REVI EWS


In our time, Professor Cohen is one of the few great voices of what used to be known as Enlightenment—a view of life compounded of Rationalism and Humanism, of faith in reason and faith in man. He has labored with passionate enthusiasm to remind us to think, and to trust only the conclusions which we could parse. He has preached the necessity for analyzing even the most “plausible and self-evident propositions,” much to the irritation of the religious-minded of all sects, and he has himself given classic examples of how such analysis should be accomplished.

But Professor Cohen is a moralist, too. He is not interested in logic as a thinking machine, and he has none of the naive and cocksure optimism of science in the generation of Bazarov. Always conscious of the dependence of thought upon ignorance, prejudice and values, he is in no sense ashamed of believing in the Rights of Man, and in his Duties, too.

The pursuit of truth requires freedom. And so does the pursuit of life, “as the condition or opportunity for the good life.” The liberal knows he has no monopoly of truth; he knows, indeed, that he hasn’t found it, even when he’s done his best. Believing in truth, he therefore favors freedom for others to seek it also. He supports the fullest freedom and diversity in ways of living as well as ways of thinking. “The aim of liberalism,” Professor Cohen writes in his strong and somber epilogue, The Future of American Liberalism, “is to liberate the energies of human nature by the free and fearless use of reason. . . . Liberalism in general thus means the opening up of opportunities in all fields of human endeavor, together with an emphasis on the value of deliberative rather than arbitrary forces in the governance of practical affairs.” 1

Humane or liberal civilization is one of individual diversity, not uniformity; of free expression rather than censorship; of tolerance, not fanaticism. The free society is one of dispersed and not of concentrated power. The free personality has a functional rather than a deferential or dependent attitude towards authority. His constant effort is to keep power over others to a social minimum, not to seek its expansion for its own sake, or as a source of cheap security. Professor Cohen’s overriding aim is not only to perfect our understanding of the uses and abuses of the scientific method, but to demonstrate that science can exist only in a free society, and that humane civilization is the full and necessary goal of the disinterested pursuit of truth.

The Faith of a Liberal is a selection of Mr. Cohen’s more popular essays on many subjects, from different periods of his life. They illustrate the unity

1. P. 439.
and vigor, as well as the distinction, of his outlook. There is throughout a characteristically equal emphasis on reason and nature, and a characteristic zeal in dealing with problems of life as well as of philosophy. The uncompromising quality of some of his reviews is tempered by the warmth, humor and affirmation which run through the collection as a whole. The papers are a pleasure to read. Mr. Cohen writes without pretense, and with conversational ease. Yet every essay has its argument, plainly visible, to be weighed on its merits, and enjoyed for its skill and sophistication, even when one's conclusion is to disagree. Not since Keynes' *Essays in Persuasion* and *Essays in Biography* has there been so rich a collection of occasional papers.

One striking thing about Mr. Cohen's essays is their range. Apart from his more strictly professional papers, published as *A Preface to Logic* and *Law and the Social Order*, there are 51 items in *The Faith of a Liberal*, divided into 11 chapters and an epilogue. There are chapters on Education, Law and Justice, Science and Mythology, Politico-Economic issues, and individual papers on Baseball as a National Religion, the Sacco-Vanzetti case, Zionism, Erasmus and Luther, and Napoleon. On many of these topics, naturally, Mr. Cohen has the inestimable advantages of the amateur: the fresh, well-trained mind, the freedom from traditional limitations and perspectives, the ability to raise fundamental questions which professionals in the field have long since forgotten to consider. Sometimes he makes the amateur's mistakes; this reviewer, for example, finds Mr. Cohen's economics deplorably pietistic, in the tradition of Fabian socialism. But there is everywhere vitality, enthusiasm, and the useful thrust of an enquiring mind, writing against the background of a mature and fully realized point of view.

Perhaps the most general trait these papers have in common is their strong sense that history is the matrix of everything, the vital key to understanding human attitudes and social problems. Mr. Cohen's sense of history is a broad one. It includes men, ideas and techniques, as well as battles and business; Jenner and Cartwright as well as Holmes, Spinoza and Napoleon. It is intellectual history only in that he distills experience into general forms, not that he overvalues the force of ideas as such in history. In 1923, he wrote a piece on "the insistently violent notes of Russian life," and "the marked weakness, if not the absence [in Russian life] of the spirit of tolerance, moderation and compromise which goes to make up our traditional liberalism." It is an admirably balanced insight, of special interest at the moment in view of the amount of compromising with the Russians which our public business requires. His several papers on American history and American culture have an altogether remarkable force, quality and penetration. They are directed with great economy to ultimate issues, and together comprise an essay on American civilization of absorbing interest, and considerable hope.

The papers on law in this volume fairly represent the important work with

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2. P. 261.
which Professor Cohen has for some years enlarged the horizons of the professional literature of public law. There are three essays on judges—Holmes, Brandeis and Cardozo, a substantial article on Constitutional and Natural Rights in 1789 and Since, shorter comments on the cases of Sacco and Van- zetti, and of Bertrand Russell, and a famous review of Professor Arnold's Symbols of Government.

The article on Constitutional and Natural Rights, published in 1938, is something of a paradox in the general body of Professor Cohen's thought for its emphasis on logic rather than history. It is a full dress attack on the historical legitimacy of the American practice of judicial review. Mr. Cohen is indignant at Marshall's tricky reasoning in Marbury v. Madison, ruthless in disposing of the common constitutional myths, and vigorously the democrat in preaching reliance on the legislature rather than the courts for social advance and the protection of human rights. Yet Professor Cohen's intellectual pleasure in the argument runs away with him. It does not dispose of a century and a half of judicial supremacy to prove that it rests on error. Erroneous or not, judicial review is a functioning part of the machinery of our society, and cannot be destroyed by a brilliant demonstration of inconsistency. The intellectual evolution of our present Supreme Court justices since their elevation to the Court is an interesting case in point. Many of them were (and are) outspoken critics of judicial review in general, and particularly of judicial supremacy as practised during the consulships of White, Taft, and the early years of Hughes. The pressure of history, however, has been too much for all of them. Despite elaborate evasions to conceal the unpalatable fact, they have all agreed to the exercise of their traditional powers. The institution of judicial review has changed its direction, but not its character. It is stronger than its claim to legitimacy.

All in all, The Faith of a Liberal is a testament of works. If in the end Professor Cohen's liberalism has less glamor than the dogmas and systems of more scholastic philosophers, it is because he cannot abide false gods, nor "the petty ointments by which quacks pretend to cure the mortal ills of finitude." 3 There is nothing easy or comfortable about his outlook, despite its passion for individual and social justice. It is hardly his purpose, however, to make things easy, or certain, or consoling. "[T]he main function of teaching philosophy," he said of his own experience as a teacher, "should be the opening of the human mind to new possibilities, rather than the inculcation of any new set of doctrines. . . . This in practice amounted to abandoning the traditional attempt to teach philosophy as a self-sufficient body of learning, and instead attempting to teach future scientists, lawyers, economists, and citizens to think philosophically about the problems of science, law, economics, and citizenship." 4

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REVIEWS


The deprecating descriptions and varied cross-criticisms addressed to American legal education in the course of recurring discussions on the subject, may have created an atmosphere of pessimism in regard to its future prospects. But without minimizing the difficulties of the matter, it should be recognized that such constant re-examination by the law teachers of their own purposes and function helps to create a forward tension, a leaning out toward further action, that insures to a considerable extent the steady progress of legal education in this country.

The process of discussion just referred to has not lacked, in the past, the contributions of persons versed in the European methods of law training. And the usefulness of these descriptions of the French and German experiences can be conceded since in legal education, as in many other fields of human endeavor, it is often valuable to step outside the circle of customary observation and come into contact with other forms of experience. Then, with a new perspective acquired from the outside, the familiar ways appear with strange relief and unexpected significance.

Esther Lucile Brown, Director of the Department of Studies in the Professions of the Russell Sage Foundation, does not exaggerate any claims for Mr. Schweinburg's survey when she says in the preface that in continental law training "there must be ideas new to us that would have great potential usefulness for the re-evaluation of our educational system." ¹ The structure, the aims and traditions, the good points and shortcomings of legal education in the European countries covered by this study are presented with thoroughness and candor. They invite at almost every step the reader's critical return to his own surroundings with a keener insight and appreciation of what constitutes their essence.

Differences between the local and the foreign are apt to be striking, but they are far less interesting than the reasons for which they exist. Once the question is opened on that level, the problem becomes one of distinguishing the peculiarities which are consequential to the spirit or the institutions of a nation, from those which are accidental in their origin and might therefore have taken some other form. Mr. Schweinburg's survey of continental legal education raises this kind of question in regard to the function of law schools. In the United States, he writes, their incentive "was plainly the need for better trained men at the bar. . . . [Law] schools, set up on private initiative and with private means, looked toward the requirements of private litigation and counseling. Method of instruction and courses offered were adapted to this immediate purpose." ² The continental law school, instead,

¹. P. 7.
². P. 14.
he characterizes as founded under official auspices, rather closely controlled by the government and oriented both toward scholarly endeavors and the training of men for public life. The carefully proportioned picture which the author gives of the development of these aims through the activities of continental law schools could not be compressed into a paragraph of this review without serious distortion. But perhaps it is enough to say that in most European institutions the law course is meant solely to provide a solid cultural foundation for the subsequent activities of the individual. His professional training is a separate and subsequent phase of his preparation for the bar, the bench, or public administration. Mr. Schweinburg makes it clear that in opening up the fields of law, political science, economics and philosophy to its students, the continental law school "strives for a systematic, genetic and thus scientific presentation of the totality of legal science, with no other proximate objective." His later explanations qualify this statement somewhat, but the essential idea remains.

It may be appropriate to note, in passing, that this attitude of the European law school towards its subject-matter is to be found in almost the same degree in the new setting of the Western Hemisphere. The Latin-American law schools have sought to obtain a great part of their contemporary inspiration from European models. This is one illustration of the many intense cultural currents which ran from some European countries, particularly France and Germany, towards the former Iberian colonies, at a time when these were gathering the materials for their basic educational institutions. Although erected upon the rather bare ground left by the incidents of political stabilization and by the cultural revulsion against the ex-oppressors, the mother countries, the Latin-American law schools in their modern form retained, nevertheless, the nature of their function in the scheme of things to which they belonged. There is probably no parallel in the English colonies of America for the role which law schools played in the colonial tradition of the Hispanic nations. This function was substantially identical to that which Mr. Schweinburg describes in connection with the European institutions, namely, providing the cultural background and the general qualifications for public life. In this role, the importance of the colonial university law schools in Spanish-America was heightened by the fact that outside of private business, or the military service, the opportunities for a career open to the men of that time were largely confined by the existing university facilities to the clergy or to the law. And, whether in response to the demands for a lay, humanistic education, unavailable elsewhere in Spanish-America, or in keeping with the general trend of European law training, the colonial law school came to represent the best chance for obtaining both the social prestige and the all-around intellectual ability which made a public career possible. For this reason, the professional character of the Spanish-American law school appears just as de-emphasized as in the case of the

3. P. 10. Author's italics.
institutions on the continent. Thus, in common with the educational models they adopted, the Spanish-American law schools, significantly titled "Schools of Law and Social Sciences," have a tradition of academic comprehensiveness and of contact with public affairs which accounts to a great extent for the success of their graduates in private practice, in politics, or in the civil administration or the magistracy, without prejudice perhaps to their activities in the fields of writing or teaching.

But not all the Spanish-American countries have brought into their scheme of legal education an element of professional training after law studies are completed. The absence of this element in Argentina,\(^4\) for instance, makes it compare more closely with the United States than with the countries of which Mr. Schweinburg presents a detailed picture. Austria\(^5\) and Germany, and with some differences, France\(^6\) and Russia, have developed an extended process of professional apprenticeship under close government supervision. For varying periods of time (as long as seven years in Austria) the graduates of law schools come into direct contact with, and effectively participate in the workings of, judicial tribunals, administrative agencies and law offices before they are allowed to complete the series of official tests which finally qualify them for positions in the government or judiciary, or for active practice at the bar.

The author contrasts the "non-professional course of study in the law department of a university" with the professional apprenticeship training which follows it, and emphasizes the latter in his survey. This is one of the great merits of his work, for it is now possible for English-speaking law men to see continental legal education in full, whereas previously the available literature focused on "the theoretical, preparatory foundation afforded by the university, . . . [making it appear] as if theoretical study exhausted the range of the training or as if the unmentioned second part were of subordinate importance."\(^7\)

Although a worthy and welcome addition to the fund of information upon which American educators may now draw in their planning, this aspect of Mr. Schweinburg's survey invites less comment because there is nothing in the United States which could be directly compared with the apprenticeship training required of continental law graduates. The author's analysis of

\(^4\) In Argentina, lawyers are allowed to enter the profession solely upon the strength of their official diploma, only the formality of registration with the Federal or Provincial courts being required. No attempt to train judges for their specific task appears to have been made outside of the practice of appointing magistrates from among judicial functionaries with lawyers' degrees who have acquired experience over long years of progression along the hierarchy of positions in the court system. Lacking the "outside help" of apprenticeship training, the Argentine law schools have had to answer both cultural and vocational aims, balancing in a rather uneasy compromise the exigencies of legal scholarship with the practical requirements of future advocates.


\(^6\) Pp. 73–80.

\(^7\) P. 9.
European university organization and activity, on the other hand, contains many provocative passages. In his general presentation of continental law training, which precedes the description of individual national systems, Mr. Schweinburg devotes a special section to the secondary school structure in the European "gymnasium" or "lycée." In this connection, he emphasizes the point that "the characteristics of the first portion of continental law training, namely, its being theoretical, systematic, and unbridled by practical purpose, are intrinsically linked to the specific kind of education offered by the gymnasium, the lycée, or the liceo. Without the kind of instruction given in these secondary schools the above-mentioned features of the university study are hardly possible. . . ." 8

This statement effectively underscores the well-known fact that educational problems on the university level can not be dealt with unless reference is made to the objectives and accomplishments of the secondary school system which serves as its basis. This is particularly true where advanced studies (law in this case) follow immediately upon completion of the secondary school course (both in European and in Latin-American countries, at an average age of 18) without an intervening Liberal Arts course such as colleges in the United States provide. Some of the comparisons which Mr. Schweinburg draws between the graduate of a European secondary institution and the American college student may run the risks of generalization, but they serve to emphasize the comprehensiveness and systematic purpose of the material covered by the compulsory curriculum of the continental secondary school. It is to be further noted that due to the complete control of the national government over secondary education, the acquisition of the degree or certificate required for admission to the university signifies compliance with a prescribed course of study which is uniform throughout the country. Discounting personal factors, the law training offered at the European university can then proceed on the assumption of a basically identical intellectual background in all the student body.

Mr. Schweinburg points out further the implications of the issue of "academic freedom" which in Europe, as in Latin-America, has been raised both to define the relationship of the university, as an institution, to the respective national government, and to protect the students' traditional immunity against any compulsion to participate in most of the classroom activities. Within this system the position of the student differs very much from that of his American colleague, whose residential attachment to the university and closely integrated activities on a "campus," are always very much noticed by the foreign visitor.

Lacking any persistent association between professors and their students, life in the European law school is based on public lectures and formal examinations. The author complains of the excessive importance attached to the latter, but where classroom preparation and participation are lacking as a

criterion of performance, it is hard to see how examinations could fail to assume such dominance. The student must necessarily orient his activities towards these tests and he therefore resorts to whatever practical means are at his disposal to insure a satisfactory result. This is the origin of the "repetiteurs" or private tutors, who with their coaching courses seem to have given European law schools some of their gravest anxieties.9

Granted that the combination of lectures and examinations does not lead to a satisfactory adjustment of relations between professors and students,10 and may even be responsible in a large measure for the inflexibility of structure and content which law courses tend to show over long terms of years, I think it is clear that the continental fashion for lectures is far more than a convenience to the faculty (the members of which are practically never on a full-time status) or a concession to the student body. The point of departure and the material for most of the law courses of the continental type is given by the different Codes. From the exegetical point of view that generally prevails, the coverage of a course becomes co-extensive with the respective Code and its successive amendments. This means that a whole field of human relations is approached systematically by means of subdivisions founded upon a logical differentiation of various legal institutions and of the norms which govern them; the study then proceeds through a deductive breakdown of the definitions and rules given by the Code, with a correlation of conflicting or harmonizing provisions and an analysis of those provisions in the light of their historical background in local or foreign law. In this task of exposition, the clarity of concept and the persuasiveness of argument demonstrated by the professor in the development of his lecture stand ahead of any inquiry into the state of court decisions on the particular point, which seldom enter into the matter except at a highly doctrinal level; the absence of any relation of the issues to concrete fact situations as presented by litigated cases, coincides with an utter lack of discussion of the material between the instructor and the class, since obviously such dialogues would simply interfere with the statement of the professor's views, which the students tend to concentrate upon to the exclusion of any strong critical preoccupation.

As any traveler is likely to be struck by the unusual or the picturesque

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9. P. 24. Nothing like that has appeared in Argentina as yet; the complaints of professors are directed instead to more or less commercial editions of their previous lectures (taken down in shorthand by consistent students and embellished with footnote references to classical treatises) which under the generic name of "apuntes" effectively fill the place of "cram courses." Such compilations, also known on the continent, have at least this to say for themselves,—that they cover the whole subject, while the professor seldom does so in his lectures. Hours of class per week are two or three for each subject in Argentina, and about the same in France. Compare the Austrian schedule, p. 72.

10. P. 50. Seminars and exercise classes have been instituted both to alleviate this deficiency and to supply occasion for intensive research; see, for instance, in Austria, p. 46; in Germany, p. 93. But this development has not, in Mr. Schweinburg's opinion, influenced legal education as a whole to any great extent.
of foreign panoramas, the reporter of developments in legal education abroad tends to concentrate on the peculiarities of other systems. The differences which rise from any comparison are, however, suggestive of actual or possible trends, not so much toward cancellation of diversities, as toward their fusion in a higher synthesis. This may be too ambitious a vision when the interchange of educational experience between the American and the Continental spheres of influence is still so meager. But there are already some indications of a converging process of evolution.

In Europe, for instance, law schools acquired their characteristics under the eyes of monarchs, particularly of the "enlightened-despot" type, who wished them to train able administrators for public service. The contemporary development of these institutions seems to have tempered this characteristic—except perhaps in the German schools of the Nazi period—with the affirmation of a disinterested academic aim: legal scholarship for its own sake. At the same time, they remain government institutions, charged with the intellectual formation of a substantial class which eventually goes into public life.

In the United States, the private universities have set the tone of educational endeavor. And yet, without loss of their characteristic independence vis \( \text{à vis} \) the government, those which most nearly approximate national stature have evidenced a growing sense of responsibility in regard to public affairs. Their law schools have developed from academies for the training of future members of the bar into university departments with an academic standing fully as high as those of any graduate division, and even while they continue to emphasize their professional goals, they show the increasing recognition which disinterested intellectual work is gaining in the legal field.

This circumstance is not the only one that seems to be bringing American and Continental methods of legal training closer together. A reading of Mr. Schweinburg's work suggests many ways in which the experience of European countries may be relevant to the purposes of improvement and reform in the United States. Without attempting anything more than the statement of a personal impression, I would like to point out three factors whose combined gravitation upon American legal education seems to influence it in approximately the same direction as that followed by the Continental development.

In the first place, if it be proper to assume that the university law schools in this country typify the main trends, one may observe that they tend to withdraw, little by little, from the specific function of preparing candidates for the state bar examinations, and to leave the bulk of that task to the special courses organized for the purpose. In addition there is a growing practice by large law firms of employing recent graduates in a capacity rather closely similar to that of the French stagiaire,\(^11\) although this development remains fundamentally different from the compulsory and elaborately

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11. P. 75.
prescribed scheme of apprenticeship training which several European countries possess. But in any event, both factors shift at least some of the burden of professional training to a time and a place beyond the limits of the regular law course, thus approximating in some measure the "two-pronged" design of Austrian and German education.

In the second place, the American law schools have become increasingly aware of the public life which their graduates are bound to experience to some degree, whether they concentrate on private practice, choose the positions offered them by any of the three branches of government, or enter that professional penumbra between the two, wherein move the counsel for civic organizations, the arbitrator, the representative of business groups before legislative bodies, and the public relations expert. Legal education alone can bring young men and women into direct contact with the problems of the human being in society, and at the same time furnish them the instruments which can be used least imperfectly to deal with those problems. The American law schools are consequently beginning to realize their own potentialities in a task which does not differ very much from that undertaken by European law schools in the past. From such an awareness there may easily spring a realization that, whatever the capacity in which he acts, the lawyer cannot expect to fulfill his mission in contemporary society without that understanding of his own historical circumstance, that comprehensive set of ethical and intellectual insights, in substance that culture which only legal education on a university level can provide.

And if in the discharge of their public responsibility, the American law schools were to implement this approach by broadening their curricula to the extent necessary for the better integration of economic and political science with the appropriate fields of private and public law, they should find help in a third factor. The teaching of law in the leading schools of the United States is taking account of those "non-legal" materials to approximately the same extent as the "legal" courses become further relieved of the excess bulk which they tended to accumulate in the expansion of the case method. The instinct of self-preservation may have influenced the law faculties in their attitude towards the overwhelming proliferation of judicial opinions over the past generation, so that today there is less of an attempt of laying down "the law" through a sequence of cases, and more of a desire to select from such raw materials those which can help the student to grasp the context of human activities to which rules of law apply, and can illustrate the considerations which play upon the course of decision. This shift of emphasis away from the normative element of case material seems to make room for an increasingly broad development of legal science in the field of law teaching. As the "national" schools have to deal more and more with

12. In Mr. Schweinburg's opinion, Austrian law schools have failed to achieve this integration due to the disconnected manner in which the disciplines of the social sciences are placed in the curriculum. See p. 43. Cf. the French results, at p. 72.
law as a phenomenon transcending the limitations of the positive norms (statutory or judicial) which control in a particular jurisdiction, other aspects come to the fore: the search for historical trends, for contrasts of judicial attitudes and reasoning, the systematization of materials in the light of whatever “approach” may be dominant. This emergence of a scientific over a purely expositive trend in law teaching is what I believe can be detected in the state of American legal education at the present time, and can be set down as one of the most encouraging promises which the law schools of the United States can offer to the western community of nations. Moving as it does in the peculiar intellectual climate of case law, the American law course has the advantages which Mr. Schweinburg probably had in mind when he pointed out the limitations imposed by legal positivism upon the continental method of instruction. He says:

“Inquiry moves continually within the realm of legal prescriptions and concepts, without reaching down into the soil of living facts upon which these prescriptions and concepts rest. It moves as if roaming the legal province were an ultimate purpose, and law an end in itself. The student's attention is hardly ever, and certainly not nearly enough, turned upon the social function of law and upon its merits or demerits in molding life or even keeping abreast of it.”

It seems so unlikely that American legal science, as developed and expounded in university classrooms should run into this kind of difficulty, that one may hope confidently for its steady growth over the next generation or so; certainly, it has gathered enough potentialities to travel well beyond the beaten paths.

But all this meditation on the prospects of the American law school may be nothing more than a one-sided commentary on Mr. Schweinburg’s work. Perhaps readers less contaminated than this reviewer by the pervasive influence of the academic atmosphere may discern in the elaborate European schemes of apprenticeship training for future barristers, magistrates and public administrators, the principles and the methods which ought to be studied and reformulated in the light of American conditions, with a view to facilitating the development of the practical skills which the university law school is unable to impart. The most valuable and suggestive part of Mr. Schweinburg's survey may be his detailed explanation of apprenticeship training in the European law field, both because of the actual experience it discloses and of the possibilities of adaptation to which it may give rise. If such is the case, it may be asked, by way of a closing remark: Might it not be worthwhile to consider a comprehensive chronological change in the organization of legal studies in the United States, i.e., shortening the prelegal college course in order to make room for a compulsory period of “legal

13. P. 46.
internship" in law offices, courts and government departments, following a law and social sciences curriculum of four or more years, in which the allied disciplines could be given the specific direction and purpose required by legal education?

Jorge Roberto Hayzust


This is an inspiring and timely book. It is inspiring in its picture of how Brandeis used his extraordinary talents to produce the maximum in personal self-fulfillment and in public good, in its portrayal of what Justice Holmes called "the high way in which he always has taken life." 1 It is timely as a story of unwavering faith in the worth of struggle and in the certainty of ultimate success.

Neither bitter personal attack nor temporary defeat could shake Brandeis' faith in the future, provided men would continue the fight. Many men have had this spirit in their youth. But Brandeis' faith and courage remained undimmed until the end. They shone forth in his dissenting opinions of the 1920's, dissents filled with "the glow and fire of a faith that was content to bide its hour." 2 These traits extended to matters largely beyond his power to influence. Professor Mason tells that "In the dark days of 1933 when it seemed that the very depths of depression had been reached, a visitor inquired whether he believed the worst was over. 'Yes,' he replied cheerfully, 'the worst happened before 1929.'" 3 Even in the last year of the Justice's life, when the Nazi tide threatened Palestine, to which he had given much of his spirit as well as his substance, there was no hint of discouragement. "This is the time to stand firm and resolute," he is quoted as saying. "Assuming that the Germans will do their worst, invade and destroy and obliterate part of what we have created, they cannot destroy Jewish ideals and aspirations with regard to Palestine." 4

Faith there was, and a "sense of personal, inner security, which gave one a greater sense of poise and sure balance than one probably had ever gotten from another man." 5 But Brandeis was no philosopher in an ivory tower. In 1890 his former partner, Warren, sent him a selection from The Bacchae

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1. P. 614.
2. Cardozo, Law and Literature (1931) 36.
3. P. 602.
4. P. 636.
5. Memorandum of Willard Aurst, quoted at p. 643.
concluding with the line "Go forth, my son, and help." Brandeis answered that call not merely with faith and good will but with specific solutions and an amazing freedom from doubt as to their validity.

Early in his career he formulated the principles which, without substantial change, he was to advocate throughout his life—freedom for the individual, the right to privacy, the desirability of small rather than large units, the value of an informed competition with scope for reasonable business practices, a union shop but not a closed shop, regularity of employment, and the high trusteeship required in the use of Other People's Money. These tenets, which he preached on any and all occasions, were the basis of his social philosophy and, in his firm conviction, constituted specifics for the evils of our time.

Professor Mason's book is largely the story of how Brandeis labored to have these tenets, so evident to himself, accepted by others. The book properly places emphasis on Brandeis the lawyer rather than on Brandeis the judge. This is not because Brandeis was not a great judge. It is rather that Brandeis was primarily the advocate in everything that he did, including his work on the bench. He made no pretense, at least in the great constitutional controversies, of keeping his mind in balance until the last word of argument had been said. He had a definite point of view, and he conceived it his task to make this prevail by every proper means. His approach to every problem was the approach of the lawyer handling great causes—ferret out the facts, formulate a position, assess its elements of strength, marshal the considerations in its support, attack the opposition at its weakest point, and pursue that attack until victory was achieved. These were the elements of the lawyer's craft which Brandeis employed, first for his clients, then as "People's Attorney," and ultimately as Associate Justice of the Supreme Court.

Looking backward at eighty-four, Brandeis told his niece, "I think the fifties are the best." The breadth of his activities, particularly during those years of his life, literally passes understanding. Take, for example, the period 1910 to 1913. During Christmas week of 1909 Brandeis had been retained to act for Glavis in the controversy over the latter's dismissal from the Interior Department by Ballinger and the allegedly libelous article which Glavis had written in COLLIER'S. Hearings before a Congressional investigating committee were practically continuous from late January until the end of May. On July 24 he was called to New York to attempt to settle the garment workers' strike. This took much of his time until September when the "protocol" was signed. Shortly thereafter he was chosen as the first impartial chairman under this agreement—a post in which he served for several years. In August he had accepted a retainer from the Boston Chamber of Commerce in the Advanced Rate Case. The hearings at which

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6. P. 95.
7. P. 584.
the railroads' witnesses appeared before the Interstate Commerce Commission and were cross-examined by Brandeis began on August 15, adjourned in late September, and resumed on October 12. By this time Brandeis was ready with his own affirmative case—scientific management and what it would do to improve railroad efficiency and reduce costs. The hearings lasted through November, briefs were filed just after the turn of the year, and Brandeis argued the case in January, 1911. No sooner was his argument before the Interstate Commerce Commission concluded than he was off to New Hampshire to conduct an investigation of certain freight rates proposed by the Boston & Maine Railroad. This period also included his opposition to a bill introduced in the Massachusetts General Court providing for leases of new tunnels and subways, further activities in connection with the Interior Department and Alaska land grants, the early stages of the United Shoe Machinery case, and advocacy of the so-called La Follette-Stanley Bill, the legislative precursor of the Clayton Act. During 1912 and 1913 the United Shoe Machinery battle continued and Brandeis' fight against the management of the New Haven Railroad came to a successful conclusion. The year 1912 marked the beginning of Brandeis' interest in Zionism to which, from that time forward, he gave a great amount of time. During 1912 also he made two political speaking tours, first for La Follette's candidacy for the Progressive nomination for the presidency, and, after this fell to Roosevelt, in support of Woodrow Wilson. After the new executive came into office in March, 1913, Brandeis was constantly consulted by the administration on economic measures such as the Federal Reserve Act and the Clayton and Federal Trade Commission Acts. Early in 1913, the railroads again sought rate increases. In August, Brandeis accepted the Interstate Commerce Commission's request that he insure that "all sides and angles of the case are presented," and the hearings began on December 1. The first article in Other People's Money was published in November, 1913. Yet throughout this period Brandeis was the head of a highly successful law office from which he derived a professional income reaching a peak of $105,758 in 1912 8—with very little of this coming from any of the causes mentioned. For as "People's Attorney" he neither sought nor would accept remuneration.

It is hard to understand how a man could do all this, even in a perfunctory fashion. It is still harder to understand how a man could discharge so many responsibilities in the way that Brandeis did. In whatever cause he was engaged, he gave himself fully. His concern for the facts was prodigious—not merely the facts at the center but those on the periphery which might reflect a light not suspected by other men. Brandeis was at the opposite pole from the barrister who picks up a brief and educates himself while the cause is in progress. Nor, so far as Professor Mason's book reveals, did Brandeis "organize" for the great causes which he handled as is done in large law offices today. It is true that there were many matters, including

8. P. 691.
in the latter years most of the ordinary work of his law office, which he turned over entirely to others. But the cases in which he was personally active he seems to have handled very largely on his own.

Professor Mason explains "how he did it" on the basis that Brandeis "applied scientific management to his own life and work." This, of course, is only part of the story. He had an amazing memory, one which had enabled him to achieve the most brilliant record ever made at the Harvard Law School in spite of the necessity of having to husband his eyes, and which in his years on the bench would permit him to quote accurately figures as to barge traffic on the Ohio River or boot and shoe production in Massachusetts with which he had not been concerned for decades. Unwittingly, he belied his own statement that "no man can have . . . detailed knowledge of the facts of many enterprises." He had a remarkable ability to get to the heart of a matter. And, perhaps most important of all, he had no doubts once a decision had been made.

Perhaps too much has been said in this review about the subject of this biography and too little about the biography itself. In a way, however, that is the highest tribute that can be paid to Professor Mason's work. The book makes Brandeis come alive as nothing previously written about him has done. It conveys the quality of the man and the many fields in which that quality was displayed. It tells the story of a life greatly lived, with enduring lessons for every citizen and particularly for every lawyer. It should be required reading for every law student.

Professor Mason has given us such a fine book that it seems ungracious to add even a few minor notes of criticism. One does have the feeling, particularly in the latter part of the book, that the adulatory note is a little too strongly struck. Brandeis becomes a shade too virtuous, those with whom he differed a shade too vicious. For example, it is hard to think of the Justice, even at the height of his disagreement with the brethren, referring to the Supreme Court, as the author does, as "the citadel of corporate-financial power." To turn to a matter of a very different sort, why did Professor Mason consign his wealth of interesting reference material to the end of the volume, where they are made difficult of discovery even by the most diligent reader? And this in a biography of the man who made the footnote live!

Professor Mason's purpose has been to sum up, in a scholarly and readable form, the activities which made up, in the words of his subtitle, "A Free Man's Life," and the character that lay behind them. He has achieved this objective surpassingly well.

HENRY J. FRIENDLY†

11. P. 418.

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If this letter-diary combination had been written by an officer named Jones who, after 1865, went into the wool business and died obscurely in due course of time, it would justifiably be hailed as a literary and historical find. Having been written by Captain Holmes of the Twentieth Massachusetts, who later attained other distinctions, it provides one of the best evening's reading offered in a long time.

Holmes, J. had a flair for the dramatic, including dramatizing himself. He was articulate by right of inheritance. The Civil War was the most vivid thing that ever happened to him and, in many deep and subtle ways, guided the pattern of his thought and speech to his dying day. All of these qualities and attitudes stand out in this book. Those of us who were his secretaries heard much of the Civil War, and it is amazing how accurate the memory was as checked against the impressions of the moment—the awful night of pain and doubt among the other wounded after Ball's Bluff, the Message-to-Garcia episode before Cold Harbor with condiments by Dumas père and Tom Mix.

The Captain and his mother went through these documents and threw out a lot of them. From my days of trying cases I retain an inordinate curiosity as to suppressed documents. Why was Volume 1 of the Diary destroyed, leaving only Volume 2 and some scraps of earlier pages? What was wrong with the rest of the letters? Were they just dull? Did they give an even worse drubbing to OWH's father than he receives in those published? Were there passages (oh dear) which might have been distasteful to some of the maidens of Beacon Street? Only one bit of evidence exists, a notation in OWH's hand: "letter referred to within destroyed—rather pompous." From this it is a fair inference that the excisions were designed to improve the tone of the product—a process which a recent examination of my own diaries of World War I indicates to be a wise precaution.

This book is a record of daily events through which the Captain lived. With one exception, it is not a record of thoughts on public issues or great occurrences. Gettysburg is not mentioned, nor the Gettysburg Address.  

1. In support of this proposition I need only cite the handlebars, wincing at the thought that, had he lived fifteen years longer, he would have been known in the columns as "The Moustache."

2. These diaries also are in two volumes; and I also find Volume 1 painfully deficient in social significance. If these are preserved in print for posterity I recommend the title, "Thoughts on the World Aflame." The volume will naturally start with the diary entry for the crucial date April 6, 1917 when the nation declared war in defense of democracy and justice:

"April 6. Slept all morning. Went to lunch and a movie with Putnam in afternoon. Called on Louise J. in the evening and cut my finger on one of her hairpins."
There is no word of the Emancipation Proclamation and only a passing reference to slavery.

The one venture into thinking on general issues presents a case history in Psychological Warfare. At 3 A.M. on September 17, 1862, Captain Holmes was bursting with confidence, pride and combative spirit, those priceless ingredients of morale: "Hooker licked the Rebs nicely t'other day. . . . We're in reserve and near him and may fight today. . . . Lick 'em if we do." That very day he was wounded at Antietam. Here followed a series of contacts with the enemy and enemy sympathizers in which they displayed personal kindness plus a high belief in their own cause and a determination to sustain it. The first contact was with a Confederate soldier who, moving forward in a skirmish line in the midst of combat, stopped to give to wounded Yankees his canteen full of water. Then Holmes spent some well-publicized days of luxury and charm in Hagerstown, Maryland, which certainly was not a hotbed of Union sentiment. Six weeks later Holmes and Lt. Abbott, returning to duty, had trouble finding their regiment. The diary entry shows the last contacts and the pay-off: "Nov. 19. A. and I walked over 20 miles stopping occasionally at Secesh houses & finally put up at a good house with a motherly old gal who advised us to go home and get stronger. The women are freer in their expressions than the men and swear the South will stick it out to the end—one of 'em had a brother shot in the face before Richmond. . . . I've pretty much made up my mind that the South have achieved their independence & I am almost ready to hope spring will see an end. . . . We shall never lick 'em. . . . I think before long the majority will say that we are vainly working to effect what never happens—the subjugation (for that is it) of a great civilized nation." The net result was the temporary loss to the Union of one Massachusetts captain. While awaiting comment on this sequence from Anne Morrow Lindbergh and General Paulus, let us bestow a round of applause on the Captain and his mother for not excising this bit of bad prophecy.

At this particular time the publication of a soldier's diary from another war inevitably raises the question: How different was it? To show the startling contrasts it is worth while to list some Holmes quotations under headings which describe well-recognized characteristics of the fighting men of the war just finished:

Admiration and respect for officers of high rank. "With the crack brained Dreher & obstinate ignoramus Shepherd as act'g Col & Lt Col the Regt is going to H--L as fast as ever it can or at least no thanks to them if it isn't. . . . Gen. Halleck (whom may the Lord confound). . . . Burnside is a d'd humbug. Warren is a ditto." But N.B. nothing but praise for McClellan; and obvious pride at having shaken the hands of Grant and Meade, though the latter-snubbed him.

Generous recognition of virtues of other units. "What a joy it is to have [Col. Hall in command of the Brigade] in place of one who tells you his Regt (not such a remarkable one except for a Penna Regt) has been in 42 battles
& other unending blowing about himself, it, and the transcendent merits of both. . . .

Objective viewpoint as to one's own unit. "I really very much doubt whether there is any Regt wh. can compare with ours in the Army of the Potomac..."

Indifference to the plaudits of the throng. "I wish that while local Regts like the 10th & 13th get cracked up like thunder that the 20th got its due credit. . . . While we hear about the 10th &c &c & how the Tammany stood like veterans (two miles out of the fight) our work is hardly mentioned. After all it makes very little difference except for the sake of justice and one's friends."

Affection for the fourth estate. "Page is a nasty toadying snob like most correspondents. . . . D--n the N. Y. Herald."

Deference to the superior understanding of the home front. "Father'd better not talk to me about opinions at home & here. On the staff one can form a far better opinion of the particular campaign than one at home. . . . I wish you'd take the trouble to read my letters before answering."

Appreciation of close support. "Our own side fired shell and canister into us (hurt no one luckily)."

Meticulous adherence to security regulations. "Remember once for all that all details like those I've written of our actual or probable movements are strictly private as we are strongly forbidden to write about such things. . . . Officers have reduced baggage to a very few portables—nobody knows, but we may go on a naval expedition."

Single-hearted fidelity to the one true love. "Recd today also one from Fanny McGregor, one from Fanny Dixwell & one from Ida Agassiz. . . . Today's mail—four letters and, even better, a toothbrush—3 were from blushing maidens."

Practical devotion to the precepts of democracy. "Co. G although roughs and poor material fought splendidly. . . . Shall I confess a frightful fact? Many of the officers including your beloved son have discovered themselves to have been attacked by body lice—caught perhaps from the men. . . . I'm an out-and-outer of a democrat in theory, but for contact, except at the polls, I loathe the thick-fingered clowns we call the people."

W. Barton Leach†

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