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## PERSONAL THOUGHTS ABOUT SOME PROBLEMS OF JUDICIAL BIOGRAPHY

Philip B. Kurland\*

"Biography" is defined by the Oxford Universal Dictionary as "the history of the lives of individual men, as a branch of literature." One need not believe with Emerson that "there is properly no history; only biography,"<sup>1</sup> in order to recognize the close relationship between biography, whose Muse I cannot identify, and Clio. The connection with the art of literature is more tenuous. And, if the current experts on the subject are accurate in their prediction, this relationship is bound to disappear, in any event. In Sir Harold Nicolson's words:<sup>2</sup>

I have insisted throughout on the three elements of truth, individuality, and art, and I have contended that biography cannot be "pure" biography unless these three elements are combined. I have traced the evolution of truth and individuality from the fifth to the twentieth century, and I have implied that when they reach their zenith and combine . . . they destroy the third of my essential elements, they put an end to "pure" biography as a branch of literature.

And biography has now reached that height of which Sir Harold spoke. (It is obvious that he had not had the opportunity to read Lord David Cecil's biography of Melbourne when he reached his conclusion, for that volume is certainly "pure" biography at its literate best.) But I take solace in Sir Harold's prognosis, reinforced as it is by the work of Edgar Johnson.<sup>3</sup> I take solace because, rash as I may be in assuming the role of historian of an individual's life, I should certainly never have dared to try to write literature.

I am further encouraged to believe that literary merit is not a requisite for judicial biography by the possibility that judicial biography has never in its history qualified as literature or art, at least as those terms are used by Nicolson and the Oxford dictionary. A perusal of various volumes devoted to biography in the English language fails to reveal a single reference to any judicial biography.<sup>4</sup> Neither Campbell's *Lives*,<sup>5</sup> nor Beveridge's *Marshall*,<sup>6</sup> nor any other biography of a legal figure — unless it be remembered that Samuel Johnson was a lawyer — receives so much as a footnote reference. Perhaps here, as in the case of Cecil's *Melbourne*, an exception would have been noted had these treatises been written after rather than before the appearance of Mark Howe's

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1 THE WRITINGS OF RALPH WALDO EMERSON 127 (Modern Lib. ed. 1940).

2 NICOLSON, THE DEVELOPMENT OF ENGLISH BIOGRAPHY 157-58 (1959) (the lectures that make up this volume were delivered in 1928 and published then).

3 JOHNSON, ONE MIGHTY TORRENT (1955).

4 See NICOLSON, *op. cit. supra* note 2; JOHNSON, *op. cit. supra* note 3; GARRATY, THE FUTURE OF BIOGRAPHY (1957).

5 CAMPBELL, LIVES OF THE CHIEF JUSTICES (1849, 1857); CAMPBELL, LIVES OF THE LORD CHANCELLORS (1845-47).

6 BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916).

first volume on Holmes.<sup>7</sup> Nonetheless, I am relieved, if other addicts of judicial biography are not, that both the record of the past and the forecast of the future excuse judicial biographers on the contemporary scene from qualifying as literateurs.

One of the three requirements of biography as defined by the Oxford dictionary and Sir Harold Nicolson may then be dispensed with. A second is the requirement that it be a history, history in the sense that it be as objective a record of the past as is possible for authors living in the present. The limitation may be put in Santayana's language:<sup>8</sup>

It will be observed, however, that what is credibly asserted about the past is not a report which the past was itself able to make when it existed nor one it is now able, in some oracular fashion, to formulate and to impose upon us. The report is a rational construction based and seated in present experience; it has no cogency for the inattentive and no existence for the ignorant.

Again I am relieved to discover that in looking back over many volumes of judicial biography, I find that the lack of literary values is matched by an equal void in scientific or objective norms. Perhaps the subjectivity of these volumes is demonstrative of the legitimate origins of this branch of the subject. Sir Sidney Lee, in his famed Leslie Stephen lecture, suggested that the inspiration for biography was properly the "intuitive desire to do honor to the memories of those who, by character and exploits, have distinguished themselves from the mass of their countrymen."<sup>9</sup> It has not been enough that Dr. Johnson commanded that "If we owe regard to the memory of the dead, there is yet more respect to be laid to knowledge, to virtue, and to truth."<sup>10</sup> The fact remains that biography had "its rudimentary origins in saga and elegy"<sup>11</sup> and these still seem to dominate judicial biography. Thus, it is apparent that much, if not most, judicial biography has been sponsored, or indeed, written by the family of the deceased. Examples are numerous but a few will suffice: Lord Birkenhead and Lord Reading each had his biography written by his son, and Lord Campbell's "autobiography" was "edited" by his daughter.<sup>12</sup> To come closer to home, Shiras' recent biography<sup>13</sup> was written by his son and edited by his grandson and Mason's biography of Stone<sup>14</sup> was sponsored by the Stone family. Certainly the great tradition of judicial biography — Lord Campbell's *Lives* to one side — has been eulogy. To speak only of recent efforts, one cannot read Mason's biography of Stone,<sup>15</sup> or Pusey's *Hughes*,<sup>16</sup> or Gerhart's *Jackson*,<sup>17</sup>

7 HOWE, JUSTICE OLIVER WENDELL HOLMES; *THE SHAPING YEARS, 1841-1870* (1957); see Kurland, *Portrait of the Jurist as a Young Mind*, 25 U. CHI. L. REV. 206 (1957).

8 SANTAYANA, *THE LIFE OF REASON* 3 (1954).

9 Lee, \_\_\_\_\_, XX CORNHILL MAG. XXX (March 1896).

10 *Rambler*, No. 60 (Oct. 13, 1750).

11 NICOLSON, *op cit. supra* note 2, at 132.

12 BIRKENHEAD, FREDERICK EDWIN, EARL OF BIRKENHEAD (1933); READING, RUFUS ISAACS (1942); HARDCASTLE, LIFE OF JOHN, LORD CAMPBELL (1891); *cf.* YORKE, *THE LIFE OF LORD CHANCELLOR HARDWICKE* (1913).

13 SHIRAS, JUSTICE GEORGE SHIRAS, JR. OF PITTSBURGH (1953); *cf.* CURTIS, *LIFE AND WRITINGS OF B. R. CURTIS* (1879); W. W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* (1851).

14 MASON, HARLAN FISKE, *STONE: PILLAR OF THE LAW* (1956).

15 See Book Review, 70 HARV. L. REV. 1318 (1957).

16 PUSEY, CHARLES EVANS HUGHES (1951).

17 GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* (1957).

without seeing, in varying degrees, the self-imposed blindness of the authors to the defects of their subjects. Nor is it only on this side of the Atlantic that this is true, as Jackson's recent biography of Lord Hewart<sup>18</sup> and Arthur Smith's *Lord Goddard*<sup>19</sup> quickly reveal. If all this is in the tradition of Beveridge's *Marshall* and Twiss' *Eldon*,<sup>20</sup> it is perhaps heartening to the reader and discouraging to the author to note that distance in time has, in recent years, provided greater objectivity, if less familiarity. Thus, we have recently seen judicial biographies of more scholarly character in, for example, Gore-Brown's *Chancellor Thurlow*<sup>21</sup> and Mays' *Edmund Pendleton*.<sup>22</sup> I do not mean to suggest that eulogy is the exclusive bias revealed in judicial biography. Hate and jealousy have equally destroyed objectivity. And there is no surer evidence of this than Campbell's *Life of Lord Brougham*.

If the current biographer of judicial figures had to meet only the standards of the past, he needn't be much concerned with the objective nature of his study. But the critics in this area today are not willing to dispense with the demand for scientific effort as they have been willing to surrender the requirement of literary excellence. The standard is often put in the elegant language of Shakespeare's *Othello*:

Speak of me as I am; nothing extenuate,  
Nor set down aught in malice.

Or, in the homely words of Cromwell: "Paint me as I am, warts and all."

One difficulty is that Cromwell's warts were more readily perceivable to his portraitist than is much of the factual data necessary to the contemporary judicial biographer. And, if one is to speak of Othello as he was, there remains the problem of truthfully depicting Desdemona as well. Let me translate these generalities into two specific problems of a would-be biographer of a Supreme Court justice. The problems may be labelled as the problem of accessibility and the problem of inaccessibility.

Among the papers of an appellate judge are likely to be records of confidential communications. They are confidential by the necessity for candid exchange of views that could not take place in a public forum. The extent to which this secrecy is carried is perhaps revealed by the fact that the Supreme Court of the United States now maintains its own printing press on the premises and by the fact that the conference room is so sacrosanct at conference time that nobody is permitted to enter it except the justices themselves. What then is the putative biographer to do with these precious confidential papers in the preparation of his study? To exclude them is to reject probably the most cogent and important evidence available to him. To make use of them is to threaten the privacy of the communications necessary to the effective function of an appellate bench.

Mr. Justice Roberts solved the problem for his would-be biographers

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18 JACKSON, *THE CHIEF* (1959).

19 SMITH, *LORD GODDARD* (1959).

20 TWISS, *LIFE OF LORD CHANCELLOR ELDON* (1844).

21 GORE-BROWN, *CHANCELLOR THURLOW* (1953).

22 MAY, *EDMUND PENDLETON* (1952).

by destroying these records when he retired from the Court. But others of equal conscience have carefully preserved the documentary evidence for posterity's use.

Sir Harold Nicolson's advice on a similar problem is clear. He says:<sup>23</sup>

Obviously all malice or all unnecessary infliction of pain must be avoided by the biographer. But should he feel that he can draw no truthful picture of his victim without wounding the feelings of survivors or the morals of his age, then assuredly he should not sully his conscience by the suggestion of untruth but rather abandon his project, and wait until the passage of time shall render his disclosures less scandalous or painful.

Professor Paul Freund dealt with this very question in his introduction to Bickel's *Unpublished Opinions of Mr. Justice Brandeis*<sup>24</sup> and came to approximately the same conclusion. He wrote:<sup>25</sup>

It is certainly true that privacy is essential in the consultative phase of a court's work, and no one was more sensitive to this need than Justice Brandeis, or more scrupulous in its observance. But there are also the claims of history, the interest of a succeeding generation in understanding, judging, and profiting from the deliberations of their predecessors which for valid reasons were veiled when they occurred. What is wanted is an accommodation between two truths: that perfect candor in the conferences preceding judgment requires secrecy and that, in Lord Acton's phrase, whatever is secret degenerates. The problem of reconciliation has been met satisfactorily in other contexts: diplomatic correspondence is made public after an interval; Madison's notes of the debates in the Constitutional Convention were published a generation after the event. If, as these examples suggest, a major key to the solution is the passage of time, it is to be noted that all of the cases presented in this collection are more than twenty-five years old. Moreover the intimacies here described are not aimless or malicious disclosures; they are relevant to understanding, and so, to use a favorite word of Justice Brandeis, they are instructive. The fact that the Justice preserved his working papers and entrusted them without restriction to one in whose judgment he had perfect confidence . . . should be sufficient warrant that in the use which has been made of them there is no breach of his own rigorous standards of propriety.

Postponement would then seem to be the solution thus offered. But Professor Mason of Princeton would not seem to agree. He didn't have Brandeis' court papers available to him when he wrote his Brandeis biography. But he did have Stone's papers in the preparation of the Chief Justice's biography<sup>26</sup> and he certainly appears to have made full use of them.

Postponement has other difficulties, moreover. If one must wait until an appropriate period has elapsed so that all those connected with the transactions to be reported have died, one must necessarily also be awaiting the destruction of vital materials available by way of examination of the wit-

23 NICOLSON, *op. cit. supra* note 2, at 11.

24 BIGKEL, *UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957).

25 *Id.* at xvi.

26 MASON, *op. cit. supra* note 14, at xi.

nesses to the events. Perhaps the answer then lies with the choice made by Professor Mark Howe, that is, to make the study of the jurist in question a life-long task, publishing materials as they become free from the restraints that I have discussed. Or it may lie in the possibility of writing the biography but postponing its publication, a possibility that requires the will-power that few, if any scholars, seem to possess. Both are discouraging answers and I have no better one.

Let me turn then to the problem of inaccessibility. I shan't belabor the difficulties created by sealed files that are not to be opened until a specified lapse of time. I really want to talk of a slightly different problem, that of files once opened and reported and then again sealed. I cite two examples. As I have noted, Lord Birkenhead's biography was written by his son. A new edition came out only lately.<sup>27</sup> It was a filial biography in every sense of the term. Last year another biography of Birkenhead was published.<sup>28</sup> In the introduction to the latter it was stated that the Birkenhead materials had not been made available to the author, but that the author had been assured that nothing was in them that wasn't accurately reflected in the original biography. The scholar then is again faced with dilemmas. He has his choice of postponement in the hope that the papers will some day be made public. But this means that the first biography will, by reason of its monopoly position, tend to become accepted as the real picture of its subject. By the time the files are again opened, it may be pointless to attempt to draw a truer picture. The other choice is to accept the interpretation of the officially colored biography on the assurance that the bias of the first author has in no way effected the removal of warts.

A second example is closer to home. Mason's *Stone* was, as I said, drawn with strong reliance on the court papers of the Chief Justice. In preparation of his volume of the history of the Supreme Court, Paul Freund sought leave to inspect these papers. It was denied him by the sons of the Chief Justice. Blame cannot be put on Professor Mason, for the papers were not within his control and it must be assumed that a scholar could not with good conscience willingly act in this manner. The fact that one of Stone's sons is a professor and the other a lawyer doesn't seem to have created in them the recognition of any moral obligation. Again the official portrait is to remain unassailable. A sponsored biography is to be the only one with access to the resources on which a proper evaluation must rest.

I no more have a solution for this problem than I have had for the others that I have raised. I submit only that the lot of a judicial biographer is, in some ways, like that of the Gilbert and Sullivan policemen, "not a happy one."

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<sup>27</sup> BIRKENHEAD, F. E. (1959).

<sup>28</sup> CAMP, *THE GLITTERING PRIZES* (1960).