

In the explanation of these contrasting events lies a fertile field for research in legal and political sociology. Professor Konvitz mentions each of these events. But his segmented case-book approach leads him to ignore their larger inter-relations.

Professor Konvitz also does not do justice to the strength of organized public sentiment behind this country's immigration policy. That policy—insofar as it has affected Asiatics—was dictated to the nation up to 1943 by Pacific Coast groups. This is true from the very first Chinese Exclusion Act to the recent *déportation* of those American-Japanese who became the "spoilage" of the evacuation. Yet nowhere in Professor Konvitz's volume does one catch this significant sociological fact, nor precisely understand how close is the connection between West Coast race-baiting and the Supreme Court rhetoric. Professor Konvitz knows pressure groups are at work. But he records neither their permanence nor their potency.

His lack of sensitivity on this score occasionally traps him. Thus he repeats with approval Ichihashi's error that there was "no need" for the 1924 act barring Japanese from immigration because Japan "did not violate the Gentlemen's Agreement."<sup>5</sup> The same line of reasoning could be used to prove the lack of "need" (from the viewpoint of national policy) of virtually every one of the Oriental discrimination laws. What this overlooks is the fact that there was another "need" behind these acts, no less potent as a social force for the fact of its national irrelevancy. This was the "need" of those on the West Coast to use the racial issue to engage in political fortune hunting or to profit economically or simply to preserve the West Coast as a "white man's Paradise." These were the social verities of the case. These were the true "needs" demanding satisfaction. These should have—but did not—concern Professor Konvitz in his construction of a political and legal sociology.

In a very real sense, then, this volume is a meritorious preface. It provides the case-book background for a larger and more difficult intellectual task. From it, also, should be constructed a positive recommendation for American legal policy with respect to the alien and the Asiatic in the years to come.

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*Brandeis: A Free Man's Life.* By Alpheus Thomas Mason. New York: The Viking Press, 1946. Pp. xiii, 713. \$5.00.

Mr. Justice Cardozo had come on a Monday afternoon to one of the famous Brandeis teas. He was telling how much he had appreciated a gift of a book from a lady in New York. "I am an exile here," he sighed, a wan smile on his pale, mild face, "How often I long for New York. It was a pleasure for me simply to stand on Fifth Avenue and watch the stream of people go by." At that moment Brandeis was sitting on his sofa, the center of a little tight circle of eager listeners and talkers, but he probably had heard. Later when Cardozo was going, he came up quite deliberately to him with his bright, benign smile, put a fatherly arm around Cardozo's shoulder and said, "Come and sit down and let us talk a little."

The incident illustrates for me Brandeis' remarkable at-homeness in the world, his comparative freedom from nostalgia. This trait was at the same time his strength and his limitation. It was this, I think, which underlay the remarkable integration of his

<sup>5</sup> P. 23.

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character, his thought, and his work. It was this which accounted for his optimistic and almost unquestioning rationalism. He was a committed servant and exponent of the Enlightenment and Nineteenth Century liberalism. By endowment and breeding a man of immense intellectual powers, uncommon self-control, enormous industry and profound good-will, he created his fellow man in his own image. Man in society could with his own powers strive successfully for the solution of his problems; and could further develop the great gifts of individuality. He assumed almost unconsciously (as Holmes did not) that desirable consequences would follow. Working in this creed, his life, as Professor Mason recounts it, was an unending series of causes and campaigns. He threw himself into them with gusto. He said of himself that he "would rather fight than eat."<sup>1</sup>

It is amazing, at least to this reviewer, how completely Brandeis integrated all facets of his life. Out of his general philosophy he developed his devotion to democratic method, to individual effort, to limited and efficient enterprise, and to social co-operation. Each of his fights became for him a microcosm of some aspect of his philosophy. In the mismanagement of the railroads, of finance, of insurance, of government, he found the evils of monopoly and of personal irresponsibility. In labor disputes he saw the evils of violence and of ignorance of the essential conditions of human productivity. Professor Mason has emphasized his "conservatism." In part that is a matter of words. Surely he did not believe in wholesale social reconstructions. These usually far outran experience and concentrated power in fewer and fewer centers. Man's intellectual and moral capacity, as he thought, had limits which these schemes violated. But just as surely some of his insights would involve radical change in ways of thinking and acting. I refer particularly to the following which is, I think, one of his most fruitful and revolutionary proposals:

The great developer is responsibility. Hence, no remedy can be hopeful which does not devolve upon the workers participation in, responsibility for, the conduct of business; and their aim should be the eventual assumption of full responsibility—as in co-operative enterprises. This participation in, and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.<sup>2</sup>

He pursued the dramatization of his philosophy with an almost priest-like consecration. His Spartan regime was famous. His time and energy were carefully saved and allotted to the appropriate tasks. But so were his emotions, or better, his sensibility. He had no time, and as the years went on perhaps little inclination, for the va-grant sentiments, the wayward longings, that led Mr. Justice Cardozo to watch with wistful hunger the New York processional. Though he listened to music and looked at pictures one sensed that it was with duty and respect rather than emotion. Though greatly attached to classical antiquity, it was its concept of citizenship rather than its art which attracted him.

Professor Mason tells us that Franklin Roosevelt called him Isaiah. The noble austerity of his person, the gifts of prophecy, his impassioned didacticism, make the cognomen not inappropriate. And yet he was the most thoroughly secular of prophets. He seemed to believe entirely in human inspiration; he seemed hardly ever to distrust the sufficiency of his own reason. This "religion of humanism," as it has been called, is still, I believe, our dominant philosophy. Some may attribute the present terrible sick-

<sup>1</sup> P. 290.

<sup>2</sup> Quoted at p. 585.

ness of our civilization to its influence. But there are great numbers who if they have any hopes at all base them on faith, not in the supernatural but in the powers of man. What is clear, I think, is that most of us humanists, and Brandeis among them, have not understood the immensity of the task. We have been caught off guard. One felt that nothing in his system prepared Brandeis for Hitler. He moved with such assurance in the realms of light that darkness had ceased for him to be a living reality. The demonic depths and vast violence of man's soul were part of the historical past rather than the smoldering basis of the present. Rationalists may be forced to admit, as Christians and Communists insist, that man is so made that rationalism alone cannot harness the demon and that without a supra-rational faith, we shall destroy ourselves and each other. In any case, it is not given to us to write on a clean slate. In seeking justice, be it domestic or international, we encounter always the accumulated momentum of individual, class, and racial attitudes. These embody the fear and hate, the emotional intensities of centuries of living. The effort for social reconstruction may find its compelling form in rational discourse, but it is effective in the degree that it galvanizes passions more powerful than those opposed to it. How terrible, for example, is the testimony of Palestine to the irrelevance of a too narrow and optimistic rationalism!

But there are still many who, perhaps chastened by a knowledge of its limitations, will cling hopefully to the life of reasoned action. And to them Brandeis should be a shining example and men of his stature an ever present need. For he was indeed a great man, as Mr. Mason's biography makes clear. It is primarily a public and political biography; the intimate man is implied rather than described. But Professor Mason within the limits he has set has done a splendid job of research; he has told the story in great detail with care, precision, and detachment, his writing if a bit prolix is competent. He has done well to quote copiously from Brandeis who spoke and wrote with verve and with an eye to education and action.

He tells us some interesting things of Brandeis' life as a judge, but his account of the judgeship itself, adequate as it may be for the layman, the lawyer will not find very thorough or discriminating. This is true, particularly, of one of his most important conclusions which has recently been given prominence by Arthur Schlesinger, Jr., in his *Fortune* article on the Supreme Court. Mr. Schlesinger calls the Black wing of the present Court "activists." They interpret the Constitution and the statutes to achieve in each case a solution which furthers their social policy. Brandeis, he says, was in this respect their predecessor, and he quotes Professor Mason, "his official biographer," to the effect that Brandeis "was inclined to translate his own economic and social views into the Constitution itself."<sup>3</sup> Here is not the place to canvass this important question in detail. It is enough to say that Professor Mason offers very little to support this judgment. Brandeis, of course, laid no claim to Holmes's skepticism which was at the farthest remove from his own rational dogmatism; it is true also that most, but not all,<sup>4</sup> of his constitutional decisions upheld laws of which he approved. I very much

<sup>3</sup> P. 580.

<sup>4</sup> In *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) in which the majority invalidated a state statute licensing entry into the ice business, Brandeis dissented. Brandeis, of course, believed generally in competition. Did he dissent, then, because of deference to state power, as Holmes did, or because of belief in the necessity of such regulation in times of depression? I feel that he would have dissented regardless of his belief in the necessity or value of such a law. His elaborate justification of it does not necessarily indicate his belief in it, but is equally to be ac-

doubt that a study of his record in cases involving statutory interpretation or in negligence actions brought by railroad employees and seamen would show a tendency to favor the underdog at the expense of premises that would otherwise obtain. It could be demonstrated, I think, that he had a strong "lawyer's" feeling for the "law" as an objective guide independent of the judge's desire, and a sense of the judge as bound to make choices within the limits established by the law as so conceived.

I think, indeed, that to classify Brandeis as an "activist" involves a serious error in "placing" him both as a judge and as a man. It is true that Brandeis read his principles into the Constitution and into the laws. But in this context his principles were political and moral abstractions rather than specific social and economic preferences. He put, for example, a high value on "federalism" quite independent of whose ox it gored. And so he persistently fought limitations on state power; he was hostile to extensions of the diversity jurisdiction; and, of course, he wrote the decision in *Erie v. Tompkins*.<sup>5</sup> But in this respect Holmes was not only in complete agreement with him, but actually his forerunner. It is my point, in short, that Brandeis as judge was so much the lawyer that it would not have occurred to him to have deviated from his principles in favor of some immediate social or economic gain. Both he and Holmes were quite remarkably united in their aloofness to the specifically class appeal and in their devotion to what they accepted as the principles controlling judicial action. And as a man Brandeis was a Puritan, though without the later-day Yankee guilt complex.<sup>6</sup> He had the Puritan's reverence for law and moral principle, the Puritan's preference for spiritual gain. I think that it can be said that the plight of a particular party, his social or economic appeal would in itself have been irrelevant to him. Keeping in mind his fame as a realist and fact finder, it is noteworthy how immune he was to the fallacy that facts in themselves decide cases. It is probably true that principles can become dogmatic tyrants when pressed beyond the realities which they express. And there were times, if not as a judge, when Brandeis was possibly too uncompromising, too aloof. But that toughness, that rigidity was the peculiar glory of his character. The world is full today, of persons great and small who out of sympathy, or fear, or hope of favor, are sensitive to the demands of those whom they would please. We need such people. But we need also the rather rare man who is so emotionally secure, so true to his mind and his conscience that his teaching and his action are free from the desire to please. Brandeis was such a man.

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counted for as demonstration of its reasonableness. It is true, however, that Professor Cohen quite automatically assumes (as Professor Mason might) that it implies approval of the law. Cohen, *The Faith of a Liberal* 33 (1946) and Professor Laski in his review of Cohen's book makes almost the same assumption. 59 *Harv. L. Rev.* 816, 819 (1946).

<sup>5</sup> 304 U.S. 64 (1938).

<sup>6</sup> Holmes, for example, felt impelled to read and to "know the classics," though he professed to believe that the insights of modern literature were more pertinent for the modern man. But, as he playfully put it, he would not like to confess to St. Peter that he had not read Dante. And as he grew older he could not give himself up to light reading without an uneasy sense of anxiety. The ancestral culture, enforced by some nameless sanction, overcame his judgment. Brandeis seems to have been relatively free from this not unusual sort of conflict.

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