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A CHALLENGE TO BLEACHED OUT PROFESSIONAL IDENTITY: HOW JEWISH WAS JUSTICE LOUIS D. BRANDEIS?

Russell G. Pearce,[*] *Adam B. Winer,*[**] *and Emily Jenab*[***]

I. INTRODUCTION

Louis Brandeis is the most famous American Jewish jurist.[1] The first Jew to sit on the Supreme Court of the United States, Brandeis earned acclaim as a brilliant corporate lawyer and preeminent Progressive legal thinker. He earned the accolade "the People's Lawyer" through his advocacy against monopolies, support for workers' rights, opposition to political corruption, robust defense of the rights to privacy and freedom of expression, and even served as a steward of the American Zionist movement during the critical World War I era.[2] But despite his renown as a Jewish jurist, Brandeis' Jewish identity has been the subject of considerable debate. Most commentators have argued that Brandeis' primary Jewish identification was either secular or ethnic, with only a minority describing his identification as religious.

By placing Brandeis' Jewish identification in the context of the professional project's commitment to bleaching out identity,[3] we

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[1] *See, e.g.*, Marc Galanter, *A Vocation for Law? American Jewish Lawyers and Their Antecedents*, 26 FORDHAM URB. L.J. 1125, 1125 (1999) ("Louis Brandeis is surely the presiding eminence in the story of the encounter of Jews with the American legal order.").

[2] *See, e.g.*, JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 32 (2016).

[3] Professor Sanford Levinson famously described the professional project of "bleaching out" the identity of "almost purely fungible members of the respective professional

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demonstrate Judaism was indeed significant to his work as a lawyer. In doing so, we do not reach the question of whether Brandeis' Jewish identity was authentic. Instead, we focus on professional identity and suggest that Brandeis offers a counter-narrative to the dominant professional ideology. His counter-narrative is relevant far beyond Brandeis himself. As we explain, he offers a model for lawyers of many, but not all, personal identities to draw upon those identities to pursue professional goals more effectively than if they relied on bleached out professionalism.[4] We say many, but not all, because in relatively infrequent circumstances a lawyer's identity might lead a lawyer to reject the profession's core commitment to equal justice. In those limited instances, such as that of White Supremacist leader Mathew Hale or of lawyers whose opposition to LGBTQ rights would lead them to deny representation to LGBTQ clients (as opposed to LGBTQ issues), we would apply tests suggested by David Wilkins and Robert Vischer to guide lawyers in fulfilling their professional obligations.[5]

In Part II, we describe Brandeis' Jewish biography with its complex and sometimes contradictory evidence regarding his Jewish identity. Part III explains how commentators have variously described Brandeis as a secular stalwart, as an ethnic or cultural Jew, or as a religious Jew. Each of these perspectives emphasizes different elements of Brandeis' Jewish biography as viewed through the individual commentator's understanding of what constitutes authentic Jewish identity. Part IV places the question of Brandeis' Jewishness squarely within the context of his professional identity and the dominant commitment to bleaching out "contingent aspects of the self."[6] By expressly crediting Judaism as the source of his professional values, Brandeis violated the commitment to bleaching out in applying his Jewish identity to reinforce professional commitments to equal justice and the public good.

In Part V, we argue that Brandeis serves as an exemplar for all lawyers, whether Jewish or not. His model for combining personal and professional values could potentially inspire lawyers to

community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer." Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993).

[4] Levinson, *supra* note 3, at 1578.

[5] See *infra* Part V.

[6] Levinson, s*upra* note 3, at 1578.

Electronic copy available at: https://ssrn.com/abstract=2961283

integrate their own personal commitments with their professional identity. At a time when professionalism itself is in crisis and lawyers have difficulty finding meaning in their work, Brandeis' example provides a model of how personal identity, instead of undermining the professional project, can provide a resource for heightened devotion to professional values, such as, integrity, excellence in representing clients, equal justice, and responsibility to the public good. Indeed, given the reality of implicit bias and homophily in the legal system, Brandeis' identity conscious approach is more likely to fulfill professional values than the bleaching out approach. Even in those few cases where a lawyer's personal identity provides values contrary to core professional goals, the identity conscious approach provides a more transparent and persuasive method for protecting commitment to those goals.

II. BRANDEIS' JEWISH BIOGRAPHY

Brandeis' life included elements that rendered his Jewish identity marginal in some respects and significant in others. The absence of formal Jewish education, Jewish ritual observance, or Jewish communal membership in his life evidenced the former. His statements casting Judaism as the shaping force behind his professional values, American belonging, and later, his Zionist leadership speak to the significance of his Jewish identity.

Brandeis' upbringing in Louisville was largely secular, with the exception of his valued relationship with his maternal Uncle, Lewis Dembitz.[7] Brandeis' mother Frederika, who rejected the relevance of religious ritual[8] and the veracity of religious belief,[9] consciously set a secular tone in the Brandeis household. She

[7] ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 117-19 (1988).

[8] MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 18-19 (2009) (quoting Frederika, "I do not believe that sins can be expiated by going to divine service and observing this or that formula; I believe that only goodness and truth and conduct that is humane and self-sacrificing towards those who need us can bring God nearer to us.").

[9] ROSEN, *supra* note 2, at 32 (stating "[T]his is my justification for bringing up children without any definite religious belief: I wanted to give them something that neither could be argued away nor would have to be given up as untenable, namely a pure spirit and the highest ideals as to morals and love. God has blessed my endeavors.").

deliberately raised her children without religious belief, though she did profess belief in God.[10]

Accordingly, Frederika raised her family with no Jewish observance and no substantial connections to the Louisville Jewish community. Brandeis received no formal Jewish education as a child[11] and did not attend synagogue with his family.[12] Indeed, one revealing anecdote has a neighbor chastising a young Brandeis for riding in the streets on Yom Kippur.[13] Though non-observant of Jewish holidays, the Brandeis family did observe Christmas as a cultural holiday in the fashion typical of assimilated American Jews.[14] The family did identify as ethnic Jews, but this was not a powerful component of Brandeis' identity.[15]

Brandeis' sole strong connection to Jewishness came through his close relationship with his Uncle Lewis Dembitz. Brandeis once celebrated the Jewish Sabbath at Dembitz's home, later recalling that "[i]n the home of my parents there was no Jewish Sabbath, nor in my own home. But I recall vividly the joy and awe with which my uncle, Lewis Dembitz, welcomed the arrival of the day and the piety with which he observed it."[16] Brandeis also deeply respected Dembitz's thoroughgoing intellectualism, work as a lawyer, and Talmudic scholarship.[17] In recognition of Dembitz's significant influence on him, Brandeis honored Dembitz as a young teenager by changing his middle name from David to Dembitz.[18]

Brandeis had no significant connection to his Jewish identity as a student at Harvard Law School, which he entered at age

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[10] *Id.* at 32 (claiming to have brought up her children without any definite religious belief, and that "God has blessed my endeavors.").

[11] UROFSKY, *supra* note 8, at 18-19.

[12] ALBERT VORSPAN, GIANTS OF JUSTICE 23 (1960) ("The Brandeises belonged to no synagogue.").

[13] ROSEN, *supra* note 2, at 32.

[14] ROSEN, *supra* note 2, at 32 (noting that the Brandeis family exchanged Christmas cards).

[15] BURT, *supra* note 7, at 7 (quoting that Brandeis' "Jewishness was not denied, but it was not observed at his home in any way.").

[16] BURT, *supra* note 7, at 119.

[17] ROSEN, *supra* note 2, at 32 (stating that "Brandeis admired his uncle intensely for his accomplishments as a lawyer and Talmudic scholar"); ROSEN, *supra* note 2, at 33 (noting that Brandeis later wrote that Dembitz "was a living university. . . . In the diversity of his intellectual interests, in his longing to discover truths, in his pleasure in argumentation and in the process of thinking, he reminded of the Athenians.").

[18] BURT, *supra* note 7, at 118 (noting that Brandeis' choice to pursue the legal profession was influenced by Dembitz); *see also* ROSEN, *supra* note 2, at 32.

eighteen.[19] His ties to Judaism were so attenuated that a classmate tellingly commented that Brandeis "is currently believed to have some Jew[ish] blood in him."[20] When Brandeis later married and began a family in Boston, he continued to have very minimal formal Jewish identification. Brandeis and his Jewish cousin Alice Goldmark were married in a non-Jewish ceremony in 1891.[21] The ceremony was performed by Goldmark's brother-in-law Felix Adler, famed for renouncing Judaism and helping to create the secularist Ethical Culture Society.[22] Brandeis and Adler held each other in high regard, and Adler invited Brandeis to head the Boston branch of the Ethical Culture Society, though Brandeis rejected this offer.[23] Brandeis would later warmly support his daughter's marriage to a Christian man in contravention of the norms of the Jewish community in his time which rejected intermarriage, Brandeis, called his new "son-in-law 'a rare find.'"[24] His wife Alice eventually developed a Christian affiliation, discarding her Jewish and Ethical Culture ties in favor of membership in the Unitarian Church.[25] As in his childhood, Brandeis and his family celebrated a secularized variant of Christmas: the Brandeis family adorned their home with a Christmas tree, though according to Brandeis' daughters it lacked any

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[19] BURT, *supra* note 7, at 7; UROFSKY, *supra* note 8, at 31.

[20] UROFSKY, *supra* note 8, at 31; *see also* BURT, *supra* note 7, at 7 (writing that, at Harvard, Brandeis "could associate with others almost without Jewish self-consciousness as such. This seems to have been his attitude and the reciprocated attitude of his fellow students . . . his Jewishness played no discernable role in Harvard's subsequent decision to extend a teaching offer to him.").

[21] Jonathan D. Sarna, *"The Greatest Jew in the World since Jesus Christ": The Jewish Legacy of Louis D. Brandeis*, 81 AM. JEWISH HIST. 346, 348 (1994) [hereinafter *The Greatest Jew in the World*]; *"The People's Attorney": Family Life*, BRANDEIS UNIV., https://lts.brandeis.edu/research/archives-speccoll/exhibits/brandeis/family/family.html (last updated Aug. 4, 1999).

[22] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348.

[23] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348 (relating that Brandeis and Adler "respected one another, and Adler considered [Brandeis] a spiritual kinsman; he even invited him to become the leader of the Society for Ethical Culture's Boston branch, an invitation that was declined. In 1907, when Brandeis was considered for membership in the newly created American Jewish Committee, his link to Adler was one of the grounds upon which he was rejected.").

[24] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348; JONATHAN SARNA, *Intermarriage in America: The Jewish Experience in Historical Context*, *in* AMBIVALENT JEW: CHARLES LIEBMAN IN MEMORIAM 129-33 (Cohen & Susser eds. 2007) (noting that intermarriage has become far more common today).

[25] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 349.

religious significance.[26] The Brandeis family also enjoyed non-kosher food, such as Kentucky ham.[27]

Brandeis never received a formal or informal Jewish education,[28] and may never have seen the inside of a synagogue as a worshipper.[29] His family also had little to do with Boston's organized Jewish community, with Brandeis making only very occasional and small donations to communal organizations such as the United Hebrew Benevolent Association and the Federation of Jewish Charities.[30] Reflecting back upon this period of his life, Brandeis commented in 1914 that "I have been to a great extent separated from the Jews,"[31] and admitted to his paucity of knowledge about Judaism.[32]

In this period of his life, Brandeis strongly rejected what he termed "hyphenated identities," dismissing Jewish affiliation as incompatible with American citizenship.[33] In a 1905 speech to a Jewish audience at the New Century Club of New York, Brandeis told his coreligionists that true Americans cannot maintain a pronounced Jewish identity: "there is no place [in America] for what President Roosevelt has called hyphenated Americans. . . . Habits of living or of thought which tend to keep alive difference of origin or to classify men according to their religious beliefs are inconsistent with

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[26] LEWIS J. PAPER, BRANDEIS 199 (1983).

[27] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348 (documenting that Brandeis professed "great rejoicing" upon his receipt of Kentucky hams, shipped north by his brother Alfred).

[28] UROFSKY, *supra* note 8, at 18.

[29] VORSPAN, *supra* note 12, at vii (writing that Brandeis "conspicuously avoided the synagogue and Jewish religious life throughout his amazing career").

[30] *See* UROFSKY, *supra* note 8, at 52-53 (writing that Brandeis was a member of the United Hebrew Benevolent Association and the Federation of Jewish Charities, though he did not take on any leadership roles, and his donations were low and anonymous); *see also* Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348.

[31] ROSEN, *supra* note 2, at 146; *see also* PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 101 (1993) (writing that Brandeis "displayed little interest in Jewish causes until summer 1910").

[32] ROSEN, *supra* note 2, at 147 (quoting Brandeis' comment "I am very ignorant in things Jewish").

[33] ROSEN, *supra* note 2, at 147 (quoting Louis D. Brandeis, Address at the New Century Club on the Occasion of the 250th Anniversary of the Settlement of the Jews in the United States: What Loyalty Demands (Nov. 28, 1905)).

the American ideal of brotherhood, and are disloyal."[34] Brandeis reiterated his hostility to hyphenated identities until as late as 1910.[35]

While Brandeis was non-observant during his career as an attorney in Boston, and though he expressed grave reservations about strong affiliation with Judaism, he did maintain informal ties with fellow Boston Jews. Some commentators argue that Brandeis experienced social exclusion tinged with anti-Semitism while living in Boston,[36] and therefore his social circles were largely, but not exclusively, Jewish.[37]

Brandeis' Jewish contacts began to intensify in 1910. In that year, Brandeis enjoyed his first prolonged contact with Jews of Eastern European descent. Brandeis encountered them in the context of his role in arbitrating the 1910 New York garment workers' strike.[38] Brandeis had extensive interactions[39] with the Jews on the management and labor sides of the dispute, and was deeply inspired by the cooperative spirit and intellectual acumen displayed by both sides.[40] Unlike the wealthy and conservative Boston Jews, with

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[34] *Id.*

[35] STRUM, *supra* note 31, at 101 (Brandeis announced that "I have a great deal of sympathy for the [Zionist] movement" in a 1910 interview, but emphasized in the same interview that "there is no place for . . . hyphenated Americans").

[36] *See* ALLON GAL, BRANDEIS OF BOSTON 30 (1980) (writing that the Boston Brahmins became increasingly unwelcoming to outsiders in the late 19th century in response to heavy Irish immigration and the influx of immigrants "sharpened the insularity of the native Bostonians," creating heightened barriers to social integration in Boston); s*ee also id.* at 169 (identifying an increase in anti-Semitism in turn-of-the-century Boston).

[37] *See id.* at 40 (claiming that Brandeis' social status in Boston was far below what one might expect given Brandeis' prodigious intellect, eminence as an attorney, and wealth); *see also id.* at 31-34 (noting that Boston Jews, including Brandeis, were excluded from mainstream society and therefore kept the company of other Jews).

[38] VORSPAN, *supra* note 12, at 27 ("In 1910 Brandeis was asked to serve as chairman of the Arbitration Board in the garment workers' first general strike in New York City.").

[39] These included time spent around the negotiating table, as well as social interactions. ROSEN, *supra* note 2, at 148-49 ("Brandeis relaxed after an arduous day of negotiations by indulging in a glass of beer with [the workers] and telling them war stories about the Pinchot-Ballinger affair.").

[40] *See* ROSEN, *supra* note 2, at 148 ("[B]oth the Jewish garment workers and their Jewish employers impressed him—with their intellectualism, idealism and commitment to industrial democracy . . . . The strike was Brandeis's first real contact with eastern European Jews, and he was deeply impressed by their ethical attitude and capacity for idealism and empathy."); STRUM, *supra* note 31, at 101 ("[Brandeis] displayed little interest in Jewish causes until summer 1910 when he mediated the New York garment strike and discovered the Eastern European Jewish workers . . . . His enthusiasm for their potential as citizens of his ideal democratic state began to grow. . . . Brandeis acknowledged that the strike showed him 'the true democracy of my people, their idealistic inclinations and their love of liberty and freedom.' ").

whom Brandeis did not identify politically, the Jews on both the management and labor sides reflected more of Brandeis' political and ethical sensibilities.[41] Several of Brandeis' contemporaries commented that this experience was a deeply transformative one for Brandeis, serving to spark his interest in Jewish affairs.[42]

In that same year, Brandeis began to have formative meetings with Zionist leaders that further spurred the development of his Jewish identity. Brandeis met Jacob De Haas, the American secretary of Zionist leader Theodor Herzl, in autumn 1910.[43] The two met again in 1912, and De Haas referred to Brandeis' Uncle Lewis Dembitz, who had become an ardent Zionist, as "a noble Jew."[44] When De Haas explained the extent of Dembitz's involvement with the Zionist movement, Brandeis became fascinated by De Haas and by Zionism, immediately asking De Haas to teach him about Zionism.[45] By the end of 1912, Brandeis had become a member in various Jewish and Zionist organizations.[46]

At the same time, Brandeis' perspective on hyphenated identities evolved. No longer rejecting hyphenated identities, he

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[41] VORSPAN, *supra* note 12, at 27 ("Unlike the comfortable, conservative Jews he had met in Boston, almost all of whom had left him cold, the intensely Jewish Jews he came to know in New York stirred in him a sense of spiritual kinship. [These Jews were] [v]ital, aflame with a peculiarly Jewish zeal for social justice, and reflecting a deep sense of rootage to a Jewish tradition.").

[42] STRUM, *supra* note 31, at 101 (noting that Brandeis first expressed his support for Zionism shortly after the garment workers strike).

> His close friend Elizabeth Glendower Evans was certain that the strike was a "profound emotional experience that gave birth to his realization of himself as a Jew," and Benjamin V. Cohen attributed Brandeis's newly emerged Jewish consciousness to his experience with the Jewish workers. Labor leader Henry Moskowitz said that Brandeis's meetings with the workers "became almost a mystic experience for him."

STRUM, *supra* note 31, at 101.

[43] ROSEN, *supra* note 2, at 147.

[44] ROSEN, *supra* note 2, at 149; STRUM, *supra* note 31, at 101.

[45] *See* BURT, *supra* note 7, at 118 (citing A.T. Mason's comment that, upon De Haas' praise of Dembitz, Brandeis "was so profoundly aroused that he forgot vacation plans and invited [De Haas] to stay for lunch and take a later train"); *see also* STRUM, *supra* note 31, at 101 (explaining Brandeis "later said that he was 'eternally grateful' to de Haas for 'unfold[ing] the Zionist cause' to him."); *see also* ROSEN, *supra* note 2, at 149 (writing that on De Haas' telling, Brandeis embarked on an "earnest quest for knowledge. . . . [he] made the Zionist idea his own.").

[46] STRUM, *supra* note 31, at 102 (recording Brandeis' enlistment in the Associate Executive Committee of the Federation of Zionists; the Zionist Association of Greater Boston; the Menorah Society; and the board of the Hebrew Sheltering and Immigrant Aid Society).

embraced a more pluralistic outlook according to which American belonging could happily coexist with strongly held religious and ethnic identities. In a July 4, 1915 speech on *True Americanism*, delivered to a general audience in Boston, Brandeis declared that the grounding premise of the American polity is that "many people would make one nation" united under the goal of "serv[ing] our country."[47] Americanism is not defined by external trappings such as dress and language, but by adherence to core American ideals, which include "the development of the individual for his own and the common good."[48] Since these ideals are compatible with the worldviews espoused by various groups, even a new immigrant "from distant lands, ignorant of our language" may "already [be] truly American in this most important sense" of having "long shared our ideals."[49]

Brandeis applied his pro-hyphenation perspective to Jews specifically. Brandeis explained that, "[T]o be good Americans, we must be better Jews."[50] He argued that Judaism could contribute greatly to American public culture, particularly because Judaism was the source of American constitutional and democratic values.[51] Brandeis wrote that:

> To America the contribution of the Jews can be peculiarly large. America's fundamental law seeks to make real the brotherhood of man. That brotherhood became the Jews' fundamental law more than twenty-five hundred years ago. America's twentieth century demand is for social justice. That has been the Jews' striving ages-long.[52]

In 1916, President Wilson nominated Brandeis to the United States Supreme Court, on which he would become the first Jewish Justice.[53] This nomination resulted in great controversy due to

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[47] LOUIS D. BRANDEIS, *True Americanism*, *in* BRANDEIS ON DEMOCRACY 25, 26 (Philippa Strum ed., 1995) [hereinafter BRANDEIS ON DEMOCRACY].

[48] *Id.* at 26.

[49] *Id.* at 26.

[50] STRUM, *supra* note 31, at 115.

[51] Louis D. Brandeis, *Greetings from Louis D. Brandeis*, 1 MENORAH J. 4, 4 (1915) [hereinafter *Greetings from Louis D. Brandeis*].

[52] *Id.*

[53] *This Day in History: Jan. 28*, HIST., http://www.history.com/this-day-in-history/wilson-nominates-brandeis-to-the-supreme-court (last visited Jan. 15, 2017).

Brandeis' progressive views, with business interests agitating against his nomination.[54] Opponents also accused Brandeis of improper representation of conflicting interests,[55] stemming from Brandeis' philosophy of being "counsel to the situation" as an attorney.[56] More relevant to this Article, the nomination resulted in both explicit and implicit anti-Semitic attacks on Brandeis.[57] Some contended that Brandeis had only been nominated because President Wilson sought to capture the Jewish vote,[58] or protested that Brandeis lacked quintessential American traits necessary to serve on the Court.[59] Other critics conveyed their distaste for Brandeis' Jewishness more subtly through attacks on his character.[60] Despite these critiques, the Senate confirmed Brandeis' nomination in June 1916.[61]

As a Justice of the Supreme Court of the United States, Brandeis continued to identify Judaism as having a central role in shaping professional identity. He took up a general project of finding

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[54] *See* ROSEN, *supra* note 2, at 95 (documenting that "the most determined opposition focused on his social and economic views. Traditional lawyers, bankers, industrial leaders, and conservative Republicans saw him as a radical").

[55] *See* UROFSKY, *supra* note 8, at 72.

[56] UROFSKY, *supra* note 8, at 67-72 (analyzing several instances in which Brandeis attempted to advance the best interests of multiple parties to the same dispute).

[57] David G. Dalin, *The Appointment of Louis D. Brandeis, First Jewish Justice on the Supreme Court*, LOUIS D. BRANDEIS 100: THEN & NOW, 6-8, http://bir.brandeis.edu/bitstream/handle/10192/31435/LDB100Dalin.pdf?sequence=1 (last visited Jan. 15, 2017).

[58] *See* ROSEN, *supra* note 2, at 92. The *New York Sun* claimed that the nomination was designed to win Wilson the substantial Jewish vote in the northeast. ROSEN, *supra* note 2, at 92. The *Sun* also wrote that, "It is clearly apparent that if he were obliged to go before the Senate purely on his merits he would be defeated. There is, however, danger that the racial issue will become involved in the struggle, and that in that event it would be difficult to predict how members of the Senate would vote." ROSEN, *supra* note 2, at 92.

[59] ROSEN, *supra* note 2, at 96 (recording lawyer Arthur Hill's comment that Brandeis lacks "that spirit of playing the game with courtesy and good-nature which is part of the standard of the Anglo-Saxon. . . . It is not for nothing that in the Old Testament there isn't a word from beginning to end of admiration for a gallant enemy").

[60] ROSEN, *supra* note 2, at 95-96 (listing various digs at Brandeis' character that tack on to anti-Jewish stereotypes, including that "he is not always truthful, that he is untrustworthy, and that he sails under false colors"); ROSEN, *supra* note 2, at 96 (recording Harvard president Lawrence Lowell's comment that Brandeis was "unscrupulous").

[61] ROSEN, *supra* note 2, at 96. An indication of shifting American attitudes, as well as the contribution of Brandeis' achievements as a Justice to those attitudes, "there was much less opposition . . . to Cardozo's nomination fourteen years later. . . .[H]is Jewishness, in particular, did not appear to weigh more heavily than . . . other negative considerations." Robert A. Burt, *On the Bench: The Jewish Justices*, *in* JEWS IN AMERICAN POLITICS 70 (Louis Sandy Maisel, et al. eds., 2001).

law faculty positions for Jews,[62] which he explained in light of the Jewish propensity for dedication to public service. In a 1929 letter to Felix Frankfurter, at the time the sole Jewish faculty member at Harvard Law School,[63] Brandeis requested Frankfurter's assistance in securing a teaching position for his clerk Harry Shulman.[64] Brandeis explained that Jews brought to law school faculties "a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews."[65]

While Brandeis continued to articulate the central importance of Jewishness to his professional identity, and to American Constitutionalism, he also served as a leader of the American Zionist movement. He became chairman of the Executive Committee for General Zionist Affairs for the American Zionist movement in August 1914, and continued to lead the movement until 1921, albeit in an unofficial capacity after his appointment to the Supreme Court in 1916.[66] Brandeis steered the movement during the crucial WWI years, swelling the movement's ranks with new members and its coffers with heightened donations,[67] and playing a crucial part in securing the Balfour Declaration in support of a Jewish national home in Palestine.[68] Although Brandeis described Judaism as the

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[62] BURT, *supra* note 7, at 64 ("Brandeis himself made a special project of finding law faculty positions for young Jewish lawyers whom he regarded as particularly talented.").

[63] BURT, *supra* note 7, at 64. Brandeis evinced special affection for Frankfurter. BURT, *supra* note 7, at 37 ("[F]or Brandeis their friendship was apparently the most intimate male relationship in his adult life. Most uncharacteristically, Brandeis referred to Frankfurter, in a letter to him in 1925, as 'half brother—half son.' ").

[64] BURT, *supra* note 7, at 65 (noting Shulman would go on to serve as Yale Law School's first Jewish dean).

[65] BURT, *supra* note 7, at 65.

[66] Dalin, *supra* note 56, at 6-8; Jonathan D. Sarna, *Louis D. Brandeis: Zionist Leader*, 2 BRANDEIS REV. 22, 23-24 (1992), https://www.brandeis.edu/hornstein/sarna/americanjewishcultureandscholarship/Archive4/LouisD.BrandeisZionistLeader.pdf [hereinafter *Zionist Leader*].

[67] *See, e.g.*, UROFSKY, *supra* note 8, at 409; ROSEN, *supra* note 2, at 156-57 (documenting in increase in membership from 12,000 in 1914 to 176,000 in 1919, and movement-wide budgetary increase from several thousand dollars to almost two million dollars).

[68] *See, e.g.*, VORSPAN, *supra* note 12, at 32 ("Under Brandeis's leadership, President Wilson was approached, as were the British and French ambassadors, and verbal assurances were secured as to Allied policy on Palestine. Brandeis conferred with Lord Balfour, the British Foreign Minister, at a White House luncheon at which the basis for the Balfour Declaration was evolved. On November 2, 1917, the historic Declaration, pledging His Majesty's Government to the development of a national Jewish homeland in Palestine, was issued.").

force motivating his Zionist beliefs, critics accused him of draining the Zionist movement of its uniquely Jewish ideological basis in favor of a myopic focus on efficiency.[69]

Despite this critique, Brandeis continued to expressly connect his Zionism to his Judaism. In 1914, he remarked that one could become an improved Jew by becoming involved with Zionism: "[T]o be good Americans, we must be better Jews, and to be better Jews, we must become Zionists."[70] In his 1915 speech *The Jewish Problem*, Brandeis referred to Palestine as a place where Jews can "lead a Jewish life."[71] In another 1915 speech, *Palestine and the Jewish Democracy*, Brandeis lauded the Zionists for "carry[ing] forward the work of the Jewish spirit."[72]

Unsurprisingly, given Brandeis' high profile as a Jew, both Jewish and non-Jewish contemporaries described him in Jewish terms. President Franklin D. Roosevelt regularly dubbed him 'Isaiah,'[73] in reference to the Old Testament prophet known for his piercing moral critique of ancient Israelite society, as did Brandeis' law clerks,[74] and Zionist leader Jacob De Haas.[75] One admirer dubbed him "a modern prophet,"[76] and political leaders showered

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[69] *See* UROFSKY, *supra* note 8, at 528 (writing that Brandeis came under fire from other Zionist leaders, especially European Jews, for failing to construct a unifying Zionist ideology, and for generally spurning ideological debate); *see also* LOUIS D. BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 166, 166 (culminating with the hardly rousing charge to "Organize, organize, organize—until every Jew in America must stand up and be counted").

[70] STRUM, *supra* note 31, at 115.

[71] BRANDEIS, *The Jewish Problem: How to Solve It*, *in* BRANDEIS ON DEMOCRACY *supra* note 46, at 155, 162

[72] BRANDEIS, *Palestine and the Jewish Democracy*, *in* BRANDEIS ON DEMOCRACY *supra* note 46, at 174-75.

[73] *See* ROSEN, *supra* note 2, at 3 (noting that Roosevelt termed Brandeis "old Isaiah," and wrote to him as "My dear Isaiah"); *see also* ROSEN, *supra* note 2, at 3 (commenting that "by the age of seventy-eight . . . he did indeed resemble an ascetic Old Testament prophet: his impressive shock of black hair had turned an unruly gray, and his taut, intelligent face had been chiseled by a lifetime of intensely disciplined reading and writing on behalf of personal and economic liberty."); *see also* Sarna, *The Greatest Jew in the World*, *supra* note 21, at 346 (documenting Roosevelt's remark that "we of the inner circle call him Isaiah").

[74] DEAN ACHESON, MORNING AND NOON 96 (1965); Galanter, *supra* note 1, at 1129 n.19.

[75] Galanter, *supra* note 1, at 1129 n.21 (citing the closing line of De Haas' memoir: "As scornful as Isaiah in his castigation of evil he joins the brotherhood of the great prophets in his zeal for righteousness and in his faith in the ultimate achievement of Zion restored and Israel redeemed").

[76] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 346 (attributing the comment to Brandeis' friend Louis E. Kirstein); Sarna, *The Greatest Jew in the World*, *supra* note 21, at 346 (quoting a reporter from the *Boston Jewish Advocate*, who likened Brandeis to the

Brandeis with such accolades as "Messianic,"[77] from a Jewish perspective, and "the greatest Jew in the world since Jesus Christ," from a Christian perspective.[78] Perhaps most striking is a clerk's description of Brandeis' reaction to an academic's characterization of morality as culturally relative. Brandeis, furious at the suggestion,

> [W]rapped the mantle of Isaiah around himself, dropped his voice a full octave, jutted his eyebrows forward in a most menacing way and began to prophesy. Morality was truth; and truth had been revealed to man in an unbroken, continuous, and consistent flow by the great prophets and poets of all time.[79]

III. THREE APPROACHES TO BRANDEIS' JEWISH IDENTITY: SECULAR STALWART, ETHNIC JEW, OR JEWISH GIANT

It is not surprising that, in light of the complex and inconsistent narrative of Brandeis' Jewish biography, commentators have understood this biography in contrasting ways. In this Part, we identify how these commentators fall primarily within three categories, arguing respectively that Brandeis was primarily secular, ethnically Jewish, or religiously Jewish.

A. Brandeis as Secular Stalwart

A number of commentators, including Melvin Urofsky, Philippa Strum, Jonathan Sarna, and Jerold Auerbach, argue that the core of Brandeis' identity was secular and that his Jewish identity was marginal at best.

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prophet Daniel "[a]nd how much like the great Daniel, prophet of old, who struggled against historic wrong and injustice is this mighty modern Jewish prophet"). Marc Galanter rejects the Daniel analogy, arguing that Brandeis is better analogized to Joseph. *See generally* Galanter, *supra* note 1, at 1135-36. Galanter notes, however, that Brandeis himself saw Daniel as a personal role model. Galanter, *supra* note 1, at 1134 (noting that Brandeis had declared in an interview that he "found his prototype in Daniel").

[77] JACOB DE HAAS, LOUIS D. BRANDEIS: A BIOGRAPHICAL SKETCH WITH SPECIAL REFERENCE TO HIS CONTRIBUTIONS TO JEWISH ZIONIST HISTORY 113 (1929) (quoting Chaim Weizmann's remark that there is "something Messianic" about Brandeis).

[78] *Id.* at 47 (quoting Senator Hoke Smith of Virginia).

[79] BURT, *supra* note 7, at 20.

In explaining that Brandeis' true ideological commitment was to a secular Americanism, commentators argue that his ideological commitment was strong and his Jewish commitment weak or non-existent. Philippa Strum, for example, asserts that Brandeis identified with a Jeffersonian strand of American patriotism seeking to cultivate civic virtue and democratic participation.[80] Indeed, as a result, Strum argues that even Brandeis' ostensibly Jewish commitment to "Zionism was an extension of Americanism,"[81] and was in no way informed by Judaism. While noting Brandeis' excitement at first encountering Eastern European Jews in the context of the 1910 garment workers' strike, Strum posits that Brandeis was attracted to their idealism, and not to their Jewishness: "His enthusiasm for their potential as citizens of his ideal democratic state began to grow."[82] Strum also claims that Brandeis mapped Jewish values on to American ideals, and did not truly believe American values to originate with Judaism: "His speeches demonstrate that in many ways the Jewish community in Palestine had become, for him, the fourteenth colony or, perhaps, the colonies as they should have been."[83]

Jerold Auerbach similarly discounts Brandeis' Jewish commitments, writing that Brandeis' overarching allegiance was American. To Auerbach, Brandeis' only interest in Judaism was "the reconciliation of Judaism with Americanism,"[84] with the goal that Jews could "become as impeccably American as the Brahmins themselves."[85] Indeed, Auerbach identifies Brandeis as a central

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[80] *See* STRUM, *supra* note 31, at 2 (noting congruities between Brandeis' political thought and Jefferson's); *see also* STRUM, *supra* note 31, at 3 (explaining Brandeis' "political thought, then, centered on such basic concepts as the individual, liberty, rights, responsibilities, power, justice, human possibilities, and human limitations. . . . [Brandeis] combined them into a unique formulation of the ideal state that maximized individual involvement in both the political process and economic decisionmaking and that secured political and economic autonomy in the industrial age.").

[81] STRUM, *supra* note 31, at 115.

[82] STRUM, *supra* note 31, at 101.

[83] STRUM, *supra* note 31, at 107 ("He extolled the 'Jewish Pilgrim Fathers,' 'the pioneers in Palestine,' and called . . . Zionism 'the Pilgrim inspiration and impulse over again.' ").

[84] JEROLD AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 133 (1990) ("Only one issue of Jewish consequence deeply engaged Brandeis (and helps to account for his 'conversion' to Zionism). That was the reconciliation of Judaism with Americanism.").

[85] *Id.* at 137 ("[O]nce converted from an expression of Jewish nationalism into a manifestation of loyal Americanism, [Zionism] could serve as an instrument of Jewish acculturation. . . . Rejected by the modern descendants of the Pilgrims and Puritans, Brandeis

transitional figure in what he describes as the journey of American Jews away from their authentic Jewish beginning and towards wholesale assimilation into American society.[86]

To buttress their view that Jewishness was marginal to Brandeis, the proponents of the secular stalwart view rely on his lack of Jewish education and observance. Melvin Urofsky observes that Brandeis' parents "never denied their Jewishness," but "neither did they practice it."[87] Jonathan Sarna notes that Brandeis' mother had a strong "distaste for formal religion," and instead hoped to imbue her children with "a character formed by a 'pure spirit and the highest ideals.' "[88] Sarna also suggests that her aversion to institutionalized religion may have owed to the Frankist antinomian spirit in which she was raised, referring to the Jewish religious movement based on the messianic claims of Jacob Frank in the eighteenth century that championed the validity of Jewish ideals in place of Jewish law.[89] Urofsky explains that the Brandeis children "had no idea of the Jewish holidays"[90] and received no Jewish education,[91] and that the Brandeis family was entirely disconnected from the "thriving Jewish community" of Louisville.[92]

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found in Zionism the way to identify with Puritan New England; the way, that is, to become as impeccably American as the Brahmins themselves.").

[86] On Auerbach's account, Jewish immigrants to America, initially loyal to Jewish law, sought to sidestep accusations of dual loyalty by reading themselves into the American national narrative. *Id.* at xvi ("That was the challenge of American Jewish life: to transform enduring Jewish commitments to land and law into indisputably American sources of Jewish obligation."); *Id.* at xvii ("Eager to find a place within the American creation story, Jews absorbed the Puritan rendition of Biblical history as their own. With the Hebrew Bible as the primary source of American civilization, Jews could become as indisputably American as the Puritan pioneers."); *Id.* (writing how rabbis and lawyers were the central actors of this struggle, articulating a "persuasive synthesis between Judaism and Americanism" that "fused Torah [and the] Constitution as the sacred texts of a Judeo-American legal tradition"). To Auerbach, the unfortunate upshot of this attempt at synthesis was that the Torah was replaced by the Constitution as the lodestar of Jewish identity: this was "a decisive step in the repudiation of Jewish legal authority in the modern era." AUERBACH, *supra* note 83, at xvii.

[87] UROFSKY, *supra* note 8, at 18.

[88] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347 (quoting Ben Halpern, A Clash of Heroes: Brandeis, Weizmann, and American Zionism (1987)).

[89] *See* Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347; *see also* Galanter, *supra* note 1, at 1132-33.

[90] UROFSKY, *supra* note 8, at 19.

[91] UROFSKY, *supra* note 8, at 52-54; *see also* Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347.

[92] UROFSKY, *supra* note 8, at 18.

Commentators further argue that Brandeis' lack of a strong Jewish identity is demonstrated by his non-observance of Jewish tradition and law. Sarna contends that Brandeis "never himself took up any traditional Jewish practices,"[93] and always remained "remote . . . from Jewish tradition."[94] Urofsky also notes that Brandeis flouted Jewish ritual law, emphatically rejecting "the Judaism of the priests, with its emphasis on rules and rituals."[95] Indeed, argues Sarna, "[f]or one who was so widely denominated a Jewish prophet, his deviations from traditional Jewish norms were, in fact, astounding."[96] On Sarna's account, as we noted earlier, these deviations included celebrating Christmas while failing to observe the Jewish holidays,[97] and reveling in the consumption of non-Jewish foods such as ham.[98]

Brandeis is also said to have deviated from Jewish norms insofar as he failed to hold authentically Jewish beliefs. One variant of this argument has it that Brandeis simply never took an interest in Judaism, and therefore never had occasion to develop Jewish beliefs. On this view, as articulated by Melvin Urofsky, Brandeis "did not believe in religion" and "ignored religion in general," and had no reason to take interest in Judaism.[99] To Sarna, Brandeis never engaged actively with Judaism, and "remained, by his own admission, extraordinarily ignorant about Judaism's rites and precepts."[100] For this reason, Strum concludes that Brandeis:

> [W]as Jewish in the same way that he came from Louisville: both were acknowledged as making part of

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[93] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347; *see also* UROFSKY, *supra* note 8, at xi (writing that Brandeis was a "nonpracticing Jew" throughout his life).

[94] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 363.

[95] UROFSKY, *supra* note 8, at 19.

[96] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347-48.

[97] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348 ("The Brandeises celebrated Christmas but no Jewish holidays, and certainly not the Sabbath."); UROFSKY, *supra* note 8, at 366.

[98] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348; *see also* UROFSKY, *supra* note 8, at 358 ("From Alfred, in addition to books, also came good Kentucky bourbon, later to be replaced by whole hams, products of Ladless Hill. Louis served the hams to his dinner guests and would send Alfred the names of the people who had enjoyed the feast."). See notes 28 and 29 *supra*.

[99] UROFSKY, *supra* note 8, at xi.

[100] Sarna, *The Greatest Jew in the World*, *supra* note 21, at 347; *see also* AUERBACH, *supra* note 83, at 133 (contending that Brandeis never seriously studied Jewish ideas or culture, and only closely engaged with Jewishness in the context of "the reconciliation of Judaism with Americanism.").

> his background; both were relatively unimportant to his present. Perhaps Louisville was of greater importance than Judaism, for his family ties in Louisville led him to return there for visits; he was conscious of no such ties to Judaism.[101]

A complementary variant of the argument that Brandeis did not possess valid Jewish beliefs posits that his belief structure was bereft of actual Jewish content, even if he packaged his ideas as Jewish. Urofsky protests that Brandeis' Jewish rhetoric is empty: when Brandeis spoke about Palestine, he "envisioned a secular society populated by Jews who lived according to American values that Brandeis conflated with those of the prophets."[102] In Urofsky's view, Brandeis did not adhere to the authentically Jewish values of the prophets, but rather to *secular* ones.

In arguing that Brandeis lacked a substantial Jewish identity, commentators also draw upon his disconnect from the Jewish community and his apathy towards Jewish continuity. In the view of numerous commentators, Brandeis' lack of affiliation with the Jewish community was manifested in his paltry contributions to Jewish causes and his lack of membership in Jewish institutions prior to his leadership of the Zionist movement.[103] Although Brandeis earned a "substantial income over the years," and was therefore capable of larger donations, "his contributions to Boston Jewish charities remained minimal, he preferred that his name not be published in the list of contributors, and he took neither an important membership role nor any leadership position in Jewish affairs" before 1912.[104] Commentators also find significant the fact that Brandeis "did not live near other Jews, did not belong to a synagogue[,] . . . and socialized largely with non-Jews."[105]

Commentators also ground their conclusion that Brandeis was secular in his lack of concern about Jewish assimilation and marriage to non-Jews. Strum argues that Brandeis was "a thoroughly

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[101] PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 233 (1984).

[102] UROFSKY, *supra* note 8, at 408.

[103] UROFSKY, *supra* note 8, at 53; Sarna, *The Greatest Jew in the World*, *supra* note 21, at 348.

[104] UROFSKY, *supra* note 8, at 53; *see also* Sarna, *supra* note 21, at 348 (documenting that, in the years prior to his Zionist involvement, Brandeis "gave only perfunctory gifts to Jewish charities").

[105] Sarna, *supra* note 21, at 348.

assimilated Jew who had never considered Jewishness as a key element of his identity"[106] and therefore was not concerned with the Jewish identity of his children. Indeed, as Sarna observes, Brandeis was supportive of his daughter's marriage to a non-Jewish man despite the Jewish community's fear that intermarriage threatened its survival.[107]

The commentators describing Brandeis as a secular stalwart minimize the Jewish significance of Brandeis' statements associating Judaism with Americanism or with his Zionist leadership. Auerbach, for example, rejects Brandeis' efforts to "reconcile[ ] . . . Judaism with Americanism,"[108] and denies the Jewishness of Brandeis' Zionist leadership insofar as Brandeis "depleted [it] . . . of Jewish content."[109]

With regard to Brandeis' Zionist leadership, Strum notes that Brandeis "admonished Zionist audiences, '[t]he Pilgrims had faith, we should have it,' " and determines that the American Pilgrim worldview lies at the root of Brandeis' ideology, to the exclusion of Judaism.[110] Auerbach similarly dismisses Brandeis' Zionist inspiration as grounded in idealized American virtues: democracy, social justice, law-abiding citizenship, and the pioneering spirit.[111] Jonathan Sarna agrees that "Brandeis' Zionism was much more American than Jewish, drawing less from the Bible and rabbinic sources than from Progressive idealism."[112] Sarna argues that "[t]he key to Zionism's legitimacy, as Brandeis understood it . . . lay in its link to Americanism."[113]

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[106] STRUM, *supra* note 31, at 101.

[107] Sarna, *supra* note 21, at 348; *see also* Sarna, *supra* note 24, at 129-33; Galanter, *supra* note 1, at 1132.

[108] AUERBACH, *supra* note 83, at 133 ("Only one issue of Jewish consequence deeply engaged Brandeis (and helps to account for his 'conversion' to Zionism). That was the reconciliation of Judaism with Americanism.").

[109] AUERBACH, *supra* note 83, at 132, 137 (claiming that Brandeis transformed Zionism "from an expression of Jewish nationalism into a manifestation of loyal Americanism.").

[110] STRUM, *supra* note 31, at 107.

[111] AUERBACH, *supra* note 83, at 148.

[112] Sarna, *supra* note 21, at 359.

[113] *See also* Sarna, *supra* note 21, at 358-59 ("The Zion that Brandeis so proudly championed and actually saw in his mind's eye was . . . a projection of America as he wished it to be . . . . ").

B. Brandeis as Ethnic or Cultural Jew

A second group of commentators present Brandeis as an ethnic or cultural Jew. Like the commentators who view Brandeis as a secular stalwart, the advocates of the ethnic Jewish perspective minimize Jewish religious identification. Marc Galanter, for example, echoes Sarna's view and contends that Brandeis was devoted to an antinomian vision of idealistic reform, and not to Judaism.[114] Galanter too refers to Brandeis' ancestors' ties to Frankism and posits that "[s]omething of this [ideology] filtered through to Louis Brandeis."[115] Following in the spirit of his Frankist forebears, Brandeis framed his deeply felt "urge to reform, redeem, and perfect the world" in artificially Jewish terms, thus articulating "a Jewishness that had little content apart from being a container for reform and redemption."[116]

Like Urofsky and Strum, commentators who depict Brandeis as a secular stalwart, Allon Gal argues that Brandeis only bolstered his affiliation with the Jewish people and Zionist movement to further his American ideals.[117] It follows that, for Gal, Brandeis did not genuinely lay claim to Jewish ideals; instead, the values that informed his activism were wholly American ones.

But unlike the secular stalwart view of Brandeis, the ethnic Jewish perspective view acknowledges the significance of Brandeis' cultural and ethnic identification as a Jew. Galanter, for example, focuses on Brandeis as a distinguished Jewish-American. He analogizes Brandeis to the biblical figure of Joseph, "prototype of the inspired technician, the inventive doer and, in the setting of living among nations, the discerning advisor to power and the devoted intermediary on behalf of the Jews."[118] Indeed, Galanter treats the Jewishness of the Joseph figure as an open question: "Whenever [the Joseph figure] appears, is there anything distinctively Jewish about it?"[119] Galanter answers this query with a positive but ambivalent

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[114] Galanter, *supra* note 1, at 1144.

[115] Galanter, *supra* note 1, at 1132-34.

[116] Galanter, *supra* note 1, at 1134.

[117] *See* GAL, *supra* note 35, at 180 ("The morality and industry of the pioneer Zionists in Palestine completed for Brandeis the picture of his own people as the new 'Puritans.' He could now shift his allegiance, for he had decided that the values of the Massachusetts founders were being carried on in far-off Palestine.").

[118] Galanter, *supra* note 1, at 1136.

[119] Galanter, *supra* note 1, at 1145.

response: "[I]n important ways Joseph is the road taken – or at least the road on which we find ourselves traveling."[120]

Another perspective, that of Gal, attributes Brandeis' Jewish ethnic identification to his experience of anti-Semitism. Gal argues that Brandeis was largely ostracized by the elite Boston Brahmins, who closed ranks in the late 19th century in response to heavy Irish immigration.[121] Gal explains, as we note earlier, that Boston's Jews were largely restricted to their own social circles at that time,[122] and Brandeis' social position was below what one might expect given his wealth and intellect.[123] According to Gal, Brandeis' drive to gain acceptance into the ranks of elite New England society, whose Puritan values he greatly admired,[124] was thus thwarted.

In Gal's view, Brandeis found an outlet for the expression of his American values by deciding that "his own people," the Jews, were in fact "the new 'Puritans,' " and that he could help the Jews to construct the ideal society in Palestine.[125] This decision allowed Brandeis to "shift his allegiance [to the Jews], for he had decided that the values of the Massachusetts founders were being carried on in far-off Palestine."[126] Gal's narrative of Brandeis' Jewishness is best described as ethnic because, had Brandeis not suffered anti-Semitic social exclusion, he would have seen no compelling need to garb his

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120 Galanter, *supra* note 1, at 1145.

121 *See* GAL, *supra* note 35, at 30 (finding that the arrival of high numbers of Irish immigrants in the late 1800s "only sharpened the insularity of the native Bostonians."); *see also* GAL, *supra* note 35, at 169 (identifying an uptick in social anti-Semitism in Boston at the turn of the century). Other commentators agree that turn-of-the-century Boston played host to strong anti-Semitic sentiment. *See* UROFSKY, *supra* note 8, at 54 ("That anti-Semitism existed in Boston is beyond doubt") (also noting that Brandeis mentioned incidents of social clubs being closed to Jews in letters to his brother Alfred).

122 GAL, *supra* note 35, at 31-34.

123 GAL, *supra* note 35, at 31-40. *But see* STRUM, *supra* note 31, at 111 (arguing that Brandeis "had not experienced anti-Semitism himself and had not been particularly concerned about it."). Strum contended that Brandeis was first exposed to the reality of anti-Semitism through his conversations with Eastern European Jews in 1910. STRUM, *supra* note 31, at 111 ("[h]e was shocked at the depth of European anti-Semitism," and remarked that "'[y]ou cannot possibly conceive of the horrible sufferings of the Jews in Poland & adjacent countries . . . . The Jews are having a bad time.").

124 GAL, *supra* note 35, at 80 (noting that Brandeis revered New Englanders' "heritage of individualism, hard work, excellence, reform, and tempered realism.").

125 GAL, *supra* note 35, at 180-81.

126 *See also* GAL, *supra* note 35, at 180-81 (quoting Brandeis' remark that "Zionism is the Pilgrim inspiration and impulse over again . . . . "); GAL, *supra* note 35, at 202 (writing that Brandeis' Zionism was a "nationalist, not simply a missionist, movement.").

American values in Jewish form and to extend his focus to the Jewish nationalist project in Palestine.

Another variant of this approach is that Brandeis came to affiliate with the Jewish people precisely because they were social outsiders. In this account, articulated by Robert Burt, Brandeis came to embrace Jewishness because of his self-conception as an outsider standing "both within and apart from his society."[127] To Burt, Brandeis' career as a lawyer[128] and as a judge[129] was marked indelibly by this tension: Brandeis always maintained a distance between himself and the causes that he supported or the communities with which he identified.[130]

According to Burt, this dispensation towards existential homelessness sparked Brandeis' renewed interest in both Judaism and Zionism:[131] Unlike most Zionists, who subscribed to the dictum

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[127] BURT, *supra* note 7, at 14. Burt is careful to note that Brandeis' experience of rejection and loss was vicarious, insofar as Brandeis inherited the trauma of his mother's early loss of her own mother. BURT, *supra* note 7, at 122. As such, Brandeis experienced outsider status in the second degree, and viewed his life's mission as the transcending of such status. BURT, *supra* note 7, at 123 ("Louis might feel not only that outcast status could be transcended, but that he himself could be, perhaps even was obligated to be, an instrument of that transcendence. This too would come as his natural heritage: Brandeis'[ ] sense of mission on behalf of outsiders and his tenacious optimism that this mission could be achieved."); BURT, *supra* note 7, at 13 (writing also that Brandeis "found a place to stand both in and apart from his society. He was neither insider nor outsider. He found a unique place for himself, poised always at the boundary.").

[128] BURT, *supra* note 7, at 9 (writing that Brandeis did not see himself as a hired gun dedicated to advancing the interests of his clients, but instead "stood apart from, and maintained a critical distance from, his clients," often charging them to take "his own standards of [moral] conduct" into account); BURT, *supra* note 7, at 33 ("From his outsider's perspective Brandeis appreciated the frustration and anger of the union men in ways that his more comfortable and complacent colleagues could not comprehend.").

[129] BURT, *supra* note 7, at 10, 13 (recalling Brandeis' dissent in *Olmstead v. United States*, in which he remarked that the framers of the Constitution "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men . . . . " and noting Brandeis' seemingly contrary statement in a different dissent that "[a]ll rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community.").

[130] BURT, *supra* note 7, at 34:

> Brandeis insisted on "holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either." Brandeis kept this independence, moreover, not only in the conflicts between rich and poor, but wherever he saw struggle between comfortable insider and scorned outsider. In these conflicts, Brandeis sought to occupy a middle ground between the disputants, between the insiders and outsiders.

[131] BURT, *supra* note 7, at 36 ("Brandeis seized on his own Jewishness, through the Zionist movement, as one expression of this social role.").

"I am a Jew and therefore homeless," Brandeis "knew he was homeless before he fully recognized his Jewishness; it was as if he concluded, 'I am homeless and therefore a Jew; and this homeless Jewishness finds its clearest expression in Zionism.' "[132] Brandeis' sense of self as an outcast therefore preceded his affiliation with Judaism, and was not itself produced by his Jewishness: indeed, "this element of his background could have driven him to seize the possibilities for abandoning outsider status, as [Felix] Frankfurter's career suggests, as much as to cherish such status."[133] Brandeis opted to identify with the Jews precisely because they did not enjoy full acceptance as members of American society: he expressed his "identification [as an outsider] through the cultural medium of his Jewishness."[134]

Burt takes a different route than Galanter and Gal to embracing Brandeis as an ethnic Jew, but all three share the view that Brandeis' ethnic Jewish identity was significant.

C. Brandeis as Religious Jew

Albert Vorspan is the sole commentator to argue explicitly that Brandeis laid claim to a religious Jewish identity. Vorspan posits that Brandeis came to endorse a prophetic mode of Judaism, dedicated to transforming society in light of Judaism's lofty ideals — a model that Vorspan considered authentically Jewish.[135]

In Vorspan's view, "there was nothing Jewish about Brandeis'[ ] life, his contacts, or his interests until about 1910."[136] In that year, as noted above, Brandeis worked closely with Jews on both the labor and management sides of the garment workers' strike, and was deeply impressed with "the intensely Jewish Jews he came to know in New York . . . ."[137] These Jews were "[v]ital, aflame with a peculiarly Jewish zeal for social justice, and reflecting a deep sense of rootage to a Jewish tradition," and they succeeded in stirring

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[132] BURT, *supra* note 7, at 18.

[133] BURT, *supra* note 7, at 117.

[134] BURT, *supra* note 7, at 122.

[135] VORSPAN, *supra* note 12, at 22.

[136] VORSPAN, *supra* note 12, at 22; VORSPAN, *supra* note 12, at 23 (with respect to Brandeis' childhood, Vorspan writes that "[f]ormal religion . . . played no part in the life of the family. The Brandeises belonged to no synagogue.").

[137] VORSPAN, *supra* note 12, at 27 (contrasting these New York Jews with the "comfortable, conservative Jews [Brandeis] had met in Boston.").

within Brandeis "a sense of spiritual kinship."[138] This "kinship" went deeper than the ethnic bonds identified by the commentators supporting the second view outlined above; Brandeis came to share a spiritual and religious identity with the garment workers.

As a consequence of this formative encounter, writes Vorspan, Brandeis "found himself as a Jew . . . . [H]e began to probe the implications of his own Jewishness."[139] The Jewish identity which Brandeis assumed is best characterized as prophetic: "Louis Dembitz Brandeis . . . was, above all else, an American embodiment of the ancient prophet of Israel."[140] Brandeis' Judaism was also prophetic insofar as it aimed to bring Jewish ideals to life on the world stage: "It was the task of the Jew to help clothe these majestic principles with the flesh of reality, by ennobling American life with the Jewish reverence for social justice and the Jewish exaltation of the saga of the spirit."[141] Brandeis' ideals were authentically Jewish, and were not merely derivative of American values.[142]

Indeed, Vorspan observes that "Brandeis came to the conclusion that only by expressing himself Jewishly could he and other Americans of the Jewish faith play their full part as Americans . . . . [T]he Jew could and must contribute to the panoply of American life *as a Jew* – proudly, consciously, affirmatively Jewish."[143] To Vorspan, Brandeis saw Judaism as substantially modifying the way

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[138] VORSPAN, *supra* note 12, at 27.

[139] VORSPAN, *supra* note 12, at 27. While other scholars view Brandeis' non-observant upbringing as setting the tone for his adult life, Vorspan finds that Brandeis enjoyed enough intellectual flexibility to take on new beliefs. VORSPAN, *supra* note 12, at 28 ("Thus did Brandeis, the assimilationist, who discovered his own Jewishness at the height of his career, set his feet upon the ground of Zionism. Few mature adults have the plastic capacity for change and growth which characterized Louis Brandeis."). The fact that Brandeis remained non-observant of Jewish ritual law does not alter Vorpsan's analysis. VORSPAN, *supra* note 12, at vii (noting that Brandeis "conspicuously avoided the synagogue and Jewish religious life throughout his amazing career.").

[140] VORSPAN, *supra* note 12, at 39.

[141] VORSPAN, *supra* note 12, at 28. Brandeis' religious commitments also gave rise to his Zionist involvement. VORSPAN, *supra* note 12, at 29 (writing that Brandeis "invest[ed] the cause of Zionism with a nobility of spirit which was a mirror of his own consecrated spirit."); VORSPAN, *supra* note 12, at 29 ("To [Brandeis], the chief purpose in Zionism rested in the spiritual and emotional effect which the restoration of a Jewish homeland would have upon Jews and Jewish life throughout the world.").

[142] VORSPAN, *supra* note 12, at 28 (citing Brandeis' remark that "[t]he twentieth century ideals of America . . . have been the ideals of the Jew for more than twenty centuries.").

[143] VORSPAN, *supra* note 12, at 28 (emphasis in original).

he engaged in public affairs: one must not be a Jew who contributes to society, but must "contribute . . . *as a Jew*."[144]

IV. BRANDEIS THE JEWISH JURIST: THE IMPORTANCE OF JUDAISM TO BRANDEIS' PROFESSIONAL IDENTITY

We take a different approach than other commentators to the question: how Jewish was Justice Louis D. Brandeis? Using the lens of professional identity, we find that Judaism provided Brandeis with a formative understanding of his role as a jurist. His Jewish identity functioned as a source of the values that informed his understanding of the legal system and the public good, and most importantly his role as an American lawyer and judge. Because of this focus on the connection between Jewish identity and professional identity, we need not follow the lead of other commentators who either expressly or implicitly impose the lens of authenticity upon Brandeis' Jewishness.

In his professional role as a jurist, Brandeis was very Jewish. True, he did not begin his life or legal career with that perspective, and at one point earlier in his career adopted a bleached-out approach to American citizenship that rejected the influence of ethnic or religious identity upon the professional role.[145] However, as Albert Vorspan notes, "Brandeis, the assimilationist . . . discovered his own Jewishness at the height of his career . . . ."[146] Exactly why Brandeis abandoned his earlier view in favor of one that embraced strongly held Jewish identity is not clear. None of Brandeis' biographers offer a detailed account of his shift away from the bleached-out perspective towards the adoption of a Jewish professional identity.

Perhaps, though, this shift was not entirely out of context for Brandeis. His devotion to his Uncle and mentor, Lewis Dembitz,[147] may have left him with an openness to Judaism that would make Brandeis willing to learn and gain inspiration from the Eastern European Jewish labor leaders and the Zionist leaders with whom he

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144 VORSPAN, *supra* note 12, at 28 (emphasis in original).

145 *See* ROSEN, *supra* note 2, at 148-49 (documenting Brandeis' hostility to hyphenated identities).

146 VORSPAN, *supra* note 12, at 28 (writing "Thus did Brandeis, the assimilationist, who discovered his own Jewishness at the height of his career, set his feet upon the ground of Zionism. Few mature adults have the plastic capacity for change and growth which characterized Louis Brandeis.").

147 *See* BURT, *supra* note 7, at 119-20.

worked closely.[148] These experiences, in turn, created the space for him to develop the Jewish literacy[149] that he would deploy in his writings and remarks on Jewishness and professional identity.

Brandeis repeatedly described Judaism as importantly informing the devotion of Jews to the public good in their professional endeavors, and opined that Jews could make a unique contribution to American society only by maintaining their Jewishness.[150] In doing so, he prescribed a Jewish professional identity consistent with anthropologist Clifford Geertz's observation that religion always "point[s] to action" and carries strong "directive force . . . in public and private life."[151] To Geertz, the religious individual feels the motivation to act upon her convictions: "[B]etween the way that one ought to live and way things really are there is an unbreakable inner connection."[152]

In this manner, Brandeis identified Judaism as the origin of key values, such as social justice and democracy, for all Jewish Americans, and the force obligating them to make good upon those values. For Brandeis, the "Jewish Spirit" conveys these crucial commitments.[153] Furthermore, adherence to Judaism requires

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[148] *See* VORSPAN, *supra* note 12, at 27.

[149] *See* ROSEN, *supra* note 2, at 148-49 (noting that, after meeting Jacob de Haas for a second time in 1912, Brandeis "began a rigorous program of self-study." In de Haas' words, Brandeis immediately "began an earnest quest for knowledge . . . . He studied the footnotes as well as the printed page of Jewish history and made the Zionist idea his own.").

[150] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 168-69.

[151] CLIFFORD GEERTZ, ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA 95-96 (1968) (writing that religion offers "a particular manner of interpreting experience, a certain way of going at the world as opposed to other ways, and the implications such a perspective has for conduct."); *see also id.* at 98 ("Religious patterns . . . have a double aspect: they are frames of perception, symbolic screens through which experience is interpreted; and they are guides for action, blueprints for conduct.").

[152] *Id.* at 97.

[153] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 161. Brandeis asserted that Judaism "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." LOUIS D. BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON ZIONISM 63 (1999) [hereinafter BRANDEIS ON ZIONISM]. Brandeis stated numerous times in this speech that the Jewish people are united by core ideals; he saw this as a general property of religious identity: religious groups are bound by a desire to "elaborate and express their idea." BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON ZIONISM, *supra* note 152, at 17. The Jewish people are united around "common ideas better worth expressing." BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 161. These ideas are uniquely Jewish:

compliance with these ideals in all arenas of life: "Duty must be accepted as the dominant conception in life,"[154] and Judaism stresses an "all-pervading sense of duty in the citizen."[155]

Indeed, in Brandeis' view, Judaism requires that Jews fulfill their duties as citizens by promoting social justice, and equality. He noted that "[t]o America the contribution of the Jews can be peculiarly large. America's fundamental law seeks to make real the brotherhood of man. That brotherhood became the Jews' fundamental law more than twenty-five hundred years ago. America's twentieth century demand for social justice. That has been the Jews' striving ages-long."[156] To Brandeis, the Jewish dedication to social justice chronologically preceded America's pursuit of the same ideal, insofar as America's newly-gotten "twentieth century demand" for social justice has been the aspiration of the Jews for decades, and the American aim of "mak[ing] real the brotherhood of man" had been a staple of Judaism for 2,500 years.[157]

Brandeis saw the Jewish commitment to social justice as reinforcing and constructing American constitutional values. To Brandeis, the core values of the constitutional system are "the development of the individual for his own and the common good; the development of the individual through liberty, and the attainment of the common good through democracy and social justice."[158] All individuals, that is, are charged with fulfilling two overlapping duties:[159] duties to the individual and to the common good.

> We recognize that with each child the aim of education should be to develop his own individuality, not to make him an imitator, not to assimilate him to others. Shall we fail to recognize this truth when applied to whole peoples? And what people in the world has shown greater individuality than the Jews?

BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 161.

[154] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 169.

[155] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 169.

[156] Brandeis, *Greetings from Louis D. Brandeis*, *supra* note 50, at 4.

[157] Brandeis, *Greetings from Louis D. Brandeis*, *supra* note 50, at 4.

[158] BRANDEIS, *True Americanism*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 26.

[159] BRANDEIS, *True Americanism*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 26. These duties overlap insofar as one's obligations to the individual stem from the very nature of democracy: since each individual helps to govern the democratic society, the polity will flounder if its members are incapable of rule. BRANDEIS, *True Americanism*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 27 ("Unless the rulers have, in the main, education and character, and are free men, our great experiment in democracy must fail. It devolves upon

Judaism served to advance and construct these values, in that democracy is "not an ideal merely" for the Jews, but an ingrained "practice."[160] One way in which Judaism does so is by pushing adherents to develop their intellectual faculties: Judaism "imposed the use of the mind upon the Jews . . . . It demanded of the Jew not merely the love, but also the understanding of God."[161] This is a much-needed virtue in a participatory democracy, in which "everyone is part sovereign," and therefore "everyone should be competent."[162] Through its focus on the development of the intellect, Judaism produces excellent democratic citizens.

Brandeis identified Jewish judges and lawyers as exemplars of these constitutional values. As noted above, when Brandeis recommended his clerk Harry Shulman to Felix Frankfurter for a Harvard Law School faculty position, he explained that:[163]

> a great service could be done generally to American law and to the Jews by placing desirable ones in the law school faculties. There is in the Jew a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews.[164]

This conception of Brandeis as having a significant Jewish professional identity is, of course, consistent with Vorspan's view that for Brandeis, "only by expressing himself Jewishly could he and other Americans of the Jewish faith play their full part as Americans . . . . [T]he Jew could and must contribute to the panoply of American

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the state, therefore, to fit its rulers for their task."); BRANDEIS, *True Americanism*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 29 (arguing that individual rights must be extended because of "the conviction that such equal opportunity will most advance civilization.").

[160] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 169.

[161] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 169. This view hews closely to that espoused by the reform movement of Judaism in its classical period. According to the Reform doctrine, taking action in obedience of moral duty "was the 'supreme and sufficient religious act.' " MICHAEL A. MEYER, RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM 287 (1988) (noting that this stance was originally developed by Christian proponents of the Social Gospel).

[162] BRANDEIS, *A Call to the Educated Jew*, *in* BRANDEIS ON DEMOCRACY, *supra* note 46, at 168.

[163] BURT, *supra* note 7, at 65.

[164] BURT, *supra* note 7, at 65. See notes 66-68 *supra*.

life *as a Jew* – proudly, consciously, affirmatively Jewish."[165] We differ from Vorspan's perspective only in explaining how Brandeis' reflections about Jewish identity were largely grounded in Brandeis' own experience as a lawyer and judge, and thereby carry more pointed implications for Jewish lawyers than for American Jews generally. We therefore focus in greater detail on the way Judaism shaped Brandeis' understanding of American law, policy, and constitutionalism. In addition, our focus on professional identity differs from Vorspan's analysis in that Vorspan assumes the authenticity of Brandeis' Judaism and we do not reach that question.

The divergence between our view and those of the commentators who describe Brandeis as either a secular or ethnic Jew is not surprising, given Brandeis' complex and conflicting Jewish biography. We suggest, however, that the focus on professional identity provided a way to clarify the evidence. It does so by narrowing the inquiry to how Brandeis understood the Jewish dimension of his professional role, including whether that identity conformed to the modern view that professional identity should exclude all "contingent aspects of the self,"[166] such as race, gender, and religion. Within the scope of this inquiry, the validity of Brandeis' understanding of Judaism becomes largely irrelevant.[167] Indeed, commentators' rejection of Brandeis' religious Jewish identity in favor of a secular or ethnic one too often rests upon commentators' own views that Brandeis' religious identity was inauthentic,[168] particularly regarding his lack of ritual observance. Without question, though, Brandeis rejected bleached-out professionalism in favor of a robust Jewish professional identity that

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[165] VORSPAN, *supra* note 12, at 28 (emphasis in original).

[166] Levinson, *supra* note 3, at 1578.

[167] MEYER, *supra* note 160, at 286 (nothing that without reaching the question of the authenticity of Brandeis' Jewish beliefs, that they fell within the ambit of mainstream Reform Judaism); MEYER, *supra* note 160, at 286-87 (writing that for Reform Jews, "moral action took precedence over religious observance." Moral conduct, in place of "dogma or ceremony—was the supreme and sufficient religious act."); MEYER, *supra* note 149, at 264 (writing that this emphasis on moral principles "overshadowed ritual as the basis of Reform religious expression.").

[168] Several commentators issued normative judgment as to what does, or does not, constitute a valid Jewish identity. Galanter, *supra* note 1, at 1134 (writing that Brandeis' Jewishness "had little content apart from being a container for reform and redemption," thereby implying that one must believe in more than reform and redemption to have a valid Jewish worldview.).

he believed important to lawyers who sought to promote American values and benefit the public good.

V. BRANDEIS AND THE CHALLENGE TO THE BLEACHED OUT PROFESSIONAL PROJECT FROM LAWYERS WITH DIVERSE IDENTITIES

Brandeis' approach to his Jewishness invites us to reconsider bleached out professional identity. As an exemplary lawyer and judge, he provided a model for combining personal and professional identities in way that reinforced each. In this way, his approach fit within a variety of perspectives that emerged within the past decades to draw upon personal identity in constructing professional role.

As Sandy Levinson has explained, bleached out professional identity is essential to the modern professional project.[169] The conception of the lawyer as neutral partisan, which became dominant after the 1960s,[170] assumed that lawyers were extreme partisans for their clients in order to achieve a just adversarial system. Equal outcomes in the adversarial system require equal lawyering which would only occur if all lawyers were "fungible."[171] In turn, lawyers could be fungible only if they bleached out their personal identities in favor of a uniform professional role.[172]

Analytically, the dominant approach to bleached out identity suffers from several defects. First, the quality of lawyers' work is not fungible. It varies widely, often depending upon the amount clients are able or willing to pay for legal services.[173]

Second, as Bruce Green notes, "[a]ll lawyers hold beliefs and values that 'are contingent, or are not shared by others,' including by their clients or by other lawyers."[174] Organizational behavior research supports his insight. Organizational behavior theorists have found that in the workplace people are always managing both their

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[169] Levinson, *supra* note 3, at 1601.

[170] Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381-84 (2001) [hereinafter *Lawyers as America's Governing Class*].

[171] Levinson, *supra* note 3, at 1578.

[172] Levinson, *supra* note 3, at 1578-79.

[173] DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970-73 (2004).

[174] Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 55 (1997) [hereinafter *The Role of Personal Values*].

work roles and their personal identities, in terms of how they view themselves and how others view them.[175] For example, even though large law firms have sought to provide equal treatment of lawyers through a bleaching out strategy of color and difference blindness, the interpersonal dynamics of implicit bias and homophily continue to favor white men and disadvantage women and people of color.[176]

Third, bleaching out to serve as a neutral partisan does little to promote important professional values beyond the aspiration to excellence in representing clients that the neutral partisan role requires. Whether neutrality requires integrity and civility is unclear. One could argue that a properly functioning adversarial system requires these values; but at the same time a focus on neutral partisanship for a client does not necessarily require either integrity or civility in dealing with courts, adversaries, and third parties.[177] Equal justice, including equal access to justice,[178] may be the rationale for bleaching out, but the goal of bleaching out identity does not require a commitment to equal justice, only to the client's interests. Similarly, neutrality does not require a commitment to the public good, whether pursued through client counseling,[179] pro bono representations, "improvement of the law,"[180] or other conduct that fulfills lawyers' "vital role in the preservation of society."[181]

Given the bleaching out project's inconsistent and ineffective advancement of professional values, perhaps another neutral approach preserves these values. Indeed, the traditional ideology of professionalism once played such a role.[182] In the late nineteenth century lawyers and non-lawyers asserted that lawyers had become

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[175] *See* DAVID A. THOMAS & CLAYTON P. ALDERFER, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, *in* HANDBOOK OF CAREER THEORY 133, 143-45 (Michael B. Arthur et al. eds., 1989).

[176] Russell G. Pearce, Eli Wald & Swethaa Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2423-25, 2426-27 (2015).

[177] *See* MODEL RULES OF PROF'L CONDUCT r. 3.1 - 3.7, 4.1 - 4.4 (AM. BAR ASS'N 1983).

[178] *E.g.*, MODEL RULES OF PROF'L CONDUCT Preamble, r. 6.1 (AM. BAR ASS'N 1983).

[179] Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1638 (2002).

[180] MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 1983).

[181] *Id.*

[182] Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1341, 1359-60 (2006) [hereinafter *The Legal Profession as a Blue State*]; Rebecca Roiphe, *Redefining Professionalism*, 26 U. FLA. J.L. & PUB. POL'Y 193, 197, 211 (2015).

greedy business people, thus professionalism offered a way for lawyers to explain how they could revive and maintain professional values.[183] Unlike businesspeople who sought to maximize profit, lawyers possessed inaccessible expertise and worked primarily for the public good.[184] To the extent that some lawyers did not live up to these values, the leadership of the bar policed the lawyers' ranks by developing ethics rules that reflected high standards and by enforcing those standards through the licensing and discipline of lawyers.[185]

But beginning in the 1980s, the legal profession entered what bar leaders described as a "crisis of professionalism."[186] Bar leaders complained that lawyers had once again abandoned their commitment to the public good in favor of commercial self-interest.[187] The overwhelming majority of commentators, as well as surveys of lawyers, similarly found that a consensus no longer existed among lawyers on commitment to the values of professionalism.[188] Accordingly, professionalism cannot be relied upon to provide the motivation for lawyers to adopt and maintain the professional values that bleaching out does not effectively supply.

Brandeis offers a different approach. Although he originally embraced a bleached out approach to citizenship in condemning hyphenated Americanism,[189] Brandeis shifted his perspective after his exposure to workers and owners in the garment business who were steeped in a highly Jewish milieu.[190] He came to see hyphenated Americanism, and in particular his Judaism, as a resource for promoting a commitment to democracy and social justice – one of the highest aspirations of American citizenship."[191] In contrast to bleaching out, Brandeis' Judaism inspired his commitment to equal justice and the public good and thereby reinforced his adherence to professional values. Indeed, in the advent of the crisis of professionalism, an extensive body of literature argues for an

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[183] Pearce, *The Legal Profession as a Blue* State, *supra* note 181, at 1342-43, 1356.

[184] Pearce, *The Legal Profession as a Blue* State, *supra* note 181, at 1342.

[185] Pearce, *The Legal Profession as a Blue* State, *supra* note 181, at 1342, 1349.

[186] Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1263 (1995) [hereinafter *The Professionalism Paradigm Shift*].

[187] Pearce, *The Professionalism Paradigm Shift*, *supra* note 185, at 1251-52.

[188] Pearce, *The Professionalism Paradigm Shift*, *supra* note 185, at 1230, 1232.

[189] Pearce, *The Professionalism Paradigm Shift*, *supra* note 185, at 1244.

[190] Pearce, *Lawyers as America's Governing Class*, *supra* note 169, at 401-02.

[191] Pearce, *The Legal Profession as a Blue* State, *supra* note 181, at 1244.

understanding of the lawyer's role that rejects bleaching out and promotes professional values. Commentators suggest that moral responsibility,[192] feminism,[193] racial justice,[194] LGBTQ rights,[195] religion,[196] and civic obligation[197] offer a way for lawyers to combine personal and professional perspectives in order to reinforce professional values. Indeed, as Robert Cochran observed, "[m]orality is more likely to take hold and to affect one's life when it is drawn not from the ethical considerations of the profession, but from the deepest source of values of the person."[198]

In turn, these efforts drawing upon personal identity in promoting professional values have led to two concerns. One concern is systemic; it reiterates the bleaching out assumption that if lawyers apply their personal identity to their work, rule of law will no longer apply equally and will instead depend upon the personal identity of the lawyer client.[199] A second concern relates to the quality of representation that clients receive; specifically that a lawyer's personal identities may cause her to neglect her ethical

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[192] *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); *see also* Gerald P. Lopez, *Keynote Address: Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2045, 2048 (2005) [hereinafter *Keynote Address*].

[193] Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S LJ. 1, 2-3 (1991); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women 's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 41, 49-50 (1985).

[194] *See, e.g.*, Bill Ong Hing, *The Great Opportunity in Law*, 15 ASIAN PAC. AM. L.J. 30, 32, 34 (2010); Lopez, *Keynote* Address, *supra* note 191, at 2048-49; Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766, 773, 784 (1997); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1523 (1998).

[195] *See, e.g.*, Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement,* 17 U. PA. J. L. & SOC. CHANGE 107, 113 (2014).

[196] *See, e.g.*, AZIZAH Y. AL-HIBRI, 1 ISLAMIC WORLDVIEW: ISLAMIC JURISPRUDENCE, AN AMERICAN MUSLIM PERSPECTIVE (1995); Joseph Allegretti, *Christ and the Code: The Dilemma of the Christian Attorney*, 34 CATH. LAW. 131, 133 (1991); Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199, 1204 (1996).

[197] *See generally* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010); *see also* Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1211-12 (2009).

[198] Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 318 (2000).

[199] *E.g.*, Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CAS. W. RES. L. REV. 127, 143-44 (2004); Robert K. Vischer, *Heretics in the Temple of the Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J.L. & RELIGION 427, 428, 432-33 (2004).

obligations to provide loyal and competent representation to her client. Examples of this view include allegations that an African-American "lawyer who interjects race or racism into a legal proceeding has 'played the race card' in a manner that undermines 'colorblind' justice,"[200] or fears that religious lawyers will seek to impose their religion upon clients.[201]

David Wilkins responds that lawyers have the capacity to manage their personal and professional obligations.[202] In the context of black lawyers, he argues that they:

> must negotiate three . . . moral realms: the "professional," representing the legitimate moral demands emanating from the norms and practices of the legal profession; the "obligation thesis," representing the legitimate moral claims emanating from a black lawyer's membership in the black community; and the "personal," representing the unique desires and commitments that black lawyers have in virtue of their basic humanity.[203]

Wilkins suggests that when conflicts arise, "lawyers should seek to narrow the range of conflict among these competing moral claims" and where the conflict cannot be resolved, "choose the course of action that best supports the 'social purposes' underlying the lawyering role in question" and:

> [I]n those circumstances where honoring the social purpose of a particular lawyering role requires a given black lawyer to ignore or slight a legitimate moral interest emanating from one of the three moral domains-which once again, I believe to be inevitable-she must honor this 'moral remainder' in some other part of her professional life.[204]

This prescription for black lawyers offers a guide for all lawyers who seek to integrate their personal and professional identities.

The Wilkins approach, as well as similar efforts to integrate identities that concern professional ethics, fall well within the ethics

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[200] Wilkins, *supra* note 193, at 1515.

[201] Pearce & Uelmen, *supra* note 198, at 153-56.

[202] Wilkins, *supra* note 193, at 1507.

[203] Wilkins, *supra* note 193, at 1507.

[204] Wilkins, *supra* note 193, at 1507-08.

rules. Many rules, such as Rule 1.6 on confidentiality, Rule 1.16 on terminating representation, and Rule 2.1 on independence of judgment, expressly provide lawyers with discretion.[205] Bruce Green notes that:

> [A] lawyer may rely on personal conscience to signal a possible ethical quandary, draw on personal values to construct a philosophy of legal practice within the porous construct of professional norms, invoke personal values (almost) always in making professional decisions that are relegated to the lawyer's ungrounded discretion, and refer to personal moral considerations in counseling clients.[206]

Nonetheless, as Wilkins and Green note, in some instances personal preferences, like other lawyer interests, may violate ethical guidelines. Indeed, even Brandeis' renowned conception of the lawyer for the situation has been the subject of a debate as to whether to celebrate it or declare it a violation of the lawyer's duty of loyalty.[207] As a general matter, though, the lawyers' personal conscience must give way to professional rules. For example, Rule 1.7 identifies a conflict where "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[208] In those situations, a lawyer can only continue representation with both informed consent and a reasonable belief that the lawyer can provide competent representation.[209] Not surprisingly, though, while the ethical rules will generally provide appropriate boundaries, commentators have debated whether lawyers should engage in civil disobedience in extreme circumstances.[210]

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[205] MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.16, 2.1 (AM. BAR ASS'N 1983).

[206] Green, *The Role of Personal* Values, *supra* note 173, at 56.

[207] Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 362 (2013); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 377-78, 392 (2004); Katherine A. Helm, *What Justice Louis Brandeis Taught Us About Conflicts of Interest*, 35 J. LEGAL PROF. 1, 5, 9-10, 21 (2010); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1474 (1996).

[208] MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 1983).

[209] MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 1983).

[210] *See generally* MARTHA MINOW, BREAKING THE CYCLES (2002); Kathryn Abrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753, 757-58, 775, 777, 781-82 (1991); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 235, 239 (1996).

Beyond these conflicts and the Wilkins approach to balancing identity with professional values, Robert Vischer suggests that some identities are simply inconsistent with the professional value of equal justice under law. He points to Matthew Hale, leader of "white-supremacist sect, World Church of the Creator."[211] The Illinois Supreme Court rejected Hale's application for "admission to the bar on the grounds that his racially discriminatory ideology was incompatible with membership in the legal profession[.]"[212] Vischer observes that "There is something disconcerting about an avowed white supremacist serving as a gatekeeper to the legal system, even if we do not object to the white supremacist spouting his views freely on a street corner."[213] Vischer, the Dean of a religiously affiliated law school, notes that even some mainstream religious groups oppose LGBTQ rights and offers a test for determining whether their identity commitments are consistent with professional values:

> One of the few core principles on which the gatekeeping function depends is that representation may not be denied based on an individual's immutable characteristics, as opposed to the objective the client seeks to pursue (or her inability to pay for the services, of course). To allow lawyers – religious or not – to avoid this limitation threatens the ability of disfavored groups to access the legal system, and could turn the pluralist profession into a vehicle by which society itself becomes further balkanized.[214]

Wilkins and Vischer offer valuable guidance for determining when a lawyer's identity commitments reinforce, or are not inconsistent with, professional values. While their perspectives identify the limits of integrating personal identity with professional values, they acknowledge the significant value of promoting identity integration within those limits. Indeed, that is the lesson of Justice Louis D. Brandeis in embracing his Jewish identity in his work as a lawyer and judge. By employing his Jewishness to promote professional commitments, Brandeis offers a persuasive counter-narrative to bleached-out professional identity. At a time when

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211 Vischer, *supra* note 199, at 41.

212 Id.

213 Id. at 43.

214 Id. at 45-46.

professionalism no longer offers many lawyers a resource for finding meaning in their work, identity commitments offer a potentially powerful resource lawyers can use in understanding that their work is meaningful and that professional values demand their obedience.

VI. CONCLUSION

How Jewish was Justice Louis D. Brandeis? Given that his biography offers evidence for a range of interpretations, commentators have understandably offered contrasting perspectives, falling into the categories that view him as largely secular, as ethnically Jewish, or as religiously Jewish. By applying the prism of professional identity, we offer a somewhat different approach. Although his strong Jewish identity emerged only after his mediation of the garment workers' strikes in 1910, Brandeis expressly described his understanding that Judaism required his commitment to equal justice and the public good. In doing so, he offers a model of professional excellence that contradicts the dominant conception of bleached out professional identity. His example provides validation to the lawyers of diverse personal identities who have already chosen to integrate their personal and professional identities, and invites those who are exploring their professional identity to consider how they can bring their personal resources to bear on their work as a lawyer.