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Summer 2019

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The Brandeis Thought Experiment: A Reflection on the Elimination of Racial Bias in the Legal System

PATRICK C. BRAYER*

Introduction

In 2027, Harvard Law School and predictably legal institutions across the nation will in some form or another celebrate the 150th anniversary of Louis Brandeis' graduation.¹ His legacy as a legal genius, reformer, and "the people's attorney"² will be extolled to budding progressive activists and legal reform advocates as an example of how to change the world for the better. As 2018 passes, an arguably more significant 140-year anniversary is taking place. In 1878 Louis Brandeis departed the intellectual safety of Cambridge for the burgeoning new legal frontier of St. Louis, Missouri, becoming a practicing attorney for the first time.³ In less than eight months, he was back in Boston permanently, launching a career and building a legacy that would include 25 years as a reforming member of the United States Supreme Court.⁴ It is my belief that Brandeis was greatly, but quietly, impacted by his brief time in St. Louis and frequently reflected on his failure to dedicate himself to the betterment of the community and possibly to the African American community

As today's conversations on racial injustice and biases dominate our national debate, biographers of Brandeis are increasingly contextualizing his absent advocacy for people of color.⁵ As the 150th anniversary of Brandeis' legal graduation and swearing in as a lawyer approaches, we can best honor his contribution by completing his legacy of service and continuing his fight for social justice. But unlike Brandeis, today's advocate can advance the cause of eliminating injustice that occurs in inconvenient places by

Patrick Brayer is the Deputy District Defender of the St. Louis County Trial Office where he is a veteran of the trial division. This essay represents his personal opinions and beliefs. Special thanks to Lacy Rakestraw, Lindy Henry and Renee Whyte for their insights and suggestions.

1. Burton Bernard, *Brandeis in St. Louis*, 11 ST. LOUIS B.J. 53 (Winter 1964).
2. RICHARD M. ABRAMS, CONSERVATISM IN A PROGRESSIVE ERA 59 (1964).
3. MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 3-4 (1981).
4. *Id.* at 43-45.
5. See JEFFERY ROSEN, LOUIS D BRANDEIS, AMERICAN PROPHET 18-19 (2016), MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 20 (2009).

interacting with individuals who may not be receptive to discussing issues of bias and prejudice. The best example of this type of service is the legal advocacy of people of color, who have been marginalized by issues of poverty and class in all regions of our nation, especially in rural communities. If this effort is made by a legion of new lawyers, can the impact of racism and bias in the law be largely eliminated by 2027?

To focus on the plight of minorities in under-resourced rural communities in this essay is not to disregard the devastating impact that bias and prejudice play on marginalized populations in larger cities. But does bias and prejudice exist in the legal system today largely because smart, well-intentioned professionals only engage in a cause when it is comfortable, convenient, and not disruptive to our lifestyle? For many lawyers, confronting bias and prejudice in a rural community is the one selfless vocation that tests the boundaries of a professional commitment to social justice. This essay prompts the reader to consider their own limits in advancing the cause of a legal system free from racism and bias, and lawyers are encouraged to use the Brandeis experience as a guide in this self-reflection. Specifically, this essay calls attention to the fact that Louis Brandeis started his legal career at the same time and place where “thousands of Black migrants” were escaping persecution and traveling in search of economic and political freedom.⁶ Yet throughout his career Brandeis demonstrated an “intellectual disengagement, and a cavalier dismissal of the issues that sustained widespread public suffering by African-Americans.”⁷ I also share my own thoughts in this essay, as a trial attorney, considering if I can do more to eliminate bias in our system of justice.

Additionally, will the public interest causes championed by Brandeis be eroded in the coming years⁸ because the foundation (the creation of a mostly bias-free legal system) has never been properly secured throughout the nation by bright lawyers confronting injustice?⁹ To explore these questions, in the final section of this essay I ask the reader to review a thought experiment; to consider the established facts historians know about Brandeis, and then consider an alternative unproven narrative, reflecting why Brandeis was absent on issues of race in his career. By engaging in this reflection, it is my hope professionals will create their own narrative about Brandeis and in addition create a narrative about their own personal absence on issues of race and poverty.

6. See generally GATES et al., *infra* note 13, at 189.

7. Bracey, *infra* note 15, at 864.

8. See generally Chemerinsky, *infra* note 109.

9. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 117–118 (2012), for examples of how the legal system is impacted by racial bias; see also *id.* at 39–40 and 258–259 for a discussion on how civil rights are tied to basic human rights.

Brandeis and St. Louis

For a legal essayist, sometimes names, dates, and places all come together to lend context to an idea. For me, when I first learned about Louis Brandeis and his brief stint as a new lawyer in St. Louis and a member of the Missouri Bar (admitted November of 1878),¹⁰ it raised the questions: why and how did that happen? After gathering all the facts, more questions remained. Why did Brandeis leave St. Louis after only seven months of practice? Biographer after biographer (and there are a number of them) utilize several letters from Brandeis himself to explain his unhappiness with the city.¹¹ Quite simply, the Brandeis scholars boil the phenomenon down to the young lawyer's lack of exposure to interesting legal work and stimulating people.¹²

For historians, and probably for Brandeis himself, Boston provided better opportunities on both fronts. But what is the relevance of an essay if you can't prod the point a little and seek historical context that explains the events of today? When I discovered the African American exodus of 1879 from the southern States (the Exoduster movement)¹³ took place literally on the door step of Louis Brandeis's law office, I reflected how this migration may have impacted his career and service, and how it should have. Since historians are relatively silent on this connection, I use the mechanism of the thought experiment in the last section of this essay to explore the possible impact this mass migration had on the noted legal thinker.

St. Louis's history has been defined less by Brandeis' 1879 departure and more by the racially charged events that occurred in the neighboring town of Ferguson in 2014, triggered by the tragic killing of an African American teenager by a white police officer.¹⁴ Conversely, Brandeis has been defined less by his short interaction with the city of St. Louis and more by his towering legal work on progressive causes, though also by his public absence in the face of racial injustice and Jim Crow.¹⁵ Legal scholars have declared,

“[C]ertainly, from the perspective of African-Americans,

10. See Bernard, *supra* note 1, at 53.

11. See, e.g., ALLON GAL, *BRANDEIS OF BOSTON* 36 (1980); see also ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 53–54 (1946).

12. *Id.*

13. See HENRY LOUIS GATES & DONALD YACOVONE, *THE AFRICAN AMERICANS: MANY RIVERS TO CROSS* 189 (2013) (“But the Great Migration was foreshadowed by the Exoduster movement, during which tens of thousands of black migrants fled the South, searching for economic opportunity in Oklahoma, Kansas, and Colorado in the late 1870's and throughout the 1880s”).

14. See Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors about Ferguson*, 109 NW. U. L. REV. ONLINE 163, 165 (2015).

15. Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859 (2001).

Brandeis' systematic evasion of issues affecting African-Americans severely undermines any claim that Brandeis was a universal public advocate who championed the rights of all men. His chronic inability to defend their interests against the ravishes of white supremacy constitutes a critical failing that simply cannot be overlooked."¹⁶

This essay is about a missed opportunity for Brandeis, St. Louis, and our nation. Specifically for St. Louis, Brandeis failed to become a powerful permanent voice for racial equality in a city that stood and still stands at the confluence of America's racially "House Divided."¹⁷ And for Brandeis, his legacy will always present a missing chapter of service to his fellow citizens of color.

The African American Migration of 1879

A young Louis D. Brandeis became a practicing attorney in November of 1878.¹⁸ In March of 1879, just one block from the Courthouse famed for the Dred Scott¹⁹ case and where Brandeis practiced law,²⁰ hundreds of free black citizens escaping the persecution of the southern States after the American Civil War wandered through the streets of St. Louis. They were in search of food, shelter, and basic necessities needed to survive.²¹ They had just arrived on one of the many crowded steamers traveling north on the Mississippi providing deliverance from the beating, lynching, and inhumane treatment that was now the life of a newly freed African American residing in the South.²² As day gave way to evening, one reporter "observed their pitiful condition as they huddled among their piles of freight in the darkness

16. Bracey, *supra* note 15, at 909.

17. BRYAN M. JACK, THE ST. LOUIS AFRICAN AMERICAN COMMUNITY AND THE EXODUSTERS 95, 120 (2007); *see also* National Park Service, *Seventh Debate: Alton Illinois* (where Lincoln before a crowd that included residents of St. Louis—and in sight of Missouri across the river from Alton—defended his historic "House Divided Speech" in his 7th Lincoln Douglas Debate on October 15, 1858) *available at* <https://www.nps.gov/liho/learn/historyculture/debate7.htm>.

18. Bernard, *supra* note 1, at 56–59.

19. Dred Scott v. Sanford, 60 U.S. 393 (1857).

20. Compare Schwendemann, *infra* note 21, at 32, 40, with Bernard, *supra* note 1, at 56–59 (1870 maps of St. Louis indicate Chestnut Street—the 1879 address of Brandeis's law office—was one street South of Pine Street with Pine Street appearing to be one of the main thoroughfares of the 1879 Exoduster movement. The "Old Courthouse" also was and is catty-corner from where Brandeis practiced law and also one city block South from where the migrating African Americans traveled from the wharf to shelters at local Black churches.); *see also* Library of Congress, 1870 Map of St. Louis, <https://www.loc.gov/resource/g4164s.la002007/?r=0.368,0.528,0.198,0.089,0>.

21. Glen Schwendemann, *St. Louis and the "Exodusters" of 1879*, 46, no.1 THE JOURNAL OF NEGRO HISTORY 32–33 (1961).

22. *See* JACK, *supra* note 17, at 7.

of the levee,”²³ as snow and the winter conditions consumed them.²⁴

Originally 280 African-American men, women, and children arrived at the foot of St. Louis’ Pine Street in mid-March; days later 600 more arrived, with hundreds more arriving throughout the month.²⁵ With each new steamer of migrating citizens, city residents observed and the *St. Louis Globe-Democrat* reported the “migrants scattered along the waterfront warming themselves at several bonfires, all without food or the means to obtain it.”²⁶ On March 16th, newspapers warned that thousands of black citizens were waiting on river banks ready to depart southern cities for St. Louis.²⁷ Many were on their way to Kansas for a new start at life, with a promise of land and an assurance of freedom. For many of the formerly enslaved travelers, the Kansas enticements proved to be a scam, as the reality of their dream ended in this city regarded as the gateway to the west and, for these travelers, a gateway to true freedom.²⁸ The Exodus of 1879 was “important symbolically because it was the first large migration by former slaves out of the South” and St. Louis took on the biblical symbolism of the “Red Sea” as the “destitute” participants of exodus “languished” in the city that proved to be their “crucible” to freedom.²⁹ Nearly all of these migrating Americans required food, shelter, activism, and advocacy. While the African-American community in St. Louis went through heroic efforts to provide assistance, little support came from the white community, one member of that white community in March of 1879 being the young attorney Louis Brandeis.³⁰ Biographies are silent on whether Brandeis himself was indifferent to the plight of the migrating African Americans but separate historical accounts of Brandeis in St. Louis, and of the migration, place both events in close proximity.³¹

In March of 1879, just one street south of the dominant thoroughfare for the migration, on Pine Street in downtown St. Louis, a young attorney and freshly-minted member of the Missouri Bar practiced law in an office he shared with his employer on Chestnut Street.³² On April 1st, twenty-one-year-old Louis Brandeis (future justice of the United States Supreme Court) wrote a letter to his brother-in-law complaining “business was poor” in his

23. See Schwendemann, *supra* note 21, at 32.

24. *Id.* at 33–36.

25. *Id.*

26. *Id.* at 33.

27. *Id.* at 35.

28. *Id.* at 33.

29. See JACK, *supra* note 17, at 32, 151–152.

30. Compare JACK, *supra* note 17, at 27–28 with UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 40–42.

31. *Id.*

32. Compare Schwendemann, *supra* note 21, at 32, 40 with Bernard, *supra* note 1, at 56–59.

law office with only a few old cases keeping them occupied,³³ despite the fact Brandeis was free to develop his own practice, independent from his mentor and boss.³⁴ Just a month earlier he had complained to his sister about the tiresome social scene in the city with endless dances and superficial conversations.³⁵ In the spring of 1879, Brandeis found time to play Romeo in a stage production, but this diversion from unchallenging legal work and a dull social life proved to be equally distasteful.³⁶ For Brandeis, “his year of practice” in St. Louis “proved unrewarding, and he found the intellectual climate of the city dull after the excitement of Cambridge.”³⁷

In the years preceding his arrival in St. Louis, “in Cambridge, he heard a lecture by his favorite author, Ralph Waldo Emerson. He also heard the last Harvard lectures of Henry Adams.”³⁸ No such intellectual opportunities are evidenced from his months in St. Louis. Either biographers or Brandeis himself dismissed the fact that he shared a small section of a city with unrecognized African-American philosophers of freedom who, at the time, were openly discussing “the many abuses inflicted upon their people by the southern economic system and the white residents of that region.”³⁹ In this year of missed opportunity, did Brandeis ever interact with W. H. Whitesides, who spoke eloquently to reporters and all who would listen, about the plight of the travelers seeking deliverance from Southern persecution?⁴⁰ Or were ideas exchanged between Brandeis and Charleton Tandy, who lead the efforts of the Black community in finding shelter, food, and aid for the thousands of free citizens of color migrating through the city, documented just one block from Brandeis’ law office?⁴¹ Did Brandeis observe in court one of the best educated and most highly cultured members of the St. Louis Bar, J.L.D. Ferrier, a famed African-American attorney who defended high-profile criminal cases arising out of the victimization of the migrants?⁴²

It is surprising how historical evidence of Brandeis’s intellectual, professional, and social tedium exist in the midst of such well-publicized pain and suffering by the 10,000-plus participants of the exodus.⁴³ Review of Brandeis’ biographies and personal letters mailed from St. Louis lack any

33. THE FAMILY LETTERS OF LOUIS D. BRANDEIS (Melvin Urofsky & David W. Levy eds., 2002).

34. UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 40–41.

35. *Id.*

36. *Id.*

37. See UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 3, at 34.

38. See ROSEN, *supra* note 5, at 35.

39. See Schwendemann, *supra* note 21, at 32.

40. *Id.*

41. See JACK, *supra* note 17, at 32–33.

42. *Id.* at 56.

43. See JACK, *supra* note 17, at 28.

indication of awareness or engagement with the African-American exodus of 1879.

Brandeis and His Eroding legacy

Fifty years after his experience in St. Louis, in a correspondence to W.E.B. Du Bois, Brandeis politely declined an invitation to express his thoughts on racial equality for the NAACP publication, *The Crisis*.⁴⁴ Brandeis wrote in his letter since “our meeting” he had watched Du Bois’ contribution on behalf of “your people.”⁴⁵ By today’s standards, Brandeis’ comment regarding “your people” would be seen as an insensitive microaggression⁴⁶ by a public figure, revealing an implicit belief system that viewed African Americans as different from himself. When considered through the lens of time, Brandeis is considered racially normative if not enlightened by 1929 standards. But Brandeis was not normal. He is considered exceptional in thought and progressive innovation⁴⁷ His relatively benign slight would have little meaning if his inaction on issues of racial injustice were not so pronounced and his potential contributions to civil rights for people of color was not absent from the history of our nation.⁴⁸

For Brandeis, Du Bois’s “people” were different. The experiences, ideas, and struggles of the black citizens that he left on the riverfront of St. Louis in 1879 for the perceived intellectual comforts of Boston, would remain forever absent from Brandeis’s body of public work. In his time on the Court, Brandeis never authored an opinion on racial issues and “he voted with the majority in every one of those cases.”⁴⁹ “In sharp contrast to the passionate dissents he issued in *Gilbert, Olmstead*, and so many other cases, he simply went along with the majority in race cases and remained silent.”⁵⁰ Without the African-American experience as a touchstone to his social justice message, Brandeis’s legacy and contributions will remain intact, but for many, erode in relevancy as the 150-year anniversary of his Harvard graduation approaches.⁵¹

Brandeis may have predicted his own future inaction on issues of civil rights when as a Harvard law student he contemplated how “The masses of

44. Bracey, *supra* note 15, at 883.

45. *Id.*

46. Derald Wing Sue, Ph.D., *Microaggressions: More than Just Race*, PSYCHOLOGY TODAY (Nov. 17, 2010), available at <https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race>.

47. Bracey, *supra* note 15, at 860–861.

48. *Id.* at 861–863.

49. UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 639.

50. Edward A. Purcell, *The Judicial Legacy of Lewis Brandeis and the Nature of American Constitutionalism*, 33 *TOURO L. REV.* 5, 25 (2017).

51. Bracey, *supra* note 15, at 861–863.

any people, however intelligent, are very little moved by abstract principles of humanity and justice, until those principles are interpreted for them by the stinging commentary of some infringement upon their own rights.”⁵² In St. Louis, Brandeis may have been too comfortable, experiencing little of the sting that was felt by his fellow citizens and migrating African-American neighbors.

Conversely, the stinging commentary of experiencing anti-Semitism may have greatly impacted the future reformer. In the years following his return to Boston, he was excluded from social events by friends who belonged to the social elite of the city.⁵³ When his law partner and friend from Harvard was to be married, Brandeis was excluded from the invitation list by the bride’s socially conscious and anti-Semitic family.⁵⁴ “Brandeis suffered anti-Semitism in Boston almost from the time he set up practice there and this experience later led him into Zionism,”⁵⁵ where he became a leader, organizer, and advocate.⁵⁶

Arguably, Brandeis understood the great void in his record of public service and possibly reflected on his abandonment of the great racial causes that would present on the streets of cities like St. Louis for the 140 years following his exit from the Midwest. Brandeis encouraged some of the greatest young minds in the field of civil liberties and civil rights to live in St. Louis and take up the cause of service.⁵⁷ Columbia law professor Walter Gelhorn declined the advice, but the famed founder of the ACLU Roger Baldwin headed west after Harvard and settled in the city of Brandeis’ escape.⁵⁸

According to Roger Baldwin, Brandeis never regretted starting his career in St. Louis and referred to St. Louis as the “valley of democracy.”⁵⁹ Perhaps the efforts he undertook to convince Gelhorn and Baldwin to serve in St. Louis is evidence of regret for his missed opportunity. The missed opportunity for Brandeis was that, as a young lawyer, he could have learned from his fellow Americans who were fleeing persecution. For St. Louis, the missed opportunity was that the city could have grown more racially inclusive with the help of great thinkers like Brandeis and Gelhorn. If St. Louis had been the permanent home of Brandeis, would the city still have played host to the tragic 2014 events of Ferguson? And would Brandeis be missing a major portion of his legacy if he had shared experiences with his

52. See ROSEN, *supra* note 5, at 35 quoting MASON, *supra* note 11, at 27.

53. UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 97.

54. *Id.*

55. *Id.* at 53

56. *Id.* at x.

57. *Id.* at 725.

58. *Id.*

59. Roger N. Baldwin, *Affirmation of Democracy*, JEWISH FRONTIER 10 (Nov. 1936).

migrating neighbors?

From Summerton, South Carolina to Leeds, Alabama, civil rights attorney and future Justice of the Supreme Court, Thurgood Marshall and his courageous colleague, NAACP lawyer Arthur Shores, took cases originating from 1940s small-town, segregated America.⁶⁰ At great risk to their safety and to the safety of their family, these two champions of legal advocacy advanced the cause of voting rights, educational opportunities, and equal pay for people of color throughout the South.⁶¹ I think of their bravery every time a law student tells me they want to be a Public Defender, but only in a large city. I also think of the bravery of Marshall and Shores every time a new trial attorney tells me of their reluctance to make an appellate record protesting the peremptory strike of a juror of color, as the new lawyer is hesitant to accuse opposing counsel of biased motives.⁶² Ironically, these students and new lawyers can often claim involvement in a past protest movement, calling attention to police brutality or racial inequality in America. I have witnessed how activism on the streets is not easily transitioned into courageous advocacy in the courtroom as many attorneys struggle to achieve the same level of commitment demonstrated by Marshall and Shores. I write this essay to awaken today's lawyer to the power of their advocacy and their ability to facilitate positive change beyond the boundaries of a major American city. In the next section of this essay, I encourage lawyers to engage in a thought experiment, self-evaluating if, like Brandeis, we withdraw from confronting racial bias and systemic poverty in courthouses located in communities we perceive to be geographically inconvenient and intellectually uncomfortable.

The Brandeis Thought Experiment

To contextualize this essay, I engage in a thought experiment rather than a traditional analysis. Since little is known about the detailed daily and routine activities of Brandeis as a young lawyer in St. Louis, I offer a different historical (arguably hypothetical) account of his interactions with the migrating formally enslaved Americans of 1879. My purpose in constructing a narrative around established historical facts is to prompt the reader to reflect on their own private motives, thoughts, and inactions when it comes to issues of race and poverty. For purposes of this thought experiment, I mostly assign altruistic motivations and actions to Brandeis when historical proofs are absent, prompting all lawyers to do the same when engaging in their own

60. HELEN SHORES LEE & BARBRA S. SHORES WITH DENISE GEORGE, *THE GENTLE GIANT OF DYNAMITE HILL: THE UNTOLD STORY OF ARTHUR SHORES AND HIS FAMILY'S FIGHT FOR CIVIL RIGHTS* 20–21, 186–188, 192, 279–281, 331(2012).

61. *Id.*

62. See Brayer (*Foster v. Chatman*), *infra* note 92, at 54–55.

self-reflection. I also encourage each lawyer to conduct an honest and critical examination of how individually we fall short when confronting prejudice in the legal system and in society.

Another great thinker of the 20th century can help us with this analytical reflection. One of Albert Einstein's most ingenious talents was his ability to conduct thought experiments in which he could visualize how a theory would play out in practice.⁶³ When he utilized these thought experiments he focused on the "physical ramifications" of "theoretical concepts" or how real-life questions are answered by "sniffing out the underlying realities."⁶⁴ To theoretically understand Brandeis' inaction on issues of race, it is helpful to visualize his system of rationalizations when confronted with the realities of race, poverty, and persecution as experienced on a mass scale by the Exodusters. Similarly it is helpful for lawyers today to visualize the reason for their own inactions, knowing that the realities of race, poverty, and access to justice still plague our country and to acknowledge that these concepts actually (not theoretically) present on extreme scales for a large number of people of color living in rural communities.⁶⁵

In this thought experiment I consider the possibility Brandeis frequently interacted with the African-American men, women, and children of the exodus, escaping from his law office for moments during the day to bring food and clothing to the cold and hungry. I imagine Brandeis was engaged in alleviating their plight, spending weeks in the marginalized and least developed areas of the city, exposing himself to mosquitoes carrying malaria, thus explaining his frequent bouts with the devastating disease.⁶⁶ Did he educate himself as a great future reformer by reading every news account of the exodus, devouring all articles in local and national newspapers that explained the brutal cause of the large migration?⁶⁷ I like to think he spoke often and offered support to the leaders of the exodus and to the African-Americans of St. Louis who tirelessly labored to alleviate their suffering. Unfortunately, while this narrative of Brandeis is certainly possible, it is not currently supported by historical fact. As this thought experiment prompts me to consider the plight of the Exodusters in 1879, I am reminded of the rural poor of 2019; ignored, unseen, and an inconvenient problem left to the advocacy of others.⁶⁸

63. WALTER ISAACSON, *EINSTEIN; HIS LIFE AND UNIVERSE* 78–79 (2007).

64. *Id.*

65. Bassett, *infra* note 68, at 11–12.

66. MASON, *supra* note 11, at 53–54; *see also* GAL, *supra* note 11, at 58–59, for example of how Brandeis ventured out into the community of Boston to learn about "unionism" and progressive ideas from Irish labor leaders in Boston.

67. *See* JACK, *supra* note 17, at 28.

68. Debra Lyn Bassett, *Distancing Rural Poverty*, 13 *GEO. J. ON POVERTY L. & POL'Y*, 3, 12 (2006).

The suffering and desperation experienced by the participants of the migration are still with us today. “America has distanced its most egregious poverty issues away from heavily-populated areas and into distant, rural, unseen areas.”⁶⁹ Before any lawyer becomes content in their efforts to alleviate suffering that occurs at the intersection of race and poverty, they should reflect on whether they are indifferent or conveniently unaware of the high rates of poverty in this nation that exist far from the urban centers and far from where most of us as lawyers choose to live and practice.⁷⁰ “[W]e find exceptionally high and persistent poverty in the most remote, rural areas that are populated by a disproportionate number of minorities.”⁷¹ As lawyers, have we interacted with or regularly contemplated the African American, Hispanic, Latino and Native American women, children, men and individuals of rural America who suffer hidden from national view?⁷²

To continue my thought experiment, I position Brandeis after months of being quietly engaged with the participants of the exodus realizing he couldn’t directly eliminate their persecution and economic suffering. Was it his discourse with the African Americans of the movement that educated him on the existence of broader issues of human rights that impacted thousands of people instead of just a few clients? I posit that Brandeis may have been impacted by the Exodusters as they told their stories, of economic injustice and deprivation of free movement.⁷³ It is comforting to speculate that his possible exposure to the exodus influenced his evolving position on advocacy for labor unions⁷⁴, women’s rights⁷⁵, the Jewish residents of Europe fleeing persecution⁷⁶, and for citizens who just wanted to be “left alone” as they enjoyed the privacy of their “beliefs, their thoughts, their emotions and their sensations.”⁷⁷ Possibly because of his experience with the migration Brandeis decided to lead nationally as a reforming attorney who battled all causes of injustice. First he had to learn from the great legal thinkers of his day, many of whom resided in Massachusetts, so he returned to Boston.⁷⁸

Today, assistance from denied benefits, evictions, domestic violence, and unjustified incarceration is largely unavailable for a person of color who lives far from a major city.⁷⁹ “The lack of attorneys living and practicing in rural

69. Bassett, *supra* note 68.

70. Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, 40-AUG HUMRT 15 (2014)

71. Bassett, *supra* note 68, at 12.

72. *Id.* at 11.

73. See JACK, *supra* note 17, at 49.

74. See UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 228–229.

75. See *id.* at 222–223; see also ROSEN, *supra* note 5, at 20.

76. See ROSEN, *supra* note 5, at 18–19

77. UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 630–631.

78. *Id.* at 44.

79. See Runge, *supra* note 70.

communities is an acute, access-to-justice issue because it means low-income individuals in those communities are more likely not to have access to their most basic needs. Rural America is disproportionately poor,”⁸⁰ “with more than one out of every four rural African Americans, Hispanics, and Native Americans living in poverty.”⁸¹ I reflect on this reality to comprehend the enormity of the misery that stands unfronted by our legal community as “[t]he poverty rates for African-Americans, Hispanics, and Native Americans are all higher in rural areas than in urban areas.”⁸²

By considering the plight of the rural poor, I am better able to understand how my contribution as a lawyer, whose clients are disproportionately people of color, is meager compared to the efforts of a relatively few courageous attorneys who fight injustice in small towns and undeveloped areas. I recognize I have a desire to be recognized as a legal reformer and an advocate for individuals living in poverty. I also recognize how comfortable I am being an advocate in a community with a world-class symphony, recognized restaurants, and endless cultural opportunities. Would I be a better lawyer if I had invested my time in advocating for our nation’s hidden poor; specifically people of color who live far from the protections of legal assistance organizations and public defender offices in vast rural sections of our nation?⁸³

I consider whether Brandeis was proud of his bravery in advancing the great causes of the new 20th century, especially being a voice for the men and women of the Great Depression⁸⁴ I also consider if each time he declined to speak publicly on behalf of African-American citizens, suffering under the cruelty of Jim Crow, Brandeis reflected “[w]hat the lawyer needs, is not more ability or physical courage but the moral courage in the face of financial loss and personal ill-will to stand for right and justice.”⁸⁵ Did he regret leaving St. Louis and leaving the thousands of citizens of color who were in great need of his advocacy and activism, including the hundreds of Exodusters who remained in St. Louis?⁸⁶ He learned innumerable lessons from his short experience away from Harvard. Could he have worked privately to eliminate racial persecution, as the experience of the Exodusters and his own experience with anti-Semitism taught him what it meant to be “despised and rejected of men”?⁸⁷ Unfortunately, he could never muster the “moral

80. See Runge, *supra* note 70.

81. Bassett, *supra* note 68, at 11.

82. *Id.* at 9.

83. *Id.*

84. UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 710.

85. See UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 3, at 16.

86. JACK, *supra* note 17, at 40.

87. DAVID L. LEWIS, A BIOGRAPHY; W.E.B. DU BOIS 342 (2009).

courage” required to speak publicly on behalf of the millions of African Americans facing injustice in the 20th century.⁸⁸

I was prompted to consider a different hypothetical in this essay. Was Brandeis more inclined to leave St. Louis for Boston to work with Horace Gray, the Chief Justice of Massachusetts,⁸⁹ because in part he was uncomfortable with the arrival of the thousands of African Americans streaming into the city around the time of his departure?⁹⁰ This idea has no factual foundation other than historical coincidence, but as a trial attorney, Brandeis’ departure made me reflect. Do I individually avoid discussing issues of race and confronting my own implicit biases, thus allowing my hidden belief system to impact my actions as a professional?⁹¹ Do I have the “moral courage” to stand in a courtroom and publicly litigate the unwelcomed arguments that one must present when representing a person of color who is marginalized because of their race?⁹² More significantly, do I have the “moral courage” to travel to a rural community, a couple hours from my home, and represent a person who identifies as an African American, Hispanic, or Native American, living in poverty, before a white judge and possibly before a mostly white jury, in a predominantly white community? And do I have the moral courage to permanently move to that community and advocate for the kind of change that would help lift people from poverty and lessen the impact of bias and racism on people of color?

Did Brandeis continually question his own belief system, rationalizing it was not his obligation to be a voice for African Americans? He probably believed his life was void of the black experience, and he convinced himself that it was not his place to be the leader in a cause that did not or would never impact him directly.⁹³ This admirable task would be left to the eloquence of African-American leaders like W.E.B. Du Bois and a generation of lawyers of color that were emerging from law schools like Howard⁹⁴ and hopefully someday institutions like the University of Missouri.⁹⁵ But Brandeis did labor at providing the legal and judicial tools⁹⁶ that would help others fight segregation and injustice.⁹⁷ Did Brandeis consider all his good works in an effort to advance the cause of the common person could slowly erode because

88. See ROSEN, *supra* note 5, at 18–19.

89. See UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 44.

90. See JACK, *supra* note 17, at 40.

91. See Brayer, *supra* note 14, at 163–165.

92. See Patrick C. Brayer, *Foster v. Chatman and the Failings of Batson*, 102 IOWA L. REV. BULL. 53, 53–54 (2016–2017).

93. See UROFSKY (LOUIS D. BRANDEIS: A LIFE), *supra* note 5, at 20.

94. *Id.* at 640.

95. See UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 639.

96. See UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 219–220 (see Brandeis Brief).

97. *Id.* at 639–64.

he failed first to do everything possible to eliminate race-based persecution?

In researching why Brandeis was unspoken on issues of race, I noted one experience in his life that may have dictated his ambivalence. He was raised by an abolitionist family living in a pro-slavery state and was arguably conditioned by the bullying of others to remain silent on the topics of slavery and racial persecution.⁹⁸ Because of his family's antislavery beliefs Brandeis was beaten in a Kentucky school on the day after the second battle of Bull Run.⁹⁹ This biographical connection may be conjecture, but by speculating on Brandeis' belief system I better understand my own fears about discussing race and bias in legal proceedings. Is the subject "too controversial and too personal, and would it become a distraction" to the representation of my client"?¹⁰⁰ In a trial I would consider if, "the jurors would resent me and my client for introducing the issue."¹⁰¹ By pausing to reflect on my own fears, I acknowledge I am considering taking a professional road that is comfortable, convenient, and not disruptive yet ineffective in confronting racial bias.¹⁰²

As lawyers are we doing everything possible to connect with the individuals who reside in locations outside of our geographical comfort zone and think differently from ourselves? Talking about race in communities where we perceive people would be hostile or indifferent to our message may be the first step in advancing other causes of justice that would benefit our nation.¹⁰³ Scholarship suggests that making a personal connection goes a long way to changing minds about difficult subjects, even in locations that are resistant to a new belief system.¹⁰⁴ It is my belief many of today's lawyers, like Brandeis, are abdicating their responsibility to advocate for the destruction of prejudice, convincing themselves that other advocates in other places are better positioned to advance this cause. The Brandeis experience also made me consider if the elimination of gender inequality, religious discrimination, ethnic prejudice, bias based on sexual orientation, social injustice, and economic injustice can ever truly be realized, until the impact of implicit and explicit racial bias is first removed from our legal system in every state and territory.¹⁰⁵

In this thought experiment, I presume that the Supreme Court Justice of

98. See ROSEN, *supra* note 5, at 31.

99. *Id.*

100. See Patrick C. Brayer, *supra* note 14, at 164.

101. *Id.*

102. *Id.* at 165.

103. ALEXANDER, *supra* note 9, at 258.

104. See Jacquelyn Bridgeman, Gracie Lawson-Borders, Margaret Zamudio, *Representative Democracy in Rural America: Race, Gender, and Class Through a Localism Lens*, 8 SEATTLE J. FOR SOC. JUST. 81, 99 (2009).

105. See ALEXANDER, *supra* note 9, at 39–40, 258–259 for a discussion arguing that civil rights should be reframed into a vision of basic human rights, "food, shelter, health care, education, and security" and dignity for all races.

the 20th century considers how the unfronted racial bias in the hearts of men and women would continue 100 years into the future, possibly triggering the political and legal regression of his life's works in advancing basic human rights for the "poor and working-class."¹⁰⁶ Would Brandeis be concerned about the current opinions of the Supreme Court: resulting in the weakening of labor unions,¹⁰⁷ Justices advocating to strip citizens of their right to privacy by recognizing protections of property over people,¹⁰⁸ and opinions impacting the freedom of people to travel because of their religion?¹⁰⁹ Did Brandeis also contemplate the great migrations of the 21st century, imagining how the government would treat adults and children as new populations seek freedom from persecution?¹¹⁰

An evolving vision of racial justice includes "a society in which all human beings of all races are treated with dignity and have the right" to the basic human needs poverty denies.¹¹¹ This vision framed by Dr. King can only be fully realized by a wave of dialogue and advocacy that engages people of all races and all belief systems, emanating from small towns and rural areas.¹¹² Brandeis advocated for basic human needs for all, while ignoring racial injustice for a large segment of his fellow citizens. Advocates today must endeavor to bring human rights and a life of dignity to all people living throughout our nation, without abandoning any one person because they live in any particular place.

I like to believe Brandeis also maintained one overriding positive hope for the future: when the law profession celebrated his 150th year as a graduate of Harvard Law School, racism, bias, racial injustice, and discrimination would have largely been eliminated from the national fabric by an army of

106. Compare UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5 at 70–710 with ALEXANDER, *supra* note 9, at 39–40, 258–259 emphasizing the basic human rights of food, shelter and security.

107. See UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 5, at 249–252 for a discussion on Brandeis being an early innovator of the preferential union shop; see also *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 585 U.S. ____ (2018).

108. See, *Carpenter v. United States*, No. 16-402, 585 U.S. ____ (2018) (Thomas, C. dissenting), see *id.* at ____ (Gorsuch, N. dissenting), see *id.* at Alito S. dissent; see also *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

109. See UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 3, at 168–169. See generally, Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES, June 28, 2018, <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>; see also Erwin Chemerinsky, *Chemerinsky: Conservatives' victories in key cases are a harbinger of what is to come*, ABA JOURNAL, July 2, 2018, http://www.abajournal.com/news/article/chemerinsky_a_harbinger_of_what_is_to_come/.

110. See José de Córdoba, *Migrants Separated From Their Children at U.S. Border Mostly Come From Central America*, WALL ST. J., June 18, 2018, <https://www.wsj.com/articles/migrants-separated-from-their-children-at-u-s-border-mostly-come-from-central-america-1529376939>.

111. ALEXANDER, *supra* note 9, at 258–259.

112. *Id.*

great legal thinkers who had the moral courage to advocate for inconvenient causes in inconvenient places. The plight of the people of the 1879 exodus always informed his concern for the future, and he hoped that when legal historians reflected on his sharing of a time and a place with these brave and committed fellow citizens, the historians would conclude their motivating force on Brandeis was more fact than fiction and not just a thought experiment.

I encourage the reader of this essay (especially new lawyers) to take part in their own self-reflective thought experiment; asking what they can do individually to eliminate racism, explicit and implicit bias, and prejudice from the legal system and from society, especially in inconvenient, under-resourced places by discussing difficult topics. The elimination of prejudice and bias in the legal system by 2027 may be only achievable in a thought experiment. But do enough members of our legal profession today possess “the moral courage in the face of financial loss and personal ill-will”¹¹³ to bring into being a system of justice that advances all human rights in every community?

Conclusion

This essay is a call to celebration through service. Many of today’s graduating law students are missing the opportunity to agitate through advocacy, to leave the cities surrounding their academic safe places for the unknown and unpredictable practice of law, in locations considered for many “fly over” communities. I celebrate Louis Brandeis, but advocates for social justice can learn from his experiences and eroding legacy corroded by his absence of advocacy for people of color. I analogize his abandonment of the urban Midwest to today’s young lawyers choosing the occasional appearance on a San Francisco, Washington D.C., or Boston protest line to the full-time advocacy of a person of color in a rural Missouri, Mississippi, North Dakota, or New Mexico courtroom. Preservation of Brandeis’ legacy can be accomplished if a generation of new lawyers learns from his missed opportunity: an opportunity to travel to a people in need of advocacy, to recognize their plight, and to engage in a quality practice of law on their behalf. No greater form of legal activism can be practiced.

113. See UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 3, at 16.