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In Memoriam: William Hughes Mulligan

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In his lifetime a man plays many roles. I was fortunate—blessed would be a better word—to know Bill Mulligan in his many incarnations: teacher, Dean, Judge, and most memorably, friend. Our lives and careers spiraled and intersected for forty-two years.

A superb teacher, a fine administrator, and then a gifted judge, he never lost that sense of humor which gave him the fortitude to serve Fordham for a quarter of a century, under five presidents during times ranging from the halcyon days of the '50s through the Vietnam era. A man without mirth is like a wagon without springs: he is jolted by every pebble in the road. And, indeed, there were many pebbles in the career of William Mulligan from the Bronx to the Bench.

He came to Fordham College in 1935 and achieved success as Editor of the Ram, when the school paper was still literate. Young William Mulligan came to Fordham Law School in 1939 as just plain Bill, and later adopted the clerical middle name when he learned that he was a collateral descendant—in those days the clergy did not acknowledge direct descendants—of John Hughes, the first Archbishop of New York. He served as an editor of the Law Review and upon graduation entered the Army. He spent all of World War II chasing spies in New York City, more particularly in Brooklyn, where he protected the Gowanus Canal from German treachery.

Doffing his uniform, he came back to Fordham Law School, first as a part-time teacher, while he practiced law at what would evolve into the Shea Gould firm, and then on a full-time basis. Professor Mulligan taught me Criminal Law in my first year at the Law School. He subsequently taught me three other courses. At the end of my first year, he became Dean of the Law School.

His accomplishments as Dean require no Boswell for it is universally known that Dean Mulligan brought Fordham Law School to Lincoln Square. For fifteen years his constancy demonstrated to student and faculty alike that DEAN is not just another four-letter word. Aristotle has observed that there are some professions in which a gentleman cannot be virtuous. Bill Mulligan's career as Dean sorely tested this dictum, but I think Dean Mulligan bested Aristotle in that arena.

It was the boast of Ceasar Augustus that he found Rome of brick and left it of marble. While I know that Dean Mulligan would have

* United States Circuit Judge, United States Court of Appeals for the Second Circuit, 1990 to Present. Formerly, U.S. District Judge (E.D.N.Y.) 1981-1990.

shrugged off that comparison, I succeeded him as Dean and can attest that the Law School he left had grown to prominence on his watch.

I became Dean on July 1, 1971. I remember it well. July, 1971 was a steamy, sultry month, and Dean Mulligan had just been elevated to the Court of Appeals for the Second Circuit. Also ascended with him were his desk, the better office appointments, and his secretary.

Working alone, midst a motley assembly of three legged chairs and a table—not unlike what I had seen in a M.A.S.H. unit in Korea—I answered the phone to hear a man asking to speak "to Dean Mulligan." "He is not here," I responded, "for he is risen as he said he would."[1] Risen he had, to make a lasting impress on the Second Circuit and to leave us a trove of hundreds of opinions, sparkling with grace, learning, and, most notably, that lightening wit that was his signature.

He first sat in August of that *annus mirabilis*. The judicial planets were in alignment that month, for his first opinion, a criminal case,[2] had drawn a galaxy of legal stars who would themselves eventually ascend to the Bench: for the Government: Raymond J. Dearie (now an Eastern District Judge) and on the brief David G. Trager (also a District Judge). For the Defendant: Phylis Skloot Bamberger (now an Acting State Supreme Court Justice). Anyone who knew Bill can sense immediately that he struggled to restrain his natural impish streak. He churned out a unanimous opinion of impeccable prose and logic, but lacking the expected flashes of wit.

His self-control lasted three weeks. In his second opinion, also a garden variety criminal case,[3] Bill Timbers, a New Englander, first by disposition and then by choice, was on the panel. A bank had been held up by three masked men, and without eye-witness identifications, the evidence was largely circumstantial. Trudo and Tatro were convicted and mounted an appeal on sufficiency of the evidence grounds. Doubtless, with one eye on winning Timbers's concurrence, Mulligan capitalized on Timbers's flinty respect for the virtues of parsimony:

> There was abundant evidence of sudden acquisition of wealth on the part of both Trudo and George Tatro after the robbery. Trudo had a very meager income in the fall of 1969 and lived very modestly. In the weeks following the robbery there was an abrupt change in his spending habits. He purchased a used car for $500 and gave a $100 gift to a girl friend. In January, 1970 he paid $70 to have his road plowed of snow, a most lavish and quixotic gesture for any Vermonter irrespective of means. George Tatro was regularly employed at a modest salary and did cash an insurance refund check for $542.44 on December 29th, 1969. However, in January, 1970

1. *Matthew* 28:6.

2. *United States v. Howell*, 447 F.2d 1114 (2d Cir. 1971).

3. *United States v. Trudo*, 449 F.2d 649 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

> George Tatro participated in poker games where the stakes were as high as $1,200 a hand. Although known as an average tipper, on three occasions in January, 1970 he bought drinks for everyone at the bar (8 to 10 people), paid his check with a $100 bill and left the waitress a $10 tip, all of which was unprecedented.[4]

Bill Mulligan had gone to Cathedral Prep, which in those days prepared young men to enter the seminary. Though he abandoned his clerical aspirations to enter Fordham College, that early clerical/Jesuit formation surfaced in many of his opinions. Thus, in one of the many IBM appeals that filled the Federal Reporters in the early 1970s, he dissented on jurisdictional grounds from Leonard Moore's opinion reviewing an interlocutory order. Loosing an anathema, Mulligan wrote: "It must languish in Purgatory until the Day of Final Judgment."[5]

A lifelong devotee of Latin and Greek classics, he often laced his opinions with classical allusions. In that same IBM dissent he repeated Judge Edelstein's (another classical scholar) caution against opening "a Pandora's Box," which Mulligan quickly endorsed as being "not as Delphic a pronouncement as it might first appear."[6]

His favorite allusion—and of this let there be no doubt—was to the fabled "Serbonian Bog." Because even the Colorado Supreme Court was befuddled by this reference ("Whatever kind of bog that is"),[7] a little background may be helpful. In the time of the Pharaohs there was a marshy Lake Serbonis in Egypt. Herodotus, who was notoriously given to exaggeration, reported that entire armies disappeared into the marshes. John Milton, in *Paradise Lost*,[8] carried the story into English; and, then Cardozo, wrestling in insurance law, with the distinction between accidental results and accidental means, characterized the dichotomy as doomed to "plunge this branch of the law into a Serbonian Bog."[9] Teaching the Insurance course at Fordham (I was one of his students), Dean Mulligan had led us through this bog, only to become mired in the indemnity distinction between friendly fires and hostile fires. The Serbonian Bog metaphor is about all I recall of the course on Insurance.

The Bog resurfaced a year after Judge Mulligan joined the Second Circuit. The same dissenting opinion in the IBM case chastised Leonard Moore's majority opinion as destined to "lead us only into the

4. *Id.* at 651.

5. *IBM Corp. v. United States*, 471 F.2d 507, 519 (2d Cir. 1972), *cert. denied*, 416 U.S. 980 (1974).

6. *Id.* at 521.

7. *Equitable Life Assurance Soc'y v. Hemenover*, 67 P.2d 80, 81 (Colo. 1937).

8. John Milton, Paradise Lost, bk.II, l.592 (1667) ("that Serbonian bog . . . where armies whole have sunk").

9. *Landress v. Pheonix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting).

Serbonian Bog."[10] When I upbraided him (ever so mildly) for this conceit he told me that nobody would know what it meant and, besides, said he, "the primary purpose of a dissent is to annoy the majority." His love for the Bog is evident in three[11] other majority opinions that he wrote. (As his faithful acolyte, I threw into one of my opinions[12] a Monet-Manet distinction to the bemusement of two of my colleagues.)

Judge Mulligan served for ten years on the Second Circuit. With the celestial regularity of Haley's Comet, the judicial planets once again fell into alignment for his final opinion. The panel, *mirabile dictu*, included Bill Timbers (again) and District Judge Kevin Thomas Duffy, two other jurists not adverse to a touch of Celtic wit. Neither, it would seem, were the defendant (Janet Byrnes) or the trial judge (Neal McCurn, N.D.N.Y.). The defendant was implicated in smuggling rare birds from Canada into the United States and then lying to a grand jury about her involvement.

This landmark case, *United States v. Byrnes*,[13] affirmed her conviction unanimously. Bill Mulligan's opinion opened as follows:

> Who knows what evil lurks in the hearts of men? Although the public is generally aware of the sordid trafficking of drugs and aliens across our borders, this litigation alerts us to a nefarious practice hitherto unsuspected even by this rather calloused bench — rare bird smuggling. This appeal is therefore accurately designated as *rara avis*. While Canadian geese have been regularly crossing, exiting, reentering and departing our borders with impunity, and apparently without documentation, to enjoy more salubrious climes, those unwilling or unable to make the flight either because of inadequate wing spans, lack of fuel or fear of buck shot, have become prey to unscrupulous traffickers who put them in crates and ship them to American ports of entry with fraudulent documentation in violation of a host of federal statutes.[14]

Several of the footnotes command attention. Footnote 8, for example comments upon an observation that Judge McCurn had made during the trial:

> The trial judge, perhaps to relieve the tension, observed that while he had enjoyed goose dinners he had never consumed swan—some indication of the limited cuisine available in the Northern District.[15]

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10. 471 F.2d at 519.

11. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Diematic Mfg. Corp. v. Packaging Indus., Inc.*, 516 F.2d 975, 978 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975); *Agur v. Wilson*, 498 F.2d 961, 968 (2d Cir.), *cert. denied*, 419 U.S. 1072 (1974).

12. *United States v. Cropper*, 42 F.3d 755, 759 (2d Cir. 1994).

13. 644 F.2d 107 (2d Cir. 1981).

14. *Id.* at 108-09.

15. *Id.* at 110 n.8.

There apparently was a difference of opinion as to whether swans were birds for purposes of the federal statute. Footnote 9 is illuminating:

> For a liberal construction of the term "birds," by a Canadian court *see Regina v. Ojibway*, 8 Criminal Law Quarterly 137 (1965-66) (Op. Blue, J.), holding that an Indian who shot a pony which had broken a leg and was saddled with a downy pillow had violated the Small Birds Act which defined a "bird" as "a two legged animal covered with feathers." The court reasoned that the statutory definition
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> > "does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement. . . . Counsel submits that having regard to the purpose of the statute only small animals 'naturally covered' with feathers could have been contemplated. However, had this been the intention of the legislature, I am certain that the phrase 'naturally covered' would have been expressly inserted just as 'Long' was inserted in the Longshoreman's Act.
> >
> > "Therefore, a horse with feathers on its back must be deemed for the purpose of this Act to be a bird, *a fortiori*, a pony with feathers on its back is a small bird." *Id.* at 139.[16]

The opinion concludes: "The judgment of conviction is affirmed, justice has triumphed and this is my swan song."[17]

It is not without significance that this last Mulligan opinion was filed on St. Patrick's Day, 1981.

Sean O'Casey once observed that we Irish never hesitate to give a serious thought the benefit and halo of a laugh. In a city of carbon copies, William Hughes Mulligan was an original. He touched all who knew him with his kindness and his unforgettable wit.

In the melancholy words from the refrain of an old Irish ballad:

> The music in my heart I bore,
> Long after it was heard no more.

16. *Id.* at 112 n.9.
17. *Id.* at 112.