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## JUSTICE BRANDEIS AND CIVIC DUTY IN A PLURALISTIC SOCIETY

By Joel K. Goldstein\*

### I. INTRODUCTION

History remembers Justice Louis D. Brandeis as a champion of individual rights. Max Lerner, for instance, associated Brandeis with a “deeply felt individualism.”<sup>1</sup> Alpheus Mason, who authored the first significant Brandeis biography titled *Brandeis: A Free Man's Life*, concluded that, for Justice Brandeis, “[i]ndividual worth remained his favorite theme, human dignity his unvarying touchstone.”<sup>2</sup> Philippa Strum, another prominent biographer, wrote, “individual liberty was the value [Brandeis] held highest.”<sup>3</sup>

This association of Brandeis and rights is certainly not a misperception. Few Americans have done more than Brandeis to articulate and establish widely cherished liberties. The iconic *Harvard Law Review* article Brandeis co-authored in 1890<sup>4</sup> and his dissent in *Olmstead v. United States*<sup>5</sup> established him as a creator of both common law and constitutional rights to privacy, the growth and influence of which have surely exceeded his expectations. And his eloquent concurrence in *Whitney v. California*<sup>6</sup> remains the classic judicial exposition of the freedom of speech and assembly. These

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<sup>1</sup> Max Lerner, *The Social Thought of Justice Brandeis*, in MR. JUSTICE BRANDEIS 9, 12 (Felix Frankfurter ed., 1932).

<sup>2</sup> ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 644 (1946).

<sup>3</sup> PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE*, x (1984).

<sup>4</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>5</sup> 277 U.S. 438 (1928).

<sup>6</sup> 274 U.S. 357 (1927).

writings retain their instructive power, in judicial opinions and teaching materials. They would have secured his legacy as a contributor to the development of individual rights if he had written nothing else on these subjects. But he did.

Yet the common focus on Brandeis as a vindicator of rights risks obscuring other defining aspects of his jurisprudential and philosophical outlook, aspects which speak even more urgently to the challenges America now faces a century after he joined the Court. Brandeis' discussion of rights coexisted with his commitment to a demanding concept of civic duty. He believed that living in civil society imposed obligations on citizens that went well beyond the basic duties to obey the law, pay taxes and vote. He thought engagement an obligation of citizenship and knowledge an obligation, and a likely consequence, of engagement. In contexts where modern liberals and conservatives celebrate various rights, Brandeis was likely to emphasize duties as well. Rather than simply assuming the perspective of the individual and asking what government owed him or her, Brandeis also adopted society's vantage point and considered what the individual owed the community.

Brandeis' conception of duty (and rights) coincided with and was linked to his recognition that America was a pluralistic community, and to his commitment to the ideal that America should be open to, respectful of, and welcoming of, diverse people. The fact and value of pluralism may have made his acknowledgement of rights more important but it also compelled a robust conception of civic duty. Brandeis saw communal engagement as a vehicle for individuals to broaden their knowledge and experience that, in turn, would better lead them to accept and appreciate others, minimize discord, and act as an instrument for individual and societal growth.

Brandeis' commitment to a demanding ideal of civic duty in a pluralistic community was evident in his words, on and off the Court, and his call was made credible by its consistency and by its fit with the behavior of a lifetime. Brandeis' sense of duty in a pluralistic context was apparent in multiple facets of his life including his sense of professional responsibility as a lawyer, his activity as a public citizen, his engagement as a Zionist leader, and, ultimately, his work as a Supreme Court justice. This essay shows how Brandeis' commitment to civic duty in a pluralistic society appeared in these four areas.

**II. CIVIC DUTY IN A PLURALISTIC SOCIETY****A. In Law Practice**

Brandeis' conception of civic duty related to his sense of professional responsibility. In 1905, he converted an invitation to speak to students at Harvard Law School about the "Ethics of the Legal Profession" into an occasion to expound on a lawyer's duty to serve the public.<sup>7</sup> He began by attributing to his listeners a predisposition for service. "[F]eeling the generous impulse for service which the University fosters, you wish to know whether the legal profession would afford you special opportunities for usefulness to your fellow-men, and, if so, what the obligations and limitations are which it imposes."<sup>8</sup> After Brandeis imputed to the Harvard Law students of 1905 a desire to be men for others, he proceeded to reassure them that the legal profession offered "unusual opportunities for usefulness" in part because a lawyer's "training" prepared him for "the questions which are presented in a democracy."<sup>9</sup>

Brandeis criticized lawyers for promoting business interests rather than the public good. They had failed to advance "constructive legislation" necessary to vindicate the public interest regarding great societal problems and had failed to oppose proposals motivated by "selfish interests."<sup>10</sup> In fact, lawyers had often erred by advocating "as lawyers, legislative measures which as citizens they could not approve" and justifying their behavior by a "false analogy" to their role in litigation.<sup>11</sup> Instead, lawyers should only support meritorious legislation.<sup>12</sup> They had both an opportunity and a duty to participate in public affairs. Future lawyers would find in their chosen profession "an opportunity for usefulness which is probably unequalled" since the legal profession was called "to do a great work for this country."<sup>13</sup>

As a lawyer, Brandeis practiced what he preached. His sense of duty was evident in his professional activities before his

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<sup>7</sup> LOUIS D. BRANDEIS, *Opportunity in the Law, in BUSINESS—A PROFESSION*, 329 (1933).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 330-31.

<sup>10</sup> *Id.* at 339.

<sup>11</sup> *Id.*

<sup>12</sup> BRANDEIS, *Opportunity in the Law, in BUSINESS—A PROFESSION*, *supra* note 7, at 339-41.

<sup>13</sup> *Id.* at 343.

appointment to the Court when, in the words of Alexander Bickel, he “engaged in the private practice of the public profession of the law.”<sup>14</sup> From at least the time he was in his mid-thirties until he joined the Court a quarter-century later, Brandeis devoted an extraordinary amount of time to public interest legal work.<sup>15</sup> When Clarence Darrow, counsel to the United Mine Workers, asked Brandeis what his fee would be for the substantial work involved in representing Pennsylvania coal miners before a commission investigating their wage dispute, Brandeis replied that other than reimbursement of his expenses, his compensation would consist entirely of the “satisfaction of having aided a good cause.”<sup>16</sup> Brandeis repeatedly refused to bill a wealthy client for legal work he thought was in the public interest, telling him that he intended to spend 50 percent of his time in public service.<sup>17</sup> He often reimbursed his partners for his time spent in pro bono matters to minimize the extent to which they subsidized his public-minded work.<sup>18</sup> Although his early efforts centered on Boston and New England, during the decade before his appointment to the Court he was increasingly involved, often simultaneously, in demanding efforts that brought him national, even international attention. In 1902, a massive coal strike in Pennsylvania brought Brandeis into a major national controversy involving labor unions.<sup>19</sup> In November 1907, the National Consumers’ League engaged him to defend Oregon’s maximum hours statute for women employees.<sup>20</sup> Brandeis marshaled an abundance of data which consumed all but a few pages of his 113-page brief in *Muller v. Oregon*,<sup>21</sup> to demonstrate that the Oregon statute fit within a loophole left open by *Lochner v. New York*<sup>22</sup> because the restriction on freedom of contract was a means to protect the health and safety of women workers.<sup>23</sup> The fact-laden “Brandeis

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<sup>14</sup> ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* v (1957).

<sup>15</sup> See generally David W. Levy, *Brandeis, The Reformer*, 45 *BRANDEIS L.J.* 711 (2007).

<sup>16</sup> Quoted in MELVIN I. UROFSKY, *BRANDEIS: A LIFE* 231 (2009).

<sup>17</sup> Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 *BRANDEIS L.J.* 733, 738 (2007).

<sup>18</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 354.

<sup>19</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 230-33.

<sup>20</sup> MASON, *supra* note 2, at 248-52.

<sup>21</sup> 208 U.S. 412 (1908).

<sup>22</sup> 198 U.S. 45 (1905).

<sup>23</sup> *The Brandeis Brief—in its Entirety*, LOUIS D. BRANDEIS SCHOOL OF LAW LIBRARY, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety> (last visited Nov. 17, 2016).

Brief” not only produced a unanimous decision upholding the statute, but also created a new legal instrument that civil rights attorneys later imitated. In 1910, his representation of *Collier’s Magazine* before a Congressional committee in connection with the Pinchot-Ballinger conservation dispute also attracted national attention.<sup>24</sup> Ultimately, Brandeis’ painstaking legal work produced revelations that impugned the integrity and conduct of President William Howard Taft and led to the resignation of Secretary of the Interior Richard Ballinger.<sup>25</sup> That summer, shortly after the previous assignment was completed, Brandeis became involved in the New York garment workers’ strike.<sup>26</sup> By 1910, Brandeis’ public interest involvements made him “a household name.”<sup>27</sup>

Brandeis’ legal training predisposed him to an inclusive outlook and he connected law and lawyers to pluralism. Brandeis stated that law practice “tends to make the lawyer judicial in attitude and extremely tolerant.”<sup>28</sup> The legal profession was premised on the belief that a dispute could not “be properly decided until both sides are heard.”<sup>29</sup> Experience taught a lawyer “that nearly every question has two sides . . . .”<sup>30</sup>

Brandeis worried that the limited exposure of many lawyers to other communities would minimize understanding. In 1905, he warned an audience of Harvard law students that the lack of contact many of them had with working men left them ignorant of the working man’s thinking.<sup>31</sup>

The prior year, Brandeis had displayed a commitment to industrial pluralism in a remarkable speech to his clients at the annual banquet of the Boston Typothetae. Annual banquets are, of course, occasions for celebration and self-congratulation, this one particularly so because the printers had just prevailed in an industrial struggle with the printers union, in part owing to Brandeis’ work as their counsel. In his address, Brandeis briefly reviewed the facts of the

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<sup>24</sup> See MASON, *supra* note 2, at 254-82.

<sup>25</sup> See UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 254-74.

<sup>26</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 243-53.

<sup>27</sup> LEWIS J. PAPER, *BRANDEIS* 161 (1983).

<sup>28</sup> *BRANDEIS, Opportunity in the Law, in BUSINESS—A PROFESSION*, *supra* note 7, at 333.

<sup>29</sup> *BRANDEIS, Opportunity in the Law, in BUSINESS—A PROFESSION*, *supra* note 7, at 333.

<sup>30</sup> *BRANDEIS, Opportunity in the Law, in BUSINESS—A PROFESSION*, *supra* note 7, at 333.

<sup>31</sup> *BRANDEIS, Opportunity in the Law, in BUSINESS—A PROFESSION*, *supra* note 7, at 329 n.1, 342.

dispute and congratulated his clients on their victory.<sup>32</sup> He then proceeded to devote most of his remarks to explaining why industrial democracy was necessary for the well-being of their businesses, why they should recognize and respect unions and negotiate with union leaders, and how they should go about it.<sup>33</sup> When a controversy developed, Brandeis instructed his employer-clients that “[e]mployers and employees should try to agree.”<sup>34</sup> Rather than persist in the common entrepreneurial response that the business owner was entitled to dictate its own conduct, Brandeis, who President Franklin D. Roosevelt later aptly nicknamed Isaiah, implored his clients to adopt the “spirit” of “[c]ome, let us reason together.”<sup>35</sup> Employers should view their employees as partners.<sup>36</sup> Brandeis believed that industrial dialogue could avoid or resolve most disputes. He said:

Nine-tenths of the serious controversies which arise in life result from misunderstanding, result from one man not knowing the facts which to the other man seem important, or otherwise failing to appreciate his point of view. A properly conducted conference involves a frank disclosure of such facts—patient, careful argument, willingness to listen and to consider.

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Owners and “the real managers” should participate in these conferences, time-consuming though they are, to maximize the chances of resolution.<sup>38</sup> While employers should resist illegal or immoral demands, they should approach labor based on “the eternal

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<sup>32</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 13-15.

<sup>33</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 15-21.

<sup>34</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 21.

<sup>35</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 22.

<sup>36</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 22.

<sup>37</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 21.

<sup>38</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 22-23.

principles of Liberty, Fraternity, Justice, [and] Honor.”<sup>39</sup> Brandeis’ belief in the efficacy of reasoned discourse in the industrial setting foreshadowed his approach a quarter century later when, as a justice, he considered free speech rights of dissidents and encouraged majorities to go to lengths to engage adversaries rather than silence them.<sup>40</sup>

Shortly before his nomination to the Court, Brandeis lamented specialization in legal practice because it narrowed the exposure of most lawyers to a diversified clientele.<sup>41</sup> Moreover, and perhaps more importantly, in the past most able lawyers participated in civic affairs but now their practices discouraged such activity “and thus the broadening of view which comes from political life was lost.”<sup>42</sup>

### B. As a Public Citizen

Brandeis’ conception of civic duty was even more evident in his conduct as a public citizen and his discussions about citizenship. As a close friend of leading progressive Senator Robert La Follette, he helped draft, and testified for several days before congressional committees in favor of, legislation to amend the Sherman Act to mitigate some of the consequences from the Supreme Court’s decision<sup>43</sup> in *Standard Oil Co. of New Jersey v. United States*<sup>44</sup> and actively supported La Follette’s candidacy for the Republican presidential nomination in 1912.<sup>45</sup> Following Woodrow Wilson’s nomination as the Democratic presidential candidate that year, Brandeis became an important adviser to him, financial supporter, and surrogate who spoke around the country on his behalf.<sup>46</sup> Although Brandeis was passed over for Wilson’s cabinet, he remained a close adviser to Wilson on banking regulation, antitrust, and other matters.<sup>47</sup>

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<sup>39</sup> BRANDEIS, *The Employer and Trade Unions*, in BUSINESS—A PROFESSION, *supra* note 7, at 24, 26-27.

<sup>40</sup> See, e.g., *Gilbert v. Minnesota*, 254 U.S. 325, 334, 336-39, 343 (1920) (Brandeis, J., dissenting); *Whitney*, 274 U.S. at 372, 375-78 (Brandeis, J., concurring).

<sup>41</sup> BRANDEIS, *The Living Law*, in BUSINESS—A PROFESSION, *supra* note 7, at 360.

<sup>42</sup> BRANDEIS, *The Living Law*, in BUSINESS—A PROFESSION, *supra* note 7, at 360-61.

<sup>43</sup> PAPER, *supra* note 27, at 168-72.

<sup>44</sup> 221 U.S. 1 (1911).

<sup>45</sup> PAPER, *supra* note 27, at 172-74.

<sup>46</sup> UROFSKY, BRANDEIS: A LIFE, *supra* note 16, at 343-52.

<sup>47</sup> UROFSKY, BRANDEIS: A LIFE, *supra* note 16, at 380-97.



Paul A. Freund, Brandeis' former law clerk, wrote that to Brandeis "[t]he opportunity to serve was also an obligation."<sup>48</sup> When Brandeis' former law clerks suggested a gathering to honor his 80<sup>th</sup> birthday, he asked that instead each write to him regarding the public service they were performing.<sup>49</sup> They did a lot.<sup>50</sup> Brandeis did not think past performance or current exigencies discharged someone from a continuing duty of public service. His demanding creed perhaps explained his reaction when a friend suggested that Al Smith, the former governor of New York and 1928 Democratic presidential candidate, might be excused from further public service due to financial hardships, age, illness, and lengthy prior service, unless one believed a man had an eternal duty to his community. Brandeis focused on the last thought and replied, "Isn't that the answer?"<sup>51</sup> For Brandeis it was. He joined the Court in his 60<sup>th</sup> year and continued to discharge the Court's work for nearly 23 years, retiring only after his health began to slip and about two-and-one-half years before his death.<sup>52</sup> Even so, he continued his involvement with Zionism and his engagement in public affairs until his death.<sup>53</sup>

Brandeis certainly thought that those to whom the most had been given had the greatest obligation to serve,<sup>54</sup> but his ambitious vision of citizenship included a much more democratic view of public service. His conception of duty was not confined, as Justice William O. Douglas implied, to "those whose training and competence

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<sup>48</sup> PAUL A. FREUND, ON LAW AND JUSTICE 131 (1968).

<sup>49</sup> Paul A. Freund, *Mr. Justice Brandeis*, 55 HARV. L. REV. 195, 195 (1941).

<sup>50</sup> Brandeis' law clerks included Secretary of State Dean Acheson; Judge Calvert Magruder of the United States Court of Appeals for the First Circuit; Judge Henry Friendly of the United States Court of Appeals for the Second Circuit; James M. Landis, former Dean of Harvard Law School and Chairman of the Securities and Exchange Commission; William G. Clayton, Jr., Secretary of the Navy and Deputy Secretary of Defense; Harry Shulman, a professor and dean at Yale Law School; and Paul A. Freund, a professor at Harvard Law School who served two stints in the office of the Solicitor General).

<sup>51</sup> FREUND, ON LAW AND JUSTICE, *supra* note 48, at 131-32.

<sup>52</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 436, 458, 748-49, 752-53.

<sup>53</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 751.

<sup>54</sup> Louis D. Brandeis, Address before New Century Club on the Occasion of the 250<sup>th</sup> Anniversary of the Settlement of the Jews in the United States: What Loyalty Demands (Nov. 28, 1905) (transcript available in the Louis D. Brandeis School of Law Library) [hereinafter Louis D. Brandeis, *What Loyalty Demands*] ("Of him who has most in ability and intelligence, most is required, as the rich should contribute most in money to the expense of government. Few have the privilege or the burden of serving the State in an elective or an appointive office[.]").

permitted to assume an active civic role.”<sup>55</sup> Rather, Brandeis thought of political participation as an obligation of citizenship more generally. In 1904 he proclaimed that the people could only govern “by taking the trouble to inform themselves as to the facts necessary for a correct decision, and then by recording that decision through a public vote.”<sup>56</sup> He scoffed at those who criticized politicians but refused to participate because “politicians, even if their motives are not of the purest, come much nearer performing their duties as citizens than the so-called ‘good’ citizens who stay at home.”<sup>57</sup>

The following year, Brandeis argued that “active participation in government” was a test of a citizen’s loyalty.<sup>58</sup> Although all could not hold public office, citizens had both “the right and the obligation to vote.”<sup>59</sup> Voters were part of government and were “our country’s rulers.”<sup>60</sup> Voting was “essential to the welfare of the State” but because it imposed duties that “are difficult and exacting” was “not simple.”<sup>61</sup> And just performing the not-so-simple act of voting, a duty 40 percent neglected, was not alone sufficient. Men had to vote “right.”<sup>62</sup> To do so required voters to seek “accurate information” and make appropriate judgments “about men and measures.”<sup>63</sup> Brandeis thought it an abuse for a citizen to vote based on personal self-interest rather than on the public good. Above all, voters “should recognize the seriousness of this office of citizen, the seriousness of

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<sup>55</sup> Hon. William O. Douglas, *The Lasting Influence of Mr. Justice Brandeis*, 19 TEMPLE L.Q. 361, 361 (1946).

<sup>56</sup> Louis D. Brandeis, Speech Before the Public School Association (Dec. 2, 1904) (transcript available in the Louis D. Brandeis School of Law Library) [hereinafter Louis D. Brandeis, Speech Before the Public School Association].

<sup>57</sup> *Id.*

<sup>58</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54. See also Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 704 (2007) (stating that Brandeis expected citizens “above all, to participate actively in their democracy.”); UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 747 (“The highest honor in a democracy is to be a citizen, but it carries the responsibility to participate in the governing process.”); Douglas, *supra* note 55, at 361 (stating that “Brandeis had a deep conviction that citizenship in a democracy carried responsibilities more extensive than the conventional duty to vote and to pay taxes. He perceived that it was not only necessary for those who exercised the franchise to have an intelligent grasp of the issues of government. He was convinced that it was the bounden duty of those whose training and competence permitted to assume an active civic role in getting at the heart of the issues and in carrying those issues to the public.”).

<sup>59</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54.

<sup>60</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54.

<sup>61</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54.

<sup>62</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54.

<sup>63</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54.

the vote which is its expression” and must treat it “as a sacred trust to be exercised for the common good, and that he who selfishly omits to cast it, as he who casts it selfishly – is disloyal.”<sup>64</sup> Democracy, Brandeis wrote in a letter in 1922, “is a serious undertaking. . . . It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government.”<sup>65</sup> As Jeffrey Rosen rightly points out, Brandeis rejected the idea of some progressives that experts could govern the people with little intrusion on the time of non-elites. On the contrary, Brandeis “believed passionately that citizens have a duty to educate themselves so that they are capable of self-government, both personal and political, and of defending their liberties against overreaching corporate and federal power.”<sup>66</sup>

Brandeis conceived “every voter [a]s a part ruler of the state.”<sup>67</sup> Democracy depended on an educated and engaged citizenry. The state, therefore, was obliged to provide citizens with facilities for development, the opportunity for their use, and must stimulate the desire to use those facilities.<sup>68</sup> That imposed a requirement to consider the well-being of others. In a democracy, Brandeis concluded, citizens were “necessarily our brothers’ keepers.”<sup>69</sup> In order to discharge their function as citizens, individuals must have an appropriate income, reasonable working hours, education, independence, and leisure.<sup>70</sup> Society must make sure that these conditions existed so that all could function as democratic citizens.<sup>71</sup>

Leisure was a critical resource for democratic citizens but, to Brandeis, leisure was certainly not “idleness”<sup>72</sup> or reading a thriller at

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<sup>64</sup> Louis D. Brandeis, What Loyalty Demands, *supra* note 54; see also UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 401 (discussing Brandeis’ belief that the office of citizen was the highest office in a democracy and required considerable effort to fulfill its responsibilities).

<sup>65</sup> Letter from Louis D. Brandeis to Robert W. Bruere (Feb. 25, 1922), in *V LETTERS OF LOUIS D. BRANDEIS, 1921-1941: ELDER STATESMAN*, 45, 46 (Melvin I. Urofsky & David W. Levy eds., 1978) [hereinafter *V LETTERS*].

<sup>66</sup> JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET* 17 (2016).

<sup>67</sup> LOUIS D. BRANDEIS, *True Americanism*, in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 3, 5 (1942) [hereinafter *True Americanism*, in *BRANDEIS ON ZIONISM*].

<sup>68</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 5.

<sup>69</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 5.

<sup>70</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

<sup>71</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

<sup>72</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

the beach. After all, Brandeis found relaxation by reading a favorite book, Alfred Zimmern's *Greek Commonwealth*, repeatedly for pleasure even when he was immersed in stressful litigation.<sup>73</sup> Rather, leisure, he said, "means ability to work not less but more, ability to work at something besides breadwinning, ability to work harder while working at breadwinning, and ability to work more years at breadwinning."<sup>74</sup> Leisure would allow citizens to develop the knowledge that was a prerequisite for skillful civic participation and afford them the opportunity to so engage.<sup>75</sup> Democracy depended on such leisure.<sup>76</sup>

Brandeis supported women's suffrage not simply as a right but as a duty. He recognized and as a good advocate made, both arguments for granting women the vote. He concluded, "[t]hat women should enjoy this right and perform this duty is essential to the success of democracy."<sup>77</sup> But ultimately he thought the more compelling justification for women's suffrage was the "need of the state."<sup>78</sup> Women could only fully develop "through the assumption of broad responsibilities."<sup>79</sup> They needed the vote primarily so they could give to, not get from, society. Moreover, since each group could best protect its own interests, democracy was at risk when any failed to participate.<sup>80</sup> Women, thought this father of two professional women, could best protect themselves as democratic participants.

Brandeis also believed that the society in which a citizen was obligated to participate was and should be pluralistic. A year before joining the Court, Brandeis became the first Jewish American invited to deliver the Independence Day address at Boston's Faneuil Hall.<sup>81</sup> In the speech, Brandeis reaffirmed his belief that pluralism was both a constitutional principle and a source of strength. Modern men shared the founders' belief "that in America, under a free

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<sup>73</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 295-97, 359.

<sup>74</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

<sup>75</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

<sup>76</sup> *BRANDEIS, True Americanism*, in *BRANDEIS ON ZIONISM*, *supra* note 67, at 6-7.

<sup>77</sup> Louis D. Brandeis, Speech on Suffrage at the Tremont Temple (Oct. 12, 1915) (transcript available in the Louis D. Brandeis School of Law Library) [hereinafter Louis D. Brandeis, Speech on Suffrage].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 413.

government, many peoples would make one nation.”<sup>82</sup> America had welcomed to citizenship immigrants from many countries in the belief that such a policy could “best serve ourselves and mankind. This faith has been justified.”<sup>83</sup>

Although Brandeis thought other nations could match America’s commitment to individual autonomy and liberty, he recalled that one “peculiarly American” feature is “inclusive brotherhood.”<sup>84</sup> Brandeis imagined the democratic state as an “inclusive brotherhood,” which rested on the twin “pillars” that all were equally entitled to liberty and that “equal opportunity will most advance civilization.”<sup>85</sup>

Moreover, Brandeis thought America had and should welcome immigrants from different lands and celebrate their diversity, not insist on conformity.

America has believed that each race had something of peculiar value which it can contribute to the attainment of those high ideals for which it is striving. America has believed that we must not only give to the immigrant the best that we have, but must preserve for America the good that is in the immigrant and develop in him the best of which he is capable. America has believed that in differentiation, not in uniformity, lies the path of progress.<sup>86</sup>

Far from seeking to extinguish national differences, Brandeis believed they provided strength. America believed that every people, “has the right and duty to develop, and that only through such differentiated development will high civilization be attained.”<sup>87</sup> In Brandeis’ formulation, individuals and the racial and ethnic groups with which they identified had a duty as well as a right “to develop” and that “differentiated development” constituted a public good.

Brandeis believed that prejudice remained in liberal society because of the failure to grant “the equality of whole peoples or

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<sup>82</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 3.

<sup>83</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 3.

<sup>84</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 8.

<sup>85</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 8-9.

<sup>86</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 10.

<sup>87</sup> BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 11.

nationalities” as well as of individuals.<sup>88</sup> Democracy was predicated on the belief that “the full development of each individual is not only a right, but a duty to society; and that our best hope for civilization lies not in uniformity, but in wide differentiation.”<sup>89</sup> Inclusion was a right but it implied a duty to participate to fully develop and accordingly redeem society’s faith and investment in each individual.

### C. The Influence of Brandeis’ Zionism on His Views

These ideas were consistent with, and probably traced in part to, Brandeis’ involvement in the Zionist movement, a commitment which allowed him to develop his views about civic duty and its relationship to pluralistic society. In his activities as a Zionist leader, Brandeis was committed to mobilizing American Jews to accept a communal responsibility to support the quest for a national homeland that would provide a refuge from anti-Semitism in Europe and elsewhere. Yet he also had to address the suggestions that support for Zionism was inconsistent with loyalty to America.

Brandeis made occasional speeches in support of the Zionist movement in the early months of the Wilson administration before becoming its American leader in August 1914 after World War I began. These reflected a duty Jews had to advance Jewish communal interests. For instance, in May of 1913 Brandeis told a Young Men’s Hebrew Association meeting in Chelsea, Massachusetts, of his conversation with the great Zionist, Aaron Aaronsohn, who had attributed the lack of crime among Jews in Palestine to their sense of mutual communal responsibility.<sup>90</sup> This anecdote confirmed Brandeis’ belief that a sense of duty encouraged good citizenship in multiple ways.<sup>91</sup> He told his audience that they must each feel themselves “the trustee of what is best in Jewish History” and let the example of the “pioneers in Palestine . . . radiate” their lives and commit to support their efforts.<sup>92</sup> Indeed, he assumed leadership of the American Zionist movement because he deemed it his “duty” to

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<sup>88</sup> BRANDEIS, *The Jewish Problem, How to Solve It*, in BRANDEIS ON ZIONISM, *supra* note 67, at 17.

<sup>89</sup> BRANDEIS, *The Jewish Problem, How to Solve It*, in BRANDEIS ON ZIONISM, *supra* note 67, at 19.

<sup>90</sup> BRANDEIS, *To Be a Jew*, in BRANDEIS ON ZIONISM, *supra* note 67, at 39, 40-41 [hereinafter *To Be a Jew*, in BRANDEIS ON ZIONISM].

<sup>91</sup> BRANDEIS, *To Be a Jew*, in BRANDEIS ON ZIONISM, *supra* note 67, at 40-41.

<sup>92</sup> BRANDEIS, *To Be a Jew*, in BRANDEIS ON ZIONISM, *supra* note 67, at 41.

help and thought there was a collective “duty” to save the Jewish people.<sup>93</sup>

Brandeis’ call for American Jews to actively support the Zionist movement ran counter to suggestions, in some Jewish and non-Jewish circles, of dual loyalty. Brandeis confronted the issue and repudiated the premise that Jews could not be both loyal Americans and Zionists. He associated American “ideals of democracy and of social justice” with venerable Jewish teachings.<sup>94</sup> He insisted, “loyalty to America demands rather that each American Jew become a Zionist. For only through the ennobling effect of its strivings can we develop the best that is in us and give to this country the full benefit of our great inheritance.”<sup>95</sup> Brandeis insisted that American Jews had a duty to lead the Zionist movement and that that effort would allow them to develop their own skills, which they could contribute to America.

Brandeis called on every adult Jew, women and men to join the Zionist organization.<sup>96</sup> Women would have equal rights but “[e]qual rights spell equal obligations.”<sup>97</sup> In Chicago on January 2, 1916, Brandeis told the Knights of Zion that their “duty as Jews” required them to elevate the Jewish people so it could “best serve America and the world.” And he concluded, “Let no one of you, if he be a true American, shirk his duty.”<sup>98</sup> In July, 1916, one month after joining the Court, Brandeis associated Zionism with democracy and said that “[d]emocracy means not merely, . . . the rights of the whole people, as the duties of the whole people.”<sup>99</sup> Jews had not simply “a right to be heard” but “he has also a duty to be heard.”<sup>100</sup> Every Zionist had a duty to read at least one Zionist newspaper daily,

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<sup>93</sup> BRANDEIS, *The Jewish People Should Be Preserved*, in BRANDEIS ON ZIONISM, *supra* note 67, at 43-44; *see also* BRANDEIS, *Strain Every Nerve*, in BRANDEIS ON ZIONISM, *supra* note 67, at 46-48.

<sup>94</sup> Louis D. Brandeis, *A Call to the Educated Jew*, 1 MENORAH J. 13, 15 (1915).

<sup>95</sup> BRANDEIS, *The Jewish Problem*, in BRANDEIS ON ZIONISM, *supra* note 67, at 29; *see also* BRANDEIS, *The Fruits of Zionism*, in BRANDEIS ON ZIONISM, *supra* note 67, at 49-50.

<sup>96</sup> BRANDEIS, *Every Jew a Zionist*, in BRANDEIS ON ZIONISM, *supra* note 67, at 76, 77 [hereinafter *Every Jew a Zionist*, in BRANDEIS ON ZIONISM].

<sup>97</sup> BRANDEIS, *Every Jew a Zionist*, in BRANDEIS ON ZIONISM, *supra* note 67, at 76, 77.

<sup>98</sup> BRANDEIS, *Not by Charity Alone*, in BRANDEIS ON ZIONISM, *supra* note 67, at 84, 88.

<sup>99</sup> BRANDEIS, *Democracy Means Responsibility*, in BRANDEIS ON ZIONISM, *supra* note 67, at 91 [hereinafter *Democracy Means Responsibility*, in BRANDEIS ON ZIONISM].

<sup>100</sup> BRANDEIS, *Democracy Means Responsibility*, in BRANDEIS ON ZIONISM, *supra* note 67, at 91.

to master its facts and to communicate what he read.<sup>101</sup> A Zionist did not do his duty unless he joined a Zionist organization and saw that his siblings did Zionist work.<sup>102</sup>

Brandeis expressed confidence that American Jews would “perform fully their obligation” to support Zionism. There were “special reasons” they should be “eager to do so” since a Jewish State would do more for American Jews than they could do for it by enabling American Jews “to perform our plain duty to America.” A Jewish State would help American Jews contribute “toward the attainment of the American ideals of democracy and social justice.”<sup>103</sup> Supporting Zionism was a Jewish and American “duty.”<sup>104</sup>

In arguing for the consistency of Americanism and Jewish experience, Brandeis also revealed his fundamental premises regarding life in democratic society. For Jews, Brandeis argued, democracy was not simply an abstraction but a reality due to the existence of certain necessary conditions including “[a]n all-pervading sense of duty in the citizen.”<sup>105</sup> “Democratic ideals cannot be attained through emphasis merely upon the rights of man,” Brandeis wrote in 1915. “Even a recognition that every right has a correlative duty will not meet the needs of democracy. Duty must be accepted as the dominant conception in life.”<sup>106</sup> After identifying other conditions essential to democracy, namely “high intellectual attainments” and “[s]ubmission to leadership,” rather than to authority, Brandeis returned to the theme of duty, which rested upon “[a] developed community sense.”<sup>107</sup> Jews could not be described as individualists because “to a rare degree” they had “merged” their individuality and community interest, a condition evident in their interest in identifying themselves with the larger community rather

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<sup>101</sup> BRANDEIS, *Democracy Means Responsibility*, in BRANDEIS ON ZIONISM, *supra* note 67, at 92.

<sup>102</sup> BRANDEIS, *Democracy Means Responsibility*, in BRANDEIS ON ZIONISM, *supra* note 67, at 93.

<sup>103</sup> BRANDEIS, *The Fruits of Zionism*, in BRANDEIS ON ZIONISM, *supra* note 88, at 54.

<sup>104</sup> BRANDEIS, *Dreams May Be Made Into Realities*, in BRANDEIS ON ZIONISM, *supra* note 88, at 71, 72.

<sup>105</sup> BRANDEIS, *A Call to the Educated Jew*, *supra* note 94, at 15.

<sup>106</sup> BRANDEIS, *A Call to the Educated Jew*, *supra* note 94, at 15.

<sup>107</sup> BRANDEIS, *A Call to the Educated Jew*, *supra* note 94, at 16.



than focusing on an individual's life as a prelude to a personal afterlife.<sup>108</sup>

#### D. Justice Brandeis

Once Brandeis was confirmed as a justice in June of 1916, except for an occasional speech to Zionist organizations, he essentially limited his public written discussions to his judicial opinions. Unlike many modern justices, he did not write books or law review articles about the Court or constitutional theory nor did he sit for published interviews. Yet his judicial writings continued to reveal the importance he gave to the ideals of civil duty and American pluralism.

At times he went out of his way to introduce the ideal of civic duty into contexts where it was not otherwise under discussion. For instance, in *Duplex Printing Press Co. v. Deering*,<sup>109</sup> Brandeis dissented from the majority opinion holding a secondary boycott violated federal statutory law.<sup>110</sup> Although he concluded that the union was within its rights, Brandeis went out of his way to recognize community obligation as paramount to individual rights. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community," he wrote. "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community."<sup>111</sup>

Similarly, Brandeis' commitment to duties as well as rights was evident in discussions of rights to private property. In *Pennsylvania Coal Co. v. Mahon*,<sup>112</sup> he dissented from the majority opinion, which held a state statute unconstitutional because it prohibited the mining of coal beneath the surface of property to protect against subsidence.<sup>113</sup> Brandeis rejected the suggestion that the doctrine of reciprocity of advantage precluded government from exercising police power to protect the public "from detriment and danger."<sup>114</sup> Those the statute hurt enjoyed "the advantage of living

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<sup>108</sup> BRANDEIS, *A Call to the Educated Jew*, *supra* note 94, at 16-17.

<sup>109</sup> 254 U.S. 443 (1921).

<sup>110</sup> *Id.* at 478-79.

<sup>111</sup> *Id.* at 488 (Brandeis, J., dissenting).

<sup>112</sup> 260 U.S. 393 (1922).

<sup>113</sup> *Id.* at 416.

<sup>114</sup> *Id.* at 422 (Brandeis, J., dissenting).

and doing business in a civilized community”<sup>115</sup> thereby constituting whatever reciprocity of advantage they were owed.<sup>116</sup> Brandeis, unlike his colleagues, refused to consider the owner’s rights to private property independent of the obligations associated with the privileges of social living.

To be sure, Brandeis’ classic opinions in *Whitney v. California* and *Olmstead v. United States* in consecutive years in the late 1920s, represent two of the greatest statements of individual rights in American literature.<sup>117</sup> Yet the former really represents a synthesis of his views regarding civic duty in a pluralistic society and the latter can easily be seen as related to those concerns, although the connection is less obvious.

Brandeis’ *Whitney* concurrence was the culmination of years of thought and judicial writing about free speech. In 1920 in *Pierce v. United States*,<sup>118</sup> he had written that the “fundamental right of free men to strive for better conditions through new legislation and new institutions” would be imperiled “if efforts to secure it by argument to fellow citizens” was treated as criminal incitement.<sup>119</sup> Later that year he characterized political speech as not simply a political right but an obligation of citizenship. He wrote:

The right of a citizen of the United States to take part, for his own or the country’s benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so, ‘the right of the people to assemble for the purpose of petitioning Congress for a redress of

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<sup>115</sup> *Id.* (Brandeis, J., dissenting).

<sup>116</sup> *Id.* (Brandeis, J., dissenting).

<sup>117</sup> See, e.g., UROFSKY, *BRANDEIS: A LIFE*, *supra* note 16, at 618 (“Yet if he had never written anything other than the *Olmstead* and *Whitney* opinions, his impact on American constitutional law would still have been great.”); *Id.* at 641 (referring to Brandeis’ “towering” *Whitney* opinion which has “informed all discussions of free speech since.”); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988) (stating that “the idealism that permeates his *Whitney* opinion . . . makes it arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.”).

<sup>118</sup> 252 U.S. 239 (1920).

<sup>119</sup> *Id.* at 273 (Brandeis, J., dissenting).

grievance or for anything else connected with the powers or duties of the national government' would be a right totally without substance. Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.<sup>120</sup>

In essence, Brandeis conceived of the right to free speech and assembly as essential to democracy. The “[f]ull and free exercise of this right by the citizen is ordinarily also his duty,” Brandeis proclaimed in the quoted passage, because “its exercise is more important to the nation than it is to himself.” He gave two reasons for his conclusion regarding the public importance of performance of the duty. First, public exchange was an essential instrument of national “harmony.” Exchange was more likely than avoidance to produce understanding. Second, “frank expression of conflicting opinion” was most likely to produce wise government behavior. By contrast, suppression of speech is perilous.

*Whitney* involved an appeal from the conviction of Anita Whitney for helping to organize, belonging to and associating with the Communist Party of California, which was formed to teach criminal syndicalism.<sup>121</sup> Brandeis used his opinion to suggest criteria which narrowed the “clear and present danger” test by his celebrated declaration of the centrality of liberty.<sup>122</sup> “To reach sound conclusions on these matters,” Brandeis wrote, required considering “why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believe to be false and fraught with evil consequence.”<sup>123</sup> He wrote:

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<sup>120</sup> *Gilbert v. Minnesota*, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting) (citations omitted).

<sup>121</sup> *Whitney*, 274 U.S. at 359-60.

<sup>122</sup> *Id.* at 374 (Brandeis, J., concurring).

<sup>123</sup> *Id.* (Brandeis, J., concurring).

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>124</sup>

Brandeis' connection of speech with the discovery of political truth and the repression of "noxious doctrine" implied that he regarded political participation as a duty of citizenship in a democratic society.<sup>125</sup> How else was a society to make certain that "political truth" triumphed over "noxious doctrine" than through the active engagement of its citizenry? And how else could democratic society combat "the greatest menace to freedom[,] . . . an inert people?" Yet Brandeis did not leave that association merely to inference. On the contrary, he made the point explicit, writing that "public discussion is a political duty; and that this should be a fundamental principle of the American government." Whereas fear bred repression and hate, Brandeis argued that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."<sup>126</sup> The founding generation believed "in the power of reason as applied through public discussion" and recognized that majorities could be tyrannical and accordingly, guaranteed free speech and assembly as an antidote.<sup>127</sup>

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<sup>124</sup> *Id.* at 375 (Brandeis, J., concurring).

<sup>125</sup> See Urofsky, *Louis D. Brandeis: Teacher*, *supra* note 17, at 747 ("Free speech is necessary not just as an individual right, but as the bedrock of democratic government.").

<sup>126</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>127</sup> *Id.* at 375-76 (Brandeis, J., concurring).

To be sure, Brandeis thought that speech promoted individual development. In *Whitney*, Brandeis stated that “[i]t is the function of speech to free men from the bondage of irrational fears.”<sup>128</sup> Yet the context of that statement makes clear that Brandeis’ concern was collective tyranny, not individual ignorance, and the remedy was discussion as a vehicle for social exchange not as a means of individual discovery.

In other words, a “fundamental principle” of American government should recognize that “public discussion is a political duty.” People had a “duty” to discuss issues publicly because political engagement protected freedom. It helped produce truth; it checked majority tyranny; it protected minorities from oppression; and it produced an engaged populace with the “personal qualities of wisdom, creativity, and confidence” to resist noxious doctrine.<sup>129</sup> Brandeis believed that “the fully developed human would have a profound sense of responsibility to the community.”<sup>130</sup>

Brandeis sought to protect, indeed encourage, robust political speech, including speech from society’s dissenters. As such, Brandeis’ *Whitney* concurrence implicitly seeks to foster a pluralistic society. Those who express orthodox thoughts are not in jeopardy of having their voices silenced. The capacious free speech Brandeis championed was designed to prevent oppression of minorities. Daniel Farber wrote that Brandeis’ goal was “to produce a vibrant and creative intellectual community, and one genuinely open to full participation by all groups within society.”<sup>131</sup> Brandeis believed in “popular participation in the governmental process as the path to a free and stable society, and public *deliberation* as a critical component of that participation.”<sup>132</sup> Inasmuch as the people were the rulers in a democracy, they also had a duty to discharge their responsibility.

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<sup>128</sup> *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

<sup>129</sup> See, e.g., Blasi, *supra* note 117, at 674 (“To me, his point is that noxious doctrine is most likely to flourish when its opponents lack the personal qualities of wisdom, creativity, and confidence.”).

<sup>130</sup> Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 185 (1995).

<sup>131</sup> *Id.* at 190.

<sup>132</sup> Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 383, 403 (Michael C. Dorf ed., 2d. ed. 2009) [hereinafter Bhagwat, *The Story of Whitney v. California*, in CONSTITUTIONAL LAW STORIES].

Brandeis envisioned an interactive society. He thought participation and exchange would make majorities more pluralistic. “Men feared witches and burnt women,” he wrote in one of the most memorable passages.<sup>133</sup> Brandeis’ remedy of public discussion rests on the faith that reason and interaction would have saved such a community from such a blunder. In some instances, exchange would have produced converts in the direction reason led. It at least would have promoted mutual understanding. Interaction would have led the witch-fearing men to recognize their misperception before they acted upon it. And discussion would have increased the likelihood that dissenters would believe the system heard their voices. An impulse which, before his appointment to the Court, had led Brandeis to advocate industrial democracy, now led Justice Brandeis to prescribe interaction and exchange in political society.

Brandeis celebrated the revolutionary generation who, not only, “did not fear political change,” as he said, but accomplished it.<sup>134</sup> He stated:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.<sup>135</sup>

Diversity imposed more risk than did a homogeneous society. It required more courage to hear one’s cherished views denounced and more ingenuity to meet those challenges by better reasoning. Brandeis envisioned a community of “courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government.” He believed, as Vincent Blasi has written, that “in a political community personal qualities, such as hope and imagination tend to be contagious and

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<sup>133</sup> *Whitney*, 274 U.S. at 376. (Brandeis, J., concurring).

<sup>134</sup> *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

<sup>135</sup> *Id.* (Brandeis, J., concurring).

reciprocal.”<sup>136</sup> Brandeis was not naïve nor did he attribute superhuman powers to men. On the contrary, a few years after his concurrence in *Whitney* he wrote that “[m]an is weak, and his judgment is at best fallible.”<sup>137</sup> Yet reason was the alternative to repression, and therefore democratic society depended on creating conditions hospitable to it. Thus, free speech was necessary to make democracy possible.<sup>138</sup>

Democratic government existed in part to enable individuals to fully develop their abilities so they could function effectively as democratic citizens.<sup>139</sup> Brandeis wrote in 1922 that “[t]he great developer is responsibility.”<sup>140</sup> Citizens needed to participate in “the processes of common living” to develop their full potential.<sup>141</sup>

Brandeis, of course, was an architect of a common law and constitutional right to privacy. The former traced to his 1890 article in the *Harvard Law Review*.<sup>142</sup> The year after Brandeis published his concurrence in *Whitney*, he dissented in *Olmstead* from Chief Justice Taft’s majority opinion that upheld a prosecution based on massive wire-tapping. Brandeis invoked the right to privacy which was implicit in the Fourth and Fifth Amendments to the Constitution.<sup>143</sup> Brandeis wrote that:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of

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<sup>136</sup> Blasi, *supra* note 117, at 676.

<sup>137</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

<sup>138</sup> Farber, *supra* note 130, at 183 (stating Brandeis believed that without free speech democracy was not “viable”); see also David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2049 (2014) (“Brandeis defended freedom of speech primarily on the instrumental ground that it promoted free and rational public discussion, essential for the American people to govern themselves.”); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1323 (2010) (explaining Brandeis advocated free speech not simply as right “but because it safeguarded the social processes of self-governance.”).

<sup>139</sup> Farber, *supra* note 130, at 184-85.

<sup>140</sup> Letter from Louis D. Brandeis to Robert W. Bruere, in V LETTERS, *supra* note 65, at 46.

<sup>141</sup> Letter from Louis D. Brandeis to Robert W. Bruere, in V LETTERS, *supra* note 65, at 46.

<sup>142</sup> Warren & Brandeis, *supra* note 4.

<sup>143</sup> *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>144</sup>

Brandeis' identification with the right to privacy and "the right to be let alone" may seem inconsistent with a commitment to civic duty in a pluralistic society. As seminal were his *Harvard Law Review* article and his *Olmstead* dissent, Brandeis focused on privacy only episodically during his career,<sup>145</sup> a fact that provides further confirmation of how diverse and consequential his life was. Moreover, Brandeis did not view either right—of privacy or speech—as absolute. Although he struck the balance in favor of both rights, his formulations made clear that he weighed them against other values nonetheless. The Fourth Amendment protected individuals not against all government searches and seizures but only against "unjustifiable intrusion;"<sup>146</sup> rights of speech and assembly must yield to the government's need to protect against destruction of, or serious injury to, the State.<sup>147</sup> In each instance, rights, even those given highest value, existed in a social context and must sometimes yield to other community interests.

More importantly, Brandeis saw the "right to be let alone" as a right individuals held against society or the government against unjustified intrusion.<sup>148</sup> Even though Brandeis did not believe society

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<sup>144</sup> *Id.* at 478 (Brandeis, J., dissenting).

<sup>145</sup> Richards, *supra* note 138, at 1311.

<sup>146</sup> *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

<sup>147</sup> *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) ("But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.").

<sup>148</sup> *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most



or the state should intrude into private spaces, by force or technology, he certainly did not endorse reclusive life. His example and words refute any such conclusion.

Brandeis' belief in a right to be let alone was fully consistent with a duty to participate in a pluralistic society. The right to be let alone was not designed to allow individuals to "pursue lives of private fulfillment," but to serve the instrumental purpose of helping them "develop their abilities and imaginations, to be applied creatively to the needs of those around them, free from the deadening weight of government or group pressure."<sup>149</sup> Whereas wiretaps in *Olmstead* were a device to detect bootlegging, the same technique could be used to eavesdrop on political conversations and become an instrument whereby a government or majority could act to chill political exchange. In his dissent in *Gilbert v. Minnesota*, Brandeis had complained of a statute which would preclude teachings that a citizen should not engage in war during the privacy of a family conversation in the home.<sup>150</sup> Technology, like statutory prohibitions, could suppress discussion. In some respects, wiretaps, being less conspicuous and accordingly less accountable, presented the graver threat. As Neil Richards has written, Brandeis believed "ideas need space to incubate and develop, and that privacy protections for thoughts and new ideas are essential to meaningful debate and discussion."<sup>151</sup>

There is another aspect in which recognition of an expansive right of privacy serves, rather than inhibits, an interactive society. Although Brandeis did not articulate such a connection, one of his wisest law clerks and one who best understood his thought, Paul A. Freund, did.<sup>152</sup> In his article, "Privacy: One Concept or Many," Freund suggested the "hypothesis" that privacy "serves an important socializing function. An unwillingness to suffer disclosure of what has been discreditable in one's life, or of one's most intimate

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comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.").

<sup>149</sup> Farber, *supra* note 130, at 185.

<sup>150</sup> *Gilbert*, 254 U.S. at 335-36 (Brandeis, J., dissenting).

<sup>151</sup> Richards, *supra* note 138, at 1347.

<sup>152</sup> See generally Paul A. Freund, *Privacy: One Concept or Many*, in *PRIVACY* (J. Roland Pennock & John W. Chapman eds., 1971). I am grateful to my friend and former professor, Charles A. Miller, who a number of years ago first pointed out to me Freund's unique skill as an expositor of Brandeis' thought and work.

thoughts and feelings, reflects an intuitive sense that to share everything would jeopardize the sharing of anything.”<sup>153</sup> Brandeis may have recognized Freund’s profound insight that successful interaction depends on mutual recognition of a private sphere.

### III. CONCLUSION

History has secured Brandeis’ reputation as a foremost and effective champion of individual rights relating to speech, assembly, and privacy. Yet Brandeis was a gifted contextual thinker and his work in those pursuits occurred in a context that saw the individual not as an isolated being but as a part of a larger society. His commitment was to societal, as well as individual, development and he recognized the interdependence of those aspirations. Individuals would best develop in democratic society, and democratic society depended on engaged and developed individuals for its sustained health.

Brandeis insisted that individuals had duties as well as rights, and that the effective performance of duties of citizenship was essential to individual development and societal health. Society could not function effectively if individuals focused only on their own self-interest rather than on communal needs. Individuals could not develop fully if their cause was simply themselves rather than their community. On the other hand, engaged citizens who took their public responsibilities seriously would not only develop but would contribute to the functioning of democratic society.

Brandeis recognized that democratic society was necessarily diverse. Free individuals would develop differently in any case. The reality of American demography, with its composition drawing people of different races, nationalities and religions, accentuated its inherent diversity.

Brandeis regarded pluralism as not simply a fact, but as a necessity. American society could only function if citizens interacted - if they made an effort to know and understand each other. Society must recognize not simply the rights of diverse people, but also the duties each has in order to behave as democratic citizens. Citizens must perform their duties in a pluralistic society so that differences

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<sup>153</sup> *Id.* at 195.

could be expressed and resolved peacefully and so that public decisions would reflect the views and wisdom of the collective body.

But diversity presented an opportunity as well as a challenge. Brandeis believed that understanding, knowledge, growth, and wisdom were more likely to come from exposure to difference than to convention. Immigrants from different lands enriched America and provided the opportunity to enhance America by contributing to its culture. Citizens from different backgrounds could expand their knowledge and understanding by reciprocal interaction.

Brandeis' expansive conception of the duty of citizens in a pluralistic society was evident in his work as a lawyer, his activity as a public citizen, his deep commitment to Zionism, and his work as one of the greatest justices on America's Supreme Court. He gave voice to a deeply entrenched American ideal that has endured, despite occasional challenges. His work and words provide a continuous beacon as against those who would free individuals from their social responsibilities and against those in modern times and in all times who would place walls in America between people of different races, religions or nationalities.