

# Book Review

## Falling Under the Brandeis Spell

*Brandeis and Frankfurter: A Dual Biography.* By Leonard Baker.\* New York: Harper & Row, 1984. Pp. vi, 567. \$25.00.

*Louis D. Brandeis: Justice for the People.* By Philippa Strum.\*\* Cambridge: Harvard University Press, 1984. Pp. x, 508. \$27.50

Maeva Marcus†

Shortly after the death of Louis D. Brandeis on October 5, 1941, Max Lerner forecast: "Years from now, when historians can look back and put our time into perspective, they will say that one of its towering figures—more truly great than generals and diplomats, business giants and labor giants, bigger than most of our presidents—was a man called Brandeis."<sup>1</sup> Comments like this one create a legend about a man who, in his own lifetime, certainly inspired enormous adoration but also generated a good deal of animosity. Alpheus Thomas Mason's masterful, but largely uncritical, biography, *Brandeis: A Free Man's Life*,<sup>2</sup> published in 1946, contributed to the Brandeis legend. Over the next twenty-five years nothing was published to change this laudatory portrait in any significant way. Scholarly interest in Brandeis increased in 1971, with the publication of the first volume of the *Letters of Louis D. Brandeis*<sup>3</sup> and *A Mind of One Piece: Brandeis and American Reform*,<sup>4</sup> by Melvin I. Urofsky, one of the editors of the Brandeis *Letters*. And with the completion of the fifth, and what then was thought to be the final, volume of the *Letters* in

---

\* Winner of 1979 Pulitzer Prize for Biography.

\*\* Professor of Political Science, CUNY; Vice President, American Civil Liberties Union.

† Visiting Professor, Georgetown University Law Center, and editor of *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* (1985).

1. Quoted in 1 *LETTERS OF LOUIS D. BRANDEIS*, xxx (M. Urofsky & D. Levy, eds. 1971).

2. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946).

3. *LETTERS OF LOUIS D. BRANDEIS* (5 vols., M. Urofsky & D. Levy, eds. 1971-78).

4. M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971).

1978,<sup>5</sup> a Brandeis industry took off in earnest: Seven books dealing with Brandeis have been published since 1980, none of which questions the prevailing view of Brandeis as a "towering figure."<sup>6</sup>

What accounts for this public and scholarly fascination with Brandeis?<sup>7</sup> Other contemporaneous figures would appear to have an equal claim on the mind of the present generation. Justices of similar stature to Brandeis—in this century we might name Holmes, Hughes, Stone and Cardozo—have served on the Supreme Court and yet have received far less scholarly attention. Brandeis was not the only prominent lawyer to engage successfully in the work of reform. Other men and women had an equal or greater impact on the Zionist movement in America and abroad. From the perspective of the present generation, does Justice Brandeis deserve all the acclaim?

Two recent books gave promise of being distinguished entries in the field of Brandeis scholarship: Leonard Baker's *Brandeis and Frankfurter: A Dual Biography*<sup>8</sup> and Philippa Strum's *Louis D. Brandeis: Justice for the People*.<sup>9</sup> Baker, who had won a Pulitzer Prize for *Days of Sorrow and Pain: Leo Baeck and the Berlin Jews*, had dealt with legal figures and themes previously in works on John Marshall and FDR's court-packing fight and could be expected to treat the Brandeis/Frankfurter material with authority and insight. Strum's solid record of schol-

5. Because of the current availability of two manuscript collections not open to researchers at the time the original five volumes of *Letters* were published, two additional volumes are now being prepared. The first will contain letters from Brandeis to Felix Frankfurter, and the second will consist of letters to Brandeis's wife and daughters.

6. In addition to the two reviewed here, these books are: N. DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL* (1980); A. GAL, *BRANDEIS OF BOSTON* (1980); M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981); B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982); L. PAPER, *BRANDEIS* (1983). While Murphy's book challenges the Brandeis legend, it does so by making a somewhat sensational attack on Brandeis's character, rather than by placing Brandeis's legal contribution in critical perspective. See *infra* notes 55-57 and accompanying text. Thomas McCraw's *Prophets of Regulation*, however, does devote two of its chapters to a critique of Brandeis's economic thought. See *infra* notes 48-54 and accompanying text.

7. While scholarly interest is certainly encouraged by the availability of certain individuals' papers, that cannot by itself account for the number of works dealing with those individuals. If it did, we would expect to find many more books and articles, for example, about President and Chief Justice William Howard Taft, a contemporary of Brandeis, whose papers at the Library of Congress contain a wealth of material. In Brandeis's case the existence of major collections of his papers acted as an incentive to scholarly attention, but his difficult-to-read handwriting hindered the efforts of some. Thus the publication of Brandeis's letters surely promoted work on the Justice; yet any serious study of his career would entail examining the original manuscripts held by various institutions because the Urofsky-Levy edition of Brandeis's *Letters* is selective. The published *Letters*, however, with their excellent annotation, do make the scholar's task easier. In this sense, they undoubtedly have contributed to the number of recent works on Brandeis.

8. L. BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* (1984) [hereinafter cited by author and page number only].

9. P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984) [hereinafter cited by author and page number only].

## The Brandeis Spell

arly publication and ten years of research into sources, some of which had never before been used, led to eager anticipation of the appearance of her biography. However, while Strum's book fulfills its promise, Baker's work falls woefully short. Moreover, both books leave us questioning whether all the recent attention paid to Brandeis adds any fresh insight to our knowledge of the man and his times or helps us place his achievements into critical perspective.

One cannot help wondering as one begins Baker's *Brandeis and Frankfurter* why he decided to write a "dual biography." No clear explanation is contained in the book, which has neither preface nor introduction. (In the acknowledgments Baker says merely that someone at Harper & Row gave him the idea.<sup>10</sup>) Early on, Baker does suggest a possible reason for the combination:

Brandeis, born in America, the child of immigrants, and Frankfurter, who came to the United States as an immigrant; their story is the immigrant story. Brandeis, secure in his American birth, devoted much of his life to assisting the immigrants, identified with them. Frankfurter, always mindful of his foreign birth, became their symbol.<sup>11</sup>

The immigrant experience is one of a few possible unifying themes that Baker touches on but fails to develop. Beyond the fact that Brandeis and Frankfurter were involved in many of the same activities and that their lifetimes, when combined, spanned more than a century, thus giving the author an opportunity to cover a large chunk of American history, there appears to be no advantage—at least in the hands of Mr. Baker—to a paired biography. In his attempt to deal with so many people and events, Baker gives most of them short shrift, presenting us with, essentially, a chatty, chronological narrative with little of substance treated in depth, and a good number of things presented incorrectly or in a misleading manner.

The first chapter, which opens dramatically with Brandeis arguing before the Supreme Court, exemplifies the problems found throughout Baker's book. Dealing with the famous "Brandeis brief" case of *Muller v. Oregon*<sup>12</sup> at great length (for this book: fourteen pages), Baker introduces the scene, the characters, the social issues, and the legal issues—all in sweeping strokes—trying to capture the essence of each with as few words as possible. After one paragraph summarizing the legal context of *Muller*

---

10. L. BAKER, at 494.

11. *Id.* at 45.

12. 208 U.S. 412 (1908).

(in which no cases are mentioned and no citations given for the substance of the summary),<sup>13</sup> Baker begins to describe Brandeis's oral argument. In so doing, Baker reveals his lack of understanding of argument before the Supreme Court generally and Brandeis's *Muller* argument in particular.

According to Baker's account, Brandeis, in asking the justices to uphold an Oregon law that limited the workday of women laundry workers to ten hours, wanted the Court "to change its thinking, jettison its definitions."<sup>14</sup> Not two paragraphs later, however, Baker describes Brandeis's method as "[s]eizing upon the remarks in earlier opinions, building them into a rationale, . . . attempting to persuade the Court to funnel those diverse remarks into a decision which, in turn, would influence other decisions."<sup>15</sup> Clearly, if Brandeis's strategy was to place the *Muller* argument within the context of the Court's existing jurisprudence, he would not suggest that the Court "change its thinking, jettison its definitions." Indeed, he did not. Although Brandeis employed a novel approach in *Muller*, it was one that allowed the justices to uphold unanimously the Oregon law without upsetting previously declared doctrine.<sup>16</sup> But this contradiction seems to have escaped Baker, who further misunderstands Brandeis's thinking by imputing opinions to him simply because they represent the opposite of what Muller's counsel expressed. Baker quotes the summary of the issue in the case as stated by Muller's attorneys in their brief:

The question involved is far-reaching. If such legislation may be sustained and justified merely because the employee is a woman, and if such employment in a healthy vocation may be limited and restricted in her case, there is no limit beyond which the legislative power may not go.<sup>17</sup>

In contrast, Baker notes, Brandeis hoped that when his argument ended "all would understand, as his opponents had said, that 'there is no limit beyond which the legislative power may not go.'" Surely Brandeis would

---

13. L. BAKER, at 3.

14. *Id.* at 4.

15. *Id.*

16. The Court, using "substantive due process" doctrine, balanced freedom of contract against a state's inherent power to regulate the health of its citizens. *See Holden v. Hardy*, 169 U.S. 366 (1898) (upholding Utah law restricting working hours of miners as reasonable health regulation); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating working-hour law for bakers as unreasonable).

17. L. BAKER, at 4.

## The Brandeis Spell

never have urged such an extreme proposition before the Court,<sup>18</sup> and, more to the point, Baker cites no authorities in support of his contention.<sup>19</sup>

Baker misconceives the oral argument further by describing the proceedings before the Supreme Court as if they exactly followed the briefs submitted by Brandeis and the opposing counsel.<sup>20</sup> Although one can sympathize with an author's desire to dramatize his material, Baker's presentation is very misleading: Arguments before the Court rarely repeat everything that is in the brief in the order it is treated in that document. In fact, we have no record of Brandeis's argument in *Muller*. Even Alpheus Mason was reduced to assessing Brandeis's performance in *Muller* by quoting from a 1944 memorandum that Mason himself had solicited from Josephine Goldmark, who had worked with Brandeis on the brief.<sup>21</sup> Baker undermines the reader's confidence in his method by freely filling gaps in his information with guesswork. He deals with many of the well-known episodes in the lives of Brandeis and Frankfurter in a simplistic manner, authoritatively stating his views on various matters without providing supporting evidence.<sup>22</sup>

In particular, Baker's treatment of the financial arrangement between Brandeis and Frankfurter, and his discussion of Frankfurter's views on Roosevelt's court-packing plan, illustrate the lack of attention to the need for proper documentation. In a few pages, Baker attempts to put an end to the controversy that has been raging ever since Bruce Murphy's *The Brandeis/Frankfurter Connection*<sup>23</sup> appeared. Murphy argued that the financial help that Justice Brandeis extended to Professor Frankfurter "was given . . . not merely out of generosity, but as part of an entire package that over the years included literally hundreds of requests for political action by Frankfurter."<sup>24</sup> The funds sent to Frankfurter compen-

---

18. There are illustrations throughout Brandeis's career that show his antipathy to the idea that legislatures have no limits. In the judicial context, see, for example, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Brandeis joining opinion of court invalidating federal "fair competition" legislation on commerce clause grounds) and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating provision of federal bankruptcy law on Fifth Amendment due process grounds).

19. Strum presents a much more sophisticated analysis of *Muller*, one that sets the case in the context of some of the Supreme Court's previous liberty of contract cases. See P. STRUM, at 114-23.

20. L. BAKER, at 13-14.

21. A. MASON, *supra* note 2, at 250, 660 n.12.

22. Baker's method of citation is sloppy. He sometimes quotes from manuscripts without supplying the author or the date in either the text or the endnote. See, for example, the quotation on page 11 that begins "if you look about his home," and the endnote on page 510. In other cases, he has some unusual authorities for material in the text. Baker gives a short description of the lifestyle of Joseph Choate, stating "The house operated smoothly; if Joseph Choate or his guests wanted something, it was there. They did not care how it came to be there; they only cared that it was there," L. BAKER, at 10, and he supports these statements by a citation to "Author's visit to Naumkeag [Choate's summer home]." *Id.* at 510.

23. B. MURPHY, *supra* note 6.

24. *Id.* at 373 n.80.

sated him for his services as Brandeis's "paid political lobbyist and lieutenant."<sup>25</sup> This financial arrangement represented only one aspect of the extrajudicial activities engaged in by Brandeis and Frankfurter, as revealed by Murphy, that have caused a furor in the press and among scholars of the Court. The larger questions—ethical, political and legal—raised by these activities have been debated at length by several scholars reviewing Murphy's book.<sup>26</sup> Baker, however, contents himself with poking a few holes in Murphy's factual argument.<sup>27</sup> His treatment of the issues consists of two sentences: "That type of financial assistance was not unusual when professors' salaries were low, consultants' fees were nonexistent, and foundation grants were sparse. Generally such aid was not discussed publicly; it was not considered a subject for discussion by gentlemen and ladies."<sup>28</sup> These assertions by Baker are undocumented and add little to the ongoing discussion of the propriety of Brandeis's and Frankfurter's behavior.

Baker's discussion of the court-packing episode suffers from a similar lack of supporting evidence. He states categorically that Frankfurter opposed Roosevelt's plan to alter the Supreme Court.<sup>29</sup> As proof of his contention, Baker cites the comments of friends of Frankfurter who said he disliked the Court plan even though publicly he would not take a stand either for or against it.<sup>30</sup> Other authors have come to different conclusions. Alpheus Mason noted that he had it on the "best of authority that [Frankfurter's] sympathies were then favorable to the plan."<sup>31</sup> Bruce Murphy observed that it is impossible to know for certain what Frankfurter's views on the court-packing plan were: Existing evidence is conflicting, and Frankfurter's diary for 1937, which may have contained a definitive statement of his position, was stolen from the Library of Congress and thus cannot be consulted by scholars.<sup>32</sup> Another point Baker makes, again in contrast to Murphy, is that after the conclusion of the Court fight, Brandeis and Frankfurter resumed their old friendship. The interruption of that relationship after the court-packing bill was announced, Baker states, "had not represented hostility but an awareness by

---

25. *Id.* at 10.

26. *See, e.g.*, Dalton, Book Review, 91 *YALE L.J.* 1708 (1982); Danelski, Book Review, 96 *HARV. L. REV.* 312 (1982); Luban, Book Review, 91 *YALE L.J.* 1678 (1982); Nathanson, Book Review, 78 *NW. U. L. REV.* 494 (1983); Resnik, Book Review, 71 *CALIF. L. REV.* 776 (1983).

27. For example, Murphy has dated the establishment of the Frankfurter fund in the Engineers National Bank in late 1916, B. MURPHY, *supra* note 6, at 41, but Baker points out that there was no Engineers National Bank in Boston before 1927. L. BAKER, at 243.

28. L. BAKER, at 243.

29. *Id.* at 327.

30. *Id.*

31. A. MASON, *supra* note 2, at 625.

32. B. MURPHY, *supra* note 6, at 180-82, 417 n.109, 418 n.111.

## The Brandeis Spell

both that friendship sometimes requires discretion.”<sup>33</sup> How Baker knows this is a mystery, for he cites no sources to support his contention.<sup>34</sup> In sum, Baker’s *Brandeis and Frankfurter: A Dual Biography* is so lacking in authority that it has little to offer scholars.

Philippa Strum’s *Louis D. Brandeis: Justice for the People*, on the other hand, is a far more serious study and worthy of scholarly attention. Although Alpheus Mason’s *Brandeis: A Free Man’s Life* will continue to be consulted because of its encyclopedic range, Strum’s book will be read for the skillful portrait it paints of Brandeis, the whole man, public and private, intellectual and practical. Far superior to its most recent biographical competitor, Lewis Paper’s *Brandeis*,<sup>35</sup> Strum’s study attempts to analyze the internal forces that motivated Brandeis’s actions, as well as to reveal the texture of the world in which he acted.<sup>36</sup>

If we look at Strum’s treatment of one of the many interesting puzzles that Brandeis’s life presents—his sudden conversion to the cause of Zionism—the value of Strum’s work becomes evident. Approaching sixty years of age, Brandeis apparently had spent little time or effort on the affairs of his fellow Jews.<sup>37</sup> He was religiously nonobservant, and, moreover, had publicly lamented the division of citizens’ political loyalties along ethnic lines—the existence, as noted by Theodore Roosevelt, of “hyphenated Americans.”<sup>38</sup> Why then did Brandeis, in 1914, become a leader of the American Zionist movement?

The germ of Strum’s answer to this question can be found in Mason’s book,<sup>39</sup> but it is only a bare outline compared to Strum’s approach. From the very beginning, Strum pays attention to the issues that will be crucial in the determination of what factors influenced Brandeis’s unexpected involvement in Zionism. She rejects the idea—put forward by Allon Gal in

---

33. L. BAKER, at 336.

34. Murphy, on the other hand, maintains that the court-packing episode placed a “permanent strain” on Brandeis and Frankfurter’s friendship. B. MURPHY, *supra* note 6, at 181. In his supporting citations Murphy indicates that other scholars do not wholly agree with him, but he bases his view on a reading of the Brandeis-Frankfurter correspondence and personal interviews. *See id.* at 418, n.112.

35. L. PAPER, *supra* note 6.

36. To my mind, one of the most serious drawbacks of Paper’s biography is the absence of historical context. Brandeis forges ahead in a world about which we learn little. The literature of the Progressive Era, World War I, the 1920s, the Great Depression, and the New Deal is unfamiliar to Paper, or perhaps he just ignores it. Paper’s biography basically recounts familiar episodes in Brandeis’s life, with some new details added, in a journalistic style that palls after the first few chapters. There is very little analysis of Brandeis the man and the public figure as part of the society in which he lived. As a result, we lack a knowledge of the complex and sometimes contradictory character of the man.

37. For divergent views on just how much Brandeis was involved with Jews and Jewish affairs before he turned to Zionism, compare A. MASON, *supra* note 2, at 441–51 with A. GAL, *supra* note 6, at 66–95.

38. A. GAL, *supra* note 6, at 93.

39. A. MASON, *supra* note 2, at 442–3.

*Brandeis of Boston*<sup>40</sup>—that Brandeis's exclusion by Brahmin society in Boston, during both his Harvard years and his career as a practicing attorney, threw him back to the fellowship of his co-religionists. Strum finds no evidence that Boston's upper class did not accept Brandeis because he was Jewish<sup>41</sup> and therefore dismisses this as a possible reason for Brandeis's turning to Zionism. Instead, she credits Brandeis's "knowledge of classical Greece [and especially his admiration for Alfred Zimmern's study, *The Greek Commonwealth*], his relationship with his uncle [Lewis Naphtali] Dembitz, his mediation of the 1910 garment workers' strike, an extraordinary meeting with an English Zionist [Jacob de Haas], and another one with a Palestinian Jew [Aaron Aaronsohn]" with contributing to his late conversion to Zionism.<sup>42</sup> Strum perceptively and absorbingly describes the influence of each of these in Brandeis's transformation, but she is at her best in demonstrating how Brandeis's wrestling with the problems of industrial democracy led him to a vision of society that could more easily be achieved in a Jewish state in Palestine than in the United States. It was this vision, Strum convincingly argues, that prompted Brandeis's intense efforts to see such a community established.

In his 1892 lectures at the Massachusetts Institute of Technology, Brandeis, disturbed by accounts of the violent suppression of the Carnegie steel workers' strike at Homestead, departed from his earlier belief in the formal equality of labor and capital. Strum traces the subsequent evolution of his thoughts on the relationship between labor and industry from traditional beginnings to the more progressive view that legislatures should promote the interests of labor to offset the imbalance of power in favor of industry that common-law courts had perpetuated; and, eventually, to the more radical conclusion that workers must share in the management of business.<sup>43</sup> Along the route of this intellectual odyssey Brandeis drew important lessons from his first-hand experiences, most notably his mediation of the 1910 garment workers' strike. This conflict, in which both employers and employees were Jews, convinced Brandeis that workers could participate in industrial democracy and awakened in Brandeis a sense of the bond between himself and other Jews.<sup>44</sup> From this point on, his ideas on industrial management intertwined with his emotional transformation as a Jew. Indeed, his espousal of workers' cooperatives, in which the full human potential of each individual could be realized, took

---

40. See A. GAL, *supra* note 6, at ix, 76, *passim*.

41. P. STRUM, at 22 & n.16, 29-30 & n.33, 225-29.

42. *Id.* at 230.

43. See *id.* at 94-113, 159-95.

44. *Id.* at 180.



## The Brandeis Spell

its inspiration in large part from the experience of the Jews on the kibbutzim in Palestine.<sup>45</sup>

Although Strum's interpretation of Brandeis's career before he became a Supreme Court justice is insightful, her treatment of his accomplishments on the bench suffers from a flaw that is shared by all the recent works on Brandeis: the absence of any rigorous analysis of his economic views as set forth in his judicial opinions. The obvious reason for this is that Brandeis broke no new ground in these opinions. As Strum explains:

It is easy to hear echoes in these opinions of Brandeis's pre-Court writings and testimony before congressional committees. His ideas were forged by the combined experiences of home, Harvard, Boston, his legal practice, and his days as the "People's Attorney," and they did not change one iota once he reached the Court. A comprehensive summary of Brandeis's 528 judicial opinions would be as repetitive as it would be lengthy, because he kept hammering at the same finely honed ideas he had espoused in the decades before he ascended the bench. It is therefore unnecessary to delve at length here into even all of those opinions that might be labeled "major." . . . The history of his ideas moves with no break from his days as an attorney to his years on the bench.<sup>46</sup>

But if Brandeis's ideas had not changed, surely the world to which he applied them had. It is reasonable to ask whether those views, developed in the late nineteenth and early twentieth centuries, were wisely invoked in the 1920s and '30s. Strum does not address this issue but, instead, offers the problematic and unsubstantiated opinion that the economic ills of the 1970s and 1980s would have been alleviated had Brandeis's policies been followed.<sup>47</sup>

One who does answer this question, however, and answers in the negative, is Thomas K. McCraw in a chapter of his Pulitzer Prize-winning study, *Prophets of Regulation*.<sup>48</sup> Using Brandeis's analysis of the trust movement (which McCraw labels "very perceptive"<sup>49</sup>), McCraw shows, in some detail, what he considers to be the fatal error in Brandeis's thought. Brandeis correctly understood that the failure of many trusts must be indicative of critical problems in that form of industrial organization, and that if size were the crucial factor for success all trusts should have prospered. But he missed the proper conclusion—"that large size

---

45. *Id.* at 189, 232-34.

46. *Id.* at 342-43.

47. *See id.* at 151-52, 168, 194-95, and 409-13.

48. T. McCRAW, *PROPHETS OF REGULATION* (1984). The other "prophets" examined by McCraw include Charles Francis Adams, Jr., James M. Landis, and Alfred E. Kahn.

49. *Id.* at 97.

was an advantage to firms in some types of industries and a disadvantage to firms in other types."<sup>50</sup> According to McCraw, "Brandeis too simply asserted that bigness in general was inefficient."<sup>51</sup> He demonstrated again the "dominance of political over economic considerations in his thinking."<sup>52</sup> Brandeis's "fixation on bigness as the essence of the problem," McCraw observes, "doomed to superficiality both his diagnosis and his prescription."<sup>53</sup> And this preoccupation with the curse of bigness appeared in enough of Brandeis's judicial opinions to make him appear naïve to the sophisticated economic analyst.<sup>54</sup>

The lack of this kind of analysis in Strum's work, however, detracts only slightly from its generally high quality. Based on years of research in primary and secondary sources, this biography evidences throughout the author's sympathetic understanding of her subject both as public figure and private individual.

Having said that, however, we might inquire further just how much all the recent Brandeis scholarship has added to our knowledge of the man. Scholars have provided new details to flesh out the familiar episodes of his life but have revealed little to change dramatically the picture we hold of Brandeis. Until the publication of McCraw's *Prophets of Regulation*, the legend appeared to have remained intact despite the muckraking efforts of Bruce Murphy in *The Brandeis/Frankfurter Connection*.<sup>55</sup> In fact, the works published after Murphy's bombshell contain specific attempts to refute his charges.<sup>56</sup> Even Murphy himself felt compelled to pay homage to Brandeis; in his conclusion, Murphy predicted that after the material presented in his study had been digested by scholars and the public, Brandeis would nevertheless remain a giant of twentieth-century America.<sup>57</sup> The hagiographic view of Brandeis began during his lifetime with the publication in 1936 of Alfred Lief's biography, *Brandeis: The Personal History of an American Ideal*.<sup>58</sup> Lief called Brandeis an "enduring example" and cited other people's estimates of the Justice to bolster this judgment: "I treasure the memory of my only visit to [Brandeis]: a person of

---

50. *Id.* at 99.

51. *Id.*

52. *Id.* at 109.

53. *Id.* at 141.

54. *See id.* at 338-39 n.117.

55. If we set aside Murphy's and Oxford University Press's deliberately sensational approach to the subject matter of the book, *see* Cover, *The Framing of Justice Brandeis*, *THE NEW REPUBLIC* 17 (May 5, 1982), we can appreciate the valuable information Murphy has to offer on Brandeis's frequent involvement, while he was on the bench, in the work of political reform.

56. *See* L. BAKER, at 240-44; L. PAPER, *supra* note 6, at 256-58; P. STRUM, at 372-405.

57. B. MURPHY, *supra* note 6, at 341.

58. The term "hagiographic" is not metaphorical here. Cover, who calls Brandeis a "prophet," notes the well-known fact that FDR used to refer to Brandeis as "Isaiah." Cover, *supra* note 55, at 17.

## The Brandeis Spell

swift and clear insight, of keen conviction, wanting nothing but to serve society, and serving in the loneliness of great work”—this from a personal memorandum of Albert Einstein.<sup>59</sup> In honor of Brandeis’s upcoming sixtieth birthday, his fellow justice, Oliver Wendell Holmes, had scrawled: “You turn the third corner tomorrow. You have done big things with high motives—have swept over great hedges and across wide ditches, always with the same courage, the same keen eye, the same steady hand. As you take the home stretch the onlookers begin to realize how you have ridden and what you have achieved. I am glad that I am still here to say: Nobly Done.”<sup>60</sup>

What was it about Brandeis that inspired such respect and admiration, that made Max Lerner’s assessment of him as a “towering figure” seem appropriate? Urofsky and Levy, the editors of the *Brandeis Letters*, focus on his intelligence, his integrity, his energy, his tremendous strength of character, and his own recognition of that strength that enabled him to behave like the symbol he was thought to be.<sup>61</sup> From a reading of the various biographies of Brandeis, a number of other factors that encouraged high regard became apparent. Most attractive was Brandeis’s moral vision of society and his attempt to live his life according to moral principles. His biographers realized that he was not always successful—witness the complaints about his behavior as an attorney that were brought out during his confirmation hearings before the Senate<sup>62</sup>—but this hardly produced a nick in the solid wall of esteem. The breadth of Brandeis’s knowledge and interests astonished people. But perhaps more than anything else, the image that emerges of Brandeis as a romantic figure spurning modernity (he hated cars and telephones) and engrossed in the life of the mind continues to captivate. As Dean Acheson, a law clerk to Justice Brandeis, concluded at Brandeis’s death: “In a time of moral and intellectual anarchy, he handed on the great tradition of faith in the mind and spirit of man.”<sup>63</sup>

Will this be the last word on Brandeis? Despite the plethora of recent works, there is still room, as Thomas McCraw has shown, for a variety of fruitful studies dealing with the quality of Brandeis’s thought both as it affected his actions in the world of politics and business, and as it shaped the corpus of his judicial opinions. A reading of the bulk of the Brandeis literature reveals a need for systematic analysis of Brandeis’s judicial contributions. Alexander M. Bickel began the work many years ago in his

---

59. A. LIEF, *BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 13 (1936).

60. *Quoted in* 5 *LETTERS OF LOUIS D. BRANDEIS* (1978), *supra* note 3, at xvi.

61. 1 *LETTERS OF LOUIS D. BRANDEIS*, *supra* note 1, at xxx-xxxiii.

62. Although many of the charges by the opponents of Brandeis’s confirmation were outrageous, at least one of the complaints about his legal ethics was by no means frivolous. *See* L. PAPER, 221-26.

63. 1 *LETTERS OF LOUIS D. BRANDEIS*, *supra* note 1, at xxxiv.

brief but brilliant book, *The Unpublished Opinions of Mr. Justice Brandeis*.<sup>64</sup> More should and will be done. And then, perhaps, we shall have all the information we need to assess, finally, the contributions of Louis D. Brandeis.

---

64. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957).



