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 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?\(^2\) 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 atrocities 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 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 the heap, 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 work 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

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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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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 misrepre-
senting 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
words were 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