writing judicial biography is a deep-seated consciousness of the difference between primary and secondary evidence. American historians have, I believe, sometimes used newspaper sources without a full consciousness of this distinction. Newspaper sources are usually secondary. They are primary only when they contain an article by one's subject. American newspapers have never had any facility in reporting litigation, such as is possessed by the London Times, where the reports of trials are by trained barristers. American historians have often neglected the official reports of the Court in favor of newspaper reports. Here the lawyer has at least the advantage of familiarity.

Another great desideratum in a biographer is objectivity. A lawyer is well acquainted with the difference between the partisan approach and the objective approach. Although partisanship is the practicing lawyer's traditional attitude, he must strive to shed it in the preparation of a judicial biography.

WHO IS THE "GREAT" APPELLATE JUDGE?

Willard Hurst†

One characteristic so marks most judicial biography—good, bad, and indifferent—as to raise a question about its meaning. This is the let-down that occurs when the biographer has brought his subject to the Bench. While he explores birth, family, education, practice, and politics, the author usually seems to be enjoying himself. But in the chapters that deal with the judicial years, a grim tone enters the treatment; the author seems to feel that he has had his fun, and now he must pay for it. And so with conscientious plodding, he gives us the usual generalities about separation of powers, due process, equal protection, and the rest.

So many judicial biographies bear this stamp that we may interpret the fact as reflecting a remarkable lack of definition of the problems posed by "judicial" biography. Few books written about judicial years show much effort to define what questions are worth asking about a man's

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judicial career, or provide much notion of how to go about answering them.

We confront two main questions in appraising a judge: (1) What is the nature of the judge's job? (2) In what consists greatness, or quality, in the doing of it?

Let me suggest some possible criteria by which to measure at least the appellate judge's job.[1] I do not advance these dogmatically; certainly in the present state of inattention to the problem every man is entitled to make up his own list.

It is part of our tradition that we think of public issues in terms of law. Such a tradition puts to the front as an important function of the judge that of educator and symbol-maker. What has been the greatest impact of the Supreme Court of the United States on our national life? Not, I will venture, the results of its decisions; particularly, not the consequences of its judgments in that much exaggerated field—judicial review. Rather, in full perspective the Court's main influence is its contribution to the main currents of American ideas about government, about the rights and duties of individuals and of men acting in association, and about the standards of decency to be observed in the use of government's power. Viewed in this light, the judge's "style" takes on a significance far more than literary, and both his ideas and his effectiveness in their articulation become important data for the historian of ideas.

A second social function of the judge has been that of planner of policies. It is a function of high importance in any society, but particularly in ours, whose preoccupation

1. It is apparent that biographers have proceeded on the unspoken assumption that the only judicial job worth attention is that of the appellate judge. There is little or no outstanding work on trial judges; the insight we have of this branch of judging we owe so far chiefly to autobiography—for example, the two sensitive books by Judge Curtis Bok.

Again, examination of judicial biography suggests a second unspoken premise: that only the work of the Supreme Court of the United States deserves study. We have as yet little enough first-rate writing on that Court; but of state appellate judges we have practically nothing. Horton's *Kent* is an honorable exception; but the measure of our deficiencies is the fact that we have no significant study of even so towering a fignre as Shaw. This lack of attention to the state appellate courts cannot be justified by their unimportance. For one thing, we know so little about their functioning that to call them important or unimportant is at present largely guesswork. For another, their role in building a body of common law for the United States in the years 1810-1880 is on the face of it enough to cast the burden of proof on him who would deny their significance.

with the exploitation of a continent allowed little patience for the long view. Judges, it is true, have not often had the opportunity to lay out policy on the grand scale. The exception has been in some periods of constitutional decision; here is one aspect in which we may properly assign importance to the task of judicial review of the constitutionality of legislation.[2] But attention to the judge as planner will bring us to appraisal of a more pervasive function, generally neglected in judicial biography. Until the comparatively recent overshadowing rise of the administrative process, we have relied on judges as perhaps our primary experts in the difficult business of relating particulars to generals, of giving life to vague standards of community policy through skillful handling of detailed application. Especially in the states, the legislature has tended to lack the tradition or means for sustained follow-through, and this enhances the function of the courts in the evolution of policy. In this light, for example, the judge's approach to problems of statutory interpretation takes on an importance rarely recognized in judicial biography.

A third appellate court job which has generally had little attention from the biographers is the administration of the judicial system: What is the top court's contribution to the morale and efficiency of the lower courts, and how does it appraise the scope and limits of its responsibility in these respects? Judicial self-restraint, vis-à-vis the legislature, has become a trite subject; but there is little in the books about the reviewing judge's ideas and practice concerning his proper relation to the trial judge.

These are some aspects of the appellate court job that the biographers have typically avoided. Likewise, judicial biography has been surprisingly lacking in a feeling for history in its most elementary sense—that of time. To be an appellate judge has not meant the same thing, functionally considered, in all periods of our history. Take the striking contrast between men like Shaw and Cardozo. Shaw is the exemplar—Ryan of Wisconsin is another—of the great 19th century period of judicial lawmaking. Shaw's opinions deal with public policy in broad strokes and speak with a

2. It is a reasonable hypothesis that John Marshall, for example, by his imaginative and adroit development of commerce clause doctrine contributed a good deal to the maintenance of a single free-trade area in the nation.

buoyant confidence natural to a time when judges were masters of our law, and were fully conscious that they were. Cardozo, on the other hand, speaks with a care for detail and distinction, and a sensitivity to his proper limits as judicial law-maker, that express a wholly different conception of the judge's job. After two generations of eclipse, the legislature, and then more lately the executive, had begun to take the lead in policy. The 20th century appellate judge is no longer a policy-maker of the first rank; proper appraisal of his function must weigh values which had secondary importance in the 19th century.

So much for definition of the appellate judge's function. These are at least significant aspects of his job. Now, in what consists greatness in the doing of his job? What are the most important ways in which the appellate judge may affect his times? Here is our central question, but despite its importance it is almost unexplored. What makes a "great" judge? You will search the books and learned journals and come up only with scraps of analysis of this question, the answer to which should provide the whole framework for judicial biography. There are certain names that recur in essays and in the bar association after-dinner speeches. Some years ago Roscoe Pound nominated ten or so state appellate judges as the "greats" of the 19th century—Shaw, Doe, Ruffin, Martin, and others. Those names turn up elsewhere with suspicious frequency; there is the uneasy suspicion that all of the solemn judgments passed on our great figures of the bench come back to that one list which Dean Pound gave us. We have failed to develop a comprehensive, explicit statement of a norm by which to weigh the quality of the judge's work. By what criteria do we single out Shaw, and the rest?

Integrity? Of course we want our judges to be honest in the sense that they will not sell their decisions for personal gain. This is, however, to define integrity in the most elementary terms. Even so, it poses problems that are unexplored. What sickness in our society can explain why a senior judge of our most distinguished Federal Circuit Court of Appeals, a man who one would think had all in authority, honors, and security that a man could want, would sell his vote to get money?

But we want a more subtle integrity in those whom we

call great judges. We want the intellectual integrity that makes a man conscious of his own limitations of imagination and sympathy, aware of self-interest and prejudice. It is dreadfully easy to be the Pharisee on the bench. We put Holmes in our list of greats in large part because of the value we put on his irreverence toward judicial pretense. The problem of intellectual integrity is a peculiarly challenging one in the case of the judge, because typically he is called on to assume the burdens of impartiality after a long training in being the partisan. The moral hazard of the lawyer is that he will justify his means by his particular end. Here, then, is a prime problem for the student of such a man as Brandeis. As a practitioner, a feared opponent and valiant champion, master of technique and not mastered by it, daring, adroit, sometimes ruthless in attack, yet holding to principle: what in the practice of such a man must the biographer find to explain why the judge could cast off the partisan robe so completely? Despite the challenge of the question, which poses itself in almost every great judicial career, judicial biography is typically most unsatisfactory in telling of a man's practice.

We want our judges to be men of learning, and of wisdom. Pretty clearly, we are more concerned that they be wise than that they be learned. Learned men may be small men. Story was a learned man. He was also a rather pretentious little man, and afraid of ideas and events. Marshall was not a very learned man, but he had bold imagination and courage of decision, and a vision of what an economically unified nation could mean for men's living on this continent.

Still, we do want learning, in the sense of craftsmanship in the job; the wise man, like Marshall, will have that even though he may not know so well as others the black-letter. Judicial biographers show very little awareness of the criteria of craftsmanship in the job. And, not surprisingly, since they do not seem to know what to look for, they do not see the evidence of it. Good craftsmanship in any job, for one thing, involves economy of means, getting the product with minimum waste and fuss. A judge's handling of citations, for example, can be most revealing: the care in selection, the precision in choice, the skill in building on existing foundations.

Again, the choice of means reflects the master. A great

deal of judicial history, for example, is wrapped up in the techniques of statutory interpretation. It is no accident that the 19th century digests and treatises are full of cases enunciating abstract rules of statutory construction: "strict" construction of this or that kind of law, "liberal" construction of one or the other. Twentieth century digests and writings show less and less of such talk, and more and more discussion of the use of committee hearings and reports, of executive messages, and amendments and revisions.[3] Finally, let us note that craftsmanship shows itself nowhere more surely than in the handling of facts. In the hands of a first-rate judge the statement of the facts of a case seems almost itself to declare the proper result. In his hands, the statement of facts will reveal directions of thought and policy, and light up the competing considerations among which choice must be made. Of such matters can we make up a catalog of the marks of good workmanship.

On what bases shall we weigh wisdom? Wisdom, that is, for the judge. The judicial biographers tell us little of their criteria of wisdom; indeed, they actually pass little judgment on what would seem to be their ultimate problem. I will make only two suggestions. The work of judges must be subjected to two tests that apply sharply to all men who have the responsibility of power. First, they will be measured by their knowledge of what they are doing, by their sense for the secondary and more remote consequences of their decisions. For the judge, this means not only awareness of the choices he makes, but also of their significance in the life of his community. Mr. Justice Holmes cautioned that judges need a touch of Mephistopheles. Second, the wisdom of the great judge consists in a grasp both of the potentialities and the limitations of the kind of power that he wields. For the Bench, this question which Dean Pound posed as "the limits of effective legal action" presents peculiar difficulties. For, as was suggested earlier, the greatest influence of the courts has probably been exerted not along obvious lines of power, but in ways subtly related to the currents of

3. The difference in approach reflects a different role of the judge. The 19th century judge was not keenly conscious of obligations to the legislative intent; he was riding high in the confidence of an era when judges were accustomed to the role of law-maker. The 20th century judge is increasingly aware that he is in fact and not only in theory merely a co-ordinate officer of government, and no longer the primary policy maker. See discussion p. 397 *supra*.

thought and emotion that move men to action, and to the inertia which holds back what must be done.

Sensibility to such considerations is imperative for the biographer who would acutely interpret a judicial career. The lack of a conscious philosophy is apparent in most judicial biography to date—the best as well as the worst. Judicial biography has a job yet to do in forming and applying adequate criteria, first as to the nature of the job, second, as to the measure of greatness in the job. Discrimination is the prerequisite of distinction. The "great" judge's impact is felt on the law, on politics and on the history of ideas. A definitive conception of the "great" judge is essential if judicial biographers are to make significant and durable contributions to legal literature. This is the inquiry and the challenge.