

January 1939

## Review of “The Brandeis Way,” By Alpheus Mason

Harry W. Jones

Follow this and additional works at: [http://openscholarship.wustl.edu/law\\_lawreview](http://openscholarship.wustl.edu/law_lawreview)



Part of the [Law Commons](#)

---

### Recommended Citation

Harry W. Jones, *Review of “The Brandeis Way,” By Alpheus Mason*, 24 WASH. U. L. Q. 293 (1939).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol24/iss2/6](http://openscholarship.wustl.edu/law_lawreview/vol24/iss2/6)

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

this omission should occur in a book in which "the views are those of the practitioner," for the reviewer suspects that practitioners today are having as much trouble with the questions suggested as with any others in the field of trade regulation.

BRECK P. MCALLISTER.†

**THE BRANDEIS WAY.** By Alpheus T. Mason. Princeton: Princeton University Press, 1938. Pp. viii, 336.

Democracy is wisely slow to concede heroic stature to its political leaders, but Mr. Justice Brandeis has lived to become the symbol of the finest traditions of American liberalism and constitutional government. Today's universal recognition of Brandeis as one of the greatest of living Americans makes it difficult to realize that in 1916, when Brandeis was nominated for the Supreme Court by President Wilson, a bitter campaign was fought against his confirmation by the Senate. The caliber of the opposition is indicated by the fact that the late Mr. Chief Justice Taft joined in protesting against the appointment and, if legend is to be believed, lived to regret his hasty action and to make a handsome apology for it.<sup>1</sup> The opposition to Brandeis was based upon his supposedly "radical" and "immoderate" activities during his sustained campaign for industrial justice and against the "money trust," the interests of finance capitalism which then, perhaps to an even greater degree than now, dominated American industry.

The present book, *The Brandeis Way*, is an account of the Brandeis crusade, in 1905 to 1907, to secure the adoption of savings bank life insurance in Massachusetts. Investigations such as that of Charles Evans Hughes on behalf of the Armstrong Committee in New York had exposed the scandalous conditions under which industrial life insurance was being offered to the American working classes. After careful study Brandeis became convinced that the only way to provide reasonably priced life insurance for those of small means was the issuance of insurance by the Massachusetts savings banks. Throughout the struggle, Brandeis, acting as usual without compensation, applied his genius at analysis to the exposure of the evils of commercial industrial insurance, created and marshalled effective public opinion in support of the solution which he devised, and directed the legislative strategy by which the plan for savings bank life insurance was driven through a generally indifferent Massachusetts legislature. The story is worth telling, both for the light it throws upon the much misunderstood pre-judicial career of Brandeis and for its exposition of the social advantages of a type of insurance which deserves to have been more widely adopted throughout the nation.<sup>2</sup>

---

† Visiting Professor of Law, University of North Carolina.

1. "Isn't this Mr. Brandeis? I am Mr. Taft. I once did you a great injustice, Mr. Brandeis. I am sorry." Conversation quoted in Pearson and Allen, *The Nine Old Men* (1936) at page 176.

2. New York, which adopted savings bank life insurance in 1938, is the only state which has followed the lead of Massachusetts, despite the im-

But Mr. Mason is not content to present his story for so modest a purpose. His effort in the present volume, as indicated by his choice of the broad title, *The Brandeis Way*, is to use the history of Massachusetts savings bank life insurance as a springboard from which to leap into a discussion of Brandeis' entire contribution to American progress. Certain words from the introduction to *The Brandeis Way* are significant:

The purpose of this volume is to analyze the philosophic, functional, and institutional implications of Massachusetts savings bank life insurance in terms of the democratic process. \* \* \* Savings bank life insurance, when thus considered, portrays in action the social-political philosophy of its founder, Louis D. Brandeis, in depth and in ramification; it makes us realize his implicit faith in man, his unflinching confidence in democracy, and his unswerving part in the democratic process of our own day.

To the present reviewer it is as if an admirer of Abraham Lincoln should recount the story of Lincoln's fight with Jack Armstrong (which also throws an interesting light on a great character) and use it to "portray in action the social-political philosophy" of its protagonist, Abraham Lincoln. Mr. Mason's narrative is interesting and significant, but he claims too much for it.

There are other flaws which mar a generally valuable book. Although two-thirds of its pages are devoted to a play-by-play account of the progress of savings bank life insurance, Mr. Mason has also contributed eighty pages or so of vigorous editorializing on democracy in general, which, although it may be very good Mason, is only occasionally Brandeis. One has the general impression that Mr. Mason is attempting to prove, by sheer force of rhetoric, two propositions which there is no disposition to deny: that democracy is the only worth-while method of government, and that Louis D. Brandeis is a very great American. The author's frequent use of quotations from Rousseau, John Stuart Mill, Burke, and other political philosophers seems to the present reviewer to break the continuity of his presentation. It would seem, also, that the quotations are not always too well chosen. Thus, on page 33, Rousseau is referred to as a "libertarian," while on page 148, Mr. Mason refers to Fascism as "the modern version of the Hobbes-Rousseau philosophy."

A more serious flaw in Mr. Mason's argument was evident also in his otherwise very effective earlier book, *Brandeis: Lawyer and Judge in the Modern State* (1933). Although the present reviewer is more than willing to recognize that the personal economic and social preconceptions of Supreme Court judges play a considerable part in their decisions upon constitutional issues, he feels it necessary to insist that the process of judicial review is more than the mere imposition of the economic notions of the members of the Supreme Court upon the legislative branch of the government. It would seem to be a dangerous over-simplification to say, with Mr. Mason, that Brandeis concurred in the unanimous decision in the *Schechter* case because he was "the inveterate foe of bigness, who had never pinned his faith to government control." There were, after all, powerful arguments based upon the limitations of the commerce clause and the

separation of powers which were available in testing the constitutionality of the National Industrial Recovery Act.

In the judgment of the present reviewer, Mr. Justice Brandeis will be reckoned as the most significant Supreme Court justice since Marshall. He brought to the court an attitude of positive encouragement to necessary governmental experiment and, perhaps most important of all, a technique for the presentation and analysis of significant facts which revitalized constitutional interpretation in the *Jones & Laughlin* case.<sup>3</sup> Doubts have been expressed that the economic beliefs of Mr. Justice Brandeis are adequate to cope with the problems of concentration of economic power presented by modern industrial organization.<sup>4</sup> But the greatness of Brandeis transcends his personal economic opinions. The vigour of his spirit and the perfection of his analytical technique have, to a large measure, converted the majority of the Supreme Court and have added immeasurably to the stability of American constitutional government.

HARRY WILLMER JONES.†

**MAY'S LAW OF CRIMES.** Fourth edition. By Kenneth C. Sears and Henry Weihofen. Boston: Little, Brown & Company, 1938. Pp. lvi, 438.

Thirty-three years have elapsed since the last edition, prepared by Dean Harry A. Bigelow, of John Wilder May's original two-chapter treatise on *The Law of Crimes*. During this period new problems have been presented, and new applications of old principles of criminal law have been made in an attempt to cope with changing conditions. The present edition recognizes the social significance of its subject matter, and its emphasis is constantly upon the functioning of legal conceptions in a dynamic social order. While the general form of earlier editions is retained, "the writers concluded that it was no longer possible merely to revise the book and have a suitable expression of the current law. Accordingly that which started out as a revision has ended as a practically complete rewriting. Very little of the text of the third edition has been retained, and there is practically nothing left of the first edition published in 1881."<sup>1</sup> Although limitations of space resulted in the omission of many cases, the table of cases refers to nearly half again as many decisions as in the prior edition, and this volume contains an increase of seventy pages.

In their preface,<sup>2</sup> the authors refer to the first edition as designed to give "not \* \* \* a history of what the law has been, nor a discussion of

pressive record made by the Massachusetts institution, particularly in the last few years.

3. See Fuchs and Freedman, *The Wagner Act Decisions and Factual Technique in Public Law Cases* (1937) 22 WASHINGTON U. LAW QUARTERLY 510.

4. Laski, Mr. Justice Brandeis (1934) 168 Harper's Magazine 209; Hart, *Book Review* (1934) 82 U. of Pa. L. Rev. 668.

† Assistant Professor of Law, Washington University; Fellow, Columbia University School of Law, 1938-39.

1. P. v.
2. *Ibid.*