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BOOK REVIEW

BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY. By *Leonard Baker*. New York: Harper & Row, Publishers. 1984. Pp. 567. \$25.00.

*Reviewed by Paul Brickner**

Leonard Baker, a Pulitzer Prize winning author,¹ has produced a comprehensive and informative study on Justices Louis Brandeis and Felix Frankfurter. Although several books have been written about Justices Brandeis and Frankfurter within the past five years,² Baker contributes to existing scholarship with a balanced presentation of the close working relationship between the two men, a relationship which began in 1905 and endured until the death of Brandeis in 1941. Baker portrays their individual roles as lawyers, academicians, jurists, and presidential advisors. He examines their private lives and sheds light on how their backgrounds and beliefs affected their judicial decisions. In addition, Baker provides sketches of other Supreme Court Justices, several United States Presidents, leaders of the bar, and an occasional foreign dignitary. He supplies abundant materials on the Harvard Law School and the Zionist movement, with which both Brandeis and Frankfurter were

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1 Baker's other works include *BACK TO BACK: THE DUAL BETWEEN FDR AND THE SUPREME COURT* (1967); *JOHN MARSHALL: A LIFE IN LAW* (1974); and *DAYS OF SORROW AND PAIN: LEO BAECK AND THE BERLIN JEWS* (1978), for which he won a Pulitzer Prize in biography in 1979.

2 Since 1980, eleven volumes including Baker's work have been published on Brandeis and/or Frankfurter: N. DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL* (1980); A. GAL, *BRANDEIS OF BOSTON* (1980) (focusing on Brandeis as a progressive and Zionist); N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981) (an interpretive biography of Frankfurter which seeks to provide psychological insight into his personality and behavior); T. McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, AND ALFRED E. KAHN* (1984); B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982) (describing the extra-judicial activities of Brandeis and Frankfurter as conspiratorial, such activities including their support of particular legislation, defense of the war effort, impact on judicial appointments, and advice to American Presidents); L. PAPER, *BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES* (1983) (a lawyerlike and comprehensive biography); M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES* (1982); M. SILVERSTEIN, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING* (1984); P. STRUM, *BRANDEIS: JUSTICE FOR THE PEOPLE* (1984) (covering politics, economic theory and biography); and M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981) (an excellent short general biography written by a co-editor of a five volume work of Brandeis letters).

intimately involved. The historic trials of Sacco and Vanzetti and Alger Hiss are treated in separate chapters.

Brandeis and Frankfurter arose from similar backgrounds and eventually developed allied outlooks on law.³ Yet, the two men were of different dispositions and followed separate paths in pursuing their goals. Louis D.⁴ Brandeis, born in Louisville, Kentucky to a family of German-speaking Jewish immigrants from Prague, was educated in Louisville and Germany before entering Harvard Law School. After a brief period of private practice in St. Louis, Missouri, he returned to Boston to a highly successful and lucrative law practice with Sam Warren, a law school friend (pp. 25-26). Brandeis's law practice was a general one with heavy emphasis on commercial and business law. During his career as a practicing attorney, Brandeis responded to various public causes to advance the progressive ideas that meant so much to him. For example, he successfully defended, in the context of *Muller v. Oregon*, the state's right to prohibit businesses from forcing laundry women to work more than ten hours per day (pp. 9-16). Brandeis's outside litigation activities on behalf of popular causes made him famous as the "people's attorney" and as one of the nation's leading trial attorneys.

President Wilson appointed Brandeis to the Supreme Court in 1916. Baker points out that Brandeis's nomination was controversial because of his Jewish background, the anti-German sentiment which existed during World War I, and his stands as a "progressive" (p. 102). Although many important members of the bar opposed his nomination, Wilson himself provided the needed political support for Senate confirmation. Brandeis had first met Wilson in 1912 in New Jersey during Wilson's presidential campaign. Brandeis fully supported Wilson's progressive ideals and campaigned

3 Not only did both eventually become United States Supreme Court Justices, but both have been characterized as among the greatest of Justices to have served on the Court. See H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 338 app. A (2d ed. 1984) (65 scholars rate Brandeis and Frankfurter as 2 of 12 "great" Justices). More than 20 years ago, in recognition of the death of Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit, Judge Henry J. Friendly rated Brandeis, along with Holmes, Cardozo and Hand, as the four greatest American judges of the first half of the twentieth century. See Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOKLYN L. REV. 6, 7 (1962).

4 Baker erroneously rejects the "tradition, frequently reported" that Brandeis changed his middle name from David to Dembitz in honor of his beloved uncle Lewis Dembitz, a distinguished member of the Kentucky bar. Questioning Baker's conclusion that Brandeis was given the middle name Dembitz at birth, this reviewer wrote to Professor Alpheus T. Mason, author of a classic biography of Brandeis. Mason, now emeritus, replied: "Brandeis's uncle, an extraordinarily erudite lawyer, highly informed in various fields, was greatly respected by his nephew. Quite early in his life Brandeis himself changed his name in honor of his uncle. The Justice himself told me this." Letter from Alpheus T. Mason to Paul Brickner (July 13, 1984).

vigorously for his election. Wilson later considered Brandeis for the positions of Attorney General and Secretary of Commerce, but opposition seemed to have prevented these appointments. Nevertheless, Wilson and Brandeis kept in touch during Wilson's first term, and Brandeis became a valued advisor to Wilson.

Baker discusses the general course of Brandeis's developing jurisprudence on the Supreme Court. While Baker conspicuously ignores Brandeis's leading opinion in *Erie Railroad Co. v. Tompkins*,⁵ he examines a selected number of his famous dissents (pp. 202-19), often joined by or joining Justice Holmes, which planted the seeds for majority opinions in years to follow. For example, in *Olmstead v. United States*,⁶ the early wiretap case, Justice Brandeis spoke of the general "right to be let alone."⁷ In free speech cases, Brandeis developed Holmes's "clear and present danger test" and provided an articulate expression of first amendment principles (pp. 246-50).

Baker also examines the non-judicial aspects of Brandeis's life, including his association with the Zionist movement.⁸ Brandeis first became interested in Zionism and his own Jewish identity late in life when he met large numbers of Eastern European Jewish immi-

5 304 U.S. 64 (1938).

6 277 U.S. 438 (1928) (wiretapping of phones not a search and seizure for purposes of fourth amendment).

7 Justice Brandeis stated: "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.* at 478 (Brandeis, J., dissenting). Justice Brandeis's dissent in *Olmstead* foreshadowed the Court's later decision in *Katz v. United States*, 389 U.S. 347 (1967) (holding wiretap of public phone a violation of fourth amendment).

8 Baker portrays Brandeis as a Justice willing to admit decisional error and as a man, though Jewish himself, capable of expressing anti-Semitic aspersions about an adversary. Brandeis became embroiled in a split among Zionists in 1921 and clashed with another leading Zionist, Chaim Weizmann, an Eastern European of Russian Jewish origin. Brandeis stated that the split was inevitable, resulting in differences in standards: "The Easterners—like many Russian Jews in this country—don't know what honesty is and we simply won't entrust our money to them. Weizmann does know what honesty is—but weakly yields to his numerous Russian associates. Hence the split." (p. 180).

Weizmann, who stayed with the Zionist movement and later became the first President of the State of Israel, had some harsh things to say about Brandeis too. Lewis Paper quotes Weizmann as bitterly attacking his opponent: "Old Brandeis . . . hidden behind his judicial robes, is capable of the vilest intrigues and tricks worthy of the lowest type of American politician." L. PAPER, *supra* note 2, at 318. In his memoirs, Weizmann again criticized Brandeis, but with more restraint:

Justice Brandeis has often been compared with Abraham Lincoln, and indeed they had much in common besides clean-chiseled features and lofty brows. Brandeis, too, was a Puritan: upright, austere, of a scrupulous honesty and implacable logic. These qualities sometimes made him hard to work with; like Wilson he was apt to evolve theories, based on the highest principles, from his inner consciousness, and then expect the facts to fit in with them. If the facts failed to oblige, so much the worse for the facts.

C. WEIZMANN, *TRIAL AND ERROR* 248 (1949). Baker attributes the 1921 split in part to ego conflicts, (p. 179-80) but reaffirms Brandeis's intellectual honesty and integrity.

grants while resolving a labor dispute in New York City's garment industry (p. 73). Brandeis was taken by the Bible-quoting, Yiddish-speaking adversaries who could step back from their disputes long enough to appreciate the arguments of their opponents (p. 73). Brandeis devoted years of energy to the establishment of a Jewish state in Palestine. In 1919, three years after his appointment as an Associate Justice of the Supreme Court, he made a personal visit to the Holy Land. With the development of Nazi Germany as a backdrop, Brandeis continued his Zionist activities until his death in 1941.

Brandeis and his wife Alice lived frugally, but were lavish in their charitable endeavors, generously donating to Zionist causes and to the University of Louisville, where the ashes of both are buried beneath the law school portico (p. 493). The austere personal lifestyle of the Brandeises never changed. Chief Justice Stone noted after Brandeis's death, "I never realized how serious Brandeis always was. There was little that I can recall of him in the lighter vein." (p. 184). Brandeis was noted also for being selfless and zealously devoted to his causes. Justice Holmes once cautiously stated, "I'm not sure that he wouldn't burn me at a low fire if it were in the interests of some very possibly disinterested aim." (p. 184). Brandeis was old fashioned in many respects. He disapproved of movies, radio and automobiles and rarely dined out. Perhaps his only recreation was summer vacationing at Cape Cod where he canoed, hiked and read.

Frankfurter is portrayed by Baker as a lesser figure than Brandeis, lesser in personality but not in intellect. Frankfurter came to the United States as a youngster and went on to study at the City College of New York and Harvard Law School, where he later became a distinguished professor. Baker describes Frankfurter as a flatterer who had a charming personality, a brilliant mind and an enormous capacity for work. Yet, he was also a loner, often imperious, and sometimes irreverent to authority (p. 380).

President Franklin Roosevelt thought well of Frankfurter and, in 1939, named him to succeed Cardozo on the Supreme Court. The tenures of Brandeis and Frankfurter on the Court overlapped for only about one week, but their friendship dated back to 1905. Baker tells us that Frankfurter was ready for a role model when, in 1905, he first heard Brandeis speak in Boston on ethics and opportunity in the legal profession (p. 45). He describes their mentor-student relationship as it developed over the years. Their friendship became closer after Frankfurter began teaching at the Harvard Law School in 1914. Brandeis, of course, was still in private practice in Boston during that period and was an area resident until his appointment to the Supreme Court in 1916.

Frankfurter has left his mark as an academician, government official and distinguished jurist. His career, however, was often marked with controversy. Baker tells of Professor Frankfurter's recommendation of one of his students, Alger Hiss, to serve as a law clerk to Justice Holmes and of Justice Frankfurter's appearance at federal court as a character witness in the Hiss perjury trial.⁹ Baker also discusses Frankfurter's judicial involvement in the Sacco and Vanzetti case and his extreme disappointment with his lack of success and the executions (pp. 245-72).

In a more critical discussion, Baker describes Frankfurter as being too sensitive to his immigrant origins. Perhaps as a somewhat overzealous convert to America, he ruled against the Jehovah's Witnesses in the first flag salute case (pp. 399-409). When the Court reversed that decision three years later, Frankfurter remained adamant and issued an emotional dissent supporting the previous decision. Baker also notes that Frankfurter remained silent during President Franklin Roosevelt's court-packing efforts in order to maintain good favor with the President and to remain, thereby, a viable candidate for appointment to the United States Supreme Court (pp. 326-28). At the same time, he tells us that Frankfurter was dismayed that Brandeis saw fit to make a public statement on this issue (p. 330), despite his usual reticence in making public pronouncements and despite the fact that Roosevelt and Brandeis were mutual admirers (pp. 279-80).

It seems fair to say that but for the friendship of Frankfurter and Franklin Roosevelt, Brandeis might never have become associated with Roosevelt. Frankfurter first became acquainted with Roosevelt when Frankfurter was working as a prosecutor for Henry Stimson and Roosevelt was practicing law in New York (p. 276). During World War I both worked in the same government office building and they extended their acquaintanceship. Frankfurter established closer ties with Roosevelt during the latter's tenure as Governor of New York. Before his inauguration as President, Roosevelt asked Frankfurter to arrange for him to meet Brandeis, whom he regarded as a man of ideas (p. 279). Roosevelt's favorable impression of Brandeis was garnered from reports by Frankfurter (p. 280).

Baker describes the manner by which the wealthy Brandeis eventually came to support Frankfurter financially, noting Frank-

⁹ Baker may be faulted here for his limited source material regarding the Hiss case. In particular, he fails to take into account Allen Weinstein's thesis that the perjury conviction was justified. See A. WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* (1978). Similarly, in his discussion of the Rosenberg spy case, he neglects to consider Louis Nizer's argument that the Rosenbergs received a fair trial and were proved guilty. See L. NIZER, *THE IMPLOSION CONSPIRACY* (1973).

furter's ineptness in financial matters and his limited professorial earnings. Baker affirms, however, that their relationship was like that of "half-brother, half-son." (p. 70). For example, Brandeis provided financial assistance to Frankfurter when Mrs. Frankfurter required expensive medical treatment. On a separate occasion, when Frankfurter refused a check from Brandeis to cover expenditures "for travelling, telephoning and similar expenses in public matters undertaken at my request," Brandeis explained that he and Mrs. Brandeis "are clearly of opinion that you ought to take the check . . . [T]his is nothing different than your taking travelling and incidental expenses from the Consumers League or the New Republic—which I trust you do." (p. 241). Frankfurter's ineptness in financial affairs is distressing. While his professorial salary might have been somewhat limited, surely as a Justice of the Supreme Court he should have made the arrangements necessary to provide for his wife after his death. But Baker reports that in 1972, five years after her husband's death, Marion Frankfurter received support from former law clerks to keep her from becoming dependent on welfare (p. 493).

Baker indirectly discredits the conspiracy-like implications suggested in a recently published book by Bruce Murphy.¹⁰ Murphy would have us believe that Frankfurter was Brandeis's "paid political lobbyist and lieutenant."¹¹ Murphy states that "Justice Brandeis and Professor Frankfurter forged in 1916 a potent partnership for the purpose of shaping public policy. . . . [T]he financial aspects of his relationship with Brandeis led Frankfurter to view himself as an employee being compensated for services rendered."¹² While Murphy seems aghast that Brandeis and Frankfurter were instrumental in having editorials written or published in support of their viewpoints, one would expect a political science professor to know that even in the days of Brandeis and Frankfurter editorials were created not only in the minds of editorial writers, but were then and are today recommended by business and labor, bankers and consumer groups, educators and others.¹³

One might surmise from Baker's title and subject that his book is a response to Murphy's thesis. Baker states, however, that his effort was undertaken in 1979. While he does occasionally point

10 B. MURPHY, *supra* note 2.

11 *Id.* at 10.

12 *Id.* at 40-41.

13 For critical reviews of Murphy's book, see Resnik, Book Review, CALIF. L. REV. 776, 794 (1983) ("By careless history and provocative prose, Murphy has sparked others to think about the roles Supreme Court Justices should play in the legislative and executive spheres."); Wheeler, Book Review, 81 MICH. L. REV. 931, 932 (1983) (stating that Murphy presents his interpretations "as conclusive when his facts merely create an arguable case for them.").

out errors in Murphy's book, Baker's dual biography does not purport to be a refutation of or an attack on the charges made by Murphy. Baker's work presents a more balanced picture of the relationship between the two men and their extra-judicial activities. He presents the two Justices as active and caring human beings who had beliefs and opinions which they promulgated in the marketplace of ideas and advanced in political and legislative arenas. Regrettably, Baker fails to discuss whether Frankfurter's intellectual independence was compromised over the years by the funding that he received from Brandeis. Nor does Baker expressly discuss the propriety of their extra-judicial activities as a legal or an ethical matter. But it was not his objective to examine that issue. Rather, Baker set out to describe the lives of the two men and to discover how they interrelated with each other and the society in which they lived. With the verve and literary ease of a skilled journalist, Baker succeeds in achieving that goal.

