Celebrating the 100th Anniversary of Louis D. Brandeis'
Appointment to the U.S. Supreme Court

Speech and Democracy
The Legacy of Justice Brandeis Today

Philippa Strum*

Justice Louis Dembitz Brandeis is widely regarded by legal scholars as having been one of the "great" justices of the United States.[1] Although he is known for his emphasis on judicial restraint and his delineation of the right to privacy, his reputation rests as well on his having penned what remains the definitive judicial pronouncement on the necessity for free speech in a democracy. He did not begin his tenure on the U.S. Supreme Court in 1916 with a coherent philosophy of speech, however. It evolved gradually during the second and third decades of the twentieth century, in response to societal conditions. What follows is an exploration of that evolution and some questions about whether today's societal conditions warrant even further thinking about speech, limitations on governmental power, and the rights and responsibilities of American citizens.

Let's begin as Justice Brandeis did, by looking at what the Constitution has to say about speech. The First Amendment is remarkably straightforward: "Congress shall make no law . . . abridging the freedom of speech or press." In other words, Congress can't interfere with speech.

Nonetheless, in 1917, when the United States was two months into World War I, Congress passed the Espionage Act.[2] One section outlawed speech and actions designed to hamper the draft or the war effort in general. It was amended by the Sedition Act of 1918, which said in part, "Whoever, when the United States is at war . . . shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States . . . or advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."[3]

Taken as a whole, the amended Espionage Act criminalized speech that, for example, criticized the original Constitution's endorsement of slavery; or asserted that the military uniforms issued by the government during World War I were not warm enough; or argued that both war in general and World War I in particular were wrong and the United States should never have entered the war, or that the draft was unconstitutional.

Over 2,000 people were actually prosecuted under the Act for saying some of those things. Charles Schenck, the general secretary of the Socialist Party, was convicted for hindering the war effort by publishing a two-page leaflet calling the draft a violation of the Thirteenth Amendment's prohibition of involuntary servitude. Newspaper publisher Jacob Frohwerk was also convicted under the Act for writing and circulating articles that were allegedly designed to cause disloyalty in the armed forces by questioning the legality of the draft and depicting the war as having been caused by a combination of American capitalists and England. He was so certain that his articles were legal that he sent the paper to the Justice Department office in Kansas City each week. It nonetheless took a Kansas City jury only three minutes to find him guilty.[4]

Schenck's and Frohwerk's appeals were heard by the U.S. Supreme Court in 1919. So was the case of labor leader and Socialist Party presidential candidate Eugene Victor Debs, who had been convicted for making a fiery anti-war speech in Canton, Ohio. At his trial, Debs had declared, "I believe in the right of free speech, in war as well as in peace .

. . I would under no circumstances suppress free speech. It is far more dangerous to attempt to gag the people than to allow them to speak freely what is in their hearts."[5]

The Supreme Court disagreed, and upheld both the constitutionality of the Espionage Act and all three convictions under it.[6] The decisions were unanimous. Brandeis's fellow justice Oliver Wendell Holmes spoke for the court in Charles Schenck's case, penning language that was to become familiar to many Americans. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic," Holmes wrote.[7] He continued with what would become known as the clear and present danger test:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[8]

The problem with the "clear and present danger test" was that Holmes did not define "clear" or "present" or "danger." Supreme Court Justice Robert Jackson, referring to the test three decades later, commented, "All agree that it means something very important, but no two seem to agree on what it is."[9] The doctrine had become something of an ideological Rorschach test, allowing people of widely differing opinions to interpret it in ways that reflected their own attitudes towards speech.

That ambiguity became apparent to Justice Brandeis not long after the 1919 decisions were handed down. In 1924, looking back, he would tell Professor Felix Frankfurter of the Harvard Law School that when the *Schenck* case was decided, "I had not then thought the issues of freedom of speech out—I thought at the subject, not through it."[10] In the years after 1919 he began to think "through" the question of what speech should be permitted in a democracy, and why. His thinking culminated in the concurring opinion he wrote in the 1927 case of *Whitney v. California.*[11] It remains the Supreme Court's most comprehensive and eloquent discussion of the rationale for free speech, and it makes today's American speech jurisprudence the most permissive in the world. It also lays out the connection between the right to free speech and the responsibilities of citizens.

Earlier in the post-World War I years, thirty-four of the states reacted to the anti-Communist, anti-union hysteria of the period by enacting criminal syndicalism and criminal anarchy laws, which criminalized advocating or organizing for the purpose of altering the political or economic system of the United States.[12] California was one of them.[13] In 1920, its criminal syndicalism law was used to convict a woman named Anita Whitney.

Whitney was the descendant of five people who had arrived on the Mayflower in 1620. Believing both that the country had turned its back on what she saw as the egalitarian principles of her ancestors and that the American political and economic systems of the early twentieth century would never solve the problems of poverty and inequality, she turned first to socialism and then to communism. She was ostensibly convicted for helping to organize the Communist Labor Party of California, which advocated non-violence and participation in the political process but also supported direct action such as strikes and demonstrations. In fact, as her trial made clear, she was doomed by her advocacy of political and economic change. She was sentenced to one to fourteen years in the San Quentin penitentiary.[14]

The Supreme Court upheld her conviction. Justice Brandeis concurred with the result for procedural reasons. He was a firm believer in judicial restraint and the importance of adhering to established procedures, which meant in part that the Supreme Court should not consider issues that were not raised in the courts below. Brandeis did not think that Whitney should have been prosecuted, but he also thought that the only way to keep the Supreme Court within its appropriate bounds was to follow the rules. Whitney's lawyers had not argued at trial that there was no clear and present danger justifying either the statute or her indictment under it. Brandeis therefore concurred. At the same time, however, he wrote an opinion for himself and Justice Holmes that reads very much like a dissent.[15] It was the first time that a member of the court had made the argument for free speech in detail.

Brandeis placed the rationale for free speech in the context of American history and ideology. The Founding Fathers, he declared, "believed that freedom to think as you will

and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."[16]

The Framers, in Brandeis's interpretation, understood that finding "political truth"—that is, answers to the question of what would best serve society and the individuals in it—was dependent upon full discussion, which was itself in turn dependent on "free speech and assembly." The guarantee of free speech protected the citizen's freedom to hear, without which the citizen could not make intelligent choices.

To Brandeis, speech was both something of a panacea and an obligation. When he wrote that "discussion affords ordinary adequate protection against the dissemination of noxious doctrine," he was asserting that incorrect ideas would soon be exposed as such if they were held up to public scrutiny. That did not mean that people could not be misled by wrong ideas: the Founding Fathers, he said, "recognized the risks to which human institutions are subject." They also knew, however, that democracy required "public discussion" rather than "an inert people."

Brandeis saw the state as an inevitably imperfect instrument, not only because "arbitrary" forces will challenge "deliberative" forces and because institutions are run by fallible human beings, but because it is in the nature of humanity to generate and heed what he called "evil counsels," at least temporarily.

At the same time, Brandeis insisted that a balance must be struck between two societal imperatives: the first, a government strong enough to protect citizens and their rights from over-zealous majorities; the other, the kind of protection needed by citizens from that very government. No government is to be entirely trusted, no matter who are its administrators, and every democratic government must be subjected to constant examination by the people.

The Founders, he continued, knew:

> that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion . . . they amended the Constitution so that free speech and assembly should be guaranteed.[17]

Brandeis was not naïve. He understood that ideas could be dangerous, and was aware of the possible impact of the kind of "noxious" political ideas that Anita Whitney believed in. "Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it," he acknowledged.[18] And yet that risk did not negate the greater danger of government repression. When speech is repressed, what follows is the "hate" that "menaces stable government." Stability and lawfulness were crucial to a free society. The safest course was not to repress speech but to count on "the power of reason as applied through public discussion." People could be misled, but not permanently, and so Brandeis fashioned a standard that he was convinced would protect both speech and the security of the nation:

> To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent . . . even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.[19]

And, he added, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there

is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[20]

Fear that words *might* be persuasive is not sufficient reason to ban or punish them, Brandeis declared in that paragraph. The clear and present danger doctrine means that speech cannot be suppressed unless it is "reasonable" to believe that "serious" and "imminent" evil is about to occur. As long as there was time for more reasoned voices to respond, speech, however noxious, could not be abridged or punished. Brandeis trusted that truth ordinarily would conquer error; otherwise, democracy made no sense. Perhaps more importantly, he believed that the difficult job of engaging in debate and refuting error, unlike the comparatively easy method of suppressing it, would contribute to building democratic habits and character. The answer to bad speech was good speech, and lots of it.[21]

The Brandeis formulation is as persuasive as it is eloquent. One of its elements, however, has been given far too little attention. In addition, in the world of the twenty-first century, there is something important missing from it. Let's return to Brandeis's language to pick up first on the piece that has been largely ignored. It is exemplified by the sentence that reads in part, "the greatest menace to freedom is an inert people . . . public discussion is a political duty."

Freedom—or democracy—cannot exist without an involved citizenry, according to that passage, and it is therefore the obligation of all citizens to involve themselves in the political process. They must engage in "public discussion" of the pressing issues of the day. Or, to put it somewhat differently, the right to speak is inextricably tied to the responsibility to participate.

Brandeis did not mean mindless participation, of course. He assumed that in order to fulfill their democratic responsibility, citizens would educate themselves about public policy. Education, to him, was not a matter only for the schoolroom, nor does "educated citizen" in the title of this essay imply that he was referring only to people with college degrees. On the contrary, Brandeis was insistent that education in a democratic polity was

a lifelong process, and that *all* citizens had to keep educating themselves in order to fulfill their civic responsibility. In 1906, ten years before he was appointed to the Supreme Court, he told the Civic Federation of New England that citizens had to be educated because they were the "rulers" of a democracy. "The citizen should be able to comprehend . . . the many great and difficult problems of industry, commerce and finance" he said, because they affect public policy decisions.[22] The right to assemble brought with it the responsibility to participate, Brandeis added in a 1920 Supreme Court case, for the citizen's "exercise" of the right "is more important to the nation than it is to himself."[23]

The bottom line, to summarize, was that democracy was impossible without citizen participation, and the right to speak and to assemble—the right to hear and discuss ideas—brought with it the responsibility of citizens to educate themselves for active political participation.

Let us examine the way that responsibility is approached today. In 2012, a presidential election year, the Center for the Study of the American Dream at Xavier University telephoned 1,023 native-born citizens to ask them some of the questions on the naturalization test given to immigrants. It took 6 out of 10 correct answers to pass. Of those surveyed 35 percent failed; only 6 percent got all 10 correct. And 85 percent could not answer the question, "What is the rule of law?"; 75 percent did not know what the judicial branch does. Only 37 percent knew the name of one of their state's U.S. senators; only 38 percent could name the governor. Fewer than half of the respondents replied correctly to the question, "What does the Constitution do?" It is relevant to a discussion of rights that less than half—47 percent—could name "two rights of everyone living in the United States" or one power of the federal government (41 percent).[24]

Two years later, in September 2014, the University of Pennsylvania's Annenberg Public Policy Center conducted a national survey of 1,416 American adults. When they were asked, "Do you happen to know any of the three branches of government?" 72 percent said yes, but then 35 percent could not name a single branch of the national government, and another 13 percent could name only one. Asked "which party has the

most members in the United States House of Representatives," 44 percent did not know, and an additional 17 percent guessed wrong.[25]

Only slightly more than 54 percent of eligible voters went to the polls in 2012, and in 2014 the turnout was somewhat over 35 percent.[26] Voting rates are not the only indicator of citizen participation, but it seems reasonable to assume that those who are active in the political process in other ways—through contributions to candidates, involvement in political parties and political campaigns, and so forth—are likely to be a good proportion of those who vote. There is of course no way of knowing how many of the people who did vote fell into the category of those unable to identify a branch of Congress or explain what the rule of law means. A cynic might comment that given the citizenry's appalling lack of knowledge about the government, it is just as well that more people did not vote. That cynic, however, would not be a fan of democracy, because as Justice Brandeis understood, democracy is meaningless without real citizen participation.

To Brandeis, there was no such thing as rights without responsibilities; there was no such thing as a well-functioning democracy if citizens did not accept the responsibility to remain informed. An updated version of the Brandeisian approach comes from Michael Sandel, who has noted that "sharing in self-rule requires the capacity to deliberate well about the common good."[27] So one problem today is how to deal with the lack of informed citizens and with what appears to be the reluctance of too many citizens, especially younger ones, to exercise their responsibility to be politically engaged. A 2005 Brookings Institution report stated that "American democracy is at risk" because "Americans have turned away from politics and the public sphere in large numbers, leaving our civic life impoverished." It added that this is particularly true of younger Americans.[28] Scholars have documented younger adults' disinterest in following the news.[29] The authors of a recent book surveyed 4,200 high school and college students and reported that they "see politics as pointless and unpleasant " and would prefer to do almost anything else in life than run for political office.[30]

A number of scholars have argued that young Americans are simply fulfilling their citizen responsibility in different ways, by participating in demonstrations and consumer

boycotts, petitioning media and entertainment corporations, and engaging in discussions on social media.[31] That is all to the good, but the numbers of young Americans taking part in such activities is very low. Involvement in no more than the occasional demonstration or boycott, coupled with a lack of sustained interest in public policy matters, does not fulfill a citizen's responsibilities. Substituting such activities for voting means not participating in choosing the government and holding it accountable. If democracy is not "by" the people, can it really be called democracy?

The failure of so many young Americans to involve themselves in electoral politics may be due to a variety of factors, including the current political gridlock in Washington and the resultant despair about the efficacy of the political system, voter identification laws that make registration and balloting difficult for many, holding elections on work days rather than the week-end, and the way campaign consultants assume that young people will not vote in substantial numbers and so fail to produce information in formats likely to engage them.[32] It nonetheless seems clear that part of the blame for the failure of citizens to fulfill their responsibility lies with our schools. Almost all the states mandate at least a minimum of civic education at the high school level.[33] It is, however, a minimum, and the results either of the limited time devoted to civic education or the poor teaching of it (including relying on textbooks rather than teaching in more interactive ways to engage today's young adults) or both speak for themselves: students are not learning about either their rights or their responsibilities.[34] The phenomenon is perhaps exacerbated by No Child Left Behind, which does not make civic education a priority.[35] While some states have begun to incorporate the citizenship exam mentioned earlier into their curricula, as of this writing, only two states—Arizona and North Dakota—require high school students actually to take it.[36] Is this something that colleges and universities might also think about? Can we increase citizen responsibility by educating for it?

But there is another aspect to the connection between speech rights and citizen responsibility that deserves to be explored. A number of American critics have questioned the American approach for its failure to include what we might label here as the responsibility not to speak. It is an issue that Brandeis, living in a world far different

from that of the twenty-first century, did not consider. It is, however, one that deserves our attention.

What is perhaps the sharpest criticism of American speech jurisprudence and the Brandeis model comes from the Critical Legal Studies school of thought. Its proponents, most of them law professors, argue that the ideas and doctrines that underlie American law are merely extensions of a political system that legitimizes injustice and the dominance of American society by groups such as white people, men, and the wealthy. Their critique says in part that by permitting what legal scholar Mari Matsuda and others have labeled "words that wound," or what we usually refer to as hate speech, the law effectively implies that groups such as racial and ethnic minorities, women, gays and lesbians, employees, low income people, and persons with disabilities are lesser human beings. In doing so, it effectively denies them full citizenship by penalizing their participation in the public sphere or silencing them entirely. In this view, some speech can actually prevent participation in the political process.[37]

Similarly, Feminist Legal Theory focuses on the effect of pornography and verbal sexual harassment on women. Critics such as Catharine MacKinnon and Andrea Dworkin have argued that the concept of free speech has been misused to allow sexually explicit material that subordinates women, condones violence against them, and denies them full equality at home, in the workplace, and in society at large.[38] Does permitting "words that wound" and denigrating sexual language conflict with the democratic goals of equality and inclusiveness?

It is worth noting that nations ranging alphabetically from Austria to Zimbabwe outlaw the kind of hate speech that is permissible in the United States. That includes, for example, Argentina, Brazil, Cameroon, Chile, China, Colombia, Cuba, Mexico, Niger, Senegal, and Venezuela. In Great Britain, a person who uses abusive or intentionally harassing language about race, religion, or sexual orientation can be fined or sentenced to prison. The German Criminal Code bans attacks on "the human dignity of others" that are likely to breach the peace because of "inciting to hatred against part of the population" or "insulting, maliciously making them contemptible, or defaming them." The South

African constitution declares, "Everyone has the right to freedom of expression" but the right "does not extend to . . . advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."[39]

Put differently, what these countries do is emphasize the responsibility of citizens to each other and to the maintenance of civility in the public sphere, along with the right to speak.[40] Is that the kind of legislation needed in this country, or would it result in too much government control and the resultant stifling of useful speech? And would it work? Justice Samuel Alito commented in a 2015 interview that European countries "have laws against hate speech, including Holocaust denial speech, and yet you see what's happening with anti-Semitism in Europe so it doesn't seem to be very effective."[41]

A second critique of American speech jurisprudence has emerged as a result of the late twentieth- and early twenty-first- century decisions by the Supreme Court, which relied in some measure on Brandeis's language about speech, striking down laws designed to regulate the flow of money into political campaigns. The Court has ruled in cases such as *Citizens United v. Federal Election Commission* (2010)[42] that contributions to political campaigns and expenditures to publicize a candidate's views are a form of speech, and so the First Amendment's speech clause prohibits the government from limiting the amount of money that can be contributed to and spent on election campaigns by individuals, political groups and corporations. Those decisions have generated criticism from people who argue that money is not speech and that the democratic process is in danger of being undermined by the infusion into it of large amounts of money from the wealthy. If we say that the expenditure of money is speech, have we made a mockery of the democracy that free speech is meant to safeguard and enhance?

An equally important question about our speech laws today arises in the context of the Internet, which has altered our world in dramatic ways. It has created a "global village," where in seconds we can access an astonishing amount of information about people all over the world and from cultures far different from our own. To quote Sandel again, our society "is situated in a global economy whose frenzied flow of . . . information and images, pays little heed to nations, much less neighborhoods."[43] While

the Internet expands the reach of political speech, it also gives both our neighbors and complete strangers enormous power without accountability. The anonymity of the Web permits posts of questionable veracity, which frequently go viral and misinform the very public so crucial to the democratic proves. In addition, anyone can say anything on the Internet about anyone else, and whether it is true or false it is immediately—and, in most cases, permanently—accessible by people we know and others whom we do not.

We have seen this in the phenomenon of cyberbullying: the use of cell phones, computers, and other electronic communication devices to harass and threaten others. Cyberbullying has resulted in a number of widely covered adolescent suicides as well as in severe psychological damage that stops short of self-destruction, and research suggests that the bullying phenomenon is fairly widespread.[44]

In addition, the web has made incursions into the zone of personal privacy that has historically contributed to the kind of civic courage and political participation that were so important to Justice Brandeis. In the past, people could participate in public discussions and then retire to the relative anonymity of their homes. The Internet and the availability of large amounts of information about almost everyone have severely limited privacy and anonymity. There may be ways in which the rights to speech and privacy conflict. Then-attorney Brandeis and a colleague famously extolled what they called the "right to be let alone" in an 1890 law review article, and Justice Brandeis elaborated on the right in the 1929 case of *Olmstead v. United States.*[45] A United Nations Special Rapporteur on speech, writing in 2013, echoed and updated the Brandeis formulation: "Privacy can be defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how is that information used."[46] Privacy can also be necessary for the kind of intellectual exploration that is a key aspect of citizen responsibility. Citizens must be able to access ideas (in books, websites, etc.) and discuss them without wondering if the government, employers, colleagues or

others are listening.[47] Edward Snowden's revelations about the National Security Agency's monitoring of Americans' phone calls and Internet use has made it clear that the government is in fact listening.

What might be viewed as the conflict between privacy and some speech can be seen rather dramatically in the phenomenon of revenge porn: pictures or videos, showing an identifiable person either nude or engaged in a sex act, that are taken consensually but are later posted, shared, and distributed without the consent of the subject. Internet postings are a form of speech. At the same time, they can be a devastating violation of the right to privacy, and two of the important features of the Internet are that postings can command a huge audience and it is extremely difficult to make anything posted there go away permanently. The potential for assaults on a person's dignity is substantial. Do we need tighter speech laws, or might it be sufficient to make greater use of state laws (where they exist) governing invasion of privacy, appropriation of one's likeness and intentional infliction of emotional distress?[48] Social media websites such as reddit, Gawker, and Twitter have recently banned cyberbullying and revenge porn.[49] Google and Microsoft's Bing now allow the subjects of revenge porn to request that the search engines remove links to such material—another way of attacking the problem without government censorship.[50] Is it possible that part of the answer lies in encouraging all such sites and platforms to adopt similar policies, just as most of them now ban child pornography?

Internet speech that is potentially incendiary but perhaps not immediately inciteful and that therefore cannot be punished under current law raises yet another issue. An example might be a post that says, "Abortion is murder, Dr. Smith performs abortions, here is his address," or "Councilwoman Jones is threatening to vote to take away the guns we all need to protect ourselves, and she lives at 461 Elm Drive." (A website that named abortion providers and marked off those injured or killed was held by a federal appeals court in 2005 to constitute a "true threat" not protected by the First Amendment.[51]) Still another concern comes from the national security and law enforcement communities, which point to the problem of the spread of terrorist recruitment and communications on the Internet.[52]

The question of what to do about these phenomena, while remaining committed to the kind of robust speech rights that are crucial in a democracy, is not an easy one. Presumably we can all agree that cyberbullying, for example, is unacceptable; one might define it as a growing public health problem. Is the answer, however, a limitation on speech, or better education about bullying and the importance of civility—that is, the responsibility not to speak, or to speak in a civil manner? Do we need to rethink what education for democracy means in the age of the Internet? The majority of states have enacted laws either prohibiting cyberbullying or directing school districts to adopt regulations that do so.[53] Massachusetts's anti-bullying law is typical. It requires school districts to develop a plan to keep children safe from both physical and cyber bullying. The plan must including training for teachers and all other school personnel as well as lessons for children from kindergarten through grade twelve.[54] Some websites now teach children and young adults about Internet safety, cyberbullying, and sexting.[55] Would making that kind of information part of school curricula solve the problem, or do we need somewhat different speech laws? Can we teach Americans that the opposite side of the coin of their right to speak, and their responsibility to speak, is that they sometimes have a responsibility not to speak?[56] Should education for responsible use of the Internet and social media be a requirement on college campuses as well as in the lower schools?

And above all, as we examine those questions, we must deal with the danger of government power implicit in Justice Brandeis's thought. "We must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence," he wrote in *Whitney*.[57] His answer was that both the State—the government—and the "vast majority of its citizens" could be wrong. Human beings were both inherently conservative and fallible, Brandeis knew, and that was true of human beings in government and of those outside it. It was perilous to give the government the right to censor speech. Viewed from the vantage point of the twenty-first century, we can see that a government with the power to prohibit "dangerous" speech could have punished so many of the ideas that have enhanced American freedom and equality: the

abolition of slavery, racial integration, gender equality, and LGBTQ rights, to cite but a few. In fact, at various moments, such as the World War I era and the McCarthy Red-baiting period of the 1950s, the federal and state governments did indeed punish speech. "It's not that I believe the exercise of the freedom of speech will always bring about good results," law professor Alan Dershowitz writes; "it's that I believe that the exercise of the power to censor will almost always bring about bad results. It's not that I believe the free marketplace of ideas will always produce truth; it's that I believe that the shutting down of that marketplace by government will prevent the possibility of truth."[58] Former *New York Times* journalist David Shipler adds, "Denial of the right to speak silences the speaker and also deafens the audience, impoverishing everyone."[59]

Let us return here to Justice Brandeis's insistence in *Whitney* that speech rights properly exist only in the context of citizen responsibility. Part of the responsibility of the citizen is to consider issues such as the ones discussed above. It is no answer to fall back on, "Oh, but the First Amendment says . . ." because, as we have seen, the speech clause, along with virtually all the other clauses of the Constitution, has been interpreted and reinterpreted in the light of changing societal necessities. Woodrow Wilson noted more than a hundred years ago, "Government is not a machine, but a living thing" that is "accountable to Darwin, not to Newton . . . Living political constitutions must be Darwinian in structure and in practice."[60] Constitutional interpretation, and our laws generally, must evolve to keep pace with society. The question of what speech laws—and what kind of education—are appropriate for the American democracy in the early decades of the twenty-first century is one that we, as citizens, have the responsibility to address. The legacy of Justice Brandeis demands no less.

***Philippa Strum** is a senior scholar at the Woodrow Wilson International Center for Scholars. She has written many works about Justice Brandeis, including *Louis D. Brandeis: Justice for the People.* She recently completed *Speaking Freely:* Whitney v. California *and American Speech Law*.

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Notes

1. Jonathan Turley, "The 9 Greatest Supreme Court Justices," July 29, 2009, http://www.historynet.com/the-9-greatest-supreme-court-justices.htm; Cass R. Sunstein, "Home-Run Hitters of the Supreme Court," *Bloomberg View,* Apr. 1, 2014, http://www.bloombergview.com/articles/2014–04–01/home-run-hitters-of-the-supreme-court; Bruce Allen Murphy and Maria A. Fekete, "Louis Dembitz Brandeis" in John R. Vile, ed., *Great American Judges* (ABC-Clio, 2003), v. I, pp. 121–130.

2. Espionage Act of 1917, Pub.L. 65–24; ch. 30, 40 Stat. 217.

3. Sedition Act of 1918, Pub.L. 65–150; ch. 75, 40 Stat. 553.

4. James J. Fisher, "He Lost His Battle in WWI—Fighting for Press Freedom," *Kansas City Times,* Mar. 6, 1961, p. A1. Thomas Healy says the Justice Department subscribed to the newspaper. Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America* (Henry Holt and Co., 2013), p. 84. Three minutes: Healy, op. cit., p. 85, citing "Convicted in 3 Minutes: Verdict on Frohwerk Case Set Record for Haste," *Kansas City Times,* June 29, 1918, p. 1.

5. Quoted in H. C. Peterson and Gilbert C. Fite, *Opponents of War, 1917–1918* (University of Wisconsin Press, 1957), p. 253, citing Eugene V. Debs, *Writings and Speeches of Eugene V. Debs* (Hermitage Press, 1948), pp. 437–439.

6. *Schenck v. United States,* 249 U.S. 47 (1919); *Frohwerk v. United States,* 249 U.S. 204 (1919); *Debs v. United States,* 249 U.S. 211 (1919).

7. *Schenck v. United States,* at 52.

8. Op. cit.

9. *Dennis v. United States*, 341 U.S. 494, 567 n. 9 (1951) (Jackson, J., concurring).

10. "Memorandum" written by Felix Frankfurter after conversations with Brandeis during the years 1922–1926. Frankfurter Papers, Library of Congress, Box 224, p. 23. The memorandum in the Library of Congress is a typescript of Frankfurter's notes, reportedly put together by Alexander Bickel. The original notes are in the Brandeis Papers, Harvard Law School (Untitled

Notebook, Box 114–7 and 114–8). They are difficult to read but differ in some ways from the typescript, probably because of the problems presented by Frankfurter's handwriting. Another transcription is in Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *The Supreme Court Review* 299 (1985). The conversation about speech, dated August 8, 1923, is at pp. 323–324.

11. *Whitney v. California,* 274 U.S. 357, 372 (1927).

12. Woodrow C. Whitten, "Criminal Syndicalism and the Law in California: 1919–1927," 59 *Transactions of the American Philosophical Society* 3 (1969); Eldridge Foster Dowell, *A History of Criminal Syndicalism Legislation in the United States* (The Johns Hopkins Press, 1939), p. 147; James Lipsig, *Summary of Arguments Against Sedition, Criminal Syndicalism and Criminal Anarchy Laws* (American Civil Liberties Union, 1939).

13. West's Ann. Cal. Penal Code §§ 11400 to 11402; repealed by Stats.1991, ch. 186 (A.B.436), §10. Statutes, 1919, c. 188, p. 281

14. Record of Transcript, *Charlotte Anita Whitney, Plaintiff in Error vs. The People of the State of California,* Supreme Court of the United States, October Term 1925, p. 30.

15. *Whitney v. California,* 274 U.S. 357, 372 (1927).

16. *Whitney v. California,* Brandeis, J., concurring, at 375.

17. *Whitney v. California,* at 375–376.

18. *Whitney v. California,* at 376.

19. *Whitney v. California,* at 376.

20. *Whitney v. California,* at 377.

21. Citing the Brandeis opinion, the governor of California pardoned Whitney. Brandeis commented, "The pardon of Anita Whitney was a fine job." Louis Dembitz Brandeis to Felix Frankfurter, June 26, 1927, in Melvin I. Urofsky and David W. Levy, eds., *"Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter* (University of Oklahoma Press, 1991), p. 301. Brandeis's reasoning was soon used by the Court in a variety of cases, and was adopted officially by the Court in 1969 (*Brandenburg v. Ohio,* 395 U.S. 444). It is now the basis for American speech jurisprudence. *See* Philippa Strum, *Speaking Freely: Whitney v. California and American Speech Law* (University Press of Kansas, 2015), pp. 130–134.

22. Louis Dembitz Brandeis (hereafter LDB), "House of Labor," address to first annual meeting of the Civic Federation of New England, Jan. 11, 1906, reprinted in LDB, *Business—A Profession,* ed. Ernest Poole (Small, Maynard, 1914), 28–36, at 32–33.

23. *Gilbert v. Minnesota,* 254 U.S. 325, 338 (1920) In spite of the pronoun, Brandeis did not believe that the responsibility belonged to men alone. While he had opposed woman suffrage when he was a young adult, his subsequent experience of working in the public sector with activist women persuaded him that women ought to have the right to vote. In 1915 he declared "not only that women should have the ballot, but that society demands that they exercise the right." LDB to Mrs. F. W. Wile, June 19, 1915, Brandeis Papers (hereafter BP), Louisville of Kentucky, NMF 47–3. See also Alfred Lief, *Brandeis: The Personal History of an American Ideal* (Books for Libraries Press, 1936), pp. 340–341; LDB to Caroline I. Hibbard, Mar. 18, 1913, BP, NMF 37–3; to Agnes E. Ryan, Sept. 30, 1915, BP, NMF 47–3, agreeing to help judge a contest for a symbol for the suffrage "ideal;" to Alfred Brandeis, Oct. 22, 1915, BP, M 4–1; Philippa Strum, *Louis D. Brandeis: Justice for the People* (Harvard University Press, 1984), pp. 128–131.

24. Center for the Study of the American Dream, "U.S. Naturalization Civics Test: National Survey of Native-Born U.S. Citizens, March 2012," http://www.xavier.edu/americandream/programs/documents/5CivicTestpowerpointfinalPDF.pdf. The test of 100 questions can be accessed at http://www.csmonitor.com/USA/2011/0104/Could-you-pass-a-US-citizenship-test/Who-signs-bills. The answers are at http://www.uscis.gov/sites/default/files/USCIS/Office%200f%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/100q.pdf.

25. Annenberg Public Policy Center of the University of Pennsylvania, "Americans know surprisingly little about their government, survey finds," Sept. 17, 2014, available in Appendix to http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Civics-survey-press-release-09–17–2014-for-PR-Newswire.pdf. The problem of electorate ignorance does not appear to be new. *See,* e.g., Pew Research Center, "Public Knowledge of Current Affairs Little Changed by News and Information Revolutions," Apr. 15, 2007, http://www.people-press.org/2007/04/15/public-knowledge-of-current-affairs-little-changed-by-news-and-information-revolutions/.

26. University of California, The American Presidency Project, "Voter Turnout in Presidential Elections: 1828–2012," http://www.presidency.ucsb.edu/data/turnout.php; United States Elections Project, "2014 November General Election Turnout," http://www.electproject.org/2014g.

27. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996), p. 318.

28. Stephen Macedo, et al., *Democracy at Risk: How Political Choices Undermine Citizen Participation and What We Can Do about It* (Brookings Institution Press, 2005), pp. 1, 2.

29. David T. Z. Mindich, *Tuned Out: Why Americans Under 40 Don't Follow the News* (Oxford University Press, 2005); Martin P. Wattenberg, *Is Voting for Young People?* (Pearson Education Inc., 3rd ed., 2012), chs. 1, 2.

30. Jennifer L. Lawless and Richard L. Fox, *Running From Office: Why Young Americans Are Turned Off to Politics* (Oxford University Press, 2015), p. 4. The students surveyed were ages 13–25.

31. See, e.g., Aaron J. Martin, *Young People and Politics: Political Engagement in the Anglo-American Democracies* (Routledge, 2012); Russell J. Dalton, *The Good Citizen: How a Younger Generation is Reshaping American Politics* (CQ Press, rev. ed., 2009); Jennifer Earl and Alan Schussman, "Contesting Cultural Control: Youth Culture and Online Petitioning" in W. Lance Bennett, ed., *Civic Life Online: Learning How Digital Media Can Engage Youth* (The MIT Press, 2008), 71–96. Wattenberg, *Is Voting for Young People,* ch. 7, argues that such engagement is limited and sporadic.

32. There are of course other reasons for lack of engagement, including the belief that the heavy injection of money into the electoral process has made individual citizen's participation meaningless. For information about the participation or lack thereof by young adults, see CIRCLE, The Center for Information & Research on Civil Learning and Engagement, www.civiyouth.org. See also the United States Elections Project, www.electproject.org;

Arend Lijphart, "Unequal Participation: Democracy's Unresolved Dilemma," 91 *American Political Science Review* (Mar., 1997), pp. 1–14;Wattenberg, *Is Voting for Young People?* pp. 192–203. Citizens aged 18–24 have never voted in great numbers but the percentage has declined. In 1972, when the 26th Amendment gave 18-year-olds the right to vote, 49.6% of that age group voted. In 2012 the percentage fell to 38%. Thom File, "Young-Adult Voting: An Analysis of Presidential Elections, 1964–2012 (U.S. Census Bureau, April, 2014), https://www.census.gov/prod/2014pubs/p20–573.pdf. Michael Xenos and Kirsten Foot argue that candidates' websites tend not to engage in the kind of communication that seems relevant to younger voters. "Not Your Father's Internet: The Generation Gap in Online Politics" in Bennett, *Civic Life Online,* pp. 51–70. While some campaigns have become more youth savvy since the article was published in 2008, their points are still relevant.

33. Nora Fleming, "Civic Education Found Lacking in Most States," *Education Week,* Mar. 4, 2015, http://blogs.edweek.org/edweek/curriculum/2012/10/civic_education_assessments_fo.html.

[1] Stephen Macedo et al., *Democracy at Risk: How Political Choices Undermine Citizen Participation and What We Can Do about It* (Brookings Institution Press, 2005), 1, 2.

34. See, e.g., David W. Bennett, "Changing Citizenship in the Digital Age," in Bennett, *Civic Life Online,* pp. 7, 16–18, and Howard Rheingold, "Using Participatory Media and Public Voice to Encourage Civic Engagement" in the same volume. The Bennett books contains a number of other interesting articles about whether/why young adults are not more engaged and ways to get them involved. *See also* MacArthur Online Discussions on Civil Engagement, September 29-October 13, 2006, available at http://ccce.com.washington.edu/about/assets/Civic_Engagement-Online_Discussions06.pdf. See also Carnegie Corporation of New York and Center for Information & Research on Civic Learning and Engagement, "The Civic Mission of Schools' (2003), http://www.civicyouth.org/PopUps/CivicMissionofSchools.pdf.

35. Emma Chadband, "In Standardized Testing Era, Civic Education Getting Left Behind," neaToday, Oct. 17, 2012, available at http://neatoday.org/2012/10/17/in-standardized-testing-era-civic-education-getting-left-behind-2/.

36. Center for Information & Research on Civic Learning and Engagement, "More than a Test: Truly Committing to Civic Education," Feb. 9, 2015, http://www.civicyouth.org/more-than-a-test-truly-committing-to-civic-education/; Rich Rojas and Motoko Rich, "States Move to Make Citizenship Exams a Teachers' Aid," *New York Times,* Jan. 27, 2015, available at http://www.nytimes.com/2015/01/28/us/states-move-to-make-citizenship-exams-a-classroom-aid.html?_r=0.

37. See, e.g., Mari Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993).

38. Catharine A. MacKinnon, O*nly Words* (Harvard University Press, 1993); Andrea Dworkin, *Pornography: Men Possessing Women* (E. P. Dutton, 1989).

39. Criminal Justice and Public Order Act, 1994, §4a, *http://www.legislation.gov.uk/ukpga/1994/33/section/154; German Penal Code §86, Dissemination of Means of Propaganda of Unconstitutional Organizations, and §86a(2), Use of Symbols of Unconstitutional Organizations,*

*http://www.iuscomp.org/gla/statutes/StGB.htm#86a;*Constitution of the Republic of South Africa 1996: chapter 2 section 16, http://www.gov.za/documents/constitution/1996/a108–96.pdf. Laws against hate speech in most countries can be found by searching on the Web for the name of the country and "speech" or "constitution." The website LegislationLine has a list, with links, of the criminal codes of many countries: http://www.legislationline.org/documents/section/criminal-codes.

40. Cf. Article 29 of the Universal Declaration of Human Rights: "Everyone has duties to the community in which alone the free and full development of his personality is possible," http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement; Frank La Rue, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," U.N. Human Rights Council, 16 May 2011: "legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life)," http://www2.0hchr.org/English/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.PDF, p. 8.

41. "Conversation with Samuel Alito" (Conversations with Bill Kristol, June 2015), http://conversationswithbillkristol.org/video/samuel-alito/, http://conversationswithbillkristol.org/transcript/samuel-alito-transcript.

42. *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010)

43. Sandel, *Democracy's Discontent,* 317.

44. Megan Meier Foundation, ""Cyberbullying and Social Media," http://www.meganmeierfoundation.org/empoweren43444.html; NoBullying.com, "Cyber Bullying Statistics 2014," http://nobullying.com/cyber-bullying-statistics-2014/. In 2007, the Pew Research Center reported that one in three teenagers using the Internet had been bullied on it. At the same time, however, Pew found that teenagers were more likely to be bullied offline. Amanda Lenhart, "Cyberbullying," June 27, 2007, http://www.pewinternet.org/2007/06/27/cyberbullying/.

45. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 (Dec. 15, 1890) *Harvard Law Review*: 193; Olmstead v. United States, 277 U.S. 438 (1928).

46. Frank La Rue, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," U.N. Human Rights Council, 17 Apr. 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf .

47. For the argument that privacy and speech are inextricably connected, see, e.g., Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press, 2015).

48. A number of states have enacted or are considering criminal and/or civil laws about revenge porn, either as a subset of acts such as harassment or as a stand-alone phenomenon. "States with Revenge Porn Laws," http://www.endrevengeporn.org/revenge-porn-laws/; C. A. Goldberg, "State with Revenge Porn Criminal Laws," http://www.cagoldberglaw.com/states-with-revenge-porn-laws/.

49. reddit Announcements, "Let's talk content. AMA," July 16, 2015, https://www.reddit.com/r/announcements/comments/3djjxw/lets_talk_content_ama/; Jonathan Mahler, "Limits at Gawker? Rules at Reddit? Wild West Web Turns a Page," *New York Times,* July 21, 2015, http://www.nytimes.com/2015/07/22/business/media/limits-at-gawker-rules-at-reddit-wild-west-web-turns-a-page.html?_r=0; Twitter, "The Twitter Rules," https://support.twitter.com/articles/18311#.

50. Amit Singhai, "'Revenge porn' and Search," Google Public Policy Blog, June 19, 2015, http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html; Jacqueline Beauchere, "'Revenge porn:' Putting victims back in control," Microsoft on the Issues, July 22, 2015, http://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/. Of course making speech dependent on the judgement of Internet and website providers, or the other intermediaries we use when we access and share information, raises other questions.

51. *Planned Parenthood v. American Coalition of Life Activists,* 422 F.ed 949 (9th Cr. 2005). The decision defined "true threats" as "a threat where a reasonable person would foresee that the listener will believe he will be subjected to physical violence" and added, "true threats of the sort ACLA made in order to intimidate physicians are not protected under the First Amendment." The decision is available at http://openjurist.org/422/f3d/949. For more recent "true threat" jurisprudence, see *Elonis v. U.S.*, 575 U.S. ___ (2015).

52. See, e.g., Gabriel Weimann, *Terrorism in Cyberspace: The Next Generation* (Woodrow Wilson Center Press, 2015). *Also see* J. M. Berger and Jonathon Morgan, "The ISIS Twitter

Census: Defining and describing the population of ISIS supporters on Twitter" (Brookings Institution, Mar. 2015), http://www.brookings.edu/~/media/research/files/papers/2015/03/isis-twitter-census-berger-morgan/isis_twitter_census_berger_morgan.pdf; Department of Homeland Security, "Terrorist Use of Social Networking Facebook Case Study," Dec. 5, 2010, https://publicintelligence.net/ufouoles-dhs-terrorist-use-of-social-networking-facebook-case-study/; United Nations Office on Drugs and Crime, "The Use of the Internet for terrorist purposes," http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf. On the question of the tension for social media sites between free speech and the fight against terrorist propaganda, *see* Scott Higham and Ellen Nakashima, "Why the Islamic State leaves tech companies torn between free speech and security," *The Washington Post,* July 16, 2015, https://www.washingtonpost.com/world/national-security/islamic-states-embrace-of-social-media-puts-tech-companies-in-a-bind/2015/07/15/0e5624c4–169c-11e5–89f3–61410da94eb1_story.html?kmap=1.

53. National Conference of State Legislatures, "Cyberbullying and the States," July 9, 2010, http://www.ncsl.org/research/civil-and-criminal-justice/cyberbullying-and-the-states.aspx. See also Dena T. Sacco, et al., "An Overview of State Anti-Bullying Legislation and Other Related Laws" (Born This Way Foundation, 2012), http://www.meganmeierfoundation.org/cmss_files/attachmentlibrary/State-Anti-Bullying-Legislation-Overview.pdf. Misdemeanor: *see,* e.g., Idaho Code Title 18 § 18–917A, http://www.legislature.idaho.gov/idstat/Title18/T18CH9SECT18–917A.htm; North Carolina General Statute § 14–458.1 http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14–458.1.html (Conn. Gen Stat. Ann. § 53a-183 http://www.cga.ct.gov/2011/pub/chap952.htm#Sec53a-183.htm

54. Massachusetts Acts 2010 Chapter 92, "An Act Relative to Bullying in Schools," https://malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter 92.

55. www.childline.org.uk;www.thinkuknow.co.uk

56. For information about methods of teaching young people about bullying and acceptable cyber behavior, see, e.g., Nancy E. Willard, *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Aggression, Threats, and Distress* (Research Press, 2007); Jennifer Masters and Nicola Yelland, "Changing Learning Ecologies: Social Media for Cyber-citizens,"

Gillian Palmer and Juliana Raskauskas, "Kia Kaha: Police and Schools Working Together to Eliminate Bullying," and Will Gardner, "Cyber-bullying: A Whole-school Community Approach," all in Shaheen Shariff and Andrew H. Churchill, eds., *Truths and Myths of Cyber-Bullying: International Perspectives on Stakeholder Responsibility and Children's Safety* (Peter Lang, 2010).

57. *Whitney v. California,* at 374.

58. Alan Dershowitz, *Taking the Stand: My Life in the Law* (Crown Publishers, 2013), 107.

59. David K. Shipler*, Freedom of Speech: Mightier than the Sword* (Alfred A. Knopf, 2015), 11.

60. Woodrow Wilson, "What is Progress?" in Wilson, *The New Freedom* (Doubleday, Page & co., 1913), 46, https://www.gutenberg.org/files/14811/14811-h/14811-h.htm.