

## | Book Reviews |

### **Louis D. Brandeis: A Life**

By Melvin I. Urofsky

Pantheon Books, New York, NY, 2009. 955 pages, \$40.00.

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REVIEWED BY JEFFERSON M. GRAY

With more than 750 pages of text, Melvin Urofsky's hefty biography of Louis D. Brandeis—lawyer, economic reformer, political adviser, Zionist leader, and Supreme Court justice—is not a book to be tackled lightly. But if you enjoy American history and judicial biography, this book will amply repay the investment of time and attention it requires.

Louis Brandeis (1856–1941) is best remembered by lawyers today as the first Jewish Supreme Court justice and as a frequently dissenting progressive voice on the Court during the last two-thirds of the *Lochner* era (1905–1937). But, as Urofsky demonstrates, Brandeis would deserve to be remembered for his contributions to American law, the progressive movement, and the development of Zionism even if he had lost the acrimonious confirmation battle over his nomination to the Supreme Court in 1916.

Brandeis lived a classic, distinctive, and singularly American life, painted across a broad canvas. He was born the year before the *Dred Scott* decision, and almost lived to see the Japanese attack on Pearl Harbor. A second-generation American from a non-observant German Jewish family of prosperous grain merchants, he was born and raised in Louisville, Ky., when it was still very much a provincial Southern city. He never lost his sense of commitment to his birthplace, and always believed that America's smaller cities offered better laboratories for social and economic reform than did the great metropolises of the East and Midwest. Although he was born in the American heartland, he completed his secondary education at a rigorous gymnasium in Dresden, Germany, where the instruction was in his parents' native tongue. In 1875,

he returned to the United States and matriculated at Harvard Law School just as it was beginning its transformation into the country's preeminent institution of legal education under its renowned dean, Christopher Columbus Langdell.

Although his family was relatively well-off, Brandeis was still very much a self-made man. In 1879, he opened a law practice in Boston with a blue-blooded Brahmin classmate. Within little more than a decade, at the age of 34, he was already earning today's equivalent of \$1 million annually—at a time when there was no income tax. Although he prospered mightily by representing large commercial clients, he was a passionate economic reformer who condemned what he called “the curse of bigness.” He won his most celebrated legal victory in *Muller v. Oregon* (1908), in which the Supreme Court upheld a state statute limiting the hours of working women to 10 per day.

Although his adversaries denounced him as a radical and a socialist, Brandeis, Urofsky contends, was motivated by values that were fundamentally conservative. He did not always see eye-to-eye with organized labor, and he believed that working people should be encouraged to provide for their own retirements, rather than looking to the government for old-age pensions. He did not believe that reforms should be imposed from the top down, and he distrusted bigness in government—particularly the federal government—quite as much as he distrusted it in the business world. His commitment to allowing states to develop their own approaches to problems shines through in his decision in *Erie Railroad Company v. Tompkins* (1938), in which he held that federal courts in diversity-of-citizenship cases must follow the statutes and common law of the states in which they sit.

Melvin Urofsky is well-suited to the task of writing a comprehensive biography of this brilliant and active man. A long-time professor of law, public policy, and history at Virginia Commonwealth University, Urofsky

served as the co-editor of the five volumes of Brandeis' correspondence, wrote two earlier concise biographies of Brandeis, and has also authored a history of the Zionist movement in America. With this new book, he clearly sought to pull together everything he had learned about Brandeis over four decades, and he has produced a biography that it is hard to imagine will ever be surpassed.

Litigators and attorneys in private practice will find much of interest in Urofsky's treatment of Brandeis' years as a practicing lawyer (1878–1916, although progressive reform and Zionist activities increasingly occupied his time from 1905 onwards). Brandeis made three significant contributions to the development of the American legal profession during his years in practice. First, along with contemporaries such as Paul Cravath and William Cromwell of New York, he was one of the creators of the modern multi-service American law firm. His Boston legal practice started out as a two-man partnership in 1879, but with the acceleration of the industrial and commercial revolutions in the last quarter of the 19th century, the firm grew as able younger colleagues came aboard to help meet the needs of Brandeis' clients. In 1897, Brandeis promoted several of his associates to full partnership and the firm acquired the name of Brandeis, Dunbar & Nutter. Today, more than a century later, the direct descendant of Brandeis' law partnership continues in business as Nutter McClennen & Fish.

Brandeis' second major contribution to the legal profession derived from his fervent belief that lawyers should devote a portion of their time to public service. As he told his friend and client Edward Filene, the department store owner, “he had resolved early in his life to give at least one hour a day to public service, and later on he hoped to give fully half of his time”—an aspiration he may have met by as early as 1903. To Brandeis, the greatest luxury that his success and wealth as a practicing lawyer afforded him was to enable him to devote his time “to the pleasure of tak-

ing up a problem and solving, or helping to solve, it for the people without receiving any compensation.” As this comment suggests, Brandeis’ pro bono efforts often focused not on representing an individual client in litigation, but on tackling a public policy problem or acting as “counsel to the situation” to develop a solution to a knotty legal, economic, or social problem. Although his efforts in this latter regard foreshadowed to some degree the modern practice of turning to outside mediators to resolve cases, confusion and misunderstandings about the exact nature of Brandeis’ role sometimes resulted, giving rise to lingering bitterness. This accounted for some of the charges of unethical behavior that were later laid at his doorstep by opponents of his nomination to the Supreme Court.

Brandeis was a highly effective trial lawyer who once wrote to his older brother Alfred that “[t]here is a certain joy in the draining exhaustion and backache of a long trial, which shorter skirmishes cannot afford.” Today, however, Brandeis’ litigation career is best remembered for his work as an appellate lawyer, and it is in that capacity that he made a third significant contribution to the law. It was the “Brandeis brief,” which persuaded a conservative Supreme Court in *Muller v. Oregon* to uphold a state statute limiting the hours of working women. It was noteworthy both for its length—113 pages—and its contents. After a two-page discussion disposed of the handful of applicable legal precedents, the remainder of the brief summarized the statutes restricting women’s working hours that had been enacted by various states and foreign nations, and excerpted public reports detailing the experience upon which these statutes were based.

Over the next several years, Brandeis followed up the success of his *Muller* brief with similarly prolix and heavily researched efforts. According to Urofsky, one of these briefs ran a Tolstoyan 1,021 pages, while in another case he added 400 pages of factual material as a supplement to a brief prepared by New York’s attorney general defending a statute prohibiting night work for women.

Although Urofsky sees the Brandeis brief as an influential innovation—

he suggests that “the concept of the Brandeis brief, that is, the use of non-traditional and nonlegal materials to uphold a particular view, has received widespread approval”—this is less true than he believes. The brief in *Muller* was mainly a compendium of summarized legislation and excerpts from public reports, with surprisingly little text by Brandeis himself. Reviewing it today, its most impressive characteristic is the breadth and sweep of its research, particularly in foreign sources. (Curious readers can find it at [www.law.louisville.edu/library/collections/brandeis/node/235](http://www.law.louisville.edu/library/collections/brandeis/node/235).) Litigants before the Supreme Court in recent years have argued in favor of limiting capital punishment in cases involving juveniles and retarded persons by compiling records of state legislative actions and citing the approaches of foreign courts, and *amicus curiae* briefs in the Supreme Court often seek to advance a broader perspective on an issue pending before the Court. But few advocates today would produce a brief for an actual party so decoupled from a discussion of the record below and the applicable precedents.

Brandeis’ second “career,” as an advocate of progressive reform, particularly in the economic sphere, is likewise fully developed by Urofsky. But this section of the book, presented in eight chapters totaling just under 200 pages, is likely to tax the patience of many readers. Urofsky spends nearly 20 pages detailing Brandeis’ unsuccessful effort to prevent the New York, New Haven, & Hartford Railroad from acquiring the Boston & Maine line in 1907–1909, and another 23 pages discussing Brandeis’ later battle against what he considered monopolistic practices by the New Haven Railroad, along with his subsequent involvement in railroad rate-setting cases before the Interstate Commerce Commission.

In contrast to these complicated and tedious discussions, Urofsky’s account of Brandeis’ involvement in the Boston Consolidated Gas Company capitalization controversy of 1903–1906 and the Massachusetts Savings Bank Life Insurance reform battle of 1905–1907 usefully showcases Brandeis’ operative principles as a reformer. These principles were: (1) master the facts,

especially where they related to corporate balance sheets and profitability; (2) educate the public; (3) know the political power brokers (“ten minutes alone with the governor,” Brandeis once said, “could yield a veto of a bad bill”); and (4) look for win-win solutions that advanced not only one’s own interests, but the corporate interests on the other side.

These principles show that claims that Brandeis was a radical or a socialist could hardly have been further from the mark. To the contrary, he viewed reform as a means of protecting the deeply traditional values he cherished. As Urofsky sums up his approach:

Brandeis no more cared for governmental regulation than did Muller’s attorneys or Joseph Choate [a leading New York corporate attorney]. But as a conservative who believed that new times demand accommodation even while holding on to older values, he recognized that the greater the opposition to minimal social progress, through measures such as protective legislation, the greater would be the popular demand for more extreme measures ... . A real need to protect workers existed, and that need would somehow be met. It would be better if men of goodwill cooperated in ameliorating the evils of industrial transition.

Brandeis also did much to build and shape the nascent American Zionist movement. He was an unlikely figure to assume such a role. One of his daughters described him as “completely non-religious, a nonobservant Jew,” and he did not join the Federation of American Zionists (FAZ) until June 1912, when he was 55 years old. Yet, barely two years later, he took over the leadership of the nearly moribund organization. Within five years—three of which overlapped his service as an associate justice of the Supreme Court—Brandeis had increased the FAZ’s membership 14-fold, reorganized it along more centralized and hierarchically structured lines, and raised a sum for the relief of

**REVIEWS** *continued on page 68*

the Jews in war-ravaged eastern Europe that exceeded the entire amount that the organization had previously taken in during its 15 years of existence. Brandeis envisioned the future Zionist state as a secular society that would be informed by both Jewish and American values, predominantly agricultural in character, and without the large business organizations that he believed served to undermine democracy and social justice in the United States.

Yet, despite his accomplishments, Brandeis' period of influence in the international Zionist movement was relatively brief. He had deep reservations about the English chemist Chaim Weizman, who came to dominate the movement's European branch following World War I, and, in 1921, Brandeis, Felix Frankfurter, and his other close associates all resigned their leadership positions in the American Zionist organization.

Urofsky devotes more than 200 pages to Brandeis' 22 years on the Supreme Court (1916–1939), providing a comprehensive overview of his career. He argues convincingly that Brandeis ultimately proved to be a more influential jurist than his colleague and great friend Oliver Wendell Holmes. Brandeis was a forceful exponent of judicial restraint and of deference to legislative policy choices; he memorably argued that “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” He was also a staunch defender of privacy interests—lauding “the right to be let alone” as “the most comprehensive of rights and the right most valued by civilized men”—against new and intrusive technologies such as electronic eavesdropping. During America's first “Red Scare,” in the years immediately following World War I, he argued that only the starkest of emergencies could justify restrictions on freedom of speech: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

In modern terms, Brandeis believed in a living Constitution, writing that “Our Constitution is not a strait-jacket. It is a living organism. As such, it is capable of growth—of expansion and adaptation to new conditions.” “Originalists” such as Justice Antonin Scalia would have perplexed him; as Urofsky writes, to Brandeis, “the original intent of the Framers had been to create an instrument that would change as the nation changed, but at all times relying on fixed and immutable moral values.”

Although Brandeis died almost 70 years ago, his economic and social views remain strikingly relevant today. His denunciations of “the curse of bigness” have attracted renewed attention in the wake of the financial crisis of 2008. He fretted that a relative handful of bankers had gained control over too large a share of the country's investment capital, vigorously advocated the separation of investment and banking functions, and even published a muckraking book exposing dubious banking practices, entitled *Other People's Money: And How the Bankers Use It* (1914). During the Depression, he heartily endorsed the stimulus programs and public employment initiatives that President Roosevelt sent to Congress, although, he added, “I want 10 times as much.” He also commented in a letter to Felix Frankfurter that, rather than going off the gold standard, “I wish [President Roosevelt] would experiment instead with banishing the bankers ... and putting on heavier estate taxes.”

Likewise, from as early as 1890, when he co-authored a famous law review article titled “The Right to Privacy” (available at [www.law.louisville.edu/library/collections/brandeis/node/225](http://www.law.louisville.edu/library/collections/brandeis/node/225)), through his rejection of warrantless wiretapping in his dissenting opinion in *Olmstead v. United States* (1928), Brandeis sought to preserve a sphere of personal autonomy and confidentiality where life could be carried on free from the intrusions either of a sensationalistic and scandal-mongering press or of overly aggressive and self-righteous government investigators (whom he unforget-

tably characterized as “men of zeal, well-meaning but without understanding”). He would doubtless have some trenchant and troubling observations to make about modern American society, where commercial and government data-mining, the pervasiveness of cameras and video devices, and the widespread accessibility of the Internet make possible the exposure of private and intimate moments and communications in ways and on a scale that Brandeis could never have imagined.

In a time when the legal profession has been shaken by the economic downturn and a growing sense that technological developments and the high costs of legal services are altering the practice of law in fundamental ways, Urofsky's *Louis D. Brandeis: A Life* provides a timely reminder that it is indeed possible to live greatly in the law. Near the beginning of the last century, Brandeis told students at Harvard that “Those of you who feel drawn to [the legal] profession may rest assured that you will find in it an opportunity for usefulness which is probably unequalled. There is a call upon the legal profession to do a great work for this country.” As we move deeper into a new century, his words can challenge and inspire us still. **TFL**

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### **All the Devils Are Here: The Hidden History of the Financial Crisis**

By Bethany McLean and Joe Nocera

Penguin Books, New York, NY, 2010. 380 pages, \$32.95.

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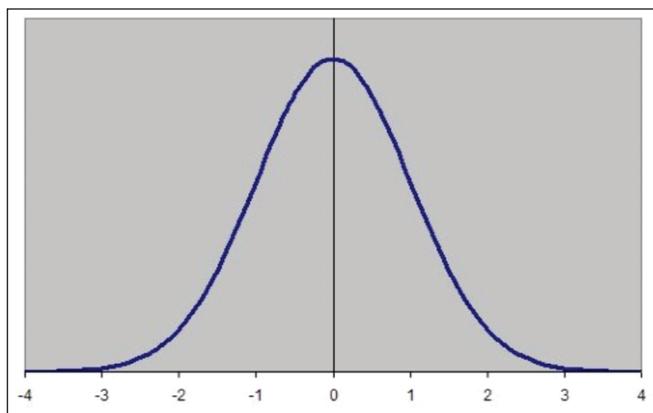
REVIEWED BY CHRISTOPHER C. FAILLE

This is a marvelously thick account of the financial crisis of 2007–2008 and its origins. Thick is good. The thin gruel offered in some interpretations of events comes in two forms: the

one-devil-will-suffice gruel, and the details-about-furniture gruel. But here we get finance, not burlwood tables or the other pseudo-novelistic details that fascinate Andrew Ross Sorkin in his book, *Too Big to Fail*, which I reviewed in *The Federal Lawyer* in February 2010. We also get, as the Shakespeare-inspired title implies, lots of different intersecting lines of cause and effect—plenty of devils.

I dissent from several of the themes and interpretations in this book, but I won't make this review about my dissents. The book's very thickness made some disagreement inevitable. There is a lot to like and, because I'm in an angelic mood, I will focus on that.

McLean and Nocera speak briefly but with great clarity about the birth of the "Value at Risk" (VaR) metric. This is a measurement of the hazard posed by a particular asset, on a period-by-period (and, in its origin, on a day-by-day) basis. Suppose that you own stock in XYZ Co. The probability of various events in the near future of XYZ's stock can be laid out as a curve, thus:



The most likely result (the highest point on the curve) may represent a small profit. Higher levels of profit become increasingly unlikely as one gets more ambitious, as indicated by the downward slope to the right. The downward slope to the left of the mean, however, represents first the slide into 0 percent profit and, later, the descent into loss at ever-higher levels.

### Maybe Worry about Meteorites

For how serious a loss should an investor holding this stock make plans? Surely, if something is as unlikely as,

say, the possibility that a meteorite will hit an elephant at the Bronx Zoo on the head tomorrow morning, one need hardly trouble oneself with it. But what if a certain result will happen one out of every 20 times one establishes a position? That's a 5 percent probability, and it is just plausible enough that institutional "risk managers" have often employed it as a boundary. When you hear of "stress testing" in an investment context, this is often what is meant. An institution's risk manager asks himself: what will happen to our portfolio if various 1-in-20 bad shots come to pass?

VaR is a single number created by the risk managers at JPMorgan in the early 1990s. They would present it every afternoon, after the close of trading, to their then-CEO, Dennis Weatherstone. It meant: Netting out all of our positions and all of our different risks across this institution, we can be 95 percent sure that our losses tomorrow, if any, will amount to no more than X million. Thus, a VaR of 42 would signify a value at risk, in this sense, of \$42 million.

It will occur to some of you, even though not educated in either finance or statistics, that VaR as described is a very simplistic way to think about risk. After all, when that 20th day comes, how much further down the slope than \$42 million would the loss be? Is it enough to know it will be at

least \$42 million, without regard to the difference between \$42.5 million and \$84 million?

Even more fundamental: Who says the bell curve is the appropriate shape? Perhaps the appropriate curve is not the standard one, but a curve with fatter tails. The great mathematician Benoit Mandelbrot, famous for fractal geometry, thought so. In 2004, he wrote, "I believe the conventional models ... are not merely wrong; they are dangerously wrong. They are like a shipbuilder who assumes that gales are rare and hurricanes myth; so he

builds his vessel for speed, capacity and comfort—giving little thought to stability and strength."

The part of the probability curve at the further leftward part of the graph—hurricane territory—might have to be drawn higher on the graph paper than the "normal distribution" would have it. The good news is that this would allow you to draw a fatter tail at the right end of the graph, the prosperous end, too. The bad news is that, in the midst of a hurricane, the good news will seem mighty irrelevant.

### Don't Demonize Goldman Sachs

Weatherstone, to his credit, didn't take VaR too seriously. He viewed it as the beginning, not the end, of a serious consideration of risk. But JPMorgan soon made its use of VaR publicly known. The number spread through finance, becoming standard by the late 1990s, and became a bit of importantly misplaced abstraction—one of the "devils" emptied out of hell.

One refreshing element of this book is that McLean and Nocera refrain from demonizing Goldman Sachs. GS has taken a lot of heat of late. Heck, Matt Taibbi, writing in *The Rolling Stone* in July 2009, called Goldman Sachs "a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money." But McLean and Nocera contend that there are good reasons for GS' success, and indeed that the pity is that the other major Wall Street institutions didn't act somewhat more like this squid. One aspect of GS' superior risk management was, precisely, that it didn't take VaR seriously. But there was more.

"Goldman was a stickler for using what's known as mark-to-market accounting, meaning that it marked its books, every day, at the price at which securities traded in the market," McLean and Nocera tell us. If an institution (A) has a \$1 million IOU from another institution (B), but it knows that B is in trouble and that the most likely outcome is that it will only get \$100,000 from B, then what is the value of that instrument? Most accoun-

**REVIEWS** *continued on page 70*

tants would agree that it represents only \$100,000 worth of wealth in A's possession, and should be marked that way. This is called marking to market simply because, if A wanted to sell that IOU to a third party (C), that \$100,000 represents what it could reasonably expect to get from that sale consistent with honest dealing.

A publicly traded corporation that keeps the IOU on its books at the face value of \$1 million in such a case is, quite arguably, defrauding its own investors. Even more important for the point McLean and Nocera are making here is that the management of a company that valued that instrument at \$1 million would be deceiving itself. McLean and Nocera in effect praise Goldman Sachs because it did not deceive itself in this way. While others around them adhered to increasingly meaningless book values, GS maintained the discipline associated with mark-to-market accounting. Of course the specific instruments involved in the recent bubble-and burst, such as collateralized debt obligations (CDOs), were a good deal more complicated than an old-fashioned IOU. But the principles of fair valuation were the same.

#### Complicated: Not Quite the Word

I won't try to explain what exactly a CDO is, but I will mention that, when an institution packages many of them together, it can create something even more obscure, appropriately called a CDO squared.

Merrill Lynch was among the firms that did not display Goldman-like discipline, but that suffered nonetheless from what the authors call "Goldman envy." They discuss the CEO of Merrill Lynch, Stan O'Neal, and make a convincing case that he was ignominiously isolated from the operations of his company throughout crucial months in 2006 and 2007. Indeed, one sign that he was out of touch was that he took VaR far too seriously. "His feel for the firm's risk positions came primarily from reading the daily VaR reports."

*All the Devils Are Here* also describes an incident in August 2007, when Dale Lattanzio, the head of Merrill's CDOs operations, "commandeered two junior

quants [quantitative analysts] and told them to sign off on a new valuation method the mortgage desk wanted to use for CDOs squared." The quants felt that they were being maneuvered into responsibility for something improper, so they complained to their boss, John Breit. Breit soon discovered that the exposure of Lattanzio's operation was not in the millions (as Lattanzio had been pretending), but in the billions.

Lattanzio was fired in early October 2007, as Stan O'Neal finally came to understand the enormity of the crisis unfolding. It was, in a sense, too late. From the time of that firing, Merrill had less than a year left as independent entity. It had to sell itself at the peak of the panic in September 2008 to Bank of America.

#### A Personal Appeal

I conclude this review with a word specifically to those who, like me, admire the operations of free markets and believe that the roots of our troubles are to be found in too little capitalism, not in too much. You may know that McLean and Nocera are not among our number in this respect. The point of view of this book is much too friendly toward regulators, much too inclined to believe that, if only Washington had been looking more carefully over Stan O'Neal's shoulder, everything would have been okay.

So, fellow free marketers: There are passages in this book that will tick you off. Read through and past them, though. There is so much of value here that you will want to press on, and will be glad once you have done so. Behind it all, the book shows—even though the authors would likely not put it this way—that those firms that survived the worst of the crisis, notably Goldman and Bank of America, did so because they possessed the virtues of the ants in the fable, and that those that failed, like Lehman and, in a different manner, Merrill, did so because they possessed the shortsightedness of the grasshopper. It is, at its bottom, the classic free market lesson. **TFL**

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### Colonel Roosevelt

By Edmund Morris

Random House, New York, NY, 2010. 766 pages, \$35.00.

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#### REVIEWED BY HENRY S. COHN

Edmund Morris has completed his award-winning three-volume biography of Theodore Roosevelt (1858–1919) with *Colonel Roosevelt*, the title being Roosevelt's preferred appellation during the last decade of his life. Although the factual outlines of this book may be found in any number of other works—including Lewis Gould's *Four Hats in the Ring* and Joshua David Hawley's *Theodore Roosevelt: Preacher of Righteousness*—no prior effort can compare with Morris' book in its literary flair.

Each chapter of *Colonel Roosevelt* begins with a stanza from a poem by Edwin Arlington Robinson, a devotee of Roosevelt, that links to the chapter's subject matter. Morris does not limit his book to political matters, as he masterfully describes, for example, Roosevelt's tour of a New York City exhibit of newly completed paintings of the Ashcan School, as well as Roosevelt's published reaction to it in the magazine *Outlook*. Morris also includes Roosevelt's own contributions to the political lexicon, such as the following, which date from Roosevelt's final decade: "The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood"; "My hat is in the ring"; "The New Nationalism puts the national need before sectional or personal advantage"; and "I'm as fit as a bull moose." This last declaration, of course, gave rise to the Progressive Party's nickname—the Bull Moose Party—and to numerous cartoons and political symbols in the shape of a moose.

*Colonel Roosevelt* begins with the fascinating story of Roosevelt's run

for the presidency in 1912. He had vaulted to prominence as governor of New York in 1898. When President McKinley's popular vice president, Garret Hobart, died before the 1900 Republican convention, Roosevelt was chosen as Hobart's replacement. Then, in 1901, McKinley was assassinated at the Pan-American Exposition in Buffalo, N.Y., and Roosevelt, age 42, was summoned from his Adirondacks vacation to take the oath of office; he is still the youngest man ever to become President. Roosevelt was triumphantly re-elected in 1904. In 1908, much to the public's disappointment, he chose not to run again and, instead, urged that the Republican convention nominate William Howard Taft, who was secretary of war and one of Roosevelt's closest advisors. The Republicans did so, and Taft went on to defeat William Jennings Bryan, who lost his third presidential race. (Morris covered this material in his prior volumes, *The Rise of Theodore Roosevelt* and *Theodore Rex*.)

On inauguration day, on March 4, 1909, Roosevelt handed the reins of government to Taft and headed, with his son Kermit, to British East Africa for an extensive hunting trip. He promised to furnish specimens to the Smithsonian and a manuscript about big game kills to his publisher, Scribners. While in Africa, having great success in killing elephants and lions, Roosevelt received a troubled message from Gifford Pinchot, his friend and appointee as chief of the Forest Service. Pinchot reported that Taft had fired him after he had feuded with a superior whom Taft favored. When Roosevelt finished his hunting trip, he met Pinchot in Italy. Pinchot related that Taft was under the thumb of G.O.P. conservatives and was retreating from a pro-conservation stand. Pinchot begged Roosevelt to return to the United States at once to try to remedy the situation.

Roosevelt, however, refused to challenge Taft. He traveled from Italy to France, Germany, and England, meeting with officials such as Kaiser Wilhelm, and he gave lectures at various parliaments and universities, calling for a "league of nations." At Taft's bidding, he served as the United States'

representative at the funeral of Edward VII. His speeches and appearances enhanced his position as the world's most highly regarded political figure.

While Roosevelt was in Europe, the calls continued for him to run for President in 1912, and, when he arrived home in New York City, his ship was met by a great throng, and a ticker-tape parade followed. Meanwhile, Taft's standing continued to slip. Taft appeared to dislike executive branch affairs; the judiciary interested him more and, in 1921, President Harding appointed him chief justice of the Supreme Court. Concerned with the public's potential reaction to his turning on his hand-picked successor, Roosevelt lingered in deciding to break with Taft, but finally did so.

To win the Republican nomination, Roosevelt needed to attract delegates, but Taft, as the incumbent, had most of them under his control and had the party leaders in his corner too. Roosevelt, however, took all but one of the few state primaries that were held, managing a major victory in Pennsylvania to ensure that he held sufficient delegates to make the choice a contest. The raucous Republican convention at Chicago proved to be a battle between Taft's regulars and Roosevelt's insurgents, who claimed that Taft was defying the public will.

But Roosevelt failed to obtain the nomination of the Republican Party, and he moved his quest down the street to the convention of the Progressive Party. Its leaders were Jane Addams, the heroic Chicago social worker; Ben B. Lindsey, founder of the Denver juvenile court; Roosevelt's former advisor Gifford Pinchot; and two legal scholars who later became judges, Learned Hand and Felix Frankfurter. Roosevelt addressed the convention, attacking the two major parties as mere "husks"—boss-ridden and controlled by the privileged. In response, the convention joined in singing "Onward Christian Soldiers," and a reporter compared the convention, in its enthusiasm for Roosevelt, to a religious convocation. The Progressive Party nominated Roosevelt.

To conservatives, Roosevelt was now a radical who had bolted from his lifelong attachments to accept the most

liberal platform of his day. Roosevelt replied that he was fighting for vital principles, such as conservation of natural resources, recall of corrupt judges, workers' compensation, and universal old-age insurance. "We stand at Armageddon, and we battle for the Lord," Roosevelt said of himself and his equally progressive running mate, Hiram Johnson. Roosevelt's platform presented ideas, such as national health insurance, that are still debated today.

Roosevelt took his campaign to the country, and exhausted himself traveling through both East and West in his special train, the *Mayflower*. On Oct. 14, 1912, in Milwaukee, a mentally ill man shot Roosevelt in the chest, but Roosevelt was spared major injury as the bullet penetrated his eyeglass case and the 50-page text of his address in his jacket pocket before it lodged in his chest. The bullet did not penetrate the lung wall, and Roosevelt gave his campaign speech before he sought medical attention. In this speech, he said, "I have just been shot; but it takes more than that to kill a bull moose." The G.O.P.'s effort was shattered by Roosevelt's bolting from the party, and Democrat Woodrow Wilson cruised comfortably to victory, with Roosevelt coming in second and Taft a distant third.

Roosevelt would never again run for office. The assassination attempt had long-term effects on his circulatory system, and, in traveling to Brazil in 1914, he had a bout of "Cuban fever" that also left him weak. In 1913 and 1915, he was involved in two controversial libel suits that arose from the 1912 campaign. In the first, Roosevelt sued a newspaper editor who had suggested that Roosevelt had shown signs of alcoholism on the campaign trail. The editor apologized on the witness stand and Roosevelt agreed to nominal damages. In the second case, Roosevelt was sued because, in a campaign speech, he had accused a politician from Syracuse, N.Y., of abetting "rotten government." The jury found for Roosevelt.

In 1914, World War I broke out, and, in 1916, when the Republicans nominated Charles Evans Hughes to run against Wilson, Roosevelt was

**REVIEWS** *continued on page 72*

again a team player. Wilson, running on the slogan, “He kept us out of the war,” was re-elected. Roosevelt could abide neither Wilson nor his secretary of state, William Jennings Bryan, who viewed the war as exclusively a European affair. Roosevelt spoke out against the “pacifist” Bryan until he was removed from the cabinet in June 1915, and, in April 1917, Wilson asked Congress to declare war.

Roosevelt wanted Wilson to act more aggressively and to send more troops. He declared, “Peace is not the end. Righteousness is the end. ... If I must choose between righteousness and peace, I choose righteousness.” Likewise he thought that Wilson’s 14 points, issued as the war concluded, were too idealistic and foolish. He agreed with French premier George Clemenceau’s icy comment on the 14 points—even the good Lord had only 10.

Roosevelt’s last years—beautifully captured by Morris—were semi-tragic. His health failed and his dream of mounting a presidential campaign for 1920 vanished. He was delighted to orchestrate the weddings of his daughter Ethel and his son Archie, but had to face the death of his son Quentin, whose fighter plane was shot down over France by a German aircraft in 1918.

On Jan. 6, 1919, at age 60, Roosevelt died suddenly of a heart attack, and debate began over his political legacy. H.L. Mencken called him “a liar, a braggart, a bully, and a fraud,” and Mark Twain labeled him a showy charlatan. But Edna Ferber said that he was “the most encouraging person that ever breathed.” And his distant cousin, Franklin Roosevelt, who put many of Theodore Roosevelt’s ideas into effect, called him the greatest man he had ever met. Perhaps the honor that would have pleased Roosevelt the most was that his fellow delegate to the 1912 Progressive Party convention, the sculptor Gutzon Borglum, placed him on Mt. Rushmore with Washington, Lincoln, and Jefferson. **TFL**

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### ***Child-Centered Practices for the Courtroom and Community: A Guide to Working Effectively with Young Children and Their Families in the Child Welfare System***

By Lynne F. Katz, Cindy S. Lederman, and Joy D. Osofsky, with Candice Maze  
*Paul H. Brookes Publishing Co., Baltimore, MD, 2011. 203 pages, \$34.95.*

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REVIEWED BY GEORGE W. GOWEN

The New York State Bar Association devoted its January 2011 *Journal* to youth courts, which are special courts in which youths aged 14 to 18 prosecute, defend, and sentence youthful offenders. I recommend this issue of the *Journal*, and I mention it as a lead-in to *Child-Centered Practices for the Courtroom and Community* because the child welfare system—the subject of the book—is as much in need of the bar’s attention and of new ideas as are juvenile courts.

The book follows the teenager Pam and her two sons through the child welfare system. Pam had her first child at age 14 while she was repeating the 9th grade for the second time and failing all of her classes. Two and half years later, she had a second son. Hers is a tale of multi-generational violence, drugs, and child abuse—Pam herself had been victimized at age three. Fathers are identified as “boyfriends” who take no responsibility for their progeny and are often the perpetrators of violent crimes against the mothers and their children.

The three authors of this disturbing book are experienced and knowledgeable. Lynne Katz is an assistant professor at the University of Miami Department of Psychology, with an appointment in pediatrics, and director of an intervention center at the university. Cindy Lederman is a circuit court judge at the Juvenile Justice Center in Miami and a leader in the creation of the Dade County Domestic Violence Court. Joy Osofsky is a professor of pediatrics and psychiatry at Louisiana State University and has received wide recognition for her books and work on

infant trauma and mental health. The authors are more than professors; they have served in the trenches.

Their book is directed at those who work within the child welfare system. It is replete with sample questions that every lawyer and judge should ask, sample court reports, sample evaluation reports, sample child-caregiver relationship assessment forms, and many other forms and questionnaires that will be helpful to the professional. The authors’ commendable expertise may discourage the lay reader, but their goal is to assist those whose daily lives are committed to assisting the child and parent entrapped by inter-generational collapse.

I was told by a social worker that juvenile killers seem not to care or realize that those whom they kill are human beings. I was equally shocked to read that Pam, the teenage mother, had to learn to play with her child and only with the assistance of a therapist did she learn that “my babies love me.”

Just as youth courts are a nontraditional approach to teen delinquency, so, the authors explain, are juvenile dependency courts a nontraditional approach to child welfare problems. They write, “The juvenile dependency court, more than any other court, must identify, address, and resolve issues of domestic violence, substance abuse, child abuse, child neglect, and other problems that require significant investment of time, energy, and resources to properly address, if not solve. Problem-solving courts have emerged on the scene as an alternate to traditional courts.” **TFL**

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## ***After America: Narratives for the Next Global Age***

By Paul Starobin

*The Viking Press, New York, NY, 2009. 368 pages, \$26.95.*

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REVIEWED BY JOHN C. HOLMES

Journalist Paul Starobin believes that America has passed its peak. He sets the high-water mark of the “American Century” at 4:26 p.m., Washington, D.C., time, on Aug. 22, 1991, when the Soviet government removed the statue—which had stood as the symbol of Soviet communism—of Feliks Dzerzhinsky, the founder of the Soviet secret police, from its pedestal in Moscow. Starobin sets out five of the most likely scenarios that may follow America’s decline as a world power (hence the title, *After America*) and discusses how America could cope with these various scenarios.

America’s dominance began after World War II, when it emerged as a military power rivaled only by the Soviet Union. The United States was admired for its democracy, culture, and economy, and was appreciated for its Marshall Plan to help rebuild Europe. However, rather than laud America for its exceptionalism and as a model for the world to emulate, Starobin finds that the United States had become an “accidental empire”—just another of the many influential powers—such as ancient Rome, the Ottoman Empire, and Great Britain—that have ebbed and flowed throughout history.

Indeed, Starobin attributes America’s ascendancy to its earlier good fortune of being isolated from other world powers in Europe, Asia, and the Middle East, and serving as a magnet for people from those regions seeking freedom and opportunity. The immigration of such people turned the United States into a dynamic, creative society. Starobin notes, however, that the country was also seriously flawed by political corruption, criminal gangs, and robber barons that exploited the common people. He is dismissive of our modern presidents, whom, except for Franklin Roosevelt, he views as unsophisticated in understanding and assessing other world cultures.

Starobin states that Americans are under the illusion that we are still the world leader in nearly every important respect, when, in fact, the opposite is true. France spends 11 percent of its gross domestic product on health care and its people have a longer life expectancy than those in the United States, which spends 15 percent; Japan, and not the United States, leads in robotics; not only Japan but also the small country Estonia has made more and better advances with respect to the Internet. The United States also lags behind the Netherlands, Belgium, Spain, Canada, and South Africa in recognizing gay marriage, and is slow to develop a green society.

The United States is bogged down in the conflicts in Iraq and Afghanistan, costing us both financially and in world opinion. We are increasingly a debtor nation, with foreign governments—particularly China—holding the debts and, thereby, potential future leverage over us. Starobin alleges that the United States is no longer looked to by most nations for leadership. Many Arabs, as well as other world citizens, are revolted by aspects of American culture, including movies that champion sex and violence, sports and entertainment excesses, and celebrity worship. Starobin believes America’s ideal of worldwide democratic government is probably doomed to failure. The best example of this, to which he devotes a chapter of the book, is Russia, which has apparently returned to its autocratic past after it had seemed so likely to embrace freedom and democracy following the fall of communism.

Starobin suggests that one outcome of the decline of the United States’ world influence could be chaos. The region stretching from Central Asia to Eastern Europe suffers from tribalism, sectarianism, religious fanaticism, tyranny, political corruption, poverty, and gangsterism. Post-colonial Africa has not evolved into a democratic bastion but rather has autocratic governments and frequent tribal wars and bloodshed. The United States itself could be the target of terrorists who unleash nuclear weapons or digital mass attacks that could cripple the American psyche and financial structures. With no nation to replace the United States as a counterbalance to chaos, the world

could enter another period like the medieval dark ages, with rampant starvation, poverty, and disease, and little hope for the individual beyond mere survival. However—perhaps revealing a nihilist bent to his political philosophy—Starobin posits that the result of the decline of the United States could be a “happy chaos” in which, freed from the restraints of nation-states, people could use modern technology to establish their own destinies, much as the lawlessness of the American frontier provided creative individuals with such opportunities.

A second possible result of American decline, according to Starobin, could be a multipolar world led by nations such as India, China, Russia, Brazil, and Iran, in addition to Great Britain, Germany, and the United States, in a precarious balance of power. On opposite sides of the balance might be democracies and autocracies, East and West, or English-speaking nations and others. Starobin cites India as a usually overlooked (but less so since President Obama’s visit in November 2010) potential power. It has a huge population, educated citizens, an advancing economy, increasing military strength, and nuclear capability. While India has close ties to the United States due to our shared values of democracy and a nonexpansive foreign policy, it also has cultural and historical ties to Iran, a country it doesn’t fear. For this and other reasons, India could become a world power broker. Starobin believes that, although the United States would probably have little ability to influence countries such as China, Iran, and Russia to emulate our democracy, we could comfortably exist in such a multipolar world and, by not being the dominant world power, even benefit by having reduced financial and military expenses.

An obvious third scenario is the dominance of China. Examining an alternative to the idea that the world could be better off with a multipolar power structure, Starobin posits that perhaps a dominant nation is necessary for world stability and that China is the most likely candidate to fill that role. China has taken great strides in acquiring trad-

**REVIEWS** *continued on page 74*

ing partners and businesses throughout the world, and doing so will be necessary for it to continue to progress as an advanced society. Starobin notes that China has forged strong relationships not only with Hugo Chavez's Venezuela for obtaining oil, but with democratic Chile, which owns 38 percent of the world's copper production. China's economy has expanded at a rate of close to 10 percent annually for the past 30 years—a faster rate than that of the United States in its heyday, and certainly faster than our current (2009) rate of about 3 percent, Japan's of 2.2 percent, or Germany's of 2.7 percent. Starobin envisions China's combination of economic expansion, military strength, and diplomatic aggressiveness as the path to its future global dominance.

Starobin labels a fourth possible outcome of American decline as "City-States"—a modern version of those in ancient and medieval times. Under this scenario, the importance of the nation-state would diminish as populations feel more connected to the cultural developments of their more immediate regions. Although this notion may seem unlikely, Starobin notes that 40

areas that surround and encompass cities produce most of the world's wealth. Not only established cities such as New York, London, Paris, Moscow, Hong Kong, Shanghai, and Tokyo, but emerging cities such as Tel Aviv, Dubai, Abu Dhabi, Bangalore, and Santiago could become economically and culturally more important than the countries of which they are a part.

Starobin calls his fifth "after America" possibility universal civilization. As America evolved from individual states to a centralized nation and European countries joined together to form the European Union, so could the world join together to create a single governing entity. Many nations are already moving in this direction in their trade negotiations, defense alliances such as the North Atlantic Treaty Organization, and the World Court. Moreover, advanced technology, convenient travel, and instant communications have produced worldwide interacting economies. Toyota has become a successful "American" company, while General Motors and Burger King are successful in Japan and other countries throughout the world. China imports coal, iron ore,

and other materials and exports clothes and automobile parts; the United States imports oil and exports computer software and agricultural products. These transactions require international cooperation and regulation.

Starobin looks forward to the United States becoming a less dominant and less militaristic power, with a more peace-loving and culturally advanced population; he somehow sees California as a model to emulate. *After America* is a wide-ranging, fast-paced narrative, with material garnered from extensive conversations with high-level officials and experts as well as with ordinary citizens throughout the world. It contains both statistical and analytical research, as well as more than a little speculation. The reader need not agree with all of its premises or conclusions to find the book of considerable value. **TFL**

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**INSULAR CASES** *continued from page 25*

**Endnotes**

<sup>1</sup>See Treaty of Peace, Dec. 10, 1898, U.S. Spain, 30 Stat. 1754; Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1899).

<sup>2</sup>33 CONG. REC. 2105 (1900); CONG. REC. 6019 (June 14, 1898).

<sup>3</sup>33 CONG. REC. 3616 (1900); 56th Cong., 1st Sess. pp 704–712 (Jan. 9, 1900).

<sup>4</sup>Theodore Roosevelt, Address at the Hartford Coliseum, Connecticut (August 22, 1902); Theodore Roosevelt, Speech at Methodist Episcopal Church Celebration of the African Diamond Jubilee, Washington, D.C. (Jan. 18, 1909).

<sup>5</sup>E.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawai'i v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>6</sup>G. Edward White, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF, 298–301 (Oxford Univ. Press 1993); Liva Baker, JUSTICE FROM BEACON HILL, 346–49 (Harper Collins 1991); Sheldon M. Novick, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES, 234–37 (Little, Brown & Co. 1989).

<sup>7</sup>*Downes v. Bidwell*, 182 U.S. 244, 282 (1901); *Hawai'i v. Mankichi*, 190 U.S. 197 (1903); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Morales v. Bd. of Registration*, 33 P.R.R. 76 (1924);

*Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

<sup>8</sup>*Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>9</sup>98 CONG. REC. 1528 (1952); *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 595 n.26; 1966 U.S.C.C.A.N. 2786–90.

<sup>10</sup>*Balzac v. Porto Rico*, *supra*, note 8.

<sup>11</sup>E.g., LSA-C.C.P. Article 1731–1841; Pub. L. No. 42, 3d Guam Legis., 1st Sess. §§ 3 and 4 (1955); U.S. Virgin Islands Rev. Organic Act of 1954 § 3, 48 U.S.C. § 1561.

<sup>12</sup>*United States v. Laboy-Torres*, 553 F.3d 715, 721 (3rd Cir. 2009).

<sup>13</sup>E.g., *Igartua De la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc), *cert. denied*, 547 U.S. 1035 (2006); *Balentine v. United States*, 486 F.3d 806 (3rd Cir. 2007); *Attorney General of Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985); *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001).

<sup>14</sup>*Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 475–76 (1979).

<sup>15</sup>*Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>16</sup>*Igartua v. United States*, 626 F.3d 592, 612–38 (1st Cir. 2010).