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Recommended Citation

Reed, John W. "It's Worth Remembering." Mich. B. J. 73, no. 11 (1994): 1147-9.

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It's Worth Remembering

By John W. Reed

The following is a speech delivered to the Michigan Supreme Court Historical Society Annual Meeting luncheon, held in Southfield on April 28, 1994.

It is a high privilege to be asked to speak at this third annual luncheon of the Michigan Supreme Court Historical Society. It also is more than a little daunting, because my two predecessors in this role, Thomas Brennan and John Fitzgerald, are former justices of the Court. They brought to their task the perspective of an insider, which, of course, I do not have. Paraphrasing St. Paul, I see only through a glass darkly, but they see face to face. One need not, however, have been a participant in events to be interested in the history of those events.

This Historical Society was organized six years ago to promote public education and awareness of the Michigan Supreme Court's historical significance and its role in the development of the laws of our state and nation, and, to that end, to preserve documents and memorabilia relating to the Court. In these first half-dozen years, its emphasis has been on compiling and preserving information about the men, and lately women, who have served as justices of the Court. It has catalogued all the existing portraits of the justices over the years, and it has commissioned portraits of justices not yet pictured. It has engaged the renowned journalist, Roger Lane, to carry out an oral history project, in which he has interviewed and recorded the recollections of former justices. Those interviews have been transcribed and are on file at the Thomas M. Cooley Law School.

Most recently, the Society has compiled and published a special volume of the Michigan Reports containing a list of the tenures of all the justices, an index to the special sessions of the Court—swearings in, retirements, memorials, portrait presenta-

tions—and nearly 400 pages of excerpts from those ceremonies. This new volume of the Court's special sessions, which was prepared under the direction of Tom Brennan, offers evidence of the high culture of the Supreme Court and of the Bar in Michigan's early days. Perhaps subconsciously, many of us think of those early citizens as frontiersmen with rough hands and muddy boots and, probably, language to match. But hear the elegance of expression when, in 1884, the portrait of Benjamin Graves was presented to the Court:

Patient in hearing, careful in judgment, courteous to the bar, studious and learned without ostentation, wise without pretension, in private life pure and upright, without suspicion and above reproach, you have commanded the respect and won the love of all. Your high bearing and good example have kept before us, as ministers of the law, the dignity and responsibility of our profession and worthily shown how men should serve in places of public trust. Nothing graces an honorable retirement like sincere respect and affection won by duty well done; and we follow you with the earnest prayer that your future may be as rich in peace as your past has been in good service.

And when Thomas M. Cooley's portrait was presented, Henry Severens, speaking for the Michigan Bar, chose a delightful phrase to say that his laudatory remarks would be no exaggeration. He said:

I am sure your Honors will not think I pass beyond the bounds of what may fitly be said of one yet living if on this occasion I speak of the illuminated record our brother has made and in doing so press no fact beyond its fixed and well-known place.

There is much delightful reading in these pages.

The Society's highly personal approach to Supreme Court history, its emphasis on individual justices, is entirely appropriate. The French poet Lamartine put it succinctly: "History is neither more nor less than biography on a large scale." And so the Society is assembling and recording

information about the persons who have constituted the Court over the years.

As you would suppose, the tone of ceremonial sessions of the Court is somewhat different from the informal recollections gathered in the oral history project. The former are essentially laudatory; when weakness or foible is mentioned, it is softened by affection. The oral histories, on the other hand, are much more candid. None that I have seen is bitter, but likes and dislikes are stated frankly, and behind-the-scenes conversations and events throw light on Court developments over the last half century. They will be of value to judges, lawyers, and other scholars who seek to divine the mind of the Court.

Perhaps most intriguing of all are the reminiscences of former justices now transcribed from the tapes of their interviews.

Let me share with you a random sample of things I have learned from the materials that have been compiled.

First, some interesting numbers drawn from the lists in the first section of the Historical Society volume of the Michigan Reports.

In the Supreme Court's 158 years, there have been 107 different justices. That means that, on average, there were two new justices every three years. The longest tenure, 32 years, belongs to James V. Campbell, who served from 1858 to 1890. His more famous contemporary, Thomas M. Cooley, served 22 years (1863-1885). In our time, the longest tenures have been held by Henry M. Butzel, 26 years (1929-1955) and John R. Dethmers, 25 years (1946-1971). Justice Levin is at 21 and counting.

Of the 107 justices, three have been women: Mary Coleman, Dorothy Riley, and Patricia Boyle; and three have been blacks (not including Eugene Black): Otis Smith, Dennis Archer, and Conrad Mallett. Those unpleasant numbers look a little better if we start counting in 1961, the year Otis Smith went on the bench. Of the 20 new justices beginning with him, three have been women and three blacks—15% each and 30% total. Much distance remains to be traveled, but we have moved ahead from the first 136 years, in which the numbers were zero and zero.

Fifty-seven of the 107 justices—more than half—have served as chief justice, sometimes a single term, sometimes consecutive terms, sometimes intermittent terms. The semi-pattern of rotating chiefs began early. The first eight chief justices served terms of 6, 1, 5, 4, 2, 2, 1, and 9 years. Then, for the next dozen years or so, the position rotated primarily among the Famous Four: Cooley, Campbell, Christianity, and Graves. Serving one or two years at a time, Cooley and Campbell had three separate terms, Christianity one, and Graves two. The two longest tenures as chief justice are nine years and belong to George Martin, in the Court's early days, and to John Dethmers, who served on three different occasions.

Two years ago at this luncheon, Tom Brennan recalled Otis Smith's observation that the change of just one person on the Court changes its chemistry and makes

it, in effect, a substantially different Court. By his count, there have been 88 different Courts in these 158 years. A Court that changes so often presents a challenge to anyone who seeks to analyze its jurisprudence. It can be a little like the familiar comment about Michigan's changeable weather: If you don't like it, wait a minute.

...knowledge of the history of the Supreme Court and its justices is vital to an appreciation of the Court's role in Michigan's system of government and of justice, and is vital to those who make decisions about Michigan's tomorrow.

When I arrived in Ann Arbor as a young teacher, the Michigan Supreme Court was widely regarded as a conservative court. Later appointments often have been moderate or more liberal. I'm not sure what those labels mean, but the humorist Mort Sahl recently defined them for us: "A liberal," he said, "is someone who believes in busing but is repelled by school prayer. A conservative is someone who is repelled by busing and believes in school prayer. And a moderate would like to compromise

between these two extremes and perhaps have prayer on the bus."

Perhaps most intriguing of all are the reminiscences of former justices now transcribed from the tapes of their interviews. Running into the hundreds of single-spaced pages, they hold a world of illuminating anecdotes and information about the justices and their interrelationships. I have by no means read them all, and there is time to mention only a little of what I have read.

There is much about how the justices actually did their work. Justices Souris and Talbot Smith, for example, would spend the night at the Kellogg Center, on the MSU campus, rather than at a hotel, so that they might eat and work in peace away from the politicians and lobbyists who flooded the hotels. And I suppose all of you remember that at one time briefs and other papers relating to a case were given in advance of argument only to the justice to whom it had been assigned. Then there were the infamous "window matters" and "window reports." The oral histories record the personalities and dynamics that changed those practices so that all justices began to receive and study the motions and briefs. And one could go on and on.

But in the few minutes remaining, let me choose anecdotes about just one justice—Justice Black—to give you the flavor of the oral histories. Surely no justice was personally more complex or problematic than the talented, prolific Eugene Black.

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Justice Souris recounts the story of Black's role in the famous 1960 case of *Stoliker v The Board of State Canvassers*. At issue was whether the Michigan constitution required a different vote for the call of a constitutional convention than it required for a constitutional amendment. Souris had just arrived as a new justice at the beginning of January, when Black handed him a 56-page opinion he had written in the *Stoliker* case and asked whether Souris might join him in the opinion. Souris said, "You must be out of your mind. I was a member of the Board of State Canvassers. How can I participate as a justice?" To which Black replied, "That doesn't matter." But that is not the oddest part of it. The *Stoliker* case hadn't even been argued! It was scheduled for oral argument the next day, and yet, Justice Black's opinion was already written. When the Court sat on the morrow, Justice Souris withdrew, as planned. But at the end of the arguments, Black announced from the bench that he had prepared his opinion in the case, which he had filed with the clerk with sufficient copies for distribution to the press—who, by the way, had been alerted and filled the courtroom. A few days later, Souris, the newest justice, moved to strike Black's opinion on the ground that it was "precipitous." (That particular ground probably wouldn't work in England, where opinions often are delivered instanter.) Justice Talbot Smith ultimately wrote the *Stoliker* opinion. According to the official report, "Souris, J., did not sit" and "Black, J., took no part in the decision of this case." Souris says that he and others have copies of Black's abortive opinion.

That kind of impetuosity appears again and again in accounts of Justice Black. On one occasion, Chief Justice Dethmers physically had to step between Black and another justice who were about to come to blows. Souris once asked Justice Black why he found it so necessary to vent his spleen. His response was revealing. He said, "If, throughout your life, your friends had thwarted you, you'd understand me a little better. When I played guard on a semi-pro football team, the only time I ever got the ball and was able to run for a touch-down, one of my teammates tackled me." That telling statement made me think of Judge Jerome Frank's view that, as a condition of elevation to the bench, all judges should be psychoanalyzed, so that they might know their own biases.

Finally, on a lighter note is a delightful Eugene Black story told by Tom Brennan. For a time, Black's seat at the bench was at the right-hand end. On the paneled wall behind him, over his shoulder, hung the portrait of a long-ago justice. The justice had been portrayed with a pained, dyspeptic countenance that, it was often said, looked as if he were passing gas. An advocate before the Court, asking the Court to overturn an earlier case, said, "In that case, your honors, the Court 'aired.'" "You're wrong," said Justice Black. "If anything, we erred." And pointing toward the portrait, he said, "If we had 'aired,' we would have looked like that."

The materials this Society is gathering and preserving report events both light-hearted and troubling, important and trivial. Some actions seem to reveal pettiness. Others exemplify nobility of spirit—for example, the extraordinary help that members of the court, particularly Eugene Black, gave to Justice Harry Kelly in his time of poor health. But, in the aggregate they show a remarkable body of men and women who have exercised their will and wisdom in the service of this great institution and of the people of the state of Michigan.

It is indeed the view of the Michigan Supreme Court Historical Society that a knowledge of the history of the Supreme Court and its justices is vital to an appreciation of the Court's role in Michigan's system of government and of justice, and is vital to those who make decisions about Michigan's tomorrow. The minds and hearts of all of us are enlarged by an awareness of the lives of the men and women who have brought us to this good hour. In the quaint words of the 16th-century poet John Skelton, "History makes us some amends for the shortness of life."

Thank you for your interest in the history of the Michigan Supreme Court. ■



John W. Reed is a professor emeritus at the Thomas M. Cooley Law School and the University of Michigan Law School. He is professor emeritus and formerly Dean at Wayne State University Law School, a board member of the Michigan Supreme Court Historical Society, and a recipient of the State Bar's Hudson Award.

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