THE WRITING OF JUDICIAL BIOGRAPHY— A SYMPOSIUM*

INTRODUCTION

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No biography of a judge is so poor that there is no one to speak well of it, none is so good that there is no one to find it disappointing. Some reviewers make no bones about being quite subjective: the author is a friend of mine and I agree with the judge about whom he wrote. But it is not to be doubted that most critics mean to be judicial about judicial biography, so that the wide disparity in their judgments reflects the absence of generally accepted standards. What qualities should we demand of a book about a judge, how can the level of accomplishment be raised? It seemed that a free discussion within a group of men experienced in the business would develop criteria of excellence and point to lines of improvement. Hence the convening of the roundtable here recorded.

In 1888, when Justice Miller was addressing the Law Department of the University of Pennsylvania, he commented with characteristic ruggedness upon "recent writers of books" whose work proved to be nothing more than a mere assembling of "ill-considered extracts from the decisions of the courts." "This field of literary labor has been overworked," he bluntly announced; the public was "tired of the endless production of books not needed and of little value."[1] Today it may be said in paraphrase that a good many studies about judges prove to be ill-considered collections of extracts from their opinions, and that this field of literary activity, too, has been overworked. There is no value in mere snipping, arranging and commenting unless somehow the biographer can contribute mature wisdom and deep insight.

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1. *The Use and Value of Authorities*, 121 Pa. St. xix, 23 AM. L. REV. 165 (1889).

Too many have been content to rely on the most obvious sources. To collect material adequate for a good judicial biography one must go into the field and search—imaginatively, patiently, persistently. As Mr. King's paper will suggest, sometimes the quest is handsomely rewarded. No doubt much material of first-rate importance still awaits the systematic search and the practiced hunch.

The writer who decides to take a judge as his subject without being prepared to do a responsible and competent piece of work leaves judicial biography the poorer by his dabbling. For once the manuscript materials—which ordinarily are not too abundant—have been exposed to view in no matter how imperfect a study, it is unlikely that any other worker will soon care to write on the same subject. He would be obliged constantly to make acknowledgements to a book to which he was actually under no indebtedness.

A judicial biographer has a wide range in selecting the frame within which he will work. Some have dealt with a man who was much more than a judge. Taney, Brandeis, and Taft, for example, each bore a large part in public events quite aside from service on the Supreme Court. Another figure, on the other hand, may owe his importance to the one great fact that he sat upon the bench. Accordingly the scope and emphasis of one study may appropriately be very different from that in another. Even where the subject was uniquely a judge, the biographer has several choices as to the focus. He may concentrate upon the inner man. He may study the man as judge—his conception of the judicial function, his philosophy of law in society, his professional competence and the artistry which marked his work. Again, the author may view his subject against some significantly elaborated background—perhaps an entire period in the history of the law, or the movement within a particular field (common law, federal law, or whatever it may be), or the institutional history of the court of which the judge was a member. All of these conceptions seem sound enough in the abstract. A wise choice in a particular case will depend upon the characteristics of the particular subject, the materials available, and the interest and special proficiency of the author.

Whatever the point of view from which one writes, one needs an adequate conception of the professional business in

which the judge was engaged—as Professor Frank explains candidly and fairly in his paper. Quite aside from having a working knowledge of the law and a familiarity with the ordinary operations of legal bibliography, an effective student of the judiciary needs to develop special skills and methods of research. On this point the privileged position of chairman and introducer affords an opportunity to select for emphasis certain ideas developed in the symposium.

A judge's opinions, however charming they may be as literature and however luminous in their philosophy, are not mere essays written *ad libitum*. A part of understanding is to discern how far they were influenced by the facts as reflected in the record, by the form in which the action was cast and by the remedy sought, by the nature of the review available, and by the intensity and direction of the arguments of counsel. The records in cases taken to the Supreme Court of the United States go back to January Term 1832, the briefs to December Term 1854. Ordinarily one is not entitled to feel assured he has gotten to the bottom of a case until he has examined these materials.[2] At the very least one should have a look at the report of the case in the state or inferior federal court from which it was brought up.

What was the state of the law before the Court spoke? Often a leading decision becomes so well learned that we lose the ability to perceive that it might have gone differently. Did the opinion lay down something new and significant—or did it merely repeat familiar doctrine? Often it is enlightening to go back to the old treatises, to see what they said before and then after the decision. The old law journals are inadequately indexed, but if one will have patience to turn the pages he will come upon many items of interest.

The relation between legislation and judicial action ought always to be kept in mind. Actually it is well-nigh ignored

2. Everyone working in the field should be familiar with the information set out by H. C. Hallam, Jr. and Edward G. Hudon of the Library of the Supreme Court of the United States in their account of *United States Supreme Court Records and Briefs: A Union List, with a Note on their Distribution and Microfilming*, 40 LAW LIB. J. 82 (1947). At this point one may note the intersection of the private aspect of adversary proceedings with the public interest in the rulings to which they give rise. The Court hears only "cases and controversies" between parties having adverse interests; the rules of court appropriately require litigants to print and file only such quantity of the papers as is required for the work of the Court—30 copies of the record and 40 of the brief. Yet these materials perform a vital function in the judicial process and so are of major public significance.

in much of the writing about the work of judges. We observe, for instance, that the Supreme Court held a state statute invalid. Perhaps this law had long been on the book. How did it come to be challenged at that particular moment? Did the statute express a policy which though once deemed sound had come to appear unsuited to the needs of the country? How far was this statute typical of legislation throughout the United States? What in the reports appears as a single instance dealing with a particular statute may in truth have been decisive for an important nation-wide trend. One should work the session laws and the revised statutes side-by-side with the reports.

A judicial biographer needs, also, to look up from the law books to inquire: Out of what social conflict did this litigation arise? What was the ultimate objective in view? Questions such as these should be pursued into out-of-the-way places where the answers may be found. I would suggest two important sources we have not even begun to explore. One is the records of the corporations interested in the litigation. The reports of committees, the opinion of counsel, the votes of directors, may disclose the strategy of some campaign of which this lawsuit was a skirmish or perhaps a decisive battle. Another untapped source is to be found in the letter-books, briefs, and other office papers of law firms prominent in the conduct of major litigation. Mr. Swaine has opened that door for us in *The Cravath Firm.* His example should quicken the interest of other practitioners in making that sort of material available to responsible scholars.

Pursuing these reflections in anticipation of the roundtable, my thoughts naturally turned to the influence which Mr. Justice Frankfurter has exerted through the years—by exemplifying the most refined and discriminating standards in the study of judicial action, by stressing at the same time the enlarged view that puts each instance in its perspective, by fostering the traditions of our highest Court. It occurred to me that a note from him to be read at the opening of the symposium would be especially appropriate. My request was communicated just in time to permit Justice Frankfurter, responding instanter, to send his greeting to the roundtable on judicial biography. I thank him for permission to quote.

Supreme Court of the United States
Washington, D.C.
December 27, 1948

My dear Fairman:

Your kind desire to have a word from me for your round-table on judicial biography stirs in me the nostalgic desire for academic freedom. (Not that I am implying a grievance against the restraints of the bench, for the Thirteenth Amendment protects me against involuntary servitude.) As it is, let me take shelter behind thoughts I was free to utter when academic freedom was mine. I find that nearly twenty years ago I ventured these observations:

> the work of the Supreme Court is the history of relatively few personalities. However much they may have represented or resisted their *Zeitgeist*, symbolized forces outside their own individualities, they were also individuals. The fact that they were *"there"* and that others were not, surely made decisive differences. To understand what manner of men they were is crucial to an understanding of the Court. Yet how much real insight have we about the seventy-five men who constitute the Supreme Court's roll of judges? How much is known about the inner forces that directed their action and stamped the impress of their unique influence upon the Court? Only of Marshall have we an adequate biography; Story's revealing correspondence takes us behind his scholarly exterior; very recently not a little light has been shed on the circumstances and associations that helped to mold Field's outlook. About most of the Justices we have only mortuary estimates.

Since this was written, a half a dozen or so additional Supreme Court biographies have been published. It would be invidious for me to speak of their inadequacies or their merits. Suffice it to say most worlds of exciting judicial biography still remain to be conquered. Indeed, my lips may be judicially sealed regarding living biographers, but I may be pardoned—or not—for confessing that time has lessened for me the significance of Beveridge's *Marshall.* I do not remotely imply that this is due to disagreements I may have with Beveridge's views. The excellence of a biography is hardly to be measured by the extent to which it echoes a reader's opinion. A biography is to be judged by the insight it gives into the complexities of character, not by the satisfaction it affords the reader's presuppositions.

I suppose judicial biography has all the difficulties that confront biographers of those who are thinkers rather than

doers. But there are additional difficulties as to judges. A member of the Supreme Court is at once a soloist and part of an orchestra. While dissenting opinions seem like solo performances, even that is not always true and, in any event, the private rehearsals, as it were, behind the impenetrable draperies of judicial secrecy may tell much more about the soloist and the rest of the orchestra than the public performance even remotely reveals.

Judges like other people have their inborn qualities, deflected and disciplined, enriched or narrowed, by their education, their reading, their experience, their associations, their depth and drive of creative reflection, their capacity for rigorous, undeceiving self-analysis.

Judges are seldom men of great literary talent and not always are they copious letter writers yielding self-revelation—self-revelation that is either the product of a Socratic kind of self-knowledge or the unintended self-revelation which gives a picture of oneself as one would like to appear to oneself as well as to others. One can infer much of Holmes's outlook on life as well as on law from his opinions. But how much greater our opportunity for knowing him by reason of his voluminous correspondence and that awing list of books covering his reading for half a century. Reading maketh a man only in part—yet how illuminating it would be to have a list of the books read by the justices, as well as to know who were their intimates before they went on the bench and after.

But the fullest knowledge of the elements that play upon a judge do not automatically reveal or explain him, any more than even Lowes's penetrating *Road to Xanadu* accounts for the creativeness of Coleridge. Still less do the variegated and illusive aspects of human personality lend themselves to tidy but tight categories. Perhaps you will tell us in your Life of Bradley why that "corporation lawyer" should have entertained such drastic but wise views of constitutional law against what were deemed to be the interests of property while Harlan, who thought himself a tribune of the people, gave comfort to those interests.

I have said very little but enough, I hope, to make you realize why I covet your academic freedom to discuss these exciting problems. They are problems that go to the root of the judicial function and to our capacity to produce men

adequately equipped to discharge it. But even one who is *ex officio* compelled to deny himself freedom of speech may say wholeheartedly that the great art of judicial biography requires deep understanding of the judicial process, delicate analysis of character, and the creative humility of the artist.

My best wishes for the success of your round-table discussion. May it stimulate great biographies.

Very sincerely yours,

Felix Frankfurter

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TYPES OF JUDICIAL BIOGRAPHY

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It has been a matter of mingled regret and anticipation that American judicial biography has remained a relatively undeveloped field of scholarship. The reasons for this neglect are obvious. It is traceable partly to the difficulties presented by the materials, partly to the unspectacular nature of the careers of judges, who with some notable exceptions have been less subject to the drama of fate than most public figures, and, incidentally, to the economics of the book business. Commercial publishers proceed quite frankly on the regressive assumption that the only biographies worth printing are those about persons who have already been written up, and the more often the better. After all, who buys a biography except on someone whose name is familiar? Happily, our burgeoning university presses are able to operate on another theory. The gaps in the biographical history of the Supreme Court are rapidly being filled. And we may expect that as an increasing number of Ph.D. candidates assault a constantly diminishing number of thesis topics, the careers of the more important state and lower federal court judges will eventually be given proper consideration.

Judicial biography cannot and should not escape judg-

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