

# COMMENTARY

## JUDGING LIVES

ROBERT C. POST\*

Judge Posner's comments on the genre of judicial biography amply display the virtues that sustain his position as one of our leading legal intellectuals. His observations are fearless and fresh. They recreate the subject at hand with a candor and an incisive originality that is nothing short of astonishing. Posner's conclusion that we ought to substitute "judicial *studies*" for "judicial *biographies*," is fascinating.<sup>1</sup> It will repay our closest attention.

Posner casts his conclusion in the rough form of a "cost-benefit calculation."<sup>2</sup> He recommends "alternative genres to biography"<sup>3</sup> because, on the one hand, judicial biographies are "a particularly costly undertaking,"<sup>4</sup> and, on the other, such biographies can offer at best only an uncertain "contribution . . . to knowledge."<sup>5</sup> To adequately analyze this argument, therefore, we must distinguish Posner's claims about the costs of judicial biographies from his claims concerning their potential benefits.

I myself find Posner's claims about costs somewhat suspect. Speaking for a moment autobiographically, as someone caught in the coils of one of the "alternative genres" recommended by Posner—the alternative that studies "the membership of a court at a particular point or interval in its history"<sup>6</sup>—I can personally testify that it involves no less work, no less an "enormous investment of time,"<sup>7</sup> than traditional judicial biography. If the biographer must commit years to uncovering the personal life of her subject, the student of a court must spend equivalent portions of his life committed to the project of com-

---

\* Alexander F. & May T. Morrison Professor of Law, University of California, Berkeley. A.B., 1969, Harvard University; J.D., 1977, Yale University; Ph.D., 1980, Harvard University.

<sup>1</sup> Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. Rev. 502, 523 (1995).

<sup>2</sup> *Id.* at 509.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 515.

<sup>5</sup> *Id.* at 509.

<sup>6</sup> *Id.* at 520. For longer than I care to acknowledge I have been toiling in the all-too-fertile vineyards of Volume 10 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Posner calls such studies an "especially attractive alternative to the conventional judicial biography." *Id.*

<sup>7</sup> *Id.* at 509.

prehending the social, economic, legal, and intellectual implications of innumerable judicial decisions. In fact I do not know of any reason a priori to believe that historical or empirical accounts of judicial work will be less costly than judicial biography.

Thus the plausibility of Posner's cost/benefit analysis must rest on its "benefits" side, on the notion that the high costs of judicial biography are wasted on "an epistemologically problematic endeavor" with little likelihood of a successful payoff.<sup>8</sup> With his typical clarity, Posner offers us multiple yardsticks by which to measure the success of serious academic biographies. One such criterion of assessment applies to what he calls "scientific biographies," which attempt to answer "specific questions, often of a causal nature: Why did *X* do *Y*, or where did *X* get the idea for *Y* . . . ?"<sup>9</sup> A second applies to what Posner calls "essentialist biographies," which attempt to reveal the "essential self" of a biographical subject.<sup>10</sup>

Posner argues that both essentialist and scientific biographies make truth claims that cannot be proven true or false.<sup>11</sup> Because the whole notion of an "'essential self' is a fiction,"<sup>12</sup> Posner repudiates essentialist biographies as having "the embarrassing property of making truth claims that cannot be verified."<sup>13</sup> Scientific biographies are subject to the same indictment of "unverifiability": "It is a general problem with attributions of causality to historical events, and biography is in one sense a branch of history."<sup>14</sup>

I find myself unpersuaded by these arguments about the epistemologically problematic nature of biography. Verifiability is an appropriate test of truth for only certain kinds of propositions; namely, those that seek to predict and control the natural world.<sup>15</sup> Sometimes we do in fact seek to understand human beings as natural facts; much medical knowledge is of this kind, because it attempts technically to understand and control human bodies. But such knowledge necessarily objectifies persons. For that reason it is highly unusual in the human sciences, and particularly in biography, to view human beings in this way. That is why Posner's effort to read biographies as about specifically causal claims sounds peculiar and inaccurate.

---

<sup>8</sup> Id. at 508.

<sup>9</sup> Id. at 503.

<sup>10</sup> Id. (emphasis omitted).

<sup>11</sup> Id. at 505-06.

<sup>12</sup> Id. at 505.

<sup>13</sup> Id. at 506.

<sup>14</sup> Id.

<sup>15</sup> See Jürgen Habermas, *Knowledge and Human Interests* 113-39 (Jeremy J. Shapiro trans., 1971).

Most biographers examine human lives not to predict and control them, but to understand or appreciate their meaning or value or significance.<sup>16</sup> Biographies therefore do not portray persons as natural objects, but as moral beings. Biographies sometimes do assert causal propositions, but they do so primarily in order to ground interpretative claims about the meaning of human life. It is a categorical mistake to attempt to test the truth of such claims by the logic of verifiability, at least in the sense propounded by Posner.

The truth of claims of interpretation generally involves the application of intersubjective norms, norms that are both independent of particular speakers and yet responsive to the perspectives of the class of competent speakers.<sup>17</sup> Like the grammar or semantics of a language, such norms are both contestable and constitutive. Most writing within the human sciences is about the meaning and application of such norms, because these norms are the ground of cultural significance.

Posner seems implicitly to recognize this when he recommends, as a useful alternative to judicial biography, studies of judicial work. Posner particularly recommends as a model "the insightful essays on Holmes's jurisprudence by Thomas Grey."<sup>18</sup> Yet Grey's work is plainly one of interpretation;<sup>19</sup> Grey does not make claims to which the logic of verifiability could plausibly apply. Indeed very little writing within the human sciences would survive Posner's reliance upon verifiability as a test for truth. An appeal to this test, therefore, cannot justify a very strong argument for a turn to "judicial *studies* that will employ a range of legal, humanistic, and social-scientific techniques."<sup>20</sup>

Posner concedes that the most common form of judicial biography is what he calls "ideological," which attempts directly to establish moral meaning by critique or edification.<sup>21</sup> Posner dismisses this effort to set forth "some ideal with which to compare and by which to measure the individual who is [the] subject" of the biography, because he deems it afflicted with "profound epistemological problems."<sup>22</sup>

---

<sup>16</sup> See generally *id.* at 161-86 (discussing logic of hermeneutic truth).

<sup>17</sup> See Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 Cal. L. Rev. 491, 494-95 (1994).

<sup>18</sup> Posner, *supra* note 1, at 520.

<sup>19</sup> See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787, 812-13 (1989) (noting Holmes's conservatism as both skeptical and romantic; stating "Holmes's love of the old and alluring logical pleasure of continuity led him repeatedly astray").

<sup>20</sup> Posner, *supra* note 1, at 523.

<sup>21</sup> *Id.* at 503.

<sup>22</sup> *Id.* at 504.

But if I am correct that almost all humanistic scholarship is ultimately about this effort to establish human meaning and value,<sup>23</sup> then judicial biography stands in no worse position with respect to these profound "problems" than any likely alternative genre.

I do not mean to be too categorical about the distinction between interpretative claims and the logic of verifiability, because the plausibility of interpretative claims about the subjects of judicial biographies will often depend upon subsidiary assertions about the nature of the world. These assertions will contain both factual and causal propositions, and these propositions will appropriately be subject to the logic of verifiability. In this sense the logic of verifiability is relevant to judicial biography, as it is relevant to history.

My point, however, is that judicial biography is not *about* factual and causal propositions, as Posner seems to imply. Judicial biography depends upon factual and causal propositions in order to develop a convincing account of the meaning of a human life.<sup>24</sup> And in this dependence judicial biography stands no differently than any of the human sciences, which also typically presuppose accounts of the nature of the world. Once again, judicial biography is neither more nor less vulnerable than any plausible "alternative" that could be recommended.

Quite apart from the issue of verifiability, Posner argues that the benefits of judicial biography are uncertain because of what he calls the "problem of inconsequence."<sup>25</sup> Posner notes that the very reason that we are interested in a judge's life is because of her work, and yet there is a profound "disconnection of achievement from self," so that an explication of the life rarely seems to capture "[t]he spark of genius" that attracts us to the work.<sup>26</sup> If we attempt judicial biography to explain judicial work, and if that work seems always to elude accountings founded in judicial lives, then perhaps Posner is correct that we would indeed be better served by trying other genres, most particularly studies of judicial "work" itself.<sup>27</sup>

Posner's observations about inconsequence seem to me accurate and useful. They raise fascinating implications about the relationship between biography and legal work. We might perhaps begin to tease out these implications by considering Posner's astute suggestion that

---

<sup>23</sup> For a profound argument to this effect, see Friedrich Nietzsche, *The Use and Abuse of History* 12-17 (Adrian Collins trans., 2d ed. 1986).

<sup>24</sup> To appropriate Alasdair MacIntyre's phrase, a biography must offer a "narrative concept of selfhood" that is convincing. Alasdair MacIntyre, *After Virtue* 202 (1981).

<sup>25</sup> Posner, *supra* note 1, at 506.

<sup>26</sup> *Id.* at 507-08.

<sup>27</sup> See *id.* at 522.

the problem of inconsequence "is obscured in the case of biographies of men of action," whereas it "is conspicuous in the case of literary biographies."<sup>28</sup> Why might this be so?

The inquiry requires us to think somewhat more precisely about the purpose of writing biographies. Plutarch, who of course wrote primarily about men of action, stated that he spent his "time and pains in writing of the lives of famous persons" because "virtue, by the bare statement of its actions, can so affect men's minds as to create at once both admiration of the things done and desire to imitate the doers of them."<sup>29</sup> To state the matter somewhat abstractly, we could say that Plutarch did not write biography in order to demonstrate the truth of causal propositions, but instead to acknowledge and perpetuate the significance of human life, which he understood to subsist in virtues displayed in action.

Hannah Arendt offers a theoretical account of why virtue might be thus disclosed in action. Arendt insists on the "revelatory character of action,"<sup>30</sup> because in action (and speech) "men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world."<sup>31</sup> Arendt argues that action and speech—for Arendt the two are indissolubly connected—"are the modes in which human beings appear to each other, not indeed as physical objects, but *qua men*."<sup>32</sup> Politics consists of the interplay of the appearances created by speech and action. Thus the meaning of the human world, certainly to the extent that that world is politically constituted, resides in the revelations of action and speech. We apprehend this human meaning by telling the stories of these revelations in the form of history and biography.<sup>33</sup>

Arendt's perspective is helpful in explaining why the problem of inconsequence does not seem to arise in the case of biographies of men of action. The significance of action lies precisely in its appearance. If the purpose of biography is to assess the meaning of a human

---

<sup>28</sup> *Id.* at 507.

<sup>29</sup> Plutarch, *The Lives of the Noble Grecians and Romans* 122 (John Dryden trans., Arthur H. Clough ed., 1952). Plutarch stated: "Moral good is a practical stimulus; it is no sooner seen, than it inspires an impulse to practice, and influences the mind and character not by a mere imitation which we look at, but by the statement of the fact creates a moral purpose which we form." *Id.*

<sup>30</sup> Hannah Arendt, *The Human Condition* 192 (1959).

<sup>31</sup> *Id.* at 179.

<sup>32</sup> *Id.* at 176.

<sup>33</sup> *Id.* at 166.

life engaged in political action, this purpose is exhausted in telling the story of the speech and actions that comprise the life.<sup>34</sup>

The situation is far otherwise, however, with respect to the biography of, to use Posner's example, a literary author. The authorship of a literary work is not an action (praxis), but, according to Arendt, a "fabrication" (poiesis).<sup>35</sup> To fabricate is to reify, to transform something into a thing. The essence of art is the transfiguration of life into a thing. Arendt argues that in modern times we have tended to value the thing produced more than the life of the fabricator, establishing thereby an "inverted order between man and his product."<sup>36</sup> The upshot is that literary biographies tend to have exactly the purpose described by Posner, which is to explain the creation of the literary work.<sup>37</sup> That work, however, is fated to be always both more and less than the life that produced it, so literary biographies do suffer from the problem of inconsequence.

The issue of inconsequence thus forces us to ask how we conceive the nature of judicial work. Are judicial decisions a form of action, a kind of political engagement, or are they instead a form of fabrication, a making of a thing, which is the law? In his biography of Solon, Plutarch takes something like the first view of lawmaking; he writes of Solon's lawgiving as one political action in a life of political action.<sup>38</sup> Arendt, on the other hand, writes that for the Greeks

the laws, like the wall around the city, were not the results of action but the products of making. Before men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law; legislator and architect belonged to the same category.<sup>39</sup>

Arendt herself seems to reject this view as based upon the "delusion that we can 'make' something in the realm of human affairs—'make' institutions or laws, for instance, as we make tables and chairs."<sup>40</sup>

---

<sup>34</sup> Telling a story, of course, is not a simple concept; it requires establishing what MacIntyre would call a "narrative" frame. See MacIntyre, *supra* note 24, at 190-209 (discussing giving meaning to actions through imposition of context). That frame will no doubt encompass such important and subsidiary questions as those of motivation and responsibility. With respect to the latter, see, e.g., Meir Dan-Cohen, *Responsibility at the Boundaries of the Self*, 105 Harv. L. Rev. 959, 962-65 (1992) (defining responsibility and discussing its genesis and its normative and deviant forms).

<sup>35</sup> See Arendt, *supra* note 30, at 167-74, 187, 195, 207-10.

<sup>36</sup> *Id.* at 211.

<sup>37</sup> See Posner, *supra* note 1, at 506-08.

<sup>38</sup> See Plutarch, *supra* note 29, at 64-77.

<sup>39</sup> Arendt, *supra* note 30, at 194-95.

<sup>40</sup> *Id.* at 188.

The underlying question is profound and by no means resolvable in the brief compass of this Commentary.<sup>41</sup> But I would note that Posner himself seems to conceive judges chiefly as fabricators of opinions, so that it is "the judge's work" that should be the primary object of study, "rather than his life."<sup>42</sup> This conception need not rest on a naive perception of the judge as "an oracle or a computing machine" transparently transmitting the law.<sup>43</sup> But it must presume that the essence of judging is the making of judicial opinions or legal rules, rather than the performing of acts of political engagement.

It may be that we cannot choose definitively between these two characterizations of judging. Even Posner seems slightly ambivalent; he astutely notes the "curious property of judicial biography that the more political the judge, the more illuminating the biography is likely to be."<sup>44</sup> Thus Posner finds Roger Newman's biography of Hugo Black edifying precisely because Black was "*au fond* . . . a politician in robes."<sup>45</sup> But Posner also believes that "Newman's approach would not get far with a Holmes, a Hand, or a Cardozo" because for these judges "we are interested in much more than their votes on particular cases."<sup>46</sup> We are interested, that is, in their craft, in their opinions, in the law they made.

To the extent that we are interested in the fabrication of opinions, the problem of inconsequence will rise to the fore, and judicial biography will be subject to the difficulty that Posner elucidates. The point to be emphasized, however, is that this conception of judging is not innocent, because it presupposes a certain image of law as reified, and therefore of the judge as a maker of things. There is no doubt that this image corresponds to our profound sense of the law as (hopefully) structurally solid and enduring.<sup>47</sup>

---

<sup>41</sup> I note that Rousseau seems to have conceived those who establish law as fabricators, writing that the law which they create bears the mark "of that great and powerful genius which lies behind all lasting things." Jean-Jacques Rousseau, *The Social Contract* 88 (Maurice Cranston trans., 1968).

<sup>42</sup> Posner, *supra* note 1, at 522; see *id.* at 512-13:

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, such as Holmes, Cardozo, and Hand.

<sup>43</sup> *Id.* at 515.

<sup>44</sup> *Id.* at 519.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Conceiving the law as fabricated does not imply that the law must be unchanging. Even if each opinion constructed by a judge is conceived as a brick cemented into the wall of stare decisis, the wall can still change direction or even turn a corner. The point, how-

Lurking beneath this sense, however, is an equally inescapable vision of law as part of a process of governance, and therefore as a form of "statesmanship."<sup>48</sup> Perhaps the paradigmatic illustration of this vision is Chief Justice Warren's powerful and astute performance in *Brown v. Board of Education*,<sup>49</sup> which, in the words of Warren's sympathetic biographer, represented an "elevation of practical politics and morality to major components in the Court's decision making [and] downgraded the significance of technical reasoning in the process of reaching decisions."<sup>50</sup> If we see lawmaking as a kind of action, as an intervention in the life of the nation, we will also tend to see judging as a form of political engagement. In such circumstances we can expect the problem of inconsequence to recede. Judicial biography will reclaim a certain pride of place as reciting the stories of political actors who happen to be judges.

Our attitude toward judicial biography, therefore, reveals a good deal about the implicit grounds of our jurisprudence. It is a telling index of how we regard our law: as reified or as appearance, as structure or as action. Perhaps it is our very ambivalence about these fundamental questions that makes judicial biography the extraordinarily difficult genre that it is.

---

ever, is that each judicially fabricated contribution is understood at the time of its making as solid and enduring.

<sup>48</sup> See Felix Frankfurter, Book Review, 16 A.B.A. J. 251, 251-52 (1930) (reviewing Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements* (1928)), reprinted as Felix Frankfurter, *The Court and Statesmanship*, in *Law and Politics: Occasional Papers of Felix Frankfurter 1913-1938*, at 34, 34-36 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1971).

<sup>49</sup> 347 U.S. 483 (1954).

<sup>50</sup> G. Edward White, *Earl Warren's Influence on the Warren Court*, in *The Warren Court in Historical and Political Perspective* 37-44 (Mark Tushnet ed., 1993).