

BOOKS & THE ARTS

The Tragedy of William O. Douglas

DAVID J. GARROW

WILD BILL: The Legend and Life of William O. Douglas.

By Bruce Allen Murphy.
Random House. 716 pp. \$35.

William O. Douglas was a judicial record-setter. He sat on the US Supreme Court for more than thirty-five years (1939–75), longer than any other Justice, and during those years he wrote some thirty books in addition to his legal opinions. Present-day commentators may frown at Justice Clarence Thomas penning an autobiography for which HarperCollins is paying him a \$1.5 million advance, and at how Chief Justice William Rehnquist and Justice Sandra Day O'Connor likewise have sufficient spare time to keep publishing popular histories and memoirs, but Douglas's record for sidebar productivity is unlikely ever to be topped. Ditto for another, less commendable Douglas achievement: four marriages and three divorces, spanning the thirteen years from 1953 through 1966.

Unfortunately for Douglas, however, most legal historians now see his judicial track record as having been no better than his domestic one: a huge disappointment. Only 40 years old when President Franklin Roosevelt named him to the Supreme Court in March 1939, Douglas could very well have revolutionized constitutional protection for individual rights and liberties in a permanently expansive manner. A crusading liberal as chairman of the Securities and Exchange Commission from 1937 to 1939, and before that "the most outstanding law professor in the nation," according to University of Chicago president Robert Maynard Hutchins, Douglas demonstrated that he had both the ability and the energy to become the dominant in-

tellec on the Supreme Court.

But it was not to be. Leadership on the Court throughout the 1940s and '50s instead devolved into an unproductive tussle between the conservative Felix Frankfurter and the simple-minded Hugo Black [see Garrow, "Doing Justice," February 27, 1995], with Douglas often following in Black's footsteps. During the 1950s, the appointments of Chief Justice Earl Warren (1953) and Justice William J. Brennan Jr. (1956) added new leadership to the Court, but only in 1962, when Arthur Goldberg succeeded the retiring Frankfurter, did a solidly liberal majority finally take shape. The following six years marked the real

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heyday of the Warren Court, yet it was the Chief Justice and Brennan who led the progressive charge, not Douglas or Black. Brennan remained the liberal helmsman even after Nixon nominee Warren Burger replaced Warren as Chief Justice in 1969, but Douglas, unlike the increasingly conservative Black, remained a consistently liberal vote until a disabling stroke forced his retirement in 1975.

So why did Douglas not become the Court's progressive pacesetter? How he voted as a Justice wasn't the problem. As one of his former law clerks, Lucas 'Scot' Powe, correctly observes, Douglas "stood for the individual as no other justice ever has." Indeed, "the intensity of his fear of government, with its ability to oppress individuals in body and spirit, was genuine and unmatched," Powe adds. Yet the written opinions Douglas filed in support of his usually commendable votes were so hastily written that "they are easy to ignore," Powe admits. "For those of us who think Douglas was correct in his results and instincts, this is too bad."

Most of Douglas's other clerks concur

David J. Garrow, the author of Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (California), won a 1987 Pulitzer Prize for his biography of Martin Luther King Jr., Bearing the Cross (Morrow).



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with Powe. Steven Duke, like Powe now a prominent law professor, allows that Douglas's "published opinions often read like rough drafts," which is not surprising since "many were drafted in twenty minutes" and sent to the printer without meaningful revision. The conclusion that Douglas's all-important opinions were often "superficial or just plain sloppy" was likewise articulated in the first comprehensive biography of him, James Simon's impressive *Independent Journey*, published in 1980. Written before the opening of the huge collection of Douglas's private papers and Court files at the Library of Congress, Simon's volume nonetheless won widespread praise. Douglas's longtime literary assistant, Dagmar Hamilton, said *Independent Journey* was "by far the best single book yet written about the Justice" and "probably will remain so for a long time."

Sympathetic but far from uncritical, Simon described Douglas as a "shy" and "intensely private man" whose accounts of his own life were thoroughly unimpeachable. As one colleague subsequently related, even Justice John Marshall Harlan, the Warren Court's gentlemanly conservative, once teased Douglas by asserting that "You've told that story so often, you're beginning to believe it." Simon buttressed his portrait with some very frank interviews: Douglas's son, Bill Jr., described his father's behavior toward him and his sister Millie as so cold and hostile that at times "Dad was scary." Mercedes Douglas Eicholz, Douglas's second wife, characterized her ex-husband as "totally insecure."

But was Douglas's disappointingly deficient judicial performance the result of his personal shortcomings? The noted legal theorist Ronald Dworkin addressed that question in 1981—"How could he have been so unlikable a man? Why did he make so little impact on constitutional law?"—and answered "no." True, Douglas's opinions offer very little in the way of "a developed and general constitutional philosophy," Dworkin noted, but many of Douglas's most substantively important decisions, ranging from *Skinner v. Oklahoma* (1942), voiding punitive sterilization, to the famous *Griswold v. Connecticut* (1965), which decriminalized the use of contraceptives, were grounded in the "idea that individuals have certain moral rights against their government that are prior to all law including the Constitution." Yet Douglas "only mentioned, and never elaborated or defended, this theory of individual pre-legal rights," or what is often loosely called "natural law," Dworkin observed. Douglas's failing, Dworkin concluded, was that while he indeed believed deeply in these

fundamental individual rights, he also believed that this was simply "a matter of his own emotional biases" rather than a universal truth of which he should do his utmost to convince others. Unlike both Frankfurter and Black, who proselytized their decidedly imperfect constitutional visions most energetically, Douglas felt no commitment whatsoever to advance, rather than simply live out, his own far more progressive vision. If Douglas had been willing to meet the "minimal intellectual responsibilities" of a Justice who believed in fundamental individual rights, Dworkin concluded, "he would have achieved a great deal more of lasting importance than he did."

Against this background of commentary and interpretation comes Bruce Allen Murphy's long-awaited life of Douglas, *Wild Bill*, a book that Murphy has worked on for almost fifteen years and that at one point in typescript, he tells his readers, reached a length of 2,700 pages. Two decades ago Murphy made his name with *The Brandeis/Frankfurter Connection* (1982), an account of those two Justices' off-the-bench political activities that drew wide attention, and some criticism, from their admirers. In 1988 Murphy published *Fortas: The Rise and Ruin of a Supreme Court Justice*, a superbly impressive study of how Justice Abe Fortas's intimate political relationship with President Lyndon Johnson, plus some amazingly unwise financial entanglements, led to his forced resignation from the Court in 1969.

Dagmar Hamilton noted in a 1990 review that Murphy's *Fortas* was "much more political than judicial" in its focus, with "a great deal more on his extra-judicial activities" than on Fortas's Court work as a Justice. *Wild Bill* merits a similar characterization. Murphy offers a comprehensive account of Douglas's early life, a highly detailed description of his incessant careerism as a young law professor and four full chapters on Douglas's work at the SEC. Even after Douglas ascends to the High Court, Murphy's most extensive treatments concern Douglas's unsuccessful effort to become FDR's 1944 vice-presidential running mate and Douglas's 1948 rejection of the vice-presidential nomination from the man who had joined Roosevelt's 1944 ticket, President Harry Truman.

To anyone who refreshes an acquaintance with Simon's *Independent Journey*, there are fewer surprises in *Wild Bill* than Murphy's publicists would like to acknowledge. Murphy does add substantially to Simon's account of just how many out-and-out falsehoods mar Douglas's own accounts of his early life. (Douglas published one

less, "Douglas lived the rest of his life *believing* that the names on this letter had been switched." Douglas thus thought that not only had he, rather than Truman, been FDR's first choice but also that were it not for the convention chicanery, he would have become President of the United States upon Roosevelt's death in April 1945.

Murphy contends that Douglas "never got over" that 1944 experience, and that Douglas's frustrated presidential ambitions contributed mightily to his less than half-hearted job performance on the Supreme Court in the years thereafter. Douglas and Truman's mutual confidant, Washington lawyer Clark Clifford, endorsed Murphy's view, explaining that such a narrow miss at the presidency "sort of takes some of the shine, I think, off the rest of your life."

But Clifford also addressed the fundamental enigma of Douglas as well as anyone Murphy interviewed: "To me it seemed as if he was searching for something—something more—all of his life. But he never found it, and I never really knew what it was. I'm not sure even he knew what it was."

Murphy's own answer to that enigma is decisive: Once Douglas's dream of the presidency dissipated (after the indecisive Justice refused to give up the financial security of his Supreme Court seat to accept Truman's offer of the vice-presidential nomination in 1948), the pursuit of women younger and more attractive than his first wife, who was six years Douglas's senior, became the recurring focus of his life.

Murphy stresses that "Douglas had always treated his family badly," but that his behavior became progressively worse during the 1940s. His daughter, Millie, told Murphy that her father "never talked to us like [we were] people" and that "when he got angry at us, which was often over the slightest things, he would simply not speak to us for days on end." Millie also added that "I didn't like him very much because of the way he treated my mother," and by early 1951 Douglas was in serious and open pursuit of Mercedes Davidson, a social acquaintance whom he wed in 1954.

Wild Bill details how increasingly heavy drinking went hand-in-hand with Douglas's sour disposition and nonstop marital escapades. Murphy's constant theme is that Douglas "was just plain bored as a Justice," that he felt "trapped forever" on the Supreme Court rather than occupying the Oval Office where he "rightfully belonged." Yet *Wild Bill* also makes indisputably clear that Douglas year in and year out worked fearsome hours in his office, even if a good

portion of his time was devoted to churning out off-the-bench books rather than thoughtfully polished judicial opinions. His law clerks, like his children, found him to be a cold and standoffish man, and his two secretaries struggled to keep up with Douglas's pace. "If you hadn't stopped working, you wouldn't be tired," he once told an exhausted Fay Aull. "Work is energizing."

But Murphy, just as in his Fortas book, devotes surprisingly little attention to the

Douglas's failure to be named FDR's 1944 running mate is cast as a defining experience that helps to explain the rest of his life.'

High Court's actual case decisions. *Brown v. Board of Education* (1954), in which Douglas wanted to void school segregation from the very start of the Court's extended, two-year consideration of the issue, passes almost unmentioned. Even when Murphy does offer extended quotations from those Douglas opinions that merit attention, the seriatim presentation is so short on context that many readers may find themselves skimming over them like block quotes in a textbook. Anyone hungry for a rich, thorough and thoughtful survey of the important rulings of those years should turn to Lucas Powe's *The Warren Court and American Politics* (2000), a superb and highly readable book.

Douglas's behavior throughout the 1950s did not change in the 1960s, as reflected in Murphy's portrait. In 1961 Douglas began pursuing a young Allegheny College student, Joan Martin, who was writing her senior thesis on him, and once Martin moved to Washington the affair became public. "Other Justices at the time had mistresses," Douglas's utterly loyal Court messenger, Harry Datcher, told Murphy, "but they would employ them as secretaries or keep them away from the Court building. Douglas, though, did what he did in the open. He didn't give a damn what people thought of him."

A 1962–63 law clerk recalled Joan Martin once hiding in an office closet to avoid Mercedes, but the following summer the 64-year-old Douglas divorced Mercedes and married 23-year-old Joan. But Douglas's behavior toward women did not improve. One old Douglas friend remembered how Joan "just sat down and cried all night because he never paid any attention to her," and more than once Joan complained to a former Douglas clerk that "he beats me up all the time." Less than two years later Douglas dismissed Joan from his life, took

up with an old Washington State girlfriend, Elena Leonardo, and then met a 22-year-old Oregon waitress, Cathleen Heffernan, who became his fourth wife in mid-1966.

Griswold v. Connecticut (1965), Douglas's "most famous opinion," with its oft-quoted paean to how marriage is "intimate to the degree of being sacred," was handed down just a few weeks before its author ditched young Joan. But *Griswold* reflected more than just personal dissonance, it also highlighted the imprecise and incomplete constitutional analysis that so many Douglas opinions featured. Douglas's result was arguably correct; Hugo Black's contrary insistence that a state legislature could outlaw the use

of all contraceptives if it so chose was just as foolishly contradictory of any constitutional guarantee of personal liberty in 1965 as it is today. But Douglas's assertion that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," was less an articulation of a nontextual right to privacy, a word the Constitution fails to cite, than an invitation to scholarly complaint and derision. Press reports assert that a warning sign mocking Douglas's *Griswold* language—"Please don't emanate in the penumbras"—hangs today in the Supreme Court chambers of Justice Clarence Thomas.

Douglas's final ten years on the bench were true to form. Justice Brennan later complained about "the slovenliness" of Douglas's writing "and the mistakes that he constantly made." Thurgood Marshall, who joined the Court in 1967, called Douglas "about as independent a cuss as I knew," and a 1968–69 law clerk described his boss as "a very unhappy man," someone who "wanted to be something other than what he was." When Douglas's first wife died in 1969 after a long illness, some time went by before he was even informed. "Neither my brother nor I felt the slightest inclination to tell him that Mother had died," his daughter Millie told Murphy.

Reviewing *Wild Bill* in *The New Republic* a few weeks ago, Circuit Court Judge Richard Posner splenetically denounced Douglas as "one of the most unwholesome figures in modern American political history." Offended by Douglas's abuse of both alcohol and women, Posner reproached Murphy for excusing "Douglas's flaws of character" and for an "uncritical" treatment of his "slipshod and slapdash" judicial performance. Posing much the same question that Ronald Dworkin addressed two decades ago about whether Douglas's professional deficiency was indeed the product of

his personal shortcomings, Posner, unlike Dworkin, answered "yes." Did Douglas's substantive views preclude him from being a dedicated constitutional crusader, as Dworkin suggested? No, said Posner, it was simply "for reasons of temperament" that Douglas "could not buckle down and commit himself wholeheartedly to the Court."

Put this way, Dworkin's analysis of Douglas's judicial failing transcends Posner's emphasis on Douglas's personal imperfections. One of Douglas's longtime champions, former Yale professor Charles Reich, once conceded that his hero "had egregious personal flaws, but so what—he was a great man." But no, William O. Doug-

las was not a great man. He was a man of great ideals, but his career on the Supreme Court unfortunately represented only a witness to those ideals, rather than their actual attainment or realization. As Lucas Powe stated in 1990, Douglas, as "a man of action, not reflection," was "miscast in the judiciary." Yet notwithstanding the disappointing caliber of Douglas's Supreme Court career, he nonetheless remains a poignant archetype of how "even in the worst of times judges can actually stand up and demand we adhere to our ideals." If more present-day Justices and judges embraced William O. Douglas's ideals, constitutional liberties would be far safer than they are. ■

this way, and the things our peculiarities lead us to do. To a long and disparate list let us add another name: In a writing life that now spans almost four decades, it is hard to think of an American writer who has made the deep dive into his time and place as effectively as Robert Stone.

This may as well get said straightaway: Nobody of Stone's generation comes near him—not in the elegant clarity of his sentences and not in terms of the thematic whale he has pursued from one book to another. Stone has a new novel out, and this may as well be noted in the front, too: *Bay of Souls* does not rank among his best work—certainly not his biggest. There are flaws that beg repair. It lacks the ambition and magnitude of *Damascus Gate*, his prophetic book (sorry—couldn't resist) on the Middle East. And it has nowhere near the cleanliness, power and singularity of purpose Stone achieved in *A Flag for Sunrise*, his Central America novel. *Flag* is now twenty-two years old, but I agree with Reynolds Price about it: It's the best book Stone has ever produced.

Bay of Souls seems small by comparison. Stone takes us traveling once again, but the book unrolls primarily in a university-town household and the psyche of its male inhabitant. It seems closer in its aspirations, and in its mostly domestic setting as well, to some of the stories collected six years ago in *Bear and His Daughter*. To this we must quickly add that Stone attempts some important new turns in his latest book. No one who follows him and wants to know where he is going can consider *Bay of Souls* dispensable: It's "must" reading in the way everything Stone writes is. So we can quip once again and call this novel a Stone of modest size, while recognizing that without it the edifice would not be complete.

If Stone has his great subject, as Greene had his, how shall we describe it? Much of Stone's work is strangely similar to much of Greene's in a co-relative sort of way. They both are given to wretched, peripheral locales to reflect upon the metropole—the force and connivance elsewhere that produced the wretchedness in remote places. Spooks, opportunists, the morally shredded, the morally bankrupt—Greene and Stone often seem to draw from the same population pool, though the sociology is never the same. None of this should surprise: Their differences may finally outweigh their similarities, but as Greene did falling and fallen England, Stone's piece of marble is America as it enters and learns to live uneasily within its late-imperial phase, as it begins to suspect itself—as it weaves "the fabric of predatory power," as Stone put it in *A Hall of Mirrors*, the book that

A Stone Unturned

PATRICK SMITH

Someone once described Graham Greene as the novelist of decolonizing Britain. England during and after the war and the imperial fall was his true subject, the uncut stone from which he chiseled his themes. Think of knob-kneed, lonely-hearted Wilson, the sunburned colonial officer in *The Heart of the Matter*, which many consider Greene's most achieved novel, and the notion seems a natural. But what about the whiskey priest in *The Power and the Glory*, the messy domestic duplicity of the narrator in *The End of the Affair*, or the dog-walking double agent of *The Human Factor*? These are among the ranking inhabitants of Greendale, as we've come to think of the territory, but fitting them into the thesis makes it seem reductive.

Is it, finally? Range through Greene's work and you begin to see the argument's validity. Greene's writing is all tied together by a running concern for a certain England at a certain time. His novels are maps for a journey through the moral, emotional and psychological terrain of a nation in triumph and decline at once—and then a nation re-encountering a world it so recently thought it had mastered. Between all the lines of all the histories to come, Greene may as well have advised us, this is the good and bad of who we were, this is how it looked from where we sat.

Some novelists lend themselves to this kind of reflection because their work is theme and variation from start to finish, as Milan Kundera once put it—and because their books are cast against the velvet curtain of public events: against history. Law-

rence had his post-Victorian, postwar industrial England, injured and ugly; for Vidal the thread is spun of his preoccupation with us—we peculiar Americans and how we got

IN THIS ESSAY

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Patrick Smith is a writer and former correspondent abroad, primarily for the International Herald Tribune and The New Yorker.

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