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COMMENTARY

JUDICIAL BIOGRAPHY: AMICUS CURIAE

DENNIS J. HUTCHINSON*

When Sir Robert Skidelsky coined the term “contracted”¹ biography, he had in mind the agreements, explicit or implicit, that scholars make with their subjects or with the patrons who facilitate their work. The transaction cost, of course, is the truth—at least in part. In return for access to correspondence and working papers, the biographer agrees not to pursue dark corners of the subject’s private world—infidelity, domestic violence, alcohol, the batty aunt who lives in the basement. On balance, it must seem a small price to most scholars. After all, the work is central to the study, and the archives illuminate the work; so what if a few colorful, and usually unattractive, details are quietly omitted? The problem is that biographical contracts are usually executory: Unlike the prisoner exchanges in spy novels, there is no clean hand-off—all the papers in return for redacted truth—between author and patron. Subjects and families maintain their control over archives and their access for extended periods of time. Grace and favor become rewards for sustaining discretion and restricting field of vision. If Olwyn Hughes and the Sylvia Plath Estate continue to be the extreme case of archival control,² the unrestricted Thurgood Marshall Papers, at the other extreme, are not yet the common judicial model.

Gerald Gunther was lucky; his subject was dead and the family apparently had no desire to micromanage his work. That is not to say that the risks foreseen by Lord Skidelsky do not exist even in those luxurious circumstances. The dangers are more subtle and perhaps to some degree subconscious. “An ‘authorized’ or ‘official’ biographer tends to become an ‘admiring biographer,’”³ so much so that the

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¹ See Robert Skidelsky, Anthony Eden, in *Interests and Obsessions* 333, 335 (1993) (discussing biographer Robert Rhodes James’s method of obtaining private information while only publishing some of it in his biography of Anthony Eden).

² See Janet Malcolm, *The Silent Woman: Sylvia Plath & Ted Hughes* 171-83 (1994) (discussing life of Sylvia Plath and process of researching that life).

³ Philip B. Kurland, Book Review, 70 *Harv. L. Rev.* 1318, 1318 (1957) (reviewing Alpheus T. Mason, Harlan Fiske Stone: *Pillar of the Law* (1956)).

author identifies with the subject and “the reader gets a somewhat idealized picture of the Justice: not an objective portrait, but rather the man as he saw himself.”⁴ The judge, of course, may be duplicitous in the transaction—even from beyond the grave. There are numerous instances of self-serving artifacts being created by judges more with an eye to future historians than to the pressure of the moment—Stone, Frankfurter, and Douglas are notorious examples. The well-known but as yet unscrutinized “case histories” prepared annually in Justice Brennan’s chambers may, or may not, be the epitome of the genre. The Justice’s law clerks, who created the chronicles at the end of each term, were hardly in a position to be detached or omniscient, yet I suspect their work product may eventually be seen, especially by the sympathetic, as authoritative.

Gunther now regrets the price of candor in admitting that he was writing about his “idol,” but at least he sailed under honest colors from the starting line.⁵ Too many judicial biographies are little more than admiring portraits—warts air-brushed away, but carrying the aura of complete authenticity provided by detailed citations to letters, memoranda, drafts, and other nonpublic artifacts. Judicial biography has always tended to be what the British call a “friendly match.” How many judges end up in the author’s cross-hairs, other than Felix Frankfurter (everybody’s favorite whipping boy), and Abe Fortas (the stock tragic figure)? For the most part, even after Alpheus Mason’s life of Harlan Fiske Stone⁶ pierced the mystery of the velour curtain, judicial biography still reads like *Lives of the Saints*—respectful, conservative, uncritical, and oriented toward explicating the Great Man’s Thought, with special attention to its origins and internal consistency.

The question is not whether the *Lives of the Judges* have been contracted but why. Beyond natural affinity or the irresistible temptation of a partially cooked archive, why do American judicial lives continue to read more like densely documented campaign biographies than scholarly analyses? Despite the welter of judicial biographies since World War II, there is no Lytton Strachey for the American bench. Irony and detachment are foreign to the chronicles, and too often the pieties of the last generation are burnished rather than debunked. What we have is respectful demystification, something a step or two beyond Paul Freund’s hesitant defense of the enterprise forty years ago: “What was done for the inner mysteries of the poetic

⁴ *Id.* at 1321.

⁵ See Gerald Gunther, “Contracted” Biographies and Other Obstacles to “Truth,” 70 N.Y.U. L. Rev. 697, 706 (1995); see also Gerald Gunther, *Learned Hand: The Man and the Judge*, at xviii (1993) [hereinafter *Gunther, Learned Hand*].

⁶ Mason, *supra* note 3.

process in John Livingston Lowes's *The Road to Xanadu* surely deserves to be emulated in approaching the arcana of the judicial process"⁷

Whether Freund was speaking from studied detachment or hiding his own colors is unfortunately open to question, because the anticipated capstone of his career—*The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* volume on the Hughes Court—was unfinished at his death. What is clear, however, is that judicial biography presents perils beyond those suggested by Lord Skidelsky for biography in general. Modern judicial biographers, especially law professors, tend to use their subjects to presentist purposes, avowed or not. One might call the impulse "instrumental," but the label is simply a trendy way of making the same point. The three most recent judicial biographies—Gunther's *Hand*,⁸ Jeffries's *Powell*,⁹ and Newman's *Black*¹⁰—all manifest the problem in different ways.

Newman's *Black*, despite its density and wealth of detail, is the least substantial and the least theoretically evolved. As I detail elsewhere¹¹ the book is not an admiring but an adoring work, in which Black's enemies are the author's enemies and Black's friends, literally and figuratively, are the author's friends. Black's "greatness" is established by testimony and epithet. At bottom, Black's jurisprudence is portrayed as courageous and consistent, themes open to debate but resolved happily in the end (although without a hearing).

Jeffries's *Powell* is an admiring work of rehabilitation. Justice Powell, who succeeded Black on the Court, was a man of both strong private impulses and (largely) measured public rectitude, a combination that allowed him to occupy a pivotal position on the Supreme Court for much of his sixteen-year tenure. Powell came to the Court with a Good Housekeeping seal of approval, in the form of a hopeful essay by Professor Gunther,¹² but his reputation plummeted almost as soon as he retired.¹³ The biography selectively sketches Justice Powell's thinking and attempts to establish his probity and wisdom.

⁷ Paul A. Freund, Introduction to Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis*, at xv, xvi (Univ. of Chicago Press 1967) (1957).

⁸ Gunther, *Learned Hand*, supra note 5.

⁹ John C. Jeffries, Jr., *Justice Lewis F. Powell: A Biography* (1994).

¹⁰ Roger K. Newman, *Hugo Black: A Biography* (1994).

¹¹ See Dennis J. Hutchinson, *Hugo Black Among Friends*, 93 Mich. L. Rev. 1885, 1885-86 (1995) (reviewing Newman, supra note 10).

¹² See Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972) (analyzing Justice Powell's first term on Supreme Court).

¹³ See, e.g., Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L.J. 1 (1987) (arguing that Justice Powell took inappropriate balancing approach to judicial review).

The charm of the exercise sours when Jeffries turns to those cases where the conventional wisdom has condemned the Justice over time: *Bowers v. Hardwick*¹⁴ and *McCleskey v. Kemp*¹⁵ were “mistakes,” and Powell now confesses error.¹⁶ Jeffries has defended Powell’s recantation of his votes in these cases as evidence of “growth.”¹⁷ One suspects that to Michael Hardwick and Warren McCleskey, Powell’s repentance is cold comfort.

John Jeffries served as a law clerk to Justice Powell more than two decades ago and his affection for his ex-boss is at once becoming and unsettling. As Grant Gilmore said in the *festschrift* for a retiring colleague entitled “The Truth About Addison Mueller,” “[n]ot the whole truth, of course—we reserve that for our enemies.”¹⁸ Powell’s performance on the Court is open to charges of opportunism and unrelieved anxiety over how historians would judge his brief tenure. Indeed, he feared at the outset of his tenure that he was too old to serve long enough to make his mark. His belated recantations on the death penalty and homosexual rights suggest a final appeal to posterity by one no longer judging but judged. Yet the authorized biography does not explore such disquieting themes.

Learned Hand never sat on the Supreme Court, much to his private frustration and the public regret of many legal academics—at least at the height of his powers. Hand was universally regarded as a great judge, but the dominant theme of Professor Gunther’s work is Hand the Constitutionalist, both in his own time and even for today. Judge Posner has delicately chided the work (as “off-center”),¹⁹ but a 680-page treatment that wholly omits *United States v. Carroll Towing*²⁰ and *The T.J. Hooper*²¹ is not only skewed but fails to allow the

¹⁴ 478 U.S. 186, 197 (1986) (5-4 decision) (Powell, J., concurring) (voting to uphold Georgia statute criminalizing sodomy because it did not violate fundamental rights of homosexuals under either Fifth or Fourteenth Amendments).

¹⁵ 481 U.S. 279, 312-13 (1987) (5-4 decision) (dismissing “apparent disparities in sentencing”—racial disparities—as “inevitable part[s] of our criminal justice system” and upholding appellant’s death sentence).

¹⁶ See Jeffries, *supra* note 9, at 451-54, 530 (discussing Justice Powell’s second thoughts about his votes in *McCleskey* and *Hardwick*).

¹⁷ See John C. Jeffries, Jr., *A Change of Mind That Came Too Late*, N.Y. Times, June 23, 1994, at A23 (describing Justice Powell’s reconsideration of his vote in *McCleskey* as “a reasoned interpretation of experience”).

¹⁸ Grant Gilmore, *The Truth About Addison Mueller*, 22 UCLA L. Rev. 1013, 1013 (1975).

¹⁹ Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L.J. 511, 512 (1994) (book review).

²⁰ 159 F.2d 169, 173 (2d Cir. 1947) (balancing costs and benefits in mathematical formula as test for negligence).

²¹ 60 F.2d 737, 739-40 (2d Cir.) (finding liability where boats were not equipped with two-way radios despite industry norms to the contrary), cert. denied, 287 U.S. 662 (1932).

judge to show why his reputation is deserved—or time-bound, or overrated. On the other hand, the rehabilitation of Hand's Holmes Lectures²² comes off as a sympathetic exercise in special pleading.

All three works are numbingly detailed, the conspicuous products of sustained labor; indeed, Newman and Gunther each spent multiple decades, on and off, at their tasks. Nonetheless, all three share a common symptom: The judge, misunderstood then or now, in fact had a consistent, theoretically rich view of timeless issues that instructs us today. Objectivity, in the purest sense, may be a will-o'-the-wisp. But as long as judicial biographers set their agendas and marshal their resources to serve pressing contemporary issues, judicial biography will continue to be to biography as "law-office" history²³—the staple of the amicus curiae brief—is to history. Peter Ackroyd, the Dickens biographer, emphasized not too long ago the common-place that "the subject of a biography is the biographer, not the subject,"²⁴ a point that nicely puts the author in his place, as one more personally absorbed curiosity-seeker and not an unimpeachable authority. The point is no less true of judicial biographers, as Professor Gunther admits in his paper. He dwelt on the First Amendment and judicial review because the topics interested him, not because they were necessarily at the core of Judge Hand's career. Not everyone is Gerald Gunther, however, and idiosyncrasy is hardly a protocol for a serious discipline.

If Ackroyd is right, the nagging question is whether biography, judicial or even literary, constitutes a serious discipline. I don't think it makes much sense to talk about serious judicial biography until Mason's *Stone* in 1956,²⁵ because, despite well-documented limitations,²⁶ the work was the first to utilize the subject's actual working papers to tell his story. And, unlike literary biography, judicial biography is inevitably institutional history as well as life history—the creation of literary artifacts within an institution and with institutional significance. Mason's book was sensitive to this dual focus, but, unfortunately in my view, it propelled two developments that were quickly

²² See Learned Hand, *The Bill of Rights* (1958) (publishing Hand's Holmes Lectures on constitutional law, given at Harvard Law School in Feb. 1957), discussed in Gunther, *Learned Hand*, supra note 5, at 652-64 (discussing impact of Hand's Holmes Lectures); Posner, supra note 19, at 515 (labeling Hand's lecture series at Harvard "a bust").

²³ See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13.

²⁴ See Robert Winder, *For Literature, Read Real Life*, Independent, Mar. 30, 1991, at 25, 25 (analogizing biography to fiction, Ackroyd argued biographer is central to biography, as author is to novel).

²⁵ Supra note 3.

²⁶ See Kurland, supra note 3, at 1325 (noting Mason's bias towards Justice Stone).

exaggerated and which, two-score years later, still sometimes distort studies of judicial behavior.

First, the use of working papers, which at the time caused a rage²⁷ that died out rather quickly,²⁸ instantly became the sine qua non of judicial biography and studies in judicial behavior. This produced two consequences, one problematic and the other comical. The first effect was to render serious studies incomplete without internal working documents, which made the works look deceptively comprehensive as long as some internal memoranda and notes or letters associated with the deliberative process were reproduced. Some scholars failed to realize either that tell-tale documents might be missing, that smoking revolvers might have been planted, or that the most important fact was not, or could not be, reduced to writing. Those risks inhere in all historical work, of course, but lawyers, who now tend to produce most judicial biography, may not always be as attuned to the problems as they should be. At what is almost a comic level, rich archives sometimes produce disproportionate treatments: Frank Murphy was one of the most marginal players on the New Deal Court, but his extremely full working papers have provided the foundation for two of the most sustained biographies on the shelves.²⁹ Murphy's wholesale reliance on his staff for both research and opinions receives nodding attention but not the emphasis it requires. The lesson in both cases is that archives don't write themselves up and that working papers don't tell the entire story.

Second, on the heels of Mason's *Stone*, Walter F. Murphy, also of Princeton, produced *Elements of Judicial Strategy*,³⁰ which treated the Court as a small group and documented the strategies employed by members of the Court to secure results, change positions, bargain for language, and so on. In some respects, Professor Murphy has been

²⁷ See, e.g., Henry J. Friendly, Book Review, 106 U. Pa. L. Rev. 766, 766 (1958) (discussing whether it was appropriate to publish previously unpublished opinions in Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (1957)); Edmund Cahn, *Eavesdropping on Justice*, Nation, Jan. 5, 1957, at 14, 15-16 (discussing problems of publishing private communications).

²⁸ There is no evidence that the Mason book inhibited the Warren Court; in fact, the papers of the period suggest more rather than less interplay among the Justices. Indeed, the reaction within the Court to the book went quite far in the direction opposite to that of Cahn's prediction that exchange of ideas would be inhibited by such works: Every member of the Court sitting when the biography of Stone was published subsequently donated his judicial working papers to a research library, and the most restrictive condition of access guaranteed that researchers could be reading the papers within a decade of the donor's death—the same restriction, in effect, that controlled the Stone Papers.

²⁹ See Sidney Fine, *Frank Murphy: The Washington Years* (1984); J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* (1968).

³⁰ Walter F. Murphy, *Elements of Judicial Strategy* (1964).

more influential than Professor Mason, because he has emphasized the aspects of tactical and strategic behavior that seem intrinsic to small-group decisionmaking and which at the same time feed the legal realist premise that behavioral factors trump intellectual factors any day of the week. Henry Hart had already stirred the pot with his claims in "The Time Chart of the Justices"³¹ that the Court's internal decisionmaking practices frustrated adequate deliberation, and Justice Frankfurter, behind the scenes,³² lobbied for what he saw as reforms to address the problems at which Hart guessed. Hart's (and Frankfurter's) critics dismissed the debate,³³ but scholars absorbed the lesson and Murphy became commonplace.

Journalists learned the lesson by half.³⁴ *The Brethren*, published in 1979, took Mason and Murphy to their illogical conclusion. If social history is history with the politics left out, then *The Brethren* was constitutional history with the ideas left out. Indeed, as more than one lawyer said after the book's publication, more can be learned about the Court by reading its opinions than by reading the gossip columns.

The recent run of judicial biography suggests that ideas are making their way back into judicial studies. That is not to say that the discipline has entered a mature phase or that the problems of contracted biography are in decline. As authors gain greater control over their sources and become more sophisticated in assaying their evidence, the principal remaining challenge is the one that faces all students of another's life: how to temper what might be called the Ackroyd Syndrome—the biographer as subject. For judicial biography, the syndrome has an added dimension. The lawyer-biographer must be careful not to require his subject to fight the biographer's battles more than his own. No biographer can reasonably be asked to disarm himself of his convictions, experiences, and perspectives. For the duration of the biography, however, he at least can be asked to check his guns at the door.

³¹ See Henry M. Hart, Jr., Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959) (reviewing Supreme Court's administrative and time management problems).

³² See Dennis J. Hutchinson, Felix Frankfurter and the Business of the Supreme Court, Oct. Term 1946-Oct. Term 1961, 1980 Sup. Ct. Rev. 143, 144 (reviewing Justice Frankfurter's efforts to improve operation of Supreme Court).

³³ See, e.g., Thurman Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298, 1299, 1317 (1960) (criticizing Hart's conclusions regarding role of administrative concerns in functioning of Supreme Court).

³⁴ See, e.g., Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979) (discussing inner workings of Supreme Court from 1969 Term through 1975 Term).