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LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION. By *Melvin I. Urofsky*. Boston: Little, Brown. 1981. Pp. vi, 183. \$11.95.

Throughout a lifetime that included a career as a private lawyer, involvement in national and international political issues and a twenty-three year tenure on the Supreme Court, Louis Brandeis was constantly active in reform. In *Louis D. Brandeis and the Progressive Tradition*, Melvin Urofsky attempts to demonstrate an essential consistency in Brandeis' philosophy and his approach to reform throughout those years. Urofsky does not undertake an exhaustive history of Brandeis' reform activities. Instead, Urofsky adopts a thematic approach, identifying various strains of thought underlying Brandeisian reform and documenting the recurrence of those ideas in each phase of his career. This thematic approach results in an oversimplification of Brandeis' philosophy and reform methods. Though adequate as an introduction to Brandeis and his beliefs, this approach is likely to disappoint readers seeking a more comprehensive treatment of the subject.

According to Urofsky, Brandeis' political and social philosophy reflected that of the progressive movement. Brandeis, contrary to his critics' allegations, did not desire radical change in American society (p. 18). In fact, Brandeis was committed to the free enterprise system in which he and his family had prospered. But Brandeis recognized defects in the market system, most of which were caused, he believed, by industrialization. Brandeis saw large industry as a corrupting force that degraded the laborers responsible for its success and inhibited the economic freedom of the common man. Brandeis sought a return to an earlier America, when businesses were small and hard work and merit ensured advancement. In this attempt to return to the past, Brandeis and the progressives were fundamentally conservative, not radical (pp. 18-21). In Urofsky's view, Brandeis consistently adhered to this conservative philosophy from his childhood until his death.

Urofsky's conception of Brandeis' philosophy has been criticized as simplistic.¹ By portraying Brandeis as committed to certain "immutable values" (p. 1) cherished by the progressives, Urofsky discounts the possibility of growth and development in Brandeis' outlook. On the contrary, it seems clear that development did occur. Allon Gal points out Brandeis' change from mugwump to progressive, and notes that Urofsky ignores this transition completely.² Urofsky himself notes that Brandeis "imbibed" the values of Bostonians after moving to that city (p. 4) and changed his position on several issues, particularly Zionism (p. 90).

These changes, moreover, were the natural corollary of Brandeis' world view. His orientation toward facts made this growth in philosophy inevitable. As Urofsky emphasizes, Brandeis believed that the law should grow out of the facts of each situation; indeed, Brandeis' stands on issues were so

1. Gal, Book Review, 68 J. AM. HIST. 708, 709 (1981).

2. *Id.*

fact-specific that they were often considered inconsistent with each other.³ It is difficult to imagine a man committed to learning from the particular facts of a situation clinging to an unchanging set of values for an entire lifetime, particularly in light of the many different social, economic and political circumstances Brandeis experienced. In addition to being inaccurate, this simplification limits Urofsky's analysis. By insisting that Brandeis subscribed consistently to the progressive philosophy, Urofsky fails to illuminate Brandeis' attitudes toward issues outside the range of progressive ideology. As Gal points out, Urofsky's analysis sheds no light on Brandeis' attitude toward the New Deal and the issues it raised because such issues were never considered during the life of the progressive movement.⁴

Within the context of this static progressive philosophy, Urofsky emphasizes various methods common to Brandeisian reform. As previously noted, one of the most widely recognized Brandeisian characteristics was an emphasis on facts. Brandeis believed that all law must be firmly based on the facts of particular situations; law divorced from the facts was essentially dead (p. 50). Urofsky presents examples of Brandeis' appetite for facts from all phases of his career. As a private lawyer in Boston, Brandeis made an effort to know the facts of his client's business as well as, if not better than, the client. He felt that in order to serve as an effective counselor, a lawyer had to impress clients with "superior knowledge" and "know [clients'] affairs better than [do] they" (p. 7). As the "[p]eople's [a]ttorney" (p. 47) in *Muller v. Oregon*,⁵ Brandeis succeeded in persuading the Supreme Court to uphold an Oregon statute prohibiting workdays of longer than ten hours for women. Of his one-hundred page brief, only two pages were devoted to legal citations; the remainder was devoted to an exhaustive presentation of statistics concerning women and the effects of long workdays (pp. 51-53). Finally, as a Supreme Court Justice, Brandeis advocated and attempted to apply a "living law." In his second dissent from a decision by the Court, Brandeis stated that "the judgment should be based upon a consideration of relevant facts, actual or possible — *ex factor jus oritur* [the law arises out of the fact]. That ancient rule must prevail in order that we may have a system of living law."⁶ In illustrating Brandeis' use of facts, Urofsky is neither profound nor original. Nevertheless, his point is made clearly and effectively.

Another characteristic of Brandeisian reform was the offering of a remedy for every evil attacked. This practice distinguished Brandeis from other progressive reformers of his day, many of whom showed no capacity for devising realistic solutions. Again Urofsky uses several examples to illustrate his point. Brandeis proposed the creation of savings bank insurance as an alternative to the corrupt industrial workers' life insurance policies (pp. 31-39); he introduced sliding scale rates to the public utility industry in Boston to combat inefficiency and high rates (pp. 26-30); and he suggested the institution of a "preferential union shop" and a protocol to handle labor grievances as a solution to the major conflicts in the New York garment

3. See A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 5 (1946).

4. See Gal, *supra* note 1, at 708-09.

5. 208 U.S. 412 (1908).

6. *Adams v. Tanner*, 244 U.S. 590, 600 (1917).

industry (pp. 62-67). Also indicative of Brandeis' impulse to provide remedies was his frequent suggestion to clients that he be "counsel to the situation" rather than advocate of one side (p. 12). Lacking ties to one side of a conflict, Brandeis was free to search out lasting solutions. To Urofsky, Brandeis always undertook reform in a comprehensive manner. To attack an evil without providing a remedy would have been inadequate.

Recently, the most widely publicized aspect of Brandeisian reform has been the use of surrogates.⁷ Brandeis began to use surrogates when his personal secretary, Alice Grady, became Deputy Commissioner of the savings bank insurance system. Grady provided a constant link to the system through which Brandeis could monitor its progress and make suggestions for its improvement (p. 39). But the use of surrogates did not flourish until Brandeis became a Supreme Court Justice and propriety forced him to take a less active role in reform activities. At this time, according to Urofsky, Felix Frankfurter was "undoubtedly [Brandeis'] most important surrogate" (p. 155). Brandeis gave Frankfurter a salary to support his reform activities; in return Frankfurter served "as a conduit for funneling information from a variety of reform groups to Brandeis, advising him of their problems and progress and in turn conveying his advice" (p. 156).

Frankfurter was not Brandeis' only surrogate during his Supreme Court years. Brandeis turned to his family in his efforts to improve the University of Louisville Law School (p. 148) and relied on Zionist allies to orchestrate and accomplish the ouster of the corrupt Lipsky Administration of the Zionist Organization of America (pp. 152-56). Urofsky does not discuss the ethical problems arising from this use of surrogates by a sitting Supreme Court justice⁸ and does not undertake a detailed analysis of Brandeis' funneling of funds and advice through such lieutenants. In the context of Urofsky's thematic examination of Brandeisian reform, the use of surrogates is simply evidence of Brandeis' continuing involvement in reform activities even when he could no longer do so openly.

This thematic approach enables Urofsky to provide a coherent view of a complicated life. Ultimately, however, Urofsky's approach is disappointing. In detailing these themes, Urofsky omits details and inconsistencies and thus fails to provide a complete picture of Brandeis' reform. For instance, in emphasizing Brandeis' ability to find consistently "reasonable" and "workable" solutions (p. 15), Urofsky quickly passes over Brandeisian reforms that failed. Rather than analyze these failures and Brandeis' reaction to them, Urofsky either blames the failure on others or states, without much further explanation, that the reform did not succeed. As a result, Urofsky neglects a significant part of Brandeis' development as a reformer. Similarly, Urofsky states that Brandeis experienced difficulties in making the transition from progressive advocate to impartial judge. Urofsky states that Brandeis made "several mistakes" and occasionally "violated his own canons of conduct" (p. 122), but the book does not examine those mistakes. Brandeis' errors in this transitional period, like his failures in reform, could reveal much about the nature of the man. In his insistence on showing

7. See B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982) (reviewed in this volume).

8. See Wheeler, Book Review, 81 *MICH. L. REV.* (1983).

consistency and success in Brandeis' reform, Urofsky sacrifices a more complete understanding of the Justice's complex character.

Nevertheless, Urofsky's portrait of Brandeisian reform is a useful addition to the literature, albeit in a limited way. Other books are more detailed,⁹ providing fuller portraits of Brandeis and his involvement in reform. These books are also of more use as research tools since assertions and quotations are documented; Urofsky does not use footnotes and provides only a brief note on sources. Detailed books, however, are not necessarily satisfactory introductions. *Louis D. Brandeis and the Progressive Tradition* can fill this role. Urofsky's simplification, a liability for one seeking a complete understanding of Brandeis, is not necessarily detrimental in an introduction. Urofsky presents a clear, concise and generally accurate view of Brandeis, uncluttered by inconsistencies and extensive detail.¹⁰ Urofsky's book should suffice for the reader seeking an overview of Brandeisian reform.¹¹

9. See, e.g., A. MASON, *supra* note 3; A. MASON, *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE* (1933).

10. Urofsky has written another book surveying Brandeis' involvement as a reformer. M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND THE AMERICAN REFORM* (1971). *Louis D. Brandeis and the Progressive Tradition* is a refinement of that work and an improvement upon it.

11. This book is also reviewed in 68 *J. AM. HIST.* 708 (1981); 86 *AM. HIST. REV.* 942 (1981).