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Sunlight and Shadows: Louis D. Brandeis on Privacy, Publicity, and Free Expression in American Democracy

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**SUNLIGHT AND SHADOWS:
LOUIS D. BRANDEIS ON PRIVACY, PUBLICITY, AND FREE
EXPRESSION IN AMERICAN DEMOCRACY**

*Erin Coyle**

I. INTRODUCTION

A gossip and news website, in 2012, posted a grainy video showing a well-known professional wrestler and actor having sex with a woman who was not his wife.¹ The celebrity, known as Hulk Hogan, sued for invasion of privacy, violation of his right of publicity, intentional infliction of emotional distress, and negligent infliction of emotional distress.² A district court of appeals held that a temporary injunction preventing the website from publishing excerpts of the video and a written report on Hogan's affair was "an unconstitutional prior restraint" on a matter of public concern.³ A jury, however, found that publishing the video invaded Hogan's privacy.⁴ The jury awarded more than \$100 million in damages.⁵ Fear of such large damage awards may eventually deter others from addressing the private lives of celebrities like Hogan, who have sought the spotlight in some arenas, and who may turn around and

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¹ A.J. Daulerio, *Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work but Watch it Anyway* (Oct. 4, 2012, 2:15 PM), <http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>; *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624 at *1 (M.D. Fla. Nov. 14, 2012).

² *Bollea*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624 at *2.

³ *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1203 (Fla. Dist. Ct. App. 2014).

⁴ Jury Verdict & Settlement, *Bollea v. Gawker Media, LLC*, JVR No. 1603280023 (Fla. Cir. Ct. Mar. 21, 2016).

⁵ *Id.*

sue members of the press for shining a spotlight that is unwanted when celebrities enter other arenas.⁶

Laws that protect invasions of privacy caused by disclosures of personal information inherently may conflict with the constitutionally protected freedoms of speech and press.⁷ The U.S. Supreme Court has refused to categorically answer “whether truthful publication may ever be punished consistent with the First Amendment.”⁸ Legal scholar Amy Gajda has written that deciding where to draw the line between privacy rights and press freedom “is a difficult task, but one that is absolutely necessary, both for the protection of privacy and for the protection of First Amendment freedoms.”⁹ Louis D. Brandeis is known as a Justice who provided an intellectual foundation for privacy law in the United States¹⁰ and

⁶ See, e.g., Len Niehoff, *Hulk Hogan v. Gawker: A Fight Between Privacy and Free Speech*, HUFFINGTON POST (Mar. 16, 2016), http://www.huffingtonpost.com/len-niehoff/hulk-hogan-gawker-lawsuit_b_9477556.html.

⁷ See, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989) (acknowledging the “tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other . . .”); ERIN K. COYLE, *THE PRESS & RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOMS VS. INVASION OF PRIVACY CLAIMS* 23 (2012) (stating “the press’s First Amendment rights occasionally conflict with privacy rights recognized by state common law and statutory torts that protect individuals’ privacy interests against invasions by individuals or private entities.”).

⁸ *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

⁹ AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 260 (2015).

¹⁰ See, e.g., Elbridge L. Adams, *The Right of Privacy, And Its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905) (calling Warren and Brandeis’ article as “one of the most brilliant excursions in the field of theoretical jurisprudence . . .”); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1134 (1992) (stating that the article “presented the idea of privacy as it should be understood”); Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 438 (1992) (writing that “the article is supposed to be the most influential law review article ever written, an essay that single-handedly created a tort and an awareness of the need for legal remedies for invasions of privacy. It is a classic, a pearl of common-law reasoning . . .”); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-85 (1960); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1295 (2010) (stating that two pieces written by Brandeis “are the foundation of American privacy law.”); Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 123, 125 (2007) (stating that “Warren and Brandeis did not invent the right to privacy from a negligible body of precedent but instead charted a new path for American privacy law.”). Cf. Jeffery A. Smith, *Moral Guardians and the Origins of the Right to Privacy*, 10 JOURNALISM & COMM. MONOGRAPHS 63 (2008) (arguing that multiple thought leaders had called for privacy protection before the *Harvard Law Review* published the Warren and Brandeis article).

espoused the value of transparency.¹¹ This article reviews Brandeis' writings for guidance on how he would balance privacy rights and public interests to receive truthful information on matters of public significance in an ideal democratic state.

Brandeis is known for his co-authored 1890 *Harvard Law Review* article that called for judges to create a branch of law that presently provides individuals with means to sue for public exposure of sensitive information about an individual.¹² Yet, Brandeis is also known for working with muckraking journalists to expose corporate and political corruption, which was not in the best interest of our democratic society.¹³ Brandeis wrote articles,¹⁴ letters,¹⁵ and court opinions that presented freedom of expression and publicity as powerful means to protect individuals against corruption and to promote their participation in self-governance.¹⁶ His writings introduced the concept, stating the need for judges to determine whether invasions of privacy were reasonable.¹⁷ This concept has allowed judges to balance privacy against other interests when

¹¹ See, e.g., Amitai Etzioni, *Is Transparency the Best Disinfectant?*, 18 J. POL. PHIL. 389, 389 (2010); Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1143-44 (2007) [hereinafter Kreimer, *Rays of Sunlight*]; Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, U. PENN. L. REV. 1, 6-7 (1991) [hereinafter Kreimer, *Sunlight, Secrets, and Scarlet Letters*]; Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROB. 109, 113-14 (2004).

¹² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Warren & Brandeis, *The Right to Privacy*]. See also Prosser, *supra* note 10, at 383-85 (stating that the "noted" article "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American Law.").

¹³ Erin K. Coyle, *The Moral Duty of Publicity: Louis Dembitz Brandeis' Crusades for Reform in the Press and Public Affairs, 1890-1916*, 35 JOURNALISM HISTORY 162, 163 (2009) [hereinafter Coyle, *Duty of Publicity*].

¹⁴ See, e.g., Warren & Brandeis, *The Right to Privacy*, *supra* note 12; LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914) [hereinafter *OTHER PEOPLE'S MONEY*].

¹⁵ See, e.g., Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890), in 1 LETTERS OF LOUIS D. BRANDEIS, 94-95 (Melvin I. Urofsky & David W. Levy eds., 1971) [hereinafter 1 LETTERS]; Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 96; Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

¹⁶ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 197; *Olmstead v. United States*, 277 U.S. 438, 473-85 (1928) (Brandeis, J., dissenting).

determining whether invasions are unreasonable.¹⁸ This article explores how the writings of Brandeis on privacy, publicity, and participation in self-governance indicated the potential for individuals to fully develop in a democratic society and thus influence the balance of privacy interests.

Brandeis believed that an ideal democratic state must allow individuals to reach their full human potential and assume civic responsibilities.¹⁹ To reach that potential, people needed education, opportunities to receive and discuss information relevant to potential government policies, and freedom to participate in determining what ideas could become laws or policies.²⁰ Following a philosophy common among progressives, Brandeis opposed bigness in corporations and government.²¹ He favored competition among corporate and government actors because he believed such competition was more likely to help common individuals who were not engaged in economic or political corruption.²² As an attorney, U.S. Supreme Court Justice, and an advocate for reform, Brandeis' focus on promoting self-fulfillment and self-governance in an ideal democracy is apparent in his writings about seemingly incongruent topics: protecting privacy against prying journalists and government agents,²³ protecting individuals from corporate and political corruption,²⁴ and protecting freedom to speak and participate in self-government in a democratic society.²⁵ This article aims to address the question of how to balance individual privacy interests against societal interests promoted by transparent government or corporate activities by reviewing Brandeis' correspondence, speeches,

¹⁸ See *Slocum v. Sears Roebuck & Co.*, 542 So. 2d 777, 779 (La. Ct. App. 1989) (explaining an example of a judge weighing privacy against other interests when determining if it was an unreasonable invasion.).

¹⁹ MELVIN I. UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 39 (Melvin I. Urofsky ed., 1994).

²⁰ *Id.* at 39-40.

²¹ MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 21-22, 70 (1981) [hereinafter UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*].

²² *Id.* at 70.

²³ See, e.g., Warren & Brandeis, *The Right to Privacy*, *supra* note 12; see *Olmstead*, 27 U.S. at 473-85 (Brandeis, J., dissenting).

²⁴ See UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 21-22, 70.

²⁵ See Fred R. Shapiro & Michelle Pearse, *The Most Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012); *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

published articles, and Supreme Court rulings that address privacy,²⁶ the duty of publicity,²⁷ political participation in a democracy,²⁸ and freedom of expression.²⁹

II. RIGHT TO PRIVACY

Brandeis is known for writing about privacy in a landmark *Harvard Law Review* article,³⁰ several letters,³¹ and a U.S. Supreme Court ruling.³² Brandeis co-wrote “The Right to Privacy” in 1890 with Samuel Warren, Brandeis’ Harvard Law School classmate, friend, and former law partner.³³ Roscoe Pound indicated that Brandeis and Warren added a chapter to the law as a result of that article.³⁴ More recently, commentators recognized “The Right to Privacy” as one of the most cited law review articles of all time.³⁵ The 1890 essay called upon judges to recognize a legal right to privacy via common law tort that would protect individuals against prying by members of the press, photographers, and gossips.³⁶ The essay called for courts to recognize a legal right to privacy that would protect “what Judge Cooley calls the right to be ‘let alone’ ” via common law precedent that could provide redress for psychological harms that resulted from unconsented disclosures of images and information related to individuals’ private lives.³⁷

²⁶ See Warren & Brandeis, *Right to Privacy*, *supra* note 12, at 206; See *Olmstead*, 27 U.S. at 473-85 (Brandeis, J., dissenting).

²⁷ See Coyle, *Duty of Publicity*, *supra* note 13, at 162.

²⁸ *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

²⁹ *Id.*

³⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12.

³¹ See, e.g., Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890), in 1 LETTERS, *supra* note 15, at 94-95; Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), in 1 LETTERS, *supra* note 15, at 97; Letter from Louis D. Brandeis to Samuel D. Warren (April 8, 1905), in 1 LETTERS, *supra* note 15, at 303.

³² See *Olmstead*, 27 U.S. at 473-85 (Brandeis, J., dissenting).

³³ Brandeis and Warren practiced together from 1879 to 1889 and when Warren’s father died in 1889, Warren left the partnership to manage his family’s business. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 4-5 (1979).

³⁴ ALPHEUS T. MASON, *BRANDEIS: A FREE MAN’S LIFE* 70, 650 (1956) (quoting a 1916 letter from Roscoe Pound to William Chilton) [hereinafter, MASON, A FREE MAN’S LIFE].

³⁵ Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (stating in 2012 that the Warren and Brandeis article was the second most-cited law review article of all time).

³⁶ Warren & Brandeis, *The Right to Privacy*, *supra* note 12 at 195-97.

³⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195-96, 198, 213.

Brandeis and Warren published the essay during an era of considerable change in the American population, technology, press, culture, and social mobility.³⁸ After the Civil War, urban areas grew rapidly as people migrated from other countries and smaller towns.³⁹ Advances in photography made it possible for images to be snapped and sold without consent.⁴⁰ Jacob Riis used flashlight to photograph members of a growing working class who lived in crowded houses in large cities.⁴¹ Telephone and telegraph lines also spread across urban centers, allowing individuals and employees of the Penny Press to quickly send news and information over distances.⁴² Details from personal events, thus, spread via images, word-of-mouth, and news stories.⁴³ The Penny Press' highly-circulated, inexpensive newspapers produced detailed stories that addressed society events, sports, crime, and matters of human interest to appeal to members of the growing working and middle urban classes, spreading details that elite classes did not want shared outside select social circles.⁴⁴

Warren and Brandeis quoted E.L. Godkin's criticism of the inexpensive newspapers to support their call for privacy laws.⁴⁵ Historians have described Godkin—who was an attorney, journalist, and editor of *The Nation*—as an opinion leader and a distinguished

³⁸ See, e.g., JOHN F. KASSON, RUDENESS & CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 71-79 (1990); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (expanded ed. 2003).

³⁹ See, e.g., KASSON, *supra* note 38, at 72; DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 6-8 (1972).

⁴⁰ See, e.g., Robert E. Mensel, "Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885-1915, 43 AM. Q. 24, 27-28 (1991).

⁴¹ See, e.g., JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 9-18 (Luc Sante ed., Penguin Books 1997) (1890).

⁴² Joel A. Tarr & Thomas Finholt, *The City and the Telegraph: Urban Telecommunications in the Pre-Telephone Era*, 14 J. OF URB. HIST. 38 (1987); MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 34-35 (1978).

⁴³ See, e.g., Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195-96; 1870s-1940s – Telephone, IMAGINING THE INTERNET, <http://www.elon.edu/e-web/predictions/150/1870.xhtml> (last visited Aug. 20, 2016).

⁴⁴ See, e.g., ANDIE TUCHER, FROTH AND SCUM: TRUTH, BEAUTY, GOODNESS, AND THE AX MURDER IN AMERICA'S FIRST MASS MEDIUM 2-3 (1994); TED CURTIS SMYTHE, THE GILDED AGE PRESS, 1865-1900, 149 (2003); MARION TUTTLE MARZOLF, CIVILIZING VOICES: AMERICAN PRESS CRITICISM, 1880-1950 7-8 (1991).

⁴⁵ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 217 n.4 (citing E. L. Godkin, *The Rights of the Citizen*, SCRIBNER'S MAGAZINE, July 1890, at 58, 66 [hereinafter Godkin, *The Rights of the Citizen*]).

journalist.⁴⁶ In a series of columns published prior to Warren and Brandeis' article, Godkin criticized inexpensive newspapers and gossips for harming the dignity of persons and societal standards for morality by spreading details about personal lives.⁴⁷ Godkin blamed newspapers for causing greater harm than gossips because the widespread publication of sensitive information "inflict[ed] what [wa]s, to many men, the great pain of believing that everybody he meets in the street is perfectly familiar with some folly, or misfortune, or indiscretion, or weakness"⁴⁸ Godkin argued that Americans needed some instrument, such as a law, to chill the wide circulation of such personal information.⁴⁹ Warren and Brandeis acknowledged that call for a remedy to protect individuals from "the evil of the invasion of privacy by the newspapers."⁵⁰

Newspapers addressed those who attended high-society weddings and parties in cities, such as Boston.⁵¹ Scholarship has suggested that Warren and Brandeis were inspired to write their essay, partly by newspaper coverage of the Warren family's personal lives and events.⁵² Since Warren married Mabel Bayard, who was the daughter of a U.S. Senator and former candidate for President, newspapers published details about his wedding and his family's

⁴⁶ See, e.g., FRANK LUTHER MOTT, A HISTORY OF AMERICAN MAGAZINES: 1865-1885 22 (1967); EDWIN LAWRENCE GODKIN, PROBLEMS OF MODERN DEMOCRACY: POLITICAL AND ECONOMIC ESSAYS vi-xii (Morton Keller ed., Belknap Press 1966) (1896); Erin K. Coyle, *E. L. Godkin's Criticism of the Penny Press: Antecedents to a Legal Right to Privacy*, 31 AM. JOURNALISM 262, 262-67 (2014) [hereinafter Coyle, *E.L. Godkin's Criticism of the Penny Press*].

⁴⁷ Coyle, *E.L. Godkin's Criticism of the Penny Press*, *supra* note 46, at 262-72; Godkin, *The Rights of the Citizen*, *supra* note 45, at 66; E. L. Godkin, *Cheap Newspapers*, THE NATION, May 1, 1890, at 346; E. L. Godkin, *Libel and Its Legal Remedy*, AM. SOC. SCI. ASS'N, Dec. 1880, at 79-83; E. L. Godkin, *The Law of Libel*, THE NATION, Feb. 28, 1889, at 173.

⁴⁸ Godkin, *The Rights of the Citizen*, *supra* note 45, at 66.

⁴⁹ Godkin, *The Rights of the Citizen*, *supra* note 45, at 67.

⁵⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195.

⁵¹ PEMBER, *supra* note 39, at 23-24 (stating that "[t]he Warren-Brandeis proposal was essentially a rich man's plea to the press to stop its gossiping and snooping").

⁵² See, e.g., Prosser, *supra* note 10, at 383 (explaining that Warren married the daughter of Senator Bayard of Delaware, and she was among Boston's social elite). He wrote that Boston newspapers "covered her parties in highly personal and embarrassing detail" during the era of yellow journalism, "when the press had begun to resort to excesses in the way of prying" Prosser, *supra* note 10, at 383.

subsequent social affairs.⁵³ In *The Right to Privacy*, Warren and Brandeis wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁵⁴

In a letter to Warren, Brandeis indicated that they wrote the article at Warren's suggestion and because of Warren's "deepseated abhorrence of the invasions of social privacy"⁵⁵

Warren and Brandeis described a right to privacy deserving of legal protection as a right related to one's control over whether and how his thoughts and sentiments are publicized.⁵⁶ They argued that protection afforded to individuals to determine whether their ideas, thoughts, or words were publicized related to a right to be let alone.⁵⁷ The principle protecting personal writings was "that of an inviolate personality."⁵⁸ Warren and Brandeis added:

⁵³ See, e.g., Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy,"* 2008 MICH. ST. L. REV. 35 (2008).

⁵⁴ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

⁵⁵ Letter from Louis D. Brandeis to Samuel D. Warren (April 8, 1905), in 1 LETTERS, *supra* note 15, at 303.

⁵⁶ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 198.

⁵⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 204-05.

⁵⁸ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 205.

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. . . . If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.⁵⁹

Thus, a right to privacy could be recognized as part of a “more general right to the immunity of the person, —the right to one’s personality.”⁶⁰

The Right to Privacy suggested that individuals have a right to control whether and how their thoughts, ideas, and sentiments are conveyed to others, and that right of control was threatened by modern inventions, such as portable cameras and sound recordings, and by journalists or gossips who publicized details for individuals’ personal lives.⁶¹ Warren and Brandeis grounded the legal right to privacy in the right to an inviolate personality, which protected “individual demands.”⁶² They wrote: “The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.”⁶³

In addition to recognizing that individuals endured emotional harm when gossip and news intruded upon the personal sphere, or domestic life, Warren and Brandeis argued that circulating those details harmed society.⁶⁴ They wrote:

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards

⁵⁹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 206.

⁶⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 207.

⁶¹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12.

⁶² Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 211.

⁶³ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 213.

⁶⁴ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people.⁶⁵

The essay argued that those details detracted from individuals' learning and thinking about "matters of real interest to the community," thus the spread of gossip and sensational news had a "blighting influence" on society.⁶⁶ The right to privacy, then, would afford legal remedies against severe emotional harms that deterred individuals from participating in an ideal democratic state and distracted others from focusing on matters of importance in an ideal democratic state.⁶⁷

Warren and Brandeis identified broad limitations for the right to privacy that allowed for judges to determine when invasions were unreasonable.⁶⁸ First, a judge could not consider a publication of general interest or public interest an invasion of privacy.⁶⁹ The essay distinguished between privacy interests for persons who have sought public attention, or notoriety, and those who have not. Warren and Brandeis wrote:

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.⁷⁰

⁶⁵ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

⁶⁶ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

⁶⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

⁶⁸ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 214-19.

⁶⁹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 214-15 ("The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.").

⁷⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216.

For instance, Warren and Brandeis wrote that “[p]eculiarities of manner and person” may be considered matters of public import regarding a candidate for public office.⁷¹ On the other hand, publicizing that a common person had a speech impediment would not be considered a matter of public importance.⁷²

Warren and Brandeis stated that the law of privacy would adopt privileges for communications recognized by defamation law, with the exception of the privilege for publishing truth.⁷³ First, privacy law would not prohibit communication made in a court, legislative body, or other government body or quasi-public body.⁷⁴ Second, invasions of privacy would only apply to oral communications made with special damages, following restrictions applied for slander.⁷⁵ As malice was not necessary to prove in most defamation claims, invasion of privacy would not require proving publicity was provided with ill will.⁷⁶ Unlike the laws for libel and slander, however, privacy law would address harms caused by publishing either true or false information.⁷⁷

Since Warren and Brandeis’ recognition also drew upon rationales for copyright protection of personal writing,⁷⁸ their recognition of limitations for privacy rights also related to limitations for intellectual property rights.⁷⁹ They reasoned that the right to privacy was not invaded by an individual’s own publication of information or by publication with an individual’s consent.⁸⁰ Publicizing such information without consent would harm the principle of inviolate personality.⁸¹ As such, compelling publication without permission would harm personal autonomy related to how to present one’s self to others, which would revoke solitude and privacy that would be “more essential” due to modern enterprises and “advancing civilization.”⁸²

⁷¹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 215.

⁷² Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 215.

⁷³ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216-18.

⁷⁴ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216-17.

⁷⁵ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 217.

⁷⁶ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 218-19.

⁷⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 218.

⁷⁸ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 198.

⁷⁹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 218.

⁸⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 218.

⁸¹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 205.

⁸² Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

Brandeis addressed the privacy article in two letters to Alice Goldmark, whom he was courting, in 1890.⁸³ The first stated that he received the proofs, and what he read “did not strike [him] as being as good as [he] thought it was.”⁸⁴ The second indicated that he and Warren hoped the essay would help shape public opinion regarding invasions of privacy.⁸⁵ They wanted to convince people that such invasions are not necessary.⁸⁶ They also wanted to “make [people] ashamed of the pleasure they take in subjecting themselves to such invasions.”⁸⁷ Brandeis indicated that law would not be effective unless public opinion supported the premise for the law.⁸⁸

Several weeks later, Brandeis addressed privacy again in a letter to James Bettner Ludlow,⁸⁹ a New York attorney involved in an unsuccessful invasion of privacy appeal the New York Court of Appeals considered in 1895.⁹⁰ In that case, New York’s highest court did not recognize a right to privacy was violated during the use of a deceased woman’s image to sculpt a statue in 1895.⁹¹ A decade later, Brandeis informed Ludlow that Georgia’s highest court recognized a legal right to privacy in *Pavesich v. New England Life Insurance Co.*⁹² The *Pavesich* court concluded that a man’s right to privacy was violated by an advertisement that used his image without his permission.⁹³ Brandeis wrote, “You will, I know, be pleased, as I am, to find that the right to [p]rivacy is at last finding judicial

⁸³ Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890), in 1 LETTERS, *supra* note 15, at 94-95; Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 97.

⁸⁴ Letter from Louis D. Brandeis to Alice Goldmark (Nov. 29, 1890), in 1 LETTERS, *supra* note 15, at 95.

⁸⁵ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 97.

⁸⁶ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 97.

⁸⁷ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 97.

⁸⁸ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 22, 1890), in 1 LETTERS, *supra* note 15, at 97.

⁸⁹ Letter from Louis D. Brandeis to James Bettner Ludlow (April 20, 1905), in 1 LETTERS, *supra* note 15, at 306.

⁹⁰ Letter from Louis D. Brandeis to James Bettner Ludlow (April 20, 1905), in 1 LETTERS, *supra* note 15, at 306; *Schuyler v. Curtis*, 42 N.E. 22, 22-23 (N.Y. 1895).

⁹¹ *Schuyler v. Curtis*, 42 N.E. 22, 28-29 (N.Y. 1895).

⁹² 50 S.E. 68 (Ga. 1905).

⁹³ *Id.* at 73-74.

recognition.”⁹⁴ Brandeis added that he received a letter from Judge Andrew Cobb, who wrote the majority opinion in *Pavesich*.⁹⁵ That letter indicated the right to privacy “would before long become the established doctrine of our law.”⁹⁶

In 1905, Brandeis also wrote about *The Right to Privacy* again in a personal letter to Samuel D. Warren, in which Brandeis pointed Warren’s attention to an *American Law Review* article that cited *The Right to Privacy*.⁹⁷ In the letter, Brandeis wrote to Warren stating that the citation of *The Right to Privacy* demonstrated that their article “remain[ed] a vital force.”⁹⁸ Warren encouraged Brandeis to draft legislation to address invasions of privacy.⁹⁹ However, Brandeis did not write a privacy statute.¹⁰⁰

More than two decades passed before Brandeis publicly addressed privacy in his dissent in *Olmstead v. United States*,¹⁰¹ which included some key phrases also included in *The Right to Privacy*.¹⁰² The majority opinion in *Olmstead* held that federal prohibition officers did not violate the Fourth and Fifth Amendment rights of Olmstead and his associates when the officers recorded Olmstead’s telephone conversations.¹⁰³ The men were accused of violating the National Prohibition Act by importing, possessing,

⁹⁴ Letter from Louis D. Brandeis to James Bettner Ludlow (April 20, 1905), in 1 LETTERS, *supra* note 15, at 306.

⁹⁵ Letter from Louis D. Brandeis to James Bettner Ludlow (April 20, 1905), in 1 LETTERS, *supra* note 15, at 306.

⁹⁶ Letter from Louis D. Brandeis to James Bettner Ludlow (April 20, 1905), in 1 LETTERS, *supra* note 15, at 306.

⁹⁷ Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), in 1 LETTERS, *supra* note 15, at 302.

⁹⁸ Letter from Louis D. Brandeis to Samuel D. Warren (Apr. 8, 1905), in 1 LETTERS, *supra* note 15, at 302.

⁹⁹ Letter from Samuel D. Warren to Louis D. Brandeis (Apr. 20, 1905), *quoted in* 1 LETTERS, *supra* note 15, at 303; Richards, *supra* note 10, at 1310-11.

¹⁰⁰ Richards, *supra* note 10, at 1310-11.

¹⁰¹ 277 U.S. 438 (1928).

¹⁰² *Id.* at 473-78 (Brandeis, J., dissenting) (explaining that as society continues to make advances in discoveries and technologies, it is inevitable that the government will have more efficient means available to them to invade one’s privacy, making it necessary to protect against any invasions of “the sanctities of a man’s home and the privacies of life.” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

¹⁰³ *Olmstead*, 277 U.S. at 466-69 (holding that wire-tapping did not amount to a search and seizure within the meaning of the Fourth Amendment and that the common law rule which allowed for illegally obtained evidence to be admissible in court was applicable in this case).

transporting, and selling liquors.¹⁰⁴ Brandeis countered that government agents violated the law in the state of Washington where they recorded telephone conversations without the knowledge or consent of Olmstead and his associates, thus their actions invaded the privacy of Olmstead and his associates.¹⁰⁵ Brandeis wrote: “Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet,”¹⁰⁶ as advances in technology and journalistic prying made it possible that personal information whispered in the closet in 1890 could be shared with broader audiences.¹⁰⁷ Brandeis’ *Olmstead* dissent described the wiretapping performed by the government agents as an instrument of “tyranny and oppression.”¹⁰⁸

Scholarship has considered Brandeis’ *Olmstead* dissent significant because it provided a foundation for modern conceptions of Fourth Amendment law¹⁰⁹ and the constitutional right to privacy¹¹⁰ that legal scholar Neil Richards calls “intellectual privacy.”¹¹¹ That opinion reiterated the value of emotions and sensations that may be harmed by unreasonable invasions of privacy.¹¹² Brandeis wrote:

¹⁰⁴ *Id.* at 455.

¹⁰⁵ *Olmstead*, 277 U.S. at 479 n.13 (Brandeis, J., dissenting) (citing a lengthy list of state statutory compilations which have made it a criminal offense to intercept, disclose or divulge without consent, or willfully interfere with the transmissions of any message made through the telegram or telephone).

¹⁰⁶ *Id.* at 473.

¹⁰⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195.

¹⁰⁸ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

¹⁰⁹ *Katz v. United States*, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring); Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 *BRANDEIS L.J.* 643, 645 (2007); Richards, *supra* note 10, at 1296 (explaining how Brandeis was able to “introduce[] modern concepts of privacy into constitutional law,” which had a major influence on the Supreme Court’s decision to recognize a constitutional right to privacy and change its perspective on Fourth Amendment law).

¹¹⁰ *Roe v. Wade*, 410 U.S. 113, 152 (1973) (holding that even though the Constitution does not explicitly grant the right to privacy, the Supreme Court has recognized this “fundamental” right through its historic application of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 486-96 (Goldberg, J., concurring) (“Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection.”); Richards, *supra* note 10, at 1296.

¹¹¹ Richards, *supra* note 10, at 1298; NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 95 (2015) (describing intellectual privacy as “a zone of protection that guards our ability to make up our minds freely.”).

¹¹² *Olmstead*, 277 U.S. at 478-79 (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 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. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth [Amendment].¹¹³

Addressing the facts in *Olmstead*, Brandeis indicated that wiretapping was a particularly invasive action because it recorded not only the conversations of someone suspected of committing a crime, but also recorded the conversations the suspected person had with other people.¹¹⁴ That act encroached upon the liberty of individuals not suspected of criminal activity.¹¹⁵ Brandeis recognized a constitutional right to privacy that would protect individuals' information from such unwarranted collection of personal information by government actors.¹¹⁶

Brandeis' writings, accordingly, indicated that the Constitution and common law ought to protect individuals against unreasonable invasions of privacy that undermined his vision for a democratic state.¹¹⁷ Invasions were considered unreasonable when they harmed individuals' sensations and emotions in a manner that exposed private persons to scrutiny otherwise reserved for voluntary participants in public life, such as political office holders.¹¹⁸ Invasions were also considered unreasonable when government

¹¹³ *Id.*

¹¹⁴ *Id.* at 475-76.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 478-79.

¹¹⁷ *Id.*; Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195-97.

¹¹⁸ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216.

agents acted in manners that could diminish individuals' trust in the democratic system of laws.¹¹⁹

III. DUTY OF PUBLICITY

Although publicity seemed to be a foe to privacy interests, Brandeis presented privacy and publicity as essential for an ideal democracy. Through his work as the people's attorney and a publicist, Brandeis also strove to protect individuals' independence against powerful political or government actors.¹²⁰ In those crusades, he used publicity as a means to protect individuals against exploitation that could potentially stunt their self-fulfillment,¹²¹ and as a means to enable individuals to contribute to democracy.¹²² Commentators have noted Brandeis' assertion that sunlight disinfects people's actions,¹²³ particularly when addressing his advocacy related to economic legislation and corporate activities.¹²⁴ This section reviews some of Brandeis' writings related to publicity as a means to promote good government and individual participation in democracy.

Brandeis wrote about the duty of publicity in a letter indicating that he wished to write somewhat of a companion piece to *The Right to Privacy* called *The Duty of Publicity*.¹²⁵ He proposed that sunlight could expose wrongdoing, preventing people from pretending to be honest or associating with honest people when they are actually encouraging "wickedness" in secrecy.¹²⁶ He continued, "If the broad light of day could be let in upon men's actions, it would

¹¹⁹ *Olmstead*, 277 U.S. at 471-72, 484-85.

¹²⁰ See, e.g., ALPHEUS T. MASON, *BRANDEIS AND THE MODERN STATE* 32-39 (1936) [hereinafter MASON, *BRANDEIS AND THE MODERN STATE*]; LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (1935).

¹²¹ See, e.g., MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 33-38.

¹²² See, e.g., LOUIS D. BRANDEIS, *Letter from Louis D. Brandeis to Robert W. Bruere*, in *THE CURSE OF BIGNESS*, at 270-71 [hereinafter BRANDEIS, *CURSE OF BIGNESS*].

¹²³ See, e.g., Coyle, *Duty of Publicity*, *supra* note 13, at 162; ETZIONI, *supra* note 11, at 389; Kreimer, *Rays of Sunlight*, *supra* note 11, at 1144; Kreimer, *Sunlight, Secrets, and Scarlet Letters* *supra* note 11, at 6-7; Winkler, *supra* note 11, at 113-14.

¹²⁴ See, e.g., Coyle, *Duty of Publicity*, *supra* note 13, at 162; Winkler, *supra* note 11, at 113-14.

¹²⁵ Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

¹²⁶ Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

purify them as the sun disinfects.”¹²⁷ Although he did not write that article,¹²⁸ he subsequently addressed the duty for publicity to keep government and corporate corruption in check in letters, magazine articles, and speeches.¹²⁹

Throughout the late nineteenth century and into the first decade of the twentieth century, Brandeis used publicity to shine a proverbial spotlight on inefficiency, bribery, and corruption in the Boston government.¹³⁰ In 1903, he helped form The Good Government Association, which focused on government in Boston.¹³¹ A year later, he helped form the Public Franchise League, which focused more broadly on people’s interests in public utilities and the government in Massachusetts.¹³² Brandeis called upon citizens and business leaders to push for more efficient and less corrupt government that would favor public interests rather than political interests.¹³³

In a March 1903 speech delivered before the Boot and Shoe Club, Brandeis publicly criticized Boston officials for corruption.¹³⁴ He stated that public funds paid for work that was never completed.¹³⁵ He also indicated that a member of the common council had resigned after he was charged with attempting to defraud the United States, and “there was an open vista of election frauds and corruption far surpassing anything ever known in this city” in 1903.¹³⁶ The *Boston Herald* summarized Brandeis’ argument, stating that publicity was “the foe of corrupt politics” and was the instrument

¹²⁷ Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

¹²⁸ MASON, A FREE MAN’S LIFE *supra* note 34, at 94.

¹²⁹ See, e.g., BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 263-65; MASON, BRANDEIS AND THE MODERN STATE, *supra* note 120, at 32-39; Louis D. Brandeis, Speech before the Good Government Association (Dec. 11, 1903) (transcript available in the Louis D. Brandeis School Of Law Library) [hereinafter Brandeis, Speech before Good Government Association].

¹³⁰ BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 263-65.

¹³¹ MASON, A FREE MAN’S LIFE, *supra* note 34, at 118.

¹³² MASON, A FREE MAN’S LIFE, *supra* note 34, at 118, 127, 129.

¹³³ BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 263-65.

¹³⁴ *Rich Men to Blame*, BOSTON HERALD, March 19, 1903, at 1.

¹³⁵ *Id.* (referring to a letter sent to Boston Newspapers, which indicated that Brandeis had not written down the speech made before the Boot & Shoe Club, and as such the newspaper incorrectly reports that he criticized work by clerks in the city’s financial departments); Letter from Louis D. Brandeis to the Editors of the Boston Newspapers (Mar. 24, 1903), in 1 LETTERS, *supra* note 15, at 228-29.

¹³⁶ *Rich Men to Blame*, BOSTON HERALD, Mar. 19, 1903, at 1.

that would inform citizens about municipal affairs.¹³⁷ Brandeis urged members of the business community to take greater interest in the local government.¹³⁸ A second published transcript of the speech indicated Brandeis stated that the opinions of the general public in Boston are sensitive, making their opinions capable of causing reforms when “intelligently directed” against corruption in any government department.¹³⁹ He stated that Boston needed citizens to organize and seek competent government by revealing misgovernment: “The light of truth and honesty and honor will be shed in all the nooks and corners of our political system of Boston, and the corrupt politicians will be forced into darkness.”¹⁴⁰ Brandeis proposed that providing citizens with information about misgovernment would empower citizens to call for reforms.¹⁴¹

Less than a month later, Brandeis stated that misgovernment in Boston had reached the “danger point.”¹⁴² Brandeis praised then Mayor Patrick Andrew Collins for informing the public about a new investigation of how the city spent public money over the past decade.¹⁴³ Brandeis stated, “At such a time, it behooves us to look about carefully and determine where danger lies, and where there is safety.”¹⁴⁴ He offered Collins’ work to reveal financial records, which demonstrated an example of good government, showing that the records were of “of inestimable value.”¹⁴⁵ Brandeis indicated that Collins’ report struck at the cause of past misgovernment by providing citizens with access to information about how public employees performed government business.¹⁴⁶ The *Boston Herald’s*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 264.

¹⁴⁰ BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 264.

¹⁴¹ BRANDEIS, *Address on Corruption*, in CURSE OF BIGNESS, *supra* note 120, at 265.

¹⁴² *City Hall Corruption*, BOSTON HERALD, Apr. 9, 1903, at 2.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The newspaper’s coverage of his speech and Collins’ report continued:

The reason the people are indifferent is because they are ignorant of the facts—ignorant of the specific acts of misgovernment—ignorant of the low character or quality of many of the men by whom in public life they are misrepresented. No one can grow enthusiastic over virtue in general or become indignant over evil in general. It is the particular virtuous or vicious act in all its details which receives our admiration or excites our condemnation. Not a man here who as a thinking and feeling human being can look into the details of our city’s administration and be

coverage of Brandeis' speech explored the difference between governors who operated with secrecy and good governors who made information available to the public.¹⁴⁷ The newspaper summarized Brandeis' assertions that people should be able to learn information about government, stating that learning about misgovernment would inspire indignation and shame.¹⁴⁸ Those feelings needed to be "followed by remedial action" to replace misgovernment with a government that served citizens' interests.¹⁴⁹ Citizens, however, had difficulties learning about how government officials conducted the city's business because its Board of Alderman established a Committee on Public Improvement that met and voted in closed sessions, allowing the Alderman Committee to keep the government's activities secret.¹⁵⁰

The week of the December 1903 elections, Brandeis made a more direct appeal for citizens to change who was representing them in Boston.¹⁵¹ Brandeis urged members of the Good Government Association not to support James Michael Curley, a local politician Brandeis said was convicted of conspiracy to defraud the government of the United States.¹⁵² In 1902, Thomas F. Curley and James Michael Curley pretended to be other men when they attempted to answer civil service examination questions.¹⁵³ In a speech, Brandeis stated:

The waste and theft of public monies which result from having such men in office is bad enough, but a hundred times worse is the demoralization of our people which results . . . [s]hall we permit these, our fellow citizens—perhaps our future rulers—to be

indifferent. He will be at times filled with admiration by the excellent work done by some men—and at other times roused to indignation—overcome by shame that the offices of a great people are prostituted by his own representatives to their contemptible and corrupt ends.

City Hall Corruption, BOSTON HERALD, Apr. 9, 1903, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ MASON, A FREE MAN'S LIFE, *supra* note 34, at 121.

¹⁵¹ Brandeis, Speech before Good Government Association, *supra* note 129.

¹⁵² Brandeis, Speech before Good Government Association, *supra* note 129 ("Nothing breeds faster than corruption. Every criminal in the public service is a plague spot spreading contagion on every hand. Think what a heritage we shall leave to our children if corruption is allowed to stalk about unstayed [sic].")

¹⁵³ 1 LETTERS, *supra* note 15, at 227 n.4.

taught that in Boston liberty means license to loot the public treasury—that in Boston opportunity means the chance for graft.¹⁵⁴

Despite Brandeis calling upon “men of honor” to vote against Curley and other criminals, and thus protect Boston from future corruption, Curley won reelection.¹⁵⁵ Four of the nine candidates that the Good Government Association endorsed were not elected in 1903.¹⁵⁶ Thereafter, Brandeis responded with plans for the association to systematically use more publicity for its candidates to win elections the following year.¹⁵⁷

Brandeis again addressed the importance of an informed citizenry when he spoke before the Public School Association in 1904.¹⁵⁸ He called upon citizens to cast their votes for “men and women who are scrupulously honest,” “absolutely disinterested,” and “efficient.”¹⁵⁹ He contrasted those characteristics with those of Bostonians who sought public jobs for themselves and their friends “by corrupt means to obtain from public officers corrupt contracts to enrich themselves.”¹⁶⁰ He chided people who were uninformed or who rationalized not voting on the premise that they would not support “machine politicians;” he identified their responsibility for the bad government that resulted from a lack of votes for candidates who would serve the public interest.¹⁶¹ Brandeis stated, “Democracy means that the people shall govern, and they can govern only 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

¹⁵⁴ Brandeis, Speech before Good Government Association, *supra* note 129.

¹⁵⁵ *Id.* Curley went on to serve as the mayor of Boston, governor of Massachusetts, and a U.S. congressman. *James Michael Curley*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/James-Michael-Curley> (last visited Sept. 17, 2016).

¹⁵⁶ Letter from Louis D. Brandeis to Edmund Billings (Dec. 16, 1903), in 1 LETTERS, *supra* note 15, at 240 n.2.

¹⁵⁷ Letter from Louis D. Brandeis to Edmund Billings (Dec. 16, 1903), in 1 LETTERS, *supra* note 15, at 238-40. He suggested that Edmund Billings, secretary of the association, systematically start contacting more associations and arranging for speakers to address good government during at least one hundred meetings. Letter from Louis D. Brandeis to Edmund Billings (Dec. 16, 1903), in 1 LETTERS, *supra* note 15, at 239.

¹⁵⁸ Louis D. Brandeis, Speech before the Public School Association (Dec. 2, 1904.) (transcript available in the Louis D. Brandeis School of Law Library).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

vote.”¹⁶² In a democracy, then, publicity must provide citizens with information, and citizens must seek that information to educate themselves regarding the administration of government; otherwise, governors could act in secrecy against the public’s interest.¹⁶³

In the late 1800s and early 1900s, muckrakers and members of the Progressive Movement used publicity to expose abuses to the general public in the hope that the public would call for accountability and reform.¹⁶⁴ At that time, members of the Progressive Movement referred to publicity as a type of “broad searchlight for exposing [corporate] excess and [political] corruption”¹⁶⁵ As a progressive, Brandeis corresponded with leading muckraking journalists, editors, and publishers during the twentieth century.¹⁶⁶ Muckraking magazines published more than a dozen of Brandeis’ articles that addressed abuse of power during the Progressive era.¹⁶⁷ Communication scholars, Kevin Stoker and Brad Rawlins, wrote that muckraking journalists and social activists saw publicity as a “ ‘righteous weapon for fighting social ills’ ”¹⁶⁸ Stoker and Rawlins described “the progressive[’s] definition of publicity as something with the intrinsic value of correcting corporate wrongdoing.”¹⁶⁹ Brandeis also used the term in that manner.¹⁷⁰

As progressives used publicity in their pursuit of political freedom and economic independence, Brandeis used publicity as he sought to protect citizens’ interests against government employees’ misdirected loyalties that could enrich politicians and corporations at the expense of the public.¹⁷¹ For instance, Brandeis represented an Interior Department employee in a Congressional investigation examining reports made by the Taft administration, which stated that corporations gained access to coal filings and land in Alaska by

¹⁶² *Id.*

¹⁶³ See MASON, A FREE MAN’S LIFE, *supra* note 34, at 121.

¹⁶⁴ Kevin Stoker & Brad Rawlins, *The “Light” of Publicity in the Progressive Era: From Searchlight to Flashlight*, 30 JOURNALISM HIST. 177, 177 (2005) https://www.researchgate.net/publication/273439997_The_Light_of_Publicity_in_the_Progressive_Era_From_Searchlight_to_Flashlight.

¹⁶⁵ Stoker & Rawlins, *supra* note 164, at 177.

¹⁶⁶ Coyle, *Duty of Publicity*, *supra* note 13, at 163.

¹⁶⁷ Coyle, *Duty of Publicity*, *supra* note 13, at 164.

¹⁶⁸ Stoker & Rawlins, *supra* note 164, at 178.

¹⁶⁹ Stoker & Rawlins, *supra* note 164, at 177.

¹⁷⁰ BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE’S MONEY, *supra* note 14, at 92.

¹⁷¹ See, e.g., Brandeis, Speech before Good Government Association, *supra* note 129.

having an individual obtain the land on their behalf.¹⁷² Brandeis' investigation revealed that Louis Glavis reported the conspiracy to then Secretary of the Interior, Richard A. Ballinger, who also previously worked as an attorney for some of the applicants for tracts of the land.¹⁷³ Some of the lands were also under the jurisdiction of the Chief Forester, Gifford Pinchot, who reported the potential conspiracy to President William Howard Taft.¹⁷⁴ Glavis also reported what had occurred to Taft, who sent Glavis' report to Ballinger.¹⁷⁵ The Secretary of the Interior then sent Taft a report for Taft to sign.¹⁷⁶ The report, which Taft signed, praised Ballinger and directed Ballinger to dismiss Glavis.¹⁷⁷ When another employee testified that Ballinger—not Taft—had written that report, the investigation revealed duplicity.¹⁷⁸

Following the Progressive tradition, Brandeis focused on informing citizens about official wrongdoing as he investigated the actions of Ballinger and Glavis.¹⁷⁹ Brandeis called for Ballinger to be held accountable for wrongdoing, and he sent copies of his arguments defending Glavis to members of the press.¹⁸⁰ Brandeis argued that Glavis should not be punished for insubordination in a society endangered by employees who are “of too complacent obedience to the will of superiors” and forget their obligation to serve the public.¹⁸¹

¹⁷² MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 46.

¹⁷³ MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 46.

¹⁷⁴ MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 173, at 46-47.

¹⁷⁵ MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 46-47.

¹⁷⁶ MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 47.

¹⁷⁷ MASON, *BRANDEIS AND THE MODERN STATE*, *supra* note 120, at 47.

¹⁷⁸ UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 57-61.

¹⁷⁹ UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 60.

¹⁸⁰ UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 59-60.

¹⁸¹ Louis D. Brandeis, Opening Argument at the Joint Committee to Investigate the Interior Department and Forestry Service (May 27, 1910) (transcript available in the Louis D. Brandeis School Of Law Library) [hereinafter Brandeis, Opening Argument]. Brandeis suggested that Ballinger had misperceived what type of loyalty is desired in a democracy. Brandeis wrote:

The loyalty that you want is loyalty to the real employer, to the people of the United States. This idea that loyalty to an immediate superior is something commendable when it goes to a forgetfulness of one's country involves a strange misconception of our Government and a strange misconception of what democracy is. It is a revival—a relic of the Slave status, a relic of the time when “the king could do no wrong,” and when everybody owed allegiance to the king. The people to whom our officials owe allegiance are the people of the United States, and every man in it who is paid by the people of the United States and who takes the

He stated that Americans needed public employees to think about their responsibility to citizens—not only to their superiors.¹⁸² He stated: “We are not dealing here with a question of the conservation of natural resources merely; it is the conservation and development of the individual; it is the conservation of democracy; it is the conservation of manhood. That is what this fight into which Glavis entered most unwillingly means.”¹⁸³ Brandeis praised Glavis and a second employee for disclosing the acts of superiors.¹⁸⁴ Glavis and a second employee exposed wrongdoing to sunlight rather than allowing such actions to be hidden in the shadows.¹⁸⁵

Brandeis also used publicity as a tool for reform when he sought to protect common people against the turmoil he believed would ultimately result from concentrated economic power.¹⁸⁶ He encouraged economic competition because he recognized that concentrated economic power, as well as concentrated political power, could cause social turmoil that would hinder individuals’ freedom to enjoy life in an ideal democratic state.¹⁸⁷ His article, *What Publicity Can Do*, stated: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁸⁸ Scholars subsequently have cited those opening lines from Brandeis’

oath of office owes that allegiance to the people of the United States and to none other. These men who stand by the Secretary with a sort of personal fidelity and friendliness are actually disloyal. They may claim that they are not insubordinate to him; but they are insubordinate to the people of the United States.

Brandeis, Opening Argument, *supra* note 181.

¹⁸² Brandeis, Opening Argument, *supra* note 181.

¹⁸³ Brandeis, Opening Argument, *supra* note 181.

¹⁸⁴ Brandeis, Opening Argument, *supra* note 181.

¹⁸⁵ UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 60. Ballinger resigned in 1911. UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 61.

¹⁸⁶ MASON, *A FREE MAN’S LIFE*, *supra* note 34, at 104-05 (“Brandeis saw democracy fatally threatened by the ‘excesses’ of capitalism, by ‘its own acts of injustice.’”).

¹⁸⁷ UROFSKY, *BRANDEIS AND THE PROGRESSIVE TRADITION*, *supra* note 21, at 70 (stating that “Reason and morality imposed limits on the competitive struggle. Brandeis also held that political democracy depended upon economic democracy;” MASON, *A FREE MAN’S LIFE*, *supra* note 34, at 104 (explaining that Brandeis believed that “social turmoil, as he saw it, was but the natural, inevitable byproduct of a changing order, of the shift of power from the few to the many.”)).

¹⁸⁸ *BRANDEIS, What Publicity Can Do*, in *OTHER PEOPLE’S MONEY*, *supra* note 14, at 92.

article as support for transparency in business and government.¹⁸⁹ That article was part of a series of Brandeis' articles, published in *Harper's Weekly* in 1913 and 1914, that addressed the concentration of power of investment bankers and the consolidation of banks and railroads.¹⁹⁰ Those articles presented economic risks that Brandeis associated with concentrations of wealth and financial power and his proposals for legislative and economic reforms.¹⁹¹ *What Publicity Can Do* described publicity as a "potent force" and "in many ways as a continuous remedial measure."¹⁹² By publishing articles on excesses and speaking about reforms at meetings, Brandeis used publicity as a means to make the public aware of entities that had grown powerful enough for select people to gain financial benefits without necessarily providing common people with benefits that Brandeis sought for all citizens.¹⁹³

Brandeis demonstrated that publicity could serve as a tool to promote reform.¹⁹⁴ He stated that the law was starting to require publicity as a measure to protect the public's interest in fair competition.¹⁹⁵ He indicated that The Federal Pure Food Law helped citizens make decisions about food quality because the law required manufacturers to disclose ingredients, shining a metaphorical flashlight on food products.¹⁹⁶ He suggested that the public needed to similarly require banks to inform investors about the values of securities and how much bankers earned by marketing and selling the securities.¹⁹⁷ Brandeis identified the wealth of investment bankers as a problem that limited the potential for common people to gain "New Freedom."¹⁹⁸ He indicated that individual investors contributed to that wealth partly due to ignorance regarding the benefits bankers

¹⁸⁹ See, e.g., Kreimer, *Rays of Sunlight*, *supra* note 11, at 1144; Kreimer, *Sunlight, Secrets, and Scarlet Letters*, *supra* note 11, at 6-7; Winkler, *supra* note 11, at 113-14.

¹⁹⁰ See Norman Hapgood, *Preface to* BRANDEIS, *OTHER PEOPLE'S MONEY*, *supra* note 14, at xiv.

¹⁹¹ Norman Hapgood, *Preface to* BRANDEIS, *OTHER PEOPLE'S MONEY*, *supra* note 14, at xiii.

¹⁹² Brandeis, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 92.

¹⁹³ BRANDEIS, *OTHER PEOPLE'S MONEY*, *supra* note 14.

¹⁹⁴ BRANDEIS, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 92.

¹⁹⁵ BRANDEIS, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 98.

¹⁹⁶ BRANDEIS, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 103-04.

¹⁹⁷ BRANDEIS, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 101-03.

¹⁹⁸ BRANDEIS, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY*, *supra* note 14, at 97.

received when individuals invested in securities.¹⁹⁹ He called for bankers to disclose to investors the commissions and profits the bankers received from selling stocks or bonds, as well as how the bankers' financial benefits were influenced by the riskiness of securities for investors.²⁰⁰ He wrote, "To be effective, knowledge of the facts must be actually brought home to the investor, and this can best be done by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase."²⁰¹ Brandeis proposed that banks, railroads, public services, and industrial corporations should be subjects of publicity, so that their actions would be subjected to the force of public opinion.²⁰²

Brandeis' essay, *True Americanism*, connected his themes on the need for education and information regarding government and economics to the rights for individuals to enjoy liberty and freedom in a democracy.²⁰³ Brandeis stated that American ideals "are the development of the individual for his own and the common good—the development of the individual through liberty and the attainment of the common good through democracy and social justice."²⁰⁴ He added that the American "form of government, as well as our humanity, compels us to strive for the development of the individual man."²⁰⁵ Brandeis related the ideal for individuals to exercise the rights guaranteed by the Constitution to "liberty, freedom in things industrial as well as political," and "the full development and utilization of one's faculties."²⁰⁶ He wrote that democracy depended upon equal opportunities for all individuals to develop and advance

¹⁹⁹ BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY, *supra* note 14, at 99.

²⁰⁰ BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY, *supra* note 14, at 101-03.

²⁰¹ BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY, *supra* note 14, at 104.

²⁰² BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY, *supra* note 14, at 93, 99, 103.

²⁰³ Louis D. Brandeis, *True Americanism*, HARPER'S WEEKLY, July 10, 1915, at 31-32. THE CURSE OF BIGNESS identified this piece as a speech that Brandeis delivered at Faneuil Hall in Boston, on July 4, 1915. BRANDEIS, *List of Addresses*, in CURSE OF BIGNESS, *supra* note 120, at 271.

²⁰⁴ Brandeis, *True Americanism*, *supra* note 203, at 31.

²⁰⁵ Brandeis, *True Americanism*, *supra* note 203, at 31.

²⁰⁶ Brandeis, *True Americanism*, *supra* note 203, at 31. (explaining that individuals needed education initially through formal schooling and later through discussions or reading, for "freshness of mind" it is necessary that work conditions allow individuals to enjoy freedom from oppressive industrial power during work hours and enjoy time off for leisure activities, and also have "some degree of financial independence.").

civilization.²⁰⁷ Each person's exercise of individual rights in the twentieth century democracy, thus, was limited when the exercise "interfere[d] with the exercise of a like right by all others."²⁰⁸

Thus, in a democracy, Brandeis identified a duty for the press.²⁰⁹ He hoped for people to use publicity to provide the public with information that would help individuals develop and advance the common good, particularly when publicity served as a tool for social justice by piercing the veils of secrecy that prevented the public from discovering practices that helped powerful entities and did not help the general public.²¹⁰ Publicity also served as a valuable tool for exposing other people's actions that would hinder an individual's development or harm the common good.²¹¹ But exercising freedom of expression for publicity, as is true for the exercise of other rights, necessarily must be limited when the exercise would hinder individual liberty or the common good for society.²¹²

IV. FREEDOM OF EXPRESSION AND DEMOCRACY

Brandeis believed that laws needed to keep pace with contemporary standards in a democratic society.²¹³ In 1916, he wrote that the American ideal of government had changed from "A government of laws and not of men" to a government that promotes "[d]emocracy and social justice."²¹⁴ An ideal democracy provided people with the freedom and opportunities to develop fully as

²⁰⁷ Brandeis, *True Americanism*, *supra* note 203, at 32.

²⁰⁸ Brandeis, *True Americanism*, *supra* note 203, at 32.

²⁰⁹ Letter from Louis D. Brandeis to Edwin Munroe Bacon (Aug. 6, 1890), *paraphrased in* 1 LETTERS, *supra* note 15, at 90. Urofsky and Levy paraphrased that letter as stating "Americans put up with many abuses less from indifference than from forgetfulness. Today's wrong is forgotten quickly by people involved with their jobs and interests. A reform-minded press must not only point out new evils, but remind people of old ills, so they will not be forgotten." *Id.*

²¹⁰ Coyle, *Duty of Publicity*, *supra* note 13, at 163.

²¹¹ Coyle, *Duty of Publicity*, *supra* note 13, at 163.

²¹² See Brandeis, *True Americanism*, *supra* note 203, at 32 ("Each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty came to mean the right to enjoy life, to acquire property, to pursue happiness in such manner and to such extent only as the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens. Liberty thus defined underlies twentieth century democracy.").

²¹³ Louis D. Brandeis, *The Living Law*, HARPER'S WEEKLY, Feb. 19, 1916, at 173.

²¹⁴ *Id.*

individuals and help promote the well being of society.²¹⁵ Democracy also allowed for government to limit individual exercises of expression and other rights, when such exercises harmed another person's liberty—the rights to enjoy life, acquire property, and pursue happiness.²¹⁶ Brandeis' concurring opinion in *Whitney* suggests that freedom of expression "is essential" to democracy and, thus, trivial harm to personal liberties cannot justify a restriction on freedom of expression.²¹⁷ Neil Richards has suggested that Brandeis changed his mind about the exercise of freedom of expression in a democratic society after he joined the U.S. Supreme Court, and that shift might have affected how to logically balance privacy and free expression rights.²¹⁸ Thus, this section reviews opinions, in which Brandeis addressed freedom of expression or privacy, to address how he perceived those interests during the twentieth century.

The American federal government grew bigger during World War I, as Congress sought to protect the nation by passing legislation.²¹⁹ Brandeis primarily voted with the rest of the U.S. Supreme Court to uphold that legislation.²²⁰ Congress passed several statutes that restricted free speech.²²¹ Brandeis initially voted with the majority in support of the federal government's application of two of those statutes in *Schenck v. United States*,²²² *Frohwerk v. United States*,²²³ and *Debs v. United States*.²²⁴ Justice Holmes wrote all three

²¹⁵ Brandeis, *True Americanism*, *supra* note 203, at 31.

²¹⁶ Brandeis, *True Americanism*, *supra* note 203, at 32.

²¹⁷ See, e.g., *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("[E]ven imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.").

²¹⁸ Richards, *supra* note 10, at 1321-22.

²¹⁹ MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 545-46 (2009) [hereinafter UROFSKY, A LIFE].

²²⁰ *Id.* at 546.

²²¹ *Id.* at 548-49. The Selective Service Act allowed the federal government to punish people who dodged the draft. *Id.* at 548. The Espionage Act of 1917 punished the making of false reports that benefited the enemy, harmed the United States by causing disobedience of soldiers, or obstructed recruitment or enlistment of soldiers. *Id.* at 548-49. The 1918 Sedition Act targeted activities that included "printing, writing, or publishing any disloyal . . . language." UROFSKY, A LIFE, *supra* note 219, at 549. The Immigration Act of 1918 also allowed the government to deport non-citizens "who believed in the use of force to overthrow the government." *Id.* at 549.

²²² 249 U.S. 47 (1919).

²²³ 249 U.S. 204 (1919).

²²⁴ 249 U.S. 211 (1919).

unanimous rulings that addressed uses of publicity.²²⁵ *Schenck* addressed whether the First Amendment was violated after two socialists were indicted under federal law.²²⁶ Charles Schenck and Elizabeth Baer were charged under the Espionage Act of 1917 for distributing a circular to cause and attempt to cause insubordination in the U.S. military services and to obstruct the U.S. armed forces' recruitment and enlistment when the nation was at war.²²⁷ They were also charged with conspiring to mail and mailing the circulars, which were not mailable under the Espionage Act.²²⁸ The majority ruling affirmed the indictments.²²⁹ The majority's rationale indicated that the First Amendment does not prevent punishment of words that are "used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."²³⁰ A week later, the majority affirmed Frohwerk's conviction for violating the Espionage Act by preparing and circulating newspaper articles that were evidence of "a conspiracy to obstruct" the U.S. armed forces' recruitment.²³¹ On the same day, the majority also confirmed Eugene Debs' conviction for attempting to obstruct military recruitment by delivering speeches.²³² In both cases, the defendants' actions were treated as threats to the security of the nation during wartime—not expressions protected by the First Amendment.²³³ The war also affected the rulings of the Court at that time. Professor Melvin Urofsky stated that the Court delayed cases that did not involve questions for "which the government needed a quick decision."²³⁴

²²⁵ *Schenck*, 249 U.S. 47; *Frohwerk*, 249 U.S. 204; *Debs*, 249 U.S. 211.

²²⁶ *Schenck*, 249 U.S. at 48-49.

²²⁷ *Id.* at 48-49.

²²⁸ *Id.* at 49.

²²⁹ *Id.* at 49, 53.

²³⁰ *Id.* at 52 (citations omitted) (stating "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

²³¹ *Frohwerk*, 249 U.S. at 204-06, 209-10.

²³² *Debs*, 249 U.S. at 212, 216-17.

²³³ *Frohwerk*, 249 U.S. at 209; *Debs*, 249 U.S. at 212-13, 216.

²³⁴ UROFSKY, A LIFE, *supra* note 219, at 545.

Brandeis also initially followed the Wilson administration's wishes and did not dissent.²³⁵

Brandeis and Holmes, however, strayed from the majority after their thoughts on free expression interests and Espionage changed after they read Zechariah Chafee's 1919 article,²³⁶ *Freedom of Speech in War Time*.²³⁷ Chafee described the First Amendment as "a declaration of national policy in favor of the public discussion of all public questions."²³⁸ Chafee criticized Holmes' opinions in *Schenck* and *Debs* for missing an opportunity to clarify what forms of expression fall inside the protection of the First Amendment and which ones do not.²³⁹ Almost five months after that article was published in the *Harvard Law Review*, Brandeis supported Holmes' dissenting opinion in another Espionage Act case involving publicity.²⁴⁰ The majority ruling in *Abrams v. United States*²⁴¹ confirmed the conviction of five Russian-born defendants involved in printing and distributing 5,000 circulars that called President Wilson a "hypocrite and a coward because troops were sent into Russia"²⁴² and called upon workers to "Rise!" and "Put down your enemy."²⁴³ Holmes, however, reasoned that the language at issue might call upon workers to strike, but the language did not actually threaten to hinder the United States' war efforts.²⁴⁴ The dissenting opinion suggested that the majority was applying the clear and present danger test too broadly in this case.²⁴⁵ Holmes wrote that this case was punishing opinions and freedom of speech should limit punishment of

²³⁵ UROFSKY, A LIFE, *supra* note 219, at 545.

²³⁶ Richards, *supra* note 10, at 1321-22.

²³⁷ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

²³⁸ *Id.* at 934.

²³⁹ *Id.* at 943-44.

²⁴⁰ *Abrams v. United States*, 250 U.S. 616, 616, 624, 630-31 (1919) (Holmes, J., dissenting).

²⁴¹ *Id.* at 616.

²⁴² *Id.* at 616-19, 624. The indictment stated that the circulars included " 'disloyal, scurrilous and abusive language about the form of government of the United States; ' . . . language 'intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute;' and . . . language 'intended to incite, provoke and encourage resistance to the United States' " in its war efforts. *Id.* at 617. They also were charged with conspiring to "urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." *Id.*

²⁴³ *Abrams*, 250 U.S. at 620.

²⁴⁴ *Id.* at 626 (Holmes, J., dissenting).

²⁴⁵ *Id.* at 628 (Holmes, J., dissenting).

expression to “Only the emergency that makes it immediately dangerous” and the type of “evil” that Congress may correct.²⁴⁶

In 1920, Brandeis wrote a dissenting opinion in another Espionage Act case involving publicity.²⁴⁷ Scholars suggest that Brandeis’ change of heart about the importance of freedom of speech was apparent in *Schaefer v. United States*,²⁴⁸ in light of Chafee’s article.²⁴⁹ Brandeis and Holmes agreed with the majority’s dismissal of the convictions of two people on the basis that the government had not proven those defendants were involved with publishing false statements and reports,²⁵⁰ but they dissented from the majority’s decision that upheld the convictions of an editor and business manager of German language newspapers under the Espionage Act.²⁵¹ Citing Chafee’s article, Brandeis wrote that Chafee had shown that the clear and present danger must be limited to only immediate and actual threats of danger.²⁵² Brandeis indicated that the newspaper articles at issue could not be considered such threats.²⁵³ He also challenged the majority’s finding that the news reports willfully conveyed false reports intended to promote the success of the United States’ German enemies.²⁵⁴ Brandeis read the English translation and the original German articles to address the charge of willful falsity.²⁵⁵ He found the slight variation between the two works did not provide evidence that the publishers added to the original dispatch and thus created a false statement.²⁵⁶ Nor did the mistranslation of the word that means “bread-lines” as “bread riots”

²⁴⁶ *Id.* at 629-31 (Holmes, J., dissenting).

²⁴⁷ *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

²⁴⁸ *Id.* at 486 (Brandeis, J., dissenting). *See, e.g.,* Richards, *supra* note 10, at 1321-22; Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 667 (1988).

²⁴⁹ Chafee, Jr., *supra* note 237, at 935-36, 952, 966-67.

²⁵⁰ *Schaefer*, 251 U.S. at 482 (Brandeis, J., dissenting).

²⁵¹ *Id.* at 482, 493 (Brandeis, J., dissenting) (“To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.”).

²⁵² *Id.* at 486 (Brandeis, J., dissenting).

²⁵³ *Id.* (Brandeis, J., dissenting).

²⁵⁴ *Id.* at 486-87 (Brandeis, J., dissenting).

²⁵⁵ *Schaefer*, 251 U.S. at 487 (Brandeis, J., dissenting).

²⁵⁶ *Id.* at 488 (Brandeis, J., dissenting).

provide evidence of willfully misleading readers to hinder the United States' success in the war.²⁵⁷ Brandeis wrote:

To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities. Nor will this grave danger end with the passing of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.²⁵⁸

He warned that holding harmless additions or omissions from articles and expressions of opinion in newspapers eligible for prosecution “will doubtless discourage criticism of the policies of the government.”²⁵⁹ In other words, punishing such expression that does not constitute a clear and present danger might undermine important duties of publicity by hindering individuals' willingness to think about and discuss the government in critical terms as well as individuals' ability to access such information via the press.

One week later, Brandeis delivered a dissenting opinion in *Pierce v. United States*,²⁶⁰ a case involving the distribution of a four-page leaflet published by the Socialist party.²⁶¹ Brandeis objected to charging the defendants under the Espionage Act for attempting to cause insubordination and for making false reports and statements with the intent to interfere with the success of the armed forces.²⁶² Brandeis stated that the government did not provide evidence indicating that the defendants had the required intent to create a clear

²⁵⁷ *Id.* at 492-93 (Brandeis, J., dissenting).

²⁵⁸ *Id.* at 494-95 (Brandeis, J., dissenting).

²⁵⁹ *Id.* at 493-94 (Brandeis, J., dissenting).

²⁶⁰ 252 U.S. 239 (1920).

²⁶¹ *Id.* at 253-73 (Brandeis, J., dissenting).

²⁶² *Id.* at 253-57 (Brandeis, J., dissenting).

and present danger.²⁶³ His dissent stated that the test required evidence of intent to cause and likelihood of causing a clear and present danger.²⁶⁴ He also indicated that the allegedly false statements were statements of opinion that interpreted and discussed “public facts of public interest.”²⁶⁵ He stated that allowing such statements to be punished “would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and questions involved are deemed fundamental.”²⁶⁶ He wrote:

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.²⁶⁷

That rationale may be compared to his prior assertion in *True Americanism* that all individuals needed equal opportunities to develop for their own good and the common good in an ideal American democracy.²⁶⁸

Philippa Strum wrote that Brandeis’ “clerk David Riesman said that Brandeis had ‘an extraordinary faith in the possibilities of human development.’”²⁶⁹ That faith in individuals is apparent in Brandeis’ dissenting opinion in *Gilbert v. Minnesota*.²⁷⁰ That dissent, released nearly nine months after Brandeis’ dissenting opinion in *Pierce*, involved a state statute that made it unlawful to hinder enlistment in the armed forces as an overreaching statute that deprived individual liberties guaranteed by the Fourteenth

²⁶³ *Id.* at 271-73 (Brandeis, J., dissenting) (“It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offenses. Certainly there was no clear and present danger that such would be the result.”).

²⁶⁴ *Id.* at 272-73 (Brandeis, J., dissenting).

²⁶⁵ *Pierce*, 252 U.S. at 269 (Brandeis, J., dissenting).

²⁶⁶ *Id.* (Brandeis, J., dissenting).

²⁶⁷ *Id.* at 273 (Brandeis, J., dissenting).

²⁶⁸ Brandeis, *True Americanism*, *supra* note 203, at 31.

²⁶⁹ LOUIS D. BRANDEIS & PHILIPPA STRUM, *BRANDEIS ON DEMOCRACY* 210 (1995).

²⁷⁰ 254 U.S. 325, 334-43 (1920) (Brandeis, J., dissenting).

Amendment.²⁷¹ Since the statute also punished the teaching of pacifism in any context, Brandeis argued that the statute invaded the privacy and freedom of the home because it made it unlawful for individuals to follow their religious beliefs related to pacifism and it also made it unlawful for parents to teach their children about pacifism.²⁷² Brandeis also described the statute's limitations on speech as an abridgement of individuals' duty to discuss government conduct.²⁷³ 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 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. There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the lower conquest of error by truth. And in such emergencies the power to suppress exists.

²⁷¹ *Id.* at 334-40 (Brandeis, J., dissenting) ("The Minnesota statute was, when enacted, inconsistent with the law of the United States, because at that time Congress still permitted free discussion of these governmental functions.").

²⁷² *Id.* at 335-36 (Brandeis, J., dissenting).

²⁷³ *Id.* at 337-38 (Brandeis, J., dissenting).

But the responsibility for the maintenance of the army and navy, for the conduct of war and for the preservation of government, both state and federal, from “malice domestic and foreign levy,” rests upon Congress.²⁷⁴

Brandeis stated that the Minnesota statute was not valid because it interfered with functions reserved for the federal government “and with the right of a citizen of the United States to discuss them.”²⁷⁵ His reasoning limited the ability of the government to suppress expression and teaching to emergencies when the suppression was essential to protect public safety.²⁷⁶ Brandeis’ subsequent dissenting opinion in *Duplex Printing Co. v. Deering*,²⁷⁷ however, indicated that individuals’ rights to pursue self-interests are secondary to their duty to the well being of society.²⁷⁸

In 1925, Brandeis joined Holmes’ dissenting opinion in *Gitlow v. New York*.²⁷⁹ Holmes agreed with the majority’s assertion “that freedom of speech and of the press . . . are . . . fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”²⁸⁰ The dissenting opinion, nonetheless, indicated that the majority opinion had not correctly applied the clear and present danger test to assess whether New York’s law unconstitutionally punished Benjamin Gitlow for publishing *The Left Wing Manifesto*.²⁸¹ Holmes wrote:

If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s

²⁷⁴ *Id.* at 337-38 (Brandeis, J., dissenting) (citations omitted).

²⁷⁵ *Gilbert*, 254 U.S. at 343 (Brandeis, J., dissenting).

²⁷⁶ *Id.* at 338-39 (Brandeis, J., dissenting).

²⁷⁷ 254 U.S. 443 (1921).

²⁷⁸ *Id.* at 488 (Brandeis, J., dissenting) (stating “All rights are derived from the purposes of the society in which they exist; above all rights rises duty to community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.”).

²⁷⁹ 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

²⁸⁰ *Id.* at 666.

²⁸¹ *Id.* at 672-73 (Holmes, J., dissenting).

views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.²⁸²

Homes reasoned that freedom of speech meant that people should be able to express ideas.²⁸³

Two years later, in a concurring opinion in *Whitney v. California*, Brandeis further clarified that the government could only be justified restricting incitements to violence that were intended to and actually likely to cause harm.²⁸⁴ Professor Vincent Blasi noted that Brandeis' tone and emphasis changed in that concurrence.²⁸⁵ In *Whitney*, the Court found that the California Criminal Syndicalism Act was not unconstitutionally applied to punish activist Charlotte Anita Whitney for her involvement in helping organize the Communist Labor Party of California in 1919.²⁸⁶ Brandeis stated that he supported the majority ruling because testimony indicated that the party was engaged in some advocacy that could be considered a clear and present danger.²⁸⁷ He also wrote that freedom of speech and freedom of assembly are fundamental rights that government may restrain if necessary "to protect the State from destruction or from serious injury, political, economic, or moral."²⁸⁸ Brandeis then clarified what would be necessary for the state to prove such restraints are necessary.²⁸⁹ He wrote:

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil

²⁸² *Id.* at 673 (Holmes, J., dissenting).

²⁸³ *Id.* (Holmes, J., dissenting).

²⁸⁴ 274 U.S. 357, 374-78 (1927) (Brandeis, J., concurring).

²⁸⁵ Blasi, *supra* note 248, at 666.

²⁸⁶ *Whitney*, 274 U.S. at 372.

²⁸⁷ *Id.* at 379 (Brandeis, J., concurring).

²⁸⁸ *Id.* at 373 (Brandeis, J., concurring).

²⁸⁹ *Id.* at 374, 376 (Brandeis, J., concurring).

apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.²⁹⁰

He added that the “evil apprehended” must cause a serious injury and not merely prevent “a relatively trivial harm to society.”²⁹¹ Brandeis’ concurrence has provided the foundation for the Court’s modern conception of freedom of expression.²⁹²

Brandeis clarified that the Nation’s founders perceived freedom of speech and assembly to serve the essential role of protecting against tyranny from governing majorities. He stated that government limitations should not prevent freedom of speech and assembly from serving essential roles in American society.²⁹³ He wrote:

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

²⁹⁰ *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

²⁹¹ *Id.* (Brandeis, J., concurring).

²⁹² *Id.* at 373, 375-78 (Brandeis, J., concurring).

²⁹³ *Id.* at 374 (Brandeis, J., concurring).

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.²⁹⁴

Thus, his words advocated for the importance of providing individuals with freedom to assemble and engage in political discussion.²⁹⁵ He presented freedom to discuss public matters as a right and a duty of American citizens in order to contribute to the well being of their democratic state.²⁹⁶ He also presented good speech as the remedy for bad speech.²⁹⁷

In 1928, Brandeis again addressed, in his *Olmstead* dissent, the founders' motivation to amend the Constitution in order to protect liberties fundamental to the pursuit of happiness.²⁹⁸ Although that ruling addressed privacy rights under the Fourth and Fifth Amendments rather than First Amendment freedoms of expression and assembly, the facts of the case involved the defendants' rights to engage in telephone conversations without having government agents record the conversations and use the recordings as evidence of criminal activity.²⁹⁹ Brandeis' dissenting opinion presented the Fourth and Fifth Amendments as a way to protect individuals against means the government could use to force self-incrimination.³⁰⁰ He noted that the Founders "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations," recognizing "the right to be let alone."³⁰¹ Thus, the defendants' constitutional right to privacy was violated when government actors revoked the defendants' freedom to choose whether to share their thoughts, beliefs, and descriptions of their activities with government actors.³⁰²

²⁹⁴ *Id.* at 375 (Brandeis, J., concurring).

²⁹⁵ *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

²⁹⁶ *Id.* at 375-76 (Brandeis, J., concurring).

²⁹⁷ *Id.* at 375 (Brandeis, J., concurring) (stating "the fitting remedy for evil counsels is good ones").

²⁹⁸ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

²⁹⁹ *Id.* at 473 (Brandeis, J., dissenting).

³⁰⁰ *Id.* at 473-74 (Brandeis, J., dissenting).

³⁰¹ *Id.* at 478 (Brandeis, J., dissenting).

³⁰² *See id.* at 477-79 (Brandeis, J., dissenting). Brandeis also criticized the agents' actions that intruded upon the privacy of the defendants and that violated a state law forbidding wire tapping for failing to follow laws that citizens must follow. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). He wrote:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be

Brandeis was concerned about the wrongdoing of the law enforcement officers who intruded upon the rights of individuals and whose unwarranted intrusions violated state law and the Constitution.³⁰³

Three years later, Brandeis joined the majority opinion in *Near v. Minnesota*³⁰⁴ that also dealt with government actions that intruded upon fundamental liberties—freedom of speech and of the press.³⁰⁵ The majority deemed a Minnesota statute unconstitutional, which allowed newspapers to be enjoined for writing articles that harmed the reputation of government officials, regardless of whether the statements were true.³⁰⁶ Although Brandeis did not write an opinion, he made statements during oral arguments that may shed light on his separation of tortious wrongs to individuals and society from exposés that help society by revealing individuals’ wrongdoing.³⁰⁷ In 1931, Brandeis criticized the Minnesota gag law statute for restricting free expression necessary in a democratic community.³⁰⁸ When the U.S. Supreme Court considered *Near*, the *New York Times* quoted Brandeis as challenging a Minnesota gag law because it limited a privilege that seemed critical to having a “free press and the protection it affords in the democratic community.”³⁰⁹ Brandeis stated that the editors sought to expose the alleged involvement in criminal activity of “criminals and public officials.”³¹⁰ “You are dealing here not with a sort of a scandal too often appearing in the press, and which ought not to appear to the interest of anyone, but with a matter of prime interest to every American citizen,” he stated, “They went forward with a definite program and certainly

imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id. at 485 (Brandeis, J., dissenting).

³⁰³ *Id.* at 472-73, 477-79, 482 (Brandeis, J., dissenting).

³⁰⁴ 283 U.S. 697 (1931).

³⁰⁵ *Id.* at 707.

³⁰⁶ *Id.* at 722-23.

³⁰⁷ *Brandeis Criticizes Minnesota Gag Law*, N.Y. TIMES, Jan. 31, 1931, at 6.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

they acted with great courage. They invited suit for criminal libel if what they said was not true.”³¹¹ He then asked if the press does not exist to expose such potential wrongdoing by public officials, “for what does it exist?”³¹² Those statements reiterated the importance of free expression for citizens to learn about government activities and to be able to discuss such activities in a democratic society.³¹³ Although the ruling deals with libel rather than privacy, his comment about exposing other types of scandals relates to his previous writing about invasions of privacy that expose embarrassing information that is not related to a public or quasi-public interest.³¹⁴

In 1937, Brandeis addressed privacy and publicity in *Senn v. Tile Layers Protective Union, Local No. 5*,³¹⁵ a 5-4 ruling that did not support enjoining union members’ lawful picketing of a non-union business.³¹⁶ Writing for the majority, Brandeis held a Wisconsin statute constitutional that permitted unions to use peaceful picketing and truthful publicity during a labor dispute.³¹⁷ He indicated that the facts of this case were not comparable to a 1921 ruling that addressed picketing involving libelous and disparaging statements and threats.³¹⁸ Rather, *Senn* addressed annoyances arising from the union members’ disclosing true information about Paul Senn, who owned and worked in a small tile contracting business that did not employ union-members.³¹⁹ Brandeis stated that the annoyance suffered from such publicity “is not an invasion of the liberty guaranteed by the Constitution.”³²⁰ In a footnote, Brandeis acknowledged that the state may protect “interests of personality, such as ‘the right of privacy.’”³²¹ *Senn*, however, dealt with property interests rather than personality interests.³²² That ruling, thus, favored the right of publicity to disclose truthful information that addressed commercial

³¹¹ *Id.*

³¹² *Brandeis Criticizes Minnesota Gag Law*, *supra* note 307, at 6.

³¹³ *Id.*

³¹⁴ *See, e.g., Warren & Brandeis, The Right to Privacy*, *supra* note 12, at 195 n.7.

³¹⁵ 301 U.S. 468 (1937).

³¹⁶ *Id.* at 472, 482-83.

³¹⁷ *Id.* at 472, 482-83.

³¹⁸ *Id.* at 479-80 (citing *Truax v. Corrigan*, 257 U.S. 312 (1921)).

³¹⁹ *Id.* at 473, 482.

³²⁰ *Senn*, 301 U.S. at 482.

³²¹ *Id.* at 482 n.5.

³²² *Id.* at 477.

interests rather than private matters that did not harm the type of privacy rights addressed in *The Right to Privacy*.³²³

In summary, Brandeis' writings acknowledged that freedom of speech; press; and assembly, much like publicity, could serve as important means to protect individuals' liberties to foster the common good. But excesses, or abuses, of those freedoms that undermined individual liberty by inciting imminent violence or invading personal privacy could not be justified when they caused serious harm to the well being of individuals or government in a democratic society.

V. BALANCING PRIVACY AND FREE EXPRESSION IN AMERICAN DEMOCRACY

Brandeis' writings suggested that privacy and publicity might be two sides of a coin essential to an ideal democratic society. He wrote in a letter to Alice Goldmark that he wanted to write a companion piece to *The Right to Privacy* on *The Duty of Publicity*.³²⁴ Warren and Brandeis' article suggested that legal protection for thoughts and sensations was necessary for self-development in a democratic society.³²⁵ Publicity and freedom of expression served specific duties in American democratic society. Brandeis believed that public opinion and law interacted, and both could be made.³²⁶ For Brandeis, the living law was dynamic, subject to change as public opinion changed.³²⁷ His writings, nonetheless, provided some guidance for balancing free expression and privacy rights, as he wrote that the exercise of one individual's rights ended where such exercise would hinder the exercise of another individual's rights.³²⁸

³²³ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196, 198-200; *see also*, Richards, *supra* note 10, at 1334.

³²⁴ Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

³²⁵ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 195-96.

³²⁶ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), in 1 LETTERS, *supra* note 15, at 97 ("All law is a dead letter without public opinion behind it. But law and public opinion interact—and they are both capable of being made.").

³²⁷ *See, e.g.*, Brandeis, *The Living Law*, *supra* note 213, at 461, 464.

³²⁸ Brandeis, *True Americanism*, *supra* note 203, at 32. Brandeis wrote,

Each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty came to mean the right to enjoy life, to acquire property, to

Warren and Brandeis likely could not have imagined how sex tapes now are recorded and, at times, that the moving pictures and sound recordings would be disclosed publicly without consent during the twenty-first century. In *The Right to Privacy*, they addressed the distribution of a celebrity's portrait without her approval in the nineteenth century, stating, "Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency."³²⁹ They criticized newspapers for publishing "details of sexual relations" and gossip, "which [could] only be procured by intrusion upon the domestic circle" in the nineteenth century.³³⁰ They suggested that the widespread circulation of those sensitive details harmed individuals by disclosing embarrassing information.³³¹ They also presented the circulation of such information as harmful to society because it "invert[s] the relative importance of things" and distracts individuals from matters more relevant to the well being of society.³³²

The Right to Privacy also clarified nuanced categorizations of reasonable public information disclosures that were fundamental in a democracy and the types of unreasonable disclosures of private information that a state could punish for invading privacy. Warren and Brandeis indicated that private matters that "should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual" when those details "have no legitimate connection" to a person's "fitness for a public office" or to a person's fitness "for any public or quasi public position . . . which [a person] seeks or for which [a person] is suggested."³³³ Matters also should be considered private when they "have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity."³³⁴ On the other hand, subjecting information to publicity may be justified if the released information "is of public or general interest" or may serve as a means of protecting individuals against

pursue happiness in such manner and to such extent only as the exercise of a like right by every other of our fellow citizens.

Brandeis, *True Americanism*, *supra* note 203, at 32.

³²⁹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

³³⁰ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

³³¹ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

³³² Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

³³³ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216.

³³⁴ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 216.

despotism, corruption, exploitation, or incompetence that could harm society or undermine individual liberty.³³⁵ Warren and Brandeis wrote:

The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of privacy which is reprehended, and to be, so far as possible, prevented. . . . There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.³³⁶

Thus, disclosing the intimate details of one's sexual affairs that occurred in the seclusion of the private, domestic sphere could be considered an unreasonable invasion of privacy when the person has not previously made such information publicly available.³³⁷ Similar disclosures also could be considered unreasonable when such information did not shed light on the character of a person who either has assumed or was likely to serve as a public leader or to assume public responsibility in business or politics.

The Right to Privacy could also be considered a publication serving the duty of publicity to foster an ideal democratic state.³³⁸ Warren and Brandeis' criticism of invasions of privacy by the Penny Press was similar in nature to Brandeis' criticism of excesses and corruption in business and government, which Brandeis considered potentially harmful to individuals and the common good in the late nineteenth and early twentieth centuries.³³⁹ In December 1890,

³³⁵ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 214-15.

³³⁶ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 214-15.

³³⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 214-15.

³³⁸ See BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE'S MONEY, *supra* note 14, at 92.

³³⁹ See, e.g., Brandeis, OTHER PEOPLE'S MONEY, *supra* note 14; see also BRANDEIS, CURSE OF BIGNESS, *supra* note 120.

Brandeis wrote to Alice Goldmark that he would send her the *Harvard Law Review* article “to show you how public opinion may be made.”³⁴⁰ Two months later, Brandeis sent her a letter indicating his desire to write “ ‘The Duty of Publicity’—a sort of companion piece to the last one that would really interest me more.”³⁴¹ That letter addressed people hiding wickedness and “shielding wrongdoers,” and presented “the broad light of day” as a remedy that “would purify them as the sun disinfects.”³⁴² For Brandeis, publicity was a means to shape public opinion³⁴³ in a society that he saw as “fatally threatened by the ‘excesses’ of capitalism” and by injustice.³⁴⁴ He wrote articles, speeches, letters, and court opinions that addressed overreaching and excesses.³⁴⁵ Brandeis presented secrecy as a potential veil for such wrongdoing, a veil that ought to be pierced by the sunlight of publicity.³⁴⁶

Later, in his service as a member of the U.S. Supreme Court, Brandeis focused on the facts of cases that came before the Court. His early rulings that addressed freedom of expression were shaped by the context of World War I and a call for unanimity.³⁴⁷ Some of his subsequent dissenting opinions reflect concerns about government actors reaching beyond the roles assigned to them by law. For instance, his dissenting opinion in *Gilbert* criticized Minnesota for passing a statute that limited freedom of speech by prohibiting the teaching or advocacy of pacifism.³⁴⁸ He called the law inconsistent with the liberties guaranteed by the Constitution, and he indicated that the State did not have the authority to pass a law related to the U.S. army and navy, as Congress had that exclusive authority.³⁴⁹

³⁴⁰ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), in 1 LETTERS, *supra* note 15, at 97.

³⁴¹ Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

³⁴² Letter from Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in 1 LETTERS, *supra* note 15, at 100.

³⁴³ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), in 1 LETTERS, *supra* note 15, at 97.

³⁴⁴ MASON, A FREE MAN’S LIFE, *supra* note 34, at 104.

³⁴⁵ See, e.g., BRANDEIS, OTHER PEOPLE’S MONEY, *supra* note 14; see also BRANDEIS, CURSE OF BIGNESS, *supra* note 120; *Olmstead*, 277 U.S. at 472, 485.

³⁴⁶ See, e.g., BRANDEIS, *What Publicity Can Do*, in OTHER PEOPLE’S MONEY, *supra* note 14, at 92.

³⁴⁷ UROFSKY, A LIFE, *supra* note 219, at 545-48.

³⁴⁸ *Gilbert*, 254 U.S. at 336 (Brandeis, J., dissenting).

³⁴⁹ *Id.* at 335-36 (Brandeis, J., dissenting).

Brandeis subsequently addressed excesses by government actors in his *Olmstead* dissent when he criticized federal prohibition agents for violating a state law that made recording telephone conversations unlawful.³⁵⁰ Brandeis suggested that the agents' actions threatened the system of American government by applying different standards to citizens and government employees.³⁵¹ Brandeis wrote, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."³⁵² He suggested that by ignoring wiretapping laws the agents' unreasonable actions suggested that others also might ignore the laws intended to protect individuals against intrusions upon their private conversations.³⁵³ He voiced concern that the unwarranted electronic intrusions could record "the most intimate occurrences of the home."³⁵⁴ Both of these opinions addressed the potential for government actions to restrain the exercise of individual privacy rights, specifically, as hindering individual rights to develop thoughts and beliefs without unwarranted interference by government.³⁵⁵ In those contexts, the right to privacy contributed to personal development for an individual and to an individual's ultimate ability to contribute to the common good of society.³⁵⁶

In addition to Brandeis' *Olmstead* and *Gilbert* opinions that focused on freedom for individual rights to develop their thoughts and beliefs via expression without unwarranted intrusions from government,³⁵⁷ Brandeis also made a reference to privacy in a footnote in *Senn*.³⁵⁸ Whereas the other two rulings addressed constitutional rights to privacy, that footnote indicated that states had authority to address harms to personality rights as invasions of

³⁵⁰ *Olmstead*, 277 U.S. at 480, 482-85 (Brandeis, J., dissenting).

³⁵¹ *Id.* at 480, 485 (Brandeis, J., dissenting).

³⁵² *Id.* at 485 (Brandeis, J., dissenting).

³⁵³ *Id.* (Brandeis, J., dissenting) ("For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

³⁵⁴ *Id.* at 474 (Brandeis, J., dissenting).

³⁵⁵ *Olmstead*, 277 U.S. at 474-75 (Brandeis, J., dissenting); *Gilbert*, 254 U.S. at 335-36, 343 (Brandeis, J., dissenting).

³⁵⁶ *Olmstead*, 277 U.S. at 474-75 (Brandeis, J., dissenting); *Gilbert*, 254 U.S. at 335-36 (Brandeis, J., dissenting).

³⁵⁷ *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting); *Gilbert*, 254 U.S. at 337-38 (Brandeis, J., dissenting).

³⁵⁸ *Senn*, 301 U.S. at 472 n.5.

privacy.³⁵⁹ The footnote differentiated those serious harms to personality from the annoyances that harmed a business owner's property rights in the commercial realm.³⁶⁰ On one level, those rulings echoed Brandeis' earlier concerns about privacy rights in the domestic realm, suggesting that Brandeis was concerned about disclosures of personal information that could thwart self-development and individuals' capabilities to participate in democratic society.

For Brandeis, privacy, publicity, and freedom of expression for individuals and the press each contributed to individuals' self-development and participation in a democratic society. His dissenting opinion in *Pierce* addressed the distribution of a circular that included opinions and discussions of "public facts of public interest."³⁶¹ He argued that allowing such publications to be punished would hinder individuals' willingness and abilities to criticize and discuss government and harm "[t]he fundamental right of free men to strive for better conditions."³⁶² His concurring opinion in *Whitney* more emphatically defended the role that freedom of speech and press serve in a democratic society.³⁶³ He wrote, "public discussion is a political duty" and "this should be a fundamental principle of the American government."³⁶⁴ He proposed that more speech—not criminal punishment—was the remedy that ought to be applied to bad speech in the context of seeking political truth.³⁶⁵ In *Pierce* and *Whitney*, however, Brandeis focused on speech about public matters that could be harmful to public perception of government—not on disclosures of sensitive personal information about private individuals.³⁶⁶ When Brandeis focused on freedom of expression as a means for individuals to learn about wrongdoing and to discuss reforms, speech and press served important roles to help form public opinion in a democratic society.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Pierce*, 252 U.S. at 269 (Brandeis, J., dissenting).

³⁶² *Id.* at 273 (Brandeis, J., dissenting).

³⁶³ *Whitney*, 274 U.S. at 373, 375 (Brandeis, J., concurring).

³⁶⁴ *Id.* at 375 (Brandeis, J., concurring).

³⁶⁵ *Id.* at 375, 377 (Brandeis, J., concurring) (stating "the fitting remedy for evil counsels is good ones").

³⁶⁶ *Id.* at 373, 375 (Brandeis, J., concurring); *Pierce*, 252 U.S. at 264-67, 272-73 (Brandeis, J., dissenting).

Warren and Brandeis similarly used the *Harvard Law Review* as a vehicle for their expression to seek reform on matters that harmed individuals and democratic society when they criticized the Penny Press' abuses of its power by publishing sensational gossip and trivial matters that "both belittles and perverts."³⁶⁷ Brandeis wrote that the most he and Warren could hope for the essay was "to start a backfire, as the woodsmen or the prairie men do."³⁶⁸ Rather, they have been credited with inspiring a new area of law,³⁶⁹ an area that requires judges to engage in nuanced determinations of what types of invasions of privacy are sufficiently harmful to merit punishing the publications and potentially chilling future speech or publications.³⁷⁰ Brandeis indicated that government could limit individuals' exercises of those rights when the exercises caused serious harm to another person, limiting that person's right to enjoy life, acquire property, or pursue happiness.³⁷¹ Brandeis' dissenting opinion in *Duplex Printing Co.*, however, stated that individuals' duties to the well being of society outweigh individuals' self-interests.³⁷²

³⁶⁷ Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196.

³⁶⁸ Letter from Louis D. Brandeis to Alice Goldmark (Dec. 28, 1890), in 1 LETTERS, *supra* note 15, at 97.

³⁶⁹ See, e.g., Gavison, *supra* note 10, at 438; Prosser, *supra* note 10, at 383-84; Richards, *supra* note 10, at 1295-96; Richards & Solove, *supra* note 10, at 125.

³⁷⁰ Richards, *supra* note 10, at 1296-97.

³⁷¹ Brandeis, *True Americanism*, *supra* note 203, at 32. Brandeis wrote,

[Each] man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty came to mean the right to enjoy life, to acquire property, to pursue happiness in such manner and to such extent only as the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens. Liberty thus defined underlies twentieth century democracy.

Brandeis, *True Americanism*, *supra* note 203, at 32.

³⁷² *Duplex Printing Co.*, 254 U.S. at 488 (Brandeis, J., dissenting) ("All rights are derived from the purposes of the society in which they exist; above all rights rises duty to community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.").

Brandeis recognized the press was a valuable tool for informing citizens and inspiring reform in a democracy.³⁷³ *The Right to Privacy* was an attempt to deter wrongdoing by newspapers publishing gossip and personal information by rallying public opinion—not an attempt to shut down the Penny Press newspapers. In his dissenting opinion in *Schaefer*, Brandeis presented a newspaper's presentation of opinion and discussion of public matters as essential for democracy.³⁷⁴ He argued that punishing newspaper employees for publishing minor errors when reporting material that could not hinder the nation's military efforts would "discourage criticism of the policies of the government," abridge freedom of speech, and "threaten freedom of thought and belief."³⁷⁵ Brandeis also criticized the Minnesota statute applied to punish a newspaper publisher for reporting on potential wrongdoing by government employees when he considered *Near*.³⁷⁶ Brandeis' commentary quoted in the *New York Times* suggested Brandeis was distinguishing between types of material that promoted democracy and thus ought to be published in the press and other stories of scandal that "ought not to appear to the interest of anyone."³⁷⁷ Brandeis recognized a role of the press to expose wrongdoing related to public matters, but not a role for the press to expose personal details related to home life in the late nineteenth and early twentieth centuries.³⁷⁸

Brandeis' writings suggest that he might have supported judgments that punish gossip-publishers for publishing intimate details from private life, such as sexual affairs, when those details failed to shed valuable light on a person's wrongdoing or potential for wrongdoing in a public position.³⁷⁹ As a jurist, Brandeis recognized an important role that speech and press play, informing people and addressing wrongdoing by societal leaders. He also supported providing individuals with information that would help

³⁷³ See, e.g., Letter from Louis D. Brandeis to Edwin Munroe Bacon (Aug. 6, 1890), paraphrased in 1 LETTERS, *supra* note 15, at 90; *Brandeis Criticizes Minnesota Gag Law*, *supra* note 307, at 6.

³⁷⁴ *Schaefer*, 251 U.S. at 494-95 (Brandeis, J., dissenting).

³⁷⁵ *Id.* at 494-95 (Brandeis, J., dissenting).

³⁷⁶ *Near*, 283 U.S. at 697.

³⁷⁷ *Id.* at 713, 715; *Brandeis Criticizes Minnesota Gag Law*, *supra* note 307, at 6.

³⁷⁸ See *Near*, 283 U.S. at 697; see also Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196, 214-16.

³⁷⁹ See, e.g., Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 196, 214-16.

them participate in an ideal democratic society.³⁸⁰ His writings suggest judges could draw a line between privacy rights and free expression rights at the point that disclosures would cause serious harm to individuals that hinders their personal development and participation in society without addressing matters of public importance.³⁸¹

³⁸⁰ Richards, *supra* note 10, at 1350.

³⁸¹ See, e.g., *Duplex Printing Co.*, 254 U.S. at 486, 488 (Brandeis, J., dissenting); Brandeis, *True Americanism*, *supra* note 203, at 32; Warren & Brandeis, *The Right to Privacy*, *supra* note 12, at 215.