

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1995

Judicial Biography

Richard A. Posner

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Posner, "Judicial Biography," 70 New York University Law Review 502 (1995).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

JUDICIAL BIOGRAPHY

RICHARD A. POSNER*

Biography is an old (older than Plutarch, conventionally regarded as the father of the genre), rich, various, immensely popular, and philosophically controversial genre. Judicial biography is a newish, growing, increasingly popular, and—I think—highly problematic subgenre of biography and of legal scholarship. As the first speaker at a conference on judicial biography I consider it appropriate to take a broad, general view of the topic. It will aid in this endeavor if I begin with some remarks about biography in general and literary biography—which, as I shall explain, judicial biography resembles—in particular.

I

One cannot speak intelligently about biography without considering its aims, and, as these are various, “biography” is not a homogeneous category of writing. Some biographies use a person’s life as a scaffold on which to hang a narrative of historical events that the person participated in or observed, or as a skeleton for supporting a selection of letters or other previously unpublished documents. These biographies are the least interesting so far as analysis or critique of biography as a distinct genre is concerned. A closely related but more interesting subgenre of biography uses the subject’s life as a window on the past and could be considered a branch of history.

Many biographies cater to our curiosity (often, though not always, prurient) about other people’s lives, especially famous people’s (Suetonius and Procopius are the pioneers here). These biographies are not very interesting, either, from an analytical standpoint, though Professor Grey’s comment¹ persuades me that I should not write off this subgenre—biography as “vicarious acquaintanceship,” one might call it—too quickly. It is related to the interest (which I have de-

* Chief Judge, United States Court of Appeals for the Seventh Circuit. Senior Lecturer in Law, University of Chicago. A.B., 1959, Yale University; LL.B., 1962, Harvard University. This is a revised version of a paper given at the National Conference on Judicial Biography held at New York University School of Law on May 5-6, 1995. I thank Robert Ferguson, Dennis Hutchinson, Philip Kurland, Martha Nussbaum, Cass Sunstein, and the participants in the conference (especially the three commentators on my paper) for their many helpful criticisms of the original draft.

¹ See Thomas C. Grey, *Commentary, Unrepeatable Lessons*, 70 N.Y.U. L. Rev. 524, 525-26 (1995).

fended²) in gossip and more broadly to the possibility of acquiring valuable insights by reading about people as well as by getting to know them in person.

Some biographies tell an exciting story; Symons's *The Quest for Corvo*³ is an example. Some are critical, debunking, like Strachey's *Eminent Victorians*,⁴ and many are hagiographical, like the original lives of the saints—"hagiography" means writing about saints;⁵ I shall call both these sorts of biography *ideological*, without however intending the word to be given its usual, faintly pejorative connotation. Some biographies are *edifying*: they are designed to provide models or antimodels for the reader's own life. A famous example is Cecil's life of Melbourne.⁶ Many feminist biographies are of this character.

Some biographies aim at answering specific questions, often of a causal nature: Why did *X* do *Y*, or where did *X* get the idea for *Y*, or was *X* really the author of *Y*, or, most commonly, why was *X* a great writer, leader, whatever? Let me call these *scientific* biographies. Psychobiography is an illustration; it seeks to identify psychological causes of people's beliefs and actions. Finally, the most common aim of "great" biography and of biography that aspires to greatness is to reveal the "inner man" (or woman), the essential self—what Walt Whitman called "the Me myself"⁷ and Leon Edel "the private self-concept that guides a given life" or equivalently the "concealed self."⁸ I shall call biographies dominated by this aim *essentialist* biographies, as they posit an essential self. Obviously I am not using the word in its normal philosophical sense.

The aims identified by this description of biographical genres are not mutually exclusive, and therefore more than one of them may be found in the same biography. The most common aims of judicial biography, other than that of providing a scaffold for discussing an area of law, or a legal institution (usually the Supreme Court), or the history of a legal institution, have been ideological and essentialist, though some have had, or at least can be imputed to have had, other aims—

² See Richard A. Posner, *The Economics of Justice* 238-40 (1981).

³ A.J.A. Symons, *The Quest for Corvo: An Experiment in Biography* (1934).

⁴ Lytton Strachey, *Eminent Victorians: Cardinal Manning, Florence Nightingale, Dr. Arnold, General Gordon* (1918).

⁵ Illustrations from judicial biography are legion. See, e.g., Frank Sikora, *The Judge: The Life & Opinions of Alabama's Frank M. Johnson, Jr.* (1992).

⁶ David Cecil, *Melbourne* (1954).

⁷ Walt Whitman, *Song of Myself*, in *Leaves of Grass* 28, 32 (Harold W. Blodgett et al. eds., New York Univ. Press 1965) (1891-92).

⁸ Leon Edel, *Keynote Address: Biography and the Science of Man*, in *New Directions in Biography* 1, 9, 10 (Anthony M. Friedson ed., 1981); see also Elisabeth Young-Bruehl, *The Writing of Biography*, 50 *Partisan Rev.* 413, 413 (1983).

instead, or as well—such as edification, vicarious acquaintanceship, or causal explanation (what made Judge *X* great?; or decide cases the way he did?). Both the ideological and the essentialist biography are beset by profound epistemological problems; that is to say, they have an uneasy relation with truth. The ideological biography presupposes some ideal with which to compare and by which to measure the individual who is its subject, and often it will be difficult to justify the ideal to doubters, to show that it is a worthy ideal. This is a serious problem of judicial biography, as we shall see. A related problem of ideological biographies, and again one that commonly afflicts judicial biography, is that in order to sharpen the comparison between his subject and the ideal the biographer will be sorely tempted to prune the “nonessential” features of his subject—the good features if the biographer wishes to debunk him for his failure to come up to the ideal, the bad features if the biographer wishes to present the subject as an exemplar of the ideal. For the subject in these biographies is not an end in itself but an instrument to the exposition of an ideal, and the sharper and cleaner the instrument the more effective it is to this end.

The essentialist biographer encounters epistemological difficulties of a different kind. He is in search of the essential self of his subject. Invariably that essential self is assumed to be coherent,⁹ a unity of some kind; if it is a disorderly aggregation of conflicting elements, the biographer and his readers will not be satisfied that the biography has penetrated beneath the surface. In the implicit psychology employed by essentialist biographers, every human being has three layers of personality. The first consists of the constructed self—the face we present to the world in an effort to facilitate our transactions, whether commercial or personal, with other people. Below is a second self, consisting of those aspects of personality that we conceal from most or all other people. Which of these selves is the more authentic is a deep, and I think unanswerable, question.¹⁰ Below the second self is—or so at least the essentialist assumes; it is the indispensable assumption of his project—the essential self, the one that generates the two higher levels, that holds the key to the person and his works, that enables the biographer to describe particular aspects of the subject as “uncharacteristic,” discordant, anomalous. The essential self, too, is a constructed self, though constructed by the biographer rather than by his subject. Is it a construct that captures, that recreates, a reality? Is it, in short, a hypothesis, and, if so, is it testable? Or is it a fiction, which “makes sense” of the subject in the way that avowed fiction

⁹ See Ira B. Nadel, *Biography: Fiction, Fact and Form* 8-10, 154-56 (1984).

¹⁰ See Richard A. Posner, *Overcoming Law* 531-51 (1995).

seeks to make human action coherent, intelligible, plausible, probable?¹¹

My own view, based partly on introspection and partly on observation of other people, is that the "essential self" is a fiction.¹² People are confusing mixtures, both over time¹³ and at the same time. I do not mean that they are irrational in the sense of behaving inconsistently or even foolishly. I mean only that their preferences, values, reactions, and traits of character and personality are not reducible to an easily grasped, coherently organized, essence—the "saint," the "villain," the "weak man," the "designing woman," the "genius," the "hero," and so forth. There is no inconsistency, no "irrationality," in having preferences that do not compose an aesthetically or emotionally pleasing unity—no inconsistency, therefore, in being a brilliant writer and a vicious anti-Semite, a brilliant doctor and a child molester, a daring warrior and an acrophobe, a lover of hairshirts and of caviar. Aristotle famously distinguished in the *Poetics* between history and imaginative literature on the ground that the former dealt with the actual in all its confusing particularity and the latter with the probable, making poetry "something more philosophic and of graver import than history."¹⁴ Characters in fiction have a unity, a coherence and hence intelligibility, that is missing from real life (not all fictional characters: just think of Hamlet). We are constantly being fooled about real people; they don't conform to the models we construct of them. Writers borrow generously from real life, but in recasting the people they know into fictional characters, the complexities of those people are downplayed, and a dominant trait is allowed to swallow the other traits of the real-life model. (It is a particular distinction of Joyce and Proust that they do not do this.) Most fictional characters are more like the medieval "humors" than they are like people you actually encounter. The essentialist biographer fictionalizes his subject. The novel and the essentialist biography are related genres.

I may be wrong in my skepticism about the existence within each of us of an "essential self." My evidence is weak. Reliance on introspection will be particularly derided, and not only by Freudians. I may be exaggerating the difference between scientific and essentialist

¹¹ The danger of exaggerating the unity of the self in the writing of biography is noted in Richard H. Blum, *Psychological Processes in Preparing Contemporary Biography*, 4 Biography 293, 301-03 (1981).

¹² Cf. Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 Harv. L. Rev. 959, 965-68 (1992). See generally *The Self in Social Psychology* (Daniel M. Wegner & Robin R. Vallacher eds., 1980).

¹³ I emphasize this idea in Richard A. Posner, *Aging and Old Age* (forthcoming 1995).

¹⁴ Aristotle, *Poetics*, in 2 *The Complete Works of Aristotle* 2316, 2323 (Jonathan Barnes ed., 1984).

biography, both of which could be thought engaged in the common project of inference from data to the best explanation of the data. But even if I am wrong about the nonexistence of an essential self, essentialist biography has the embarrassing property of making truth claims that cannot be verified. When the biographer proposes an essential self for his subject, there is no technique for comparing the proposal to the "real" essential self to determine whether the biographer has actually discovered that true self. Nor is there any other method of verifying that the biographer is "right." Whenever truth claims cannot be verified, the claims themselves are likely to be influenced by wishful thinking generated by the claimant's, in this case the biographer's, own traits and values; this turns out to be a serious problem for judicial biography. The problem of unverifiability also attends what I am calling the "scientific" biography. It is a general problem with attributions of causality to historical events, and biography is in one sense a branch of history. To say that Napoleon caused the diffusion of the ideas of the French Revolution throughout Europe is to hypothesize that had there been no Napoleon those ideas would have diffused more slowly or perhaps not at all. That is a counterfactual impossible to verify through experimental or statistical methods.

Both history and biography are plagued by the hindsight problem. We know how things turned out, how a life turned out. We have no direct knowledge of how they would have turned out if something had been different, say in the subject's upbringing. The tendency to see the climactic events or crowning achievements of a life as latent in a person's character or early life is well-nigh irresistible, though we have no way of knowing whether things would have turned out differently had the person had a different character or different life experiences. Biography is often, perhaps characteristically, the telling of a plausible story of how the events of a person's life might have been causally related to each other and (as both cause and effect) to earlier and later perturbations in the social environment. These stories may be interesting and edifying, but their accuracy cannot be verified. The most honest biography would be the one written contemporaneously with the life being lived by its subject, so that the biographer would not know how that life was going to turn out until he had finished the biography.

Another problem of biography, one closely related to the epistemological, may be called the problem of inconsequence or disconnection. Even if each of us has an essential self discoverable by an empathetic biographer, it is far from clear that the essential self generates whatever it is about the subject of the biography that interests us. The deepest layer of personality must be connected with something in

the more visible layers, if the former is a responsible (even if unverifiable) inference from the latter, but it may not be connected with the individual's aptitudes or achievements. This point is obscured in the case of biographies of men of action because the interest is mainly in the actions, and they are visible. It is conspicuous in the case of literary biographies and other biographies of men or women of thought. We might learn about Napoleon's campaigns by reading a biography of Napoleon. But we would be unlikely to read a biography of Joyce without some previous acquaintance with his writings, and our main curiosity in reading the biography would be about the source of his genius. And here we would be disappointed. We might learn why he was so strange, but we would not learn why he was a great writer or what his works mean. We learn from modern biographies of T.E. Lawrence that he derived sexual pleasure from being whipped and apparently from nothing else;¹⁵ the connection between his somewhat unusual sexual taste and his achievements as soldier, writer, translator, statesman, and self-promoter remains wholly obscure, and my surmise is that there is none.

The principal lesson that I take from the best, the most thorough, the most impartial modern biographies about creative people whether in the arts or sciences is precisely that of the disconnection of achievement from self. I am not alone in drawing that lesson. "Whenever a writer, artist, musician, any man of imagination is made the subject of a biography, his light may be extinguished. . . . [L]ife is simply a shell, the kernel of which is creative work. There is no real nourishment in biography. The words fly up, the lives remain below."¹⁶ I have known a number of brilliant, creative people and read about many more, and the curious thing is how rarely the brilliance, the creativity, is diffused throughout the individual's personality. Brilliant natural and social scientists tend to be ordinary people with a few highly developed, esoteric, invisible (by their fruits only shall ye know them), and impacted intellectual skills, while brilliant creative people in the arts and humanities tend to be psychologically disturbed people with a few highly developed, esoteric, invisible, and impacted artistic skills. The spark

¹⁵ See Malcolm Brown & Julia Cave, *A Touch of Genius: The Life of T.E. Lawrence* 22, 174, 177, 184 (1988).

¹⁶ Michael Holroyd, *Literary and Historical Biography*, in *New Directions in Biography*, supra note 8, at 12, 18. As Aldous Huxley put it, the biographer has the Midas touch—but in reverse. This point is made with specific reference to G. Edward White's effort to expose Oliver Wendell Holmes's "inner self" in Evans Wohlforth, *The "Essential" Holmes*, 47 Rutgers L. Rev. 441, 443-47 (1994) (reviewing G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1993)). And here is another pertinent maxim of Huxley's: To like a writer and want to meet him is the equivalent of liking *paté de foie gras* and wanting to meet the goose.

of genius eludes the biographer's grasp. Generally all the reader of the biography of a creative person discovers so far as the springs of genius are concerned is what should have been obvious all along: that highly successful people in any field tend to take their work very seriously, at least while they are doing it, however reckless or frivolous the rest of their life may be, and that outside their (often very narrow) area of achievement creative people are just like ordinary people. "You were silly like us: your gift survived it all," as Auden said in his funeral ode to William Butler Yeats.¹⁷

I do not want to exaggerate the disconnection thesis. Obviously the fact that Joyce grew up in Dublin is related to the setting of *Ulysses*, and the fact that Napoleon became an officer at a time when the established military and political hierarchies had been destroyed is related, along with luck, to his rapid rise to power. And it is a reasonable guess that intelligence and energy are preconditions for most forms of admired achievement; again we could illustrate with Napoleon and Joyce. But we know these things without the aid of essentialist or scientific biography. The literary biography in particular seems somehow to miss the point, to illustrate the old joke about the man who searched for his keys not where he had dropped them but where the light from the street lamp made a search possible, and to support the New Critics' distrust of biographical literary criticism.¹⁸

So the writing of biography, or of the interesting kinds of biography at any rate, is an epistemologically problematic endeavor. It is also very costly. Biographies of people who have been dead for a long time are labor-intensive, like works of outright history, because it takes a lot of digging in musty archives to make even a plausible reconstruction of the past. Biographies of the recently deceased (or the still living) are labor-intensive for a different reason—the likelihood of an extraordinary abundance of material. Letter writing is undergoing a rapid decline, it is true. But more copies are made of those letters that are written, so loss is less likely. And people are leaving their traces in all sorts of other recoverable forms, ranging from e-mail and videotapes to oral histories and library depositories of personal papers. And if acquaintances of the subject survive, there is much interviewing to be done.

¹⁷ W.H. Auden, In Memory of W.B. Yeats, in *The Collected Poetry of W.H. Auden* 48, 50 (1945).

¹⁸ See, e.g., Cleanth Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* 183 (1947) (discussing "perils of biographical bias" in interpreting W.B. Yeats's "Among School Children"); W.K. Wimsatt, Jr., *The Verbal Icon: Studies in the Meaning of Poetry* 3-18, 19 (1954); cf. Richard A. Posner, *Law and Literature: A Misunderstood Relation* 218-27 (1988) (comparing legislative interpretation and New Critics' view of interpreting literature).

Time is money for people who write for a living. For academics, the cost of time takes a slightly different form—the forgoing of other scholarly projects. Time is a finite resource that must be allocated across potential projects. Anyone who is trying to decide whether to write a biography must, therefore, weigh the enormous investment of time that will be required against the likely rewards, financial or otherwise. The financial rewards are limited to biographies of the famous or the notorious. The obscurely great, or non-great, are unlikely to find biographers anywhere but in the universities. An academic must consider carefully what he is giving up by devoting years to doing the research for, and writing, a biography, given the uncertainty of the contribution that biography makes to knowledge and the alternative uses for his time. In the time that Gerald Gunther took to write his 818-page biography of Learned Hand (about which more later), he might have written twenty (or probably more) law review articles averaging forty pages, and conceivably the contribution to legal scholarship would have been greater. Of course benefits to scholarship are not, and should not be, the only consideration in decisions about a career; the taste of the scholar is an important consideration. If Gunther got a kick out of writing the biography that he would not have gotten from writing its weight in articles, as he must have thought when he embarked, this is something to be added into the cost-benefit calculation, and likewise the fact that biographies can be expected to have a longer “shelf life”—to remain in print longer and be read longer—than an essay or (nonbiographical) book about the same person. Because biographies are so costly to write, fewer biographies will be written about a person than essays and nonbiographical books. The biographies will be spaced farther apart in time and as a result will not be superseded so quickly as the other types of writing about the subject of the biography.

The high cost of biography is the principal explanation for the practice of granting a biographer exclusive access to the private papers of his subject. Exclusivity performs a function similar to that of patents. A scholar or writer may be unwilling to invest a huge amount of his time in doing a biography if he has no assurance that his work cannot be duplicated before he has had a chance to recoup some of his costs (in time lost to other projects) through the publication and sale of a book for which there is no close substitute.

An important consideration in deciding whether to write a biography is the existence of alternative genres to biography.¹⁹ These are

¹⁹ See, e.g., J. Woodford Howard, Jr., *Judicial Biography and the Behavioral Persuasion*, 65 *Am. Pol. Sci. Rev.* 704, 704-09 (1971).

substitute projects not only for the biographer but also for readers. The better these substitutes, the smaller will be the supply of and the demand for standard biography. Indeed, by the term "alternative genres" I simply mean studies that offer themselves as substitutes for biography—works that strive to attain the aims, or some of them, of biography at a lower cost in time and perhaps with a stronger claim to truth. Examples of the alternative genres are brief lives (by Plutarch, Aubrey, Johnson, Strachey, and others); biographical studies that confine themselves to the most momentous years of the subject's life or that focus even more narrowly on specific crises or turning points in that life; group biographies (more likely of course to be biographical sketches, "profiles," so as to fit within one cover);²⁰ interpretive essays that seek to "explain" a historical figure; studies of a person's works with only incidental reference to his life; oral histories—autobiography midwived by a historian; and aggregative comparative studies. By the last I mean works like the Goertzels',²¹ which try to discover the springs of creativity inductively by comparing the frequency with which certain traits are found in creative people with the frequency of those traits in the population as a whole. The sampling of three hundred lives in one book seems a more *efficient* method of studying people's lives than three hundred biographies—until one realizes that the Goertzels could not have gotten to first base without the biographers, for it was the biographers who generated the data (and indeed furnished the sample) on which the Goertzels' study was based.

II

So: a problematic and costly genre, the biography, and nowhere is this truer than in judicial biography.²² All the problems of general biography, and of literary biography, are present, exacerbated by additional problems.

²⁰ See, e.g., Strachey, *supra* note 4, which remains the most famous example of this genre. A distinguished example in law is G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (1976).

²¹ Mildred G. Goertzel et al., *Three Hundred Eminent Personalities: A Psychosocial Analysis of the Famous* (1978). The criterion for inclusion in the Goertzels' list was to have been the subject of at least one biography since 1962. For other examples of this genre, see Dean K. Simonton, *Greatness: Who Makes History and Why* (1994), and Howard Gardner, *The Creators' Patterns, in Changing the World: A Framework for the Study of Creativity* 69 (David H. Feldman et al. eds., 1994). For a hybrid of this genre and group biography, see Howard Gardner, *Creating Minds: An Anatomy of Creativity Seen Through the Lives of Freud, Einstein, Picasso, Stravinsky, Eliot, Graham, and Gandhi* at xi (1993).

²² I am not, of course, the first to have noted this. See Howard, *supra* note 19, at 705-07; Walter F. Murphy, *Populist in the Pulpit*, 78 *Yale L.J.* 725, 728 (1969) (reviewing J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* (1968)).

The aims of judicial biography are various,²³ just as with other biographical writing. The scaffolding aim is prominent, especially, but not only, in biographies of recent Supreme Court Justices, an example being the recent biography of Lewis Powell.²⁴ In these biographies, the author's interest appears to be almost entirely in the workings of the Supreme Court as illuminated by the Justice's private papers (abundant only in the case of recent Justices), unless the Justice happens to be a person of exceptional qualities, which is rarely the case, or lived an exciting life, which is even more rare. Biographies of early Justices, from Marshall to Fuller, often turn out to be histories of the Supreme Court during the subject's tenure. Perhaps these should not be regarded as biographies at all, but as works of an alternative genre. The more recent the Justice, the more likely the biography is to provide a vehicle for expounding the biographer's judicial philosophy—to be, in short, ideological.

The recent biography of Hugo Black²⁵ maintains a good balance between the subject's pre-Supreme Court years and his Court years. But while it is a good read and a mine of interesting information, it is not a critical or analytic work. It is adulatory and slightly breathless. Such a book, which comes closest to general biographies written for popular audiences, caters mainly to the public's curiosity about the personalities and private lives of the powerful.

A notable exception to my generalizations about biographies of Supreme Court Justices is Laura Kalman's biography of Abe Fortas,²⁶ a rare, perhaps unique, example of an edifying judicial biography. Kalman's book is in the tradition of medieval cautionary tales of the mutability of worldly fortune. Fortas had a meteoric rise followed by an even more meteoric fall due, as Kalman skillfully and unobtrusively demonstrates, to the arrogance, pride, loss of touch, overconfidence, closed-mindedness, and lack of self-knowledge that are the occupational hazards of the highly successful. It is the only judicial biography known to me that can be recommended to judges and lawyers as a warning not to stray too far from the paths of virtue, humility, and prudence.

²³ For useful lists, see J.W. Peltason, *Supreme Court Biography and the Study of Public Law*, in *Essays on the American Constitution* 215, 217-19 (Gottfried Dietze ed., 1964); Murphy, *supra* note 22, at 728-29. Murphy was describing the benefits of "well-done" biographies in his review of what is widely considered the most successful biography of a Supreme Court Justice, Howard's biography of Justice Murphy, *supra* note 22.

²⁴ John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (1994). An older example is Fowler V. Harper, *Justice Rutledge and the Bright Constellation* (1965).

²⁵ Roger K. Newman, *Hugo Black: A Biography* (1994).

²⁶ Laura J. Kalman, *Abe Fortas: A Biography* (1990).

Few judges, however prominent, have been extraordinary individuals;²⁷ few have led interesting lives; few have had Fortas's Lucifer-like fall from grace. Satisfying the reading public's curiosity about the great, or about the fascinating, is rarely a motive for a judicial biography. I have mentioned one exception—Newman's biography of Hugo Black. The principal exception, however, is the biographies of Holmes, a judge of towering greatness who, in addition, lived an interesting life and left a huge mass of public and private papers to sift through. Biographies of Holmes²⁸ try to locate his essential self in the thousands of pages of and about him (mostly of). Their failure is one reason for my skepticism concerning the existence of the essential self. Gunther has tried to do the same for Learned Hand,²⁹ and Hirsch for Felix Frankfurter in a psychobiography.³⁰

The most common type of judicial biography is the ideological. Judges are presented as standing for a judicial philosophy that the biographer either approves or (rarely) disapproves. Gunther's biography of Hand is a recent example.³¹ Scientific judicial biographies—biographies that try to identify causal relations, for example between what a judge read and the judicial opinions that he wrote—are rare. The most pawed-over causal issue in judicial biography has been whether and in what direction Holmes's three years' service in the Civil War, in which he was wounded three times, each time seriously, influenced his judicial philosophy. There is endless speculation, but no satisfactory answer. It is *plausible* to attribute the "hard" side visible in so many of his opinions to his brutal experiences in wartime, but is it right? Many of his contemporaries who had no military experience were equally "hard," a good example being Holmes's English friend James Fitzjames Stephen.³²

Because the principal output of judges, especially appellate judges (and biographies of trial judges are rare), consists of judicial opinions, judicial biography is a cousin of literary biography. The relation is particularly close for those who believe, as do I, that literary distinction is a central element in the reputation of the great judges,

²⁷ Reviewing biographies of Earl Warren, Dennis J. Hutchinson concluded, with impolitic candor, "he was a dull man and a dull judge." Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 Mich. L. Rev. 922, 930 (1983).

²⁸ Of which there are now a goodly number. See generally John F. Hagemann, *Looking at Holmes: A Review Essay*, 39 S.D. L. Rev. 433 (1994).

²⁹ See Gerald Gunther, *Learned Hand: The Man and the Judge* at ix, xvii-xviii (1994).

³⁰ See Harry N. Hirsch, *The Enigma of Felix Frankfurter* at ix (1981).

³¹ See Gunther, *supra* note 29, at xviii ("I began work on this biography despite the fear that my admiration might preclude an absolutely unprejudiced portrayal He remains my idol still.").

³² See my essay on Stephen in Posner, *supra* note 10, at 259-70.

such as Holmes, Cardozo, and Hand. This makes the disconnection between inner self and literary expression almost as serious a problem for judicial biography as for literary biography. We have some clues, if nothing more, to where these judges got their judicial philosophies, but we have no idea what it was in these judges or their environments that can explain their literary distinction. Their education was not significantly different from that of other judges, who wrote with no literary distinction, yet some of those other judges, such as William Howard Taft and Charles Evans Hughes, were men of formidable intellect. Emphasis on personality has done unwarranted damage to the reputation of Felix Frankfurter, an extremely accomplished judge. We find it hard to accept that jerk and genius are often found in the same body.³³

Yet if the literary dimension of judicial performance complicates judicial biography in one sense, its increasing absence complicates it in another. Today, few judges, even the most famous (William Brennan being a notable example), write their own opinions or speeches. The writing is delegated, often with very little supervision, to law clerks; sometimes even the selection of the law clerks is delegated. Increasingly, judicial output is a corporate affair (it always was, in a more limited sense, because of the heavy reliance that most judges place on the briefs of the parties). The biographies of modern judges may come to resemble histories of General Motors or the New York Public Library. This is another reason to doubt whether judicial biography has a bright future as a distinct genre.

The special problems of judicial biography can be brought into focus by asking who can be expected to be the authors and who the readers of such biography. The answer to both questions is: mainly lawyers. Few others are interested in reading about the lives of judges, because judges, with just a tiny handful of exceptions, are obscure and forbidding figures to the public at large. If the readership of judicial biography is to be composed largely of lawyers, there is a certain logic to the authors' being lawyers as well: the better to communicate with the primary audience for the work. In addition, it is very difficult for a nonlawyer to write a judicial biography. This is not only because judges deal with technical legal issues but also because the role of the judge is difficult for nonlawyers to understand. Nonlawyers tend either to be credulous about judges' self-serving rhetoric of disinterest or to assume that judges are merely politicians ("states-

³³ Cf. George Orwell, *Benefit of Clergy: Some Notes on Salvador Dali*, in 3 *The Collected Essays, Journalism and Letters of George Orwell* 156, 161 (Sonia Orwell & Ian Angus eds., 1968).

men," if the nonlawyer shares the judge's politics) in disguise, whereas the truth usually lies somewhere in the middle.

It is true that a number of well-known biographies of Supreme Court Justices, beginning with Beveridge's life of John Marshall,³⁴ have been written by nonlawyers. But the results are certainly mixed. An example is Alpheus Thomas Mason's biography of Harlan Fiske Stone.³⁵ As Philip Kurland has demonstrated, Mason's biography does not show Stone as he was but as he would have liked the public to think that he was.³⁶ Mason turned out to be a gullible member of that public.

Judges are great bluffers, and it is particularly difficult for nonlawyers to penetrate the bluff unless they are highly cynical. It is possible to be too cynical even about the legal profession, but lawyers don't generally do much better in piercing the facade, though for a different reason. Deference to judges is deeply ingrained in the legal culture. This is partly because judges have power over lawyers (elected judges have less power over lawyers, and are deferred to by them less), and partly because, like any guild or profession, lawyers tend to close ranks against outsiders. The probity and intelligence of judges are central figures in the "official" picture of the law that lawyers paint for laymen. Even when writing biography, lawyers are reluctant to foul the nest by depicting judges as they really are. Then, too, the relation of lawyers to truth is an ambivalent one, making them particularly unreliable practitioners of a craft—the writing of biography—that itself bears a questionable relation to truth. Lawyers are skilled equivocators, and are more comfortable defending a "position" than finding out the way things really are. So it comes naturally to the lawyer-biographer to write a brief for his subject. These things are truer of practicing lawyers than of law professors, and it is from the ranks of the latter rather than the former that most judicial biographers come.³⁷ But few law professors are able and inclined to shed entirely the outlook of the lawyer they were trained to be.

³⁴ 1-2 Albert J. Beveridge, *The Life of John Marshall* (1916); 3-4 Albert J. Beveridge, *The Life of John Marshall* (1919).

³⁵ Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956).

³⁶ Philip B. Kurland, Book Review, 70 *Harv. L. Rev.* 1318, 1321 (1957) (reviewing Mason, *supra* note 35); see also J. Woodford Howard, Jr., Alpheus T. Mason and the Art of Judicial Biography, 8 *Const. Commentary* 41, 48-49 (1991). The problem of a biographer identifying with his subject is of course not limited to judicial biography, let alone judicial biography by nonlawyers. Cf. Eva Schepeler, *The Biographer's Transference: A Chapter in Psychobiographical Epistemology*, 13 *Biography* 111 (1990).

³⁷ Though one of the better judicial biographies was written by a practicing lawyer. See Willard L. King, *Melville Weston Fuller: Chief Justice of the United States 1888-1920* (Univ. of Chicago Press 1967) (1950).

The more a lawyer is a true believer in the legal profession's official (still widely believed, and even more widely propagated) view of law, the less likely he is to think that writing a judicial biography is a worthwhile undertaking. In the most extreme versions of legal formalism, the judge is an oracle or a computing machine; his personality, life history, values, family, and politics do not enter into his decisions at all and, it would seem to follow, are therefore not very interesting. What I am calling the problem of disconnection is then at its most acute. No lawyer is *that* formalistic today. And one can imagine a formalist biography the very point of which is that the judge's life had not influenced the outcome of his decisions; some might find a hint of this theme in Gunther's biography of Hand. Yet in general, as one moves from the formalist pole toward the realist (or, nowadays, the "crit") pole, the attraction of biography as a mode of explaining judicial decisions grows. Phil Neal has pointed out that one reason for an interest in writing and reading biographies of Supreme Court Justices is that we doubt that their decisions are fully determined by the rules of law; we think that personal factors must play a significant role.³⁸ Oddly, the legal realists did not write judicial biographies. The critics, too, have shown very little interest in the lives of judges. (One reason may be that their judicial heroes would not bear close scrutiny.) The supply, among lawyers anyway, of good judicial biographers is apt to remain small.

A relevant consideration in appraising the prospects for judicial biographies written by lawyers is that the writing of biography is a particularly costly undertaking for academic, as for other, lawyers. Law schools are not oriented to the demands of time-consuming scholarly projects, because historically and even today few law professors have had the taste or training for such projects. Law professors do not have cadres of graduate students to assist them, though they can get some help from law students; they have, many of them, heavy teaching loads; they are constantly being dragooned into university governance activities, for which their lawyerly talents particularly equip them; and they are easily tempted from their academic duties by opportunities for engaging in legal consulting, public service, and other "real world" extracurricular activities. The distractions that beset law professors are part of the explanation for the extraordinary delay in the appearance of biographies of major judges by law professors. Mark DeWolfe Howe died before he could finish his biography of Holmes and was followed to his grave by his designated successor, Grant Gilmore; the Hand biography was published thirty years after it

³⁸ Phil C. Neal, Introduction to *id.* at vii.

was commissioned; law professors' biographies of Brandeis, Cardozo, Frankfurter, and Jackson have yet to appear, although the Cardozo biography (by Andrew Kaufman—forty years in the making) is due out soon.

Worst of all, nothing in a lawyer's or legal scholar's training and experience equips him to write biography. He is not trained to write narratives or to depict human beings empathetically; few academic lawyers, even those with experience as law clerks, have demonstrated an ability to imagine what being a judge *feels* like. In one sense a weak faculty of empathy does not matter with respect to the most popular subject for judicial biography, Holmes. His biographies are essentially written out of his letters and judicial opinions. The empathetic observer is Holmes himself. But in another sense, a lack of empathy is a serious impediment to the writing of an adequate biography of Holmes. His outlook has proved deeply antipathetic to most of his biographers. He is not "politically correct." He is not the patient judicial craftsman of legend. He is not entirely consistent. He does not seem entirely likeable. He wrote so much, yet so determinedly concealed his "inner self," that it is hard to get a handle on him. Read in great swatches, he becomes a little tedious. And his intellectual breadth exceeds that of his biographers. The biographers thus have trouble encompassing him, yet at the same time feel compelled constantly to apologize for him. The Novick³⁹ and White⁴⁰ biographies are works of distinction, yet there is a sense that the definitive biography of Holmes has not been written, and perhaps never will be.

The case of Holmes is special. The general challenge of judicial biography, to which few judicial biographers rise, is to write empathetically and arrestingly about dullish people who are not introspective. That is an art. The writing of a biography requires great diligence and patience, which many academic lawyers have, but diligence and patience are not enough to produce a first-rate biography.

If dull people make for dull biographies, a focus on the handful of exciting judges (led by Holmes) becomes the inevitable focus of judicial biography. But if, as I have assumed throughout this paper, the primary use of judicial biography is to illuminate the judicial process, a focus on the handful of exciting judges is apt to create a distorted impression of that process. Most judge-made law is made by the ordinary judge, not the extraordinary one.⁴¹ Holmes, Brandeis, Cardozo, Hand, and a handful of other judges may well be each of them far

³⁹ Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (1989).

⁴⁰ White, *supra* note 16.

⁴¹ See Posner, *supra* note 10, at 109-10.

more influential than any judges outside of that charmed circle, but the aggregate contribution of the run-of-the-mill judges to the shape of our law is much greater than that of the charmed circle, because of the incremental nature of judge-made law and the vastly greater number of ordinary than extraordinary judges.

The result of all the obstacles to good biography in general and to good, useful judicial biography in particular is that most judicial biographies really do not deserve the name and that even the best are not completely satisfactory. I will illustrate the first point with Charles Fairman's biography of Samuel F. Miller,⁴² who served on the Supreme Court in the latter part of the nineteenth century, and the second with Gunther's biography of Hand. The title of Fairman's biography is significant. He substitutes a title for the man's first name (known to few lawyers even) and makes all too clear that the only thing that interests him about Miller is his long service on the Supreme Court during a tumultuous period in the Court's history. Miller never comes alive. The impression conveyed, seemingly unintentionally, is of a pompous ass, energetic and well-meaning but mediocre in intellect and thoroughly conventional in outlook. Dickens could make a conceited ass interesting. Fairman could not. The writing is stilted and full of respectful gestures toward the Court and its members. It is writing by and for the guild.

King's biography of another Supreme Court old-timer, Chief Justice Melville Fuller,⁴³ is better written than Fairman's book and paints a lively picture of a nice man, though a lesser judicial figure than Miller. Fairman was a distinguished scholar; King was not a scholar at all, and Fairman had an abler subject and a more interesting period to write about. But King's is a genuine biography, and Fairman's is a slice of Supreme Court history garnished with quotations from the not very interesting private letters of one of its not very interesting members.

I have written a review of Gunther's biography of Learned Hand and do not want to repeat what I said there.⁴⁴ But no contemporary discussion of judicial biography would be complete without some mention of Gunther's book. The thoroughness of his research, extending over decades, the superb writing and organization, the distinction of the author in the legal academic community, and the intrinsic

⁴² Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862-1890* (1939).

⁴³ King, *supra* note 37.

⁴⁴ See Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *Yale L.J.* 511, 520 (1994) (book review). Or what Judge Boudin said in his excellent—and more generous—review. See Michael Boudin, *The Master Craftsman*, 47 *Stan. L. Rev.* 363, 386 (1995) (book review).

importance of his subject have made the publication of the book an event in the history of judicial biography. Gunther has set a standard against which all subsequent judicial biographies will be judged.

Yet despite its excellence, the book has serious limitations. One is its ideological cast, which carries Gunther away from the true significance of Learned Hand's career. Gunther, a constitutional scholar, wishes to make Hand a spokesman for self-restraint in constitutional adjudication. Although Hand wrote a few notable constitutional opinions and gave a series of lectures on constitutional interpretation, the vast bulk of his judicial career was devoted to statutory and common law cases rather than to constitutional ones. It is in those areas, not constitutional law, that he made an enduring mark on American law and earned the reputation of the greatest lower-court judge in American history. Yet they receive short shrift in Gunther's long book as a result of their remoteness from the theme of judicial self-restraint that preoccupies him because of his extrabiographical interests and commitments.

As with all ideological biographies, the author's desire to make his subject stand for (or against) an ideal causes some trimming of rough edges. The Hand portrayed by Gunther is a pretty rough diamond; the actual diamond was even rougher. I don't think this matters much. A related but more serious problem with the Hand biography, which a deeper or franker confrontation with Hand's foibles would only have magnified, is the disconnection that I have been emphasizing between the inner self and the outer achievement.⁴⁵ The insecurity, the rudeness, the orneriness, the uxoriousness, the ambition, the emotionality, the neuroticism that characterized Hand the person are not visible in the judicial opinions. Although Gunther attempts to relate the skepticism that he finds at the root of Hand's philosophy of judicial self-restraint to Hand's personal insecurities, the attempt founders on the familiar problem of biographical causality—the difficulty of verifying counterfactuals. Hand got his philosophy of judicial self-restraint from Holmes, who seems to have had none of Hand's insecurities. It could nevertheless be that insecurity is a sufficient but not a necessary condition of being a restrained judge. Could be, but is not, for it would be easy to make a list of judicial activists who were personally insecure.

Gunther's desire to use Hand to make a point about the importance of judicial self-restraint may have been a factor in Gunther's

⁴⁵ A similar point is made in Kannar's superb review of Hirsch's psychobiography of Frankfurter. George Kannar, Representative Egos, 16 Harv. C.R.-C.L. L. Rev. 875, 901 (1982) (reviewing Hirsch, *supra* note 30).

decision to try to reach a large audience by publishing with a commercial press, a decision that in turn entailed an effort at "humanizing" the subject by downplaying his technical work as a lower-court judge. As a result we do not learn a great deal (in an 818-page book!) about the judicial process. Indeed, we do not discover wherein Hand was a great judge and, unless we accept facile psychologizing, what made him great. But I acknowledge that this may be an insider's complaint. We know that the public is avid for biography, and it can be argued therefore that judicial biography affords a rare opportunity for informing the lay public about law. Catherine Drinker Bowen's two widely read "popularizing" judicial biographies—*Yankee from Olympus*,⁴⁶ about Holmes, and *The Lion and the Throne*,⁴⁷ about Coke—can be seen, in this light, as significant contributions to public enlightenment about law. Novick's biography of Holmes and Gunther's of Hand may have a similar significance, in addition to their undoubted scholarly merits.

It is a curious property of judicial biography that the more political the judge, the more illuminating the biography is likely to be. Hugo Black was a highly political Supreme Court Justice. Appointed to the Court from the United States Senate, where he had been notable for his partisanship, Black was hardly likely to be otherwise than political, and he was not. He was an intelligent person, an able lawyer, and a graceful writer, but *au fond* he really was a politician in robes; the stamp he placed on the Constitution was an entirely personal one. Newman's biography identifies some aspects of personality and life experiences that shaped Black's political outlook and by doing so helps explain why Black was the kind of Supreme Court Justice that he was.⁴⁸ Newman's approach would not get far with a Holmes, a Hand, or a Cardozo. That is not because these judges' decisions were not influenced by extralegal knowledge and experience; it is because we are interested in much more than their votes on particular cases and because even those votes cannot be mapped onto a simple pattern of political preferences. Brandeis is an intermediate case, a judge far more thoughtful, learned, and disciplined than Black, yet also more influenced by political or ideological passion than Holmes, Hand, or Cardozo.⁴⁹

⁴⁶ Catherine D. Bowen, *Yankee from Olympus: Justice Holmes and His Family* (1943).

⁴⁷ Catherine D. Bowen, *The Lion and the Throne* (1956).

⁴⁸ Newman, *supra* note 25, at 3-121.

⁴⁹ See generally *infra* notes 58, 61.

III

The serious, and seemingly inherent, obstacles to successful judicial biography make the issue of alternative genres a particularly urgent one. There is no dearth of these. Since what is interesting about judges is mainly their opinions and their votes (and sometimes their behind-the-scenes influence), the obvious alternative to studying the judge's life is studying his opinions, philosophy, style, legacy, and influence. Each of the famous judges has accreted a large commentary of this sort—so large a commentary that the question of what a biography could add to the understanding and critique of the judge *qua* judge is a legitimate and not merely impertinent one. The insightful essays on Holmes's jurisprudence by Thomas Grey,⁵⁰ G. Edward White,⁵¹ and others tell us more about Holmes than the biographies do.⁵² It is noteworthy that of the four sessions of this conference on judicial biography, two—"Biographies of Titans: Holmes, Brandeis, and Other Obsessions" and "Members of the Warren Court in Judicial Biography"—barely touched on biography. The first was concerned with the sociology of reputation⁵³ (why have Holmes and Brandeis in particular earned such huge reputations?) and the second with the evaluation, not biography, of the members of the Supreme Court during Chief Justice Warren's tenure.

Since appellate judges decide cases as a committee, an especially attractive alternative to the conventional judicial biography is the study of the membership of a court at a particular point or interval in its history. A distinguished example of this genre is Schick's book on the Second Circuit during the period when Learned Hand was chief judge.⁵⁴ This book, nastily criticized by Henry Friendly when it was published,⁵⁵ is essentially ignored by Gunther (though he does cite it),

⁵⁰ Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787 (1989).

⁵¹ G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 *Hofstra L. Rev.* 633 (1982).

⁵² Professor Howard in his comment on this paper discusses some of the alternative genres to judicial biography. See J. Woodford Howard, Jr., *Commentary*, 70 *N.Y.U. L. Rev.* 533, 543-46 (1995). He is himself the author not only of a notable biography of Justice Murphy, Howard, *supra* note 22, but also of a notable alternative study of the judicial system, J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (1981) [hereinafter Howard, *Courts of Appeals*].

⁵³ This is a central theme of my book, Richard A. Posner, *Cardozo: A Study in Reputation* 58-69 (1990) (examining nature of reputation and how it is affected by merit, exploitation, accident, and politics).

⁵⁴ Marvin Schick, *Learned Hand's Court* (1970).

⁵⁵ Henry J. Friendly, *Book Review*, 86 *Pol. Sci. Q.* 470 (1971). The tone of the review is set in the first two sentences:

In an access of modesty Marvin Schick questions in his preface whether, in having tried to employ some techniques familiar to lawyers and some tech-

even though it deals with important aspects of Hand's work as a judge in greater depth than does Gunther's book. A number of things, I conjecture, offended Friendly (and perhaps Gunther) about Schick's fine work. First is Schick's less than reverential, although highly respectful and on the whole highly positive, evaluation of Hand as a judge. Second is his suggestion that Hand's court contained "liberals" and "conservatives" and that the balance between the two wings determined the outcome of some cases. Third is Schick's willingness to wash the court's dirty linen in public (albeit a tiny public), by exposing the infantile feud between two of its members, Jerome Frank and Charles Clark. Fourth is a taste for quantification (though this receives the grudging approval of Judge Friendly), as in the series of tables in which Schick reports each judge's "scorecard" of affirmances and reversals by the Supreme Court, and shows that "liberal" Second Circuit judges and "liberal" Supreme Court Justices tended to vote the same way, and the "conservatives" on both courts likewise. Last is the presumptuousness of a social scientist's undertaking to evaluate judges. Schick's sins against the legal establishment were thus many: failing to worship at the shrine of a judicial saint; treating the judicial process as politicized and personalized; presuming that a nonlawyer can pass judgment on respected members of the legal profession; and reducing cases to statistics. Friendly remarks revealingly that if the reader skips roughly the first two-thirds of the book and skims much of the remainder, "the book can be palatable to *aficionados* of the Second Circuit in its great days."⁵⁶ Should *this* be the criterion of scholarship about judges?

We need more books like Schick's and fewer judicial biographies. We learn a lot about the judicial process from Schick's book (not least how it is viewed from outside law), which is why most of us, judges or lawyers, would read a judicial biography. We do not learn much about the judicial process from biographies—except, as I have suggested, in the case of judges who really are politicians in disguise. In the case of the great judges, like Holmes and Hand, we may feel that we are getting near the inner man, but it is not clear that it is the inner man who writes the judicial opinions that drew us to the biography in the first place. Biography is a costly genre, and there is not such a plenitude of first-rate legal scholarship as should make us complacent about the many years of scholarly time that have been lost to the com-

niques used by political scientists, he has "succeeded to the satisfaction of either." As a lawyer I can confirm his doubts; my guess is that political scientists also will share them.

Id. at 470 (citation omitted).

⁵⁶ Id. at 476.

position of judicial biographies. The natural curiosity that we judges, at any rate, have about the lives of other judges is satisfied by biographical essays, of which there are many.⁵⁷

Schick's approach is only one alternative to biography as a way of studying judges. The focus can remain on the individual judge rather than on his court, yet it can be the judge's work that is studied rather than his life.⁵⁸ The quantitative approach is important and should be expanded to include the study of patterns of judicial and scholarly citations to the opinions of the judge or judges being studied.⁵⁹ And if one wanted to study the effects of race and gender on judicial performance, a quantitative study using race and gender as explanatory variables would produce more objective results than biographies of individual black or female judges.

No evaluative study of an individual judge is complete until his opinions are compared with the lawyers' briefs.⁶⁰ This is necessary in order to determine not only the judge's "value added" but also his scrupulousness with respect to the facts of record and the arguments of the parties. It is also important to determine so far as possible what the judge read—because what a person reads, and doesn't read, shapes his outlook, style, and philosophy—and, more broadly, to determine how the judge informed himself about what was going on in the world about him.⁶¹ When the judge who is being written about is an appellate judge, an assessment ought to be made of his colleagues, because the performance of an appellate judge is both enhanced and constrained by them. Hand benefited from having unusually good colleagues; Holmes complained about the overediting of his opinions by his colleagues. The heft and composition of the caseload of the judge's court is important, too, as is the method by which cases were assigned in his court. For judges active in the modern era of ghost-

⁵⁷ See, e.g., Henry J. Friendly, *Benchmarks* 291-307, 308-17, 318-24 (1967); Charles E. Wyzanski, Jr., *Augustus Noble Hand*, 61 *Harv. L. Rev.* 573, 573-91 (1948). My personal favorite among the works in this genre is Edmund Wilson's great essay on Holmes in his book, *Patriotic Gore: Studies in the Literature of the American Civil War* 743-96 (1962).

⁵⁸ For a notable recent example, see Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* 227-74 (1994); cf. David F. Bryden, *Brandeis's Facts*, 1 *Const. Commentary* 281 (1984).

⁵⁹ I tried to do this with Cardozo in my book, see Posner, *supra* note 53, at 74-91, and with Hand in my review of Gunther's biography, see Posner, *supra* note 44, at 536 *tbl. 1*; cf. Howard, *Courts of Appeals*, *supra* note 52, at 143-45. I believe such a quantitative approach is never taken in judicial biographies.

⁶⁰ See, e.g., Posner, *supra* note 53, at 111-12 (noting that minimal resemblance of Cardozo's opinions to lawyers' briefs attests to his ample creativity). This is rarely if ever done in judicial biographies.

⁶¹ This is not a new idea. See, e.g., Lynford A. Lardner, *Judges as Students of American Society*, 24 *Ind. L.J.* 386, 389-90 (1949); cf. Baskerville, *supra* note 58, at 274.

writing by law clerks, an attempt must be made to separate the judge's work from that of his ghosts; the polite fiction that all judges are the authors of their opinions must be dropped. The failure to do this reduces the value of biographies of Powell⁶² and other contemporary judges.

In short, for full-scale judicial *biographies* I impertinently propose the substitution of judicial *studies* that will employ a range of legal, humanistic, and social-scientific techniques. Many, I expect, will be collaborative projects of law professors and professors from other fields. I believe that studies of the kind I have suggested, studies instanced by Schick's book on Hand and his colleagues and by Baskerville's recent book on Brandeis,⁶³ hold greater promise for illuminating the judicial process than judicial biographies do—and only part of the reason is that such studies can be conducted in less time than required for a full-length judicial biography. But I am speaking of *scholarly* illumination, and it is arguable that the judicial biography has an especially important role to play in explaining law to lay people.

⁶² See Jeffries, *supra* note 24.

⁶³ See Baskerville, *supra* note 58.