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*Photographs by* John Snyder

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**BRIGHAM  
YOUNG  
UNIVERSITY'S  
16 YOUNG  
JUDGES**

*Justice, and only justice, you shall follow*  
—RSV, Deuteronomy 16:20

FILLING the somber, quiet chambers of America's judiciary, where 16 graduates of the J. Reuben Clark Law School now hang their black silk robes, is this verse from Deuteronomy. While not embroidered or matted in a fancy frame, it is there—sometimes pervading the entire room with its admonition, other times whispering its decree from the corners.

It can be heard as a judge mulls over whether to send a man to prison, which parent should receive custody of a child, or how much compensation a victim should receive. It is always there. "Because without justice, the principles of the Bill of Rights cannot stand," says Judge Lynn W. Davis, who graduated from the law school's charter class in 1976 and was appointed to the Fourth Circuit Court in Provo in 1987.

"And that is a judge's first and primary responsibility, to champion the Bill of Rights," says Davis. "Owing to the human equation in the courtroom, it is difficult to keep the scales of justice in precise and constant balance. But without our attention to our statutory duties, a close reading and adherence to the canons of judicial ethics, a fundamental understanding of our statutory, constitutional, and inherent powers, that delicate balance will never be achieved."

"The constitutional objective of 'justice for all' can never be tempered with moderation," he continues. "We cannot plumb the depths of the dam-

age that the failure of justice may have on society."

For the 16 judges to come out of the BYU Law School, this is more than just lofty conversation. As the keepers of the Constitution and its 26 amendments, it is their job to make sure "justice for all" remains a reality and not merely an ideal. Just how each judge deals with this responsibility, both in and out of the courtroom, is something the *Clark Memorandum* wanted to find

out. What goes through a judge's mind while he or she is at the bench? How difficult is it to maintain the role of the impartial judge?

There are other questions of interest, too. How did these judges get to where they are? Would they, in hindsight, take this same road again?

After talking with the BYU judges, it quickly became apparent that no two are alike. Some of these distinctions can be explained simply by a

**Thomas Fong**



judge's location. Out of the 16 alums, seven preside in Utah, four in California, three in Idaho, one in Nevada, and one in Texas. Two of the judges rule over juvenile courts, and one, Judge Thomas Y K Fong, is over a U.S. immigration court in Los Angeles. Judge Dee V. Benson in Salt Lake City is the only federal district judge, and Judge Sheila K. McCleve is the only female judge.

For each, the days are markedly different. Judge Glade F. Roper in Porterville, California, hears almost exclusively criminal cases, whereas Judge Randell L. Wilkinson in Santa Ana, California, determines civil cases. How they came to the bench is yet another story. Some, like Judge Stephen C. Webster in Las Vegas, pounded the pavement and were elected to their positions. Others, like Judge Michael K. Burton in Murray, Utah, applied for their judgeships and

then were appointed by the state's governor.

If you go back far enough, however, they all have something in common: a juris doctorate from the J. Reuben Clark Law School.

To have this many judges come from such a young law school is a significant feat, says Judge Michael L. Hutchings, who is president of the BYU Law School Alumni Association and who, when he was 30, was the youngest judge in Utah to be appointed by a governor. "If you think about it, the most senior attorneys to have graduated from the J. Reuben Clark Law School have only been practicing law for 16 years. Often, judges are not even appointed until they are in their late forties or fifties.

"Given that BYU has only had 16 graduating classes and that half of our graduates have only been out of law school for eight years, this is amazing,"

says Hutchings, who graduated in 1979 and was appointed to the Third Circuit Court Bench in Salt Lake City in 1983.

#### *Preparation is the great equalizer*

JUDGE Marvin M. Smith, who graduated in 1977, was appointed a magistrate in 1988, and was elected a district judge for Bonneville County, Idaho, in 1990, claims he heard these words a hundred times from the senior partners in his first law firm. "The trouble is they were just too true to dismiss.

Of all the judges interviewed, most admit they wish they had studied a little harder, listened a little closer, taken a few more writing classes, or—in the words of Judge Benson—even gone to class a bit more. Yet in the end, most say they came out with a superior education, one that has made all the difference in their careers and in their lives.

"Besides the academic preparation," says Judge Brett G. London, who graduated in 1979 and was elected in 1988 to the West Orange County Municipal Court in Westminster, California, "BYU especially prepared me for the continued emphasis on integrity, which is absolutely crucial to the role of a judge."

An adjunct professor at Western State University College of Law in Fullerton, California, he says he now "saturates" his students with the importance of being confident in their integrity. "By and large, most attorneys are very ethical. But once you lose your reputation of integrity, you hurt yourself and your clients for the rest of your career."

On the academic side, four particular classes—Criminal Law, Constitutional Law, Civil Procedure, and Evidence—were mentioned by almost everyone as good preparatory classes for a judgeship. "There is just no substitute for learning the rules taught in these classes," says Judge Sheila K. McCleve, who graduated in 1976 and was appointed to the Third Circuit Court in Salt Lake City in

#### **Michael Hutchings**



1984 "If you are going to be in court, you just need to know these like the back of your hand."

Several of the judges also mentioned that they wish they had taken a course on mediation and negotiation

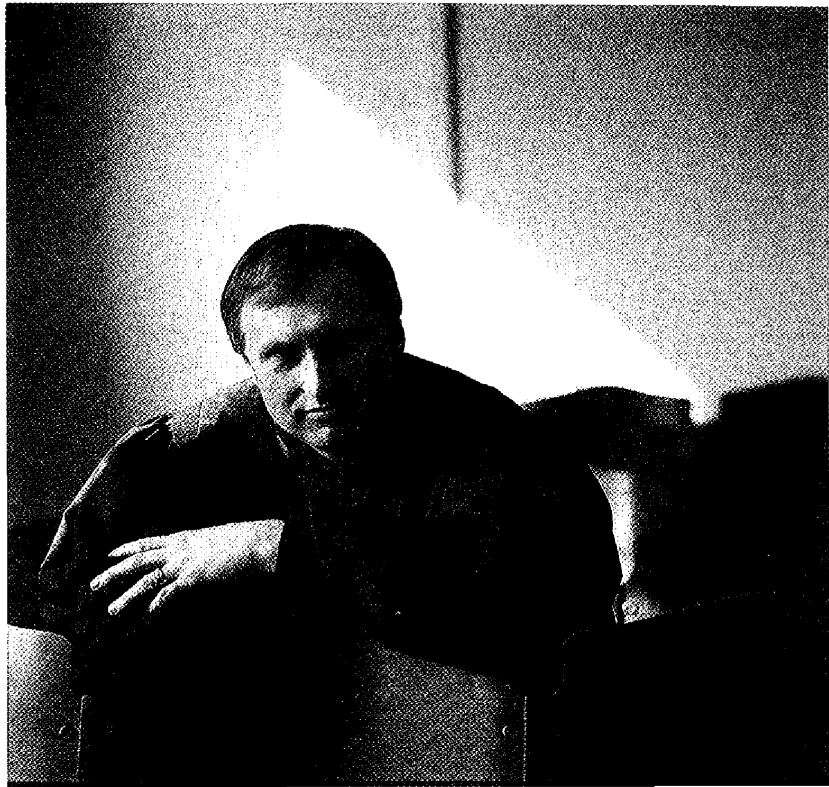
Outside of the classroom, numerous judges listed their first jobs as good preparation for what they are now doing. Many of them, in the initial years, were allowed to cover a wide gamut of legal cases before they were expected to narrow their expertise

Judge Stephen C. Webster, who graduated from BYU in 1976 and was elected to the Las Vegas Municipal Court in 1985, maintains that perhaps the best experience for a judge is to have been a practicing trial attorney. "A judge who has not been a practicing trial attorney may have a void of experience that can become a serious problem—because in order to be a judge you have to know how the court operates, you have to know about trial practice. I would not want to be a judge if I had not had extensive in-court trial experience. I would not, as an attorney, want a judge who had not had extensive in-court trial experience. And I would not, as a voter, elect someone to the bench who did not have trial court experience."

In simple terms, adds Judge Dec V. Benson, who in November was appointed a federal district judge in Utah, "The more prepared you are prior to taking the bench, the better off you are going to be as a judge. I didn't realize the breadth of cases I would be involved in. For example, in one day I'll move from a patent case involving a technical machine used in the brine shrimp industry to a matter of civil procedure and then to a child sexual abuse case on an Indian reservation. And then, in the afternoon, I'll hear a medical malpractice case."

To have any idea of what's going on in these cases, a judge must commit to a "lot of behind-the-scenes preparation," says Benson, who graduated in 1976 and most recently served as the U.S. attorney for Utah.

"I don't think lawyers realize all of the work that judges must do before coming into the courtroom. It's easy



**Colin Luke**

when you're a trial lawyer to get the impression that all a judge does is walk through a doorway and take the bench."

Without discounting their legal preparation, a few judges considered some of their best schooling to have come from outside the legal field altogether. Judge Michael K. Burton, who graduated in 1976 and was appointed to the Third Circuit Court in Murray, Utah, in 1983, regards his mission for the LDS Church as excellent groundwork for what he is now doing.

"The value of serving a mission," he explains, "was that I got to see people in a different context. In court, people are sometimes just seen as the offender or the 'bad person.' But my mission gave me a sense that people have many dimensions. Yes, they may have a bad side today, but that doesn't mean in an eternal perspective they are bad people."

The desire to see that both the accused and the victim receive a fair trial is what led many of the BYU judges into public service in the first place. Hence, the transition from public defender to judge seemed quite natural.

What wasn't so easy was actually landing the job.

*Politics should have no place in the administration of justice*

—Judge Florence Ellinwood Allen

**J**UST how a judge comes to the bench varies from state to state. In some states, judges are elected, but in others they are appointed. And in some, it's a combination of both. In Utah a commission made up of different government leaders and members of the Utah Bar Association nominates three candidates, and the governor



**Sheila McCleve**

then makes the final selection

Being appointed to the bench is something like being hit by lightning, says McCleve. "What I'm saying is that you really can't predict it. You can do all the preparation and get a broad exposure and become an expert in some areas, but getting the appointment really has to do with everything falling into the right order."

Yet for those judges who have gone through an election, being hit by lightning may not seem like such a particularly horrible fate. "When you go to the people, that is a journey fraught with peril," says Webster, who as a judge in Nevada is elected to his position and then reviewed by the public in an election every six years.

And although the system has been good to him, he admits there are problems, particularly when the media becomes involved and the election turns into a "popularity contest." On

the other hand, Webster sees elections as a way to make judges responsive to the people they represent.

Smith, who was appointed a magistrate in Idaho Falls in 1988 and then won a contested election in 1990, also has some reservations about the election process.

"In the first place, it was a very frightful decision to run this race," he says. "I was asked to run, and I am glad that the people here have a right to select somebody who they feel represents the mores and the feelings of the community. That is basic democracy. But I found that things are said and done during an election that may call into question the objectivity and the basic fairness of a judge. For instance, could elections result in favoritism?"

"The man I ran against conducted a very ethical, courteous campaign, but there are always supporters who

move beyond the authority of the candidate. Maybe I have a Victorian attitude, but I really believe the practice of law and judging should be done in a professional manner. And campaigning is anything but dignified.

"There was a case in Florida where the community actually suspended the judicial canons while the candidates ran for a judgeship," Smith continues. "Hence, these people had the right to do and say what any other candidate for any other office would. This causes me to scratch my head, because there are things right now I can't say or do like any other citizen. We are told to avoid the very appearance of impropriety. So what happens when the judicial canons are suspended? How much should a judge be allowed to say regarding sentencing or impending cases? For me there are still many questions that need to be answered. I would like to see the American Bar Association and the National Association of Judges think long and hard about the election process."

Yet once behind the bench, life does not suddenly become trouble- and worry-free, say the BYU judges. But they are also quick to point out that the rewards are certainly worth the effort.

A most apparent one is the time benefit. "I remember when Dean Lee—now President Lee—interviewed me for the Attorney General's Honor Law Program, and he mentioned time as one of the great advantages of federal government service," says Judge Thomas Y.K. Fong, who graduated from BYU in 1977 and was appointed a United States immigration judge in 1984. In 1990 he became presiding judge of the U.S. Immigration Court, Central District of California.

Fong recalls that President Rex Lee told him, "You'll never get rich [in government service], but you will have time for your church and your family. And if that's important to you, then this is a great way to serve as an attorney."

"Think of it this way, as a judge you get to call recess anytime you want," says Judge Boyd B. White, who graduated in 1977 and was appointed magistrate of the Sixth District Court

in Bannock County, Idaho, in 1982. "I don't know about anyone else, but for me, that was my favorite time in school."

*Being a judge gives me the opportunity to do some good.*

—Judge J. Skelly Wright

OUTSIDE of the tangible benefits—paid vacations, good retirement packages, job security—there are other rewards to being a judge. And although these are somewhat hard to quantify and are often few and far between, they produce the greatest satisfaction. "Each time someone comes back to thank me for putting him in a drug rehabilitation program, I feel this satisfaction," says Judge Glade Roper, who graduated in 1980 and in 1990 was sworn in as judge of the Porterville Division of the Tulare County Municipal Court in California.

"You can't sit very long on the bench before you realize that justice is much more than just a shelf with books on it," adds White. "Judges deal with people, and they affect lives. We not only must impress upon people that America has a system of justice, but we must help those who really can't solve their own problems."

It is for this reason that McClellan maintains being a judge goes beyond putting people in jail or dividing up the money. "It really has to do with making a difference in people's lives and having them feel like they had a fair hearing and an opportunity to resolve or explain something. It is providing a structure for all of society that is reliable and lawfully governed. Although you can never take back the suffering or completely pay back what people have lost, you can give them the opportunity to be heard."

"It's the same way for those who have done wrong," she says. "Judges must recognize that they can't force these people to change, but they can give them the chance to make another choice and to see the consequences of what they have done. Of course, all of this must be done within the context

of the law—meaning, as a judge I can't set laws. I can only interpret and apply them—and then issue a sentence."

"I remember a compliment I received soon after my appointment, which I really did not understand until years later," adds Judge Stephen A. Van Dyke, who graduated in 1981 and was appointed as a Utah judge in 1985. "After carefully explaining to some parents how the court system works and calming their fears, a social service worker told me, 'I've never seen a judge do that, and I want to compliment you on the fact that you haven't yet lost your sensitivity to people.'"

Six years after Van Dyke received the remark about his sensitivity, he now understands the compliment. "To be able to see a case as more than just another case is something I battle with every day. I now know that the way

judges protect themselves, eventually, is to just start treating people as numbers. It's something I must always fight against if I am to remain sensitive to human needs."

Just by the nature of juvenile court, it is more personal, says Judge Scott Johansen, who graduated in 1977 and was sworn in as a juvenile court judge in Utah's Emery County in January.

As a native of Emery County, he laughs about the fact that he probably knows most of the people in Emery "from about three generations back." Yet instead of seeing this as a hindrance, Johansen views it as a plus.

"I don't think that having a judge in the dark about anything is to anybody's best interests," he explains. "The more a judge understands about the culture and about the family of an individual, the more empathetic he can be and the more likely it is he can do that person some good."

### Glade Roper



*I may hate the sin, but never the sinner*  
—Clarence Darrow

THE problem Van Dyke faces as a juvenile district court judge in Farmington, Utah, is how to maintain his humanity while buffering the stress and pressure that an overcrowded system forces upon him. "Over the last 10 years, our caseloads increased 33 percent, but our resources only increased 2 percent

"So we're handling a third more cases than we were just 10 years ago with essentially the same basic resources. And that increased stress forces judges to respond in a kind of mechanical way."

It is for this reason he spends an "inordinate" amount of time working on task forces and with the legislature. "I try to do whatever I can to make this system work better," Van Dyke explains. "It is very taxing to take chil-

dren away from dysfunctional parents and put them in the temporary custody of an agency of government that is often overworked and underpaid. It's a part of being a judge I never expected, but it's something that is necessary."

Dealing with overcrowded prisons and limited resources is an aspect of judging that taxes all of those interviewed. Roper, because of the California drought and the way it is affecting his community, is finding it increasingly difficult to impose any type of reasonable punishment. "People just can't pay fines a lot of times, and the jails are completely crowded," he says. "So when I sentence someone to do jail time, they may never get there because there's no place to put them. The traditional forms of punishment just aren't working in this area."

Hence, he has had to resort to

being more creative—something judges across the country are facing. "I've done such things as send women of childbearing age, particularly those who are pregnant, to a drug rehabilitation facility as part of their punishment. I arrange with the director for them to see what the effects of drug and substance abuse have had on children whose mothers used these substances. Now, not everyone agrees with this type of punishment, but I happen to feel that if it is given to the right person it can be much more of a deterrent than simply putting that individual in jail."

For most of the BYU judges, sentencing is never an easy process. Judge Colin W. Luke, who graduated in 1980 and was appointed as the Teton magistrate judge in Idaho in 1990, spoke of how difficult it is emotionally to sentence individuals—particularly criminal defendants. "In each case, you must determine what is appropriate for a particular individual. What I didn't expect was just how stressful this can be."

"Until I die," says Smith, "I will never be comfortable with certain sentences I have had to render where incarceration was involved. I know that a lot of prayer and soul-searching—not to mention legal searching—have gone into these, but I still am not comfortable with them. Just this week I had to rule on a case where a member of our community killed his wife with a 10-inch butcher knife. There were no pat answers here. There were several who testified that probation was all this man needed, but the prosecutor felt he needed to be put away."

*The problem for the law is: When will it be just to treat different cases as though they were the same?*

—Dr. Edward H. Levi

### Marvin Smith



JUST how much discretion a judge should be allowed in sentencing has long been a heated topic. As crime rates rise, the general populace tends to blame the judges for being too lenient on criminals, says Roper.

People then turn to their legislatures to impose some method of determinant sentencing whereby a judge works from a framework of sentencing guidelines

On the federal level, explains Benson, judges now have much less discretion in terms of sentencing than in the past—thanks to the Comprehensive Crime Control Act, which became effective in November 1987.

“For example,” he explains, “if you have a drug case where a person sold more than five grams of cocaine, there is a sentencing guideline that tells the judge the range wherein that individual should be sentenced, say between 51 to 72 months

“It really does limit a judge, and you have many judges who believe Congress went too far,” Benson continues “But, the truth is, Congress had the right to do this Many people have argued that judges have been too inconsistent across the country and that we needed greater consistency and uniformity

“As a general matter, there are certain gains to determinant sentencing,” Benson adds “I think the more determinant or specific a sentence is, the more likely it will be known by the public and serve as a deterrence to crime I have always thought that people should know what they are going to face if they commit a particular crime ”

At the superior court level in Southern California, sentencing guidelines have become an accepted fact of life, says Judge Randell L. Wilkinson, who graduated in 1977, was appointed to the municipal court in 1986, and was elevated to the superior court in 1990

“What this means is that sentencing is not just left strictly up to a judge,” he says “Usually there is a ballpark in which almost all judges have to make their considerations, especially for settlement purposes If a case goes to trial, then that is a whole different situation The judge there really does have a lot of discretion ”

And a judge needs to have this discretion, says Judge Hutchings



**Randell Wilkinson**

“The reason is that each case is different, and the people involved in every case are different Yet there is a strong movement afoot to remove that discretion or limit it even further, which I think would be a terrible mistake

“This country has given judges discretion because it recognizes that each person who appears before a judge is different and has a different motivation Judging is not an exact science, it is an art ”

*Labour to keep alive in your breast that little celestial fire called conscience*

—George Washington

**I**N the end, few people are ever happy with a judge's decision Which is why the BYU judges almost always conclude that when it comes right down to it, they have to make deci-

sions based on what seems right to them Admittedly, says Fong, “It's a great trust ”

Like many of the other judges, he reminds himself daily of this responsibility He also reminds himself of the gospel principles he has chosen to follow as a member of the LDS Church

“That makes it very simple and easy for me to always try and remember what I should be doing,” says Fong, “which is to sustain and carry out the laws as passed by our people and our Congress It involves being fair and unbiased toward the facts presented in a case And it includes being sensitive to all of the people in my courtroom ”

It is as Socrates said, explains Judge Davis: The characteristics of a good judge are “to hear courteously, to answer wisely, to consider soberly, and to decide impartially”—to follow after justice—and only justice