embraces terms like "Liberal Republicans" (associated with the anti-Grant movement of 1872), "Independents," "liberal reformers," and "Cleveland Democrats" (a group that included numerous Mugwump bolters from the Republican party as well as many who had been Democrats all along). Of course, "Liberal" in this context is closer to the nineteenth-century than to the New Deal meaning of "liberalism." For useful accounts of this political movement, whose supporters were mostly in Massachusetts and New York, see GEOFFREY BLODGETT, THE GENTLE REFORMERS: MASSACHUSETTS DEMOCRATS IN THE CLEVELAND ERA 19–47 (1966) [hereinafter BLODGETT, GENTLE REFORMERS]; GERALD W. MCFARLAND, MUGWUMPS, MORALS & POLITICS, 1884–1920 (1975) [hereinafter MCFARLAND, MUGWUMPS, MORALS & POLITICS]; JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 111–41 (1968) [hereinafter SPROAT, "THE BEST MEN"]; and Geoffrey Blodgett, *Reform Thought and the Genteel Tradition*, *in* THE GILDED AGE 55 (H. Wayne Morgan ed., rev. ed. 1970).

16. *See, e.g.*, STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 10, 56 (describing Brandeis's interactions with Brahmin society).

17. Brandeis's friend and original law partner, Sam Warren, once remarked that as a young man Brandeis was "more Brahmin than the Brahmins," and Brandeis's later quarrels with his erstwhile Brahmin colleagues indicate that he had moved to a different set of political understandings. MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 4–5 (1981) [hereinafter UROFSKY, LOUIS D. BRANDEIS].

18. *See* BURT, TWO JEWISH JUSTICES, *supra* note 11, at 13 (on Brandeis's "self-conscious marginality").

19. *See* RICHARD M. ABRAMS, CONSERVATISM IN A PROGRESSIVE ERA: MASSACHUSETTS POLITICS, 1900–1912, at 56 (1964) ("Fundamentally, Brandeis represented an advanced variety of the 'Mugwump

Although there were variations among liberal reformers, the Mugwump creed was a concrete and coherent one. The defining issue for Mugwumps was the problem of corruption and dishonor in government, and their partially successful demand for civil service reform is their most durable legacy. Their conservative economic views led them to predictable if passionate positions in favor of tariff reduction and sound money; at the same time, the severity of their Darwinist outlook led some Mugwumps to nativism and an appalling insensitivity to the plight of Southern blacks.[20] The thread running through their crusade against governmental corruption and machine politics, their economic conservatism, and their social Darwinism was an insistence on honor, "manliness," and a haughty independence in the public life of the individual. Consequently, Mugwumps expressed disdain for the established political parties, with their emphasis on party regularity, ethnic loyalties, and devices for mobilizing masses of voters. The Mugwump affirmation of faith was summed up by one of their own, William Everett, who asserted, "When I am in a small minority I believe I am right. When I am in a minority of one, I know I am right."[21]

Brandeis does not appear to have shared, even as a young man, all of the social prejudices of the most precious Mugwumps, but he participated in several of their rites of passage.[22] Like Theodore Roosevelt, another repentant graduate of the nineteenth-century school of liberal reform, Brandeis throughout his public life celebrated the exercise of "manhood"—not simply as a synonym for "virility," but as a description of citizen honor, of resistance to forces that might erode one's character and independence.[23] Brandeis did,

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type.'"); ALLON GAL, BRANDEIS OF BOSTON 1–28 (1980) [hereinafter GAL, BRANDEIS OF BOSTON] (noting Brandeis's association with numerous liberal reformers and their causes); SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890–1920, at 82 (1964) [hereinafter HABER, EFFICIENCY AND UPLIFT] ("Brandeis was that special type of progressive whose chief ideals remained those of a New England mugwump but whose manners became that of a social engineer."); MCFARLAND, MUGWUMPS, MORALS & POLITICS, *supra* note 15, at 208 (listing Brandeis in author's compilation of "Mugwumps Living in 1910").

20. *See* SPROAT, "THE BEST MEN," *supra* note 15, at 12–44. Even liberals with authentic abolitionist credentials, such as Carl Schurz, called for an end to Reconstruction in the 1870s. *Id.* at 36–37.

21. *Quoted in* BLODGETT, GENTLE REFORMERS, *supra* note 15, at 42.

22. For example, Brandeis joined in the bolt to Cleveland in 1884; he railed publicly against municipal corruption on several occasions; his first testimony before Congress was in support of free trade; and he rejected the Democratic populism of William Jennings Bryan in 1896 and as late as 1908 voted for William Howard Taft over Bryan. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 54–55, 63–67; BLODGETT, GENTLE REFORMERS, *supra* note 15, at 225–26; Letter from Louis D. Brandeis to Alfred Brandeis (Nov. 4, 1908), *in* 2 LETTERS OF LOUIS D. BRANDEIS 213 (Melvin I. Urofsky & David W. Levy eds., 1972) [hereinafter LETTERS]. Bryan's ascendancy in the 1890s helped divide the Democratic party into a populist wing and a more conservative wing known as "Gold Democrats" (for their views on the currency question). Brandeis, like many Mugwumps who never returned to the Republican fold, tended toward the Gold Democrat view.

23. Brandeis frequently adverted to "manhood" and "manliness" in rallying his supporters in reform ventures. *See, e.g.*, Letter from Louis D. Brandeis to Charles Marshall Cox (June 5, 1914), *in* 3 LETTERS, *supra* note 22, at 270 (writing that New Haven transportation monopoly was "undermining not only the business but the morale and manhood of New England"); *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 138 ("We are not dealing here [in the Ballinger-Pinchot affair] with a question of the

it is true, gradually develop a far more nuanced economic outlook—for example, an appreciation of the role of organized labor in an industrial society—that took him well beyond the worldview of most liberal reformers. This is one reason why Brandeis attained a political relevance that no out-and-out Mugwump ever enjoyed.[24] But one fundamental attribute of Mugwumpery that Brandeis retained was an unqualified commitment to personal *independence*—to *freedom* from the constraining hand of groups and parties. For Brandeis, that commitment was more a way of being than an expressed ideology. And, more acutely than many Mugwumps, who trumpeted independence seemingly as an end in itself, Brandeis valued political nonaffiliation as a means of achieving his larger political goals.

One sees this, for example, in Brandeis's diffidence concerning the prospect of public office and his almost ostentatious refusal to associate himself with either of the major political parties. Having achieved considerable popularity in Massachusetts and a reputation for effectiveness in local reform, on a number of occasions Brandeis was importuned by both Democrats and Republicans to run for office, but he always declined.[25] His stated rationale

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conservation of natural resources merely: it is the conservation and development of democracy; it is the conservation of manhood."); *Quoted in* Adelstein, *"Islands of Conscious Power," supra* note 12, at 623 ("[W]e must have, above all things, men. It is the development of manhood to which any industrial and social system should be directed . . . ."); *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 276 (the Zionist goal in Palestine should be "a manly, self-supporting population"); *Quoted in* ALPHEUS THOMAS MASON, BUREAUCRACY CONVICTS ITSELF: THE BALLINGER-PINCHOT CONTROVERSY OF 1910, at 197 (1941) [hereinafter MASON, BUREAUCRACY] (celebrating "the virtues of manliness, of truth, of courage, of willingness to risk position, of willingness to risk criticisms, of willingness to risk the misunderstandings that so often come when people do the heroic thing"). This gendered rhetoric was not simply the expression of machismo or a resurgent primitivism. It linked courage with independence and a kind of "aloneness." Of course, its use by a Mugwump elite often derided as effete was not incidental. *See* SPROAT, "THE BEST MEN," *supra* note 15, at 68; MCGERR, DECLINE OF POPULAR POLITICS, *supra* note 14, at 44; BLODGETT, GENTLE REFORMERS, *supra* note 15, at 41 (noting derision of Mugwumps as effeminate); Arnaldo Testi, *The Gender of Reform Politics: Theodore Roosevelt and the Culture of Masculinity*, 81 J. AM. HIST. 1509, 1525–27 (1995).

24. *See* BLODGETT, GENTLE REFORMERS, *supra* note 15, at 273 ("It was not until Brandeis escaped from the political matrix of Massachusetts and could identify himself with the regenerated national Democratic party after 1910 that his Progressivism bloomed in full creative fashion.").

25. As early as 1890, Brandeis spurned the Democratic nomination for representative to the Massachusetts legislature as "one of the many things one must postpone or leave wholly undone." *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 67. In 1907, the local Republican machine sought to secure for Brandeis the Republican nomination for mayor of Boston, which he again turned down, citing commitments to other reform activities. *See* Letter from Louis D. Brandeis to Alfred Brandeis (Oct. 19, 1907), *in* 2 LETTERS, *supra* note 22, at 31. (Interestingly, Brandeis also observed in this letter to his brother, "My course in knocking heads right and left is not exactly such as to create an 'available' candidate." *Id.*) Elsewhere Brandeis put the matter more emphatically: "Nothing could be further from my thought than to be candidate for mayor, or for any other public office." *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 66. On at least two occasions, Massachusetts Democrats besought Brandeis to run for state attorney general, but they too were rebuffed. *See* Letter from Louis D. Brandeis to Norman Hapgood (July 9, 1913), *in* 3 LETTERS, *supra* note 22, at 128–29. Reasonably enough, Brandeis rejected Henry Morgenthau's scheme to have him turn down the Supreme Court nomination in 1916 (after his confirmation) so that he might run for U.S. Senator from Massachusetts on the Democratic ticket against Henry Cabot Lodge. *See* 4 LETTERS, *supra* note 22, at 139 n.2; Henry Morgenthau, *All in a Life-time: Chapters from an Autobiography, V. The Campaign of 1916*, 43 WORLD'S WORK 138, 141–42 (1921). Brandeis, by then an Associate Justice of the U.S. Supreme Court, declined Robert M. La Follette's

for refusing to run was his veneration of the role of "public private citizen" in a democracy. As he wrote to Harvey Wiley in 1913:

> I am sure you must have found, since retiring from office, what has been the experience of myself, who have never held any office, that there is great opportunity for helping the people as a public private citizen. Indeed I have been disposed to think that I could best serve the people in that humble capacity.[26]

There is much to commend in this republican vision of the citizen's role, and few have performed the role with greater skill and gusto than Brandeis.[27] But one need not deny that ideal's appeal as a principle of self-government in order to recognize its utility in enhancing the prestige and ideological power of the citizen who performs the role as comfortably as Brandeis did.[28] There were moments when Brandeis, in forgoing positions of institutional power, even nonelective positions, shrank from forfeiting the ideological capital of "public private citizenship" and its concomitant aura of nonpartisanship.[29] The more

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invitation to serve as La Follette's running mate in the latter's 1924 presidential bid on the Progressive party ticket. 2 BELLE CASE LA FOLLETTE & FOLA LA FOLLETTE, ROBERT M. LA FOLLETTE: JUNE 14, 1855–JUNE 18, 1925, at 1115–16 (1953).

26. Letter from Louis D. Brandeis to Harvey Washington Wiley (Dec. 9, 1912), *in* 2 LETTERS, *supra* note 22, at 725; *see also* Letter from Louis D. Brandeis to Raymond Wellington Pullman (Mar. 12, 1913), *in* 3 LETTERS, *supra* note 22, at 45 ("Do not believe anything you hear about my accepting an office. I am convinced my best usefulness will be as a public private citizen."); Letter from Louis D. Brandeis to Arthur Norman Holcombe (Oct. 3, 1912), *in* 2 LETTERS, *supra* note 22, at 699; Nadine Strossen, *The Lawyer and the Law Professor as Public Private Citizen*, 1986 AM. B. FOUND. RES. J. 107, 118–22 (book review).

27. *See* Philippa Strum's astute discussion of Brandeis's intense interest in Athenian democracy and in Alfred Zimmern's 1912 book, *The Greek Commonwealth*, a treatment that has spawned new efforts to claim Brandeis for "republican" ideology in its putative battle to the death with "liberal" ideology for the American soul. *See* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 237–43; Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 680–97 (1988) [hereinafter Blasi, *Civic Courage*]; Garfield, *Twentieth Century Jeffersonian*, *supra* note 12, at 571–88; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 458–66 (1988).

28. For contemporary approval of Brandeis's disavowal of elective politics, see, for example, STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 205 (newspaper comment that "[a]s a private citizen [Brandeis] weighs more than a carload of [Massachusetts Governor and U.S. Senator] Murray Cranes. . . . Anyone who has ever heard him . . . must realize how little the senatorial toga would add to [his] stature . . . .").

29. With a minimum of effort, Brandeis might well have secured for himself the position of U.S. Attorney General or, later, Federal Trade Commissioner in the Wilson administration; each position would have offered him significant opportunity to prosecute policies for which he had long contended. In both instances he either declined to be considered or allowed his candidacy to wither. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 204–07; MCCRAW, PROPHETS OF REGULATION, *supra* note 12, at 125. Admittedly, there was vehement opposition to Brandeis's appointment as Attorney General in 1912, and confirmation would have been difficult and uncertain. Concerning the Federal Trade Commission, McCraw stresses not only that Brandeis declined an appointment to the fledgling FTC, but also that, at the crucial moment, he shunned the opportunity to help shape the final versions of what would become the Clayton and Federal Trade Commission Acts in 1914. McCraw's characterization of this as "Brandeis' Abdication" seems harsh but aptly suggests Brandeis's distaste for the half-loaf politics that would have been required. *See id.* at 122. Even his appointment to the Supreme Court inspired some wistfulness concerning the end of what his wife termed his "knight erranting." UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 105 (quoting Alice Brandeis). The classical knight serves a superior, but "knights errant" are more sovereign agitators for honor and chivalry rather than for narrowly partisan ends. Brandeis himself gave this sober response to the

one studies Brandeis, the more one senses his reluctance to act in a "representative" capacity, with its attendant constraints, and public office confers that very responsibility—responsibility in the sense of accountability to others. While this preference for personal sovereignty—so reminiscent of the self-trust Emerson had commended to antebellum Americans—excluded Brandeis from the exercise of formal decisionmaking power prior to 1916, it also seems to have enhanced his credibility as a participant in public debate. And it ensured that he would be the sole architect of his message.[30]

Brandeis did not even identify consistently with either of the major political parties, an elusiveness that appeals to present-day ideals of political self-definition but that perplexed some men raised on the nineteenth-century party loyalties the Mugwumps had condemned.[31] This distance from parties likewise fortified his image as an independent, nonaligned public servant. Even after the election of 1912, when he campaigned first for Robert M. La Follette (an early aspirant for the Republican presidential nomination) and then for the Democrat Woodrow Wilson, Brandeis languidly brushed aside questions of his party affiliation: "I like to think I am an economist and not a politician. I don't know that anyone would call me a Republican. I am a La Follette Republican or a La Follette Democrat or a La Follette Progressive."[32]

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nomination: "I am not exactly sure . . . that I am to be congratulated, but I am glad the President wanted to make the appointment, and I am convinced, all things considered, that I ought to take it." Letter from Louis D. Brandeis to Alfred Brandeis (Jan. 31, 1916), *quoted in* MASON, FREE MAN'S LIFE, *supra* note 3, at 466. See also Amos Pinchot's moving telegram to Brandeis upon the latter's confirmation, *in* 4 LETTERS, *supra* note 22, at 41 n.1.

30. For a more benign interpretation of Brandeis's distance from elective politics, see STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 67, 205 (stressing Brandeis's desire not to give up his law practice).

31. At times after 1896, Brandeis identified himself as a Democrat, but this designation was about as helpful in predicting his positions on candidates and policies as knowledge of his favorite dessert. Henry Cabot Lodge, well aware of Brandeis's influence in Massachusetts and national politics, expressed his irritation at this elusiveness at the time of Brandeis's nomination to the U.S. Supreme Court in 1916: "I did not know that Mr. Brandeis, who has been in and out of all political parties and of late has been a staunch Democrat, had such a hold on the Progressives." Letter from Henry Cabot Lodge to Arthur D. Hill, *quoted in* A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS 88 (1964) [hereinafter TODD, JUSTICE ON TRIAL]. Lodge, by this time the most stalwart of Republicans, well knew the stakes of choosing between independence and party loyalty. A Mugwump as a young man, he chose in the 1880s to foreswear stubborn independence in favor of the opportunities for advancement that commitment to the regular Republican organization could bring. Lodge attained national influence and stature as U.S. Senator from Massachusetts, but not without enduring the slings and arrows of Mugwumps who questioned his integrity in abandoning liberal reform. *See* BLODGETT, GENTLE REFORMERS, *supra* note 15, at 41.

32. *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 202. Though he had been perhaps the most loyal of La Follette's prominent supporters, Brandeis privately expressed relief at La Follette's withdrawal from the race, noting, "Personally I shall be glad to have no political obligations." *Quoted in id.* at 155. Of this remark, Philippa Strum states: "The reference to 'political obligations' presumably reflects Brandeis's unwillingness to take further time from his other work to campaign. . . ." *Id.* However, I discern in this remark Brandeis's sense of relief that he would be free to pursue an independent political line, a matter of some importance in 1912 because the closeness of the presidential contest placed considerable power in the hands of uncommitted political figures. Brandeis was unwilling to desert La Follette as many others had done, but he did not relish being condemned to irrelevance by La Follette's faltering campaign. As it turned out, Brandeis played a critical role in the formulation and articulation of Wilson's New Freedom, and he could hardly be termed "unwilling" to devote substantial time to Wilson's election effort—both as a strategist and as a campaigner. *See id.* at 196–204.

Such professions of detachment not only cleared for Brandeis a personal political space; they also constituted an uncommonly shrewd and effective rhetorical mode. In abjuring political parties, Brandeis was mining both traditional and contemporary veins in American political sensibilities, lending both progressive and comfortingly conservative overtones to his message. His professions of nonalignment echoed a traditional American theme of antipartyism that the Mugwumps had revived in the 1880s.[33] Most late-nineteenth-century liberal reformers did not seriously propose to remove parties from American politics, but they viewed loyalty to party as a fatal corruption of the judgment that the "independent man" in politics (the Mugwumps' highest accolade) ought to exercise.[34] Brandeis admirably fit this ideal of independence; but by joining it to more affirmative language about the need for social uplift, he avoided the siege mentality and tone of nostalgia characteristic of many Mugwumps, whose conception of politics seemed strangely impoverished. Many Mugwumps appeared troubled by anything that might threaten their own "minority privileges"[35] or divert individuals from their consciences, an attitude that by implication condemned not simply the excesses of parties but the collective nature of democratic governance itself.[36]

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33. On the course of antipartyism in the eighteenth and early nineteenth centuries, see Caroline Robbins, *'Discordant Parties': A Study of the Acceptance of Party by Englishmen*, 73 POL. SCI. Q. 505 (1958) (describing evolution of British antipartyism); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840 (1969); Ronald P. Formisano, *Political Character, Antipartyism, and the Second Party System*, 21 AM. Q. 683 (1969); DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 50–56 (1979) (discussing Whig antipartyism); Michael Wallace, *Changing Concepts of Party in the United States: New York, 1815–1828*, 74 AM. HIST. REV. 453 (1968) (discussing defense of parties made by leaders of New York's "Albany Regency"). On the highly partisan nature of American political culture in the mid- and late nineteenth century, see RICHARD L. MCCORMICK, THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA 200–03 (1986) [hereinafter PARTY PERIOD AND PUBLIC POLICY]; MCGERR, DECLINE OF POPULAR POLITICS, *supra* note 14, at 12–41; JOEL H. SILBEY, THE AMERICAN POLITICAL NATION, 1838–1893, at 2 (1991) [hereinafter SILBEY, THE AMERICAN POLITICAL NATION].

34. *See* SPROAT, "THE BEST MEN," *supra* note 15, at 60–62. However, a few Gilded Age academic theorists, more estranged from the center of American political life even than the Mugwumps, proposed to eliminate political parties altogether. *See* RICHARD L. MCCORMICK, *Antiparty Thought in the Gilded Age*, *in* PARTY PERIOD AND PUBLIC POLICY, *supra* note 33, at 228. Of course, the Liberals' rejection of partisanship and of the seemingly sordid politics of the Gilded Age proceeded to a disquieting degree from their revulsion at the mobilization of large numbers of ethnic voters by the urban political machines, a concern that seems never to have inspired Brandeis. *See generally* MARTIN J. SCHIESL, THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1880–1920 (1977) [hereinafter SCHIESL, POLITICS OF EFFICIENCY] (tracing connections between the anti-immigrant animus of Mugwump agitation for "good government" and the "municipal efficiency" movement, more technocratic in tone, that reached its peak in numerous American cities in early twentieth century).

35. BLODGETT, GENTLE REFORMERS, *supra* note 15, at 45.

36. A few Mugwumps, notably Moorfield Storey, could trace their own political views quite directly to the abolitionist tradition of the "Conscience Whigs" and never lost their fervor for politics as a civic duty. *See* WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 6–16 (1972). But the enthusiasm of many Mugwumps for limitations on suffrage and reduction of city government to "business principles" suggested their fundamental estrangement from democratic politics more generally. *See* MCGERR, DECLINE OF POPULAR POLITICS, *supra* note 14, at 45–52. As Geoffrey Blodgett has written:

> Their political isolation forced the Mugwumps through a remarkably swift conversion from the inbred values of intense localism fostered by the town-meeting tradition toward a view of their

Brandeis, by contrast, did not revel in political irrelevance, and in mobilizing political support for his various reform ventures, he never overlooked the powerful image of Massachusetts as a creator of American traditions as well as a contemporary leader among the states.

His soothing invocations of tradition and local prerogative made Brandeis's brand of reform independence more effective than the sniping of an outsider. The most vivid example was his rhetoric in the New Haven Railroad merger battle, where Brandeis's self-conscious identification with Massachusetts tradition was yoked to the spirit of localism for which he later became famous:[37]

> The question therefore up before us is whether the whole transportation system of Massachusetts shall be turned over to a single monopoly, and that one controlled by aliens—practically the Standard Oil and J.P. Morgan interests,—parties who have great interests in other states and little in Massachusetts, and are foreign to our tradition.[38]

This mode of debate was a regular feature of Brandeis's reform rhetoric in Massachusetts,[39] reflected in his preference for the term "Commonwealth" in referring to his adopted state.[40] He was not alone in using this faintly archaic term, which had long conveyed a venerable New England sense of mission, but

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political responsibilities as essentially detached and universal, toward a concept of representation that placed mind and principle above circumstance and number.

BLODGETT, GENTLE REFORMERS, *supra* note 15, at 42.

37. In the New Haven affair, Brandeis spearheaded the local opposition to the proposed merger of the New York, New Haven & Hartford Railroad Company with the Boston & Maine Railroad, a consolidation that would have given interests controlled by J.P. Morgan a virtual monopoly over the New England transportation system. For a fair-minded but critical assessment of Brandeis's role in this controversy, see Abrams, *Merger Revisited*, *supra* note 12.

38. Letter from Louis D. Brandeis to Edward Albert Filene (June 29, 1907), *in* 1 LETTERS, *supra* note 22, at 591, 592 (footnote omitted); *see also* Letter from Louis D. Brandeis to Bishop William Lawrence (May 14, 1908), *in* 2 LETTERS, *supra* note 22, at 148, 152 (stating that approval of the merger "would not be consistent with the honor of the Commonwealth"); Letter from Louis D. Brandeis to Editor, *Boston News Bureau* (Jan. 16, 1908), *in* 2 LETTERS, *supra* note 22, at 63, 64 ("I have opposed the proposed Merger as a citizen of Massachusetts desiring to protect it from what I believe would be a calamity to the people of the Commonwealth.").

39. Brandeis used this mode, in which he projected personal political ideology onto "Massachusetts tradition," in a variety of contexts, such as his advocacy of voluntary rather than compulsory old-age insurance: "Massachusetts, according to her traditions, is endeavoring to lead the way to voluntary as distinct from compulsory old age insurance. It seeks to make the superannuated working people independent instead of dependent." Letter from Louis D. Brandeis to Meyer Bloomfield (July 6, 1908), *in* 2 LETTERS, *supra* note 22, at 196.

40. Brandeis's rhetoric thus tapped the "Commonwealth tradition" of eighteenth- and nineteenth-century Massachusetts, in which pervasive governmental promotion of economic growth was linked to an ideology of harnessing private entrepreneurial energy for the common good. The classic work on this subject, OSCAR HANDLIN & MARY F. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861 (rev. ed. 1969), demonstrated how far antebellum political institutions in Massachusetts were from resting on genuinely laissez-faire premises. This was a tradition that many Mugwumps, with their commitments to laissez faire, preferred to play down.

it was a striking stratagem for a man bearing many marks of the outsider.[41] In identifying himself with the traditions of the Commonwealth of Massachusetts rather than with contemporary political alignments, Brandeis was not only appealing to authority on a specific political issue but also creating for himself a usable ideological past. Though his Jewishness would later inspire nativist whispers among some of his political opponents, this combination of the exotic and the traditional in one man helped create an image of Brandeis as sagacious and visionary.[42]

Brandeis's nonpartisanship thus referenced a venerable American tradition. But his influence in reform circles rested as well on his appeal to a more contemporary sensibility, that of the nonpartisan *expert*. An important strand of Progressive reform denied that many issues of social concern were "political" at all and amenable to the political process.[43] The antidemocratic implications of this technocratic impulse were alien to Brandeis's vision, and yet that impulse was pertinent to his contemporary image.[44] While Brandeis never embraced the most extravagant proposals of the "municipal efficiency" crowd,[45] his fame as "the people's attorney" rested in part on the perception that he could substitute an intimate knowledge of the facts of complex social problems for slogans and ideologies. This kind of nonaligned or nonpartisan expertise, which differed from the approaches of both party loyalists like Lodge and insurgents like La Follette, had a growing appeal for a Progressive political culture in which party bonds and voter turnout were deteriorating.[46]

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41. *See* BURT, TWO JEWISH JUSTICES, *supra* note 11, at 9 (noting that Brandeis "always found a place to stand alone"); GAL, BRANDEIS OF BOSTON, *supra* note 19, at 36–43.

42. *See "Up from Aristocracy"—The Career of the Bohemian Jew Named for a Seat in the Supreme Court*, 60 CURRENT OPINION 166 (1916); *see also* Poole, *Foreword*, *supra* note 2, at ix; Livy S. Richard, *Up from Aristocracy*, 79 THE INDEPENDENT, July 27, 1914, at 130, 132 [hereinafter Richard, *Up from Aristocracy*] ("There is . . . a certain fineness of conscience in Brandeis which is more suggestive of the Jewish prophet of old than of the twentieth century Big Business lawyer."). Note also the recollection of Elizabeth Glendower Evans, a reformer and friend of Brandeis, that her discovery that he was Jewish "gave an aroma to his personality. . . . A Jew! He belonged then to Isaiah and the Prophets." *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 17.

43. *See* HABER, EFFICIENCY AND UPLIFT, *supra* note 19, at 103–04 (discussing characteristic Mugwump and Progressive separation of politics and administration); SCHIESL, POLITICS OF EFFICIENCY, *supra* note 34, at 16, 73–75.

44. On the technocratic dimension of Brandeis's reformist persona, see David Luban, *The Twice-Told Tale of Mr. Fixit: Reflections on the Brandeis/Frankfurter Connection*, 91 YALE L.J. 1678, 1703–04 (1982) (reviewing BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982)).

45. For example, there is little evidence that Brandeis was especially interested in the proposals for the centralization of political authority that percolated in Boston, as in other American cities, in the late 1800s and early 1900s. While some of these proposals were designed to promote responsibility in the handling of public expenditures, others would clearly reduce the political power of ethnic voters in cities, like Boston, with a strong "ward" system. *See* SCHIESL, POLITICS OF EFFICIENCY, *supra* note 34, at 51–52, 68–70. On the other hand, a typical Brandeis rationale for a reform that he did play a large role in realizing, the sliding-scale mechanism in determining rates charged for artificial gas in Boston, was that it would "keep the Gas Co. out of politics." *Quoted in* MASON, FREE MAN'S LIFE, *supra* note 3, at 139.

46. On this trend, see MCCORMICK, PARTY PERIOD AND PUBLIC POLICY, *supra* note 33, at 7, 222–23, 346–48; MCGERR, DECLINE OF POPULAR POLITICS, *supra* note 14, at 151–53, 184–87; SILBEY, THE AMERICAN POLITICAL NATION, *supra* note 33, at 238–48. By 1920, this technocratic ideal had acquired a national symbol in Herbert Hoover, the popular, nonaligned engineer whose image resembled Brandeis's

The appeal of Brandeis's expertism had two dimensions. At the level of legislative politics, it was responsive to a hope that some issues of policy might be lifted from the chaos of politics and dealt with in a nonpartisan, scientific fashion—hence the "efficiency craze" of the early 1910s. Particularly after Brandeis's virtuoso performance in the Interstate Commerce Commission Advance Rate Case of 1910,[47] during which he brought the terms "efficiency" and "scientific management" into public view even more effectively (one might say efficiently) than Frederick W. Taylor had done, the respect accorded "the people's lawyer" began to resemble the enthusiasm for the "engineer" as a nonpartisan devoted solely to the improvement of life for "the people."[48]

The second, larger dimension of Brandeis's expertist appeal lay in its promise for marking out a neutral, "public" interest distinct from the interests of capital and labor. Here again one finds a striking illustration of the plaudits that accrued to Brandeis because of his independence of either party to a social conflict. After a generation punctuated by violent clashes between capital and labor, large segments of the public during the Progressive Era seemed to long wearily for a political space transcending that conflict, even as they acknowledged its reality.[49] Brandeis was one of the public figures who proved most consoling to those hoping for such a mediation of the seemingly irreconcilable interests of capital and labor. Although the debates over the Advance Rate Case of 1910 dealt more explicitly in the imagery of carriers, shippers, and consumers than in that of capital and labor, Brandeis's performance in those hearings reinforced the perception that he was able to mediate the selfish strivings of private interests—impliedly, those of capital and labor—all to the public good. An even more vivid illustration of Brandeis's image in this regard arose from his virtually contemporaneous

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in important ways. *See* JORDAN A. SCHWARZ, THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT 45 (1993) (describing Hoover as Wilsonian technocrat).

47. In the Advance Rate Case of 1910, Brandeis (representing a consortium of shippers opposed to the rate increases sought by the major railroads) made the startling claim that, by implementing principles of scientific management, the railroads could save a million dollars a day. *See* HABER, EFFICIENCY AND UPLIFT, *supra* note 19, at 53. For an entertaining account of the 1910 hearings, highly critical of Brandeis, see MARTIN, ENTERPRISE DENIED, *supra* note 12, at 194–230.

48. For a contemporary example of such a view, see Judson C. Welliver, *Louis D. Brandeis, Trouble-Maker*, 21 WORLD TO-DAY 1603 (1912). *See also* HABER, EFFICIENCY AND UPLIFT, *supra* note 19, at 51–55, 75–82; EDWIN T. LAYTON, JR., THE REVOLT OF THE ENGINEERS: SOCIAL RESPONSIBILITY AND THE AMERICAN ENGINEERING PROFESSION 144 (1971).

49. The ubiquitous three-member commission or three-part board, with representatives of capital, labor, and "the public," attested to this concern in the late nineteenth and early twentieth centuries. A picturesque illustration is the National Civic Federation (NCF), the classic Progressive Era corporatist organization, which was explicitly dedicated to providing a forum for representatives of capital and labor to find a middle ground between socialism and anarchic capitalism. It is not surprising to find Brandeis working closely with both the NCF and its regional and state affiliates in Massachusetts. For evidence of this work, see the numerous letters between 1904 and 1910 from Brandeis to Ralph Easley, founder and executive chairman of the NCF, reproduced in 1 LETTERS, *supra* note 22, at 259, 282–83, 304, 356, 357–58, 362, 365, 395–96, 488, 493–94, and in 2 *id.* at 12–14, 47, 394. For a useful discussion of the NCF, see JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900–1918, at 3–39 (1968).

orchestration of the "Protocol of Peace" in the New York garment trades.[50] A. Lincoln Filene, during his efforts to bring Brandeis into that bitter dispute, paid his friend this compliment, as quaint as it is revealing:

> I am going over with the idea of seeing some of the leaders among the employers' organizations and try to get them to secure Brandeis to represent them. If I fail in impressing them of the value of this, it is my intention to get Gompers to secure Brandeis. It does not seem to me to make very much difference which side has him so long as one side gets him.[51]

Filene's paean to Brandeis's transcendence of labor-capital conflict reflects the reformist faith of many Progressive Era figures, as well as the enigma of Brandeis's precise position on the "labor question."[52] As Richard Adelstein has pointed out, there is an unsettled quality to Brandeis's views on labor that makes simple characterization of them problematic.[53] By the turn of the century he had clearly come to accept the role of the large labor unions in the American economy and polity, and at times he suggested (though at a very abstract level) that the future of American enterprise lay in the sharing of both profits and managerial responsibilities between workers and employers.[54] At the same time, Brandeis's enthusiasm for scientific management disappointed many labor leaders, for whom "efficiency" signified the "speed-up" and the final elimination of whatever control labor retained in the workplace.[55] Other positions taken by Brandeis seemed designed to reproduce in working people the individualist, self-defining ideal by which he himself lived. For example, he fought hard against the "closed shop" and remained to the end of his life troubled by what he regarded as its coercive nature.[56] Just as Brandeis considered basic to his own personhood the freedom to choose whether to

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50. For an epic account of the adoption of the "Protocol of Peace," see LOUIS LEVINE, THE WOMEN'S GARMENT WORKERS: A HISTORY OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION 168–207 (1924) [hereinafter LEVINE, WOMEN'S GARMENT WORKERS]. *See also* MELVYN DUBOFSKY, WHEN WORKERS ORGANIZE: NEW YORK CITY IN THE PROGRESSIVE ERA 58–66 (1968); MOSES RISCHIN, THE PROMISED CITY: NEW YORK'S JEWS, 1870–1914, at 247–57 (1962).

51. Letter from A. Lincoln Filene to Edward A. Filene (July 18, 1910), *quoted in* 2 LETTERS, *supra* note 22, at 365 n.2.

52. *See* UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 34 (describing trust and respect for Brandeis by both labor and employers in 1910 garment workers' strike).

53. *See* Adelstein, *"Islands of Conscious Power," supra* note 12, at 619, 650.

54. *See* STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 34–42.

55. On Brandeis's role in popularizing "efficiency" and "scientific management," and labor's response, see HABER, EFFICIENCY AND UPLIFT, *supra* note 19, at 53–55, 78–82; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 160–67; Adelstein, *"Islands of Conscious Power," supra* note 12, at 646–52; Oscar Kraines, *Brandeis' Philosophy of Scientific Management*, 13 W. POL. Q. 191 (1960).

56. With a characteristic combination of realism and insistence on preserving the integrity of his own view, Brandeis, in helping to mediate the garment workers' dispute in 1910, ultimately succeeded in having the parties agree to adopt the principle of the "preferential union shop"—one in which openings would be offered first to members of the union, assuming equally qualified applicants. *See* LEVINE, WOMEN'S GARMENT WORKERS, *supra* note 50, at 189–90.

affiliate with parties and other political groupings, he regarded it as the birthright of every working person to choose whether or not to be represented by a union.[57]

It would be dogmatic if not anachronistic to regard this assortment of views on matters touching labor as incoherent or suspiciously inconsistent. Brandeis's rhetoric of both "industrial democracy" and "social efficiency" reflected the dual character of Progressive reform, a vision that was at once humanitarian and organizational, serving the ideals of both social justice and social control, both uplift and efficiency.[58] What is notable is the diversity of reform constituencies with which Brandeis was able to develop trusting relationships, exemplified by his fruitful connections with two characteristic, but very different, reform magazines of the era, the *Survey*[59] and the *New Republic*.[60] That Brandeis could appeal so powerfully to different sects within the broad movement for reform in the early twentieth century is evidence not of his insincerity or tentativeness but of his extraordinary success in embodying a special kind of freedom, the freedom of self-definition.

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57. Brandeis's privileging of "independence" (which overlooked the context governing "choices" made by workers) took a voluntarist, even antipaternalist turn in his campaign on behalf of Savings Bank Life Insurance, which he preferred to welfare systems dependent either on the state or on the employer:

> *What we want is to have the workingman free*; not to have him the beneficiary of a benevolent employer, and *freedom* demands a development in the employees of that self control which results in thrift and in adequate provision for the future. The development of our savings banks and savings bank insurance will be effective in this direction.

Letter from Louis D. Brandeis to Warren Augustus Reed (Dec. 3, 1906), *in* 1 LETTERS, *supra* note 22, at 504, 505 (emphasis added); *see also* UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 40 (quoting and discussing letter). The same impulse led Brandeis to oppose the adoption of a state-sponsored pension system. *See* Letter from Louis D. Brandeis to John Edward Pember (Feb. 4, 1908), *in* 2 LETTERS, *supra* note 22, at 73, 74–75.

58. *See* Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113, 115 (Dec. 1982) (discussing numerous dichotomies that historians have found in Progressive movement).

59. The *Survey* grew out of Paul Kellogg's work in the social welfare movement in Pittsburgh; it reflected Progressive interest in local social conditions and tended to be prolabor, localist, and feminist in outlook. In the 1920s, Brandeis plied Kellogg and his associates with a stream of ideas for articles and investigations, reflecting Brandeis's own emphasis on knowledge of local social conditions as a basis for public policy. On Brandeis and the *Survey* (to which Brandeis left a substantial bequest in his will), see CLARKE A. CHAMBERS, PAUL U. KELLOGG AND THE *SURVEY*: VOICES FOR SOCIAL WELFARE AND SOCIAL JUSTICE 116–17, 197–98 (1971).

60. By contrast to the *Survey*, the *New Republic*, reflecting the views of its founder, Herbert Croly, was militantly nationalist in its reform impulse, subordinating concern for specific questions of social justice to an almost mystical reverence for a vaguely "progressive" national policy. *See* CHARLES FORCEY, THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMANN AND THE PROGRESSIVE ERA, 1900–1925, at 178–217 (1961). Despite the fact that Croly's hospitality to economic consolidation and the centralizing trend of American politics flew in the face of his own ideals, Brandeis (after an initial period of hostility, *see id.* at 207–08) was able to maintain a respectful and productive relationship with the magazine, largely through his friendship with Felix Frankfurter, who played a major role in setting editorial policy during the late 1910s and early 1920s. On Brandeis and the *New Republic*, see David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916–1933*, 78 MICH. L. REV. 1252, 1281–85 (1980). *See also* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 375–77.

B. *Fusing the Self and the Whole: Brandeis, "Interest," and Progressive Political Culture*

Brandeis's public persona thus embodied a productive ambiguity, in that the freedom or independence he sought provided the opportunity to articulate views, uncompromised by association with parties, groups, or mind-sets, that political culture often ruthlessly defines as conventional or natural.[61] There is no paradox in linking Brandeis's clear, uncompromising independence with ambiguity in his image, because ambiguity only acquires meaning in relation to a communal culture—a socially defined notion of the values and opinions that naturally "go together"—which is precisely the thing from which Brandeisian independence seeks refuge. Of course, there need be no artifice in taking a middle ground, in declining to be bound by the "either/or" of a social conflict whose parameters are defined by forces outside oneself. A person can sincerely believe that the truth lies closer to the golden mean than to the endpoints of such a conflict; indeed, it is part of the Emersonian tradition to proclaim freedom from preexisting definitions of permissible beliefs, issues, and loyalties. Brandeis's ambiguous place within labor politics or other social issues of his time is no more in need of apology than is the difficulty of placing him on the spectrum of "Progressive" attitudes that historians have constructed after the fact.[62]

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61. One can usefully contrast Brandeis's approach with the more ideological and solidaristic mode adopted by his friend Robert M. La Follette, Governor and later U.S. Senator from Wisconsin, with whom Brandeis was in agreement on a great many political issues. La Follette, while willfully independent in his own way, exemplified the "insurgent" spirit of Progressivism; he believed even more fervently than most other Progressives in a unitary public interest—one which "the people" necessarily embodied—that was threatened by selfish individuals and corporations, and with which he was in complete solidarity. This was not the fugitive independence of self-definition, as I have ascribed it to Brandeis, but independence from one particular monolith of financial and political oligarchs in order to empower the other side, what La Follette conceived as "the united community of consumers and taxpayers." DAVID P. THELEN, ROBERT M. LA FOLLETTE AND THE INSURGENT SPIRIT 99 (1976) (the last quoted words are Thelen's) [hereinafter THELEN, ROBERT M. LA FOLLETTE]. The curious mixture of independence and solidarity conveyed by La Follette throughout his political life could never have formed a part of Brandeis's rhetoric. For an evocative illustration of La Follette's rhetorical professions of solidarity with the people, see ROBERT M. LA FOLLETTE, LA FOLLETTE'S AUTOBIOGRAPHY (1960) [hereinafter LA FOLLETE'S AUTOBIOGRAPHY]. For an astute assessment of La Follette's place within Progressive political culture, see THELEN, ROBERT M. LA FOLLETTE, *supra*.

62. Like his position on the question of labor, Brandeis's ambiguous relationship to women's demands for justice and equality in the early twentieth century merits further exploration. While his role in briefing and arguing Muller v. Oregon, 208 U.S. 412 (1908), and subsequent maximum-hours and minimum-wage cases marked him as an ally of Florence Kelley and other social feminists, the extent to which he shared their larger social agenda remained and remains unclear.

The meaning of *Muller* has itself had a fascinating history. Presumably, its contemporary meaning could not be wholly detached from the questions of gender, home, workplace, and state that most concerned Kelley and those who worked with her. But in the traditional legal history narrative *Muller* has, if anything, stood *more* conspicuously for progressive developments in the more abstract realms of constitutional reasoning and appellate advocacy. Until quite recently, *Muller* has generally been treated as a heroic episode in American constitutional politics, not because of any particular concern with gender, but primarily because of its juxtaposition with Lochner v. New York, 198 U.S. 45 (1905), and its place generally in the standard narrative of the evolution from judicial supremacy to legislative supremacy culminating in the New Deal. *Muller* represented a blow for judicial restraint and for sociologically informed legal argument. *See*

Yet one can concede all this and still marvel at Brandeis's success in identifying his views, so solitary in conception, with the good of the public. It is this paradoxical identification with the good of the whole that made Brandeis's aloneness so powerful an image. A few contemporaries, however, found exasperating his ability to persuade both sides in a bitter conflict of his fundamental wisdom, as this statement, attributed to Big Bill Haywood, leader of the Industrial Workers of the World (IWW), suggests:

> This fellow Brandeis . . . is the most dangerous man in the United States. . . . Brandeis is the kind of a man the I.W.W. has got to look out for. Brandeis knows something about capital and labor. He isn't one of these highbrow reformers who is sure to make a fool of himself. That's why I say he is in our way. The workers trust him even when he goes against them. Think of it. He tells them they're wrong here and wrong there, he defends the manufacturers more than half the time, and still they believe him. They even say he was right sometimes when he decided against them. They're a pretty sentimental lot in the working class, and I think they'd follow Brandeis to Kingdom Come because they say nobody can buy him, that he's not in this for himself, and that he's the whitest man who ever mixed up in the class struggle. That's what makes him so damned dangerous. If he were a fool, if he didn't know all about everything, if he were in it for Brandeis, if there were only something the matter with him, he wouldn't be messing things for the I.W.W. wherever he goes.[63]

Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 365 (1916) (*Muller* important "not because of its decision" but because of "the way in which Mr. Brandeis presented the case"); Letter from Roscoe Pound to Senator William Chilton (1916), *quoted in* STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 62 ("The real point" of the Brandeis brief and argument in *Muller* "is not so much his advocacy of these statutes as the breadth of perception and the remarkable legal insight which enable him to perceive the proper mode of presenting such a question." (citation omitted)); PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 86 (1949) (calling the Brandeis brief "[p]robably the most notable contribution to the lawyer's technique in constitutional cases"); JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908–1940, at 29–30 (1981) (describing "revolution in legal analysis" and "informational mind-set" epitomized by Brandeis brief). And since nobody finds Justice David Brewer's majority opinion in *Muller* especially praiseworthy, there is almost a tendency to regard Brandeis as the true author of the opinion—a remarkable fact that is underscored by Brewer's highly unusual reference to Brandeis in his opinion. *See* 208 U.S. at 419. This view of *Muller* as a salutary development in constitutional interpretation appeared immediately and continued throughout this century. But it abstracted the meaning of *Muller* so that it had less to do with women or work or the state as such than with styles of judicial reasoning. It was not until the case of Automobile Workers v. Johnson Controls, 499 U.S. 187 (1991), that the Supreme Court, albeit in dictum, revisited the gender implications of *Muller* and found them wanting: "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908)." 499 U.S. at 211.

63. *Quoted in* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 167–68 (internal quotation marks omitted).

These earthy and unselfconscious remarks, whatever their origin,[64] capture something important about Brandeis's image within Progressive Era political culture. They call to mind a characteristic typology of liberal politics, in which *self* (the individual), *group* (the "interests"), and *whole* (the public) are accorded varying degrees of honor and importance. Consider Haywood's lament concerning the power of his contemporaries' perception that "nobody can buy him . . . he's not in this for himself . . . if [only] he were in it for Brandeis." According to Haywood, workers found Brandeis persuasive and believable, although he was not palpably "of" them, because his views were not dictated or foreordained either by another person or group ("nobody can buy him") or by consideration of his own advantage ("he's not in this for himself"). The "freedom" thus exemplified by Brandeis resonated within Progressive political culture. As a unit of political action, the group—the notion that political identity is defined through association with one or more others—was viewed with increasing suspicion by adherents of the modernizing (if often reformist) impulse of the early twentieth century.[65] As historian John Buenker has noted, the Progressive Era witnessed "a struggle between two competing political cultures"—those of "sovereign individuals" and "organic networks":

> [T]he common assumption of modernizers, cosmopolitans, structural reformers, mercantilists, and advocates of the "new politics" was a universe of independent, rational, "modern" individuals, while that of traditionalists, parochials, social reformers, militants, and proponents of the "old politics" was a world of interdependent families, neighborhoods, and socioethnic groups.[66]

Brandeis's image of disinterestedness made him an archetype of the first of these two categories—the ascendant one. As Richard M. Abrams has observed in an astute essay on Brandeis that deserves to be better known, group loyalty as a mode of political action was antithetical to Brandeis's outlook.[67] Even his oft-cited encounter with Jewish garment workers in 1910

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64. Philippa Strum identifies the memorandum setting out this statement and attributing it to Haywood as "an interesting, unidentified typescript in the Library of Congress's Frankfurter papers, which appears to be a draft of a speech or article." *Id.* at 167. I attribute the remarks to "Haywood" because it is less important that he in fact uttered them than that he could plausibly have been thought to have uttered them.

65. *See* THELEN, ROBERT M. LA FOLLETTE, *supra* note 61, at 100 ("In a majoritarian world there was only the individual and the majority, and [progressive] insurgents wanted people to resist all other loyalties. Senator John Works of California condemned any group discipline, whether caucus discipline over legislators, organized medicine's over doctors, or labor unions' over workers.").

66. John D. Buenker, *Sovereign Individuals and Organic Networks: Political Cultures in Conflict During the Progressive Era*, 40 AM. Q. 187, 188 (1988).

67. Richard M. Abrams, *Brandeis and the Ascendancy of Corporate Capitalism, Introduction* to LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT at vii, xxi (Harper Torchbook ed. 1967) (1914) [hereinafter BRANDEIS, OTHER PEOPLE'S MONEY] ("Brandeis tended to view himself, with some good reason, as working within the policy-making councils of the nation. And yet, he never acquired

and his later leadership of the world Zionist movement never really impressed Brandeis with the importance of what today might be called identity politics. Buenker is correct to observe that the modernizing culture, celebrating the sovereign individual, triumphed; that is not to say, however, that a competing view was lacking. The comments of Haywood—who would have favored a particular type of organic loyalty, namely, working-class solidarity—evidence his frustration that some "sentimental" workers were evidently willing to place their trust in a disinterested figure like Brandeis.[68]

The crucial ideological move of the modernizing or rationalizing impulse discussed by Buenker is the devaluing of "group" or "organic" loyalties and the simultaneous fusing of "individual" with "public." The Mugwump could celebrate the hermetically sealed conscience of the individual because a noble individual like himself, unenslaved by ethnic or party loyalties, would of course have only the public good in mind. This notion of the public good, abstracted and definable by the uncorrupted individual rather than through the communal process of collision and interaction among individuals and groups, characterized much Progressive political thought.[69] Many Progressives did forcefully condemn what Herbert Croly called the materialistic tradition of Jeffersonian individualism in American society;[70] but there is a difference between conceiving the sovereign individual as the source of *political* consciousness and political choice ("When I am in a minority of one, I know I am right"), and conceiving it as a source of *material* or *economic* "interest" ("He's in it for himself"). In the Mugwump-Progressive conception, "interest," whether that of individuals or groups, was corrupting of or troubling for democratic politics when it took the form of *material* or *economic* interest, as

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the instinct for group loyalty that appears to have governed so much of the behavior of the country's policy makers.").

68. Some workers, such as the New York garment workers in 1910, may have come to trust Brandeis because of his own status as Jew and outsider—an organic bond in its own right. But it remains the case that Brandeis acted not as partisan but as mediator during the 1910 strike and its aftermath, and Haywood (who, admittedly, represented a constituency within the labor movement that was light years away from the garment workers culturally) was decrying the force exerted by precisely this image of the mediator.

69. As political scientist Jeffrey Leigh Sedgwick has noted:

> [W]hereas the Founders understood a community to be founded out of an interplay of the parts, different in kind, that composed it, the Progressives appear to have understood the public interest to have been conceptually distinct from such an accommodation of parts. For some Progressive thinkers, the public interest is embodied in the president who holds an electoral mandate; for others, neutral competence and professionalism seem to be the path to the common good. . . . This is community derived not by dialogue among parts different in kind, but rather community by abstraction from difference.

Jeffrey Leigh Sedgwick, *Of Centennials and Bicentennials: Reflections on the Foundations of American Public Administration*, 19 ADMIN. & SOC'Y 285, 306, 299 (1987).

70. *See* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (Arthur M. Schlesinger, Jr., ed., Belknap Press, 1965) (1909) (exhorting American public to rally behind mystical and vaguely defined "national interest" and shed its materialistic, Jeffersonian past). For a recent analysis of Progressive political ideas that seeks to recapture the nationalist vision exemplified by Croly, see ELDON J. EISENACH, THE LOST PROMISE OF PROGRESSIVISM (1994).

when robber barons bought the votes of U.S. Senators, or when urban bosses traded jobs for the political support of the rank and file. Indeed, to most political commentators in the early twentieth century, this kind of self-dealing was what "interest" meant. It would have been uncharacteristic for Progressives to subject the notion of "ideological" interest (what one "truly wants" for the polity) to the same corrosive critique that they applied to economic interest. The very etymology of the word "interest" suggests the centrality of economic or financial concepts to the term; before it came to mean "attraction" or "concern" or "stake" in a general or non-economic sense, it had acquired its meanings as a "share in land" or compensation for the incurring of a debt.[71] The reformist rhetoric of the Progressive Era, which did more than anything else to make the phrase "the interests" "a smear of no mean force,"[72] bound the political meaning of "interest" even more tightly to material and economic forces.[73] That rhetoric reflected an animating impulse of Progressive reform, what Richard L. McCormick has called "the discovery that business corrupts politics."[74]

Brandeis, like a number of apostles of expertise during the Progressive Era, could attain heroic stature pursuant to the terms of this typology because his disinterestedness made his commitment to the common good pure and incorruptible. He was nobody's man; nor was he motivated by the hope of personal gain. As Ernest Poole wrote admiringly in 1911:

> He has kept himself free: striving to hold a position of absolute independence "between the wealthy and the people." On the one hand, he has no close political ties: he has declined every proffer of office,

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71. It remains significant that our most general words for attraction or involvement ["interest," "interesting"] should have developed from a formal objective term in property and finance. The older general sense survives in a special form in certain types of 'conflict theory', where a 'conflict of interest' is seen as embedded in the social structure, often indeed in matters of property. . . . It seems probable that this now central word for attention, attraction and concern is saturated with the experience of a society based on money relationships.

RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 173 (rev. ed. 1985) (entry on "Interest"); *see also* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 156–59 (1967) (discussing etymology of "interest") [hereinafter PITKIN, CONCEPT OF REPRESENTATION].

72. DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 178 (1987) [hereinafter RODGERS, CONTESTED TRUTHS]. Rodgers's discussion of the use of the term "interests" in American politics has shaped my thinking about the issues discussed in the text.

73. See such muckraking classics as LA FOLLETTE'S AUTOBIOGRAPHY, *supra* note 61, at 60–76 (chapter entitled "The Crucial Period of My Public Life," dealing with attempt by U.S. Senator to bribe him to obtain favors from a local judge); DAVID G. PHILLIPS, THE TREASON OF THE SENATE (George E. Mowry & Judson A. Grenier eds., Quadrangle Books 1964) (1906); IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (Peter Smith 1963) (1904); and, of course, Brandeis's own OTHER PEOPLE'S MONEY, *supra* note 67.

74. RICHARD L. MCCORMICK, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, *in* PARTY PERIOD AND PUBLIC POLICY, *supra* note 33, at 311, 311–56; RODGERS, CONTESTED TRUTHS, *supra* note 72, at 185–86.

> has occasionally even refused to work for or against any candidate. On the other, he has no connection with any big corporation.[75]

Of course, such an iconography rested on arguable premises. The first is that the public interest or public good exists, not only apart from the sum of individual interests (a somewhat stale debating point in political theory) but also apart from the individual's imaginative act in perceiving and articulating it. One need not be wholly skeptical about the notion of a common good or public interest or altruism in order to question this assumption. We may agree that, however defined and whatever its sources, a sense of public-spiritedness is preferable to its absence or opposite. But that insight will not obliterate the role of the self in imagining and contending for the realization of that public interest. This has special relevance to Brandeis and his aura of disinterestedness (well captured by the label bestowed on him of "the people's attorney"), for he was seldom interested simply in registering his view or "vote" on a predefined menu of choices concerning public policy. Time and again his contribution to the solution of public problems lay in improvising a remedy that was not merely the sum or balance of contending views with respect to an issue but that itself constituted a new direction. Examples include his proposal for a "sliding scale" to calibrate the price charged for artificial gas to consumers in Boston; the "preferential union shop" in industry; and the development of "savings bank life insurance" as a means of providing security for wage earners. Once Brandeis determined in his own mind that these solutions were the best ones, he was not terribly interested in rethinking them or compromising on them. To be sure, an indefatigable immersion in the realities of a social problem, including his fabled interrogations of friends and acquaintances for information on subjects that interested him, underlay his solutions. But the solutions themselves were, in their conception and articulation, as "apart" as a work by Picasso.[76]

The second arguable premise in the iconography referenced by Haywood's and Poole's remarks is that to be "interested" is to be *materially* interested and not *ideologically* interested. There is, after all, an enigma in Haywood's observation that Brandeis "isn't in [it] for himself." That view of Brandeis,

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75. Poole, *Foreword*, *supra* note 2, at *l*. It is difficult to identify a prominent political figure about whom these sentiments could be expressed today. There remains, however, a periodic if fleeting attention to the "virtuous amateur" in politics, whose most recent archetype appears to be General Colin Powell. The first and preeminent "virtuous amateur" was our first President. *See* GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT (1984). I am grateful to Dan Levin for this reference.

76. Brandeis thus exhibited a brilliant command of the skill that Carrie Menkel-Meadow, in the context of negotiation as a device for resolving legal disputes, has termed "problem solving." *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter Menkel-Meadow, *Problem Solving*]. This skill is even more desirable in a mediator—the role with which Brandeis's behavior seems most resonant—than in a partisan. Unfortunately, a different skill of the mediator—the willingness to bend to the solutions preferred by another—was less native to Brandeis's temperament.

which was scarcely unique to Haywood, facilitated his image as a wise mediator rather than an interested partisan. The phrase—"he isn't in [it] for himself"—is intelligible to us because we believe that to "speak the rude truth in all ways"[77] is an intrinsically unmediated facet of human behavior. The integrity of that human quality is threatened by material self-interest or by ties to collectivities that impede the exercise of true conviction by the sovereign self. This avenue to abiding respect for Brandeis and his prescriptions is especially difficult to resist because in fact his prescriptions were wise ones. It is easier to suspect the motives of a person with whom one disagrees. But, of course, Brandeis *was* in it for himself.[78] His interest lay in his social and political vision. In terms of the typology I identified above, Brandeis's public life embodied a fruitful fusion of self and the common good, all but bypassing the constellations of interests, groups, and others from whom alternative definitions of the common good might have emerged.

As Erikson observed in his study of Gandhi, this ability persuasively to link the self with the whole on such a scale is a rare and masterful achievement.[79] Carol Gilligan's apt comment on Erikson's theme is suggestive here:

> [I]n Erikson's studies of Luther and Gandhi, while the relationship between self and society is achieved in magnificent articulation, both men are compromised in their capacity for intimacy and live at great personal distance from others. . . . These men resemble in remarkable detail pious Aeneas in Virgil's epic, who also overcame the bonds of attachment that impeded the progress of his journey to Rome.[80]

Within a smaller circle, but nevertheless palpably, Brandeis too was able to combine personal remoteness with a compelling embodiment of the public good.

The trait of autonomy or independence in Brandeis's lawyerly persona, which I discuss in detail in Part II, thus did not originate there. For Brandeis, the habit of nonaffiliation did not emerge from a role-specific conception of the lawyer's proper attitude, but in fact constituted an essential element of his approach to political action of all kinds—one that was well adapted to Mugwump-Progressive political culture, as well as responsive to his own preferred way of functioning in the world. As I discuss in Part II, this trait was equally in evidence when Brandeis undertook to promote the public good while

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77. EMERSON, *Self-Reliance*, *supra* note 1, at 142.

78. Strum, however, would disagree: "Haywood was right: Brandeis wasn't 'in it for Brandeis.'" STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 168; *see also* STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 31 ("Haywood was right: Brandeis was not 'in it for Brandeis' but was genuinely concerned with the problem of industrial justice . . . .").

79. ERIK H. ERIKSON, GANDHI'S TRUTH: ON THE ORIGINS OF MILITANT NONVIOLENCE 115 (1969).

80. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 155 (1982).

acting as a lawyer with clients; and here that trait proved to have more troubling consequences.

II. BRANDEIS AND LAWYERING: THE DILEMMA OF REPRESENTATION

> Representation is that by which we make our will known and, simultaneously, that which alienates our will from ourselves in both the aesthetic and the political spheres.
>
> —W.J.T. Mitchell[81]

Brandeis, as we will see, exhibited an independence in his role as lawyer that closely resembles the autonomy he displayed in the world of reform politics more generally. Nor is this surprising, since so many of Brandeis's legal representations involved advocacy in the legislature or in the court of public opinion—the sphere of "politics" conventionally defined. Indeed, Brandeis's most precocious and imaginative act as a lawyer was to identify and mobilize, using all the available tools of the legal advocate, a "public interest" that could compete on equal terms with other groups in an increasingly interest-oriented politics. It was an apt strategy in a polity emerging from "the state of courts and parties" into an age of legislation and regulation.[82]

But the trait of autonomy assumes a different complexion in the context of lawyering. The resistance to explicit affiliation that I have ascribed to Brandeis in the political sphere, while certainly worth isolating and describing, is not intrinsically disturbing. Many will see in it a salutary independence of thought and action that has often been in short supply in American political culture. And, as I have suggested, one can see Brandeis's approach in cultural-historical terms—as epitomizing the ideal of nonpartisanship that characterized late-nineteenth-century liberal reform, an ideal that had blossomed by the early twentieth century into a more explicit celebration of expertism. In much of his reform work, however, Brandeis was acting not only as a political activist but as a "public interest" lawyer. Here, the strategy of nonaffiliation is more problematic, for an organic loyalty, or at least a recognition of interdependence—a concept with which Brandeis seemed uncomfortable—is woven into the very fabric of the lawyer's role.

In this part, then, I offer a description and interpretation of various ways in which Brandeis maintained the kind of freedom from the control of clients and associates that permitted him extraordinary self-direction in many of his

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81. W.J.T. Mitchell, *Representation*, *in* CRITICAL TERMS FOR LITERARY STUDY 11, 21 (Frank Lentricchia & Thomas McLaughlin eds., 1990).

82. This image is drawn from the lucid discussion in STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 24–35, 285–92 (1982) [hereinafter SKOWRONEK, BUILDING A NEW AMERICAN STATE].

legal representations. Because my interpretations of these episodes differ from previous scholarly treatments, I offer in Section A a brief overview of the laudatory imagery that scholars have customarily used in describing Brandeis's lawyering activities. Then, as a first illustration of Brandeis's strategies for maintaining autonomy, I examine in Section B his celebrated practice of working without compensation in matters of public interest, and I suggest that that practice involved more than the personal altruism that is so often cited to explain it. In Section C, I use the episodes raised in Section B as a basis for exploring the central dilemma confronting Brandeis in his marriage of the legal and political worlds: the dilemma of *representation*, which, as W.J.T. Mitchell's observation suggests, threatens to limit one's freedom of action even as it provides a ground for that action. Finally, as more complex illustrations of this same problem, I consider in Section D three famous incidents from Brandeis's lawyering career that attained notoriety at the watershed moment of his public life, the 1916 hearings on his nomination to the U.S. Supreme Court.

A. *Images of Brandeis as Lawyer*

Even to imply doubt about some of his lawyering instincts is to go against the grain of most scholarship on Brandeis, which understandably regards him as a model for the modern aspiration to a public-spirited lawyering ethic. In any such vision of socially responsible advocacy, Brandeis must play a significant role, for he did more than anyone else to implant the notion of the public interest lawyer in our legal consciousness.[83] But the scholarly literature on Brandeis-as-lawyer is even more admiring than this, for its composite portrait of Brandeis brings together no fewer than three distinct, though congruent, images of the ideal lawyer: the People's Attorney, the Mediator, and the Independent Lawyer.

1. *The People's Attorney*

First, the sheer extent, notoriety, and influence of Brandeis's public interest labors stand in marked contrast to the materialism and narrowness of vision that are thought to characterize both today's legal profession and Brandeis's peers. As his contemporary sobriquet "attorney for the people" suggests,[84] this

83. "Out of Brandeis's moral activism emerged the twentieth-century public interest law movement . . . ." LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 238; *see also* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 81 [hereinafter Simon, *Ideology of Advocacy*] ("Brandeis' career provides thrilling suggestions of what the Purposivist model [Simon's term for a vision of lawyering that serves common social purposes rather than atomistic preferences] could have been.").

84. *See, e.g.*, Shelby M. Harrison, *The Massachusetts Scheme of Savings Bank Insurance*, 24 THE SURVEY 237, 239 (May 7, 1910); 2 LETTERS, *supra* note 22, at 173 n.2 (editors' note). Not everyone was

profile of Brandeis is no mere creation of historians after the fact, but it has been especially evocative for more recent critics of the legal profession. Brandeis's career prior to his appointment to the Supreme Court appears as a series of brilliant forays into the public realm—the New Haven Railroad merger battle, the Boston traction fight, the crusade for savings bank life insurance, the Ballinger-Pinchot affair, and the ICC rate proceedings, to name only a few. Moreover, the fact that the positions advocated by Brandeis in these matters suit most of us looking back on them tacitly adds to the impression they create. Since Brandeis's public representations were often undertaken without fee, they also seem relevant to current efforts to expand lawyers' pro bono activities. And, like many foundational images, Brandeis's public interest persona has its own canonical text—his oft-quoted speech "The Opportunity in the Law," in which he called for lawyers to abandon their vassalage to corporate interests.[85]

Sometimes the scholarly assessment of this dimension of Brandeis's work assumes a credulous tone, as in these comments by Philippa Strum:

> His preferred role . . . 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.[86]

However, even those with a more skeptical perspective on the ideology of lawyering find moral nourishment in Brandeis's example. Thus, in his

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equable about ceding this title to Brandeis, just as some were unwilling to credit his aspirations to political nonaffiliation. During the New Haven merger battle, when Brandeis was the leading agitator against the New Haven Railroad's attempts to obtain a transportation monopoly in New England, he appeared at one hearing, *sans* client, "as a citizen." Charles Choate, counsel for the New Haven, thereupon "announced that he too would like to appear 'as a citizen. I represent the people, the same as my dear brother Brandeis.'" MASON, FREE MAN'S LIFE, *supra* note 3, at 207.

85. Brandeis, *Opportunity in the Law*, *supra* note 8. Excerpts from this 1905 address to Harvard undergraduates appear routinely in casebooks and readers in legal ethics and professional responsibility. *See, e.g.*, GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 1023–26 (1990); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 5–10 (3d ed. 1994); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 36–41 (1992). It is also a set piece in numerous scholarly works on legal professionalism. *See, e.g.*, Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 292 n.48 (1990) [hereinafter Gordon, *Corporate Law Practice*]; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2 (1988) [hereinafter Gordon, *Independence of Lawyers*]; David Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717–27 (1988) [hereinafter Luban, Noblesse Oblige *Tradition*]; William H. Simon, *Babbitt v. Brandeis*, 37 STAN. L. REV. 565, 574 (1985) [hereinafter Simon, *Babbitt v. Brandeis*]; William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) [hereinafter Simon, *Homo Psychologicus*].

86. Philippa Strum, *The Legacy of Louis Dembitz Brandeis, People's Attorney*, 81 AM. JEWISH HIST. 406, 407 (1994) [hereinafter Strum, *People's Attorney*]; *see also id.* at 417 ("The effort he was best equipped to expend lay in the area of the law, so he became a lawyer for the public.").

discerning work *Lawyers and Justice*, David Luban recurs often to Brandeis, using such chapter headings as "The Opportunity in the Law," "The People's Lawyer," and "Brandeisian Meditations."[87] To be sure, as befits a book with such a sharp moral and critical edge, there is nothing hagiographic in Luban's discussion of Brandeis.[88] Yet it is plain that, for Luban, the image of Brandeis-as-public-interest-lawyer came closer than anything else to unifying the book's discussion of the diverse ethical issues in lawyering.[89] The same can be said for works by scholars who share Luban's concerns with lawyering, such as William H. Simon[90] and Robert W. Gordon,[91] not to mention the authors of more conventional biographical works on Brandeis,[92] all of whom cite his law practice for its edifying qualities.

2. *The Mediator*

A second image that pervades the treatments of Brandeis-as-lawyer is that of the mediator, the harmonizer of conflicting social interests. The central exhibit in this rendition of Brandeis's lawyerly virtues is his role in mediating the New York garment workers' strike.[93] But one can find this image of Brandeis as harmonizer in other parables as well—for example, in the episode involving Brandeis's use of the phrase "counsel for the situation," discussed below in greater detail.[94] Another celebrated example is Brandeis's counseling of his friend and client, the shoe manufacturer William McElwain, who found himself in a labor dispute arising out of his effort to cut wages during an economic downturn. After visiting McElwain's plant and consulting labor leader John Tobin, who was representing the workers, Brandeis counseled (commanded, really) McElwain to devote greater efforts to regularizing employment, and he told Tobin, in McElwain's presence, that the workers

87. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at x–xi.

88. For example, Luban suggests some of the defects in the reasoning of Brandeis's "The Opportunity in the Law." *See id.* at 173; *see also* Luban, Noblesse Oblige *Tradition*, *supra* note 85, at 720–27 (describing Brandeis's philosophy as "progressive professionalism").

89. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at xxiii ("In line with Brandeis's own thinking, I have chosen to devote the second half of the book to problems facing the people's lawyer.").

90. Simon, *Babbitt v. Brandeis*, *supra* note 85, at 574, 586 (on Brandeis as paradigm for "lawyer-as-regulator"); Simon, *Homo Psychologicus*, *supra* note 85, at 496–97; Simon, *Ideology of Advocacy*, *supra* note 83, at 81.

91. Gordon, *Corporate Law Practice*, *supra* note 85, at 266; Gordon, *Independence of Lawyers*, *supra* note 85, at 40; Robert W. Gordon, Lawyers as the American Aristocracy 37–38 (Feb. 1985) (unpublished manuscript, on file with author) [hereinafter Gordon, Lawyers as the American Aristocracy].

92. STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 49–64; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 30–41; UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 17–42.

93. *See supra* text accompanying notes 50–51. The image continues to appear in unexpected places. *See* Stuart Silverstein & Don Lee, *Arbitration as American as Baseball, and as Tricky*, L.A. TIMES, Feb. 9, 1995, at A1 (identifying Brandeis's proposal of arbitration in 1910 garment workers' dispute as origin of labor arbitration device proposed to settle 1994–95 baseball strike).

94. *See infra* Subsection II.D.1.

were "right."[95] Brandeis, in the eyes of some writers, thus demonstrated that he privileged human relationships or "situations" over the mere individualized interests of clients.[96] Not surprisingly, this part of Brandeis's image has seemed to support modern-day efforts to enlist lawyers in roles that transcend the narrow and conventional confines of adversarial justice.[97] Nor is the appeal of such a "situational" approach to human relations limited to the context of lawyering. One can hear echoes of it in fields far removed from the question of lawyer and client—for example, in the study of industrial relations, where Mary Parker Follett's influential emphasis on "the law of the situation" strongly resembles the ethic attributed to Brandeis.[98]

3. *The Independent Lawyer*

The third image, closely linked with the previous two, is that of Brandeis's steely independence. A favorite illustration of this independence is Brandeis's storied policy of refusing to take cases in whose justness he did not believe, which serves as a stern reproach to the "hired gun" reputation that has long plagued the American legal profession. Brandeis doubtless departed from this policy from time to time—it is hard to believe that so successful a counselor and advocate could have been quite so fastidious—but there certainly are

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95. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 96–97; Luban, Noblesse Oblige *Tradition*, *supra* note 85, at 722–23; Robert Eli Rosen, Lawyers in Corporate Decision-Making 84–85 (1984) (unpublished Ph.D. dissertation, University of California (Berkeley)) [hereinafter Rosen, Lawyers in Corporate Decision-Making].

96. This, for example, is Luban's reading. *See* Luban, Noblesse Oblige *Tradition*, *supra* note 85, at 722–23; *see also* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 303 (1985) [hereinafter SHAFFER, AMERICAN LEGAL ETHICS] (discussing Brandeis's "implicit insistence on the moral reality of human associations" and his willingness to give his "professional assistance to such 'situations'"). Of course, there are other ways of characterizing this episode. One might, for instance, say that Brandeis was not subordinating the interest of his client to a larger "situation" but was in fact helping McElwain to understand where his interest really lay. *See* Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1080–82 (1979) (discussing disjuncture between client's actual wants and legal results she claims she is seeking); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 469–71 (1984) [hereinafter Simon, *Visions of Practice*] (arguing that client's interests are not anterior to representation but are partly constructed by it).

97. As noted below, explicit recognition of the "lawyer as intermediary" in the *Model Rules of Professional Conduct* owes something to the association of Brandeis's name with that ideal. *See* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 744 [hereinafter Dzienkowski, *Lawyers as Intermediaries*]; Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 972–84 (1987) [hereinafter Shaffer, *Radical Individualism*].

98. *See, e.g.*, MARY PARKER FOLLETT, FREEDOM & CO-ORDINATION: LECTURES IN BUSINESS ORGANISATION 16–33 (L. Urwick ed., 1949). Interestingly, in these lectures Follett refers approvingly at a number of points to the management practices of the Boston department store magnates Edward A. and A. Lincoln Filene, whose experiments in cooperative ownership and management had made a deep impression on their friend Brandeis. *See id.* at 7, 17; *see also* STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 39–40 (on Brandeis's coauthorship of the constitution of the Filene Co-Operative Association); STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 99–102 (discussing same). I am grateful to an unidentified discussant at the 1993 Law and Society Association annual meeting for pointing out to me the resemblance between Follett's theories and the lawyering ethic attributed to Brandeis.

particular instances to support its attribution to him. One such instance, cited by historians Melvin I. Urofsky and David W. Levy,[99] involved an effort in 1907 by the Harriman railroad interests to retain Brandeis's firm in connection with a proxy fight for control of the Illinois Central Railroad. Waddill Catchings, an attorney employed in 1907 by Harriman's New York counsel, Sullivan and Cromwell,[100] testified at the 1916 nomination hearings concerning his effort to engage Brandeis's services:

> I . . . had to lay the situation before Mr. Brandeis, and I may say that the hardest interview I had during the whole campaign was with Mr. Brandeis in convincing him of the justness of our cause, so to speak.
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> . . . .
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> . . . [H]e had to be satisfied of the justness of our position. It was an unusual experience. I had occasion to retain other lawyers and no one ever raised that question.[101]

Brandeis's refusal to be "bought" by the offer of a fat retainer without first passing on the merits of the client's position is given greater luster by Catchings's bemused observation that other lawyers did not concern themselves with such things.[102] Levy had this episode in mind when he wrote approvingly, "It was precisely the 'judicial temperament' which characterized Brandeis' entire career as a practicing lawyer."[103] Depending on their point

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99. 4 LETTERS, *supra* note 22, at 84 (editors' note); UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 111; David W. Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374, 393–95 (1969) [hereinafter Levy, *The Lawyer as Judge*].

100. Catchings later achieved greater fame as coauthor, with William Trufant Foster, of a series of books and articles in the 1920s and 1930s prefiguring the "underconsumption" approach to fiscal policy that attained currency among architects of the later New Deal. ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 75–77 (1995).

101. 1 MERSKY & JACOBSTEIN, *supra* note 7, at 338, 344 (testimony of Waddill Catchings). Another issue raised by Brandeis in this interview was the possibility of a conflict of interest, given Brandeis's public criticism of Harriman in connection with the New Haven merger that Brandeis was fighting at this time. 1 *id.* at 343–44. Undoubtedly, recognition of this situation counseled Brandeis (who did, incidentally, accept the Harriman retainer) to be especially careful in assessing Harriman's position. The suggestion of unethical behavior on Brandeis's part in this matter was meritless. *See* 4 LETTERS, *supra* note 22, at 84 nn. 2–3 (editors' notes); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 686 (1965) [hereinafter Frank, *Legal Ethics of Louis D. Brandeis*]. For Catchings's complete testimony in 1916, see 1 MERSKY & JACOBSTEIN, *supra* note 7, at 336–55.

102. The alert reader will note that, in the end, Brandeis *did* accept the retainer. Whether and how often Brandeis actually turned down matters solely on moral grounds I do not know. Long before 1907, his lucrative practice had enabled him to choose such matters as appealed to him, although as the head of a growing firm he seems to have felt obliged not to deprive his partners or the firm's younger lawyers of income through his own selectivity in accepting clients.

103. Levy, *The Lawyer as Judge*, *supra* note 99, at 395. Levy quotes Calvert Magruder, Brandeis's first law clerk, as saying that Brandeis "seemed to have been a judge all his life. We see now, more clearly perhaps, that he *had* been a judge all his life." *Quoted in id.*; *see also* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 40 ("Brandeis was not merely interested in winning cases . . . he was concerned with whether or not the battle was just."); UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 111–12. Yet when one turns to Brandeis's *judicial* persona, one finds a very different kind of observation. Compare with Magruder's statement Holmes's observation to Harold Laski: "I told him [Brandeis] long ago that he really was an advocate rather than a Judge. He is affected by his interest in a cause, and if he feels it he is not detached . . . ." Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Dec. 11, 1930), *quoted in*

of view, students of the legal profession may be slower to regard this temperament as the unqualified good that Levy did. Still, Brandeis's autonomy or independence represents an important and salutary alternative to the "principle of nonaccountability," the term used by Murray Schwartz and David Luban to describe one of the fundamental premises of the lawyer's role in an adversarial system.[104] That is, Brandeis not only refused to act as a simple mouthpiece for unchallenged client preferences;[105] he also cleared space for himself to pursue activities in the public interest, free from the dictates and objections of powerful clients. Thus, when Robert W. Gordon poses the timely question, "How can lawyers feel free to pursue public projects independent of their clients' interests without driving their clients away?," Brandeis's example provides him with one of the most powerful historical models for a hopeful answer.[106]

These, then, are the images that attach to Brandeis's lawyering: People's Attorney, Mediator, Independent Lawyer. In redescribing the episodes below involving Brandeis, some of which are well known, I am hesitant to disturb this imagery, embodying as it does the hopes for a public-spirited lawyering regime. But there are benefits in pushing beyond these constructs and delving more concretely into the circumstances surrounding Brandeis's lawyering controversies. Too often the frame of reference for scholarly discussions of lawyerly "independence" and "loyalty" or "partisanship" is a defense or critique of a professional ethos or ideology.[107] In focusing so narrowly on a

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ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 222 (1957). For similar remarks, see Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Jan. 16, 1918), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 94 (Mark DeWolfe Howe ed., 1963) [hereinafter HOLMES-LASKI LETTERS]; Letter from Oliver Wendell Holmes, Jr. to Laski (Nov. 5, 1923), *in* 1 HOLMES-LASKI LETTERS, *supra*, at 390. In his critical assessment of Brandeis's campaign against "bigness," Thomas K. McCraw stresses that "above all else Brandeis was a professional litigator, primarily committed to the business of advocacy." MCCRAW, PROPHETS OF REGULATION, *supra* note 12, at 136. James L. Penick makes the same point with respect to Brandeis's role in the Ballinger-Pinchot affair in PROGRESSIVE POLITICS AND CONSERVATION, *supra* note 12, at 164. To the extent that McCraw and Penick mean to suggest that Brandeis's commitment to the litigation mentality impeded his ability to consider public issues soberly and independently, I am in disagreement; the precise opposite appears to be the case. But these comments do underscore what is sometimes forgotten, that when Brandeis played the game of advocacy, he played to win.

104. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 7; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).

105. Luban captures this part of Brandeis's image especially clearly in David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1014 (1990) [hereinafter Luban, *Partisanship, Betrayal and Autonomy*].

106. Gordon, *Independence of Lawyers*, *supra* note 85, at 41.

107. For example, in his essay *The Lawyer as Friend*, Charles Fried defends the lawyer's duty of loyalty from what he regards as an inapt utilitarian ethics. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) [hereinafter Fried, *The Lawyer as Friend*]. Likewise, in a series of articles, William H. Simon explicates his vision of the lawyer-client relationship largely by way of contrast to the professional principles of neutrality and partisanship that he rejects. *See* Simon, *Ideology of Advocacy*, *supra* note 83; Simon, *Visions of Practice*, *supra* note 96; Simon, *Babbitt v. Brandeis*, *supra* note 85; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*].

few episodes involving Brandeis, I am necessarily aiming at an insight that is more personal and, I hope, less abstract. It speaks not to the premises that should govern the behavior of all attorneys in all situations, but to the modes of interaction and isolation (which are prior to anything found in any professional code) that were sought and preferred by a lawyer who, we are often told, can serve as a model for the rest of us.

B. *The Uses of Unpaid Lawyering*

A conspicuous feature of Brandeis's practice of law in the public interest was his policy of refusing compensation for legal work concerning what he characterized as "public" issues. As he attained financial security through his successful private practice and became increasingly engaged in questions of public policy, Brandeis determined to work for free on such matters. Brandeis's practice was not unvarying in this regard,[108] but taken as a whole his approach to these public cases was generous and novel. It helped win for him his reputation as "the people's lawyer."[109] And Brandeis's practice has, understandably, also met with the approval of historians and students of legal professionalism. Few writers on Brandeis have failed to compare his altruism favorably with the venality that is commonly associated with the lawyerly practices, not only of the Gilded Age, but of our own time.[110] Strum's assessment of Brandeis's motivations is crisp: "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."[111] But surely there is more to the story than this. Even were there abundant evidence (which there is not) that Brandeis was motivated by the selfless considerations that Strum mentions, some of his feeless representations suggest that more than simple altruism was involved.

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108. As Strum has pointed out, Brandeis at first donated his fees for such public work to charity, then worked without fee altogether; finally, in the long and complex New Haven merger controversy, he made himself his firm's "client" so as not to deprive the firm of revenues it would have obtained had he spent the time on private matters. Strum, *People's Attorney*, *supra* note 86, at 413–14. In the Ballinger-Pinchot affair, where his aggressive questioning exposed the Taft administration's self-dealing in rebutting the accusations of whistle-blower Louis Glavis, Brandeis represented Glavis without charging him, but received a $25,000 retainer from *Collier's Magazine*, which had broken the story and hoped to see Glavis vindicated. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 692–94. By pointing out this variation in approach, I do not mean to condemn it as "inconsistent."

109. *See, e.g.*, Richard, *Up from Aristocracy*, *supra* note 42, at 130; Welliver, *supra* note 48, at 1603.

110. For typical examples of delight and approval, see 1 LETTERS, *supra* note 22, at 212 n.4 (comments of Urofsky and Levy); STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 50–51; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 61, 76; TODD, JUSTICE ON TRIAL, *supra* note 31, at 47; UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 15–16; Gordon, *Independence of Lawyers*, *supra* note 85, at 40; Levy, *The Lawyer as Judge*, *supra* note 99, at 390–91.

111. Strum, *People's Attorney*, *supra* note 86, at 414.

1. *"I Want to Be Free"*

The admiration by later scholars for Brandeis's pro bono work rests partly on his eloquent, if quaint, explanation of his desire to provide free legal services:

> Some men buy diamonds and rare works of art, . . . others delight in automobiles and yachts. My luxury is to invest my surplus effort, beyond that required for the proper support of my family, to the pleasure of taking up a problem and solving or helping to solve it for the people without receiving any compensation. Your yachtsman or automobilist would lose much of his enjoyment if he were obliged to do for pay what he is doing for the love of the thing itself. So I should lose much of my satisfaction if I were paid in connection with public services of this kind. I have only one life, and it is short enough. Why waste it on things I don't want most? I don't want money or property most. I want to be free.[112]

This statement, one of the best-known in the Brandeis canon, itself contains the seeds of a more complex account of Brandeis's uncompensated labors. *"I don't want money or property most. I want to be free."* There is an interesting paradox in these words, a tension between "freedom *to*" and "freedom *from*." On one level, they reflect Brandeis's passion for public service and his desire for the freedom to act on that passion. As his attitude toward social insurance suggests,[113] Brandeis placed a high value on the attainment of financial independence, a condition with both material and ideological dimensions. In an oft-cited letter to a young man seeking Brandeis's career advice, Brandeis counseled as follows:

> Whatever you do, bear in mind that the fundamental requirement is that you should keep yourself free; that is, at all times be able to take such course as you think proper. In order to do this you will have to be free from financial necessities or obligations, and to that end lead a frugal life. When you make money in business remember that the only thing that you can properly buy with that money is freedom to do as seems to you from time to time right.[114]

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112. *Quoted in* UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 16.

113. *See supra* note 39.

114. Letter from Louis D. Brandeis to Clarence R.S. Martin (Nov. 5, 1912), *in* 2 LETTERS, *supra* note 22, at 709. Compare this paternal advice with the sentiment expressed to the future Mugwump Richard Henry Dana by his father:

> Back in the fall of 1870 when young Richard Henry Dana entered Harvard, his father had written him a letter of advice. Warning his son against female entanglements, the father unconsciously echoed the most urgent wisdom of nineteenth-century New England. "Think what you are to do on earth," he wrote. "Man is meant *to be* and *to do*, and not to be tied down. You have four years of college, and then a profession,—through all of which you must be *free*, to do whatever will be best for your future." When the young men of the Mugwump movement

Implicit in this exhortation was a traditional republican theme that runs through all of Brandeis's prescriptions for industrial democracy: Citizens, and especially working people, must attain a certain economic autonomy so that they can freely pursue the fulfillments of life, including promotion of the public good as they see it. Brandeis brilliantly exemplified this assertion of independence in his own life (albeit in a manner that few could hope to emulate) by subsidizing the pursuit of social justice with his ample earnings as a business lawyer.[115]

But the search for "freedom" and "financial independence" operated on a more immediate level as well. Brandeis seems to have assumed that the payment of a fee cements a bond between lawyer and client that obliges the former to pursue the latter's legal goals with unqualified zeal. The obverse assumption is that, without a fee, the duty of zealous representation is attenuated or nonexistent. Of course, there is nothing in the conventional lexicon of legal ethics to suggest that a lawyer's duties to her client are diminished in any way simply because she is not paid.[116] But, at a time when these duties were less formally specified than they are today, it was perhaps not unreasonable for Brandeis to believe that the absence of a fee appropriately gave him more discretion, and thus more control, in his actions as counsel. His juxtaposition of fees and freedom seems to have been based on a simple psychological intuition: If you want to cut your own path without another person's claim on you, avoid obligations to that other person, avoid accepting things (such as a fee) from him. Of course, appearances matter too. Brandeis may well have believed that his refusal to accept fees in connection with "public" representations would help inoculate him against accusations that his expressions on these public matters had been determined by his obligations to a paymaster, accusations that in the Mugwump-Progressive mind-set cut deeply. Probably both impulses were involved in Brandeis's disavowal of fees; both speak to the desire to mark out an authentic, unencumbered self that can act politically.

To date, no one has subjected Brandeis's motivations in refusing compensation to much scrutiny. Consequently, his biographers have offered the following characterizations of particular public representations, with no

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faced the sterner tests of the world beyond Harvard Yard, their mood—excited, anxious, virginal—was shaped by words like these.

BLODGETT, GENTLE REFORMERS, *supra* note 15, at 46–47 (footnote omitted).

115. No very clear picture of the economics of Brandeis's law practice, particularly in its early years, emerges from the vast literature on him, apart from his work for the Warren family's paper business and some generalizations about his small business clientele. For some useful but still general discussions, see GAL, BRANDEIS OF BOSTON, *supra* note 19, at 11–22; CONSTANTINE ALEXANDER ET AL., NUTTER, MCCLENNEN & FISH: THE FIRST CENTURY, 1879–1979, at 2–16 (1979). A complete portrait of Brandeis's lawyering career would include an account of precisely how he was able so successfully to subsidize his public interest activities. I am grateful to Susan Carle for mutually informative conversations on this point.

116. Of course, this principle is often honored in the breach; in practice, lawyers can be found cutting corners with pro bono work in a way that they would not attempt with paying matters.

apparent unease at their implications: "He agreed to act as counsel [for the New England Policy-Holders' Protective Committee] but would take no fee, so that he might do whatever he felt needed doing in the public interest as well as for the committee,"[117] and, "[o]nce again sensing the large issues involved [in the antimerger fight], Brandeis agreed to serve only if there were no fee; he wanted complete freedom of action."[118] But this leaves the largest questions unanswered: *Why* would feeless work give Brandeis "complete freedom of action"? And *why* had he sought to act as a representative at all? Only by exploring these questions further can one make sense of Brandeis's otherwise cryptic explanation for his desire to forgo compensation in his representation of the opponents of the New Haven Railroad merger: "[B]eing a matter of great public interest in which I am undertaking to influence the opinion of others, I do not want to accept any compensation for my services."[119]

2. *The New England Policy-Holders' Protective Committee*

Whatever Brandeis's own thinking may have been, some of his "public interest" clients, associations of individuals who had their own ideas of proper public policy, were alert to the implications of a fee. On more than one occasion, Brandeis's efforts to work for free met strong resistance from his clients, who were, after all, neither impecunious nor powerless. For example, in 1905 a power struggle within the Equitable Assurance Society, a dominant competitor in the life insurance industry, led to revelations of abuses and corruption not only within the Equitable but in the insurance industry as a whole. In response, a number of prominent Bostonians formed the New England Policy-Holders' Protective Committee "to protect cash interests amounting to nearly a million annually in premiums."[120] That the members of the Committee may have been public-spirited gentlemen does not alter the fact that they were inspired to form the Committee principally by a desire to protect their investments, and that any interest they had in reforming the insurance industry was directed to that end. The Committee sought to retain Brandeis as counsel:

> Brandeis had a somewhat stormy session with Whitman and Abbot [members of the Policy-Holders' Protective Committee] before they yielded to the arrangement whereby he was to serve the committee without compensation. Brandeis explained that the matter involved

117. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 76.

118. UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 41; *see also infra* text accompanying note 121.

119. Letter from Louis D. Brandeis to E. Louise Malloch (Nov. 4, 1907), *in* 2 LETTERS, *supra* note 22, at 44.

120. ALPHEUS T. MASON, THE BRANDEIS WAY: A CASE STUDY IN THE WORKINGS OF DEMOCRACY 88 (1938) [hereinafter MASON, THE BRANDEIS WAY].

> was one of grave importance, affecting not only these gentlemen but the public at large, and he therefore wished to be . . . perfectly free at any time to take such action as he might deem wise in the public interest. The committee yielded because Brandeis refused to serve under any other conditions and they had to have him. *In this way Brandeis became the people's advocate in life insurance matters.*[121]

Whether this explanation was soothing to the Committee members is not recorded. One cannot know, exactly, what went on at this "somewhat stormy session," but it was more than the jolly repartee of gents vying to pick up a check in a restaurant. These were negotiations amongst individuals, like-minded but also strong-minded, to determine how free a hand Brandeis would have in representing their interests in the public policy arena.

The point is not that Brandeis, having secured this "freedom," ultimately betrayed the interests of his client, for he did not. So far as the need to force changes in the organization of insurance companies like the Equitable was concerned, in order to reduce waste, minimize self-dealing, and secure efficiencies for policyholders, Brandeis and the Committee were no doubt in agreement. But it was not long before Brandeis turned his attention to more fundamental issues and more imaginative remedies than any the Committee had contemplated in retaining him. From the start, Brandeis was less interested in saving a few policyholders some money than in promoting a wiser and juster mode of providing insurance, particularly to working people. It was partly from the platform supplied by this representation that Brandeis promoted the reform that always remained closest to his heart, savings bank life insurance for wage earners.[122] I am not aware that Brandeis explicitly identified himself as counsel to the Committee (a representation that seems to have lasted at least until 1907) when, beginning in 1906, he mounted the public relations campaign for savings bank life insurance; but that representation did help inject him into the public sphere on the insurance question generally.[123]

William Whitman, chairman of the Protective Committee, praised Brandeis's services highly in his testimony before the Senate subcommittee investigating Brandeis's Supreme Court nomination in 1916. Certainly his remarks preclude the inference that any actual conflict arose in Brandeis's

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121. *Id.* (emphasis added); *see also* UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 32; 1 LETTERS, *supra* note 22, at 363 n.1 (editors' comment); ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 94–95 (1936) [hereinafter LIEF, AMERICAN IDEAL].

122. The investigations that ensued upon exposure of the Equitable's problems revealed how exploitative the insurance industry's practices were in providing "industrial insurance" to wage earners, which resulted in the lapse without payment of benefits of an extraordinary number of policies. Brandeis's effort to enlist savings banks in the provision of such insurance was a creative response to this problem. For an informative, albeit worshipful, account, see MASON, THE BRANDEIS WAY, *supra* note 120.

123. "From the time Brandeis enlisted as counsel for the New England Policy-Holders' Protective Committee, he had been in great demand as a public speaker." *Id.* at 101. Unwitting or not, Mason's use of the word "enlisted" seems apt.

activities.[124] Yet even Whitman's characterization of Brandeis's uncompensated representation, suggesting the Committee's at best bemused interest in savings bank life insurance, is revealing:

> Mr. ANDERSON. How much was he paid?
>
> Mr. WHITMAN. Oh, he did not get any pay. He did it because he was greatly interested in the whole matter, and he had in view the carrying on of insurance without any cost, without middlemen, and all that kind of thing. He was public spirited in that regard. I could not go so far as he did. I could not join him in everything, because we do not agree. But I could not have asked for a man to have stood by me right through thick and thin and advise me better than Mr. Brandeis did.[125]

3. *The Sliding-Scale Gas Affair*

Brandeis's representation of the Protective Committee proceeded amicably, apparently with no objections from the client or its members once they acquiesced in his insistence on working for free. The same cannot be said of another representation Brandeis undertook at about the same time, involving the regulation of artificial gas service to consumers in the Boston area. This matter led to another of Brandeis's notable reform initiatives, the adoption of the "sliding scale" principle of calibrating utility shareholder dividends inversely to consumer rates in the provision of gas. More than that, however, the gas episode suggests some of the difficulties that could arise from Brandeis's conception of the freedom conferred by refusal of a fee, from the ease with which he claimed or disclaimed the status of "legal representative" as occasion demanded, and from the close linking of his role as "representative" of others with his role as *one* of those "others," equally interested in the policy issues under discussion.[126]

In 1903, concerns about monopolization in the provision of artificial gas came to a head when the Massachusetts legislature enacted a bill consolidating

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124. Opponents of Brandeis's nomination accused him in 1916 of "unlawyerly" behavior because his firm defended the Equitable (for which it handled a number of matters over a period of years) in a 1906 lawsuit alleging some of the same misbehavior that Brandeis was publicly criticizing on behalf of the Protective Committee. The Senate subcommittee on Brandeis's nomination paid little attention to this charge, probably because the Equitable itself had never expressed concern. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 690–92.

125. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 971–72 (testimony of William Whitman). Note Whitman's use of the phrase "greatly interested."

126. On the gas matter generally, see Letter from Louis D. Brandeis to Thomas McCrate Babson (Mar. 31, 1905), *in* 1 LETTERS, *supra* note 22, at 298–300; 1 LETTERS, *supra* note 22, at 272–73 n.1 (editors' note); Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 119–23; MASON, FREE MAN'S LIFE, *supra* note 3, at 126–40; 2 MERSKY & JACOBSTEIN, *supra* note 7, at 1309–16 (testimony of Edward R. Warren); STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 67–73; LIEF, AMERICAN IDEAL, *supra* note 121, at 76–84.

the eight companies that had theretofore provided gas service. Attention turned to the question of valuation for the stock that the newly consolidated company would be permitted to issue. It was natural that the Massachusetts Associated Board of Trade and the Public Franchise League, two organizations that had (with Brandeis's participation) previously joined forces on public utility questions, particularly the issue of "stock watering," would become involved.

The Board of Trade and the Public Franchise League had different, if overlapping, memberships; they were united in their concern that consolidation of the gas companies into a single utility not result in stock watering and exorbitant rates. Brandeis was a dominant figure in both organizations. Whether and for what purposes he purported to act as "counsel" to each of them is a difficult question to untangle. When Brandeis entered the fray early in 1905, the first order of business from the point of view of those anxious about excessive rates was to propose that the legislature enact *another* general consolidation bill, modifying the earlier one so as to ensure that there would be no water in the issued stock of the new gas company. As to this general notion, the Board of Trade, the League, and Brandeis were in agreement. Brandeis became unpaid counsel to the Board of Trade for purposes of pursuing this matter in the legislature; George Anderson was designated (paid) counsel to the League.

It was on this basis that Brandeis testified on March 9, 1905, before the Massachusetts legislature's Committee on Public Lighting in support of a new general consolidation bill.[127] Toward the end of the hearing, discussion turned to the question of just how "fair value" might be determined and, in particular, to the propriety of permitting the consolidated companies to receive dividends on the surplus that the constituent companies had obtained from years of excessive charges. Some League members, whom Brandeis later derided as anti-stock-watering fanatics, opposed *any* dividends on surplus, which they regarded as "treachery to the principle of anti-stock-watering."[128] Brandeis, however, testified in favor of granting some return on the surplus; failure to do so would, in his view, amount to impermissible confiscation.[129] This position may have been agreeable to the Board of Trade (although Edwin L. Sprague, whom Brandeis described as the Board's "motive power on stock watering questions,"[130] later repudiated it). But some members of the Public Franchise League did not share it, and they professed consternation that

127. This bill would have governed consolidation of electric light as well as gas companies, and thus went beyond the immediate question of gas in Boston. Telegram from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 124.

128. MASON, FREE MAN'S LIFE, *supra* note 3, at 134; *see* Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 122.

129. MASON, FREE MAN'S LIFE, *supra* note 3, at 131.

130. Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 121. Brandeis recalled with some distaste that "Sprague was also a one-idea man and his one idea was the iniquity of stock watering under any circumstances." *Id.*

Brandeis appeared to be presenting the views of the League in so testifying before the Committee.

When Edward R. Warren,[131] a League member whose bitterness at Brandeis over this episode never abated, complained to him that the League's position on stock watering had been misrepresented,[132] Brandeis replied, "I did not understand that at this hearing I should represent the League, and I feel very certain that a stenographic report would show that I did not mention the Public Franchise League once in any way in the course of my remarks."[133] Brandeis was correct; he had not engaged in active deception as to the identity of his client at this hearing.[134] But it does seem (as Warren later argued) that Brandeis did nothing to dispel the impression that, in his testimony before the Committee, his views were the League's.[135] Brandeis's notoriety as a moving force within the League, not to say one of its founding members, made it unlikely that anything but the most explicit disclaimer would suffice to rebut the presumption that his views were those of the League's.[136] Certainly the magazine *Practical Politics*, which referred a few weeks later to "Louis D. Brandeis, co-operating as counsel with the Public Franchise League," was under that impression.[137]

However one assesses the episode of March 9, 1905, in isolation, subsequent developments make it more interesting. Within a few weeks, Brandeis realized that the prospects for enactment of a general consolidation bill along the lines outlined by him and others on March 9 were dim. Through intermediaries, however, he became convinced that he could reach a compromise with James L. Richards, chairman of the board of the new Consolidated Gas Company, based on the sliding-scale principle that Brandeis determined would best solve the gas problem. Brandeis then worked out the

131. A persistent if amusing confusion in the Brandeis nomination fracas arises from the fact that three different men named "Edward Warren," all hostile to Brandeis, figured in the hearings: the aforementioned Edward R. Warren of the Public Franchise League; Edward P. "Ned" Warren, brother of Brandeis's former law partner Sam Warren; and Edward H. Warren, Professor of Law at Harvard.

132. MASON, FREE MAN'S LIFE, *supra* note 3, at 132.

133. Letter from Louis D. Brandeis to Edward R. Warren (Mar. 13, 1905) (footnote omitted), *quoted in id.*

134. In addition to the fact that Brandeis did not explicitly mention the League in his testimony, Morton Prince, a member of the League, testified at the same hearing in opposition to the capitalization-of-surplus principle that Brandeis espoused. MASON, FREE MAN'S LIFE, *supra* note 3, at 131. Anyone intensely interested in sorting out the question of who was speaking for whom thus might conclude easily enough that Brandeis did not speak for the League on the surplus issue. Whether that fact was enough, realistically, to preclude confusion on the point is another question.

135. In explanation of this scenario, it seems possible that neither the League nor the Board had hammered out in advance a position on the question of capitalization of surplus.

136. Since Brandeis was a League member (not always true of legislative counsel for organizations), there may have been some confusion as to whether he was speaking as counsel or as a "member" of the League. In either case, however, his "representative" capacity seems clear. The fact that Brandeis was a well-known attorney enhanced the likelihood that he would be regarded as counsel.

137. MASON, FREE MAN'S LIFE, *supra* note 3, at 131 (quoting Apr. 1, 1905 article). Mason describes this reference by the magazine as erroneous, *see id.*, but what is significant is that the mistake could be so easily made.

compromise with Richards in a series of private conferences. Now, however, Brandeis was not acting on behalf of the Board; in his own recollection, "I, *on behalf of the League* worked out a settlement with Richards and Snow [counsel for the gas companies] . . . ."[138] It took all of Brandeis's powers of advocacy to persuade the League *after the fact* that it should ratify what he and Richards had agreed on. Brandeis was able to convince most members of the League—but not the Board of Trade—to accept his views.

In his testimony in 1916, Warren acknowledged quite openly that this turn of affairs justified Brandeis in appearing before the legislative committee in an informal "executive session" (that is, not a public hearing), this time on May 3, 1905, to argue for a compromise gas bill based on the agreement with Richards and to represent that he was doing so on behalf of the League.[139] What Warren objected to was that now—precisely the reverse of the situation on March 9—Brandeis's appearance on behalf of the League was creating a misimpression that the *Board of Trade*, as well, was in support of the compromise.[140] In the end, Warren and a few others resigned in protest from the League over this episode, and the Massachusetts legislature adopted the sliding-scale approach that Brandeis had championed.

To the extent that students of Brandeis's career have focused on this episode, they have concluded, first, that it *was* clear on May 3 that Brandeis was representing the League and not the Board of Trade; and, second, that Warren was a disgruntled zealot[141] whose testimony in 1916 was more the result of sour grapes than of any authentic concern with Brandeis's lawyerly obligations.[142] With these propositions I can agree. As Brandeis noted privately during the 1916 hearings, contemporaneous newspaper accounts, as well as a letter he wrote after the hearing, indicate that he represented the League at the Committee's "executive session" of May 3.[143] In addition, the League and the Board of Trade epitomized a difficulty that organizational clients often present: They are comprised of strong-minded, knowledgeable individuals who can be fragmented in their goals, and counsel may therefore find it necessary to engage in persuasion bordering on arm-twisting.[144] And

138. Telegram from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 124 (emphasis added).

139. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 1310 (testimony of Edward R. Warren).

140. 2 *id.* at 1309–10, 1312–13.

141. Brandeis's own conclusion was that Warren was "a man essentially narrow minded and of few ideas." Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 120.

142. *See, e.g.*, 4 LETTERS, *supra* note 22, at 125 nn. 1, 4 (editors' comments); MASON, FREE MAN'S LIFE, *supra* note 3, at 488–89.

143. *See* Telegram from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), in 4 LETTERS, *supra* note 22, at 124–25. One might ask, however, why the same argument might not suggest the significance of the reference in *Practical Politics* to Brandeis as the League's counsel at the earlier hearing. *See supra* notes 136–37 and accompanying text.

144. Significantly, Brandeis later recalled that "I had on my hands in the [League's Executive] Committee a fight which had become even more difficult than that against the Gas Company. My fight was

Warren does seem to have been an unimaginative fellow whose complaint that Brandeis did not "represent his other client as he should have done"[145] was somewhat disingenuous. Therefore, Brandeis stands acquitted of any charge of deception or failure to represent his formal client with the requisite zeal.[146]

Yet I am puzzled that most students of Brandeis, whether biographers or scholars of legal professionalism, do not at least find it *intriguing* that Brandeis, in this affair, navigated the labyrinth of "client" and "representation" in so facile a manner. It is as though Brandeis's transcendent intelligence, the superiority of his solution to the gas problem, makes the question of how he obtained the adoption of that solution in the public arena really quite secondary.[147] Even if one concludes that Brandeis never in this matter committed the error of stating formally that he was representing a client that had not authorized him to do so, he could not have realistically supposed that these distinctions would be clear to all involved.[148] To have alternately assumed and shed the coloration of "representation," as a snake might grow and then shed its skin, suggests that Brandeis regarded his role as representative principally as an instrument for effectuating his proposed solution to a social problem. To understand why this elusiveness on the part of Brandeis-as-lawyer is more disturbing than the parallel trait of Brandeis-as-political-reformer discussed in Part I, one must explore the meaning of "representation" and the reasons Brandeis often sought the role of representative in his reform ventures.

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against the radicals with one idea who could not see the bearing of the whole situation." Letter from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 123.

145. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 1313 (testimony of Edward R. Warren). The published version of the nomination hearings attributes these words to Senator Walsh, but this is plainly a typographical error.

146. John P. Frank presumably agrees, since he does not even mention Edward R. Warren's charges in his review of the 1916 nomination controversy. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101. This is probably because Warren's complaint came to light at the very end of the hearings and was not considered serious by any of the subcommittee's five members. 3 MERSKY & JACOBSTEIN, *supra* note 7, at 209 (views of Senator Chilton).

147. One need only read the accounts of this episode in STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 67–72, and MASON, FREE MAN'S LIFE, *supra* note 3, at 126–40, to see that the conventional meaning of this episode for Brandeis's life resides in its demonstration of his superior vision, commitment to the public interest, and skill in political organization.

148. Brandeis became immediately aware of the problem when (as he recalled years later) "Sprague [of the Board of Trade] was much disgruntled and insisted that because I had acted for the State Board on the general bill I ought not to have approved with the Franchise League any act of which he and Chamberlain [another Board of Trade member] disapproved." Telegram from Louis D. Brandeis to Edward Francis McClennen (Mar. 14, 1916), *in* 4 LETTERS, *supra* note 22, at 124. Had Brandeis consistently identified himself as counsel for both the Board of Trade and the League, a conflict-of-interest problem might have been presented. Although the interests of the Board of Trade and the League were not strictly and obviously adverse, Sprague's comment suggests that Brandeis was, at a minimum, flirting with what today might be called a "positional" conflict of interest, in which a lawyer takes a position on behalf of one client that is disagreeable to another client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1994); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993). That Brandeis was working with both groups on the same matter would seem to make his actions even more questionable. But this merely begs the original question, whether Brandeis was at any one time acting as counsel to both groups.

C. *"Representation" and "Standing" in the Public Sphere*

It may seem harsh and peremptory to ascribe Brandeis's disavowal of fees in his public interest work to motives, unarticulated at best, that are more complex than simply a love of justice or of the public good.[149] To give Brandeis his due, he was ahead of his time in appreciating the possibilities of legal representation as a means of participating in debates over public policy. One should also acknowledge that Brandeis developed his law practice at a time when lawyers' disregard of the line between public and private was often flagrant, and that his public-spiritedness was a notable political act that gave hope to many.[150] His efforts in the sliding-scale gas matter, like several of his other reform activities, resonate strongly with a more modern conception of public interest advocacy. David Luban, citing the old master, has given this enterprise of "lobbying for the people"—more recently exemplified by Ralph Nader—a powerful defense, based on the check it can provide upon the antidemocratic influence of lobbying by private interest groups:

> [L]obbying in the public interest is worth the effort. As in the case of class actions, it works to remedy an imbalance and thus to compensate for legislative failures that undermine democracy. The idea is pure Brandeis, and in his career as a people's lawyer, Brandeis was a tireless and brilliantly effective lobbyist; it was, in fact, what he did best.[151]

On this view, private gas interests would have seized control of the legislative and regulatory processes and crafted public policy for their own benefit had Brandeis not entered the fray on behalf of the public (albeit with specific groups as clients, a detail that Luban passes over). His efforts in the gas affair thus constituted the highest form of democratic citizenship in the service of the public good. Yet the problematic feature of Brandeis's behavior in the gas matter resides not in the legitimacy of public interest lobbying,

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149. There were occasions, in fact, on which the disagreement over whether Brandeis should receive a fee took place during or after the representation. *See* UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 35. It is easier to see the client's desire to pay in these instances as a matter of courtesy rather than an effort to control the representation. So I am not arguing that solely strategic considerations about who would control the representation always motivated Brandeis's desire to work without pay. *But see* Letter from Louis D. Brandeis to Alton E. Briggs (Apr. 25, 1913), *in* 3 LETTERS, *supra* note 22, at 70–72 (referring to request from Boston Fruit and Produce Exchange that Brandeis terminate his feeless representation of the Exchange after his activities on their behalf extended to issues on which they had not sought his representation).

150. One might favorably contrast Brandeis's assumption of public responsibilities with the behavior of nominally "public" lawyers like Richard Olney, who continued to represent the Burlington Railroad while serving as Attorney General of the United States in the 1890s. *See* Gordon, *Independence of Lawyers*, *supra* note 85, at 55 n.193; *see also* Charles W. McCurdy, *The* Knight *Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 318 (1979) (noting that state prosecution of Standard Oil Company was managed by counsel for independent oil competitors).

151. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 380.

which Luban ably defends, but in his treatment of his role as representative. For it was one thing to signify by his use of the phrase "The Opportunity in the Law" that lawyers should resurrect their historic role as statesmen and speak for a vision of political good subject to the dictation of neither the corporations nor the people.[152] It was quite another to seize the prerogatives of legal representation, as Brandeis did on several occasions by serving essentially as an unpaid lobbyist for ad hoc citizens' groups, while eluding the constraints on freedom of action that the role of counsel can bring with it.

As Luban aptly observes, Brandeis's characteristic public-lawyering role was not the provision of essential legal services to individuals unable to afford them, but advocacy in the public sphere (occasionally in court, but more often before the legislature or in the media) concerning public questions on behalf of clients who were, if not nominal, at least fungible. As is common with the impact litigation of more recent times, the issue or matter motivating this kind of representation resides less in the lived experience of the actual client(s) than in the goals perceived and articulated by the lawyer. And, as with impact litigation, the representation can nevertheless be thought to proceed in harmony with traditional notions of lawyerly duties to clients so long as the interests of lawyer and client remain coincident, or so long as any divergence of interest remains a matter of indifference to the client.[153]

But Brandeis's advocacy in these cases nonetheless constituted *representation*, and called for the duties and justifications that representation demands. The *Model Rules of Professional Conduct*,[154] the *Model Code of Professional Responsibility*,[155] and the 1908 *ABA Canons of Professional*

152. Brandeis, *Opportunity in the Law*, *supra* note 8, at 337–39.

153. I recognize that the class action, a paradigm for modern impact litigation, presents distinct problems because of the risk that absent class members may unwittingly forgo legal rights in the form of available claims and defenses, a risk that is not presented in quite the same way in the legislative context. My emphasis is on the complexities of defining group "interests" in a representation that seeks to vindicate public values: Who decides, and why? For some classic discussions, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 341–57. The unique and problematic features of the class action, as well as its interaction with conceptions of "interest" and "representation," are well discussed in STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 238–66 (1987).

154. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 (1994) (representation before legislative or administrative tribunals); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 6, § 13.8.2, at 749 ("Model Rule 3.9 and its comment . . . evidently conform to the Code's 'advocacy' model for lobbyists.").

155. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-16 (1982) (representation before legislative body); *id.* EC 7-15 ("A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." (footnote omitted)); *cf. id.* EC 8-4 (footnote omitted):

> Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

Ethics[156] all suggest, albeit vaguely, that the baseline ethical principles applicable to the lawyer as courtroom advocate (including the duty of zealous advocacy on the client's behalf) apply as well to the lawyer as legislative advocate.[157] One of these principles is the duty to advance the interests of the client—the represented party—within the bounds of the law, which would seem to imply a certain attention to the client's articulation of those interests. It is the meaning and dilemma of representation that render problematic Brandeis's commitment to political self-definition while acting as an attorney in these legislative and quasi-legislative settings.

Undoubtedly the tensions of representation can be especially salient where one is "lobbying for the people"—a lawyering activity with its own dilemmas and imperatives. The principles of neutrality and partisanship, with their highly privatist tone, can appear inapt in the legislative arena. Where the deliberative and not the adversarial process prevails, we want the applicable duties to be the citizen's duties of participation, sincerely expressed conviction, and fealty to the common good, not the lawyer's duties of loyalty and partisanship. We tolerate, up to a point, the lawyer's role as opportunistic "mouthpiece" in a court of law; that role seems somehow out of place where the advocate is testifying in the public sphere, particularly if he is a public figure (like Brandeis) known to have strong individual views on public policy. Unfortunately, recognition of the special issues raised by the lawyer as lobbyist or publicist has yet to find much formal expression, in the *Model Rules* or elsewhere.

But one wonders why this tension should arise at all. Why should we find the lawyer-statesman acting in a "representative" capacity in the first place? Assuming that Brandeis's principal interest was in promoting a particular vision of public policy, it is worth exploring why he elected this method—accepting (and at times soliciting or, in Mason's word, "enlisting") the role of counsel to individuals or associations. There was nothing in the nature of the policy issues that Brandeis took up that required a

156. Canon 26 of the 1908 *ABA Canons of Professional Ethics*, the provision most contemporaneous with Brandeis's activities (although adopted a few years after the gas matter), read as follows:

> *26. Professional Advocacy Other Than Before Courts*
>
> A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

ABA CANONS OF PROFESSIONAL ETHICS Canon 26 (1908), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 254 (1995).

157. Charles Wolfram has hypothesized (without advocating) that, owing to the absence of procedural and adversarial restraints upon the lobbying process, "a lawyer-lobbyist should be required to urge as policy only those measures that the lawyer personally regards as in conformance with the public interest," although he acknowledges that such a requirement would be difficult to reconcile with the principle of nonaccountability that otherwise attaches to the lawyer-client relationship. WOLFRAM, MODERN LEGAL ETHICS, *supra* note 6, § 13.8.2, at 749.

lawyer/representative's, as opposed to a citizen's, voice. As an articulate, upstanding, and well-known Boston attorney and citizen, Brandeis did not require a client in order to publish letters to the editor, correspond with legislators and executive officers, and otherwise make his views known on such issues as New England transportation monopolies and the need for savings bank life insurance.

But, to return to the terms I used earlier, often it is only by associating oneself with a predefined group (or "interest") that is larger and more compelling than the views of an individual citizen—even a brilliant, public-spirited citizen like Brandeis—*and* smaller or more concrete than the "public good" that one can obtain a voice in the larger political sphere. The means by which the individual citizen becomes a meaningful participant in the formation of public policy has long been a contested point in the theory and practice of representative democracy. One skeletal model posits merely that legislative representatives register the preferences of their constituents, who are geographically arranged but otherwise independent from one another—whose agreements and disagreements are simply fortuitous. The Mugwump took this picture literally and offered as his paradigm of citizen participation in governance the hermetically sealed and uncompromisingly expressed conscience of the upright individual. By contrast, the pluralist political theories of this century stress the role in democratic politics of pressure groups organized along lines of material interest rather than geographical groupings of autonomous individuals. New Deal political culture, moving beyond the anti-group bias of Mugwumpery and Progressivism, partly ratified this vision of democratic politics by evincing a toleration for collective organization.[158]

To be an autonomous political actor whose only claim to be heard resides in maintaining "the integrity of your own mind"[159] may be consoling, but (as numerous Mugwumps discovered) it is the surest way to political oblivion, even for those fired by a desire to shape public policy. One seeks, almost instinctively, association with a larger movement that not only is "louder" but that somehow attains ontological status through collective identity.[160] Thus, an "interest" is born. For example, the shippers whom Brandeis represented in the 1910 ICC rate hearings[161] may have had an intrinsic identity by virtue of their economic role in the delivery of goods, and politicians' response to their demands may have been a simple recognition of the votes the shippers could mobilize; but by becoming "the shippers" they achieved the dignity of

158. *See* RODGERS, CONTESTED TRUTHS, *supra* note 72, at 198–211.

159. EMERSON, *Self-Reliance*, *supra* note 1, at 141.

160. For a fascinating historical survey of the role of interests and collectivism in mainstream English political thought and practice, see Samuel H. Beer, *The Representation of Interests in British Government: Historical Background*, 51 AM. POL. SCI. REV. 613 (1957). A classic analysis of the obstacles to such group action is MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

161. *See supra* note 47 and accompanying text.

a greater political status than they would have had they remained simply an unorganized assortment of businessmen seeking to keep freight rates low.[162] The benefits of such association were practical as well as ontological: Our formal institutions for affecting public policy—legislatures, agencies, courts—do not have an infinite capacity for hearing and registering the views of every person claiming an interest in policy. Affiliation with a group, especially a group recognized as bearing legitimate and important interests, helps secure a piece of this scarce resource. Acting as the group's "voice" enhances one's claim to that resource still further. As I believe Brandeis intuited, one effective way of obtaining input in the formation of public policy is the privilege of speaking on behalf of organized associations of prominent citizens—sometimes in formal legislative settings, sometimes simply in the public eye—conferred by the role of counsel. The benefits of this move, from the perspective of one committed to having a say in the public arena, were manifest. Whereas the lawyer-statesman archetype of the nineteenth century, Daniel Webster, reached the pinnacle of his influence through his service as a U.S. Senator, Brandeis exerted his influence through the medium of the lawyer-client relationship. But to engage in this act of legal representation was inevitably to imperil the dream of a wholly self-willed political existence. Precisely because Brandeis's role was as *counsel*, his approach brought in its train the constraints and dilemmas implied by the duties of representation.

What are those constraints and dilemmas? As Hanna Pitkin has observed in her classic study,[163] the concept of representation has assumed a variety of meanings in Western culture, but the most enduring problem it has presented is the "mandate-independence controversy"—the degree to which legislative representatives should serve as uncritical conduits for their constituents' desires or, conversely, exercise independent judgment.[164] And, while Pitkin's principal concern in her study is the nature of representative government, the duties of a "representative" are even more persistent a question in the context of the lawyer-client relationship (indeed, in any professional-client relationship). The legislative representative's independence is limited ultimately by political realities (the likelihood that an unresponsive legislator will be voted out of office), but the lawyer's independence is constrained by more than just the fact that the client can fire her. Specific ethical rules, not to say the broader principles of partisanship and

162. The price of attaining this status was that they also became a "special interest," opening their legitimacy to potential challenge.

163. PITKIN, CONCEPT OF REPRESENTATION, *supra* note 71.

164. *Id.* at 144–67. Brandeis's own view on this issue was straightforward: "I am unwavering in my belief in democracy of the old representative type, when the representative was to exercise his judgment and discretion and not merely voice the will of the electorate." Letter from Louis D. Brandeis to Norman Hapgood (Nov. 23, 1932), *quoted in* MASON, FREE MAN'S LIFE, *supra* note 3, at 602.

neutrality[165] that undergird the entire system, require her to attend to her client's interests.[166] Of course, these principles persistently confront competing visions of legal professionalism, some of which posit a role for the lawyer that is far less client-deferential.[167] But the assumption of the role of legal representative inevitably entails the surrender by the representative of a considerable degree of freedom with respect to issues relevant to the representation—not the freedom to engage and even challenge the client with respect to these issues, nor the freedom to sustain public values in the face of the client's demands, but the freedom to appear in the world bearing a wholly unmediated and self-determined expression of belief. The necessity of this surrender seems psychological or phenomenological rather than normative or ideological, a consequence of the "relatedness" that representation brings.[168]

This, I believe, was what made his legal representations on public matters at times a precarious undertaking for Brandeis. Having chosen representation of groups (or, on occasion, individuals) as a vehicle for fighting for the right in the public sphere, Brandeis risked running afoul of two kinds of norms. To attain his ultimate purpose, (his vision of) the public good, he might have to

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165. See Simon, *Ideology of Advocacy*, *supra* note 83, at 36–37, for an identification and critique of these principles.

166. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1991) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

167. *See, e.g.*, Simon, *Ethical Discretion*, *supra* note 107 (arguing that lawyers should have discretion to resist client goals that disserve justice). Recent nostalgia for the tradition of the American "lawyer-statesman" exercising *phronesis* or practical wisdom, recalling Tocqueville's well-worn invocation of lawyers as the American "aristocracy," reminds us that the primacy of partisan loyalty in the lawyer's hierarchy of duties is a historically contested notion. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) [hereinafter KRONMAN, LOST LAWYER]; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264–70 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (13th ed. 1850). For an imaginative application of Tocqueville's observation to a later period, see Gordon, Lawyers as the American Aristocracy, *supra* note 91. *See also* Gordon, *Independence of Lawyers*, *supra* note 85, at 11–17 (noting that vision of lawyers exercising independence from client control "has real historical content"); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 919–35 (1980) (nineteenth-century American lawyer not regarded strictly as conduit or "mouthpiece" for client's views or ends). Luban persuasively finds an invocation of *phronesis* in Brandeis's own "The Opportunity in the Law." *See* Luban, Noblesse Oblige *Tradition*, *supra* note 85, at 721.

Structural-functionalist theories of the professions, and to a certain extent Weberian theories as well, suggest that lawyers perform an independent or "mediating" role between public and private (i.e. client) interests. Thus, Simon specifically likens Brandeis's own rhetoric in "The Opportunity in the Law" to Talcott Parsons's functionalist approach to the sociology of professionalism. *See* Simon, *Babbitt v. Brandeis*, *supra* note 85; *see also* John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 893 (1983) (discussing lawyering and "functionalist school"). Magali Sarfatti Larson, whose writing on professionalism is more in the Weberian tradition, has taken up the lawyer's role as "representative" more explicitly: "In the broad sense, representation can be seen as the defining trait of lawyers, an expression of their responsibility for patrolling the boundary between state and custom, public and private, and intersecting rights in the private sphere." Magali S. Larson, *The Changing Functions of Lawyers in the Liberal State: Reflections for Comparative Analysis*, *in* 2 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 427, 434–35 (Richard L. Abel & Philip S.C. Lewis eds., 1989).

168. Thus, Pitkin can say, in the course of a discussion of Hobbes's definition of representation in terms of the "ownership" of the representative's words and actions by another, "[T]he man who complains that his life is no longer his own [is] . . . seeking the control and the freedom which go with ownership. The same element exists in the concept of authority." PITKIN, CONCEPT OF REPRESENTATION, *supra* note 71, at 28.

attend with something less than warm zeal to the preferences of his clients. But the alternative—allowing the client a greater role in determining the ends of the representation—might be to abdicate Emersonian self-definition in the discussion and resolution of public questions. To paraphrase W.J.T. Mitchell, the imperatives of representation would thus operate, in their remorseless way, to alienate Brandeis's will from himself, a result he would not abide. Moreover, such a resolution would surrender not only autonomy but also the credibility it conferred, creating the risk that his independent judgment (always a high value in the Mugwump-Progressive mind) might appear corrupted by client affiliation. The gas matter illustrated that the dilemma was not merely hypothetical. Ultimately, Brandeis's behavior in that affair signified not so much the breach of an ethical canon as the conflict between the lawyerly norm of zealous representation and the political-cultural norm of independence.

As it turned out, these competing norms were the very issues underlying the most virulent accusations leveled, often unscrupulously, against Brandeis, particularly during his 1916 nomination hearings: that he abandoned or disserved clients to suit his own objectives and that he was the witting or unwitting mouthpiece of mysterious individuals and groups. Perhaps anticipating these pitfalls, Brandeis at times explicitly disclaimed association with an organizational client, preferring to rest his case on disinterested duty to the public. For example, in one of his first great public interest fights, the effort to keep the Boston Elevated Railway from monopolizing the local transportation market, Brandeis worked closely with a number of prominent Bostonians to organize effective opposition to a bill supported by the Boston Elevated. In the midst of that affair we find Brandeis writing the following to Albert Pillsbury, counsel to the Boston Elevated and a man who would become his inveterate foe:

> My Dear Pillsbury:
>
> During the last ten days I have been told by two editors of our papers and by some other people that it has been stated to them by persons connected with the Boston Elevated Railroad that I was retained by F. L. Higginson or Lee Higginson & Co. or some opposition interest to oppose the Boston Elevated Railroad bill. . . . To-day a common friend of ours told me that you had said to him that I was retained by F. L. Higginson. That statement is absolutely without foundation. I am not retained by Mr. Higginson or any other person or corporation or association, and have opposed this measure merely as a matter of duty, believing it to be absolutely prejudicial to the interests of the people of the Commonwealth.[169]

169. Letter from Louis D. Brandeis to Albert Enoch Pillsbury (May 20, 1897), *in* 1 LETTERS, *supra* note 22, at 131 (footnotes omitted); *see also* Letter from Louis D. Brandeis to William Ames Bancroft (May 20, 1897), *in* 1 LETTERS, *supra* note 22, at 130–31 ("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 . . . ."); STRUM, JUSTICE FOR

The point here is not that Brandeis's claim to be driven by public duty alone was disingenuous, but that he appreciated the importance of the perception that he was free from an influence (the Higginson interests, which were not principally philanthropic) that might undermine that claim. In later episodes, however, Brandeis was more willing to accept the role of counsel, perhaps sensing that the risk that his judgment might appear corrupted was less where the client was an organization formed specifically to promote the public good. Abjuring fees when rendering these services may have served as an acceptable middle way for Brandeis: attaining a certain "standing" in the public policy arena without appearing to be corrupted by private "interest."[170]

I deliberately use the term "standing," with its contemporary implications concerning access to the federal courts. At Brandeis's confirmation hearings in 1916, Moorfield Storey, whose sense of the lawyer's role was equally public-spirited but more traditional than Brandeis's, addressed this notion of "standing" in objecting to Brandeis's role in the Ballinger-Pinchot affair, one of three episodes in Brandeis's *annus mirabilis*, 1910, that brought him to national attention.[171] The Ballinger-Pinchot affair, an epic in the history of federal environmental policy, began when Louis Glavis, an Interior Department employee, blew the whistle on Interior Secretary Richard Ballinger, claiming that Ballinger was surreptitiously opening certain public lands in Alaska to private development. These accusations became a nagging problem for the embattled Taft administration, which was forced to endure extended congressional hearings on the matter after Taft foolishly and peremptorily fired Glavis for insubordination. Brandeis appeared at the hearings and dominated them, looking for all the world as though he were counsel to Glavis, the persecuted whistle-blower who had temporarily captured the public's fancy. Brandeis's tireless investigation (he operated for several months out of a D.C. hotel room), his brilliant cross-examination of administration witnesses, and his

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THE PEOPLE, *supra* note 3, at 58 (discussing letter to Pillsbury). Like Brandeis's feeless work, this raises the interesting question of whether there is an ethical distinction between actions taken to preserve propriety and those taken to preserve the *appearance* of propriety. In the latter situation, the actions seem to be more instrumental than ethical.

170. Brandeis's elaborate orchestration of these considerations reached a crescendo in his letter to Charles Sanger Mellen, president of the New Haven Railroad (Nov. 20, 1907), *in* 2 LETTERS, *supra* note 22, at 50–51, in which he claimed to "represent only myself" in seeking financial information from Mellen about the New Haven's holdings; to nevertheless be "cooperating with others" in opposition to the New Haven merger; to be "nominally act[ing] as counsel" for the Lawrences in connection with the merger fight "merely because of my interest as a citizen in this question and of my desire to cooperate with all those who wish to protect the Commonwealth from what we believe to be a serious menace to its welfare"; but, lest there be any misunderstanding, to have "decline[d] to receive compensation for my own services as counsel."

171. The others were his ICC testimony and his mediation of the garment workers' strike. An excellent treatment of the Ballinger-Pinchot affair is PENICK, PROGRESSIVE POLITICS AND CONSERVATION, *supra* note 12. Penick's book, often critical of Brandeis, is an important corrective to the standard interpretation popularized in MASON, BUREAUCRACY, *supra* note 23.

stirring closing argument led to the Taft administration's embarrassment.[172] As it turned out, Brandeis in fact was retained not by the impecunious Glavis but by *Collier's Magazine*, an anti-Taft periodical, which had broken the story and which was edited by Brandeis's friend Norman Hapgood.[173] Storey, not surprisingly, found it disconcerting that Brandeis was able to obtain a central role in the hearings under such circumstances:

> It is something of the same nature that happened in the Ballinger case, where Mr. Brandeis appeared for Mr. Glavis, when, as a matter of fact, he was retained and paid by Colliers Weekly. If he had stated that position, and that he was there as the representative of Colliers Weekly, he would have had no standing at the hearings. . . . I mean to say if Mr. Brandeis had come before the committee and said he was there in the interests of an illustrated newspaper that was engaged in pushing this case all the way through, he would have occupied a very different position from that which he apparently occupied when he appeared for a man without means to conduct a great public inquiry. . . . My impression was that this committee of Congress would be slow to allow newspapers to send their attorneys to represent them in these hearings.[174]

Although he identified *Collier's* as the interest that Brandeis represented and that had no business at the Ballinger-Pinchot hearings, Storey doubtless

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172. In classic fashion, Brandeis demonstrated that a critical memorandum had been back-dated and that, contrary to his public statements, Taft had exonerated Ballinger without reading the internal report that had been prepared for him. *See* PENICK, PROGRESSIVE POLITICS AND CONSERVATION, *supra* note 12, at 156–62.

173. Brandeis disputed Storey's contention that he had concealed the identity of his true client. *See* Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 17, 1916), *in* 4 LETTERS, *supra* note 22, at 63–65. There is no question, however, that Brandeis left the firm impression that he was acting for Glavis while saying nothing about *Collier's*. *See* 9 INVESTIGATION OF THE INTERIOR DEPARTMENT AND OF THE BUREAU OF FORESTRY, S. DOC. NO. 719, 61st Cong., 3d Sess. 5021, 5182 (1911) [hereinafter INVESTIGATION]. In his assessment of the charges made against Brandeis in 1916, John P. Frank acknowledges that Brandeis appeared to be acting for Glavis while being paid by *Collier's* but finds nothing problematic in this because Brandeis's zeal on Glavis's behalf was undimmed. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 692–94. The difficulty, however, was not that Brandeis acted for Glavis while being paid by *Collier's* but that Brandeis seems not to have made this arrangement generally known. Had this vagueness amounted to "concealment," it would have been contrary to Canon 26 of the 1908 *ABA Canons of Professional Ethics*. *See supra* note 156; *see also* Edward M. Shepard, *Lawyers and Corporate Capitalization*, 18 GREEN BAG 601, 603–04 (1906) [hereinafter Shepard, *Corporate Capitalization*]:

> Whether it be in executive office or in Congress, or as a candidate, or upon the stump, a lawyer dealing with a public question in which a client who has retained him is interested, is bound by sheer elementary considerations of honor to frankly state his professional relation to the client. It is his plain duty scrupulously to abstain from any attempt to influence public sentiment in favor of or against any public measure in which his client is interested or upon which he cannot as comfortably differ from his client as he can agree with him, except when he speaks openly and confessedly for his client as a retained advocate.

174. 1 MERSKY & JACOBSTEIN, *supra* note 7, at 269–70 (testimony of Moorfield Storey).

recognized that what was at work here was Brandeis's resourceful way of getting his own views on policy before the country.[175]

Senator Albert Cummins, Brandeis's most tenacious opponent on the Senate subcommittee considering his nomination in 1916, seems also to have been alluding to these issues of "standing" and "representation" in his discussion of Brandeis's role in the controversy over the proposed merger between the New Haven Railroad and the Boston & Maine:[176]

> In so far as the public generally was concerned Mr. Brandeis ought not to have represented anybody as an attorney and there should have been no compensation for work done to promote the common good. . . .
>
> Personally I am of the opinion that a lawyer has no right to appear before a committee of Congress or a committee of a legislature as an attorney to urge questions of public policy. He has a right as a citizen to become a part of a movement and to be the spokesman of the movement but in so doing he is not an attorney or representative. He is speaking for the people of whom he is one. In such a situation there ought to be no clients whose pecuniary interests are to be served or protected.[177]

Cummins's remarks may simply reflect the standard Progressive typology of "the People" and "the interests," and for political purposes at that. His emphasis on "compensation," which is different from the point I am making (there is no basis for the claim that Brandeis inappropriately accepted a retainer in this or any other matter), suggests this.[178] Yet in making these comments,

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175. One should read Brandeis's Ciceronian opening and closing arguments to see how Glavis's plight became merely a point of departure for Brandeis's broadside against Taft administration insiders and the threat they posed to democratic values. *See* 9 INVESTIGATION, *supra* note 173, at 4903–23 (Brandeis's opening argument); 9 *id.* at 5005–21 (Brandeis's closing argument).

176. Brandeis was retained by Samuel and William Lawrence, Boston & Maine stockholders who strongly opposed the merger and who had huge investments at stake. (Again, confusion of names is easy here because a *different* William Lawrence, *Bishop* William Lawrence, was a correspondent of Brandeis's on various matters, including the New Haven merger controversy.) Of course, Brandeis, concerned with more than the Lawrence investments, was fighting the merger in a far broader way through the medium of public opinion and in the Massachusetts legislature. Abrams, *Merger Revisited*, *supra* note 12, at 417–19; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 159–60. As this was "public" work, Brandeis refused compensation from the client stockholders, but paid his partners more than $25,000 so as not to deprive them of revenues they might have received had he not spent the time on this public matter.

177. 3 MERSKY AND JACOBSTEIN, *supra* note 7, at 322–23 (statement of Senator Cummins).

178. See also the following comment made by Cummins at the hearings:

> It seems to me a very material thing for the inquiry, in order to reach a conclusion about the inquiry, to know whether Mr. Brandeis appeared on a question of public policy, or of public morals, and received compensation for it. I can conceive that a man might appear under the laws of Massachusetts in this capacity and still be in the same relation towards the public that any citizen would. To me, there is a great deal of difference between appearing upon a public question of this sort for pay and to accomplish the purposes which his employers might have in mind and appearing to declare his sincere sentiments as a citizen.

2 *id.* at 1070 (statement of Senator Cummins). The desire to anticipate and defuse sentiments like these may help explain why Brandeis declined compensation on so many occasions.

Cummins also seems to have discerned that Brandeis never entered the arena of public policy for any reason other than to promote what he believed to be correct policy, and that the existence of a "client" was gratuitous.

The objection to Brandeis's "standing," expressed by Storey and echoed by Cummins, resembles the conundrum of standing in federal court under Article III of the U.S. Constitution that arose once a public rights model of litigation came to compete with the traditional private rights model.[179] While the analogy is not exact, the two situations share a fundamental point of contention: When, indeed why, should a citizen be permitted a direct voice (assertedly as a representative of the public) in an institution of self-governance that has limited resources and therefore cannot accommodate all such voices? As the U.S. Supreme Court noted in 1975: "[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance . . . ."[180] Perhaps the most celebrated judicial pronouncement concerning this principle dates from 1935:

> The fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that corporate action, taken or contemplated, is illegal *gives the stockholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public.* The function of guarding the public against acts deemed illegal rests with the public officials.[181]

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179. For astute discussions of this development, see JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW (1978); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

180. Warth v. Seldin, 422 U.S. 490, 499–500 (1975).

181. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 343 (1936) (Brandeis, J., concurring) (emphasis added). Note also the excerpt from an earlier memorandum addressed by Brandeis to his judicial colleagues during their consideration of *Ashwander*:

> Stockholders may, within the recognized limits, invoke the aid of the courts to enjoin illegal acts which threaten their own property rights. But they are no more entitled to a judicial remedy to restrain action which . . . do[es] not imperil their property, merely because the action is alleged to be illegal. They are not guardians of the public. The function of guarding the public interest against acts *ultra vires* or otherwise illegal rests with the public officials. The belief that the company action is unconstitutional gives the stockholder no greater right than that possessed by any other citizen.

The Louis Dembitz Brandeis Papers, Box 96, Folders 1–7, *microformed on* Part II: United States Supreme Court, Oct. Terms 1932–1938, Reel 16, No. 0447 (Library of Congress), *quoted in* Winter, *supra* note 179, at 1448; *see also* Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) (Brandeis, J.) ("Plaintiff has only the right, *possessed by every citizen*, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute [a suit] in the federal courts . . . ." (emphasis added)). As Winter points out, Brandeis's opinion in *Fairchild* preceded by a year the Court's decision in Frothingham v. Mellon, 262 U.S. 447 (1923), perhaps our leading case on "taxpayer standing." Winter, *supra* note 179, at 1376. Although Brandeis did not write

The Justice expressing these views was Louis D. Brandeis. Had they heard them, Storey and Cummins might well have wondered why such observations would not have applied with equal force to Brandeis's own lawyering in the public sphere.

D. *The 1916 Confirmation Hearings: The Lawyer as Judge*

The 1916 nomination hearings at which Storey criticized Brandeis for his involvement in the Ballinger-Pinchot affair afford the single most illuminating window on Brandeis's approach to the practice of law in the public interest and the response to that approach by some of his contemporaries. I want to examine more closely three episodes from Brandeis's lawyering career that were explored at the hearings, both because they have acquired a certain notoriety in the literature on Brandeis and because, in differing ways, they illustrate the misunderstandings and recriminations that could result from his instinct for standing apart from others. To a remarkable extent, the 1916 hearings offered a kind of postmortem on the self-direction that had characterized Brandeis's behavior in legal matters involving public issues; they consisted largely of an inquiry into charges that he had departed from the ethics of his profession on a variety of occasions.

Of course, caution is advisable in interpreting and extrapolating from those hearings, fascinating though they are. Unlike the handful of episodes aired during the hearings, most of Brandeis's work as a lawyer never came to public attention, and one should not identify his usual lawyerly modus operandi with its most notorious episodes. Those episodes at best cast light on one aspect of Brandeis's practice of law and do nothing to change the fact that he was a brilliant counselor and advocate in his conventional representations. In

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the Court's opinion in *Frothingham*, he joined in it and no doubt approved of its admonition that a plaintiff must do more than allege "merely that he suffers in some indefinite way in common with people generally." 262 U.S. at 488.

Since I have made something of the similarity between Brandeis's views on standing and the kind of objections expressed by Storey to Brandeis's participation in legislative proceedings, let me state clearly: It is not difficult to construct and articulate a theory that would distinguish analytically the question of standing in court from the question of standing at a public hearing. If one believes, as Justice Brandeis apparently did, that standing requirements are constitutional (Article III) rather than prudential, Winter, *supra* note 179, at 1436–48, then it is not analytically inconsistent for Brandeis to have been so insistent on jurisdictional proprieties in the judicial context. In any case, the distinction between the judicial and political processes is so ingrained that it seems natural to regard standing as a more crucial consideration in the former.

As to a different kind of question—Isn't there at least a broad irony in the kinds of attitudes struck by Brandeis in the two contexts?—the point made by Winter is a crucial one: At the time Brandeis made his *judicial* pronouncements, easy access to the federal courts was largely a boon to conservatives trying to invalidate Progressive or New Deal political initiatives. By contrast, Brandeis's own public interest forays were in the service of a very different political end. For a similar point, see Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125, 137–46 (1992) [hereinafter Spillenger, *Reading the Judicial Canon*] (arguing that Brandeis's commitment to jurisdictional proprieties and judicial restraint rested partly on recognition of contemporary political realities).

addition, as more recent judicial nominations make clear, the rhetoric used in nomination hearings may conceal some of the real issues at stake in them. A sensitive reading "between the lines" is as necessary in exploring Brandeis's confirmation hearings as it will be when historians examine the Bork and Thomas hearings (so shrouded in rhetoric that diverts attention from the fundamental questions of judicial politics and ideology) a generation from now.

Nevertheless, it is worth looking closely at some of the charges made against Brandeis at the hearings, if only because the standard accounts of that debacle have rarely explored them. The general verdict has been that the real issues underlying opposition to Brandeis's nomination were a genuine (if misguided) fear of his "radicalism" (in particular, his attitudes concerning labor and property); feelings of resentment on the part of Boston lawyers he had bested in court; and a measure of anti-Semitism.[182] A more nuanced version emphasizes the personal and cultural chasm dividing Brandeis from the bluebloods who could not understand or accept him. I acknowledge the importance of these factors; no one could credibly argue that only a noble and disinterested commitment to the canons of legal ethics lay behind the often vituperative onslaught on Brandeis's reputation. Moreover, some of the harshest criticism of Brandeis came from Republican Senators Cummins and Works, who should have been Brandeis's most ardent defenders on the investigating subcommittee in light of their own supposed commitments to Progressive reform. Cummins and Works, like other sympathizers of the waning Progressive Republican insurgency of 1909–1914, were seeking readmission to the higher councils of mainstream Republicanism, and 1916 was an election year. Their hypercritical statements on Brandeis thus have a contrived, politicized air. But these are not reasons for disregarding as pretextual the issues actually discussed in the hearings. Even the disguises people use for their "real" agenda are chosen only if they can resonate in the hearts and minds of those who hear them.[183]

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182. The role played by anti-Semitism in the opposition to Brandeis's nomination is difficult to calculate. If by adverting to anti-Semitism one means that those who opposed Brandeis would have supported a non-Jewish nominee with views identical to Brandeis's, or would have opposed a Jewish nominee with views congenial to their own, then the importance of anti-Semitism in the opposition to Brandeis's nomination seems slight. If, however, by anti-Semitism one means that Brandeis's Jewishness contributed to the social isolation from the Boston lawyers who either opposed his nomination or remained aloof from it, then anti-Semitism played a more significant role. It does appear that a few of those who would have opposed the nomination in any case made disparaging references to Brandeis's Jewishness, although these comments were usually made in private. *See* TODD, JUSTICE ON TRIAL, *supra* note 31, at 216–17.

183. Previous accounts of the Brandeis nomination struggle have tended to regard the discussion of Brandeis's "ethics and character" as a veil for the real concerns of elitism within the legal profession, fear of social change, and, to a lesser degree, ethnicity. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 179–80 (2d ed. 1985); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 66–73 (1976); TODD, JUSTICE ON TRIAL, *supra* note 31; UROFSKY, LOUIS D. BRANDEIS, *supra* note 17, at 104–05 ("[T]he major issue at all times remained whether or not to admit a radical into the sacrosanct—and conservative—citadel of the law."); ALEXANDER M. BICKEL & BENNO C. SCHMIDT, THE JUDICIARY AND

The 1916 hearings were virtually one long inquiry into claims that, on various occasions, Brandeis had violated the ethical norms of law practice.[184] And almost all of the charges played on a common theme—that Brandeis did not measure his duties as advocate according to the interest of an individual client, to whom he owed unqualified loyalty; in more modern terms, he had become embroiled in conflicts of interest and had failed to pursue his clients' interests with the zeal required by the canons of the bar. But the "conflicts of interest" here were of an idiosyncratic kind: Brandeis was accused essentially of permitting his *own* vision to interfere with what should have been a deferential loyalty to his clients. Then, as now, this was a situation not really contemplated in the formal definition of "conflict of interest." Just as Mugwump-Progressive ideology confined its critique of "interest" in politics to the power exerted by external forces, principally material reward, the canons of professional ethics (even today) tend to define "conflict of interest" as a financial commitment to another person or entity that interferes with the duty to one's client.[185] Nevertheless, some lawyers of Mugwump leanings testified in 1916, at times inarticulately, that there was *something* problematic in Brandeis's self-direction even though material gain did not seem to be at issue. Austen G. Fox, who presented most of the evidence against Brandeis during the hearings,[186] suggested to Amos Pinchot that "[t]he trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients instead of being his client's lawyer, which is against the practices of the Bar."[187]

RESPONSIBLE GOVERNMENT, 1910–21, at 379–86 (1984) (Vol. IX of Oliver Wendell Holmes Devise History of the Supreme Court (Paul A. Freund & Stanley N. Katz eds.)).

184. This fact itself suggests how different in form Brandeis's confirmation hearings were from those of our own day. Little attention was given in the hearings to the question of Brandeis's "jurisprudence"—that is, how he was likely to vote on particular cases that might come before the Court—although the periodical press treated that issue more explicitly.

185. The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 6 (1994). Note the omission of any reference to ideological commitments in this gloss on impermissible conflicts.

186. This is yet another detail that will startle those coming to the Brandeis nomination for the first time. Fox, a leader of the conservative New York and Boston lawyers opposed to the nomination, was appointed by the subcommittee to present the case against Brandeis through the submission of evidence and the examination of witnesses, as a way of simplifying the charges proffered to the subcommittee. A modern analogue would be if Nan Aron of the Alliance for Justice had been invited to present the case against Robert Bork in 1987.

187. Letter from Steven S. Wise to Louis D. Brandeis (Mar. 23, 1916), *quoted in* MASON, FREE MAN'S LIFE, *supra* note 3, at 506. Fox evidently spoke these words to Pinchot, who conveyed them to Wise, who in turn reported them to Brandeis. *See* Letter from Louis D. Brandeis to Stephen Samuel Wise (Mar. 24, 1916), in 4 LETTERS, *supra* note 22, at 133. This hearsay twice removed must therefore be treated with caution. The letter cited by Mason appears now to be lost.

This complaint has elicited considerable chortling from those who have looked back on the hearings, since it suggests that Brandeis was being made to suffer for his moral vision in maintaining a critical distance from his clients, which seems an ironic complaint to make of a man being considered for the judiciary.[188] Perhaps Fox's words reflected the changed self-image of the mainstream bar, from a nineteenth-century conception of representation as moral and public to one that regarded it as private and professional.[189] But there is more to Fox's comment than befuddlement at the notion that a lawyer might have a moral vision.[190] To Fox and some others who had encountered Brandeis in the legal arena, there was an *elusiveness* to Brandeis because of his unwillingness to have his persona defined principally by a client's goals—a "man behind the curtain" quality that made many of his representations seem surreptitious (and invariably successful) efforts to promote his own vision of public policy. Albert Pillsbury, an old adversary of Brandeis, put the general criticism more harshly when he called Brandeis "a man who works under cover, so that nobody ever knows where he really is or what he is really

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188. At the same time that Fox was decrying Brandeis's judicial attitude, other opponents of Brandeis were claiming that he had been too aggressive and "adversarial" in his Boston law practice. The *New Republic*, a vigorous supporter of the Brandeis appointment, caught the irony:

> What might be called the theme, the *leitmotif* of the charges, is that Mr. Brandeis has frequently been guilty of double-dealing. He is supposed to be a man who is at once violently partisan for his client, and yet disloyal to him. He is supposed to be without the "judicial temperament," and at the same time inclined to be on both sides of a case. Those who attacked him seemed unable to agree on whether he is a ruthless partisan, or a man who is not partisan enough. But they concentrated finally on the belief that he is not the absolute partisan of his client.

The Case Against Brandeis, 6 NEW REPUBLIC 202, 202–03 (1916); *see also supra* note 103.

189. See the brilliant elucidation of this view in Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191 (1977) [hereinafter Schudson, *Public, Private, and Professional Lives*], including a discussion of Brandeis's place in this changed conception, *id.* at 210–11. It is a commonplace of the histories of modern American lawyering that the absorption of lawyers into corporate enterprises (a development mentioned by Brandeis himself in *Opportunity in the Law*, *supra* note 8, at 559) tended to reduce their independence and public-spiritedness and to make them more counselors than advocates. *See, e.g.*, UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at 19–20. For a contemporary expression of this view, see Shepard, *Corporate Capitalization*, *supra* note 173, at 601–04. But our understanding of how that development might have operated upon the legal-ethical conceptions of lawyers remains partial. For some useful beginnings, see generally WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930 (1986); Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51 (Gerald W. Gawalt ed., 1984); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983).

190. McFarland lists Fox in his "Masterlist" of "Mugwumps Living in 1910." *See* MCFARLAND, MUGWUMPS, MORALS & POLITICS, *supra* note 15, at 207–08. The role of Mugwumps like Fox and Storey in opposing Brandeis's confirmation is an interesting phenomenon in light of my assertions on the Mugwump ideal of "independence." Plainly, Brandeis's move to a more daring Progressivism alienated these fundamentally conservative men. Yet one might have expected them to be less critical than they were of the pattern of "nonaffiliation" exemplified by some of Brandeis's more notorious lawyering activities. One must conclude that these men, born in the 1840s in what became the breeding grounds of liberal reform (Boston and New York), were as committed to traditional canons of lawyerly behavior as they were to an ideal of "independence" in politics.

about."[191] Several of the incidents recounted during the nomination hearings were variations on this theme, suggesting the risks Brandeis ran when he sought to be "counsel for the situation" or "attorney for the public" or when he asserted too firm an independence from the goals of a powerful private client.[192]

1. *The Lennox Case: Representing the Situation*

The Lennox case was one such incident. Few phrases in the literature on lawyering are as evocative as the one attributed to Brandeis in connection with the Lennox affair: "counsel for the situation." Few know much about the incident that inspired these words, but many can articulate the images they call to mind. Certainly the Lennox episode is an important constituent of Brandeis's image as a mediator or harmonizer.[193] To be "counsel for the situation"[194] is to resist in appropriate cases the traditional notion that lawyers should have a single client to whom they owe unqualified loyalty. It is to recognize and respect certain organic bonds, like family and other relationships, as deserving of representation. It is to suggest that the lawyer should be able to act as intermediary in situations that involve multiple but not necessarily adverse interests—for example, in the contexts of bankruptcy, divorce, and inheritance. Sometimes the phrase refers to the role of lawyers as social reformers—making "the situation" synonymous with "the public" or "the public good."[195]

These concepts reflect an important and salutary development in the vision of the lawyer's role, for which Brandeis's image has come to constitute

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191. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 653 (testimony of Albert Pillsbury). Francis Peabody stated that Brandeis's "reputation is that he is not always truthful, that he is untrustworthy, and that he sails under false colors." 2 *id.* at 750 (testimony of Francis Peabody). Mr. Peabody, a Boston lawyer, opposed Brandeis's activities with respect to the New Haven merger and was one of those solicited (unsuccessfully) for his proxy in the Illinois Central matter, mentioned above.

192. For illustrative purposes, I confine my discussion here to three episodes that have acquired a certain notoriety and have consequently contributed to Brandeis's reputation as a lawyer. A number of other episodes would be equally apt examples; it is uncanny how many of them spoke to the same issues. In the case of the Warren will, Brandeis handled the estate of his friend and partner, Sam Warren, and was accused of neglecting the interests of Sam's brother, Ned. As in so many instances, the supposed problems arose at least in part because Brandeis attempted to handle the needs and interests of everybody involved—that is, all the family members who were or might have been beneficiaries under Sam's will. As John P. Frank has shown, these kinds of problems are almost endemic in estate practice, and Brandeis acted properly throughout this matter. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 694–98. Those looking for a succinct but more compendious description and evaluation of the serious charges made against Brandeis in 1916 should consult Frank's thoughtful article.

193. On Brandeis's image as mediator, see *supra* text accompanying notes 93–98.

194. One finds with about equal frequency the phrases "counsel for the situation," "lawyer for the situation," and "attorney for the situation." All refer to the Brandeis episode and its implications for lawyering.

195. For an interesting historical discussion that treats Brandeis as a source of social reform lawyering ideals without mentioning the Lennox case, see Gerald L. Fetner, Counsel to the Situation: The Lawyer as Social Engineer, 1900–1945, at 56–64 (1973) (unpublished Ph.D. dissertation, Brown University).

powerful authority.[196] Thus, when Geoffrey C. Hazard advocated an explicit recognition of the lawyer's role as intermediary—first in his 1978 book, *Ethics in the Practice of Law*, later in his role as reporter for the committee drafting the *Model Rules of Professional Conduct*—Brandeis and his role in the Lennox case were a natural point of departure.[197] Other writers have even more explicitly traced to Brandeis some modern critical notions concerning the lawyer's role. William H. Simon,[198] David Luban,[199] Robert Gordon,[200] Charles Wolfram,[201] David Wilkins,[202] Stephen Ellmann,[203] Ted Schneyer,[204] and Robert Rosen[205] all speak of Brandeis's phrase "counsel for the situation" as a cutting-edge concept in modern legal professionalism.

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196. Through my conversations with students and teachers of professional responsibility, I have anecdotal evidence that not all classroom discussions of the Lennox case end in praise for Brandeis's role in it. The scholarly treatment of it is usually positive, however.

197. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 58–68 (1978) [hereinafter HAZARD, ETHICS IN THE PRACTICE OF LAW]; *see also* Dzienkowski, *Lawyers as Intermediaries*, *supra* note 97, at 744 n.11 (discussing sources of lawyer-as-intermediary provision in *Model Rules*). Dzienkowski's article is very informative on the "intermediary" issue generally.

198. Simon, *Visions of Practice*, *supra* note 96, at 486 (on "Brandeis' notion of 'counsel to the situation' in which the lawyer attempts to reconcile disputing family members or business associates conventionally held to have interests that conflict too severely to permit joint representation").

199. Brandeis coined the term "lawyer for the situation" at his confirmation hearings for the Supreme Court. When accused of unethical law practice for simultaneously representing several parties to the same transactions, Brandeis replied that he viewed himself as counsel for the situation rather than for any single party.

Luban, Noblesse Oblige *Tradition*, *supra* note 85, at 721 n.18.

200. Gordon, *Corporate Law Practice*, *supra* note 85, at 266 n.48 ("Brandeis . . . characterized the proper role of a lawyer as being a 'lawyer for the situation.'"); Gordon, *Independence of Lawyers*, *supra* note 85, at 67 ("It was in representing [smaller] businesses that Louis Brandeis was able to give content to his vision of socially responsible counsel 'for the situation.'").

201. WOLFRAM, MODERN LEGAL ETHICS, *supra* note 6, § 8.7.1, at 438 ("Historical support exists for lawyer mediation, although lawyers have infrequently engaged in it. In private practice Louis D. Brandeis sometimes represented dual parties with differing interests in an attempt to urge an accommodation, calling himself 'counsel for the situation.'" (footnote omitted)).

202. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 862 n.280 (1992) ("The classic formulation" of an independent approach to lawyering that attempts to reconcile the client's goals with larger public values "is Brandeis's famous injunction that lawyers should be 'counsel to the situation.'").

203. Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 125 (1990) (reviewing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)) ("The Brandeisian idea that attorneys should be 'counsel for the situation' has been with us through the century.").

204. Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95, 113 (Robert L. Nelson et al. eds., 1992) (noting that Kutak Commission's early draft of what became *Model Rules of Professional Responsibility* "revived Louis Brandeis's famous concept of the 'lawyer for the situation,' allowing lawyers to act as 'intermediaries' between clients, even at some risk that a conflict of interest might later materialize"); *see also* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1568 [hereinafter Schneyer, *Standard Misconception*] ("Brandeis believed that lawyers should sometimes think of themselves as 'counsel for the situation' rather than try to serve the interests of only one party.").

205. Rosen, Lawyers in Corporate Decision-Making, *supra* note 95, at 83 ("'Counsel to the situation' summarizes Brandeis' approach to practice."). Rosen's important manuscript is widely cited in recent literature on legal professionalism.

Thomas Shaffer's more elaborate account of the genesis of the phrase is worth quoting at length:

> Brandeis first used the word "situation" in the Senate hearings on his nomination to the Supreme Court, when he was defending himself against the charge that his representation during the bankruptcy of a family business demonstrated that he did not know who his client was. In other words, Brandeis had violated the norm that a lawyer represents only individuals, except on extraordinary and necessarily superficial facts. He was asked who (singular) his client was. And, in answer, he chose the word "*situation.*"
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> . . . When Brandeis used the word . . .*situation*—he . . . made a moral judgment about what was going on in the Senate hearings concerning a moral judgment he had made years earlier when confronted with the fact that the human harmony he had perceived or created was falling apart. Brandeis had decided originally that the human harmony was sufficient to be his client, and might have been . . . something prior even to the people he met when he decided that, together and not alone, they could be his client.
>
> Brandeis thus looked at what he had done through a broken magnifying glass . . . and he approved of it. The hounding senators failed in the attempt to make him ashamed of himself.[206]

The many scholarly accounts of "counsel for the situation" exhibit some differences in nuance, but collectively they suggest the following picture of Brandeis and his use of the phrase: (1) Brandeis believed that lawyers should act in certain situations as "counsel for the situation" and said so; (2) Brandeis believed that the role of "counsel for the situation" entailed acting as a mediator or harmonizer of differing interests, including, in some formulations, the public interest; and (3) in the versions rendered by Luban and Shaffer, Brandeis announced or defended these views at the hearings on his nomination to the U.S. Supreme Court in 1916.

One thing is clear: Brandeis did not defend this or any other phrase at the 1916 hearings, as he did not appear or testify at those hearings. It is true that the phrase "counsel for the situation" came to public attention during the 1916 hearings, but the phrase was actually attributed to Brandeis by Boston lawyer Sherman Whipple.[207] Whipple was testifying concerning the Lennox case, a dispute that had taken place several years earlier in which he and Brandeis had been adversaries. It would be easy to overstress the error made by those who

206. Shaffer, *Radical Individualism*, *supra* note 97, at 980–81 (footnotes omitted); *see also* SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 96, at 241–314 (extended discussion of Brandeis as exemplar of both freedom and morality in the practice of law).

207. Mr. Whipple was another Boston lawyer of Mugwump vintage. He attained sufficient political standing to run on two occasions for U.S. Senator from Massachusetts on the Democratic ticket. *See* Richard B. Sherman, Progressive Politics in Massachusetts: 1908–1916, at 86, 228 (1959) (unpublished Ph.D. dissertation, Harvard University).

have placed Brandeis at the hearings (although it is hard not to smile at the melodramatic narrative that Shaffer has constructed); perhaps it is just one of those urban myths that one writer passes unwittingly to another.[208] Brandeis's words, professing an unconventional but noble lawyering ethic, seem more stirring when heard from the U.S. Capitol in the face of "the hounding Senators" than from Brandeis's own office, where he actually uttered them in some confusion.

James T. Lennox, whose tannery business (operated jointly with his father) was on the brink of insolvency, came to Brandeis for legal help in 1907. He was accompanied by his friendly principal creditor, Abe Stein, and Stein's lawyer, Moses Stroock.[209] Personal notes that Lennox had executed as consideration for loans to the firm were about to come due, and neither Lennox nor the firm had sufficient funds to pay them. The holders of these notes were either at arm's length from Lennox or unknown to him and unlikely to be as forebearing as Stein. Lennox and Stein were eager to consult Brandeis partly because he was on familiar terms with some of the banking houses holding Lennox's notes (in fact, one of them, Weil, Farrell & Co., was a client of Brandeis's firm), and partly because Stein felt that the force of Brandeis's reputation might keep the creditors from forcing Lennox into bankruptcy.

In the ensuing conference among the four men, which a stenographer recorded and transcribed, Brandeis suggested that Lennox appoint Brandeis's own law partner, George Nutter, as trustee to whom Lennox should assign his business assets for the benefit of creditors. Operation of the business under the assignment might dissuade creditors from pushing the firm into bankruptcy, giving it the time to restore financial order.[210] It is apparent from the

208. The misapprehension concerning Brandeis's 1916 "testimony" resembles a game of "telephone" in which errors in communication are progressively reproduced. The controversy over Brandeis's nomination to the Supreme Court, while recounted in the standard Brandeis biographies, was reintroduced to a legal-academic audience by John P. Frank in 1965. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 698–703. Geoffrey C. Hazard, Jr., relied on Frank's treatment in Hazard's own discussion of the vagaries of an attorney acting as "counsel for the situation." *See* HAZARD, ETHICS IN THE PRACTICE OF LAW, *supra* note 197, at 58. Hazard's discussion appears to have rekindled interest in the episode and to have served as a source for most of the modern chroniclers. Hazard's account, while accurate, does not make it absolutely clear that Brandeis did not testify in 1916, and one can understand why that fact may have escaped those relying on Hazard's version. John S. Dzienkowski gives a painstakingly accurate account of the Lennox affair, although (unlike this author) he diplomatically refrains from calling attention to the misapprehensions of others. *See* Dzienkowski, *Lawyers as Intermediaries*, *supra* note 97, at 748–53.

209. Stein plainly was as anxious as James Lennox that the Lennox business be maintained as a going concern, since Stein had sunk a good deal of money into it. The Lennox problem thus serves as an effective reminder that the superficially "adverse" relation between parties is often inchoate and that there may actually be a coincidence of interest between such parties. This is one reason why the Lennox matter has seemed a compelling illustration of the lawyer's role as intermediary. It also suggests why it can sometimes be arbitrary to characterize the assumption of an "intermediary" stance by a lawyer as a move away from wholesale commitment to individual client "interest," since it can be very much in the client's interest to take account of his interdependence with others.

210. The law of bankruptcy in 1907 was far less flexible than today's Bankruptcy Code. It was designed more to effect liquidation than to facilitate reorganization or rehabilitation. As a partnership, P. Lennox & Sons was entitled to file for voluntary bankruptcy but, as this would reach the Lennox's

interview that Brandeis was utterly uninterested in becoming Lennox's counsel for the purpose simply of working things out for him; his first move after eliciting the relevant facts was to devise a plan that would be "fair to all." But Brandeis, as Nutter's partner, was in effect undertaking to serve as trustee of the firm's property, *not* as Lennox's counsel, a distinction he did not adequately explain to Lennox, nor even to Stroock, an experienced lawyer:

> Mr. STROOCK. May I ask you this question, Mr. Brandeis? From all that you know, do you believe that you could remain in the case in view of your firm's position with Weil, Farrell & Co.?
>
> Mr. BRANDEIS. Yes, I think I could. The position that I should take if I remained in the case for Mr. Lennox would be to give to everybody, to the very best of my ability, a square deal . . . .
>
> . . . .
>
> . . . I should feel if I were acting for Mr. Lennox as trustee that it was the duty of the trustee to see that everybody got his legal rights as nearly as we could make it . . . .
>
> . . . .
>
> Mr. LENNOX. You are speaking now of Mr. Brandeis acting as my counsel?
>
> Mr. BRANDEIS. Not altogether as your counsel, but as a trustee of your property.[211]

The Lennox matter ended badly for all concerned (except perhaps for some of the creditors). The trust instrument was prepared, and Nutter was appointed trustee. But Lennox proved uncooperative: His father was discovered to be hiding firm assets, and Lennox himself remonstrated repeatedly with Nutter over his meager weekly allowance of $100. When this intransigence made it necessary for Nutter to take the business into bankruptcy upon petition of

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individual assets as well as those of the partnership, it had little appeal for James Lennox. The assignment of firm assets to a trustee for the benefit of creditors was a device, generally recognized under state law, for avoiding the rigid machinery of bankruptcy and permitting continued operation of the business under the direction of the trustee (who acted like a receiver). *See* FRANK O. LOVELAND, A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY §§ 13, 54 (3d ed. 1907). Conceivably, it might even facilitate rehabilitation of the enterprise.

Under the Federal Bankruptcy Act in effect in 1907, creditors were entitled to file a petition in bankruptcy whenever an insolvent debtor committed one of a number of statutorily enumerated "acts of bankruptcy." Interestingly, one such statutory "act of bankruptcy" was the assignment of assets to a trustee for the benefit of creditors—the very plan Brandeis suggested as a means of avoiding bankruptcy. Bankruptcy Act of 1898, ch. 541, §3, 30 Stat. 544, 546, *amended by* Act of Feb. 5, 1903, ch. 487, §2, 32 Stat. 791, 797 (repealed 1978); LOVELAND, *supra*, § 54. Brandeis apparently assumed that creditors might be reluctant to initiate bankruptcy proceedings and would prefer a less public and less formal means of settling matters; the addition of this one "act of bankruptcy" to the other signs of the firm's financial distress, far from provoking creditors to petition, might reassure them and persuade them to forebear. While James Lennox plainly hoped that the business could be salvaged and his personal liability minimized, Brandeis just as clearly contemplated nothing more than an orderly liquidation of assets and the utmost fealty to creditors. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 794–95 (transcript of Brandeis's interview with James T. Lennox, Abe Stein, and Moses Stroock, exhibit to testimony of Edward F. McClennen).

211. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 788–90 (transcript of Brandeis's interview with James T. Lennox, Abe Stein, and Moses Stroock, exhibit to testimony of Edward F. McClennen).

creditors, Lennox professed surprise and anger at discovering that Brandeis and Nutter were not acting for him, but rather were serving the adverse interest of his creditors in the bankruptcy proceedings. Lennox then retained Whipple to represent him in the bankruptcy proceeding. Whipple, concerned by Lennox's account of Brandeis's "representation," repaired to Brandeis's office, where he demanded the facts concerning Brandeis's apparent abandonment of a client. As Whipple recounted Brandeis's response at the nomination hearings in 1916:

> [H]e said, in substance, "Of course, that would be a serious situation, but it is not the situation at all; I did not agree to act for Mr. Lennox when he came to me. When a man is bankrupt and can not pay his debts, . . . he finds himself with a trust, imposed upon him by law, to see that all his property is distributed honestly and fairly and equitably among all his creditors, and he has no further interest in the matter. Such was Mr. Lennox's situation when he came to me, and he consulted me merely as the trustee for his creditors, as to how best to discharge that trust, and I advised him in that way. I did not intend to act personally for Mr. Lennox, nor did I agree to." "Yes," I said, "but you advised him to make the assignment. For whom were you counsel when you advised him to do that, if not for the Lennoxes?" He said, "I should say that I was counsel for the situation."[212]

The absorbing question is not whether Brandeis's behavior violated legal or ethical norms, then or now, written or customary—although there is no question that his failure to make clear that he did not intend to act as Lennox's counsel was a serious miscommunication.[213] What seems important is the impulse that fired Brandeis's imagination in this episode and how one ought to describe and evaluate it. Felicitous or not, Brandeis's use of the phrase "counsel for the situation" was not the expression of a lawyering metaphysic but a hurried and embarrassed response to a question put to him by hostile counsel. What he said is less important than what he did, and why he did it.

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212. 1 *id.* at 287 (testimony of Sherman Whipple). Whipple's response to Brandeis's claim that he "was looking after the interests of everyone" was

> I must say, Mr. Brandeis, it looks to me very much, according to your principles, as if when a man was bankrupt and went to a lawyer, and the lawyer advises him to make an assignment for the benefit of his creditors, he assigns his lawyer with it, very much in the way a covenant runs with land.

1 *id.* at 287–88.

213. An even more obvious problem is the propriety of Brandeis's actions with respect to Lennox in light of the representation by Brandeis's firm of Weil, Farrell, one of the major creditors. In terms of the present-day approach represented by Rule 1.7 of the *Model Rules of Professional Conduct*, one might give Brandeis the benefit of the doubt by supposing that both Lennox and Weil, Farrell waived any objection they might have had to such simultaneous representation. Of course, this question begs the original one, which is whether Brandeis in fact undertook to serve Lennox as counsel.

Frank's conclusion that Brandeis was guilty in this matter of a failure to make himself properly understood, but not of any ethical duties, seems reasonable. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 698–703. For reasons made plain in the text, however, I think that Frank moves too hastily from exoneration to celebration.

One might find in Brandeis's claim to be "looking after the interests of everyone" confirmation of the view, suggested by the comments of Shaffer, Simon, and Wolfram, that Brandeis's actions were an effort to harmonize competing interests, to reach an accommodation that preserved a relationship rather than merely maximizing a private interest. As is suggested by his private correspondence during the nomination fracas, Brandeis consciously embraced this task of "dispensing justice among" the various parties to a transaction:

> I think it should be brought out clearly somehow, that it was specifically my "judicial temperament" that led to my holding a position in the community of advisor to those who had varying interests in the same matter, they leaving to me the decision as to what should be done because they recognized that I was in no sense a partisan, and that a very large part of my practice with large business concerns consisted in just that kind of service.[214]

But, as my earlier discussion of the relationship between the public good and the individual's role in defining it suggests, Brandeis's visionary instinct in the Lennox case was not quite this benign. There is a difference between seeking harmony and imposing it, between arriving at a sense of the common good consensually and defining it unilaterally. If "harmonizing" suggests inquiring deeply and openly into the goals and possibilities of the parties to the "situation" (here, Lennox and his creditors) so as to enable them to reach an agreement of some kind, Brandeis, based on his performance in the Lennox case, would rate last among the harmonizers. The transcript of his interview reveals Brandeis, swiftly and masterfully, eliciting from Lennox all relevant information concerning firm and personal assets and liabilities, and coming to an almost immediate conclusion: "I think there is very little doubt under all the circumstances but that it will be necessary to make an assignment to trustees for the benefit of creditors."[215] This was no doubt lawyerly good sense and not inconsistent with Lennox's professed desire (belied by his later obstructive behavior) to treat all creditors fairly. But it was the virtuoso improvisation of a masterly lawyer, not a sympathetic inquiry into the goals and needs of the various parties.[216] Brandeis did not have most of the creditors (necessary parts of what Shaffer would call the "human harmony") before him when he

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214. Letter from Louis D. Brandeis to Edward Francis McClennen (Feb. 19, 1916), *in* 4 LETTERS, *supra* note 22, at 77–78. Although Brandeis was referring here to his work with the Filenes, his remarks are directly relevant to the Lennox affair, which came to the subcommittee's attention a few weeks later. As the introductory sentence of the quotation in the text indicates, Brandeis maintained a close and strategic correspondence with his partner McClennen (who testified at the hearings essentially as Brandeis's mouthpiece, while George Anderson acted as Austen Fox's opposite number, cross-examining witnesses hostile to Brandeis) during the first few months of 1916.

215. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 786. Readers interested in Brandeis's approach should consult this interview in its entirety. 2 *id.* at 775–96.

216. My colleague Carrie Menkel-Meadow, upon reading the transcript of Brandeis's interview with Lennox and Stein, commented that she would give Brandeis a 'D' for client interviewing and counseling.

made his analysis. What he *knew*, without further inquiry, was that debts were owed and should be paid.

David Wilkins's understanding of the phrase "counsel for the situation" may describe Brandeis's behavior in the Lennox episode more realistically: The lawyer should respond to the client's needs in the light of other public values.[217] In the writings of Wilkins, Simon, Gordon, and others, one glimpses a vision of lawyers who encourage their powerful corporate clients to comply with, not to undermine, regulations that serve important public values, and who otherwise urge those clients to behave in socially responsible though not legally compelled ways.[218] The lawyer is thus counsel for a "situation" formed by the formal client and the larger public world that gives the client's behavior meaning. Perhaps Brandeis's actions followed this model; his instinct was that Lennox should not merely maximize his and his company's interests but should do what was fair to all—in particular, to creditors. No doubt Brandeis would have argued that a policy of "paying 100 cents on the dollar" would also best serve Lennox's interest, but the essence of Brandeis's impulse was an argument from public morality, as he told Lennox at the interview:

> My own feeling is that the best thing for you to do is not to be thinking too much of yourself, but thinking of the best interests of your creditors. If there is plenty there you have got it safe; if there is not, you will be in the position of having a fair, open, and aboveboard compromise; but I feel that it is for your interests as it is in accordance with good morals that you and your father should be just as frank and fair in the present situation as it is possible to be . . . .[219]

A sympathetic interpretation based on Wilkins's reading, then, would regard Brandeis as resisting slavish adherence to a client's private desire, facilitating a socially useful rather than a wastefully adversarial solution to a problem, and promoting "good morals" all at once. But I am inclined toward a less sympathetic reading of this episode: Brandeis saw a "situation" that he could solve, in the manner of a good Progressive problem-solver—or, in the words of one of my colleagues, a "one-man New Deal"—and he sought to impose a solution that made reference less to the expressed desires of the parties involved than to a vision nurtured by and known only to himself.

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217. Wilkins, *supra* note 202, at 862.

218. *See* Gordon, *Corporate Law Practice*, *supra* note 85, at 275–88 (discussing application to corporate practice of ideal of law as public profession); Wilkins, *supra* note 202, at 862 (arguing that lawyers must assess client's "true" interests and "public purposes underlying relevant legal restrictions"). *See generally* Simon, *Ethical Discretion*, *supra* note 107 (arguing that premise that legal permissibility of client's claim is ethically sufficient for assisting client is defective).

219. 2 MERSKY & JACOBSTEIN, *supra* note 7, at 794–95 (transcript of Brandeis's interview with James T. Lennox, Abe Stein, and Moses Stroock, exhibit to testimony of Edward F. McClennen).

Perhaps this reading reflects an overly skeptical attitude about one's ability to identify the public good. But my interpretation is less about that hoary issue than about Brandeis's own instincts—how quickly he gravitated to the role of trustee and how inadequately he conveyed that situation to Lennox. What is palatable or, if you like, exemplary about Brandeis's behavior is not the lawyering process it embodied but the high-mindedness of the ideal of "fairness to all," an ideal cast in bolder relief by the fact that the Lennoxes turned out to be self-serving, and by the hope of Stein and Stroock that they could trade on Brandeis's connections in the financial world. To those who regard "fairness to creditors" as a contingent or secondary value, even that aspect of the episode will seem less than compelling.

Sherman Whipple, who supported Brandeis's judicial nomination despite their differences in the Lennox case, spoke discerningly of Brandeis's lawyerly mien:

> I think Mr. Brandeis was so much absorbed in the question of caring for the situation, and so much interested in the development of his ideas as to how this estate should be administered, that he unconsciously overlooked the more human aspect of it, which would perhaps have appeared to another; but here was a man confronted with perplexities and charges and troubles, who wanted his personal and individual care and attention. But I think Mr. Brandeis looked upon it as a problem of distribution.
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> . . . Upon reflection . . . I was not convinced that his motives were unworthy. He, so to speak, was in love with this idea of looking after everybody concerned and guiding the situation . . . .
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> . . . .
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> I think it is . . . most unfortunate that under these circumstances Mr. Brandeis, instead of resting in the security of the purity of his own mind and the purity of his own purpose, has not cultivated association with gentlemen who are equally honest and equally high-minded and been affected somewhat by their views. He is a deep thinker. He is a man of original ideas, and after he has worked out the problem, so far as I can ascertain, he never consults anybody; he gives very little thought as to how it is going to affect the mind or minds of other men . . . .[220]

To those who will recall that Lennox operated a large business and displayed less than exemplary behavior, Whipple's reference to him as "a man confronted with perplexities and charges and troubles" may appear sentimental. However, in reality, the Lennoxes of this world probably fall in the vast middle of a universe of clients bounded by "powerful, amoral corporations" (from which a lawyer should exercise independence), on one side, and

220. 1 *id.* at 299–301.

"disempowered individuals" (with whom a lawyer should engage in empathetic dialogue), on the other. A lawyerly ethic that counsels independence from a powerful client's unlawful or immoral goals does little to explain Brandeis's instincts in the Lennox case—his lack of interest in solutions other than his own. There is considerable irony, in light of Shaffer's suggestion that Brandeis sought to preserve the "human harmony," in Whipple's more contemporaneous observation that Brandeis "overlooked the more human aspect."

2. *The ICC Rate Matter: Representing the Public*

If the Lennox affair suggests the way in which Brandeis could be drawn to a "situation" more powerfully than to a self-interested client, the somewhat overheated testimony of Clifford Thorne, concerning Brandeis's role in the 1914 ICC rate case, illustrates the misunderstandings and recriminations that could result from Brandeis's intuitive assumption of the role of lawyer for the public.[221] Even when, as here, Brandeis's formal client was "the public," accusations of lawyerly disloyalty could ensue when others disagreed with Brandeis concerning the definition of the public good.

Thorne[222] and Brandeis had first worked together in the Advance Rate Case heard by the Interstate Commerce Commission in 1910.[223] Brandeis had taken part in the 1910 case as paid counsel on behalf of the Seaboard Shippers' Association and suggested to the Commission a novel and compelling approach to the railroads' rate petition. Rather than contesting the railroads' claims of financial difficulties, Brandeis startled everyone by making detailed and damning charges of the railroads' inefficiency, thus shifting attention from the allocation of the expected rate increases among shippers and consumers to the question of whether there should be any rate increases at all. Brandeis claimed that the railroads, far from requiring a rate increase, could achieve economies of one million dollars per day if they would institute techniques of scientific management.[224] The Commission largely echoed

221. On Brandeis's image as the people's attorney, see *supra* text accompanying notes 84–92.

222. Thorne's career was intimately connected with Iowa antirailroad politics. At the time of the 1914 ICC rate case, he was chairman of the Iowa Board of Railroad Commissioners, *see* 3 LETTERS, *supra* note 22, at 202–03 n.1 (editors' note); in 1922 he ran unsuccessfully for United States Senator from Iowa. *See* 17 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 197 (1927) [hereinafter AMERICAN BIOGRAPHY]; Ralph Mills Sayre, Albert Baird Cummins and the Progressive Movement in Iowa 525 (1958) (unpublished Ph.D. dissertation, Columbia University) [hereinafter Sayre, Albert Baird Cummins]. As part of Thorne's posthumous entry in *The National Cyclopaedia of American Biography*, he received this encomium: "It was his deliberate choice to serve the people rather than aggregations of great wealth and he consecrated himself to the interests of his clients." AMERICAN BIOGRAPHY, *supra*, at 198.

223. The Advance Rate Case of 1910 was the first major adjudication by the ICC of a proposed rate increase by the railroads after enactment of the Hepburn Act in 1906 gave the ICC substantial ratemaking powers. For differing accounts of the 1910 hearings, see MARTIN, ENTERPRISE DENIED, *supra* note 12, at 194–230 (sympathetic to railroads); GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916, at 195–97 (1965) (hostile to railroads).

224. As historians have pointed out, Brandeis's emphasis on efficiency helped extricate the ICC from a painful political dilemma. It was apparent that, whatever the causes, the railroads were in trouble. The

Brandeis's contentions in denying most of the rate increases. Thorne, who, like Brandeis, argued in 1910 against the proposed increase, had reason to be pleased.[225]

But through his 1910 argument Brandeis had associated himself so persuasively with public values like "efficiency" and "scientific management," rather than with mere private interests, that the ICC invited him to act as its special counsel at the second round of rate hearings, held in 1914. His role in the 1914 hearings was different from the one he had played in 1910 and was well calculated to confuse and frustrate those participants who disagreed with him on the larger public questions at issue. The ICC's formal invitation to Brandeis, proffered by Commissioner James Harlan, suggests both the characteristic Progressive confidence in defining the public good and Brandeis's image of trustworthiness in undertaking that responsibility:

> We are of course aware of the fact that the carriers will not fail fully to present their side of the case and the commission has felt that every effort should be made, in the public interest, adequately to present the other side. Would you care to undertake that burden? . . . [T]he commission has reached the conclusion that in the Rate Advance case special counsel should be retained, and I have been asked to ascertain whether your engagements and inclinations are such as to permit you to undertake the task of seeing that all sides and angles of the case are presented of record, without advocating any particular theory for its disposition. In making this last observation you will of course understand that you will be expected to emphasize any aspect of the case which in your judgment, after an examination of the whole situation, may require emphasis. The commission, however, wishes to avoid a record based solely on a particular view or theory.
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> . . . My personal feeling is that your participation in the case will give to the public at large the assurance that the whole case will be

commissioners could not turn a blind eye to the damage to national interests that might ensue if major trunk lines ceased operations. But political tides had turned against the railroads and in favor of those who favored their aggressive regulation. Brandeis's argument enabled the Commission both to acknowledge a need for greater railroad revenue *and* to deny the requested rate increases. SKOWRONEK, BUILDING A NEW AMERICAN STATE, *supra* note 82, at 269–70.

It was natural, perhaps even necessary, that this proconsumer result was achieved by the adoption of arguments made by counsel for shippers, who were not simply representatives of the "public." As this first generation of modern regulators was discovering, the interests of the larger community of consumers could be easily lost amidst the arguments of better-organized "interests" like "carriers" and "shippers." In states like Thorne's Iowa, where antirailroad insurgents had seized the reins of government, the state could represent such a proconsumer view, but this situation did not obtain on a national scale. Thus, shippers' groups (such as the one represented by Brandeis), rather than "consumers" or "the public" as such, were in 1910 the effective representatives of the antirailroad view that would result in denying applications for higher rates. For an interesting study of the way in which one remarkable politician was able to mobilize a constituency of "consumers," see THELEN, ROBERT M. LA FOLLETTE, *supra* note 61.

225. Thorne participated in the 1910 case as "special counsel for the American National Live Stock Association, Corn Belt Association and Co-operative Grain Dealers' Association." AMERICAN BIOGRAPHY, *supra* note 222, at 197.

> fully presented, and I very much hope that you will acquiesce in the commission's wishes in the matter.[226]

Brandeis understandably accepted this gracious invitation. Of course, the notion of a private citizen serving as special counsel to a governmental or quasi-governmental body is today relatively unremarkable[227] and was not unprecedented even in 1914. Harlan's letter no doubt reflected the Commission's recognition that a strictly adversarial process was unsuited to the gathering of information and development of models that might inform the Commission's determination on a controversial and important question of public policy. Yet the credulous assumption that Brandeis, as special counsel, could unproblematically be entrusted with investigating "all sides and angles" of the "situation" is striking, especially given his participation in the 1910 hearing on behalf of shippers.[228]

As Thorne insisted in 1916, two questions were presented at the 1913–1914 rate hearings: (1) whether the railroads had insufficient revenue; and, if so, (2) what measures should be taken to obtain the needed revenue. It was an article of faith for Thorne and his supporters that the first question should be answered in the negative: They thought, not without justification, that revenue shortfalls would end up coming out of consumers' pockets

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226. 3 MERSKY & JACOBSTEIN, *supra* note 7, at 158 (letter from James S. Harlan, ICC Commissioner, to Louis D. Brandeis (Aug. 15, 1913)) (referred to in testimony of James S. Harlan). Harlan's ambiguous letter seemed alternately to stress special counsel's role in marshaling facts on behalf of the "other side" (the public), his role as a neutral, nonpartisan fact-finder, and his role in making a recommendation for disposition of the case. It is not surprising that Brandeis made the most of this last possibility.

227. One example that comes to mind is that of Arthur Liman, a partner at the law firm of Paul Weiss Rifkind Wharton & Garrison, serving as counsel to the Senate select committee investigating the Iran-Contra affair in 1987.

228. The Commission's assumption did not go unremarked. Thomas C. Spelling, legal treatise-writer and sometime counsel to the American Federation of Labor, *see* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 155 (1991), who as counsel for the Freightpayers' League of the United States in the 1910 case had had an unpleasant encounter with Brandeis, filed a pleading with the Commission in 1914 objecting to

> the appearance or participation herein of any person assuming to represent the people, or any part or number of them, except such as shall see fit to employ him in some proper and legal way, or for himself alone. . . . Said objection is based on the ground that neither Constitution, nor any law enacted pursuant thereto, gives or can give any person any authority to so appear, nor is there any law authorizing or which gives even the semblance of authority to the Interstate Commerce Commission to employ anyone to represent the public, otherwise than as an attorney or other employee of the commission; that such a practice, if adopted, pursued, or tolerated, would open the way to the grossest frauds and oppressions, and would open the door to perversions of official power and authority which might be thereby prostituted to base purposes; that responsibility for consequences might be thus shirked and concealed, the rights of the public sacrificed and betrayed without recourse or remedy against any responsible person, officer, or official body.

1 MERSKY & JACOBSTEIN, *supra* note 7, at 109 (copy of motion accompanying letter referred to in testimony of Thomas C. Spelling, Attorney at Law). Spelling's objection, however, was ignored. Spelling evidently mounted a personal campaign against Brandeis's nomination in 1916, to little effect. *See* William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 8 & n.29 (1990).

regardless of the method chosen by the ICC to make up the difference.[229] Thus, Thorne, as he later recalled, was horrified to hear Brandeis begin his oral argument by asserting that the railroads' current revenues were "smaller than is consistent with their assured prosperity and the welfare of the community."[230] Brandeis did go on to deny, in very clear terms, that the railroads should be granted the rate increases, recommending that the elimination of inefficiencies and rate discriminations by the railroads could more than make up the shortfall. But to Thorne, even Brandeis's limited concession to the railroads amounted to treason, and, in a spirit of unrestrained bitterness, he accused Brandeis at the nomination hearings of "infidelity, breach of faith, and unprofessional conduct in connection with one of the greatest cases of this generation."[231]

Obviously, one part of Thorne's quarrel with Brandeis was on the merits of the rate problem. As he had earlier done with respect to the gas problem in Boston, Brandeis expressed the view that regulated enterprises must be permitted substantial returns on their capital.[232] Thorne's entire public career was predicated on a different conception of the carriers' role and their entitlements, and he consequently expressed outrage that Brandeis would be so liberal in his recommendation of an allowance for profits. But the more significant source of Thorne's pique lay in their differing conceptions of the duties Brandeis owed the "public," his "client" by virtue of his appointment as special counsel to the Commission. Thorne, who also had pretensions to arguing the "public side" of the question, assumed that he and Brandeis would present a united front against the railroads, as they had in 1910. As Thorne later recalled, the early stages of the 1914 proceeding seemed to confirm his assumption:

> The following day [after my testimony before the Commission] the railroads offered evidence. During the cross-examination of these witnesses Mr. Brandeis and I sat next to each other most of the time. Mr. Lyon also sat at the same table, and various other counsel for the

229. Thorne feared that individual shippers or shippers' associations, knowing that rate increases could be passed along to consumers, would concede the issue of the need for greater revenues and focus their efforts on fairness in the allocation of increases, to insure that they would not be disadvantaged, relatively speaking.

230. 1 MERSKY & JACOBSTEIN, *supra* note 7, at 33 (oral argument of Brandeis quoted in testimony of Clifford Thorne, Chairman of the State Board of Railroad Commissioners of Iowa).

231. 1 *id.* at 8 (testimony of Clifford Thorne).

232. We must give to those of our railroads that are managed well, where the judgment is good, and where the roads are managed with integrity and skill and with a special effort and desire to advance the interests of the railroad as well as the community, an opportunity to earn—I myself care little for the laying down of any specific rule as to the percentage, because I would never stick to any limit at all.

1 *id.* at 31 (testimony of Brandeis in 1914, quoted in 1916 testimony of Clifford Thorne).

> shippers. We participated in the cross-examination together. Our relations were the most friendly.[233]

Thorne could not have hit on a more suggestive image than to note that Brandeis had "sat at the same table" with those whose opposition to the railroads was clear and uncompromising, a vivid and literal depiction of where Thorne believed Brandeis's loyalties should lie.[234] The format adopted by the Commission for the hearings—a traditional, bipolar structure in which the railroads would have a specified amount of time to argue for the increases, followed by an equal amount of time for those opposed to the increases—reinforced Thorne's conception of the proceeding as addressed to one simple question: Should the railroads win, or should the people win? In Thorne's eyes, a party could be present only for the purpose of supporting the railroads or opposing them.

But Brandeis, both by the terms of his commission and by his own lights, was not complying with this vision. By careful arrangement, he spoke last at the 1914 proceedings, with the result that Thorne and others opposed to the rate increases (as well as the railroads) were unable to counter his arguments. Thorne pressed this point in 1916 by noting that, when the outbreak of war in Europe necessitated a supplemental rate hearing later in 1914, he and other antirailroad counsel successfully demanded that Brandeis make his argument *before* the others, because "I hardly knew on which side he was. . . . I did not—propose to see that the public side should be thrown again."[235]

Much of Thorne's testimony in 1916 was unedifying—he was probably the only person in the country to suggest that Brandeis would exhibit a pro-railroad bias if seated on the Supreme Court—but it did illustrate the vagaries of the term "the public." It was inevitable that Brandeis's identification of the public interest would someday conflict explicitly with someone else's definition of it; that is what happened in 1914. Senators Chilton and Fletcher, aware of the terms used by Harlan in his letter to Brandeis and somewhat perplexed by Thorne's vehemence, asked Thorne whether he believed Brandeis

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233. 1 *id.* at 12 (testimony of Clifford Thorne). Oddly, at the 1914 hearings, Thorne himself represented not only the railroad commissions of several states, but also a consortium of shippers. Martin's account expresses well the vagaries of locating the "public" in this strange proceeding:

> [H]ow could [Thorne] represent the official regulatory commissions of eight western states and, at the same time, appear as counsel for a number of shippers' organizations? "I am simply here to help Mr. Brandeis and the others," he said [in his statement to the Commission]. "In selecting someone to present the side of the public in these States, the [state] commissioners have gone no further than did the ICC in the appointment of Mr. Brandeis." In other words, to Thorne everybody not connected with the railroads *was* the public, whether they were shippers engaged in private business for profit, or state commissioners. Their interests were identical, while the railroads were merely private interests who had to look out for themselves.

MARTIN, ENTERPRISE DENIED, *supra* note 12, at 277–78 (footnote omitted) (last alteration in original).

234. Moreover, joint participation in cross-examination by counsel seated at the same table strongly implies the exchange of confidential information that is appropriate only where clients have coinciding interests and objectives. I thank Tanina Rostain for pointing this out to me.

235. 1 MERSKY & JACOBSTEIN, *supra* note 7, at 37, 39.

was bound to take a position regarding the railroad's revenues in which he did not in fact believe. Did not Brandeis's assignment from the commission to take the "public" side authorize him simply to give the best, fairest, and most balanced assessment he could? Thorne replied: "If Mr. Brandeis believed the revenues were inadequate in the eastern territory . . . he should have retired from the case or retired from that part of the case."[236] To Thorne and to Senator Cummins,[237] who (unlike Brandeis) had committed themselves politically to an unremitting opposition to the railroads, Brandeis's best judgment was irrelevant. Obstinately, but confidently, they understood "the public" to mean one thing: the side opposed to any claims made by the railroads. As Cummins put it:

> Mr. Brandeis was employed to take the public side of the question, that is to say, he was to present the side opposed to the claims of the railroads. . . . Sitting as a judge rather than as an advocate he . . . practically decided the suit in favor of the railroads.
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> . . . I have heard it said that if Mr. Brandeis honestly believed the railroads were right on this question it was his duty to say so. Any such view is a total misconception of the situation. If he could not honestly argue for the public he ought not to have argued the question at all.

Cummins concluded that were Brandeis to escape "the condemnation which follows betrayal, then I confess that I do not understand either common morality among men or the ethics of the profession to which Mr. Brandeis belongs."[238] Of course, this was simply the "mandate-independence controversy," transposed from the realm of representative government to the realm of "the people's attorney" and "counsel for the situation."[239]

Thorne's claim that Brandeis had "thrown the public" was foolish and demagogic,[240] and Cummins's dogmatic pronouncements were scarcely less

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236. 1 *id.* at 46.

237. On Cummins's somewhat opportunistic career in Progressive reform, see generally Sayre, Albert Baird Cummins, *supra* note 222.

238. 3 MERSKY & JACOBSTEIN, *supra* note 7, at 309, 313–14 (statement of Senator Cummins).

239. The majority of theorists argue that the representative must do what is best for those in his charge, but that he must do what he thinks best, using his own judgment and wisdom, since he is chosen to make decisions for (that is, instead of) his constituents. But a vocal minority maintain that the representative's duty is to reflect accurately the wishes and opinions of those he represents. Anything else they consider a mockery of true representation. The truth may lie somewhere in between, but if so, where does it lie, and how is one to decide?

PITKIN, CONCEPT OF REPRESENTATION, *supra* note 71, at 4; *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (amended 1980) ("[W]hen a lawyer purports to act on behalf of the public, he should espouse only those [legislative or administrative] changes which he conscientiously believes to be in the public interest.").

240. Thorne's testimony in 1916 was followed by that of several other witnesses, some of whom were affiliated with shipping interests or had participated in the 1914 hearings, who testified in support of Brandeis and expressed surprise at Thorne's vehemence. *See* 1 MERSKY & JACOBSTEIN, *supra* note 7, at 62–67 (testimony of John M. Eshleman); 1 *id.* at 67–74 (testimony of Joseph N. Teal); 1 *id.* at 75–84

so. At bottom, they reflected a sense of frustration and resentment that Brandeis could appropriate the role of "the public's" representative from insurgent antirailroad Progressives, in whose hands it had long rested as a matter of rhetoric, and turn it to ends measured only by Brandeis's internal sense of proper policy. In part, the debacle initiated by Harlan's invitation to Brandeis reflected the adolescence of American administrative law and process. As Ernst Freund noted almost as soon as Brandeis's acceptance of Harlan's invitation was made public, Brandeis's appointment as counsel to the Commission offered an opportunity for experimentation in a new kind of administrative adjudication in which the "public interest" could be impartially ascertained.[241] While the Commission might appoint "the public" a lawyer, it could not confer on that lawyer or anyone else the exclusive right to define that client's interests so long as others had their own ideas about those interests.

That Thorne and Cummins could so frantically equate Brandeis's expression of opinion with "practically decid[ing] the suit in favor of the railroads" attests to the contemporary power exerted by Brandeis's reputation for wisdom and evenhandedness.[242] Yet the whole episode also illustrates the special pitfalls of the role of "counsel for the situation" that Brandeis willingly assumed. It invited not the firm disagreement of adversaries who were well aware of each other's differences, but accusations of treason by those who claimed to have been betrayed.

3. *The United Shoe Machinery Matter: Dividing Public and Private*

As counsel to a mute "public" in the 1914 ICC case, Brandeis could comfortably voice his own views without his client's interference. Such freedom of self-expression on public matters, however, might be compromised when Brandeis represented a private client in connection with those public

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(testimony of James W. Carmalt); 1 *id.* at 86–93 (testimony of Frank Lyon). Some observers commented unflatteringly on Thorne's political ambitions as the source of his inflammatory charges against Brandeis. *See, e.g.*, TODD, JUSTICE ON TRIAL, *supra* note 31, at 101.

241. "I venture to express the hope that you will set a precedent of importance in Administrative Law, and make it clear, whatever your conclusions, that a counsel of a quasi-judicial commission, as distinguished from counsel employed by a prosecuting department, represents, not one side or the other of the controversy, but purely the public interest which is the interest of justice to all concerned." Letter from Ernst Freund to Louis D. Brandeis (Oct. 27, 1913), *microformed on* Felix Frankfurter Papers, Container 128, Reel 78 (Library of Congress). Freund later criticized Cummins's assessment of this episode in a letter to the editor of the *New York Times*, dated April 6, 1916, *cited in* 4 LETTERS, *supra* note 22, at 141 n.1. See also the *New Republic*'s Crolyesque editorial criticism of Thorne and Cummins, *A Communication: Senator Cummins on Legal Ethics*, 6 NEW REPUBLIC 292 (1916) (noting that ICC "is not the railroad's commission, or the shipper's commission, or the consumer's commission. It is the nation's commission."). On the role of the ICC in expressing the Progressive faith in a disembodied "public interest," see Sedgwick, *supra* note 69, at 301–05. *See also* SKOWRONEK, BUILDING A NEW AMERICAN STATE, *supra* note 82, at 132–34, 248–84.

242. 3 MERSKY & JACOBSTEIN, *supra* note 7, at 312 (statement of Senator Cummins); *see also* 1 *id.* at 45 (testimony of Clifford Thorne) ("Our work was useless.").

matters. For a private client might well expect her lawyer to subordinate his own views on policy to persuasive advocacy on her behalf. Brandeis's commitment to self-definition in the public sphere therefore rested on a sharp distinction between "public" and "private" activities, a distinction one finds in his speech "The Opportunity in the Law," in his explanation for his pro bono work, and in other contexts relevant to his conception of lawyering. The significance of this dichotomy was underscored by his approach to the private lawyering that absorbed him for much of his professional life, for Brandeis was not merely a professional altruist. For all his public-spiritedness, Brandeis did have an enormously successful corporate law and litigation practice,[243] which required him to act as lawyers often do—as instruments for their clients' views and ends. Although the charge made by embittered contemporaries that Brandeis was an unscrupulous and overly zealous advocate foundered, it is clear that he was a remorseless and relentless advocate, who had no objection to making even farfetched arguments on behalf of clients, so long as those arguments did not compromise his credibility on the many public issues that engaged him. Especially during the years when he was building his firm, Brandeis did not and could not believe in every position that he espoused in court, nor would it be reasonable to expect him to have done so.

But the distinction between "public" and "private," as a means of preserving both public autonomy and lawyerly zeal, can prove unstable in the lawyer-client relation, where the act of representation is central and where seemingly private concerns can suddenly and unexpectedly assume larger public significance. The instability of this divide between public and private emerged in the most serious accusation leveled against Brandeis during the nomination hearings—that he had turned against a client, the United Shoe Machinery Company. And the United affair demonstrated the difficulties of the "independent lawyer" struggling to break free of a former client's dictation.[244]

The origins of this affair lay in Brandeis's initial representation of the Henderson family, a representation that seems to have involved nothing more "public" than protection of their interests with respect to investments they held in the McKay Shoe Machinery Company. When the United Shoe Machinery Company was formed by a consolidation of several smaller companies, including McKay, the Henderson family became a large shareholder in United.[245] Brandeis became a director of United; he also served United as counsel (although not, apparently, as "general" counsel). Importantly, Brandeis seems to have regarded his initial representation of the Henderson family as

243. The breadth of Brandeis's law practice is recalled fondly by a partner in Edward F. McClennen, *Louis D. Brandeis as a Lawyer*, MASS. L.Q., Sept. 1948, at 1, 22–23.

244. On Brandeis's image as independent lawyer, see *supra* text accompanying notes 99–107.

245. *See* Letter from Louis D. Brandeis to Sidney W. Winslow (Dec. 6, 1906), *in* 1 LETTERS, *supra* note 22, at 508–09.

a conventional retainer, not involving "public" issues as such; but this fortuity came to an end in 1906, when United sought to defeat a bill in the Massachusetts legislature that would have outlawed the "tying" clauses in United's contracts with shoe manufacturers. At the request of Sidney Winslow, president of United, Brandeis reluctantly agreed to seek the defeat of the legislation.[246]

United's patent monopolies and its "tying" clauses (by which it virtually precluded its own customers, shoe manufacturers, from using machinery manufactured by its competitors) were plainly anticompetitive.[247] Anyone familiar with Brandeis's views on monopoly can imagine his discomfort at having to defend such practices before the Massachusetts legislature. In Brandeis's later account, he was personally willing to oppose regulation of these practices in 1906 and only later changed his mind as his views on competition and his perception of United's ruthless behavior evolved.[248] But

246. As Mason describes it, the tying clauses "had the effect of forcing a shoe manufacturer to use United's entire line [of shoe machinery] if he wanted to use any of it." MASON, FREE MAN'S LIFE, *supra* note 3, at 215. Brandeis was at this time also counsel to a number of shoe manufacturers who, needless to say, were less than enthusiastic about these clauses. However, rival shoe machinery companies, rather than the shoe manufacturers, were behind the bill that United sought to kill. The manufacturers agreed not to support the proposed legislation in return for United's agreement to "discuss" the offending tying clauses at a later date. United apparently did not live up to this commitment. See the account in *id.* at 214–29. Brandeis gave a careful and elaborate account of the whole affair, including his eventual falling-out with Winslow and United, in his letter of February 24, 1912 to Senator Moses E. Clapp, *reprinted in* 2 LETTERS, *supra* note 22, at 551–60. Brandeis's simultaneous representation of United and of the manufacturers, who were some of United's most important customers, obviously raised the specter of a conflict of interest. Although, under today's rules, we might hypothesize that the parties did or would have waived any objection to the conflict, to my mind this situation strains the notion of "reasonableness" in the dual representation that must underlie any such waiver. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994) (Conflict of Interest: General Rule). The ensuing debacle between Brandeis and United was at least partly instigated by the manufacturers' displeasure at United's business practices, and the possibility of such a dispute was nothing if not foreseeable. Here I think that John P. Frank is overly generous to Brandeis. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 703–06. Canon 6 of the 1908 *ABA Canons* did not require such reasonableness in addition to the client's consent and, in any case, was adopted two years after this portion of the United affair, so Brandeis seems not to have violated any contemporary ethical rule. *See* ABA CANONS OF PROFESSIONAL ETHICS Canon 6 (1908), *reprinted in* GILLERS & SIMON, *supra* note 156, at 97.

247. The increasingly sophisticated tying arrangements and other exclusionary devices employed by United's successor corporation eventually formed part of a landmark antitrust decision, United States v. United Shoe Machinery Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam). *See also* United States v. United Shoe Mach. Co., 247 U.S. 32 (1918). My assertion that these arrangements in 1906 were "plainly anticompetitive" is not intended to rebut the criticism that has been made of that decision on the ground of economic theory, *see* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 218, 222 (1986), but to note that United's practices did place enormous restraints on both the manufacturers and shoe machinery rivals. One such entrant into the shoe machinery business, Thomas Plant, was forced to sell out to United in a transaction that Brandeis termed "the most flagrant instance of violating the anti-trust law that I have known." *See* Letter from Louis D. Brandeis to Senator Robert M. La Follette (May 5, 1911), *quoted in* MASON, FREE MAN'S LIFE, *supra* note 3, at 222.

248. *See* Letter from Louis D. Brandeis to Moses E. Clapp (Feb. 24, 1912), *in* 2 LETTERS, *supra* note 22, at 551–60. A few months after Brandeis's testimony, a federal court decision came down that seriously weakened United's legal position. Brandeis thereupon expressed his doubts more fully to Winslow concerning the propriety of United's contract practices, and he discreetly tendered his resignation as a director. MASON, FREE MAN'S LIFE, *supra* note 3, at 218–19.

he was plainly uncomfortable even in 1906 with the rather weak arguments he advanced to the Massachusetts legislature.[249] For example, it is startling to find the man who two years later would argue *Muller v. Oregon*[250] and in 1913–1914 help craft the Clayton Act and the Federal Trade Commission legislation contending that Massachusetts's regulation of "tying" clauses would be unconstitutional because "[y]ou cannot limit the right to do business except by the requirements of safety, of health, or of morals."[251]

Brandeis evidenced his discomfort with the whole proceeding in 1906 in a curious way: He emphasized, more than once, that he was appearing "not as counsel, but as one of United's directors,"[252] although he was plainly appearing as its representative and his testimony was largely a succession of legal arguments.[253] It is as if he felt that he could account for the taking of an unprogressive position on public policy—or, more to the point, a position that did not reflect his sincere convictions—by reference to a financial interest (as director) or, perhaps, a fiduciary duty that would not have attached to him simply as a lawyer. Of course, one can only speculate about the reasons for Brandeis's disavowal of his status as legal representative. I suspect he was simply embarrassed about voicing, as an attorney, a view on public policy that he did not hold and that others had reason to know he did not hold.[254] Eventually, Brandeis tendered his resignation, first as a director and then as counsel for United. For some years thereafter he resisted, on ethical grounds, entreaties from his shoe manufacturer clients to assist them in opposing United's increasingly sharp practices, but when United crushed an enterprising shoe machinery competitor in 1910, Brandeis termed it "the most flagrant instance of violating the anti-trust law that I have known."[255] He undertook to represent a consortium of shoe manufacturers opposed to United's market strategies; and, though he remained aloof from the federal government's antitrust prosecution of United, he testified before several congressional committees and federal agencies in 1911–1912, citing United's ruthless behavior as evidence of the need for changes in the antitrust laws. This sequence of events led to some of the most vicious attacks on Brandeis's character in the whole nomination spectacle.[256]

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249. Brandeis's main argument in defense of United was that it was, in essence, a "good monopoly" because it treated small as well as large manufacturers on an equal basis, thereby promoting entry into the shoe manufacturing business. *See* Letter from Louis D. Brandeis to Moses E. Clapp (Feb. 24, 1912), *in* 2 LETTERS, *supra* note 22, at 552.

250. 208 U.S. 412 (1908).

251. MASON, FREE MAN'S LIFE, *supra* note 3, at 217.

252. *Id.* at 215.

253. Mason notes that Brandeis "submitted a brief and received payment just as if he had been acting as counsel." *Id.* at 215–16.

254. Mason tends toward this interpretation as well. *See id.* at 215.

255. Letter from Louis D. Brandeis to Senator Robert M. La Follette (May 5, 1911), *quoted in id.* at 222.

256. See the anti-Brandeis pamphlet printed in 1912 by the United Shoe Machinery Company, BRANDEIS AND SIƎDNAЯB: THE REVERSIBLE MIND OF LOUIS D. BRANDEIS, "THE PEOPLE'S LAWYER," AS

While Brandeis's hostility toward United would be very difficult to reconcile with modern principles of professional responsibility,[257] one can admire his refusal to remain silent when his former client's behavior turned oppressive. But I cite the episode for a different reason—to suggest some of the difficult questions for Brandeis in balancing the imperatives of a private law practice, in which he always served his clients superbly, with his insistence upon being free from embarrassing influences in his pronouncements upon public issues. Representation of the Henderson family in 1900 had been a conventional "private" matter; by 1910, United's sharp practices implicated the "public" issues of competition and monopoly that were perhaps closest to Brandeis's heart. The 1906 episode involving the Massachusetts legislature was a transitional moment that caught Brandeis between these "private" and "public" modes and the discrepant models of behavior that each required.[258]

In a sense, all of the lawyering episodes I have recounted speak to the dilemma of private action in the public sphere, and to Brandeis's resolution of that dilemma. Of course, one important aspect of that resolution, his fervent commitment to public life, is his most beguiling trait. In many respects, Brandeis exemplified a classical republican conception of civic life. Consistent with his idealization of the Athenian city-state, Brandeis spoke of participation in the political life of the community not merely as a desirable state of affairs but as a civic obligation.[259] But his use of the phrase "public private citizen" was an uncannily apt description of his own public actions. Few people have retained the degree of privacy Brandeis commanded when he entered the public sphere. His feeless work, his attorneyship for the public, his self-conferred responsibility for the "situation," all fortified that privacy. In retrospect, it seems inevitable that clients (or those who, like Lennox and Thorne, might more fastidiously be called participants with Brandeis in a common project) would balk when Brandeis did "things of a startling

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IT STANDS REVEALED IN HIS PUBLIC UTTERANCES, BRIEFS, AND CORRESPONDENCE, *reprinted in* 2 MERSKY & JACOBSTEIN, *supra* note 7, at 936–59. Winslow renewed the onslaught on Brandeis at the 1916 hearings. *See* 1 MERSKY & JACOBSTEIN, *supra* note 7, at 159–261 (testimony of Sidney W. Winslow, President, United Shoe Machinery Co.).

257. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1994) (Conflict of Interest: Former Client). Whether this rule, which of course did not exist at the time, would have been violated by his behavior in the United Shoe Machinery case would depend on whether the later antitrust issues constituted the "same" or a "substantially similar" matter as the original ones on which Brandeis worked, and whether in opposing United he had used any "confidential information" obtained from United during the course of his representation of it. *See id.* Whatever the answers to these questions, I suspect that few lawyers would want to take their chances in a disciplinary proceeding on these facts.

258. For an astute comment on Brandeis's conception of the public nature of his lawyerly role, see Schudson, *Public, Private, and Professional Lives*, *supra* note 189, at 210–11.

259. Philippa Strum makes this point repeatedly. *See, e.g.*, STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 54, 61, 66–67; *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[P]ublic discussion is a political duty."); Blasi, *Civic Courage*, *supra* note 27, at 680–97 (containing an elegant exegesis of the *Whitney* concurrence).

character"[260]—startling because the very solitude of those deeds was at odds with the task of representation that Brandeis seemed to have undertaken.

III. LAWYERING VISIONS AND THE MEANING OF BRANDEIS

In offering a less celebratory account of Brandeis's political and lawyerly persona, I have tried to suggest, not that Brandeis misbehaved, but that his style in politics and lawyering had as much to do with a chosen mode of self-presentation as with larger ideals of the good lawyer or the public-spirited citizen. That choice necessarily came at the expense of competing values, those of dialogue and engagement with others. In interpreting his actions as I have, I am not so much devaluing Brandeis's choice as I am underscoring the dilemma that awaits anyone faced with the alternatives of aloneness and solidarity. That dilemma has tended to drop out of sight in the invariably admiring scholarly evaluations of Brandeis's lawyering. Ultimately, Brandeis would not be worth all the attention he has received had he been as uncomplicated and as stultifyingly wise as is the Brandeis of the textbooks.

Reconsideration of Brandeis's approach to lawyering, however, begets other questions. The first entails a more general examination of our lawyering ideals. If one is to assess his approach critically, one must at least outline a more general theory of legal representation that mediates between the ideals of autonomy and engagement. Second, why has so partial a Brandeis made its way into the standard scholarly accounts? What interpretive process explains the ingenuous manner in which he has been portrayed?

A. *Independence, Loyalty, and Dialogue*

As I have suggested, Brandeis's personal imperviousness in the service of political self-reliance is presumptively more troubling in the realm of lawyering, where notions of representation and loyalty are intrinsically in tension with an ideal of autonomy, than it is in the political realm, where notions of solidarity and clientele are less formally inscribed. But the kinds of interactions that different lawyers encounter are so numerous and diverse that it would be as dogmatic to reject the Brandeisian impulse *in toto* as to lionize it. The concepts of both independence and engagement that I have distilled from consideration of specific episodes involving Brandeis are themselves too abstract to support a universal lawyering ethic or a critique of such an ethic. There would be something faintly irrelevant in advising associate corporate counsel for RJR Nabisco to develop an attitude of greater empathy toward her client, and something downright bizarre in commending an attitude of steely independence to the legal services lawyer representing a member of a

260. 1 MERSKY & JACOBSTEIN, *supra* note 7, at 300 (testimony of Sherman Whipple).

traditionally subordinated group, such as Mrs. G. in Lucie White's illuminating article.[261] Any hope of drawing either positive or negative general lessons for lawyering from consideration of Brandeis's approach must be chastened by the knowledge that one can scarcely imagine Brandeis as *either* associate corporate counsel for RJR Nabisco *or* attorney for Mrs. G.—a fact that those who celebrate Brandeis's lawyerly virtues sometimes overlook.

Stated with the requisite generality, or embedded in a sufficiently poignant scenario, the lawyering traits attributed to Brandeis have unquestionable appeal. For example, when Robert W. Gordon advocates lawyerly independence and points to Brandeis as an inspiring example thereof, concededly he is not calling for lawyers to adopt an attitude of contempt or neglect toward their clients. What he has in mind is Brandeis's willingness to guide his business clients, forcefully if necessary, toward morally acceptable behavior and to engage in public interest work of his own, regardless of what they might think.[262] Luban's conception of "moral activism"[263] and Simon's phrase "ethical autonomy"[264] speak to the same point. Likewise, a subtly different ethic associated with Brandeis—that of "counsel for the situation"—has clear and fruitful application to the more nuanced portrait of lawyers as counselors, negotiators, and intermediaries that has partially supplanted the image of lawyers as adversarial litigators that structured the set of legal-ethical norms prevalent in Brandeis's day. Thomas Shaffer's argument concerning the responsibilities of lawyers to represent *relationships* and not merely individuals is only one example of the invocation of Brandeisian imagery to support the notion of the lawyer-as-intermediary.[265] While I believe that the vignette usually cited for this vision, the Lennox case, could not be less edifying in this respect, the more general observation that lawyers must often confront a "situation" and not simply an individual client is unarguable.

These visions of lawyering differ in some respects, but they share one important feature: They ascribe to the lawyer a responsibility for articulating larger values (whether those of the "public interest" or of the "situation" or

261. White, *Sunday Shoes*, *supra* note 10.

262. Gordon, *Independence of Lawyers*, *supra* note 85, at 27 & n.81, 33.

263. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 238.

264. Simon, *Ethical Discretion*, *supra* note 107, at 1128.

265. *See supra* note 97; *see also* HAZARD, ETHICS IN THE PRACTICE OF LAW, *supra* note 197, at 58–68; Dzienkowski, *Lawyers as Intermediaries*, *supra* note 97, at 744; James C. Hagy, Note, *Simultaneous Representation: Transaction Resolution in the Adversary System*, 28 CASE W. RES. L. REV. 86, 91 (1977) ("Brandeis' commitment to the efficacy of multiple representation . . . is an indication of its potential utility in dealing efficiently and economically with particular clients' needs."). This vision has played an increasingly important role in family law counseling. *See* Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 120 n.49 (1982). John P. Frank, somewhat prophetically, mentioned the problems of counseling the parties in an uncontested divorce in assessing Brandeis's performance in the Lennox case. *See* Frank, *Legal Ethics of Louis D. Brandeis*, *supra* note 101, at 700–01. While Frank's example is the ideal counterpoint to the suggestion that no lawyer ought ever to counsel more than one party at a time, it is difficult to imagine the Brandeis of the Lennox case performing this sensitive task well. ("I think there is no doubt but that a divorce will be necessary . . . .").

"relationship") that must structure or qualify the ends desired by an individual client. In this sense, Brandeis is indeed an apt source of inspiration for modern critiques of the ideology of lawyering. No lawyer ever assumed this responsibility with fewer qualms. But this seemingly salutary principle is itself the source of my ambivalence concerning Brandeis and his meaning for the ethos of lawyering.

The problem is this: The lawyerly autonomy that Luban and Simon counterpose to the principle of nonaccountability is usually framed as the "Lysistratian prerogative"—the lawyer's right to "withhold services from those of whose projects he disapproves."[266] The prerogative is one of withdrawal, of refusal to assist.[267] And the disapproval is an expression not merely of private preference, but of values that are public and categorical. The Lysistratian prerogative is concerned not with saving the lawyer's soul, nor with minimizing her sense of cognitive dissonance by permitting her to act as she believes, but with ending the lawyer's exemption from the citizen's duty to uphold public values. The principle of nonaccountability that underwrites this exemption is problematic because it rationalizes the lawyer's obligation to perform acts on behalf of a client that, as Richard Wasserstrom has put it, "an ordinary person need not, and should not do."[268] It is this image of disengagement from the act condemned by common morality that gives the Lysistratian prerogative its picturesque and compelling character.

Accordingly, Simon and Luban leave the impression that the circumstances that called forth Brandeis's characteristic assertions of lawyerly independence involved clients hell-bent on evil deeds, from whose dictation Brandeis extricated himself, or whom Brandeis persuaded to take a different path. But the truth is more complicated. No doubt in some instances[269] Brandeis prevailed upon clients to abandon wrongheaded plans of action.[270] But it is

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266. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 169; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642.

267. To people not imbued with the ideologies of legal professionalism, it is bizarre to find lawyers responding to proposals for higher than minimal ethical standards by asking rhetorically why a lawyer should "arrogate to herself" the power to determine the justice of a client's goals. When the issue is whether the lawyer will lend her efforts to furthering the goals, this arrogation is nothing more than the right and responsibility of any person who aspires to ethical autonomy.

Simon, *Ethical Discretion*, *supra* note 107, at 1128 (footnote omitted).

268. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5 (1975).

269. The classic example is Brandeis's advice to the shoe manufacturer William H. McElwain to respond to a threatened job action by his employees by regularizing their employment and acceding to their demands. *See supra* text accompanying note 95. Luban cites this episode in *Partisanship, Betrayal and Autonomy*, *supra* note 105, at 1005 n.6, and in Noblesse Oblige *Tradition*, *supra* note 85, at 722–23. Simon seems to have it in mind when he refers to Brandeis's "famous struggles with his business clients" in *Babbitt v. Brandeis*, *supra* note 85, at 574 (although he may be referring to the United Shoe Machinery case). But there is no indication that McElwain, whom Brandeis later praised as an upright and visionary employer, was morally insensible to this kind of advice. *See* LOUIS D. BRANDEIS, *Business—A Profession*, *in* BUSINESS—A PROFESSION, *supra* note 2, at 1, 5–9.

270. In this Brandeis did no more than carry out the admonition of Elihu Root—usually the *bête noir* of those who criticize the "hired gun" model—that "half the practice of a decent lawyer consists in telling

one thing to speak of the lawyer's "ethical autonomy" or her "moral activism" as a basis for declining, in specific instances, to assist in the furtherance of the client's goals. It is another for a lawyer to conceive an attorney-client relationship primarily to further her own. Anyone attending closely to Brandeis's actions in the Lennox case, or the sliding-scale matter, must sense that they were assertions not simply of ethical autonomy for its own sake, of withdrawal or abnegation, but of individual political aspiration.

Therefore, while critiques of the nonaccountability principle and the concomitant exaltation of moral activism are inspiring in the abstract, the more complex kind of autonomy exhibited by Brandeis seems more troubling. I have arrived at a certain sympathy with the plaints of James Lennox, Edward R. Warren, and Clifford Thorne, whatever their grubbiness or self-interest. But what might be an alternative to Brandeis's approach? The traditional lawyerly ideal is "loyalty," but to adhere to this ideal in its unqualified form would be merely to reinscribe the "hired gun" vision of lawyering that critics have so effectively castigated as morally untenable. (Brandeis, of course, cuts a dashing figure in our histories of lawyering partly because he was the antithesis of a "hired gun.") To have one's own articulated view on a matter of public concern determined entirely by the identity or the views of another impoverishes the very notion of political belief and action. In challenging Brandeis's mode of independence, I am not thereby accepting the defense of the extreme form of the lawyerly duty of loyalty that has been articulated by Charles Fried and others.[271]

Yet the phrase used by Fried, "The Lawyer as Friend," does capture an image that grounds a compelling alternative to Brandeisian detachment in legal representation. Toward the end of his elegant critique of the "deontological ethic" associated with Kant and more recently John Rawls, Michael Sandel refers tellingly to this relationship between friendship and self-understanding:

> [T]o see ourselves as deontology would see us is to deprive us of those qualities of character, reflectiveness, and friendship that depend on the possibility of constitutive projects and attachments. And to see ourselves as given to commitments such as these is to admit a deeper commonality than benevolence describes, a commonality of shared self-understanding as well as "enlarged affections." As the independent self finds its limits in those aims and attachments from which it cannot stand apart, so justice finds its limits in those forms

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would-be clients that they are damned fools and should stop." *Quoted in* Schneyer, *Standard Misconception*, *supra* note 204, at 1549. As Ted Schneyer has pointed out, this comment is in some tension with the remark for which Root has more often been skewered: "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." *Id.* at 1549 n.78, *quoting* 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 667 (1946) (quoting Elihu Root).

271. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 107.

> of community that engage the identity as well as the interests of the participants.[272]

While this ideal of friendship as a constituent of the self, sentimental enough in Sandel's application of it to moral philosophy, may appear downright unreal when applied to the problems of lawyering,[273] I believe it sheds light on the dilemmas of representation. The most glaring weakness of Fried's *The Lawyer as Friend* is not its analogy between lawyering and friendship, but its impoverished conception of what real friendship involves. Friendship connotes a duty of remonstration, of interpersonal challenge, and not simply the unquestioning adoption of another's ends as one's own. Perhaps the image that best captures this idea is that of *dialogue*—the notion that in any meaningful relationship, questions of ends are not determined solely in an anterior way by one party but are made the subject of a joint inquiry.

This way of looking at relationships, including lawyer-client relationships, is an apt critique not only of Fried's vision but of Brandeis's as well. No doubt the image of friendship, and of joint exploration of ends, can appear artificial or inapt in a variety of lawyering contexts. The criminal defense lawyer, the counsel to a major corporation, the attorney for a mentally incompetent person might find such a portrait of representation unrecognizable. But Brandeis's representations, at least those that I have chosen to highlight here, did not fall into these categories. Precisely because so many of his representations involved larger questions of public policy, they *did* lend themselves to deliberation or dialogue between lawyer and client about ends.[274] There is thus some irony in Luban's commendable emphasis on the "moral requirement on the lawyer . . . to engage the client in moral dialogue,"[275] a requirement that lies at the heart of the "moral activism" he sees embedded in the figure of Brandeis. But dialogue usually involves two people talking and two people

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272. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 181–82 (1982).

273. As George P. Fletcher points out, the loyalty engendered by professional relationships such as that of attorney and client differs from more organic loyalties in that the former "derive[s] solely from contract, from voluntary commitments, not from an historical self." GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 22 (1993). Hence my emphasis in the text on dialogue rather than loyalty in the strict sense.

274. My view of Brandeis is thus diametrically, almost ironically, opposed to Thomas Shaffer's, who sees Brandeis as *resisting* the Kantian notion of human autonomy as the fundamental basis of moral life:

> Kant and his followers see human autonomy (self rule) as essential to moral life, and, I think, as the highest good a lawyer can hope for for his client—that the client be self-governing, or, as it is usually put, *free*. Martin Buber, in his theory of the importance of the I-Thou relationship, said that a person is not even able to demonstrate his own existence until he comes into relationship with another person. It exaggerates but makes a point to say that, to Buber, the *only* reality is what Brandeis called the "situation."

SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 96, at 303. The case of Brandeis suggests that one cannot assess the possibilities for the client's autonomy, freedom, or self-governance without taking account of the lawyer's aspiration toward these same ends.

275. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 163; *see also* Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 105, at 1025.

listening.[276] The fixation among legal ethicists upon the *figurae* of the immoral client and the amoral lawyer has almost concealed the possibility that moral dialogue might be edifying for the lawyer as well as the client.[277] Brandeis's very lack of interest in this enterprise of dialogue takes us beyond the question of whether the lawyer should be a frictionless conduit for the client's views and ends, a question to which few would now give an unqualifiedly affirmative answer. It raises the question as well of whether the client should constitute the pedestal from which the lawyer attains political "standing."

What, then, could Brandeis have done instead in the cases I have discussed? I do not suggest, as some might, that he should have said to James Lennox, "Just tell me your goals and I'll go to the mat for you." He was not obliged to say (as Lennox and Stroock plainly wanted him to), "I know many of your creditors, and I'll see if I can get them to hold off until you can get back on your feet." But he might have said, "If all you are interested in is saving your business, I'm not the man for you; you should be interested in my services only if you agree that you must pay all your just debts before even thinking of making your business a going concern again. How do you respond to that?" Or, in the sliding-scale case, Brandeis might have consulted more specifically with members of the Public Franchise League and the Board of Trade to reach a common understanding concerning the degree to which he was justified in publicly equating his views with theirs. Even in the 1914 ICC hearings, where Brandeis's client concededly was the public rather than shippers, consumers, or Clifford Thorne, Brandeis might have conversed with Thorne and others concerning what they regarded as a common enterprise. It is even possible that, from such conversations, Brandeis would have learned something he did not already know. Of course, such discussions would no doubt have impeded Brandeis's ability to deliver his intended message or to carry out his view of the public good. But such impediments are the inescapable condition of politics in a relational world.

Brandeis's distinctive commitment to political self-definition, a human approximation of what Sandel terms the "unencumbered self" in the public sphere, is meaningful precisely because his consuming interest was the public weal; that commitment comes into view when we see his activities in lawyering and reform encounter "public" issues. Because of Brandeis's commendable devotion to the public good, it will seem to some that my resistance to his approach is simply the post-Progressive's corrosive skepticism concerning what is and who is entitled to define and speak for the public

276. For dialogue as inquisition and sermon, see the transcript of Brandeis's interview with James Lennox, *in* 2 MERSKY & JACOBSTEIN, *supra* note 7, at 775–96.

277. *Cf.* Schneyer, *Standard Misconception*, *supra* note 204, at 1537 n.32 ("If the lawyer's role . . . does in some cases bring the lawyer's values into line with those of his clients, it does not necessarily follow . . . that the lawyer is being changed for the worse.").

interest;[278] and that it implicitly derogates the "cause lawyering" that has done so much to promote political and social change. That is, to question Brandeis's modus operandi is seemingly to question the tactics of the many lawyers who have subordinated traditional conceptions of the adversary process to creative and activist uses of the legal arena for just ends. One cannot scrutinize Brandeis's activities without coming to grips with impact litigation (especially class actions), legislative advocacy on behalf of the public, and the other forms taken by public interest law.[279] Political opponents of these developments in the practice of law invariably have crafted their arguments in terms of their supposed violation of traditional conceptions of representation and the duties implied by it.[280]

But I do not challenge the legitimacy of the public interest law movement, whose source Luban finds in Brandeis's "moral activism."[281] The question raised by Brandeis in his roles as lawyer and reformer is, rather, how political meaning—the identification of ends and means, in the smallest dispute as well as the largest conflict—is created. I am less troubled by the "arrogation of power" of which some accuse the activist lawyer[282] than by the implications of an ideal of withdrawal, the aspiration to an Emersonian autonomy, embodied in Brandeis's quest to have his political voice wholly self-defined. Anyone for whom the application of critical intelligence to the larger world partakes of a *creative* individual act understands, at least dimly, the allure if not the compulsion of that aspiration: To say only what one thinks, to advocate only the precise thing that one believes to be just and true. That ideal is an indispensable part of the tradition of conscience and dissent suggested by the figure of Emerson himself (who maintained a famous remoteness from the political controversies of his time).[283]

But in nurturing "devotion to a thought,"[284] one eventually encounters a world of others, some bearing claims that conflict with such a devotion. To join with others in political action, or to stand up for a client in court or

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278. *Cf.* MARTIN, ENTERPRISE DENIED, *supra* note 12, at 365 ("The public interest, in fact, is nothing more than the algebraic sum of all the private interests.").

279. Luban makes this connection explicitly in LAWYERS AND JUSTICE, *supra* note 4, at 317.

280. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 483–84 (1985) (describing opposition to Legal Assistance Corporation); LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 301.

281. LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 238.

282. Stephen L. Pepper articulates one version of this objection when he asserts:

> [F]or the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.

Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617. Luban effectively answers this and other objections to the lawyer's moral activism in LAWYERS AND JUSTICE, *supra* note 4, at 317–40. *See also* Simon, *Ethical Discretion*, *supra* note 107, at 1128.

283. *See* Lawrence Alan Rosenwald, *Emerson*, 16 INTELL. HIST. NEWSL. 38, 40 (1994).

284. These are Sherman Whipple's words. *See* 1 MERSKY & JACOBSTEIN, *supra* note 7, at 300.

elsewhere, may entail some surrender of individual prerogative if those others are not to be made simply role players in one's own script. For those of us tempted to look back wistfully on him, fixation upon the larger public good that is transcendently embodied by a figure like Brandeis is poignant, not because no one has the right to define the public good, but because that fixation can hide from us the virtues of dialogue, negotiation, and accommodation as politics. It is no coincidence that the person most often revered as a modern-day Brandeis, Ralph Nader, seems as little committed to a communal or "dialogic" approach to the substance and process of politics as Brandeis was.[285] It may be that Brandeis and Nader represent an essential type in the realm of rebellious or dissenting politics—charismatic figures who bear an inspiriting and egalitarian message, but whose effectiveness is due in part to the very aloofness that makes them uninterested in accommodating dialogue even with followers.[286] Whether this is an equally essential type in the realm of client representation is another question.

B. *The Meaning of Brandeis*

> He's fictional, but you can't have everything.
>
> —Mia Farrow, on her cinematic paramour in *The Purple Rose of Cairo*[287]

Brandeis's role in our narratives of the "good lawyer" illustrates a more pervasive iconography of Brandeis in twentieth-century public law. There seems to be much at stake in "claiming"[288] him, a process even more apparent in the use to which Brandeis's *judicial* persona has been put. It is understandable that judges and legal scholars see advantage in citing Justice Brandeis for their own views; what is less clear is how they have been able to

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285. *See* CHARLES MCCARRY, CITIZEN NADER 126 (1972) ("He dislikes any descent below the surface of behavior, his own or anyone else's."); *id.* at 216 (noting "the connection between Nader's personal remoteness and his concern for mankind"); *id.* at 152 (discussing Walter Mondale's comparison of Nader and Brandeis); Morton Keller, *Brandeis—Reformer*, 81 AM. JEWISH HIST. 394, 394 (1994) (noting parallels between Brandeis and Nader). Nader, incidentally, is one of the few ever to have maintained a successful invasion-of-privacy suit, *see* Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. 1970), based in part on the theory first put forward in Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Interestingly, Nader seems to have rejected the comparison in these acid comments on his legal education: "Harvard Law School . . . never raised the question of sacrifice. Nothing! The icons were not those who had sacrificed at all. They were Brandeis, who took a few briefs for child labor after he had made a million dollars and so became 'the people's lawyer.'" *Quoted in* MCCARRY, *supra*, at 49–50. Nader might have observed, however, that Brandeis's "ostentatious austerity" (in Richard Posner's felicitous phrase) strongly resembled his own. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 8 (1990).

286. See *supra* text accompanying note 79 on the similarities between Brandeis's approach and Erik Erikson's portrait of Gandhi.

287. THE PURPLE ROSE OF CAIRO (Orion 1985).

288. This image is drawn from JOHN RODDEN, THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL (1989).

do so plausibly, given their diverse ideological persuasions. The phenomenon appears most clearly in the claims to Justice Brandeis made by both the supporters and the critics of the Warren Court, who by rights should have been hard pressed to find warrant for their positions in the very same judicial figure.[289] Of course, by now, so many studies have appeared concerning the protean quality of historical reputations that it would be fatuous to posit the uniqueness of Brandeis's "interpretability." Merrill Peterson's accounts of Thomas Jefferson and Abraham Lincoln are perhaps the best-known examples.[290] Yet the malleability of foundational images like those of Jefferson and Lincoln—long-dead politicians who sought to mobilize huge constituencies around spacious terms like "liberty" and "free labor"—seems explicable. In the world of law, where questions and answers tend to be framed discretely, and influential jurists become associated with fairly concrete positions, the breadth of Brandeis's constituency is more striking. The appearance of his image in more recent writing on lawyering suggests that not only participants in the mainstream debate over judicial activism, but also those with a more critical perspective on American law, find consolation in that image.

That is not to say that the scholarly invocation of Brandeis-as-lawyer is either wrong or *wholly* fictional, simply one among an infinity of possible portraits. As with all explorations of the past, the scholarly image of Brandeis is a product of the fertile encounter between contemporary aspiration and an evocative historical figure. Consider, for example, the term "counsel for the situation." This concept, indelibly associated with Brandeis, not only grounds a sophisticated critique of adversarial lawyering; it also responds to a longing, never wholly absent from our politics, for a wise, all-seeing ombudsman who will reach intelligent solutions to nagging problems while transcending partisan politics and socioeconomic strife. There is some resemblance between the independent "public private citizen" (a generalized version of "counsel for the situation") and Max Weber's concept of *honoratiores* or "notables" who are "able to live *for* politics without living *from* politics."[291] The resurgent interest in the romanticized figure of the "lawyer-statesman" who consults his own "practical wisdom" speaks to the same longing.[292] And in this country,

289. *See* Spillenger, *Reading the Judicial Canon*, *supra* note 181.

290. MERRILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND (1960); MERRILL D. PETERSON, LINCOLN IN AMERICAN MEMORY (1994). For other examples in this genre, see RODDEN, *supra* note 288 (Orwell); GARY TAYLOR, REINVENTING SHAKESPEARE (1989); A. RICHARD TURNER, INVENTING LEONARDO (1993). Brandeis has often been compared with Lincoln and Jefferson, on the basis of both their sociopolitical visions and, in the case of Lincoln, their physical resemblance and their common state of birth.

291. On Weber's conception of "notables," see 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 290–92 (Guenther Roth & Claus Wittich eds., 1968) (1956). On legal *honoratiores* in particular, see 2 *id.* at 664 n.18, 784–802. The quoted words are at page 290 of volume one. I thank Rick Abel for this and numerous other helpful observations.

292. KRONMAN, LOST LAWYER, *supra* note 167.

there have always been lawyers whose representation of the "public good" rather than any particular person or group has brought them fame and influence. New Deal actors such as Donald Richberg consciously aspired to such roles in transcending industrial conflict; blander figures with bipartisan reputations as "mediators," such as Warren Christopher, appear on the political scene from time to time; Nader, while undoubtedly exhibiting a more populist political edge, has crafted his appeal largely as the anti-politician advocate for the classless consumer (a modern surrogate for the "people") and has pursued federal regulators with equal ferocity regardless of which party is in power.[293] The Brandeis of such homely episodes as the mediation of the garment workers' strike and the achievement of a rapprochement between McElwain and Tobin can appeal to virtually any student of professional responsibility, irrespective of ideology. To academics with strong political commitments who have largely left political activism behind, the role of "counsel for the situation" must, in a subtle way, offer a still stronger appeal (as technocratic solutions to political problems often have).

In a more general way, this attraction to a transcendent figure—to a "free man's life"—has shaped the distinguished Brandeis biographies, from Alpheus T. Mason to Melvin I. Urofsky to Philippa Strum. In entitling his first book on Brandeis *A Mind of One Piece*, Urofsky borrowed a phrase used by Paul Freund, Brandeis's law clerk and (if such a thing existed) intimate.[294] By this phrase, Freund meant that Brandeis did not suffer from the characteristic twentieth-century disease of the divided self; his beliefs and actions proceeded from a central, unified vision. In light of my emphasis on the complexity and ambiguity of Brandeis's persona, I find a fertile irony in this notion of Brandeis's "mind of one piece." But it is an irony, not an error, for I agree that Brandeis was a person with a powerful moral vision. The discrepancy results from a shift of focus from a definition-from-within, according to which the unity and integrity of Brandeis's thought are indeed remarkable, to a persona measured against the world created by a community of associates and interactions, wherein the multiplicity of Brandeises becomes inevitable.

Likewise, Strum's work exhorts us to rediscover the Brandeis vision to help make sense of our own lives, enabling us to escape the disabling narrowness of our own social ideals.[295] This Brandeis vision appears partly in a series of parables, some of which I have discussed here, whose meaning I believe is far more complex than is conventionally understood. But largely it emerges from a series of famous and stylized statements by Brandeis: his speech "The Opportunity in the Law"; his letter to a junior lawyer in his firm,

293. This is to speak only of twentieth-century figures. Daniel Webster is the most frequently cited example of the "lawyer-statesman" of an earlier day.

294. UROFSKY, A MIND OF ONE PIECE, *supra* note 3, at xii.

295. *See, e.g.*, STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 5 ("Perhaps it is time to revisit Brandeis.").

William H. Dunbar, expressing his views on the qualities that make a good lawyer;[296] his letter to New York reform figure Robert Bruère, setting forth some of his convictions concerning the duties of citizenship in a representative democracy;[297] his congressional testimony vaguely intimating support for a system of cooperative ownership in industry; his frequent references to Athenian democracy; and so on. There is no reason to trivialize these stirring statements or to disparage the notion of his serving as an inspiring historical model, just as there is no need to rescue Brandeis from the revelations concerning the "Brandeis/Frankfurter Connection."[298] But we should understand that Brandeis could become an iconic source for us precisely because of his disaffiliation, precisely because his vision is best captured in an uncorrupted realm of published and private writings rather than in any fateful choice to ally himself politically with a controversial group or cause. There is thus an unexpected connection between the independence he exhibited and the variety of his admirers.

Whatever the sources of his biographers' response to him, most interesting of all is the attraction of Brandeis for critics of the adversary system and its attendant ethos. Of course, there is no simple way of characterizing the large and diverse literature on lawyering and professionalism. There seems, however, to be a rough divide between those who stress new and creative approaches to the *relationships* (both between lawyer and client and between nominal adversaries) created by a representation,[299] and those who criticize the larger, historic *ideologies* of lawyering whose exaltation of the principles of partisanship and neutrality has underwritten the recruitment of lawyers for antisocial ends. Shaffer's romanticized account of the Lennox episode suggests how readily Brandeis can serve as an object lesson in the first of these critiques. But Brandeis's image has, if anything, been even more compelling for critics of the "ideology of advocacy." For such forceful writers in this tradition as William H. Simon and David Luban, Brandeis's unrepentant pursuit of socially just ends testifies powerfully to the viability of alternative visions of practice, conceived by a figure who is neither radical nor marginal, but central to modern legal consciousness.[300] What I earlier described as

296. Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), *in* 1 LETTERS, *supra* note 22, at 106–10.

297. Letter from Louis D. Brandeis to Robert Walter Bruère (Feb. 25, 1922), *in* 5 LETTERS, *supra* note 22, at 45.

298. *See* BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982). For a painstaking assessment of Murphy's charges, as well as other intimations of improper conduct by Brandeis, see David J. Danelski, *The Propriety of Brandeis's Extrajudicial Conduct*, *in* BRANDEIS AND AMERICA, *supra* note 12, at 11.

299. *See, e.g.*, Menkel-Meadow, *Problem Solving*, *supra* note 76 (discussing alternative, cooperative model of legal negotiation).

300. As I have noted earlier, Luban's discussions of Brandeis are not without a degree of skepticism, but on the whole those discussions are for purposes of "edification" rather than criticism. *See supra* text accompanying note 88. Similarly, Simon has identified Brandeis as the principal source of a "Progressive-Functionalist" or "Purposivist" vision of legal practice which, whatever its attractions, has tended to evade

Brandeis's fusing of self and public, bypassing intermediate and relational sources of meaning and value, here becomes a virtue, because it permits the assertion (by lawyers) of public values at times to trump or at least qualify the prerogatives of private parties (clients).

In an interesting critique of a move within the theory and pedagogy of lawyering toward what he sees as an excessive psychologism of intimacy and refuge from politics in the lawyer-client relation (what he calls the "community of two"), Simon has argued for a more explicit recognition of *politics* as the ground upon which such relations should be understood:

> Political Man could follow Psychological Man to the extent of acknowledging the value of intimate personal experience and relations, *but he would have to insist on the distinction between the private realm of intimacy and the public world and on the value of relatively impersonal action in the public world.* . . . The Political Vision . . . counters the tendencies of the Psychological Vision to sentimentalize law practice and to deny or obscure the political character of lawyering.[301]

Although Brandeis does not appear in this passage, it is easy to see from it why Simon has frequently referred to him. Brandeis, more than anyone else, cherished "the distinction between the private realm . . . and the public world" and engaged in "relatively impersonal action in the public world." These are the very things I have emphasized. But Brandeis's iconic role in the critique that Simon and others have leveled at the "ideology of advocacy" rests not only on a stylized portrait of "Brandeis," but also on a curiously partial vision of what "politics" is. Only "politics" conceived as a critique of what is "out there," politics solely as structure and ideology, as a studied indifference to the local interactions between and among people, could facilitate the unproblematic recruitment of Brandeis on behalf of a particular vision of lawyering, whether "progressive" or "functionalist" or "critical." One can, of course, choose to see the reality of lawyering as residing principally in the lawyer's reaction to a prevailing ideology of professionalism; but then one is unlikely to see the complexity of Brandeis's encounter with others, expressing an element of character that for most people is more basic than, and prior to, the reception

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issues of social conflict that a more critical vision would confront. *See, e.g.*, Simon, *Babbitt v. Brandeis*, *supra* note 85, at 565–69; Simon, *Ideology of Advocacy*, *supra* note 83, at 74–89, esp. 78–79 n.108. At other times, however, Simon has been more effusive about "Brandeis's ideal of the lawyer as mediator between public and private":

> Brandeis argued that narrow devotion to private interest was ignoble and stultifying for both lawyer and client. In his view, personal fulfillment could only be attained by escaping the private realm and linking one's fortunes to the welfare of the greater community. Brandeis saw law as a uniquely attractive occupation because it was distinctively concerned with building bridges between private and public interest.

Simon, *Homo Psychologicus*, *supra* note 85, at 497, 496.

301. Simon, *Homo Psychologicus*, *supra* note 85, at 558 (emphasis added).

or rejection of professional codes and ideologies. The partiality of the "Brandeis"—or the unwillingness to probe more deeply into the nature of his choices—that I find portrayed in some of the critical scholarship on lawyering is, I believe, attributable to this focus on the "ideology of advocacy."

In its own way, Simon's emphasis upon abstract and all-embracing lawyering ideologies—purposivism,[302] progressive-functionalism,[303] the "liberal view,"[304] the "conservative view,"[305] the "critical view,"[306] the "Psychological Vision,"[307] the "Political Vision"[308]—as the principal route to divining the social meaning of lawyering relationships replicates the flight from the local world of interactions that I believe marked much of Brandeis's behavior. One begins to act politically, and in the most daring way, when one willingly encounters another person as a person, as a potential inroad upon one's ends and understandings.[309] While it would be presumptuous to doubt that Brandeis did this in a few close relationships, it seems not to have been his characteristic instinct as a lawyer and reformer. To call attention to this is not to sentimentalize the "community of two" as a haven in a heartless world. It is to suggest that a meaningful politics cannot emerge from a community of one.

CONCLUSION

Brandeis's profound sense of autonomy and his linking of that sense with a larger public good help explain his powerful hold on us. But they also afford us an opportunity to explore the alternatives of independence and engagement that, however obliquely, confront any person (including any lawyer) who undertakes to represent another. If I have tended toward criticism of Brandeis, it is by way of redressing the imbalance created by generations of praise for him and the mode of independence he favored. For every Emersonian paean to self-reliance there is Martin Buber's answering admonition, "All actual life is encounter."[310]

Whatever its deepest sources,[311] Brandeis's "self-conscious marginality,"[312] or what I have called his sense of autonomy, ultimately was

302. Simon, *Ideology of Advocacy*, *supra* note 83, at 62–91.
303. Simon, *Babbitt v. Brandeis*, *supra* note 85, at 565–71.
304. Simon, *Visions of Practice*, *supra* note 96, at 474–84.
305. *Id.* at 472–74.
306. *Id.* at 484–89.
307. Simon, *Homo Psychologicus*, *supra* note 85, at 488–90.
308. *Id.* at 557–59.
309. For an extended treatment of this theme, see GILLIGAN, *supra* note 80.
310. MARTIN BUBER, I AND THOU 62 (Walter Kaufmann trans., 1970).
311. *See supra* text accompanying notes 79-80 for one model that deserves further exploration. Any such exploration would have to examine the nature and influence on Brandeis of his Jewishness, a subject I leave unexamined here. For an interesting but speculative discussion, see BURT, TWO JEWISH JUSTICES, *supra* note 11.
312. *Id.* at 13.

not thrust upon him but chosen by him. It was not a response to constricted opportunity, but a skillful adaptation of his enormous talents to a changing political culture. It was not a species of moral wisdom, but a political strategy. Brandeis's personal aloofness and his political nonalignment were two sides of the same coin; the one denied him the comforts of fellowship with his immediate peers, but the other helped him attain the trust and gratitude of thousands who had never met him. In using terms like "political strategy," I do not mean to imply that Brandeis was a manipulator, or that what has previously seemed appealing should now be thought sinister. Surely there can be no quarrel with the Brandeis who declined to take cases that he believed were not just, and who devoted himself to public service rather than mere accumulation. But the renunciation of material self-interest is not the automatic equivalent of embracing a communitarian ideal.

That some writers have seen a partial or even (to me) an unrecognizable "Brandeis" is, perhaps, to be expected. Mia Farrow's genial embrace of the contingency of perception strikes me as a most appropriate attitude toward interpretation, particularly interpretation of our canonical historical figures. As a teacher of mine once said, "We view the acts of history as authoritative precisely because we read into that history that part of the past which we choose to make authoritative, which we wish to emulate."[313] But the prospect of emulation, an element of what I have called "edification," does raise the stakes of interpretation. This is particularly the case with respect to invocations of Brandeis in the literature on lawyering. For that literature, as I stated at the outset, is concerned with lawyers' behavior, and its references to him therefore imply that we as lawyers should emulate him. A reconsideration of what Brandeis was really doing in the cases that have brought him fame, one in which he is driven by more than sheer prophetic wisdom, may help us assess just what we are being asked to emulate. For the ultimate problem of lawyering is not that of devising a better ideology, but that of acting in the world.

313. Robert M. Cover, *quoted in* Tanina Rostain, *Tributes to Robert M. Cover*, 96 YALE L.J. 1713, 1715 (1987).