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LOUIS BRANDEIS AND THE RACE QUESTION

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American society is deeply fascinated with heroes and celebrities. Legal academics undoubtedly share in this fascination. The sheer volume of scholarly work that purports to identify and categorize intellectual heroes in American law evinces an enduring romance with idealized standard-bearers of legal culture.[1] Heroes in the law, like their counterparts in popular culture, are presented to us in exalted form—superbly packaged, replete with canonized tidbits of transhistorical wisdom and exhaustive lists of legendary accomplishments. Images of juridical heroes are usually met with rapid genuflection and fairly uncritical acceptance by the majority of interested lawyers, students, and academics—an unfortunate testament to the pernicious consequences of unchecked hagiography and the overwhelming seductiveness of celebrity skin. Rarely are celebrated heroes, including those of the intellectual sort, everything we make them out to be. Exactly who and what these heroes are, the texture and efficacy of their lives, is often blended away beneath

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1. Books and articles that fall into this category are simply too numerous to catalogue here. However, it is worth acknowledging a relatively recent line of scholarship that purports to rank the greatest American legal minds. *See generally* RICHARD POSNER, A STUDY IN REPUTATION (1990); William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401 (1996); Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93 (1995); Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183 (1972).

the soft focus of reverent and adoring eyes.

Such is the case of Louis Dembitz Brandeis—the renown "people's attorney"[2] and champion of the common man. Brandeis is clearly among the most celebrated figures in American law.[3] We credit him for shaking loose tired and anachronistic nineteenth century notions of private attorneys as unprincipled functionaries of the corporate elite and for substituting in its place a fresh and leading example of socially responsible lawyering that remains an aspirational goal for many lawyers and students nearly a century later.[4] Brandeis also appears consistently on the short list of great American justices,[5] a phenomenon largely attributable to his maverick independence of thought and "creative questioning and analysis of phenomena that were treated as givens by most of his contemporaries."[6] His core insights have largely withstood the test of time and are treated by many historians and commentators as prophetic fragments of a thoroughly modern jurisprudence.[7] In short, Brandeis is considered an icon in American legal culture because we purport to understand his public-spirited approach to the law as having elevated our expectations of lawyers and judges and transformed our perceptions of the

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2. RICHARD M. ABRAMS, CONSERVATISM IN A PROGRESSIVE ERA 59 (1964).

3. The life work and legacy of Louis Brandeis has been celebrated in a great many books and journals. Some of the more prominent books are: STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS (1994); PHILLIPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM (1993) [hereinafter STRUM, BEYOND PROGRESSIVISM]; PHILLIPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984) [hereinafter STRUM, JUSTICE FOR THE PEOPLE]; LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES (1983); BRUCE A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); ALLON GAL, BRANDEIS OF BOSTON (1980); MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM (1971); ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE (1956). Notable articles include: G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Interpretations*, 70 N.Y.U. L. REV. 576 (1995); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism For the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995); Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967); Robert Cover, *The Framing of Justice Brandeis*, NEW REPUBLIC, May 5, 1982, at 17 (book review).

4. Brandeis not only took exceptional pride in his role as "the people's attorney," Phillipa Strum, *The Legacy of Louis Dembitz Brandeis*, 81 AM. JEW. HIST. 406, 407 (1994), but encouraged others to follow his lead. *See* Louis D. Brandeis, The Opportunity in the Law, Address Before the Harvard Ethical Society (May 4, 1905), *in* 39 AM. L. REV. 555 (1905).

5. Brandeis generally receives high marks as a Supreme Court justice. *See* POSNER, *supra* note 1, at 8-10, 79, 138; Ross, *supra* note 1, at 402; Schwartz, *supra* note 1, at 122-23; Blaustein & Mersky, *supra* note 1, at 1183.

6. STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 141.

7. One finds "prophet" imagery throughout much of the Brandeis literature. *See, e.g.*, BASKERVILLE, *supra* note 3, at 28, 192, 275 (describing Brandeis' "prophetic vision," "Gift of Prophecy," and the "Vision of Isaiah"); ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 126 (1988) (noting that Brandeis' contemporaries saw him as the prophet Isaiah); Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181 (1941) (describing Brandeis as an "American Prophet"). However, at least one scholar has questioned the wisdom of certain ideas put forth by Brandeis. *See* Symposium Transcript, *Biographies of Titans: Holmes, Brandeis, and Other Obsessions*, 70 N.Y.U. L. REV. 677, 693 (1995) (quoting Professor Mark Tushnet as saying, "[I]f there is a phenomenon of decannonization and the process is tied to backing the wrong horse, we may soon see interesting things happening with respect to the reputations of Brandeis and Holmes, who may turn out now to have backed the wrong horse.").

purpose of law in civilized society.

To date, no scholar has seriously questioned this celebrated image. Indeed, critiques of Louis Brandeis often take the form of mild character exploration, such as Professor Spillenger's meditative questioning of Brandeis' personal motives for engaging in personal service.[8] These sorts of critiques provide a welcome bit of texture to discussions of Louis Brandeis. But the celebrity image is typically left very much intact: Brandeis remains a man of heroic proportions, whose psychological idiosyncrasies accent, but do not jeopardize his legendary reputation.

Yet, there is an aspect of Brandeis' life—one that routinely escapes mention in the historical literature—that gives rise to a far more powerful critique of his celebrated image: namely, his conspicuous evasion of public issues that dealt with inter-ethnic relations between African-Americans and Euro-Americans and his complicity in rendering judicial decisions that reinforced core principles of the segregation regime. The exposure of this troubling side of Brandeis places him in an unfamiliar, yet revelatory light. Brandeis, although exceptional in many ways, was *not* a universal public advocate who championed the rights of *all* men. He was, more accurately, a lawyer for *certain* people, a "public" advocate who chose to embrace a truncated view of the American people that cavalierly excluded African-Americans. We may choose to celebrate Brandeis for any number of reasons, but we cannot, in good faith, continue to celebrate his purported wealth of compassion for the suffering of ordinary people broadly defined. Any *legitimate* claim Brandeis had to elevated status should be sharply questioned, if not surrendered, at least to the extent that such status is predicated on these sorts of global assertions.

Of course, one can (and perhaps should) extend this line of critique to other "great" American jurists.[9] But this critique is particularly rele-

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8. *See generally* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996) (highlighting, among other things, Brandeis' penchant for self-direction and insistence upon freedom and independence in his public work).

9. There are certainly other towering figures in American law with character flaws equally shocking to modern sensibilities. Perhaps most notable was Justice Oliver Wendell Holmes, who was both a faithful adherent to the eugenics movement, *see* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 8 (1996); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986) (discussing Holmes' support for racial eugenics), and arguable racist as well. *See* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES xvii-xviii (1989) (acknowledging that Holmes partook of notions that today "seem sexist or racist," but that his virtues nevertheless "shine[] through" after many years); GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 146-149 (1989) (discussing Holmes's lack of support for the claims of black citizens to equal rights and his "racist prejudices"). Justice Holmes' views occasionally found their way into his legal rulings. For instance, in *Buck v. Bell*, 274 U.S. 200 (1927), Justice Holmes' opinion not only upheld a 1924 Virginia statute allowing involuntary sterilization of "mental defectives" because "[t]hree generations of imbeciles are enough," but referred sarcastically to the Equal Protection Clause of the Fourteenth Amendment as "the usual last resort of constitutional arguments." *Buck*, 274 U.S. at 205, 207, 208.

Hugo Black proves equally susceptible to this line of critique. A popular lawyer in Birmingham,

vant in Brandeis' case, not only because it strikes at the very heart of his particular claim to fame, but also because his reputation as *public* champion was acquired and expanded to mythic proportions during the most vulgar and horrific period of African-American *public* suffering since chattel slavery.[10] As Brandeis ascended the ranks to prominence, the nation witnessed the ravaging effects of race riots in many of its urban centers[11] and experienced a record number of lynchings throughout the South and Midwest.[12] Social, political, and economic rights obtained by American blacks during Reconstruction were being systematically eroded if not denied outright, as private, piecemeal racism evolved into a full-blown, state-sponsored segregation regime. African-Americans desperately needed a lawyer-champion of Brandeis' caliber to defend their rights and interests against southern-style rage and northern-bred ambivalence. Given Brandeis' familiarity with the issues facing blacks in American society, his reputation for public vanguardism and social responsibility, and his purportedly strong predisposition toward vindicating the rights of common people, one naturally would assume that he was among the first to confront such obvious and rampant public injustice.

This assumption would prove incorrect. When it came to defending

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Alabama, Black drew wide acclaim for his defense of an admitted member of the Ku Klux Klan who had all but confessed to the murder of a Catholic priest that officiated the marriage of the klansman's young daughter to a "middle-aged, dark-skinned Puerto Rican paper-hanger." ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 72 (2d ed. 1997). Black's defense played upon local prejudices and anti-Catholic sentiment. He argued to the jury that the Puerto Rican husband was in fact "[n]egro"—that if he were of "proud Castillian descent, . . . he had descended a long way." *Id.* at 83 (citation omitted). He accused government witnesses who were Catholic of being "'brothers of falsehood as well as faith,' who gave perjured testimony." *Id.* Black even went so far as to recite passages of the official Ku Klux Klan prayer during his closing arguments to ensure that every juror understood the nature of his defense. *Id.* To no one's surprise, the jury found the defendant not guilty by reason of self-defense. *Id.* at 85.

Black, described by the *Montgomery Advertiser* as "the darling of the Ku Klux Klan," remained active in Klan activities and would later avail himself of Klan resources in his pursuit of public office. *See* NEWMAN, *supra*, at 101-17. After winning the primary election in the U.S. Senate race, the Klan awarded Black a "grand passport," which read in part: "Senator Hugo L. Black is a citizen of the invisible empire and . . . he may travel unmolested throughout our beneficent domain and grant and receive the fervent fellowship of Klansmen." *Id.* at 116 (citation omitted).

10. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974); David E. Bernstien, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 840 n.389 (1998) ("The Wilson administration may have represented the nadir of national African-American political fortunes."). *See also* discussion *infra* text accompanying notes 39-113.

11. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 110-13 (1975); *see also* JAMES GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION 178-79 (1989); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 909 (1998). For additional sources, see *infra* notes 100-103.

12. *See generally* ROBERT ZEGANDRO, THE NAACP'S CRUSADE AGAINST LYNCHING, 1909-1950 (1980); NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES (1969); IDA B. WELLS-BARNETT, ON LYNCHINGS: SOUTHERN HORRORS, A RED RECORD, AND MOB RULE IN NEW ORLEANS (1969). For a brief and informative discussion regarding the impact of lynching on American politics, see RANDALL KENNEDY, RACE, CRIME AND THE LAW 41-49 (1997).

the interests of African-Americans, Brandeis abandoned his legendary capaciousness and approached such issues with remarkable indifference. Conspicuously absent from his "series of brilliant forays into the public realm"[13] is any serious attempt to address the myriad issues facing a black population hampered and constrained in its development by an overtly racist government. Brandeis' profound ambivalence toward and avoidance of the race question continued throughout his twenty-year tenure on the Supreme Court, where he did not author a single opinion in any of the race cases[14] heard by the Court. More importantly, Brandeis voted *with the majority* of the Court in every one of these cases, some of which served to reinforce the core principles of racial stratification and the subordination of blacks in American society.[15]

Brandeis' curious complacency on racial issues stands in dramatic contrast with the healthy enthusiasm and sense of perseverance he brought to bear on other public causes he chose to champion.[16] However, another layer of disappointment is powerfully revealed when one contrasts Brandeis' strategy of evasion with the strategy of relentless engagement adopted by a number of his white and Jewish contemporaries—lawyers and public advocates who viewed the defense of African-American interests as essential to their own survival in America's racialized society. Indeed, the alliance forged between members of the black, Jewish, and white elite at the turn of the century provided the foundation that would launch and sustain nearly one hundred years of public discourse on race relations *and* anti-Semitism. From participating in the formation and organization of the National Association for the Advancement of Colored People ("NAACP"), to representing black litigants in civil rights cases, to ensuring that a civil rights plank would be included in the Progressive Party's 1912 political platform, the work of Brandeis' white and Jewish liberal contemporaries accents the problems and possibilities faced by those who viewed advocacy of the "Negro" cause as an essential component of public service at the turn of the twentieth century.

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13. Spillenger, *supra* note 8, at 1472.

14. The term "race cases" refers to cases in which a litigant (usually, but not always, an African-American) seeks a legal remedy to redress some perceived racial injustice. *See infra* Part II.B. identifying and discussing race cases heard during Brandeis' tenure on the Court.

15. *See* discussion *infra* text accompanying notes 162-244. One might be tempted to argue that Brandeis' ambivalence toward the race question was entirely consistent with contemporary public interest, as reflected by the majority of the American population's cultural disdain for blacks. However, as discussed at *infra* text accompanying notes 103-13, Brandeis was particularly sensitive to what he referred to as "the occasional tyrannies of governing majorities," Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), and the suggestion that there was something fundamentally undemocratic about the treatment of American blacks certainly would have appealed to Brandeis' political and intellectual sensibilities.

16. Some of these causes, such as maximum work hours for women, insurance for wage earners, labor issues in the New York garment industry, federal environmental policy, and pricing schedules for artificial gas consumers in the Boston area, are discussed at *infra* text accompanying notes 21-34.

Although Brandeis himself would forgo public activism on behalf of American blacks, his signature approach to lawyering and legal analysis would later provide sympathetic lawyers and judges with the tools and inspiration they would need to bring the national policy of segregation to its knees. For instance, the NAACP would build upon the role of lawyer-as-public-advocate pioneered by Brandeis when it established a legal defense fund to finance litigation efforts aimed at dismantling the segregation system.[17] Civil rights lawyers also would adopt Brandeis' signature style of brief writing (the so-called "Brandeis Brief"), which made generous use of sociological data to support legal arguments.[18] Moreover, the Warren Court,[19] which proved unusually sympathetic to the plight of black citizens in American society, unabashedly followed the path laid down by Brandeis, who, while serving as an Associate Justice on the Supreme Court, not only made a point of viewing legal issues as grounded in social and economic realities, but also openly declared that judges should take social and economic context into account when deciding cases.[20] These same judges also were likely inspired by Brandeis' well-documented belief in the capacity of humans to alter powerful historical forces and thereby shape the destiny of a nation. The logical extension and successful deployment of Brandeis' powerful ideas in the context of American race relations has left an indelible imprint on American culture and society and serves as a testament to the transcendent power of his visionary concepts and ideas.

But in the end, our assessment of Brandeis must focus on his own words and deeds, and not on those of his progeny. In this light, it is clear that Louis Brandeis falls short of his celebrated image as America's "People's Attorney." When we peel back the celebrity skin, we see self-conscious, intellectual disengagement, and a cavalier dismissal of the issues that sustained widespread *public* suffering by African-Americans. Although Brandeis plainly possessed the capacity to articulate an arguably revolutionary vision of American inter-ethnic relations, it is clear that he was content to leave these transformative possibilities fundamentally unrealized. The deep irony, of course, is that we revere Brandeis precisely because we perceive him as a visionary, a man who was not particularly susceptible to the retrograde social and political conventions

17. *See* discussion *infra* text accompanying notes 259-69.

18. *See* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1688 (2000).

19. I use the term "Warren Court" to refer to the United States Supreme Court between the years 1953 and 1969, when Chief Justice Earl Warren was presiding over the Court.

20. *See* discussion *infra* text accompanying notes 285-89. Here, I do not mean to suggest that Brandeis would have stood behind the substance of any one of the many doctrinal innovations put forth by the Warren Court. At least one commentator has pointed out that "[t]here seems to be much at stake in 'claiming' [Brandeis,] . . .that judges and legal scholars see advantage in citing Justice Brandeis for their own views." Spillenger, *supra* note 8, at 1529. My point is simply that the Warren Court's pursuit of public justice in many ways echoes Brandeis' general approach to law and legal analysis.

that constrained the intellects of so many of his contemporaries.

The case of Louis Brandeis highlights the pitfalls associated with our preoccupation with heroes and celebrities in American law. Perhaps the most obvious lesson is that, in our haste to define heroes, we compromise the integrity of our heroic subjects. The process of repackaging people as heroes for mass consumption invariably obscures the character lines that give texture, insight, and meaning to the life that we purport to celebrate. Troubling nuances and vulgar details tend to be sacrificed on the altar of unadulterated praise. This tendency to evade rather than confront such inconsistencies evinces a fundamentally anti-intellectual posture—one that serves to truncate rather than expand knowledge—that should be avoided at all costs.

Second, the exposure of celebrity culture in the law reveals certain troubling assumptions regarding the values of the dominant legal community. We sometimes forget that heroes are designated by and inextricably linked to a particular community. Indeed, heroes are nothing more than people who exemplify the hopes and aspirations of a community. Heroes in the law are deemed "heroic" precisely because we view such persons as embodying certain aspirational values that are highly regarded within the legal community. Of course, both the legal community and our values evolve over time. Our assessment of who and what is praiseworthy should reflect the rhythm of these changes. The case of Louis Brandeis highlights the manner in which unconditional fidelity to heroic images of a bygone era can stifle growth in this direction.

This does not mean that we should not celebrate, admire, and aspire to heroic virtue. Indeed, I find nothing problematic about idealizing certain heroic *attributes*—intelligence, courage, compassion, integrity, steadfastness—many of which Brandeis undoubtedly possessed. But to mythologize and celebrate a contrived image of Louis Brandeis as *universal* public advocate does more than deny the reality of the suffering endured every day by black Americans—suffering that was amplified, in part, by Brandeis' inaction. Preservation of such mythology makes an unequivocal statement regarding where core notions of racial equality and justice fit within the hierarchy of aspirational values of the dominant legal culture.

Finally, this critique of Brandeis highlights the contingency in our concept of the public interest. We often forget that no single issue or set of issues fully encompasses the "interests" of a fluid and evolving public. Social dynamism renders the status of *universal* public advocate highly covetous, but impossible to achieve. It is a bit much to ask of Louis Brandeis, or any legal figure for that matter, to be the master of such infinite possibility. Thus, we should abandon the practice of celebrating contrived, heroic images. If Louis Brandeis is to be an aspirational figure in American legal culture, let our image of him be one that is crisply rendered and free of distortion. Let his image be one that en-

ables us to idealize the heroic virtues he possessed, without compromising the solemn dignity of his life and the unsettling legacy of our difficult racial past.

This Article proceeds in four parts. Part I situates Brandeis' development as a lawyer and jurist within the larger context of inter-ethnic relations at the turn of the century. My purpose in doing so is to underscore the prevalence of racialized sentiment in popular and intellectual circles during the early part of the twentieth century and to establish Brandeis' familiarity with the set of issues and concerns affecting African-Americans during his lifetime. Part II discusses what Brandeis did and did not do to improve inter-ethnic relations between African-Americans and Euro-Americans and contrast these findings with the work done in this area by his white and Jewish contemporaries. I conclude this Part with a discussion of the impact of Brandeis' legacy on the civil rights revolution and, in particular, how Brandeis' lawyering style and approach to legal decision-making influenced the manner in which other lawyers and judges would work to bring an end to state-sponsored segregation. Part III explores possible explanations for Brandeis' evasion of public issues affecting American blacks. Part IV concludes with a brief commentary on the stakes of our current preoccupation with heroes and celebrities in the law.

I. LOUIS BRANDEIS' FAMILIARITY WITH PUBLIC ISSUES AFFECTING AFRICAN-AMERICANS

We are all familiar, at least superficially, with Brandeis' reputation as the "people's attorney."[21] As a practicing attorney in Boston, Brandeis became legendary for taking on "public causes" and representing the common man against big business or big government.[22] Brandeis is perhaps best known for his work in securing maximum work hours for women,[23] which culminated in legal victory in *Muller v. Oregon*.[24] Equally well-known is Brandeis' work to obtain insurance for wage earners[25] and his now infamous representation of both labor and management during a dispute involving the New York garment industry.[26]

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21. ABRAMS, *supra* note 2, at 59.

22. *See* RICHARD M. ABRAMS, INTRODUCTION TO LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, xvi-xvii (1914) (noting that Brandeis developed his reputation as "the People's Attorney" when he began to litigate cases on behalf of low-income and working people against big business entities and corporate trusts, such as insurance companies, utilities, and banks).

23. *See generally* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 114-23.

24. 208 U.S. 412 (1908).

25. For a history of state savings bank life insurance and Justice Brandeis' part in its creation, see generally ALPHEUS T. MASON, THE BRANDEIS WAY: A CASE STUDY IN THE WORKINGS OF DEMOCRACY (1938).

26. *See* LOUIS LEVINE, THE WOMEN'S GARMENT WORKERS: A HISTORY OF THE INTERNATIONAL LADIES GARMENT WORKERS UNION 189-90 (1924) (discussing Brandeis role as mediator during the New York garment worker's strike in 1910); UROFSKY, *supra* note 3, at 34

No public stage was either too big or too small for Brandeis. He was equally comfortable negotiating pricing schedules for artificial gas consumers in the Boston area,[27] as he was being an inside player in federal environmental policy.[28] Brandeis was also willing to lend his support to other liberal public causes[29]—all of which Brandeis is said to have pursued "with a monastic fervor."[30] Brandeis refused to accept a fee for his public work, a practice that surely must have seemed strange at the time, but is now commonplace.[31] It was this series of "brilliant forays into the public realm"[32] that earned Brandeis a reputation as "the people's attorney"[33]—a reputation that he not only took exceptional pride in, but one that he hoped would inspire others to follow his lead. As he famously lamented in his speech "The Opportunity in the Law," delivered before the Harvard Ethical Society in 1905, many new lawyers chose to represent the nation's moneyed interests "while the public is often inadequately represented or wholly unrepresented."[34]

Unlike his reputation as a private lawyer, which was more or less a contemporary bestowal by his colleagues and associates, Brandeis' reputation as a jurist is purely a retrospective accolade. Brandeis, after all, was never that popular with his fellow Justices, and his "unusual" views and innovative approaches were not always greeted with warm enthusiasm.[35] Yet Brandeis had a profound impact on the manner in which many of the Court's cases were decided. In addition to writing powerful dissenting opinions, Brandeis frequently used the threat of dissent to temper an otherwise unacceptable majority opinion.[36] Ironically, it was Brandeis' strident independence which heralded his ascension to the

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(describing trust and respect for Brandeis by both labor and employers in 1910 garment workers' strike).

27. *See* MASON, *supra* note 3, at 139 (discussing Brandeis' creation of a "sliding-scale" pricing schedule for Boston's artificial gas consumers).

28. *See id.* at 254-82 (discussing Brandeis' role during the Ballinger-Pinchot Affair of 1910). For a more comprehensive discussion of the Ballinger-Pinchot Affair, see generally JAMES L. PENICK, JR., PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR (1968).

29. GAL, *supra* note 3, at 1-28 (1980) (describing Brandeis' association with numerous liberal reformers and their causes); BEN HALPERN, A CLASH OF HEROES: BRANDEIS, WEIZMANN, AND AMERICAN ZIONISM 78-79 (1987) (noting that "Brandeis was surrounded by friends devoted to good works, many of them women active in charities or labor unions . . . and by clients . . . impelled, both by public spirit and business interests, to sponsor public-interest lobbies or launch experimental social projects") (footnote omitted).

30. Max Lerner, *The Social Thought of Justice Brandeis*, *in* MR. JUSTICE BRANDEIS 14 (Felix Frankfurter ed. 1932).

31. *See* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 114-31.

32. Spillenger, *supra* note 8, at 1472.

33. ABRAMS, *supra* note 2, at 59.

34. *See* Brandeis, *supra* note 4, at 561.

35. *See* PAPER, *supra* note 3, at 252 (remarking that Justice Brandeis displayed "serenity even when his position did not prevail at the Saturday conferences" during which the justices debated the merits of pending cases).

36. *See* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 369 ("[H]e held his fire when a dissent might hurt his bargaining position; and he used the threat of a dissent as a way of 'lobbying'").

pantheon of great American thinkers.[37] Ultimately, scholars and students would come to respect Brandeis, and he would be declared "by common consent . . . among the greatest of Supreme Court judges."[38]

Conspicuously absent from this laundry list of accomplishments, however, is any discussion regarding Brandeis' advocacy on behalf of African-Americans, whose public suffering during this time was reflected in nearly every facet of American life. Surely Brandeis, a man born and raised in the crucible of race, a man described by *Harper's Weekly* as a "powerful lawyer[] who [was] also informed about modern conditions,"[39] a man whose reputation as the champion of the common man is rooted equally in his unorthodox approach to legal practice and his general tendency to swim against the tide of his times, was cognizant of the gross maltreatment of African-Americans. Indeed, given that Brandeis' rise to prominence occurred during the height of Jim Crow, one cannot imagine a more obvious public cause to champion than the defense of African-Americans against the violent and oppressive techniques of a racist and tyrannical majority. Similarly, given Brandeis' iconoclastic *judicial* disposition and sympathy toward public causes, one would naturally assume that he took the opportunity to write an opinion in a race case that would outline his moral vision of inter-ethnic relations between African-Americans and Euro-Americans. As it turns out, Brandeis' contribution—both as a practitioner and a jurist—would prove remarkably deficient.

Yet there is nothing in Brandeis' upbringing to suggest that he was either unfamiliar or unsympathetic toward the plight of blacks in American society. Unlike many of his less informed contemporaries, Brandeis was intimately acquainted with the issues affecting African-Americans. Born on November 13, 1856, in the slave state of Kentucky,[40] young Brandeis lived and prospered during the most tumultuous period in America's racial history. Like every child of the Civil War, Brandeis lived and breathed the air of his times. Indeed, Brandeis' earliest memory was of helping his mother provide food and coffee to Union soldiers camped outside the Brandeis family home.[41] In the years preceding the Civil War, Brandeis' home state of Kentucky boasted the largest number

37. As one commentator notes, "a judge who espouses his era's prevailing philosophy is more apt to be celebrated than is a judge of equivalent caliber who challenges that philosophy head-on." Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 784 (1997). Brandeis was not alone in his initial unpopularity. Holmes' views were frequently considered unpalatable by other justices on the Court. As one commentator has written, "Holmes and Brandeis[] swam against the tide of their times and had little apparent success in making converts among their brethren on the Court." Ross, *supra* note 1, at 439. Like Brandeis, Holmes, over time, also made the transition from bastion of unorthodoxy to visionary.

38. Jaffe, *supra* note 3, at 987.

39. *See The Brandeis Nomination*, HARPER'S WEEKLY, Feb. 12, 1916, at 146.

40. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at ix.

41. *See* MASON, *supra* note 3, at 24; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at i.

of slaveholding families in all of the border states.[42] Kentucky politicians made clear that no black person within its borders was freed by President Abraham Lincoln's Emancipation Proclamation, and more than 65,000 blacks remained enslaved in Kentucky at War's end.[43] The passage of the Thirteenth Amendment eventually ended slavery in Kentucky, despite firm opposition from the Kentucky state legislature,[44] and in 1866 Kentucky passed a Civil Rights Act that finally repealed the old Kentucky slave code.[45] As one contemporary commentator put it, "Kentucky's head was with the Union and her heart was with the South."[46]

It was here, in the great state of Kentucky, that Brandeis observed the vulgar reality of American racist ideology. The Brandeis family did not actively participate in the Kentucky slavocracy. Most of Brandeis' family members supported the Republican Party, and some even considered themselves abolitionists.[47] Brandeis' uncle, Lewis Naphtali Dembitz, was the most liberal member of the Brandeis family.[48] Young Louis took after his abolitionist uncle, and later incorporated his uncle's last name into his own.[49] Although Brandeis never engaged in any overtly abolitionist activity, one can fairly assume that he shared the family's liberal disposition toward matters of race. For example, young Brandeis reportedly aligned himself with the Republican Party at an early age.[50] In the years immediately following the War, the Brandeis family refused to indulge in the "polite racism" developing in Brandeis' hometown of Louisville[51] and joined other liberal whites in an effort to respond to "the social needs and aspirations of their city's expanded black community."[52] These formative experiences appeared to have had some influ-

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42. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 37 (1988). During the Civil War, more than 200,000 blacks were held in bondage in Kentucky. *See* PAPER, *supra* note 3, at 10. In exchange for siding with the Union during the war, Kentucky was permitted to remain a slave state. *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 198 (1974).

43. *See* FONER, *supra* note 42, at 37.

44. *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 568 (1935); *see also* FONER, *supra* note 42, at 37; VICTOR B. HOWARD, BLACK LIBERATION IN KENTUCKY: EMANCIPATION AND FREEDOM 1862-1884, at 72-90 (1983); E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY 258-280 (1926). Kentucky's resistance to emancipation did not mean that blacks did not find other avenues to freedom during the Civil War. As one commentator points out, many slaves and their families were emancipated pursuant to congressional acts and military orders as a result of having enlisted in the Union army. *See* FONER, *supra* note 42, at 8.

45. *See* DUBOIS, *supra* note 44, at 568.

46. BASKERVILLE, *supra* note 3, at 54 (quoting an article dated 25 December 1868, as reprinted in THE EDITORIALS OF HENRY WATTERSON 21 (Arthur Krock ed., 1923)).

47. *See* PAPER, *supra* note 3, at 7; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 7; *but see* BASKERVILLE, *supra* note 3, at 55-56 (suggesting that the Brandeis family's supportive gestures evinced mere sympathy and paternalism).

48. *See* GAL, *supra* note 3, at 2-3.

49. *Id.* at 1; PAPER, *supra* note 3, at 13; *but see* BASKERVILLE, *supra* note 3, at 195 (referring to "Dembitz" as part of his given name).

50. *See* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 7.

51. BASKERVILLE, *supra* note 3, at 55.

52. *Id.*

ence on his later outlook on life. Indeed, when interviewed about his childhood, Brandeis went to great lengths to establish the fact that the Brandeis household was staffed with Negro *servants* and not slaves.[53]

Following the Civil War, Brandeis witnessed firsthand state efforts to create a racial caste society sanctioned by law. Because Kentucky was a border state, it was never controlled by the Republican Party as part of the Southern Reconstruction.[54] Thus, while the former confederate states struggled to undo the racial progress obtained by blacks during the period following federal occupation, Kentucky and other border states simply continued the process of subjugating blacks by further entrenching existing black codes and other institutionalized forms of legal segregation. For instance, as early as 1872, Kentucky had enacted a statute which barred blacks from testifying in court.[55] Kentucky, which initially made no effort to provide public education for black children, subsequently ordered separate public schools built for black children, to be funded exclusively by taxes paid by black citizens.[56]

The Knights of the White Cameilia and Ku Klux Klan—the two most powerful white supremacist secret orders at that time—also flourished in Kentucky. As in the other states, the Cameilia and Klan terrorized blacks in an effort to discourage their participation in politics.[57] Nevertheless, Brandeis' hometown of Louisville, Kentucky remained a popular locale for African-American progressive activity. For instance, on July 18, 1869, Louisville hosted a Negro Convention attended by 250 delegates who discussed such topics as "the abolition of the relics of slavery, equal education, the rights of the courts, equal taxation, the ratification of the Fifteenth Amendment, and the purchase of real estate."[58]

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53. *See* MASON, *supra* note 3, at 24.

54. *See* FONER, *supra* note 42, at 421.

55. *See* DUBOIS, *supra* note 44, at 568; COULTER, *supra* note 44, at 340. *See generally* Victor Howard, *The Black Testimony Controversy in Kentucky, 1866-1872*, 58 J. NEGRO HIST. 140 (1973).

56. *See* FONER, *supra* note 42, at 422.

57. *See* FRANKLIN, *supra* note 42, at 327. In the twenty years preceding the twentieth century, "lynching attained the most staggering proportions ever reached in the history of that crime." WOODWARD, *supra* note 10, at 43. Kentucky was no exception. The lynching of two young black men in Shelbyville, Kentucky was described in a 1911 Special Report to the Chicago Tribune:

> Just at sunrise this morning two local Negroes took the hemp cure for propensity to insult white women. . . . An unusual feature of this lynching was that the two young Negroes who were strung up for insulting white girls, both broke the rope by which they were suspended. Each made a dash for safety and was riddled with bullets, although one of the bodies has not yet been discovered, and the suspicion is that he crawled to some underbrush to die. The mob numbered only twenty men, all masked.

The Story of One Hundred Lynchings, *in* NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, at 19 (1919). In a separate lynching that same year, a white mob in Kentucky abducted a black charged with murder and charged admission to witness the hanging. *See* DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 119 (1991). Certain attendees paid additional sums of money for the privilege of firing bullets into the victims' bodies. *See id.*

58. CHARLES WESLEY, NEGRO LABOR IN THE UNITED STATES, 1850-1925, at 173 (1927).

In 1870, with a black population of nearly fifteen percent,[59] Louisville became the site of early protest movements to integrate urban streetcars.[60]

By the time nineteen-year-old Louis Brandeis entered Harvard Law School in 1875, many of the nation's public and private institutions had already begun the process of perfecting the marginalized status of historically free and recently-emancipated American blacks. The Reconstruction Amendments and newly enacted federal Civil Rights Acts of 1866, 1871, and 1875 had done much to extend basic liberties and civil protections to blacks.[61] By 1875, however, courts had already begun to undermine these early advancements.

The Supreme Court delivered its first blow against Negro equality in *The Slaughterhouse Cases*.[62] The Court's decision in that case drew a sharp distinction between state and national citizenship, and held that the Fourteenth Amendment protected against the infringement of rights derived only from the latter, such as the right to use navigable waters of the United States, the right to run for federal office, and the right to federal protection while on the high seas or traveling abroad.[63] All other rights were said to be derived from and protected by the several States and therefore did not come within the purview of the Fourteenth Amendment.[64]

The Court continued to run roughshod over the rights of African-American citizens in *United States v. Cruikshank*,[65] rendering a decision which left little doubt as to the direction of the Court's jurisprudence on race relations. In *Cruikshank*, the Court overturned the convictions of two white men who had been found guilty of lynching two black men in

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59. *See* BASKERVILLE, *supra* note 3, at 53.

60. *See* FONER, *supra* note 42, at 369; *see also* Marjorie M. Norris, *An Early Instance of Non-Violence: The Louisville Demonstrations of 1870-78*, 32 J.S. LEGAL HIST. 487, 496-503 (1966).

61. The Civil Rights Act of 1866 constituted a bestowal of citizenship rights, duties, and obligations upon African-Americans. The Act affirmed and delineated the scope and contour of full citizenship for formerly free and newly emancipated blacks, including: the right to enforce contracts; to sue in courts of law; to possess and dispose of real property; to enjoy equal protection of the laws; and to be subject to equal punishment under law. *See* 42 U.S.C.A. § 1981 (1994). The Civil Rights Act of 1871—also known as the Ku Klux Klan Act—was enacted by Congress in response to the widespread terrorism against blacks and white northerners residing in southern states. The Act made it unlawful to "conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws," and allowed persons to seek civil damage awards against law enforcement officers who failed to enforce the provisions of the Act. *See* 42 U.S.C. §§ 1981, 1985 (1994). In many ways, the passage of the Civil Rights Act of 1875 represents the final gasp of legislative efforts during Reconstruction. The Act of 1875 had three basic aims: (1) to secure equal enjoyment of inns and other public accommodations; (2) to provide for civil damages if such discrimination were to occur; and (3) to establish the right of blacks to serve as jurors in court cases. *See* 18 U.S.C. § 243 (1994).

62. 83 U.S. (16 Wall.) 36 (1873).

63. *Slaughterhouse Cases*, 83 U.S. at 79-80.

64. *See id.* at 80.

65. 92 U.S. 542 (1876). The Coalfax Massacre has been described as "the bloodiest single act of carnage in all of Reconstruction." FONER, *supra* note 42, at 530.

the Coalfax Massacre of 1872.[66] The Court found that the federal statute under which the men had been convicted required proof of racial motive, which prosecutors had curiously failed to present at trial.[67] Thus, the Court declared that the defendant's conduct did not constitute acts punishable by federal authority.[68] If that were not enough, the Court, perhaps sensing an opportunity to strike a far greater blow against all black Americans, went on to declare that the Reconstruction Amendments provided only for federal punishment of *state* transgressions, and that punishment of terrorist acts perpetrated by private individuals would be left to the States.[69] As one historian sadly recounts, the *Cruikshank* decision "rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law."[70]

Young Brandeis therefore came of age during a time when anti-Negro sentiment was on the rise, and legal protections for blacks were being narrowly construed by the highest court in the land. Not surprisingly, the marginalization and stigmatization of blacks quickly gained in popularity in every region of the country, even in traditionally liberal cities such as Boston, Massachusetts. In the final decades of the nineteenth century—the period in which Brandeis established himself as an upstanding member in Boston's Brahmin society[71]—the city of Boston was becoming increasingly racially stratified. During the mid-1800s, black Bostonians mounted a legal challenge to segregation in Boston public schools.[72] Their efforts resulted in the first articulation by a court of the "separate-but-equal" doctrine[73]—the same doctrine that would gain infamy when applied to public transportation in *Plessy v. Ferguson*.[74] By the time Brandeis arrived in Boston, segregation had already

66. *See Cruikshank*, 92 U.S. at 547-49.

67. *Id.* at 555-56.

68. *See id.* at 555-59. For a discussion of *Cruikshank* and how the case fits into the Supreme Court's jurisprudence concerning federal prosecutions of racially motivated violence, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 50-58 (1997).

69. *See Cruikshank*, 92 U.S. at 555-56.

70. *See* FONER, *supra* note 42, at 531.

71. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 4-5 (1981) (discussing the observation by Brandeis' friend and original law partner, Sam Warren, that as a young man Brandeis was "more Brahmin than the Brahmins"). The evolution of Brandeis' politics and his abiding belief that law must reflect social necessities, however, ultimately led him to abandon the more staid features of Brahmin society. As Phillipa Strum writes:

> A break with the Brahmins was inevitable once Brandeis became uncomfortable with the emphasis the law placed on the protection of property and the limited role this left for the lawyer, as well as with the assumption that answers to all the political-legal problems could be found in the intentions of the Constitution's authors.

STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 56.

72. *See* Kenneth S. Tollett, *Universal Education, Blacks and Democracy: The Expansion and Contraction of Educational Opportunities*, *in* RACE: TWENTIETH CENTURY DILEMMAS—TWENTY-FIRST CENTURY PROGNOSES 49, 60 (Winston A. Van Horne ed., 1989).

73. BLACK'S LAW DICTIONARY 1369 (7th ed. 1999).

74. *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 205, 209 (1849) ("[P]rejudice, if it

begun to permeate most aspects of public and private life. Residential neighborhoods became increasingly segregated, as black enclaves were dubbed "Nigger Hill" and "New Guinea."[75] The expansion of the segregation regime occasionally resulted in discrimination against Jews. Such was the case in 1877, when Joseph Seligman, an immigrant German-Jewish banker, was denied accommodations at "a certain fashionable Northern WASP hotel."[76]

Despite bearing witness to all sorts of ritual degradation of African-Americans, Brandeis' personal interactions with blacks suggest that he never accepted the ideology of racial malice that permeated the dominant culture. Stephen Baskerville relates the following story of Brandeis' interaction with Lizzie, the black cook for the Brandeis family, while young Brandeis was on vacation from Harvard Law School, in Lizzie's own words:

> [A]nd there was Mr. Louis lying flat on his back on the sand. I said, 'Why ain't you in bathing, Honey?' An' he said, 'I'm waiting for you, Lizzie.' 'Go on,' I said. 'I ain't goin' in. I'm afraid o' the salt water.' 'That's all right,' he said. 'I won't let it hurt you. An' I ain't goin' in one step until you come along.' So, rather than have him lose the nice swim he enjoyed so much, I jes' had to go and put on that bathing suit, and he led me in just like I was a fine lady.[77]

Although it is unclear whether Brandeis' conduct was indicative of a belief in racial egalitarianism or simply reflective of a certain level of comfort implicit in the master/servant relationship, it seems fairly certain that Brandeis appreciated the importance of treating the black persons with whom he interacted with civility and respect.

The shadow of race followed Brandeis into the legal profession. As Brandeis' legal career gained momentum, so too did the countrywide effort to return African-Americans to a servile caste. It was during this time that Brandeis championed a number of public causes that would form the basis of his reputation as the "people's attorney."[78] Meanwhile, the Supreme Court and local officials seized every opportunity to un-

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exists, is not created by law, and probably cannot be changed by law."). *Cf.* Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) ("[Plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. . . . Legislation is powerless to eradicate racial instincts . . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

75. *See* WOODWARD, *supra* note 10, at 19.

76. HAROLD CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL 479 (1967). Cruse notes that "[t]his incident, among others of less notoriety, alerted such Jewish groups as B'nai B'rith to the fact that the status of American Jewry was then less than secure." *Id.*

77. *See* BASKERVILLE, *supra* note 3, at 89-90.

78. *See* discussion *supra* text accompanying notes 21-34.

dermine the core principles of the Reconstruction Amendments and sympathetic federal legislation. As the nineteenth century drew to a close, the Supreme Court's ruling in the *Civil Rights Cases*,[79] *Plessy v. Ferguson*,[80] and *Williams v. Mississippi* [81] became "tokens of hard and present truths and signs of things to come—of the surety of white supremacy and the futility of black resistance."[82]

The dawn of the twentieth century signaled the blossoming of race prejudice into the elaborate segregation regime that would survive nearly sixty years. African-Americans became both the object of popular and intellectual curiosity, and the target of hate and scorn. In intellectual circles, it was now *en vogue* to be a scientific racist.[83] Late nineteenth century social Darwinism gave birth to the popular Eugenics movement, exemplified in "scholarly" works such as Charles Josey's *Race & National Solidarity* and Lothrop Stoddard's *The Rising Tide of Color Against White World Supremacy*.[84] Another set of works focused on the lack of social development in the African-American population. The first of these books was Charles Carroll's *Is the Negro a Beast, or in the Image of God?*, in which the author argues that African-Americans were not only a separate species from all other human races, but that they lacked "a soul" and thus should be classified as belonging to the species of apes.[85] The enormity of social distance between African- and Euro-Americans would cause William Graham Sumner, in his classic work *Folkways*, to lament the "vain attempts . . . to control the new [racial] order by legislation" following the Civil War.[86] Folkways would ultimately prevail over stateways, or laws, that attempted to change social mores—"what any one thinks ought to be, but slightly affects what, at any moment, is."[87] Likewise, Madison Grant declared in *The Passing of*

79. 109 U.S. 3 (1883) (invalidating the public accommodations section of the Civil Rights Act of 1875 and establishing the "state action" requirement for Fourteenth Amendment violations).

80. 163 U.S. 537 (1896) (finding segregation of Louisiana railroad cars permissible under the Constitution, and inaugurating national policy of "separate but equal").

81. 170 U.S. 213, 224 (1968) (upholding the constitutionality of a Mississippi voter qualification scheme that included, among other things, the imposition of a poll tax and literacy tests administered by local officials). The Court conceded that these provisions operated to the detriment of African-Americans en mass, but found no constitutional violations because "the operation of [these provisions] is not limited by their language or effects to one race [and reaches] weak and vicious white men as well." *Williams*, 170 U.S. at 222.

82. JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 225 (1984).

83. Intellectual circles, at that time, were quite small, and it is highly likely that Brandeis would have come into contact with these ideas. One need only look as far as his colleague on the Court, the great Justice Oliver Wendell Holmes. For details on Holmes' notorious racial and ethnic views, see sources listed *supra* note 9.

84. LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY (1922).

85. CHARLES CARROLL, IS THE NEGRO A BEAST OR IN THE IMAGE OF GOD? (1900).

86. WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 77-78 (1906).

87. *Id.* at 78. This central proposition that "stateways" cannot change "folkways" also leads

the Great Race that blacks had proven themselves incapable of civilization and that intellectuals should dedicate themselves to "rousing fellow Americans to the overwhelming importance of race and to the folly of the Melting Pot."[88] In some instances, bigoted "scientific" evidence was explicitly relied upon by state officials when defending segregation laws against legal challenges.[89]

Frequently, however, mainstream social commentators took a more hateful approach, which reflected both a fascination with and profound loathing of Americans blacks. No person's work greater exemplified this horrific tradition than that of Thomas Dixon, Jr. Dixon's first book, *The Leopard's Spots* encapsulates the core principles of early twentieth century anti-Negro mythology. For instance, one of Dixon's characters observes: "One drop of Negro blood makes a Negro. It kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions."[90] Dixon followed this early success with *The Clansman: An Historical Romance of the Ku Klux Klan*, which was eventually converted into a screenplay for the cinematic breakthrough *The Birth of a Nation*.[91] One historian characterized Dixon's works as "orgies of hatred" in which "[h]is Negro characters, when they were not clowns, all seemed to be either contemplating or swiftly fleeing after the rape of a white woman."[92] *The Birth of a Nation* met with immediate popular success, and was a favorite among Southerners, including President Woodrow Wilson and Edward White, then Chief Justice and former member of the Ku Klux Klan.[93] Indeed, Wilson screened the film at the White House for "the Chief Executive and the Cabinet and their families," after which Wilson is said to have remarked that Griffith's film was "like writing history with lightning . . . and my only regret is that it

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Sumner to conclude that the American institution of slavery has "dominated and given tone and color" to all social mores, and that, because slavery has become a part of our folkways, "no philosophical dogmas can prevent its reintroduction if economic changes should make it fit and suitable again." *Id.* at 262, 266.

88. *See* MADISON GRANT, THE PASSING OF THE GREAT RACE xxvii (1916).

89. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917). The state's use of this kind of social science data is discussed briefly *infra* text accompanying notes 274-84.

90. THOMAS DIXON, JR., THE LEOPARD'S SPOTS: A ROMANCE OF THE WHITE MAN'S BURDEN, 1865-1900, at 244 (1902).

91. GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW 43, 67 (1996).

92. KLUGER, *supra* note 11, at 85. Dixon's images arguably whet the appetites of many whites already predisposed to commit violence against blacks. *See* Angela Y. Davis, *Rape, Racism, and the Myth of the Black Rapist*, *in* WOMEN, RACE & CLASS 172-201 (1983) (describing the ways in which accusations of rape were used to justify lynchings and other forms of oppression against black men). In most instances, however, the reasons for lynching blacks had more to do with perceived disrespect toward white men. *See* DONALD L. GRANT, THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA 160 (1993) (listing typical reasons for lynchings as insulting whites or disputing their word, living with a white woman, being lazy, using inflammatory language, and throwing stones); NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889-1918, at 10 (1919) (finding that rape was not even alleged in seventy-one percent of the 3224 recorded lynchings that occurred during the previous thirty years).

93. *See* DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 26-27 (3d ed. 1981).

is all so terribly true."[94]

In the midst of this burgeoning atmosphere of near-universal contempt for black Americans, Brandeis, a newly-appointed Associate Justice to the United States Supreme Court, arrived in Washington, D.C.,[95] where he would become all the more familiar with the brute facts of American racism. At that time, Washington, D.C., which was segregated during the Wilson years and remained segregated until the Eisenhower administration,[96] resembled more of a Southern town than an actual city.[97] On one occasion, Brandeis, then living in a segregated neighborhood, apparently caused quite a stir by allowing his black court messenger/family servant to use the building's main elevator rather than the back stairs set aside for coloreds.[98] Like many other urban centers at that time, the District of Columbia was experiencing race riots following World War I.[99] In July of 1919, white soldiers, later joined by armed white civilians, attacked a black neighborhood in Washington in response to a racially incendiary article printed in *The Washington Post* concerning "a naval employee's wife who was jostled by two blacks who tried to steal her umbrella."[100] The black residents, armed with guns of their own, fired back at their attackers and engaged in retaliatory raids of white neighborhoods as well.[101] The fighting lasted for four days.[102]

As racial tensions increased across the country, nationalist sentiment

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94. *Id.* at 26-27.

95. *See* PAPER, *supra* note 3, at 238-39 (noting that Brandeis received word that his nomination to the Supreme Court had been confirmed by the Senate on June 16, 1916, and assumed his duties in Washington four days later).

96. *See* George C. Osborn, *The Problem of the Negro In Government, 1913*, 23 HISTORIAN 330, 332-39 (1961) (discussing the adoption of a segregation plan for all government workers); Henry Blumenthal, *Woodrow Wilson and the Race Question*, 48 J. NEGRO HIST. 1 (1963) (discussing segregation and racism in the government during the Wilson years); Cleveland M. Green, *Prejudice and Empty Promises: Woodrow Wilson's Betrayal of the Negro, 1910-1919*, 87 CRISIS 380 (1980) (discussing Wilson administration as the low point in American race relations).

97. *See* WOODWARD, *supra* note 10, at 138.

98. *See* BASKERVILLE, *supra* note 3, at 286.

99. *See* CONSTANCE M. GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITOL 190-94 (1967); *see also* TYLER STOVALL, PARIS NOIR: AFRICAN AMERICANS IN THE CITY OF LIGHT 28 (1996) (discussing race riots in cities following the return of black servicemen from overseas).

100. MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 145 (1971).

101. *Id.* at 146.

102. *See id.* at 145-46. For a more comprehensive account of the Washington Riot of 1919, see ARTHUR I WASKOW, FROM RACE RIOT TO SIT IN, 1919 TO THE 1960S, 21-37 (1966). Many of the riots appeared to be triggered by white reactions to increased social militancy by blacks, especially black soldiers. Having fought to preserve democracy overseas, black soldiers felt frustration and dismay at the fact that not much had changed at home. *See* JAMES GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOLDIERS, AND THE GREAT MIGRATION 178-79 (1989); NEIL R. MCMILLEN, BLACK MISSISSIPPIAN IN THE AGE OF JIM CROW 303 (1989); *see also* STOVALL, *supra*, at 99. As a result, black soldiers were a frequent target of lynch mobs. *See, e.g.*, MCMILLEN, *supra*, at 306 (noting that at least three of the twelve men lynched in Mississippi in 1919 were black soldiers).

rose among black Americans, culminating in the "Back to Africa!" movement led by Marcus Garvey.[103] That sentiment would not have gone unnoticed to Brandeis, who himself became an active member in the Jewish Zionist movement around the same time. Brandeis, who came to Zionism out of his "deep solicitude for the spiritual and moral welfare of the Jews"[104] as well as his fundamental belief in the precepts of American democracy,[105] eventually embraced the more political agenda of "opening up Palestine to the masses."[106] This meant more than finding a place for the "mistreated Jews of Europe" to develop into self-made citizens.[107] For Brandeis, it meant creating a place "that could exemplify the values and lessons of Judaism and that could be pointed to as a model for Americans in their quest for a just society."[108] In 1914, Brandeis became chairman of the Provisional Executive Committee for General Zionist Affairs,[109] and as such, became the principal spokesman for the American Jewish Zionist movement. Brandeis surely must have known that images of alienation, exclusion, and marginalization—thematic material squarely within the Jewish Zionists repertoire—were equally relevant when describing the status of blacks in American life. The opposite was certainly true, for in 1920 Garvey announced:

> "[a] new spirit, a new courage, has come to us simultaneously as it has come to other peoples of the world. It came to us at the same time it came to the Jew. When the Jew said, "We shall have Palestine!" the same sentiment came to us when we said "We shall have Africa."[110]

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103. For a brief summary of the life and legacy of Marcus Garvey, see Lawrence W. Levine, *Marcus Garvey and the Politics of Revitalization*, *in* BLACK LEADERS OF THE TWENTIETH CENTURY 105-38 (John Hope Franklin & August Meier eds., 1982) [hereinafter BLACK LEADERS]. For a more detailed account, see generally EDMUND D. CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (1962). A finely edited compilation of Garvey's own writings is PHILOSOPHY AND OPINIONS OF MARCUS GARVEY (Amy Jacques Garvey ed., 1969).

104. *See* BASKERVILLE, *supra* note 3, at 201.

105. *See* GEOFFREY WHEATCROFT, THE CONTROVERSY OF ZION: JEWISH NATIONALISM, THE JEWISH STATE, AND THE UNRESOLVED JEWISH DILEMMA 125 (1996). Brandeis provided the following insight:

> My approach to Zionism was through Americanism . . . . In time, practical experience and observation convinced me that Jews were by reason of their traditions and their character peculiarly fitted for the attainment of American ideals. Gradually, it became clear to me that to be good Americans we must be better Jews, and to be better Jews we must become Zionists.).

Id.

106. *Id.* at 202.

107. STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 247.

108. *Id.*

109. *Id.* at 248.

110. ROBERT G. WEISBORD & RICHARD KAZARIAN, JR., ISRAEL IN THE BLACK PERSPECTIVE 16 (1985).

The maltreatment of blacks in America would continue to have collateral effects on Brandeis' life throughout the remainder of his career. His nomination to the Supreme Court would stall in the Senate amid rumors that Brandeis was sympathetic to blacks.[111] Later, while serving as an Associate Justice on the Supreme Court, Brandeis would hear case after case filed by African-Americans seeking redress for racial injustice.[112] NAACP officials as well as his colleague and protégé Felix Frankfurter would periodically solicit Brandeis' views on how to best address the civic inequality of blacks.[113] In this way, Brandeis would be reminded how race and racism made life for African-Americans tragically different from his own.

II. WHAT THE "PEOPLE'S ATTORNEY" DID AND DID NOT DO FOR INTER-ETHNIC RELATIONS BETWEEN AFRICAN-AMERICANS AND EURO-AMERICANS

A. Brandeis the Practitioner

Although the public-centered legal efforts undertaken by Brandeis during his years as a practitioner are well documented, not much has been written about Brandeis' position or activities with respect to racial issues. Perhaps this is because Brandeis generally avoided the subject of race during the years he practiced law. Not once did Brandeis claim to represent "negro interests;" nor did he take up the mantle of their cause surreptitiously. Perhaps the most direct involvement Brandeis had with the race question occurred one year prior to his Supreme Court confirmation hearings when he was approached by his colleague Chapin Brinsmade, an attorney for the NAACP. Brinsmade solicited Brandeis' input on the issue of segregation on railroad cars.[114] Brandeis declined to provide direct assistance, "pleading pressure of other business."[115] However, Brandeis later wrote to Brinsmade and suggested that the NAACP may wish to file a formal petition with the Interstate Commerce Commission "seeking redress for failure to provide reasonable accommodations on such railroad cars as appeared to be particularly serious offenders."[116] Brandeis would subsequently qualify the significance of this advice:

I should greatly doubt whether the ICC would, upon the filing of

111. This matter is dealt with in more detail at *infra* text accompanying note 124.
112. *See* discussion *infra* text accompanying notes 162-244.
113. The substance of these conversations is discussed in more detail *infra* Part II.A.
114. *See* BASKERVILLE, *supra* note 3, at 286.
115. *Id.*
116. *See* LETTERS OF LOUIS D. BRANDEIS 305 (Melvin I. Urofsky & David W. Levy eds. 1973) [hereinafter BRANDEIS LETTERS].

> a formal petition, enter upon a general investigation of conditions of service to colored people on interstate trains . . . . After the presentation of a number of such petitions, the Commission might be induced to undertake a general investigation, but I should greatly doubt whether it would do so in the first instance.[117]

Phillipa Strum, a prominent Brandeis biographer, identifies one other occasion in which Brandeis was to have "suggested action to eliminate discrimination and enhance racial equality" to both his colleague Felix Frankfurter, and then-president of Howard University Mordeci Johnson, although the specifics of Brandeis' suggestion are not reported.[118]
Some additional evidence of Brandeis' public views on the race question can be found in a speech he delivered on July 4, 1915 entitled "True Americanism."[119] In that speech, Brandeis made an interesting observation about America that provides some insight into his personal views on the race question:

> Other countries, while developing the individual man, have assumed that their common good would be attained only if the privileges of their citizenship could be limited practically to natives or to persons of a particular nationality. America, on the other hand, has always declared herself for equality of nationalities as well as full equality for individuals. It recognizes racial equality as an essential of full human liberty and true brotherhood, and that racial equality is the compliment of democracy.[120]

Although not addressing the race question explicitly, Brandeis appeared to suggest that his concept of America embraced modern liberal notions of freedom and racial equality. Brandeis went on to comment, "[t]he new nationalism adopted by America proclaims that each race or people, like each individual, has the right and duty to develop, and that only through such differentiated development will high civilization be attained."[121] Again, Brandeis seems to have advocated a vision of America that promotes the social, political, and economic growth of all its constituents, including African-Americans. It would appear, then, that Brandeis is offering a subtle critique of America's dramatic failure to live up to what he believes to be its "true" promise of equality for all races.

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117. *Id.*
118. STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 141-42; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 332-33.
119. Speech Delivered on July 4, 1915, *in* BRANDEIS ON ZIONISM 3-11 (Solomon Goldman, ed. 1942).
120. *Id.*
121. *Id.* at 11.

One also might interpret this speech conservatively as articulating a rather abstract belief that all people have the right and duty to develop under the current racial regime—separate but equal—sanctioned by the Supreme Court nearly two decades earlier in *Plessy v. Ferguson*.[122] After all, many of Brandeis' contemporaries believed that the system of "separate-but-equal" provided formal equality for blacks, although this contention would later be proven empirically false.[123] Thus, Brandeis might well have been highlighting this uniquely "American" achievement, and urging racial and ethnic minorities to "cast their bucket down" and flourish under the current segregation regime.

If Brandeis intended his speech to be a liberal critique of the *Plessy* regime and an affirmative statement in support of lifting constraints on racial and ethnic minorities, he would later retreat from this position and settle into what can only be described as an extended period of racial ambivalence. During the course of Senate confirmation hearings, meetings were halted based on a rumor in the Senate that Brandeis, if confirmed, would mount an attack on the "separate but equal" doctrine. George Nutter, who represented Brandeis during the hearings, wrote in a letter to Edward T. McClennon that Brandeis "has never expressed an opinion one way or the other on this subject, and as a matter of fact" that Brandeis "would approach it with an entirely open mind."[124]

Certainly Brandeis may have had many private, unreported conversations with various people regarding the plight of American blacks. But when compared with Brandeis' public efforts relating to maximum work hours for women, insurance for wage earners, labor issues in the New York garment industry, federal environmental policy, and pricing schedules for artificial gas consumers in the Boston area, there is little doubt that Brandeis' dedication to the public did not fully extend to African-Americans.

Of course, one must not forget that there was great risk associated with public advocacy of the "Negro" cause.[125] However, a substantial

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122. 163 U.S. 537 (1896)

123. For example, to galvanize public support for his campaign against segregation, Charles Houston traveled through South Carolina filming the disparities between white and colored public schools because he believed that "[m]otion pictures humanize and dramatize the discrimination which Negroes suffer much more effectively than any corresponding amount of speech could do. . . ." GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 140 (1983) (citations omitted). Houston would later present generous amounts of empirical data in the brief filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948), to highlight the various harms and inequities caused by segregated housing conditions. *See* KLUGER, *supra* note 11, at 253-54.

124. PAPER, *supra* note 3, at 237 (citations omitted). Brandeis' nomination was delayed for over three months; he was ultimately confirmed by a partisan vote of 47 to 22. *See* A.L. TODD, JUSTICE ON TRIAL 244 (1964).

125. The lack of mass participation is not surprising. Racial activism during this era was essentially the province of politicians, intellectuals, and professional elites. At least one commentator has suggested that contemporary "[b]ackground social, political, economic, and ideological forces created a climate within which judicial invalidation of a railway segregation law would have been dramatically countermajoritarian, and indeed virtually unthinkable." Michael J. Klar-

number of his white and Jewish contemporaries remained undeterred. Indeed, Justice Harlan's dissenting opinion in *Plessy v. Ferguson* made clear from the outset that not all intelligent minds were in accord on the issue of segregation. Although progress in American race relations had slowed dramatically by the turn of the century, the voice of dissent and liberal ferment continued to be heard. For example, the NAACP, established in 1910, consistently articulated a more enlightened and democratic approach to American race relations.[126] An important feature of this movement was that its personnel consisted of mainstream figures in the legal community.[127] As one commentator has written, "the white neoabolitionists of the NAACP were not exclusively exotic, marginal persons,"[128] but included the members of the American professional elite, such as Karl Llewellyn, a Columbia law professor,[129] Louis Marshall, President of the American Jewish Committee,[130] as well as "Moorfield Storey, a president of the American Bar Association, and Oswald Garrison Villard, an occasional advisor to President Woodrow Wilson."[131] Jewish participation in the NAACP was unusually robust: seven of the forty-five members of the NAACP's first general committee were Jewish, with four Jews serving on the thirty-member executive committee.[132]

Jews also participated heavily on the NAACP's legal committee.[133]

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man, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 887-88 (1988).

126. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1653 (1986).

127. *Id.*

128. *Id.*

129. Karl Llewellyn, one of the founding fathers of the Legal Realist movement, was an active supporter of the NAACP during the 1920s and 1930s and a self-proclaimed opponent of the segregation regime. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 124 (1973). In fact, the NAACP Board of Directors once asked Llewellyn to lead the NAACP's Legal Committee. 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE—THE DEPRESSION DECADE 221 (1978).

130. In addition to working on behalf of the NAACP in *Corrigan v. Buckley*, 271 U.S. 323 (1926), discussed *infra* text accompanying notes 169-73, Louis Marshall worked diligently against all forms of racial and religious discrimination. As one commentator observed, Marshall's defense of minorities resulted in multiple Supreme Court appearances "to challenge the California Alien Land Law, *Porterfield v. Webb*, 263 U.S. 225 (1923); to protect a Jew convicted by mob-controlled jury in Georgia, *Frank v. Mangum*, 237 U.S. 309 (1915); and to defend Catholic parochial schools in Oregon, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925)." CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 261 n.62 (1967).

131. Kennedy, *supra* note 126, at 1653. Storey, like Brandeis, attended Harvard Law School and established a lucrative legal practice in Boston, Massachusetts. VOSE, *supra* note 130, at 32.

132. MURRAY FRIEDMAN, WHAT WENT WRONG? THE CREATION AND COLLAPSE OF THE BLACK-JEWISH ALLIANCE 48 (1995). The National League on Urban Conditions, which later became the National Urban League, likewise grew out of a coalition between blacks, whites, and Jews. The Urban League evolved out of a committee established to improve city living conditions for blacks. Issac N. Seligman, a Jewish philanthropist who provided initial financial support, was named its first chairman. *See* GUICHARD PARRIS & LESTER BROOKS, BLACKS IN THE CITY: A HISTORY OF THE NATIONAL URBAN LEAGUE 34 (1971).

133. HASIA R. DINER, IN THE ALMOST PROMISED LAND: AMERICAN JEWS AND BLACKS, 1915-1935, at 122 (1977).

Indeed, Jews comprised nearly one-half of the committee well into the 1930s.[134] The efforts of well-known Jewish attorneys, such as Louis Marshall and Joel Spingarn, would be supplemented by the work of celebrated criminal attorney, Clarence Darrow.[135] For Marshall, whose work focused mainly on securing voting rights for disenfranchised blacks, advocacy on behalf of African-Americans was directly relevant to his experience as an American Jew.[136] When asked to participate in debate on whether Jews should speak out against black disenfranchisement, Marshall responded that such a debate was unnecessary in the Jewish community because it would be absurd for Jews, who come from a tradition of oppression where their own ancestors were denied the franchise, to even debate the issue of disenfranchising any citizen of this country.[137]

Although Marshall had been the most active and effective NAACP lawyer in the 1920s, it was Spingarn who gained the most notoriety. Spingarn, who played a significant role in *Guinn v. United States*,[138] a case in which the Supreme Court struck down Grandfather Clauses that prevented black citizens from voting in Maryland and Oklahoma,[139] and headed the legal team in *Buchanan v. Warley*,[140] would later assume the chairmanship of the NAACP, where he continued to aggressively pursue progressive racial policy.[141] In addition, Jewish attorneys otherwise not affiliated with the NAACP would occasionally offer their services. For example, Joseph Brodsky and Samuel Liebowitz, two Jewish attorneys, were enlisted by the NAACP to represent the nine defendants in the *Scottsboro Boys* cases.[142] Liebowitz fought the case through the appellate courts and ultimately prevailed before the Supreme Court.[143]

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134. *Id.*

135. Although Darrow thought of himself as "colorblind," he understood that African-Americans were often singled out for especially poor treatment in American society and therefore endeavored to provide "all the extra assistance he could give them." MIRIAM GUNKO, CLARENCE DARROW 77 (1965); *see also* ARTHUR WEINBERG & LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 21 (1980) (describing Clarence Darrow as "an early protagonist in the fight for black equality"). The *Ossian Sweet* case—the most notable trial undertaken by Clarence Darrow on behalf of the NAACP—is discussed *infra* note 261 and accompanying text. For a more detailed account of Darrow's involvement in the *Sweet* case, see GUNKO, *supra*, at 234-42. For a brief commentary regarding Darrow's withdrawal from the *Scottsboro Boys* case—discussed *infra* text accompanying notes 187-195—see WEINBERG & WEINBERG, *supra*, at 366-67.

136. DINER, *supra* note 133, at 122-23.

137. *See* 1 LOUIS MARSHALL, CHAMPION OF LIBERTY: SELECTED PAPERS AND ADDRESSES 425-26 (Charles Reznikoff ed., 1957).

138. 238 U.S. 347 (1915).

139. *Guinn*, 238 U.S. at 367.

140. 245 U.S. 60 (1917). This case is discussed in detail *infra* text accompanying notes 162-68.

141. Spingarn's radical approach included joining the fight against the stereotyping of blacks in the movies. Acting on behalf of the NAACP, Spingarn publicly denounced the controversial film *The Birth of a Nation* and petitioned the National Board of Censorship in Moving Pictures to ban the film. FRIEDMAN, *supra* note 132, at 67.

142. Powell v. Alabama, 287 U.S. 45 (1932).

143. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 156-58, 161-

These and other positions established by the growing number of sympathetic Euro-American elites stood in marked contrast to America's chronically racist disposition.[144] However, it should be noted that these purported "radical" measures being undertaken on behalf of African-Americans were nothing more than the logical extension of early twentieth century liberal legal thought into the field of race. In many ways, these visionaries represent the best of their era in terms of expanding the liberal political imagination in the face of crude and overt expressions of brute racism. Against this backdrop of deeply ingrained prejudice and liberal ferment, one can only conclude that Brandeis' individual contribution to racial progress was curiously deficient.

B. Brandeis the Jurist

Brandeis' conspicuous evasion of public issues affecting African-Americans continued throughout his tenure on the Supreme Court. Outside of the courtroom, Brandeis remained publicly noncommittal on racial issues. Nevertheless, there is evidence to suggest that Brandeis remained well-informed of the ongoing struggle for racial equality. In 1929, W.E.B. DuBois, then serving as editor of the NAACP journal *The Crisis*, solicited Brandeis for a written contribution.[145] Brandeis later declined that request in the following letter: "My Dear Mr. DuBois: To my regret, judicial duties preclude compliance with your courteous request. I recall with pleasure our meeting at Mrs. Glendower Evans' house many years ago and have watched ever since your work on behalf of your people."[146]

Brandeis was also rumored to have been quite exasperated by the *manner* in which civil rights cases were brought before the court, claiming that a number of civil rights cases may have been lost because of flawed preparation and presentation. The statement, attributed to Brandeis by lawyer and historian Jack Greenberg, is that Brandeis claimed that he could "tell most of the time when I'm reading a brief by a Negro attorney."[147] This sentiment was apparently shared by DuBois, who once remarked that "[i]t has happened time after time, in case after

63, 235-41, 322-24 (1969).

144. Dissenting voices could also be heard in the press, which praised Supreme Court decisions that vindicated the rights of blacks and condemned those that did not. *See* Kennedy, *supra* note 126, at 1650-51 (citing, among others, as examples: the *Baltimore Evening Sun*'s condemnation of *The Grandfather Clause Cases* and the *New York Age*'s praise of the decision in *Buchanan v. Warley*).

145. Letter from Louis D. Brandeis to W.E.B. DuBois (Jan. 10, 1929), *in* 5 BRANDEIS LETTERS, *supra* note 116, at 365-66 & n.1.

146. *Id.* at 365.

147. JACK GREENBERG, CRUSADERS IN THE COURTS 5 (1994); *see also* VOSE, *supra* note 130, at 41 & n.67 (listing Allen Oliver, Chief Counsel for Equality, Life, June 13, 1955, at 141 as the primary source of the statement); 1 SITKOFF, *supra* note 129, at 217 (attributing similar statement to Louis Brandeis).

case [that the] negro has taken his cause before the Courts half prepared."[148]

But while Brandeis' comments seem to suggest some level of partiality, he nevertheless maintained his racial agnosticism inside the courtroom. Perhaps most revealing is the fact that the usually assertive Brandeis never authored an opinion in any of the race cases heard by the Court during his tenure. The absence of a written opinion in a race case deprives us of the most obvious means of appraising Brandeis' judicial philosophy on race. However, the essence of a judge's work is his decisions. It is through the making of decisions that a judge makes his true opinion most powerfully felt.[149] Despite the absence of a written opinion, then, one can still gain a sense of Brandeis' disposition toward racial issues by examining his voting record and the effect of the decisions he endorsed.[150]

The race cases decided during Brandeis' years on the Court dealt with essentially three issues: the attainment of civic equality, the right to vote, and the right to quality public education.[151] By the turn of the century, it was clear that the Reconstruction Amendments and Federal Civil Rights Acts were being interpreted by courts and local officials so as not to interfere with the creation of what W.E.B. DuBois contemporaneously described as "a distinct status of civil inferiority for the Negro."[152] In addition, African-Americans, having been afforded the right to political participation during Reconstruction, now witnessed a dramatic curtailment of both their political power and ability to exercise the franchise. Concerns over public education and, in particular, higher education for black youth, accented the belief shared by many African-Americans that education was essential to economic progress. American blacks, having been given a taste of freedom, inevitably resisted having that liberty severely curtailed and being reduced to a servile caste. Not surprisingly, such resistance occasionally resulted in a formal legal challenge, a few of which eventually arrived before the Supreme Court.[153]

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148. 1 SITKOFF, *supra* note 129, at 217.

149. As Judge Jerome Frank observed, "Often when a judge decides a case he simultaneously publishes an essay, called an opinion, explaining that he used an old rule or invented a new rule to justify his judgment. *But no matter what he says, it is his decision which fixes the legal positions of the litigants.*" JEROME FRANK, LAW AND THE MODERN MIND 126 (1930) (emphasis added).

150. It is true, of course, that a vote is severely opaque, and that without an opinion, the underlying reasoning is masked. The same is not true for the *consequences* of such a vote, however. Votes translate into a decision, and the effects of that decision—on private litigants and on the public—are real.

151. *See* discussion *infra* accompanying notes 162-244.

152. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 53 (1903).

153. Both the number of cases involving blacks that the Supreme Court agreed to hear and the percentage of favorable outcomes for black litigants increased dramatically after 1937—one year before Brandeis left the Court. *See* 1 SITKOFF, *supra* note 129, at 217. Of course, this increase had less to do with Brandeis' departure and more to do with momentum gained in the freedom movement itself.

The civic equality cases during this time were typically challenges to racial restrictions on the disposition of property or claims in which the litigant was purportedly denied equal treatment by state officials or courts of law.[154] Voting rights cases during this time consisted mainly of challenges to primary election in which only whites were allowed to vote.[155] The public education cases focused mainly on the disparity between schooling opportunities provided for whites and "coloreds."[156]

The first thing one notices upon reviewing Brandeis' voting record is that he voted *with the majority* in every race case presented before the Court.[157] The impact of the Court's jurisprudence on the contours of American race relations during this period was mixed at best. Some of the decisions were indeed progressive. Others were simply disastrous. Yet there appears to be a trend that emerges from these decisions insofar as the Court's dispositions in race cases become increasingly liberal over time. One can also perceive the Court moving away from *individualized* relief and toward more *systemic* relief. With each consecutive year, rulings in which the Court sought to vindicate the rights of African-Americans increased in social and political impact, culminating in *Gaines v. Canada*[158]—a case which laid the groundwork for the Court's decision in *Brown v. Board of Education*.[159] Other rulings, however, had the effect of preserving the racial status quo or further entrenching essential components of the segregation regime. In this way, Brandeis and the other members of the Court effectively undermined what marginal gains they did provide by allowing fundamental aspects of racial oppression to remain intact.

What follows is a discussion of race cases heard by the Supreme Court during Brandeis' tenure. At the end of this discussion, I shall briefly contrast Brandeis' uncharacteristic silence on the issues raised in these cases with concurring and dissenting opinions filed by Brandeis in two cases involving non-racial civil liberties—*Whitney v. California*[160] and *Olmstead v. United States*.[161] This latter set of opinions make clear that Brandeis was willing to go quite far in the defense of certain rights of the public. Unfortunately, the liberty and equality interests of African-American citizens were not among those rights.

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154. *See* discussion *infra* text accompanying notes 174-202.
155. *See* discussion *infra* text accompanying notes 203-25.
156. *See* discussion *infra* text accompanying notes 226-44.
157. *See, e.g.*, Powell v. Alabama, 287 U.S. 43 (1932); Corrigan v. Buckley, 271 U.S. 323 (1926); Moore v. Dempsey, 261 U.S. 86 (1923); Buchanan v. Warley, 245 U.S. 60 (1917).
158. 305 U.S. 337 (1938).
159. 347 U.S. 483 (1954).
160. 274 U.S. 357 (1927).
161. 277 U.S. 438 (1928).

1. Racially-Restrictive Covenant Cases

The first race case in which the newly-appointed Justice Brandeis participated was *Buchanan v. Warley*,[162] a case in which Brandeis and the majority of the Court purportedly vindicated the civil rights of American blacks. In *Buchanan*, the Court unanimously agreed to strike down as unconstitutional a local ordinance that made it unlawful for any white or black person to move into and occupy as a residence any house upon any block upon which a greater number of houses were occupied by persons of the opposite color.[163] A white property owner challenged the statute on the ground that it impaired his ability to sell his house, which was situated in an exclusively white neighborhood, to a prospective black buyer.[164] The court held that the statute deprived the white homeowner of his right to dispose of his property without due process of law.[165] The Court reasoned that he should be able to dispose of his property to any prospective purchaser, regardless of race.[166]

Although this case appears at first blush to be a victory for racial equality, a closer inspection reveals that the true "winner" in this instance is not the potential black purchaser, but the white seller. By holding that the owner's right to dispose of his property had been impaired, the Court was asserting that the rights of individual whites are more fundamental and therefore "trump" the rights of a state to maintain a constitutionally sanctioned pigmentocracy via the exercise of police powers. In other words, the burden of maintaining separation between the races should not derogate the fundamental rights accorded to individual property holders—the right to use, exclude, and dispose of the property—without due process of law. Viewed in this light, it comes as little surprise that the decision was unanimous. Far from making a racial stand, the court simply afforded property owners—the overwhelming number of which are white—the sort of protection that Courts had traditionally afforded them.

A few commentators have suggested that *Buchanan* should be read more broadly as a racial victory of sorts. As Professor Beno Schmidt maintains:

> Contrary to the general impression among historians, *Buchanan* was not a decision that turned on property rights, with segregation merely the happenstantial, invalid restriction on the right to buy, sell, and occupy residential property. Had *Buchanan* in-

162. 245 U.S. 60 (1917).
163. *Buchanan*, 245 U.S. at 82.
164. *Id.* at 72-73
165. *Id.* at 82.
166. *Id.* at 81-82.

> volved a comparable nonracial restriction on a use of residential property deemed out of keeping with communal values, the power to regulate almost certainly would have been upheld. On the other hand, the segregation requirement certainly was not by itself a sufficient ground for unconstitutionality either. It was the combination of a racial restriction addressed to personal property rights of substantial importance—not so important as to be immune from regulation in any general sense, but important enough to withstand legislative policies looking to segregation—that produced the result in *Buchanan*.[167]

However one might interpret the *Court's* motives here, the *Buchanan* decision was perceived *by the public* at the time to represent a fairly dramatic victory for the Negro cause, and drew the ire of many whites.[168]

The rising tide of racial resentment was not lost on the Court, however. In *Corrigan v. Buckley*,[169] Justice Brandeis and the other members of the Court considered the question of privately-entered, publicly-enforced racially restrictive covenants, and the Court, reiterating its holding from the *Civil Rights Cases*,[170] declared that "the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.'"[171] According to the Court, the Fourteenth Amendment did not "prohibit[] private individuals from entering into contracts respecting the control and disposition of their own property. . . ."[172] Private citizens read between the lines of the Court's opinion in *Corrigan* and proceeded along a path of radical self-segregation. Thus *Corrigan* effectively neutralized the modest gains attained under the *Buchanan* decision by reinforcing a regime of residential apartheid that would remain legally intact for thirty years to come.[173]

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167. Beno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 903 (1982).

168. As Vose observed, the *Buchanan* decision "caused white supporters of residential segregation to rely upon judicial enforcement of racially restrictive covenants [which] where widely enforced by courts after 1918." VOSE, *supra* note 130, at 52. The constitutionality of racial restrictive covenants was initially upheld by the Supreme Court in *Corrigan v. Buckley*, discussed *infra* text accompanying notes 169-73, but was subsequently overturned in *Shelley v. Kraemer*, discussed *infra* note 173 and accompanying notes, and text accompanying note 284.

169. 271 U.S. 323 (1926). For a detailed discussion of the strategy employed by NAACP attorneys in *Corrigan*, see VOSE, *supra* note 130, at 52-54.

170. 109 U.S. 3 (1883).

171. *Corrigan*, 271 U.S. at 330.

172. *Id.*

173. In 1948 the Supreme Court, in the landmark decision *Shelley v. Kraemer*, 334 U.S. 1 (1948), held that court enforcement of racially restrictive covenants constituted improper "state action" that was violative of the Fourteenth Amendment's Due Process Clause. The enlargement of "state action" contemplated by the *Shelley* Court has been the subject of highly contentious debate. Indeed, *Shelley* has been called "one of the most controversial and problematical decisions in all of constitutional law." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1491 (1986).

2. *Due Process/Equal Protection Cases*

During Brandeis' tenure, the Supreme Court agreed to hear a number of cases in which litigants claimed to have been denied equal treatment by state officials and in courts of law.[174] In each of these cases, the Court found that the state had indeed violated the African-American litigant's right to procedural due process under the Fourteenth Amendment and afforded each litigant an individualized remedy.[175] *Moore v. Dempsey*,[176] also known as the *Elaine Riot Cases*, was the first in this line of cases. In *Moore v. Dempsey*, the Court was asked to review the convictions of five black men, each of whom had been sentenced to death.[177] The five men were thought to have been "ringleaders" in the Arkansas race riot of 1919, in which a white deputy sheriff was killed and another white person wounded.[178] Although African-Americans in Phillips County, Arkansas outnumbered Euro-Americans three to one, the five men were nevertheless indicted by an all-white grand jury and tried before all white juries.[179] The first trial lasted forty-five minutes.[180] The jury deliberated for five minutes and returned with a verdict of guilty of murder in the first degree, which carried with it a mandatory death sentence.[181] The remaining eleven defendants received similar treatment, each ultimately sentenced to death.[182] The defendants subsequently filed a writ of habeas corpus, in which they claimed that they had been deprived of due process under the Fourteenth Amendment in nearly every way imaginable.[183]

In a 7-2 decision, the Court overruled the lower court's dismissal of a writ of habeas corpus.[184] Brandeis, along with the majority, held that

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Like *Brown* and other early civil rights cases, *Shelley* was roundly criticized as an unprincipled decision. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959); *see also* ROBERT BORK, THE TEMPTING OF AMERICA 151-53 (1990). For early attempts to defend *Shelley*, see Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). For a contemporary defense of *Shelley*, see Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

174. *See* Moore v. Dempsey, 261 U.S. 86 (1923); Powell v. Alabama, 287 U.S. 45 (1932); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

175. *See* cases cited *supra* note 174.

176. 261 U.S. 86 (1923).

177. *Moore*, 261 U.S. at 87.

178. *Id.* at 87-89.

179. *Id.* at 89.

180. *Id.*

181. *Id.*

182. *Moore*, 261 U.S. at 89-90.

183. *Id.*

184. *See id.*

the petitioners' allegations sufficiently demonstrated that they were being deprived of their lives without due process of law.[185] Two years later, these five men—along with sixty-seven other blacks who had been coerced into pleading guilty and had received life sentences—were set free by the State of Arkansas.[186]

In *Powell v. Alabama*,[187] also known as the *Scottsboro Boys Case*, Justice Brandeis voted with the majority to overturn the conviction and sentencing to death of eight African-American youth for the alleged rape of two white girls.[188] The Court reasoned that in certain circumstances, an indigent accused of a capital crime has the right to a state-provided attorney.[189] The Court observed that the defendants in this case were "young, ignorant, illiterate, surrounded by hostile sentiment," and unable to obtain counsel.[190] The Court concluded that the trial court's failure to make an effective appointment of counsel to aid the defendants in preparing and presenting their defense constituted a denial of defendants' right to due process of law under the Fourteenth Amendment and remanded the case back to the trial court.[191]

The defendants were subsequently retried and convicted, and three years later, the Court reversed the second conviction.[192] In a unanimous decision, the Court reversed the conviction on the ground that the State of Alabama had denied defendants due process of law on account of their race.[193] An Alabama statute at the time was being interpreted by state authorities to exclude blacks consistently from participating as grand or petit jurors in the criminal trials of other blacks.[194] The court held that this statute violated the Equal Protection Clause of the Fourteenth Amendment and denied defendants a fair trial.[195]

The Court was also presented with a case involving the protection of African-American employees' civil rights in the workplace. In *New Negro Alliance v. Sanitary Grocery Co.*[196] Justice Brandeis voted with the majority to reverse a lower court decree and hold that the Norris-LaGuardia Act covered a labor dispute in which the New Negro Alliance picketed to persuade the owners of a District of Columbia Store to hire blacks in their large chain of stores.[197] The Norris-LaGuardia Act restricts the right of a court to issue injunctions against boycott or pick-

185. *Id.*
186. *See* KLUGER, *supra* note 11, at 114.
187. 287 U.S. 45 (1932).
188. *See Powell*, 287 U.S. at 70-73.
189. *Id.* at 59-60, 73.
190. *Id.* at 57-58.
191. *Id.* at 71-73.
192. Norris v. Alabama, 294 U.S. 587 (1935).
193. *Norris*, 294 U.S. at 599.
194. *Id.* at 590-91.
195. *Id.* at 597-99. The Court restated this holding three years later in *Hale v. Kentucky*, 303 U.S. 613 (1938) (per curiam).
196. 303 U.S. 552 (1938).
197. *New Negro Alliance*, 303 U.S. at 562-63.

eting activity in cases that grow out of labor disputes.[198] At issue in this case was an injunction issued against the New Negro Alliance to prevent the organization from picketing a local food chain that engaged in discriminatory hiring practices.[199] The lower court had interpreted the Act as applying only to disputes involving wages, hours, unionization, and working conditions.[200] The majority, however, pointed out that the Act did not classify disputes according to motive and added that "[t]he desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned" as was any other labor dispute.[201] The majority went on to note that "[r]ace discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."[202]

The Court during Brandeis' tenure displayed an obvious preference for granting narrow, individualized relief over more sweeping proclamations. The glaring constitutional violations in *Moore v. Dempsey*, *Scottsboro I*, and *Scottsboro II* presented fairly easy targets for the Court, and failure to acknowledge these violations would constitute a near complete abrogation of the Court's duty to enforce the Constitution. However, the Court's equivocation on the issue of residential segregation in *Buchanan* and *Corrigan* demonstrated its hesitancy to stake out a controversial legal position on a racial issue, however consistent with the Constitution that position might be. In this way, the Court would allow critical aspects of the segregation regime to remain fundamentally intact while simultaneously insulating the Court against wholesale embarrassment and charges of rank hypocrisy.

3. *The "White Primary" Cases*

The Court's approach to cases in which black litigants claimed to have been denied the right to vote is consistent with the Court's treatment of race cases involving civic equality. In *Nixon v. Herndon*,[203] L. A. Nixon, a "negro, a citizen of the United States and of Texas and a resident of El Paso," challenged a Texas statute that forbade blacks from voting in Democratic primary elections.[204] The purpose of the statute could not have been clearer: "[I]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of

198. *Id.* at 561 (citing 29 U.S.C. § 101 (1932)).
199. *See id.* at 554-55.
200. *See id.* at 559.
201. *Id.* at 561.
202. *New Negro Alliance*, 303 U.S. at 561.
203. 273 U.S. 536 (1927).
204. *Herndon*, 273 U.S. at 539-40.

Texas."[205] Despite what appeared to be an obvious violation of the Fifteenth Amendment (a citizen being deprived of his right to vote on account of race),[206] the Court instead unanimously found that the statute violated the Fourteenth Amendment by discriminating against African-Americans on the basis of color alone.[207] As the Court noted, "[s]tates may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."[208]

The Court's failure to designate Texas' actions violative of the Fifteenth Amendment proved to be the Achilles heel of the decision. The Texas Democrats took note of the Court's evasion of the Fifteenth Amendment and immediately began to consider ways of circumventing the Fourteenth Amendment.[209] The Texas legislature's solution was to repeal the statute that openly prevented blacks from voting and replace it with a statute through which it would hand over its power to prescribe voting qualifications to the state executive committee for each party.[210] The Democratic Executive Committee ("DEC") convened shortly thereafter and agreed to limit the vote in Democratic primary to "all white democrats . . . qualified under the constitution and laws of Texas."[211]

The actions by the Texas legislature and DEC were again challenged by Nixon, and in a 5-4 decision, Brandeis, along with the majority of the Court, once again declared Texas' actions unconstitutional.[212] Once again, the Court steadfastly relied upon the Fourteenth Amendment, ruling that the case was controlled squarely by *Nixon v. Herndon*.[213] The Court reasoned that the DEC, pursuant to statutory authority, was obligated to abide by the Constitutional "mandates of equality and liberty."[214] The DEC officials, as "[d]elegates of the State's power," discharged "their official functions in such a way as to discriminate invidiously between white citizens and black"[215] thus violating the Fourteenth Amendment.[216]

The Court's repeated failure to find the DEC's action in violation of

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205. *Id.* at 540.

206. "It was as if a man on fire had preferred to pat out the flames with a damp sponge instead of plunging into the nearby swimming pool." KLUGER, *supra* note 11, at 122.

207. *See Herndon*, 273 U.S. at 540-41. The Court declared, "We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." *Id.*

208. *Id.*

209. Nixon v. Condon, 286 U.S. 73, 82 (1932).

210. *Condon*, 286 U.S. at 82.

211. *Id.*

212. *Id.* at 89.

213. *Id.*

214. *Id.* at 88.

215. *Condon*, 286 U.S. at 89.

216. *Id.*

the Fifteenth Amendment only strengthened the DEC's resolve. Not to be deterred, the Texas legislature passed a statute that required the nomination of Democratic candidates at primary elections at Democratic Conventions.[217] At the same time, the Democratic Convention passed a resolution that excluded blacks from the Democratic Party by limiting its membership to white citizens.[218] The net effect was that blacks were virtually excluded from exercising their franchise in primary elections.[219]

R.R. Grovey, a Negro citizen and Texas resident, sought to obtain an absentee ballot for the upcoming primary.[220] Albert Townsend, then serving as county clerk, refused to furnish the ballot on the ground that he was merely obeisant to the law of Texas.[221] Grovey claimed that Townsend's conduct violated the Constitution because Townsend, working as a state official, had deprived him of his right to vote in a primary election on account of his race.[222]

A unanimous Court rejected Grovey's argument and held that neither the State of Texas nor Townsend had acted unconstitutionally, despite an admission by representatives of the State that a Convention nomination by the Democratic Party was tantamount to election.[223] Although this was a clear attempt by the Texas legislature to circumvent the Court's holdings in *Nixon v. Herndon* and *Nixon v. Condon*, the Court reasoned that there was no state action at issue because control was vested in private parties rather than the state and that political organizations did not violate the Fourteenth or Fifteenth Amendments by passing racial or color qualifications for membership.[224]

The voting cases reflect the Court's overall preference for granting narrowly-tailored relief to black litigants when a constitutional violation is particularly glaring, but abandoning the defense of the rights of blacks when the violation is less obvious, and where popular backlash appears imminent. We can only wonder why Brandeis, who would later describe the role of the Supreme Court Justice as ensuring that "[r]ights declared in words [are not] lost in reality,"[225] would stand silent as the State of Texas systematically denied its black American citizenry the right to vote.

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217. *See* Grovey v. Townsend, 295 U.S. 45, 46 (1935).

218. *Grovey*, 295 U.S. at 47. The Convention adopted the following resolution on May 24, 1932: "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations." *Id.*

219. *Id.* at 55.

220. *Id.* at 46.

221. *Id.*

222. *Grovey*, 295 U.S. at 46.

223. *Id.* at 55.

224. *See id.* at 55.

225. Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

4. *Equal Education Cases*

Ironically, the first major race case to address segregation in public education during Brandeis' tenure on the Court did not involve an African-American complainant. In *Gong Lum v. Rice*,[226] Martha Lum, a nine-year-old Chinese-American girl, sought admission to an all-white public school in Mississippi.[227] Her father, aware of the inferior status of Negro schools at the time, wanted his daughter to attend the white schools. He did not challenge the legality of segregation—he simply wanted his daughter classified as something other than "colored" for purposes of school assignment.[228]

In rejecting Mr. Lum's request, however, the Court nevertheless treated the case as a challenge to segregation policy, noting that the question "has been many times decided . . ."[229] Brandeis joined a unanimous opinion in which the Court held that a state's power to classify a Chinese student as legally "colored" and require that she attend a "separate but equal" black school did not violate the Equal Protection clause of the Fourteenth Amendment.[230] The Court found that for purposes of educating its students, separation of the races falls within the discretion of state regulation of public schools.[231] Thus, although no black person was involved, the Court was able to render a decision that suggested that the issue of racial segregation in public schooling was no longer open for debate.

Eleven years later, the Supreme Court would revisit its position on the issue of public education. However, by 1938, the Supreme Court's position began to weaken, largely due to the persistence of NAACP attorneys.[232] The Court's decision in *Missouri ex rel. Gaines v. Canada*[233] represents the Court's first clear vindication of the right of black citizens to receive equal (or at least some) public education. This case, decided near the end of Brandeis' tenure on the Court, was the first in a series of decisions that eventually led the Court to declare in *Brown v. Board of Education* that separate schools for whites and blacks were inherently unequal.[234]

Lloyd Gaines wanted to be a lawyer.[235] However, upon receiving his

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226. 275 U.S. 78 (1927).
227. *Gong Lum*, 275 U.S. at 80.
228. *Id.* at 79-81.
229. *Id.* at 86.
230. *Id.* at 85-86.
231. *Id.* at 87.
232. Early efforts by the NAACP to dismantle the segregation regime are discussed *infra* text accompanying notes 259-69.
233. 305 U.S. 337 (1938).
234. *See, e.g.*, John Marquez Lundin, Note, *The Call for a Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 416 (1997); Steven H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 HOW. L.J. 505, 525 (1989).
235. *Gaines*, 305 U.S. at 342.

Bachelor of Arts from Lincoln University—"an institution maintained by the State of Missouri for the higher education of negroes"—Gaines discovered that Missouri did not have a separate law school for blacks.[236] Gaines' application to the states' only law school was refused on the ground that it was "'contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.'"[237] Missouri had passed a statute that arranged for non-whites to attend substantially "equal" Negro schools in other states with tuition and fees to be paid by the State of Missouri.[238] Gaines challenged the constitutionality of the statute, arguing that the states' failure to live up to its obligation under *Plessy v. Ferguson* violated his rights under the Fourteenth Amendment.[239]

In a 7-2 decision, the Court agreed with Gaines and struck down the Missouri statute as unconstitutional.[240] According to the Court, the Missouri statute that offered to pay out-of-state tuition for black would-be law students in order to keep their state law school entirely white violated the Equal Protection Clause of the Fourteenth Amendment.[241] The victory was short-lived. Gaines disappeared shortly before the final oral argument in the case, never to be heard from again.[242] Thurgood Marshall, who served as co-counsel with Charles Hamilton Houston on the case, believed that Gaines was lynched in order to prevent him from integrating the law school.[243]

In looking back on the Supreme Court's jurisprudence on race during Brandeis' tenure, there is not much to celebrate. The legal victories enjoyed by African-American litigants typically benefited only individual litigants and provided little by way of concrete change. The precedential value of these decisions was fairly modest, especially when compared to the rulings that would come in subsequent decades. Thus, periodic symbolic victories provide only a thin gloss on an otherwise lackluster period in the history of race relations law.[244]

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236. *Id.* at 342.
237. *Id.* at 343.
238. *Id.* at 342-43 (citing MO. REV. STAT. § 9622 (1929)).
239. *See id.* at 342.
240. *Gaines*, 305 U.S. at 352.
241. *Id.*
242. Ken Gormley, *A Mentor's Legacy: Charles Hamilton Houston, Thurgood Marshall and the Civil Rights Movement*, 78 A.B.A. J. 62, 63 (1992).
243. *See id.*
244. African-Americans were not the only people of color who suffered as a result of the Court's race relations jurisprudence. Non-European immigrants were also slighted by the Court. In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court interpreted federal statutes as permitting the naturalization of only "free white person[s]" and "aliens of African nativity." *Ozawa*, 260 U.S. at 195. The Court determined that a "white person" was synonymous with the words "a person of the Caucasian race" and that the petitioner Ozawa, a native of Japan who resided in the United States for over twenty years, should be denied citizenship because he was "clearly of a race which is not Caucasian. . . ." *Id.* at 198. The Court would revisit this issue the following year in *United States v. Thind*, 261 U.S. 204 (1923). In *Thind*, the Court considered whether a "high caste Hindu" who was born in Punjab, India, but claimed to be of Aryan decent, was sufficiently

5. *Brandeis on Other Civil and Economic Liberties*

Brandeis' judicial record on racial issues pales in comparison with his demonstrated commitment to civil and economic liberties. From this, one cannot help but conclude that his strikingly deficient record on matters of race evinces a conscious avoidance of the race question (whenever such avoidance was possible) and a certain complicity in the continued subjugation of American blacks. The irony in this is that most historians agree that "Brandeis' great value to American political thought and jurisprudence lay in his creative questioning and analysis of phenomena that were treated as givens by most of his contemporaries."[245] However, there is little doubt that racial progress for African-Americans ranked fairly low on Brandeis' list of priorities.

Brandeis demonstrated profound creativity when crafting opinions in vigorous defense of civil and economic liberties that arose in a non-racial context. Two of Brandeis' most influential opinions exemplify this approach. In *Whitney v. California*,[246] Brandeis offered a powerful defense of the right to speak freely as integral to the concept of liberty in American society:

> 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. . . . They recognized the risks to which all human institutions are subject. But they knew that . . . it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government. . . . Believing in the

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Caucasian to be deemed a free white person for purposes of naturalization. *Thind*, 261 U.S. at 210. Confronted with conflicting sociological and ethnographic opinion on what racial classification petitioner Thind fell into, the Court retreated from its "Caucasian" standard in favor of one based upon "familiar observation and knowledge" regarding race distinctions. *See id.* at 214-15. The Court thus rejected Thind's petition for naturalization based upon "the physical group characteristics of the Hindus" that render them readily distinguishable from whites, and a "racial difference . . . of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation." *Id.* at 215. The Court's rulings in these racial prerequisite naturalization cases, coupled with the rise of the eugenics movement and conservative social politics, led one scholar to describe this period as the "Regressive Era" in American immigration. *See* ROGER DANIELS, NOT LIKE US: IMMIGRANTS AND MINORITIES IN AMERICA, 1890-1924, at 48 (1997). For a detailed discussion of these cases, see IAN HANEY LOPEZ, WHITE BY LAW (1996) and Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).

245. STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 141.

246. 274 U.S. 357 (1927)

> power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[247]

Of particular importance is the fact that it was the rights of Communists that were at issue in this case. Following World War I and the Russian Revolution, the United States indulged a period of vigorous anti-socialism in the 1920s and 1930s.[248] Nearly half of all states enacted laws enabling prosecution of the advocacy of socialism as criminal anarchy and criminal syndicalism.[249] Brandeis' defense of the rights of Communists to speak freely, then, cut profoundly against the prevailing national sentiment and makes clear that Brandeis was not overly fearful of taking reputational risks.[250]

Equally important, however, is that Brandeis' opinion in *Whitney* is jurisprudentially distinct in the sense that it moves beyond the formalistic mode of reasoning employed in the majority opinions in the race cases. Note that, in contemplating the scope of freedom of speech, Brandeis transcends the formal category of free speech in order to reach the underlying concept of liberty in American society. For Brandeis, the right to speak freely was not simply a matter of positive law.[251] Rather, it was an indispensable feature of American political life that could only be properly understood when viewed against the backdrop of other theoretical concepts such as liberty and democratic process.[252]

A similar eschewal of formalism is evident in Brandeis' dissenting opinion in *Olmstead v. United States*,[253] in which he offers a vigorous defense of the right to privacy.[254] Here again, we see Brandeis demonstrate the creative capacity to articulate a defense of fundamental liberties that he believed should be enjoyed by all members of the public:

> 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 emo-

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

248. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 654 (1988).

249. *See id.* at 655.

250. *See id.* at 654. In the decade following *Whitney*, the Court would overturn similar sorts of convictions expressly on First Amendment grounds. *See* Herndon v. Lowry, 301 U.S. 242 (1937) (overturning the conviction of a black organizer for the Communist Party, in part, on First Amendment grounds); De Jonge v. Oregon, 299 U.S. 353 (1937) (reversing conviction under Oregon's criminal syndicalism law on substantive First Amendment grounds).

251. *See* Blasi, *supra* note 248, at 667-97.

252. *See id*

253. 277 U.S. 438 (1928).

254. *Olmstead*, 277 U.S. at 471-85 (Brandeis, J., dissenting).

> tions 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.[255]

However, in arguing that a federal statute authorizing wiretaps violated the Constitution, Brandeis reminded the Court, in the words of Chief Justice Marshall, that "it is a constitution we are expounding."[256] He goes on to note that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have . . . [the capacity to adapt] to a changing world. . . . [Otherwise], '[*r*]*ights declared in words might be lost in reality.*'"[257] Specific provisions of the Constitution, according to Brandeis, must be read broadly in order to protect fundamental freedoms, such as the right to privacy, that reside within the interstices of the text.[258] Thus, we see Brandeis throwing off the mantle of formalism in order to vindicate civil liberties in a non-racial context.

Brandeis' opinions in *Whitney* and *Olmstead* burst with possibilities and capture Brandeis at his rhetorical best. They highlight the extent to which Brandeis the jurist would go in defense of certain rights of the public against tyranny and oppression. However, they also serve as a striking contrast to the lack of creativity and strict adherence to formalist principles that characterized Brandeis' jurisprudential contribution to the advancement of American race relations and the defense of the liberty interests of African-American citizens.

C. The Legacy of Louis Brandeis

Brandeis would never take it upon himself to address the myriad issues facing African-Americans in the early twentieth century. Like many of his contemporaries, Brandeis would allow the methodological strengths of his legal innovations to be constrained by contemporary racial attitudes. However, Brandeis' legacy ultimately would have a profound effect on the character and development of inter-ethnic relations in America. For instance, Brandeis brought to the fore the role of lawyer for the public. Certainly, there were lawyers before him who took up various causes on behalf of the public. However, it was Brandeis who not only embraced public causes with unbridled enthusiasm, but encouraged others to do the same. Thus, our foundational images of "the public interest lawyer" are images of Louis Brandeis.

One can see these images reflected and extended in dramatic fashion in the development of the litigating wing of the NAACP that would later become the Legal Defense Fund. Established in 1909, the NAACP was

255. *Id.* at 478
256. *Id.* at 472.
257. *Id.* at 472-73 (emphasis added).
258. *Id.* at 474.

the largest organization devoted to transforming the system of race relations in America through political and legal action.[259] Although its political efforts drew national attention from the outset, its legal component was slow to develop.[260] In its first two decades, the NAACP's early legal efforts consisted mostly of assisting individual black litigants in seeking redress where they had been poorly treated on account of their race.[261] In some instances, the NAACP would carry cases all the way up to the United States Supreme Court.[262] More often than not, these cases would proceed under the careful supervision of NAACP President and Boston practitioner Moorfield Storey, Joel Spingarn, Louis Marshall, or others.[263]

All that would change in September 1925, when James Weldon Johnson, Executive Secretary of the NAACP, proposed the creation of a fund "to finance a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights and thereby 'a self-consciousness and self-respect, which would inevitably tend to effect a revolution in the economic life of this country.'"[264] Johnson urged President Storey to submit an application to the American Fund for Public Service to obtain funding for the NAACP's legal work.[265] Although the American Fund initially pledged $100,000 to support the cause, the Fund initially only provided about $20,000 over a three-year period.[266] However, the American Fund monies enabled the NAACP to institutionalize the role of public attorneys as champions of racial injustice by hiring Harvard graduates Nathan Margold and Charles Hamilton Houston to spearhead the litigation campaign.[267] While Margold, a white attorney, was primarily responsible for articulating the different sorts of challenges one could make to the Jim Crow regime, it was Houston who

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259. *See* MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-196, at 10 (1994).

260. *See* KENNEDY, *supra* note 12, at 48 (noting that "[f]or the first four decades of its existence, the NAACP's primary activities consisted of investigating, publicizing and denouncing lynchings."). The NAACP also lobbied on behalf of many federal anti-lynching bills. *See* MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICTS IN THE POST-*BROWN* SOUTH 18 (1995).

261. One of the more nationally publicized cases involved the trials of the Sweet family. Ossian Sweet, a black psychiatrist, had purchased a home in a white Detroit neighborhood and sought to move his family into the new house. A mob gathered around the Sweets, and shots were fired from the house, killing a white man. All 12 people in the house at the time the shots were fired were charged with murder. The NAACP hired Clarence Darrow and Arthur Garfield Hayes—two of the nation's most prominent trial attorneys—to defend the Sweets. The Sweets were tried twice and ultimately found not guilty. *See* Eugene Levy, *James Weldon Johnson and the Development of the NAACP*, *in* BLACK LEADERS, *supra* note 103, at 93.

262. Perhaps the most significant case brought by the NAACP during this time was *Nixon v. Herndon*, discussed *supra* text accompanying notes 203-08.

263. *See* VOSE, *supra* note 130, at 40

264. TUSHNET, *supra* note 259, at 12.

265. *See* VOSE, *supra* note 130, at 40-42; Levy, *supra* note 261, at 94.

266. *See* VOSE, *supra* note 130, at 42-43

267. *Id.* at 43.

would devise and implement the strategy.[268] In this way, both Margold and Houston reflected and extended the Brandeis model of lawyer-as-public-advocate.[269]

Brandeis' legacy also influenced the way race cases were briefed and argued. In *Muller v. Oregon*,[270] Brandeis submitted a brief packed with social science data to convince the Supreme Court that a state had the constitutional power to regulate the working hours of women even though it could not do so for men.[271] After only a few pages of citation to precedent, Brandeis' brief proceeded with page after page of detailed information about maximum hour laws for women.[272] Brandeis was passionate about keeping law in step with reality, and he felt that lawyers bore the burden of keeping the law in check. As Brandeis would later remark, "a lawyer who has not studied economics and sociology is very apt to become a public enemy."[273]

In *Buchanan v. Warley*,[274] decided almost a decade after *Muller v. Oregon*, the United States Supreme Court was for the first time directly and systematically confronted with social science data about race. Moorfield Storey, who had argued the plaintiff's case over two days in April 1916, pressed a new point in oral argument that had not been argued in his brief: that racial mixing or "racial amalgamation" was not only desirable, but that the state policy of segregation was unreasonable precisely because it undermined the goal of racial amalgamation.[275] As Professor Herbert Hovenkamp recounts, "To bolster his argument, Storey had 'cited various scientific authorities' in support of racial mixing. The Louisville attorneys argued that the surprise use of scientific data was all part of an NAACP conspiracy to foist racial mixing on America. The City of Louisville felt obliged to reply in kind."[276] The response was a brief not unlike that filed by Brandeis in *Muller v. Oregon*[277]—a brief that consisted of "a half-dozen pages of legal summation, followed by

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268. *Id.* at 44.

269. For a detailed account of the work of NAACP attorneys, see generally JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

270. 208 U.S. 412 (1908).

271. *See* Brief for the Appellant, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107) [hereinafter Brandies Brief]; *see also* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 187-88, 208-10 (1992) (describing the "Brandeis Brief" filed in *Muller v. Oregon* as containing "two pages of legal argument and ninety-five pages of sociological and economic data about the conditions of working women's lives in factories").

272. *See* Brandies Brief, *supra* note 271, at 9-113.

273. BASKERVILLE, *supra* note 3, at 229; Farber, *supra* note 3, at 175.

274. 245 U.S. 60 (1917).

275. *See* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 659.

276. *Id.* at 659-60.

277. *Compare* Supplemental and Reply Brief for Defendant in Error on Rehearing at 123, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 33) *with* Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).

one hundred pages of social science data, designed to prove that amalgamation of the races was clearly not in the best interest of either blacks or whites."[278]

Justice Day's opinion declared that the racial zoning statutes were unconstitutional,[279] but neither acknowledged the pages of sociological evidence presented in Kentucky's brief nor addressed directly the policy arguments raised by the parties.[280] Civil rights advocates, however, nevertheless were pleased with the Court's ultimate finding that the Louisville statute violated the fundamental rights to acquire, use, and dispose of property.[281] Some law review commentators criticized the court decision for failing to adequately consider the social science data presented in the briefs.[282] In the coming years, the use of social science data to quantify the harms of racial prejudice would become the "bread and butter" of civil rights brief writing, culminating in tremendous sociological data-driven victories in *Shelley v. Kraemer*[283] and *Brown v. Board of Education*.[284]

Brandeis' legacy can also be seen in the judicial disposition of race cases. It was Brandeis who openly declared that judges should take the social and economic context of cases into account when deciding legal issues.[285] Brandeis himself was fond of incorporating volumes of social

278. Hovenkamp, *supra* note 275, at 660. As Professor Hovenkamp points out, the similarity of the two briefs was not lost on the Louisville attorneys, and that the lawyers arguably had strong motivation to invoke Brandeis against Storey. *See id.* at 660 n.197 (noting that "Moorfield Storey and Justice Brandeis were bitter political enemies," and that Storey had been "one of the most ardent opponents of Brandeis's Supreme Court nomination.").

279. *Buchanan*, 245 U.S. at 82.

280. *See* Hovenkamp, *supra* note 275, at 663 (remarking that "Justice Day's opinion never acknowledged the pages of scientific evidence in the Louisville brief, and it completely sidestepped the policy arguments that both sides in the controversy had argued so strenuously.").

281. *See* David Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 856 (1998).

282. *See id.* at 857 (discussing various notes and commentaries published in law reviews, including one in the *Harvard Law Review* that criticized the Court for failing to consider data presented by the Louisville attorneys regarding the desirability of segregation).

283. 334 U.S. 1 (1948).

284. 347 U.S. 483 (1954). *See* VOSE, *supra* note 130, at 65 ("[T]he sociological method became 'all but the official doctrine of the Court.'") (quoting HENRY STEELE COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S, at 381 (1950)). The brief submitted by Charles Hamilton Houston in *Shelley* invited comparison to the "Brandeis Brief" filed nearly a half century earlier in *Muller v. Oregon*, 208 U.S. 412 (1908), due to the large quantity of medical and sociological data used by Houston. Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1622 n.111 (1995). The social science and statistics-driven "Brandeis Brief" would resurface again in *Brown v. Board of Education*. Once again, this style of argument proved effective, demonstrated by the Court's reliance on such data as one of the bases of its decision to end segregation in public schools in *Brown*, 347 U.S. at 494-95 & n.11. For a detailed account of use of sociological data in Supreme Court race cases, see generally Hovenkamp, *supra* note 275.

285. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 306 (1932) (Brandeis, J., dissenting) ("[O]ne of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 603 (1995) (observing that Brandeis possessed a "tendency to see legal issues as bottomed in social and economic 'reali-

science and historical data into his opinions.[286] Brandeis' recognition of the persuasive power of social science data likely encouraged Chief Judge Earl Warren to credit the social science data offered by Thurgood Marshall in *Brown v. Board of Education* as a basis for finding segregation in public schools unconstitutional.[287] In the wake of the *Brown* decision, the use of liberal social science in legal adjudication came under intense scrutiny. Indeed much of the data underlying the Court's decision in *Brown* was criticized as suffering myriad methodological flaws and dubious conclusions.[288] Today, it is the Court's unprincipled shifting between reliance upon social science and dependence upon the insights of human experience that is the target for criticism.[289] Nevertheless, it is necessary to underscore the importance of this jurisprudential development in terms of securing rights for African-Americans and its roots in the Brandeis tradition.

Likewise, Brandeis was a firm believer in the capacity of humans to alter powerful historical forces and shape the destiny of a nation. In Brandeis' view, judges played a critical role in ensuring that "[r]ights declared in words [not] be lost in reality."[290] Occasionally, Brandeis would read heavily into the Framers' intentions in order to support what he believed to be the moral and correct position on a constitutional issue.[291] Although Brandeis never considered himself a "judicial activist," there is little doubt that certain judges, more powerfully moved by the deplorable state of race relations, drew inspiration from Brandeis as they assumed a more proactive role in defining American racial policy.

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ties'").

286. *See, e.g., New State Ice Co.*, 285 U.S. at 280-311 (Brandeis, J., dissenting); Crowell v. Benson, 285 U.S. 22, 65-95 (1932) (Brandeis, J., dissenting); Olmstead v. United States, 277 U.S. 438, 471-85 (Brandeis, J., dissenting) (1928); Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417-36 (1921) (Brandeis, J., dissenting).

287. Unlike previous courts, which typically did not acknowledge the social science data submitted by the parties, the Warren Court expressly relied upon such data to support its decision. *See Brown*, 347 U.S. at 494-95 & n.11 (declaring that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority" and citing "K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer & Kotinsky, Personality in the Making (1952), c. VI; Deutscher & Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs*, *in* DISCRIMINATION AND NATIONAL WELFARE (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681; [and Gunnar] Myrdal, An American Dilemma (1944)").

288. *See, e.g.*, Ernst Van Den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

289. *See, e.g.*, Donald N. Bersoff & David J. Glass, *The Not-So* Weisman*: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279 (1995).

290. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

291. *See, e.g., Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *Whitney*, 274 U.S. at 375-76 (Brandeis, Holmes, JJ., concurring).

The Warren Court best exemplifies this aspect of Brandeis' approach to legal issues. The Warren Court's decision in *Brown v. Board of Education* marks the first instance since the New Deal revolution where the Supreme Court actively sought to reconceptualize the constitution in a manner consistent with the times. It was clear from the Court's ruling in *Gaines v. Canada*[292] that the manifestly unequal conditions in segregated public schools would not satisfy the "separate-but-equal" requirement set out in *Plessy v. Ferguson*.[293] However, to the extent that *Plessy* was rooted in constitutional doctrine, overruling *Plessy* would mean that the Constitution meant something very different in 1954 than it did in 1896. That the Warren Court was courageous enough to initiate this paradigm shift was "a quite surprising and perhaps even miraculous moment in American constitutional history."[294] The Warren Court's dramatic assertion of a living and adaptive Constitution would no doubt have resonated with Brandeis, although Brandeis' instinct toward restraint perhaps would have led him to stop short of initiating a full-blown conceptual shift in constitutional thinking. Nevertheless, the Warren Court plainly shared in Brandeis' belief that law must keep pace with reality and applied this manner of thinking on a routine basis.[295]

In *Bolling v. Sharpe*[296] and *Brown II*,[297] the Warren Court extended the reach of *Brown* into the District of Columbia[298] and ordered desegregation efforts to commence with "all deliberate speed."[299] The Court's decisions in *Loving v. Virginia*[300] and *Gomillion v. Lightfoot*[301] built upon the resuscitated principles of equality, as the Court "turned its back on a century of Court complicity in racial discrimination and demanded better from itself and from the citizenry."[302] Likewise, the Warren

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292. 305 U.S. 337 (1938).

293. 163 U.S. 537 (1896).

294. Morton J. Horwitz, *The Warren Court and The Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 7 (1993); *see also* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 151-52 (1992) (highlighting the transformation of both the Court and constitutional order as a result of the *Brown* decision). Yet, it should it be noted that the Court's approach was incremental. *See id.* at 171 (noting that the Court's "strategic decision was that [the] command to desegregate . . . need not be complied with immediately.").

295. Chief Justice Earl Warren made no secret of his admiration of Louis Brandeis. In a speech delivered on Brandeis' Centennial Celebration, Chief Justice Warren praised Brandeis as a man whose "whole life was devoted to keeping the shackles off people," who "insisted that each individual was entitled to room to grow to the full stature of his own personality." Chief Justice Earl Warren, Remarks at Brandeis Centennial Celebration, (Nov. 11, 1956 (manuscript on file with author).

296. 347 U.S. 497 (1954).

297. 349 U.S. 294 (1955).

298. *Bolling*, 347 U.S. at 500.

299. *Brown II*, 349 U.S. at 301.

300. 388 U.S. 1, 12 (1967) (Virginia statute prohibiting interracial marriages violates "the central meaning of the Equal Protection Clause").

301. 364 U.S. 339, 340 (1960) (invalidating an attempt at racial gerrymandering and describing the proposed district as an "uncouth twenty-eight-sided figure").

302. Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the War-*

Court's treatment of racial issues in the criminal context was largely driven by the changing racial times. Warren Court criminal procedure novelties, such as the warrant rule,[303] exclusionary rule,[304] and probable cause requirements[305] are best understood as part of the overall struggle to attain civil rights for blacks.[306] Not surprisingly, some commentators now suggest that the Warren Court's era of reform of the criminal process should be treated as a branch of race relations law.[307]

The Warren Court's pursuit of public justice was not limited to Afri-

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ren Court, 50 VAND. L. REV. 459, 463 (1997).

303. The warrant rule was developed in a number of cases, such as *Bumper v. North Carolina*, 391 U.S. 543, 546, 550 (1968), which involved four white police officers who lied about their legal authority in order to obtain the "consent" of an elderly black woman to search her home for evidence against her grandson; *Davis v. Mississippi*, 394 U.S. 721, 722, 726-28 (1969), which involved the roundup of twenty-four black youths for fingerprinting upon a rape victim's description of her assailant as a "Negro youth"; and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389, 392-94 (1971), in which FBI seized and strip-searched a black suspect after ransacking his home and threatening his entire family with arrest—all without either a warrant or probable cause.

304. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Warren Court held that the Fourth Amendment not only guarded against unreasonable searches and seizures, but also justified the exclusion of any illegally seized evidence from criminal trials. *Mapp*, 367 U.S. at 656-57.

305. In *Terry v. Ohio*, 392 U.S. 1 (1968), which involved the stop-and-frisk of black men by a white officer, the Warren Court sought to create a two-tiered approach to classify police conduct in order to bring these "low-level" detentions within the ambit of the Fourth Amendment by requiring police to show a "reasonable suspicion" in order to justify such "investigatory" stops. *See Terry*, 392 U.S. at 4-6, 30-31.

306. Even the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which did not directly involve a black defendant, is thought to have been a response to the growing racial turmoil of the 1950s and 1960s. Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1470 (1985). *See also* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 844 (1994) ("[T]he Warren Court was responding to these images [of police overreaching], construing the Fourth Amendment's prohibition of 'unreasonable' government action in light of the most pressing concerns of the day."); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968). Pye noted:

> The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. It would have been equally anomalous for such a Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity.

Id. at 256.

307. *See, e.g.*, Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. LAW & CRIMINOLOGY 691, 708-09 (2000) ("When one situates the reform of the criminal process within the larger context of Warren Court era liberal reform . . . one gains a fuller appreciation of the extent to which the Court sought moral redemption and institutional legitimacy as a means to dispel America's profound sense of shame."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones."); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993) ("As Charles Ogletree has suggested, much of the Warren Court's 'criminal procedure' reform more properly should be understood as constituting a branch of race law.") (citing Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990)).

can-Americans. Religious minorities,[308] free speech advocates,[309] and the indigent[310] all obtained a modicum of respect and validation during the Warren Court era. Although many of these cases were built upon or expanded existing precedent,[311] and much of what the Warren Court accomplished was procedural in nature,[312] these cases nonetheless were of "almost revolutionary significance" in the way they collectively transformed the legal landscape.[313] I do not mean to suggest that Brandeis' substantive views on the law informed the substance of these Warren Court decisions. In fact, the opposite is perhaps more accurate, especially given Brandeis' views on federalism, the Fourteenth Amendment, and the public/private distinction.[314] However, the mode of judicial inquiry exemplified by Brandeis—his penchant for independent analysis of a situation and desire to ensure that law did not lag too far behind contemporary social and political concerns—is plainly reflected in the Warren Court's approach to judicial decision-making. In this way, the legacy of Louis Brandeis played a critical role in the inauguration of an era of new freedom for African-Americans—despite his best efforts to

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308. *See* Sherbert v. Vener, 374 U.S. 398, 403 (1963) (requiring government to prove compelling interest in applying purportedly neutral government policy that compromises minority religious beliefs); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225-27 (1963) (declaring unconstitutional a state law requiring ten verses from the Bible to be read aloud at the opening of each public school day); Engel v. Vitale, 370 U.S. 421, 436 (1962) (finding school prayer unconstitutional).

309. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that the government may regulate certain kinds of speech only if the government interest underlying the regulation is "unrelated to the suppression of free expression"); New York Times v. Sullivan, 376 U.S. 254, 283-92 (1964) (holding that First Amendment shielded newspaper from a libel suit for printing falsehoods about a public official). Like many cases during the Warren years, there was a racial subtext to the *Sullivan* case, it involved an attempt by the State of Alabama to force a newspaper that had published pro-desegregation advertisements out of business. Thus, as Professor Horwitz remarked, "[e]ven those Warren Court cases that are doctrinally not about race are almost always, in one way or another, about the agony of race in America." Horwitz, *supra* note 294, at 8.

310. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-68 (1966) (striking down a poll tax of $1.50 on all Virginia residents over twenty-one as discriminating against the indigent's right to vote); Gideon v. Wainwright, 372 U.S. 335 (1963) (providing a right to counsel for the indigent at all felony trials); Douglas v. California, 372 U.S. 353, 358 (1963) (granting the right to counsel because of the "equality demanded by the Fourteenth Amendment."); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (holding an indigent criminal defendant's direct appeal cannot be denied because of an inability to afford a transcript).

311. *See* Kermit L. Hall, *The Warren Court in Historical Perspective*, *in* THE WARREN COURT: A RETROSPECTIVE 299, 301 (Bernard Schwartz ed., 1996), *reprinted in* Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309 (1995).

312. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 32-33 (1980).

313. James B. O'Hara, *Introduction*, *in* THE WARREN COURT, *supra* note 311, at 3; *see also* Julius Chambers, *Race and Equality: The Still Unfinished Business of the Warren Court*, *in* THE WARREN COURT, *supra* note 311, at 21, 28 ("not . . . create law from whole cloth").

314. For an alternative view, see ROBERT BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 97-98 (1988) (arguing rather unpersuasively that Brandeis viewed himself as a social outcast, and that his sense of alienation and marginality pervaded not only his constitutional jurisprudence, but informed the jurisprudence of the Warren Court as well). For a critique of Burt's position and his book generally, see Eben Moglen, *Jewishness and the American Constitutional Tradition: The Cases of Brandeis and Frankfurter*, 89 COLUM. L. REV. 959 (1989) (book review).

the contrary.

III. WHY BRANDEIS CHOSE TO EVADE PUBLIC ISSUES AFFECTING AFRICAN-AMERICANS

We can only speculate as to why Brandeis chose the path of avoidance and complacency when it came to public issues affecting African-Americans. Brandeis himself never offered an explanation of his own. In a very real sense, the story ends here. In presenting this topic to my colleagues, however, the "why" question seemed to present a most alluring and essential component to this inquiry. From my perspective, Brandeis' evasion of public issues affecting African-Americans can be documented and discussed without indulging in such a speculative inquiry. Nevertheless, there may be some value in engaging in a bit of conjecture, and I offer my thoughts accordingly.

Perhaps the most plausible explanation for Brandeis' evasion is that a combination of self-interest and "polite racism" precluded him, as a practical matter, from any serious consideration of public advocacy on behalf of African-Americans. Brandeis, after all, was a man of lofty aspirations, and there were obvious risks in aligning oneself with a public cause opposed by nearly every influential sector of American life. It is possible, then, that Brandeis believed that public advocacy on behalf of African-Americans exacted too high a price. In order to maintain a certain measure of personal security and autonomy and to ensure that he could continue his work in other areas of public life, it seems plausible that Brandeis simply drew the line when it came to African-Americans.

Another plausible explanation relates to Brandeis' experience as a Jew in American culture. There is little doubt that Brandeis' views about the relationship between segregation and equality were complicated, and it seems likely that this complexity was perhaps related to Brandeis' own feelings about Jewishness, equality and assimilation. As an assimilated, acculturated Jew who nonetheless turned to the anti-assimilationist, nationalist ideology of Zionism, it seems plausible that Brandeis harbored some doubts about the virtues of integration. It is worth noting, however, that Brandeis advocated a softer version of Zionism that did not necessarily contemplate migration to Israel, but instead sought to find Zion in American life.[315] As Brandeis remarked, "the place is made ready; legal habitation is secured; and any who wish are free to go. But it is the essence of Zionism that there shall be no compulsion."[316] Indeed, Brandeis arguably found his Zion in the comfort of wealth accumulated during his years as a practitioner and status as a Supreme Court Justice. In any event, it is entirely possible that Brandeis had some mis-

315. *See* GEOFFREY WHEATCROFT, THE CONTROVERSY OF ZION: JEWISH NATIONALISM, THE JEWISH STATE, AND THE UNRESOLVED JEWISH DILEMMA 124-27 (1996).

316. *Id.* at 126.

givings about the melting pot model of assimilation, and such misgivings may have informed his decision to leave the general policy of segregation untouched.

However, one also might argue that Brandeis' connection to Zionism supports the opposite conclusion. According to Brandeis biographer Lewis Paper, Brandeis was introduced to Zionism by Jacob deHaas for the unstated purpose of mainstreaming American Zionism and providing the movement with national respectability and legitimacy.[317] In choosing the highly assimilated Brandeis as its leader, it is arguable that the movement sought to *embrace* and expand upon Brandeis' model of assimilation rather than present Brandeis with the "traditional" Zionist alternative. Thus, it is not entirely clear what sort of inferences might be drawn from Brandeis' relationship to Zionism.

Of course, it may be the case that Brandeis' evasion was motivated by something other than his own personal, psychological idiosyncrasies—that Brandeis had some *principled* basis for restricting his involvement. Four such principled explanations are briefly discussed below.

A. Federalism

One possible explanation relates to Brandeis' views on federalism, namely, that Brandeis' failure to disrupt state segregation regimes was rooted in a firm dislike for the Fourteenth Amendment.[318] Brandeis commented on numerous occasions that he found the Fourteenth Amendment to be far too intrusive on state authority.[319] Indeed, his dissenting opinion in *New State Ice Co. v. Liebmann*[320] clearly articulates his preference for state experimentation and autonomy.[321] Thus, one might argue that Brandeis' respect for state sovereignty and federalism precluded him, as a jurisprudential matter, from second-guessing the overall appropriateness of segregation. Or put differently, perhaps Brandeis felt that principles of federalism prohibited the use of national institutions to implement policy to protect African-Americans from the tyranny of the states.

Strict adherence to principles of federalism, however, would not explain Brandeis' failure to intervene on behalf of African-Americans.

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317. *See* PAPER, *supra* note 3, at 203.

318. The "federalism" explanation is the explanation primarily relied upon by Brandeis' most prolific biographer, Phillipa Strum. *See* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 3, at 330; STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 140-41.

319. *See* STRUM, BEYOND PROGRESSIVISM, *supra* note 3, at 140.

320. 285 U.S. 262 (1932).

321. *See New State Ice Co.*, 285 U.S. at 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Indeed, just the opposite is true. A rigid concept of federalism would demand, in turn, strict application of the anti-discrimination principle contained in the Fourteenth Amendment, thereby *necessitating* intervention rather than precluding it.

In any case, Brandeis was acutely aware that federalism provided opportunities for innovation as well as intervention when states seek to impose pernicious norms. Perhaps the clearest examples of this appear in his opinions in *Whitney v. California*[322] and *Olmstead v. United States*,[323] in which Brandeis came down strongly on the side of individual liberties. In those cases, Brandeis was not willing to sacrifice individual liberty—or at least certain liberties—on the altar of states' rights.[324] One could approve of federalism and find threats to individual liberty sufficient to warrant central intervention. Thus, it is not strict adherence to principles of federalism, but an *unprincipled* federalism that has explanatory power in this case.

However chalking up Brandeis' inaction to an *unprincipled* federalism is problematic for another reason. Unprincipled federalism was routinely invoked to perfect the marginalized status of African-Americans—first, as a barrier to prevent the federal government from interfering with the institution of slavery, and later as justification for state-sponsored racism. Indeed, during Brandeis' time, federalism served as a "vessel[] of racial subordination"[325] routinely invoked as a basis to oppose legal efforts to protect African-Americans against violence and political degradation.[326] Thus, to argue that Brandeis' inaction was attributable to *unprincipled* federalism is to suggest that Brandeis, like many southern Euro-Americans, attempted to cover his "naked racism with the fig leaf of states' rights."[327] Of course, there is nothing specific in Brandeis' past to warrant such a profound condemnation—nothing that would suggest that Brandeis harbored some deep-seated prejudice. An adherence to an *unprincipled* federalism may explain why others adopted a hands-off approach when it came to racial issues, but is not particularly persuasive in this instance.

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322. 274 U.S. 357 (1927).

323. 277 U.S. 438 (1928).

324. *See Whitney*, 274 U.S. at 372 (Brandeis, J., concurring) (arguing that state criminal syndicalism statute offended constitutional rights of Whitney); *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting) (asserting that government's wire tapping was an unconstitutional search and seizure).

325. MARI MATSUDA ET AL., WORDS THAT WOUND 6 (1993).

326. *See* W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, at 161 (1993) (suggesting that constitutional constraints prevented Congress from enacting anti-lynching legislation); Claudine Ferrell, *Nightmare and Dream: Antilynching in Congress, 1917-1922*, *in* AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS 200-13 (Harold Hyman & Stuart Bruchey eds., 1986) (attributing Congress' failure to pass the Dyer Anti-lynching Bill to constitutional impediments and to general concerns about federalism).

327. James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89, 115 (1984).

B. Public/Private Distinction

Brandeis' willingness to intrude upon state sovereignty in cases challenging state-sponsored segregation also points to another plausible explanation—a commitment to maintaining the distinction between public and private segregation. Brandeis generally voted to strike down public segregation efforts,[328] while voting to uphold private segregation efforts.[329] These decisions suggest that Brandeis may have harbored substantial reservations as to whether, as a matter of constitutional interpretation, the Fourteenth Amendment could be read to prohibit discrimination by private individuals. Such formalism, however, is inconsistent with Brandeis' jurisprudence with respect to other civil liberties. As previously discussed, Brandeis rejected the Court's formalistic approaches in *Whitney* and *Olmstead*, and offered an alternative conceptualization of the issues presented in those cases in accordance with a liberal interpretation both of the Constitution and its normative underpinnings.[330] Plainly, Brandeis seems to have indulged in a moment of jurisprudential inconsistency when it came to protecting the interests of blacks. However, this fact alone does not answer the question of why he chose to be inconsistent at these moments.

C. "Separate But Equal" as Settled Doctrine

One also might seek to explain Brandeis' judicial passivity on race matters on the ground that the constitutionality of the "separate but equal" doctrine was a settled issue by the time he arrived on the Court and that Brandeis had no opportunity to shape racial policy because no explicit challenge to *Plessy* was presented during Brandeis' tenure on the Court. As to whether *Plessy* was settled doctrine, Justice Harlan's dissenting opinion made clear that state-sponsored segregation was not a universally accepted premise of American society.[331] And while it is true that no case explicitly challenged the *Plessy* decision, there were ample cases presented that challenged various aspects of the segregation regime.[332] As the Court's decision in *Gong Lum v. Rice* illustrates, one did not need a heads-up challenge to *Plessy*, as the Court would later demonstrate, in order to address either the Court's specific ruling in *Plessy* or the overall validity of the segregation regime.

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328. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).

329. Corrigan v. Buckley, 271 U.S. 323 (1926); Grovey v. Townsend, 295 U.S. 45 (1935).

330. *See* text *supra* accompanying notes 323-25.

331. Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting)

332. *See* discussion *supra* accompanying notes 226-44.

D. African-American Issues Were Not on the Progressive Agenda

Another possible explanation is that racial issues, by and large, were not on the Progressive agenda in the early twentieth century. As Professor Herbert Hovenkamp perceptively notes, "[p]rogressive legal thought was dominated by a single agenda item: maldistribution of wealth and the resulting inequities and suffering visited mainly on low-income workers and the unemployed."[333] For Brandeis, progressivism manifested itself in two preeminent concerns: the pursuit of the democratic ideal in political life and the dehumanizing threat of massive corporate and economic organizations.[334] Although Brandeis would expand his repertoire to include advocacy of women's labor issues, the fact remains that racial issues and other matters intimately connected with the larger question of political and economic inequities did not achieve prominence on the Progressive agenda until the late 1940s. Thus, it might have been a bit much to expect Brandeis to have further expanded the Progressive agenda to include vigilance on behalf of blacks. However, as Brandeis acolytes are quick to point out, Brandeis' own ideological agenda was not usually limited to other people's priorities.

IV. CONCLUSION

When we speak of heroes in the law, we are, of course, speaking of human beings, subject to human frailties. But not all frailties are the same. Some faults and transgressions may only give us pause. Others may be sufficient to ruin a legacy. People will likely differ in their perceptions of the seriousness of Brandeis' shortcomings as well as the damage suffered by his reputation. Certainly, from the perspective of African-Americans, Brandeis' systematic evasion of issues affecting African-Americans *severely* undermines any claim that Brandeis was a *universal* public advocate who championed the rights of *all* men. His chronic inability to defend their interests against the ravishes of white supremacy constitutes a critical failing that simply cannot be overlooked.

One might be tempted to discount or minimize the import of these revelations, but there are significant costs in doing so. For instance, if we choose to ignore the less-flattering aspects of Louis Brandeis, we are in effect abandoning the intellectual enterprise, because we refuse to embrace the man in all his disturbing complexity. Our posture becomes

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333. Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 158 (1995).

334. *See* DEAN ACHESON, MORNING AND NOON 50 (1965) ("[T]wo interacting themes seem to have dominated [Justice Brandeis'] talk—the Greek Genius (he was an admirer of Alfred Zimmern's The Greek Commonwealth) and the Curse of Bigness.")

one that is fundamentally anti-intellectual—one that seeks to constrain rather than expand our collective knowledge. Acolytes that choose to hold fast to the celebrated image of Louis Brandeis not only deny the humanity of their subject, but also threaten to replicate this error each time they present that image to future lawyers, judges, and academics.

Furthermore, to disregard this critique of Louis Brandeis is to arrogantly discount the lives and memories of those African-Americans whose suffering increased, in part, because of his conduct. Brandeis, after all, was uniquely positioned to do good things for the public causes he supported. His failure to act on behalf of African-Americans had very real consequences for those that continued to live a subordinated existence. To continue to celebrate a contrived image of Brandeis that does not acknowledge his complicity to African-American suffering simply adds yet another layer of denial in the ongoing drama of inter-ethnic relations.

Does this mean that we should not celebrate Louis Brandeis? That we should revoke the hero status of every person who harbored troubling racial views? Absolutely not. But we ought to be clear on exactly who and what we purport to celebrate. One can begin to accomplish this by focusing less on contrived images of heroism, and more on heroic virtues. There is tremendous value in idealizing certain heroic *attributes*—intelligence, courage, compassion, integrity, steadfastness—many of which Brandeis undoubtedly possessed. But to do so, we must first acknowledge and adhere to what we already know to be true—that *real* heroes are rarely heroic all the time. Only then can we freely admire persons such as Louis Brandeis, who exude heroic attributes, without compromising either the dignity of our subject or the legacy of our past.