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KEYNOTE

JUDICIAL BIOGRAPHY: HISTORY, MYTH, LITERATURE, FICTION, POTPOURRI

PHILIP B. KURLAND*

Last summer, I was enjoying my emeritus status in the mountains of New Hampshire, in my wife's wonderful aerie—a modernly equipped eighteenth-century farm house—where I had the difficult chore of deciding each day whether I would recline on the open porch on the south or the screened porch on the north. The vistas are equally beautiful. The phone rang and I found myself listening to the dulcet tones of Professor Norman Dorsen. He had, he said, arranged this wonderful conference on judicial biography. It was thick with heavy thinkers and great speakers. And our redoubtable Norman, by way of comic relief for his conferees, had the prescience to seek a sitting Supreme Court Justice to speak at the Friday dinner session. But the Justices were all busy, having been booked by Professor Arthur Miller or some other television guru for some equally appropriate (if extracurricular) judicial activities. Out of desperation, and understanding contemporary views on adhering to budget limitations, Norman asked me to undertake the role of top banana for the evening and talk a little about the Supreme Court in the days before the Flood. (Norman has long been under the illusion that I had once clerked for Joseph Story—or was it John Marshall?)

Because Norman was Norman, and because July 1994 was so far away from May 1995, and because my wife had just bought me a Macintosh PowerBook which she assured me would write talks all by itself, all three of us are here tonight. But do not fear, Norman extracted from me a promise of terseness: my talk shall be no longer in fact than an average-length Felix Frankfurter opinion—no matter how tedious it may seem.

Let me tell you, as an aside, that I have found in my late years a new savant who, though a lawyer, never served on the Supreme Court: John Sparrow, onetime master of All Souls. Toward the end of an accomplished intellectual life, he privately published a small

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book of poems including the following, which I offer as explanation not excuse for what I shall say:

To age and imbecility resigned
 I watch the struggles of my failing mind
 Lumbering along the all-too-well-worn grooves
 The poor old thing moves slowly—but it moves!¹

Ralph Waldo Emerson wrote in his "History" that: "There is properly no history; only biography."² As with other New England aphorists of his time, his witticisms often read as well backwards as forwards. Certainly as to American judges other than Justices of the Supreme Court, he might well have said: There is no biography, only history. For with few exceptions, time tends to erase the names of individual jurists. Even the story of the Supreme Court, to the extent that it is marked in history, is that of an institution, perhaps best known by the name of its Chief Justice to whom credit or blame is often attributed for accomplishments or errors most of which are, in fact, not of his doing.

The Roosevelt Court, as Professor Pritchett once dubbed it, was the interregnum between the Nine Old Men who frustrated the execution of the New Deal and the Age of Aquarius, which most of you still acknowledge as your salad days. It was this Court of the 1940s to which Norman Dorsen referred me, probably because the young do not believe that much of importance could have occurred before their time. And, in a way, he was right in thinking that this period can be regarded as antediluvian in the history of the Court. It was not the beginning of the Warren Court philosophy of judicial power, but it was the time when some of the shackles of precedent were loosened if not destroyed.

Oliver Wendell Holmes often told us that continuity with the past was not a duty, only a necessity.³ The Warren Court demonstrated in its way that the past was not even a necessity. It proved that an erased slate was as useful as an empty one if you were allowed the premise that no case was binding on you if you had not been a participant in its decision. The poet W.H. Auden was not a lawyer, but he seemed to

¹ John Sparrow, *Eppur si muove*, in *Grave Epigrams and Other Verses* 44 (1981).

² Ralph W. Emerson, *History*, in *Essays: First Series*, reprinted in *2 The Complete Works of Ralph Waldo Emerson* 3, 10 (2d ed. 1979).

³ See, e.g., Oliver W. Holmes, *Learning and Science*, in *Collected Legal Papers* 138, 139 (1920) (commenting, in speech delivered at Harvard Law School, that while continuity with past brings a "peculiar logical pleasure . . . , the present has a right to govern itself so far as it can"); Oliver W. Holmes, *Law in Science and Science in Law*, in *Collected Legal Papers*, supra, at 210, 211 (cautioning, in address to New York State Bar Association, that "historic dogma" need not dictate law since "continuity with the past is only a necessity and not a duty").

understand the shift of the Court from a basis in thought to one in feeling in one quatrain of "Law, Say the Gardeners, Is the Sun":

Law is the wisdom of the old
 The impotent grandfathers shrilly scold;
 The grandchildren put out a treble tongue,
 Law is the senses of the young.⁴

It is not to be wondered that the same poem contains the lines: "Law is no more, Law is gone away."⁵

Of course, if that is true, the subject of this conference becomes all the more important because under such circumstances judicial action is deemed to turn not at all on the rules and facts and circumstances, but only on the personalities and idiosyncrasies of the men and women in black robes. But that is for the learned speakers to moot during the day. For my postprandial talk, suffice it to speak a bit of how the Hughes-Stone Courts cleared the path for the halcyon days then-to-come.

First, however, I would tell you that some things *were* a bit different in those days. For the most part Brandeis's boast that judges were the only officials in government who did their own work was largely still true. The Justices themselves read the briefs, including the petitions for certiorari, and themselves wrote the opinions, if often borrowing from memoranda from their clerks. But they had time for the business at hand, although they each had but one clerk except for the Chief (who had only two) and Mr. Justice Eugene Gressman (who worked for Frank Murphy and did not have any). They seldom, if ever, talked publicly about the work of the Court—except occasionally to Marquis Childs or Drew Pearson—but were rather of the view that they should be a cloistered lot and that judicial opinions should speak for themselves even if in somewhat arcane language. The Justices then seemed, for the most part, to lack what a reviewer of Deirdre Bair's biography of Anaïs Nin in the *New York Times* called "some of the more unfortunate distinguishing characteristics of our age: an obsession with fame; a zeal for self-advertisement; a tendency to confuse [law] and self-expression; a rejection of intellect in favor of feeling; a romantic glorification of neurosis, selfishness, and irresponsibility."⁶ But that was then.

Whatever the deficiencies of the Old Court, however, it left much room for complaint, especially among the newly dominant—in

⁴ W.H. Auden, *Law, Say the Gardeners, Is the Sun*, in *A Treasury of Great Poems* 1220, 1221 (Louis Untermeyer ed., 1942).

⁵ *Id.* at 1221.

⁶ Bruce Bawer, *I Gave So Much to Others!*, *N.Y. Times*, Mar. 5, 1995, § 7 (Book Review), at 10 (reviewing Deirdre Bair, *Anaïs Nin: A Biography* (1995)).

academia at least—school of Realism. For it was still a Court and it believed then, as some still do, in Walt Whitman's conviction "that we ride forward on the shoulders of our ancestors."⁷ Precedents still have meaning to some, if only to point out the fallibility of even the most supreme of judicial courts. Precedent was never regarded as a procrustean bed to which new decisions had to be shaped, but rather as a devise for explicating a ruling and determining whether the reasons behind the ruling were still persuasively applicable to the questions to be addressed by the Court. The exercise of naked power—whether by executive, or legislature, or judiciary—is beyond constitutional plan, but it is probably least democratically justified by the appointed, life-term judges. It should be remembered that there were wise Justices before Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, even before Justices Brennan, and Marshall, and Blackmun, from whose antiquated opinions some wisdom might be derived even by the more competent contemporaries who fill the bench today.

Charles Evans Hughes wrote *Home Building & Loan Ass'n v. Blaisdell*⁸ before Roosevelt made his first appointment to the Supreme Court. Speaking for a five-to-four majority, and wiping out a long series of Contract Clause decisions denying the power to extend the period of redemption on a defaulted mortgage, he said:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlooks of their time would have placed upon them, the statement carries its own refutation.⁹

(Which is one of the great proofs of Holmes's dictum that "the life of the law has not been logic."¹⁰)

The post-New Deal Court was saved much labor, however, because the Roosevelt Court undertook a rather substantial revision of the constitutional landscape. It clearly marked the end, at least temporarily, of economic due process as measured by the principles of Adam Smith.¹¹ Perhaps most important, however, is what it did not

⁷ Malcolm A. Hoffmann, *The Long Canoe* 11 (1994) (imputing this conviction to Whitman).

⁸ 290 U.S. 398 (1934).

⁹ *Id.* at 442-43.

¹⁰ Oliver W. Holmes, *The Common Law* 1 (Little, Brown & Co. 1881).

¹¹ See, e.g., *Olsen v. Nebraska*, 313 U.S. 236, 243 (1941) (holding constitutional state statute capping fees charged by private employment agencies); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (holding constitutional state minimum wage law for women and minors); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (holding constitutional nonarbitrary state price controls on milk).

do; for it pretty much left moribund the Equal Protection Clause of the Constitution. The Equal Protection Clause was still, as it had been to Justice Holmes, "the usual last resort of constitutional arguments."¹² It was for later generations to recognize that equality was the key by which the Supreme Court could unlock the "true meaning" of the Constitution.

The Roosevelt Court did however begin the restoration of the rights of black Americans in jury cases,¹³ primary election cases,¹⁴ and even school segregation¹⁵ and electoral gerrymandering¹⁶ cases. Nevertheless, in 1946 the Court found that redistricting Illinois congressional districts was a political decision beyond the reach of the judiciary if only by a plurality of the Court with seven Justices sitting.¹⁷ It was not until 1962 that the judiciary began the construction of the rigid rule of "one person-one vote" for all elected offices.¹⁸ Equality of the sexes had not yet registered its meaning on the occupants of the marble palace on the hill. The best that can be said for them was that theirs was a macho code of chivalry, not one of equality.¹⁹

It was the New Deal Court that effectively made the religion clauses of the First Amendment a vital part of the Constitution, although their meaning has still to be satisfactorily resolved. Starting

¹² *Buck v. Bell*, 274 U.S. 200, 208 (1927) (holding that state provision mandating sterilization of inmates of state-supported institutions with hereditary form of insanity did not violate Equal Protection Clause because it was not overbroad).

¹³ See, e.g., *Smith v. Texas*, 311 U.S. 128, 132 (1940) (overturning conviction of black defendant on equal protection grounds because blacks were excluded from grand jury membership); *Pierre v. Louisiana*, 306 U.S. 354, 357 (1939) (holding that black defendant's indictment for murder violated Equal Protection Clause because blacks were systematically and intentionally excluded in grand jury selection procedure).

¹⁴ See, e.g., *Nixon v. Condon*, 286 U.S. 73, 81 (1932) (holding that refusal by state election judges to allow blacks to vote in primary election, based on statute allowing political parties to establish voting qualifications of its own members, violated Constitution). But see *Grovey v. Townsend*, 295 U.S. 45, 48 (1935) (upholding state political convention's decision to exclude blacks from party membership because decision did not constitute state action and thus did not violate Equal Protection Clause).

¹⁵ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 345 (1938) (holding that provision of legal education by state of Missouri to white but not to black residents violated Fourteenth Amendment).

¹⁶ *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (holding state statute that changed municipal boundaries, thereby depriving blacks of right to vote, would violate Fifteenth Amendment).

¹⁷ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

¹⁸ See *Baker v. Carr*, 369 U.S. 186, 188, 204, 237 (1962) (holding that claim that votes of residents of more populous areas were "debased" relative to those of less populous areas was federal constitutional question and therefore justiciable).

¹⁹ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (holding that state law prohibiting women to work as bartenders did not violate Equal Protection Clause).

with *Everson v. Board of Education*,²⁰ the wavering line between the realms of church and state has been limned by the Court, not always to the satisfaction of the partisans of either. Freedom of speech and freedom of the press, if not raised to the level of idolatry that the ACLU has since sought, emerged from the enchanted confines of Holmes's and Brandeis's encouraging dissents²¹ to become staples of majority opinions.²² Even motion pictures, not then highly regarded as an art form, were protected by the Court under the First Amendment.²³ But, as Susan Sontag once noted: "We linger unregenerately in Plato's cave, still reveling our age-old habit, in mere images of the truth."²⁴

The Court did prepare the way for the national government to effectuate what would once have been considered local rather than national policies through the Commerce Clause. The road from *Wickard v. Filburn*,²⁵ applying the Agricultural Adjustment Act to a small family farm in Ohio,²⁶ to the case of Ollie's Barbecue—sustaining the application of the Civil Rights Act of 1964 to a small restaurant in Birmingham, Alabama²⁷—was a short one but a straight one. State interference with interstate commerce was not tolerated

²⁰ 330 U.S. 1, 18 (1947) (holding that resolution allowing reimbursement of parents for cost of public transportation to public and Catholic schools did not violate First Amendment).

²¹ See, e.g., *Gitlow v. New York*, 268 U.S. 652, 672, 673 (1925) (Holmes & Brandeis, JJ., dissenting) ("If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences."); *Abrams v. United States*, 250 U.S. 616, 624, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) ("I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force."); see also *Whitney v. California*, 274 U.S. 357, 372, 379 (1927) (Brandeis, J., joined by Holmes, J., concurring) ("I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party . . . is not a right within the protection of the Fourteenth Amendment.").

²² See, e.g., *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (holding efforts by state to punish person for statement on grounds it may cause violence unconstitutional unless statement was "intended to produce, and likely to produce imminent disorder"); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (holding statute calling for punishment of advocacy violated First Amendment).

²³ See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (holding that state may not ban motion picture based on censor's conclusion that film is "sacrilegious").

²⁴ Susan Sontag, *Photography*, N.Y. Rev. Books, Oct. 18, 1973, at 59.

²⁵ 317 U.S. 111 (1942).

²⁶ *Id.* at 114, 133.

²⁷ *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

however strong the local effects.²⁸ But that road to national power may have reached a sharp turning point when the Court struck down the Gun-Free School Zones Act of 1990²⁹ on April 26, 1995.³⁰

The road to making the Bill of Rights applicable to the states as well as the national government was begun in the Roosevelt Court, but it has had a tortuous journey. And the result has not simply been the extension of the federal rules to the states, but, as for example in the application of the Sixth Amendment, a diminution of its requirements in its application to the national courts to make for uniformity between the two.³¹ In the early Court, Mr. Justice Black argued that all the first eight amendments were applicable in their crystalline clarity to the states through the Fourteenth,³² but he also argued that Mr. Justice Frankfurter's espousal of Cardozo's "moveable feast"—derived from *Palko v. Connecticut*³³—was too loose and subjective.³⁴ (Parenthetically, I have often wondered whether Black did not, in fact, end up more in agreement with his old adversary Harlan than his new ally Brennan.) In any event, if the Due Process Clause was acknowledged to be malleable by the New Deal Court, it was to become all but limp in the hands of its successors.³⁵

²⁸ See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783-84 (1945) (striking down state train-length limitations on grounds that state's inherent interest in safety was "outweighed by the interest of the nation in an adequate, economical and efficient railway transportation system").

²⁹ 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).

³⁰ See *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (holding that Congress exceeded its Commerce Clause authority in passing Gun-Free School Zones Act because possession of firearm in school zone does not substantially affect interstate commerce); see also Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. Times, Apr. 27, 1995, at A1.

³¹ See *Williams v. Florida*, 399 U.S. 78, 102-03 (1970) (freeing states from requirement, previously read into Sixth Amendment, that criminal juries must consist of 12 jurors); Hans Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 712-15 (1971) (linking trend toward smaller federal juries to *Williams*).

³² See, e.g., *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that "chief object" of Fourteenth Amendment "was to make the Bill of Rights applicable to the states").

³³ 302 U.S. 319 (1937) (Cardozo, J.). In *Rochin v. California*, 342 U.S. 165 (1952), Frankfurter relied on Cardozo's view in *Palko* that due process protects certain immunities "implicit in the concept of ordered liberties" in reasoning that the meaning of due process is not fixed, but needs to be determined through objective judicial deliberation on the nature of decency, civility, and justice. *Id.* at 169 (quoting *Palko*, 302 U.S. at 325).

³⁴ See *Rochin*, 342 U.S. at 174, 177 (Black, J., concurring) (criticizing majority because "evanescent standards" and "accordion-like qualities" of its opinion "must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights").

³⁵ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963) (rejecting view that Supreme Court can strike down state laws perceived to be unreasonable or unwise, and holding that state legislation will not be considered unconstitutional unless it violates specific federal constitutional provisions or federal law); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (noting that "[t]he day is gone when this Court uses the Due Process

As with Abraham Lincoln, the Government found that wars—hot and cold—put pressures on it to which it might not have yielded in less hectic times. In 1942, seven German saboteurs landed on the East Coast, were captured, and were tried as spies by the military. Their convictions were sustained at an extraordinary summer session of the Court in July.³⁶ It was also in 1942 that Japanese Americans on the West Coast first had a curfew imposed on them and then were removed to what were politely called relocation centers away from the West Coast. The Court sustained these actions³⁷ which had the endorsement not only of the President but of Earl Warren, who would later sign the opinion for a unanimous Court in *Brown v. Board of Education*.³⁸ As Mr. Justice Douglas said of these decisions some thirty years later:

The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there was no attempted Japanese invasion of our country. But those making plans for defense of the Nation had no such knowledge and were planning for the worst.³⁹

When hindsight was available to the Court, it used it. Thus, in 1946, the Court announced that “martial law” imposed at Pearl Harbor on December 7, 1941 was unconstitutional.⁴⁰ It was easy for black-robed gentlemen sitting in Washington, D.C., in the late spring of 1946, to decide that Oahu was not threatened by a Japanese invasion early in December of 1941, even as the American fleet was still burning in the harbor.

The New Deal Court ended with the war. But by then the beginnings of its successor Court’s reading of the Due Process Clauses had been established. It had not yet fully established freedom from government pressures against left-wing dissenters. The real rise of the new Right would only later be one consequence of a stupid misadventure in Vietnam, first undertaken by a well-intentioned group of political innocents in Camelot. The new Right might prove to be more

Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident or out of harmony with a particular school of thought”).

³⁶ Ex parte Quirin, 317 U.S. 1, 48 (1942).

³⁷ See, e.g., Ex parte Endo, 323 U.S. 283, 302 (1944) (noting that evacuation and initial detention in relocation centers was lawful); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (upholding executive order excluding people of Japanese ancestry from West Coast war area); *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943) (upholding curfew order).

³⁸ 347 U.S. 483 (1954).

³⁹ *DeFunis v. Odegaard*, 416 U.S. 312, 339 n.20 (1974) (Douglas, J., dissenting).

⁴⁰ *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).

recalcitrant, even less yielding to the Rule of Law, which is the Court's only weapon. The analogue between America's "militias" of the '90s and Europe's Redshirts, Blackshirts, and Brownshirts of the '20s and '30s is too evident for comfort. The real test of survival is now more likely to arise with reference to the radical Right than the radical Left, and we have a whole new crop of civil libertarians on the horizon with the Second rather than the First Amendment as their cornerstone.

I have encapsulated the events of the period about which Norman asked me to speak, but I have told you nothing. I have told you nothing because the facts are only a part of the story. Back when Hector was a pup, and I was a law student, somebody wrote an important piece—important for the time—called "Perpetuities in a Nutshell." Somebody, I think it was Professor Bart Leach, said: "It is one thing to put perpetuities in a nutshell, it is another to keep it there." So it is with judicial biography. It requires more than a statement of events during the life of the subject—and even that is difficult.

I speak as a judicial biographer manqué. At the suggestion of Felix Frankfurter, I undertook the biography of Robert H. Jackson. I collected almost as much documentation for that task as Gerry Gunther did for his volume on the Marshall Court in the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, before he gave it all up for a longer and worthier project on Judge Learned Hand.⁴¹ The biographical job was well beyond me. It required imagination and skills not readily available to the workaday law professor.

A judicial biography requires of the biographer a thorough knowledge of the experiences of the subject's life; of the mores of the time, public as well as private; of judicial precedents and decisions; of relationships of the subject to other individuals, to groups, and to institutions. If there were a checklist, it would be almost endless.

But why write judicial biography at all? Robert H. Jackson had an interesting career before he got to the Court. He was a noted advocate at an early age in the courts of upstate New York, with something of the Horatio Alger hero about him. He came to Washington, played David to Andrew Mellon's Goliath, and then moved steadily up the Department of Justice ladder to attorney general, meanwhile becoming a friend of F.D.R., who found in him an able public spokesman for the New Deal. He clearly had aspirations for the presidency, at first through the governorship of New York. But he was frustrated here in part because James A. Farley's ambitions were inconsistent

⁴¹ Gerald Gunther, *Learned Hand: The Man and the Judge* (1994).

with his and, in part, in my mind, because there was more integrity than populism in his makeup.

Jackson was never fully taken with the cult of the robe. He was an advocate at heart. Brandeis said Jackson should be made solicitor general for life. Nuremberg was, to him, his crowning achievement. It must have left a bitter taste as it denied him the center chair on the Court. I mention these things because Jackson's life was more dramatic and appropriate for storytelling than that of most jurists.

It does, however, suggest one reason for judicial biography: to tell a tale with all the drama and suspense of a good novel, except that the plot happens to be true. But truth is a terrible restraint to impose on any writer, and particularly on those whose business is most often some form of advocacy.

Judicial biography ordinarily cannot merely be a response to the Bible's admonition "to praise famous men,"⁴² for there are few such important public servants who are so faceless in our history as are the members of the judiciary. And, as Frankfurter once wrote of that biblical phrase:

[It] was not an exhortation for a gesture of pietistic generosity, the placing of verbal flowers on the graves of famous men. It is for our sake that we are to praise them, for, as Ecclesiasticus added, they have given us an "inheritance." We commune with them to enlighten our understanding of the significance of life, to refine our faculties as assayers of values, to fortify our will in pursuing worthy ends.⁴³

In sum, a judicial biography could be not merely an encomium but a vade mecum. It could provide a role model. How often does it do so?

Then there was Judge Jerome Frank's theory that judicial biography served the function of showing what mortals these fools be.⁴⁴ Of course, judicial biographies could, like literary biographies, lead to understanding of the corpus of the subject's judicial efforts by helping to read his judgments in light of his behavior. But, as one brought up as a "judicial realist," I remain dubious about the effect of a judge's ingestion on his jurisprudence. Fortunately, few judicial biographies, if any, seem to have concentrated on the sex life of a judge as they have so often of an executive. (I found Sheldon Novick's sleek recent ef-

⁴² Ecclesiasticus 44:1 (Oxford Annotated with the Apocrypha).

⁴³ Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. Pa. L. Rev. 781, 781 (1957), reprinted in *Of Law and Life and Other Things That Matter* 77, 77 (Phillip B. Kurland ed., 1965) (quoting Ecclesiasticus 44:11 (Oxford Annotated with the Apocrypha)).

⁴⁴ See, e.g., Jerome Frank, *Law and the Modern Mind* 114-15 (1930) (noting that judicial biography can reveal life experiences which inevitably influence judge's decisionmaking).

fort to make a Lothario out of Holmes by innuendo somewhat less than persuasive.⁴⁵) Judges appear to have freed pornography from most government restraint without becoming addicted. Or at least, if they have, we have not been told.

A few weeks ago, we saw Tom Stoppard's *Arcadia*⁴⁶ played on its native soil. It would suggest that time and place are basic ingredients in any attempt at a credible history whether of a person or of events or of an institution.⁴⁷ The Derbyshire countryside and early-nineteenth century inform *Arcadia* as much as the playwright's words. Perhaps even closer to the subject of our conference deliberations are the differences between the events known to the participants and the same events as perceived by their successors some generations later; however much those perceptions rest on documents, some preserved, some altered, some imagined. The ambiguity of the past impresses, even when documents are dealt with without malice aforethought by those who originally made them, tore them up, or amended them. Anyone who has been associated with a public event must be well aware of the perversions of fact that are daily reported in the journals of record or even more sober publications and then recounted in serious scholarly tomes.

But these are not the only roadblocks to successful judicial biography. The task is a very difficult one, and I would here touch on but a few of the more egregious problems and then call it quits.

The first of these is the all but universal, if unconscious, confusion between the biographer and his subject; not in the details of the life but in the biographer's ascriptions to his protagonist of his own views, his own mental constructs. Dean James F. Simon once used the phrase "in his own image" as a title for a book on the Court.⁴⁸ What better title could there be for a typical Supreme Court Justice's biography? A rather happy example of the conversion may be found in Learned Hand's pieces in *The Spirit of Liberty*⁴⁹ which were devoted to the judicial thought of Brandeis,⁵⁰ Stone,⁵¹ and Judge Thomas

⁴⁵ See Sheldon M. Novick, *Honorable Justice* 227, 234 (1989).

⁴⁶ Tom Stoppard, *Arcadia* (London: Faber & Faber, 1993).

⁴⁷ See, e.g., Simon Schama, *Landscape and Memory* (1995) (exploring cultures as interpretations of, and themselves inexorably shaped by, history and specifics of local physical landscape).

⁴⁸ James F. Simon, *In His Own Image: The Supreme Court in Richard Nixon's America* (1973).

⁴⁹ Learned Hand, *The Spirit of Liberty* (Irving Dillard ed., 1952).

⁵⁰ Learned Hand, *Address at the Meeting of the Bar of the Supreme Court of the United States in Memory of Justice Brandeis*, 317 U.S. xi (1942), reprinted as *Mr. Justice Brandeis*, in Hand, *supra* note 49, at 155.

⁵¹ Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 *Colum. L. Rev.* 696 (1946), reprinted in Hand, *supra* note 49, at 201.

Swan⁵² and which certainly revealed at least as much about Hand's judicial approach as about theirs. With most authors we should prefer to learn of their subjects' attitudes and points of view.

Equally, the treatment of a biographical subject as a faultless hero is a common problem. Judges do not ordinarily make good idols. Religious idols should not have clay feet. Not even Holmes was benefitted from his characterization as the "Yankee from Olympus."⁵³ Perhaps, we should have more of the intellectualization, so to speak, of the judicial figure: a better picture of his or her mind as well as his or her actions. I am reminded again of a Learned Hand statement, and again it probably tells more about him than about his judicial colleagues:

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than mere verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.⁵⁴

There were judges of the '30s and '40s who will never be captured between the covers of books. The values involved in good judging are too hard to define. It was once said by a professorial colleague about Alfred North Whitehead: "[H]is significance as a person far out-ranked his importance as a philosopher."⁵⁵ So, too, with these judicial subjects. We are not sure of our bases for evaluation. Yesterday we applauded judges who wrote opinions expressing arguments delineating persuasive reasons, whether legal, historical, political, economic,

⁵² Learned Hand, Thomas Walter Swan, 57 Yale L.J. 167 (1947), reprinted in Hand, *supra* note 49, at 209.

⁵³ Catherine D. Bowen, *Yankee from Olympus* (1944).

⁵⁴ Learned Hand, *Sources of Tolerance*, 79 U. Pa. L. Rev. 1, 12-13 (1930), reprinted in Hand, *supra* note 49, at 66, 81.

⁵⁵ Letter from Felix Frankfurter to David Riesman (Oct. 10, 1957) (available in Harvard Law School Library).

or sociological, for particular judgments. Today we extol the judge who can persuade a majority of his brethren to reach a conclusion in keeping with his personal instinctual predilections. Judging is rhetoric whether John Marshall style, or Oliver Wendell Holmes style, or Louis D. Brandeis style, or William J. Brennan style.

And this brings me, you'll be glad to hear, to my last proposal: that biography, like all history, often is to a very large degree myth. My point here is not Henry Ford's that "history is bunk," but rather the insistence of many professional historians that the gossamer line between what occurred in the past and what is believed to have occurred in the past may not differ in their importance for the present.⁵⁶ John Mortimer, renowned in part as Boswell to Rumpole of the Old Bailey, concluded the second volume of his memoirs thus:

I have not been writing a novel, although once you decide what to leave out, or how you feel about an event that happened, or how you would like the reader to see it, you are on your way to inventing a myth. Politicians describing the economy, lawyers and judges describing a crime, every one of us re-inventing our pasts, are myth-makers to a greater or lesser degree. Fiction is what comes naturally to us.⁵⁷

"Literature is a luxury;" said Chesterton, "fiction is a necessity."⁵⁸ One trouble with much judicial biography has been too much necessity and too little luxury. And I would tell you that the grapes of one who can afford you neither necessity nor luxury are very sour indeed.

⁵⁶ See William H. McNeill, *Mythistory and Other Essays* 3-22 (1986) (defending conflation of myth and history as indiscernibly different and mutually reinforcing); Schama, *supra* note 47, at 14-15 (recognizing that landscape traditions which shape national identity and other contemporary institutions were "built from a rich deposit of myths, memories, and obsessions").

⁵⁷ John Mortimer, *Murderers and Other Friends* 260 (1994).

⁵⁸ G.K. Chesterton, *The Defendant* 10 (1901).