

LOUIS D. BRANDEIS. By Philippa Strum.¹ Cambridge, Mass.: Harvard University Press. 1984. Pp. xv, 508. \$27.50.

BRANDEIS AND FRANKFURTER. By Leonard Baker.² New York: Harper and Row. 1984. Pp. 567. \$25.00.

*Michael P. Zuckert*³

Until very recently readers have not required a comprehensive, comparative evaluation of Brandeis biographies. Alpheus T. Mason's *Brandeis: A Free Man's Life* monopolized the field. Mason's book has set a standard, not merely for Brandeis studies, but for all judicial biographies. Almost forty years after its initial publication, it is still easy to see why that should be so. As the "authorized" biographer, Mason had certain advantages that he used to very good effect. In addition to Brandeis's mass of papers, he had access to Justice Brandeis himself and derived insights at first hand that others have had to reconstruct at second and third hand at best. Mason's was clearly a labor of love as well; his admiration for Brandeis shines through on almost every page. Mason loved his work and crafted it accordingly—his book is thorough, careful, judicious, thoughtful, and informative. Within the past few years, however, not only the two books under review here, but at least four other major biographical studies of Brandeis have appeared on the market.⁴

Mason proved that a craftsman's work can hold its own for a very long while even in the fins and chrome, novelty-oriented academic market. Yet the appearance of so many new books in such a short period cannot be attributed solely to the thirst for novelty. The new books have appeared, one supposes, in response to two developments. First, the passage of time has made available much new primary source material to which Mason did not have access. Some of the materials relate directly to Brandeis himself—for example the Urofsky and Levy edition of his letters, and the

1. Professor of Political Science, City University of New York.

2. Journalist and professional writer; winner of 1979 Pulitzer Prize for Biography.

3. Dorothy and Edward Congdon Professor of Political Science, Carleton College.

4. A. GAL, *BRANDEIS OF BOSTON* (1980); B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982); L. PAPER, *BRANDEIS* (1983); M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981).

Brandeis-Frankfurter papers around which Bruce Murphy built his challenging study of the two justices' extrajudicial activities. Moreover, while Mason had the advantage of immediate access to Brandeis, he necessarily missed out on the papers, oral histories, and materials of other men that have become available in the past thirty years.

The passage of time has also led historians to view Brandeis's times differently from the way they once did. From the perspective of the 1970's and 1980's both the Progressive era and the New Deal have changed their visage, and since Brandeis's career was so intimately bound up with those times, it must be reassessed in the light of changed perceptions. At the same time, distance from Brandeis also encourages the retelling of his life; Mason's version, it must be admitted, suffers from some of the flaws of "authorized biographies" written by admiring younger men. It is not that Mason is uncritical, but the blemishes he finds are so inconsequential compared to the strengths of the man that our cynical age can hardly help wondering whether he has done justice to the justice. It is a tribute to Brandeis, or to his biographers, that for the most part he retains his appearance as a giant in these new retellings of his life. (I say "for the most part" only, because Bruce Murphy does raise very serious ethical questions about Brandeis.)

A further development in the nearly forty years since Mason's book that might have been expected to have an impact on the new generation of Brandeis studies has not done so. The very interesting approaches we might class under the heading of "psychohistory" or "psychobiography" have no more place in these new studies than they did in Mason's. Perhaps judicial biography—or is it judicial biographers?—is especially resistant to psychoanalytic approaches. Witness the controversy over the recent psychological study of Justice Frankfurter by H. N. Hirsch.⁵

In any case, the newer model Brandeis books are not much different in form or function from the older Mason model they would supplant. In the classic tradition of biographies, most of them are "inclusive, archival and comprehensive in detail."⁶ The continuity with Mason's book can be seen easily enough by glancing at the tables of contents of the newer books—in most of them the organization of the materials is remarkably similar to Mason's. Emphases differ—more concern with Brandeis's Zionism in Strum, with his relationship to Frankfurter in Baker, with his

5. H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

6. Nadel, *George Eliot and Her Biographers*, in HAIGHT & VAN ARSDEL, *GEORGE ELIOT—A CENTENARY TRIBUTE* 115 (1982).

Court career in Paper—but the basic outline of each book is the same as Mason's. In a sense, of course, this is merely to say that all are biographies, and as the story of the same life they might be expected to have the same outline. Agreed; and yet the very conservatism in form bespeaks a lack of the daring necessary to change the ways in which we perceive the subject.

Because of the narrative character of these biographies, their qualities will best be revealed by a comparative look at their treatments of some specific events in Brandeis's career. From the specific we can move naturally to a more general assessment.

I

As Melvin Urofsky says, "The one case more than any other associated with Louis Brandeis's name" is *Muller v. Oregon*, a case testing the constitutionality of an Oregon law limiting the number of hours women may work in a day. The biographers for the most part tell the same story—of the legacy of *Lochner* and the liberty of contract doctrine; of Brandeis's sister-in-law Josephine Goldmark and her comrade at the National Consumer's League, Florence Kelley; of their effort to retain Joseph H. Choate to argue the case for them; of that conservative gentleman's refusal to take the case on the ground that a husky Irish washerwoman should be allowed to work more than ten hours per day, if she wished. Finally, they all describe the brief itself—Brandeis's derring-do in presenting a mere two pages of traditional legal argument and a hundred or so pages of scientific and social scientific evidence about the effects of long hours of work on women. And, of course, they emphasize Brandeis's triumph, not only securing a unanimous victory in a case many expected to go the other way, but, more than that, receiving a commendation by name in the Court's opinion.

The more recent biographies do contain some information about the case apparently unknown to Mason, but little of the new information is of much overall importance. Relatively more important differences of interpretation and presentation, however, distinguish the different biographies from each other. Strum's is by far the most satisfactory. Like the others, she treats Brandeis's procedure in *Muller* as marking a great innovation, but she more clearly, more accurately, and more profoundly sees how *Muller* fits into the context of Supreme Court jurisprudence at the time, and thus avoids the great simplifications, overstatements, and even contradictions of the other accounts. She, alone of the authors here, chases the liberty of contract doctrine back to the 1894

case of *Allgeyer v. Louisiana*, where a unanimous Court invoked that liberty as part of the fourteenth amendment's due process clause, but where the Court also held, as Strum puts it, that this liberty, "was subject to the regulatory powers of the state. Proper exercise of these powers was a matter to be decided by the courts on a case-by-case basis." Alone of all the biographers, she followed that doctrine into *Holden v. Hardy*, decided the very next year, in which the Court upheld a law limiting the number of hours miners may work as a health and safety regulation. She notices that even in the notorious *Lochner* case, the Court was prepared to sustain the law if satisfied that it was a genuine health measure. The result in *Lochner* might have been different, Strum suggests, if the attorney general of New York had made more than his "mild attempt" to show that the regulation was a health law. Thus, while she gives due recognition to the novelty of what Brandeis did in *Muller*, she places his strategy clearly within the context of the liberty of contract doctrine as the Court was actually applying it—on a "case-by-case-basis," examining whether the regulation being challenged could be justified on grounds of health, safety, or morals. She shows that Brandeis's novel form of argument was responsive to the way the Court framed the issue in liberty of contract cases. She thus helps the reader understand that one reason for Brandeis's victory was the fact that his novel method fundamentally followed rather than challenged the Court's jurisprudence.

Strum thus does not impose on the reader such misstatements as Baker's claim that Brandeis was asking the "Court to change its thinking, jettison its definitions." Indeed, Baker's treatment of the *Muller* case is characterized by inaccuracy and oversimplification in any number of places. He asserts that Brandeis aimed to establish *Muller* as a precedent for the proposition that "there is no limit beyond which the legislative power may not go." Apart from the fact that, as Strum shows, *Muller* was highly unsuited to establishing such a proposition, there is much reason to believe that Brandeis himself would have rejected it as Strum shows in her analysis of Brandeis's broader position. Moreover, Baker's more uncontrolled pronouncements run afoul of observations he himself makes about Brandeis's argument, as when he acknowledges that the main thrust of the argument was to "demonstrate reasonableness," and that he "acknowledged that the Fourteenth Amendment protected the right to sell or purchase labor." Having failed to set the case clearly and firmly into its constitutional

context,⁷ Baker does not see that these comments undercut his earlier claims.

Instead of delineating the constitutional context of *Muller*, Baker gives us a Masterpiece Theater type of costume drama setting, in which the reader is treated to all manner of irrelevant but "picturesque" detail. For example: "The nine justices sat on a raised platform, behind them were an arched doorway, a gilded American eagle, and marble columns." Likewise, he gives us two sentence "profiles" of all the sitting justices, which serve little purpose other than to supply opportunities for several gratuitously snide asides about the ones he dislikes.

Baker treats *Muller* as a morality play of good-guy, bad-guy politics, economics, and constitutional law, in which intelligent, caring people confront hard-hearted, greedy, legally backward exploiters, or dupes of exploiters. Revealingly, he titles this section of his book "Knight Errant." He tells us, for example, that "Choate's lifestyle demanded that he oppose legislation such as the Oregon ten-hour law." Then, as if he were writing a television script, he surveys Choate's mansion, his trimmed lawns and clean table linens, his servants, heating "water for tea, coffee, or hot chocolate." Now since we know that many wealthy people have supported legislation like Oregon's, and since we do not know that Choate's wealth would be in the slightest threatened by women in Oregon working only ten hours a day, or women everywhere working ten hours a day, and since Baker furnishes no evidence to impugn Choate's sincerity, all this is immaterial and unfair.⁸

Even Mason, whose knowledge of constitutional law is ordinarily impressive, does not do justice to *Muller's* constitutional context, and hence fails to describe the true character and significance of the case. Surely nothing in the Court's decision, nor in Brandeis's argument, justifies Mason's conclusion that in *Muller* "the Court had rejected its own freedom-of-contract fiction as regards working women." The Court had not so much rejected its doctrine as it had been brought by Brandeis to see how that doctrine applied in the factual situation before it. One might think of the analogy of the separate-but-equal doctrine, under which from

7. Baker's inaccuracies extend to small as well as large matters, and recur throughout the book. He says, for example, that Florence Kelley's father was "an Illinois Congressman." In fact, he was the well-known Pennsylvania congressman, "Pig-iron" Kelley. More important, he incorrectly identifies *Baker v. Carr* as demanding "that legislative and congressional districts be equal in population size."

8. Melvin Urofsky sins less mightily than Baker, but his treatment of *Muller* is rather similar. Not setting the case properly into the context of the constitutional law of the time, he makes overstatements such as, "The ten-hour law struck at the heart of the conservative creed, the idea of liberty of contract." M. UROFSKY, *supra* note 4, at 51-52.

time to time the Court found that particular separate institutions were unequal and therefore unconstitutional. Such decisions did not overturn the separate-but-equal doctrine; rather, they applied it.

There is a point in all this that bears on the broader question of the value of judicial biography as a genre. The superficial facts about the Brandeis brief are well-known, well agreed on, and frequently retold in these and other books as well. But what makes the various treatments differ from each other is the context into which those facts are set and the significance of the case within that context. Why did only Strum bring to bear a context that would make the meaning and character of *Muller* relatively clear? No doubt the very nature of biography tends to lead authors to slight historical context, as they describe the doings of their subject, neglecting events in which he did not participate or to which he does not explicitly point them. Brandeis played no part, after all, in *Allgeyer* or *Holden*.

One could push the inquiry further by wondering about some issues that even Strum does not raise. None of our authors asks broader questions about the meaning of the doctrine of liberty of contract. For example, none of them makes the least effort to enter sympathetically into a consideration of what might have recommended such a doctrine to the Supreme Court (other than Choate's alleged concern to have a ready supply of servants to make his hot chocolate). None considers the connection between the attack on slavery and the increasing emphasis on ideas such as liberty of contract in the period around the forming of the postwar amendments. Brandeis's attempted reorientation of the judicial process around facts, away from abstract reasoning and abstract principle, begs for a deeper kind of analysis than any of our authors gives it. Facts do not speak for themselves as clearly as Brandeis may have supposed. Strum begins to raise these questions when she wonders, in the light of our changed views about women, whether Brandeis's approach in *Muller* was correct or valuable. But she too is a biographer, and biography may not be the best medium for consideration of such questions.

II

The biographers diverge far more sharply in their depictions of the events surrounding Brandeis's nomination to the Court than in their accounts of his role in *Muller*. At one end is Mason, who devotes two fairly lengthy chapters to the subject, supplying a thorough survey of the forces on each side and a detailed sum-

mary of the arguments made against Brandeis in the hearings. On the other is Strum, who devotes less than ten of her four hundred pages to this subject. Paper's account of the confirmation covers about the same amount of space and follows the same chronological organization as Mason's. But Paper's treatment is superior. He has more information than Mason did, including a fuller and more plausible reconstruction of Wilson's motives in nominating Brandeis and of the events leading to Brandeis's success in the Senate Judiciary Committee. Paper's account of the various issues raised in the hearings is also much clearer than Mason's. An official biographer is partly an archivist, and Mason seems as much concerned to pack in all the information he can as to make good narrative or analytic sense of the story he undertakes to tell. The later biographers labor under much less obligation to get it all in, and show more concern for making sense of the evidence.

Mason was ambivalent about the cause and meaning of the furor over Brandeis's nomination. In his most thematic statement, he interprets the uproar as follows: "In effect privilege, openly and for the first time, proclaimed: 'Hands off! The Supreme Court is our province.'" On the other hand, a rather similar attempt by Brandeis himself to dismiss all the opposition "as tools or adjuncts of sinister forces" was pronounced by Mason to be "not very successful"; nor, says he, "was it wholly admirable." Paper gets a more solid thematic hold on the confirmation fuss by observing that "the main issue" was "Brandeis's character." The dredging through the records of Brandeis's past behavior was not so much for the sake of finding Brandeis guilty of illegal behavior as to see how it reflected on "Brandeis's ethics, on his temperament, on his ability to be a fair and honest judge."

In the perception that the issue was Brandeis's character and in the realization that that topic is an important opportunity for a biographer, Baker does far better than Strum. While it would be a great exaggeration to say that Baker makes full use of the opportunity, he does see that the microscopic public probing of his subject is a proper matter for his biography. And, like Mason, even though he hesitates to endorse any of the arguments raised against Brandeis (they were "baseless charges"), he nonetheless supplies enough information for the reader to see at least some of the point of the opposition—that it was not merely the knee-jerk reaction of men trying to preserve their well-manicured lawns. There were genuine questions about that elusive, but real quality called judicial temperament. As one of Brandeis's opponents put it:

I consider the nomination unfit to be made not because Mr. Brandeis is a bad

man, but because he is not a judicial man. Nobody in Boston would think of selecting him as a referee about anything. That is the test. He has brooded over such subjects as rights of labor until he has reached a point where it is impossible for him to be fair.⁹

As all the biographers emphasize, Brandeis was a partisan, a man who adopted causes and fought very hard for them. His friend Holmes mused about it: "I'm not sure that he wouldn't burn me at a low fire if it were in the interest of some very possibly disinterested aim." Baker calls this assertion "one of the better estimates" of Brandeis.

Strum's treatment of the hearings is worse than Baker's. In a book that tops four hundred pages of text, she declines to follow the hearings in any detail, because all this makes "a lengthy and dramatic tale, which has been told elsewhere." But much else in her book also has been told elsewhere. This reviewer suspects that Strum decides not to go over the charges about Brandeis not only because they do raise questions about the propriety of some of his actions and of some of his attitudes, but even more because they bring the very question of his character to the fore. That is a question she seems reluctant to treat. As she says in her preface, "because information on Brandeis the man is sparse, his personal life will remain something of a mystery." It is not merely that she supplies us with very little in the way of a portrait of Brandeis at home and play, nothing of his intimate life and not much of his family life, but that she shies away from probing into Brandeis the person, and therefore misses out on the central possibility opened up by biography as a genre. She gives us an encyclopedic account of a career, but the personality behind that career is missing.

III

The absence of more sustained and more daring psychological speculation is a defect in the whole group of Brandeis biographies. I do not mean to suggest that biographers ought to become clinical psychologists, or choose sides in the debates between different schools of psychology, but that more attention to psychological matters is part of the obligation of the biographer to find the thread, the organizing principle inside the life they are studying.¹⁰ Biography is most often practiced in a way that implies authors consider it a "safe" genre. Hard work in the sources, a

9. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 470 (quoting Josiah H. Benton).

10. See M. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* (1970), and P. SHAW, *THE CHARACTER OF JOHN ADAMS* (1976) as examples of books in which, in quite different ways, the authors make a sustained and intelligent but altogether nondogmatic effort to reconstruct the psychology of their subjects.

certain facility in organizing materials, an ability to write passable narrative, an eye for the human-interest anecdote—these and similar qualities are what biographers typically bring to their work. The course of the subject's life normally saves the biographer from making the kind of fundamental choices about theme and structure that authors in other genres must make. Mere accuracy and comprehensiveness as such become, more often than not, the aims of the tale. When these are lacking we readily appreciate their value. Yet they are not enough.

So far as biography has a unique contribution to make, it is through the possibility it offers of placing human deeds and thoughts into the context of a whole life, a life understood not merely as an aggregation of events and deeds, but as the working out of a unified or unity-seeking personality. Thinkers as different from Freud as Plato and Aristotle would agree, I think, that reconstruction of the soul, and of the way that soul informs the deeds and thoughts of the subject is the most valuable contribution biography may make. Lest I be misunderstood, however, let me quickly add that I do not believe that psychological reconstruction can substitute for historical, political, and other kinds of knowledge. Nor do I wish to equate psychological insight with Freudian dogmatizing. The most successful biographies tend to employ relatively commonsensical psychological categories.¹¹ Over-reliance on psychological theory is just another safe type of biographical writing. Properly done, biography, far from being one of the safer genres, is perhaps the riskiest. The subject is a soul, a person, a self, a character, however one wishes to name it, acting and thinking in a given historical world. Both the personality and its world are elusive, sprawling, hidden in their own ways. Biographers must therefore be the most daring of authors. They must behave less like archivists and more like novelists. Or even more difficult, they must blend the artistry of the novelist with the solid virtues of the archivist.

Strum may have failed most spectacularly in her zealous avoidance of the person of Justice Brandeis, but even so her book is the best of the lot and indeed quite good by any standard. While it falls short of what biography at its best might be, it avoids what biography at its most common is.

Most of the time, Baker writes nicely, better on the whole than Strum, whose prose has a much heavier, more academic pall about it. While his book is certainly well researched, the fact that

11. Cf. R. GITTINGS, *THE NATURE OF BIOGRAPHY* 43 (1978); R. ELLMAN, *GOLDEN CODGERS* 1-17 (1973); Nadel, *supra* note 6, at 113-20.

he is writing a "dual biography" of Brandeis and Frankfurter requires that he take a less microscopic approach to the materials of their lives. Approaching the materials at a more general level, he frequently is more insightful and revealing than the other authors. For instance, his description of Brandeis's Zionist activities contains much less detail than Strum's account of the same matters, but he does a better job of placing those activities in the context of Zionism and of the world forces shaping and constraining the Zionist movement. Likewise, he is often fuller than Strum on Brandeis's judicial career; he gives a better account of the emergence of the clear and present danger test, for example, than she does.

But for all his strengths, Baker still produces a book that gets nowhere in particular. The work probably closest to it in intention is Murphy's *The Brandeis/Frankfurter Connection*, like Murphy, Baker seems to have been inspired to address the careers of the two men because of the recent coming to light of documents bearing on their long-standing and multifarious relationship. But Murphy did not write a biography. He wrote a contentiously thematic book, addressing an issue about the relationship between judges and politics. Baker's book, in contrast, is governed by little other than a sense that there is something "interesting" in the lives of his two subjects. In this reader's opinion, at least, that wasn't enough to make his book itself consistently interesting.

Strum's book succeeds because it has point and direction. Her real interest is not in the life of Brandeis, but in Brandeis as the bearer and champion of an alternative form of liberalism to that which triumphed in the New Deal and which writhes in crisis in the 1970's and 1980's. Her book may not be great biography, but it is a fine study of political thought. She sees Brandeis partly as an architect of twentieth-century liberalism, but more importantly as a spokesman for the "road not taken." Brandeis developed what I would call a "noble liberalism," liberal in being inspired by generosity of spirit and concern for justice, noble in its insistence that the end was the development of free and strong human beings. Modern liberalism has made peace with dependence; Brandeis never forgot that the goal was independence. Modern liberalism has accepted the legitimacy of governance by elites, including courts; Brandeis sought to establish the conditions for democratic rule within or against all institutions, including courts.

Readers of this journal will be interested to know that Strum devotes most of her attention to Brandeis's pre-Court career as a reformer, and especially to the deepening development of his lib-

eral vision. She covers the Court years briefly and almost casually; her treatment of his years on the Supreme Court is governed by a thought that she attributes to Brandeis, but that more clearly represents her own view of the judicial part of his career: "[C]learly he considered a Court seat appropriate for his 'retirement' years." Nonetheless Strum, more than Baker and the other biographers, opens herself to learning from Brandeis, and thus she has something more to teach as well.