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WILLIAM HENRY HASTIE

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*... to make those institutions serve the people well in our times*<sup>1</sup>

By the time he died, William Henry Hastie had been a great judge—indeed, one of the most distinguished appellate judges in the nation—for a long time. So long a time (twenty-six years) that it is not easy to remember that he was a major force in the law years before he became Circuit Judge Hastie. But it is important to have in mind the several professional achievements that preceded Hastie's appointment to the Third Circuit. To recall these is not simply to flesh out Hastie's biography, but to review major themes in America's recent history.

Back in the thirties and forties, Hastie had been a professor at Howard Law School, a government lawyer, Judge of the Virgin Islands, Dean of Howard Law School, Special Adviser to the Secretary of War, and Governor of the Virgin Islands. But overshadowing all of these accomplishments was his partnership with Charles Houston and Thurgood Marshall in the most important lawyers' endeavor since the establishment of judicial review: developing the strategy and launching the litigation

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<sup>1</sup> Hastie, *Dedicatory Ceremony at Independence Hall*, 426 ANNALS 1, 2 (1976).

that, four years after Hastie was named to the Third Circuit, led to the overthrow of *Plessy v. Ferguson*.<sup>2</sup>

In sum, Hastie was a lawyer-judge of towering stature. He is still too close for us to see him whole. But the memorial essays written for this issue of the *Review* by three of Hastie's friends and working colleagues—Roy Wilkins, Judge Spottswood W. Robinson, III, and Chief Judge Collins J. Seitz—do much to provide a base point for a more comprehensive assessment. These essays illustrate especially Hastie's dominant attributes: his intellectual power, his unflagging energy, and his unremitting commitment to principle.

I would say a word about Hastie's instinctive devotion to principle. One of the earliest and most celebrated evidences of Hastie's stubborn integrity was his resignation, in the middle of the war, from the highest civilian post to which a black had been appointed—Special Adviser to Secretary Stimson. Hastie's quarrel was with the Air Force, which resolutely continued to follow the flight patterns of Jim Crow. And the best way Hastie knew to call attention to this festering wrong was to remove himself from collaboration with those who had authority to take corrective action.

Commitment to principle remained habitual with Hastie throughout his life. On March 22, 1973, Hastie, by then a venerated Senior Judge, delivered the Owen J. Roberts Memorial Lecture, the Lecture that annually commemorates the eminent Philadelphian who served as a Justice of the Supreme Court and, later, as Dean of the University of Pennsylvania Law School. In tribute to his fellow judge, Hastie spoke on the *Judicial Role and Judicial Image*.<sup>3</sup> In the course of his address, Hastie noted the importance of "principled criticism" of the courts, "an invaluable corrective of otherwise unrealized error."<sup>4</sup> Hastie then contrasted "principled criticism" with "outcry against the courts by those who seek to make them partisan."<sup>5</sup> Of this latter phenomenon he offered examples, including "repeated threats from vocal local officials that judges will be opposed and defeated for reelection if they do not conform their own honest and lawful sentencing practices to the Draconian thinking of the

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<sup>2</sup> 163 U.S. 536 (1896).

<sup>3</sup> 121 U. PA. L. REV. 947 (1973), reprinted in THE OWEN J. ROBERTS MEMORIAL LECTURES: 1954-1974, at 265 (1975).

<sup>4</sup> *Id.* 951.

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

executive or the prosecutor.”<sup>6</sup> Then Hastie interrupted himself, expanding on his prepared text to remind his audience forthrightly of the latest instance of the malady, an instance that other lawyers or judges delivering such an address might well have decided, on some palatably prudential ground, not to include in the bill of particulars. Hastie’s amendment of his text went as follows:

I must interpolate at this point that when the preceding sentence was written I had in mind only local executives and prosecutors. But now, if one is going to cite this kind of pressure at all, he cannot with integrity ignore a nationally broadcast address which made page one newspaper headlines all over the country Sunday, a week ago. In a broadside against judicial sentencing practices the President said: “The time has come for soft-headed judges and probation officers to show as much concern for the rights of innocent victims of crime as they do for the rights of convicted criminals.” Of course the key to the whole sentence, the denunciatory and inciting phrase that makes headlines and gives the broadside public impact, is “soft-headed judges.” Actually, the attack is upon hard headed judges who are independent and tough minded enough to sentence in accordance with their own evaluation of all relevant considerations without yielding to the simplistic thinking and Draconian demands of particular prosecutors or local executives, or even chief executives.<sup>7</sup>

Hastie had the strength to censure the President, when the President deserved censure, because Hastie had serene faith in the soundness of our tripartite republican structure. And that faith was in turn anchored in unwavering commitment to a democratic social order.

The nature of that commitment is reflected in an anecdote told by Kenneth Clark, the eminent social psychologist who was one of Hastie’s long time friends:

A few years ago Bill Hastie told me about an experience he had which I shall never forget. He said that he gave a lecture to some students at Temple Univer-

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* 951-52 (footnote omitted).

sity, and after he had concluded his presentation the floor was opened to questions.

As usual in such situations, there were as many if not more comments and speeches than there were questions. This general problem was complicated by the fact that at that time it was fashionable for black students to demand separate facilities, separate curricula, and separate attention, as proof that they were, without question, non-negotiable racial militants.

Although Bill did not tell me what the substance of his presentation was, I knew him well enough to know that if any part of his talk was about America's race problem, it was a clear and unqualified exposition of the thesis that racial integration was the only rational and intelligent approach to the attainment of racial justice in America.

. . . .

One of the black students in the audience stood up and prefaced his remarks to Bill Hastie by accusing him of being a spokesman and an apologist for the establishment. Bill stopped him just at that point and said:

"Young man, stop, stop right there. I want you to understand something. I am not a spokesman for the establishment. I am not an apologist for the establishment. I am the establishment."<sup>8</sup>

I offer another Hastie anecdote by way of counterpoint. In the spring of 1945, a young private, first class, stationed at an Army post near Washington, decided to find out whether he could begin studying law on a part-time basis while still in service. One of the schools he visited was Howard Law School. Innocently, he concluded that the place to obtain information was the Office of the Dean. The private, first class was received graciously by a gentle, slender, quiet man of about forty who listened thoughtfully to his young visitor. When his young visitor had completed a somewhat jumbled statement of his problem, Dean Hastie quickly broke an awkward momentary silence: "It's all right, Mr. Pollak, we accept whites."

One of the mysteries of our national experience is that blacks still do accept whites. If we are to translate our Bicenten-

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<sup>8</sup> Transcript of Memorial Service in Memory of William H. Hastie, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, at 18-19 (3d Cir., June 18, 1976), *reprinted in* 535 F.2d 5, 16-17 (1976) (memorial preface).

nial ceremonies into a future that redeems America's unkept promises, we must turn that mystery into the miracle of reciprocal acceptance. Hastie—schooled in our history and our institutions, and shaper of both—believed in our capacity to become the nation we believe in. I think he told us why in the last public words he ever uttered. On April 5, 1976, Hastie, standing in Independence Hall, in the very room in which the Constitution was written, addressed the opening session of the Bicentennial Conference on the Constitution:

That which has been characterized as “government of the people, by the people and for the people” is as eternally difficult a business as it is an exciting and inciting idea.

I suppose it is human nature on the one hand and the uses of government on the other that make this so. For men will always yearn, and properly so, for both freedom and provision. And in the yearner's mind the relative importance of each will be a variable of time, place, and circumstance. To the extent that there is want in the midst of plenty or the potential of plenty, men will demand that government be more effectively organized and act more aggressively for greater provision. On the other hand, to the extent that governmental impositions prove burdensome or oppressive, there will be outcry for greater freedom. Thus, from generation to generation, it becomes more difficult to satisfy, or even to reconcile, the resulting diversity of deserving, but often contradictory, claims.

Yes, our political legacy includes intractable problems. Yet we continue to believe that the genius of the founders of our nation lay in the devising of political institutions that would both command respect and loyalty because of their decency and exhibit flexibility enough for effective adaptation to the needs of other and different times. For that, we cannot give them too much credit. Yet our belief in the excellence of their work is also the measure of our responsibility to make those institutions serve the people well in our times.<sup>9</sup>

Nine days later, Hastie was dead. We must continue to strive “to make those institutions serve the people well in our times.” And he will continue to guide our work.

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<sup>9</sup> Hastie, *supra* note 1, at 1-2.