

A MOMENT IN THE PRAGMATIC POLITICAL STYLE:

THE RHETORIC OF LOUIS D. BRANDEIS

A Thesis

by

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Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

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August 2004

Major Subject: Speech Communication

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ABSTRACT

A Moment in the Pragmatic Political Style:

The Rhetoric of Louis D. Brandeis. (August 2004)

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This thesis examines the rhetoric of Louis D. Brandeis in light of pragmatism—specifically, the philosophical pragmatism of William James and John Dewey. While a number of scholars claim that pragmatism has nothing to offer politics, rhetoric, or decision-making, this thesis argues that Brandeis’s method of acting politically, speaking publicly, and solving problems exemplifies the pragmatic political style—a style of political operation that is characteristically pragmatic, a direct extension of James and Dewey’s philosophy. This thesis illustrates Brandeis’s pragmatic political style through an analysis of his rhetoric prior to taking his seat on the United States Supreme Court, his rhetoric while on the Supreme Court, and his rhetoric as one of America’s most prominent Zionists. This thesis shows that pragmatism (at least William James and John Dewey’s classical American pragmatism—the pragmatism Brandeis exemplifies rhetorically) can be a fruitful part of political operation.

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CHAPTER I

INTRODUCTION

Rhetoric scholars continually want to know what difference “theory” makes.¹ “So what?” is the question. For rhetoric scholars interested in political discourse the question is, “What difference does a given theory make for the study of political rhetoric?” What does theory add to social, cultural, political exchanges? Why prefer one theory to another? Why care about “theory” at all?²

Those familiar with William James’s work will recognize these questions; they are questions derived from the same spirit with which James spoke about the “pragmatic method”: “The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?”³ James was disdainful of theory without “feet,” of ideas that had no “cash value,” of philosophical conundrums that had no bearing on the way in which one had one’s experiences. This was James’s theoretical dictum:

There can *be* no difference anywhere that does n’t *make* a difference elsewhere—no difference in concrete fact and in conduct consequent upon that fact, imposed on somebody, somehow, somewhere and sometime. The whole function of philosophy ought to be to find out what definite difference it will make to you and me, at definite instants of our life, if this world-formula or that

This thesis follows the style of *Rhetoric & Public Affairs*.

world-formula be the true one.⁴

James championed pragmatism as a method of inquiry that sought to offer answers to the “so what” question. Pragmatism emerged, under James’s guidance, as a means of probing theory and experience to see what concrete, practical differences given philosophies made. He wrote,

You must bring out of each word its practical cash-value, set it at work within the stream of your experience. It appears less as a solution, then, than as a program for more work, and more particularly as an indication of the ways in which existing realities may be *changed*.

Theories thus become instruments, not answers to enigmas, in which we can rest. We don’t lie back upon them, we move forward, and, on occasion, make nature over again by their aid. Pragmatism unstiffens all our theories, limbers them up and sets each one at work.⁵

Recently, however, scholars have been trying to out-James James. That is, scholars—even scholars who consider themselves pragmatists—have turned the tables on James’s formulation of pragmatism and asked, What concrete, practical difference does *pragmatism* make? What is pragmatism’s cash-value? What does pragmatism add to the discussion? For social, political, and rhetorical theory, the question becomes, What difference does pragmatism make for discussions of society, politics, and rhetoric?

On many occasions, the answer comes back, Pragmatism makes *no* difference for discussions of society, politics, and rhetoric; pragmatism makes no concrete, practical difference. It adds nothing to sociopolitical exchanges. “Pragmatism has no political

valence,” says Richard Posner.⁶ Stanley Fish concludes, “If pragmatism points out that its rivals cannot deliver what they promise—once-and-for-all answers to always relevant questions—pragmatism should itself know enough not to promise anything, or even to recommend anything. If pragmatism is true, it has nothing to say to us; no politics follows from it or is blocked by it; no morality attaches to it or is enjoyed by it.”⁷ John Diggins turns the point specifically on the early American pragmatists, William James and John Dewey, and their vision of philosophy as experience: “The concept of experience is not only cognitively dubious, it is politically mischievous.”⁸ Elsewhere, Diggins echoes the sentiment of Arthur O. Lovejoy, a contemporary of James: “pragmatism cannot provide useful knowledge at all. Unable to certify as truthful that which we need to know before we act, pragmatic philosophy cannot provide knowledge precisely when it is most valuable. Verified ex post facto wisdom can tell us little about how to face the future if the past is behind us.”⁹

These sentiments would have baffled James. James championed pragmatism specifically because of what he saw as pragmatism’s cash-value as a philosophical method or attitude. Pragmatism, James said, stands for a “perfectly familiar attitude in philosophy. . . . At the same time it does not stand for any special results. It is a method only.”¹⁰ Pragmatism has no special results indeed, but it does have an aim; as John McDermott writes, “In ideal terms, a person comes to consciousness and begins to work out one’s place, one’s version, and one’s taste for this or that. Yet we now know that the burgeoning self is fraught with personal freight. . . . [T]he fundamental challenge is to convert the personal weaknesses into strengths and to drive our strengths into the teeth

of a personally neutral but relatively pregnant world.”¹¹ As James saw it, pragmatism was a method, mood or attitude for navigating a world of experience and relations, a world forever in-the-making, a world that was ripe with novelty, possibility, danger, insensitivity, chaos and potential flourishings. The pragmatic upshot was the attempt to figure out how to nourish oneself through one’s environment, how to thrive. This is why, despite having the reputation as a rugged individualist, James was undyingly concerned with social, political, cultural and communal issues of his day.¹² He was a philosopher concerned with the individual, but not at the expense of the community. James paid attention to politics. As a dedicated New England anti-imperialist during the Philippine conflict, James spoke and wrote publicly numerous times on what he saw as an American community in danger of losing its soul. James lamented America’s involvement in the Philippines with rhetoric reflecting the profound spiritual crisis he saw ensuing:

We used to believe then that we were of a different clay from other nations, that there was something deep in the American heart that answered to our happy birth, free from the hereditary burden which the nations of Europe bear, and which obliges them to grow by preying on their neighbors. Idle dream! pure Fourth of July fancy, scattered in five minutes by the first temptation. In every national soul there lie potentialities of the most barefaced piracy, and our own American soul is no exception to the rule.¹³

In private correspondence, James remarked to his friend Granville Stanley Hall, “What makes me sickest in our whole barbaric imperialism is our Turkish superstition about the

holiness of our peculiar type of civilization.” James continued, “As if anything could be of value anywhere that had no native historic roots. We have destroyed in Luzon the one sacred thing in the world, the spontaneous budding of a national life; we are destroying their souls even more than their bodies, and we think that the violent imposition of our own entirely desperate ideals will be an act of charity! Oh the big idiots that we are!”¹⁴

James’s political concerns have deep roots in his philosophical outlook. In James’s philosophy, humans are part of a wider spiritual consciousness.¹⁵ This is James’s philosophy of being in a pluralistic universe; it is “essentially a *social* philosophy, a philosophy of ‘*co*’ in which conjunctions do the work.”¹⁶ Thus politics become extremely important for James. “Let me repeat once more,” James says, “that a man’s vision is the great fact about him.”¹⁷ Both philosophy and politics flow from one’s vision. Both are integral aspects of personhood and community. Both are forever in-the-making. And both are tools for practically steering one’s course in life.

My project in this thesis is to explore the import of pragmatism into political speech, into rhetoric. Contrary to Posner, Fish, Diggins and those who see pragmatism as a philosophical attitude with nothing to offer politics, rhetoric and public life, I offer Supreme Court Justice Louis Brandeis as an exemplar of the pragmatic political style (a term discussed later). My contention is that Brandeis articulated the pragmatic political style in accord with the passion, spirit, depth and meaning James envisaged for pragmatism and John Dewey nurtured. Contrary to the contemporary usage of the term, which sees pragmatism as “practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian

dreamers,”¹⁸ the pragmatic political style articulated by Brandeis helps individuals, the community and society to flourish in the fabric of human experience.

It would be best to pause here and explain what I mean by “pragmatism.” But offering a straightforward definition of the term is not as easy, nor as beneficial, as one may think. James tried to offer a simple definition of pragmatism and found himself in a hornet’s nest of philosophical controversy. This controversy led him almost three years later to rail against those who misunderstood pragmatism, critics who James said “labor under an inability almost pathetic, to understand the thesis which they seek to refute.”¹⁹

Not only did James face a multitude of critics in his own time, but pragmatism as a term has taken a long, strange journey throughout the twentieth century.²⁰ James offered a seemingly straightforward definition of the term and misunderstandings of pragmatism erupted.

Pragmatism’s difficulties stem from its definition of truth. “*True ideas are those that we can assimilate, validate, corroborate and verify,*” James wrote of pragmatism’s definition of truth. “*False ideas are those that we can not.*”²¹ James was quickly slammed with charges of subjectivism and relativism.²² Guilty by association, Dewey too found himself having to respond to criticism that pragmatism was a philosophy justifying “whatever makes you feel good.”²³ The subjectivist/relativist criticism followed pragmatism throughout the twentieth century and continues today. (Richard Rorty, among others, currently faces the same criticism.)

But notice the language of James's pragmatic definition of truth: assimilation, validation, corroboration, and verification—these are terms of “science.” On the flip-side of the subjectivist/relativist criticism, pragmatism, because of James's definition, became closely associated with positivism. Reviewing James's *Pragmatism* for *The Philosophical Review*, Charles M. Bakewell called pragmatism “simply the modern analogue of positivism.”²⁴ Contemporarily, Richard Posner has called the battle between positivism and pragmatism a “family quarrel.”²⁵ Nothing could be further from the truth. Whereas James used “verify” while defining pragmatism, and Dewey repeatedly used “science” to describe his mode of inquiry, the connotations of the term “science” under the positivists ran far astray from the way in which James and Dewey understood the term. James and Dewey did not adhere to a spectator theory of knowledge, nor were they verificationists in the correspondence theory sense of the term, nor did they believe the purpose of inquiry was to get at the Truth of Reality. James and Dewey viewed science organically, naturalistically, experimentally and radically. Science was for them bound in the unending project of striving for a better life, a better society. As a means of helping the individual and society diagnose experiences and make those experiences grow meaningfully for the individual and society, science was no different than art, reflection, the pursuit of happiness, and the health of humanity. By using the terms of science, James and Dewey did not, contrary to Posner's understanding, seek to define science narrowly and dismiss as unscientific, and therefore meaningless, pursuits of moral and political theory. Robert Westbrook notes that Dewey's use of the term science

was so liberal that Dewey often comfortably used science as a synonym for reason, intelligence, and reflective thought, a practice that did not manifest, as some have charged, an unduly narrow notion of the latter terms but rather a willingness to offer relatively relaxed entrance requirements to the house of science. Scientific thinking, Dewey insisted to popular as well as professional audiences, was but a refinement of the ordinary procedures for fixing belief.²⁶

For James and for Dewey, there was no natural separation between theory and practice. Rather, both believed that theory and practice proceeded organically, bound inexorably in experimentations in the fabric of experience.

Largely because James and Dewey mixed “subjectivist” and “positivistic” language, James and Dewey and pragmatism were throughout the twentieth century subjected to criticisms from squishy liberal humanists and cold, hard-nosed scientists.²⁷ This put pragmatism in a bad place. On the one hand, some said it was too ambiguous and vague to assist in decision-making or arriving at definite conclusions. On the other hand, others said it pretended to be so rigorous and scientific that it neglected issues of morality and spirituality. In a sense, pragmatism became the ugly stepchild of twentieth century philosophy.

Because its use of terms has rarely been assessed correctly, I will offer no cut-and-dried, one-sentence definition of “pragmatism.” By not offering such a definition, I am trying to avoid the fate of misunderstanding that both James and Dewey suffered and continue to suffer. Instead of offering a one-sentence definition of the term and proceeding as though the matter were settled, I will offer a list of distinguishing

characteristics of pragmatism, which, throughout this study of Brandeis and the pragmatic political style, will continually resurface as themes organically moving through texts.

For strategic purposes, I have purposefully written these characteristics without using the word “is.” I do not say pragmatism “is” this or that, that pragmatism “equals” this or that. I avoid using “is” in order to distance my portrait of the pragmatic style from a static, stagnate “checklist” of equations. Instead of saying pragmatism “is” this or that, the hope is to capture the pragmatic style by understanding what it *does*. Pragmatism acts this way or that, rather than equals this or that. The hope is to paint a picture of pragmatism’s dynamic, fluid, unfolding, experientially evolving method of engaging the world. The hope is to apprehend what James described as pragmatism’s “various and flexible” manners, “rich and endless” resources, leading to conclusions that are “as friendly as those of mother nature.”²⁸ In describing pragmatism as such, James was trying to make clear that pragmatism operates as a method.²⁹ To that end, I frame these five characteristics in terms of the “pragmatic method.” As I hope to show throughout this thesis, pragmatism entails style, attitude, approach, and process of inquiry; calling it a “method” attempts to capture that sense of undertaking. In the end, offering these characteristics will allow for a more rich, in-depth, thorough and meaningful understanding of pragmatism as a philosophical attitude and political style.

1) *The pragmatic method seizes truth through consequences.* Upon reintroducing Peirce’s conception of pragmatism, which had vanished from philosophical minds for almost twenty years, William James in 1898 said that “to develop a thought’s meaning

we need only determine what conduct it is fitted to produce; that conduct is for us its sole significance. . . . [W]e need only to consider what effects of a conceivably practical kind the object may involve—what sensation we are to expect from it, and what reactions we must prepare.”³⁰ The pragmatist wants to know where a given idea will lead, where a belief may take an inquirer, what effects may result from theories and practices, what concrete difference beliefs and conduct may make. “We live in a world of realities that can be infinitely useful or infinitely harmful,” wrote James. “The possession of truth, so far from being here an end in itself, is only a preliminary means towards other vital satisfactions.”³¹ Where will beliefs or actions fall on the spectrum of the infinitely useful or infinitely harmful? How do true beliefs add to or detract from given projects, individual or social? Simply put, what are the consequences of given habits of action? In the process of answering these questions, the inquirer seizes the truth of the matter at hand as a means of successfully furthering inquiry.

John McDermott calls pragmatism’s concern with consequences the pragmatic upshot, which he defines as “the dealing of the significance of imagination and speculation on the way in which we undergo our experiences.”³² The mission of the early American philosophers, he says, “was to address concrete problems from a perspective which was both speculative and alert to the stubbornness of reality as actually experienced.”³³ In *Human Nature and Conduct*, Dewey explains that

Deliberation is not calculation of indeterminate future results. The present, not the future, is ours. . . . The moral is to develop conscientiousness, ability to judge the significance of what we are doing and to use that judgment in directing

what we do, not by means of direct cultivation of something called conscience, or reason, or a faculty of moral knowledge, but by fostering those impulses and habits which experience has shown to make us sensitive, generous, imaginative, impartial in perceiving the tendency of our inchoate dawning activities.³⁴

Humans strive to understand consequences, and thus to seize truth and direct the present toward a better future, by engaging their changing environments. The important point for the pragmatist is that the pragmatic upshot is lived, it is experienced, it is part of the organic context in which individuals pursue meaning. The pragmatic method seizes truth through consequences because the individual directly experiences consequences in the fabric of life and comes to know truth through the process of living.

The pragmatic upshot, seizing truth through consequences, has direct relevance for the study of rhetoric: the pragmatist wants to know what consequences will result from using language in a given way. What will be the practical results of formulating a sentence thisly or thusly? How can one practically steer one's environment through language? Where will one's rhetoric fall on the spectrum of the infinitely useful or infinitely harmful? Rhetoricians have been asking these questions for millennia,³⁵ and that is why pragmatism's concern with consequences is so understandable for rhetoricians. Both rhetoricians and pragmatists want to know what concrete difference language will make on the way in which one has one's experiences. This meaningful intersection between pragmatism and rhetoric comes to fruition in Dewey's chapter on communication in *Experience and Nature*: "When events have communicable meaning, they have marks, notation, and are capable of con-notation and de-notation. They are

more than mere occurrences; they have implications.”³⁶ Toward the end of the chapter he writes, “As to be a tool, or to be used as a means for consequences, is to have and to endow with meaning, language, being the tool or tools, is the cherishing mother of all significance.”³⁷

2) *The pragmatic method strives to cope with a world unfinished, in-the-making, and malleable to the human touch.* The world is forever undergoing formation. In addition, it is forever undergoing formation because individuals and societies are adding to it, subtracting from it, redirecting it, and living in it. The individual experiences the world as much as the world experiences the individual. “The universe continually grows in quantity by new experiences that graft themselves upon the old mass,” says James. “[B]ut these very new experiences often help the mass to a more consolidated form.”³⁸ A world incomplete, forever in-the-making and continuously undergoing change is for Dewey not a matter of despair but the primary mark of possibility: “We long, amid a trouble world, for perfect being. We forget that what gives meaning to the notion of perfection is the events that create longing, and that, apart from them, a ‘perfect’ world would mean just an unchanging brute existential thing. . . . In a world where everything is complete, nothing requires anything else for its completion.”³⁹

In a world forever changing, forever in-the-making, individuals and communities must forge their way through the muddle, struggle, novelty, possibility, gains and losses of experience. The purpose of proceeding in a world unfinished and forever in-the-making is not to uncover those eternal truths that make the world complete and absolute; the purpose is to forge a life that blossoms amidst danger. “Life shall [be built in] doing

and suffering and creating,” says James.⁴⁰ The pragmatic method becomes crucial because it pushes the individual away from faith in Universals, the Absolute, and transcendental Principles, and toward a life of full-bodied participation in the fabric of experience. The pragmatic method, James says, entails the “*attitude of looking away from first things, principles, ‘categories,’ supposed necessities; and of looking towards last things, fruits, consequences, facts.*”⁴¹ By directing individuals away from Absolute fictions, the pragmatic method strives to cope with a world without a preordained teleology. Recognizing the indeterminate character of the future, the pragmatic method explores possibilities that can direct the present through the perpetual flux into a future of growth and fruitfulness. “Her only test of probable truth,” says James, “is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experience’s demands, nothing being omitted.”⁴²

The human world is a world of patchwork creations that more or less serve human interests. Patchwork creations are never final, but, more or less, work well for the purposes at hand. This leaves the rhetorician in an awkward position. Not only are the consequences of the way in which one formulates one’s sentences fundamentally important, but the rhetorical task is never done. Possibility and danger lurk around every corner. The only means of coping with this position is to understand that involvement in the creation of meaning is unending. The rhetorician’s task is never said and done. This is why James said that “our environment encourages us not to be philosophers but partisans.”⁴³ The purpose of being partisans is not to settle once and for all the questions of the universe but to struggle and fight, to undergo experiences and to grow. Language

is a primary means by which one copes. The task of rhetoric, therefore, and of the pragmatic method, is to enable the individual to cope with a world forever in-the-making. “Where communication exists,” writes Dewey, “things in acquiring meaning, thereby acquire representatives, surrogates, signs and implicates, which are infinitely more amenable to management, more permanent and more accommodating, than events in their first estate.”⁴⁴ Rhetoric operates with chance, experimentation, novelty and possibility; it strives to engage effectively a pregnant world.

3) *The pragmatic method rejects close-systems of thinking and meaning and instead pursues novelty and possibility with every undertaking.* Forging a world of meaning is a task never finished. As coping mechanisms, theory, philosophy and rhetoric do not dictate meaning but follow the individual through the fabric of experience. This is one of James’s brilliant insights: “*The intellectual life of man consists almost wholly in his substitution of a conceptual order for the perceptual order in which his experience originally comes.*”⁴⁵ This, again, leads to an understanding of coping mechanisms in a reality forever changing:

All these are ways of *handling* the perceptual flux and *meeting* distant parts of it; and as far as this primary function of conception goes, we can only conclude it to be what I began by calling it, a faculty superadded to our barely perceptual consciousness for its use in practically adapting us to a larger environment than that of which brutes take account. We *harness* perceptual reality in concepts in order to drive it better to our ends.⁴⁶

The upshot of this is that, just as the world is never finished, systems of thought should never be finished. Closed-systems of thinking⁴⁷—systems that dictate meaning, derail experiences, encourage second-handedness, and stunt growth—are ad hoc constructs that starve individual and social development. John McDermott calls this outcome relation starvation:

Repetition becomes so comforting that genuine novelty is reduced to prior experience. The width of our vision shrinks. We become more defensive about what we already know, less open to what we do not know. Relation starvation is the incarnation of the a priori. All that happens has happened, for us, before. At least we think so. And that is because we focus only on familiarity, sameness.

The novel is repressed, transformed into the familiar.⁴⁸

Closed-systems of meaning are akin to death: they lead to decomposition in the organic life. If a healthy life depends on growth, change and varieties of experience, closed-systems of meaning shut down life's progress by encouraging starvation, sameness, and monolithic experience.

Meaning, therefore, must remain open—always and forever striving to grow and remake, to discover depth and make fruits, to pursue novelty and possibility at every opportunity. James says that life produces a concrete character and expression—that of “involving a muddle and a struggle, with an ‘ever not quite’ to all our formulas, and novelty and possibility forever leaking in.”⁴⁹ The “ever not quite,” a phrase James uses repeatedly, represents pragmatism's aversion to closed-systems. “Novelty and possibility forever leaking in” means that the fruit of the aversion to closed-systems

stems from the unending potential for human growth. “[O]ur choice is between the development of a technique by which intelligence will become an intervening partner,” Dewey writes, “and a continuation of a regime of accident, waste and distress.”⁵⁰

For the rhetorician, this means that language is not absolute. Rhetoricians can easily fall into the trap of thinking that “language is all there is,” or thinking that all humanity’s problems will go away if only people stumble upon or create a one true discourse, a discourse that is all-inclusive, fine-tuned to the structure of the universe, and able to solve all problems—philosophical, cultural, social, individual or otherwise—in a single vocabulary. Problem-solving requires just the right words, and that’s it. For the pragmatist, language, while being a tremendously helpful coping mechanism, is certainly not all there is, and any hope for an ultimate discourse is unrealistic. Language is precarious and unstable, but competent enough to be a useful tool. Contrary to what rhetoricians often persuade themselves into believing, life does not all come down to language. The pragmatic rhetorician knows that a closed-system of language—one that believes all of life’s problems can be solved by formulating just the right sentences—is just as detrimental to growth as are closed-systems of philosophy, society, economics and politics. Language is always revisable, for the good of the individual and society, for the growth of the human organism. James says, “[W]e have to live to-day by what truth we can get to-day, and be ready to-morrow to call it falsehood.”⁵¹ Engaging a continually changing world through language means continually formulating new ways of understanding experience. Richard Rorty’s conception of irony reflects the endless revisability of the languages individuals use to engage reality:

[The ironist] has radical and continuing doubts about the final vocabulary she currently uses, because she has been impressed by other vocabularies, vocabularies taken as final by people or books she has encountered; she realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts; insofar as she philosophizes about her situation, she does not think that her vocabulary is closer to reality than others, that it is in touch with a power not herself.⁵²

This is the precarious state of language, a state that represents the rhetorician's muddle and struggle. But this also represents the rhetorician's opportunity to engage novelty and possibility at every turn. By being so precarious and unfinished, language is the perfect tool for experimentation, for searching through the endless "final vocabularies" that offer individuals chances to rework, recreate, and practically steer the flow of experience.

4) *The pragmatic method replaces the quest for certainty with the quest for meaning.* Pragmatists are firm believers in *meaning without certainty*. James opens his magnum opus *The Principles of Psychology* by boldly stating, "It is . . . the reinstatement of the vague and inarticulate to its proper place in our mental life which I am so anxious to press on the attention."⁵³ James thinks the pursuit of certainty is neither possible nor valuable. "Truth's fullness is elusive; ever not quite, not quite!"⁵⁴ Dewey, in fact, faults the "quest for certainty" for the problems that have created a practical stalemate in philosophy: "Man's distrust of himself has caused him to desire to get beyond and above himself; in pure knowledge he has thought he could attain this self-transcendence."⁵⁵

Distrust of one's practical abilities has sidetracked philosophy for much too long, Dewey believes. One of the foremost deceptions in contemporary philosophy is to believe that transcendence is ultimately valuable. It is this desire for transcendence and certainty in epistemological and metaphysical inquiry that Dewey seeks to rid from experience: "The consequences of substituting a search for security by practical means in place of quest of absolute certainty by cognitive means will then be considered in its bearing upon the problem of our judgment regarding the values which control conduct, especially its social phases."⁵⁶

A primary distinction that runs throughout both James and Dewey's work is the distinction between the quest for certainty and the desire to pursue a meaningful, fruitful, nourishing life. The quest for meaning, not certainty, is the spring of life; it represents the most intimate potential for growth in the human organism. Dewey makes this point in his attempt to reinvigorate the unification of theory and practice: "The problem of the relation of theory and practice is not a problem of theory alone; it is that, but it is also the most practical problem of life. For it is the question of how intelligence may inform action, and how action may bear upon the fruit of increased insight into meaning: a clear view of the values that are worth while and of the means by which they are to be made secure in experienced objects."⁵⁷ Rorty offers the same point about the American experience: "I think there is no point in asking whether Lincoln or Whitman or Dewey got America right. Stories about what a nation has been and should try to be are not attempts at accurate representation, but rather attempts to forge a moral identity."⁵⁸

There is no point in struggling fruitlessly with the quest for certainty when it is a meaningful existence for which America strives.

Accurate representation in language—akin to the quest for certainty in epistemology and metaphysics—has plagued rhetoricians for millennia. For much of Western civilization, rhetoric has been seen as the intellectually insignificant stepchild of logic, a subordinate to logic. The belief has been that to be meaningful, rhetoric must accurately represent the logical structure of the universe. This was a point Dewey railed against in *Experience and Nature*:

Logic was . . . supposed to have its basis in what is beyond human conduct and relationships, and in consequence the separation of the physical and the rational, the actual and the ideal, received its traditional formulation. . . . Social interaction and institutions have been treated as products of a ready-made *specific* physical or mental endowment of a self-sufficing individual, wherein language acts as a mechanical go-between to convey observations and ideas that have prior and independent existence. Speech is thus regarded as a practical convenience but not of fundamental intellectual significance. It consists of “mere words,” sound, that happen to be associated with perceptions, sentiments and thoughts which are complete prior to language.⁵⁹

But to shift significance from the quest for certainty to the pursuit of meaning, to believe that meaning is desirable and possible but certainty undesirable and impossible, entails a hope that the projects of *here* and *now* are projects that will create or sustain meaning. Projects that will not create or sustain meaning must be left behind. The goal should be

to find meaning through the novelty and possibility at work in everyday experience. The goal should be to steer practically and aesthetically the pulses of experience so as to forge a meaningful life. The goal must be the same for the American experience, says John McDermott: “America can no longer strut before the world as one above many. Much of our previous rhetoric, political and religious, is outworn and sterile, when it is not offensive. The task seems clear: we must develop a new celebratory language, rooted in contemporary American experience, pluralistic in style and able to resonate creatively throughout the fabric of world culture.”⁶⁰

There is no certainty with regards to language. Because it operates in a flow of experience, because it pounces forward in an endless flux, language represents only the *possibility* for success. There is no assurance that rhetoric will be successful, that it will “gain an adherence of minds.” There is, however, the very live possibility that rhetoric can imbue experience with meaning. Dewey puts the point masterfully:

That things *should be able* to pass from the plane of external pushing and pulling to that of revealing themselves to man, and thereby to themselves; and that the fruit of communication should be participation, sharing, is a wonder by the side of which transubstantiation pales. When communication occurs, all natural events are subject to reconsideration and revision; they are re-adapted to meet the requirements of conversation, whether it be public discourse or that preliminary discourse termed thinking. Events turn into objects, things with a meaning.⁶¹

5) *The pragmatic method chooses meliorism in the face of uncertainty.* If optimism is the attitude that “everything will work out in the end” or, as James says, “the doctrine

that thinks the world's salvation inevitable," and pessimism the attitude that "we are damned from the get-go," or, as James says, the doctrine that "the salvation of the world is impossible," then the pragmatist views both of these attitudes as unrealistic, unworkable, and misleading.⁶² Pragmatism takes a stand halfway between pessimism and optimism, adopting the attitude of meliorism, which "treats salvation as neither necessary nor impossible. It treats it as a possibility, which becomes more and more of a probability the more numerous the actual conditions of salvation become."⁶³ Meliorism is the attitude that the world can get better, that through the human touch, through forging meaningful experiences and seizing truth through consequences, individuals can make life better. The attitude is not that life *will* get better but that it *can* get better, that the possibilities for a better organism—individual or social—are present in the flow of experience. This is why James says that the world, instead of being ready-made and complete, "may be eternally incomplete, and at all times subject to addition or liable to loss."⁶⁴ James's point is that, as it now stands, the world can be otherwise, more or less depraved, more or less destructive, more or less rewarding, more or less enriching, more or less congenial to human purposes, depending on the enactment of human powers. John McDermott summarizes Dewey's meliorism by saying, "[T]he entire human endeavor should be an effort to apply the method of creative intelligence in order to achieve optimum possibilities in the never-ending moral struggle to harmonize the means-end relationship for the purpose of enhancing human life and achieving growth."⁶⁵

Meliorism applied to rhetorical practices means nothing more than language is potentially saving and potentially damning; which one—saving or damning—depends on the use of it. In the pursuit of enhancing human life and achieving growth, rhetorical practice is one mode of operation that can contribute to well-being. In the project of trying to make life better—for the individual and society—rhetoric represents a potentiality, the potentiality that, as a “natural function of human association,” the organic nature of the human situation derives “meaning or significance.”⁶⁶ While James’s following point does not directly address rhetoric, its significance for orators is unmistakable:

The great point is that the possibilities are really *here*. Whether it be we who solve them, or he working though us, at those soul-trying moments when fate’s scales seem to quiver, and good snatches the victory from evil or shrinks nerveless from the fight, is of small account, so long as we admit that the issue is decided nowhere else than *here* and *now*. *That* is what gives the palpitating reality to our moral life and makes it tingle. . . .⁶⁷

These characteristics represents pragmatism’s attempt to probe the surface and depths of experience, to promote meaning and authenticity, to avoid second-handedness, to pursue a life worth living. These characteristics have metaphysical implications: the world is forever in-the-making, and reality has a character, but that character is constantly changing. These characteristics have epistemological implications: the quest for certainty is distracting, and in fact detrimental, to the solving the tasks at hand; it is much better to strive to understand the possibilities for meaning in the flow of

experience, for meaning is possible, certainty unrealistic. These characteristics have ontological implications: whatever being is, it is undergoing change, interacting with its environment and reconstituting its own future, a future that will represent a new being. These characteristics have teleological implications: the ends of social and personal undertakings have yet to be set; undertakings are never-ending struggles to forge ends that are more or less congenial to human desires. But perhaps most important for the present purposes, these characteristics have *methodological implications*, for pragmatists believe they have captured a method of problem-solving that embodies the way in which individuals actually engage the world and have their experiences. The dynamic structure of this methodology, insofar as the pragmatic method has bearing on politics and rhetoric, is the subject of this thesis. My argument is that, despite what a host of scholars, pragmatists and non-pragmatists alike, claim—that pragmatism can offer nothing to politics—the pragmatic method can function fruitfully in political discussion. *Pragmatism can be a political style.*

But what does political style mean? Robert Hariman argues that political experience is stylized. In the multifaceted, continually changing world of contemporary political exchange—be that exchange in the office, the school, the church, family life, institutional life, etc.—anywhere political experience is engaged, “relations of control and autonomy are negotiated through the artful composition of speech, gesture, ornament, décor, and any other means for modulating perception and shaping response.”⁶⁸ Hariman’s point is that there are unique modes of operation, or styles, that emerge in day-to-day political experience. He outlines four such styles: the realist,

courtly, republican, and bureaucratic. Each of these styles, says Hariman, can be understood by examining specific texts that articulate these attitudes. Machiavelli's *Prince* articulates the realist style, for example. Ryszard Kapuscinski's *The Emperor: Downfall of an Autocrat* articulates the courtly style, Cicero's letters the republican, and Franz Kafka's *The Castle* the bureaucratic. These texts contain sets of indicators pointing individuals to features of a form of stylized political experience. As Hariman concludes, "These texts provided not the mirror of nature, but something closer to the hallway mirror that reflects, frames, and creates a moment for critical assessment of the figure standing in front of it, looking herself over, before she steps out for the evening."⁶⁹ The styles that Hariman outlines are attitudes, approaches, and coping mechanisms for a world filled with moments of political negotiation. And each of the styles offers a unique, particular means of engaging those moments. "As people use discourses strategically to fashion 'equipment for living,'" Hariman writes, taking a cue from Kenneth Burke, "they also become shaped by their designs, seeing the world as they would compose it and responding according to the formal pressures of their compositions."⁷⁰

Furthermore, Hariman argues that these political styles each take a specific attitude toward the role of language in political exchange. The realist style, for example, views political discourses as obstacles to true political operation; in the realist style, texts get in the way of decision-making. As Hariman says, "[The realist style] devalues other political actors because they are too discursive, too caught up in their textual designs to engage in rational calculation."⁷¹ Just as the realist style takes a specific attitude toward

texts, the republican style carries its own discursive approach: “The republican style begins with a relish for the pleasures of composing and delivering persuasive public discourse, it includes other modes of exchange and becomes a more focused mode of action by defining consensus as the foundational means and end of governance, and it culminates in a model of leadership that features personal embodiment of the civic culture.”⁷² The methodological point is that political style is marked off by a specific approach toward decision-making; the rhetorical point, an extension of the methodological point, is that political style carries with it an attitude or set of attitudes in relation to the discursive elements of decision-making.⁷³

Pragmatism lends itself directly to this notion of political style. Pragmatism is a discourse strategically fashioned to see, compose and respond to a world of political experience. Pragmatism offers a unique attitude, approach, and method for engaging the various contexts of contemporary political exchange. Just as much as the realist, courtly, republican, or bureaucratic, *the pragmatic is a particular political style*. Following Hariman’s lead, I will also offer a text, or more rightly, a body of texts from a rhetor who articulates the pragmatic method, as evidence that there is a uniquely *pragmatic way* of engaging political exchanges. The rhetor exemplifying this pragmatic method is Louis Brandeis. As I will show, Brandeis’s rhetoric—from the beginning of his social advocacy, through his leadership in American Zionism, to the end of his tenure on the Supreme Court—exemplifies characteristically pragmatic attitudes, in the James-Dewey vein of classical American pragmatism. Simply put, Brandeis articulates the pragmatic political style.

But why Brandeis? Why “marry” Brandeis to pragmatism? The simple answer is that Brandeis’ rhetoric helps shed light on evidence of pragmatism operating rhetorically and politically. While Brandeis never explicitly labeled himself a “pragmatist”—boxing himself in with a philosophical label would have never appealed to Brandeis—his rhetoric offers a window into the fruitful possibilities of the pragmatic approach to politics and rhetoric. But before I proceed into the workings of the pragmatic style in Brandeis’s rhetoric, a brief biographical sketch of his life may be helpful.⁷⁴

Louis Dembitz (formerly David)⁷⁵ Brandeis was born on November 13, 1856, in Louisville, Kentucky. His parents were part of a German-Jewish merchant class who immigrated to the United States after social, political and economic chaos ensued following the 1848 German revolutionary movement. Brandeis’s parents and extended family settled in Kentucky and opened a successful produce store and operated several factories and mills. They also became quickly convinced of the promise of the American dream. The Brandeis family was socially and politically active, stressing the importance of the pursuit of prosperity and the expression of liberty. They were convicted abolitionists and believed strongly in the social and economic possibilities of the American experience. Hard-work, individual and social amelioration, intellectual progress, cultural exploration, liberty, equality, dignity and political participation were the values with which Brandeis was raised.

Brandeis’s life with the law began in 1875 when he entered Harvard Law School. He was the youngest person ever to enter and graduate that institution. He excelled in every

part of his academic training, thoroughly impressing the dean of the Law School, Christopher Columbus Langdell, and the president of Harvard, Charles Eliot. Brandeis left Harvard in 1878, having achieved the highest scholastic record of any Harvard law student, a record that remains unsurpassed to this day.⁷⁶

His life with the law continued when, after graduating Harvard, Brandeis and his classmate Samuel Warren opened a private law practice in Boston. Brandeis's wealth and reputation soon began to grow. He became part of the social, political and intellectual elite of Boston. Being socially revered and wealthy aligned Brandeis with the Brahmins of Boston, the intellectually and culturally well-to-do class of New England. By 1910, not only was he the most famous lawyer in America, he had amassed personal wealth well over one million dollars. (It was up to three million by the time he retired from the Court.)

In 1891 Brandeis married his second cousin Alice Goldmark. (Coincidentally, William James, John Dewey, and Louis Brandeis each married a woman named Alice.) Louis and Alice had two children together: Susan, born in 1893, and Elizabeth, born in 1896. Following in their father's footsteps, Susan became a successful lawyer and Elizabeth a respected economist. Throughout their lives Brandeis was active in family life. For Brandeis, family life was inseparable from a life of education. He traveled with his family all across America and Europe and worked to give his children the best education available. The importance of family and education were values Brandeis carried with him always.

Brandeis was publicly active in the most important social and political issues of turn-of-the-century America, fighting against “bigness” in all its forms. He fought against political corruption, transportation trusts, energy trusts, industrial trusts, and the consolidation of political, economic, and social power wherever it proved to threaten social and individual well-being. In the 1890s, Brandeis fought against private corporations that wanted to monopolize public transportation throughout Boston. While he argued both successfully and unsuccessfully in this fight, the opportunity to act as an advocate for public causes gave Brandeis the chance to hone his political skills. Brandeis called his fight against the private transportation corporations his “first important public work.”⁷⁷

His important works extended into areas such as industrial life insurance and the establishment of savings bank life policies. Brandeis’s book *Other People’s Money* was his sociological analysis of the relationship between industry, the economy and society. It was also in that book that Brandeis coined the phrase the “Curse of Bigness.” As Brandeis described, “Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put. And it is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration.”⁷⁸ But these social and political concerns had less to do with what made sound economic sense and more to do with his interest in the lives of industrial laborers. Brandeis was concerned with how a laborer could live securely, freely, happily, and meaningfully in the face of consolidated power. Brandeis supported unions because he believed workers had a right to be secure in their

pursuit of prosperity. This was also the reason he fought for a limit on the number of hours women could work in a day, a fight that led to the now famous “Brandeis Brief.” With the “Brandeis Brief,” his biographer Philippa Strum writes, he “changed the course of American legal history.”⁷⁹ The “Brandeis Brief” foreshadowed much of what Brandeis would be doing on the Supreme Court.

His journey to the Supreme Court began in 1912 when he campaigned for the presidency of Robert La Follette. Brandeis went on speaking tours across the Midwest and North East campaigning for La Follette, and his national political notoriety began to grow even more. Ironically, it was through campaigning for La Follette that Brandeis got to know Woodrow Wilson, one of La Follette’s competitors for the presidency. It was Wilson who appointed Brandeis to the Court in 1916.

In January of 1916, Supreme Court Justice Joseph Lamar died. Wilson immediately thought of Brandeis. What followed in the Senate was, according to Strum, “one of the most controversial [nominations] in the history of the Supreme Court.”⁸⁰ And as Trevor Parry-Giles describes,

So notorious was Brandeis’ reputation, so complete and well known his progressivism that the possibility of his ascending to the highest court in the land sent shivers throughout the political worlds of Boston and Washington. His nomination became a signature moment in the early twentieth century and it demarcated the parameters of Supreme Court confirmations for much of the century, forever altering this critical constitutional ritual in American political life.⁸¹

Brandeis's confirmation process took more than six months, and both the Senate Judiciary Committee and the full Senate voted down party lines. But that was enough. Louis Brandeis became Justice Louis Brandeis on June 5, 1916.

His tenure on the court lasted until February 13, 1939. By the time he retired, he was the most influential Supreme Court justice still alive. His opinions have been considered some of the most eloquent and influential, especially in areas such as civil liberties and the structure of government. His influence on twentieth century American jurisprudence is almost unparalleled: "Brandeis's approach to sociological jurisprudence gradually became *the* jurisprudence of the Court and eventually of the entire federal system," writes Strum.⁸²

When he was appointed to the Court, Brandeis resigned from his duties in social and political organizations, except for one. From 1910 until his death, Brandeis was one of the most visible and respected leaders of the modern Zionist movement. Brandeis's uncle Dembitz was an orthodox Jew, a lawyer, a social advocate, and a tremendous influence on Brandeis. In fact, it was the enduring influence of his uncle that helped Brandeis embrace Zionism. Before his appointment to the court, Brandeis was an outspoken proponent of American Zionism, leading the movement within the United States and earning an international reputation for his activism. In 1919, after three years on the court, Brandeis even traveled to Palestine to consult with international Zionist leagues and to witness firsthand the struggles of Middle Eastern Jews. He considered the trip one of the greatest events of his life. Throughout his time on the court, Zionism was the only topic he spoke on publicly.

Louis Brandeis suffered a heart attack on October 1, 1941 and died on October 5.

The remainder of this thesis will explore the ways in which Louis Brandeis articulates the pragmatic political style. It is important to keep in mind, however, that by saying he articulates the pragmatic political style, I am *not* saying that his pragmatic style is *the only* pragmatic style, that it is the final word on pragmatism, or that Brandeis was even self-consciously a pragmatist.

There are, however, a number of interesting historical connections between Brandeis and James and Dewey. Brandeis knew James personally, mainly through Brandeis's wife Alice, whom James knew well as part of the Goldmark family of Boston. Also, in August of 1906 James wrote to his wife, "Henry walked too much yesterday so couldn't walk, and I went off in the forenoon, saw Miss Hillard, went to the Goldmarks where were the Brandeises and the Stewardsons. Very pleasant & very beautiful. After my nap, found Brandeis sitting with Henry and accompanied him back to the Adler's who were pleasant. . . . Brandeis I like."⁸³ Brandeis apparently thought the same of James. From his early days at Harvard, Brandeis's notebooks, writes Philippa Strum, "were replete with quotations from Emerson and William James."⁸⁴ Brandeis did not know Dewey personally, but was well aware of Dewey's philosophical and social-political work.⁸⁵ And Dewey included Brandeis along with Holmes as the most important jurists of the twentieth century: "Holmes and Brandeis are notable not only for their sturdy defense of civil liberties but even more for the fact that they based their defense on the

indispensable value of free inquiry and free discussion to the normal development of public welfare, not upon anything inherent in the individual as such.”⁸⁶

But for all his connections with James and Dewey, Brandeis would never have said that his project was to be a pragmatist. Hariman’s work on political style analyzes exemplar texts not because those texts self-consciously operate as specific political styles, under the directives of stylistic commands, but because such texts will help those interested in stylized negotiations of power better understand the possibilities and limitations of the role of language in political exchange. As Hariman rightly points out, political style is largely a rhetorical matter, “a catalog of the means of persuasion characteristic of a particular political culture that could be used by anyone attempting to secure advantage.”⁸⁷ The aim of this thesis is to show how Brandeis used pragmatic means of persuasion to secure advantage.

The next chapter will discuss Brandeis’s rhetoric prior to his tenure on the Supreme Court. The aim of this chapter will be to explore through Brandeis’s pre-Court rhetoric the relationship between pragmatism and individualism. Brandeis’s political activities prior to the Court focused on “bigness.” “[T]he race must steadily insist upon preserving its moral vigor unweakened,” Brandeis counseled against bigness. “It is not good for us that we should ever lose the fighting quality, the stamina, and the courage to battle for what we want when we are convinced that we are entitled to it, and other means fail.”⁸⁸ This chapter will show how pragmatism opposes “bigness” because bigness threatens the growth of the individual. Brandeis advocated extensively for reform in industry, especially in manufacturing, insurance and transportation; he did so because he feared

for the well-being of the individual in industrial society. Brandeis also explored privacy issues, expressed in his groundbreaking essay “The Right to Privacy,” because he feared for individuals threatened by bigness in numerous forms—political, technological, industrial, cultural, social and religious forms. Perhaps the most important part of this chapter will be the analysis of the “Brandeis brief,” which wove sociological, statistical, economic and physiological evidence through the argument that the government should regulate the number of hours women are allowed to work in a single day. Indeed, it was the “Brandeis Brief” that set the tone for his entire rhetorical corpus.

In chapter three I will explore Brandeis’s tenure on the Supreme Court, a tenure in which Brandeis became a hallmark of judicial eloquence and influence for the remainder of the twentieth century. Brandeis’s judicial rhetoric was nothing short of remarkable, as the following, frequently quoted excerpt shows:

The makers of our Constitution understood the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁸⁹

This chapter will explore the relationship between pragmatism and society. While pragmatism is often charged with being too individualistic, this chapter aims to show

that its individualism does not come at the expense of community and society.

Pragmatism is congenial to both the needs of the individual and of society—the aim, in fact, is balance between the two. I will develop this argument by analyzing Brandeis’s opinions concerning civil liberties and the structure of government and society.

Following that I will analyze Brandeis’s Zionist rhetoric. During his life Brandeis was one of the most influential Zionists, in America and abroad. While on the Court, Zionism was *the only* issue he advocated publicly apart from the Court’s activities. Perhaps that helps explain why Brandeis saw the modern Zionist movement as so complementary with American democracy. “America’s fundamental law,” wrote Brandeis, “seeks to make real the brotherhood of man. That brotherhood became the Jewish fundamental law more than twenty-five hundred years ago. America’s insistent demand in the twentieth century is for social justice. That also has been the Jews’ striving for ages. . . . The Jewish spirit, the product of their religion and experiences, is essentially modern and essentially American.”⁹⁰ Pragmatism is, nowadays, not immediately associated with religious or spiritual matters. But I will show that Brandeis’s passion for Zionism, instead of separating him from pragmatism, keeps him fully in line with the pragmatic desire to create a meaningful life. In that way, Brandeis’s life represents the culmination of the pragmatic style.

The fifth and final chapter will summarize this project’s findings. I will reiterate the main arguments and the importance of this study. As a final word, I will suggest directions for further scholarship. Pragmatism as an attitude, as an approach, as a way of engaging the world has much to offer communication and rhetorical studies. At this

time, communication scholars have done little work on it. Pragmatism is a rich body of discourse indeed, and particularly relevant if one is to engage the social, political and cultural intricacies that constitute the American experience.⁹¹

There is indeed something unique about the American experience. There is something that makes it directly relevant to contemporary society—the American experience is ongoing, it is a current undertaking, it is happening right now. My project will draw on figures in the former half of the twentieth century as a way of shedding light on the current situation of the American experience. Because communication scholars have largely overlooked pragmatism, and because it represents a rich body of literature relevant to the ongoing American experience, this study will act as an attempt to integrate the wisdom of the pragmatic attitude into common parlance, into the contemporary understanding of what it means to continue the project of forging a moral identity.

CHAPTER II
PRAGMATISM AS INDIVIDUALISM:
LOUIS BRANDEIS'S PRE-COURT RHETORIC

The common perception of William James, says John McDermott, is as “a thinker so notoriously concerned with the individual and so singularly free of apparent insight to matters social or to the sociological context for inquiry.”¹ James surely was an individualist. But the term “individualist,” applied to James without qualification, can be horribly misleading, for individualist carries with it the unfortunate connotations of being *for* the individual and *against* society. The perception is that since James was an individualist, his insights carry no significance for society. Thus pragmatism, attached to the misleading connotations of individualism, becomes a philosophy of self-interest, of personal satisfaction, of boorish self-fulfillment. Pragmatism becomes a philosophy of fulfilling one’s desires by any means necessary, of antisocial self-promotion, of ends justifying means on the way to personal advancement. Pragmatism comes to mean individualism at the expense of the community.

This understanding of James’s individualism misses the point of his philosophy. James does believe that the meaning of one’s experiences emerges from one’s own will. He says, “Every human being must sometime decide for himself whether life is worth living.”² And later he says, “The inmost nature of the reality is congenial to *powers* which you possess.”³ In that way, James’s individualism is clear. Yet James also describes his philosophy as “being essentially a *social* philosophy, a philosophy of ‘*co*,’

in which conjunctions do the work.”⁴ James’s philosophy is a philosophy of relations, of the experiential fabric of life. The reality of human experience is a reality of movement in the relational manifold, wherein one is bound more or less directly, more or less indirectly, to countless others in the flow.

Brandeis believed in individualism of the Jamesian variety. In May of 1905 he told industrial workers in Boston, “it rests with you whether and to what extent the approach to perfection shall be made. It is you who can determine how far this experiment shall go.”⁵ Brandeis was speaking of experiments in cooperation between workers and employers specifically. But his sentiment was one he carried with him always—social amelioration can only come about by the powers of individuals; and it is up to individuals to try to develop their powers, whatever limitations they may face, and pursue the better life. And like James, Brandeis’s individualism in no way neglected society and the community. The full meaning of life, for Brandeis, emerged through the individual’s creative intelligence in the context of personal and social relations.

The purpose of this chapter is to explore this notion of individualism as it relates to pragmatism, and more specifically, as articulated in Brandeis’s pragmatic political style. My contention is that the importance of individualism was not only one of Brandeis’s most cherished beliefs, it was also one of his most enacted rhetorical devices. No matter what the specific point of his address, Brandeis arrived at his point by focusing on the individual and the individual’s place in society. In that way his messages worked to focus the audience’s attention on the promises of individualism. Stressing the

importance of individualism was the rhetorical lynchpin of Brandeis's pre-Court rhetoric.

Although known primarily as a Supreme Court Justice, Brandeis was a very busy orator prior to his term on the Court. This chapter will focus primarily on three texts or areas of his pre-Court rhetoric. First I will analyze Brandeis's ground-breaking essay, which he co-wrote with his law partner Samuel Warren, "The Right to Privacy." The essay represents Brandeis and Warren's attempt to focus attention on the importance of individualism in American society. Second I will analyze Brandeis's views on industry and democracy through various speeches, articles, interviews and testimonies he gave prior to taking his seat on the Court. These various texts on industry and democracy highlight the problems and possibilities the individual faces in society. Third I will analyze what many scholars consider to be the crowning jewel of his pre-Court activities, the Brandeis Brief. Although by no means an eloquent document, the Brandeis Brief is nonetheless rhetorically powerful; it is, at the same time, thoroughly pragmatic.

The Upshot of "The Right to Privacy"

It is not exactly clear why Brandeis and Warren wrote "The Right to Privacy." The general speculation is that they wrote it in reaction to disclosures of Warren's private life in Boston's *Saturday Evening Gazette*. Philippa Strum believes it was Brandeis and Warren's distress from "the lurid newspaper coverage given to Warren's engagement and marriage to the daughter of Senator Thomas Baynard."⁶ Stephen Baskerville finds

this explanation unconvincing. It was not the portrayal of Warren's private life in the papers but the portrayal of a popular Broadway actress, including pictures of the actress in tights taken without her permission, that inspired Brandeis and Warren to write.⁷

Lewis Paper agrees with Baskerville and extends the insight. It was not the Boston *Gazette's* reporting on Warren that urged Brandeis and Warren to write the article; it was the way the Boston press in general treated Warren's father-in-law, Senator Baynard, that made Warren so sensitive to the publishing of private matters in the press.⁸

Baskerville also believes Brandeis and Warren were influenced by E. L. Godkin's essay, "The Rights of the Citizen: To His Own reputation," published in *Scribner's Magazine* in July of 1890. Unfortunately, a letter from Brandeis to Warren in 1905 disputes that claim. "My own recollection," wrote Brandeis, "is that it was not Godkin's article but a specific suggestion of yours, as well as your deepseated abhorrence of the invasions of social privacy, which led to our taking up the inquiry."⁹ The real reason Brandeis and Warren wrote "The Right to Privacy" probably has something to do with a combination of Warren in the papers, of Warren's father-in-law in the papers, and with the way in which newspapers in general treated citizens.

But for the present purposes, *what* inspired Brandeis and Warren is of less concern than the fact that through the article they impacted the entire legal community. Brandeis hoped the article would get public opinion behind a law protecting the right to privacy and "make people see that invasions of privacy are not necessarily borne—and then make them ashamed of the pleasure they take in subjecting themselves to such invasions."¹⁰ Roscoe Pound, founder of sociological jurisprudence and Dean of the

Harvard Law School, said the article did “nothing less than add a new chapter” to the law.¹¹ Other scholars referred to the article as “the outstanding example of the influence of legal periodicals upon the American law,” and, “perhaps the most influential law journal piece ever published.”¹² When he was helping compile *The Curse of Bigness*, Brandeis suggested “The Right to Privacy” be included in the volume because it was “of more interest to the general public and the profession” than any other of his pre-Court writings.¹³

Brandeis and Warren believed “The Right to Privacy” necessary because, as they said in the article, “Gossip is no longer the resource of the idle and vicious, but has become a trade, which is pursued with industry as well as effrontery.”¹⁴ What the press has done, believed Brandeis and Warren, is an affront to the organizational spaces of contemporary life: “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life” (291). And the consequences of this invasion into the “sacred precincts” of the private sphere are disastrous:

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance (292).

In their article Brandeis and Warren argue that the law, while it has paid careful attention to affirming the individual's property rights, has paid scant attention to the individual's right to be "let alone." The law must recognize, they argue, that "the individual shall have full protection in person and in property" (289). At stake is not only the health and well-being of the individual, but also the security of society: "[T]he protection of society must come mainly through a recognition of the rights of the individual" (315). And through that recognition of the rights of the individual must also come the individual's responsibility to affirm society: "Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defense, he is responsible for the results. If he resists, public opinion will rally to his support" (315). The individual is responsible for his or her individuality because such individuality is an integral part of social well-being. Again, the individualism of which Brandeis speaks is not individualism over and against the community; it is not individualism with interest in self-promotion alone. The individualism of which Brandeis speaks is individualism bound to society, bound to the needs, interests, health and well-being of the community.

Themes of pragmatism abound in "The Right to Privacy." Brandeis and Warren consider the law fluid, dynamic, operative within an endless changing social environment: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society" (289). The key phrase is "in its eternal youth." Pragmatists, recall, are against closed-systems of meaning. Meaning arises, rather, from experiencing the risks and

possibilities of the world. The meaning of the law, therefore, emerges from society's interaction with the challenges it faces. The common law is in its "eternal youth" because the challenges society faces are forever changing, forever posing new obstacles to social flourishing. The law must "grow" in order to equip society with the tools necessary for thriving in the flow of experience. The law in that sense is "always becoming," a point best put by Benjamin Cardozo, with whom Brandeis shared many intellectual convictions.¹⁵ Cardozo writes,

Real law . . . is not found anywhere except in the judgment of a court. In that view, even past decisions are not law. The courts may overrule them. For the same reason present decisions are not law, except for the parties litigant. Men go about their business from day to day, and govern their conduct by an *ignis fatuus*. The rules to which they yield obedience are in truth not law at all. Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules or principles: there are only isolated dooms.¹⁶

This point speaks to Dewey's understanding of social life—the recognition that individuals are called to cope with perpetually changing circumstances: "Nothing is blinder than the supposition that we live in a society and world so static that either nothing new will happen or else it will happen because of the use of violence. Social change is here as a fact, a fact having multifarious forms and marked in intensity."¹⁷ Just as Brandeis believed that liberating the individual in the face of menacing social

conditions meant giving the individual responsibility for his or her existence, so Dewey believes that society must relinquish control of human powers to the wills of individuals:

Flux does not have to be created. But it does have to be directed. It has to be so controlled that it will move to some end in accordance with the principles of life, since life itself is development. Liberalism is committed to an end that is at once enduring and flexible: the liberation of individuals so that realization of their capacities may be the law of their life. It is committed to the use of freed intelligence as the method of directing change.¹⁸

For Brandeis and Warren, this is exactly what being an individual in society means: “the right to life has come to mean the right to enjoy life—the right to be let alone, the right to liberty secures the exercise of extensive civil privileges” (289).

The law serves society by evolving with the dynamic character of the social environment so as to liberate the individuals who comprise society. Yet while Brandeis and Warren criticize the law for not properly accounting for the right to be let alone, their criticism would not be complete without the attempt to help the law, to help the law become better and serve social needs more effectively. Brandeis and Warren do this through a series of six guidelines that, they hope, will allow the law to serve the individual’s interest in being let along while maintaining society’s need to function. Their six propositions try to answer James’s question of what practical difference will it make if this or that world-formula be true. “*First*,” Brandeis and Warren write, “The right to privacy does not prohibit any publication of matter which is of public or general interest” (310). They believe there is no cut-and-dried way to calculate which matters

are of public or general interest and which matters are not. Application of the law is never that easy. Nevertheless, information of a clearly public interest must be made available to the public.¹⁹ “*Second,*” Brandeis and Warren write, “The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel” (312). This guideline says that private matters cease to be private when, through the proper channels, private matters become a part of the public record. When private matters are communicated publicly, they cease to be private. “*Third,*” they write, “The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage” (313). Brandeis says “would probably” because no guideline is absolute and circumstances always admit exceptions. This guideline also points to the distinction between oral and written publications that has been a common distinction in the law throughout the twentieth century.²⁰ “*Fourth,*” write Brandeis and Warren, “The right to privacy ceases upon the publication of the facts by the individual, or with his consent” (313). This guideline is a more specific instance of the second guideline: if the individual chooses to publicize private matters, such matters cease to be private. “*Fifth,*” they say, “The truth of the matter published does not afford a defense” (313-14). The end of uncovering “the truth” does not justify the means by which it is uncovered. Activities of one’s private life are by definition private matters, not public, and therefore the public has no interest in information regarding private matters whether or not such information be true or false. “*Sixth,*” Brandeis and Warren write, “The absence of

‘malice’ in the publisher does not afford a defense” (314). Just because the publisher did not intentionally mean to invade or harm one’s private life is no reason the publisher is not culpable. “Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent” (314).

Brandeis and Warren’s application of the right to privacy attempts to integrate the principles of the right to privacy into the existing legal structure. There is no utopianism in their view; there is only the recognition that a problem exists and that there is a way to deal with the problem. Brandeis and Warren face up to the same difficulty James sees for philosophers: “we are born into a society whose ideals are largely ordered already.”²¹ Brandeis and Warren face up to a system of laws that overlooks the need for a right to privacy and they act as partisans for those who should be given the right to be let alone.

Perhaps the most interesting aspect, at least for the present purposes, of “The Right to Privacy” is the way in which Brandeis and Warren enact individuality as a rhetorical devise. They open their essay surveying the historical ground of legal development. They note how the law’s “right to life” affirmation once meant only the protection from physical harm. Then the “right to life” came to mean the right to be secure in one’s property. It finally came to recognize the individual’s spiritual nature, and in contemporary society it means the right to *enjoy* life:

The intense intellectual and emotional life, and the heightening of sensation which came with the advance of civilization, made it clear to man that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts,

emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature (291).

Essentially, the “right to life” culminates in recognizing the qualities of individuality—the qualities of personal, spiritual, emotional, and intellectual growth. In its most operative sense, the “right to life” recognizes the elements most important for individuality—the feelings, interests, beliefs and desires that mark the person as an individual.

The problem, say Brandeis and Warren, is that “recent inventions and business methods” have threatened the right to develop one’s individuality. They survey the contemporary landscape, uncover the growing threat to the right to enjoy life, and stress “the necessity” of developing legal protections to secure the individual’s right to pursue individuality. The struggle, indeed, is between the endlessly developing machine of industrial society and the wonders of the cultivation of individuality:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury (292).

Brandeis and Warren’s point is not that the individual must act over and against society to cultivate individuality; their point is rather that sacrificing the project of forging an

individual identity can be disastrous. There can be no benefit from facilitating the growth of industrial democracy while destroying the potential of the individual organism. “Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm,” they write, “can flourish, no generous impulse can survive under its blighting influence” (292).

Their eloquence points to Dewey’s belief—one of his most cherished beliefs—in the importance of individual growth. The purpose of education, says Dewey in *How We Think*, is

to cultivate deep-seated and effective habits of discriminating tested beliefs from mere assertions, guesses, and opinions; to develop a lively, sincere, and open-minded preference for conclusions that are properly grounded and to ingrain into the individual’s working habits methods of inquiry and reasoning appropriate to the various problems that present themselves. No matter how much an individual knows as a matter of hearsay and information, if he has not attitudes and habits of this sort, he is not intellectually educated.²²

Dewey and Brandeis’s words are the same. The meaning of life emerges in the process of cultivating individuality, of nurturing individual powers, of grappling with the dangers of contemporary society, of rejecting second-handed individuality in all its forms. The result of pursuing meaning in this way is nothing less than human freedom in its fullest sense. “Genuine freedom, in short,” writes Dewey, “is intellectual; it rests in the trained *power of thought*, in the ability to ‘turn things over,’ to look at matters deliberately, to judge whether the amount and kind of evidence requisite for decision is

at hand, and if not, to tell here and how to seek such evidence.”²³ The danger in modern society is, of course, the opposite of freedom: enslavement. “To cultivate unhindered, unreflective external activity,” Dewey concludes, “is to foster enslavement, for it leaves the person at the mercy of appetite, sense, and circumstance.”²⁴

Throughout their article Brandeis and Warren survey legal decisions from across the ocean, in England and France, and conclude that the progress of the civilized world demands a recognition of the right to be let alone: “The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested” (307). The right to be let alone is, in fact, nothing new. Societies across the world have recognized it, say Brandeis and Warren, because the nature of contemporary society shows that individuals must be protected in their pursuits of individuality. They write,

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world. . . . The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise (308-09).

For America to turn a blind eye to the most advanced developments of the law of humanity, to reject the importance of individuality in society, would be to take a step

backwards in human progress. “It is believed that the common law provides [the individual with the right to privacy], forged in the slow fire of the centuries, and today fitly tempered to his hand,” Brandeis and Warren conclude. “The common law has always recognized a man’s house as his castle, impregnable, often even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?” (315).

The rhetorical force of “The Right to Privacy,” the power of its arguments, the strength of its presentation, all stem from its rhetorical enactment of individuality. While they specifically advocate for a legal recognition of personal privacy—in its most broad sense—they do so through an analysis of the place of the individual in contemporary society. Brandeis and Warren search the annals of historical development, they peruse the landscape of international political culture, they analyze the character of industrial society, and they conclude that it all comes down to the cultivation of individuality. To forget that would be to forget humanity’s progress. And to neglect the cultivation of individuality would be to stunt humanity’s growth.

The rhetorical structure of Brandeis and Warren’s “The Right to Privacy”—the movement of the text from the annals of human history to the promotion of individuality—is the same rhetorical structure of James’s “The Sentiment of Rationality.” Like Brandeis and Warren, James attempts to revive faith in the importance of individuality in the presence of external opposition. The external opposition to individuality James focuses on is not industrial society, as it is in Brandeis

and Warren's article (even though James would concur with Brandeis and Warren's analysis), but James's concern is with philosophy in general. The general purpose of philosophy, James says, is "to attain a conception of the frame of things which shall on the whole be more rational than that somewhat chaotic view which every one by nature carries about with him under his hat."²⁵ The usual philosophic approach is to banish individual beliefs and desires from the pursuit of rational investigation. By blocking individuality from rational inquiry, by seeking to transcend the individual's chaotic understanding of reality, philosophy's goal is to "*banish uncertainty from the future.*"²⁶ The philosopher's goal is to reduce the universe to a rational structure—and thereby achieve universality through reason—and leave behind the plague of individual insecurity.

But James objects adamantly. The meaning of life does not come with certainty or rationality, says James, but comes with the cultivation of individuality. The meaning of life comes in pouncing ahead in the fabric of experience with faith in one's ability to live a good life. Faith, in short, creates meaning: "Believe, and you shall be right, for you shall save yourself; doubt, and you shall again be right, for you shall perish. The only difference is that to believe is greatly to your advantage" (337). Philosophy needs to leave behind the meaningless quest for certainty, for self-transcendence, James proclaims, and focus on what makes life worth living, what makes the individual able to feed individuality. "[T]he highest good can be achieved only by our getting our proper life," says James. "[A]nd that can come about only by help of a moral energy born of the faith that in some way or other we shall succeed in getting it if we try pertinaciously

enough. This world *is* good, we must say, since it is what we make it,—and we shall make it good” (340). Just as Brandeis and Warren did, James ends with the belief that if the history of human development teaches one thing, it teaches the importance of individuality: “All that the human heart wants is its chance. It will willingly forego certainty in universal matters if only it can be allowed to feel that in them it has that same inalienable right to run risks, which no one dreams of refusing to it in the pettiest practical affairs” (344-45).

“The Right to Privacy” and the “Sentiment of Rationality” both try to reinsert the promise of individualism into public life. Pragmatists believe individuality is of the utmost importance if one is to have a meaningful life. The rhetorical project of both “The Right to Privacy” and “The Sentiment of Rationality” is to struggle with the prospects of human potential and arrive at a fully developed understanding of what it means to be an individual in contemporary society. Brandeis believes the key to understanding what it means to be an individual in contemporary society lies in the prospect of industrial democracy. It is to Brandeis’s take on industrial democracy that I turn.

Individualism and Industrial Democracy

Industrial democracy for Brandeis represents the potential for equality in industrial relations—be those relations social, economic, political, or hierarchical. It represents only the “potential” because for Brandeis no outcome is certain. Industrial democracy represents a hope, not a positive end to industrial strife. There will always be difficulty

in industrial relations, Brandeis says, because the nature of those problems is always changing; reality is always changing, and there is no final solution, only amelioration.

As Brandeis writes in a letter to Robert W. Bruere:

Refuse to accept as inevitable any evil in business (*e.g.*, irregularity of employment). Refuse to tolerate any immoral practice (*e.g.*, espionage). But do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society (as by State Socialism). . . . Seek for betterment within the broad lines of existing institutions. Do so by attacking evil in situ; and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions there must be much and constant inquiry into facts . . . and much experimentation; and that always and everywhere the intellectual, moral, and spiritual development of those concerned will remain an essential—and the main factor—in real betterment.²⁷

The project of industrial democracy is to strive for individual and social betterment, to undergo change, to pursue liberation. It is not an end in itself and it is not a means to an industrial utopia; it is, given the experiences of history, the best option available.

Rhetorically, Brandeis's view on industrial democracy is an extension of his view on American democracy. Whereas American democracy was created to leave behind the evils of aristocracy and monarchy, so industrial democracy is the project of leaving behind industrial despotism. In a 1904 address in Boston, Brandeis said: "Industrial liberty must attend political liberty. The lead which America takes in the industrial

world is no doubt due to our unbounded resources; but of these resources none are so great as the spirit and the ability incident to a free people.”²⁸ A year later, in May of 1905, Brandeis made the analogy of democracy to monarchy more explicit:

One hundred years ago the civilized world did not believe that it was possible that the people could rule themselves; they did not believe that it was possible to have government of the people, by the people, and for the people. America in the last century proved that democracy is a success.

The civilized world today believes that in the industrial world self-government is impossible; that we must adhere to the system which we have known as the monarchical system, the system of master and servant, or, as now more politely called, employer and employee. It rests with this century and perhaps with America to prove that as we have in the political world shown what self-government can do, we are to pursue the same lines in the industrial world.²⁹

Creating industrial democracy will surely be a struggle; it will be a struggle just as the creation of American political democracy was a struggle—an unending struggle at that. But industrial democracy is much better than the alternative, industrial monarchy or oligarchy.

A metaphor running continuously through Brandeis’s comparison of industrial democracy to industrial monarchy is the metaphor of master and slave, ruler and subject. In an address before the Ethical Cultural Meeting House in Boston, February 1912, Brandeis said, “[The industrial life nowadays] is a life so inhuman as to make our former Negro slavery infinitely preferable, for the master owned the slave, and tried to keep his

property in working order for his own interest.” Shortly thereafter he said, “Here you have a corporation that has made it its cardinal principle of action that its employees must be absolutely subject to its will. It is treason for an employee to participate with other employees for combination.”³⁰ What society cannot allow is the creation of an industrial kingdom, wherein the very few rule the many. The issue is democracy versus monarchy, and the lessons of history speak of which is the better system:

A large part of the American people realize today that competition is in no sense inconsistent with large-scale production and distribution. They realize that the maintenance of competition does not necessarily involve destructive and unrestrained competition, any more than the maintenance of liberty implies license or anarchy. We learned long ago that liberty could be preserved only by limiting in some way the freedom of action of individuals; that otherwise liberty would necessarily lead to absolutism and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place.³¹

The issue is improving the structure of the system in which industry operates so as to promote freedom, liberty, equality and well-being for all those participating in industrial relations.

But underlying the metaphors of democracy and monarchy, of master and slave, ruler and subject, is the belief that Brandeis holds most dear: the importance of the individual. Industrial democracy is pursued because it will free the individual from the tyranny of monarchical rule. The pursuit of industrial democracy is inexorably bound to the well-

being of the individual's life: "Either political liberty will be extinguished or industrial liberty must be restored."³² The problems of industry are problems for everyone in America: "What America needs is not that we do anything for these, our fellow citizens, but that we keep open the path of opportunity to enable them to do for themselves."³³ Brandeis wants to facilitate the individual's own pursuit of well-being in social and industrial relations. He wants to take the rule of the individual away from the monarchical power-brokers and leave the responsibility for individual progress with the individual person. Industrial democracy will entail, as Brandeis proclaims, "obedience to the laws which the people make for themselves in a business, and not the laws which are made for them and in the making of which they have no part."³⁴ If there is to be a master in industrial relations, industrial democracy demands that individuals be "master[s] of themselves."³⁵ And he wants every worker to come away with a clear message: "you must take that responsibility as a citizen of a free community takes his responsibility—something, that is, to be proud of; something that bears with it at times heavy burdens, not lightly but joyously."³⁶

"I abhor averages," Brandeis told a reporter for the *New York Times*. "I like the individual case."³⁷ He made this clear rhetorically by ending his speeches on industrial democracy by highlighting the importance of the individual, for it is the individual's life that is at stake in the struggle for industrial power. It is with the individual that the promise of industrial democracy lies: "You cannot eliminate [corporate] waste unless you secure the co-operation of the worker, and you cannot secure his co-operation unless he is satisfied that there is a fair distribution of profits."³⁸ In fact, all social relations, for

Brandeis, come down to the place of the individual in the fabric of experience. In February of 1914 he told the United States Chamber of Commerce,

Every man in the medical world glories in having given to the world something which advances medical science. Every man in the field of architecture glories when he can give to the world something that advances architectural science. You will find exactly the same thing in almost every department of engineering. Why should it not be so in business? Is there any lack of opportunity for competition, honorable competition, in the field of engineering or of architecture or of medicine? They can play the game wherever a man can see it. There need be no secrets when it comes to the question of advancing the art to which man devotes himself. And the same is absolutely true of business and will be recognized as true of business as soon as men come to recognize that business is one of the noblest and most promising of all the professions.³⁹

Brandeis concludes his speeches on industrial democracy by stressing the importance of the individual because it is the individual who nurtures and advances personal, social, and human health. Society and the individual are bound together in a continual give and take of the opportunity for betterment. Society depends on the individual and the individual depends on society.

In *Individualism Old and New*, Dewey makes the point that America's historical understanding of individualism—the understanding of the isolated soul sustaining his or herself in the face of natural dangers—is outmoded in industrial society. This is how Dewey frames the matter:

[T]he problem is seen to be essentially that of creation of a new individualism as significant for modern conditions as the old individualism at its best was for its day and place. . . . [T]he issue will define itself as utilization of the realities of a corporate civilization to validate and embody the distinctive moral element in the American version of individualism: Equality and freedom expressed not merely externally and politically but through personal participation in the development of a shared culture.⁴⁰

Dewey says the individual faces the most damning problem of industrial society: the mechanization of personhood. In contemporary industrial society, the individual faces the “quantification of life, with its attendant disregard of quality” (12). When life becomes mechanized and quantified, the potential for meaning slips away. “The spiritual factor of our tradition,” says Dewey, “equal opportunity and free association and intercommunication, is obscured and crowded out” (9). Not only are the industrial giants to blame for allowing the potential for meaning to slip away, individuals must also share the blame, for individuals have power over the way in which they conceive of individuality. Dewey calls on individuals to take responsibility for their own position in contemporary society. The “disintegration of individuality,” says Dewey, is largely “due to failure to reconstruct the self so as to meet the realities of present social life” (33). Because the pursuit of meaning is the point of individuality, the individual is the one who must work with the possibilities of the present to satisfy the desire for meaning: “The future is always unpredictable. Ideals, including that of a new and effective individuality, must themselves be framed out of the possibilities of existing conditions,

even if these be the conditions that constitute a corporate industrial age. The ideals take shape and gain a content as they operate in remaking conditions” (82).

Dewey shares with Brandeis the belief in the importance of individuality. Moreover, both share the belief that the importance of individuality must survive the onslaught of industrialism. Brandeis calls for a democratization of industrial relations; Dewey calls for a reconceptualization of what individuality means. But both believe it is largely the individual’s responsibility to sustain individuality. It is the individual’s responsibility to fight and struggle for meaning in industrial America. It is, in fact, that fighting and struggling, that undergoing of experience, that will, in the end, make individuality even more meaningful.

The attitude common to both Dewey and Brandeis is meliorism—the belief that the possibilities for personal and social betterment are present and available through human undertakings. Meliorism in industrial relations is the belief that, while industrialism is here to stay, the possibilities for a better future are present in the fabric of experience. Dewey summarizes the task this way: “It is a property of science to find its opportunities in problems, in questions. Since knowing is inquiring, perplexities and difficulties are the meat on which it thrives. The disparities and conflicts that give rise to problems are not something to be dreaded, something to be endured with whatever hardihood one can command; they are things to be grappled with” (78). The project as Dewey sees it is to “grapple” with industrial problems intellectually, attempting to solve the problems practically, with the knowledge that problem-solving is the creation of meaning, a step towards a better future. The belief is not that the future will be without strife and

suffering but that it will be better than the present. “[I]f life continues and if in continuing it expands,” Dewey writes, “there is an overcoming of factors of opposition and conflict; there is a transformation of them into differentiated aspects of a higher powered and more significant life.”⁴¹

Brandeis expresses his melioristic attitude toward industrial democracy by aligning it with the pursuit of social and political democracy in America: “[W]e cannot successfully grapple with the problem of democracy if we confine our efforts to political democracy. American development can come on the lines on which we seek it, and the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy.”⁴² Notice that Brandeis uses “grapple” just as Dewey used “grapple” to describe the project the individual faces. It is a struggle, it is a laborious undertaking, but it is worth it; indeed, meaning resides in the grappling. “Nothing could be more revolutionary than to close the door to social experimentation,” says Brandeis in defense of a minimum-wage statute for women. “The whole subject of woman’s entry into industry is an experiment. And surely the federal constitution—itsself perhaps the greatest of human experiments—does not prohibit such modest attempts as the woman’s minimum-wage act to reconcile the existing industrial system with our striving for social justice and the preservation of the race.”⁴³ Brandeis believes the social experimentation of women in industry holds promise for a better future. As he says, it is a matter not only of favor for women but for social justice and the preservation of humanity. He makes roughly the same point when he talks about the role of competition in contemporary society. “As long as we maintain conditions favorable to competition and

the freedom of individual development—conditions which leave the individual’s effort untrammelled by superior power,” Brandeis says, “so long may we safely allow men to make what profit they can get from an expectant public, and to exercise the largest degree of liberty in the marketing of their products.”⁴⁴

For Brandeis and Dewey, individualism, if the individual can learn to grapple intelligently with the problems of an ever-changing society, represents the promise of social and personal betterment. It is social and personal betterment because, while Brandeis and Dewey maintain faith in the individual’s powers, those powers are inseparable from the society in which the individual is embedded. The hope for amelioration is always contextualized within society. “[L]ife goes on in an environment; not merely *in* it but because of it, through interaction with it,” Dewey says. He continues, “At every moment, the living creature is exposed to dangers from its surroundings, and at every moment, it must draw upon something in its surroundings to satisfy its needs. The career and destiny of a living being are bound up with its interchanges with its environment, not externally but in the most intimate way.”⁴⁵ The individual cannot sustain well-being without the help of his or her environment, including his or her communal and social environment. But it is also true that society cannot sustain well-being without the help of the individual. The relationship is symbiotic. Brandeis puts the point masterfully: “Equal opportunity for all people as for all individuals—that is the essential of international as well as of national justice upon which a peace which is to be permanent must rest. Unless that fundamental right is

recognized and granted universally, there will be discord and war in the future, as there has been in the past.”⁴⁶

While the hope for peace is a projection of a future age, the prospects for striving for that peace are in the present age. Dewey says that “To the being fully alive, the future is not ominous but a promise; it surrounds the present as a halo. It consists of possibilities that are felt as a possession of what is now and here. In life that is truly life, everything overlaps and merges.”⁴⁷ To understand these possibilities, one must be able to understand what is happening in the fabric of experience. One must listen to the world and “read” reality. In that way, one must be able to understand the consequences of personal and social undertakings. It is only through understanding consequences that one can grasp the prospects for peace. Brandeis understood consequences arguably better than any other lawyer of his day. In 1908, his understanding of consequences turned into what later became known as the “Brandeis Brief”—a document so insightful that it changed the course of American legal history.

Consequences and the Rhetorical Power of the Brandeis Brief

Rhetorical analysis does not lend itself easily to study of the Brandeis Brief. It is, after all, two pages of legal argument, a fifteen page survey of existing laws limiting the number of hours women can work in a single day, and over ninety pages of sociological data. There is scant eloquence in the Brief. Where Brandeis does contribute sentences of his own to connect the sociological data, he writes mechanically, without the zeal and

fervor for which he is known. Even though it is probably the most influential and well-known text from his pre-Court days, it is rhetorically alien to his normal style.

The problem is that the Brandeis Brief is not meant to be eloquent. It is not an oration before a labor union, it is not an impassioned speech before the court, it is not full of his usual musings on Americanism, democracy and progress. It is, rather, a mere collection of “the facts.” But therein lies its force. For there is a deception operating within the Brief: its rhetorical power stems from its rhetorical simplicity. To understand this, however, perhaps it is best to explain some of the history of the brief.

Curt Muller, owner of a laundry in Portland, Oregon believed it was within his legal right to contract with his laundresses as to how many hours they would work in a day. The state of Oregon thought differently. In 1903 they had passed a law limiting to ten per day the number of hours women were allowed to work in factories and industrial settings. Thus, Muller violated Oregon’s statute when he contracted with his laundresses to work over ten hours a day. He was convicted of a misdemeanor under Oregon’s statute and he appealed all the way to the Supreme Court. The case was *Muller v. Oregon* (1908).⁴⁸ The National Consumer’s League acted to defend Oregon’s statute. First they sought the help of Joseph Choate, a well-known New York attorney. He heard the circumstances of the case and said, “Big, strong Irish laundry women? Why shouldn’t they work longer?”⁴⁹ The Consumer’s League then turned to Brandeis. Believing this was a matter of public concern, Brandeis freely volunteered his services, which he did often when he believed the outcome of a case would directly influence public matters.⁵⁰

But Brandeis faced an uphill battle. Two years after the State of Oregon approved its statute limiting the number of hours a woman could work, the Supreme Court heard arguments in *Lochner v. New York* (1905). The issue before the Court was the constitutionality of a law limiting the number of hours bakers could work in a single day. At issue, the court said, was “the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.”⁵¹ The Court believed the “liberty” clause of the Fourteenth Amendment included “liberty of contract,” whereby individuals could buy and sell labor without restriction, so long as that buying and selling was of mutual consent. There were exceptions to this, however. In 1898, in *Holden v. Hardy* (1898),⁵² the Court affirmed the constitutionality of a Utah statute that limited to eight the number of hours a miner could work in a day. The reasoning was that in the unique and dangerous circumstances of mining, the state had a right to protect its citizens’s safety, health, and morals, along with the general welfare of the public. Because of this precedent, the central question before the Court in *Lochner* was, “Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”⁵³ Thus the Court left open the possibility that under “reasonable and appropriate” circumstances a state could limit the number of hours individuals could work. Such a limitation was designed to protect the “safety, health, morals, and general welfare of the public.”⁵⁴

The Court's ruling in *Lochner* was a 5-4 split decision. The majority ruled against New York's statute limiting bakers's hours, but they did acknowledge the possibility for the state to limit the number of hours an individual could work in specific circumstances so long as the state was able *to prove* that it was acting to protect both individual and communal safety, health, and morality. The majority put the matter rather bluntly: "The question whether this act [of New York] is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract [guaranteed by the Fourteenth Amendment], by determining the hours of labor, in the occupation of a baker."⁵⁵ The majority continued, "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground."⁵⁶ Thus, while the Court actually struck down New York's statute, it reaffirmed the holding in *Holden*. New York had not proven, the Court said, that limiting the number of hours a baker could work actually protected the safety, health, and morals of individual workers and the public. "The purpose of a statute must be determined," said the Court, "from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose."⁵⁷ A statute claiming to protect safety, health and morals must actually do so; it must produce its intended consequences.

Oliver Wendell Holmes wrote one of his most famous dissents in *Lochner*. Believing the Court had overstepped the limits of its authority, Holmes produced one of his most memorable legal polemics:

The case is decided upon an economic theory which a large part of the country does not entertain. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁵⁸

Part of Holmes's contribution to constitutional jurisprudence, says Samuel Konefsky, was "to rescue it from the unreal world of absolute concepts."⁵⁹ But what erupted after *Lochner* was an intellectual battle around the Court's part in political decision-making, a battle that left the public wondering about the Court's competency. "The spectacle of the country's highest tribunal losing all sense of reality about a vital human and social problem," writes Konefsky, "was bound to hurt the Court's standing with the public."⁶⁰ But what the *Lochner* debate did do, notes Philippa Strum, was leave the door open for Brandeis's sociological jurisprudence: "The only hope of getting that majority [in *Lochner*] to sustain a statute was to flood it with such an overwhelming mass of statistics

that it would be hard pressed to conclude that the state had not met its burden of proof.”⁶¹

And that is exactly what Brandeis did.

The irony is that Brandeis used the Court’s reasoning and language in *Lochner* to, in effect, overturn *Lochner*.⁶² Brandeis’s entire brief actually rests on one syllogism, a syllogism Brandeis formulated using *Lochner*’s terminology. To paraphrase Brandeis’s reasoning, the argument is as follows:

If there is “fair ground, reasonably in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) or employees (or to the general welfare), if the hours of labor are not curtailed,” then the hours of labor must be curtailed.

There is “reasonable ground for holding that to permit women in Oregon to work in a ‘mechanical establishment, or factory, or laundry’ more than ten hours in one day is dangerous to the public health, safety, morals, or welfare.”

Therefore, the hours of labor must be curtailed.⁶³

Thus Brandeis’s project, in the over ninety pages remaining in the Brief, was to supply the Court with evidence of the syllogism’s minor premise. Brandeis had to “flood” the Court, to use Strum’s term, with concrete sociological data showing conclusively that there was “reasonable ground” to uphold Oregon’s statute.

Brandeis writes the Brief very mechanically. The majority of the Brief is, after all, pages upon pages of excerpts from sociological surveys and studies across the industrialized world—from England and France to Switzerland, Austria, Holland, Italy, and Germany. Brandeis writes the Brief so as to display only “the facts.” He reasons

that “facts of common knowledge” establish conclusively that “there is reasonable ground for holding that to permit women in Oregon to work in a ‘mechanical establishment, or factory, or laundry’ more than ten hours in one day is dangerous to the public health, safety, morals, or welfare” (10). But while Brandeis writes passively—in order to try and remove any human element from the data, any human interpretation that may skew “the facts”—his sentences are actually charged with emotion, infused with the “human element.”

His project in “Part First” (his language) of the Brief is to establish the international perspective on limiting the number of hours women can work. His conclusion after surveying existing laws from “leading countries in Europe” is that “In no country in which the legal limitation upon the hours of labor of adult women was introduced has the law been repealed. Practically without exception every amendment of the law has been in the line of strengthening the law or further reducing the working time” (11). So Brandeis quotes from the laws of seven “leading countries in Europe” and then offers a page and a half of similar laws in the United States. He writes, “Twenty States of the Union, including nearly all of those in which women are largely employed in factory or similar work, have found it necessary to take action for the protection of their health and safety and the public welfare, and have enacted laws limiting the hours of labor for adult women.” More to the point, he says, “In no instance has any such law been repealed. Nearly every amendment in any law has been in the line of strengthening the law or further reducing working time” (16). The subtext of this section is that if the United States were to find unconstitutional laws limiting the number of hours women could

work in a day, it would fall decades behind Europe's progress (and who in America wants to fall behind *Europe*?!). The United States cannot afford, Brandeis reasons, to fall out of sync with international progress. To do so would, in short, be un-American.

From page 18, immediately after his survey of international laws, through page 112, the end of the book, save for a one-paragraph conclusion, Brandeis undertakes his survey of sociological data. Notice how Brandeis begins this section:

Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. . . . [P]hysicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury (18).

Nowadays, Brandeis would be shunned for his description of women. In short, the Brandeis Brief, notes Strum, “could not be comforting to feminists, because it classified women as weak, dependent, and subordinate. Women were not merely different; they were both different and ‘not upon a quality.’”⁶⁴ While one could level such an argument against Brandeis, it would miss the point of his rhetoric: Brandeis framed his argument in a way the sitting Court Justices could easily accept. It was the prevailing belief of the time, the belief that all “physicians are agreed” upon, that women were built for different tasks than men. The truth of such a belief is irrelevant for the current purposes.

Brandeis had to frame his sociological survey in such a way that his conclusion—that

limiting the number of hours women could work in a day was constitutional and beneficial for women and society—was inescapable. Therefore, he had to rely upon the prevailing beliefs, not only of the Supreme Court Justices, but of the public at large. The “facts” were “to speak for themselves,” and bouncing those facts off of common contemporary beliefs was surely a way to give the facts room to speak.

The point that women are weaker than men is brought to the fore in modern industrial society, Brandeis said: “women are affected to a far greater degree than men by the growing strain of modern industry” (24). In fact any observer could conclude, Brandeis hinted, that modern industry threatens the physical endowments of individual workers: “Machinery is increasingly speeded up, the number of machines tended by individual workers grows larger, processes become more and more complex as more operations are performed simultaneously. All these changes involve correspondingly greater physical strain upon the worker” (24). By “the worker” Brandeis means not only women, but men as well. It is just a “bare fact” of modern industrial life that the dangers to “the worker” are increasing on a consistent basis. “The worker,” of course, is also a term of individualism. The threat to the individual comes from the dreadful giant known as industry. The threat is of “the machines” dominating “the individual.”

The threat of modern industry involves the individual first and foremost; but it also involves society at large, for society and the individual are bound together. “The evil effect of overwork before as well as after marriage upon childbirth,” Brandeis writes, “is marked and disastrous” (36). This brief sentence, the only sentence Brandeis writes to connect nine pages of sociological data with another six pages of data, is charged with

emotion. Industry is “evil”; it results in “overwork,” an obvious danger to the individual; it is detrimental not only to the individual but to “marriage,” a sacred institution, part of the bedrock of society, and to “childbirth”; industry threatens the entire family, and the consequences are “marked and disastrous.” The threat of industry is a matter of public morality. “The effect of overwork on morals,” he writes six pages later, “is closely related to the injury to health. Laxity of moral fibre follows physical debility. When the working day is so long that no time whatever is left for a minimum of leisure or home-life, relief from the strain of work is sought in alcoholic stimulants and other excesses” (44). Brandeis supports that claim with two pages of data. Industry destroys the individual’s potential and, more extensively, the potential for familial, moral and social well-being. Indeed, he says two pages later, “the deterioration is handed down to succeeding generations. . . . The overwork of future mothers thus directly attacks the welfare of the nation” (47).

Having discussed the dangers to society, Brandeis proceeds to show the dangers of overwork on the economy. The protection of women and society “can be afforded only through shortening the hours of labor” (56). He continues: “To the individual and to society alike, shorter hours have been a benefit wherever introduced. . . . Wherever sufficient time has elapsed since the establishment of the shorter working day, the succeeding generation has shown extraordinary improvement in physique and morals” (57). The consequences of enacting a shorter workday are far-reaching and beneficial for everyone, even the capitalists: “The universal testimony of manufacturing countries tends to prove that the regulation of the working day acts favorably upon output. With

long hours, output declines; with short hours, it rises. The heightened efficiency of the workers, due to the shorter day, more than balances any loss of time. Production is not only increased, but improved in quality” (65). Again, this is not Brandeis speaking, but the “universal testimony” of “the facts.” And the statement is wound with the God-terms of capitalism—“output,” output “rises,” “efficiency of the workers,” “balances any loss of time,” “increased” production, “improved” quality. Brandeis adopts the terms of his audience and weaves them through the interlude between data. The capitalists are worried about the effects of shorter workdays on the economy, and Brandeis co-opts them through terms of economic reassurance.

The final parts of the Brief show the “reasonableness” of universally applying the shorter workday for women and of the prudence of making that day ten hours long. “Factory inspectors, physicians, and working women are unanimous in advocating the ten-hour day, wherever it has not yet been established” (92). The subtext is that Brandeis is not the advocate; he is merely legal counsel for Oregon. The advocates, those speaking through Brandeis, are the ones truly involved in labor—factory inspectors, physicians and working women. They are the ones directly affected by labor conditions and they are the ones advocating. In good conscience, the Court cannot dismiss their testimony.

There is one final section and a conclusion remaining in the Brief. The final section deals specifically with the place of working women in laundries—the specific context of the Oregon statute and the case before the Court. The conclusion is only a paragraph long; it is, in fact, only one sentence:

We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries in Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day (113).

Brandeis's message is this: the history of the world's industrial experience comes down to the place of the individual woman working in a laundry in Oregon. The entire history of the world's experience culminates in the specific problems of the present. The Court cannot rule other than to uphold Oregon's statute. The conclusion is inescapable. All experience points to the need to secure the individual in her work. It is a matter of personal, social, economic, historical, industrial, and moral well-being.

The Court ruled unanimously in *Muller v. Oregon* to uphold Oregon's statute. In an unconventional move, Justice Brewer, writing for the Court, even mentioned Brandeis and his Brief by name.⁶⁵ One columnist at the time said, "The story of the fight on behalf of overworked women which was won before the United States Supreme Court may put heart in those who believe that ultimately we shall make industry for the sake of humanity and not regard humanity as existing for the sake of industry."⁶⁶ Over the next eight years, forty-one states passed new laws or improved existing laws limiting the number of hours a woman could work in a day.⁶⁷

Brandeis's rhetorical style in the Brandeis Brief seems, on the face of it, thoroughly Aristotelian. Brandeis begins with a syllogism and weaves together artistic and inartistic

proofs to support his argument. While there are definite traces of Aristotle in the Brief, to label Brandeis's rhetorical style thoroughly Aristotelian is misleading. For the evidence of upon which Brandeis relies hinges upon the God-term of James and Dewey's pragmatism: experience.

Aristotle's philosophy relies on words such as substance, essence, form, matter, state, faculty, virtue, etc. His language is the language of nature, of categories and logical divisions. James and Dewey leave much of Aristotle's philosophy behind. Their philosophy is one of development, of progress, of setback, of yearning and fulfillment, of danger and despair, of novelty and possibility, but no certainty. For James, there is indeed no bedrock of categories, of division, of essence, substance and nature: "In radical empiricism there is no bedding; it is as if the pieces clung together by their edges, the transactions experienced between them forming their cement."⁶⁸ James's sentiment is true of Dewey's understanding of human freedom: "Human desire and ability cooperates with this or that natural force according as this or that eventuality is judged better. We do not use the present to control the future. We use the foresight of the future to refine and expand present activity."⁶⁹

James and Dewey leave behind Aristotelian terminology and implement terms of doing, having, undergoing, progressing, expanding, desiring, fulfilling, savoring, living and dying. These are terms of experience. James says that "Experience is remoulding us every moment."⁷⁰ Dewey says that experience "reaches down into nature; it has depth. It also has breadth and to an indefinitely elastic extent. It stretches."⁷¹ For James and Dewey, the point is not to construct a formal philosophical schema but to create a

philosophy that speaks to the fabric of experience. Experience is the God-term because the way in which individuals have their experiences determines the way in which the world is made.

This was Brandeis's concern in the Brief. The subtitle of "Part Second" of the Brief is "The World's Experience Upon Which the Legislation Limiting the Hours of Labor for Women is Based." His argument is that limiting the number of hours women are allowed to work is necessary not because formal principles dictate such but because the experience of the world says so. The consequences of *not* limiting the number of hours women are allowed to work are clear. What determines what is morally good or bad is not a formal logical judgment, as Aristotle says, but the consequences of personal and social undertakings. Consequences determine good and bad, not formal categories and schemas. The consequences of not limiting women's hours are pain and degradation; the consequences of limiting women's hours are enrichment and progress—the experience of the world makes that known. The Brandeis Brief is about consequences; it is about understanding experience. Experience becomes the God-term for Brandeis just as it was the God-term for James and Dewey.

The Language of Pragmatism as Individualism

This chapter has analyzed Brandeis's pre-Court rhetoric in conjunction with the vein of pragmatism that affirms individualism as central to the meaning of life. Perhaps necessary before moving on to Brandeis's rhetoric on the Court is to highlight some of

what makes the pragmatic political style, Brandeis's political style, significant for the study of rhetoric.

The rhetoric of pragmatism as individualism is organic. Pragmatism as individualism speaks of growth, of fullness, of cultivation, of nurturing. It is the rhetoric of promise and possibility in the presence of forces that seek to stunt the organism's growth.

Dewey summarizes the point: "Man himself is living in an aleatory world; his existence involves, to put it baldly, a gamble. The world is a scene of risk; it is uncertain, unstable, uncannily unstable."⁷² But the presence of risk and uncertainty does not mean that despair is the only outcome, for what makes life meaningful is the ability to forge through the risk and uncertainty. Dewey writes,

The moral is to develop conscientiousness, ability to judge the significance of what we are doing and to use that judgment in directing what we do, not by means of direct cultivation of something called conscience, or reason, or a faculty of moral knowledge, but by fostering those impulses and habits which experience has shown to make us sensitive, generous, imaginative, impartial in perceiving the tendency of our inchoate dawning activities.⁷³

Dewey's language is not one of "reason" or "faculty" or of "conscience"; his language is of "develop[ing]," "directing," and "fostering." These are terms of organic growth.

They point to the endless project of doing, having and undergoing that pragmatists affirm. Dewey puts the point eloquently:

Life itself consists of phases in which the organism falls out of step with the march of surrounding things and then recovers unison with it—either through

effort or by some happy chance. And, in a growing life, the recovery is never mere return to a prior state, for it is enriched by the state of disparity and resistance through which it has successfully passed. If the gap between organism and environment is too wide, the creature dies. If its activity is not enhanced by the temporary alienation, it merely subsists. Life grows when a temporary falling out is a transition to a more extensive balance of the energies of the organism with those of the conditions under which it lives.⁷⁴

Pragmatism hinges on the rhetoric of the organism, the rhetoric of growth, of freight, of pain, of fulfillment, of health, of sickness, of nourishment. These are, moreover, the terms of Brandeis's rhetorical corpus. He believes that "the present tendency towards centralization must be *arrested* if we are to attain the American ideals, and that for it must be substituted intense *development of life* through activities in several states and localities."⁷⁵ He also says that "the real success in life is to be measured by one's own accomplishments in *advancing* the welfare of the community."⁷⁶ He also says that "As democracy insists that the *full development* of each individual is not only right but a duty to society, so the new nationalism proclaims the right and the duty of each race or people to *develop itself fully*."⁷⁷ He also writes to a friend that "Success in any democratic undertaking must proceed from the individual. It is possible only where the *process of perfecting the individual is pursued*. His *development* is attained mainly in the *processes of common living*."⁷⁸ He also believes that the "right to life" means the "right to live," to develop as an individual: "In order to live men must have the opportunity of *developing*

their faculties; and they must live under conditions in which their faculties *may develop naturally and healthily*.”⁷⁹

Brandeis feared unregulated industry, and all things “big,” because they threatened the individual’s potential for growth. Bigness in industry leads to “physical and moral *degeneracy*—work, work, work, without recreating any *possibility of relief* save that which dissipation brings.”⁸⁰ The same problem holds for economic “bigness”: “It is asserted that to *persist* in the *disintegration* of existing unlawful trusts is to pursue a policy of *destruction*. No statement could be more misleading. *Progress* demands that we remove the obstacles in the *path of progress*; and private monopoly is the most serious obstacle.”⁸¹ “[People] have come to realize the effect of monopoly,” Brandeis writes, “in *arresting progress, arresting that advance* in industry without which a great industrial future is unattainable.”⁸² What is at stake in industrial society is the health and well-being of individuals and of society itself: “The attempt to *dismember* existing illegal trusts is not, therefore, and attempt to interfere in any way with the *natural* law of business. It is an *endeavor to restore health by removing a cancer* from the body industrial.”⁸³

The pragmatic political style enacts the rhetoric of growth. It emphasizes the potential for, and the potential interference with, progress, development, enrichment, and betterment. And what is central to this potential is the place of the individual. What is central is the chance for growth in the particular organism. Society’s project, as Brandeis, James and Dewey all believed, is to liberate the individual to pursue enrichment. “A genuinely liberated social and political environment,” writes John

McDermott, “is one which encourages the individual, who is, after all, not ready-made, to experience the world in all of its potential intensity.”⁸⁴ In a world ingrained with risk and uncertainty, the social and political project of liberating the individual is no easy task. It is rather the deepest problem of the modern age. The next chapter will deal with Brandeis’s approach to solving that problem while he sat on the bench of the United States Supreme Court.

CHAPTER III
LEGAL PRAGMATISM AND SOCIETY:
LOUIS BRANDEIS'S SUPREME COURT RHETORIC

Unlike other well-known Supreme Court Justices, such as Benjamin Cardozo, Brandeis wrote no lengthy treatise on “the nature” of “the law.” The closest he came to delivering publicly such a treatise was his address before the Chicago Bar Association in January of 1916, five months before he would become Supreme Court Justice Louis Brandeis.

His address was entitled “The Living Law.”¹ His project in the address was to show that the law must evolve and grow in cooperation with social changes. He began, “[I]n that short period [of America’s existence] the American ideal of government has been greatly modified. At first our ideal was expressed as, ‘A government of laws and not of men.’ Then it became, ‘A government of the people, by the people, and for the people.’ Now it is, ‘Democracy and social justice.’”² The basic fact the law must deal with, said Brandeis, is that social conceptions of government and justice change, and because the law is meant to serve society, the law must change as society changes. Both the law and society are in perpetual flux, in a process of always becoming.

But Brandeis pointed out something else. Along with the change in social conceptions of the law, the public has had a “waning respect for law” (316). He questioned, “Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our

political, economic, and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?” (318). The inability of the law to develop along with social changes has led to “fury against the courts.” (319). But not all is lost. Since 1912, Brandeis said, the American public has seen in the courts a more organic appreciation of social needs. This stems from the law’s increasing recognition of local experimentation, experimentation in the states, in industry and the economy. In 1912, finally, the courts “realized that no law, written or unwritten, can be understood without full knowledge of the facts out of which it arises, and to which it is to be applied” (321-322).

Through the perpetual flux of social evolution, the law must carve out its own organic place in human progress:

What we need is not to displace the courts, but to make them efficient instruments of justice, not to displace the lawyer, but to fit him for his official or judicial task. And, indeed, the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier accomplished than that of endowing men, who lack legal training, with the necessary qualifications (323).

Here Brandeis calls on lawyers, judges, and America’s legal institution in general, to be social instruments. He calls on them to serve society. In order to do so, he says, lawyers and judges must be social thinkers, must be in tune with experiences beyond the narrow confines of the courtroom. “The pursuit of the legal profession,” Brandeis says, “involves a happy combination of the intellectual with the practical life. The intellectual

tends to breadth of view; the practical to that realization of limitations which are essential to the wise conduct of life” (324).

Brandeis’s phrase “the wise conduct of life”—his infusion of the intellectual and the practical—is essentially Dewey’s conception of “creative intelligence,” which John McDermott summarizes as the method of achieving “optimum possibilities in the never-ending moral struggle to harmonize the means-end relationship for the purpose of enhancing human life and achieving growth.”³ Brandeis’s judicial vision is intertwined with his social and personal vision: the purpose of human structures—the law, government, the economy and industry—is to liberate the struggle for living. This is the task modern society faces:

We are powerless to restore the general practitioner and general participation in public life. Intense specialization must continue. But we can correct its distorting effects by broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present them to the problems of today (325).

Brandeis ends “The Living Law” with a parable. Bogigish was a well-known law professor who grew up in the ancient city of Ragusa, located only a few miles from Montenegro. When Montenegro was “admitted to the family of nations,” its prince concluded that it needed a legal code, “like other civilized nations.” The prince of Montenegro turned to the Tsar of Russia for help, who employed Bogigish in the task of developing the legal code. So what did Bogigish do to develop the code?

[I]nstead of utilizing his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people—studying everywhere their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life which the Montenegrins lived. They respected that law, because it expressed the will of the people (326).

The moral of the story is clear: the law must embody a particular form of life in order to serve that life. The right to life, after all, for Brandeis, is more than the right to *have* life; it is the right to *enjoy* life—to pursue possibilities, to grow, to flourish, to evolve. To be effective, political actors must understand the needs of individual and social organisms and, through the method of creative intelligence, enable those forms of life to grow. Brandeis puts the point masterfully in his unpublished dissent⁴ in *Stratton v. St. Louis Southwestern Railway Company* (1930):

Life implies growth. Only change is abiding. In order to reach sound conclusions in such cases, we must strive ceaselessly to bring our opinions into agreement with facts ascertaining. We must never forget that the judgment of men is fallible, being influenced inevitably by their views as to economic, social and political policy. Our effort to reach sound conclusions will be futile if we substitute formulas for reasoning. Formulas block the paths to truth and wisdom. *Stare decisis* is always a desideratum, even in these constitutional cases. But in them, it is never a command. For we may not close the mind to the lessons of experience and abdicate the sway of reason.⁵

Completely escaping one's social, economic, and political sympathies is impossible, Brandeis rightly admits. But that does not mean that experience does not allow for wisdom. Wisdom is attained not by imposing legal formulas or mathematical reductions on social circumstances but by understanding the consequences of personal and social action and deciding a particular case given the best apprehension of the facts available.

Brandeis believes that if lawyers and judges substitute reasoning for formulas, they will be able to "read reality" and come to a decision that not only serves the needs of society but also promotes individual liberty. "His theory of democracy, centered on the individual," writes Strum, "encompassed both a recognition of the kinds of innovated governmental action required by the industrial age and an awareness of the limitations that had to be placed on business and on government if the individual was to be emphasized, the economy was to work well, and efficiency and freedom were to be kept in proper balance."⁶ In short, for Brandeis, the law is a tool for serving the individual and society in concert.

Throughout this thesis I have been aligning Brandeis with pragmatism, and his aforementioned understanding of the law is thoroughly pragmatic. It should be clear, however, that Brandeis's pragmatism-as-law, an understanding completely consistent with James and Dewey, is quite unlike certain contemporary understandings of pragmatism-as-law. Specifically, it is quite unlike Stanley Fish's understanding.

Fish is one of the most high-profile scholars grappling with the prospects of pragmatism. Whether one agrees with his views or not, he certainly stands at the fore of the modern movement known as "neo-pragmatism," a movement often ascribed to

Richard Rorty's influence. Even though he is a visible member of the neo-pragmatist movement, Fish's understanding of pragmatism diverges completely from the understanding of the pragmatic political style I have been advancing. To make this analysis of Brandeis's Supreme Court rhetoric clear, therefore, it is perhaps necessary to differentiate Brandeis's pragmatic political style from the pragmatism Fish puts forth.

Fish's main problem in his book *There's No Such Thing as Free Speech . . . And It's a Good Thing Too* is with the place of moral language in political discussions. His problem is with words and phrases such as "reason," "fairness," "neutrality," "free speech," and "tolerance." He says, "when such words and phrases are invoked, it is almost always as part of an effort to deprive moral and legal problems of their histories so that merely formal calculations can then be performed on phenomena that have been flattened out and no longer have their real-world shape."⁷ Brandeis, to be sure, shared the same concern. Problems *should* be tied to the particular circumstances of their historical, social, economic, and political place. But Fish goes further than Brandeis would like: "[W]hile notions like 'merit' and 'fairness' are always presented as if their meanings were perspicuous to anyone no matter what his or her political affiliation, educational experience, ethnic tradition, gender, class, institutional history, etc., in fact 'merit' and 'fairness' (and other related terms) will have different meanings in relation to different assumptions and background conditions."⁸ Brandeis was aware of the difficulties of escaping one's own predispositions, but unlike Fish, Brandeis never shied away from words like "justice," "fairness," "equality," "tolerance," "freedom," and

“liberty” (neither did James and Dewey, for that matter). Indeed, such words, for Brandeis, were indispensable for forging a uniquely American moral identity.

Brandeis had a theory of America—a theory of justice, of tolerance and equality, of liberty and freedom. In turn, these ideas of justice, tolerance, equality, liberty and freedom became principles for Brandeis—ideals to work toward. Theory and principles created his vision of America, his vision of where America had been, where it is now, and where it should be going. Brandeis’s job—as an advocate, rhetor, and Supreme Court Justice—was to promote that theory, that vision. And that is exactly where Brandeis diverges from Fish. For Fish, theory and vision should have no part in decision-making. Without theory, Fish writes, individuals are left “without a ground of justification more basic or higher than the grounds given us by our moral convictions and determinations of fact. There is no theory or principle or bright line that will allow us to rise above or step to the side of the conclusions we have reached as situated political agents.”⁹ Fish is against theory and principle because he says they do not aid decision-making. He says nothing follows from theory and principle. Brandeis, however, thought theory and principle, when created and enacted intelligently, were instruments specifically designed to aid political decision-making.

Fish tries to distance himself from this type of pragmatism by distinguishing between a pragmatist *account* and a pragmatist *program*. In a pragmatist account, he says, “the law works not by identifying and then hewing to some overarching set of principles, or logical calculus, or authoritative revelation, but by deploying a set of ramshackle and heterogeneous resources in an effort to reach political resolutions of disputes that must

be framed (and this is the law's requirements and the public's desire) in apolitical and abstract terms (fairness, equality, what justice requires)."¹⁰ Conversely, a pragmatist program "asks the question 'what follows from the pragmatist account?' and then gives an answer, but by giving an answer pragmatism is unfaithful to its own first principle (which is to have none) and turns unwittingly into the foundationalism and essentialism it rejects."¹¹

Brandeis's entire rhetorical corpus is the attempt to articulate a pragmatist program on top of a pragmatist account. Brandeis's entire career is the attempt to answer the question, "Given that consequences matter, given that the purpose of life is growth, given that the most significant thing about an individual is his or her vision, given that the world is forever changing and the individual and society are left forever trying to cope, forever trying to forge a meaningful life, how should I speak (as a rhetor), how should I decide (as a judge), how should I believe (as a Zionist)?" Brandeis's pragmatic political style is the attempt to fuse the pragmatic project with the pragmatic understanding of life and to promote that fusion as the best way to make decisions.

Fish would thus say that Brandeis makes pragmatism null and void. By trying to promote the pragmatist method, Brandeis's "pragmatism" has become self-defeating, trying to provide answers where none are possible. Fish believes pragmatism can only be descriptive—only an *account* of life—whereas a normative project—a project that articulates what one *should* do—is self-contradictory and unpragmatic. Brandeis (and James and Dewey, for that matter) would say pragmatism must be both descriptive *and* normative. What Fish does not understand is that pragmatism is specifically about

seeing what difference a given theory or practice makes and then advocating that theory or practice because it is desirable—because it is balanced, because it does promote growth, because it does liberate, because it is beneficial for the individual and society. Larry Hickman writes, “[T]he pragmatic account of inquiry is invariably situated with respect to specific circumstances. It arises from felt needs, employs both abstract and concrete tools, tests proposals in the laboratory of experience, and terminates in the resolution of the difficulties which occasioned that particular sequence of inquiry.”¹² By offering a “resolution of the difficulties,” pragmatism does, contra Fish, have something to offer politics; it does have a normative appeal to make. Hickman says this “resolution” is the fundamental difference between the normative account pragmatists offer and the type of descriptive account Fish offers:

[T]here is a significant difference between James’s proposal for a working method that privileges no particular *result*, and the proposal issued by Jean-François Lyotard and other postmodernists that no particular *narrative or standpoint* can or should be privileged. James’s proposal possesses the virtues of what has been termed “the scientific method” of inquiry (on which it is based): when it is properly applied, it *does* present a privileged method *with respect to knowledge-getting*, since it is experimental and therefore produces practical effects that are objective. It is self-correcting. Lyotard’s postmodern proposal, on the other hand, appears to be self-defeating on its face: it must privilege its own announced narrative, namely, that no narrative is privileged.¹³

Fish completely misunderstands pragmatism by believing it has nothing concrete and specific to offer. The pragmatic method is itself a concrete and specific tool. The pragmatic method is a concrete and specific tool for practically steering personal and social undertakings toward the better life. The pragmatic method effectively allows the individual to pursue his or her vision of the good life. Pragmatism thus works with theories, principles and ideals, not against them, as Fish believes. Of course, these theories, principles and ideals will never represent Platonic Forms, Truths or Absolutes; there will never be perfect Harmony. But that is exactly why one cannot forget one's ideals—the meaning of life is in the striving for those ideals through human limitations and danger and risk; the meaning is in the forging of a moral identity, in cutting one's path through life. And the pragmatic method allows the individual to cut such a path.

What separates Fish's understanding of pragmatism from the pragmatism of Brandeis, James and Dewey is vision. Brandeis, James and Dewey have a vision of life that relies on the pursuit of meaning, that relies on the health of the organism. Fish seems to have no such vision. In his schema, there is no hint that betterment, either personal or social, is possible. Fish explicitly denies the chances for liberty, equality, freedom, tolerance, and a balanced life, a good life. He even denies that one should have such a vision of the good life. One should not have theories, principles or ideals, Fish declares. Yet for Brandeis, James and Dewey, it all comes down to the integration of theories, principles and ideals into the process of living, into the way in which one has one's experiences. It all comes down to vision and the possibilities for betterment.

Because it all comes down to vision and the possibilities for betterment, the law must allow individuals and society to pursue those possibilities. The law must serve vision, must try to meet the personal and social needs, must try to promote liberty, freedom, equality, tolerance, health and growth. The law must act as an instrument of amelioration. And pragmatists believe they have the best way for allowing the law to do that.

My argument in the remainder of this chapter extends from my critique of Fish. The pragmatic political style, Brandeis's style, involves approaching political disputes—judicial, social, economic, etc.—normatively, under the guise of one's vision of personal and social betterment. Essentially, Brandeis's approach to judicial decision-making is a normative extension of his beliefs regarding the place of the individual in society. His approach is a normative extension of the characteristics of pragmatism: namely, that the pragmatic method seizes truth through consequences; that the pragmatic method strives to cope with a world unfinished, in-the-making, and malleable to the human touch; that the pragmatic method rejects close-systems of thinking and meaning and instead pursues novelty and possibility with every undertaking; that the pragmatic method replaces the quest for certainty with the quest for meaning; and that the pragmatic method chooses meliorism in the face of uncertainty. In the next section I will bring out these themes through an analysis of Brandeis's Supreme Court opinions regarding the First Amendment and liberty. Then I will analyze his opinions concerning the structure of government and society. I will conclude by highlighting the rhetoric of

Brandeis's understanding of the relationship between the individual, society, the law and government.

Eloquence, Dissent, and the Prospects of Liberty

Brandeis wrote most eloquently in his dissents. Strum calls his dissents “lessons for the public or at least that part of it that reads Supreme Court opinions. It is therefore in Brandeis’s dissents that one finds not only the meticulous workmanship that is a hallmark of his opinions but, in addition, clear statements of political thought.”¹⁴ In dissents judges are less constrained by creating law—less bound by the need for legal clarity and straightforward decision-making—and better able to experiment stylistically. As Don Le Duc points out, “No competent judge would draft a narrow statement of controlling law in the flamboyant style of a dissent because of the realization that lawyers might easily misinterpret its implications.”¹⁵ Walter Ulrich also points out that

In a majority opinion, a desire to insure that the opinion is clear to members of the legal progression and the need to tone down a position to gain the adherence of other judges constrain a judge. Since a dissenting or concurring judge does not face these limitations, a dissenting or concurring opinion can be “an outlet for individual, independence, idiosyncrasy—a divergence from accepted, official or conventional wisdom.” Freed from many of the constraints of judicial norms, justices can transcend the immediate case to express their broader views.¹⁶

While it is no surprise that Brandeis’s rhetorical best emerges in his dissents, it is also no surprise that Brandeis’s dissents are normative appeals. Every justice who writes a

dissenting opinion is expressing his or her opinion on what the court *should* have found or *should* do in the future. C. Evans Hughes states, “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have betrayed.”¹⁷ But what should also be clear about Brandeis’s dissents is the extent of the impact of his normative appeals. “More than any other Justice on the Court,” writes Bradley Bobertz, “Brandeis understood the need to shape free speech doctrine in a way that would respond to the long range needs of American democracy.”¹⁸ Later he says, “Brandeis provides functional justifications for free speech that stand to this day as the dominant theoretical underpinnings of the Court’s free speech jurisprudence.”¹⁹ Essentially, throughout the twentieth century, the rhetoric of Brandeis’s dissents became the prevailing rhetoric of First Amendment jurisprudence.

The point of this rhetorical analysis of Brandeis’s influential dissents is *the way in which* those appeals emerged. The point is Brandeis’s method, his judicial style. Mason, Brandeis’s first biographer, says he used the dissenting opinion “as an educational device to explore and illumine not only the law but also the relations which law governs . . . in a persuasive demonstration of what the law ought to be in terms of social justice.”²⁰ What is important for the present understanding of the pragmatic political style is the way in which Brandeis processed the circumstances of the case and arrived at his normative appeal.

An exhaustive analysis of his dissents is well beyond the scope of this project, but it is important to understand common rhetorical strategies running throughout his most

influential opinions. Perhaps the best place to start is with his very first dissenting opinion; the case was *New York Central Railroad Company v. Winfield* (1917).²¹

The circumstances of the case were as follows: James Winfield lost an eye while working as an interstate “common carrier” for the New York Central Railroad Company. Justice Van Devanter, writing for the majority, said Winfield’s injury “was not due to any fault or negligence of the carrier, or of any of its officers, agents, or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged.”²²

Winfield, however, collected damages under the Workmen’s Compensation Law of the state. The Supreme Court reversed the award, concluding that liability for damages was not covered by state statutes but by the Federal Employers’ Liability Act of Congress, which, the Court said, does not award damages in the absence of negligence.

Establishing liability under the act of Congress sent a clear message: “the controlling law should be uniform and not change at every state line.”²³ Thus, because Congress in the Employers’ Liability Act held that damages must be awarded only where there was negligence on the part of the employer, the states could not require compensation where the act withheld it. “[T]he Federal act,” the majority concluded, “governs to the exclusion of the state law.”²⁴

The states must, the majority believed, remain subject to Federal dictates: “Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of

Congress.”²⁵ The source of the majority’s belief was this: Federal law governs nationally, state law is bound by Federal law, and the individual worker is therefore also bound by Federal law. The majority looked first to the structure of Federal law, then to the necessary compliance of the states, then to the place of the individual worker within that legal system. According to the majority, the individual’s place in society was a function of legal prescriptions.

Brandeis’s dissenting opinion is a complete reversal of the majority’s understanding. Brandeis begins by asking, did Congress actually mean to subject the states to Federal dictates? “[W]e endeavor to determine,” he writes, “whether Congress, in enacting the Employers’ Liability Act, intended to prevent states from entering the specific field of compensation for injuries to employees arising without fault on the railroad’s part, for which Congress made no provision.”²⁶ How does Brandeis attempt to determine the intent of Congress? By contextualizing the act within the larger scope of social, political, economic, and industrial circumstances. He writes,

Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers’ Liability Act was passed; look on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of state Workmen’s Compensation Laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.²⁷

Brandeis believes that the actual words of the act contain nothing “expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers’ obligations in relation thereto.”²⁸ Thus, it is necessary to look to the larger social context of Congress’s actions. So he undertakes a survey of the historical circumstances of the Employers’ Liability Act. *Why* did Congress seek to write the act in the first place? Congress, he says, believed it necessary to supplement the worker’s ability to receive compensation from job-related injuries. Because of industrialization, Brandeis says, workers no longer had adequate job-related protections; the legal projects became, because of industrialization, “seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew.”²⁹ The “bigness” of corporations in the industrial age made it necessary, Brandeis concludes, for Congress to create new protections for individual workers. He says that pre-industrial protections, “When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread.”³⁰ Thus, as industrial accidents became all the more frequent, Congress “used its power over interstate commerce to afford relief.”³¹ The purpose of the act was not to *displace* the power of the states to regulate commerce; the purpose was, rather, to serve as “emergency legislation” aimed at helping workers thrive in the industrial age. Because an entity as large as the Federal government can never account for the endless contextual

contingencies, “the great diversity of conditions,” Brandeis says, Congress left room for the states to experiment in creating justice in industrial relations.³² The government cannot cut the states out of the regulatory loop, for the states have better control of the idiosyncrasies of their own, local circumstances. Brandeis believes the purpose of Congress’s action was clear:

to end the denial of the right to damages for injuries due to the railroad’s negligence,—a right denied under judicial decisions through the interposition of the defenses of fellow servant, assumption of risk, and contributory negligence. It was not the purpose of the act to deny to the states the power to grant the wholly new right to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.³³

The majority believes Congress’s action binds the states and the individual under legal dictates; Brandeis believes the opposite. Authority is due first and foremost to the individual worker, then to the right of the states to protect their citizens, then to the action of Congress to create “emergency legislation” to protect the nation. Based on “the world’s experience in dealing with individual accidents,”³⁴ the duty is clear: “Attention should be directed, not to the employer’s fault, but to the employee’s misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity.”³⁵ The law must first look to the needs of the individual, then to prospects for growth in state and local experimentation, and then to the demands of the industrial age on the

nation. It is wrong, Brandeis says, to assume that Congress gave the states no power to protect their citizens:

It is the state which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. . . . Upon the state also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible surely we may not impute to Congress the will to deny to the states the power to perform either this duty to humanity or their fundamental duty of self-preservation.³⁶

This is the normative appeal Brandeis makes: the law must serve the needs of the citizen, promote his or her happiness and sustain his or her striving for self-fulfillment. The law's duty is to serve humanity, not to conform to abstract legal dictates. What the majority should have held in *Winfield*, Brandeis concludes, is that the individual deserves protection from industrial dangers on all levels of social existence—all local, state and federal levels.

Winfield does not deal directly with a First Amendment question, but it shares with Brandeis's First Amendment dissents a distinct concern for the place of liberty in society. Like his First Amendment dissents, he believes in *Winfield* that the need is to promote liberty and nurture growth at all levels of society. So Brandeis begins by contextualizing the case. In the spirit of the Brandeis Brief, the circumstances of the case are not narrowly confined to judicial precedent; the circumstances involve historical, social, economic, scientific, political, and cultural elements well beyond

precedent. Analyzing those elements helps Brandeis understand what is at stake in a given decision—what difference it will make if a case is decided one way or another, what consequences will emerge from steering the law this way or that. After contextualizing the case in the larger socio-political context, and after centrally locating the individual within that same socio-political context, Brandeis emerges with a normative appeal. He declares what the Court *should do* given all the relevant data. But he only arrives at that belief through a careful consideration for the broader factors at stake. He deliberates extensively, but his decision is not deduced from formal legal principles; it is approached through an intimate understanding of personal and social needs. The individual is not a cog in the judicial machine and the states and Congress are not bound to transcendent legal principles.

In “Logical Method and Law,”³⁷ Dewey articulates a philosophical undergirding for Brandeis’s legal style. Richard Posner, however, believes Dewey’s attempt to formulate such an undergirding is unwarranted. “[P]ragmatic adjudication,” writes Posner, “cannot be derived from pragmatism as a philosophical stance.”³⁸ To further complicate matters, he agrees with Fish that “A pragmatic judge thus need not be recognizable by a distinctive style of judging.”³⁹ Posner believes that trying to tie judges, such as Brandeis, and even Oliver Wendell Holmes, whom Dewey repeatedly cites in his essay as a judicial authority, to pragmatism is a misdirected attempt to understand the relationship between philosophical pragmatism and the law. In fact, Posner believes there should be *no relationship* between philosophical pragmatism and the law: “The intellectual kinship between Dewey and Holmes that is displayed in Dewey’s essay is

worth remarking. It undermines two canards about pragmatism: that pragmatism has no form or character . . . and that pragmatism has a definite political cast.”⁴⁰

One theme throughout this thesis has been that the James-Dewey variety of classical American pragmatism and the Brandeis legacy in political and judicial rhetoric is largely the same; both operate with the same vision, both approach matters through the same method, and both enact a distinct political style. This does not mean that the pragmatic style *necessarily* leads to a particular set of political sympathies (like liberalism or conservatism) or that there is a static “form” of the pragmatic style. But it does mean that pragmatism offers a particular method, a particular attitude, a particular approach to problem-solving that bridges the gap between what “philosophers” do and what “politicians” and “judges” do. Because the pragmatic political style is operative in an endless number of contexts—philosophical, political, or otherwise—it is valuable to understand what James, Dewey and Brandeis claim and how their claims intersect.

“Logic” in the title of Dewey’s essay does *not* mean formal logic—logic as deduction from formal principles. Logic is not, Dewey says, “formal consistency, consistency of concepts with one another irrespective of the consequences of their application to concrete matters-of-fact” (68-69). Dewey’s understanding of logic is based in experience, a God-term of classic American pragmatism. Like experience, logic is experimental: “general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases. . . . It is an indication of a unified way of treating cases for certain purposes or consequences in spite of their diversity. Hence its meaning and worth are subject to inquiry and revision in light of what happens, what the

consequences are, when it is used as a method of treatment” (71). What does this entail for a method of legal problem-solving? It entails, first of all, that precedent is not the end-all; *stare decisis* does not dictate solutions to legal problems. “[P]rinciples of interpretation do not signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to.” Dewey continues, “for the situations to which they are to be applied do not literally repeat on another in all details” (74). Instead of being reflections of a transcendent legal structure, legal principles are tools for living: logic must be “*relative to consequences rather than to antecedents*, a logic of prediction of probabilities rather than one of deduction of certainties. . . . [G]eneral principles can only be tools justified by the work they do. . . . Like other tools they must be modified when they are applied to new conditions and new results have to be achieved” (75; emphasis in original). Where, then, is one to look for these general principles? Where is the judge to find these principles? The point is that these principles are *not to be found*; these principles are to be derived from experience, from experimentation, from trial and error, from the consequences of personal and social undertaking. The judge is supposed to understand the context of the case at bar and through creative intelligence offer a working solution based on previous experience. “[A]ttention will go to the facts of social life,” says Dewey, “and the rules will not be allowed to engross attention and become absolute truths to be maintained intact at all costs. . . . [L]ogic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline” (76). Logic and the law must, Dewey says at the close of his essay, serve

social needs; that is what the changing nature of society demands: “[I]nfiltration into law of a more experimental and flexible logic is a social as well as an intellectual need” (77).

Brandeis could have written Dewey’s essay word for word. Like Dewey, Brandeis believes the law must be contextualized, must respect consequences, and must serve social needs, which include the needs of the individual. Brandeis differs from the majority of the Court in his day by always contextualizing the case at bar in more than legal precedent. He does deal with precedent, it is true, but weaving his argument through precedent is only the beginning. More than any other justice of his day, Brandeis deals in “facts”—in historical, sociological, economic and political realities, the realities of consequences.

In *International News Service v. Associated Press* (1918),⁴¹ for example, the majority held that the case before the Court involved only the fairness of competition in business, a matter that had little to do with the public in general: “The question here is not so much the rights of either party as against the public but [the businesses’s] rights as between themselves.”⁴² The case, said the majority, involved the legally protected property of business, which was not of much concern to the public. Brandeis saw the matter completely differently. Brandeis believed the case, which involved a dispute over the legal status of news information after it had been communicated willfully and publicly, was thoroughly a matter of public concern. After all, it involved the public’s right to know: “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—became, after voluntary communication to others, free as the air to common use.”⁴³ The case involved

not “business pure and simple,” as the majority believed, but the needs of society in the presence of endlessly changing circumstances.⁴⁴ Brandeis located the case in more than just the legal precedents dealing with “property” rights; he located the case in the organic need to balance the public and the private. The case was more than a matter of free-market competition, said Brandeis; it was a social, a public, a private, an economic and a political matter; and not to contextualize it so missed the gravity of the situation.

Contextualization in a broad, thorough, intimate understanding of the personal social issues at stake in a given case became part of Brandeis’s judicial trademark. As Baskerville puts it, “Law [for Brandeis], it seems, had now to be conscious of social phenomena beyond the direct experience of judges and lawyers; restrained in its application of rigid formulas; mindful of other forces at work within the national polity.”⁴⁵ Brandeis made this clear in a number of cases stemming from enforcement of the Espionage Act. By the late-1910s the Court had declared the Espionage Act constitutional,⁴⁶ but challenges to various convictions under the Act continued throughout the 1920s. One such case, *Schaefer v. U.S.* (1920),⁴⁷ dealt with German-language newspapers in the United States printing what the government deemed false statements meant to subvert America’s war efforts.⁴⁸ The majority deemed the German-language papers “powerful” and “effective instruments of evil.”⁴⁹ The majority said the Court acted through “no other scrutiny or submission than to the sedate and guiding principles of criminal justice.”⁵⁰ “Sedate” meant the legal system was largely settled, a fixed system; “guiding principles” meant that to decide a case the Court needed only to

bounce the facts of the case off the fixed system of law. The majority's method was a matter of deduction from formal legal principles.

The majority's method was the same in *Pierce v. U.S.* (1920).⁵¹ Like *Schaefer*, *Pierce* dealt with the "clear and present" danger of communication during wartime. The majority found that the communication under question—a Socialist Party pamphlet called "The Price We Pay"—violated the Espionage Act by trying to subvert the draft. The majority believed that to afford "The Price We Pay" protection under the first amendment would corrupt the power of the entire United States government: "In effect, it would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false. . . ." ⁵² It was well within the government's power, the majority held, to curtail the spread of disloyal beliefs.

Brandeis's method in *Schaefer* and *Pierce* was completely the opposite of the Court's. In *Schaefer*, he situated the case with respect to the very complex process of communication: "The nature and possible effect of a writing cannot be properly determined by culling here and there a sentence and presenting it separated from the context. In making such a determination, it should be read as a whole. . . . The writings here in question must speak for themselves."⁵³ In *Pierce*, Brandeis said "The Price We Pay" was political communication pure and simple, and therefore entirely protected under the First Amendment. Brandeis believed the majority read the pamphlet out of context; so as not to do the same, Brandeis reprinted the entire pamphlet in his dissenting opinion.⁵⁴ His reading revealed a much different undertaking than the subversion of the United States government; it revealed political expressions "like the statements of many

so-called historical facts.”⁵⁵ The pamphlet was a judgment regarding the justness of war, not an attempt to impede the draft. As a judgment regarding the justness of war, it was fully protected, said Brandeis, as a part of the public dialog concerning the war.⁵⁶ Even the most seemingly reprehensible judgments must be given room to participate in the public exchange:

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.⁵⁷

First Amendment jurisprudence must deal first and foremost, Brandeis thought, with the place of the individual in society; the bedrock of First Amendment jurisprudence must be an intimate understanding of liberty. In *Gilbert v. State of Minnesota* (1920),⁵⁸ Brandeis made his belief clear:

The right to speak freely concerning functions of the federal government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a state was powerless to curtail. . . . The right of a citizen of the United States to take part, for his own or the country’s benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to

endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.⁵⁹

Gilbert dealt with the effect of a Minnesota law making it illegal for anyone to “interfere with or discourage” entrance into the armed forces. But Brandeis believed Minnesota’s law had consequences far beyond the borders of Minnesota: “[T]he matter is not one merely of state concern. The state law affects directly the functions of the federal government. It affects the rights, privileges, and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty.”⁶⁰ Minnesota’s law harms the entire country because it harms the individual, for it is the individual in association with other individuals who constitute the entire nation.

Brandeis believed the consequences of *Pierce*, which convicted individuals for distributing “The Price We Pay,” extended well beyond the government’s ability to recruit citizens for the armed forces: “The defendants, humble members of the Socialist party, performed as distributors of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the third count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.”⁶¹ Likewise, in *Schaefer* the consequences were just as far-reaching: “The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men, not merely for disloyal acts, but for a disloyal heart. . . . To prosecute men for such publications reminds of the days when men were hanged for constructive treason.”⁶²

Just like Dewey in “Logical Method and Law,” Brandeis wants to know what consequences follow from decision-making. Brandeis understands the consequences of the majority’s decision by placing the case at bar in a broad social context and positioning the individual as a central part of that context. In *Schaefer*, to find individuals guilty for a “disloyal heart” leads to a chilling effect on free speech. The majority’s decision, says Brandeis, “will doubtless discourage criticism of the policies of the government. . . . [A]n intolerant majority [of the public], swayed by passion or by fear, may be prone in the future, as it has often been in the past to stamp as disloyal opinions which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.”⁶³ *Pierce* involves the same issue: “To hold that a jury may make punishable statements of conclusions or of opinions, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental.”⁶⁴ *Gilbert* is likewise: “Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.”⁶⁵

It should be clear that, unlike Fish, Brandeis believes “liberty” is a powerful concept and term because it has incredible purchase in social exchange. Liberty becomes a guiding principle for Brandeis’s adjudication because experience has proven promotions of liberty to be fruitful. And for pragmatists, where action produces fruits, such action

becomes morally good and that good must be nurtured. Liberty must be nurtured because it is fruitful. Brandeis argues in *Gilbert* that the Court should extend its understanding of liberty to include more than just liberty of property:

I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union . . . the right of a business man to conduct a private employment agency . . . or to contract outside the state for insurance of his property . . . although the Legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism. . . . I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.⁶⁶

The normative appeal is, individual liberty in all its fruitful manifestations should be the guiding light of the Court's undertaking. In *Pierce*, the normative appeal is the same: the government must protect the individual's right to maintain whatever beliefs he or she sees fit, because beliefs are central to the fruitful evolution of personhood: "We may be convinced that the decision to enter the great war was wholly free from . . . base influences, but we may not, because such is our belief, permit a jury to find, in the absence, that it was proved beyond a reasonable doubt that these defendants knew that a statement in this leaflet to the contrary was false."⁶⁷ In *Schaefer*, the normative appeal is, the Court should never allow the desire to curb "dangerous" speech from destroying the balance of freedoms necessary for a health society: "[The clear and present danger

standard] is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majority, and from abuse by irresponsible, fanatical minorities.”⁶⁸

Justice Learned Hand, speaking at Brandeis’s funeral, got it right: what Brandeis hated most was “the mechanization of life.”⁶⁹ Brandeis thought promoting liberty was the best way to fight the mechanization of life. The courts had to focus on liberty first and foremost, thought Brandeis, so as to stave off life becoming mechanized. Moreover, the courts had to focus on individual liberty so as to discourage themselves from becoming mechanized instruments of formalism. A mechanized court encourages mechanized forms of life, wherein the individual’s liberty is subordinate to formal structures of law. Such, at least, was Brandeis’s concern in his most famous free speech opinion, *Whitney v. People of the State of California* (1927).⁷⁰

In *Whitney*, Brandeis, rather than dissenting in his usual style, concurred with majority. But his “concurrence” should not be seen as a break from his earlier free speech dissents, such as *Gilbert*, *Pierce*, and *Schaefer*. As Philippa Strum points out, “The ‘concurrence’ might well have been a dissent, however, as it not only showed that *Whitney* did not belong behind bars but also demolished the line of reasoning followed by the Court so completely that California’s governor cited it in pardoning her.”⁷¹ Like *Gilbert*, *Pierce*, and *Schaefer*, *Whitney* directly addressed the issue of promoting liberty in the face of an onslaught of mechanization.

Anita Whitney, daughter of a California state senator and niece of Supreme Court Justice Stephen Field, was a member of the Communist Labor Party of California. The

stated purpose of the organization was to disseminate propaganda, organize the Proletariat class and overthrow capitalist rule.⁷² As a member the organization and as an outspoken critic of the War,⁷³ Whitney was arrested for violating California's Criminal Syndicalism Act, which held that any person who "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . [is] guilty of a felony and punishable by imprisonment."⁷⁴ Whitney appealed her conviction to the Supreme Court, claiming that California's act deprived her of liberty without due process and was therefore unconstitutional. The Supreme Court rejected her argument. Writing for the majority, Justice Stanford said, "[A] State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question."⁷⁵ Essentially, Whitney did not prove that the statute was enacted unreasonably or arbitrarily, nor did she prove that the statute infringed upon "any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State."⁷⁶

Brandeis concurred with the majority because he agreed that the statute was not unconstitutional and that Whitney made the wrong argument; "she did not claim that it was void because there was no clear and present danger of serious evil."⁷⁷ But

Brandeis's agreement with the majority ended there. While California's syndicalism act was not unconstitutional, it was, Brandeis believed, rather ridiculous:

The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. . . . Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation. . . . The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.⁷⁸

Brandeis was not claiming that the state did not have the right to curb speech and assembly when a tangible threat existed. But he was claiming that the experience of history has proven that the danger the state seeks to prevent in curbing free speech must be proven imminent beyond a doubt.⁷⁹

The mastery of Brandeis's *Whitney* concurrence lies in his ability to weave a number of diverse strands together into a coherent textual whole. To begin weaving this textual whole, he reflects on the American founders: "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."⁸⁰ Laws and governments are not ends in themselves; they are, rather, instruments for promoting individual liberty—the right of the individual to pursue personhood on his or her own terms. "Those who won our independence" is a statement about the founders and America's founding period, but notice that Brandeis does not use the term

“founders.” “Those who won our independence” means those who struggled and died for the promotion of liberty, those who fought the onslaught of mechanization from a foreign government in order to free people to “develop their faculties.” As a result of struggle, the promotion of liberty becomes the hallmark of the American experience. Brandeis writes, “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.”⁸¹ As a result of struggle, the promotion of liberty is not only an end, it is a means, an ongoing struggle; it is a matter of courage.

Thus, promoting liberty is never over and done with. Liberty as “an end and as a means” reveals that liberty is both valuable and instrumental. Instrumental for what? Brandeis answers,

They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁸²

As he did in his pre-Court rhetoric, Brandeis highlights the means-ends relationship through enacting organic rhetoric; it is a matter of thinking, speaking, discovering, and spreading. Without such an organic view, assembling and discussing become futile; with such a view, assembling and discussing become tools able to combat “noxious

doctrine,” or *mechanized* thinking, speaking and writing. Promoting liberty is a means to combat the dire consequences of mechanized relationships. Since mechanization leads to an “inert people,” combating mechanization becomes a public duty, a duty that the American government must always promote. And Brandeis is quite willing to use this understanding of experience as a “fundamental principle.” Such a principle becomes a guide for meeting the needs of individuals and society and striving for betterment.

Brandeis continually highlights the role of the founders—“those who won our independence”—so as to stress the ongoing project of American democracy. That is, Brandeis sees particular continuity between the role of liberty in society during the time of the founders and during the present. He says,

They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; 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.⁸³

While specific social circumstances are always changing, experience has shown an ongoing relationship between “human institutions” and the individual. The goal is to balance those. The goal is not to enforce order, or secure it merely through “fear of punishment.” A healthy balance between institutions and subjects can be forged through

promoting liberty, through enabling individuals to discuss matters freely and propose remedies and to combat “evils counsels” with “good ones.” Promoting liberty is a matter of continually creating and enacting intelligence in social relations. As Brandeis says, “Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”⁸⁴

Brandeis goes on to reiterate the importance of liberty, concluding that “It is the function of speech to free men from the bondage of irrational fears.”⁸⁵ But he also reiterates that promoting liberty is an ongoing struggle:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, selfreliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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.⁸⁶

According to Vincent Blasi, this passage represents the heart of Brandeis’s belief in “civic courage.”⁸⁷ According to Bobertz, this passage is one of “the most frequently cited passages ever written by a Supreme Court Justice.”⁸⁸ In this excerpt Brandeis

formulates his now famous approach to First Amendment jurisprudence: the cure for “bad speech” is “more speech, not enforced silence.” It is best to allow differing opinions to clash in public dialog, says Brandeis, rather than suppress opinions that seem “dangerous.” Brandeis knows there are no easy answers for America. He knows there are only answers won through struggle, answers that are not end-all solutions to human problems, but that are more or less able to serve human purposes. Change is inevitable, so the evolution of speaking and believing is also inevitable. But what one can understand is that shutting down the opportunities for speaking and believing—mechanizing life and glossing over life’s novelties and possibilities—leads to disastrous consequences.

Pragmatic First Amendment jurisprudence holds that meaning emerges from struggle. In fact, meaning is bound in struggle; it is part of the undertaking, of the process of pursuing betterment. As Dewey makes clear, “Because the actual world, that in which we live, is a combination of movement and culmination, of breaks and re-unions, the experience of a living creature is capable of esthetic quality. . . . The moment of passage from disturbance into harmony is that of intensest life.”⁸⁹ “Intensest life” is a moment of growth, of moving from disturbance into harmony, or, as Brandeis might say, of hatching out differences and creating a solution that avoids mechanization by promoting liberty.

The experience of American history reveals, if nothing else, the need to promote liberty. In a society undergoing constant change—social, economic, industrial, political and cultural change—the need to promote liberty becomes all the more important, lest

life becomes mechanized and shuts down. Ulrich says that “Brandeis creates an image of the founders that emphasizes their willingness to take risks to protect freedom of speech. Whether they actually said these things is largely irrelevant; Brandeis asks the audience to understand the spirit of the founders as he understands it and to abide by that spirit.”⁹⁰ Ulrich is right, but the point is not limited to the founders. Brandeis’s point is about *the spirit of the entire American experience*. It is about his understanding of history, consequences, the individual, liberty, the balance of power, the relationship of government to society and the individual, and the full meaning of life coming to fruition in struggle and expression. *Whitney* contains the essence of Brandeis’s beliefs and rhetorical style. James’s point that a man’s vision is the great fact about him speaks directly to Brandeis’s entire undertaking in *Whitney*. His concurrence is a summation of his vision; it is an expression of spirit, of Brandeis feeling the total push and pull of the cosmos. One finds in Brandeis’s *Whitney* concurrence the full thrust of his assessment of the deep and profound meaning of life.

The Organic Structure of the Law and Society

While Brandeis’s individualism was primary, it was in no way absolute. That is to say, the individual could not be given free range to do whatever he or she pleased. The individual depends, believed Brandeis, directly on society and society depends directly on the individual. Essentially, what Brandeis sought was balance. He sought to balance the needs of the individual with the needs of society and the structure of government. The difficulty, as Brandeis saw it, is that the needs of the individual, society, and the

structure of government are always changing. Advances in technology and industry affect society, which affects the place of the individual in society, which affects the role the government must play in dealing with the needs of the individual and society. As the individual's needs change, so do society's needs, and so do the duties of law and government.

Brandeis's dissent in *Olmstead v. U.S.* (1928)⁹¹ is a masterful example of this point. The case concerned the government's use of wiretapping to convict persons violating the National Prohibition Act. By tapping the phone lines of a number of different suspected bootleggers, federal agents collected over 750 pages of typed transcripts, which the government then used as the primary evidence to convict the bootleggers. The defendants appealed to the Supreme Court, arguing that wiretapping violated their Fourth and Fifth Amendment rights, essentially claiming that wiretapping amounted to illegal search and seizure. Justice Taft delivered the majority opinion, which upheld the use of wiretapping and the defendants's convictions, concluding that the bootleggers "cannot justify enlargement of the language [of the Fourth and Fifth Amendments] . . . beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."⁹² He continued: "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment."⁹³ Additionally, the majority held that whether evidence was gathered legally or illegal, the evidence in *Olmstead* was admissible nonetheless.⁹⁴ Taft

argued that the Court must follow common-law precedent: “Our general experience shows that much evidence has always been receivable, although not obtained by conformity to the highest ethics. . . . A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.”⁹⁵ As the majority saw it, the issue in *Olmstead* concerned helping society, and the government, by convicting “criminals” by whatever means available; it was an either-or decision: *either* wiretapping is permitted and used to convict “criminals” *or* wiretapping is forbidden and criminals go free and society crumbles. According to James Boyd White, Taft was essentially saying, “My job is to decide this case in light of the Constitution. Here are the facts. They are as plain as can be. Here is the text. It is as plain as can be. It speaks of searches and seizures and here there is neither.” White concludes, “The function of the court as Taft enacts it is thus not to reason, not to argue, not to explain, but to declare the meaning of an authoritative text.”⁹⁶

Brandeis cannot accept the majority’s position. There are more parties concerned in the case, believes Brandeis, than just “society” and “criminals.” First, Brandeis argues in his dissent that even though the framers of the Constitution did not explicitly forbid the use of wiretapping, wiretapping does not thereby become constitutional:

When the Fourth and Fifth Amendments were adopted, ‘the form that evil had theretofore taken’ had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. . . . Subtler and more far-reaching means of invading privacy have

become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.⁹⁷

Brandeis's argument is that the law must evolve with society and technology. Because tapping a citizen's telephone is a particularly invasive form of governmental espionage,⁹⁸ the Court must sustain the individual's right to be left alone, to be secure in his or her personal sanctuary. As White characterizes Brandeis's position, "[The founders] must have meant [the Constitution] to be read in a way that would permit it to be relocated in a new, and in principle to them unknowable, context, that is, 'non-literally.' What is required in interpreting the Constitution, therefore, is something like translation, a bringing into the present a text of the past."⁹⁹ Reading the Constitution in light of the invention of wiretapping, it is clear, thought Brandeis, that the courts cannot allow the government's prosecutorial powers to grow out of hand, for if they do, the balance between individual liberty, social organization and regulatory power will be destroyed. In language almost directly from "The Right to Privacy," Brandeis infuses *Olmstead* with eloquence rivaling his *Whitney* dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most

comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹⁰⁰

The upshot of this passage is balance. The Court must understand the consequences of social, technological and industrial evolution and enable the law to grow accordingly. There is no neglecting constitutional principles, says Brandeis; there is only the realistic acknowledgment that the law must deal with social strife, not in abstract form, but as it currently exists, as the needs of society and the individual change: “Experience should teach us to be on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹⁰¹ “Understanding” is of greater importance than whatever “well-meaning” intentions one may have. For democracy to work, for the government to function properly and at the same time serve and promote social and individual undertakings, the judiciary must, says Brandeis, maintain balance.¹⁰²

Not only does his dissent in *Olmstead* follow the rhetorical movement of his opinions concerning liberty and the First Amendment—that is, by contextualizing the case in a broad social context, with an intimate understanding of the place of the individual in that context and of the potential consequences of the decision, and emerging with a normative proclamation—*Olmstead* also conveys the rhetorical upshot of his opinions

concerning the structure of society: the need for an organic, dynamic balance between social relations. He continued this point in his opinions concerning the place of labor in the industrial age.

The two most important of such opinions were *Duplex Printing Press Co. v. Deering* (1921)¹⁰³ and *Truax v. Corrigan* (1921).¹⁰⁴ *Duplex* dealt with a labor union's attempt to "injure" and "destroy" the "good will," in the majority's language, of a Michigan company who manufactured and installed printing presses. Under the terms of the Sherman Act, the printing press company sought an injunction against the labor union's actions. The majority held,

There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion.¹⁰⁵

Truax dealt with similar circumstances. Ex-employees of a restaurant in Arizona and their fellow union members, claiming unfair treatment and deplorable working conditions, staged a protest in front of the restaurant. The State of Arizona, however, had a law prohibiting the state from granting injunctions over non-violent labor disputes concerning the terms of employment. Because the ex-employees continued their protest

in front of the restaurant and cost their ex-employer considerable business, the restaurant owner claimed that Arizona's law deprived him of liberty and property without due process of law. The majority held that the restaurant owner's business was indeed a property right and therefore afforded protection under the Fourteenth Amendment. The protesters's non-violent campaign, the majority concluded, constituted an "unlawful annoyance" and a "hurtful nuisance. . . . It was not lawful persuasion or inducing."¹⁰⁶ The protesters's persuasive tactics, their forms of speech, essentially, while not violent outright were on par with a violent demonstration: "Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy."¹⁰⁷ Consequently, the Court declared Arizona's "no injunction" law invalid because it disregarded "fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."¹⁰⁸ Felix Frankfurter remarked that the majority's decision in *Truax* was "fraught with more evil than any which it has rendered in a generation."¹⁰⁹

Not surprisingly, Brandeis dissented in both *Duplex* and *Truax*. In *Duplex*, Brandeis said the question was, "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it?"¹¹⁰ He answered "yes," believing that the common self-interest of the strikers constituted a justification for their action. Brandeis supported his belief through judicial precedent, through Congressional Acts, including close readings of the Clayton and Sherman Acts, and through an historical survey of the social evolution of various labor disputes. The

central issue at stake in *Duplex*, said Brandeis, was the right of industry and laborers, of employers and employees, of the monetarily powerful business owners and the numerically powerful labor unions, to struggle through industrial conflict and negotiate a fair settlement. And the Court should have no part in this non-violent “combat”:

Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights raise duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.¹¹¹

Brandeis’s rhetorical strategy and conclusion were similar in *Truax*. He included a lengthy survey of the historical conditions of labor disputes and, because of the changing conditions of industrial relations, believed it best for industrial combatants to struggle through their own problems without governmental interference.¹¹² The only part

government should play in industrial relations, Brandeis said, was to facilitate social experimentation:

Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby. . . . Nearly all legislation involves a weighing of public needs as against private desires, and likewise a weighting of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deriving consideration particularly when the public conviction is both deep-seated and widespread and has been reached after deliberation.¹¹³

The majority in both these cases believed Brandeis was seeking to curb individual liberty—the liberty of business owners to conduct their businesses without governmental regulation or interference from labor. Given Brandeis’s undying belief in the promotion of individual liberty, his dissents in *Duplex* and *Truax* seem—*prima facie*—opposed to individual liberty. Yet, Brandeis believed, these opinions had more to do with sustaining balance in society than with economic liberty. When the uninhibited expression of individual liberty comes at the expense of public welfare—as often seemed to be the case in the industrial age—individual liberty can and should be restricted. “Practically every change in the law governing the relation of employer and employee,” he writes in *Truax*, “must abridge, in some respect, the liberty or property of one of the parties—if liberty and property be measured by the standard of the law therefore prevailing.”¹¹⁴

Furthermore, the continually changing conditions of society make the government's judicial duties even more difficult. But the American public is not looking for an easy answer, said Brandeis; it is looking for alleviation, for working solutions to particular problems: "Few laws are of universal application. It is of the nature of our law that it has dealt, not with man in general, but with him in relationships."¹¹⁵ Because particular problems are constantly changing, the law must strive for an organic, dynamic balance in social relations. Such was Dewey's belief as well: the public should aim at "more or less intelligent improvisation aiming at palliating conditions by means of patchwork policies."¹¹⁶

In *The Public and Its Problems*, Dewey's concern is with the dynamic character of social relations. Political fixes are temporary at best, says Dewey. Yet such fixes are wrongly kept in place as though they were permanent, end-all solutions.¹¹⁷ The public must pursue social amelioration by breaking through "existing political forms. This is hard to do because these forms are themselves the regular means of instituting change. The public which generated political forms is passing away, but the power and lust of possession remains in the hands of the officers and agencies which the dying public instituted."¹¹⁸ Just as Brandeis placed his hope for amelioration in social experimentation, Dewey believes the public and the state must be continually reborn to deal with the changing nature of social relations:

The formation of states must be an experimental process. The trial process may go on with diverse degrees of blindness and accident, and at the cost of unregulated procedures of cut and try, of fumbling and propping, without insight

into what men are after or clear knowledge of a good state even when it is achieved. Or it may proceed more intelligently, because guided by knowledge of the conditions which must be fulfilled. But it is still experimental. And since conditions of action and of inquiry and knowledge are always changing, the experiment must always be retried; the State must always be rediscovered.¹¹⁹

Amelioration of social problems comes through the creative implementation of balance.

For both Dewey and Brandeis, balance is nothing formal, static, or prescribed; it is dynamically renegotiated always, reborn under the belief that meaning arises through personal and social growth. While the key to growth is creative and intelligent experimentation, such experimentation is not unbound. Sometimes restricting social relations in certain circumstances is necessary to promote growth in the long run.

Presumably, such was Brandeis's understanding in supporting prohibition.¹²⁰ But such surely was his understanding in *New State Ice Co. v. Liebmann* (1932).¹²¹

Oklahoma law required those wishing to manufacture, sell, or distribute ice to obtain a permit from the state. *New State Ice Co.* had such a permit; Liebmann did not, but he went into the ice business nevertheless, thus becoming a competitor with *New State Ice*. The case went to the Supreme Court. The majority held that states could not arbitrarily and unreasonably regulate private businesses; states could only regulate—and regulate in very limited ways—businesses that acted as public utilities, of which there were very few. Justice Sutherland, writing for the majority, made clear that *New State Ice* dealt with a matter of private economic pursuit: “Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private

business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment.”¹²² Thus, Oklahoma’s state law requiring ice companies to obtain a permit for doing business was unconstitutional. Furthermore, such a law was in direct opposition to free market principles: “The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.”¹²³

Sutherland even saved until the end of the majority opinion a special rhetorical jab for Brandeis: “And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. . . . The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”¹²⁴

The majority opinion is written in the rhetoric of free market individualism. It speaks of the liberty of engaging in business freely, of industrial competition, of conducting one’s business apart from governmental interference. But Brandeis dissents on the basis that the free market individualism in *New State Ice* is individualism over against the public; thus state regulation becomes desirable, even necessary: “[T]he conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.”¹²⁵

Monopoly is almost always a dreaded word in Brandeis's vocabulary. But as a pragmatist, Brandeis is against closed-systems of meaning, which means that monopoly does not *necessarily* equal evil. Sometimes, as is the case with *New State Ice*, a monopoly can serve a larger good, the public good:

[W]hile ordinarily free competition in the common callings has been encouraged, the public welfare may at other times demand that monopolies be created. . . .

The certificate of public convenience and invention is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest.¹²⁶

His appeal to monopoly is his appeal to balance. While the majority makes the argument that *New State Ice* is about individual liberty in the free market, Brandeis makes the opposite point; it is about restricting individual liberty for the public good: “If states are denied the power to prevent the harmful entry of a few individuals into a business, they may thus, in effect, close it altogether to private enterprise.”¹²⁷

At the end of *New State Ice*, Brandeis's normative appeal calls on the Court to allow states and industry to fight out for themselves the meanings of “public” and “private” enterprise:

The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. . . . Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. . . . The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . .

To stave experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. 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.

. . . If we would guide by the light of reason, we must let our minds be bold.¹²⁸

This passage not only displays Brandeis's eloquence so magnificently, but it also contains the essence of Brandeis's views on social relations. Because the world is forever in-the-making, the way in which America experiences industrial change is constitutive of America's future. If America experiences industrial relations as destructive, as over against personal and social well-being, then America's future will be

one of industrial devastation. However, if America experiences industrial relations as healthy, functional and in concert with personal and social needs, then America's future will be one of industrial democracy. Striving for balance in the present is part of creating balance in the future. Thus Brandeis calls on the courts to back off, to restrain themselves, to accommodate social experimentation.

Brandeis was one of the most vocal proponents of judicial self-restraint at a time when judicial self-restraint was not popular among judges.¹²⁹ Nowhere did he make his support of judicial self-restraint more clear than in his majority opinion for *Erie Railroad Co. v. Tompkins* (1938).¹³⁰

In *Erie* Brandeis used a case concerning a railroad's liability to a pedestrian, arguably a "trespasser," to overturn the almost one-hundred-year-old doctrine of "general common law," a doctrine Brandeis believed was destroying social experimentation within the states. A lower court awarded Tompkins damages after he was struck by an open-door of a moving train. Tompkins was on the railroad's private property, but a federal appeals court ruled that, even though no state law established liability for such an accident, the railroad was liable to Tompkins under general common law—that is, common law made by federal judges in absence of specific state legislation or precedent. The idea of general common law emerged from *Swift v. Tyson* (1842), which held that "upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is."¹³¹ *Swift* "held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its

highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be.”¹³² Essentially, *Erie* presented Brandeis the chance to disapprove *Swift*.

His main grievance was that *Swift* proved harmful; it was a matter of consequences. Through *Swift*, Brandeis said, “The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”¹³³ *Swift* thus gave the federal judiciary undue power in creating federal law, power that Congress was without. *Swift* created an imbalance in the power relationships among governmental constructs. But more pressing, perhaps, for Brandeis, were the needs of the public. *Swift* was creating social unrest by spoiling relationships among individuals, local governments, businesses, and local statutes. “Experience in applying the doctrine of *Swift v. Tyson*,” he wrote, “had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue.”¹³⁴ Legislatures create laws to serve public and private needs. But what has been the *experience* of general common law? Defects, both political and social. *Swift* does not do what it is supposed to do, said Brandeis, and it must, therefore, be disapproved. The goodness or badness of a law—morality, in a nutshell—emerges from the resulting consequences: “[T]he mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdictions was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens.”¹³⁵

Brandeis's language in *Erie* rhetorically reflects the purpose with which he undertook the majority opinion. For example, he says, "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."¹³⁶ The courts should assess issues of constitutionality by "the course pursued." Laws, therefore, need not be *prima facie* unconstitutional; that is, to decide the constitutionality of a statute, the courts need not merely compare the language of the law formally with the language of the Constitution. Unconstitutionality can emerge in a law's operation, in the way in which it interacts with social relations and in the way in which judges apply it. Constitutional issues should be judged on *processes*, not on formal principles. His language "of the course pursued" is a matter of the pragmatic upshot—what difference will it make if this world-formula or that world-formula be true? *Swift's* world-formula was disastrous, and by becoming disastrous, it also became unconstitutional.

In deciding *Erie*, Brandeis also relied upon the philosophical wisdom of an old friend. He quoted Holmes's take on *Swift* by writing,

The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matter of general law."

“But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .

“The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.”¹³⁷

The law, Brandeis said through Holmes, is progressive, organic, experimental, and in the law there is no room for closed-systems of meaning; there is only room for building and maintaining social relations. *Swift* should be disapproved because of the imbalance it creates. “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature of ‘general,’ be they commercial law or a part of the law of torts.” He continued, “And no clause in the Constitution purports to confer such a power upon the federal courts.”¹³⁸ It is not up to the federal courts, Brandeis believed, to dictate unwritten law to the states. It is up to the states to negotiate the particular social relations of their local reality.

According to Edward Purcell, *Erie* was “gnostic and pragmatic, focused on the social function and consequences of procedural rules. It was, in fact, characteristically Brandeisian: epistemologically confident, theoretically principled, institutionally rooted, and morally committed.”¹³⁹ *Erie* was also characteristically Brandeisian in that, as a counterpart to his many opinions on individual liberty and the First Amendment, it

shows that in the pursuit of growth individuals and society must act in concert. Put next to *Pierce*, *Schaefer*, and *Gilbert*, not to mention *Whitney* and *Olmstead*, *Erie* reveals Brandeis's commitment to nurture both society and individuality. Neither society nor individuality can be absolute, of course. For Brandeis, there was no room for absolutism of any kind, especially on the bench.

For his eightieth birthday celebration, Dewey once wrote, "Democracy is a way of personal life controlled not merely by faith in human nature in general but by faith in the capacity of human beings for intelligent judgment and action if proper conditions are furnished."¹⁴⁰ Brandeis saw his role on the Court as furnishing the "proper conditions" for life. The task was not to dictate the structure of life, but to enable individuals to create the structure of their own lives. The judiciary, thought Brandeis, should only go so far, should only act to facilitate the release of powers—social and individual powers. It was up to the individuals who comprise society to make the great society become a great community, in Dewey's famous words. It was up to the Court to furnish individuals with the opportunities for doing that.

The Language of the Law and Social Relations

In releasing their powers so as to make the great society become the great community, individuals face a particular obstacle, writes James: "Woe to him whose beliefs play fast and loose with the order which realities follow in his experience; they will lead him nowhere or else make false connections."¹⁴¹ Play is nothing James forbids; indeed, playing and experimenting within the fabric of experience can be sources of

liberation.¹⁴² But experimentation is *more or less* successful, *more or less* liberating, to the degree that it follows the order of the reality of one's experiences. The point, to be sure, is one of *degree*. Play can be both liberating and constraining—liberating if it leads one down paths of enrichment, constraining if it leads one down paths of deterioration. Because James bases his philosophy in experience, and because experience is an endless undergoing, an endless process, good and bad experiences are matters of degree. Experiences can be more or less enriching, more or less liberating, more or less destructive, more or less painful, more or less promising, more or less sources of health. Thus James says, “[M]ust not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can*? That act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions.”¹⁴³ The ethical pursuit is *towards* a life that satisfies needs and leaves behind dissatisfactions. The ethical and moral life is a process; it is a matter of proximity, because, of course, not all needs can be met. James is speaking here of a good life that comes in *degrees*, never through formal calculations or abstract maxims.

This, however, is the point Stanley Fish fails to understand. Principles are misleading, Fish says, because people expect them to “drop from the sky.”¹⁴⁴ Because they do not drop from the sky, it is politics all the way down, and principles are thus rather insignificant and mostly misleading:

[M]y point . . . is that adhocery will be what is going on despite the fact that the issues will be framed as if they were matters of principle and were available to a

principled resolution. As we have seen, there are principles aplenty—autonomy, respect, toleration, equality—but when they are put into play by sophisticated intelligences, the result is not resolution but a sharpened sense of the blind alleys into which they lead us.¹⁴⁵

This is how Fish views decision-makers with principles: as individuals duped into believing they possess Truths, Absolutes, and Essences. Decision-makers are duped, says Fish, into thinking liberty, equality, and freedom are static states representing Timeless Forms. But, Fish retorts, principles never work out that way in actual political exchanges. So decision-makers should drop talk of principles altogether or admit they are ad hoc rhetorical decorations with no real value.

Is there another way to view principles? Is there a way to view principles without thinking they are Timeless Forms, Logical reflections of Reality, and without thinking, as Fish does, that they have no real value? Yes, there is another way of viewing principles, the pragmatic way. For the pragmatist, principles are not objects had, not static states to be possessed, nor are they worthless, ad hoc constructs. Rather, for the pragmatist, principles function as ideals one should work toward, goals one should strive for. Principles are part of the pragmatic project of forging a moral identity. In that way, *principles become matters of degree*. They are matters of an experimental process, of living in a certain direction, toward a certain goal, with a certain hope. Dewey says, “What the live creature retains from the past and what it expects from the future operate as directions in the present.”¹⁴⁶ Experience carries with it lessons of history, lessons that help the individual avoid the bad and pursue the good. Morality, for the pragmatist, is a

matter of doing, a matter of process and degree. James argues that “there is no such thing possible as an ethical philosophy dogmatically made up in advance.”¹⁴⁷ But in James’s philosophy there is a rejoinder: “Wherever a process of life communicates an eagerness to him who lives it, there the life becomes genuinely significant.”¹⁴⁸ Fish concedes that there is no such thing as an ethical philosophy dogmatically made up in advance, but he does not see that a life of liberty, equality, and freedom is possible nonetheless—possible, namely, because that life is a matter of degree, a matter of organic interactions in an endless process of negotiation. Principles are never had as Forms, but they are had as significant elements of the way in which one has one’s experiences and creates the future.

For Brandeis, the process of American life, the undergoing of American experience, is one of the most profound, significant and meaningful ways of experiencing life. The American experience is living toward liberty, toward freedom, toward equality, toward an embodiment of American ideals. Articulating this American experience becomes, in Brandeis’s vocabulary, a rhetoric of degree. In his unpublished opinion for *Stratton v. St. Louis Southwestern Railway Co.* (1929), Brandeis echoes James’s understanding of pursuing the good life by moving life away from destructive relationships:

[T]hroughout the greater part of our history, the States guarded jealously their control over grants of the corporate privilege; and they have made it a source of revenue. Severe restrictions originated in fear. First, there was the fear of monopoly. Then, the fear of a domination more general. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of

labor to capital. Fear that the absorption of capital by corporations and their perpetual life, might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital. Incorporation for business purposes was long denied after it had been freely granted for religious, educational and charitable purposes. And when finally granted for business purposes, fees graduate according to the capital stock were commonly exacted as compensation for the privilege.¹⁴⁹

Liberty, novelty, possibility, and the good life are gained in degrees as one turns away from the elements that harm liberty, novelty, possibility, and the good life. Such a statement may sound obvious, but the point is easy to miss. Brandeis describes the turning away from harmful social elements as a process. Certain fears of bigness lead to other fears, which lead to measures to curb bigness, which lead to opportunities to promote liberty and the good life where they had been threatened.

What is common to Brandeis, James and Dewey—a commonality Fish fails to understand—is the spirit of hope in which the good life is pursued. Pragmatists share the language of hope because they believe the opportunities for a meaningful, significant life are present in the fabric of experience. Brandeis’s second dissent, coming in *Adams v. Tanner* (1917),¹⁵⁰ dealt with Washington State’s attempt to solve “the chronic problem of unemployment” by forbidding employment agencies from collecting fees for finding work for unemployed laborers. He saw Washington’s social experiment as an attempt to create meaningful relationships among workers, the state, and industry: “There is reason to believe that the people of Washington not only considered the collection by the

private employment offices of fees from employees a social injustice, but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.”¹⁵¹ At stake in *Adams* was the public’s attempt to infuse the community with social justice; and it was a pursuit, it was a process, a process of moving away from the evils of unemployment and toward a future of economic opportunity for all. Success in such circumstances is gained in degrees, in more or less alleviating the pain of social injustice.

Like Brandeis, James believed meaning is gained step-by-step, in an endless process, in striving for betterment: “[H]ere we are, a countless multitude of vessels of life, each of us pent in to peculiar difficulties, with which we must severally struggle by using whatever of fortitude and goodness we can summon up. The exercise of the courage, patience, and kindness must be the significant portion of the whole business.”¹⁵² Dewey shared the same hope in deriving meaning from struggle: “Contrast of lack and fullness, of struggle and achievement, of adjustment after consummated irregularity, form the drama in which, action, feeling, and meaning are one.”¹⁵³

It is hard to imagine Fish writing with the same passion as James, Dewey and Brandeis. But that is exactly where Fish’s understanding of pragmatism misses the point of the pragmatic project, indeed, the pragmatic political style: meaning is found in the struggle for betterment, which means that meaning is possible and the pursuit of meaning becomes a moral principle. And this is why pragmatists have to advocate specific political procedures; pragmatists have to help steer society toward a better life by advocating the paths that more or less lead to fulfillment and enrichment and away

from deterioration and pain. In so advocating, pragmatists speak not in terms of states, essences, absolutes, substances and forms, but in terms of degree, in the rhetoric of degree.

In the following chapter, I will show how for pragmatists the pursuit of meaning becomes all-encompassing, how it comprises the threads of the entire fabric of experience. The pursuit of meaning becomes the spiritual undergirding of the way in which one has one's experiences. Such is the upshot of James's understanding of life:

Life is in the transitions as much as in the terms connected; often, indeed, it seems to be there more emphatically, as if your spurts and sallies forward were the real firing-line of the battle, were like the thin line of flame advancing across the dry autumnal field which the farmer proceeds to burn. In this line we live prospectively as well as retrospectively. It is 'of' the future and so far as the future, when it comes, will have continued *it*.¹⁵⁴

For a full life, the pursuit of meaning is the beginning *and* the end. The pursuit of meaning helps Brandeis move with belief in the utmost importance of individualism, through the need to sustain balance in social relations, to the promises of Zionism. The subject of the next chapter is Brandeis's rhetoric on Zionism.

CHAPTER IV
PRAGMATISM AS RELIGIOUS EXPERIENCE:
LOUIS BRANDEIS'S ZIONIST RHETORIC

Pragmatism is often charged with being anti-religious or, at the very least, a-religious. As Stuart Rosenbaum points out, “many intellectuals continue to see the American pragmatic tradition as mired in unproductive commitments to relativism, skepticism, scientism, or extreme individualism.”¹ This common perception often causes the “representatives of traditional religious perspectives all [to] reject the American pragmatic tradition.”² Richard J. Bernstein calls this common perception the “aggressive atheism” view of pragmatism.³

From an historical perspective, James and Dewey would cringe at the suggestion that they were “aggressive atheists,” that their pragmatism committed them to relativism, skepticism, scientism, or extreme individualism. After all, William James said in 1907, three years before his death, “I firmly disbelieve, myself, that our human experience is the highest form of experience extant in the universe. I believe rather that we stand in much the same relation to the whole of the universe as our canine and feline pets do to the whole of human life.”⁴ Even John Dewey, much more of a secular humanist than James, wrote *A Common Faith* in 1934, in the later half of his career. In that book Dewey argued for an increased awareness of the religious experiences of life, which would “have its natural place in every aspect of human experience that is concerned with estimate of possibilities, with emotional stir by possibilities as yet unrealized, and with

all action in behalf of their realization. All that is significant in human experience falls within this frame.”⁵

Throughout this thesis I have been aligning Brandeis with pragmatism, specifically with what I call the pragmatic political style. But Brandeis was also a Jew, and throughout his life he became increasingly committed to a personal and public expression of the Jewish religion. In 1910, Brandeis’s Judaism became an integral part of his public speaking when he became a Zionist. As Strum notes, Zionism quickly became the “dominating theme of his life.”⁶ Even more impressively, throughout his tenure as Supreme Court Justice, Zionism was the one public cause in which Brandeis participated outside of his Court duties. Zionism was the only public form of social advocacy that followed him through his term on the bench until his death in 1941.

If pragmatism is anti-religious, if it is “aggressive atheism,” or meaningless secular humanism, as traditional religious advocates argue, then Brandeis cannot be a pragmatist. Brandeis’s style cannot be pragmatic because Zionism was an integral part of his public and private life; indeed, it was probably the *most meaningful part* of his public and private life. If in pragmatism there is no room for religion, then the preceding chapters have been for naught.

The present chapter is an attempt to show how pragmatism is in no way anti-religious. Furthermore, it is the attempt to show how Brandeis’s Zionism in no way separates him from the pragmatic style; rather, his Zionism, I will argue, shows the pragmatic style come to fruition, the pragmatic style in its most meaningful form. Brandeis’s Zionist rhetoric is more than just Brandeis dealing with a problem—the

Jewish problem, as he calls it—in a pragmatic manner; it is Brandeis embodying the pragmatic style in the most enriching way possible, as a part of the quest for meaning. I will first examine more extensively James and Dewey’s takes on pragmatism and religion, focusing on James’s “Philosophical Conceptions and Practical Results” and his “Pragmatism and Religion,” and Dewey’s *A Common Faith*. I will then proceed with a rhetorical analysis of Brandeis’s addresses on Zionism and the Jewish tradition, showing not only how his Zionism is congruent with James and Dewey’s beliefs on pragmatism and religion, but how there is a particular rhetorical strategy for dealing pragmatically with religious and spiritual issues. I will conclude by highlighting the linguistic emphasis running throughout Brandeis’s Zionist rhetoric, a linguistic emphasis fully a part of James and Dewey’s understanding of the intersection between pragmatism and religion.

Religious Roots in American Pragmatism

Perhaps James is best known as a religious thinker for his *The Varieties of Religious Experience*. This is a remarkable and important work, to be sure. But I want to approach James’s sentiments on religion through the lens of his pragmatism, and there are, it seems, two more direct ways to do so than through the *Varieties*.

Raised a Protestant, James remained religious, more or less so, throughout his entire life, and as he became the popular prophet of pragmatism, the issue of religion was an explicit part of his focus. In 1898, James addressed philosophers at the University of California, Berkeley, presenting a paper entitled “Philosophical Conceptions and

Practical Results.” While the paper was first and foremost an attempt to bring “the principle of practicalism,” or pragmatism, into common philosophical parlance, James approached the matter through an analysis of belief in God. It seems no accident, then, that when James resurrected the word “pragmatism” from C. S. Pierce he did so, in large part, by applying it to religious disputes.

James’s thesis in that address is a straightforward proclamation of the pragmatic method: “[T]o develop a thought’s meaning we need only determine what conduct it is fitted to produce; that conduct is for us its sole significance.”⁷ He claims that the purpose of philosophy is “to find out what definite difference it will make to you and me, at definite instants of our life, if this world-formula or that world-formula be the one which is true” (349). To show the worth of the pragmatic method, James needs to show its applicability to problems and the way in which it can help solve problems—concrete problems. And there is, James believes, one problem that has plagued philosophers for millennia: the debate between materialism and theism.

James approaches the debate by asking, What concrete difference will it make if God exists or not? He answers, if it makes no concrete difference, then the existence of God is a non-issue. If it makes a concrete difference, then it is a live issue and quite a significant part of life, to be sure. If existence is viewed retrospectively—that is, with an orientation toward the past and the past alone—then, James says, the existence of God makes no difference in concrete fact: “When a play is once over, and the curtain down, you really make it no better by claiming an illustrious genius for its author, just as you make it no worse by calling him a common hack” (351). But if existence is viewed

prospectively—that is, with an orientation toward the future as an extension of the present—then, James says, the existence of God becomes something completely different: “Theism and materialism, so indifferent when taken retrospectively, point when we take them prospectively to wholly different practical consequences, to opposite outlooks of experience” (353). What are those opposite outlooks of experience? Materialism, viewed prospectively, blocks the individual’s experiences from his or her “more ideal interests” and cannot act as a “fulfiller of our remotest hopes” (354). But theism, viewed prospectively, “however inferior it may be in clearness to those mathematical notions so current in mechanical philosophy, has at least this practical superiority over them, that it guarantees an ideal order that shall be permanently preserved” (354).

For James, the point is not that a specific ideal order is True or False, that one’s beliefs have been cosmically pre-ordained, but that the presence of certain beliefs and ideals dramatically affects the way in which the individual *has* his or her experiences. When belief in God is viewed prospectively, experience becomes not mechanically philosophical but infused with promise: “Materialism means simply the denial that the moral order is eternal, and the cutting off of ultimate hopes; theism means the affirmation of an eternal moral order and the letting loose of hope” (354). James thus calls religion “a living practical affair” (356). *It is a live option.* And more than that, it opens up a new range of possible experiences. James says,

If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear,

inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways. The power comes and goes and is lost, and can be found only in a certain definite direction, just as if it were a concrete material thing (357).

Religious experiences thus become not things aloof, not unembodied abstractions, but things concrete, particular and meaningful. Religious experiences become *specific ways of having experiences*. They become meaningful because they intimately connect the individual to the relational manifold, as authentic sources of meaning, completely opposed to superficiality and second-handedness.

James's analysis of this intersection between pragmatism and religion continues in "Pragmatism and Religion," the final chapter, the capstone, of *Pragmatism: A New Name for Some Old Ways of Thinking*. In this chapter, James masterfully articulates the attitude of meliorism, which he infuses with religious language: "Some conditions of the world's salvation are actually extant, and [the pragmatist] can not possibly close her eyes to this fact: and should the residual conditions come, salvation would become an accomplished reality."⁸ As the belief that the world can become *better*, meliorism steers between both optimism and pessimism, and also rationalism and empiricism. As James says,

I find myself willing to take the universe to be really dangerous and adventurous, without therefore backing out and crying 'no play'. . . . I am willing that there should be real losses and real losers, and no total preservation of all that is. I can believe in the ideal as an ultimate, not as an origin, and as an extract, not the

whole. When the cup is poured off, the dregs are left behind for ever, but the possibility of what is poured off is sweet enough to accept (470).

Notice that James places danger and possibility together in the same breath. While the present is teeming with novelty and possibility, danger, risk and the inevitability of lose are just as real. But the religious attitude plunges forward nevertheless. The religious attitude pushes through danger and risk and lose in pursuit of consequences that are “sweet enough” to accept.

For James, the religious life is not opposed to pragmatism but a very integral part of it. This does not mean, however, that pragmatism accepts any religion *whatsoever*. For some religions are indeed antithetical to the prospects of pragmatism. As James puts it, “You see that pragmatism can be called religious, if you allow that religion can be pluralistic or merely melioristic in type. . . . Pragmatism has to postpone dogmatic answer, for we do not yet know certainly which type of religion is going to work best in the long run” (472). Pragmatism is against closed-systems of meaning of any type, and close-systems of religious meaning are no exception. James’s main point is that pragmatism is not opposed to religion, because religion, or more rightly, religious experiences, can signify profound sources of fruitfulness. The main task is to find which religions or religious experiences are better, more fruitful, more meaningful, than those that stunt life’s growth and encourage spiritual stalemates.

In *A Common Faith*, Dewey introduces a distinction that is necessary for understanding the pragmatic religious attitude—the distinction between *religion* and *religious*. Religion, says Dewey, is a noun that denotes substance; religious is an

adjective that denotes quality of experience. And the division between the two must be made clear. Religion refers to “a special body of beliefs and practices having some kind of institutional organization, loose or tight. In contrast, the adjective ‘religious’ . . . denotes attitudes that may be taken toward every object and every proposed end or ideal.”⁹ Dewey’s interest in thus dividing the terms is a pragmatic move to emphasize process and leave behind substance.

Moreover, Dewey makes the same point as James that the intersection between pragmatism and religion is experientially about ratios, proportions, fitness, etc.: “The actual religious quality in the experience described is the *effect* produced, the better adjustment in life and its conditions, not the manner and cause of its production” (14). Also like James, Dewey here asserts that the religious quality is valuable prospectively, not retrospectively. The religious experience is the process of moving ahead in the flow of experience with the hope of gaining a more functional and meaningful understanding of life. As Dewey writes, “The self is always directed toward something beyond itself and so its own unification depends upon the idea of the integration of the shifting scenes of the world into that imaginative totality we call the Universe” (19). Oriented toward the future, the religious experience thereby becomes not correspondence to an antecedent substance or pre-established belief structure, but the grasp of possibilities: “For all endeavor for the better is moved by faith in what is possible, not by adherence to the actual” (23).

The religious experience for Dewey signifies an experience of a *particular quality*. That quality is so important because it fuses the conditions of the present with hope, a

process Dewey calls “a working union of the ideal and actual” (52). As a fusion of ideals and possibilities, the religious experience also becomes socially significant. Because life’s possibilities are found in the relational manifold, of which the individual is a constitutive part, pursuing those possibilities through creative intelligence has social consequences:

It is possible to trace to some extent these [social] evils to their causes, and to causes that are something very different from abstract moral forces. It is possible to work out and work upon remedies for some of the sore spots. The outcome will not be a gospel of salvation but it will be in line with that pursued, for example, in matters of disease and health. The method if used would not only accomplish something toward social health but it would accomplish a great thing; it would forward the development of social intelligence so that it could act with great hardihood and on a larger scale (77).

Dewey’s point is that the quality of religious experience becomes functional and operative because it opens up the possibilities of the present into hope for the future. Religious experiences become particularly enriching forms of experience because they are unifying, because they tie the individual and society to human evolution in general. Dewey concludes *A Common Faith* by saying,

We who now live are parts of a humanity that extends into the remote past, a humanity that has interacted with nature. The things in civilization we most prize are not of ourselves. They exist by grace of the doings and sufferings of the continuous human community in which we are a link. Ours is the responsibility

of conserving, transmitting, rectifying and expanding the heritage of values we have received that those who come after us may receive it more solid and secure, more widely accessible and more generously shared than we have received it. Here are all the elements for a religious faith that shall not be confined to sect, class, or race. Such a faith has always been implicitly the common faith of mankind. It remains to make it explicit and militant (87).

As liberty is such an important concept for pragmatists, religious experiences become significant as experiences of a broad scope, a liberal, expanding scope. *By infusing the ideal with the actual, religious experiences open up the present into the future.* Both James and Dewey agree on this point. James says the quality of the creative temper, which comes to fruition in religious experiences, is invaluable because it “immediately suggests an infinitely larger number of the details of the future experience to our mind. It sets definite activities in us at work.”¹⁰ Dewey says the religious experience entails creating imaginative possibilities in the “ceaseless flux”: “The *whole* self is an ideal, an imaginative projection. Hence the idea of a thoroughgoing and deep-seated harmonizing of the self with the Universe (as a name for the totality of conditions with which the self is connected) operates only through imagination.”¹¹

The focus of the intersection between pragmatism and religion is on *betterment*, on *amelioration*. Religious experiences thus embody the melioristic attitude. Religious experiences grab on to the leads of the present and push forward in the tissue of experience, striving to make the future better. James says that “*Excitements, ideas, and efforts*, in a word, are what carry us over the dam.”¹² The religious experience is what

describes the excitements, ideas, and efforts of the individual in the present, pushing that person into the future. Religious experiences act as particularly meaningful threads connecting the present to the future because they are organic compositions of ideals and possibilities. For pragmatists, religious experiences entail creatively applying one's hope for future betterment to the tangible, concrete leads of the present. There is, of course, no assurance that the future will inevitably become better, only that the creative powers of human beings are the best tools available for making the future better. Just as it is with meliorism, "salvation" in the future is neither inevitable nor impossible; it simply becomes more probable through the human touch.

Because it describes a particularly meaningful way of working in the present, the religious experience, far from being absent in pragmatism, becomes pervasive in it. Steven Rockefeller describes it as a moral outlook holding that "the universe of which we are a part has not made up its mind where it is going; the struggle between good and evil is real; and human choice and decision can make a critical difference in the direction of events."¹³ Stuart Rosenbaum describes it as the "concrete and experiential" idea that "our values are our 'imagination guides,' the 'inner' representations who live with us and help us through our daily rounds."¹⁴ These guides become the moral focus of one's life, joining the ideal and the practical and pursued with hope. And Douglas Anderson calls this the "religious attitude," the perspective that "when lived through one's character and career, [the religious attitude] makes an important difference in the world of experience and nature that we both inhabit and confront. The attitude, when pervasive in a life, enables free and constitutive action on our part."¹⁵

What makes pragmatic religious experiences so interesting is not their absence in daily life but their abundance. Pragmatism is bubbling over with religious experiences, the infusion of one's ideals—one's understanding of "the good life," of what is meaningful—with the very real possibilities for amelioration. In the next section I show how this understanding of pragmatic religious experiences becomes the thrust of Brandeis's Zionist rhetoric.

American Pragmatism, American Zionism

The tale of Brandeis becoming a Zionist is long, and the telling of that tale is best left to his biographers.¹⁶ But a few words on his Zionist evolution seem appropriate for understanding his rhetorical project.

While his family was Jewish, Brandeis grew up in a largely a-religious home. Brandeis's parents came to the United States in what was called the "second wave" of Jewish immigrants (usually German immigrants, which Brandeis's parents were). These immigrants, notes Joe Stork and Sharon Rose, "were poor, but they prospered rapidly, joining the middle and upper middle class merchants and professionals. . . ."¹⁷ Dedicated to the American dream of economic and social prosperity, Brandeis's parents, along with a number of close relatives, established a produce store and acquired various mills and factories.¹⁸ Yet as the Brandeis family became well-established socially and economically, their Jewish heritage became less and less distinct. But this was characteristic, notes Gerald Sorin, of the German Jewry of which Brandeis's family was a part: "By the 1880s, German Jews had become significantly acculturated. This was

reflected in their rapid economic and social mobility, their institutionalization of Reform Judaism, and the intensification of their collective identity as Americans and Jews.”¹⁹

Brandeis grew up in a religious context marked by a number of different influences: Reform Judaism, German liberalism, and dedicated Americanism. The influence of German liberalism and dedicated Americanism led many Reform Jews to express their Judaism in secular form.²⁰ So in the context of American Jewry as a whole, this secular Reform Judaism was largely at odds with Orthodox Judaism and the Socialist Judaism movement, both of which were struggling to attract incoming waves of Jewish immigrants from all over Europe. As a result, Zionism’s entrance into the American Jewish community was marked by the same “cultural, religious, and political divisions” of Judaism at large, says Sorin, along with increasing decentralization and pluralism.²¹ Some Reform Jews saw Zionism as a threat to the Americanization they had achieved in the previous decades; Orthodox Jews saw Zionism as patronizing and ideologically weak.²² To say the least, Zionism, and as a result, Brandeis’s rhetorical project, faced an uphill battle.

While there were a number of factors contributing to Brandeis’s commitment to Zionism, including the influence of his uncle Lewis Dembitz, the figure to whom Brandeis’s looked up all his life, and Jacob De Haas, editor of the *Boston Jewish Advocate*, Brandeis’s mentor in Zionism,²³ his commitment did not emerge until *after* he was a passionate proponent of American democracy. Scholars who study Brandeis seem to agree, rightly, that Brandeis’s Zionism was a counterpart of his Americanism. Indeed, Brandeis saw the creation of a Jewish state in Palestine as an extension of the prospects

of American democracy. Brandeis's belief, writes Baskerville, was that "progressive American values and Zionist goals were ultimately identical."²⁴ And Strum says, "Zionism meant not only the goal of a Jewish state but the revitalization in the United States of Jewish culture and values."²⁵ Michael A. Meyer says, "American Zionism, as Justice Louis Brandeis formulated it, was more philanthropic than ideological, mostly an extension of the colonization idea."²⁶ Brandeis himself put the matter forthright: "My approach to Zionism was through Americanism. Practical experience and observation convinced me that to be good Americans, we must be better Jews, and to be better Jews we must be Zionists."²⁷

Brandeis's appeal to Zionism through Americanism of course did not please every Jew; in fact, Brandeis's approach to Zionism eventually created a number of divisions in the American Jewish Community.²⁸ Nevertheless, from 1910 until the early 1920s, Brandeis used his rhetorical skill to become the leader of American Zionism. And despite the opposition, his rhetorical strategy was to affirm Judaism, Americanism, and Zionism in the same breath. As Sorin puts it,

Although Zionism never implied for American Jews a personal imperative to settle in Palestine, the movement provided a vehicle for steering a course between assimilation and Jewish survival in the United States. . . . Zionism, with its emphasis on common tradition, history, and fate, offered a spiritual communalism that buttressed a sense of Jewish peoplehood.²⁹

Brandeis used Zionism to appeal to a number of competing factions and to try to overcome the divisions within the American Jewish community. For Brandeis, Zionism

was so appealing because it combined the best of American democracy, communal solidarity, and Jewish traditions. Zionism was a matter of cultural pluralism, as Sorin makes clear:

Brandeis not only supplied an epigrammatic refutation of the charge of dual loyalty so often leveled at Zionists; his formulations, emphasizing Zionism's benefit to America and the world, also allowed Jewish nationalists, both religious and secular, to make the case for cultural pluralism and the congruity of Jewish ethics and American ideals. Zionism or Jewish nationalism, like American nationalism, it was argued, gained at least part of its value in its universal mission—its emphasis on democracy and self-determination.³⁰

Zionism, instead of separating Jews from either Americanism or their Jewish heritage—religious or secular heritage—“encouraged and helped American Jews to remain Jewish.”³¹ As Brandeis construed it, Zionism was an extension of both American democracy and the Jewish tradition.

Brandeis's Zionism and Americanism cannot be separated. In fact, as I will show, both are dynamic partners in his pragmatic political style. This analysis of Brandeis's Zionist rhetoric seeks to explicate the *method* by which he called for the creation of a Jewish state. My argument is that his Zionism, instead of distancing him from the pragmatic style, exemplifies the pragmatic style come to fruition, the pragmatic style in its most meaningful form.

Perhaps it will be best to begin by outlining Brandeis's general attitudes toward Zionism, which Brandeis himself provided in somewhat comprehensive form. In June

of 1915, Brandeis spoke to the Conference of Eastern Council of Reform Rabbis. His address was entitled “The Jewish Problem, How to Solve it,” and the address became, as Solomon Goldman says, “his most comprehensive statement on Zionism.”³² Brandeis began with a juxtaposition between the past and the present: “The suffering of the Jews due to injustices continuing throughout nearly twenty centuries is the greatest tragedy in history. . . . Yet the present is pre-eminently a time for hopefulness. The current of world thought is at last preparing the way for our attaining justice.”³³ Specifically, Brandeis saw the War giving Jews a chance to remake their position in world history. And when Brandeis said “Jews,” he meant not only the Jew as an individual person but Jewish people in aggregate: “For us the Jewish Problem means this: How can we secure for Jews, wherever they may live, the same rights and opportunities enjoyed by non-Jews? How can we secure for the world the full contribution which Jews can make, if unhampered by artificial limitations? The problem has two aspects: That of the individual Jew, and that of Jews collectively” (13). The Jewish Problem was individual in that the Jew needed to be secure, like any other individual, in his or her pursuit of personhood. The Jewish Problem was social in that Jews as a race of people needed to be recognized for their significant contributions to humanity in general.

Since the Jewish Problem was both individual and social, it seemed clear that the Jewish Solution needed to be both individual and social. And for Brandeis, the individual and social solution meant the creation of balance for the common good.

In the past it has been generally assumed that the full development of one people necessarily involved its domination over others. . . . [However] In establishing

the equal right of every person to development, it became clear that equal opportunity for all involves this necessary limitation: Each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty came to mean the right to enjoy life, to acquire property, to pursue happiness in such manner and to such extent as the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow-citizens (18-19).

This form of liberty had a clear home in the twentieth century, said Brandeis: American democracy. “Democracy rejected the proposal of the superman who should rise through sacrifice of the many. It insists that the full development of each individual is not only a right, but a duty to society; and that our best hope for civilization lies not in uniformity, but in wide differentiation” (19). American democracy represented the culmination of humanity’s lessons, lessons about the best form of government, about the maximization of liberty, about balancing personal and social needs in a way that affirmed both the individual and society without preference to either.

American democracy was not only the fullest incarnation of the lessons of the past, it also represented the most real hope for the future. More specifically, it represented the most real *Jewish hope* for the future. But in order to be significant parts of the potential future, Jews had to be seen as valuable parts of the present, which Brandeis, of course, believed they were:

The Jews gave to the world its three greatest religions, reverence for law, and the highest conceptions of morality. Never before has the value of our contribution

been so generally recognized. Our teaching of brotherhood and righteousness has, under the name of democracy and social justice, become the twentieth century striving of America and of western Europe. Our conception of law is embodied in the American constitution which proclaims this to be a “government of law and not of men.” And for the triumph of our other great teaching, the doctrine of peace, this cruel war is paving the way (22-23).

Because Jews were valuable parts of the present, Brandeis said the future should represent hope, not despair. “Let us make clear to the world that we too are a nationality striving for equal rights to life and to self-expression” (23). The responsibility for making known to the world the value of Jewish life rested with Jews themselves. In Brandeis’s Zionism, this was the very distinct call for personal responsibility.

However, in order for Jews to succeed in articulating their place in the world, the first step was to define terms appropriately; the world must, said Brandeis, understand what Zionism is and is not. “It is not a movement to remove all the Jews of the world compulsorily to Palestine” (24). Furthermore, “it is not a movement to compel anyone to go to Palestine” (24). So what *is* it?

It is essentially a movement to give the Jew more, not less freedom; it aims to enable the Jews to exercise the same right now exercised by practically every other people in the world: To live at their option either in the land of their fathers or in some other country. . . .

Zionism seeks to establish in Palestine, for such Jews as choose to go and remain there, and for their descendants, a legally secured home, where they may

live together and lead a Jewish life, where they may expect ultimately to constitute a majority of the population, and may look forward to what we should call home rule (24).

Brandeis believed there was something quite significant about the Jewish form of life. It was significant because of the *Jewish spirit*, which was particularly congenial to the American spirit: "There is no inconsistency between loyalty to America and loyalty to Jewry. The Jewish spirit, the product of our religion and experiences, is essentially modern and essentially American" (29). This meant there was a subsequent responsibility for Jews. Because Judaism embodied American principles and ideals, Jews had a special part to play in furthering the project of American democracy:

Indeed, loyalty to America demands rather that each American Jew become a Zionist. For only through the ennobling effect of its striving can we develop the best that is in us and give to this country the full benefit of our great inheritance. The Jewish spirit, so long preserved, the character developed by so many centuries of sacrifice, should be preserved and developed further, so that in America as elsewhere the sons of the race may in the future live lives and do deeds worthy of their ancestors (29-30).

Thus Jews had to be *active* participants in Americanism and Zionism.

However, in an age ravaged by war, anti-Semitism, and social and economic hardships, Brandeis feared that *active* participation in Zionism was rare among American Jews:

We must protect America and ourselves from demoralization, which has to some extent already set in among American Jews. . . . The sole bulwark against demoralization is to develop in each new generation of Jews in America the sense of *noblesse oblige*. That spirit can be developed in those who regard their people as destined to live and to live with a bright future. That spirit can best be developed by actively participating in some way in furthering the ideals of the Jewish renaissance; and this can be done effectively only through furthering the Zionist movement (30).

Brandeis reminded his audience that the opportunities of the present could only become realities through human action, participation and intervention. It was thus up to the Jews, and particularly the Jews of America, who were socially, politically, and economically well-equipped to contribute to Zionism, to grab hold of present possibilities and strive for betterment. “The whole world longs for the solution of the Jewish Problem. We have but to lead the way, and we may be sure of ample cooperation from non-Jews. . . . Organize, Organize, Organize, until every Jew in America must stand up and be counted, counted with us, or prove himself, wittingly or unwittingly, of the few who are against their own people” (35). Make the possibilities of the present become the realities of the future, Brandeis told the audience, which can only happen through a concert of action—individual action, to be sure, but action of groups, Jews and non-Jews alike, American and non-Americans alike, cooperating to create a better future. Through participation in the present, the future can become better; the

possibilities of salvation become more and more probable through intelligent human undertaking.

The spirit and rhetorical style of Brandeis's address is quintessentially pragmatic, a reiteration of James and Dewey's understanding of the intersection between pragmatism and religion. Possibilities are present in the relational manifold; there are "leads" in the present. Just like James and Dewey, Brandeis thinks these "leads" can quite readily be found in American democracy. But Brandeis also offers the spirit of the Jewish people as a counterpart to the promises of American democracy. Both American democracy and the Jewish spirit represent hope for a better future. But Brandeis, James, and Dewey all admit that along with the "leads," one must take thorough account of the dangers and risks of the present. For Brandeis and the other Zionists, one of the great dangers is the War, another is anti-Semitism, and another is the place of the term "Jew" in the world's vocabulary.³⁴ However, hope infused with creative intelligence can push through the dangers of the present. Humans can actually become stronger, living with more significance and meaning, through the struggle to overcome danger and risk. As Brandeis says,

The Zionists seek to establish this home in Palestine because they are convinced that the undying longing of Jews for Palestine is a fact of deepest significance; that it is a manifestation in the struggle for existence by an ancient people which has established its right to live, a people whose three thousand years of civilization has produced a faith, culture and individuality which enable it to contribute largely in the future, as it has in the past, and to the advance of

civilization; and that it is not a right merely but a duty of the Jewish nationality to survive and develop. They believe that only in Palestine can Jewish life be fully protected from the forces of disintegration; that there alone can the Jewish spirit reach its full and natural development, and that by securing for those Jews who wish to settle there the opportunity to do so, not only those Jews, but all other Jews will be benefited, and that the long perplexing Jewish Problem will, at last, find solution (24-25).

The Jew, with both personal and social needs, can look to Zionism for help. Meeting those needs, however, is a struggle; but meeting needs and fulfilling desires despite risk and danger is a mark of the Jewish spirit continuing to develop and grow.

Expressing his hope for Zionism is also Brandeis sticking his neck out. His Zionism represents his assessment of the dynamic nature of the present and his attempt to infuse the future with more meaning. Thus, it seems, Brandeis embodies James's argument in "The Will to Believe." Because it is such an influential text dealing with the intersection between pragmatism and religion, perhaps it is best to pause here and engage James's famous essay.

James's first move in "The Will to Believe" is to distinguish between a *live* and a *dead* hypothesis. The former, he says, "is one which appeals as a real possibility to him to whom it is proposed."³⁵ The upshot of this definition is that a vast number of hypotheses can be regarded as live, because an hypothesis's being real depends on the individual "to whom it is proposed." A dead hypothesis, conversely, is one that "refuses to scintillate with any credibility at all" (2). James seems to be aiming for ineffectual

definitions, for his essay is about *faith* and *belief* and not verification. James introduces “reality” or “lack of credibility” as loose ways of differentiating hypotheses specifically because *belief* is an expression of individual will, and such an expression has little to do with absolute certainty and divine clarity. “This shows,” he writes, “that deadness and liveness in an hypothesis are not intrinsic properties, but relations to the individual thinker. They are measured by his willingness to act” (2-3). Essentially, the will to believe is an expression of the desire for growth:

We want to have a truth; we want to believe that our experiments and studies and discussions must put us in a continually better and better position towards it; and on this line we agree to fight out our thinking lives. But if a pyrrhonic skeptic asks us *how we know* all this, can our logic find a reply? No! certainly it cannot. It is just one volition against another,—we willing to go in for life upon a trust or assumption which he, for his part, does not care to make (9-10).

James introduces a juxtaposition here, a juxtaposition common to both James and Dewey’s thought. The juxtaposition is between the very dry, logical, misleading quest for certainty, and the very live, organic, fruitful quest for meaning. And James celebrates this division, believing philosophers of all kinds, and individuals of all kinds, cannot *afford* to neglect the “illogical” passions of the pursuit for meaning. His thesis in the “Will to Believe,” after all, is,

Our passionate nature not only lawfully may, but must, decide an option between propositions, whenever it is a genuine option that cannot by its nature be decided on intellectual grounds; for to say, under such circumstances, “Do not decide,

but leave the question open,” is itself a passionate decision,—just like deciding yes or no,—and is attended with the same risk of losing the truth (11; emphasis in original).

James is celebrating that which philosophers for millennia have seen as base, unimportant, and spiritually misleading. Meaning in life, for James, is not a matter of correspondence to a logical structure of Truth; it is forged in accordance with the very intimate desire to lead a significant life, despite all the doubt, uncertainty, and pain associated with life.

James does, however, save a word of warning for those who pursue a meaningful life by playing fast and loose with the reality of experience: “I live, to be sure, by the practical faith that we must go on experiencing and thinking over our experience, for only thus can our options grow more true; but to hold any one of them—I absolutely do not care which—as if it never could be reinterpretable or corrigible, I believe to be a tremendously mistaken attitude, and I think that the whole history of philosophy will bear me out” (14). Believing always in the revisability of one’s beliefs is what James calls giving up the doctrine of “objective certitude.” But that is *not* the same, he underscores, as giving up “the quest or hope of truth itself. We still pin our faith on its existence, and still believe that we gain an ever better position towards it by systematically continuing to roll up experiences and think” (17). This is James speaking in the pragmatic rhetoric of degree. Belief is a matter of *better* or *worse*, not True or False. Belief and truth are pursued hand-over-fist, in the struggle for living, in the rolling up of experience. Such a project, of course, is never done, for it is identical with life

itself. So James reminds us emphatically that “Humans passions . . . are stronger than technical rules” (21). To live by such passions is good. Living by passions over technical certainty is a matter of courage, a matter of sticking one’s neck out and pouncing forward into the flow of experience with the hope for betterment: “Moral scepticism can no more be refuted or proved by logic than intellectual scepticism can. When we stick to it that there *is* truth (be it of either kind), we do so with our whole nature, and resolve to stand or fall by the results” (23).

James turns to religion as a way of bringing his point home. For James, the mere possibility of religious belief is one of the most pregnant matters in all of life. Religion, he says,

offers itself as a *momentous* option. We are supposed to gain, even now, by our belief, and to lose by our non-belief, a certain vital good. Religion is a *forced* option, so far as that good goes. We cannot escape the issue by remaining skeptical and waiting for more light, because, although we do avoid error in that way *if religion be untrue*, we lose the good, *if it be true*, just as certainly as if we positively chose to disbelieve (26).

James is oriented prospectively toward possibilities and not retrospectively toward objectivity. What religion does, says James, is open up the future—open it up to a new range of possibilities, possibilities that are closed off if one chooses explicitly to disbelieve. Religious experiences are a matter of building the future: “The more perfect and more eternal aspect of the universe is represented in our religions as having personal form. The universe is no longer a mere *It* to us, but a *Thou*, if we are religious; and any

relation that may be possible from person to person might be possible here” (27-28).

Religious experiences open up a unique chance to build solidarity. They are a specific way of seeking out the leads of the present and plunging forward, with others who feel the same passion, into the relational manifold.

James is not advocating a specific set of prescribed doctrines. Religion is not about specific *content*; it is about specific *possibility*. Whatever one chooses to do regarding the pregnant religious question, James says the consequences are the same: “Indeed we *may* wait if we will [for empirically verifiable data corroborating religious belief],—but if we do so, we do so at our peril as much as if we believed. In either case we *act*, taking our life in our hands” (30). There is a public side to this proposition, however, for James says that *willing to believe* is, indeed, an activity with social responsibility. “We ought . . .” writes James, “delicately and profoundly to respect one another’s mental freedom: then only shall we bring about the intellectual republic: then on shall we have that spirit of inner tolerance without which all our outer tolerance is soulless, and which is empiricism’s glory; then only shall we live and let live, in speculative as well as in practical things” (30).

As a Zionist rhetor, Brandeis was trying to bring about James’s notion of the “intellectual republic.” Zionism was Brandeis’s expression of the will to believe. In 1929, he told a group of fellow Jews,

To take risks is the very essence of Jewish life, that is, to take necessary risks.

The wise man seeks not to avoid but to minimize risks. He minimizes them by using judgment and by knowledge and by thinking. These are, fortunately,

preeminently Jewish attributes. Let us take counsel of our hopes, not of our fears. Let us inspire confidence in others by showing that we ourselves have courage to act. Confidence begets confidence, and achievement follows.³⁶

Belief and religion for Brandeis, and for James, were never about specific doctrines or religious content. Belief and religion, for both James and Brandeis, were not closed-systems; that is, they were not prescribed. They were about openness, about novelty and possibility, about tolerance and respect, about moving toward a public culture wherein religion was dynamic and helpful, not rigid and inoperative. Belief and religion for James and Brandeis were about the pursuit for meaning and not about preordained ends.

The same themes form the overall style of Brandeis's Zionist rhetoric. The first rhetorical step, for the pragmatist concerned with the religious question, is to sort through the present—to find the “leads” of the present and push through the dangers and risks intermingling with those leads. For Brandeis, the leads of the present are most explicitly found in the history and prospects of American democracy, for American democracy represents the culmination of the lessons of history and hope for the future. What is “peculiarly American,” Brandeis says, is “inclusive brotherhood,” that is, the dynamic integration of love of liberty, the pursuit of social justice, and the practice of democracy.³⁷ In that way, democracy involves “two pillars: one, the principle that all men are equally entitled to life, liberty and the pursuit of happiness; and the other, the conviction that such equal opportunity will most advance civilization.”³⁸ American democracy thus best locates the leads of the present because it represents the best hope for both individuals and civilization in general.

Americanism, just like Judaism, “rests upon the essential trust in the moral instincts of the people; potent to create their own well-being; to perfect it; and to maintain it, if an opportunity is given.”³⁹ But there is a social upshot of this individualism, for individualism

imposes duties upon us in respect to our own conduct as individuals; it imposes no less important duties upon us as part of the Jewish community or people. Self-respect demands that each of us lead individually a life worthy of our great inheritance and of the glorious traditions of the people. But this is demanded also by respect for the rights of others. . . . Large as this country is, no Jew can behave badly without injuring each of us in the end.⁴⁰

This fusion of the individual and society represents, for the Jew, hope for the future. “[T]hough the Jew make his individual life the loftiest, that alone will not fulfill the obligations of his trust. We are bound not only to use worthily our great inheritance, but to preserve, and if possible, augment it; and then transmit it to coming generations.”⁴¹

Brandeis fuses Americanism and Judaism together to stress the promises of the individual and society acting together in concert. That is not to say, however, that dangers in the present do not threaten growth. Anti-Semitism is always one of the dangers of the present, and Brandeis recognizes that. But as a pragmatist, Brandeis holds that the most important place to start to overcome the dangers of the present is with the responsibility of the individual:

I fell more than ever, that the opportunities are very great, greater than at any time in eighteen centuries. The world is with us, that is, the non-Jewish world.

Whether the Jewish world will be with us will depend very largely upon the Zionists themselves. But the responsibility for success or failure will rest, not upon anti-Zionists or non-Zionists. It will rest upon ourselves. The loyalty, the wisdom, the virtues of the relatively few who have declared their conviction of the truth of Zionism will determine whether the future shall bring success or failure.⁴²

There are undoubtedly dangers and risks associated with any undertaking, Brandeis says. But that only means that getting better is possible; it means that amelioration is a very live option. It also means that amelioration is pursued through human involvement, through individual participation in making the world better.

Recognizing the leads and dangers of the present, however, is only the first step of the religious experience. The next step, after seeing that amelioration is a very live option, is to will to believe, to stick one's neck out, to pounce forward into the fabric of experience and pursue such amelioration. Brandeis sticks his neck out by placing his hope in Jewish spirituality, which represents the best chance for turning the present into a better future. He says, "I find Jews possessed of those very qualities which we of the twentieth century seek to develop in our struggle for justice and democracy; a deep moral feeling which makes them capable of noble acts; a deep sense of the brotherhood of man; and a high intelligence, the fruit of three thousand years of civilization."⁴³

Meaning is to be found in the Jewish people because they have forged meaning, have struggled through many a danger and risk, and have emerged as healthier individuals.

Thus Brandeis sees a chance in "the persistence of the individual Jew; his willingness to

exert himself; to forego pleasure and to undergo pain, to brave dangers, and submit to sacrifice, that wins his individual successes.”⁴⁴ Brandeis is placing his hope in the Jew’s will to believe, in the Jew’s time-tested ability to undergo experiences and forge meaning. As a Jew himself, this means Brandeis is rallying other Jews to join in the quest for meaning that he sees in the creation of a Jewish state. Brandeis rhetorically grabs hold of the present through the Jewish spirit, and with that spirit he presses on. “Though the burden is heavy,” says Brandeis, “it will be joyously borne. For we shall be buoyed up by the spiritual appeal and the irresistible beauty of Palestine.”⁴⁵

There is yet a third step to this pragmatic spirituality. While intelligently pursuing a meaningful life is the source of hope for amelioration, such a pursuit cannot be sought without a particular understanding—the understanding that the future represents only *possibilities*, not salvation. Thus, the creation of a Jewish state, for Brandeis and the Zionists, will always be a struggle. “There are no miracles,” Brandeis said. “Things happen in the world of Zionism as they happen in you own businesses and in your own households. Things come from working. Men accomplish because they work, because they work with the necessary material and instruments. That means effort and it means money.”⁴⁶ The point is that the future will contain dangers and risks and novelty and possibility just like the present. Nevertheless, Brandeis believes the creation of a Jewish state is a step toward an ameliorated future. “[In Palestine] there will of course be Jewish sorrow as well as Jewish joy,” he told an audience in 1929.⁴⁷ But pursued intelligently, the future can become better than the present; the future can represent a step in the right direction.

This is the basic point of pragmatic spirituality: meaning does not reside in preordained ends; meaning becomes embodied in experiences, in undergoing, in the pursuit of meaning. The point is quite circular, but that is just fine for pragmatists. If meaning is derived from the pursuit of meaning, then meaning is organic, always able to evolve and never settled. This is why Dewey says,

[T]his idea of God, or of the divine, is also connected with all the natural forces and conditions—including man and human association—that promote the growth of the ideal and that further its realization. We are in the presence neither of ideals completely embodied in existence nor yet of ideals that are mere rootless ideals, fantasies, utopias. For there are forces in nature and society that generate and support the ideals. They are further unified by the action that gives them coherence and solidarity.⁴⁸

The world is thus bubbling over with possibilities, but the undergoing must be continual. It must be an active striving to realize those possibilities. “Now is the time for action, for service, and for sacrifice,” says Brandeis, “service and sacrifice directed by understanding. In that service and sacrifice every Jew must be made to bear his part. Let us proceed, for the time is urgent.”⁴⁹ Grab hold of the possibilities of the present, the pragmatist commands, but by grabbing hold, recognize that such grabbing is taking one’s life into one’s hands. The grabbing of the present is part of the creation of the future. So grab meaningfully, grab intelligently and with passion, but realize the project is never done. The real hope is only for amelioration. The point is that individuals must, whatever they believe, face the world, face the dangers and possibilities always. But that

is why meaning is possible without certainty. Meaning *is* the grabbing hold of the very real possibilities of the present in spite of danger and risk. The point, as James puts it, is that “there is really no scientific or other method by which men can steer safely between the opposite dangers of believing too little or of believing too much. To face such dangers is apparently our duty, and to hit the right channel between them is the measure of our wisdom as men. . . . What *should* be preached is courage weighted with responsibility.”⁵⁰

Brandeis’s Zionist rhetoric shows that James was right. Brandeis shows not only that pragmatism and religion are emphatically compatible, but also that, if the point of life is growth, and if—as James, Dewey and Brandeis all believed—growth is best achieved in those particular experiences known as religious experiences, then pragmatism actually comes to fruition in spiritual experience. As a Zionist rhetor, Brandeis embodies this point. Brandeis shows that his pragmatic political style is not complete until he enacts his beliefs, until he grabs hold of the leads of the present and presses on. As James says, “The most interesting and valuable things about a man are his ideals and over-beliefs.”⁵¹ So when those ideals and over-beliefs become infused in practical action, the spiritual experience begins, and begins to form meaning in one’s life in the most pregnant way possible. When Brandeis, in addition to his legal career and tenure on the bench, puts his time into Zionism, when he steps to the podium and becomes *the most influential Zionist rhetor of his generation*, then Brandeis embodies pragmatic spirituality. Despite danger and uncertainty, Brandeis pursues meaning in Zionism and he creates meaning in Zionism, and in that way lives pragmatically to the fullest.

The Language of Pragmatism as Religious

Religious experiences represent hope in its most pregnant form. They represent the hope that the prospects for a meaningful life are very real and very much a part of the present and that the future can become better. When the pragmatist speaks on religious experiences, the result is the rhetoric of hope. Hope is the point of Brandeis's November 29, 1939 letter to his friend Henry Hurwitz: "The significant thing [about Zionism] is not the extraordinary material success under most adverse circumstances; but the fact that success has been possible because of the spiritual elevation of the masses of common young men and women."⁵²

The rhetoric of hope permeated all of Brandeis's Zionist rhetoric. In 1913 he said, "The great quality of the Jews is that they have been able to dream through all the long and dreary centuries; and mankind has credited them with another quality, the power to realize their dreams. The task ahead of them is to make this Zionist ideal a living fact."⁵³ In 1915 he said, "Our Jewish trust comprises also that which makes the living worthy and success of value. It brings us that body of moral and intellectual perceptions, the point of view and the ideals, which are expressed in the term Jewish spirit; and therein lies our richest inheritance."⁵⁴ In 1920 he said, "Zionism has given a new significance to the traditional Jewish duties of truth and knowledge as the basis of faith and practice."⁵⁵ In 1923 he said, "[Palestine] is an inspiration to effort. It is an inspiration not only because of its past and its associations; but because the present urges one on to make it bloom again, bloom not only physically, but spiritually."⁵⁶ In 1929 he said,

Palestine has developed Jewish character. The sufferings to which Jews have been subjected during all those centuries has bred a people who could easily regain all that Palestine has lost. Jewish suffering not only taught Jews to think; it gave them the will, courage, pertinacity to succeed under all circumstances and amidst all difficulties. . . . To make Palestine Jewish is only a question of our will, intelligently directed.⁵⁷

And in 1939, urging international cooperation for creating a Jewish homeland, he said, “On the basis of legal right, which Great Britain with the sanction of the world established, and of the pressing human needs, Jews will continue to enter Palestine assured of the confident support of the Jewish people to all its inhabitants.”⁵⁸

From 1913, if not before, until the end of his life, Brandeis’s Zionism was based on hope. No matter what the dangers of the present—war, anti-Semitism, legal restrictions, economic turbulence, an inert will of the people—Brandeis saw hope. This was no blind faith, for the struggle would be there forever, but the chance for amelioration was very real. In that way, it seems Brandeis was trying to leave Zionists, and all individuals in general, with the same words that James left the Harvard Young Men’s Christian Association in 1895:

Be not afraid of life. Believe that life *is* worth living, and your belief will help create the fact. The ‘scientific proof’ that you are right may not be clear before the day of judgment (or some stage of being which that expression may serve to symbolize) is reached. But the faithful fighters of this hour, or the beings that then and there will represent them, may then turn to the faint-hearted, who here

decline to go on, with words like those with which Henry IV. greeted the tardy Crillon after a great victory had been gained: "Hang yourself, brave Crillon! we fought at Arques, and you were not there."⁵⁹

CHAPTER V

CONCLUSION

A number of themes recur throughout Brandeis's rhetoric—from his pre-Court days, through his days on the bench, into his Zionism. Two such themes are facts and consequences.

Brandeis thought uncovering the facts of the issue at hand was an integral part of intelligent decision-making. He also thought that consequences were of primary importance. One had to understand the consequences of one's undertakings—personal and social undertakings—in order to grasp the full moral status of one's actions. Put together, facts and consequences established, for Brandeis, solid ground for solving problems.

Richard Posner thinks much of the same thing. In *Overcoming Law* he writes, “Emphasizing the practical, the forward-looking, and the consequential, the pragmatist, or at least my kind of pragmatist . . . is *empirical*. The pragmatist is interested in ‘the facts,’ and thus wants to be well informed about the operation, properties, and probable effects of alternative courses of action.”¹ In *The Problems of Jurisprudence*, he echoes the point:

Pragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the “localness” of human knowledge, the difficulty of transitions between cultures, the unattainability of

“truth,” the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.²

Posner’s points *seem* like points with which Brandeis could easily agree; and *at least to a degree*, Brandeis probably would agree with Posner’s argument. Posner, after all, is a self-described pragmatist of a “scientific” sort, and throughout this thesis I have been calling Brandeis a pragmatist of the “scientific” sort (at least in Dewey’s sense of the term). Even more strikingly, Posner approaches the law through economics, and Brandeis considered himself first and foremost a “student of economics.”³ However, while one cannot totally discount the few similarities between Posner and Brandeis, one also cannot overlook the ocean that separates the two.

Throughout his work, Posner takes a number of turns away from the pragmatism Brandeis exemplified. For example, Posner concludes the above passage by saying, “These dispositions, which are more characteristic of scientists than of lawyers (and in an important sense pragmatism is the ethics of scientific inquiry) have no political valence.”⁴ Posner also says, “[T]he pragmatist shares the logical positivist’s suspicion of propositions that cannot be tested by observation, propositions that run the gamut from the maxims of common sense to the claims of metaphysics and theology.”⁵ He also says, “Pragmatism engages the clutch that disconnects the whirring machinery of philosophical abstraction from the practical business of governing our lives and our societies. It seeks to free us from preconceptions based on ‘philosophical’ thinking.”⁶

He also says that “Pragmatism will not tell us what is best; but, provided there is a fair degree of value consensus among judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts.”⁷ He also writes, “What no one needs is a normative moral philosophy, or the kind of legal theory that is built on or runs parallel to normative moral theory, or postmodern antitheory. We can avoid these dead ends and keep on the path that leads to a true and healthy professionalization of law if we steer by the light of pragmatism.”⁸ He also says, “The pragmatic mood induces a willingness to delegate political rule to a specialist class of ambitious, rivalrous politicians, leaving a reduced but essential checking role to the people.”⁹

Brandeis would never agree with these statements. Brandeis would never say that the characteristics of pragmatism have no political valence, specifically because the pragmatic style is a way of *producing guidance* for political decision-making. The pragmatic method is a means of creating concrete political beliefs in specific contexts. Brandeis would never say that people should be suspicious of propositions that cannot be tested by observation (his whole participation in Zionism, after all, was about sticking his neck out for a belief that no one could “verify” through scientific rigor). Beliefs are about progressively pursuing the good life, not about retrospective correspondence. Brandeis would never completely sever philosophical reflection from practical activity, because philosophy and decision-making can be fruitful partners *if they work in concert*. Like James and Dewey, Brandeis did not want to banish philosophy but make it more congenial to the pursuits of meaning in everyday life. Brandeis would also never say that pragmatism can never propose what is best for decision-making, because Brandeis’s

method was *specifically about producing normative proclamations*. Pragmatism is about providing the best working solutions to specific conflicts because the pragmatic method enables the individual to contextualize the problem in actual human needs and the hope for amelioration. Brandeis would also never say that people do not need a normative moral philosophy; he would just say it should be a relevant and an organic normative moral philosophy. Moral philosophy should be an extension of the pragmatic method, a dynamic part of the pragmatic style. And Brandeis would surely never say that political decision-making should be left in the hands of an elite, specialized class. For Brandeis, political decision-making has to be a local, fully embodied democratic undertaking. Political decision-making has to be available to everyone in society, not just the courts, not just the economists or the sociologists or the congress or the president. Political decision-making has to be part of one's very existence as an American. It is one's American *duty*, thought Brandeis, to be politically active.

Reading Brandeis—from his pre-Court rhetoric, to his Supreme Court and Zionist rhetoric—one gets a very poignant message: living a meaningful life is possible. In fact, life is all *about* the creation of meaning. The same message comes from James and Dewey. Creating a meaningful life, having meaningful experiences, is *the purpose* of any undertaking. While society and government must enable and facilitate the creation of meaningful experiences, the value of such experiences emerges from the individual's *having* those experiences.

Reading Posner (and Fish, I might add), it is difficult to understand that a meaningful life is possible. Political decisions can be made, says Posner, government can be

structured for efficiency, the law can be just. But Posner's dry, no-nonsense empiricism steers him far away from James, Dewey, and Brandeis's fundamental conclusion—namely, that the entire project of society, government, and inquiry itself, is to enable the individual to live a meaningful life; life is fundamentally about the creation of meaning through experiences. Such an insight is absent from Posner's pragmatism. For Posner neglects *the spirit* in which pragmatism was originally born, the spirit that radiates from James, Dewey, and Brandeis's pragmatism.

Pragmatism, in whatever form it takes, can never afford to forget or neglect the spirit in which it was born. If nothing else, Brandeis's influence throughout the twentieth century—his revered status as an advocate for labor, civil rights, liberty, and justice, his standing as Zionism's great America hero, his place as a rhetor of incomparable skill and eloquence—shows that the pragmatic style, conceived in the spirit of James and Dewey's pragmatism, *can be politically fruitful*. If pragmatism is about *what works*, and if pragmatism's fruitfulness has to do with the spirit in which it was originally born, then to be fruitful pragmatism must embrace the spirit of its tradition, the pragmatic spirit of William James, John Dewey, and Louis Brandeis.

The claim of this thesis has been that specific political attitudes *do* follow from pragmatism. But this claim needs a bit of clarification. For James and Dewey and Brandeis, no *general* political orientations follow from the pragmatic style. For example, there would be no point in declaring that pragmatists are necessarily liberals or conservatives, pro-life or pro-choice, Democrats or Republicans, committed absolutely

to this or that. No general political orientations follow from pragmatism because pragmatism is all about *contextual judgment*. The pragmatist *may* be a liberal or a conservative, depending on the circumstances in which he or she finds his or herself; the pragmatist may even find some hazy, middle-ground, working-solution that seems to fall nowhere on the political spectrum. But even if no *general* political content follows from the pragmatic style, the pragmatist is very content to say that *specific* political beliefs follow from specific circumstances. For example, when faced with ever-expanding industrial “bigness,” a bigness that threatened the individual’s chances for growth, Brandeis had no problem saying that such bigness was an evil. When bigness threatens the individual’s pursuit of personhood, Brandeis believed, then the pragmatist *must* conclude that bigness is an evil. The consequences of industry threatening the individual are clear, and the pragmatist must pay attention to those consequences. That is why “bigness” was such a “curse” for Brandeis: it *proved itself* to be a curse; bigness derived its moral status from the consequences that followed from it. Brandeis’s fellow pragmatist William James thought the same thing: “I am against bigness and greatness in all their forms. . . . I am against all big organizations as such, national ones first and foremost; against all big successes and big results; and in favor of the eternal forces of truth which always work in the individual and immediately unsuccessful way, underdogs always, till history comes, after they are long dead, and puts them on the top.”¹⁰ Experience has shown bigness to be detrimental to the individual and society. And thus the pragmatist turns against bigness. Being against bigness, for the pragmatist, is *specific political content* because of the context in which bigness developed, the world’s

experience in dealing with bigness, and the personal and social consequences that follow from bigness.

Through Brandeis's rhetoric, this thesis shows that pragmatism provides a unique method for producing specific political content. Pragmatists have a particular method for experiencing the world, formulating beliefs, and producing normative proclamations. Of course, one cannot know the force of those specific beliefs and proclamations without having a specific political context in which to work. But the method is there, and the method, the pragmatist believes, is the best option available.

This thesis has tried to show how Brandeis operated in specific political contexts and how that operation was an extension of James and Dewey's pragmatism. This thesis has tried to provide an outline of the pragmatic political style, an outline of the method with which pragmatists undertake problem-solving. Through Brandeis's rhetoric, this thesis has offered a window into the style with which pragmatists very meaningfully approach concrete problems in life. And this thesis has also offered an understanding of pragmatism that is—contra those who believe pragmatism has nothing to offer politics—a unique way of participating in political decision-making. What follows from pragmatism? The pragmatic political style.

To make this thesis's conclusions a bit clearer, one question seems to remain: As a political style, does the pragmatic style have a specific attitude toward the role of language, communication, and rhetoric in political exchanges?

In the introduction, I briefly touched on the attitudes of the realistic and republican styles toward the role of language in political exchange. In the realist style, texts get in the way of informed political decision-making.¹¹ In the republican style, political leaders relish texts and use eloquence to guide the citizenry.¹² Hariman's two other political styles—the courtly and bureaucratic—also adopt attitudes toward the role of texts in political decision-making. In the courtly style, texts, discourse, communication, and rhetorical decorum create a hierarchy of power and subordination, of ruler and subject, of control. As Hariman writes, “Courtly tropes facilitate communication around and about focal individuals, they both define and enhance personal authority, and they distribute power within a social order oriented toward an individual’s display of political authority and aesthetic distinction.”¹³ The bureaucratic style also entails an attitude toward discourse. In the bureaucratic style, texts create an all-encompassing technical system of signs and symbols. As Hariman writes, “This bureaucratic style culminates in the symbolic drama of assimilation into the social structure of modernity, where all individuals assume a composite identity which denominates them as both persons and functionaries, residents of local cultures and participants in totalizing systems of communication and control.”¹⁴

For the purposes of this thesis, the question is, Does the pragmatic style adopt a specific attitude toward texts in the role of political decision-making? The answer is yes. Simply put, for the pragmatic political style, language is a tool for satisfying the demands and meeting the needs of political decisions. Individuals are left trying to cope with and create meaning in a world constantly changing, constantly shifting the terms of

the debate. Language, for the pragmatist, becomes a means of grabbing onto the flow of experience and directing it toward more congenial personal and social ends. This pragmatic position—the position that views language as a tool—is nothing new, of course.¹⁵ But the metaphor can quickly get out of hand,¹⁶ so I will use the remainder of this conclusion to draw out the implications of language-as-tool for political problem-solving.

Individuals are embedded in a constant undergoing. James called this the stream of consciousness.¹⁷ Experiences run concurrently and continuously, with no definite breaks in the flow of experience.¹⁸ But individuals do employ “concepts”—linguistic marks and noises—to seize certain elements of the stream of thought and drive those elements toward practical or aesthetic ends.¹⁹ Dewey says that “The story of language is the story of the *use* made of these occurrences; a use that is eventual, as well as eventful.”²⁰ The individual receives, creates, and implements marks and noises to handle the perceptual stream. Language, as a result, becomes the tool by which individuals select, reflect, and deflect from the stream of experience, the tool by which individuals seize experiences, emphasize and formulate practical and aesthetic possibilities, and drive experience better toward personal and social ends. Language harnesses reality, more or less effectively, and pushes it forward in the tissue of experience. “Concepts not only guide us over the map of life,” James writes, “but we *revalue* life by their use. . . . The mere possession of such vast and simple pictures is an inspiring good: they arouse new feelings of sublimity, power, and admiration, new interests and motivations.”²¹

But this puts language, and the pragmatist, in a very precarious position. To order the flow of experience linguistically is to chop the flow of experience into more or less manageable segments. But once that is done, the flow of experience continues; it continues to evolve, change, undergo, and reweave the fabric of life. The language of the conceptual order can therefore lose its grasp on life. Language quickly becomes outmoded and ineffective as the marks and noises of the conceptual order prove in need of reconstitution.

In political exchanges, the task is to seize the flow of events in such a way that the terms of the conceptual order effectively engage the needs and desires of those involved in the political reality. In some cases, language proves to be not enough for accomplishing the tasks at hand; that is to say, realistically, that proper discursive moves cannot solve all of life's problems. But in many cases, language can work effectively, opening up the possibilities of the present and pushing into an ameliorated future. As Dewey puts it, "When events have communicable meaning, they have marks, notations, and are capable of con-notation and de-notation. They are more than mere occurrences; they have implications. Hence inference and reasoning are possible; these operations are reading the message of things, which things utter because they are involved in human associations."²²

When political disputes arise, the marks and noises of the pragmatic style—the language of pragmatism, in short—become *tools* for approaching and working through those disputes. The language of the pragmatic style, while nothing like a silver bullet, a sure-fire way to reach an ideal solution, represents the chance to work through problems

with an intimate understanding of the dynamic nature of reality, the need for personal and social growth, and the hope for achieving a working solution. Political realities are only manageable to a degree; but being manageable to a degree is often enough for establishing operative relations in the manifold of experience. Language helps bind individuals together. The hope, as Dewey expresses it, is to build a sense of political unity out of political disaster: “The problem of creation of genuine democracy cannot be successfully dealt with in theory or in practice save as we create intellectual and moral integration out of present disordered conditions.”²³

The preceding reiterates the conclusions of this thesis’s chapters. The pragmatic political style speaks an organic rhetoric to stress the place of language in the flow of experience. Language must be organic because speech is embedded in an endless experiential undergoing. Organic rhetoric attempts to move *with* the flow of experience, constantly evolving and progressing within the fabric of life—emphasizing certain points, neglecting others, building conceptual masses, allowing other conceptual apparatuses to fall away. As James puts it (a point which Kenneth Burke would echo), consciousness, and consequently, language, “is interested in some parts of these objects to the exclusion of others, and welcomes or rejects—*chooses* from among them, in a word—all the while.”²⁴ And he reiterates, “Out of what is in itself an undistinguishable, swarming *continuum*, devoid of distinction or emphasis, our senses make for us, by attending to this motion and ignoring that, a world full of contrasts, of sharp accents, of abrupt changes, of picturesque light and shade.”²⁵ Organic rhetoric stresses the nature of change, of the dynamic quality of life, of movement in the flow of experience.

Movement in the flow is a *qualitative* experience; it is better or worse, more or less embodied, more or less enriching, more or less fulfilling. Organic rhetoric conveys the need to allow the individual room to grow in more or less enriching ways, by pursuing novelty and possibility at every turn. James puts the point eloquently: “Every bit of us at every moment is part and parcel of a wider self, it quivers along various radii like the wind-rose on a compass, and the actual in it is continuously one with possibles not yet in our present sight.”²⁶ Dewey echoes James by saying, “Between the poles of aimlessness and mechanical efficiency, there lie those courses of action in which through successive deeds there runs a sense of growing meaning conserved and accumulating toward an end that is felt as accomplishment of a process.”²⁷ Organic rhetoric focuses on the interrelated course of the individual and society, growing and developing and deriving meaning from the flow of experience.

In addition to organic rhetoric, the rhetoric of degree underscores the precariousness of language. Language is forced to choose and reject, to emphasize and ignore, in order to try and *handle* the blooming, buzzing confusion that is the world. Pragmatic orators speak in the rhetoric of degree to emphasize the gradations of conceptual and perceptual streams. Language is more or less effective, better or worse in certain circumstances. Pragmatists speak not in terms of substance but in terms of processes, in terms of *better* and *worse*, of *more* or *less*. For example, the term “liberty” in the pragmatist’s vocabulary does not refer to a Platonic Form or to a substance that is either absolutely had or not had, either *on* or *off*. Liberty instead refers to the process of gaining more freedom—both positive and negative freedom—of moving toward ends that promote

liberty in the individual's life. The rhetoric of degree is the rhetoric of process and movement, not of substance, essence, states, faculties, and being. It is the rhetoric of understanding the better and worse at stake in all choices and possibilities. That is why James uses the rhetoric of degree in outlining pragmatism's conception of truth: "Our account of truth is an account of truths in the plural, of processes of leading, realized *in rebus*, and having only this quality in common, that they pay. They pay by guiding us into or towards some part of a system that dips at numerous points into sense-percepts. . . . Truth is *made*, just as health, wealth and strength are made, in the course of experience."²⁸ Dewey applies the same rhetoric of degree to American democracy:

Our first defense is to realize that democracy can be served only by the slow day by day adoption and contagious diffusion in every phase of our common life of methods that are identical with the ends to be reached and that the recourse to monistic, wholesale, absolutist procedures is a betrayal of human freedom no matter in what guise it presents itself. An American democracy can serve the world only as it demonstrates in the conduct of its own life the efficacy of plural, partial, and experimental methods in securing and maintaining an ever-increasing release of the powers of human nature, in service of a freedom which is cooperative and a cooperation which is voluntary.²⁹

Pragmatists of course do not have an end-all answer to life's problems. But by paying close attention to consequences and the hope for a meaningful life, they do know how to direct the flow of experience toward ends that seem *more or less* congenial to human happiness.

Directing the flow of experience toward more or less congenial ends entails, for pragmatists, speaking a rhetoric of hope. Given that individuals and their speech are embedded in an endless flux, and given that language is more or less effective relative to specific contexts, there is the very live chance that an intelligently enacted vocabulary will help create an ameliorated future. Language properly used can expand the present into the future. The rhetoric of hope gives orators a set of tools for grabbing hold of the leads of the present and pushing through the fabric of experience into a better tomorrow. “Communication is consummatory as well as instrumental,” says Dewey. “It is a means of establishing cooperation, domination and order. Shared experience is the greatest of human goods. In communication, such conjunction and contract as is characteristic of animals become endearments capable of infinite idealization; they become symbols of the very culmination of nature.”³⁰ The rhetoric of hope grabs hold of the leads of the present and strives for an ameliorated future. While danger and risk exist—and will exist forever—humans have the power to forge through that danger and risk and create a better future. Brandeis’s Zionist rhetoric, for example, looks to a future wherein a Jewish homeland exists to enable the Jewish people to pursue meaning in their own unique way. Brandeis thus uses the rhetoric of hope to infuse the possibilities of the present with vision. The rhetoric of hope works by opening up the present into the future. This is how James expresses that hope: “We can and we may, as it were, jump with both feet off the ground into or towards a world of which we trust the other parts to meet our jump—and *only so* can the *making* of a perfected world of the pluralistic pattern ever take place. Only through our precursive trust in it can it come into being.”³¹

This idea of *making* the world harmonious is the same idea Dewey applies to “the good”:
“In quality, the good is never twice alike. It never copies itself. It is new every morning, fresh every evening. It is unique in its every presentation. For it marks the resolution of a distinctive complication of competing habits and impulses which can never repeat itself.”³² The hope for the good is the hope that human powers can remake the present into a better future.

None of these rhetorics—organic rhetoric, the rhetoric of degree, the rhetoric of hope—by themselves are entirely unique to pragmatism. Rather, my purpose in bringing them to the fore is to begin to paint a picture of the rhetorical threads running through the pragmatic tradition. Moreover, in the pragmatic style, these rhetorics do not stand alone, distinct from one another. These rhetorics move through one another and work together, simultaneously, to give the pragmatic method a mode of operation in political exchanges.

Chapter two of this thesis analyzed Brandeis’s rhetoric prior to his appointment to the Supreme Court. That chapter argued that individualism became a rhetorical device for Brandeis. Not only was he undyingly concerned with the place of the individual in society, he also used individualism as the channel for his message. That is to say, whatever the specific point of his address, Brandeis ran that point through the meaning of the importance of individualism. Through the use of that rhetorical device, Brandeis spoke in organic terms, in an organic rhetoric. Brandeis focused on individualism because he believed in the potential of and need for growth, in the individual’s abilities to become a more intelligent person and live fruitfully.

Chapter three of the thesis dealt with Brandeis's Supreme Court rhetoric. That chapter extended Brandeis's understanding of the importance of individualism into disputes concerning liberty. It also highlighted the interrelated structure of the individual and society, showing how creating *balance* between individual and social needs becomes the pragmatist's ongoing project. That chapter showed that a large part of the pragmatic style is the creation of normative proclamations, the creation of *shoulds* in life. That chapter argued that normativity is an integral part of pragmatism because pragmatists believe they have a method that produces the best options with which individuals and society can function and grow in the tissue of experience. In that way, pragmatists *must* make normative proclamations to solve the problems that individuals and society face. Pragmatists *must* say what individuals and society *should* do because pragmatists believe the pragmatic method produces the most fruitful way of understanding and solving problems.

Chapter four of this thesis dealt with Brandeis's Zionist rhetoric. That chapter focused on the intersection of pragmatism and religion that James and Dewey fleshed out and that Brandeis carried forward. While pragmatism is too often seen as anti-religious, that chapter showed that the pragmatic style bubbles over with an understanding of religious experiences. In fact, that chapter showed that undergoing religious experiences represents the pragmatic style in its most pregnant form. That chapter concluded by focusing on religious experiences as expressions of hope.

While this thesis acts as an outline of the pragmatic political style, it is, of course, only *a step* toward understanding what pragmatism can offer politics and rhetoric. Much

still remains unclear about the pragmatic political style. For example, this thesis locates the pragmatic political style in classical American pragmatism—specifically, the pragmatism of James and Dewey. It is still unclear what happens if one grounds the pragmatic political style in contemporary pragmatism, or neopragmatism, as it is often called. What, for example, does Richard Rorty’s pragmatism offer politics and rhetoric? And while this thesis has briefly touched on the conflict between pragmatists and postmodernists, what happens if one frames the conflict not in terms of classical American pragmatism and postmodernism but in terms of neopragmatism and postmodernism? Is neopragmatism more congenial to postmodernism?

What is also unclear about the pragmatic political style is the extent to which it “travels.” This thesis deals with pragmatism as a particularly American mode of operation. James and Dewey—Americans—provide the ground for understanding the rhetoric of Brandeis—an American. And each one of them—James, Dewey, and Brandeis—had passion and hope for American democracy as a way of life. But it is unclear what “international import” the pragmatic political style may have. The style seems particularly operative in American politics, but will it prove fruitful in other political, social, economic, and cultural systems?

These issues fall beyond the scope of this thesis. But James, Dewey, and Brandeis do provide a starting point for thinking about the further implications and possibilities of the pragmatic political style.

In 1910, the same year of his death, William James compared his philosophy to “an arch built only on one side.”³³ James somewhat lamented that fact, but it seems all too

appropriate that pragmatism should be built on a one-sided arch. Pragmatism is best left unfinished, best left to the individual to fill in, best left eternally open to the creation of meaning. Likewise, the pragmatic political style is best left to the individual to carry out in the moment, best left to emerge fruitfully in specific contexts, facing specific problems. The pragmatic political style offers only a starting point; it offers an approach, which the individual has to enact as a tool in larger undertakings. Like James's philosophy, the pragmatic style is a tool for moving in and through concrete problems. But the resolution to those concrete problems will only become apparent while experiencing those problems, while dealing with those problems pragmatically. But at least the pragmatic political style provides a place to start.

NOTES

Notes to Chapter I

¹ For example, the rhetoric-as-epistemic debate that ran through the 1970s and 80s was essentially a debate about what difference theory makes. When Robert L. Scott first published “On Viewing Rhetoric as Epistemic” in 1967, his project was to give scholars an orientation toward texts that was primarily normative rather than descriptive. This, Scott believed, would facilitate new types of rhetorical analysis. Scott wrote, “Man must consider truth not as something fixed and final but as something to be created moment by moment in the circumstances in which he finds himself and with which he must cope. Man may plot his course by fixed stars but he does not possess those stars; he only proceeds, more or less effectively, on his course. Furthermore, man has learned that his stars are fixed only in a relative sense.” See Robert L. Scott, “On Viewing Rhetoric as Epistemic,” *The Central States Speech Journal* 18 (1967): 17. Scott believed this shift from a descriptive to a normative orientation toward texts was a shift that would make explicit the ethical responsibilities of rhetoric. “I hold that a community to sustain itself, both through reaffirmation and reform,” wrote Scott in 1976, “must be formed of members who will take the responsibility of examining critically the binding forces, the norms, of the community and of recognizing that the traditions accepted and extended entail living consistently with the social demands.” See Robert L. Scott, “On Viewing Rhetoric as Epistemic: Ten Years Later,” *The Central States Speech Journal* 28 (1976): 265.

However, in 1990, more than twenty years after Scott formulated the rhetoric-as-epistemic theory, Barry Brummett prophesized the death of the rhetoric-as-epistemic theory on the basis that it “failed to link theoretical principles to actual criticism or analysis of ‘real life’ (however that may be defined) communication.” At the end of his “eulogy” for the rhetoric-as-epistemic theory, Brummett reiterated, “Scholarship about epistemic rhetoric has perished from starvation, as academic warriors endlessly sharpened spears and arrows and complained about each other’s weapons, while hardly anybody actually left the cave to slay and roast a real discourse. Other disciplines and arenas of dispute, beware! Apply or die, and be known only by the quaint pictures you leave on the walls of old journals.” See Barry Brummett, “A Eulogy for Epistemic Rhetoric,” *Quarterly Journal of Speech* 76 (1990): 69, 71.

Scott introduced rhetoric-as-epistemic as a theory that would make a difference in the way scholars analyzed texts and individuals spoke and acted. Brummett derided rhetoric-as-epistemic because he said it was a theory that made no difference in actual experience, and should therefore be left behind. This debate was essentially about scholars wanting to know what difference a given theory would make.

² In *Protagoras and Logos*, Edward Schiappa attempts to uncover the origins of the word rhetoric (through the Greek word *rhêtorikê*). This shift in the theory based on when “rhetoric” was first introduced in the history of Western thought should, says Schiappa, “improve our understanding of what the Sophists accomplished and how their doctrines

were subsequently interpreted or distorted.” See Edward Schiappa, *Protagoras and Logos: A Study in Greek Philosophy and Rhetoric*, 2nd Ed. (Columbia: University of South Carolina Press, 2003), 64. Throughout this thesis, part of my hope is to steer the word “pragmatism” away from its contemporary, common usages toward an understanding more congenial to that which William James and John Dewey advanced in the first half of the twentieth century. Like Schiappa and *rhêtorikê*, I hope my clarification (or reformulation, as the case may be) of pragmatism will improve our understanding of what the pragmatists (James, Dewey, and Louis Brandeis, specifically) accomplished and how we can interpret their understandings for political/rhetorical purposes.

³ William James, “What Pragmatism Means,” in *The Writings of William James: A Comprehensive Edition*, ed. John J. McDermott (Chicago: The University of Chicago Press, 1977), 377.

⁴ James, “What Pragmatism Means,” in *The Writings of William James*, 379.

⁵ James, “What Pragmatism Means,” in *The Writings of William James*, 380.

⁶ Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), 44.

⁷ Stanley Fish, *The Trouble With Principle* (Cambridge: Harvard University Press, 1999), 295.

⁸ John Patrick Diggins, “Pragmatism and Its Limits,” in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, ed. Morris Dickstein (Durham, N.C.: Duke University Press, 1998), 218.

⁹ See John Patrick Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* (Chicago: The University of Chicago Press, 1994), 277.

¹⁰ James, “What Pragmatism Means,” in *The Writings of William James*, 379.

¹¹ John J. McDermott, *Streams of Experience: Reflections on the History and Philosophy of American Culture* (Amherst: University of Massachusetts Press, 1986), 151.

¹² James’s political writings (which have been largely ignored as components of the Jamesian corpus) reveal, if nothing else, an undying commitment to social, political, economic, cultural, and public matters. Many of his political writings have been collected in *The Works of William James: Essays, Comments, and Reviews* (Cambridge: Harvard University Press, 1987).

¹³ James, *The Works of William James: Essays, Comments, and Reviews*, 85.

¹⁴ James, *The Correspondence of William James, Volume 9, July 1899-1901*, Ignas K. Skrupskelis and Elizabeth M. Berkeley, eds. (Richmond: The University Press of Virginia, 2001), 207.

¹⁵ See James's "The Continuity of Experience," in *The Writings of William James*, 300.

¹⁶ James, "On the Notion of Reality As Changing," in *The Writings of William James*, 306.

¹⁷ See the preface to *The Writings of William James*.

¹⁸ Richard A. Posner, *Law Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), 50. This is the mindset Richard Posner calls "everyday pragmatism," a mindset he endorses as the only politically viable mode of adjudication.

¹⁹ See James's preface to *The Meaning of Truth in William James: Writings 1902-1910*, ed. Bruce Kuklick (New York: The Library of America, 1987), 830.

²⁰ John Diggins offers a very thorough treatment of this journey in his *The Promise of Pragmatism*.

²¹ James, "Pragmatism's Conception of Truth," in *The Writings of William James*, 430.

²² *The Nation*, for example, reviewed James's *Pragmatism* and concluded that pragmatism's failure "lies in a kind of intellectual laziness or shiftlessness, a desire to shuffle off the responsibility of the mind. It is the scholastic sister of artistic impressionism and moral opportunism." See the anonymous review of *Pragmatism* in *The Nation* 85 (July 1907): 57-58.

²³ Robert Westbrook does a thorough job comparing James and Dewey's reactions to the controversy over pragmatism's meaning of truth. See his *John Dewey and American Democracy* (Ithaca, N.Y.: Cornell University Press, 1991), 130-149.

²⁴ More fully, Bakewell writes, "Positively state and briefly put, the significance of pragmatism, as I gather it from the book before us, is, that it is simply the modern analogue of positivism. The pragmatist, like Comte, repudiating metaphysics, seeks to substitute a philosophy which shall be nothing but the larger and more comprehensive science, having the same modesty and the same ambitions, and employing the same methods, as all the other empirical sciences, but dealing with more complex experiences." See Charles M. Bakewell, Review of *Pragmatism: A New Name for Some Old Ways of Thinking*, *The Philosophical Review* 16 (1907): 626.

²⁵ In fact, Posner said that logical positivism's takeover of philosophy actually set the stage for a revival of pragmatism, after it had faded toward the end of Dewey's life, by anticipating the next developments pragmatism would take. "The logical positivists had argued in effect that only the experimental methods of scientists yielded knowledge worth the name. Logical positivists had rejected the aprioristic methods used to establish metaphysical propositions and thus banished to the outer darkness theology, moral philosophy, transcendental speculations, and political theory—in other words, much of the orthodox philosophical tradition. By doing these things they had set the stage for a renewal of pragmatism." See Posner, *Law Pragmatism, and Democracy*, 35.

²⁶ Westbrook, *John Dewey and American Democracy*, 141.

²⁷ Interesting to note, however, is the way in which James, in *Pragmatism*, anticipated pragmatism's role in the feud between the humanists and the positivists, or what James called the tender-minded and the tough-minded. Pragmatism came not to verify or falsify either tough-minded or tender-minded inquiry but to mediate the two, to facilitate the emergence of fruitful inquiry that would serve human interests. He sets this up in the first chapter of *Pragmatism*. See "The Present Dilemma in Philosophy," in *The Writings of William James*, 362-376.

²⁸ William James, "What Pragmatism Means," in *The Writings of William James*, 390.

²⁹ James, "What Pragmatism Means," 379.

³⁰ James, "Philosophical Conceptions and Practical Results," *The Writings of William James*, 348. Dewey repeats James's sentiment in *Experience and Nature*: "[W]hen an event has meaning, its potential consequences become its integral and funded feature. When the potential consequences are important and repeated, they form the very nature and essence of a thing, its defining identifying, and distinguishing form" [John Dewey, *Experience and Nature* (New York: Dover Publications, Inc., 1958), 182.

³¹ James, "Pragmatism's Conception of Truth," in *The Writings of William James*, 431.

³² McDermott, *Streams of Experience*, 128.

³³ McDermott, *Streams of Experience*, 127.

³⁴ Dewey, *Human Nature and Conduct* (Mineola, N.Y.: Dover Publications, Inc., 2002), 207.

³⁵ Rhetoric in this sense is a process of steering, of directing, of attempting to accomplish the tasks at hand. As such, these "pragmatic" questions should be familiar to rhetoricians throughout the ages. A brief, and consequently, highly selective, list of various definitions of rhetoric should make this point clear. Aristotle: "Rhetoric may be

defined as the faculty of observing in any given case the available means of persuasion.” Francis Bacon: “[R]hetoric is a technique making it possible] to apply reason to imagination, for the better moving of the will” (from *Advancement in Learning*, Book 2). Patricia Bizzell: “Rhetoric is the study of the personal, social, and historical elements in human discourse—how to recognize them, interpret them, and act on them, in terms both of situational context and of verbal style”; see “Foundational and Anti-Foundationalism,” in *Academic Discourse and Critical Consciousness* (Pittsburgh: Pittsburgh University Press, 1992), 218. Donald C. Bryant: “Rhetoric is the method, the strategy, the organon of the principles for deciding best the undecidable questions, for arriving at solutions of the unsolvable problems, for instituting method in those vital phases of human activity where no method is inherent in the total subject matter of decision. The resolving of such problems . . . is rhetoric”; see “Rhetoric: Its Function and Scope,” In *The Province of Rhetoric*, ed. Joseph Schwartz and John A. Rycenga (New York: Ronald Press, 1965), 11.

These four definitions try to understand the place of rhetoric in the process of steering one’s life, the process of cutting a path through the tissue of experience. These definitions of rhetoric try to deal with the same questions with which pragmatists try to deal. I will more specifically discuss pragmatism’s answer to these questions, as the questions regard the role of rhetoric, in the conclusion of this thesis.

³⁶ Dewey, *Experience and Nature*, 174.

³⁷ Dewey, *Experience and Nature*, 186.

³⁸ James, “A World of Pure Experience,” in *The Writings of William James*, 214.

³⁹ Dewey, *Experience and Nature*, 63-64.

⁴⁰ James, quoted in John J. McDermott, *The Culture of Experience*, 67.

⁴¹ Emphasis in original. James, “What Pragmatism Means,” 380.

⁴² James, “What Pragmatism Means,” 390.

⁴³ James, “The Moral Philosopher and the Moral Life,” 622.

⁴⁴ Dewey, *Experience and Nature*, 167.

⁴⁵ Emphasis in original. James, “Percept and Concept—Import of Concepts,” in *The Writings of William James*, 234.

⁴⁶ James, “Percept and Concept—Import of Concepts,” 239.

⁴⁷ What does a closed-system of thinking mean? Much of Plato and Aristotle's philosophy, for example, is trapped within a closed-system of thought and meaning. If there is a division between practical and speculative intellects, or parts of the soul, as Plato and Aristotle believed, then practical affairs are qualitatively distinct—less meaningful, in fact—than speculative affairs. The practical life, in this system of thought, will always amount to less—qualitatively less—than the speculative life. Pragmatism does not buy into the distinction between the practical and the speculative. Richard Rorty describes this as the pragmatic move toward edification. He writes, “the Platonic-Aristotelian view [is] that the *only* way to be edified is to know what is out there (to reflect the facts accurately—to realize our essence by knowing essences) and the [pragmatic] view [is] that the quest for truth is just one among many ways in which we might be edified.” See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, N.J.: Princeton University Press, 1979), 360.

⁴⁸ McDermott, *Streams of Experience*, 152.

⁴⁹ James quoted in John J. McDermott, *Streams of Experience*, 26.

⁵⁰ Dewey, *Human Nature and Conduct*, 277.

⁵¹ James, “Pragmatism's Conception of Truth,” 438.

⁵² According to Rorty, one's “final vocabulary” is “a set of words with which [all human beings] employ to justify their actions, their beliefs, and their lives. These are the words in which we formulate praise of our friends and contempt for our enemies, our long-term projects, our deepest self-doubts and our highest hopes. They are the words in which we tell, sometimes prospectively and sometimes retrospectively, the story of our lives.” See Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 73.

⁵³ James quoted in John J. McDermott, *The Culture of Experience*, 21.

⁵⁴ James, “Philosophical Conceptions and Practical Results,” 347.

⁵⁵ Dewey, *The Quest for Certainty: The Later Works of John Dewey, 1925-1953: Volume 4* (Carbondale: Southern Illinois University Press, 1988), 6.

⁵⁶ Dewey, *The Quest for Certainty*, 20.

⁵⁷ Dewey, *The Quest for Certainty*, 224-25.

⁵⁸ Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge: Harvard University Press, 1998), 13.

⁵⁹ Dewey, *Experience and Nature*, 169.

⁶⁰ McDermott, *The Culture of Experience*, 79.

⁶¹ Emphasis mine. Dewey, *Experience and Nature*, 166.

⁶² James, "Pragmatism and Religion," in *The Writings of William James*, 466.

⁶³ James, "Pragmatism and Religion," 466-67.

⁶⁴ James, "Pragmatism and Common Sense," in *The Writings of William James*, 418.

⁶⁵ McDermott, *The Culture of Experience*, 135.

⁶⁶ See Dewey, *Experience and Nature*, 173.

⁶⁷ James, "The Dilemma of Determinism," in *The Writings of William James*, 610.

⁶⁸ Robert Hariman, *Political Style: The Artistry of Power* (Chicago: The University of Chicago Press, 1995), 2.

⁶⁹ Hariman, *Political Style*, 177.

⁷⁰ Hariman, *Political Style*, 178.

⁷¹ Hariman, *Political Style*, 18.

⁷² Hariman, *Political Style*, 102.

⁷³ I will explicate the methodological and rhetorical components of the pragmatic political style in the concluding chapter of this thesis.

⁷⁴ Biographical and historical information for this section has been taken from Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge: Harvard University Press, 1984); Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence: University Press of Kansas, 1993); and Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* (Rutherford, England: Fairleigh Dickinson University Press, 1994).

⁷⁵ He was born Louis David Brandeis, but as a teenagers, Brandeis changed his middle name to Dembitz in honor of his uncle Lewis Dembitz, whom Brandeis respected and paid tribute his entire life. Philippa Strum quotes Brandeis as saying, "With him, life was unending intellectual ferment. . . . In the diversity of his intellectual interests, in his

longing to discover truths, in his pleasure in argumentation and the process of thinking, he reminded one of the Athenians.” See Strum, *Louis D. Brandeis*, 11.

⁷⁶ See Strum, *Louis D. Brandeis*, 18.

⁷⁷ Quoted in Strum, *Louis D. Brandeis*, 61.

⁷⁸ Louis D. Brandeis, *Other People’s Money* (New York: Frederick A. Stokes Company, 1914), 163-164.

⁷⁹ Strum, *Louis D. Brandeis*, 114.

⁸⁰ Strum, *Louis D. Brandeis*, 292-93.

⁸¹ Trevor Parry-Giles, “To Produce a ‘Judicious Choice’: Presidential Responses to the Exercise of Advice and Consent by the U.S. Senate on Supreme Court Nominations,” unpublished paper presented at the 2004 Texas A&M University Presidential Rhetoric Conference, March 5, 2004.

⁸² Strum, *Louis D. Brandeis*, 413.

⁸³ William James to Alice Howe Gibbens James, August 30, 1906, *The Correspondence of William James, Vol. 11*, ed. Ignas K. Skrupskelis and Elizabeth M. Berkeley (Charlottesville: University of Virginia Press, 2003), 263.

⁸⁴ Strum, *Louis D. Brandeis*, 45.

⁸⁵ Throughout his correspondence, Brandeis mentions Dewey a number of times. For a complete list, see the John Dewey entry in the “Cumulative Index” to Brandeis’s correspondence, found in *Letters of Louis D. Brandeis, Vol. 5, 1921-1941*, ed. Melvin I. Urofsky and David E. Levy (Albany: State University of New York Press, 1978), 694. Dewey also worked with Felix Frankfurter, Brandeis’s most trusted political and judicial ally, and close personal friend, in founding the ACLU.

⁸⁶ John Dewey quoted in Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: W. W. Norton & Company, 1995), 324.

⁸⁷ Hariman, *Political Style*, 4.

⁸⁸ See “How Far Have We Come on the Road to Industrial Democracy? – An Interview,” in *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis*, ed. Osmond K. Fraenkel (New York: The Viking Press, 1934), 46.

⁸⁹ See Brandeis’s dissenting opinion in *Olmstead v. U.S.* (1928), 277 U.S. 438 at 478.

⁹⁰ Brandeis, “Zionism and Patriotism,” in *The Curse of Bigness*, 214.

⁹¹ Throughout this thesis, I use “American” and “America” in the same way that James, Dewey, and Brandeis used the terms—to refer generally to the people, culture and ideas of the United States (even though it is impossible to use one category to refer to such things). This is done with the understanding that “America” in fact denotes more than just the United States, but the hope is to provide some continuity in style between James, Dewey, and Brandeis and the current undertaking.

Notes to Chapter II

¹ McDermott, *The Culture of Experience*, 101.

² William James, “The Sentiment of Rationality,” in *The Writings of William James*, 339.

³ Emphasis in original. James, “The Sentiment of Rationality,” 331.

⁴ James, “The Essence of Humanism,” in *The Writings of William James*, 306.

⁵ See Louis D. Brandeis, “Industrial Co-Operation,” in *The Curse of Bigness*, 36.

⁶ Strum, *Brandeis*, 37.

⁷ Baskerville, *Of Laws and Limitations*, 86-87.

⁸ See Lewis J. Paper, *Brandeis* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1983), 34-35.

⁹ Louis D. Brandeis to Samuel Dennis Warren, April 8, 1905, in *Letters of Louis D. Brandeis: Volume I, 1870-1907*, ed. Melvin I. Urofsky and David W. Levy (Albany, N.Y.: State University of New York Press, 1971), 303.

¹⁰ Louis D. Brandeis to Alice Goldmark, December 28, 1890, in *Letters of Louis D. Brandeis: Volume I*, 97.

¹¹ Pound quoted in Baskerville, *Of Laws and Limitations*, 87. Also see Strum, *Brandeis*, 38; Paper, *Brandeis*, 34.

¹² Quoted in Paper, *Brandeis*, 34.

¹³ Brandeis quoted in Baskerville, *Of Laws and Limitations*, 88.

¹⁴ Samuel Warren and Louis D. Brandeis, “The Right to Privacy,” in *The Curse of Bigness*, 292. Originally printed in *Harvard Law Review* 4 (1890). Reprinted in *The Curse of Bigness*, 289-315. Also available online: <http://www.louisville.edu/library/law/brandeis/privacy.html>. All references hereafter will refer to the pagination of *The Curse of Bigness*. All references to this work will hereafter be cited parenthetically.

¹⁵ Denis Brion grounds Cardozo in the tradition of legal pragmatism, the same tradition in which I have been grounding Brandeis. See Denis J. Brion, *Pragmatism and Judicial Choice* (New York: Peter Lang, 2003), 264. Cardozo was also “personally and professionally” closest to Brandeis on the Supreme Court. See Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago: The University of Chicago Press, 1990), 4.

¹⁶ Cardozo quoted in Brion, *Pragmatism and Judicial Choice*, 264.

¹⁷ John Dewey, *Liberalism and Social Action* (Amherst, N.Y.: Prometheus Books, 2000), 61.

¹⁸ Dewey, *Liberalism and Social Action*, 61.

¹⁹ They write, “The general object in view,” they say, “is to protect the privacy of private life, and to whatever degree and in whatever connection a man’s life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.” See Brandeis, “The Right to Privacy,” 311. There is, of course, “elasticity” to this guideline, but it must be a guideline nonetheless, for the public has a right to know matters of legitimate public concern.

²⁰ This distinction is beginning to breakdown, however. Originally, the legal distinction had to do with the number of people one could reach through oral and written publication. Because written publication could reach more people, the damages for libel were greater. Because oral publication could reach fewer people, the damages for slander were less. But since the technological developments of the mass media make the number of people one can reach through oral or written publications largely the same—with television a broadcasted oral statement can now reach as many people, if not more, as a textually published statement—the respective damages associated with slander and libel are no longer legally significant.

²¹ James, “The Moral Philosopher and the Moral Life,” 622.

²² John Dewey, *How We Think* (Amherst, N.Y.: Prometheus Books, 1991), 27-28.

²³ Dewey, *How We Think*, 66-67.

- ²⁴ Dewey, *How We Think*, 67.
- ²⁵ James, “The Sentiment of Rationality,” 317.
- ²⁶ Emphasis in original. James, “The Sentiment of Rationality,” 326. All references to this work will hereafter be cited parenthetically.
- ²⁷ Quoted in Brandeis, *The Curse of Bigness*, 270.
- ²⁸ See Brandeis’s address “The Employer and Trade Unions,” in *Business—A Profession* (Buffalo, N.Y.: William S. Hein & Co., Inc., 1996), 16.
- ²⁹ See Brandeis, “Industrial Co-Operation,” 35.
- ³⁰ See Brandeis, “Big Business and Industrial Liberty,” in *The Curse of Bigness*, 38-39.
- ³¹ See Brandeis, “The Regulation of Competition Against the Regulation of Monopoly,” in *The Curse of Bigness*, 109.
- ³² Brandeis, “Big Business and Industrial Liberty,” 39.
- ³³ Brandeis, “The Regulation of Competition Against the Regulation of Monopoly,” 110.
- ³⁴ Brandeis, “Industrial Co-Operation,” 35.
- ³⁵ Brandeis, “Industrial Co-Operation,” 36.
- ³⁶ Brandeis, “Industrial Co-Operation,” 37.
- ³⁷ Brandeis, “An Interview,” January 27, 1913, in *The Curse of Bigness*, 41.
- ³⁸ See “Efficiency Systems and Labor,” in *The Curse of Bigness*, 48.
- ³⁹ See Brandeis, “The Democracy of Business,” in *The Curse of Bigness*, 142.
- ⁴⁰ John Dewey, *Individualism Old and New* (Amherst, N.Y.: Prometheus Books, 1999), 16-17. All references to this work will hereafter be cited parenthetically.
- ⁴¹ John Dewey, *Art as Experience* (New York: Perigee Books, 1934), 14.
- ⁴² Brandeis, “The Democracy of Business,” 140-141.
- ⁴³ See Brandeis, “The Constitution and the Minimum Wage,” in *The Curse of Bigness*, 68-69.

⁴⁴ See Brandeis, “On Maintaining Makers’ Prices,” in *The Curse of Bigness*, 126.

⁴⁵ Dewey, *Art as Experience*, 13.

⁴⁶ See Brandeis, “An Essential of Lasting Peace,” in *The Curse of Bigness*, 269.

⁴⁷ Dewey, *Art as Experience*, 18.

⁴⁸ 208 U.S. 412.

⁴⁹ Quoted in Leon Stein and Philip Taft’s Introduction to Louis D. Brandeis and Josephine Goldmark, *Women in Industry* (New York: Arno Press, Inc., 1969).

⁵⁰ Brandeis first started this practice in the late 1890s when he fought against the West End Company in Boston. Brandeis represented a small group of citizens concerned that West End would monopolize Boston’s transportation system. Brandeis won the fight and refused to accept payment for what he considered work of public importance. Ernest Poole tells the story as follows: “‘When I asked Mr. Brandeis for his bill,’ the man at the head of this movement told me, ‘I expected to pay a fee of five thousand dollars at least.’ ‘There is no fee,’ he said. ‘This is part of a plan of mine.’ And he added that as soon as he could do so he intended giving the larger part of his time freely to public work.” See Poole’s Introduction to *Business—A Profession*, xv.

⁵¹ *Lochner v. New York* (1905), 198 U.S. 45 at 54.

⁵² 169 U.S. 366.

⁵³ 198 U.S. 45 at 56.

⁵⁴ 198 U.S. 45 at 53.

⁵⁵ 198 U.S. 45 at 57.

⁵⁶ 198 U.S. 45 at 57.

⁵⁷ 198 U.S. 45 at 64.

⁵⁸ 198 U.S. 45 at 75-76.

⁵⁹ Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York: Collier Books, 1961), 40.

⁶⁰ Konefsky, *The Legacy of Holmes and Brandeis*, 49.

⁶¹ Strum, *Brandeis*, 119.

⁶² Brandeis's Brief in *Muller v. Oregon*, while it supplied the sociological evidence to support the legal reasoning the Court had laid down in *Lochner*, initiated a cascade of statutes and law suits that, in effect, enabled all states to limit the number of hours *anyone*, women or men, could work in a day. The Brandeis Brief, therefore, started the momentum that overturned the social, economic, and legal reasoning the Court had implemented in *Lochner*.

⁶³ This syllogism is a summary of the two pages of legal argument Brandeis includes at the beginning of the Brief. A complete copy of the Brandeis Brief can be found in Louis D. Brandeis and Josephine Goldmark, *Women in Industry*. For Brandeis's two pages of legal arguments, see *Women in Industry*, 9-10. All references to this work will hereafter be cited parenthetically.

⁶⁴ Strum, *Brandeis*, 128.

⁶⁵ See *Muller v. Oregon* (1908), 208 U.S. 412 at 419.

⁶⁶ Lawrence Fraser Abbott, March 21, 1908, in *The Outlook* 88 (1908): 618. Quoted in *The Letters of Louis D. Brandeis, Volume II, 1907-1912*, ed. Melvin I. Urofsky and David W. Levy (Albany: State University of New York Press, 1972), 107.

⁶⁷ See Leon Stein and Philip Taft's introduction to *Women in Industry*.

⁶⁸ James, "A World of Pure Experience," in *The Writings of William James*, 212.

⁶⁹ Dewey, *Human Nature and Conduct*, 313.

⁷⁰ James, "The Stream of Thought," *The Writings of William James*, 29.

⁷¹ John Dewey, *Experience and Nature* (New York: Dover Publications, Inc., 1958), 4a-1.

⁷² Dewey, *Experience and Nature*, 41.

⁷³ Dewey, *Human Nature and Conduct*, 207.

⁷⁴ Dewey, *Art as Experience*, 14.

⁷⁵ Emphasis added. See *The Brandeis Guide to the Modern World*, ed. Alfred Lief (Boston: Little, Brown and Company, 1941), 4-5.

⁷⁶ Emphasis added. See *The Brandeis Guide to the Modern World*, 35.

⁷⁷ Emphasis added. See *The Brandeis Guide to the Modern World*, 263.

⁷⁸ Emphasis added. See Brandeis, "Letter to Robert W. Bruere," in *The Curse of Bigness*, 271.

⁷⁹ Emphasis added. See Brandeis, "Efficiency and Social Ideals," in *The Curse of Bigness*, 51.

⁸⁰ Emphasis added. See Brandeis, "Big Business and Industrial Liberty," 38.

⁸¹ Emphasis added. See Brandeis, "Shall We Abandon the Policy of Competition?" in *The Curse of Bigness*, 104.

⁸² Emphasis added. See Brandeis, "The Regulation of Competition Against the Regulation of Monopoly," in *The Curse of Bigness*, 110.

⁸³ Emphasis added. See Brandeis, "Competition," in *The Curse of Bigness*, 115-116.

⁸⁴ McDermott, *The Culture of Experience*, 141-142.

Notes to Chapter III

¹ The address has been reprinted a number of times, including in *The Curse of Bigness*, 316-326.

² Louis Brandeis, "The Living Law," in *The Curse of Bigness*, 316. All references to this work will hereafter be cited parenthetically.

³ See McDermott's Introduction to *The Philosophy of John Dewey*, ed. John J. McDermott (Chicago: The University of Chicago Press, 1981), xxvi.

⁴ Brandeis wrote several drafts of this dissent but the Supreme Court eventually dismissed the case for want of jurisdiction. The full text of his dissent can be found in *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (Cambridge: Harvard University Press, 1957), 119-63.

⁵ See *The Unpublished Opinions of Mr. Justice Brandeis*, 151-152.

⁶ Strum, *Brandeis: Beyond Progressivism*, 98.

⁷ Stanley Fish, *There's No Such Thing as Free Speech ... And It's a Good Thing Too* (Cambridge: Oxford University Press, 1994), viii.

⁸ Fish, *There's No Such Thing as Free Speech*, 4.

⁹ Stanley Fish, *The Trouble with Principle*, 146.

¹⁰ Fish, *There's No Such Thing as Free Speech*, 209.

¹¹ Fish, *There's No Such Thing as Free Speech*, 209.

¹² Larry A. Hickman, "Pragmatism, Postmodernism, and Global Citizenship," forthcoming in *Metaphilosophy*.

¹³ Hickman, "Pragmatism, Postmodernism, and Global Citizenship."

¹⁴ Strum, *Brandeis: Beyond Progressivism*, 70.

¹⁵ Don R. Le Duc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," *Quarterly Journal of Speech* 62 (1976): 284.

¹⁶ Walter Ulrich, "The Creation of a Legacy: Brandeis' Concurring Opinion in *Whitney V. California*," *The Southern Speech Communication Journal* 50 (1985): 143-144.

¹⁷ Quoted in Don R. Le Duc, "'Free Speech' Decisions and the Legal Process," 284.

¹⁸ Bradley C. Bobertz, "The Brandeis Gambit: The Making of America's 'First Freedom,' 1909-1931," *William and Mary Law Review* 40 (1999): 632.

¹⁹ Bobertz, "The Brandeis Gambit," 645.

²⁰ Alpheus Thomas Mason quoted in Konefsky's *The Legacy of Holmes and Brandeis*, 100.

²¹ *New York Central Railroad Company v. Winfield* (1917), 244 U.S. 147.

²² 244 U.S. 147 at 148.

²³ 244 U.S. 147 at 149.

²⁴ 244 U.S. 147 at 152.

²⁵ 244 U.S. 147 at 153.

²⁶ 244 U.S. 147 at 158.

²⁷ 244 U.S. 147 at 158.

²⁸ 244 U.S. 147 at 158.

²⁹ 244 U.S. 147 at 160.

³⁰ 244 U.S. 147 at 160.

³¹ 244 U.S. 147 at 160-161.

³² See 244 U.S. 147 at 167-169.

³³ 244 U.S. 147 at 164.

³⁴ 244 U.S. 147 at 164.

³⁵ 244 U.S. 147 at 165.

³⁶ 244 U.S. 147 at 166.

³⁷ The essay was originally published in *Philosophical Review* 33 (1924): 560-572; and in *Cornell Law Quarterly* 10 (1924): 17-27. I have consulted the version found in *Essays on Politics and Society, 1923-1924: The Middle Works of John Dewey, Volume 15* (Carbondale: Southern Illinois University Press, 1988), 65-77.

³⁸ Richard Posner, "Pragmatic Adjudication," in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, ed. Morris Dickstein (Durham: Duke University Press, 1998), 236.

³⁹ Posner, "Pragmatic Adjudication," 247.

⁴⁰ Richard Posner, *Law, Pragmatism, and Democracy*, 118.

⁴¹ See 248 U.S. 215.

⁴² 248 U.S. 215 at 236.

⁴³ 248 U.S. 215 at 251.

⁴⁴ Brandeis believes it necessary for legislatures, not courts, to experiment with laws that deal in different ways with the changing nature of society. Legislatures must be free to

experiment with the management of public and private interests. See 248 U.S. 215 at 262-263.

⁴⁵ Baskerville, *Of Laws and Limitations*, 230.

⁴⁶ See *Sugarman v. United States* (1919), 249 U.S. 182.

⁴⁷ See 251 U.S. 466.

⁴⁸ The majority wrote, “The purpose is manifest, however the statement of the article may be estimated, whether as criminal means, violations of law, or the exercise of free speech and of the press, and its statements were deliberate and willfully false; the purpose being to represent that the war was not demanded by the people but was the result of the machinations of executive power, and thus to arouse resentment to it and what it would demand of ardor and effort. In final comment we may say that the article in effect justified the German aggressions.” See 251 U.S. 466 at 480-481.

⁴⁹ 251 U.S. 466 at 472.

⁵⁰ 251 U.S. 466 at 475.

⁵¹ See 252 U.S. 239.

⁵² 252 U.S. 239 at 252.

⁵³ 251 U.S. 466 at 483-484.

⁵⁴ The majority said the pamphlet was “too long to be quoted in full.” See 252 U.S. 239 at 245. Brandeis believed, in effect, that it was irresponsible of the majority not to put the language of the entire pamphlet in literary context.

⁵⁵ 252 U.S. 239 at 266-267.

⁵⁶ He wrote, “War is ordinarily the result of many co-operating causes, many different conditions, acts and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimizes both prejudice and other sources of error; for individual, and classes of individuals, attach significance to those things which are significant to them, and, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis, so as to weigh and value the various elements, the historians differ necessarily in their judgments.... It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world’s history.” See 252 U.S. 239 at 267.

⁵⁷ 252 U.S. 239 at 272.

⁵⁸ 254 U.S. 325.

⁵⁹ 254 U.S. 325 at 337-338.

⁶⁰ 254 U.S. 325 at 336.

⁶¹ 252 U.S. 239 at 271-272.

⁶² 251 U.S. 466 at 493.

⁶³ 251 U.S. 466 at 494-495.

⁶⁴ 252 U.S. 239 at 269.

⁶⁵ 254 U.S. 325 at 338.

⁶⁶ 254 U.S. 325 at 343.

⁶⁷ 252 U.S. 239 at 271.

⁶⁸ 251 U.S. 466 at 482.

⁶⁹ Hand quoted in Baskerville, *Of Laws and Limitations*, 336.

⁷⁰ See 274 U.S. 357.

⁷¹ Philippa Strum, *Brandeis: Beyond Progressivism*, 126.

⁷² See 274 U.S. 357 at 363-365.

⁷³ Whitney was arrested specifically for the part she played in the Communist Labor Party of California, but she played a prominent role in a number of other activities that caught the eye of California law enforcement. For a detailed account of Whitney's arrest, trial, conviction, and appeal to the Supreme Court, see Vincent Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*," *William and Mary Law Review* 29 (1988): 653-665.

⁷⁴ Quoted in 274 U.S. 357 at 360.

⁷⁵ 274 U.S. 357 at 371.

⁷⁶ 274 U.S. 357 at 372.

⁷⁷ 274 U.S. 357 at 379.

⁷⁸ 274 U.S. 357 at 373.

⁷⁹ 274 U.S. 357 at 376.

⁸⁰ 274 U.S. 357 at 375.

⁸¹ 274 U.S. 357 at 375.

⁸² 274 U.S. 357 at 375.

⁸³ 274 U.S. 357 at 375.

⁸⁴ 274 U.S. 357 at 375-376.

⁸⁵ 274 U.S. 357 at 376.

⁸⁶ 274 U.S. 357 at 377.

⁸⁷ Blasi, "The First Amendment and the Ideal of Civic Courage," 684.

⁸⁸ Bobertz, "The Brandeis Gambit," 645.

⁸⁹ John Dewey, "Experience as Aesthetic," in *The Philosophy of John Dewey*, 538.

⁹⁰ Ulrich, "The Creation of a Legacy," 153.

⁹¹ 277 U.S. 438.

⁹² 277 U.S. 438 at 465.

⁹³ 277 U.S. 438 at 466.

⁹⁴ 277 U.S. 438 at 467 he says, "The common-law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained."

⁹⁵ 277 U.S. 438 at 468.

⁹⁶ James Boyd White, "Judicial Criticism," *Georgia Law Review* 20 (1986): 855.

⁹⁷ 277 U.S. 438 at 473.

⁹⁸ Brandeis writes, “The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him.” See 277 U.S. 438 at 475-476.

⁹⁹ White, “Judicial Criticism,” 860.

¹⁰⁰ 277 U.S. 438 at 478.

¹⁰¹ 277 U.S. 438 at 479.

¹⁰² He writes, “Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.” See 277 U.S. 438 at 485.

¹⁰³ 254 U.S. 443.

¹⁰⁴ 257 U.S. 312.

¹⁰⁵ 254 U.S. 443 at 473-474.

¹⁰⁶ 257 U.S. 312 at 327.

¹⁰⁷ 257 U.S. 312 at 328.

¹⁰⁸ 257 U.S. 312 at 330.

¹⁰⁹ Felix Frankfurter quoted in Konefsky’s *The Legacy of Holmes and Brandeis*, 125.

¹¹⁰ 254 U.S. 443 at 481.

¹¹¹ 254 U.S. 443 at 488.

¹¹² 257 U.S. 312 at 368.

¹¹³ 257 U.S. 312 at 357.

¹¹⁴ 257 U.S. 312 at 355.

¹¹⁵ 257 U.S. 312 at 355.

¹¹⁶ John Dewey, *Freedom and Culture* (Amherst, New York: Prometheus Books, 1989), 55.

¹¹⁷ See John Dewey, *The Public and Its Problems* (Athens, Ohio: Swallow Press, 1927), 30.

¹¹⁸ Dewey, *The Public and Its Problems*, 31. On page 34 he reiterates: “The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling-blocks in the way of orderly and directed change; it is an invitation to revolt and revolution.”

¹¹⁹ Dewey, *The Public and Its Problems*, 33-34.

¹²⁰ Brandeis’s support of prohibition is a strange part of his judicial legacy. It would be beyond the scope of this project to deal with it directly. But for a good account of his judicial approach see Baskerville, *Of Laws and Limitations*, 256-259.

¹²¹ 285 U.S. 262.

¹²² 285 U.S. 262 at 278.

¹²³ 285 U.S. 262 at 279.

¹²⁴ 285 U.S. 262 at 280.

¹²⁵ 285 U.S. 262 at 284. Later Brandeis writes, “[T]he business of supplying to others for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community affected. If it is a matter of public concern, it may be regulated, whatever the business. The public’s concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation.” See 285 U.S. 262 at 301.

¹²⁶ 285 U.S. 262 at 304.

¹²⁷ 285 U.S. 262 at 305.

¹²⁸ 285 U.S. 262 at 310-311.

¹²⁹ For a thorough history of this view see Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Powers, and the Politics of the Federal Courts in Twentieth-Century America* (New Haven: Yale University Press, 2000), 11-38.

¹³⁰ 304 U.S. 64.

¹³¹ Quoted in Brandeis's majority opinion in *Erie*, 304 U.S. 64 at 70.

¹³² 304 U.S. 64 at 71.

¹³³ 304 U.S. 64 at 72.

¹³⁴ 304 U.S. 64 at 74.

¹³⁵ 304 U.S. 64 at 74.

¹³⁶ 304 U.S. 64 at 77-78.

¹³⁷ Holmes quoted in Brandeis *Erie* opinion, 304 U.S. 64 at 79.

¹³⁸ 304 U.S. 64 at 78.

¹³⁹ Purcell, *Brandeis and the Progressive Constitution*, 181.

¹⁴⁰ John Dewey, "Creative Democracy: The Task before Us," in *Pragmatism and Religion*, ed. Stuart Rosenbaum (Urbana: University of Illinois Press, 2003), 93.

¹⁴¹ Quoted in John McDermott's Introduction to *The Writings of William James*, xxx.

¹⁴² McDermott writes, "Belief for James is a wedge into the tissue of experience, for the purpose of liberating dimensions otherwise closed to the agnostic standpoint." See his Introduction to *The Writings of William James*, xxx.

¹⁴³ William James, "The Moral Philosophy and the Moral Life," 623.

¹⁴⁴ Fish, *The Trouble with Principle*, 146.

¹⁴⁵ Fish, *The Trouble with Principle*, 65.

¹⁴⁶ Dewey, "Experience as Aesthetic," 540.

¹⁴⁷ James, “The Moral Philosophy and the Moral Life,” 610.

¹⁴⁸ William James, “On a Certain Blindness in Human Beings,” in *The Writings of William James*, 631.

¹⁴⁹ See *The Unpublished Opinions of Mr. Justice Brandeis*, 140-141.

¹⁵⁰ 244 U.S. 590.

¹⁵¹ 244 U.S. 590 at 614-615.

¹⁵² William James, “What Makes a Life Significant,” 650.

¹⁵³ Dewey, “Experience as Aesthetic,” 538.

¹⁵⁴ William James, “A World of Pure Experience,” 212-213.

Notes to Chapter IV

¹ Stuart Rosenbaum, “Introduction” to *Pragmatism and Religion*, 1.

² Rosenbaum, “Introduction,” 2.

³ See Richard J. Bernstein, “Pragmatism’s Common Faith,” in *Pragmatism and Religion*, 129-141.

⁴ William James, “Pragmatism and Religion,” 472.

⁵ John Dewey, *A Common Faith* (New Haven: Yale University Press, 1934), 57.

⁶ Philippa Strum, *Louis D. Brandeis*, xi.

⁷ William James, “Philosophical Conceptions and Practical Results,” 348. All references to this work will hereafter be cited parenthetically.

⁸ James, “Pragmatism and Religion,” 467. All references to this work will hereafter be cited parenthetically.

⁹ Dewey, *A Common Faith*, 9-10. All references to this work will hereafter be cited parenthetically.

¹⁰ See “Pragmatism and Religion,” 464.

¹¹ Dewey, *A Common Faith*, 19.

¹² William James, "The Energies of Men," in *The Writings of William James*, 674.

¹³ Steven C. Rockefeller, "Faith and Ethics in an Interdependent World," in *Pragmatism and Religion*, 305.

¹⁴ Stuart Rosenbaum, "Morality and Religion: Why Not Pragmatism?" in *Pragmatism and Religion*, 183.

¹⁵ Douglas R. Anderson, "Awakening in the Everyday: Experiencing the Religious in the American Philosophical Tradition," in *Pragmatism and Religion*, 148.

¹⁶ For Brandeis's evolution into a Zionist, see, for example, Baskerville, *Of Law and Limitations*, 192-226; Strum, *Louis D. Brandeis*, 224-290; Strum, *Brandeis: Beyond Progressivism*, 100-115.

¹⁷ Joe Stork and Sharon Rose, "Zionism and American Jewry," *Journal of Palestine Studies* 3 (1974): 41.

¹⁸ See Strum, *Louis D. Brandeis*, 6-7.

¹⁹ Gerald Sorin, *A Time for Building: The Third Migration, 1880-1920* (Baltimore: The Johns Hopkins University Press, 1992), 10.

²⁰ See Sorin, *A Time for Building*, 219.

²¹ Sorin, *A Time for Building*, 226.

²² Sorin, *A Time for Building*, 222-232.

²³ See Baskerville, *Of Law and Limitations*, 198-200.

²⁴ Baskerville, *Of Law and Limitations*, 213.

²⁵ Strum, *Louis D. Brandeis*, 260.

²⁶ Michael A. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* (Detroit, Mich.: Wayne State University Press, 1988), 294.

²⁷ Louis Brandeis, "Zionism and Patriotism," in *The Curse of Bigness*, 209.

²⁸ Brandeis was initially a very charismatic and appealing Zionist leader. But in the early years of the 1920s, Brandeis became a divisive figure in the eyes of many Jews. Eastern European Jews, for example, saw American Progressive Zionism as “devoid of yiddishkayt, the stuff of Jewish peoplehood. Brandeis ignored their complaints, further antagonizing the pre-1914 leadership and its immigrant constituency. Brandeis also separated himself from the eastern European rank and file by his refusal to be active in the World Zionist Organization and by his attempt to reach a reconciliation with wealthy German Jews.” See Sorin, *A Time for Building*, 231.

²⁹ Sorin, *A Time for Building*, 219.

³⁰ Sorin, *A Time for Building*, 230.

³¹ Sorin, *A Time for Building*, 230.

³² Goldman’s quote and the entire address can be found in *Brandeis on Zionism* (Washington, D.C.: Zionist Organization of America, 1942), 12-35.

³³ Brandeis, “The Jewish Problem, How to Solve It,” in *Brandeis on Zionism*, 12-13. All references to this work will hereafter be cited parenthetically.

³⁴ On page 14 of “The Jewish Problem,” Brandeis says, “The meaning of the word Jewish in the term Jewish Problem must be accepted as co-extensive with the disabilities which it is our problem to remove. It is the non-Jews who create the disabilities and in so doing give definition to the term Jew. Those disabilities extend substantially to all of Jewish blood.”

³⁵ William James, “The Will to Believe,” in *The Will to Believe and Other Essays in Popular Philosophy* (New York: Dover Publications, Inc., 1956), 2. All references to this work will hereafter be cited parenthetically.

³⁶ See his address “Jews and Arabs,” in *Brandeis on Zionism*, 153.

³⁷ See his address “True Americanism,” in *Brandeis on Zionism*, 8.

³⁸ Brandeis, “True Americanism,” 9.

³⁹ Brandeis, “The Common Cause of the Jewish People,” in *Brandeis on Zionism*, 100.

⁴⁰ Brandeis, “A Call to the Educated Jew,” in *Brandeis on Zionism*, 66-67.

⁴¹ Brandeis, “A Call to the Educated Jew,” 67-68.

- ⁴² Brandeis, "Zionism Brings Understanding and Happiness," in *Brandeis on Zionism*, 111.
- ⁴³ Brandeis, "The Jewish People Should Be Preserved," in *Brandeis on Zionism*, 44.
- ⁴⁴ Brandeis, "The Common Cause of the Jewish People," 108.
- ⁴⁵ Brandeis, "The Time is Urgent," in *Brandeis on Zionism*, 114.
- ⁴⁶ Brandeis, "Not by Charity Alone," in *Brandeis on Zionism*, 85.
- ⁴⁷ Brandeis, "Palestine Has Developed Jewish Character," in *Brandeis on Zionism*, 148.
- ⁴⁸ Dewey, *A Common Faith*, 50-51.
- ⁴⁹ Brandeis, "The Time is Urgent," 115.
- ⁵⁰ Emphasis in original. See his Preface to *The Will to Believe and Other Essays*, xi.
- ⁵¹ See his preface to *The Will to Believe and Other Essays*, xiii.
- ⁵² Brandeis to Henry Hurwitz, November 29, 1939, in *Letters of Louis D. Brandeis, Vol. V (1921-1941)*, ed. Melvin I. Urofsky and David W. Levy (Albany: State University of New York Press, 198), 630-631.
- ⁵³ Brandeis, "A Great Vision," in *Brandeis on Zionism*, 37-38.
- ⁵⁴ Brandeis, "A Call to the Educated Jew," 63.
- ⁵⁵ Brandeis, "Efficiency in Public Service," 123.
- ⁵⁶ Brandeis, "The Pilgrims Had Faith," in *Brandeis on Zionism*, 127.
- ⁵⁷ Brandeis, "Palestine Has Developed Jewish Character," 146.
- ⁵⁸ Brandeis, "Jews Will Continue to Enter Palestine," in *Brandeis on Zionism*, 156.
- ⁵⁹ William James, "Is Life Worth Living," in *The Will to Believe and Other Essays in Popular Philosophy*, 62.

Notes to Chapter V

- ¹ Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 5.

² Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), 465.

³ See Baskerville, *Of Law and Limitations*, 135.

⁴ Posner, *The Problems of Jurisprudence*, 465.

⁵ Posner, *Overcoming Law*, 9.

⁶ Posner, *Overcoming Law*, 463.

⁷ Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: The Belknap Press of Harvard University Press, 1999), 262.

⁸ Posner, *The Problematics of Moral and Legal Theory*, 310.

⁹ Posner, *Law, Pragmatism, and Democracy*, 387.

¹⁰ William James to Mrs. Henry Whitman, June 7, 1899. Quoted in Ralph Barton Perry, *The Thought and Character of William James* (Nashville: Vanderbilt University Press, 1948), 248-249.

¹¹ See Chapter I of this thesis, page 24.

¹² See Chapter I of this thesis, page 25.

¹³ Hariman, *Political Style*, 78.

¹⁴ Hariman, *Political Style*, 142.

¹⁵ Before he even revived pragmatism as a philosophical position, James, in “The Sentiment of Rationality,” described the tool-like character of language thusly: “Every way of classifying a thing is but a way of handling it for some particular purpose. Conceptions, ‘kinds,’ are teleological instruments. No abstract concept can be a valid substitute for a concrete reality except with reference to a particular interest in the conceiver.” See “The Sentiment of Rationality,” in *The Writings of William James*, 321. In *Experience and Nature*, Dewey made the language-as-tool metaphor explicit, calling language “the tool of tools.” Dewey writes, “As to be a tool, or to be used as a means for consequences, is to have and to endow with meaning, language, being the tool of tools, is the cherishing mother of all significance.” See *Experience and Nature*, 186. In *Contingency, Irony, and Solidarity*, Rorty seizes the language-as-tool metaphor, relates it back to Wittgenstein, and frames it thusly: “[Vocabularies] are not discoveries of a reality behind the appearances, of an undistorted view of the whole picture with which to

replace myopic views of its parts. The proper analogy is with the invention of new tools to take the place of old tools. To come up with such a vocabulary is more like discarding the lever and the chock because one has envisaged the pulley, or like discarding gesso and tempera because one has now figured out how to size canvas properly.” See *Contingency, Irony, and Solidarity*, 12.

¹⁶ For example, to say that language is a tool *could mean* that language “constructs” reality. A hammer is a tool used to build or construct a house. Language, as an extension of this activity, could be seen as a tool used to build or construct “reality.” As a result, the language-as-tool metaphor becomes part of a social constructivist metaphysics and epistemology, which pragmatism is *not*. I agree with Richard Rorty, rather, that “it is important that we who are accused of relativism stop using the distinctions between finding and making, discovery and invention, objective and subjective. We should not let ourselves be described as subjectivists, and perhaps calling ourselves ‘social constructionists’ is too misleading. For we cannot formulate our point in terms of a distinction between what is outside us and what is inside us.” See Rorty’s *Philosophy and Social Hope* (London: Penguin Books, 1999), xviii. Language, in the pragmatic method, is not a way to *construct* whatever reality persons or societies wish; it is a way of *handling* the reality before us, already given to us; it is a way of working with the imperfections, the mess, in which we are embedded.

¹⁷ James writes, “Consciousness, then, does not appear to itself chopped up in bits. Such words as ‘chain’ or ‘train’ do not describe it fitly as it presents itself in the first instance. It is nothing jointed; it flows. A ‘river’ or a ‘stream’ are the metaphors by which it is most naturally described. *In talking of it hereafter, let us call it the stream of thought, of consciousness, or of the subjective life.*” See “The Stream of Thought,” in *The Writings of William James*, 33.

¹⁸ James writes, “According to my view, experience as a whole is a process in time, whereby innumerable particular terms lapse and are superseded by others that follow upon them by transition which, whether disjunctive or conjunctive in content, are themselves experiences, and must in general be accounted at least as real as the terms which they relate. . . . The only function that one experience can perform is to lead into another experience.” See “A World of Pure Experience,” in *The Writings of William James*, 203.

¹⁹ See James’s “Percept and Concept—Import of Concepts,” in *The Writings of William James*, 232-243.

²⁰ Dewey, *Experience and Nature*, 175.

²¹ James, “Percept and Concept—Import of Concepts,” 242.

²² Dewey, *Experience and Nature*, 174.

²³ Dewey, *Freedom and Culture*, 43.

²⁴ See “The Stream of Thought,” 22.

²⁵ See “The Stream of Thought,” 70.

²⁶ William James, “The Continuity of Experience,” 297.

²⁷ Dewey, *Art as Experience*, 39.

²⁸ Emphasis in original. See William James, “Pragmatism’s Conception of Truth,” 436.

²⁹ Dewey, *Freedom and Culture*, 133.

³⁰ Dewey, *Experience and Nature*, 202.

³¹ William James, “Faith and the Right to Believe,” in *The Writings of William James*, 740.

³² Dewey, *Human Nature and Conduct*, 211.

³³ William James quoted in Gay Wilson Allen, *William James: A Biography* (New York: The Viking Press, 1967), 469.

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