

## ALPHEUS T. MASON AND THE ART OF JUDICIAL BIOGRAPHY

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Alpheus T. Mason was the premier judicial biographer of his generation and most likely of this century. He wrote more important biographies of jurists than any American writer: *Brandeis: A Free Man's Life* (1946), *Harlan Fiske Stone: Pillar of the Law* (1956), and *William Howard Taft: Chief Justice* (1964). Each is different in scope and technique. All are outstanding in quality. His masterpiece, *Harlan Fiske Stone*, broke new ground in our understanding of the Supreme Court during a critical transformation in American government and revolutionized the medium of judicial biography itself. While mindful that his other writings virtually created the field of American political thought in political science and contributed significantly to teaching and dissemination of knowledge about American constitutional law and the Supreme Court, I believe that judicial biography occasioned his most creative and enduring scholarship. *Brandeis* and *Taft* remain leading works on their subjects. *Stone* is the greatest judicial biography yet written. It accomplished for understanding of the twentieth century what Albert J. Beveridge's *The Life of John Marshall* (1916-1919) did for the nineteenth and set the standards by which subsequent biographies of judges are judged.

To understand this achievement, it is useful to recall the context and conceptions of Mason's biographical work. Judicial biography, a handmaiden of legal realism, Progressivism, and political jurisprudence, was still a cutting edge in the 1940s and 1950s. It attracted some of the ablest scholars in law-related disciplines.<sup>1</sup> Competition from contemporaries like Charles Fairman, Mark DeWolfe Howe, and Carl B. Swisher was keen. At the same time, their focus on individual Justices and their historical-philosophical-

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1. Konefsky, *Men of Great and Little Faith: Generations of Constitutional Scholars*, 30 *BUFFALO L. REV.* 365 (1981). See, *The Writing of Judicial Biography—A Symposium*, 24 *IND. L.J.* 363 (1949).

legal techniques faced stiff challenges from group-oriented scholars and behavioralists bent on generalization, quantification, and scientific explanation. Mason, without belaboring epistemology and struggling for tenure, made no bones about where he stood in these battles. Far from science, judicial biography was the art of creating "a portrait in words."<sup>2</sup>

As an art form, biography was a hybrid requiring a delicate blending of skills. A biographical portrait, he wrote in 1978, is "a record of human action and reaction, temperament and emotion," handicapped by a medium—words—"less malleable than clay or paint." The preliminary gathering and sifting of data call for the talents of historians; the transition from historian to artist requires the novelist's ability to render the subject's inner world and worth. "The biographer's task," said Mason, "is to blow the breath of life into inert fragments—mementoes, notes, letters, diaries, dry as dust documents. Only then does a biography emerge as a work of art."<sup>3</sup>

Judicial biography, above all, was an art of selection, discrimination, and balance. Subjectivity in choice of subject, evidence, and audience was an inescapable part of the biographer's craft. Hence, there was "no one best way of writing biography." Approaches necessarily varied according to what the biographer brought to the task and "wherever the subject leads." Definitiveness, often associated with the genre, was a delusion. Every generation would write its own biographies. Any biographer aiming for the last word was doomed to the fate of the writer of a book entitled "The S.O.B.'s of Boone County As I Have Known Them." "Every time I think I am through," he said, "I discover another."<sup>4</sup>

The concept of biography as an art form may underlie both the strengths and weaknesses of Mason's work. Several factors account for his strengths. First, he selected only major figures for subjects. The authorized biographer of Brandeis and Stone, he left "second rank figures" to others.<sup>5</sup> If these choices contributed to the "cult of the great judicial personality," the combination of his subjects' characters, careers, and available materials in many ways shaped his biographical strategy in each work.<sup>6</sup> For example, less than one-fourth of *Brandeis* is devoted to the great man's twenty-three years on the Supreme Court. Whether or not this proportion is conso-

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2. Mason, *Vicarious Living: A Biographer's Reward*, 50 N.Y. St. B.J. 396 (1978).

3. *Id.* at 396, 397.

4. *Id.* at 397-99.

5. *Id.* at 397. Justice Felix Frankfurter apparently thwarted his attempt to work on Benjamin N. Cardozo, whose papers were destroyed by Judge Irving Lehman.

6. J. Peltason, *Supreme Court Biography and the Study of Public Law* in *ESSAYS ON THE AMERICAN CONSTITUTION* 219 (G. Dietze ed. 1964).

nant with the Court years' relative significance in Brandeis's career, the primary reason for Mason's treatment was lack of access to Brandeis's judicial papers, although Mason did spend ten days in 1940 interviewing the retired Justice at his summer cottage on Cape Cod under Mrs. Brandeis's watchful eye and over spartan lunches of Spam. Having worked a decade and published three preliminary studies on Brandeis,<sup>7</sup> Mason made the best of the situation by writing a well-balanced portrait of the character and career for a general audience, which became a Book of the Month Club selection and best seller.

*Stone*, published six years after he was approached by the family, had virtually the reverse proportions. Stone's unedited judicial papers were extraordinarily rich. Writing with astonishing speed, Mason seized the opportunity to publish the first biography providing a scholarly, inside history of the Supreme Court at work.<sup>8</sup> The three-pound volume won the American Library Association's Liberty and Justice Award for the most distinguished book of the year in history and biography. *Taft*, a byproduct of a comprehensive study of the chief justiceship that came to naught, concentrated on the jovial conservative's indefatigable leadership in modernizing the federal judiciary. Based on a massive collection of Taft's private papers in the Library of Congress, this work is a fine leadership study in judicial politics, not to mention "new institutionalism."

Timing also had much to do with the impact of Mason's biographies. *Brandeis* appeared only five years after the Justice's death, *Stone* only ten after his. Unlike most scholarly biographies of jurists, these works were contemporary history. They sparkled with fresh controversies and actors, including Justices Reed, Black, Douglas, and Frankfurter, who were very much alive and kicking. Even *Taft* appeared when the saliency of its issues such as doctrinal vs. institutional leadership, judicial selection, and proprieties on the bench throbbed with current meaning. In timing as well as subjects, the biographer showed no mean eye for opportunities. Chance, as Pascal observed, favors the prepared man.

More important is the artistry that Mason brought to each project. As a portraitist of judges in action he had few rivals. His narrative gifts, his eye for revealing incidents and ear for quotations, breathed life into characters great and small. Just as the Roberts retirement letter or Harold Laski's fabrications reclaimed Justices

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7. A. MASON, *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE* (1933); A. MASON, *THE BRANDEIS WAY: A CASE STUDY IN THE WORKINGS OF DEMOCRACY* (1938); and A. MASON, *BUREAUCRACY CONVICTS ITSELF: THE BALLINGER-PINCHOT CONTROVERSY OF 1910* (1941).

8. S. FINE, FRANK MURPHY: *THE WASHINGTON YEARS* 748 (1984).

to humanity, so internal debates over the flag salute and war powers cases soared with the majesty of judges approximating our impossible expectations of the judicial role. Though eschewing psyches and sex, Mason shared Anthony Trollope's understanding of the public's endless fascination with how prominent persons "encounter the changes which come upon us all."<sup>9</sup> Personal stories made the medicine of legal realism and judicial policymaking go down easily. For readers used to impersonal histories and theories of law, his biographies pack a powerful punch. Never before, and seldom since, have the personal and volitional dimensions of judging been probed so intimately.

In addition, Mason was a graceful stylist who labored hard to satisfy his generation's expectations of biography as literature. Like painters who copy the masters to learn their craft, I have often revisited his work to see how he handled a similar problem. I discovered an uncanny ability to write his way around a hole. *Taft* demonstrated his appreciation of the minimalist's theme that less can be more.

The endurance of his biographies depends most, I suspect, on the broad modelling of his judicial portraits. Besides being a legal realist and a passionate New Dealer, Mason practiced political jurisprudence. The 6th edition of the Mason and Beane casebook on American constitutional law could hardly be more explicit:

The Supreme Court has always consisted largely of politicians, appointed by politicians, confirmed by politicians, all in furtherance of controversial political objectives. From John Marshall to Warren Burger, the Court has been the guardian of some particular interest and the promoter of preferred values.<sup>10</sup>

Each biography elaborated these themes implicitly. The wide-angle lenses he employed to put the subject in context overcame the hazards of focusing on a single life. His portraits were analyses of "judges & co.," broadly conceived. Anchored in the empirical rock of documents and papers, they guided readers into longer historical lines and philosophic implications of cases, especially enduring conflicts between private property and public power, liberty versus security, and the legitimacy of judicial review in a popular democracy. Thus, what Mason described after the fact as portraiture others saw as case studies in judicial politics and vehicles to consider clashing ideas in government.

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9. A. TROLLOPE, ANTHONY TROLLOPE: AN ILLUSTRATED AUTOBIOGRAPHY 136 (1987).

10. A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW xiii (6th ed. 1978). See M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964).

Justice Brandeis admonished him to "state the facts and let the characterizations suggest themselves."<sup>11</sup> Generalizations and final verdicts, Mason concurred, were the job of readers, not biographers. Yet he often warned students that facts cannot speak for themselves; facts are ordered by theory. However unscientific, his narratives connected persons, processes, and policies to the polity. No careful reader of his accounts of the 1937 Court-packing fight or the war power cases could miss links among individuals, institutions, and great issues stirring the country. Nor could one fail to get the realist's message that judges make law and public policy—and its constraining counterpoint that they do so in groups. The Supreme Court was hardly a "vehicle of revealed truth."<sup>12</sup>

Mason's biographies straddled sharp divisions over methodology in law-related disciplines because they offered something to almost everyone. Readers interested in processes external to the central actor, readers interested in how a judge's background, values, and role conceptions affected behavior, and readers with traditional historical and jurisprudential concerns found something to value in Mason's work. Jack W. Peltason, a pioneer of the interest group approach to law and policy, made this point over twenty-five years ago in an insightful evaluation which concluded that Mason was "the man who made judicial biography worthwhile."<sup>13</sup> Seven years later I repeated it to aspiring social scientists with a partly tongue-in-cheek inventory of behavioral propositions in fifteen leading biographies. *Stone* led the pack.<sup>14</sup>

Walter F. Murphy has compiled a highly useful set of the functions of judicial biographies as case studies. These are to: (1) impart knowledge about the judiciary in the governmental process, (2) relate the character to the office, (3) reconstruct the judge's values that influence decision making, (4) place the judge and the court in context of the times, (5) illuminate the group phase of judging, (6) describe the roles of courts in the political system, and (7) provide useful data for scholars of many interests.<sup>15</sup> On all points Mason's biographies, especially *Stone* and *Taft*, again win high marks. His accounts of the interplay of personalities, ideas, and intramural bargaining added new dimensions to analyses of constitutional and statutory interpretation. His biographies are the most vivid pictures

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11. Mason, *supra* note 2, at 398.

12. A. MASON, *THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP?* (1953).

13. Peltason, *supra* note 6, at 227.

14. Howard, *Judicial Biography and The Behavioral Persuasion*, 65 *AM. POL. SCI. REV.* 704 (1971).

15. Murphy, Book Review, 78 *YALE L.J.* 725, 728-29 (1969).

of the Supreme Court as a working institution ever written. They not only serve as data banks and heuristic sources for generating theories; they also clarify a host of practical problems such as judicial functions, selection, proprieties, and policy development. As leadership studies they contribute to far broader fronts of inquiry than the judiciary or public law. The great strength of Mason's biographies, in short, is their vibrant legal realism: the credo of law in action becomes "judges & co." in action.

The weaknesses perceived by contemporary critics are also instructive. These reduce to three main complaints: imbalanced coverage, improper evidence, and partisanship.

(1) *Coverage.* Brandeis disappointed some analysts for too little attention to the Justice's service on the Supreme Court, Taft for too much selectivity.<sup>16</sup> Stone drew fire for insufficient weaving of the jurist's pre-judicial experiences with his evolving philosophy of the judicial function. All biographies are vulnerable to criticism over coverage because they involve three angles of vision: subject, writer, and reader. Enjoying the advantages of hindsight, I agree with Charles Grove Haines<sup>17</sup> that Mason shortchanged Brandeis's greatest majority opinion in *Erie Railroad Co. v. Tompkins*,<sup>18</sup> which substantially eliminated federal common law and redistributed judicial power in the United States. Administrative law was slighted as well.

Fully as he mined the Stone papers, I wish Mason had accented more Stone's role as one of this country's greatest legal educators. More could have been made of how Stone's teaching of equity affected his judicial philosophy of balancing interests. Stone's lesson to students in 1910—a "balance of convenience" is necessary "when the public is involved"—was the nub of his approach which the Court accepted in dormant commerce, intergovernmental tax immunities, and personal jurisdiction cases.<sup>19</sup>

Still, no biographer can cover everything. In extenuation, Carl B. Swisher's reactions are persuasive. Brandeis merited full-life treatment even had he not been confirmed as a Justice. Mason's chapters on the Supreme Court reflected "a more thorough digesting of judicial materials" than any American biography to date;

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16. Haines, Book Review, 41 AM. POL. SCI. REV. 129 (1947); and Murphy, Book Review, 54 J. AM. HIST. 188 (1967).

17. Haines, *supra* note 16, at 130.

18. 304 U.S. 64 (1938).

19. Class notes in Equity I, 9, 18 (October 31, 1910), Harold R. Medina Papers, Princeton University. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); and *New York v. United States*, 326 U.S. 572, 586 (1946).

in particular his chapter entitled "Holmes and Brandeis Dissenting" demonstrated rare discernment.<sup>20</sup> Mason's is still the fullest personal portrait yet rendered, despite the handicap of incomplete sources and superior treatment of some aspects by later biographers like Philippa Strum.<sup>21</sup> When Brandeis's papers were finally opened, after years of academic infighting over access, little was found to alter the picture. Even the talented Alexander M. Bickel gleaned only *The Unpublished Opinions of Mr. Justice Brandeis* (1957), and Mason expressed no surprise over the revelations in Bruce Allen Murphy's *The Brandeis/Frankfurter Connection* (1982). Brandeis to him was still a moral giant. Similarly, it made small sense for a scholar in his sixties to tackle Taft's extensive pre-judicial career, already covered by others. And if Mason exaggerated the influence of the "preferred freedoms" concept in the Roosevelt Court, he led the way to understanding the deep potential of the *Carolene Products*<sup>22</sup> footnote as a means of reconciling liberal jurisprudence with political democracy.

(2) *Evidence*. Mason's evidence in *Stone* provoked a scholarly tempest. Given unrestricted access to "a formidable mass of Supreme Court documents—slip opinions in various stages of preparation, memoranda to and from members of the Court, and Stone's own record of the manner in which certain crucial decisions were hammered into shape," he understood that "the freedom thus permitted has been balanced by a corresponding responsibility" in selection and interpretation.<sup>23</sup> Respected critics thought he went too far. Allison Dunham saw no useful purpose or contribution to knowledge in publishing such confidential materials about decision making. Supreme Court opinions spoke for themselves in public evaluations.<sup>24</sup> Edmond Cahn feared that revelation of judicial bargaining, tactics, and squabbling, as in *Smith v. Allwright*,<sup>25</sup> was divisive and unfair to the principals who were barred from riposte.<sup>26</sup> Mark DeWolfe Howe raised issues of taste and premature exposure that returned in spades with Woodward and Armstrong's *The Brethren* (1979). In the aftermath of *Stone*, Justice Minton told

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20. Swisher, Book Review, 9 J. POL. 108 (1947).

21. P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984).

22. *United States v. Carolene Products Co.*, 304 U.S. 144, 150 n.4 (1938).

23. A. MASON, *HARLAN FISKE STONE* xi, xiii (1956). Mason told an interviewer: "On me alone rested responsibility of determining how he should stand before the bar of history and scholarship." 57 *Princeton Alumni Weekly* 9 (1957).

24. Dunham, Book Review, 24 U. CHI. L. REV. 797 (1957). Mason answered the privacy complaint in his, *THE SUPREME COURT FROM TAFT TO WARREN* 202 (1958). For a rebuttal to Dunham, see Peltason, *supra* note 6, at 224.

25. 321 U.S. 649 (1944).

26. Cahn, *Eavesdropping on Justice*, 184 *NATION* 15 (Jan. 5, 1957).

Mason that he had burned his judicial papers. Justice Black ordered a son to destroy his.<sup>27</sup> After *Stone*, all Justices made arrangements for disposition of their private and public papers.

Mason had defenders, to be sure. "These critics have chosen to treat as a grave defect what is probably the book's chief value and unparalleled contribution," Samuel J. Konefsky aptly observed.<sup>28</sup> Judge Harold R. Medina praised the portrait's accuracy and candor, while John P. Frank correctly predicted that greater openness about the Court would ensue.<sup>29</sup> The more that judges made policy, the more the need for public understanding, warts and all. Scholars had no business shielding personal reputations from truth.

There are genuine issues here of balancing privacy and public knowledge, of preserving candid collegial deliberations and avoiding unanticipated intrusion in other people's litigation. Time, nonetheless, has contracted these questions of degree. The debate about proper evidence in *Stone* now seems "quaint and moot."<sup>30</sup> Biographies of Justice Murphy by myself and Sidney Fine lifted the veil a bit more by using papers of other Justices and their notes of secret conferences.<sup>31</sup> David O'Brien's *The Storm Center* (1986) went further by using the records of a sitting Justice, William J. Brennan, Jr. On the score of evidence none of these books engendered any controversy. Mason broke the barrier and took the heat.

3. *Partisanship*. The most serious criticism is that Mason became an advocate and "uncritical alter ego" of his subjects.<sup>32</sup> A quibble about *Brandeis* and *Taft* became the dominant complaint about *Stone*. Prominent legal historians—Paul L. Murphy,<sup>33</sup> Leonard W. Levy,<sup>34</sup> and Mark DeWolfe Howe<sup>35</sup>—took Mason to task for permitting his very success as a biographer to overcome his neutrality as a historian. "Partisan spirit" and astigmatic vision allegedly produced a distorted, oversimplified, and vulgarized account of the Court. Critics charged, for example, that he exalted his central figures into heroes by denigrating their opponents into villains. Scorn for Charles Evans Hughes infected the whole institutional

27. H. BLACK, MY FATHER: A REMEMBRANCE 250-55 (1975).

28. Konefsky, Book Review, 52 AM. POL. SCI. REV. 1135 (1957).

29. Medina, "Mason's Stone," 57 Princeton Alumni Weekly 9 (1957); Frank, Book Review, 9 STAN. L. REV. 621 (1958).

30. Dennis J. Hutchinson, remarks at a panel entitled "Whither Judicial Biography?" at the annual meeting of the American Political Science Association, New Orleans, 1985.

31. J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968); Fine, *supra* note 8.

32. Levy, Book Review, 63 AM. HIST. REV. 152 (1957-58).

33. Murphy, Book Review, 11 W. POL. Q. 413 (1958).

34. Levy, *supra* note 32.

35. Howe, Book Review, 62 POL. SCI. Q. 122 (1957).



drama, leaving readers to wonder whether Stone's reputation could not stand on its own merits. Silence about liberal decisions by conservatives and doctrinal gropings by liberals left unfair impressions of Sutherland and Roberts. Complex issues and alignments in a period of great legal flux were oversimplified by labels such as "Four Horsemen" and "Three Musketeers." Special pleading, moreover, magnified the problem of using confidential private papers. Viewing Justices at work through a single keyhole, Howe argued, necessarily neglects the other side.

Frankly, some of this is true. Mason's dislike of Hughes was a standing joke among his graduate students of my generation. Five years ago, assuming that time had banked the fire, I tried out some revisionist thoughts with him: Why did Hughes awe most of his judicial colleagues?<sup>36</sup> What would Mason himself have done as chief justice facing such a divided Court? Mason snorted: "Well, at least I am not a dual federalist!"

Deeper issues of biographical vision lurk here. The more a biographer gets inside the central character, the harder it becomes to remain an outside, neutral observer. The problem is not so much partisan spirit as unconsciously becoming a captive of the subject's private illusions. Psychologists say that everyone perceives life through self-centered filters. Egocentric bias is universal in organizing memory.<sup>37</sup> How should observers compensate?

One way, Mason's way, is to take advantage of it. A single keyhole heightens perception. His "peephole jurisprudence" in the life of Stone followed a distinguished line of artists. John Updike recently speculated that the Dutch master Vermeer achieved the sparkling presence and photographic perspective of his sole landscape, *View of Delft*, by using an optical device, called a *camera obscura*, which turned his entire studio into a camera by closing the shutters on all but a small, lenslike hole through which he viewed the town below.<sup>38</sup> The opposite way is to extend the sphere. Henry James drew complex perceptual maps for scenes in his late novels to insure that observations came from the characters rather than the omniscient author. Similarly, Howe suggested that Mason should have waited for passions to cool and the papers of other Justices to become available in order to present a fairer, fuller record. That remedy is more viable now than then, ironically by virtue of the criticized work. The downside is to increase drastically the oppor-

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36. See D. Danelski, *The Influence of the Chief Justice in the Decisional Process* in W. MURPHY & C. PRITCHETT, *COURTS, JUDGES, AND POLITICS* 497 (1961); Freund, *Charles Evans Hughes as Chief Justice*, 81 *HARV. L. REV.* 4 (1967).

37. *N.Y. Times*, June 12, 1984, at C1.

38. J. UPDIKE, *JUST LOOKING: ESSAYS ON ART* 24 (1989).

tunity costs of writing biography. Biographers tend to accept these standards today but are overwhelmed with raw material.

How much can we repress subjectivity? In the late 1950s, Jasper Johns painted common objects like numbers and flags ostensibly to eliminate the artist's personal feelings. Now critics see these works as autobiographical. Behavioral scientists of that era had similar aspirations and responses. After deconstructionism and its interdisciplinary counterparts, we no longer expect neutral or objective observation of law and politics. That also is a question of degree. Though *Taft* showed Mason's ability to work with subjects whose political principles he deplored, I have often wondered whether he could have produced such exciting biographies had he lacked political passion. My guess is no. One clue came from his closest biographical rival, Carl Swisher. When I asked why he had written no more biographies after *Field*<sup>39</sup> and *Taney*,<sup>40</sup> he replied that successful biographies require empathy between writer and subject and no other Justice interested him enough. Another clue was Justice Brennan's recent call to lawyers for human passion as well as professional craftsmanship in the living law.<sup>41</sup> A final clue was a remark Mason made at our last meeting: looking back he thought teaching is where immortality, if any, lies for professors.

Alpheus Mason was a great teacher. His enthusiasms for free government and the judiciary's role in achieving it were utterly contagious. Teaching and scholarship for him were a seamless whole. That is why his contributions to the art of judicial biography are an inspiration and a challenge.<sup>42</sup> He exemplified both sides of Carlyle's equation: "a well-written life is almost as rare as a well-spent one."<sup>43</sup>

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39. C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930).

40. C. SWISHER, ROGER B. TANEY (1935).

41. W. Brennan, Jr., *Reason, Passion and the Progress of the Law*, 42 Record of N.Y.C.B.A. 948 (1987).

42. S. Konefsky, *supra* note 28, at 1137.

43. Quoted in Mason, *supra* note 2, at 396.