



March 2014

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Charles E. Rice

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Recommended Citation

Charles E. Rice, *This Was a Man*, 72 Notre Dame L. Rev. 1221 (1997).

Available at: <http://scholarship.law.nd.edu/ndlr/vol72/iss4/15>

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THIS WAS A MAN

*Charles E. Rice**

In September, 1986, Judge J. Daniel Mahoney of the Second Circuit Court of Appeals delivered a lecture at Notre Dame for the Law School Federalist Society. Judge Mahoney was impressed with Notre Dame and especially its students. He later hired several Notre Dame students as clerks. Over the past few years, Judge Mahoney and I tried to arrange another visit for him, but conflicting schedules frustrated the effort—until last year. On October 29, 1996, Judge Mahoney was scheduled to arrive at Notre Dame to deliver another address to the Law School Federalist Society. Instead, his funeral was held the day before, October 28. On the preceding Sunday, Judge Mahoney and his wife, Kathleen, had gone to the evening Mass, eaten dinner at a local restaurant, and returned home. After working for a while in his study, Dan walked over to Kathleen and said, “I’m happy. I finally have the Notre Dame speech exactly the way I want it.” A few minutes later he collapsed, and never regained consciousness.

Mrs. Mahoney has kindly given permission to publish this last work of Judge Mahoney. It is an honor and a privilege for Notre Dame to do this, as it is for me to offer a few remarks which may help to put Judge Mahoney’s address in context.

The biography can be briefly stated. Born in 1931, J. Daniel Mahoney graduated from St. Bonaventure University and from Columbia University Law School, where he was a Kent Scholar. He served on active duty in the United States Coast Guard and practiced law in New York with major law firms. He and his brother-in-law, Kieran O’Doherty, founded the New York State Conservative Party in 1962. Dan Mahoney described that founding in a fascinating book, *Actions Speak Louder*, published in 1968. Dan served as state chairman of the Conservative Party, in addition to practicing law, until 1986 when he was appointed by President Reagan to the Court of Appeals. On that court, he served on panels and authored opinions in major cases involving desegregation, copyright, criminal procedure, organized crime, drug trafficking, and various constitutional issues. As Judge

* Professor of Law, University of Notre Dame.

Frank X. Altimari's tribute notes, Judge Mahoney earned the resounding and unanimous affirmation of his peers.

So much for the biographical outline. Permit me to offer some personal observations. The Mahoneys and I go a long way back.

I went to Our Lady Queen of Martyrs grade school with Kathleen, and our parents worked together in the cause of securing Irish freedom from the British. In 1962, when I was serving on the faculty of Fordham Law School, I joined Dan in the organization of the Conservative Party and served as its state vice chairman from 1962 until 1969, when I saw the light and came to Notre Dame. Although not an alumnus, Judge Mahoney had a strong empathy for Notre Dame and particularly for what we try to do at the Law School. He was pleased with the performance of Notre Dame students as clerks. And he looked forward to his planned visit last October as sort of a mini-retreat. In his integration of faith, family, and profession, he was a worthy, indeed superb, exemplar for Notre Dame students and for others. Let me briefly note four respects in which this is true:

First, he was unfailingly selfless, as well as energetic, in devoting his talent and professional efforts to the common good. Lay aside, if you will, political preferences and labels. Dan Mahoney took the initiative in successfully creating a new political party because of what he saw as his obligation to the common good. In the initial letter which he crafted for signature by the organizing committee of the Conservative Party, Dan said,

The liberals tell us that ours is the age of collectivism; that the efforts and beliefs of individual men and women are no longer significant. We intend to prove that free men who are deeply anxious for the future of their country can stand up and be counted with decisive effect.¹

He actually believed that. And he made it work. The point I suggest here transcends political or other differences: we, as lawyers, should be willing, when the occasion arises, to put ourselves in service to the common good in whatever form that service might take. Too often, new lawyers go into big firms and drop like a rock in a lake, never to be heard from in the general community again. Whatever our political persuasion, each of us could well reflect on Dan Mahoney's contrary example in this regard.

Second, in all his professional work Dan Mahoney maintained a proper sense of the limits as well as the duties of his role. He was not a power tripper. Especially as a judge, he had the humility to see that his commission was to interpret the law and not to create it as the spirit might

1 J. DANIEL MAHONEY, ACTIONS SPEAK LOUDER 36 (1968).

move him. In the address he was to deliver at Notre Dame last October, Judge Mahoney made that clear:

The respect that is accorded to judges rests in good measure upon the perception that they decide cases and controversies in accordance with an objective standard that is provided by the law, rather than some personal whim or predilection. The great virtue of originalism for judges who are required to decide constitutional cases is that it leads them in the direction of objectivity and away from the imposition of a personal agenda in the name of the law. We hear a great deal today concerning the need to protect the independence of the judiciary from political attacks. This is a two-way street. There is a considerably greater need, in my view, to protect the political institutions of our democracy from an overweening judiciary.²

Judge Mahoney, however, was in no way a mechanical jurist. He saw that there are principles higher than the human law. In a 1994 address at Yale University, he said:

Whatever their relevance to the day-to-day judicial work of constitutional interpretation, surely the principles of the Declaration of Independence deserve to be viewed as fundamental to our self-definition as a nation. As we emerge from a century that has seen millions of human beings literally exterminated in the name of grand totalitarian designs, it certainly should not be deemed passé to reiterate the founders' perception of the innate dignity and worth, and entitlement to inalienable rights, of humankind over against the demands and presumptions of the leviathan state.³

Third, Dan Mahoney's life makes the case that a lawyer really can live a busy and successful professional life and still be an exemplary husband and father. Dan was able to do this because, with him, his family always came first. At his funeral, his son, Dan, delivered a eulogy on behalf of himself and the other children, Kieran, Frank, Mary, Eileen, and Elizabeth. Dan said,

I want to thank my father for setting before us such a fine example. We can only hope to emulate him. Our father's faith in God was the driving force in his life. Dad and Mom were there as examples of true followers of the faith. No words can express our gratitude to them for this greatest gift of all. As a truly good parent, Dad's expectations of us were as large as his belief in our abilities. With wisdom, patience and persistence he provided us with the needed

2 The Honorable J. Daniel Mahoney, *Thoughts on Originalism*, 72 NOTRE DAME L. REV. 1225 (1997).

3 J. Daniel Mahoney, Address to the Yale Federalist Society (Apr. 7, 1994) (on file with Professor Charles E. Rice).

help and guidance but always pushed us to the next level. Now with him gone, we must look to each other and ask, "What would Dad say?" We hope we're right more often than wrong. Throughout his life, Dad fully used all the gifts God gave him—intelligence, integrity, kindness and moral strength. He was a great listener and had a wonderful sense of humor. Dad's very admirable life greatly inspires each of us. *This was a man.* We will each miss our father every day of our lives but are joyful that he has ascended and is now with Christ.

I will not try to add to that. Suffice it to say that all of us would be happy to have our children think of us in such terms.

Fourth, I know, from working with him on various matters over the years and from our many conversations, that Dan Mahoney lived his entire life for Christ. St. Alphonsus Liguori, a lawyer who is a doctor of the Church, tells us that "Jesus Christ, having first given his life for us, has bound us to give our life for him."⁴ The "Crucified Christ," John Paul II said in *Veritatis Splendor*, shows us that authentic freedom and the fulfillment of the human person lie in "the gift of self in service to God and one's brethren."⁵ That was precisely the rule by which Dan Mahoney lived his life.

Requiescat in pace.

4 ALPHONSUS DE LIGUORI, THE PASSION AND THE DEATH OF JESUS CHRIST 330 (Eugene Grimm ed., 1927).

5 John Paul II, *Veritatis Splendor*, paras. 85-87 (1993).