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THE CONTINUING VITALITY OF LOUIS D. BRANDEIS'S FREE EXPRESSION JURISPRUDENCE

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There is a remarkable freshness to the work of Louis D. Brandeis. Whereas the writings of many of his contemporaries can seem dated to the reader of today, Brandeis continues to speak to us in a way that is rare in its relevance and continued vitality.[1] As with any historical figure, Brandeis must be seen in his own historical context (a task this conference on *Louis D. Brandeis: An Interdisciplinary Retrospective* has performed exceptionally), and thus his work is historically contingent in part. Nevertheless, Brandeis's writings and the impact of his career also transcend time in a way that few others can rival.

There are at least three main themes that have run through the papers and presentations of this conference, [2] illustrating the continuing vitality of Brandeis as a lawyer and as a justice.

Theory and practice – Brandeis understood that at the highest level, theory and practice do not pull in opposite directions but are mutually reinforcing.[3] As a practitioner, Brandeis was justly celebrated for introducing what can best be understood as an academic approach of reliance on sociological evidence in the

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[1] *See* Saby Ghoshray, *Looking Through the Prism of Privacy and Trespass: Smartphones and the Fourth Amendment*, 16 U. D.C. L. REV. 73, 82 (2012); Kathryn McEnery, *The Usefulness of Non-Linear Thinking: Conceptual Analysis Tools and an Opportunity to Develop Electronic Health Information Privacy Law*, 23 HEALTH LAWYER 18, 21 (2010).

[2] *Brandeis and Free Speech*, Louis D. Brandeis: An Interdisciplinary Retrospective, Touro College Jacob D. Fuchsberg Law Center, Central Islip, N.Y. (Apr. 1, 2016).

[3] *See* Melvin I. Urofsky, *"A Good Name Is Rather to Be Chosen Than Great Riches": The Louis D. Brandeis School of Law at the University of Louisville*, 37 BRANDEIS L.J. 11, 13 (1998).

celebrated "Brandeis Brief" in *Muller v. Oregon*.[4] As a Supreme Court Justice, his most recognized and longest-lasting achievements include not only cases exploring the constitution and the nature of civil liberties, but such intricate and practice-oriented questions as the application of federal or state law in state law claims brought in federal court under federal diversity jurisdiction in *Erie Railroad v. Tompkins*.[5] These are but two among many possible examples. To Brandeis, the practitioner was most effective when his work was grounded in deep theories of legal systems and justice, and the judge was most profound when his work resonated with real world contexts and issues.[6]

Doing well and doing good – Before coming to the Court, Brandeis was an extraordinarily accomplished attorney in the private practice of law.[7] Although he did not seek to use his legal skills to amass immense wealth, his practice was highly successful in financial terms.[8] Yet it was Brandeis, the "people's lawyer," who essentially invented two aspects of practice that we now largely take for granted as being basic to an attorney's ethnical obligations.[9] First, Brandeis believed that attorneys were required in certain instances to take into account the interest of parties beyond their particular clients.[10] In his confirmation hearings before the United States Senate, in the spring of 1916, he famously stated that he was the "lawyer for the situation."[11] Second, Brandeis provided representation *gratis* for those who could not afford his legal services, and for cases that he thought raised significant public issues, anticipating and championing what would become a well-accepted

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[4] 208 U.S. 412 (1908); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 104-05 (1993).

[5] 304 U.S. 64 (1938); *see* PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE, at ix (1984).

[6] *See generally* LOUIS D. BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS-A PROFESSION 329 (1933); *see also* Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 988-89 (1967).

[7] Melvin I. Urofsky, *The Legacy of Louis D. Brandeis*, 13 J. APP. PRAC. & PROCESS 189, 191 (2012).

[8] *Id.*

[9] *See* Don Burnett, *An Aim High and A Vision Broad: The Public Responsibilities of A Public Profession*, 45 ADVOCATE 12, 12 (2002); Geoffrey Hazard, *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 379 (2004).

[10] *See* Hazard, *supra* note 9, at 379.

[11] Hazard, *supra* note 9, at 377; Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502-03 (1996).

obligation for an attorney to dedicate some proportion of her or his time to *pro bono* work.[12]

Moral courage – There are many ways to illustrate the moral courage that Brandeis exemplified.[13] In his famous concurring opinion in *Whitney v. California,*[14] Brandeis wrote "those who won our independence believed . . . liberty to be the secret of happiness, and courage to be the secret of liberty."[15] Perhaps there is no better example than his willingness to play a leadership role in the American Zionist movement.[16] Brandeis, although always identifying as a Jew, did not take on any significant roles in the American Jewish community through the early part of his career.[17] But by the early years of World War I, he had become one of the leading spokesmen in America for the cause of Jewish nationalism in then-Palestine.[18] One suspects that Brandeis had to know that there was some possibility that his close identification with Zionism at the time could negatively affect his ambitions for prominent appointments, especially for a seat on the Supreme Court; with Woodrow Wilson, who greatly trusted and valued Brandeis as an advisor and counselor, as President, such ambitions were well within reach.[19] Nonetheless, Brandeis, moved by the plight of fellow Jews, took on a significant role as a prominent Zionist.[20]

In this final session of the conference, I will address another area where Brandeis's thought retains a great vitality and continues to influence our thinking. I refer to his free expression jurisprudence. I would like to suggest here that Brandeis is significant not only for being expansive and even passionate in his views of free expression but also for a significantly different philosophical methodology than that adopted even by those who shared his conclusions. The Brandeisian approach to free expression provides a firm grounding

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[12] Spillenger, *supra* note 11, at 1448.

[13] *See generally* Urofsky, *supra* note 7; Spillenger, *supra* note 11; *see also* MAX LERNER, *The Social Thought of Justice Brandeis, in* MR. JUSTICE BRANDEIS 9, 9 (Felix Frankfurter ed., 1932).

[14] 274 U.S. 357 (1927) (Brandeis, J., concurring).

[15] *Id.* at 375.

[16] *See* JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 146-74 (2016); MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 399-429 (2009).

[17] Rosen, *supra* note 16, at 146-47.

[18] *See* NELSON L. DAWSON, BRANDEIS AND AMERICA 66-70 (University Press of Kentucky, ed., 1989).

[19] *See id.*

[20] *Id.*

for the doctrine, and a grounding that is particularly relevant to our time.

Brandeis is properly thought of as an essential early, if not founding, figure, in modern free expression jurisprudence.[21] Brandeis is often associated with Justice Oliver Wendell Holmes, Jr. in this regard; they were the two great dissenters in a series of opinions in which the Supreme Court upheld restrictions on free speech.[22] In *United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson*,[23] in which both Brandeis and Holmes dissented, Holmes wrote that "I have had the advantage of reading the judgment of my brother Brandeis in this case and I agree in substance with his view."[24]

Brandeis and Holmes, however, approached the issue of free expression from different perspectives.[25] The difference is best illustrated by reference to the first sedition case in which the two justices did not vote together, *Gilbert v. State of Minnesota*[26] in 1920.[27]

Joseph Gilbert was convicted of violating a Minnesota statute that proscribed interference with or "discouragement" of the "enlistment of men in the military or naval forces of the United States or of the State of Minnesota."[28] The statute explicitly made it unlawful "to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States" in its war effort.[29] Gilbert's indictment stemmed from a speech he gave in 1917 that was highly critical of American involvement in the World War.[30] The Supreme Court affirmed Gilbert's conviction and upheld the constitutionality

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[21] *See* UROFSKY, *supra* note 16, at 553-56, 634-37.

[22] *See, e.g.*, *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis & Holmes, JJ., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis & Holmes, JJ., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting; Brandeis, J., concurring in the dissent).

[23] 255 U.S. 407 (1921).

[24] *Id.* at 436 (Holmes, J., dissenting).

[25] *See* Robert Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 374-80 (1981).

[26] 254 U.S. 325 (1920).

[27] *Id.*

[28] *Id.* at 326.

[29] *Id*. at 326-27.

[30] *Id.*

of the statute.[31] The Court applied the approach developed in a series of three 1919 cases, most notably *Schenck v. United States*.[32] In each case, the Court applied a test of whether the expression at issue represented a "clear and present danger," finding in the affirmative and determining that restriction of expression was thus constitutionally permissible.[33] In *Gilbert*, the Court assumed without deciding that the *Schenck* approach, an approach developed in the context of *federal* law and the First Amendment, applied to issues of state law.[34] The majority of the Court, citing *Schenck*,[35] *Frohwerk*,[36] *Debs*[37] *and Abrams*,[38] held that the opposition to the war effort in *Gilbert* "was not an advocacy of policies or a censure of actions that a citizen had the right to make."[39] Brandeis alone dissented on free expression grounds.[40]

Brandeis first confronted the threshold question of the source of any constitutional protections that *Gilbert* might enjoy.[41] The First Amendment on its face – "*Congress* shall make no law. . ."[42] -- could not reach *state* action.[43] The majority of the Court was prepared to assume what would ultimately develop into the doctrine of "selective incorporation," whereby certain provisions of the Bill of Rights would be applied to the state through the Due Process Clause of the Fourteenth Amendment.[44] Brandeis was reluctant to seize on the Fourteenth Amendment for his constitutional source.[45] Instead, he

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[31] *Gilbert*, 254 U.S. at 331-33.

[32] 249 U.S. 47 (1919); *see also Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

[33] *Schenck*, 249 U.S. at 52; *Frohwerk*, 249 U.S. at 206-07; *Debs*, 249 U.S. at 212-13.

[34] *See Gilbert*, 254 U.S. at 333; *see also Gitlow v. United States*, 268 U.S. 652 (1925) (holding five years later that free expression was protected from State interference through the due process clause of the Fourteenth Amendment).

[35] *Schenck*, 249 U.S. at 52.

[36] *Frohwerk*, 249 U.S. at 206.

[37] *Debs*, 249 U.S. 211.

[38] *Abrams*, 250 U.S. 616.

[39] *Gilbert*, 254 U.S. at 334 (Brandeis, J., dissenting).

[40] *Id.* (Justice Holmes did not join the majority opinion but concurred in the result. Chief Justice White dissented but on the ground that the Minnesota statute ran afoul of the Supremacy Clause, legislating in an area left to the exclusive legislative power of Congress).

[41] *Id.* at 336 (Brandeis, J., dissenting).

[42] U.S. CONST. amend. I.

[43] *Gilbert*, 254 U.S. at 336 (Brandeis, J., dissenting).

[44] *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 74 (1963).

[45] *Gilbert*, 254 U.S. at 343 (Brandeis, J., dissenting). Cover, *supra* note 25, at 377-79.

relied upon the "right to speak freely concerning functions of the Federal Government," which he described as a "privilege and immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail."[46]

> 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.[47]

Free expression thus derived its protection, according to Brandeis, from the very structure of the Government created by the Federal Constitution.[48] This "structural" approach to free expression proposed by Brandeis is striking in two respects. First, it would provide a broad-based protection against state interference with any expression bearing on a national issue.[49] The "structural" approach thus provides a more compelling and, arguably, more comprehensive basis for restricting state interference with expression than what Charles Black described as the "narrow verbal funnel of due process of law."[50] Second, the underpinning of the "structural" approach differs significantly from the marketplace of ideas notion that underlay the "clear and present danger" approach.[51] The "structural" approach is driven by the need for debate in our political life.[52] As vividly painted by Brandeis, "[l]ike the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces."[53]

The "structural" approach never prevailed in the Supreme Court, and in fact never commanded the support of any justice other than Brandeis himself. It contains the seeds, however, of a theory of

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[46] *Gilbert*, 254 U.S. at 337 (Brandeis, J., dissenting).

[47] *Id.* at 337-38.

[48] *See* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 35-46 (1969).

[49] *Gilbert*, 254 U.S. at 337-39 (Brandeis, J., dissenting).

[50] BLACK, *supra* note 48, at 46.

[51] *Schenck*, 249 U.S. 51-53.

[52] *See id.* at 338 (Brandeis, J., dissenting).

[53] *Id.*

free expression that might draw heavily upon the literature of political participation.[54] Such a comprehensive theory of free expression might avoid some of the pitfalls of the consequentialist "clear and present danger" approach. Consequentialist justifications for free expression necessarily limit speech based on its expected negative consequences and value speech based on its expected positive consequences.[55] It was in this light that Holmes saw the ultimate value of free expression as flowing from a "marketplace of ideas" that would produce the best answer to the question being debated and ultimately the best results for society.[56] Brandeis, in a more Aristotelian vein, found the core value of expression in the nature of a political and social community; a person's very human essence is grounded in the ability to participate in that political and social community.[57] To Brandeis, participation in public debate is not merely playing a role in the marketplace of ideas in order to try to determine the best idea. To participate in public debate is to participate in civil society altogether. Free expression to Brandeis is at the heart of what it means to constitute a community.[58]

Brandeis's structural approach to free expression thus finds the justification for the right to express oneself *not* in the consequences of that expression, or at least not solely in the likely consequences. This approach provides a significant alternative to a consequentialist theory of expression, one that avoids the dangers implicit in pure consequentialism, the justification of which contains the seeds of its limitations.[59] If speech is justified because it may achieve a good result, there is a corollary argument that speech may

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[54] *See generally* BENJAMIN R. BARBER, THE CONQUEST OF POLITICS: LIBERAL PHILOSOPHY IN DEMOCRATIC TIMES (1988); BENJAMIN R. BARBER, STRONG DEMOCRACY (1984); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); see also ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (detailing an early exploration of the relationship between the protection of free expression and self-government).

[55] *See* Tom Hentoff, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1457 (1991) (discussing the "clear and present danger" approach).

[56] *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 4 (2004) (describing Holmes and the Marketplace of Ideas).

[57] *See* Phillippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 704 (2007) (describing Brandeis's view on the importance of public engagement).

[58] *See id.* at 676.

[59] *See* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 688-89, 696 (2016) (discussing the consequentialism theory).

be restricted because it will produce harmful results. To be sure, no theory of the limits of free expression can fail to make some evaluation of consequences. No satisfactory answer to any conflict that implicates freedom of expression can ignore the consequences of the expression concerned altogether.[60] It is precisely because of the likely consequences that our intuition tells us that a meeting to advocate the decriminalization of narcotics should be protected speech whereas a meeting to organize a sale of narcotics may be prosecuted as a criminal conspiracy.

Yet, consequentialism in free expression theory poses many dangers.[61] If expression may be suppressed on the basis of its anticipated harm, and if the gravity of that harm will be measured by the legislature or perhaps the judiciary of the time, freedom of expression will expand and contract with the relative heat of public sentiment with respect to an issue, and to the public tolerance of views that are contrary to those held by the majority.[62] Free expression will be restricted the most when the issues concerned are the most controversial, that is, just when free expression is needed the most.[63] The American experience with restricting speech based on perceived consequences has not been a happy one.[64] This approach has driven two of the most repressive periods in our recent history.[65] Courts used a consequentialist approach to justify the suppression of anarchist and pacifist views during and following the First World War under the Sedition Act of 1918, and the suppression of Communist views during the 1950s.[66] In retrospect, we can say that neither threat was real but it is too easy to engage in this anachronistic fallacy. In each case, the perceived threat, at the time, was quite real.[67]

The irony is that, even as American law has become more protective of speech, consequentialism has remained the dominant approach.[68] The "clear and present danger" test that the Supreme

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[60] *Id.* at 688.

[61] *Id.*

[62] *Id.* at 733-34.

[63] *Id.*

[64] *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

[65] *Id*. at 184, 312.

[66] *Id.* at 184-87, 312-15.

[67] *Id.* at 184-85, 312.

[68] *See* Goldberg, *supra* note 59, at 687 (discussing consequentialism as the current doctrine courts use).

Court applied to permit the prosecution of leaders of the Communist Party in *Dennis v. United States*[69] was transformed in *Brandenburg v. Ohio*[70] into an "imminent incitement" standard.[71] Imminent incitement is understood largely in consequentialist terms.[72] In *Brandenburg*, the Court held that the power of the state to regulate expression did not reach "advocacy of the use of force or of law violation" unless the advocacy "is likely to incite or produce [imminent lawless] action."[73]

The path away from pure consequentialism is thus well worth exploring and Brandeis's structural approach is highly promising. I do not wish to overstate. Brandeis was no stranger to consequentialist argument.[74] It was Brandeis after all who in *Whitney v. California*[75] said that when faced with "bad speech," the "remedy to be applied is more speech, not enforced silence," and that the fundamental "freedom to think as you will, and to speak as you think are means indispensable to the discovery and spread of political truth."[76] However, Brandeis also saw the value of free speech as fundamental to the very way in which we participate in our society. Recall the words from his dissenting opinion in *Gilbert v. Minnesota*. Brandeis wrote:

> The right of a citizen 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.[77]

Brandeis's structural approach is not only different from consequentialist free expression jurisprudence; it also differs from

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[69] 341 U.S. 494, 508-11 (1951).

[70] 395 U.S. 444 (1969).

[71] *Id.* at 447.

[72] ANTHONY LEWIS, *Keynote Address: Freedom of Speech and Incitement Against Democracy*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 12 (David Kretzmer and Francine Kershman Hazan eds., 2000).

[73] *Brandenburg*, 395 U.S. at 447-49.

[74] David A. Strauss, *Persuasion, Autonomy, And Freedom of Expression*, 91 COLUM. L. REV. 334, 353 (1991).

[75] 274 U.S. 357 (1927).

[76] *Id.* at 375, 377.

[77] *Gilbert*, 254 U.S. at 337-38 (Brandeis, J., dissenting).

other deontological approaches to free expression.[78] Consider the autonomy-based approach to free expression advocated by Ed Baker, among others. Baker argued that hate speech laws are improper because they violate the right of an individual to say that which he wishes to say.[79] "Law's purposeful restrictions on [the speaker's] racist or hate speech violate [that person's] *formal autonomy*."[80] Brandeis's understanding of a right to speak, write, or teach one's views, is best understood not as a freedom *from* but a freedom *to*, that is, not just freedom from inference with personal, even atavistic, autonomy, but rather freedom to engage in public life.[81] Joel Goldstein spoke at this conference about Brandeis's view of civic duty – to Brandeis there was not merely a right to vote but an obligation to vote; not merely a right or interest to be educated but an obligation to be educated so as to play a role in our democracy.[82]

Brandeis biographer Alfred Lief observed in 1936,

> Brandeis had little faith in what passed for good government, the paternalistic hand which stunted growth. Ancient history was studded with instances of the demoralizing effects of benevolence; in Rome, after a period of benevolent emperors, the populace stagnated. America's need was not more government but a greater development of her citizens.[83]

For Brandeis, free expression is at the heart of each member of society's project of individual development of the citizenry.[84] The protection of this right flows not only from the specific guarantees of the First Amendment but from the very structure of our democratic system of government, a system that conveys rights but twins these rights with the responsibilities of an informed citizenry. This is quite

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[78] Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1028-29 (2015).

[79] C. EDWIN BAKER, *Autonomy and Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 139-57 (Ivan Hare & James Weinstein eds., 2009) (emphasis added).

[80] *Id.*

[81] *Id.*

[82] Joel K. Goldstein, *Brandeis on Civic Duty in a Pluralistic Society*, TOURO COLLEGE JACOB D. FUCHSBERG LAW CENTER (Mar. 31, 2016), https://videos.tourolaw.edu/media/+Thursday%2C+March+31%282%29+-+Brandeis+and+the+Public+Good/0_rru1c4dz/42862991.

[83] ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 200 (1936).

[84] *See* PHILIPPA STRUM, *Speech and Democracy: The Legacy of Justice Brandeis Today*, *in* LOUIS D. BRANDEIS 100: THEN AND NOW AT BRANDEIS UNIVERSITY 7 (2016).

a distance for the man who years earlier wrote that the most comprehensive of rights is the right to be left alone.[85] This is a source of freedom that perhaps could allow one simply to be let alone, but more fundamentally, it calls on each of us to play an active and informed role in our governance and in our society.

[85] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that "[t]he makers of our constitution … conferred, as against the government, the right to let alone-the most comprehensive of rights and the right most valued by civilized men."); Samuel Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 193 (1890).