

*The National Consumers' League and the Brandeis Brief**

SINCE 1899 the National Consumers' League has contributed heavily to the successful struggle in the United States to enact, enforce and defend protective labor legislation. The latter-day development of organizations to inform shoppers of the "best buy" in the market has eclipsed the League's idealistic purpose in organizing "to have consumers use their buying power, their economic and political power, to compel the payment of decent wages."¹ Consumer action as a method of reform developed during the 1890's when so many people became conscience-stricken over the miserable working conditions created by industrialism.² Correction came only after the public was aroused, and

* The preparation of this article was assisted by a grant from the Faculty Research Fund Committee of Bowdoin College, which is gratefully acknowledged. Miss Elizabeth Magee, General Secretary of the National Consumers' League, allowed access to records still located at headquarters in Cleveland. Mrs. Pearl W. Von Allmen, Law Librarian for the University of Louisville, permitted use of the Louis D. Brandeis papers. Mrs. Suzanne Zwemer, Secretary of the Consumers' League of New Jersey, loaned records which the author prepared for permanent deposit at the Library of Congress. The author profited from conversations with these women and with Elizabeth Brandeis, Mary W. Dewson, and Elinore M. Herrick.

¹ Donald E. Richberg, *Labor Standards Conference* (Second Annual Report, 1933), back cover.

² For full histories of the League, see Josephine Goldmark, *Impatient Crusader, Florence Kelley's Life Story*; Foreword by Felix Frankfurter; Preface by Elizabeth Brandeis (Urbana: University of Illinois Press, 1953); and Maud Nathan, *The Story of an Epoch-Making Movement*; Foreword by Newton D. Baker, Mary Anderson and Edward A. Filene (Garden City: Doubleday, Page & Co., 1926). For brief accounts stressing the League's importance in general historical developments, see Robert H. Bremner, *From the Depths: The Discovery of Poverty in the United States* (New York: New York University Press, 1956),

this came only after facts and figures about conditions were provided. The leaders were individuals who did not experience in their own daily lives the factory working conditions they sought to change. Rather they were aroused by the very helplessness of the men, women and children whom they acted to protect.

I. LEADERSHIP

In the first years of the new century, activity in consumer organizations had great prestige among socially prominent women across the country. Directors or officers of state leagues included the names of Choate, Morgan, and Vanderbilt in New York; Gardiner, Lawrence, Peabody, Phillips, and Shaw in Massachusetts; Fels in Pennsylvania; Garfield, Hanna, and Mather in Ohio; Kent, McCormick, and Root in Illinois; and Sensenbrenner in Wisconsin. Not only did the society leaders in the League contribute most of the money, but they also participated actively in the work of the League. This was true of Eleanor Roosevelt and Frances Perkins, for both of them devoted much time to the organization during its early years.

The life of Florence Kelley is almost a biography of the National Consumers' League as she served as its general secretary from its origin in 1899 until her death in 1931. Her qualifications for the position were ideal. As the daughter of a Pennsylvania Congressman known as "Pig Iron" Kelley, she early gained a firm grasp of public affairs and politics. One of the first women to graduate from Cornell University, Florence Kelley also earned a law degree from Northwestern. After college she spent three years in Europe studying in Zurich. Here she became interested in socialism and translated into English Friedrich Engel's, *The Condition of the Working Class in England in 1844*. Back in the United States after an unsuccessful marriage in Europe, she always used her maiden name. Soon Mrs. Kelley was a resident of Hull House, an intimate friend of Jane Addams, the settlement house

pp. 232-243; Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Crisis of the Old Order, 1919-1933* (Boston: Houghton-Mifflin Co., 1957), pp. 23-26; and George Soule, "Consumers' League," *Encyclopedia of the Social Sciences*, IV, 291-293.

leader, and of Henry Demarest Lloyd, author of *Wealth Against Commonwealth*. These early associations with reformers continued, and it was typical that she was a director of the National Association for the Advancement of Colored People from 1909 to her death. Mrs. Kelley obtained practical experience in improving the conditions of labor after 1893 when she was appointed by Governor Altgeld to be Chief Inspector of Factories for Illinois. In 1899 she was called to New York to conduct the work of the National Consumers' League. As we shall see, Mrs. Kelley understood the difficulties of improving the conditions of work throughout the whole country, and her strategy was as broad as the problem she faced. Her time was divided among lecturing, writing, and directing the organization of the Consumers' League at national headquarters on Henry Street in New York City. Felix Frankfurter has recently recalled that "Florence Kelley was one of a galaxy of wonderful women with whom she worked—Jane Addams, Julia Lathrop, Lillian D. Wald, Grace and Edith Abbott, Alice Hamilton, among others. Florence Kelley seemed at the time, and remains in memory, the most salient, salty character of them all."³

On the professional staff of the National Consumers' League, Mrs. Kelley's main support came from Miss Josephine Goldmark, who subsequently wrote her biography. As chairman of the League's important Committee on Legislation, Miss Goldmark directed some of the early campaigns for reform. Then from 1908 until 1915 she worked closely with Louis D. Brandeis, her brother-in-law, in the defense of legislation in the courts. She survived Mrs. Kelley by twenty years, during which time she provided a good deal of informal direction to League affairs. Her sister, Miss Pauline Goldmark, working chiefly for the New York Consumers' League, contributed to the publications of the national league.

In the twenties, a new generation of women enlisted to carry on the work of the League. To the national office came Jeannette Rankin, who as Congresswoman from Montana had in 1917 cast a vote against America's entry into the first World War and

³ Goldmark, *Impatient Crusader*, p. ix.

was to do the same in 1941. Miss Rankin assisted Mrs. Kelley, travelling over the country as a lecturer. At the same time, Mary W. Dewson took over much of the work of Josephine Goldmark in doing economic and social research.

The presidents of the National League during these years were a distinguished and active group of men. First was John Graham Brooks, Bostonian, Unitarian and independent social scientist who wrote many books, including *The Social Unrest* and *Labor's Challenge to the Social Order*. On vacating the office after sixteen years, Brooks was honorary president of the League until his death in 1938 at age ninety-one. In 1915 Newton D. Baker succeeded to the presidency of the League. Baker had been City Solicitor and Mayor of Cleveland and was soon appointed Secretary of War under Wilson. In 1923 John R. Commons, professor of economics at the University of Wisconsin and historian of the American labor movement, became president and continued in office until 1935. The last in line for the period before 1938 under study was John G. Winant, liberal Governor of New Hampshire, first chairman of the Social Security Board, and later American Ambassador to Great Britain.

A number of college professors in the social sciences contributed intellectual assistance to the National Consumers' League during its most active years. These included Richard T. Ely of the University of Wisconsin; Arthur Holcombe and Sumner Slichter of Harvard; Frank P. Graham of the University of North Carolina; E. R. A. Seligman of Columbia University; Walton H. Hamilton and Irving Fisher of Yale University; William A. Neilson of Smith College; Mary E. Wooley of Mount Holyoke College; Walter Willcox of Cornell University; and Monsignor John A. Ryan of Catholic University, an especially effective supporter of the League's objectives. Since the prime method of the National Consumers' League was educational, these leaders of thought played a vital role in advancing the work of the organization.

Lawyers played important functions in drafting model legislation, defending the position of the League in court cases, and advising on the constitutional problems of the day. Louis Brandeis was preeminent as counsel until 1916, when he was appointed to

the United States Supreme Court. His successor was Felix Frankfurter, then a professor at Harvard Law School. Newton D. Baker, Benjamin Cohen and Dean Acheson were among the attorneys who assisted the National Consumers' League during the early New Deal period.

II. POLITICAL ACTIVITY

Early experience taught the National Consumers' League to take different types of action to achieve its objective of raising standards of employment for women and children. Devoted supporters could make a personal contribution to the League's purpose through alert shopping. The principles of the organization declared it to be "the duty of consumers to find out under what conditions the articles they purchased are produced and distributed, and insist that these conditions shall be wholesome and consistent with a respectable existence on the part of the workers."⁴

The League made it practical for members to live up to these ideals. Led by Florence Kelley, volunteers acting as private factory inspectors persuaded manufacturers of ladies underwear to stitch on their goods the Consumers' League label signifying that production had taken place under satisfactory working conditions. In 1903, this meant that "the state factory law is obeyed; all the goods are made on the premises; overtime is not worked; children under sixteen years of age are not employed." A declaration of the National Consumers' League explained that this guaranty was based on the following procedure:

Before the use of the label is awarded to a manufacturer, his factory is visited and an agent of the League also asks both the local Board of Health and the State Factory Inspector for a report on the establishment. When this is satisfactory, the manufacturer signs a penalty contract embodying the four points guaranteed. After the use of the label is awarded, the factory is visited from time to time by the Agent of the League, and the local committee of the League reports it to the National Secretary.

⁴ N. C. L. *Fourth Annual Report* (1903). See John Graham Brooks, "The Label of the Consumers' League," *Publication of the American Economic Association*, Third Series (New York: Macmillan Co., 1900), I, 250-258. Also, see "The Consumers' League Label and Its Offspring," *Survey* (August 8, 1914), XXXII, 478.

Although the use of the label declined after 1917, when it was generally superseded by the union label, the Consumers' League continued through the years to emphasize direct action through boycott by the shopping public.

Intelligent consumption based on investigation and education was an approach to the problem of working conditions which necessarily laid great stress on publicity. The location of the League with other organizations at the United Charities Building in New York afforded important advantages, as *The Survey*, *The Outlook* and related magazines edited there over a period of years served almost as house organs for the Consumers' League. The organization also had many friends among people of influence like teachers and ministers, and it sought them as the Reverend James T. Bixby's report to the seventh annual meeting reveals.⁵

During the last year I have sent out about fifty letters to clergymen and men of distinction, asking for their interest and sympathy in the work of the League; also asking them to promise to address public audiences occasionally in behalf of the League, due notice to be given them. The pastors of the churches have been asked to make the work of the League the theme of some Sunday service, or subject of some address to their congregations. Favorable answers have been received from Rev. Newell Dwight Hillis, of Plymouth Church; Rev. Lyman Abbott, Rev. Martin K. Schermerhorn, of Poughkeepsie; Dr. Maurice A. Harris, Rev. Charles F. Dole, of Jamaica Plain, Massachusetts; Rev. Frank O. Hall, Rev. Paul R. Frothingham, of Boston; Rev. James M. Ludlow, Rev. C. B. Elder, Rev. William B. Stevenson.

Thus directly and indirectly did the National Consumers' League seek to gain its ends.

The legislative accomplishments of the Consumers' League came from careful research, clear goals and involved alliances. Commonly, after study and wide consultation, the League drafted a model bill on maximum hours, night work for women, child labor and other subjects. In 1910, for example, a model minimum wage bill was drawn up, and in 1912 it was first enacted in Massachusetts. Through the work of state and local consumers'

⁵ N. C. L., *Seventh Annual Report* (1906).

leagues, essentially the same model soon afterwards became law in twelve other states and the District of Columbia. This pattern was repeated on other issues and at the national level, too, through alliances of the League with organizations like the American Association for Labor Legislation and the National Child Labor Committee.⁶

When statutes were on the books, Mrs. Kelley and Miss Goldmark, unlike some reformers, showed acute insight into the cycle of policy-making by focusing the attention of the National Consumers' League on public administration. Mrs. Kelley's experience in factory inspection for the state of Illinois had taught her useful lessons in dealing with the administrative branch of government everywhere, and she incorporated these in her body of teachings.⁷

Following the work of getting legislation comes the less exciting task of enforcing it. Nowhere are there enough factory inspectors for the effective enforcement of the Child Labor Laws. In some states, notably in Pennsylvania, an annual inspection is all that is regularly attempted. To meet this dearth, women have made during the present year, efforts to secure the appointment of women as inspectors in Minnesota and Connecticut.

It is desirable that in every state in which there is a Consumers' League the effort might be continued until crowned with success for the increase of the number of inspectors, and the addition of women to the staff.

By 1906 fifteen states had women factory inspectors. Some of these women were also members of the Consumers' League, carrying organizational zeal directly into the job of enforcing the new laws. Where direct control of administration was absent, Mrs. Kelley requested "all state and local leagues to make investigations within their own territory into the hours of labor and the wages and cost of living of working women and girls." She would "gladly furnish suggestions as to methods of procedure." Mrs. Kelley's interest in conducting these inquiries meant that the League was armed with facts to use before legislative committees or to nudge officials charged with enforcing the law.

⁶ See Elizabeth Brandeis, *Labor Legislation (History of Labor in the United States, 1896-1932, Vol. IV)* (New York: Macmillan, 1935).

⁷ N.C.L. *Eighth Annual Report* (1907).

The third branch of government was not neglected by Mrs. Kelley, for when the courts threw up obstacles in her path, she responded with the same methods of action used to win legislative and administrative victories. Her faith in organization, in fact-finding, and in education, as well as her belief in eventual progress is shown in her reaction to an adverse judicial decision before the turn of the century. When the Illinois Supreme Court, in 1895, invalidated an eight-hour law for women,⁸ Mrs. Kelley pointed out that maximum hours legislation had been upheld in many states and had long been in force in Europe. She continued, caustically,⁹

It remained for the Supreme Court of Illinois to discover that the amendment to the Constitution of the United States passed for the purpose of guaranteeing the negro from oppression, has become an insuperable obstacle to the protection of women and children. Nor is it reasonable to suppose that this unique interpretation of the fourteenth amendment will be permanently maintained, even in Illinois.

. . . It may be that the court is as advanced as that portion of the community which is not yet thoroughly aware that Illinois is the third great manufacturing State of the Union. When, however, the observations made during a few more years shall have convinced the medical profession, the philanthropists, and educators, as experience has already convinced the factory employees themselves, that it is a matter of life and death to young people who form so large a proportion of their numbers, to have a working day of reasonable length guaranteed by law, it will be found possible to rescue the fourteenth amendment to the Constitution of the United States from the perverted interpretation upon which this decision rests. We hope that *Ritchie vs. The People* will then be added to the reversed decisions.

Developments proved Mrs. Kelley right. The *Ritchie* decision with respect to maximum hours for women was reversed in 1910,¹⁰ but the courts did not universally accept her view on minimum wages until twenty-five years later.

⁸ *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

⁹ Florence Kelley, *Some Ethical Gains Through Legislation* (New York: Macmillan Co., 1905), p. 141.

¹⁰ *Ritchie v. Wayman*, 244 Ill. 509, 91 N.E. 695 (1910).

Although Florence Kelley had a remarkable insight into the total governmental process, her own emphasis on the enforcement of laws left the direction of court cases to Josephine Goldmark. In dealing with problems, the leadership of the League was eminently practical. At first, Miss Goldmark acted as chairman of the Committee on Legislation, its duties being to "keep informed and report to the Executive Committee all legislation concerning the objects in which the National Consumers' League is interested. . . ."¹¹ When the statutes met opposition in the courts, in 1908, the by-laws were amended to form the Committee on Legislation and Legal Defense of Labor Laws with added duties to "assist in the defense of the laws by supplying additional legal counsel and other assistance."¹² Thereafter, the organization kept watch on the three branches of government at both state and national levels.

Adversity faced the National Consumers' League in 1923 when the Supreme Court invalidated the District of Columbia minimum wage law in the case of *Adkins v. Children's Hospital*.¹³ This loss produced feverish interest in possible methods of reforming the law, the Court, or the Constitution. John R. Commons, then new as League president, polled a number of authorities in constitutional law for opinions on appropriate action. Felix Frankfurter, counsel in the *Adkins* case, presided over a minimum wage conference called by the National Consumers' League in the spring of 1923.¹⁴ It was evident that much might be done short of constitutional change to protect through law the women and children then working too much for too little. Upon "the basic theory of our common law system that a case decides a case, and nothing else," Frankfurter urged "the absolute importance of continued aggressive enforcement of those laws which have been untouched by this decision. . . ."¹⁵ Where statutes fell, new wording should be fashioned to accommodate the judicial objec-

¹¹ N. C. L. *Sixth Annual Report* (1905).

¹² N. C. L. *Ninth Annual Report* (1908).

¹³ 262 U.S. 447 (1923).

¹⁴ Minimum Wage Conference, April 20, 1923, National Consumers' League Papers, Library of Congress.

¹⁵ *Ibid.*

tions. Suggestions were made that minimum wage laws would be safe only after vacancies appearing in the Supreme Court were filled with liberal men. Also, the League asked Congress to enact a law to the effect "that all state and federal laws shall conclusively be deemed to be constitutional unless the Supreme Court otherwise determines by an affirmative vote of at least seven members if it be a state law, and by an unanimous affirmative vote if it be an Act of Congress." This was a precursor of the 1937 effort to curb the Court and was taken up by Senator Borah and the Progressive Party platform in 1924. At the same time, the National Consumers' League renewed its interest in a Child Labor Amendment and worked tirelessly with the National Child Labor Committee to bring this about. Both efforts failed.

III. FOCUS ON THE COURTS

Assembling the Sociological Data

The partnership of Louis D. Brandeis and the National Consumers' League in the preparation of sociological briefs for the defense of labor legislation was by no means accidental.¹⁸ Brandeis had an enormous reputation among reformers of the century's first decade, for he early applied his brilliant legal mind to solving specific labor relations problems. In 1902 he provided advice for Clarence Darrow, who presented the mine workers' case before the Anthracite Coal Strike Commission created by President Theodore Roosevelt. As counsel for certain corporations in New England, Brandeis had stressed the need of regular employment for all working men. His reputation as an insurgent, together with his personal connections with Josephine Goldmark, as her brother-in-law, and with Florence Kelley, as a mutual friend of Henry Demarest Lloyd, makes understandable their request, in

¹⁸ Little has been written on the work of Brandeis as an attorney for the Consumers' League. For general information and appraisal of Brandeis, see Alpheus T. Mason, *Brandeis: A Free Man's Life* (New York: Viking Press, 1947); Paul Freund, *On Understanding the Supreme Court* (Boston: Little, Brown and Co., 1951), pp. 45-75; Samuel J. Konefsky, *Holmes and Brandeis* (New York: Macmillan, 1956); Ervin H. Pollack, *The Brandeis Reader* (New York: Oceana Publications, 1957).

1907, that he help defend the Oregon ten-hour law. Miss Goldmark has reported her sensations as she and Mrs. Kelley first went to ask Brandeis for help.¹⁷

What he would say, we had no idea. After all, he had had no hand in shaping the legal record nor in presenting the defense in the state courts. The verdict of the highest court in Oregon was in our favor; but in the U. S. Supreme Court the adverse *Lochner* decision invalidating an hour law stood menacingly in our path. The time to prepare a brief was very short, probably not more than a month.

As we know, Brandeis agreed to take command. His appearance as counsel for the State Industrial Commission in *Muller v. Oregon* was the first of a series of appellate court cases in which the National Consumers' League provided defenses of labor legislation.¹⁸

Josephine Goldmark has related further what Brandeis told her would be needed for a brief, "namely, *facts*, published by anyone with expert knowledge of industry in its relation to women's hours of labor, such as factory inspectors, physicians, trades unions, economists, social workers." If she could return in two weeks to Boston "with such printed matter, sufficiently

¹⁷ Goldmark, *Impatient Crusader*, p. 154.

¹⁸ A National Consumers' League pamphlet states that the organization prepared briefs in the support of fifteen cases. *Thirty Five Years of Crusading, 1899-1935* (New York: National Consumers' League, 1935), p. 10. While no official listing is available, a compilation of known cases in which the League was involved is given below. Where two courts are cited for a single case, the League participated in both proceedings; one citation for a case signifies more limited involvement by the League. *Muller v. Oregon*, 208 U.S. 412 (1908); *Ritchie v. Wayman*, 244 Ill. 509, 91 N.E. 695 (1910); *People v. Elerding*, 254 Ill. 579, 98 N.E. 982 (1912); *Ex parte Hawley*, 85 Ohio 495, 98 N.E. 1126 (1911), *affirmed*, *Hawley v. Walker*, 232 U.S. 718 (1914); *Ex parte Miller*, 162 Cal. 687, 124 Pac. 427 (1912), *affirmed*, *Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Bunting v. Oregon*, 243 U.S. 426 (1917); *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914), *affirmed*, 243 U.S. 629 (1917); *People v. Charles Schweinler Press*, 214 N.Y. 395, 108 N.E. 639 (1915), *affirmed*, 163 App. Div. 620, 148 N.Y.S. 725 (1914); *Children's Hospital v. Adkins*, 284 Fed. 613 (D.C.C.A., 1922), *affirmed*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Radice v. New York*, 264 U.S. 292 (1924); *Gainer v. Dohrman*, S.F. No. 10, 990, Sup. Ct. Calif (1924); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

authoritative to pass muster," she and Brandeis would then work up the material into a brief.¹⁹ The *Outlook* magazine praised what then took place, as follows:²⁰

... Miss Josephine Goldmark, of the League, delved into the libraries—Columbia University Library, the Astor Library, and the Congressional Library were put at her service. Ten readers were employed. One, a young medical student, devoted himself solely to reading on the hygiene of occupation. It is significant that there is a lack of American statistics on this subject; there is plenty of opinion; the general conditions are a matter of common knowledge; but what we need are specific facts. Europe is ahead of America in this respect, and the foreign medical opinions are among the most impressive which were ultimately incorporated in the brief. It is only a lawyer with a broad view and large mind who would do what Mr. Brandeis did—go before the Supreme Court of the United States with a brief of one hundred and thirteen pages, of which only two pages could be construed as a strictly legal argument. The result of this impressive presentation of facts was a unanimous decision by the Court that the present and future mothers of the race are worthy of defense against the greed of man.

"While the brief provided once for all a new method of defense and established its basis," Miss Goldmark knew that "it needed immediate reinforcement. For, any time, Mr. Brandeis warned us, new cases might arise needing new defense."²¹ In 1909, the Russell Sage Foundation granted the sum of \$2,500 to the National Consumers' League for an extended study of the literature on fatigue in relation to the number of working hours. During that winter, the new material was pressed into use in the defense of a new Illinois ten-hour law for women in a state supreme court case. Miss Goldmark has described the brief filed for the State of Illinois.²²

Mr. Brandeis' brief again contained only a few pages of legal

¹⁹ Goldmark, *Impatient Crusader*, p. 155.

²⁰ *The Outlook*, March 21, 1908, quoted in N. C. L. *Tenth Annual Report* (1909).

²¹ Goldmark, *Impatient Crusader*, p. 160.

²² *Ritchie v. Wayman*, 244 Ill. 509, 91 N.E. 695 (1910). The quotation is from Goldmark *op. cit.*, p. 161.

argument. But now we could make a better showing of the non-legal evidence which we had accumulated during the past year or more. We had the experience of British factory inspectors, year by year, reinforced by that of various Continental countries and of the British dominions. On pertinent subjects, such as the greater morbidity of working women, the effects of continuance at work during illness, the general nature of fatigue, the statistics of sickness insurance societies which existed in some foreign countries—on all these allied subjects we had an abundance of new evidence. The whole made up a volume of new evidence.

A victory in the Illinois case rewarded the diligence of Miss Goldmark and Mr. Brandeis as preparations for additional cases began.

The repeated needs of the League and the frequent demand from outsiders for basic health and social data led to the publication of a full-scale study of the problem by Josephine Goldmark. An extra grant by the Russell Sage Foundation assisted the appearance of *Fatigue and Efficiency*²² in 1912. The first 302 pages of the book dealt with the nature of fatigue, physical overstrain in industry, and the regulation of the problem by legislation. This section also contained a history of labor laws and their defense in the courts. The second part of *Fatigue and Efficiency*, running to 591 pages and titled "The World's Experience Upon Which Legislation Limiting the Hours of Labor for Women Is Based," consisted of material contained in the first four briefs submitted to courts by Brandeis and Goldmark. Reliance on this compendium simplified the preparation of new legal briefs.

In presenting this sociological material to the courts, Louis Brandeis played a major role. His great mastery of the law was joined by his thorough devotion to the cause of the National Consumers' League in insisting upon decent standards of work for women and children. As an advocate before the Supreme Court, his heart and brain were together in providing a series of notable oral arguments. After Brandeis appeared in the first

²² Josephine Goldmark, *Fatigue and Efficiency* (New York: Russell Sage Foundation, 1912).

Oregon minimum wage case in 1914, William Hitz, later a federal judge, wrote this: ²⁴

I have just heard Mr. Brandeis make one of the greatest arguments I have ever listened to. . . . The reception which he wrested from that citadel of the past was very moving and impressive to one who knows the Court. . . . When Brandeis began to speak, the Court showed all the inertia and elemental hostility which courts cherish for a new thought, or a new right, or even a new remedy for an old wrong, but he visibly lifted all this burden, and without orationizing or chewing the rag he reached them all and even held Pitney quiet.

He not only *reached* the Court but he *dwarfed the Court*, because it was clear that here stood a man who knew infinitely more, and who cared infinitely more, for the vital daily rights of the people than the men who sat there sworn to protect them. It was so clear that something had happened in the Court today that even Chas. Henry Butler saw it and he stopped me afterwards on the coldest corner in town to say that no man this winter had received such close attention from the Court as B. got today, while one of the oldest members of the clerk's office remarked to me 'that fellow Brandeis has got the impudence of the Devil to bring his socialism into the Supreme Court.'

In the 1920's, Mary W. Dewson took over from Josephine Goldmark the task of preparing the social and economic data for the briefs of the National Consumers' League. A graduate of Wellesley in 1897, Miss Dewson had done economic research for the Woman's Educational and Industrial Union in Boston around the turn of the century and, in 1911, had been secretary of the Commission on Minimum Wage Legislation for Massachusetts. Later chairman of the Women's division of the Democratic National Committee, Miss Dewson worked for the Consumers' League from 1920 to 1925.

In *Adkins v. Children's Hospital*,²⁵ Felix Frankfurter and Miss

²⁴ William Hitz to Felix Frankfurter, Dec. 7, 1914, handwritten copy, N. C. L. Papers.

²⁵ Frankfurter and Dewson prepared the brief in the case before the lower court in 1920. *Children's Hospital v. Adkins*, 284 Fed. 613 (D. C. A., 1922). That court's decision against them was sustained by the Supreme Court. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

Dewson prepared the brief which the National Consumers' League provided for the Minimum Wage Commission of the District of Columbia. At a short meeting in New York, Frankfurter asked Miss Dewson to collect a great quantity of factual data supporting the reasonableness of the minimum wage law for women, which was under attack. Frankfurter believed that a bulky brief would by sheer size impress Chief Justice Taft. It apparently did. At any rate, the brief of 1,138 pages was the largest produced by the League; and Taft, in dissent, did adopt its position. Pressed by the deadline in February, 1923, Miss Dewson wrote Mrs. Kelley that "The *New Republic*, the *Nation*, the *Freeman* and the Russell Sage Foundation loaned us proof-readers. Our office force worked in the emergency at high speed and overtime typing citations and proof reading." Miss Dewson acknowledged that "the force was exhausted by their exertions," but showed her devotion to fair treatment of labor by arranging that "they should have twice the time off that they worked overtime."²⁶ The cost of printing the *Adkins* brief, nearly \$7,000, was paid by Mrs. Willard Straight, who had "paid in full all the cost of printing all the briefs" since 1908.²⁷ Miss Dewson has explained that while she prepared the sociological material, Frankfurter not only applied great care to the legal section of the brief but presented a masterly oral argument to the Supreme Court when the case was heard on March 14, 1923. Nevertheless, within a month the Court ruled the statute unconstitutional.

Following the loss of the *Adkins* case, an attempt was made to limit the influence of the Court's ruling so that it would not be applied to state minimum wage laws then on the books. Miss Dewson hurried to California to help the defense of the state law there. Before departing from the East, she was told by Frankfurter to remember that the precise ruling of the Supreme Court could not be challenged in the California courts. "If the Supreme Court says that a red rose is green," Frankfurter told her, "then it is green." Accordingly, Miss Dewson emphasized in a relatively short brief of one hundred pages, full of telling charts

²⁶ Mary W. Dewson to Florence Kelley, Feb. 10, 1923, N. C. L. Papers.

²⁷ Memorandum by Miss Dewson, March 22, 1923, N. C. L. Papers.

and statistics, that the California situation was totally different from that of the District of Columbia, because of the far greater number of women affected and the vastly different economic picture. Furthermore, the California law had been in active and successful operation for over ten years, while the District law invalidated in the *Adkins* decision had barely passed the initial period of fact-finding, with the process of fixing the minimum wage not started in industries employing some fourth of the women wage earners. The social and economic material prepared by Miss Dewson was introduced in the brief by a short legal preface written by Professor Frankfurter.

Events forced the National Consumers' League to file a separate brief in this case because when Miss Dewson arrived in California, she found the state attorney general distinctly uninterested in assistance. Through Katharine Philips Edson, executive secretary of the Industrial Welfare Commission of the State of California, Miss Dewson arranged to file the brief as *amici curiae* with six local organizations in support.²⁸ The case was dropped before it was reached for argument, and California continued to use its minimum wage law. Soon afterward, however, six minimum wage laws were declared unconstitutional on the basis of the *Adkins* decision.²⁹

Working With State Attorneys General

Normally the legal defense of labor legislation by Brandeis and Frankfurter under the auspices of the National Consumers' League, was conducted at the invitation of a state's attorney general. Brandeis made this stipulation to Josephine Goldmark and Florence Kelley when they first asked him to help in the defense of the Oregon ten-hour law for women in the autumn of 1907. He would not consider the alternative of entering a case as a friend of the court because "the status of appearing as an official participant on behalf of the state seemed to him an important element of strength for the defense."³⁰ This meant that as

²⁸ *Gainer v. Dohrman*, California, S.F. No. 10, 990, Sup. Ct. Calif. (1924).

²⁹ For a discussion of the aftermath, see Elizabeth Brandeis, *Labor Legislation*, p. 505.

³⁰ Goldmark, *Impatient Crusader*, p. 163.

far as a court knew, Brandeis, listed as "Of Counsel" on the brief, was a paid attorney of the State rather than a volunteer from the National Consumers' League. After the first case, in which she was not listed, Josephine Goldmark and later Mary Dewson, neither of whom was a lawyer, appeared on the basis of the briefs to have played the same role.

Through the years the League's relationships with state attorneys general varied considerably. In 1907, Mrs. Kelley and Miss Goldmark first recognized the importance of this factor when the attorney general of New York failed to provide for the adequate defense of a night-work statute. An office memorandum written in anger by Mrs. Kelley shows her understanding of the importance of competent legal argument.⁵¹

Attorney General Mayer promised repeatedly to get this case upon the calendar *before* the election. He failed to keep his promise, and it came up *the day after election*. No representative of the Attorney General's office was present in court. The defendants moved to submit. The people were thus deprived of their right to have the case argued. There has been no argument on this extraordinarily important case, before the appellate division.

This is of great importance, because the decision is not unanimous. It is due to the vote of some of the judges, three to two. A careful and learned argument on the law of the matter, might well have won over one or two,—*or even all*—of the adverse judges, to the view that the public health is involved in night work by young boys and young women.

There was *no* presentation of the *law* of the case. The brief was prepared—for the People—by the *Third Assistant* Attorney General. In its original form it was a disgraceful exhibition of ignorance of the law on the subject. It referred to a statute as in force which was repealed three years ago,—the so-called 'Fifty-Five Hour Law' of New Jersey. No allusion was made to the valuable recent decision of the Supreme Court of Oregon, sustaining a law similar to the New York law.

After these flaws were pointed out to the Third Assistant and to Attorney General Mayer, there remained still a brief without any law in it; and the case having been decided without argument, the Appellate Division is in the position of having had from the

⁵¹ Memorandum by Mrs. Kelley, Nov. 7, 1906, N. C. L. Papers.

Attorney General none of the aid to which it is entitled in arriving at every decision affecting the rights and the well-being of the People.

After *Muller v. Oregon*, in which the assistance of Louis Brandeis was obtained for the state by the National Consumers' League, there were more calls for help than could be answered. In 1911, Brandeis was besieged to lend his talents to the defense of Ohio labor legislation. From Cleveland the secretary of the Ohio State Federation of Labor, Harry D. Thomas, asked Brandeis to file a brief for them in a fifty-four hour law case.²²

. . . I wrote the Attorney General asking him to correspond with you on this matter. I realize that you are a busy man, more so than anyone else probably, but the constitutionality of these labor laws is a matter that effects the welfare of the whole people of this Country and your experience in testing their legality goes further probably than any other attorney in the Country on matters of this kind. This is the reason why we seek your advice and are willing to pay for it.

Brandeis was indeed too busy, and he declined to serve for that reason. He did note the suggestion of paying for his services and replied, "The matter is of such a nature that I should be unwilling to accept any compensation if it were possible for me to act at all."²³ Soon afterwards Attorney General Timothy Hogan sought the assistance of Brandeis for the defense of the Ohio Workmen's Compensation Act. Hogan explained that "the oral argument will be a very important feature of the case, and I am extremely anxious that you be with us."²⁴

It should be noted that the state labor federation and the Consumers' League acted in response to efforts of business organizations to have this legislation invalidated by the courts. Accordingly, Brandeis was told by Thomas that the fight on the Workmen's Compensation Act "is being put up by the Liability Cos., and they have engaged the best legal talent that they can get hold of

²² Harry D. Thomas to Louis D. Brandeis, Nov. 1, 1911, Louis D. Brandeis Papers, University of Louisville Law School.

²³ Brandeis to Thomas, Nov. 4, 1911, *ibid.*

²⁴ Timothy Hogan to Brandeis, Dec. 1, 1911, *ibid.*

in this section and some from outside the State in preparing their briefs and for making their oral arguments against the Act."³⁵ When Attorney General Hogan, in seeking help from Brandeis, told him that "those opposed to the act are to be represented by counsel other than defendant's counsel," he added this observation:³⁶

The defendant's counsel will be satisfied with presenting in a very fair way reasons why the act is unconstitutional, but the other counsel will leave nothing undone in the way of argument to successfully assail the constitutionality of the act. I do not mean to say they will do anything improper, but the idea I wish to convey is that they are, in my judgment, very much opposed to the bill and being men of a very high order of ability, they will present every possible reason against its constitutionality.

This correspondence is incomplete. Brandeis finally did file a brief in the hour case and then appeared to argue the case in the United States Supreme Court after receiving this further request from Thomas:³⁷

. . . The Ohio Manufacturers' Association has come out with another statement saying that they will carry the case to the United States Supreme Court to define what occupations come under the provisions of such a law. I don't know just how soon they expect to take this matter up, but I thought it best to notify you on time, so that you may get prepared to help us fight our battles in Washington.

Finally, the problem of insuring strong defense for a statute in jeopardy is illustrated by the efforts of the National Consumers' League in 1923 to persuade New York's Attorney General to file an *amicus curiae* brief supporting the Federal Maternity Act,³⁸ then under attack by Massachusetts in an original case in the United States Supreme Court. Florence Kelley and the League had worked for the passage of the Act in 1921 with representatives

³⁵ Thomas to Brandeis, Dec. 5, 1911, *ibid.*

³⁶ Hogan to Brandeis, Dec. 1, 1911, *ibid.*

³⁷ Thomas to Brandeis, Feb. 1, 1912, *ibid.* *Ex parte Hawley*, 85 Ohio 495, 98 N.E. 1126 (1911), *affirmed*, *Hawley v. Walker*, 232 U.S. 718 (1914).

³⁸ Maternity Act of Nov. 23, 1921, c. 135, 42 Stat. 224.

of the League of Women Voters, the National Child Welfare Association, and other groups.

This alliance, known as the United Organization for the Sheppard-Towner Maternity and Infancy Bill, held together after enactment in order to encourage New York State to take advantage of the Act's generous federal aid provisions. This part of their program was also successful. In the meantime, the Maternity Act was attacked as unconstitutional in two court cases, *Massachusetts v. Mellon* and *Frothingham v. Mellon*.³⁹ Solicitor General James Beck carried the defense of the Act, but an effort was made to have a number of states answer the attack of Massachusetts with one or more *amicus* briefs. The minutes of a meeting of the United Organization suggest the range of political stratagems that may be used to gain the support of a state's attorney general in a Supreme Court case:⁴⁰

Mrs. Kelley said when she had approached Attorney General Sherman asking him to prepare his brief for the Sheppard-Towner Act, he said he was too busy but would have one prepared in his office. Later, March 6th Mr. Griffin, Attorney General's deputy wrote Mrs. Kelley, saying the policy of the office had not been decided—the administration was not called upon to defend federal aid bills. Mrs. Kelley felt letters sent from the office were not the expression of the Attorney General's opinion, but those of Mr. Griffin; therefore, she wrote a letter to Governor Smith, asking his aid to persuade the Attorney General to prepare the brief, or to give definite instructions to have it prepared in his office. Mrs. Kelley asked an opinion from the meeting as to the advisability of sending her letter to Governor Smith. It was the unanimous opinion of the meeting that Mrs. Kelley should send the letter she had written to Governor Smith, and should take any further steps she thought necessary in the matter. It was moved, seconded and carried to ask Mrs. Frederick S. Greene of Albany to take copies of Mr. Griffin's letters, also Mrs. Kelley's to Governor Smith, to the Attorney General, personally, in order there may be no doubts that the Attorney General has full knowledge of this situation.

In conclusion to this it was decided to ask all people who had

³⁹ 262 U.S. 447 (1923).

⁴⁰ *United Organization Bulletin*, March 13, 1923, N.C.I. Papers.

any point of contact with any lawyers in Buffalo, the home city of the Attorney General, to ask these lawyers to bring pressure to bear in regard to the preparation of the brief.

The Attorney General of New York refused to cooperate with an *amicus* brief. But how can the influence of the Consumers' League be fairly estimated when at the same time the Solicitor General's office in Washington sought help in preparing the main brief? Asking for a copy of the *Adkins* brief written by Frankfurter and Dewson, the attorney in Washington explained that he was "particularly interested in Mr. Frankfurter's brief" because he was then "engaged in the preparation of a brief for the Federal Government in the Supreme Court supporting the constitutionality of the welfare legislation known as the Sheppard-Towner Maternity Act."⁴¹

Legal Work and Publicity

As successive cases were dealt with in the courts, the League distributed its legal briefs to a wide audience. At the very beginning it was found that "the brief has attracted very wide attention; there is demand for it from lawyers, economists, college professors and publicists."⁴² In the 1910 Illinois case, a special fund of \$2,500 was raised to meet the expense of printing a large edition of the brief. "This brief then was available as ammunition whenever danger threatened the now rapidly increasing legislation regulating women's hours of labor."⁴³ In one year this brief was used to defend laws by state attorneys in Virginia, Michigan, and Louisiana. The impact of the Brandeis-Consumers' League technique on the preparation of briefs would be difficult to estimate.

The concept of publicity held by the National Consumers' League was not a narrow one restricted to assisting lawyers defending labor legislation. Rather the League's public relations

⁴¹ Robert P. Reeder to National Consumers' League, March 16, 1923, N. C. L. Papers. Reeder was on the brief with the Solicitor General. *Massachusetts v. Mellon*, 262 U. S. 447, 448 (1923).

⁴² N. C. L. *Tenth Annual Report* (1909).

⁴³ N. C. L. *Twelfth Annual Report* (1911).

approach was calculated to educate future opinion makers. Since a bulky sociological brief was a document of primary interest to the academic world, the League worked hard to bring its message in this long form to the attention of colleges and universities. In 1917, for example, Josephine Goldmark, then chairman of the committee on publications, reported the following:⁴⁴

By means of the generous gift of \$5,000 from a friend interested in the defense of labor legislation, an edition of 4,000 copies of the Bunting brief was printed, a book of about 1,000 pages, in two volumes. This brief under the title of the 'Case for the Shorter Work Day' has been widely distributed. The aim has been particularly to reach students in law schools and colleges, and a gratifying response has followed the offer to send these volumes for educational purposes. Law schools and economics departments of colleges throughout the country have asked for large numbers of the brief. From England, too, repeated inquiry has come for this publication, so that its gospel has been widespread.

The brief prepared in the *Bunting* case was distributed to 462 law schools, colleges, and libraries in forty-five states and was sent to 717 individuals as well.

While the distribution of briefs was a major part of the League's publicity program, annual report, flyers, and leaflets such as "The National Consumers' League, First Quarter Century" and "Thirty-five Years of Crusading, 1899-1935" were widely circulated. Scholarly articles were sometimes reprinted at League expense.⁴⁵ In 1925, the American Fund for Public Service paid for the publication of a collection of articles on the *Adkins* case, compiled by the Consumers' League and published by the *New Republic*.⁴⁶ The book was then given wide distribution by the League.

⁴⁴ N. C. L. *Seventeenth Annual Report* (1917).

⁴⁵ For example, Thomas Reed Powell, "The Oregon Minimum-Wage Cases," reprinted from *Political Science Quarterly*, XXXII (June, 1917), 296-311.

⁴⁶ National Consumers' League, *The Supreme Court and Minimum Wage Legislation*; Introduction by Roscoe Pound (New York: New Republic, Inc., 1925).

IV. CONCLUSION

The record of the National Consumers' League in working for its goals of improved labor standards offers an example of the range of activity and the degree of improvisation demanded of an organization agitating for change through the maze of government in the American federal system. In order to gain its ends the League was forced into the legislative, administrative, litigious and constituent processes at both state and national levels. The activities of the League, especially those from 1908 to 1938, when many of its initial goals had been achieved, make up a veritable model of the strategies available to an interest group in modern America.

Organizations such as the National Consumers' League, which do not serve their own members but rather work for the protection of others, constitute perhaps a distinct category in American politics. Some might argue that the key to their success was the rightness of a cause, but the political resources of the Consumers' League were also impeccable. With its strong appeal to philanthropy, the League gained adequate financial support. This same appeal drew to its leadership a small but remarkable group of devoted people endowed with intellect, energy and resourcefulness. It is these strengths which appear to account for the development of the strategy, especially in manipulating the Brandeis Brief, which was the hallmark of the Consumers' League.

This organization's interest in the outcome of court cases illuminates the political position of the state attorney general, for any number of things may influence the performance of his duty to enforce the statutes of his state and to defend their constitutionality when challenged. His own political philosophy, party, factional, or group affiliations may interfere. As likely as not, he may lack time, funds, or an adequate staff to do the job properly. Under these circumstances, anyone concerned for the defense of legislation in the courts does well to see that the attorney general is ready, willing and able to do the job. It seems safe to assume that other organizations have had to deal with this necessity.

National Consumers' League experience in Supreme Court cases suggests reasons why organized interest groups may quite commonly become involved in litigation. The League had a high stake in the legal defense of protective labor legislation. It was so high as compared to the state attorneys general that the League regularly volunteered to take over the main responsibility in preparing legal briefs. The League was organized for sustained action in the defense of labor laws. It also had the intellectual leadership, political skill, legal talent and financial resources necessary for success. Formidable equipment is apparently essential for an organization actively concerned with winning constitutional cases.