

Crossing the Bar

“Lawyers die young; judges die old.”

—Professor J. W. Moore¹

When a judge dies or retires, flights of angels may not sing him to his rest, but his colleagues sometimes try. Their memorial incantations, with or without music, are gathered in the one or two dozen yellow pastel pages printed in the front of most volumes of the *Federal Reporter (Second Series)* and the *Federal Supplement*.² It is time this body of judicial doctrine received analysis.

Until ten years ago, memorial services and ceremonies in the federal courts went unreported, though they no doubt took place.³ Only with the death of Judge John J. Parker of the Fourth Circuit, described by his colleagues not untypically as “beloved”⁴—the Senate had felt otherwise a quarter-century earlier⁵—did the West Publishing Company think the ceremonies worthy of transcription.⁶ Not unexpectedly, the reports disclose the law’s abiding interest in stability and continuity of authority.

1. Oral tradition, New Haven, 1968.

2. Not only judges are involved. In one instance the suicide of an entire court—the United States Emergency Court of Appeals—is reported. 299 F.2d 1 (1961). The court was set up by the Emergency Price Control Act of 1942, 56 Stat. 32, to review price regulations under that act. In 1950 the Congress, re-enacting price control after having abandoned it in 1947, was surprised to learn that the court was still in existence. It was therefore given authority to review regulations under the Defense Production Act, 64 Stat. 808-11 (1950). By 1961, the court had cleared its docket, and Chief Judge Maris, fearing that its continued existence would only tempt Congress to make a renewed grant of jurisdiction, arranged to have the court dissolve itself. 299 F.2d at 21. Judge Magruder dissented without rancor, believing that the court had no power to declare itself “out of business, defunct, functus officio.” *Id.* at 19. Judge McAllister was merely grateful to have worked with his two colleagues, a gratitude he expressed rather inexactly with Virgil’s line—“Forsan et haec olim meminisse iuvabit.” (“Perhaps even these things will one day be pleasant to recall.”)

3. Memorials to members of the Supreme Court of the United States have been reported since much earlier. These proceedings, however, are beyond the scope of this Note.

4. See Proceedings in Honor of John Biggs, Jr., at the 28th Annual Judicial Conference of the Third Judicial Circuit 42, reprinted in 355 F.2d (1965) (remarks of Chief Justice Warren).

5. See *Hearing on the Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States Before the Subcomm. of the Senate Comm. on the Judiciary*, 71st Cong., 2d Sess. (1930); 72 CONG. REC. 8475-87 (1930).

6. See Proceedings in Memoriam, Hon. John Johnston Parker, reprinted in 253 F.2d (4th Cir. 1958). The change of practice represented, no doubt, a signal service in the interests of judicial biography, but its initial reception was chilly. The Yale Law Librarian, for example, appears to have deplored the break with tradition; the three copies of volume 253 of the *Federal Reporter (Second Series)* under his jurisdiction were defaced by the removal of all but the photograph of Judge Parker. A thousand words, one assumes, weren’t worth the picture. Mr. Bitner must soon have repented his haste, however, since subsequent judicial tributes have been permitted to reach law students

Most judicial eulogies begin with discussion of what in the judge's background formed and shaped the peculiar virtue he displayed on the bench, and the law's respect for tradition has often influenced speakers to find in the judges' ancestors the source of his virtues. Thus the reader learns that Judge Biggs of the Third Circuit derived his peculiar excellence from the sound training in Delaware law he received from his father, a magistrate in rural Sussex County.⁷ Similarly, the hostility of Charles E. Clark's ancestors to the stuffy atmosphere of the Massachusetts Bay Colony explains his lifelong hostility to formalities of pleading and procedure⁸—and, no doubt, to the legal heirs of the Puritan tradition still resident in Cambridge.⁹

Of course, if ancestors are to confer the traditional benefits, their line must be long. An admirer of Judge Samuel H. Sibley therefore took great satisfaction in pointing out that that judge could trace his ancestors back to 1629.¹⁰ So far as appears from the reports, this is a record: the runner-up, Judge Letts of the District Court for the District of Columbia, could boast no ancestor earlier than 1630.¹¹

But hoary lineage may sometimes be dispensed with. Thus a speaker in the Sixth Circuit was forced to concede that a connection with the family of Thomas Jefferson gave Judge John D. Martin no advantage in legal technique over Judge Charles C. Simons, whose earliest American ancestor—his father—had been an immigrant scrap dealer.¹² And Judge Learned Hand, *sui generis* in this as in so much else, apparently was his own ancestor when he had been fifty years on the bench.¹³

Ancestry, moreover, bulks larger in the eastern than in the western circuits. The Ninth Circuit rarely speaks of the judges' families; pane-

unabridged. Mr. Bitner's modified policy has been continued by the current Librarian, Mr. Arthur Charpentier, a gentle man not hostile to judicial eulogy.

7. Ceremonies *in re* Retirement of Hon. John Biggs, Jr., as Chief Judge and Elevation of Hon. Harry E. Kalodner to Chief Judge 7-8, *reprinted in* 355 F.2d (3d Cir. 1965) (remarks of Vincent A. Theisen).

8. Proceedings in Memoriam, Hon. Charles E. Clark 6-8, *reprinted in* 328 F.2d (2d Cir. 1964) (remarks of Eugene V. Rostow).

9. *Compare With the Editors*, 81 HARV. L. REV. vii (March 1968) ("... performance on an examination is the best, if not the only, method of testing legal ability"), *with* J. Winthrop, A Modell of Christian Charity, in *THE PURITANS* 195, 198-99 (3d ed. P. Miller & T. Johnson 1963) (. . . "hee shall make vs a prayse and glory, that men shall say of succeeding plantacions: the lord make it like that of New England: for wee must Consider that wee shall be as a Citty vpon a Hill, the cics of all people are vpon us;").

10. Memorial Services for the Hon. Samuel H. Sibley 9, *reprinted in* 274 F.2d (5th Cir. 1959) (remarks of F.M. Bird).

11. Memorial Proceedings for the Hon. F. Dickinson Letts 4, *reprinted in* 236 F. Supp. (D.D.C. 1965) (remarks of Chief Judge Matthew F. McGuire).

12. Proceedings on the Presentation of a Portrait of the Hon. Charles C. Simons 22-23, *reprinted in* 354 F.2d (6th Cir. 1965) (remarks of Robert Whinham).

13. See In Commemoration of Fifty Years of Federal Judicial Service by the Hon. Learned Hand, *reprinted in* 264 F.2d (2d Cir. 1959).

gyrists prefer to dwell on the magistrates' pioneer virtues. Judge Fee's early life as a farmboy in Oregon,¹⁴ like Judge Mathews's years in New Mexico and Arizona,¹⁵ appears to have imparted a special flavor to his jurisprudence. Special treatment, though, is reserved for judges fortunate enough to have passed their early lives in the rough-and-tumble of a mining camp—men of the calibre of Judge William B. Healy (Silver City, Idaho),¹⁶ Judge Jack Ross (Tonopah, Nevada),¹⁷ and Judge Walter Hodge (Nome, Alaska).¹⁸

If a good idea of the merits of a departed judge can be gathered from a consideration of his ancestors, it is clear that an even better source is the beginning of his own career. Thus the first task of everyone who would speak at a judge's memorial is to comb his precocious writings for anything that might be relevant. The process does not extend to juvenilia—if one excepts the arguable case of a student note by Judge Magruder in the *Harvard Law Review*¹⁹—though it is common to go back as far as the late judge's first cases as a lawyer or a municipal court judge.²⁰ Judge Denman of the Ninth Circuit would probably have been surprised to find his activities on behalf of the crew of the steamer Rio de Janeiro, which sank in San Francisco Bay in 1901, remembered 60 years later,²¹ but the memory of the Bar is sometimes as long as the life of the Bench. After all, Charles C. Burling-

14. Proceedings in Memoriam, Hon. James Alger Fee 9, *reprinted in* 271 F.2d (9th Cir. 1959) (remarks of Robert F. Maguire).

15. Memorial Proceedings, Hon. Clifton Mathews 6-7, *reprinted in* 312 F.2d (9th Cir. 1962) (remarks of George Reed Carlock).

16. Memorial Proceedings, Hon. William Healy 8-9, *reprinted in* 308 F.2d (9th Cir. 1962) (remarks of M. Mitchell Bourquin).

17. In Memoriam, Hon. John R. Ross 12-13, *reprinted in* 221 F. Supp. (D. Nev. 1963) (remarks of William Sanford).

18. Retirement Ceremony Honoring Hon. Walter H. Hodge 8, *reprinted in* 255 F. Supp. (D. Alas. 1966) (remarks of Bill "Judge" Arnold).

The Ninth Circuit, indeed, seems to have a peculiarly acute sense of the importance of locale. It has several times taken special pleasure in remarking that a memorial service was the first occasion when the entire court had gathered in one of the Circuit's courtrooms. *See, e.g.,* Memorial Services for Hon. William E. Orr 5, *reprinted in* 351 F.2d (9th Cir. 1966) (remarks of Chief Judge Chambers) (first time in San Francisco); In Honor of Albert Lee Stephens, Sr. 5, *reprinted in* 345 F.2d (9th Cir. 1965) (remarks of Judge Barnes) (first time in Los Angeles).

19. Note, *Is a Change of Judges in the Course of a Criminal Trial Unconstitutional?* 29 HARV. L. REV. 83 (1915); *see* Proceedings in Recognition of the Retirement of Chief Judge Calvert Magruder 8, *reprinted in* 272 F.2d (1st Cir. 1959) (remarks of Livingston Hall).

20. *E.g.,* Memorial Proceedings, Hon. William Healy 6, *reprinted in* 308 F.2d (9th Cir. 1962) (remarks of Judge Koelsch); Memorial Service, Hon. William C. Mathes 16, *reprinted in* 273 F. Supp. (C.D. Cal. 1967) (remarks of Justice Ashburn); Proceedings in Memoriam, Hon. John Clark Knox 11, *reprinted in* 258 F. Supp. (S.D.N.Y. 1966) (remarks of Judge Levett).

21. In Memoriam, Hon. William Denman 8, *reprinted in* 262 F.2d (9th Cir. 1959) (remarks of William R. Wallace).

ham was still able at the age of 100 to honor Learned Hand, whose appointment to the bench he had proposed fifty years before.²²

Apart from an early case or two, however, chosen to illustrate the general tenor of his jurisprudence, little mention is made of how the departed judge decided cases. Speakers are struck more by the quantity than the quality of his judicial work, and never tire of informing those in attendance how many volumes of the West Publishing Company's work in progress have been occupied in recording their subject's output.²³ Concern with the judge's quantitative output may be wise, for when the eulogists turn to discussion of specific cases, their choices are often unfortunate. Judge Sibley, for example, was praised for his refusal to indulge in sentimentality over the victims of crimes;²⁴ the reader learns only later that the speaker had in mind the judge's defense of the right of the sheriff in *Screws v. United States*²⁵ not to go to the federal penitentiary.

Difficulties in evaluating the content of the judge's career may lead to an emphasis on his style. A superficial reader of the reported cases might be surprised to learn how many judges were noteworthy for the clarity and lucidity of their writing and the force and persuasiveness of their legal reasoning. Many judges, indeed, have stylistic skills whose evaluation is beyond the competence of the simple lawyers who read their opinions. According to Robert Whinham of the Detroit Bar, when Judge Charles Simons sat down at his typewriter, "what came out wasn't just good legal prose—it was really poetry."²⁶ Judge Biggs's sublimity passed even these bounds. If Keats said that he would be as one whose name is writ on water, he was a piker to the judge. For Judge Biggs's name will be "chipped, as if on granite and marble. In the minds of judges and lawyers it will always be remembered."²⁷

22. In Commemoration of Fifty Years of Federal Judicial Service by the Hon. Learned Hand 13, *reprinted in* 264 F.2d (2d Cir. 1959) (remarks of Chief Judge Clark).

23. *See, e.g.*, Ceremonies *in re* Retirement of Hon. John Biggs, Jr., as Chief Judge and Elevation of Hon. Harry E. Kalodner to Chief Judge 31, *reprinted in* 355 F.2d (1965) (remarks of Judge Maris) (250 volumes); In Memoriam, Hon. John Donelson Martin 8, *reprinted in* 302 F.2d (6th Cir. 1962) (180 volumes); In Memoriam, Hon. Dal M. Lemmon 17, *reprinted in* 257 F.2d (N.D. Cal. 1958) (remarks of Judge Goodman) (40 volumes).

The record appears to belong to Judge Simons, whose opinions for the Sixth Circuit were scattered through 340 volumes of the *Federal Reporter*. Proceedings on the Presentation of a Portrait of the Hon. Charles C. Simons 9, *reprinted in* 354 F.2d (6th Cir. 1965) (remarks of Judge Levin). The increasing rapidity with which the volumes appear, however, makes Judge Simons' title insecure.

24. Memorial Proceedings, Hon. Samuel H. Sibley 21-22, *reprinted in* 274 F.2d (5th Cir. 1960) (remarks of Douglas Arant).

25. 325 U.S. 91 (1945).

26. Proceedings on the Presentation of a Portrait of the Hon. Charles C. Simons 22, *reprinted in* 354 F.2d (6th Cir. 1966) (remarks of Robert Whinham).

27. Ceremonies *in re* Retirement of Hon. John Biggs, Jr., as Chief Judge and Elevation

Poetry is a natural accompaniment of praise at the appellate level, a phenomenon perhaps proving the truth of Justice Cardozo's dictum that appellate law is literature.²⁸ Significantly, poetic panegyric finds much less use at the district court level, where judges must stay close to the facts.²⁹ It is only on the Courts of Appeals that federal judges appear determined to replace the Ovid that was in Murray lost.³⁰

In this, however, as in other matters, there is conflict among the circuits. The Sixth Circuit is partial to a poem of Longfellow's, the general effect of which is that a great judge's beliefs continue to illuminate others long after his death.³¹ But the Ninth Circuit rejects Longfellow in favor of one O. Lawrence Hathorne, whose poem, "The Years Between" was held applicable to virtues as diverse as those characterizing Judge William B. Healy³² and Judge Albert Lee Stephens, Sr.³³

Neither of these poems has had any following outside the circuit of its origin. The Third Circuit, indeed, seems hostile to the poetry of any western land, preferring to follow its own orientalizing bent. Apparently responsible for the cross-cultural bias of his home circuit is Judge Biggs, who quoted the "Eastern prophet" Kahlil Gibran at some length in a memorial to Judge Goodrich.³⁴ The Chief Judge's hint was taken at his own retirement proceedings, and a Mr. Litke of the Pennsylvania

of Hon. Harry E. Kalodner to Chief Judge 8, *reprinted in* 355 F.2d (3d Cir. 1966) (remarks of Vincent A. Theisen). One hesitates to apportion the granite and marble minds as between judges and lawyers.

28. See B. CARDOZO, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS* (1931).

29. Since the West Publishing Company began reprinting proceedings in memory of district judges, 27 such eulogies have appeared, scattered from Volume 188 to Volume 283 of the *Federal Supplement*. Of these only one contains anything that could be called a poem. Memorial Service for Judge Alexander Bicks 10, *reprinted in* 218 F. Supp. (S.D.N.Y. 1963) (remarks of Jonathan Rosner).

30. Of the 30 memorials to appellate judges, scattered from Volume 253 to Volume 392 of the *Federal Reporter (Second Series)*, no fewer than 10 contain poems.

31.

Were a star quenched on high
For ages would its light
Still traveling downward from the sky
Shine on our mortal sight.

First employed in paying tribute to Judge John D. Martin, the poem was rediscovered by a later speaker searching to express similar sentiments toward Judge Charles C. Simons. See In Memoriam, Hon. John Donelson Martin 10, *reprinted in* 302 F.2d (6th Cir. 1962); Proceedings on the Presentation of a Portrait of the Hon. Charles C. Simons 32, *reprinted in* 354 F.2d (6th Cir. 1965) (remarks of John S. Clark).

32. Memorial Proceedings, Hon. William Healy 11, *reprinted in* 308 F.2d (9th Cir. 1962) (remarks of Chief Judge Clark).

33. Proceedings in Honor of Albert Lee Stephens, Sr. 13-14, *reprinted in* 345 F.2d (9th Cir. 1965) (remarks of J.E. Simpson).

34. Memorial Session for Hon. Herbert F. Goodrich 9, *reprinted in* 317 F.2d (3d Cir. 1963) (remarks of Chief Judge Biggs).

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Bar felt it appropriate to greet Judge Biggs' successor, Harry Kalodner, in the words of the Indian tragic poet Kalidasa:³⁵

Look to this day!
For it is life, the very life of life.
In its brief course
Lie all the verities and realities of your existence,
The bliss of growth
The glory of action
The splendor of achievement,
For yesterday is but a dream
And tomorrow is only a vision.

Mr. Litke concluded, perhaps not a moment too soon, by wishing Judge Kalodner the "abundant good humor which you will need as Chief Judge."³⁶

The soundest poetry, nevertheless, is that of the Second Circuit. Judge Learned Hand, with his love of tradition, appears to have ranked Shakespeare above all others: his only poetical citation was the Bard's 123rd Sonnet.³⁷ Mr. Justice Douglas, on the other hand, striving perhaps a bit too much for modernity, prefers to quote Louis Untermyer.³⁸ But it is Harold Medina to whom the Muses have given special grace.

Judge Medina's favorite poet, he tells us, is Horace,³⁹ and it is his practice, whenever a memorial is called for, to select one of the Odes as particularly appropriate to the subject. Since the Four Books of the Odes contain some 103 pieces,⁴⁰ and since both Judge Medina's lifespan and the membership of the Court of Appeals are limited, there is no reason to fear he will exhaust this productive mine of elegant tributes.

Nor can one fault Judge Medina's choices as appropriate to the subjects. For Judge Clark he felt that the first ode provided an appropriate parallel, and analogized his colleague to the chariot driver eager for victory in the race of life.⁴¹ Judge Hincks's more passive virtues were

35. Ceremonies *in re* Retirement of Hon. John Biggs, Jr. as Chief Judge and Elevation of Hon. Harry E. Kalodner to Chief Judge 10, *reprinted in* 355 F.2d (3d Cir. 1966) (remarks of William Litke).

36. *Id.*

37. In Commemoration of Fifty Years of Federal Judicial Service by the Hon. Learned Hand 29, *reprinted in* 264 F.2d (2d Cir. 1959) (remarks of Judge Hand).

38. Proceedings in Memoriam, Hon. Charles E. Clark 22, *reprinted in* 328 F.2d (2d Cir. 1964) (remarks of Mr. Justice Douglas).

39. Memorial Proceedings, Hon. Carroll C. Hincks 23, *reprinted in* 342 F.2d (2d Cir. 1964) (remarks of Judge Medina).

40. This figure does not include the 17 Epodes, nor the "Carmen Saeculare."

41. Proceedings in Memoriam, Hon. Charles E. Clark 13, *reprinted in* 328 F.2d (2d Cir. 1964) (remarks of Judge Medina).

said to show a man of pure and innocent life—"Integer vitae scelerisque purus."⁴²

The ceremonies in honor of Judge Hincks, indeed, promise to set an example not only for the Second Circuit but for the entire federal judiciary. For, having chosen Judge Hincks an ode, Judge Medina was not content simply to recite it. Following the Roman custom, he felt the true sense of the work would be better brought out if accompanied by song. The result was a blending of separate disciplines into a harmonious whole—poetry and music, Rome and New Haven, Horace and the Yale Glee Club—for, in an abandoned Yale Glee Club songbook for the year 1917, Judge Medina had found the music to accom-

42. Memorial Proceedings, Hon. Carroll C. Hincks 23, *reprinted in* 342 F.2d (2d Cir. 1964) (remarks of Judge Medina). There is some doubt that the ode in question—1.22—is appropriate to Judge Hincks. A leading commentator points out that although "[t]he poem has been commonly read for its edifying moral," this interpretation is false. "The only moral values that the Ode proposes lie . . . in an amatory context. . . . Even the seemingly austere language of the first line [the one quoted by Judge Medina] can bear a specialized erotic meaning." S. COMMAGER, *THE ODES OF HORACE* 132 (1962).

Tantalizing to consider are the uses that might be made of Judge Medina's principle. How is one to determine which characteristics of a judge's life are to provide the basis for choice among possibly relevant poems? Judge Medina himself offers no satisfactory rationale, and one can only guess. For Mr. Justice Douglas, perhaps the Catullan analogy will do:

Vivamus, mea Lesbia, atque amemus
Rumoresque senum severiorum
Omnes unius aestimemus assis (5: 1-3)

(Let us live, Lesbia, and love, and value at but a penny the gossip of fussy old fogies.)
And one hears echoes of Virgil in the attitude of Justice Frankfurter to a case like *Rochin v. California*, 342 U.S. 165 (1952):

Tum vero ancipiti mentem formidine pressus
Obstupi steteruntque comae et vox faucibus haesit
Aeneid: III: 47-48

(Then, indeed, my mind was oppressed by a double burden; I recoiled, my hair stood on end, and my voice stuck in my throat.)

But would Justice Roberts's cast of mind in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), have been suited to quotation from the Archpoet?

Aestuans intrinsecus ira vehementi
In amaritudine loquor meae menti
Factus de materia levis elementi
Folio sum similis de quo ludunt venti

(Inwardly astir with violent anger, I talk to myself in bitterness. Constituted of a light material, I am like a leaf with which the winds play.) *DIE GEDICHTE DES ARCHPOETA* 23 (M. Manitius ed. 1913).

Or could Mr. Justice Fortas properly invoke the words of Coriolanus?

The cruelty and envy of the people,
Permitted by our dastard nobles, who
Have all forsook me, hath devoured the rest;
And suffered me by the voice of slaves to be
Whoopt out of Rome.

(IV, v, 79-83)

Until Judge Medina can provide an answer to these questions, his use of the classics must regretfully be rejected as precedent for the other circuits.

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pany Horace's poem. Struck by Judge Hincks's lifelong fondness for Yale, he felt impelled to sing aloud—to the tune laid out in the book—the ode's first verse.

Why did he do it? Pure inspiration. “[Y]ou know,” said Judge Medina, “when something comes from within and your heart speaks to you, it is never wrong to answer, I think.”⁴³

43. Memorial Proceedings, Hon. Carroll C. Hincks 23-24, *reprinted in* 342 F.2d (2d Cir. 1964) (remarks of Judge Medina).