THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

ASTAIRE. BARYSHNIKOV. BRANDEIS.

Fred Astaire is my ideal man.

Let me explain: My parents lived through the Depression and the War. They learned as young adults that life is serious, and that honor and duty are worth more than frivolity and foolishness. But they also lived through Hollywood's golden age. The Fred Astaire of the movies—perfectly tailored, flawlessly groomed, his regular-guy charm enhanced by beautiful manners—danced his way through my childhood because my parents admired him too. And of course they weren't alone. Asked to weigh in on Astaire during a tribute, Mikhail Baryshnikov once confessed that, like every other dancer, he had to acknowledge that "we are dancing, but he is doing something else."[1]

I know what Baryshnikov meant. To encounter virtuosity is to be humbled. And having recently re-read Justice Brandeis's concurring opinion in *Whitney v. California*, I am still dazzled. But never mind my reaction, see for yourself:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion af-

1. Alan M. Kriegsman, *For Dancers, A Peerless Model*, WASH. POST, June 23, 1987, at D1.

> fords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[2]

The rest of us are writing, but Justice Brandeis? Well, he was doing something else.

THE ISSUE

We have this time advice for judges hoping to lower their chances of reversal on appeal, an essay considering the right to film the actions of law-enforcement officers, an investigation into the story behind a California standard of review, a history of the early years of the Missouri Court of Appeals, and an article suggesting a way in which to increase the value of oral argument. I learned something from each and expect that you will too.

NBM
Little Rock
April 3, 2016

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2. Whitney v. Cal., 274 U.S. 357, 375–76 (1929) (Brandeis, J., concurring) (footnote omitted), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969). Although the procedural posture of the case required Justice Brandeis to concur in the Court's opinion, *Whitney*, 274 U.S. at 380 (Brandeis, J., concurring) (pointing out that "we may not enquire into the errors now alleged"), his view of the First Amendment—"more speech, not enforced silence," *id.* at 377—was later vindicated. *Brandenburg*, 395 U.S. at 449 (holding that "a statute which . . . purports to punish mere advocacy and to forbid . . . assembly with others merely to advocate the desired type of action" is unconstitutional).