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Lawyer and the Law Professor as Public Private Citizen, The Review Essay

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Review Essay

**The Lawyer and the Law Professor
as Public Private Citizen**

Nadine Strossen

PHILIPPA STRUM, *Louis D. Brandeis: Justice for the People*. Cambridge: Harvard University Press, 1984. Pp. [xviii] + 508. \$27.50.

LEONARD BAKER, *Brandeis and Frankfurter: A Dual Biography*. New York: Harper & Row, 1984. Pp. vi + 567. \$25.00.

Introduction

When the first comprehensive biography of Justice Louis D. Brandeis was published in 1946,¹ some enthusiastic reviewers declared that it should be required reading for all law students.² These exhortations probably reflected, at least in part, the often-expressed view that our nation's legal history can be gleaned from the biographies of our leading Supreme Court justices.³ Louis Brandeis, who sat on the Supreme Court from 1916 to 1939, and Felix Frankfurter, who sat from 1939 to 1961, are generally ranked among the greatest Supreme Court justices.⁴ Consequently, both biographies reviewed here provide much information about twentieth-century United States legal history

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Philippa Strum is a professor of political science, City University of New York. Her previous works include *The Supreme Court and "Political Questions"* (1974) and *Presidential Power and American Democracy* (1972; second edition 1979). Professors Strum and Strossen are both members of the Executive Committee and National Board of Directors of the American Civil Liberties Union.

Leonard Baker was a journalist and professional writer, who won the 1979 Pulitzer Prize for Biography for *Days of Sorrow and Pain: Leo Baeck and the Berlin Jews* (1978; 1980, paper). His other works include *John Marshall: A Life in Law* (1974; 1981, paper) and *Back to Back: The Duel Between FDR and the Supreme Court* (1967).

1. Mason, *Brandeis: A Free Man's Life* (1946).

2. Friendly, Book Review, 56 *Yale L.J.* 423, 426 (1947); Kaplan, Book Review, 60 *Harv. L. Rev.* 165, 169 (1946).

3. See, e.g., Ulman, Book Review, 47 *Harv. L. Rev.* 735, 735 (1934). See also French, Book Review, 170 *Law & Soc. Ord.* 167, 170 (1970) (author, former law clerk to Justice Frankfurter, recalls his saying that "when he taught students about constitutional law, he taught the biographies of the justices").

4. 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). See also Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 *Brooklyn L. Rev.* 6, 7 (1962) (rates Brandeis as one of four greatest American judges of first half of twentieth century).

through their analyses of the roles that Brandeis and Frankfurter played on the Court. Moreover, just as the lives of Brandeis and Frankfurter were distinguished by numerous accomplishments beyond the judicial sphere, much in these two accounts of their overall careers should inform and inspire not only law students and other members of the legal profession but also all who share what Brandeis and Frankfurter each regarded as his true underlying vocation: that of a private citizen dedicated to promoting the public good.

Part I of this essay contrasts the Strum and Baker biographies with two other recent Brandeis and Frankfurter biographies. Part II contrasts the Strum and Baker works with each other. Drawing on the insights afforded by both Strum and Baker, as well as on other materials, Parts III-V explore certain aspects of the interlinked thought and work of Brandeis and Frankfurter: Part III notes some important distinctions between the ideas and values that underlay each man's commitment to certain common causes, notably Zionism. Part IV discusses the fundamental beliefs that were shared by both men and reflected across the spectrum of causes championed by each. Finally, Part V describes the expansive scope that Brandeis and Frankfurter ascribed to their pre-Court professions, in accordance with their shared core faiths. By transcending traditional concepts of the lawyer's role and the law professor's role, Brandeis and Frankfurter helped to define the novel role of the "public private citizen," in Brandeis's apt phrase (Strum at 204).

I

Since Professor Mason's authorized Brandeis biography was published in 1946, numerous other works have addressed the extraordinary lives and accomplishments of Louis Brandeis and Felix Frankfurter.⁵ Many of these works have been published in the past five years,⁶ a phenomenon reflecting the recent availability of materials to which Mason and the other early biographers did not have access.⁷ The Strum and Baker books stand out from other recently published studies because they view the rich complexity of their subjects' thought and action from new thematic angles without losing sight of their overall lives and personalities.

In contrast with two of the most-discussed recent studies of Brandeis and Frankfurter, Bruce A. Murphy's *The Brandeis/Frankfurter Connection* and

5. See, e.g., L. Baker, *Felix Frankfurter* (1969); P. Kurland, *Mr. Justice Frankfurter and the Constitution* (1971); A. Todd, *Justice on Trial* (1964); M. Urofsky, *A Mind of One Piece: Brandeis and American Reform* (1971). See also books cited *infra* note 6. One scholar of history and American studies recently observed: "Brandeis may enjoy the honor of having drawn more biographers than any other modern American public figure." Murphy, *Book Review*, 1984 *Wis. L. Rev.* 1391, 1391 (1984).

6. See N. Dawson, *Louis D. Brandeis, Felix Frankfurter and the New Deal* (1980); A. Gal, *Brandeis of Boston* (1980); H. N. Hirsch, *The Enigma of Felix Frankfurter* (1981); 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); L. Paper, *Brandeis: An Intimate Biography of One of America's Truly Great Supreme Court Justices* (1983); M. Parrish, *Felix Frankfurter and His Times* (1982); M. Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (1984); M. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981).

7. See, e.g., *Letters of Louis D. Brandeis*, ed. M. Urofsky & D. Levy. 5 vols. (1971-78).

H. N. Hirsch's *The Enigma of Felix Frankfurter*, both the Strum and Baker biographies provide a welcome balance and comprehensiveness. These other recent works examine, in a highly critical light, certain facets of Brandeis's and Frankfurter's lives and personalities. The Murphy book focuses on the extrajudicial efforts to advance various public policy goals that Brandeis and Frankfurter undertook while they were Supreme Court justices. In particular, Murphy scrutinizes Justice Brandeis's provision of funds to Frankfurter (before Frankfurter was named to the Court) to facilitate his efforts on behalf of their shared policy goals.⁸ Murphy suggests that both men breached what he asserts should be the standards limiting a judge's extrajudicial conduct.⁹ Hirsch's work is a "psychobiography." Analyzing Frankfurter's personality development in neo-Freudian terms, Hirsch concludes that Frankfurter had a neurosis that marred his personal relationships generally, and

8. In 1917, Brandeis established in a Boston bank a "Joint Endeavors for the Public Good" account on which Frankfurter could draw. From 1917 through 1925, Brandeis deposited a total of \$4,500 in this account in irregular installments. From 1926 until Frankfurter's appointment to the Court in 1939, Brandeis contributed \$3,500 per year to the account. In addition to reimbursing Frankfurter for expenses incurred in his public interest activities, these funds were intended to supplement Frankfurter's personal income and to help defray the costs of psychiatric care required by Frankfurter's wife, Marion. Frankfurter had discussed with Brandeis the possibility of supplementing his professorial salary through private legal work in order to meet these costs. Brandeis, however, insisted on providing the necessary funds himself, explaining: "Your public service must not be abridged. Marion knows that Alice [Mrs. Brandeis] and I look upon you as half brother, half son" (Baker at 243). See *infra* note 46.

9. For example, Murphy contends that Brandeis's financial support to Frankfurter was conceived from the beginning as "a long-term lobbying effort" (Murphy, *supra* note 6, at 40) in which Frankfurter would be Brandeis's "paid political lobbyist and lieutenant" (*id.* at 10). See Schlesinger, *An Ideological Retainer*, N.Y. Times, Mar. 21, 1982, § 7 (Book Review) at 5 (Murphy conveys "the impression of a sinister Brandeis-Frankfurter conspiracy to run national affairs from the highest judicial bench"). Notwithstanding his book's pervasive innuendos, Murphy does not directly answer the two questions he proposes for evaluating the propriety of Brandeis's and Frankfurter's extrajudicial conduct: (1) whether they adhered to their own standards of propriety, and (2) whether they adhered to the standards of their judicial colleagues and predecessors. Even Murphy seems to acknowledge that the first question should be answered affirmatively, at least regarding Brandeis (Murphy, *supra* note 6, at 33), and there is much support for an affirmative answer to the second question as well. See, e.g., Danelski, Book Review, 96 Harv. L. Rev. 312, 323-27 (1982); Frank, Book Review, 32 J. Legal Educ. 432, 438-44 (1982). Murphy's ultimate judgment is that Brandeis's financial assistance played "no significant part in [Frankfurter's] decision to do what he did," and that both men were "forces for good" (at 342).

In an earlier study, Murphy concluded even more clearly that Brandeis acted strictly in accordance with his acute sense of judicial propriety and that, through their joint efforts, both men made significant contributions to liberal causes. See Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 Mich. L. Rev. 1252, 1302-3 (1980):

There is no evidence that Brandeis, despite his normal sensitivity to the requirements of judicial propriety, was much troubled by the questions raised by his relationship with Frankfurter. . . . Certainly Brandeis never regarded Frankfurter as a mere "employee," nor could he objectively do so. Brandeis never asked the professor to undertake projects or to act on suggestions that did not command Frankfurter's independent approval and allegiance. . . .

. . . No shred of evidence survives to suggest that Brandeis ever asked Frankfurter to perform tasks intended to enhance Brandeis's personal reputation, increase his financial holdings, or discredit some personal opponent. This nobility of purpose—as Brandeis perceived it—must have gone a long way toward quieting any nagging doubts about the propriety of the arrangement.

Whatever verdict is rendered on the matter of judicial propriety, one conclusion remains clear: for sixteen years, in an environment of social and political conservatism, Louis D. Brandeis and Felix Frankfurter had combined their efforts to further a wide range of traditional, progressive causes. . . . The surprising thing . . . is not that they did not always achieve their purposes, but that two individuals were able to accomplish so much. . . . Brandeis and Frankfurter played a substantial role in preserving the spirit of American liberalism during [the intervening years [between the first years of the century and the reform movement of the 1930s].

particularly damaged his Supreme Court career.¹⁰ Even putting aside the severe criticism that other scholars have leveled at the methodology and conclusions of the Murphy¹¹ and Hirsch¹² studies, these works would still provide distorted glimpses of their subjects. Each focuses on highly selective aspects of two personalities and careers whose greatest fascination lies precisely in their extraordinary complexity and breadth.

While Strum and Baker avoid the idolatrous overtones of some early Brandeis and Frankfurter biographies,¹³ they also avoid the hostile overtones and unfairly narrow focus of the Murphy and Hirsch works. For example, both Strum and Baker evaluate critically the two justices' extrajudicial public policy efforts, and each concludes that some of those efforts may well have fallen short of now-accepted standards governing judicial conduct (Strum at 403-5; Baker at 197, 385-86). However, both biographers set this critical evaluation in the context of the times, when such extrajudicial activities were not generally considered improper (e.g., Strum at 374; Baker at 304-7, 413).¹⁴ Moreover, they set their examination in the context of the two men's mutual belief in their obligation zealously to pursue the common good (e.g., Strum at 47, 372-76; Baker at 241-44).¹⁵ Similarly, both Strum and Baker ac-

10. Relying on the theories of Erik Erikson and Karen Horney, Hirsch diagnoses Frankfurter as having suffered a prolonged crisis concerning his Jewish identity, which led to an inflated, idealized self-image.

11. See, e.g., Cover, *The Framing of Justice Brandeis*, *New Republic*, May 5, 1982, at 17, 21 (book contains "shoddy scholarship and commercial exploitation," resulting in "a scandal-mongering distortion"); Kurland, "Brandeis-Frankfurter" Sensationalizes Serious Issue, *Legal Times*, Apr. 12, 1982, at 10 (scholarly contribution flawed by melodramatic tone); Resnik, *Book Review*, 71 *Calif. L. Rev.* 776, 794 (1983) (Murphy employs "careless history and provocative prose"); Schlesinger, *supra* note 9 (criticizes book's suggestion of conspiracy through its language, subtitle, and jacket illustration depicting Brandeis and Frankfurter as "villains in a Hitchcock movie"); Wheeler, *Book Review*, 81 *Mich. L. Rev.* 931, 932 (1983) (Murphy presents his interpretations "as conclusive when his facts merely create an arguable case for them").

12. See, e.g., Dorsen, *Book Review*, 95 *Harv. L. Rev.* 367, 372-74 (1981) (book manifests author's personal hostility toward Frankfurter); Stone, *Book Review*, 95 *Harv. L. Rev.* 346 (1981) (criticizes Hirsch's psychological analysis).

13. See, e.g., Friendly, *supra* note 2, at 426 (in Mason's 1946 Brandeis biography "the adulatory note is a little too strongly struck"); Dorsen, *supra* note 12, at 376 n.35 ("With few exceptions, contemporaneous scholarly commentary on Justice Frankfurter, usually written by former students or law clerks, tended to be flattering and uncritical"). See also Marcus, *Book Review*, 95 *Yale L.J.* 195, 204 (1985): "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*."

14. Baker specifically refutes a number of assertions in Murphy's book. See Baker at 244, 384, 413.

15. Accord, e.g., Danelski, *supra* note 9, at 325: "From Brandeis' perspective, financing Frankfurter's public interest work was not at all wrong; indeed it was to Brandeis positively right—a contribution to the betterment of society. His code of propriety concerning his assistance to Frankfurter and to social causes generally [while on the Supreme Court] was . . . that he do no more than '(1) to think on the main problems of the cause; (2) to give moral support; and (3) to give financial support'" (quoting letter from Brandeis to Jacob de Haas, dated Mar. 28, 1928).

Brandeis's financial assistance to Frankfurter was also consistent with his munificent financial contributions to numerous organizations and other individuals whose work he supported. Between 1890 and 1939, when there were no tax incentives for charitable gifts, Brandeis donated \$1 million to organizations, and \$500,000 to friends and relatives. Moreover, he sometimes suggested that people who owed him money donate the loaned sum to charity instead of repaying him (Baker at 242). The individual beneficiaries of Brandeis's financial assistance included other law professors. See Frank, *supra* note 9, at 436 ("He contributed, for example, funds to both Wilbur Katz, later Dean of the University of Chicago Law School, and James Landis, later Dean at Harvard, to help the work in which they were engaged").

knowledge their subjects' less appealing personal qualities—notably Brandeis's austerity (e.g., Strum at 361–63; Baker at 183–85) and Frankfurter's intellectual arrogance (Baker at 44–45). However, they do so in the context of more complete portraits, which also reveal their subjects' most appealing personal qualities—for example, Brandeis's warmth and generosity toward his family and friends (e.g., Strum at xii, 42–53) and Frankfurter's unstinting lavishness of affection, energy, and talents upon his friends, colleagues, and students (e.g., Baker at 381–82).

II

Both Strum's book and Baker's add new factual details and original analysis to the basic contours of Brandeis's and Frankfurter's careers, which are at least generally familiar to most members of the legal profession. Although much of the same ground is necessarily covered in both volumes, their differing emphases make them largely complementary to each other, and well worth reading in tandem.

The Strum biography of Brandeis, which was nominated for a Pulitzer prize, is by far the more scholarly of the two, with its objective tone, attention to detail, thorough documentation, and coherent intellectual focus. As befits a political science professor, Strum views Brandeis's commitments and endeavors through the prism of his political philosophy. She explicates how Brandeis drew upon the democratic ideas of classical Greek and Enlightenment philosophers to forge a new progressive ideology. According to Strum, not only did Brandeis's political thought form the basis for Woodrow Wilson's "New Freedom," but it also contained the seeds of certain contemporary political philosophy (Strum at 198–223, 193–95). Strum carefully traces the development and application of Brandeis's ideology across the broad spectrum of his public activities, including his defense of consumers' and workers' rights (at 54–123), his fight to eradicate monopolies (145–53, 198–200, 339–46), his advocacy of industrial democracy (159–95), and his commitment to Zionism (248–90). Strum also provides an insightful analysis of Brandeis's contributions to the development of U.S. constitutional law through his scholarly writings (at 37–38), his advocacy (114–27), and his judicial opinions (309–53), showing how those contributions both reflected and promoted Brandeis's particular brand of progressive liberalism.

Strum's analysis of Brandeis's conversion to Zionism at a relatively advanced age (at 224–47) is particularly significant. Having been raised in, and having himself maintained, an essentially agnostic home, Brandeis spent the first six decades of his life largely isolated from the Jewish community and the Zionist cause (at 224). Yet, as a standing joke at the time expressed it, he "became a Bar Mitzvah at the age of sixty" (Baker at 75), in short order becoming the leader of the American Zionist movement, and being offered the leadership of the world Zionist movement (Strum at 248, 280). Strum refutes some of the conventional explanations for this conversion—for example, that Brandeis was driven to it by anti-Semitism or by a desire to obtain the

Jewish establishment's backing for a Supreme Court nomination (at 225-29).¹⁶ In consonance with her overall focus on Brandeis's philosophy, Strum shows that Zionism embodied many of Brandeis's most cherished life-long political, economic, and social ideals. She demonstrates that Brandeis viewed Zionism as the struggle to create not just a state that Jews could call home, but also a state that would embody his ideals of a just polity. Brandeis believed that the Jewish state could become a "latter-day Athens" in large part because he believed that the Jewish culture itself reflected ideals of democracy and social justice. He further believed that, for 20 centuries, their traditions had fostered among Jews qualities that would promote the realization of these ideals: a deep moral feeling, a sense of brotherhood and commitment to the common good, and an emphasis on education (Strum at 229-42, 246-47, 257-65).

Baker, a journalist by background, has written a book that is less scholarly in tone and that lacks Strum's thorough documentation and her marshaling of details to convey an overarching intellectual theme. What Baker's book may lack in depth, however, it makes up for in breadth. Baker contributes to our understanding of Brandeis some interesting insights into his personal life (e.g., at 91-92) and, of course, more details concerning his relationship and collaboration with Frankfurter. Using the relationships between these two rich lives as his organizing principle, Baker points out some revealing inter-connections (e.g., at 62, 481). For example, Brandeis was appointed to the Supreme Court at about the same time that Frankfurter became a Harvard Law School professor, and Baker demonstrates that both brought similar and novel approaches to their new positions. He shows that Brandeis's efforts to persuade the Supreme Court to consider political, economic, and social facts, as well as legal precedent, were mirrored by Frankfurter's efforts in the classroom (e.g., at 142, 220, 225-28, 288).

The breadth of Baker's narrative is augmented by his excursions beyond the particular actions and events in which Brandeis and Frankfurter were directly involved, to provide illuminating background information. In line with his earlier authorship of books about the Supreme Court and about German Jewry during the Nazi era,¹⁷ much of Baker's background information concerns the role of the Supreme Court in our political system and the status of Jews and anti-Semitism in American society. These background materials render Baker's volume to some extent a history of the Supreme Court and of American Jewry during Brandeis's and Frankfurter's lifetimes. For example, in describing Supreme Court decisions in which Brandeis participated, Baker comments on the development of judicial review and Supreme Court independence (at 133-35); in describing Roosevelt's Court-

16. Strum also refutes Allon Gal's theory (see A. Gal, *supra* note 6, at ix, 76) that Brandeis was driven to Zionism by his exclusion from Boston Brahmin society. She finds no evidence that Brandeis was rejected by Boston's upper classes because of his religion. To the contrary, Strum explains that Brandeis was initially well received by the Brahmins but subsequently fell into disfavor with them because of the progressive political and economic causes he espoused. Strum at 22 & n.16, 29-30 & n.33, 225-29.

17. See introductory note *supra*.

packing plan, he discusses previous congressional and presidential efforts to alter the federal courts (at 320–21); in recounting Brandeis’s extrajudicial efforts to influence public policy, he describes parallel efforts by other Supreme Court justices (at 304–7); and in discussing Frankfurter’s career on the Harvard Law School faculty, he interjects information about anti-Semitism in the United States and at U.S. universities after World War I (at 71–73, 233–34, 299, 326–27, 348–49, 366) and outlines the history of Jews at Harvard, its “Jewish quota” during the 1920s, and indications of Nazi sympathy at Harvard and other leading U.S. universities during the 1930s (at 230–34, 346–48).¹⁸

Declaring that the story of Brandeis’s and Frankfurter’s lives “is the immigrant story” (at 45), Baker’s dual biography constitutes a celebration of two American Jews—one a first-generation American¹⁹ and the other an immigrant himself²⁰—who overcame the obstacles of anti-Semitism to make outstanding contributions to the world Jewish community (through the Zionist movement)²¹ and to the overall American community.

III

In contrast with Strum’s elaborate description of how Brandeis’s ideas were reflected in his various endeavors, Baker’s dual biography does not contain in-depth explanations or comparisons of Brandeis’s and Frankfurter’s political, legal, or judicial philosophies. For example, Baker fails to explore their differing attitudes toward the appropriate relationships between their loyalties to Judaism, Zionism, and the United States. Of course, the

18. Baker’s emphasis on how U.S. anti-Semitism affected Brandeis and Frankfurter contrasts with Strum’s downplaying of this subject. Strum largely dismisses the impact of anti-Semitism on Brandeis’s life, concluding that his Judaism neither impeded his brilliant legal career in Brahmin-dominated Boston nor accounted for the fierce opposition to his Supreme Court nomination (Strum at 15–18, 293–95). Strum’s deemphasis of anti-Semitism is at least partly attributable to the fact that American anti-Semitism was less pronounced during Brandeis’s young adulthood than during Frankfurter’s (Baker at 71–72). Also, consistent with Strum’s overall focus on Brandeis’s Zionism and other political beliefs, she attributes the hostility he faced following his Supreme Court nomination and at other points in his career not to his Jewish heritage but rather to his Zionist and other political beliefs (see, e.g., 226, 236, 294).

In contrast, Baker points to specific instances of anti-Semitism that directly affected Brandeis: he quotes the opinion of Brandeis’s law partner, who represented him during the Senate hearings on his Supreme Court nomination, that anti-Semitism was a major factor underlying the vitriolic opposition (at 102); cites certain anti-Semitic attacks on Brandeis’s character when he was being considered for Woodrow Wilson’s cabinet (at 86); notes that following Brandeis’s Supreme Court appointment he had trouble finding housing in Washington because of anti-Semitism (at 182); and points to the snubbing he received from his fellow justice, James McReynolds, an avowed anti-Semite (at 370 and notes accompanying photographs on third page following 216).

19. Brandeis’s parents emigrated to the United States from Germany in 1849. He was born in Louisville, Kentucky, in 1856. See, e.g., Strum at xviii, 1.

20. Frankfurter emigrated to the United States from Vienna with his parents when he was 12 years old. When he arrived in this country, he “never had heard a word of English spoken and never had spoken an English word . . . not one word!” H. Phillips, *Felix Frankfurter Reminisces* 4 (1960).

21. The great American Zionist leader Rabbi Stephen Wise ranked Brandeis with Chaim Weizmann, the first president of Israel, as the two individuals who did the most to create a Jewish state (Baker at 75). Baker concludes that Frankfurter also deserved to be called “a father of the Jewish development in Palestine” (at 291–92).

thrust of Baker's book is to demonstrate the common bonds between Brandeis and Frankfurter. However, it is precisely the commonality of so much in their backgrounds and beliefs that makes the important divergences in their views all the more interesting.

In light of Baker's pervasive theme of the integration of Jewish immigrants into mainstream twentieth-century America, Brandeis's and Frankfurter's differing views about such integration are particularly intriguing. Why did Brandeis, who originally decried the concept of hyphenated Americans (e.g., Baker at 70), come passionately to believe that both individual Americans and the nation as a whole would be better off if the individuals preserved their unique religious, ethnic, and cultural heritages (e.g., *id.* at 73), while Frankfurter just as passionately believed that both America and its individual citizens would be best served through the minimization of such differences in "the melting pot"?²² Surely these contrasting views constitute an essential part of "the immigrant story" that Baker sets out to tell. Yet, although Baker proclaims that "[Brandeis's] life defines the hyphenated American" (at 181), he does not discuss Frankfurter's fervent assimilationist beliefs.

As other scholars have argued, Frankfurter's deep belief in the homogenizing forces of American democracy and public education was a driving force throughout his life, and it influenced his Supreme Court opinions.²³ For example, Frankfurter's assimilationist views are manifest in his two opinions declaring that Jehovah's Witnesses schoolchildren could be compelled to salute the American flag, notwithstanding their religious belief that such a salute was idolatrous.²⁴ Frankfurter's sincere conviction that, to be good Americans, these children should be forced to become worse Jehovah's Witnesses, contrasts sharply with Brandeis's deep convictions. Brandeis told a group of his coreligionists that "to be good Americans, we must be better Jews, and to be better Jews, we must become Zionists" (Strum at 258).

Because they had divergent ideas about whether assimilation was desirable for American minority groups, including Jews, Brandeis and Frankfurter supported Zionism for different reasons. In contrast with Strum's analysis of the ideological roots of Brandeis's Zionism, Baker does not discuss Frankfurter's motivation for making his great contributions to the Zionist move-

22. See, e.g., Danzig, Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking, 36 *Stan. L. Rev.* 675, 695-99 (1984). According to Danzig, Frankfurter "believed that assimilation could be made compatible with a distinctive ethnic and religious identity by insisting on the irrelevance of" the latter for professional and public purposes. *Id.* at 696. Frankfurter therefore refused to hide his Jewish background. For example, Frankfurter rejected the suggestion of the hiring partner at a Wall Street firm, where he sought to work following his law school graduation, that he change his name. Although the partner thought Frankfurter's decision was "very foolish," Frankfurter became the first Jewish lawyer employed by the firm. Phillips, *supra* note 20, at 36-39; Baker at 63. Nonetheless, Frankfurter's adamant belief that his Jewish background was irrelevant to his professional and public identity contrasts sharply with Brandeis's staunch belief in the fusion of his two roles as a Jewish patriot and an American one. See, e.g., Strum at 258; Baker at 79.

23. See, e.g., Danzig, *supra* note 22.

24. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 591 (1940) (Frankfurter, J., writing for majority).

ment. Baker's account implies that Frankfurter's commitment to Zionism stemmed solely from his friendship with Brandeis and his horror at the sufferings of European Jewry (Baker at 70, 350–52). Perhaps Frankfurter saw the movement to create a Jewish state simply as a means of assuring a sanctuary for European Jews. For Brandeis, however, the purposes of Zionism transcended this pragmatic goal. He believed that Zionism also promoted additional goals that would benefit not only American Jews but also all Americans.

Brandeis believed that Zionism afforded a means for nonobservant American Jews to develop their sense of Jewish identity, thus revitalizing Jewish culture and values in the United States and counteracting the assimilation that he deplored as “national suicide” (e.g., Strum at 261). In view of Frankfurter's pro-assimilation philosophy, he presumably rejected this rationale for Zionism. Far from ascribing a positive value to the cultivation of a Jewish identity for nonreligious American Jews, Frankfurter expressly repudiated such an identity, declaring that a Jew should simply “be a biped and walk on the two legs that man has.”²⁵

Brandeis also thought Zionism served an important function from the viewpoint of non-Jewish Americans. He believed that, as a small, planned community, the Jewish state could provide the United States with a model of an ideal polity, reflecting the values of individual autonomy and control that were central to his general political and economic philosophy (e.g., Strum at 275–76). Because Brandeis viewed the political goals of Zionism—for example, individual freedom and social justice—as virtually identical to those of American democracy, he further believed that a commitment to Zionism would make one a better American (*id.* at 258). Declaring that his “approach to Zionism was through Americanism,” he recruited to the Zionist fold not only many Jewish Americans but also many non-Jewish Americans (*id.* at 260–61). In contrast, because Frankfurter shared neither Brandeis's abhorrence of large government nor his idealization of small, controllable communities, Frankfurter was presumably not drawn to Zionism by this rationale either (Baker at 282–83; 315–16).

IV

Despite the contrasting emphases of the Strum and Baker biographies, and the differing ideas of Brandeis and Frankfurter concerning the assimilation of American Jews and certain other specific matters, the overarching theme of these two books is that both lives were integrated by a shared set of fundamental, interrelated values. These included, among the most important, a passionate patriotism, an abiding optimism about American democracy and

25. Phillips, *supra* note 20, at 37. Professor Hirsch explains Frankfurter's Zionist undertakings as “‘a defense of Jews, as human beings, against genocide, persecution and discrimination; it was never an attempt, consciously at least, to perpetuate Jewish identity.’” Hirsch, *supra* note 6, at 219 n.129 (quoting D. Hollinger, Morris R. Cohen and the Scientific Ideal 212 (1975)).

progressive reform, a deep faith in education as the facilitator of meaningful participation by all citizens in democratic self-government, and a profound belief that individual autonomy is necessary not only for individual self-fulfillment but also for an effective democracy.

Underlying these basic values and beliefs was Brandeis's and Frankfurter's shared conviction that people are reasonable and, given sufficient information, will make wise choices. As Strum states about Brandeis, "His belief in the rationality of human beings cannot be overstated; it illuminated everything he did" (at 253). Similarly, Frankfurter said of himself, "I have a romantic view about reason."²⁶ These strong feelings enabled Brandeis and Frankfurter to maintain their optimism, and to continue their reformist activities, even under unfavorable political and social circumstances.²⁷

Neither Brandeis nor Frankfurter was religiously observant (e.g., Strum at 224; Baker at 71, 75–76), but their shared deep-seated beliefs played a role in their lives analogous to that of conventional religious beliefs. As one scholar states, Brandeis had an "essentially religious faith in civic humanism."²⁸ Similarly, Frankfurter repeatedly analogized his patriotism and his reverence for education to religious devotion. For example, when told that he was to receive the Medal of Freedom, the highest award that the United States can bestow upon a private citizen, Frankfurter spoke of "my feelings about America and how they came to be almost religious . . . in their nature" (Baker at 490).²⁹

Brandeis and Frankfurter both revered education as an integral part of the American democracy they so cherished. As Strum elucidates, Brandeis's faith in education flowed from his Jeffersonian belief that, acting through democratic political institutions, an informed citizenry would move society in the direction of enlightened progress (see, e.g., Strum at 62, 400–401, 408). Consistent with his idealization of the melting pot, the particular value that Frankfurter ascribed to education was as a force for speeding the process of assimilation.³⁰ Frankfurter thought the special genius of American democracy, and correspondingly of the American educational system, was the opportunity they afforded to all individuals to succeed on the basis of their particular abilities, regardless of their names or origins. In short, he prized democracy as a meritocracy.³¹ Frankfurter idealized the Harvard Law School and the *Harvard Law Review* because he perceived them as microcosms of

26. Phillips, *supra* note 20, at 38.

27. See generally Levy & Murphy, *supra* note 9. Fully living up to Dean Acheson's description of him as an "incurable optimist" (Strum at 329), Brandeis believed that individual liberty—which, according to Strum (at x), he valued more highly than anything else—would in the long run be strengthened even by actions that curtailed it in the short run. For example, responding to one assault on civil liberties, Brandeis counseled: "By such follies is liberty made to grow, for the love of it is reawakened. Of course there are growing pains; but with the throes come also the joys of the struggle and of creation" (Baker at 255, quoting Brandeis's note to Zechariah Chafee).

28. Thomas, Book Review, 13 *Revs. Am. Hist.* 94, 104 (1985).

29. See also Baker at 367, 396, 491; note 32 *infra* & accompanying text.

30. See, e.g., Danzig, *supra* note 22, at 706–10.

31. See, e.g., *id.* at 698–700.

the open meritocratic society that he believed the United States to be. He expressly phrased his exalted view of these institutions in religious terms.³²

Although Brandeis did not espouse meritocratic principles with Frankfurter's fervor, his general philosophy included a strong belief in the individual's right and ability to succeed on his own, provided he had a sufficient base of economic and political freedom and independence (e.g., Strum at 62; Baker at 32). Therefore, although Brandeis supported certain New Deal governmental assistance programs, he seemed to believe more strongly in government's negative obligations (to leave individuals alone to pursue their own welfare) than in its affirmative obligations (to promote individuals' welfare) (e.g., Strum at 145).³³

Brandeis's and Frankfurter's shared beliefs in democracy, education, and individual autonomy are manifest not only in their numerous pre-Court reformist endeavors, but also in their Supreme Court opinions. Justice Brandeis is best known for his ringing opinions affirming the individual's civil liberties (e.g., Strum at 309–38). These opinions eloquently express his belief in individual autonomy and his exalted view of education. Brandeis declared in his famous *Olmstead* dissent, for example, that the government may not transgress upon individual liberties because “the government is the potent, the omnipresent teacher.”³⁴ As a Supreme Court justice, Felix Frankfurter is probably best known for his staunch espousal of judicial restraint, even where the Court was asked to invalidate governmental restrictions on individual liberties (Baker at 430, 456, 464–68, 488–89). Although this philosophy conflicted to some extent with his belief in individual autonomy, it was entirely consistent with his “true democratic faith” that power should reside in the legislative and executive branches, as representatives of the majority will.³⁵ For example, Frankfurter's flag salute opinions³⁶ were certainly con-

32. See, e.g., Phillips, *supra* note 20, at 17–19, 26–27. For example, Frankfurter stated: “I have a quasi-religious feeling about the Harvard Law School. I regard it as the most democratic institution I know anything about. By ‘democratic’ I mean regard for the intrinsic and for nothing else.” *Id.* at 19.

33. Thus, in criticizing Brandeis's political ideology, the socialist philosopher Morris Cohen declared that, for some individuals, “to be let alone” by the government was not, as Brandeis had proclaimed in his famous *Olmstead* dissent, “the greatest right,” but to the contrary, “the worst calamity.” Cohen, Book Review, 47 *Harv. L. Rev.* 165, 167 (1933). Compare *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting): “[The Fourth and Fifth Amendments] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

34. 277 U.S. at 485. The high status that Brandeis accorded to education was also reflected in his view that government could not impinge on education in the absence of a clear and present danger. See, e.g., Strum at 322. Brandeis also believed that individual citizens have the responsibility to “educate” government officials concerning individual rights through all available means, including lobbying and litigation. Deeply disturbed by the governmental invasions of civil and political liberties during World War I and its aftermath, Brandeis wrote to Frankfurter in June 1926: “I think the failure to attempt such redress as against government officials for the multitude of invasions . . . is also as disgraceful as the illegal acts of the government . . . in enacting the statutes. . . . Americans should be reminded of the duty to litigate.” Letter to Felix Frankfurter (June 25, 1926), *reprinted in* 5 *Letters of Louis D. Brandeis*, *supra* note 7, at 225–26. Consonant with this encouragement, Frankfurter was one of the founders and early leaders of the American Civil Liberties Union, which was dedicated to seeking redress against governmental infringements of individual freedoms (Baker at 253).

35. See, e.g., Danzig, *supra* note 22, at 683.

36. Cited *supra* note 24.

sistent with his ardent patriotism, even if they were not wholly consistent with his belief in individual autonomy.³⁷ Notwithstanding his general deference to the political branches of government, Justice Frankfurter deferred considerably less to government actions that impinged on academic freedom, or on the right of public school students to remain free from state sponsorship of religion,³⁸ perhaps because of the extremely high value that he placed on education.

Their deep dedication to education infused not only the substantive decisions of Justices Brandeis and Frankfurter but also their contributions to the Supreme Court's institutional development. According to Dean Acheson, one of Brandeis's law clerks, Brandeis saw his opinions as serving the purposes of "education and persuasion" (e.g., Baker at 136). To promote these purposes, Brandeis made innovations in the style of Supreme Court opinions, organizing them similarly to briefs, by listing points and supporting authorities (e.g., Strum at 347-48). To maximize the value of his opinions as educational tools, Brandeis rewrote them dozens of times (*id.* at 356). Before finalizing an opinion, Brandeis would ask: "What can we do to make it more instructive?" (e.g., Baker at 193). His commitment to education was also reflected in his strengthening of the Court's ties with the nation's law schools through the hiring of recent law school graduates as law clerks (e.g., Strum at 354)³⁹ and the citations to law review articles in his opinions (*id.* at 363-64). Justice Frankfurter's profound faith in the educational process was reflected in his lobbying for a lengthening of the post-argument conferences during which the Supreme Court justices discussed their rulings.⁴⁰ Moreover, Frankfurter assumed such a lecturing and scholarly role in these conferences that his brethren sometimes jokingly referred to him as "Professor Frankfurter," to which Frankfurter once replied: "You could not give me a title that I esteem more" (e.g., Baker at 379).

V

What is ultimately most remarkable and inspiring about the lives of these two great Americans, as is made clear by the Strum and Baker works, is not what they contributed in their roles as justices of this country's highest court, but rather what they contributed in their roles as private citizens dedicated to

37. Frankfurter's majority opinion in the earlier of those cases, *Minersville School Dist. v. Gobitis*, was seen by some contemporary observers as reflecting his especially heightened patriotism following the Nazi invasion of France, and was accordingly dubbed "Felix's Fall of France opinion." See, e.g., Frank, *supra* note 9, at 442.

38. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (concurring opinion) (academic freedom precludes state attorney general from investigating political affiliations of state university instructor); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (establishment clause bars provision of religious instruction on public school premises during school hours to children who choose to receive it).

39. Oliver Wendell Holmes had pioneered this innovation, and Brandeis was one of the first justices to follow suit.

40. See, e.g., Hutchinson, *Felix Frankfurter and the Business of the Supreme Court*, O.T. 1946 - O.T. 1961, 1980 Sup. Ct. Rev. 143, 164-203.

furthering the public good. That they made such contributions despite handicaps imposed by their immigrant Jewish origins and despite working in political-economic climates that were deeply hostile to many of the causes they espoused⁴¹ enhances the inspirational quality of their life stories.

Brandeis and Frankfurter both believed and demonstrated that, in our democratic society, individuals can play a significant role in advancing justice and the public interest, even if they hold no public office. Before being named to the Supreme Court, both men repeatedly turned down opportunities to hold elective or appointive public office in order to pursue their chosen careers (Strum at 66–67, 204–5, 373; Baker at 53–54, 271–72, 281).⁴² And although the external particulars of their two careers were different—Brandeis was a successful private practitioner,⁴³ Frankfurter a respected law professor⁴⁴—they had an identical underlying core. Each man essentially viewed himself as a “public private citizen” (Strum at 204), with a responsibility to work through all available channels—including litigation, citizens’ groups, political activism, writing, and public education—to promote his conception of individual justice and the social welfare.

For example, in spurning overtures that he run for the Boston mayoralty, Brandeis declared that “the most important office, and the one which all of us can and should fill, is that of private citizen. The duties of the office of private citizen cannot under a republican form of government be neglected without serious injury to the public” (Strum at 66).⁴⁵ Similarly, when Frankfurter was approached about serving as a justice of the Massachusetts Supreme Judicial Court, he followed Brandeis’s counsel that he could be of greater public service in his position as “professor–active citizen” (Baker at 234). Likewise, when Franklin D. Roosevelt offered to name Frankfurter his solicitor general, Frankfurter accepted Brandeis’s advice to decline the offer so he could continue to participate actively in “their” causes (Strum at 373–74).

41. See, e.g., Levy & Murphy, *supra* note 9. The hostile response to the causes that Brandeis had championed surfaced most clearly during the bitter struggle to confirm his Supreme Court nomination. See, e.g., Baker at 98–115. Although Frankfurter’s Supreme Court nomination did not arouse any serious opposition, Frankfurter’s liberal activism had previously evoked strong opposition. See, e.g., Baker at 150, 260, 363–64.

42. After several years on the Court, Brandeis declined Robert M. La Follette’s invitation to become his running mate in the 1924 presidential election (Strum at 157).

43. Brandeis represented many important clients, including major businesses, and became very wealthy. See, e.g., Strum at 226 (by 1914, Brandeis was “the best-known lawyer in the United States, and by far one of the richest”).

44. As a Harvard Law School faculty member, Frankfurter was a dynamic teacher as well as a prodigious and influential scholar. See, e.g., Baker at 225–28 (quoting Frankfurter’s students regarding his stimulating and demanding teaching style); Dorsen, *supra* note 12, at 368 & n.5 (Frankfurter wrote “a series of important books and law review articles” and “was a major stimulant of new ideas”).

45. Brandeis’s view that he could “best serve the people” as a “public private citizen” (Strum at 204) was shared by others. For example, when Brandeis was approached to run for the position of Massachusetts governor or U.S. senator, one newspaper commented: “As a private citizen he weighs more than a carload of Murray Cranes [Massachusetts governor and U.S. senator]. Anyone who has ever heard him . . . must realize how little the senatorial toga would add to the stature of a real statesman, patriot and lover of his kind” (Strum at 205).

Each man expanded the traditional view of his particular profession to encompass the entire range of responsibilities, activities, and accomplishments entailed in being a “public private citizen” in the fullest sense. Thus, it is eminently appropriate that the first of the many occasions on which their two paths crossed was a 1905 Harvard student meeting at which Brandeis gave an address titled “The Opportunity in the Law.” That talk delineated the expansive conception of a lawyer’s public service role that would be exemplified by Brandeis’s entire career, as well as by that of Frankfurter, then a law student in the audience. Brandeis stated that many lawyers had become adjuncts of large corporations and had neglected their obligation to use their powers to protect individuals. He said, “We hear too much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer’” (Baker at 39–40).

Within the next decade, Brandeis himself came to be known throughout the United States as the “people’s lawyer,” a title he earned through his untiring efforts on behalf of public causes (Baker at 54). At the outset of his legal career, when the concept of rendering legal services *pro bono publico* was unknown, Brandeis resolved to donate at least one hour per day to public service legal work. He hoped to be able ultimately to donate half his total working time to public service. Brandeis never accepted fees for such work, even when the client could afford to pay, because he viewed such work as a lawyer’s obligation. He supported public interest legal work through financial contributions as well. In accordance with his general belief that workers should participate in the profits and management of the firms that employed them, Brandeis instituted a profit-sharing system for his law firm’s employees. Believing it unfair for his firm’s employees, in effect, to subsidize his public interest legal services, Brandeis voluntarily paid his firm for the value of such services (Strum at 61).

Much as Brandeis pioneered the concept of *pro bono publico* legal services by members of the private bar, so Frankfurter pioneered the extension of this concept to law school professors. Frankfurter devoted a tremendous amount of his time and talents to public service legal work, for which he steadfastly refused to accept any money from the client, even when it was pressed upon him (Baker at 236–37).⁴⁶ Echoing Brandeis’s statement regarding private attorneys, Frankfurter declared that law professors have an obligation to do public service legal work free of charge (*id.* at 237). Chafing at narrow, conventional notions of a professor’s role, Frankfurter told Roscoe Pound, “We have got to cross-fertilize between the laboratory of thinking and its application to life. I resent more and more [the] shallow dichotomy between ‘theory and practice’” (quoted in Baker at 220).⁴⁷ Also believing it was a pro-

46. Baker offers no theory for reconciling Frankfurter’s adamant refusal to accept compensation from public interest clients with his eventual acceptance of what he initially refused also—Brandeis’s stipends to support this work. See *supra* note 8. Perhaps by the time Brandeis began to make regular payments to Frankfurter’s account, Frankfurter was more in need of money because of his wife’s deteriorating health. See, e.g., Baker at 241–42.

47. See also *id.* at 225.

fessor's duty to speak out on controversial issues, he declared "[W]e are *professors*, and that means to profess those qualities which lie at the very foundation of independent truth-seeking" (quoted in Baker at 234). Through his regular contributions to national governmental policies, especially during the Roosevelt Administration, Frankfurter—in the apt words of a current Harvard Law School professor—invented the "colossal Harvard Law professor with one foot in Cambridge and the other in Washington."⁴⁸

The careers of Brandeis and Frankfurter demonstrate how the gap that has traditionally separated the role of the private attorney from that of the law professor can be narrowed, for the benefit of both the individual professional and the public. Thus, although Brandeis was never a full-time teacher,⁴⁹ he made numerous significant contributions to legal education and legal scholarship. For example, he made major intellectual (as well as financial) contributions to the curriculum development, libraries, and educational programs of both the Harvard Law School and the University of Louisville Law School;⁵⁰ he was a founder of the Harvard Law School Association and the *Harvard Law Review* (Strum at 397); he regularly counseled law students and law school graduates concerning their legal careers (Baker at 39–40, 185); he steered many promising young law school graduates, including Felix Frankfurter, toward academic careers (Strum at 359–60); and he wrote numerous scholarly works, including a law review article that is widely considered one of the most influential ever published.⁵¹

Likewise, although Frankfurter was engaged in the full-time practice of law for only a brief period immediately following his law school graduation (Baker at 63–64), he made numerous contributions to important cases and causes. For example, he handled a leading case challenging the Palmer "Red" deportations of the early 1920s; he was one of the founding members and early leaders of the American Civil Liberties Union; he headed the legal defense of the garment workers' union against an injunction that could have destroyed it; and he led the effort to secure a new trial in the celebrated Sacco and Vanzetti case.⁵² Brandeis viewed Frankfurter as "the most useful lawyer

48. See Stone, *supra* note 12, at 347.

49. Brandeis initially struggled in choosing between an academic career and private practice (Strum at 360). He at first leaned toward academia, because of "the almost ridiculous pleasure which the invention of a legal theory gives me" (Baker at 25). However, he ultimately decided that he wanted "to become known as a practicing lawyer" (*id.* at 26). Nevertheless, Brandeis did teach evidence at the Harvard Law School from 1882 to 1883, and he also taught business law at the Massachusetts Institute of Technology from 1892 to 1894. See, e.g., Strum at 35–37.

50. See, e.g., Levy & Murphy, *supra* note 9, at 1291–96; Freund, Mr. Justice Brandeis: A Centennial Memoir, 70 Harv. L. Rev. 769, 769–75 (1957).

51. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890–91). Regarding the importance of that article, see, e.g., Strum at 37–38 (Harvard Law School Dean Roscoe Pound later stated that it "did nothing less than add a chapter to our law"); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong? 31 Law & Contemp. Probs. 326, 327 (1966) (refers to the Warren and Brandeis article as "that most influential law review article of all"); Siegel, Privacy: Control Over Stimulus Input, Stimulus Output, and Self-regarding Conduct, 33 Buffalo L. Rev. 35, 38 (1984) (describes article as "the singular prominent example of the potential for the legal academic community to influence courts").

52. See, e.g., Rauh, Felix Frankfurter: Civil Libertarian, 11 Harv. Civ. Rts.–Civ. Lib. L. Rev. 496, 498–501 (1976).

in the United States.”⁵³ During the New Deal, before Frankfurter was named to the Supreme Court, the press referred to him as “the most influential single individual in the United States” (Baker at 297).

Conclusion

In light of Brandeis’s and Frankfurter’s deep dedication to education, it is fitting that the Strum and Baker studies serve a quintessentially educational purpose: not only to inform the reader of the fundamental motivating faiths that guided Brandeis and Frankfurter throughout their lives, but also to provide substantial evidence that those faiths were justified. The life stories of Brandeis and Frankfurter bear witness to the fact—as they both profoundly believed—that within a democracy, educated citizens can have a significant impact in effecting progressive reform.

53. See, e.g., J. Lash, *From the Diaries of Felix Frankfurter* 39 (1975).