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Louis D. Brandeis and the Lawyer Advocacy System

Robert F. Cochran, Jr.*

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I. INTRODUCTION

The law practice of Louis Brandeis serves as an appropriate transition between this conference's look at the history of the legal profession in the United States and its look at lawyers as philanthropists. Brandeis was one of America's most successful and innovative lawyers at the turn of the twentieth century and serves as a role model for lawyers in his dedication to public service.¹

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1. See generally 2 LETTERS OF LOUIS D. BRANDEIS, 1970–1972 (David W. Levy & Melvin I. Urofsky eds., 1st ed. 1975) (detailing Brandeis's career of public service and work as an innovative lawyer).

Brandeis, of course, is best known for his work as a Justice on the United States Supreme Court.² He wrote ground-breaking opinions in support of free speech and press, privacy, and judicial restraint.³ Franklin Roosevelt, who appointed Brandeis to the Supreme Court, saw him as a prophet, calling him “Isaiah,” despite the fact that Brandeis played a key role in killing Roosevelt’s Court-packing proposal.⁴ Justice Harlan Fiske Stone praised Brandeis for his “social conscience and vision, infinite patience, an extraordinary capacity for sustained intellectual effort, and serene confidence that truth revealed will ultimately prevail.”⁵

Brandeis is less well known for his work as a lawyer, though he practiced law for forty years before he was appointed to the Supreme Court and his professional accomplishments were many.⁶ Alan Dershowitz places Brandeis on his lists of both the United States’ most influential Supreme Court Justices and its most influential lawyers.⁷ In this essay, after a brief description of Brandeis’s legal career,⁸ I will present Brandeis’s defense of lawyer advocacy from his MIT lectures and some qualifications to it that are suggested by his later speeches and law practice.⁹

I begin with a brief summary of Brandeis’s law practice. After entering Harvard Law School with only a high school education, Brandeis earned the highest grades ever recorded.¹⁰ Following a short period of law practice in St. Louis, Brandeis served as the law clerk to Chief Justice Horace Gray of the Massachusetts Supreme Court (later a justice on the United States Supreme Court).¹¹ Gray identified Brandeis as “the most ingenious and most original lawyer I ever met.”¹² While clerking, Brandeis and his classmate Samuel Warren founded what became one of the United States’

2. Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 122 (1995).

3. See generally Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 BRANDEIS L.J. 733 (2006) (discussing Brandeis’s ground-breaking opinions).

4. LEWIS J. PAPER, *BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA’S TRULY GREAT SUPREME COURT JUSTICES 2* (1983).

5. Justice Harlan Fiske Stone, Proceedings of the Bar of the Supreme Court of the United States and Meeting of the Court in Memory of Associate Justice Louis D. Brandeis (Dec. 21, 1942), in STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* 233 (1994).

6. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 353 (1st ed. 2009) [hereinafter *BRANDEIS: A LIFE*].

7. Alan M. Dershowitz, *The Practice*, N.Y. TIMES, Sept. 27, 2009, at BR13.

8. See *infra* notes 10–22 and accompanying text.

9. See *infra* Parts II–III.

10. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 33, 47 (Viking Press 1946).

11. *BRANDEIS: A LIFE*, *supra* note 6, at 464.

12. MASON, *supra* note 10, at 61.

most successful law firms.¹³ Fifteen years into his practice, Brandeis earned more than \$50,000 a year—over \$1 million a year in current dollars.¹⁴

Brandeis was successful, both as a litigator and as a business lawyer. As a litigator, he had a reputation as “a tireless, some said a ferocious adversary.”¹⁵ He enjoyed trials.¹⁶ In a letter to his brother Alfred, Brandeis said, “I really long for the excitement of the contest—that is one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter skirmishes cannot afford.”¹⁷

Brandeis also advised small and medium-sized businesses.¹⁸ The following vignette from Melvin Urofsky’s biography of Brandeis gives a sense of Brandeis’s reputation as a business lawyer:

Marsden Perry, a businessman in Providence, sent his lawyer, Arthur Lisle, to Boston to find the best lawyer in that city to handle a complicated matter for him. Lisle first went to see a man he knew at the General Electric Company, who promised to find out; the man contacted Lisle a few hours later and told him that the lawyer he wanted was Louis Brandeis. In the meantime, Lisle had gone over to the Westinghouse Company and talked with its chief counsel, who promptly advised him to see Brandeis. Being a thorough man, Lisle also visited two banks where his employer did business, and in each of them received the identical response—the best lawyer in Boston was Louis Brandeis.¹⁹

Perry employed Brandeis in a complicated securities matter and Brandeis devised a creative solution.²⁰

In addition to his successful private law practice, Brandeis served the public interest in several ways. He and his law partner wrote *the* article on the then-novel tort of invasion of privacy, an article William Prosser identified as possibly the most influential law review article ever written.²¹

13. See *BRANDEIS: A LIFE*, *supra* note 6, at 46.

14. *Id.* at 73.

15. *Id.* at 71.

16. *Id.*

17. *Id.* (quoting Letter from Louis Brandeis to Alfred Brandeis (March 21, 1887)).

18. *BRANDEIS: A LIFE*, *supra* note 6, at 60, 71.

19. *Id.* at 51.

20. *Id.*

21. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890); see also William L. Prosser, *Privacy*, 48 *CALIF. L. REV.* 383, 383 (1960) (exploring the broad impact of Warren and Brandeis’s article).

In addition, Brandeis represented the public interest on a *pro bono* basis in many cases, taught a course on law at MIT, proposed thoughtful law reform, and encouraged wealthy and powerful clients to consider the interests of all who were affected by what they did with their wealth and power.²² These activities will be discussed more fully later.

II. BRANDEIS ON LAWYERS AND THE ADVOCACY SYSTEM

Brandeis practiced law at a time of transition in the legal profession. The profession was moving from the nineteenth-century gentleman's ethics, epitomized by the founder of American legal ethics, David Hoffman, to the adversarial ethics of the twentieth-century American Bar Association (ABA).²³ Of the client who wanted him to invoke the Statute of Limitations to defeat an otherwise valid contract claim, Hoffman said in 1836, "he shall never make me a partner in his knavery."²⁴ Hoffman argued that lawyers should not advocate a legal position unless they believed that it was good for "the jurisprudence of the country."²⁵

In contrast, the ABA's first statement of legal ethics, the 1908 Canons of Professional Ethics, required lawyers to assert the legal claims of the client, irrespective of the interests of justice or the country: "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."²⁶ Lawyers were to play their part in the advocacy system. As we shall see, Brandeis had a foot in each century, but here, as in many other areas, he moved against the tide.²⁷

In the early 1890s, when Brandeis had been practicing law for fifteen years, he taught a course on law to undergraduates at MIT.²⁸ It covered almost every area of law.²⁹ In a lecture on lawyers, Brandeis defended the lawyer's advocacy role.³⁰ It is likely that he had a tough audience.³¹

22. See *infra* Parts II–III.

23. See THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 64 (1985) (illustrating the legal profession's transition from gentleman's ethics to adversarial ethics).

24. David Hoffman, *Resolutions in Regard to Professional Deportment*, in 2 *A COURSE OF LEGAL STUDY* (2d ed. 1836), reprinted in SHAFFER, *supra* note 23, at 64.

25. SHAFFER, *supra* note 23, at 755.

26. CANONS OF ETHICS Canon 15 (1908).

27. See *infra* notes 28–41 and accompanying text.

28. BRANDEIS: A LIFE, *supra* note 6, at 93–97.

29. *Id.*

30. See LOUIS D. BRANDEIS'S MIT LECTURES ON LAW (1893–94) (Robert F. Cochran, Jr. ed. 2011) [HEREINAFTER MIT LECTURES].

31. Even in Brandeis's day, the reputation of the profession was bad enough to occasion pieces in law journals, defending it against its various despisers. See, e.g., E.C. Bumpus, *The Legal*

At the beginning of the lecture, Brandeis identifies the lawyer as “an important part of the legal machinery.”³² This placed his lecture on lawyers within the context of the course, but also established a key premise for his consideration of the work of the lawyer.³³ The lawyer’s advocacy should not be judged independently, but should be judged based on its place within the legal system. It is an instrumental role.

Early in his lecture, Brandeis lays out the criticism of lawyers made in Thomas More’s *Utopia*:

Sir Thomas More makes the absence of advocates one of the characteristic features of his Utopia. [“]They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters as well as to wrest law and therefore they think it is much better that every man should plead his own cause and trust it to the judge By this means they both cut off many delays, and find out the truth more certainly, for after the parties have laid open the merits of their cause without those artifices which lawyers are apt to suggest, the judge examines the whole matter, and supports the simplest of such well meaning persons, whom otherwise crafty men would be sure to run down, and thus they avoid those evils which appear most remarkably in all those negotiations which labor under a vast load of law.[”]³⁴

For many years, the English criminal system was somewhat like More’s Utopia.³⁵ Brandeis notes that until 1836, criminal defendants were not allowed to have a lawyer speak for them concerning questions of fact, and they could only call upon a lawyer to argue questions of law if they themselves first raised the questions of law.³⁶ Brandeis presents substantial evidence that this system did not work—defendants were unable to speak effectively for themselves and judges failed to look out for their interests.³⁷

Brandeis argues that lawyers’ presentation of opposing opinions assists the judge in ascertaining the truth: “[G]iven all the evidence at hand in a case involved in doubt, a statement of the different arguments in the most

Profession Defended, 152 N. AM. REV. 504 (1891); Asa Igleheart, *Is the Bar Unpopular?*, 26 AM. L. REG. 681 (1878).

32. See MIT LECTURES, *supra* note 30, at 238.

33. *Id.*

34. *Id.* at 239 (quoting SIR THOMAS MORE, UTOPIA 89 (David Price ed., Cassell & Co. 1901)).

35. MIT LECTURES, *supra* note 30, at 243.

36. *Id.* at 243–45.

37. *Id.* at 244.

effective way is essential to any certainty in arriving at the truth. It is the clash of the opposing elements that brings forth this spark.”³⁸ Brandeis then addresses the view of lawyers often held by laymen—including, no doubt, many of the future engineers and businesspeople in his MIT class:

It is almost the general opinion, at least on the part of those who have not occasion to employ the service of counsel frequently, that there is something necessarily dishonest in the advocacy of a case, either on the one side or on the other. It is assumed that one must be right; that only one can be right; that counsel must know when their client is not in the right; and that to advocate his cause must be to a greater or less extent immoral. This notion is singularly erroneous; there are, undoubtedly, a number of cases, but the number is comparatively small, where lawyers do advocate causes improperly; that is, where a wrong is obviously done by their advocacy. In most instances, however, it is quite otherwise.³⁹

Brandeis identifies common situations where legal representation is perfectly appropriate, indeed necessary to a just society:

In the first place, questions instead of being simple, so that it is clear who is in the right, are extremely complicated; it is often impossible to tell who is either legally or morally right, until the case is tried out in court, and the decision rendered by the proper tribunal. The means do not exist of determining all the facts until brought out by the cooperation of both parties, and the compulsory process of the court, and where questions of law are involved, it is often only the decision of the court which can determine the point at issue.

In the second place, in a large number of cases, both parties are right, or neither party is in the wrong. Take for instance the case of a person who is injured by some accident in the construction of a building. The person injured has used all possible care, and the builder himself has used all care; he has proper appliances, and has used reasonable care in selecting them, but some one in his employ has done, or omitted to do an act which it is claimed is negligent, and for which it is claimed his employer is liable. Neither the plaintiff nor the defendant is wrong in any moral sense, and if there is wrong legally it is the defendant’s misfortune, and whether the

38. *Id.* at 243.

39. *Id.* at 247.

defendant is wrong legally can rarely be told before all the facts are developed by the trial.

In the third place there are cases where one party has a legal right, and the other the moral, and there can be no impropriety in insisting on behalf of any one [sic] legal rights. The lawyer has no right to set himself up as superior to the law, except in flagrant cases.⁴⁰ Consequently the one party may well insist that his legal rights be observed. On the other hand if the other party has the moral right, he and his counsel can with all propriety endeavour to defeat the legal claim. Of course, all of this assuming that the lawyer uses fair means and in the conduct of his case conducts himself honorably. It will be found in practice that a large proportion of cases arising fall under one or the other of these heads, and that it happens with comparative infrequency, that any lawyer is obliged to consider the propriety of making a defense.⁴¹

III. BRANDEIS'S QUALIFICATIONS TO THE ADVOCACY SYSTEM

Brandeis's law practice, especially his practice following the MIT lectures, suggests three important qualifications to his arguments for the advocacy system. The remainder of this essay will consider each of those qualifications.

A. *Ensuring That All Sides are Represented: "The People's Lawyer"*

If there is to be, in Brandeis's terms from the MIT lectures, "a statement of the different arguments in the most effective way," there must be someone who makes each of those arguments.⁴² If lawyers are to ensure that the advocacy system yields justice, they must see that all sides are represented so that all legal and factual arguments will be heard.⁴³

Brandeis volunteered much of his time as a lawyer for groups that were unable to afford representation, earning the title, "The People's Lawyer."⁴⁴ His work included testifying before legislative committees, giving speeches

40. It seems that Brandeis eventually concluded that a lawyer generally should not assert a legal right that ran counter to a moral right. *See infra* text accompanying notes 68–73.

41. MIT LECTURES, *supra* note 30, at 247–48.

42. *Id.* at 243.

43. *See generally id.* at 246–47.

44. *See* BRANDEIS: A LIFE, *supra* note 6, at 89, 95.

to public interest organizations, trying cases, and writing briefs on behalf of the public interest.⁴⁵ In the early 1890s, at the time that he taught the MIT course, he led the fights against the Boston rag trade monopoly⁴⁶ and the Boston Common railroad monopoly,⁴⁷ and represented philanthropist Alice N. Lincoln in hearings examining the Long Island pauper institution.⁴⁸ Brandeis went on to advocate many social programs that we take for granted today: anti-trust legislation,⁴⁹ industrial safety laws,⁵⁰ wage and hour regulation,⁵¹ workers' compensation,⁵² public health,⁵³ public transportation,⁵⁴ conservation,⁵⁵ utility rate adjustments,⁵⁶ life insurance regulation,⁵⁷ and urban planning.⁵⁸ He famously argued and won *Muller v. Oregon* in the United States Supreme Court, upholding legislation limiting women's working hours.⁵⁹ In that case, he submitted the first "Brandeis brief"—two pages of legal arguments and 100 pages of economic and sociological data—generating an acknowledgement from the Court of the value of his contribution.⁶⁰ When Brandeis was confirmed as an associate justice on the Supreme Court, a Boston public interest lawyer wrote to Brandeis that he was more sorry than glad: "As long as you were in private life, it seemed to me that, if any monstrous injustice should be attempted upon helpless people, they would not lack protection."⁶¹

Brandeis generally refused payment for his public interest cases. Earnings from his corporate practice financed them. Moreover, not wanting to be a burden to his law partners, he paid his firm "for the privilege of using his time for public service."⁶² He paid his firm \$25,000 for the work he did

45. See *id.* at 175, 209, 213, 216–17.

46. See PAPER, *supra* note 4, at 38–39, 55; BRANDEIS: A LIFE, *supra* note 6, at 86, 94.

47. See BRANDEIS: A LIFE, *supra* note 6, at 131–34.

48. See *id.* at 89–91.

49. *Id.* at 317.

50. *Id.* at 217.

51. *Id.* at 95.

52. *Id.* at 481–82.

53. *Id.* at 483.

54. *Id.* at 275.

55. *Id.* at 331.

56. *Id.* at 611–14.

57. *Id.* at 175.

58. *Id.* at 142, 331.

59. See *Muller v. Oregon*, 208 U.S. 412 (1908).

60. See *id.* at 419–21 ("In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters [non-judicial sources], an epitome of which is found in the margin.").

61. PAPER, *supra* note 4, at 242 (quoting Letter from Amos Pinchot to Louis Brandeis (June 6, 1916), reprinted in 4 THE LETTERS OF LOUIS D. BRANDEIS 239–40 (Melvin Urofsky and David Levy eds., State Univ. of N.Y. Press 1971–78)).

62. PAPER, *supra* note 4, at 73.

in one public interest case.⁶³ When asked about his sacrifice, Brandeis explained that his actions were based on his love for the work:

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.⁶⁴

Later in his life, Brandeis actively called on other lawyers to join him in public service.⁶⁵ In a speech in 1916, *The Opportunity in the Law*, Brandeis argued (in language that sounds far too relevant to modern ears):

[A]t the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the “corporation lawyer,” and far too little of the “people’s lawyer.” The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.⁶⁶

Such a call, of course, is not inconsistent with Brandeis’s earlier arguments for the advocacy system. Indeed, such volunteer representation is necessary if the advocacy system is to succeed. If all of the parties who are affected by a legal dispute are not effectively represented, the advocacy system is unlikely to yield truth and justice.

63. See SHAFER, *supra* note 23, at 242 (citing Michael Schudson, *Public, Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 210-11 (1977)).

64. See BRANDEIS: A LIFE, *supra* note 6, at 154.

65. Louis D. Brandeis, *The Opportunity in the Law*, Address Before the Harvard Ethical Society (May 4, 1905), in *BUSINESS: A PROFESSION* 313, 321 (1941).

66. *Id.*

B. Counseling Powerful Clients to Act Justly: “A Judicial Attitude Toward His Clients”

The previous section argued that for the lawyer advocacy system to work effectively, all affected parties must be represented.⁶⁷ Of course, it is unlikely that a sufficient number of volunteer lawyers are going to emerge to protect the interests of all of the unrepresented parties in legal actions in the United States. One adjustment to the advocacy system that might temper this problem is if the more powerful parties in legal matters take the interests of other parties into consideration as they make decisions about the representation.

As noted above, in the MIT lectures Brandeis criticized lawyers who do not pursue a legal claim based on its questionable morality; he said that to do so sets up the lawyer as “superior to the law,” which is acceptable only “in flagrant cases.”⁶⁸ Elsewhere in the lectures, however, Brandeis speaks highly of lawyers’ refusal to take at least one type of case on moral grounds.⁶⁹ He notes that under the law in the United States at that time, a plaintiff could initiate a suit against a person, even where there was little or no evidence to support the case: “If one person has a claim against another, be it well or ill founded, he can bring his action, that is, can put the defendant to the trial of the case. The defendant has no protection except in the professional honor of the counsel whom the plaintiff may employ”⁷⁰ Though Brandeis does not elaborate, he seems to applaud the attorney who on moral grounds refuses to initiate a case that has little merit.

It appears that Brandeis came to believe in his later years of law practice that lawyers should take even greater responsibility for their actions as lawyers.⁷¹ Brandeis refused to advocate causes that he considered to be unjust and counseled his clients to act in a just manner.⁷² Brandeis’s practice in this respect came to light during his Senate confirmation hearings. “A banker testified that Brandeis, as a lawyer, had required satisfaction of the justness of the banker’s cause before deciding to take it on. No other lawyer he had ever dealt with, the banker testified, raised that question.”⁷³ Austen Fox, a former ABA president, testified that: ““The 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 clients’ lawyer,

67. See *supra* Part III.A.

68. MIT LECTURES, *supra* note 30, at 247.

69. *Id.* at 212.

70. *Id.*

71. See MASON, *supra* note 10, at 642.

72. See BRANDEIS: A LIFE, *supra* note 6, at 72.

73. SHAFFER, *supra* note 23, at 242 (quoting Schudson, *supra* note 63, at 210). For further discussion of Brandeis and his law practice, see SHAFFER, *supra* note 23, at 241-308.

which is against the practices of the bar.”⁷⁴ With enemies like that who needs friends? Maybe it is not surprising that Brandeis was ultimately confirmed.⁷⁵

It may be that if lawyers took a more active role in raising the question of justice with their clients, there would be less injustice and thus less need for other lawyers to take pro bono cases.

C. Seeking a Fair Solution for All: “Counsel for the Situation”

If all cases had to be litigated, the legal advocacy system would quickly break down; lawyers spend much of their time seeking to resolve disputes outside of the court system.⁷⁶ In his MIT lectures on lawyers, Brandeis makes no mention of the role that lawyers play in the negotiation of cases and business matters.⁷⁷ Lawyers, of course, play an advocacy role in negotiation, as well as in litigation, speaking on behalf of clients. They also, in consultation with their clients, seek to identify solutions to the problems that they face. In his practice, Brandeis applied the great lawyer virtue of practical wisdom to such problems.⁷⁸ He combined consideration for all of the people who might be affected in a case with his famous attention to detail and creativity.⁷⁹ These factors, in many cases, enabled him to come up with a solution that worked to the benefit of all concerned.⁸⁰

In one case, for example, shoe manufacturer W.H. McElwain hired Brandeis to negotiate a cut in the hours of his employees.⁸¹ Instead, Brandeis figured out a means of restructuring the client’s business so as to benefit McElwain and to give employees the opportunity to work more hours.⁸²

In negotiations, Brandeis sought to resolve cases in a manner that benefitted all of the affected parties, rather than focusing solely on the interests of his client.⁸³ In one such case, this led to an accusation of conflict

74. See SHAFFER, *supra* note 23, at 242.

75. See *id.* at 253.

76. “[A]pproximately two-thirds to 70 percent of civil cases settle.” STEPHEN SUBRIN & MARGARET Y. K. WOO, *LITIGATION IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 220 (2008).

77. See generally MIT LECTURES, *supra* note 30.

78. See MASON, *supra* note 10, at 641.

79. *Id.*

80. See BRANDEIS: A LIFE, *supra* note 6, at x.

81. *Id.* at 63–65; see also MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 8 (Oscar Handlin ed., 1981).

82. See BRANDEIS: A LIFE, *supra* note 6, at 63–65.

83. See, e.g., *id.* at 245.

of interest.⁸⁴ Brandeis represented one of the creditors in the Lennox bankruptcy and was approached by a representative of Lennox, the bankrupt company.⁸⁵ Brandeis stated that he would act as trustee for Lennox's property and seek "to give everybody, to the very best of my ability, a square deal."⁸⁶ Lennox grew dissatisfied with the arrangement and initiated criminal fraud charges against Brandeis, which were later dropped.⁸⁷ When pressed by Lennox's lawyer, Sherman Whipple, to identify whom he represented when he gave a particular piece of advice in the case, Brandeis replied, "I should say I was counsel for the situation."⁸⁸ At Brandeis's confirmation hearings, Whipple described his reaction:

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 He took a broader view . . . that he was charged with the duty and responsibility, not merely of looking to Mr. Lennox or to Mr. Lennox alone, but that he owed a larger and broader duty to all the interests involved.⁸⁹

Legal commentators' reactions to the "counsel for the situation" have been mixed. John Frank has said that "counsel for the situation" was "one of the most unfortunate phrases [Brandeis] ever casually uttered."⁹⁰ He argues that, while Brandeis did not breach any professional ethical norms, his failure to communicate well with Lennox had opened him to "justifiable criticism."⁹¹ Geoffrey Hazard argues, however, that "[w]hen a relationship between the clients is amenable to 'situation' treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone[.]" so long as the client and his adversary are fully informed of the arrangement and are willing to trust the good judgment and skill of the attorney.⁹²

84. See MASON, *supra* note 10, at 232–37.

85. See *id.* at 232–33.

86. *Id.* at 233.

87. *Id.* at 235.

88. 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, at 287 (Roy M. Mersky & J. Myron Jacobstein eds., 2d. ed. 1977) (Testimony of Sherman Whipple).

89. *Id.* at 299.

90. John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

91. *Id.*

92. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 65 (1978); see also John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 751–57 (1992); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004); John T. Noonan, Jr., *The Lawyer Who Overidentifies with*

In my view, there is a place for “situation treatment” in almost any representation. I recall from my days as a young law firm associate, working on a case until late at night, literally on the eve of trial. We were to be in court for trial early the next morning. In this case, a father and son had claims and counter-claims against one another over the ownership of the family business. Often such disputes arise because things have gone poorly. In this case, the father and son were fighting because things had gone well: there was a successful business to fight over. The father and son had not spoken to one another in years. Pre-trial hearings had been rancorous, with father, son, and their lawyers making sharp attacks on one another.

Shortly after midnight, our firm’s senior lawyer, Mr. Boyle, announced that he was going over to the office of Mr. Musselman, the senior lawyer on the other side. I asked if this was a planned meeting. “No,” Mr. Boyle said, “but Mr. Musselman will know that I am coming.” They had been through this before. Given what I had seen at the pre-trial hearings, I thought there was no hope of settlement.

Mr. Boyle returned a few hours later, announced that the case had been settled, and told everyone to go home. I asked Mr. Boyle how the conversation went. He said that he started off by asking Mr. Musselman what would be fair. Their conversation was all about fairness. One proposal was made; it was unfair for this reason. Another was made; it was unfair for that reason. Eventually, the two lawyers came up with a resolution that they believed would be fair for both of their clients. They were sure that their clients would agree. And they did.

I was a bit disappointed. We had done all of our preparation and were ready for trial. Our side had been successful as to pretrial issues, and I thought we would be successful at trial. In the end, I am sure that the settlement was for the good of both father and son. What surprised me at the time, as a recent law graduate, was that much of the negotiation was about “fairness.” I knew, of course, that both lawyers had in the back of their minds where they stood regarding the law and the facts. The negotiation took place, “in the shadow of the law.”⁹³ There was also a lot of practicality in the lawyers’ discussion of fairness. They wanted something that would work, in light of what they had learned about their clients. What I witnessed was a Brandeis moment, though I would not have known to call it that at the

His Client, 76 NOTRE DAME L. REV. 827, 828–33 (2001); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1499–1511 (1996).

93. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

time (in law school, we studied Brandeis the Justice, not Brandeis the lawyer). The lawyers—both strong advocates—were able to reach settlement because each looked out for the whole situation. The result was good for both parties. Lawyers reach settlements this way all of the time.

Lawyers serve their clients well if they have a bit of Brandeis’s “counsel for the situation” in all cases. A lawyer’s hope should be that his or her advocacy will lead to a just result. Fairness should be a subject for discussion between the lawyer and the client and between the lawyers. Lawyers who are negotiating a case should approach one another with the hope, a wary hope, that they can reach a resolution that will be fair, even beneficial, to all.

While looking out for their client’s interests, lawyers should look for a resolution that will benefit all. Such an approach is most likely to result in a successful settlement of the matter—one that in the short run can be implemented smoothly, and in the long run will operate without leading to further conflict. Of course, such a method will not always work. It takes some level of cooperation from both sides. If it becomes clear to a lawyer that the other lawyer is unwilling to try to be fair to all, the lawyer may need to fall back on aggressive negotiation and advocacy. The legal system, with all of its expense, delays, and inefficiencies, can be left to take its course. But that should be seen as a failure, not the norm.

IV. CONCLUSION

The objective of the advocacy system is justice. Lawyers play a part in that. When both sides are well-represented, lawyers can play the adversarial role—within the constraints of the law—trusting that the system will generally yield a just result. But, lawyers cannot merely put the blinders on and charge ahead, assuming that unrestrained advocacy will yield justice. Brandeis’s practice suggests that lawyers should go further. Lawyers should volunteer to serve clients who would not be represented without their service. They should address the question of fairness with clients, especially with powerful clients. And, they should seek solutions of conflict that will benefit all of the parties who will be affected by the representation.