

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,

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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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ment by comparison with other forms of the biographer's art. At the same time the legal materials produce special responsibilities and provide certain opportunities for analysis and criticism which must be evaluated by more narrowly professional criteria. I propose to present a few comments on the relation of judicial biography to other varieties, and some general observations on the several types of approach within the field itself. Biographical writing in general, since the beginning of the present century, has been overwhelmingly influenced by the techniques and assumptions embodied in the work of the late Lytton Strachey. In his sketches of eminent Victorians, Strachey broke sharply with an older tradition of biography that was full of fatuous eulogy and badly digested history. He demonstrated successfully that it is not necessary to be tedious and dry in order to be scholarly or authoritative. His special talents were a lucid and urbane style, a brevity which excluded everything that was redundant but nothing that was significant, and a realism that produced insight through a nice combination of factual accuracy and iconoclasm. Above all, he insisted that personality, rather than achievement, must be the primary concern of biography, and he was a master in selecting the particular episodes or aspects of his subjects' lives which most vividly revealed character.

The influence of these procedures is clearly evident in the work of such popular biographers as Carl Van Doren, Marquis James, and Arthur Schlesinger, Jr. But their influence has been resisted in judicial biography, and for understandable reasons. In the case of a judge, personality and professional accomplishments have an intimate reciprocal relationship. Biographies of judges which do not deal with technical legal achievements, as is the case with a recent and rhapsodic best seller on Justice Holmes, are a little worse than incomplete. Further, when an emphasis on personality is joined to psychological interpretations of judicial opinions—à la the realist school of jurisprudence—the combination may turn out to be what Mr. Ben W. Palmer, in the introduction to his study of Marshall and Taney, has called the "biological, visceral, glandular, Freudian and episodic" kind of biography. In short, there is always the possibility that the search for the private character of the man will lead to an illegitimate and inaccurate subjectivism.

Douglas Freeman, currently at work on a biography of Washington, put the problem recently into these cautious words: "I think I know now where Washington was every day of his life, but I would not presume to say what was going on in his mind." Yet an insight into inner character and motivations must be provided if judicial biography is to be worthy of the name. The judicial biographer must accomplish the special and difficult task of balancing sharp character delineation and the impersonal legal materials.

The type of judicial biography closest to the standards of biographical writing in general, and incidentally the most profitable financially, if that crude criterion may be mentioned, is that which fills the canvas to the frame with a picture of the judge as a person, subordinating the historical background, but showing the significance and impact of the subject on the contemporary scene. This approach seeks to realize the purpose of all art—the explication of certain values or forces, or a whole historical epoch, through one example or participant. It is a type of biography which demands the highest literary skill, and which requires the kind of extensive, intimate, and preferably first hand, information about the subject's life and habits which is usually difficult, if not impossible, to obtain. Aside from the problem of materials, there are actually only a few of our judges who should properly be treated with this method. Most are either not sufficiently striking as personalities, or sufficiently significant as representatives of trends and ideas. Two recent biographies, however, one on Brandeis and one on Holmes, are brilliant examples of the successful use of this approach.<sup>1</sup>

A different technique is adopted by another group of judicial biographers and has produced the majority of works now available. This type includes more historical background, and ranges more systematically into the issues and politics of the period involved. It shows the impact of milieu on the Justice, as well as vice versa. It requires genuine historical sense and substance, plus discrimination and careful organization. It is particularly valuable as a method for illuminating not only the career of one man, but also the institutional workings of the judicial branch as it thinks

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1. MASON, BRANDEIS: *A FREE MAN'S LIFE* (1946); BIDDLE, MR. JUSTICE HOLMES (1942).

about and acts upon the practical problems of law and statecraft.<sup>2</sup>

Additional types of judicial biography are distinguished from the first two mentioned by reason of special emphasis upon certain elements or ramifications of the jurist's art. Critical analysis of the evolution of constitutional principles is an obvious device, well illustrated by a recent biography of Chief Justice Stone.<sup>3</sup> The equally obvious weakness of an exclusively legal treatment is the fact that it makes the work both more and less than a biography. It may very easily lead to over-stressing the importance of a particular judge in the growth of the law, unless a comparative technique is adopted. It is, therefore, a method perhaps better suited to the monograph or periodical.

The examination of judicial lives from the point of view of economic forces and ideas has, with some exceptions, been undertaken largely by special pleaders. They have written primarily as historians, rather than biographers. Jeffersonians, with much solid fact and good sense, have corrected many of the hypocrisies and platitudes of the old Federalist historians who accepted without question the identification of certain economic concepts with constitutional principles.<sup>4</sup> Researchers of Socialist persuasion, such as Gustavus Myers, have pulled from official sources many significant facts about the economic affairs of certain judges.<sup>5</sup> A great deal of very important interpretative work remains to be done on this level. But it remains to be done with a broader grasp of economic theory and history, and a more realistic view of the origins of the economic convictions of judges and the way they are transmuted into law. It is hardly tenable any longer to hold that personal interest is a direct influence in this matter. But vital economic forces are clearly at work

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2. See especially BEVERIDGE, *LIFE OF JOHN MARSHALL* (4 vols. 1916); FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890* (1939); FRANK, *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* (1949); LAWRENCE, *JAMES MOORE WAYNE* (1943); LEIF, *BRANDEIS* (1936); MCLEAN, *WILLIAM RUFUS DAY: SUPREME COURT JUSTICE FROM OHIO* (1946); TRIMBLE, *CHIEF JUSTICE WAITE* (1938); SWISHER, *STEPHEN J. FIELD* (1930), *ROGER B. TANEY* (1936).

3. KONEFSKY, *CHIEF JUSTICE STONE AND THE SUPREME COURT* (1945).

4. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835* (1944).

5. MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1912); BOUDIN, *GOVERNMENT BY JUDICIARY* (2 vols. 1932).

through our judges. The Roosevelt Court should provide significant opportunities for the economic approach.

A fifth and a relatively unexploited area of interpretation is the relation between the thinking of particular judges and systematic philosophy or political theory.<sup>6</sup> Vogues in philosophical schools come and go, but while they hold sway as part of the intellectual tradition, they may and do influence the way in which judicial problems are posed, if not always the way in which they are solved. To mention just one example, the so-called Scottish "Common Sense" philosophy, now dead as a dodo, was, during the late 18th and early 19th centuries, widely popular among American lawyers and judges, providing a set of basic psychological and metaphysical concepts which proved most useful as an aid to formulating and rationalizing legal and constitutional principles.

As a final, and admittedly very gross, method of classifying the types of judicial biography, it might be observed that some biographers write from within and some from without the scheme of values that has governed the life and work of their subjects. Either position, in the extreme, reduces the power and value of the interpretation. An uncritical acceptance of the judge's assumptions and beliefs, plus a compulsion to apologize for what might be errors or deficiencies, is neither instructive nor convincing. Justice Holmes in particular has been subjected to the adoration treatment. Some of his biographers have been driven to desperate lengths to express their awe and respect. One sums it up in these words: "Justice Holmes attained a wisdom that was wider than the market place, deeper than any oil well." Without belaboring the point it seems clear that Holmes' knowledge of the law was not infallible and that his personal philosophy would be regarded by some as not ethically adequate. On the other hand, hostility to the subject's views may easily lead to superficiality, inaccuracy, and unfairness. But, of course, few biographers choose subjects that do not arouse their interest and sympathy. On the whole, in view of the power of judicial symbolism in the American tradition, the primary need would seem to be for objectivity and candor, and perhaps even a little of Strachey's iconoclasm.<sup>8</sup>

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6. See SMITH, ROGER B. TANEY: JACKSONIAN JURIST (1936).

7. BENT, JUSTICE OLIVER WENDELL HOLMES 4 (1932).

8. Although a commentator may be fully aware of the necessity of objectivity and fairness, it is sometimes possible to misconstrue even

The classification of the various types of judicial biography given above is necessarily arbitrary. Many biographies may be placed in more than one category, and the truly great biography by no means must encompass all of these approaches. The judicial biographer has succeeded if what Carlyle said of Boswell can be said of him. "Boswell," he wrote, "in spite of his sneaking sycophancies, wrote a good Book because he had a heart and an eye to discern Wisdom, and an utterance to render it forth."

### INGREDIENTS OF JUDICIAL BIOGRAPHY

*John P. Frank*†

A completed judicial biography represents a series of problems solved; and some of those problems will be considered here. But before a biography can be analyzed in terms of its subsidiary difficulties, there must be identification of the basic purposes and goals in describing the life of a judge.

The biographer's object can be stated only generally, but the generalization need not be devoid of meaning. Biography seeks to recount the events of a life with fidelity, but it needs to be much more than a series of photographs, no matter how detailed, of the stones over which the hero strode. A biography portrays a life, but it must do so in

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the written words of judges because the circumstances, or the total philosophical fix, are not adequately taken into account. A rather interesting example of such misconstruction is involved in the frequent quotation of the late Chief Justice Hughes' statement: "We live under the Constitution, but the Constitution is what the judges say it is. . . ." [Speech before the Elmira Chamber of Commerce, May 3, 1907, in *Addresses*, 139 (1908). Quoted in MASON, *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE* 1 (1933); CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 1 (1934); HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835* title page (1944).] The writer has in his possession a letter dictated by Chief Justice Hughes, dated February 2, 1948, in which it is stated that this quotation has been wrongly interpreted and given an implication Hughes regarded as unfair to the Supreme Court of the United States. In short, the legitimate interpretation is not that the Constitution is *whatever* the judges say it is, but rather that the Constitution *is* what the judges say it is.

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