The Judge as Mentor: A Personal Memoir

Stewart Macaulay

Bill Simon's objections to judicial clerkships ring true to me. Nonetheless, my clerkship with Chief Judge William Denman of the United States Court of Appeals for the Ninth Circuit was a great experience.[1] Perhaps I can reconcile these observations, perhaps not—we can seldom generalize safely from only one instance. To rephrase my conclusion: Simon has a valid argument, but he overstates his case. Indeed, he may be attacking a symptom and not the disease.

There is a mythical picture of a judicial clerkship that floats in the culture of American law schools. The young person will associate for a year or more with a judge on the order of Holmes, Brandeis, or Learned Hand. He[2] will polish legal skills that will be the basis of law practice. The judge is a man of character, a worthy model for a young professional. Furthermore, great appellate judges are part of networks of contacts leading to the best legal positions. They offer reflected status and prestige. After all, something rubbed off on anyone associated with judges such as Holmes, Brandeis, and Hand.

This picture, however, is hard to sell today. Are there judges working now who enjoy the status of Holmes, Brandeis, and Hand?[3] We like to think of our highest appellate courts as the scene of battles about great questions, but a fair observer would see that debates on major issues are rare. Some of the work does matter to specialists; much of it interests only the lawyers and perhaps the parties. A large portion of any law clerk's work will be boring and burdensome.

Simon reminds us of infamous appellate judges mistreating their clerks. For example, if even a fraction of the atrocity stories about one famous liberal justice are true, no faculty should have subjected any young lawyer to him. This justice's clerks had to face an impossible mountain of work, irresponsible demands, and an exploitative relationship. Indeed, the stories tell us that the exploitation continued long after the clerkship ended. The great man would descend on a city with little or no notice and expect to be

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1. I was extraordinarily lucky to have three mentors who helped me greatly when I began my career: Judge Denman, Malcolm Sharp, and Willard Hurst.
2. In the mythical version, both clerk and judge are male.
3. I have some favorites among those now on the bench. I cannot think of anyone, however, who plays the mythic role of Holmes, Brandeis, and Hand.

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entertained at the former clerk's expense. Of course, the stories about this judge may be apocryphal. Even so, they are good parables.

Furthermore, having listened to many young lawyers seeking teaching jobs just after clerking for upper level appellate judges, I can attest to their naivete. All are very intelligent, but most have almost no sense of the American legal system in operation. They want to teach constitutional law, federal jurisdiction, or the like. Few, however, have any sense of why such subjects might matter to anyone. If the Supreme Court deals with anything, it is, by definition, important. To put it kindly, these young people shield themselves from the world in which even elite lawyers work. Former clerks often go into the ivory tower and avoid the messy reality of legal systems in action. They teach the only thing they know—pure abstract law and ideology.

Finally, it is hard to disagree with Simon that clerkships are just another way of rewarding those who need no more rewards. Those at the top of, say, a Stanford law class today are superstars. They have all kinds of possibilities open to them. Most judges need them far more than they need the judges.

Having said all this, I can still state that my clerkship with Judge Denman was a great experience. He did not write a body of work that won scholarly acclaim, but he was a wonderful judge and human being. He was 84 years old when I worked for him. He had not learned about modern inventions such as the 40-hour week and coffee breaks; we worked five days a week and Saturday mornings as a matter of course. We stayed late to finish the work. I worked at home almost every night.

I did many things. I had to write a calendar memorandum on every case before oral argument. The memo was a draft of an opinion of the Ninth Circuit. I stated the contentions of the lawyers on both sides, but I also had to see what the lawyers omitted. The day before oral argument, Judge Denman and I would meet and discuss the cases the court would hear. After oral argument, the judge would draft opinions in those cases he assigned himself. I might do no more than read the judge's draft opinion. Often, however, there was research to be done. In addition, there was always a large pile of petitions from federal and state prisoners.

What did I learn from all this? I did polish skills I learned at Stanford Law School. I also learned that we could not do a perfect job but only the best one possible in the time available.

I learned more from a close professional relationship with Judge Denman. Before oral arguments, my work was dissected by a man who had a quick mind and great experience. First, I stated the appellant's case while Judge Denman challenged me. He was tougher than any law professor I had had. Finally, when our debate produced a statement of the appellant's positions that satisfied him, he turned the tables. Then I had to state the respondent's case. However, Judge Denman would throw at me the appellant's arguments we had just developed. We argued the case vigorously.

Of course, he was the judge and I was the recent graduate. He was 84 and I was 24. Simon says "[e]ven when things go well, . . . the relation remains an intensely subordinate one." Given what I knew at 24, I certainly should

have been a subordinate to a talented and experienced judge. Some kinds of subordination may be objectionable but others may be types of cooperation.

Simon also says that a clerk's role is objectionable because it "is not really supposed to involve responsibility or creativity." I'm unsure why he says this. Early I discovered, to my horror, that Judge Denman relied on my statement of the law and the parties' positions. Only occasionally would he check a brief or read a case or statute. And often I had to write appellate briefs for both sides when the lawyers' analysis was inadequate. Unless I am missing the point, this work seems to call for some creativity. Furthermore, I managed to survive without being given public credit for my work.[4] Simon seems to think public recognition is essential. Young lawyers will do a lot of work for partners and gain little applause. Anonymity seems the least of the problems of practice.

These one-on-one Socratic classes were not technical exercises. Judge Denman would comment on the rhetorical ploys used by the lawyers as well as on their skill and honesty. I learned, for example, that one of San Francisco's largest and most famous firms had a reputation for misrepresenting the law and the record in their briefs. I checked their work carefully. Judge Denman also knew which United States district judges were likely to be right and which were almost always wrong. He told me how the other judges on the Ninth Circuit would likely react to cases. Judge Denman pointed out that one judge was a former prosecutor. In his eyes, police and prosecutors could do no wrong. Another judge reflected President Eisenhower's debt to the far right of his party. I worked for Judge Denman shortly after Senator Joseph McCarthy's fall from power, and this judge's opinions still echoed the tone of reports of the House Un-American Activities Committee.

I came away from these sessions with tremendous respect for Judge Denman. He loved his work and enjoyed its challenges. He had an old-fashioned sense of values and responsibility. Undoubtedly, his views were those of white upper-class males. But those values were and are not all bad. Indeed, the problem is that white upper-class males talk about those values more than they act upon them. Judge Denman acted on his beliefs courageously. For example, he was the only judge who objected publicly to the "relocation" of Japanese-Americans in 1942. His secretary told me about the costs of remembering the Constitution in time of war. He believed in free speech and due process. He was contemptuous of those who attacked the Constitution while wrapping themselves in the flag. Moreover, he drew on his years of experience to reinforce his stands. He remembered the treatment of Asians in California in the early part of the century. He remembered the Red Scare after the First World War. He remembered the

4. I wrote over sixty calendar memos for Judge Denman during the year I worked for him. Three or four opinions of the Ninth Circuit appeared in the *Federal Reporter, Second Series* that somewhat resembled my original memoranda. This pleased me. Nonetheless, in each instance Judge Denman had so worked over what I had written that the published opinion was truly his. On a very few occasions he had decided to express his decision in my words. While this acceptance was nice, my reward was knowing that the judge trusted my work and relied on it. I had helped someone I admired do his job.

campaigns against unionization and union leaders. He did not do the expedient thing during the anticommunist crusades of the 1950s. He knew many of those officials who were using the anticommunist crusade for political advantage in the 1950s, and he understood their true motives.

I was under a great deal of pressure most of the year. Nonetheless, Judge Denman treated me as a person. Once I made a serious mistake in legal research. Judge Denman had drafted an opinion, relying on my mistaken memo. He had to withdraw the opinion being circulated to other judges. I felt bad. Obviously, he was unhappy. Yet he talked about errors in responsible jobs in such a way as to make me feel much better. He taught me a lesson about how to treat those with whom you work when, as is inevitable, they make mistakes.

One federal holiday I went to the office early to try to catch up. The Judge came in to deal with a few matters. He asked me into his office. He told fascinating stories of practicing law after the great San Francisco earthquake and fire.[5] Then he pointed out that it was a beautiful day. He told me my assignment for the afternoon was to take my wife and baby daughter to a park or the beach. Later he continued to ask whether I was paying enough attention to my wife and daughter. He gave us symphony and theater tickets, and he wanted to be sure that we had used them.

Judge and Mrs. Denman took my wife and me to dine at the Palace Hotel. They were part of the city's elite: his father was San Francisco's first school superintendent; Van Ness Avenue is named after her family. The Denmans were well known at the Palace Hotel. My wife and I were treated like visiting royalty for the first and only time in our lives. We worried afterward because we had discussed art, literature, and politics with the Denmans as if they were in their mid-20s instead of mid-80s. Thirty years later, I understand that the Denmans likely were delighted that younger people treated them this way.

I do not know to what extent my clerkship with Judge Denman helped me gain a position as a Bigelow Teaching Fellow at the University of Chicago. I do not know whether those at Wisconsin considering me for a teaching job thought the clerkship important. I did hear that Judge Denman had written a wonderful letter of recommendation in both instances.

I arrived at Wisconsin as a 26-year old assistant professor. Although my clerkship had helped me acquire the skill to cope with *Fuller on Contracts*, I realized how much I did not know about the legal system in operation. I

5. I liked one particularly. After the first shocks of the earthquake, the gas mains were broken. Fires started. People were fleeing from areas likely to be burned. Denman stopped a man driving a horse and wagon. Denman said he had some gold coins in one hand and a pistol in the other. He offered the man with the wagon his choice. They went to Denman's law office and loaded files and books on the wagon. As they drove to a safe place out of the line of the fire, they passed the house owned by the dean of the Hastings Law School. Denman stopped and raced inside. He rescued a few paintings. The fire destroyed the dean's house soon afterward. A few days later, Denman gave the paintings to the dean and expected to be thanked. The dean exploded, "Denman, you fool! You saved some pictures when you could have saved my class notes!" I appreciate the story more today than when Judge Denman told it to me.

taught contracts, but I did not know how to draft a contract or settle a dispute involving one. I tried to compensate by interviewing lawyers and business people.

What do I conclude from this long story? First, a clerkship can be a highly valuable experience. When I consider the cynicism built into modern law teaching, I feel fortunate to have begun my career working with a wonderful human being. Law was never an abstract exercise for Judge Denman. He was well aware of its political and social context, and he always worried about the clients involved in a case.

Of course, a clerkship is not necessarily a wonderful experience. All of Simon's charges have weight. Indeed, if law schools are to promote clerkships, they have a responsibility to gather a kind of *Consumer Reports* on the judiciary. At the very least, Simon's article makes an important point: how valuable a clerkship will be is a question faculty and students must consider. We cannot assume working with just any justice is always a good idea. Students should talk with former clerks and ask pointed questions about their experiences. Famous judges should get all due respect, but the emphasis should be on the "due." Furthermore, students must balance a chance at a clerkship against other alternatives.

A much broader point underlies Simon's article. Legal education has long had much too narrow a focus. We now offer some clinical courses; we are beginning to teach alternative dispute resolution and negotiation; there are a few courses in business planning. Yet few schools offer an accurate picture of lawyering to all their students. Our first year curriculum conveys powerful but wrong messages. We offer an implicit picture of practice that is often misleading. Despite our claim, we teach students to think like law professors, not lawyers. Many law teachers can do little else. A clerkship plus two or three years at a huge firm does not make one a lion of the bar.

Simon has harsh words for students who want to postpone hard decisions, but he overstates his case. Rather than blame the victim, I suggest that we look closer to home. Most faculty members regard the placement process as irrelevant to their concerns. Few of us take responsibility for showing our best students alternatives to the clerkship-large firm model. Most students know so little about practice that any choice they make is a wild leap of faith. Some like to look before they leap. A clerkship may offer little information about the choices facing a young lawyer, but judges' clerks can listen to their friends who started with various large firms and can learn something from their war stories. Simon does not tell students where they can get better information. He, unlike many law professors, can offer excellent advice based on experience. As much as I would like to, however, I cannot ask for a Bill Simon on each faculty as the solution to the problem he raises.

Judicial clerkships may be a minor part of a larger problem. Legal education should have something to do with the various practices of law. Of course, describing the varieties of practice sounds grubby. Some faculty members at elite schools seem to fear that they are being asked to teach classes in such things as how to collect bills from delinquent clients. What lawyers do involves much more than this, however. Looking at the reality of

the American legal system in operation provokes challenging normative questions worthy of any scholar. Why, for example, does our legal ideology promise due process and offer deals? Why do we pretend law is free? Why do lawyers representing wealth and power talk about a litigation explosion and damn the contingent fee and punitive damages? Do they advocate forcing the poor to suffer intentionally and negligently inflicted injury without redress? How can we talk of equality yet ration justice as we do? Indeed, I sometimes think legal educators avoid these questions because they so threaten comforting myths about law, the legal profession, and America.