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Of Judicial Freedom and Judicial Constraint: The Voice of Louisiana's Judge Albert Tate, Jr.

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OF JUDICIAL FREEDOM AND JUDICIAL
CONSTRAINT: THE VOICE OF LOUISIANA'S
JUDGE ALBERT TATE, JR.*

PAUL R. BAIER†

*I think it a noble and pious thing to do whatever we may by
written word and molded bronze and sculptured stone to keep
our memories, our reverence, and our love alive and to hand
them on to new generations all too ready to forget.*¹

* Address delivered at the Albert Tate, Jr. Seminar: Bridging Academia, The Bench & The Bar, Commemorating The Distinguished Life and Career of Albert Tate, Jr., May 9, 1987, Louis J. Roussell Auditorium, Loyola University, New Orleans. Thanks to Christopher J. Roy, Sr., first Chair of the Bill of Rights Section, Louisiana State Bar Association, for envisioning the Seminar in memory of Judge Tate, to Governor Edwin Edwards, Chief Justice John A. Dixon, Jr., Judge Patrick E. Higginbotham, Clare Tate, the Tate family, and the host of judges and lawyers who participated, and to Chancellor B. K. Agnihotri and Southern University Law Center for co-sponsoring the Seminar. After twenty years, we renew our memories, our reverence, our love and hand them on to new generations eager to learn from the past.

Editors' Note: The Board of Editors of the *Southern University Law Review* is pleased to publish Professor Baier's memorial portrait of Judge Albert Tate, Jr., who was a great friend of Southern University Law Center, its Faculty and student body, and a notable contributor to the history-making first volume of our *Law Review*—his brilliant exposé, *The Justice Function of the Judge*, 1 S.U. L. REV. 250 (1975). We thank Professor Baier for favoring us with his address, which he has annotated for publication here. As a new generation, we are honored to remember, not to forget, Judge Tate in this way. We also thank *The Times-Picayune* for its financial support to the *Law Review* and for its courtesy in providing the photographic frontispiece, the same image projected on to the stage at the conclusion of Professor Baier's speech. It vividly evokes memory of its amazing subject.

† George M. Armstrong, Jr. Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Member of the Louisiana Bar. Judicial Fellow, Supreme Court of the United States, 1975-76; Executive Director, Louisiana Commission on the Bicentennial of the United States Constitution, 1987-1991; Scholar in Residence, Louisiana Bar Foundation, 1990-92; Distinguished Professor, Louisiana Bar Foundation, 2004. Editor, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK (Random House, 1986); LIONS UNDER THE THRONE: THE EDWARD DOUGLASS WHITE LECTURES OF CHIEF JUSTICES WARREN E. BURGER AND WILLIAM H. REHNQUIST (La. Bar Found., 1995). Vice-Chairman, Bill of Rights Section, Louisiana State Bar Association. Secretary, Supreme Court of Louisiana Historical Society.

1. Oliver Wendell Holmes, Jr., *Ipswitch*, At the Unveiling of Memorial Tablets (July 31, 1902), in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 136 (Mark De Wolfe Howe ed., Harvard Univ. Press 1962).

The other day I reached for a volume of the *Federal Reporter*, 2d Series, in search of some point or other of the law—I forget which. My eye caught the name of Albert Tate, Jr., on the spine of the report.² We are all familiar with the countless number of judicial memorials, published in endless volumes of reports that line the walls where we work.³

The sight of Judge Tate's name in gold letters draped in black made me wince at the thought of dying young with so much energy wasted away. We all know the disbelief of losing Judge Tate, especially Claire, his companion in life. Their home on Octavia Street is empty without him. It seems only yesterday that his exuberance for life and his big smile filled our hearts with joy.

Al Tate was extraordinary.⁴ His human spirit enveloped all who knew him with love.⁵ His voice was galvanic.

2. *In Memoriam, Honorable Albert Tate, Jr.*, 798 F.2d xci (1986). Born Opelousas, Louisiana, September 23, 1920. LL.B. 1947, Yale Law School. Certificate in Civil Code Studies, Louisiana State University Law School, 1948. Married Claire Jenmard, of Ville Platte, 1949. Country lawyer, with L. O. Fusilier, Ville Platte, 1948-54. Elected, Louisiana Court of Appeal First Circuit, 1954; Presiding Judge, Louisiana Court of Appeal Third Circuit, 1960-70. Elected, Louisiana Supreme Court, 1970-79. Delegate, Louisiana Constitutional Convention of 1973; Chair, Committee on Style. Sworn in, upon President Carter's commission, United States Court of Appeals for the Fifth Circuit, November 2, 1979. Died March 27, 1986; survived by Claire and five children, Albert III (Father Jules), Emma Adelaide, George J., Michael F., and Charles E.

3. Such memorials, Judge Tate poignantly recognized, manifest an eternal ideal of justice:

And so today we reverence not only our departed friends, but through them the judicial power they exercised in the name of all the American people, present, past, and future. In ceremonies such as these, in time beyond our contemplation, the members of the legal profession will gather to pay their respects to the eternal ideal of justice, and both we and those who have already departed will in communion with them in those solemn moments render our silent account to our God of our joint stewardship of the heritage of American justice.

Albert Tate, Jr., *The Role of the Judge in the American Republic*, 16 LA. L. REV. 386, 390 (1956).

4. Judge Tate's colleague on the Louisiana Supreme Court, his good friend Justice James L. Dennis, explains:

The example of Judge Albert Tate, Jr., as a jurist, writer, teacher, colleague, and human continues to sustain us even af-

I remember seeing him in a small cubicle at New York University where he taught the Appellate Judges Seminar in the summer.⁶ He was surrounded by stacks of books, his green visor

ter his death. Undoubtedly, his judicial opinions and legal commentary constitute the most significant contribution by an individual to the jurisprudence of Louisiana. Although only his contemporaries could know fully the intensity, the honesty, and generosity of his personality, his written works remain as a source of strength and inspiration for future generations.

James L. Dennis, *Foreword* to REFLECTIONS ON LAW, LAWYERING, & JUDGING: THE ESSAYS & ARTICLES OF JUSTICE ALBERT TATE, JR. ix (George W. Pugh, Jr., ed., Pugh Inst. for Justice, La. State Univ. Law Ctr., 2006).

Warren M. Billings, Historian of the Louisiana Supreme Court, captures Judge Tate's persona precisely in his *Confessions of a Court Historian*:

One had only to be in the presence of Judge Tate but a short while to recognize him as one of God's rare creatures. A smallish, ruffled man, he mingled earthiness with an innate knack for friendliness and storytelling that immediately drew one to him. Those characteristics belied a formidable mind and a broad erudition, to which he joined an acute sense of Louisiana history and the place of his profession in it.

Warren M. Billings, *Confessions of a Court Historian*, 35 LA. HIST. 261, 262 (1994).

5. "Al was a great leader, and a great teacher." John A. Dixon Jr., In Memoriam, *Honorable Albert Tate Jr.*, 61 TUL. L. REV. 711, 712 (1987). Chief Justice Dixon said of his great friend and colleague:

But Al Tate's character and personality are what endeared him to everyone touched by his life. Judge Tate had a genuine love for people—collectively and individually. He knew more people by name than anyone I ever saw. He never failed to speak to students, law clerks, and other young people. All kinds of people came to him with their troubles, and he always listened. Even up in Shreveport people knew Al Tate. A little paper up there called the *Upstate* printed a full page editorial about him last week, called *The Nicest Genius You Ever Met*.

Id. at 713 (citing Baudouin, *The Nicest Genius You Ever Met*, *Upstate* (Shreveport, La), April 24, 1986, at 10). "Of all the judges I have known, Al also had the largest heart for mankind as well as for each and every human being. He really cared." Mack E. Barham, In Memoriam, *Albert Tate, Jr. Judge of the Fifth Circuit Court of Appeals, 1979-1986 Associate Justice, Supreme Court of Louisiana, 1970-1979*, 47 LA. L. REV. 921, 921 (1987).

6. Judge Tate first attended the Seminar as a young appellate judge and later became a stalwart member of its teaching faculty and a good friend of

jutting out from his forehead. Perhaps you know the image I have in mind. And what was he doing while others had escaped to Washington Square and beyond? A thousand miles from home, he was writing an article on his beloved Acadiana.⁷

I owe much to Judge Tate. Fifteen years ago when Piper was in the Gerry Carrier he urged me to transplant my family to Louisiana soil. Al Tate loved LSU's Law School and he advised me to join its faculty. "You'll have fun," he said. Judge Tate's confidence in me helped dispel the moments of self-doubt and distrust that come to us all. His undying example lifts our spirits still.

Now to my academic duty. I am honored to be listed on the program as the only professor given leave to speak. I propose to prove to you that Louisiana's Judge Albert Tate, Jr., was—first

Robert A. Leflar, Distinguished Professor of Law at the University of Arkansas and Director of the Appellate Judges Seminar, Institute of Judicial Administration, New York University. See Albert Tate, Jr., *Bob Leflar's Impact on the Judicial Process*, 25 ARK. L. REV. 95 (1971).

[T]he ten days or two weeks of discussion with fellow judges, in the peaceful atmosphere of a university and away from the pressing demands of the docket, offer an exhilarating opportunity to think and talk and read and dream about first things, and to come away refreshed with a clearer understanding of judicial responsibilities and an eagerness to perform them well.

Id. at 110. By the time of this tribute to Leflar, Justice Tate was on the Louisiana Supreme Court and Chairman of the Appellate Judges' Conference, Section of Judicial Administration, American Bar Association, which was then housed at Louisiana State University Law Center. Judge Tate's eagerness to judge well was bolstered by his enormous energy, his scholarship, his seriousness of purpose, his love of justice and of life. He exemplified Robert Leflar's lifetime dream of improving the quality of the law through continuing education of the judiciary. See Robert A. Leflar, *The Appellate Judges Seminar at New York University*, 9 J. LEGAL EDUC. 359 (1956); Robert A. Leflar, *The Quality of Judges*, 35 IND. L.J. 289 (1960). And Judge Tate's exemplar also inspired his colleagues. Chief Justice John Dixon said of Al Tate: "He kindled fires in his colleagues that made it possible for them to work hard together in an effort to do justice." Mack E. Barham, In Memoriam, *Albert Tate, Jr. Judge of the Fifth Circuit Court of Appeals, 1979-1986 Associate Justice, Supreme Court of Louisiana, 1970-1979*, 47 LA. L. REV. 921, 921 (1987).

7. See, e.g., Albert Tate, Jr., *Ville Platte in 1870*, 30 LA. GENEALOGICAL REG. 107 (1983); Albert Tate, Jr., *1860 Census of the Ville Platte Area*, 20 ATTAKAPAS GAZETTE 52 (1985).

and last—a judge; that however much he desired to render common sense justice under the facts, “the discipline of his craft,” as Judge Tate often called it, constrained him from administering justice solely on his own idea of what was fair.⁸

This is the old theme of judicial freedom and judicial constraint.⁹ I raise it anew because the question deeply concerned Judge Tate, both in his decisions on the bench and in his ageless academic writings.¹⁰

8. Albert Tate, jr., *The Judge As a Person*, 19 LA. L. REV. 438, 445 (1959). “But however much the appellate judge desires to render common sense justice under the facts, certain restrictions—the discipline of his craft—inhibit him from administering justice solely on his own idea of what is fair.” *Id.* “[O]ur legal system requires not only that equity be reached wherever possible in individual cases; it also requires some consistency and predictability of result based upon past decisions,” keeping in mind “the self restraint called for by the tradition of our judiciary.” *Id.* at 445, 446. In a very rare percentage of cases “the individual views of the judges as to what is fair become decisive, due for example to the absence or conflict of prior precedents. There, in these very rare cases, the court is creatively free to apply the conflicting principles of law advanced, in such a manner as to produce the result the court itself thinks is most fair.” *Id.* at 446. “[T]he vast mill-run of litigation neither requires nor allows much free play of judicial discretion.” Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 211 (1968); see also *id.* at 233 (“courts do possess and should exercise law-making responsibilities”; “judicial creativity is an essential component of the process of deciding cases”).

9. See, e.g., Albert Tate, Jr., Book Review, 25 LA. L. REV. 577, 584 (1965) (reviewing FRANÇOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (Jaro Mayda & La. State Law Inst. trans., W. Publ'g Co. 1963) (1899); Albert Tate, Jr., *The “New” Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877 (1980).

10. Like Benjamin Cardozo before him, *The Nature of the Judicial Process* (1921), and François Gény before Cardozo, *Méthode d'Interpretation et Sources en Droit Privé Positif* (Paris, 1899), Louisiana's Judge Albert Tate, Jr. subjected the judicial process to introspective scrutiny over a lifetime of extrajudicial study and scholarship. See, especially, his penetrating review of Jaro Mayda's translation of Gény's *Méthode d'Interpretation et Sources en Droit Privé Positif*, in which he stated: “For the reviewer, Gény's analysis and suggested method was not just an X-ray showing the internal arrangement of the legal system; it was more a sort of stethoscope, catching the living beat of the law in action.” Albert Tate, Jr., Book Review, 25 LA. L. REV. 577, 586 (1965). For other of Judge Tate's extrajudicial writings on the judicial process not cited in the annotations herein, see Albert Tate, Jr., “Policy” in *Judicial Decisions*, 20 LA. L. REV. 62, 67, 75 (1959) (“Policy, in the sense that justice is the aim and intent of all legal system and procedures, is the spirit vitalizing the letters of the law”; “statutes and precedents are indeed the body of the law, ‘policy’—or justice—is its soul”); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 TUL. L. REV.

Only the other day I heard a lawyer who should know better say of Judge Tate that he was a perfect example of “the unrestrained judge.” My thesis is just opposite. To be sure, Judge Tate often gave voice to the great fundamental aim of the law—“To see that justice is done”¹¹ —, but time and again he reiterated the constraint, “within the framework of the law.”¹² In Judge

673 (1970); Albert Tate, Jr., *Introduction* to JARO MAYDA, FRANÇOIS GÉNY AND MODERN JURISPRUDENCE xvii (La. State Univ. Press, 1978); Albert Tate, Jr., *The Judge's Function and Methodology in Statutory Interpretation*, 7 S.U. L. REV. 147 (1981). Judge Tate's impact on the law of Louisiana “rivalled that of François-Xavier Martin and Edward Livingston, and, like them, his influence reached far beyond the borders of Louisiana.” Warren M. Billings, *Confessions of a Court Historian*, 35 LA. HIST. 261, 261 (1994). “Indeed, William J. Brennan once ranked him as someone who would long be recalled for his contributions to modern American jurisprudence.” *Id.* Judge Tate's extrajudicial writings have recently been compiled in a volume published by the Pugh Institute for Justice, Louisiana State University Law Center, REFLECTIONS ON LAW, LAWYERING, & JUDGING: THE ESSAYS & ARTICLES OF JUSTICE ALBERT TATE, JR. (George W. Pugh, Jr., ed., Pugh Inst. for Justice, La. State Univ. Law Ctr., 2006), with a foreword by Judge James L. Dennis.

11. See, e.g., Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 754 (1962). Judge Tate described “the fundamental aim of the judge in deciding the case—to decide it fairly. After all, a conscientious judge is usually not trying to find the answer to an abstract legal conundrum; he is trying to do justice, to reach a fair and reasonable solution of a conflict between the interests of human beings.” *Id.* at 754.

12. See, e.g., Albert Tate, Jr., *the Justice Function of the Judge*, 1 S.U. L. REV. 250, 255 (1975). Judge Tate's contribution to the historic first volume of the *Southern University Law Review* is historic itself. He rejects the “illusion” that judges have no justice function. *Id.* at 255. “This view, surely, must be myopic and mistaken. It overlooks the purpose supposedly animating the judicial system—to accomplish justice, within (it is true) a framework of objective legal rule.” *Id.* “So strong is this urge toward justice (as the judge perceives it) that occasionally it persuades him to adopt a solution that, at least on prima facie analysis, is not only unauthorized by legislation, but apparently contrary to express text. A discussion of judicial creativity would be incomplete if it did not touch upon this phenomenon.” Albert Tate, Jr., *The “New” Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877, 909 (1980). In explicitly pursuing justice as an end in itself, Judge Tate built upon the Common Law tradition traced by Benjamin Cardozo in his Storrs Lectures at Yale, *The Nature of the Judicial Process* (1921), adding his own insights derived from over thirty years of appellate judging in Louisiana's Civil Law system. Judge Tate realized the advantage he had, working as a Louisiana mixed-law judge, over his common law counterpart: “Because of the differences in judicial function founded upon our civilian heritage, the Louisiana mixed-law judge has doctrinally available to him more advantageous techniques and perspectives than those of his common law counterpart.” Albert Tate, Jr., *The Role*

Tate's own words, "[O]ur legal system requires not only that equity be reached wherever possible in individual cases; it also requires some consistency and predictability of result based upon past decisions"¹³

I shall speak only of a few civil rights suits, one of which is currently pending in the Supreme Court of the United States.¹⁴ I know civil liberties cases better than others. Some of them, I am told, require great agonizing in the conference room.

I should add that in preparing my remarks I sought the help of my colleague Cheney Joseph, who unraveled Judge Tate's *Sepulvado*¹⁵ opinion for me. Some of you may know the molar step taken by Justice Tate for the Louisiana Supreme Court in 1979. Remember this date, 1979. It will be important later.

Justice Tate's opinion for the Supreme Court in *State v. Sepulvado* read Article I, Section 20 of the Louisiana Constitution of 1974, which prohibits subjecting any person "to cruel, excessive, or unusual punishment"—I emphasize "excessive"—as adding a new constitutional dimension to state judicial review of criminal sentences.¹⁶ "By it, the excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of this court,"¹⁷ said Justice Tate.

I am sure this audience knows the word "excessive" does not appear in the federal Eighth Amendment.¹⁸

Frankie Sepulvado's sentence of three and a half years at hard labor for carnal knowledge of a juvenile—Frankie was eighteen, Jamie S., fifteen and a half—was set aside by Justice Tate as violative of Article I, Section 20.¹⁹ "[I]t is necessary to

of the Judge in Mixed Jurisdictions: The Louisiana Experience, 20 LOY. L. REV. 231, 242 (1974). Judge Tate reflected in his own work-ways the genius of François Géný, fostering, with the help of Chief Justice Dixon, Justice Barham, and Justice Calogero, a Renaissance of the Civilian Tradition in Louisiana jurisprudence.

13. Albert Tate, jr., *The Judge as a Person*, 19 LA. L. REV. 438, 445 (1959).

14. Rankin v. McPherson, No. 85-208, October Term, 1986.

15. *State v. Sepulvado*, 367 So. 2d 762 (La. 1979).

16. *Id.* at 764 (quoting LA. CONST. art. I, §20).

17. *Sepulvado*, 367 So. 2d at 764 (citing LA. CONST. art. V, §5(C)).

18. See generally *id.* at 764-65 (explaining the "excessiveness" factor in the Eighth Amendment).

19. *Sepulvado*, 367 So. 2d at 764, 773.

consider the context in which the illegal conduct occurred,"²⁰ said Justice Tate, for whom context was always key.

So it is for is for all great judges.

Here is an excerpt of Justice Tate's thinking in Frankie Sepulvado's case:

Without applauding the sexual permissiveness of the times, we can only note that in the social context of the times this type of offense between young people is committed many times without criminal prosecution and that, in ordinary sentencing practice, it is not regarded so serious as to require imprisonment.²¹

Surely this would sound fair to a barber in Ville Platte, which was Judge Tate's way of testing his opinions for the court.

Frankie Sepulvado owes his freedom to Judge Tate, who himself was free to impose a new judicial duty upon his court.

Fortunately, the law of Louisiana's Constitution of 1974, which he helped write, allowed Judge Tate to satisfy his sense of justice. It was not always this way, however.

The law of the First Amendment also requires analysis of the context of Ardith McPherson's harsh words. She may owe her continued government employment to the sensitivity of the Fifth Circuit and to Judge Tate, who reversed a summary judgment against her.²² McPherson was fired from her job as a deputy constable for a remark she made after hearing of the attempted assassination of President Reagan.²³ "[I]f they go for him again, I hope they get him," she told a co-worker at lunch.²⁴ The remark capped what McPherson, a black woman, thought was a private *tête-à-tête* expressing opposition to the President's policies cutting back on welfare and ignoring blacks.²⁵ *McPherson v. Rankin* is one of the many public employee lawsuits requiring judges to ap-

20. *Id.* at 771.

21. *Id.*

22. *McPherson v. Rankin*, 736 F.2d 175, 177 (5th Cir. 1984); *rev'd and remanded by*, *McPherson v. Rankin*, 786 F.2d 1233 (5th Cir. 1986), *aff'd by*, *Rankin v. McPherson*, 483 U.S. 378 (1987).

23. *McPherson*, 736 F.2d at 177.

24. *Id.* at 177 n.2.

25. *Id.* at 177.

ply the *Pickering/Connick* “balancing test”: A judicial weighing of the First Amendment interest in protecting public employees’ freedom of expression against the government’s interest in maintaining discipline and efficiency in the workplace.²⁶ The case is a challenging civil liberties litigation that has twice hit the Fifth Circuit.

The district court thought McPherson’s remark unprotected as a matter of law, but Judge Tate identified several issues of material fact preventing summary judgment.²⁷

Constable Rankin thought that McPherson was serious; McPherson testified, “I didn’t mean anything by it.”²⁸ Said Judge Tate: “The issue of McPherson’s intent is relevant to the present inquiry because it is imperative that a court’s characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its ‘content, form, and context.’”²⁹

Some may say McPherson’s intent is irrelevant; she said what she said. But the context of the speech is especially material. If McPherson truly meant her remark as a form of political hyperbole, not as advocacy of harm to the President, then the *Pickering/Connick* balance would seem to weigh in her favor.³⁰

At any rate, summary judgment is simply too blunt an instrument in these public employee, free speech cases. Balancing the competing interests requires a razor, not a meat axe, even in the face of a public employee’s blunt tongue.

On remand the district court again ruled against McPherson, explaining from the bench: “I’m not sure that the real question in this case is what she meant. . . . I don’t believe she meant nothing, as she said here today, and I don’t believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public governmental official as to be violent words, in context.”³¹

26. *Id.* at 179.

27. *Id.* at 177-78.

28. *Id.* at 177 n.3.

29. *McPherson*, 736 F.2d at 178-79.

30. *See id.* at 180.

31. *McPherson v. Rankin*, 786 F.2d 1233, 1235 (5th Cir. 1986) (quoting the district court opinion).

In holding that McPherson's remark was not protected speech, the district court concluded that McPherson actually hoped that the President would be killed—a dubious finding of fact—and that, at any rate, Constable Rankin is not required to employ a law enforcement officer who favors political assassination—a conclusion of law hard to dispute.³² In Constable Rankin's colorful words, he ought not be required to employ a person who "rides with the cops and cheers for the robbers."³³ The difficulty, as you might guess, is that Ardith McPherson is not a cop; all she does is sit at a computer all day, in a room with no phone, closed to the public, "enter[ing] data from court papers into a computer's memory"³⁴

I wonder what Judge Tate would have done with Ardith McPherson's case the second time up? We will never know; it reached the Fifth Circuit the same month Judge Tate died.

The second time up, McPherson's case fell into the hands of a younger judge, one whose intellect and judicial sensitivity seem to me lineal to Judge Tate's. I speak of Judge Patrick Higginbotham, whom you have already heard on this program, another of Al Tate's great admirers. His presence on the Fifth Circuit keeps its landscape vital.

Judge Higginbotham reversed,³⁵ holding as a matter of law that McPherson's remark considered in its context—whether political hyperbole or an actual wish for the president's assassination—addressed a matter of public concern, and that "the value of protecting her right to express her opinion, however loathsome," outweighed the competing interest in effective and efficient law enforcement.³⁶ The court agreed that a law enforcement agency need not employ officers who favor political assassination, but Judge Higginbotham cut a finer line. "The difficulty with the government's position," said the court, "is that McPherson's duties were so utterly ministerial and her potential for undermining the office's mission so trivial."³⁷ She was not a law enforcement officer; she had no contact with the public; she had no access to

32. *Id.*

33. *Id.*

34. *Id.* at 1237.

35. *Id.* at 1235.

36. *Id.* at 1238.

37. *Id.* at 1239.

sensitive files. In these distinct circumstances, the court held that McPherson could not be fired for expressing her political opinion.³⁸ Here is the closing part of Judge Higginbotham's opinion for the Fifth Circuit: "Political liberty will best be secured in the long haul," said Judge Higginbotham, "if the government tolerates as much diversity of opinion as its responsibilities will allow. Our first amendment jurisprudence is a boast that in a free society foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office."³⁹

Surely this is sensitive writing. Whether the result is right and whether the Fifth Circuit's reasoning will hold up on certiorari remains to be seen. Ardith McPherson's case is currently in the crucible of the Supreme Court.

If I were asked to predict what will happen, I would say the Supreme Court will reverse the Fifth Circuit. But I am confident that Judge Tate, from his ultimate chambers, favors a judgment for Ardith McPherson. So do I.⁴⁰

The last time I saw Judge Tate alive he was in the company of Justice Harry A. Blackmun. There was boyish laughter between these two humble men. As fate would have it, they would never see each other again.

Justice Blackmun has a vote in Ardith McPherson's case. He is free to favor freedom.

One more case and I have done. What if the law and the judge's sense of justice conflict? What then?

One of my students put this very question to Judge Tate. We had bridged the gap between our protected academic cloister and the Judge's chambers in New Orleans. We were there on a

38. *Id.*

39. *Id.*

40. The author's prediction was wrong, *mea culpa, mea maxima culpa*. His hope, however, was fulfilled. *Rankin v. McPherson*, 483 U.S. 378 (1987) (5-4 decision), *aff'g* 786 F.2d 1233 (5th Cir. 1986). The Court affirmed Judge Higginbotham's Fifth Circuit opinion, per Justice Thurgood Marshall, joined by Justices Brennan, Blackmun, Powell, and Stevens. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist, and Justices White and O'Connor, joined.

field trip, in pursuit of a confidential chat on the judicial process. Judge Tate allowed me to tape record the session. I want you to hear his answer. Perhaps the best tribute I can pay to Judge Tate is to offer his own voice⁴¹ in proof that he was first and last a judge.

By way of essential background, I must tell you that in a case called *State v. James*,⁴² Justice Tate overruled a large body of jurisprudence requiring the reversal and dismissal of a criminal prosecution where there was technical failure of the indictment to allege all the essential elements of the crime. No other American jurisdiction has such a strict rule, which makes no sense under modern conditions of criminal practice and procedure.⁴³

Second, I must tell you that *State v. Jimmy Ray Malmay*,⁴⁴ which is the subject of the taped conversation, was decided after

41. Cf. Paul Thompson, THE VOICE OF THE PAST, ORAL HISTORY 225-26 (1978):

[T]he real justification of history is not in giving an immortality to a few of the old. It is part of the way in which the living understand their place and part in the world . . . [H]istory can help people see how they stand, and where they should go And in giving a past, it also helps them towards a future of their own making.

42. 305 So. 2d 514 (La. 1974).

43. In his historic contribution to the first volume of the *Southern University Law Review*, Justice Tate explained:

This is not to say that judicially adopted policies of criminal procedure may not be revised when the abuse they were designed to prevent is no longer a threat. For instance, until recently there was an overly strict requirement of a perfect indictment, which resulted in the dismissal sua sponte on appeal of prosecutions founded on defective indictments, even though the issue was not raised prior to conviction and even though there was no prejudice. See, e.g., *State v. Smith*, 275 So. 2d 733 (La. 1973). This could be (and was) judicially modified under twentieth century conditions, which afford more opportunity prior to trial for an accused to learn of the details of the charge against him [than] in the days when the indictment was the only notice given to the accused of the offense charged. *State v. James*, 305 So. 2d 514 (La. 1974).

Albert Tate, Jr., *The Justice Function of the Judge*, 1 S.U. L. REV. 250, 260 n.25 (1975).

44. 315 So. 2d 286 (La. 1975).

the *James* case, in 1975, four years *before* Judge Tate freed the Louisiana Supreme Court to review criminal sentences for excessiveness.

When we were in chambers, Judge Tate couldn't remember the name of the case, but then it hit him—"Malmay! Jimmy Ray Malmay, up from Sabine, up from Many, near Many." He rushed over to the reports that lined his wall and, as if by magic, he pulled down 315 So.2d—all without looking up the citation. Obviously, this case burned deeply in the Judge's memory.

I have to add that Judge Tate's desk was so cluttered I didn't see the small pocket radio that was playing when I set the tape recorder down. The haunting music you will hear in the background wasn't my idea. But in this audience, I believe Judge Tate's voice will be heard.

Finally, as you listen to the voice of Louisiana's Judge Tate, I want you to see my favorite picture of the Judge. I made a side trip the other day to *The Times-Picayune* to get it. It appeared on the cover of a *Lagniappe* feature article on Judge Tate entitled "Breaking Up the Bench."⁴⁵

Carlyle in his essay on portraiture says he would give more for a single picture of a man, whatever it was, than for all the books that might be written of him. The portrait is "a small lighted *candle* by which the Biographies could for the first time be *read*, and some human interpretation made of them; the *Biographed* Personage . . . yielding at last some features which one could admit to be human."⁴⁶

[House lights down; image on screen.]

My student asked Judge Tate to give an example of a case in which his sense of justice was outraged by what had happened, but there was nothing the Judge could do about it. Judge Tate's answer recalls one of the hardest things in his whole life:

[The Voice of Judge Tate.]

45. Claire Jupiter, *Breaking Up the Bench*, New Orleans States-Item (*Lagniappe*), Sept. 6, 1975, at 3.

46. Thomas Carlyle, Exhibition of Scottish Portraits (1854), in XVI THE WORKS OF THOMAS CARLYLE: CRITICAL AND MISCELLANEOUS ESSAYS 514, 515 (Collier ed. 1897).

Oh, I'll give you, I'll give you the—one of the hardest things in my whole life. It's a case called, uh, *State versus Jimmy*, uh, *State versus Jimmy Malvo* or something; he's in, probably in the penitentiary, poor guy. Uh, and, uh, the situation in this case from Sabine, up from Many, near Many. The situation in that case was [walks to wall and pulls down]—uh, 315 So.2d—the situation in that case was, we had been working hard to reform the jurisprudence on indictments, which as you may know for a while was awfully, awfully technical in Louisiana. It said if you left out a word negligently, even if you didn't raise it and had the trial, you could reverse 'em on appeal—I forget the line of cases. And we finally got rid of it. And, incidentally, one of the bad things about that, in application, it would depend upon, very often,—and this is one reason my good friend John Dixon might not have been crazy about overruling it—but in application, if it was an absolute, *terrible* injustice, somebody would find some little ol' indictment informality and reverse, but it wasn't consistent and it didn't make sense, you see. So we finally got the thing straight.

Now, Jimmy Ray Malmay comes up. Here's the situation: A kid from the wrong side of the tracks, uh, let's see, I think 19 years of age, uh, sold, uh, who gave a minister's boy in Many for a dollar a marijuana cigarette, for a dollar—17-year-old boy. Now if they had been one month less, this would have been about a year in the parish pen at most, but instead there's a fifteen-year-in-the penitentiary goddam thing. And I knew the facts were so terrible three guys were just itching to reverse. And the only reversal could be on resurrecting the goddam worthless, ridiculous business of the indictment technicality.

And I sat there and I cried that night, I really cried because I knew—I didn't reverse, and I got four votes to affirm—but I knew I was throwing that kid

on the scrap heap, that everybody had thrown him on the scrap heap, 'cause he—he, he wasn't going to be a hero, he was going to be a petty thief or something—but he was not going to be a damn felon in the penitentiary.

And that was the hardest thing I ever had to do in my life, come to think. Because I could have, I could have switched so easy, you know. But I wouldn't have been true, in my mind, to what doctrine was about.

At that time, you see, we couldn't review sentences for excessiveness. Thank God, since '74 we'd have had no problem with that.⁴⁷

[Tape off; house lights up.]

I will add but a word, what Holmes said in one of his commemorative speeches:

When a great tree falls, we are surprised to see how meager the landscape seems without it. So when a great man dies. We may not have been intimate with him; it is enough that he was within our view; when he is gone, life seems thinner and less interesting. . . . We shall be fortunate enough if we shall have learned to look into the face of fate and the unknown with a smile like his.⁴⁸

*Adieu, mon ami.*⁴⁹

47. Audio Tape: Confidential Chat on the Judicial Process, Chambers of Judge Albert Tate, Jr., United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana (Mar. 16, 1982) (on file in author's archives).

48. Oliver Wendell Holmes, Jr., *Sidney Bartlett* (1889), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES*, *supra* note 1, at 54-55.

49. In recalling the voice of Louisiana's Judge Albert Tate, Jr. after twenty years, let us add that Judge Tate realized his own fallibility, indeed he acknowledged that the law is produced and administered by fallible human beings:

But [this] . . . realization[,] . . . rather than decreasing our respect for the judicial process, should inspire admiration for the

human achievement in formulating from myriad efforts our great system of law. We may well be struck by the wonder and miracle of human intelligence and human integrity which, despite the imperfections of the human agents who are the constituent parts of our judicial process, produce in the majesty of the law a legal system whose breadth and compassion and fairness and intellect distills from these imperfect human contributions a substance finer and fairer than could be imagined by any of the mortals who contributed their best thought and most selfless service to this end.

Albert Tate, jr., *The Judge as a Person*, 19 LA. L. REV. 438, 447 (1959). *Requiescat in pace, cher ami.*