MEMORIAL TO MICHAEL BOUDIN

Remarks from Pierre N. Leval[1]

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One of the greatest privileges and joys I have known in my very fortunate life has been my near-60 year friendship with Michael Boudin, who died last March at the age of 84 after a lengthy and cruel, debilitating illness. Michael was a very special, extraordinary, human being in so many ways. His intelligence and analytic abilities were off the charts. In our profession, we all know smart people. Mike was on a different level, floating far above the field. In addition to his amazing raw mental powers, Mike was spectacularly endowed and achieved in so many realms—in the breadth of his reading, learning, and knowledge,—in his integrity, energy, initiative, industriousness, and conscientiousness,—in his charm, generosity, kindness, wit, conversational and storytelling skills, (he was a superb raconteur),—and in his capacity for friendship. At least until his catastrophic diminution by illness in 2009, he was admired and loved, by virtually everyone who came into contact with him.

Here's a brief sketch of his professional path and of how he was regarded at every stage.

At the Harvard Law School, Mike was President of the Law Review and graduated first in his class. I was on the Law Review Board in the year ahead of him. It was clear to all of us that he was the star of his exceptionally talented group. His election as President was no contest.

After law school he had two distinguished clerkships: First, in the Second Circuit for the amazing Judge Henry Friendly, generally accounted the scholar genius of the judiciary, and in the following year for the distinguished Supreme Court Justice John Marshall Harlan.

Friendly was a demanding and critical taskmaster. Mike was, hands down, Friendly's all-time favorite clerk, from a field that included such luminaries as Chief Justice Roberts and Attorney General Garland. This was due not only to the dazzling excellence of his work, but also to the breadth of his erudition, which enabled him to easily interact with the Judge as an equal in casual discussions of historical literature. These might open with the Judge asking, "What have you been reading?" Mike's

[1] Draft notes: Prepared by speaker for oral delivery on January 22, 2026. These notes represent a rough guide for sharing memories, not a finalized, word-for-word transcript.

response typically might have named C.V. Wedgwood's 900-page history of the Thirty Years' War, with which the Judge would have been intimately familiar.

After his clerkships, in 1966, Mike joined the Covington & Burling firm. His career there is the stuff of legend in the firm. When he started, the great Hugh Cox grabbed him as his personal aide. This entailed his being assigned to a small office in Mr. Cox's suite. Cox was a perfectionist, and Mike more than satisfied his need for perfection. At the same time, Mike was so enthralled by the superb qualities of his boss, both as a lawyer and a person, that, notwithstanding Mike's rapid increase in stature in the firm, he was happy to long remain in Cox's shadow in the tiny associate's office in Cox's suite.

Cox had a number of the firm's most significant clients. He died prematurely in 1973. Although Mike was only 34, all concerned were thrilled to have Mike succeed to Cox's position, becoming at such an early age one of the most significant partners of that great firm.

His Covington colleagues described him to me as a brilliant perfectionist with the very highest standards of integrity, which he never compromised, adding that he was "*at all times kind, thoughtful, generous and patient, with no ambition for his own advancement*."

Following twenty-some super- successful years at Covington, Mike left to become Deputy Assistant Attorney General for Antitrust. He later described that job as the happiest time of his life. His boss, Assistant AG Rick Rule told me, "*Mike's acquaintance was a highlight of my life. He was a great lawyer and a brilliant mind. But more importantly, he was one of the kindest, most considerate human beings I have ever had the pleasure of knowing. I can't think of anyone who deserves . . . to be honored more than Mike*."

In 1989, Mike was appointed to the District Court for the District of Columbia. This was a strange and puzzling interlude. There was nothing wrong with his performance as a district judge; indeed he labored over every decision with a diligence and intensity rarely seen. But for reasons not clear, he hated the job, and was miserable doing it.

Why such misery? I think it had multiple causes. He hated having to send people to prison. Another cause may have been the need to make instantaneous decisions. Mike loved to ruminate over a question in depth. I believe it came also from having to answer questions for which there were no standards. "*How*," Michael once asked me in tears, *"does one tell whether an interrogatory is 'unduly burdensome*?" I think he felt a crushing personal responsibility, owed directly to Madison, Hamilton, and the Founders, to rule

correctly (as Friendly would have) in fulfilling the role of the judiciary, and could not bear the thought that he might fail in the responsibilities that Article III placed on him.

He resigned after eighteen months of misery, but weeks later was named to the First Circuit. Perhaps drawing confidence from what he had learned in his clerkships and his largely appellate practice, he immediately understood that doing the work of an *appellate* judge was what he was born for. He served in that court with great distinction, including 7 years as Chief Judge, until ill health forced him in 2009 to stop hearing cases.

He worked seven days a week, whether in Chambers (where he would arrive shortly after 7), at home, or in his summer home on Cape Cod. He never took vacations; many, me included, believe there was no finer judge. His opinions never sought public attention. They shunned bombast and rhetorical chicanery. They gave clear, sensible explanations, based on logic and precedent. He knew every record at least as well as the lawyers arguing the case.

Colleagues who served with him told me that he was "*extraordinarily brilliant*;" that "*history will count him as one of the most significant judges of his era*," remarkable for his wisdom.

His clerks saw him in similar terms, emphasizing also his kindness and his wit. They noted that, like Friendly and unlike virtually all other federal judges, he did his own research, wrote his own first drafts, and did not really need clerks at all.

I will mention just few of his rulings. Early in his appellate career, when he had had little or no contact with copyright, he wrote a concurring opinion that made an indelible mark. In *Lotus Development v. Borland*,[2] a developer of a computer-menu-command-hierarchy charged a competitor with copyright infringement for employing the plaintiff's program in the defendant's spreadsheet system. The problem was that Congress had enacted two arguably incompatible propositions. Section 102(b) of the Copyright Act, summarizing entrenched dogma, declared, "In no case does copyright protection . . . extend to any idea, . . . process, . . . [or] method of operation . . . ." On the other hand, in a definitions provision, Congress included computer programs among "literary works," which enjoy copyright protection. What is a computer program if not a process,—a method of operation? Mike's opinion wrestled with the complexity of the issue, ultimately concluding that the plaintiff's program was not protected. He observed

[2]., 40 F.3d 807, 819 (1st Cir. 1995)

pithily that "*applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit*." Twenty-five years later, that incisive, if playful, proposition was quoted in Justice Breyer's opinion for the Supreme Court in *Google v. Oracle*,[3] where it plays a major role in explaining the Court's decision. It is often cited when courts grapple with the unrelenting conundrum of applying copyright law to computer software.

His best known ruling was his tightly and persuasively reasoned judgment in *Massachusetts v. Dep't of Health.*[4] The Defense of Marriage Act[5] denied federal economic benefits to marriages other than those between a man and a woman. Michael's opinion ruled that this was an unconstitutional discrimination. That ruling played a huge role in liberating our Nation's understanding of society's most foundational relationship.

For many years,[6] in addition to the very demanding jobs he was doing, he taught at the Harvard Law School—primarily antitrust and evidence. His mastery of the very complex field of antitrust was so complete that Professor Philip Areeda tried very hard to get Michael to join him in editing and eventually taking over Areeda's great treatise.

Michael was elected to membership in this Institute in 1974 and to the Council in 1980. For thirty years he was an exceptionally valuable contributor to Council deliberations. I was stunned by the ease with which he, having barely entered adulthood in the world of law, established equal-to-equal friendships with the legendary greats of the ALI—Herbert Wechsler, Lloyd Cutler, Charley Wright, Nick Katzenbach, Bill Coleman, Ami Cutter, and, of course, Henry Friendly. His intelligence, kindness, and charm melted all barriers. He was responsible for the establishment of our Henry Friendly Medal, and in 2014 we awarded it to him in recognition of his contributions to law.

In the non-law world, I know no one who had a wider circle of admiring and loving friends, male and female, spread though Washington, New York, and Boston.

When the end of his life began to loom, Michael told me how he wished to be remembered. It was in the same terms as Admiral Horatio Nelson, whom Michael hugely admired. While dying in the tumult of his victory at Trafalgar, Nelson reflected,

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[3] 593 U.S. 1 (2021).
[4] 682 F.3d 1(1st Cir. 2012)
5 1 U.S.C. § 7
6. 1982 to 1998

“I did my duty.” Michael made the same claim. For both, it was a prodigious understatement.

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