
Spring 1949

Ingredients of Judicial Biography

John P. Frank

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Judges Commons](#), and the [Legal Biography Commons](#)

Recommended Citation

Frank, John P. (1949) "Ingredients of Judicial Biography," *Indiana Law Journal*: Vol. 24 : Iss. 3 , Article 5.
Available at: <https://www.repository.law.indiana.edu/ilj/vol24/iss3/5>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

INGREDIENTS OF JUDICIAL BIOGRAPHY

John P. Frank†

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

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

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

† B.A. 1938, M.A., LL.B. 1940, University of Wisconsin; J.S.D. 1947, Yale University. Author of *MR. JUSTICE BLACK, THE MAN AND HIS OPINIONS* (1949); *The Appointment of Supreme Court Justices*, [1941] *Wis. L. Rev.* 172, 343, 461.

terms of the origins in American society of the particular person studied, his place in the flow of American life and culture, and his significance to posterity.

The application of this generality to judicial biography gives peculiar difficulty because it requires that the judge's work itself be constantly analyzed in terms of its relations to the society in which the judge lives. The social significance of legal subject matter may be obscure, and this encourages the easy transition to talk about legalisms instead of talk about life. No one has ever attempted a full-length judicial biography which has no more as an object than the description of the legal technicalities encountered by the subject in the course of a full life, but occasionally a work suggests that this may have been its goal.

The primary reason for writing a biography at all should be to account for the course of social development in its broadest sense, as that development relates to the life of the judge. The relation of the protagonist to the life of his time may not be an account of *accomplishment*—for example, John Marshall molded the course of history while Peter V. Daniel, a later Justice, merely resisted it; and a biography of either should try to report the event as it was. But whether the subject was a creator, a resister, or merely a passive observer, by virtue of his position he had a necessary relation to a course of public events, and the biographer must illumine the events with the man.

With the understanding then, that the judge's biography is a peephole into an era, we turn to some of the problems in its creation. As usual, it is easier to identify problems than to solve them. The difficulties may be divided into six: the problems of (1) analysis of the legal work of the subject; (2) analysis of the social meaning of the judge's work; (3) discovery of the full range of the significance of the subject's work; (4) analysis of the relations of the subject to the other members of the court on which he serves; (5) exploration of the subject's prejudicial background; and (6) style.

1. *Analysis of legal materials.* Judicial biographers are drawn from intellectual backgrounds even more diverse than are judges themselves; for while some may be lawyers, others may be political scientists, historians, journalists, or complete amateurs with no significant experience in any kind

of writing or research. Although a license to practice law does not automatically include a license to write biography, the lawyer biographer at least begins with one advantage the non-lawyer must somehow acquire: Lawyers as a group have special advantages by virtue of their training to understand thoroughly the legal materials with which the subject worked.¹

Since about half of the biographies of Supreme Court Justices have been written by non-lawyers, it is fortunate that they so frequently are able to master the technicalities of our trade. Lawyers as reviewers of non-lawyer's biogra-

1. The skills of lawyers and non-lawyers in judicial biography may be compared by analyzing a group of biographies in terms of the six problems discussed in the text. The following table is a personal and necessarily highly subjective appraisal of six biographies by lawyers and eight by non-lawyers. The classifications, to the extent not apparent by the headings, are explained in the remainder of the text above, and since the object is the comparison of work by lawyers and non-lawyers, the works may as well be anonymous. The six books by lawyers are taken from the following seven: TYLER, MEMOIR OF R. B. TANEY (1872); BROOKS, WALTER CLARK (1944); FAIRMAN, MR. JUSTICE MILLER (1939); THAYER, JOHN MARSHALL (1901); BEVERIDGE, LIFE OF JOHN MARSHALL (1916-19); PALMER, MARSHALL AND TANEY (1939); STEINER, LIFE OF ROGER BROOKE TANEY (1922).

The eight books by non-lawyers are taken from the following nine: BENT, JUSTICE OLIVER WENDELL HOLMES (1932); TRIMBLE, CHIEF JUSTICE WAITE (1938); SWISHER, ROGER B. TANEY (1936); MASON, BRANDEIS (1938); PRINGLE, LIFE AND TIMES OF WILLIAM HOWARD TAFT (1939); LIEF, BRANDEIS (1936); MCLEAN, WILLIAM RUFUS DAY (1946); CATE, LUCIUS Q. C. LAMAR (1935); HELLMAN, BENJAMIN N. CARDOZO (1940).

Book	<i>Biographies by Lawyers</i>						Total
	(25) Quality of Legal Analysis	(15) Legal- Social Inter- relation- ships	(10) Range of Legal- Social Discussion	(20) Pre-judi- cial Back- ground	(10) Intra-court Relations	(20) Style	
A	25	15	7	20	6	18	91
B	9	5	2	5	2	7	30
C	25	15	10	16	10	18	94
D	10	9	2	8	3	7	39
E	19	6	7	10	2	5	49
F	22	13	10	15	6	10	76
Ave.	18	10	6	12	5	11	63
<i>Biographies by Non-Lawyers</i>							
G	14	9	7	20	4	16	70
H	25	15	7	20	9	20	96
I	7	2	2	13	2	17	43
J	0	0	0	17	0	14	31
K	15	11	10	20	10	20	86
L	14	8	2	12	10	12	58
M	5	0	1	12	3	16	37
N	2	4	5	12	4	10	37
Ave.	10	6	4	16	5	16	57

phies are sometimes captious in the rigor of their aspersions on the failure of the author to indicate an understanding of subtle procedural distinctions. At the same time many non-lawyer's books do fail in this respect, particularly when the author gets outside the broad areas of constitutional law with which he is most familiar.

2. *Social analysis of the judge's work.* Since the prime object of biography is the determination of the meaning of the judge's work or philosophy in relation to the life of the community, it is the biographer's task to explore the full social reach of the law as the judge participates in its development. Authors show a widely variant skill in putting legal materials into their proper perspective in relation to the policies of the community, and all too frequently lawyers' habits of treasuring technical analysis for its own sake makes for preoccupation with the purely technical. Undiscerning phrases, loose talk, or hollow formulas may be substituted for analysis; and generalities about "preservation of state's rights" or "maintenance of the tri-partite system" have a way of cluttering the books at the expense of the identification of the interests that vaunt these battle cries.

It is here that technical understanding is particularly essential to the author, for he is required to identify the borders of the legally possible. The judge, it is true, is a policy making official of government, with a range of choices to be made in particular cases on policy grounds; but he is not a legislator and has not a legislator's freedom in making the law. He must operate within the framework of the legal system. The biographer is required to identify the cases in which his subject was bound by rules of judicial behavior which he found compelling to reach particular results, as distinguished from those in which he exercised real choice.²

3. *Discovering the range of the significant.* The challenge to the biographer's skill is frequently to discover the

2. An example is the case of *Fisher v. Hurst*, 333 U. S. 147 (1948), at last year's Term of the Supreme Court. In that case the Court had decided that Oklahoma must provide "equal" legal education for its Negro citizens, but a 7 to 2 majority found that the matter of "equality" in those particular circumstances could not be decided because the matter was presented by the procedure of mandamus on a clearly inadequate record. Is a biographer to treat the case as a decision reflecting a judgment concerning segregation, or merely an inevitability of the law of procedure with no significance greater than evidence of judicial intention not to expand the function of mandamus?

full meaning of a particular bit of the judge's work. The difficulty arises when the consequences of a decision are broad and real, but obscure.

Frequently biographers concentrate on the obvious, reviewing only a judge's constitutional decisions, and not all of those. But constitutional law is only one part, and not necessarily the most important part, of a judge's work.³ Today the most important cases are likely to be statutory interpretations, particularly in the field of trade regulation, while 100 years ago the bulk of the work of the Supreme Court was in commercial and property fields; but in either era, constitutional law is only a part of the important judicial work.

Thus the biographer's own training must provide for him a divining rod which bends appropriately when his reading carries him near the stuff for which he looks. This case may involve only a squabble over a single tract of land, and perhaps it should be ignored; but it may be that this is the case upon which the disposition of the land empires of California depended. That case may involve only a quarrel over a shipping accident; but it may be that most of the admiralty jurisdiction grew from it. A third case may be "only a bills and notes case"; but if it was that particular bills and notes case referred to as *Swift v. Tyson*, it will need the dignity of full length discussion. Even in the deserts of the law there may be oases of excitement; and the biographer must find them.

4. *Analysis of the relation of the subject to his brother judges.* Included here are two related, but distinct, problems: first, the establishment of the judge in proper perspective with the rest of the bench on which he served, and second, the analysis of the interrelations of court personnel.

Biographers tend to exaggerate the importance of their subjects. The Supreme Court of the United States has had its quota of members who are important but humdrum. For every Oliver Wendell Holmes there have been five Joseph Rucker Lamars. Many of the Lamars were fortunate to shoulder their way into as much as two inches in the metropolitan obituary columns; and few will ever be the subject

3. In a selection of the 33 most important cases, from a social standpoint, at the October 1947 Term of the Supreme Court, approximately half were not constitutional cases. Frank, *The United States Supreme Court, 1947-48*, 16 U. OF CHI. L. REV. 1, 46, n.164 (1948).

of biographies. But there are intermediate figures whose stories will be told, men like Justice Harlan or Chief Justice Fuller. One of the tasks of their biographers will be to determine the real significance of these judges. Of Harlan's reasoning power his colleague Holmes once said he "did not shine either in analysis or generalization and I never troubled myself much when he shied. I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other."⁴ Fuller looked at himself in relation to his more distinguished brethren shortly after his own appointment and said, "no rising sun prevails with these . . . luminaries blazing away with all their ancient fires."⁵ These are the kind of sound contemporary judgments that are wont to disappear in 500 pages of biography, in the course of which the author convinces himself that his subject deserves greater distinction than his own generation saw.

As part of putting the subject of a biography into his proper relationship to his brethren, the author must ferret out the relations of the Justices among themselves. I do not mean here to put a premium on the gathering of silly gossip. Justice Stone may have felt that his brother Butler was a brute or his brother McReynolds a churl, and Cardozo may have been happier in Albany than in Washington without there being anything very significant in it. But all of the facts, even little ones, may have significance in a setting of more facts. If the biographer studies the influence of the home upon the Justice, he certainly ought to study the influence of a brother judge; and the consequences of the conference may be affected by the demeanor of its conduct.⁶

5. *Discovery and analysis of pre-judicial background.* Of course a major part of the biographer's task is the recounting of the subject's life prior to his judicial appointment. Frequently, as in Pringle's *Taft* or Mason's *Brandeis*, this may be in bulk at least the most important part of the biography.

The significance of this part of the biographer's work is too obvious to warrant any comment except that it is

4. HOLMES-POLLOCK LETTERS 7, 8 (Howe ed. 1941).

5. FAIRMAN, MR. JUSTICE MILLER 389 (1939).

6. Chapter 15 in TRIMBLE, CHIEF JUSTICE WAITE (1938), is an example of the fine work that can be done in digging out important material on judicial interrelations.

frequently inadequate, particularly in accounts of the formative years. There is a tendency to facile foolishness, as for example some observations on the ancestry of the subject followed by the inevitable "from these sturdy ancestors (our hero) drew the outstanding qualities" of such and such. My own experience with work on Justice Daniel is that the study of his life prior to his appointment is a more difficult and time consuming task than the account of his life and work on the bench.

6. *Style.* That which is to be read must be readable, and some judicial biographies leave the impression that this simple platitude has been forgotten. Clarity, simplicity, and sheer verbal attractiveness must be part of the biographer's goal, and lawyer biographers in particular may have trouble in achieving them.

There is something in a lawyer's professional training which seems to kill top-notch writing skill as that quality is customarily evaluated. It is hard to name six Supreme Court Justices in our history who wrote really well, and the quality of ponderousness in particular moves over to biography by lawyers. The typical lawyer's prose is perfectly well constructed, but it is frequently tedious and, for the intelligent lay reader, needlessly obscure. There are no terms or conceptions in the law which cannot be translated into comprehensible English.

Perhaps lawyers' style is maligned enough when the first topic which springs to mind in connection with it is its frequent unintelligibility to non-lawyers. But of course the problem is not solved when this hurdle is overcome, for it remains to make the work not only intelligible but interesting. This may be as much a product of vocabulary and phrase as of subject matter—it may be that our modern law of free speech results not so much from the position Justice Holmes took in the *Abrams* case, but from the way he expressed himself. Sandburg's *Lincoln*, Schlesinger's *Jackson*, or Bower's *Beveridge* have much to teach legal biographers on matters of style.

The great judicial biographies—Beveridge's *Marshall*, Fairman's *Miller*, and Swisher's *Taney*, to name three of the best—illustrate the combination of high technical legal skill with high technical historian's skill. They add readability and a profound sense of the social meaning of their

subjects' work. There are about a half dozen works which have so combined the ingredients of judicial biography as to be great books. If we are to obtain a serious understanding of the Supreme Court as an institution of American government, more are needed.