

Spring 1992

# Clark Memorandum: Spring 1992

J. Reuben Clark Law Society

J. Reuben Clark Law School

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A painting of a man in profile, facing right. He has dark, curly hair and is wearing a dark, textured jacket over a white shirt and a dark tie. His right hand is resting on his chin, and his left hand is holding a mallet. The background is a mix of warm, earthy tones. The overall style is painterly and somewhat somber.

# CLARK

MEMORANDUM

SPRING  
1992

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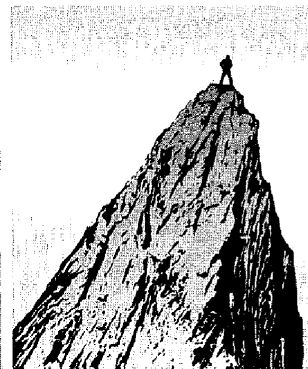
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Cover Illustration by Brian Kershisnick







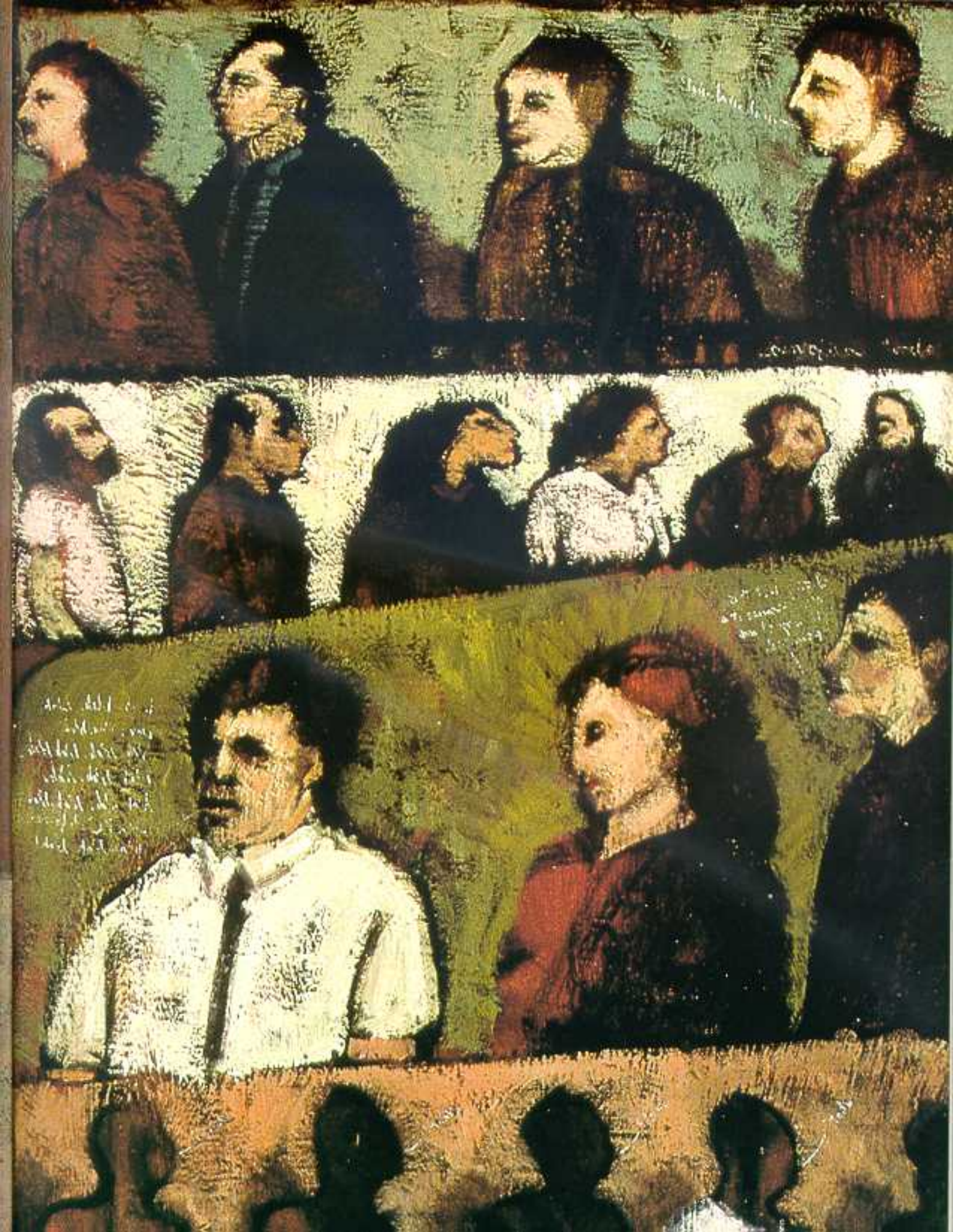
# It Is Given unto You to Judge

SHERIL K. McCLEVE

**F**or the past eight years, I have been a state trial judge in a court of limited jurisdiction. My

court's civil • ILLUSTRATION BY BRIAN KERSHISNICK







jurisdiction excludes real property, domestic, and probate subjects, with a \$20,000 limitation on damages sought. Criminal jurisdiction excludes felony trials. However, I do conduct everything from high-profile preliminary hearings on capital homicides and other felonies to jury or bench misdemeanor trials.

If one were to draw an analogy between serving as a judge in my court and serving as a doctor or a restaurateur, my work would be comparable to that done in a MASH unit or a fast-food chain. In my urban court setting, volume is extremely high, caseload pressing. I see thousands of people a year.

Mine is a people career. What I enjoy most about it is the great diversity and the universal threads I see in people's lives. For instance, there isn't a man or a woman who has come before me who hasn't evidenced some relation to loved ones. The people who face me also recognize that they are agents who have made choices that place themselves before me. And everyone I've seen has expressed to some extent his or her views on the purpose and meaning of this existence through the actions that bring them to court.

Individual examples quickly come to mind. A man in his early twenties negligently shoots to death a young girl by sighting her and then pulling the trigger on what he thought was an unloaded rifle. A streetwalker, having been incarcerated repeatedly, dies from the effects of AIDS. An alcoholic, who had been convicted of driving under the influence of alcohol several times, serves the maximum period of incarceration, becomes physically healthy, reunites with his wife and children, is rehired by his employer, and voluntarily promises me he will not return to court on criminal or alcohol-related charges again. In eight years, he hasn't.

**P**EOPLE OFTEN ASK ME how it's possible to judge another human being. In the sense of making an ultimate moral pronouncement, I simply respond that that's not my business—not that doing a little moralizing isn't a temptation with all that one sees from the bench. I see everything from police officers who sincerely regard criminals as less than human to lawyers who anonymously pay restitution for food stolen by transients. There are businessmen who forgive debts to resolve disputes and court employees who help the homeless find shelter.

While it is a temptation on the bench to do a little moralizing about people, one can resist by remembering that "all have sinned and come short of the glory of God" (Romans 3:23). Humans—unlike God, who sees our hearts perfectly—discern the intent of the heart from circumstances and acts of the individual, imperfectly listening to the Spirit. Judges, being human—albeit rumors to the contrary—are therefore in no position to issue moral pronouncements.

On the other hand, part of judging is evaluating people. A judge must appraise a lawyer's reliability, preparedness, and truthfulness. And certainly when judges sit as triers of fact, they weigh the credibility of the witnesses, examine their demeanor, and analyze their truthfulness. Similarly, in sentencing, judges assess not only the defendant but his or her family and associates, the victims, and the effects of the crime on society. Consequently, in the evaluation process, it is critical that judges look at people from the same human level we are all on. Otherwise, "'tis high to be a judge" ("Truth Reflects Upon Our Senses," *Hymns* (1985) 273).

When lawyers consider judging, their viewpoints often focus on burdens of proof, rules of evidence, and procedure and substantive law. They know that once a case is taken, winning it depends upon meeting the burden or not, following the rules, and arguing the law.

In judging, regard for the rule of law is critical. Natural laws and God's laws are constant and consequential. To the extent human law can be the same, human beings enjoy order, equal treatment, and fair process. Out of that, freedom is born and survives. It is that rule of law lawyers recognize, consciously or not, in preparing their cases for trial or appeal. It is that same rule of law that judges must follow in order to avoid arbitrary, despotic tyranny by the bench.

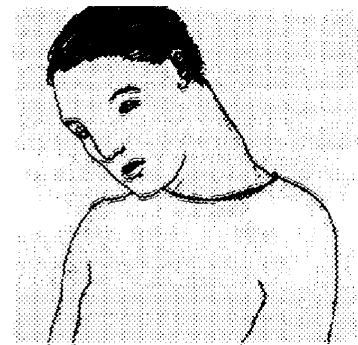
Perhaps because its purpose is to resolve conflict, judging offers an opportunity to experience how people act in intense life settings. The forum is public. Society's ability to affect lives is nowhere more powerful. Contest, persuasion, and argument are courtroom tools. Property, freedom, life itself can be taken away from individuals. And the consequences of choices people make are never more focused in society than they can become in trial.

There are those who believe they would enjoy judging because of the power, prestige, and independence it offers. And there are those who recognize that from a judge's observation point on humankind, the constant inhumanity, conflict, and greed attendant to the office render the position unenticing.

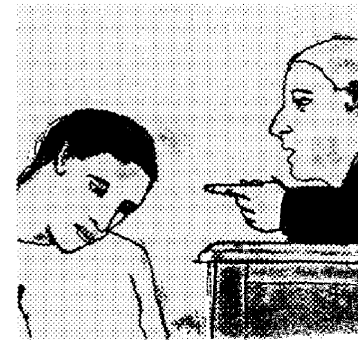
*Mine is a people career. What I enjoy most about it is the great diversity and the universal threads I see in people's lives.*



**"All have sinned and come short of the glory of god." (Romans 3:23)**



**"See that ye do not judge wrongfully." ( Moroni 7:18)**



But judging, like anything involving people, is an opportunity to serve. Judging is service when it restores some measure of hope, enforces consequences of actions taken, or resolves disputes. If it's no more than locking people up and awarding people money, it is of little value to humanity and worthy of little regard.

When one renders judgment in any given case, one renders service in at least two ways. One decides the particular issue in the lives of the people present in court—a very specific and immediate act of service. And simultaneously, one defines rules, which can be known and used by all people affected by that court. Service is less direct when it defines rules, but it is still service because it makes a difference in people's lives.

Both appellate and trial courts perform these simultaneous functions. At the appellate level, a judge works with words. At the trial level, a judge sees the faces. At whatever level a judge works, however, experiencing the problems in people's lives will unveil the Christian imperative to serve. Further, the only way to be a judge and not be destroyed by the power, prestige, inhumanity, and conflict attendant to the office is in remembering that judging is serving.

Our Lord, the Creator of the universe, who dwelt among us, who redeemed and sustains us, says that His work and His glory is to serve us by bringing to pass our immortality and eternal life. Who are we not to be serving?

Whatever one does professionally makes little difference. I assume that if the Gospel is true, it is true seven days a week. It can meet any challenge, withstand any opposition. Therefore, it is not only applicable to but also infused in all that we who espouse it do and are. And I suggest that we ought to be seeing our experiences and life choices in this context, or we have no business holding ourselves out as disciples of Christ.

Because we all share that universe of discipleship, I hope to make some observations about the nature of judging that might strike a universal resonant chord in all our lives.

There are, at this point in my life's observations, three universal issues upon which we constantly state our positions by our living. Over time we will have made our positions clear. Those issues are faith, love, and agency.

**F**

FAITH INVOLVES WHAT ONE SEES as the purpose of life, whether there is a higher power and any meaning beyond this existence. It involves hope and the ability to trust. It makes love possible. It gives us patience with agency and our own limitations. It is the power of the universe.

I see statements on faith in the anguish of alcoholics whose names I know because of their frequent appearances in my court on public intoxication charges. I see statements on faith in cocaine addicts and dealers, in streetwalkers, forgers, thieves, and murderers. I see statements on faith in lawyers who prepare their cases with dedication and thoroughness and in lawyers who push beyond the edge of representing their cases in a light most favorable to their clients.

And I make statements on faith when I walk into the courtroom and try to disregard community or bar approval,

*The only way to be a judge and not be destroyed by the power, prestige, inhumanity, and conflict attendant to the office is in remembering that judging is serving.*

to see all the people I serve as children of God, and to allow or reject the Spirit's ability to make up, after all that I can do, the difference in what I cannot discern in people before me. Every day in our lives, in all contexts, we each decide our positions on the issue of faith.

Similarly, each day we state our understandings of love. Love is charity, the greatest of all gifts, the pure love of Christ given without condition to endure forever. Charity is that love which the Lord has for us and that love which we are trying to learn to have for Him and for each other. With it, we are able to give and forgive. Because of it, we obey, repent, have faith, and respect agency. It never fails.

I see statements on love in the family who sits watching at the back of the courtroom and exchanges glances with a handcuffed, shackled, convicted defendant. I see statements on love in the tenant who refuses to pay rent, believing the landlord must allow her to remain on the premises because she has children and no job. I see statements on love when a mother appears to have suggested damning testimony to a child about the child's father.

And I make statements on love when I react to mistaken representations or intentional misrepresentations of my rulings from the bench by colleagues or others. I make statements on love in how I treat people who lie to me, try to curry favor with me, or use my reputation or name. I make statements on love in how I sentence, award or deny judgment, run my courtroom, and determine my availability to lawyers, police, and others. The statements we make are subtle, sometimes not even known to us as statements on love, but they are our statements.

We choose every day, more times than we know, to make statements on these universal issues. That is why agency,



which is the forum or context of the other issues, and which, at first, may seem inappropriately paralleled with faith and love, is a universal issue. Because no matter how dim the faith nor absent the feeling, we all understand consequences. We think in terms of cause and effect. We cherish independence and believe liberty a human right. We say we want freedom. Hence, through our choices, we evidence our true desires.

I see statements on agency in the father—also a lawyer—who wants to negate the consequences of his son’s negligent traffic collision by “taking care of it” for him. I see statements on agency by all the coke-sniffers and other addicts who daily drag into court. I see statements on agency in lawyers as they confer with one another and with their clients regarding settlement options and outcomes.

And I make statements on agency when I send someone to jail, order parties to appear before me, and respect or reject appellate decisions and legislative actions. I make statements on agency in my conduct with my colleagues on the bench regarding caseload administration, in my treatment of staff personnel, and in my willingness to accept such extra court assignments as speaking at schools or hearing cases for other judges who become unavailable.

These universal issues are always before us because this life is the day we are performing our labors. This life is the time for us to prepare to meet God, who will exercise both judgment and mercy upon us.

Law requires justice. In the broad scheme of things nothing short of an infinite sacrifice could satisfy the whole law and the demands of justice. Not any one of us, save Christ only, could make such a sacrifice. He made the great, infinite sacrifice in order to extend mercy to us, to overpower (as it says in Alma) justice, and to bring about the means for us to have faith unto repentance. God requires that we lean on His arm only, not because He needs our adoration, but because the act of worship draws us to Him and makes His love available to us. Faith, love, and agency seem to me linked not only as the universal issues of life, but as keys to our relationship with God. Because He *loves* us, He offers us the chance in this mortal probation to choose to become like Him, but He doesn’t want to lose us. He lets us *choose*, but He beseeches us to come to Him, to have *faith* in Him, because there is no other way we can avoid perishing. Without Him the perils of mortality are insurmountable.

Nor is it possible fully to love His children—each other or ourselves—without first loving Him. It is not possible because we, alone or all together, are incapable of charity without faith in Him. Not any one or all of us could make that infinite sacrifice that restores the repentant person who has done the harm and repairs the harm done to the innocent sufferer. Only He is capable of that everlasting love. And we, therefore, are capable of it only through Him.

At the same time, if we love Him, we love His children because we know by His sacrifice how infinitely priceless His children are to Him. Hence, He tells us if we don’t have charity—that is, if we turn away the needy, don’t visit the sick and afflicted, don’t impart of our substance—then

we are as hypocrites who deny the faith. Seeing how we are loved, seeing how to love, we witness our belief in Him and love for Him by treating what is priceless to Him with the same value He perceives in us.

Christ’s whole purpose is to bring to pass our immortality and eternal life. His guiding us is His service to us. He, more than we can comprehend, does not want to lose us. Yet we cannot dwell with Him finally—we cannot know as we are known—unless we are like Him. And, to be like Him is something only we can choose for ourselves. This kind of choosing is part of who He is and who we can become.

**U**NDERLYING THE SAVIOR’S ATONEMENT for us, agency, as a context or forum for choice, is our Lord’s constant expression of His love for us. Only in having the choice to do that which takes us away from Him or alternatively to do that which brings us to Him can we become like Him, preferring good to evil. Out of His great love, He respects our agency. He pleads with us to accept His grace. He tells us that by our life choices we can be subjected and sealed to the devil or have our garments made white by the blood of the lamb. He lets us choose line upon line, step by ever-so-slow step. He exhorts us to choose to come to Him and to help one another choose to come to Him. And if we ask Him, He helps us in this process. That is essentially how we serve, no matter what our life’s work.

For me, my life’s work thus far has been judging. What I hope I am trying to do, not explicitly but implicitly in the way I live and treat others every day, is to help people better understand the issues of faith, love, and agency so that we all can choose to be with Him and be like Him and not be forever lost from Him. Salvation is social. And then comes His grace.

I will be ever grateful to have held the office of judge. But in a very critical sense, we are all judges.

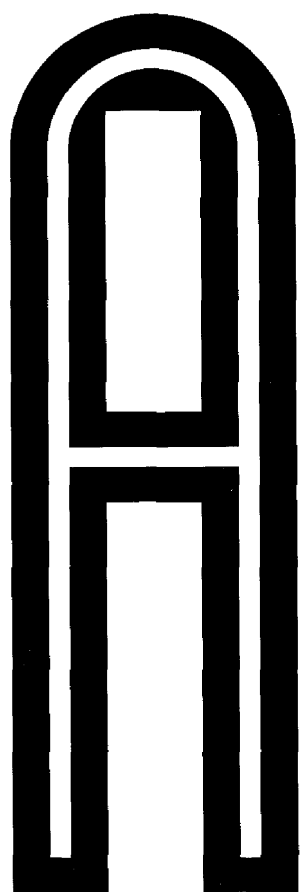
*For behold, my brethren, it is given unto you to judge, that ye may know good from evil; and the way to judge is as plain, that ye may know with a perfect knowledge, as the daylight is from the dark night.*

*And now, my brethren, seeing that ye know the light by which ye may judge, which light is the light of Christ, see that ye do not judge wrongfully. [Moroni 7:15,18]*

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*Sheila K. McCleve is a judge of the Utah Third Circuit Court in Salt Lake City. Before becoming a judge, she worked at the Utah Supreme Court for three years when it was the only appellate court in Utah. She also has served as an administrative law judge for the Utah Public Service Commission and was the first female, full-time prosecutor for Salt Lake City. After serving as the adult gospel doctrine teacher for six years, she is now the Relief Society president in her ward.*

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V I E W

F R O M

T · H · E

B E N C H

Carri P. Jenkins

*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 McCleve 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





DEE

LISA B. HAWKINS

BENSON

*"Everybody knows what a T K O is, but who's ever heard of an N O V? And the whole world knows what a good kick-off return looks like, but what's all this jazz about writs of mandamus and diversity jurisdiction?"—Dee Benson, "Sports Shorts—The Other Side of Legal Briefs," 2 Clark Memorandum 2 (October 22, 1975)*

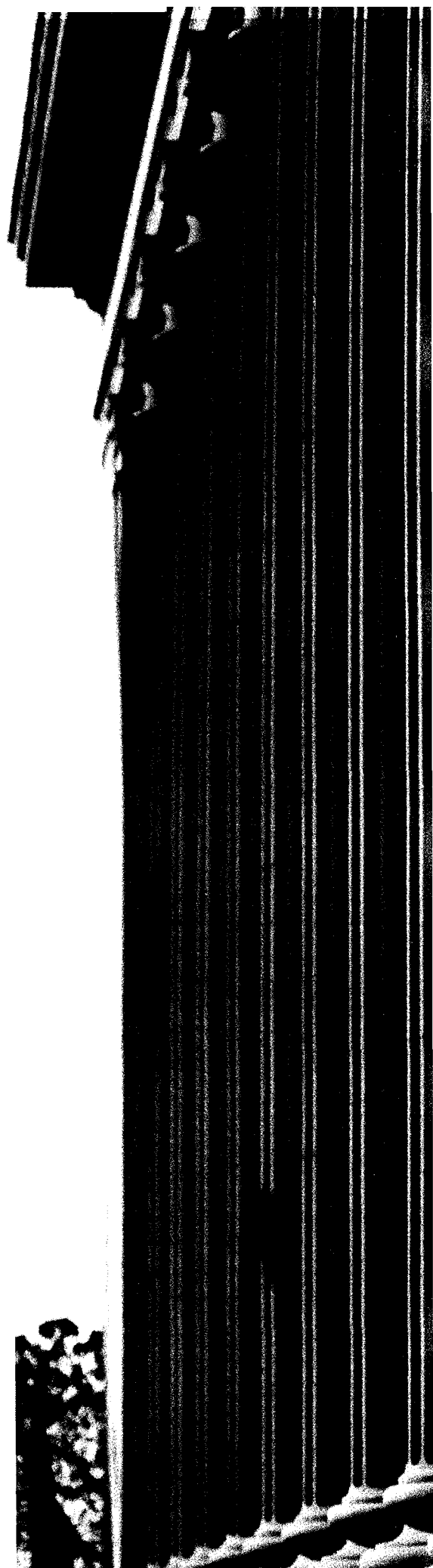
**W**hen Dee Benson was a third-year law student and the *Clark Memorandum* was a student-produced tabloid, Benson's good-natured irreverence was needed and (usually) appreciated by the law school community. In the 15 years since then, Benson's high spirits and hard work have taken him through private practice, corporate practice, positions on the U.S. Senate staff, and stints as an assistant U.S. attorney general.

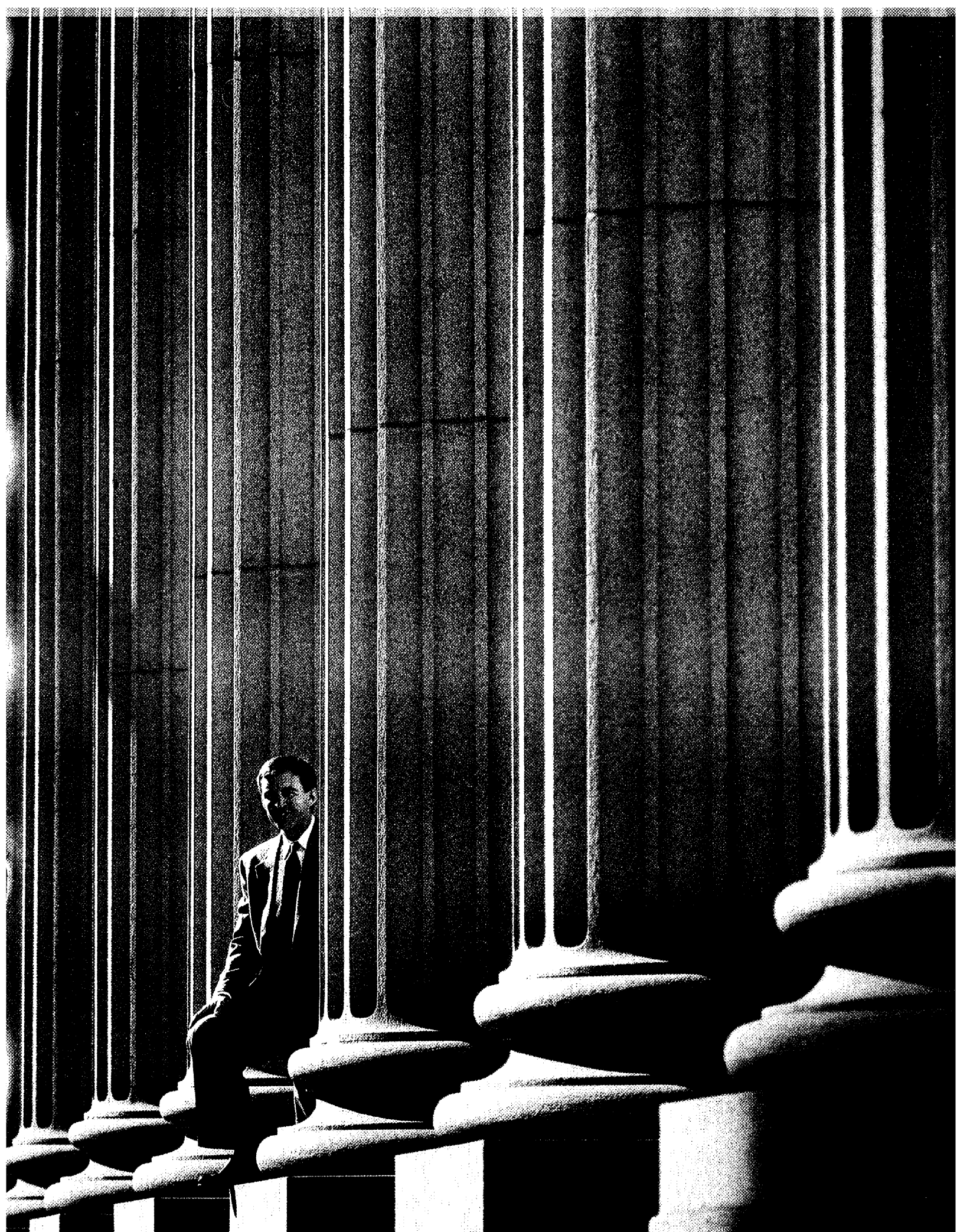
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PHOTOGRAPHS

BY JOHN SNYDER





and as U.S. attorney for Utah. Now he is the self-described "rookie" judge on the U.S. District Court for the District of Utah. Undoubtedly, he has mastered "all that jazz" about *non obstante verdicto*, writs of mandamus, and diversity jurisdiction. Yet his own assessment, after two months as JRCLS's first graduate to be a federal district judge, is that he's "learning the job."

Benson's style, which is consistently described by those who know him as "laid back," masks what Professor J. Clifton Fleming calls a "closet over-achiever." He affects the behavior of a person who's very nonchalant about being involved in the profession of law. Yet he worked very hard as a student—he just did it on his own schedule. And he has always worked hard at the positions he's held. That he tends to work on his own schedule leads people to believe he's blasé, but the number of hours he puts in and the intensity of his work indicate that he takes his profession seriously. I anticipate," Fleming continues, "that over time there will be talk among the members of the bar about how laid-back Judge Benson is, but he'll really be one of the hardest-working and most conscientious members of the federal bench."

Taking life on his own schedule seems to be Dee Benson's hallmark, as does the contradictory idea that he takes life as it comes along. "I didn't even plan to go to law school," Benson explains. But once he got there, he didn't let the rigorous curriculum get in the way of a good game of golf or soccer. Nor did he let golf or soccer get in the way of placing in the top 10 percent of his class and serving as editor of BYU's *Law Review*. Nor has he let his family life or church commitments get out of balance. Paul Warner, an assistant U.S. attorney who was Benson's law school classmate and has since worked with him in the U.S. Attorney's Office, cites examples both of Benson's church service—he currently teaches a missionary preparation class—and of time spent unofficially helping and comforting those who have been faced with a crisis or a tragedy. "But he does it quietly," Warner says. "There are dozens of people who think of Dee as their best friend, and I'm one of them."

Benson's family has always been at the top of his list. His wife, Patty, says, "When he's home, he's home. Dee is the kind of person who can forget about the office and just play. He provides the fun for the family." Benson recently settled a dispute between two of the couple's four children, Patty describes, by claiming judiciously that he'd decide the issue as he did at work. "Then he pulled a quarter out of his pocket and flipped it."

"Dee can easily shift gears from legal professional to husband and father," Warner says. "A lot of people are outstanding lawyers but are failures as parents. Dee genuinely likes his kids and is involved in their lives."

"He's a remarkable family person," says BYU President Rex Lee, who, like Fleming, was Benson's jogging partner in Washington, D.C. Rex and Janet Lee and Dee and Patty Benson had children who were playmates and both families lived in the same McLean, Virginia, ward. When the two men

would run together, Lee was impressed that Benson had read the briefs in cases for which Lee was appearing as U.S. solicitor general and was "astounded at his sophisticated and insightful views for someone of his age and experience." He has extraordinary legal ability, Lee says. "It was inevitable that we would someday have federal judges chosen from among our graduates, but there is no one more appropriate."

Benson's career path has hardly been a straight road from law school (class of '76) to the bench. He's been to Saudi Arabia, the Senate, and Salt Lake City, with a couple of stops in between. However, Benson's frequent career changes are symbolic, not of restlessness, but of his approach to life; he says the new jobs were "a matter of opportunities—I was enticed by something that seemed exciting. I could have been happy staying at any of the jobs." The federal judgeship is, Warner notes, the first of the job changes that involved a pay raise. "That's looking for opportunities in the best sense—opportunities to serve and to broaden his experience."

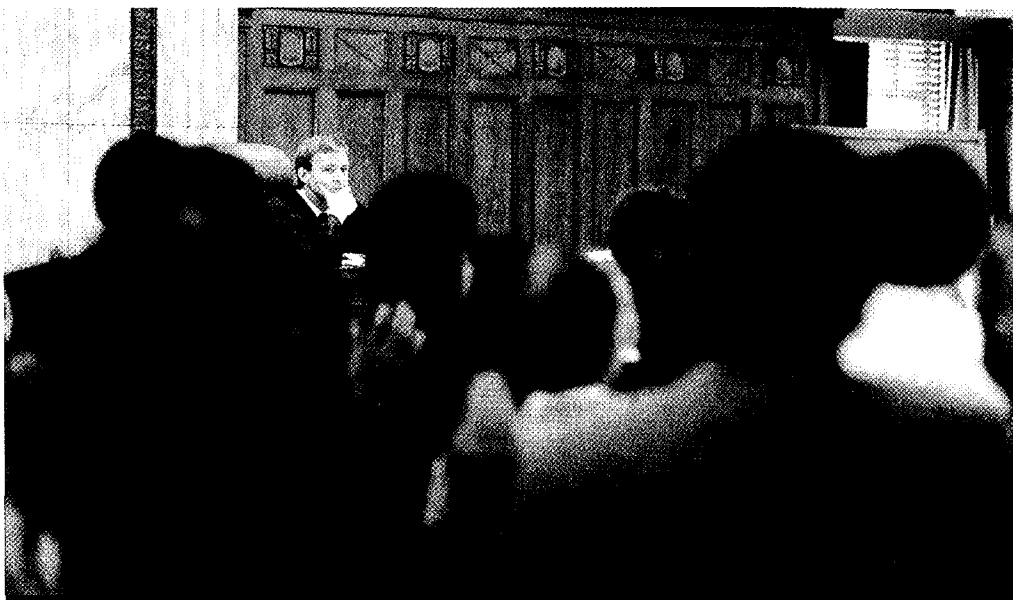
Frank Madsen, who worked with Benson on Senator Orrin Hatch's staff for several years, agrees. "Dee Benson has the right kind of ambition. He doesn't want to climb over others; he helps others and continues to grow himself." Madsen sees the federal judgeship as the natural outgrowth of Benson's work in government, as well as his love for any sporting or intellectual challenge. And for the time being, the challenges of the federal bench are quite enough. "Right now," the new judge says, "I've had to hire clerks and a secretary and a court reporter and learn how to docket and schedule—I'm trying to learn and to figure all of this out."

Yet Benson appears to already have a good handle on his new job. When asked about his own personality as compared to the stereotypical "judicial temperament," he says, "Any judge brings his or her own personality to the bench. My idea of the stereotypical judicial temperament is not the best, and I try to be cordial and courteous."



**"I anticipate  
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members of the  
federal bench."**





**Judge Benson,  
the self-described "rookie" judge,  
recently conducted his  
first naturalization ceremony.**

There are also disadvantages to being a federal judge, he says. "One peril of the job is that people are more flattering, and I know they don't mean it. It feels more isolated than the other jobs I've had, but not as much as I was warned it would be. I have a full life. The job is about what I expected, maybe a little more demanding, but that could be the start-up costs of learning the job." Benson explains that he immediately became the judge for about 350 cases given him by his colleagues, some of which were "way down the road."

Those who know Benson, however, have no doubt in his ability to manage such a caseload. "He has a rare gift to pick up and master a new legal concept faster than anyone I've seen," says Warner, who emphasizes that although his friend doesn't "fit the standard mold," he has a work ethic that "won't stop." Warner recalls how when Benson served as U.S. Attorney for Utah, he worked longer and harder than anyone in the U.S. Attorney's Office. Yet Warner is quick to add that Benson is not a workaholic: "He works hard when he works and plays hard when he plays."



Benson hasn't changed much since his days at Jordan High School in Sandy, Utah, Warner adds, except to develop the polish and maturity to go along with the values and character that enable him to be as respectful to "the security guard and the secretary as with the U.S. attorney general. He has genuinely succeeded while being a nice guy."

Benson is still finding ways to live life on his own schedule—although every day is now filled with appointments and obligations. But a settlement or delay will unexpectedly free a block of time and allow him to catch up at work, at home, or wherever his attention is most needed. And Warner notes that Benson will still take a couple of hours off for a school play or parent-teacher conference and then return to the office in the evening to make up the time. Even in his new position,

friends say that Benson is still characterized as someone with a sense of fun, relaxed competence, and wholehearted excellence in caring for people and getting the job done.

*Lisa B. Hawkins, '80, is the director of the Legal Writing Clinic at the J. Reuben Clark Law School.*

# THE CORIOLANUS SYNDROME

BRUCE C. HAFEN

*Coriolanus was*

*Shakespeare's last tragedy.*

*T.S. Eliot regarded this play as the Bard's  
finest artistic achievement, a complex and stirring  
reflection of its author's mature, consummate skill.*

*Yet Coriolanus is today among his least  
popular works, perhaps because*

ILLUSTRATION BY BRANT DAY

BRUCE C. HAFEN, DEAN OF THE J. REUBEN CLARK LAW SCHOOL FROM 1985 TO 1989, IS PROVOST OF BYU.

# IS IT VIRTUOUS TO BE OBSTINATE?





Shakespearean audiences and scholars regard its hero, Caius Marcius, as the least lovable of tragic heroes. Unlike Hamlet, Lear, MacBeth, or Othello, Marcius doesn't seem troubled or even reflective about his choices, nor does he learn from his mistakes. Like some expensive, hot-shot professional athlete, he is gifted, swaggering, and narrowly self-centered. As a warrior he is superb; as a friend or a trusted leader, he is pathetic—a dazzling quarterback with the personality of a gorilla.

Seeing the Folger Theatre's fine fall 1991 production of *Coriolanus* in Washington, D.C., made me wonder whether this play is unpopular in part because it reminds the American public all too much of its feelings these days about lawyers and other would-be public servants.

The play is set in 5th century B.C. Rome. Its opening scenes reflect an environment of class struggle and tribal warfare. In subtle anticipation of what will emerge as the hero's flaw, the common plebeians are restive with fear that the patricians of the Senate will neglect them in an approaching famine. The wise and elderly Menenius, a gentle patrician who has earned the trust of the commoners and who is, coincidentally, Caius Marcius' best friend, teaches the citizenry about the interdependence of the parts in the body politic: the Senate may be the body's stomach, "the storehouse and shop of the whole body," but in time that stomach sends nourishment through all "the rivers of the body." That the plebeians are the body's "big toe" counsels toward patience, not toward rebellion.

Suddenly word of an attack by the Volscies, a neighboring tribe, interrupts this discussion of domestic affairs. The noisy confusion of war fills the stage, until the Romans return victorious, chanting the name of their new hero, Marcius, and carrying him seated atop their shoulders, his arms drenched with blood. They change his name to "Coriolanus," in honor of his heroic role in the critical battle at Corioles, where he suffered 27 wounds defending Rome finally, as he says, "all alone." In their gratitude, the people propose to honor Coriolanus by appointing him as counsel, a high political position associated with the Senate.

**S**HAKESPEARE'S early descriptions of Coriolanus reveal that he was taught from childhood by his mother, Volumnia, a nearly overpowering figure, that military valor is the greatest virtue; but he is otherwise uneducated. As one considers the almost irresistible comparison between Coriolanus and lawyers, it is natural to wonder whether we instill in law students and apprentice lawyers the perspective Volumnia instilled in her son: if he were her husband, she says, she would prefer his presence on the battlefield to his company in bed. For her, it is more beautiful to see his forehead gashed with blood than to see it nursing at her breast. She applauds upon hearing that her grandson,

Coriolanus' child, caught a butterfly and ripped it apart with his teeth in thoughtless aggression against a symbol of natural beauty.

Against this background, the picture of the thrilled but battle-weary Marcius returning triumphantly home from the front astride the shoulders of his people recalls a scene from *Patton*: the general intently scans the battlefield through smoke-filled air that is heavy with the stench of gunpowder and death, and he says fatefully, "\_\_\_! I love it!"

But Marcius/Coriolanus is disdainful at the prospect of being honored by a political appointment: "I will go wash, and when my face is fair, you shall perceive whether I blush or no." And, "I had rather be their servant in my way than sway with them in theirs." As he returns to his family, he and his mother are so caught up in talk of his military exploits that someone needs to point out to him that he has not yet acknowledged his meek and waiting wife, Virgilia, who stands nearby.

The Senate confirms Coriolanus' appointment as counsel, but the commoners must still voice public approval. He has no interest in the traditional ritual, in which he is supposed to disrobe in public to let the people examine his wounds as an expression of their gratitude. Coriolanus says he would rather suffer all his wounds again than submit to such humiliation. A plebeian observes that he "loves not the common people," having earlier referred to them as "scabs" and "curs." As he thinks of the motley masses pressing him so closely, he says, "Bid them wash their faces, and keep their teeth clean." He is also disgusted at the common soldiers who left him to fight alone in the critical battle. Observes another citizen, "If he would incline to the people, there was never a worthier man."

Coriolanus' mother and friends urge him to be a good sport—even to flatter the people in his public response. But, says his friend Menenius, "He would not flatter Neptune for his trident, or Jove for his power to thunder." And in a line that could describe some lawyers, Menenius continues, "His heart's his mouth; what his breast forges, that his tongue must vent." Under maternal pressure from Volumnia he resentfully acquiesces, even though doing so compromises his sense of the battlefield valor that is his true identity: "Away, my disposition, and possess me some harlot's spirit! My throat of war be turn'd . . . into a pipe small as a eunuch, or the virgin voice that babies lull asleep!"

When he faces the public, some citizen leaders press him with questions that probe his attitudes. He flashes his temper and attacks the questioners, thereby confirming some public fears that he would use his proposed authority in tyranny. As a mob spirit sweeps the crowd, they demand his banishment from Rome. His friends beg him to reconcile, but he replies bitterly, "I would not buy their mercy at the price of one fair word. . . . You common cry of curs, whose breath I hate . . . whose loves I prize as the dead carcasses of unburied men that do corrupt my air—I banish *you*!"

**B**ANISHED from Rome, Coriolanus goes to his arch enemy, Aufidius, leader of the Volsces, and offers to join him in a new assault on the Romans. When this news reaches Rome, the people are terrified. Now the crowd sings a different tune: "Faith, we hear fearful news. For mine own part, when I said banish him, I said 'twas pity." And others add, "Though we willingly consented to his banishment, it was against our will." They dispatch Menenius to dissuade Coriolanus. When this is unsuccessful, they send his mother, his wife, and his son.

Meanwhile, in lines that probe the suitability of any warrior for peacetime rule, the Volsc leader Aufidius muses aloud over the possible reasons why Coriolanus' people would banish their own hero. Was it pride, he wonders? A defect of judgment? Or perhaps it was his "nature, not to be other than one thing, not moving from the casque to the cushion [from the battlefield to a soft seat in the Senate], but commanding peace even with the same austerity and garb as he controll'd the war."

When Volumnia, Virgilia, and his son approach Coriolanus in enemy territory, he loudly rejects his bonds to them: "But out, affection, all bond and privilege of nature, break!" In language some lawyers could love, he continues: "*Let it be virtuous to be obstinate*. What is that curtsy worth? or those doves' eyes, which can make gods forsworn? I melt, and am not of stronger earth than others. I'll never be such a gosling to obey instinct, but stand as if a man were author of himself and knew no other kin."

His mother argues powerfully that unless he returns, he will be responsible for shedding the blood of wife and child, and history will remember him only as a traitor. She urges him, rather, to be remembered for reconciling the tribal enemies. Finally, she reminds him that his transfer of political loyalties has not instantly created for him a new mother, a new wife, and a new child.

Her persuasion is effective. After taking her hand to declare her happy victory for Rome, he turns to the Volsc leaders, naively expecting them to be delighted: "Though I cannot make true war, I'll frame convenient peace."

Coriolanus' family returns happily to Rome, but the Volsc lords gather around him ominously. Aufidius declares him a traitor, charging that, blubbering before his mother, he broke his oath of loyalty to the Volsces "like a twist of rotten silk."

A recent research project found that the common responses of clients to the word "lawyer" included: "authoritative, insensitive, arrogant, know-it-all, and intimidating." The clients complained that lawyers won't "admit their mistakes" and that they "measure their effectiveness by the documents they produce rather than by whether they have helped solve a problem" (*Wall St J*, September 17, 1991, p. B1). Such claims, though obviously not applying to all attorneys, sound like an echo of how the plebeians viewed Coriolanus: he "loves not the common people."

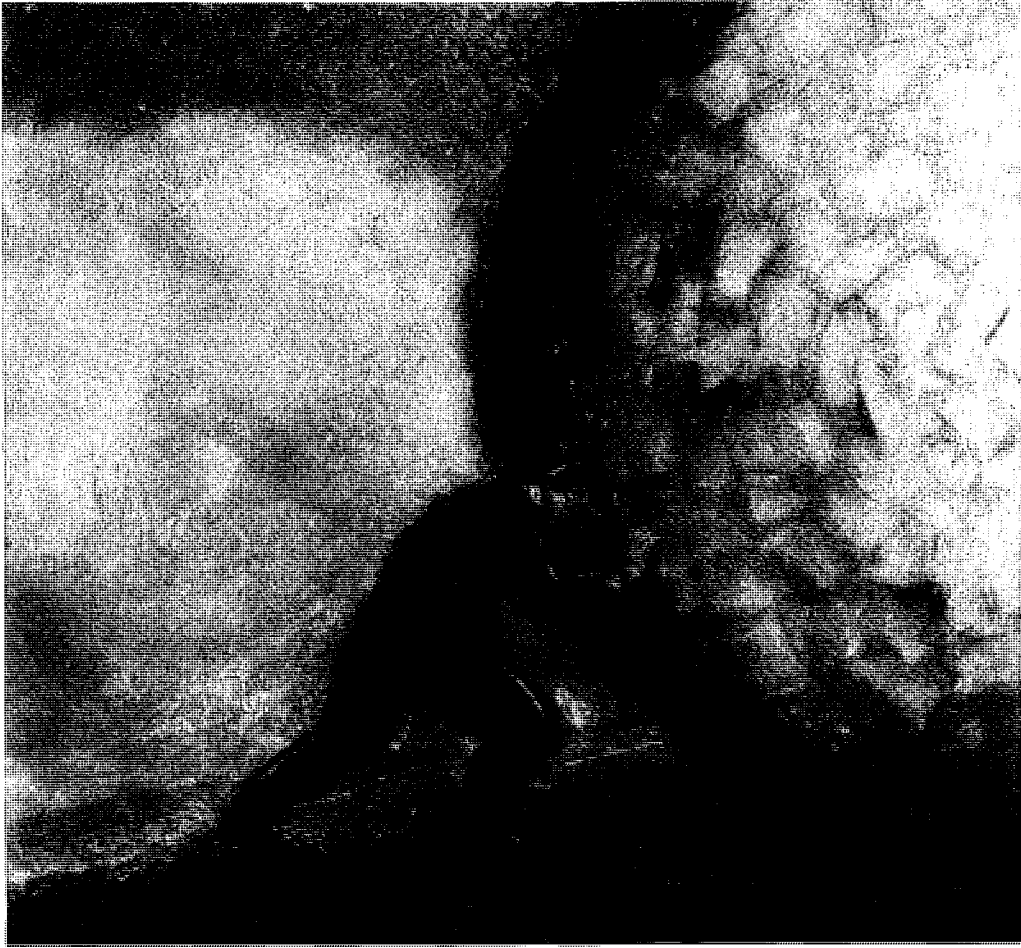
Aufidius insults the former hero, calling him, "Thou boy of tears!" Enraged, Coriolanus brags loudly about the Volscians he slew at Corioles all by himself: "Alone I did it; Boy!"

The Volsc leaders cry out that in that very battle, he killed their sons and fathers. They fall upon him in a rage of swords, Coriolanus falls dead, and the play ends.

**D**URING the same week in which I saw this play, I read a national report on the concerns of clients who have "grown resentful and even antagonistic toward their lawyers." A recent research project found that the common responses of clients to the word "lawyer" included: "authoritative, insensitive, arrogant, know-it-all, and intimidating." The clients complained that lawyers won't "admit their mistakes" and that they "measure their effectiveness by the documents they produce rather than by whether they have helped solve a problem" (*Wall St J*, September 17, 1991, p. B1). Such claims, though obviously not applying to all attorneys, sound like an echo of how the plebeians viewed Coriolanus: he "loves not the common people."

Note in these client frustrations the perception that their lawyers have an excessive love of battle and process, just like Patton: multiplying documents, piling up hours, going to court—loving the process but missing the point. Clients engage lawyers not for their love of battle, but to solve a problem.

A lawyer I know received a call from an outraged woman who had just been served with a complaint by her ex-husband charging in a tort claim that she had damaged him by intentionally inflicted emotional distress. She explained what she had done: the couple's 16-year-old son died in an auto accident. Both parents came, grieving, to the funeral. Because she had primary custody, she had directed that the boy's tombstone carry her maiden name as his last name, even though his legal surname was that of his father. She claimed indignantly that the father had shown no real interest in the boy, despite his occasional visits, and that she had reasons for wanting to "send him a message." She asked the lawyer how they might defend against the ex-husband's claim. He asked in reply whether she wanted to fight or to solve a problem. As she considered her response, the lawyer suggested quietly, "Why don't you just put



up another tombstone showing the boy's legal name?" A lawyer who loved the battle more than the people might have suggested otherwise

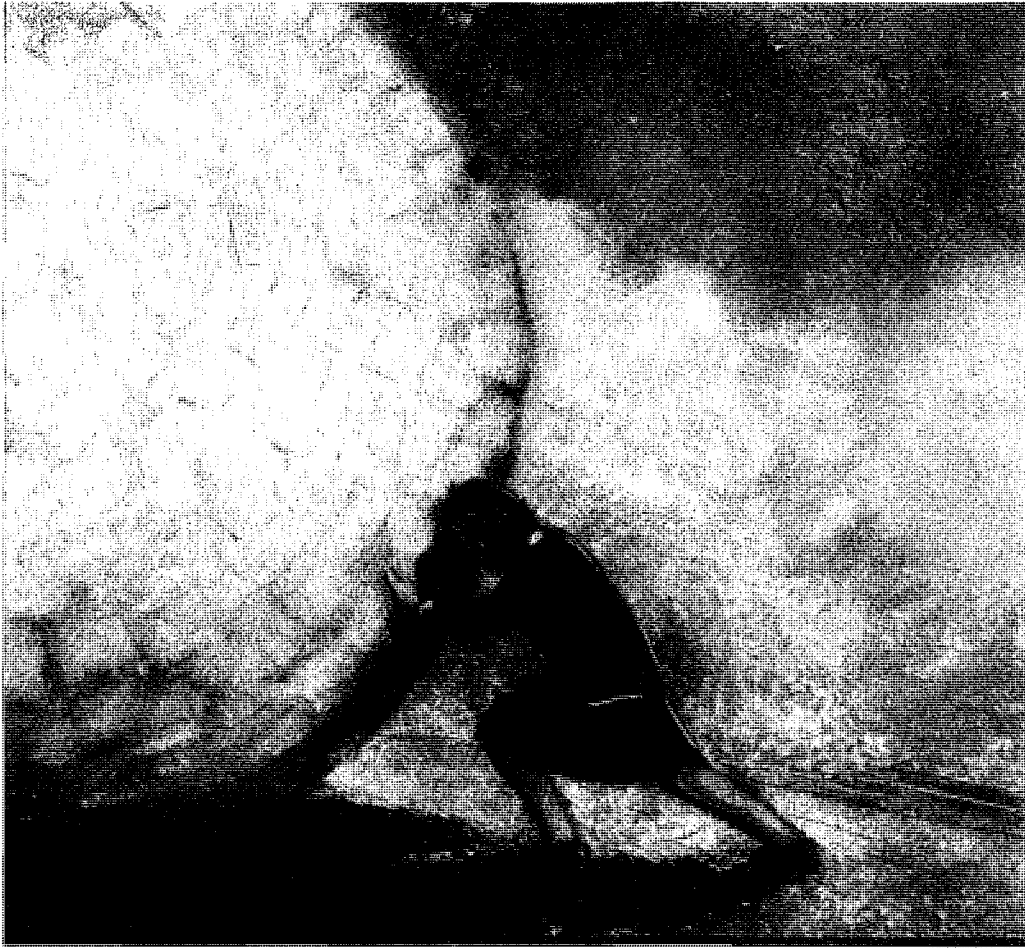
Consider three thoughts from *Coriolanus* for those who practice law: confusing valor with virtue, understanding gratitude and rejection, and inclining to the people

For Coriolanus, "valor is the chiefest virtue and/Most dignifies the haver." Shakespeare scholar Frank Kermode describes this confusion between valor and virtue as creating a pinched conception of duty that "takes no account of social obligations, being based on a narrower concept of military courage and honor . . . The spirit of anger, licensed in war, prevents him from dealing sensibly with the [common people]," rendering him "tragically inept" and "unfit for rule in a complex society." His inability to distinguish the battle field from the public square makes him excessively

intolerant of others' weaknesses—he hates their bad breath, their unwashed teeth, and their fear of battle

Because he equates valor with virtue, Coriolanus also believes that the quiet sounds of gentleness, accommodation, and peace will choke off his mighty voice. Dealing tolerantly with common people would thus squeeze his "throat of war" into a "pipe small as a eunuch." The macho man, he wants no part of a "virgin voice that babies lull asleep." As if to say, real heroes never speak tenderly. Yet even his enemy recognizes his pathetic inability to move from the casque of war to the cushion of peacetime leadership, noting that it must be his "nature, not to be other than one thing." As if to say, no specialized success can compensate for weaknesses in character.

That memorable line, "let it be virtuous to be obstinate," spoken even as his family approaches him, also reflects the



warrior's placement of valor above real virtue. And in the family of legal professionals, a growing number seem to share this form of Coriolanus' myopia. In several recent surveys, many lawyers and judges lament with genuine sadness that "a profession once characterized by mutual respect and lasting relationships has become marked by increasingly abrasive confrontations and rudeness." Litigation was never a race for the short-winded, and clients deserve aggressive representation; but the public is now paying too dearly for deliberate delays, obstruction, vicious personal attacks, and "mindless responses to legitimate requests" from one lawyer to another. (See *Wall St J*, June 24, 1991, p. B1)

At the same time, lawyers, like military warriors, must give up any dreams of being universally "well-liked"—almost as a prerequisite to entering the profession. I won't forget how the sweet victory of winning my first trial was

tarnished by the opposing client, who was so angry at the outcome that he fiercely called me a name I had never heard spoken in professional company. It didn't matter, because it couldn't matter; that is the lawyer's lot. Yet, lawyers are often needed to heal deep wounds and to bring adversaries together, whether as attorneys or as public officials in informal or formal settings. The reputation for public virtue required to satisfy this crucial civic need is not to be taken lightly.

After I had been president at Ricks College for about a year, President Spencer W. Kimball invited me into his office for a brief visit after a regular meeting of the Church Board of Education. He was like Menenius of *Coriolanus*—a gentle, wise, and seasoned man who knew firsthand about the concept of public trust. His first question, spoken with that voice of searching kindness, was, "Well, Bruce, do the



people up in Idaho love you?" The question not only surprised me, it sobered me to the point of utter speechlessness. Finally I stammered back, "I really don't know, President Kimball. But I do know that they love you." I thought about his question for days afterward. That is not a question lawyers can always answer affirmatively, but for those who must carry public responsibility, it is not a trivial question.

One ironic example of Coriolanus' confusion between valor and virtue is his assumption that his enemy will not only become his ally, but will later let him return to Rome, no questions asked. A leader, like a lawyer, has a hard time being a mercenary for whom the duty of valor may be sold to the highest bidder. Lawyers may be engaged and they may be released, but changing one's real loyalty—the serious representation of a community of interest—is hardly like changing clothes—or uniforms. One of the professional hazards of law practice is the risk that transferring loyalties among multiple causes can make a lawyer discount the meaning and the relative worth of loyalty to causes that deserve to transcend narrow professional duties. When lawyers assume that loyalties may be bought and sold, they may put at risk their own sense of what true loyalty is.

Thus, opinion polls regarding matters of personal value show that lawyers are more likely than the public and other professionals to become cynical about such conventional loyalties as patriotism, marriage, or institutional allegiance. An anecdotal Vietnam war story tells of a dazed and hardened soldier who returned from the war, saw a man with a piece of bread, killed the man, and took the bread. When asked why he did this, the soldier replied, "Because I was hungry." The Coriolanus phenomenon applies this "law of the instrument" with special fear: when one's favorite (or only) tool is a hammer, every problem can look like a nail. The dentist trained to use a high-speed drill must never use his instrument in ways that damage human tissue. A lawyer trained to use the acid of critical inquiry offers the public a skill of great value; but his skill can, if misused, destroy fragile human ties and tissues—including the lawyer's most personal ties.

The family dimension is thus among the saddest losses from Coriolanus' single-issue devotion to valor. He is so preoccupied with battlefield glory that, upon first returning home, he fails even to see his self-effacing wife as she waits away from the action to greet him. And when his family members come to beg his return to Rome, he pitifully reveals his value system's disarray: "What is that curtsy worth? or those doves' eyes, which can make gods forsworn? I'll never be such a gosling

When  
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to obey instinct." Well, what is that curtsy worth? What is it worth to nourish one's most basic human instincts enough that we still feel them—enough to obey them? Shakespeare, the great teacher, knew their worth as clearly as anyone who ever wrote a story. True to his teacher's instinct, he left these grand questions unanswered in his players' speeches, but he answered them in the tragedy of the players' lives.

**C**ORIOLANUS also teaches a perspective on gratitude and rejection. The Roman citizens are at least as fickle as he is: early in the play the crowd moves from hero worship to hostility with only arguable provocation; then, when the threat of a new war badly frightens them after they have banished him, they again change their position without hesitation: "Though we willingly consented to his banishment, yet it was against our will." Their grounds for banishing him thus seem no more deeply based than was their original gratitude. Does this mean Coriolanus was correct in his disdainful assessment of the common people? Not really: a leader must take the popular will seriously, but not too seriously. One must, as Kipling put it, "meet with Triumph and Disaster and treat those two impostors just the same."

Shakespeare here offers us a paradox: public servants must avoid arrogant aloofness from the public, yet they cannot let their sense of success turn entirely on the frequently superficial judgments that can lead to either public appreciation or public rejection. Given the public's inability to understand the intricacies of legal matters, this paradox applies especially to lawyers: They must prove worthy of public trust, but the public may not really understand their work well enough to render informed judgment of its quality.

Lawyers naturally desire recognition of their role. When Congress was investigating Oliver North in its Iran/Contra hearings, a congressional questioner appeared to ignore Brandon Sullivan, North's lawyer. Said a frustrated Sullivan, "Sir, I am not a potted plant—I'm the man's lawyer!" But not all clients, let alone the public or its congressmen, really comprehend exactly what their lawyers do, even when the lawyers render significant service. One of my first pro bono clients suffered from a mental handicap that made him not only unable to understand my efforts to help him—he actively interfered with those efforts. He never knew how hard I fought to protect his interests.

To paraphrase Hugh Nibley, lawyers may find that the service for which they are most profusely thanked is almost never the most meaningful service they render. Rather, their moments of greatest service-oriented meaning may remain a little secret between themselves and God, which they can thoroughly enjoy regardless of the absence of public acclaim. There can thus be an unavoidable loneliness that accompanies the use of professional expertise in public service. And sometimes those who need sophisticated help the most may seem to deserve it the least. But as Mother Teresa once observed, she does her work not because she is sure it will be judged as successful, but because she knows it is right.

Still, the other side of Shakespeare's paradox teaches any warrior, leader, or lawyer to seek the perspective that comes from retaining a sense of connectedness to other people. When the Roman citizens sought to banish Coriolanus, they worried that he did not sufficiently "incline to the people." This very fear has long fed public skepticism about the learned professions: what motivates these people whose expertise we require—an expertise so crucial that it may give them life-and-death power over us? Are they truly moved by our interests—or mostly by their own?

Coriolanus' preoccupation with self-interest was transparent: when the plebeians banished him, he lashed out at those "curs, whose breath I hate, as dead carcasses that do corrupt *my* air." Note—not "the" air, but "*my*" air. And when his immediate family members come to the enemy city seeking to reclaim his allegiance, his first impulse is to sever his most intimate ties: he would "stand as if a man were author of himself and knew no other kin." And in refuting Aufidius' taunting "Boy!" he invites his own tragic death by proudly remembering how he defeated the Volscies: "Alone I did it!" He was the most self-sufficient of tragic heroes. As Shakespeare critic Reuben Brower puts it, he is "the absolute hero—detached from humanity."

**T**HIS stance of unencumbered autonomy reflects the untethered individualism of our own day. Some consider this spirit our most cherished contemporary right—what Louis Brandeis once called "the right to be let alone." Thus we naively chase the illusion that we can be liberated from the apparent bondage of personal ties and somehow still be assured of the personal support systems found only in long term commitments. Today's society seems sadly unsure whether the bonds of kinship, marriage, or community are valuable ties that bind, or are sheer bondage. Yet those who break loose from the arms and bonds that hold them tend to replace their previous sense of belonging only with a sense of longing, as this age of liberation becomes more and more the age of personal isolation and loneliness. Ours is the age of the waning of belonging.

In such an age, in family courts or otherwise, people increasingly expect the law to protect them from their obligations to others, believing that their right to be let alone is more weighty than another's right to legal support that would nourish continuity and mutual allegiance. Being among society's leading individualists, lawyers especially face the risk of subordinating all other ties and interests to their desire for Coriolanus-like autonomy. But Michael Novak's insight is worth remembering: "My dignity as a human being depends perhaps more on what sort of husband and parent I am than on any professional work I am called to do. My bonds to [my wife and children] hold me back from many sorts of opportunities. And yet these bonds are, I know, my liberation. They force me to be a different sort of human being, in a way in which I want and need to be forced."

**F**

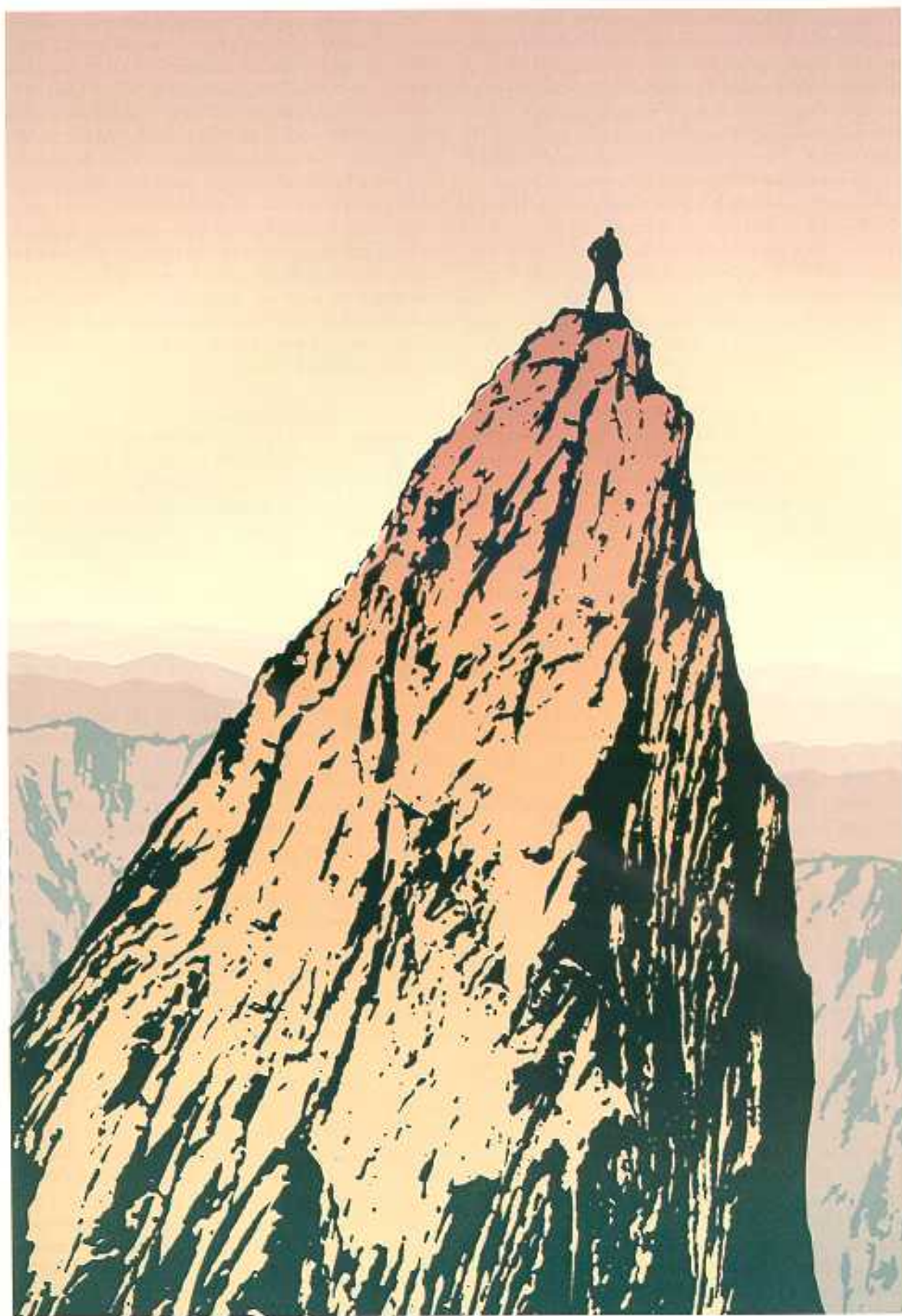
INALLY, as I consider a hero's submitting to the humiliation of showing the common people the wounds he suffered in their defense, I think of another group of commoners and another hero whose body had been wounded in their service: "Arise and come forth unto me, that ye may thrust your hands into my side, and also that ye may feel the prints of the nails in my hands and in my feet, that ye may know that I have been slain for the sins of the world."

"And the multitude went forth, and thrust their hands into his side, and did feel the prints of the nails in his hands and in his feet; one by one until they had all gone forth, and did see with their eyes and did feel with their hands, and did know of a surety . . . that it was he, of whom it was written by the prophets, that should come" (3 Nephi 11:14–15).

I can't help wondering whether the Christian tradition had any connection with the Roman tradition that invited the people to see Coriolanus' wounds first hand. But, at the least, the Christian tradition illustrates a leader who understood what Coriolanus ignored, a leader who was literally in touch with his people, the common people. All were alike to him, for he "denieth none that come unto him, black and white, bond and free, male and female" (2 Nephi 26:33).

Might there be times in the life of a Latter-day Saint lawyer, within or beyond the professional role, when he or she could in some small way emulate him who is our "advocate with the Father?" (D&C 45:3). Wouldn't this kind of a lawyer love ordinary people, even to the point of bearing some modest portion of "the pains and sicknesses of his people?" (Alma 7:11).

For me, this possibility is the highest aspiration of the J Reuben Clark Law School. It could well be said of such a lawyer as it was said of Coriolanus, "If he would incline to the people, there was never a worthier man." And on the same condition, never a worthier profession.



# JUDICIAL CLERKSHIPS

*Justice Larry M. Boyle*



IN THE SPRING 1991 issue of the *Clark Memorandum*, an article about a visiting professor's experience at the law school discussed the relative worth of a judicial clerkship.<sup>1</sup> The professor was quoted as saying, "If a student is marginally interested in a federal clerkship he or she should consider it" and went on to conclude that "as a federal clerk you get to see the world from the mountain top."<sup>2</sup> Had I not previously experienced what I have perceived to be a federal court emphasis while interviewing BYU law students or in conversations with its graduates over the past 15 years, I would not have been so interested in these comments.

While I enthusiastically agree that judicial clerkships are extremely valuable, there is no reason to assume that only certain federal court clerkships are valuable or worthy of pursuit by even the exceptional law students. Indeed, there are many state court and less emphasized federal court clerkships that can be extremely valuable to a young lawyer. Just like the federal clerkships at the United States Supreme Court or federal circuit courts, these "other," less emphasized, clerkships also provide a wonderful opportunity from which to "see the world from the mountain top," even if the view is from Mt. McKinley rather than from Mt. Everest. **ILLUSTRATION BY MORAY MAGLEBY**

◦

OTHER  
MOUNTAIN  
TOPS  
FROM WHICH  
TO VIEW  
THE  
WORLD

◦



## OTHER LOFTY MOUNTAIN TOPS



n a recent essay describing the nature of the clerkship selection process, Judge Alex Kozinski of the Ninth Circuit Court of Appeals chided law schools for not providing adequate information regarding other extremely valuable clerkship opportunities.<sup>3</sup> Judge Kozinski stated that this lack of information "is particularly true about clerkships in the state courts, Claims Court, Tax Court, etc. Few schools

of law State trial and appellate courts and the United States District, Magistrate, Tax, Bankruptcy, and Claims Courts are the courts most frequented by practicing attorneys

Moreover, judicial clerkships help provide a post-graduate education that is invaluable. Throughout my career in private practice and on the bench, I have frequently drawn on the skills and knowledge developed when I clerked for Chief Justice Robert Bakes at the Idaho Supreme Court in 1972. Most appellate clerks develop excellent writing, researching, and other lawyering skills, and a clerkship at a state or federal trial court provides a unique opportunity to learn courtroom procedure, evidence, advocacy skills, and trial tactics in a way that would take years to learn in private practice. This

interest in placing law school graduates in the most promising positions available as they leave school and embark on their respective careers. Clerkships have a significant impact on the prestige of a law school<sup>5</sup> and likewise provide the best start for a young lawyer after graduation. Therefore, it is important that students at all law schools be adequately informed about the many possible clerkship options and opportunities available following graduation.

The responsibility to spread the word about state court and less emphasized federal judicial clerkships cannot rest solely with a law school's placement director. As Judge Kozinski has pointed out, "No one plays a more decisive role in influencing clerkship selection" than law school professors.<sup>6</sup>

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present these as real options to students. Because most law schools largely ignore these clerkships, they get ignored by students, many of whom wind up not clerking at all."<sup>4</sup> In my view, this is most unfortunate and certainly should not be the case at the J. Reuben Clark Law School.

While a purpose of this essay is to equate the value of a judicial clerkship at a state supreme court with that of a federal court of appeals clerkship, I also encourage promising law students and their professors to seriously consider a broader field of clerking opportunities. This is because judicial clerkships have intrinsic value that extends well beyond the opportunities available in various federal circuit courts or the United States Supreme Court. Clerkships of all kinds, and at all levels of the state and federal judiciary, expose young lawyers to challenging legal problems and provide a window into our legal system that can be obtained in no other way. Many of these courts address significant legal issues that will be very helpful to judicial clerks when they enter the practice

unique learning experience is not limited only to the most prestigious federal courts.

Illustrative of my point is the example of Justice Sandra Day O'Connor. Before Justice O'Connor was confirmed a member of the United States Supreme Court she had served as a state trial court judge and an intermediate court of appeals judge in Arizona. There is no reason to believe that her state court clerks in the Court of Appeals of Arizona or the Arizona trial court received any less training, made any less contribution, or had anything less than the same great learning experience that her current clerks receive at the Supreme Court. For schools like the J. Reuben Clark Law School, which has long recognized the value of judicial clerkships, there should be wide agreement and recognition that many state and less emphasized federal judicial clerkships, including those at the trial level, prepare attorneys for the practice of law in a way that cannot be duplicated elsewhere.

In my view, professors, administrators, and students all share a mutual

Perceptive law professors understand that prestigious federal courts are not the only courts that address the important legal issues of our day or provide continuing opportunities for learning and development.

I recently attended a senior appellate judicial conference at the New York University Law School along with 20 selected state supreme court justices from 13 states.<sup>7</sup> Dean John Sexton of that law school opined that the most important judicial work in the nation today in the area of individual rights is taking place at the state supreme courts. He told us that in his opinion one of the darkest hours of the United States Supreme Court was when it declined to protect the First Amendment rights of the Mormons over a century ago.<sup>8</sup> He indicated that it was the state supreme courts that filled that void and ultimately restored civil rights to members of the LDS Church.<sup>9</sup> Dean Sexton concluded that state courts today are preserving essential civil liberties by recognizing these rights under their respective state constitutions, when,

in his view, the United States Supreme Court is narrowing and limiting those rights

Whether or not one agrees with Dean Sexton's comments and opinions is not important. What is important is the reality that state supreme courts are in fact dealing with many of the most significant legal issues of our day and that the judicial clerks who are fortunate enough to work for these high courts will have a key role in the development and direction of the law.

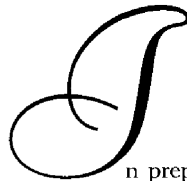
Another reason for expanding the number of judicial clerkships considered is a practical concern close to all students' hearts—employment opportunities! Yet if law students restrict their search solely to judicial clerkships in the most sought after federal courts, the students' opportunities will obviously be limited. There are many excellent clerkships available when one broadens the potential field to include trial and appellate courts from all 50 states and the federal District, Magistrate, Bankruptcy, Tax, and Claims Courts throughout the nation. A comparison of clerkships in the federal courts and state courts in Idaho is illustrative. While there are nine federal judges in Idaho who employ 14 clerks, there are 41 state court judges who employ 49 clerks.<sup>10</sup>

Securing a clerkship position in a state appellate court is extremely competitive. This year's law clerks at the Idaho Supreme Court came to us from several fine law schools, including Washington, Idaho, Yale, BYU, Minnesota, and Gonzaga. Law students should be encouraged early in their law school experience to seek judicial clerkships of all kinds and at all levels in both the state and federal judiciaries.

Unfortunately, a comparison of BYU law clerks at the state and federal courts reveals a far fewer number of clerks going to state courts than I would expect. This year, 20 graduates of the J. Reuben Clark Law School are serving clerkships. Of these 1991 graduates, 10 are clerking at state courts and 10 are clerking at federal courts. Over the past five years, 62 graduates have clerked at state courts and 50

graduates have been federal law clerks.<sup>11</sup> These numbers include clerkships of all kinds and at all levels in both the state and federal judiciaries. These figures demonstrate a need for more awareness of the clerkship opportunities available at state courts. Considering the overall number of state clerkships available, the number of graduates serving state clerkships is substantially out of proportion to the number of graduates clerking at federal courts. If adequate emphasis is placed on the value of state court clerkships, the number of clerkship opportunities will increase correspondingly and, I am convinced, significantly more students will become judicial clerks. In the process they will become better attorneys, educators, or jurists.

## HOW HIGH IS THE MOUNTAIN? MEASURING THE VALUE OF A JUDICIAL CLERKSHIP



n preparation for this essay I inquired of Elder Dallin H. Oaks of the Quorum of the Twelve, a former justice of the Utah Supreme Court, concerning his personal views regarding the relative value of state supreme court clerkships vis-à-vis federal court clerkships. While emphasizing that his opinion is not an institutional position, he stated:

*Having had a clerkship in a federal court myself, and having served in a state supreme court, and having served on a law faculty where we helped to arrange clerkships for students, I have some well-formed views on this subject*

*The most important thing in dictating the quality of a clerkship is not whether the court is state or federal, but the quality of the judge and the way he or she uses law clerks*

*The second most important consideration, in my view, is what I call the "menu" of the court—the kinds of cases it handles. This is very different from one district or circuit court to another and from the federal courts to the state courts. Personally, I prefer the menu of a state supreme court because of its comparatively larger proportion of common law issues and its comparatively smaller proportion of administrative or regulatory issues. I surely agree that state supreme court clerkships tend to be underestimated in their quality and that some federal clerkships tend to be overestimated.<sup>12</sup>*

I fully agree that the two considerations mentioned by Elder Oaks are the most important criteria for measuring the value of a judicial clerkship.

The first consideration mentioned by Elder Oaks is composed of two parts that go hand in hand: the quality of the judge and the way the judge uses law clerks. Beyond personal characteristics, the quality of a judge refers largely to the quality of the judge's decisions. The "correctness" of the decision is only one consideration because many judicial decisions involve issues that could be decided in several different ways. As a result, attributes such as whether the judge is scholarly in his or her approach to the law, as well as fair, impartial, unbiased, thoughtful, and wise in properly assessing the conflicting legal, equitable, and policy considerations at issue in a case, are at the heart of assessing the quality of a judge's decisions and the value of a clerkship with that judge. It is in this process of making a judicial decision that the law clerk, working closely with the judge, plays a significant role.

Others have recognized that judges render higher quality decisions by working with their clerks effectively. Judge Patricia M. Wald, chief judge of the D.C. Circuit Court of Appeals, recently wrote:

*Indeed, a judge sometimes decides whether to file a separate opinion or to dissent in a case based—at least in part—upon the support she can anticipate from her clerks. Or she may ask for, or beg off, responsibility for a particular opinion assignment because of the availability or nonavailability of a particular clerk to work on the case. Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers*<sup>13</sup>

At the Supreme Court of Idaho, I give my clerks extensive responsibility. While closely monitoring what they do, these bright, capable young lawyers are given the freedom to advise, critique, submit draft opinions, and counsel with me in most of my important decisions. I work with my clerks in much the same way a law firm operates. We hold regular office meetings where work assignments are made, projects submitted, and cases discussed. The end result of closely working with the clerks is a better finished product.<sup>14</sup>

The second consideration mentioned by Elder Oaks that contributes to the quality of a clerkship is the “menu” of the court, which varies greatly from one court to another. The bulk of most attorneys’ practice is with state law issues such as torts, contracts, property, corporate, wills, trusts, estates, family, water, natural resources, employment, criminal, agency, and other legal issues that are all routinely addressed in state courts. In addition, because state courts are courts of general jurisdiction, many federal issues such as constitutional law and other significant issues are frequently brought to state courts. Therefore, in my view, state supreme courts offer the widest possible exposure to the law most attorneys will use in practice.

In selecting the best clerkship available, discerning law students should first consider and determine the area of the law in which they desire to practice and then focus on securing a judicial clerkship at a court

where those interests can best be served. Students desiring to see the broad scope of the law or who desire to perfect their analytical, research, and writing skills should pursue a judicial clerkship at a state or federal appellate court. The benefits of a state supreme court clerkship are not limited to those who plan to remain in a particular state or practice that state’s law. Because the skills learned in an appellate clerkship can be taken to any state or type of practice, students should not avoid state appellate clerkships solely because they plan to practice elsewhere.

Those students desiring to be educated as to the litigation process should focus on a state trial court or the United States District or Magistrate Court because it is in those courts that general civil and criminal trials are conducted. In many jurisdictions the felony case

it is not just the specific court where a judicial clerkship is served, but also the judge or justice with whom the clerk works and the process involved in the clerkship, that measures the complete value of the judicial clerkship experience.

## CONCLUSION

*A*s law students quickly realize, the law school experience is not the final step in a lawyer’s education and development. Rather, it is only the theoretical introduction to the law and the beginning of a career path. The real education process continues after graduation when former

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load of the federal District Courts is so significant that the United States Magistrate Court has recently assumed a significant civil docket. As a result, a clerkship at a federal District Court or a United States Magistrate Court in many jurisdictions can be especially attractive to students desiring to understand civil trial practice in the federal system.

One of the best learning experiences available for those law students interested in a commercial or transactional practice will be found clerking for a judge in the United States Bankruptcy Court. If patent law is the area of the law most attractive to the law student, then the United States Claims Court is a great place to start a legal career in that specialty. A law student interested in tax law should consider the value of a clerkship in the United States Tax Court. However, as discussed above,

students begin their law practice and are required to make a practical application of the theories and discipline learned in law school. One of the best places to start the continuing post-graduate legal education process is in a court under the direction of an experienced judge or justice who will allow the clerk to grow and develop. In addition, a judicial clerkship provides a one- or two-year buffer period between law school and practice during which young lawyers can continue to refine their legal skills in an environment conducive to growth and development. Clerks may also use this year to focus on the particular area of law that will be most interesting to them. They may also decide from among the lawyers and law firms observed in the clerking process, the law firm that would best further their professional goals and development.

It is a significant responsibility and opportunity to be involved in the judi-

cial system shortly after graduation. Because of the personal growth and development that accompanies such responsibility, judicial clerkships at all levels of the state and federal judiciary are worth considering. The law school will also benefit as more of its students accept judicial clerkships and are better prepared to serve their clients. Just as in the English tradition that has been captured in the American Inns of Court, a judicial clerkship provides a tutoring and mentoring experience that comes to a law school graduate in no other way. If law students will take advantage of this opportunity by considering all of the possible judicial clerkships available,<sup>13</sup> they will be off to the best possible start in their professional careers and in the best position to select from which mountain top they want to view the world.

*Justice Boyle is a 1968 graduate of BYU and received his juris doctorate at the University of Idaho in 1972 where he served on the Law Review. He is currently an associate justice of the Idaho Supreme Court and serves on the J Reuben Clark Board of Visitors. In January 1992, Justice Boyle was nominated to be a United States Magistrate Judge in the federal District of Idaho*

## NOTES

1 "David Campbell Enjoys Sabbatical at BYU," *Clark Memorandum* (Spring 1991), 40

2 *Id* (quoting David Campbell)

3 Alex Kozinski, "Confessions of a Bad Apple," 100 *Yale L. Rev.* 1707, 1724-29 (1991)

4 *Id* at 1727 n 38

5 See Kozinski, *supra* note 3 at 1725

6 *Id* at 1728 (emphasis in original)

7 Justices from the Supreme Courts of several states attended, including California, Washington, Wisconsin, Florida, Tennessee, Kentucky, Hawaii, Virginia, Georgia, Michigan, Minnesota, Texas, and Idaho. In addition, a justice from the Supreme Court of Canada attended

8 See *Reynolds v. United States*, 98 U.S. 145 (1878)

9 The case of *Toncray v. Budge*, 14 Idaho 621, 95 P. 26 (1908), is a prime example of a

state supreme court that provided constitutional protections to the Mormons. In *Toncray*, the Idaho Supreme Court restored many rights to the Mormons in Idaho. In that case the appointment of Alfred Budge, a practicing Mormon, as a judge on a state trial court was challenged because the state Constitution specifically provided that persons entering into "celestial marriage" could not hold public office. The Idaho Supreme Court quoted from numerous early Church authorities in upholding the appointment. *Id* at 645-55. Judge Budge was appointed years later to the Idaho Supreme Court and wrote in excess of 1000 opinions during his 34 years on the bench, the longest period served by any Idaho Supreme Court justice.

10 Although there are 14 possible federal clerkships in Idaho, nearly half of these positions are currently staffed by "career law clerks." In 1989, the Executive Committee of the Federal Judicial Conference authorized implementation of the Judicial Salary Plan which reclassified career law clerk positions. This change significantly improved the salary that accompanies these positions and has resulted in increasing numbers of federal judicial clerks who work with a judge on a permanent basis. Similarly, some states hire significant numbers of career clerks. For example, the majority of law clerks employed at the California Supreme Court are career employees. The Chief Justice of that court has seven career clerks but only a single one-year law clerk. The Associate Justices of the California court likewise have only a single one-year law clerk in addition to four career judicial clerks. This trend toward employing career law clerks, particularly in the federal court system, makes it even more important for law students to seriously consider all clerkship opportunities available in the state trial and appellate courts.

11 Letter from Associate Professor Kevin J. Worthen to Justice Larry M. Boyle dated October 28, 1991.

12 Letter from Elder Dallin H. Oaks to Justice Larry M. Boyle dated November 6, 1991.

13 Patricia M. Wald, "Selecting Law Clerks," 89 *Mich. L. Rev.* 152, 153 (1990).

14 Other judges echo the same sentiment. Judge Patricia Wald, Chief Judge of the D.C. Circuit, recently stated:

*The judge to whom the opinion is assigned is expected to produce a draft for her colleagues to*

*critique. If she is in doubt, troubled, or just plain frustrated, the clerk is her wailing wall. Most of us are not Holmes or Cardozo; we are often unsure of our analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us. We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions. Despite trendy criticism of undue law clerk influence over judges, my view is that our jurisprudence is better for the give and take among judges and law clerks than if judges had to go it alone.*

Wald, *supra* note 13, at 153-54.

Judge Kozinski agrees. In his recent essay he stated that

*[i]n chambers, the success or failure of the one-on-one relationship is everything: A clerk gives the judge advice, debates with him, serves as his eyes and ears, lobbies for him, travels with him and may draft his opinions. The two work side by side every day for a year and need to function as a highly integrated unit.*

Kozinski, *supra* note 3, at 1723.

15 I am not intending to be critical of the professors or faculty for counseling exceptional law students to pursue clerking opportunities at the federal circuit courts. I recognize that many of the professors served as federal law clerks and their counsel is based on that experience. My judicial clerkship experience was in a state supreme court and thus I also have a perspective that is admittedly biased. This diversity of views should demonstrate that there is no right or wrong choice, but rather a multitude of good alternatives available to the discerning student that will lead to many promising future opportunities.

*The author gratefully acknowledges the assistance of Robert T. Smith, 1991 graduate of the J. Reuben Clark Law School and former editor in chief of the BYU Law Review, in preparation of this essay. Smith now works with Justice Boyle as a judicial clerk and plans to practice tax law in Chicago, following his clerkship.*



**DALE WHITMAN  
RETURNS TO BYU**

Author, scholar, dean, professor—all of these titles apply to Dale Whitman, who after 13 years has returned to teach at the J Reuben Clark Law School

Teaching has been the focus of Whitman's illustrious legal career. After graduating from Duke University Law School in 1966, he went to work for the firm of O'Melveny & Meyers in Los Angeles. During the year and a half he was at the law firm, Whitman came to the conclusion that he would rather be a professor than a "practicing" lawyer.

"I became a professor because students are smarter and nicer than clients," says Whitman. "I've never had any reason to question that. I've dealt with a lot of students and a lot of clients, and on the average the students are way ahead."

In addition, Whitman says, "One of the things that lawyers seldom want to admit is that litigation and negotiation both involve a lot of stress. It's just inevitable. Some people tolerate stress better than others, but it is stressful. It's the adversary system. I don't like stress or conflict. I suppose I don't like adversarial behavior. But I do like law. I like the intellectual puzzle, the challenge of it. So teaching has turned out to be a way of having the good news without the bad news; it's worked out really well for me."

Whitman began his teaching career at the University of North Carolina at Chapel Hill, where he

taught for three years, primarily in the field of property. He then served as a visiting professor at UCLA from 1970 to 1971. Taking a diversion from teaching, Whitman worked as a deputy director for the Federal Home Loan Board in Washington, D.C., and then for HUD as a senior program analyst in the Federal Housing Administration. It was then that BYU President Rex Lee stopped by Whitman's office and told him he "ought to move to Provo."

Along with a handful of others, Whitman helped get the J Reuben Clark Law School under way in 1973. When asked what it was like to assist in organizing a law school, Whitman says: "It was great. Most of us had prior teaching experience, and therefore some preconceptions about what a law school ought to be like. We tended to follow traditional patterns in creating a curriculum and the overall organization of the school. Those of us with experience had taught at some very good law schools, so that wasn't a bad pattern to follow. We had a lot of fun."

"Some people thought we would have a political agenda, but we did not. In fact, we tried quite consciously to avoid that," Whitman says. He tells the story of a young man who approached Lee when the law school was being organized. "Brother Lee," he asked, "is this going to be a constitutional law school?" President Lee thought a minute and replied, "Well, it sure isn't going to be an *unconstitutional* law school."

After five years at BYU,



*Dale Whitman*

Whitman decided to move his family to the Pacific Northwest to become the associate dean of the University of Washington Law School. He remained there for four years before accepting a position as dean of the University of Missouri Law School in 1982.

Commenting on his deanship, Whitman explains that the construction of a new law school building occupied most of his attention. "It worked out well. We dedicated the law building in 1988 and that is when I resigned as dean." Whitman remained at Missouri as a faculty member until the end of 1991 and then moved back to Provo.

To his former students and colleagues, Whitman's return is seen as a major coup. "From the beginning of our law school," says Lee, "it became apparent to everyone that Dale Whitman had all of the qualities needed in a law faculty member. He is a scintillating, inspiring, and

provocative teacher, as evidenced by his selection as the first Professor of the Year at the J Reuben Clark Law School. Dale is a nationally recognized scholar, preeminent in matters of real estate finance." Lee adds that Whitman is an excellent colleague and friend, always concerned about the progress and success of others.

Whitman has collaborated on five books since 1975. The first was a casebook on real estate finance, *Real Estate Transfer, Finance, and Development*, which he co-authored with Grant Nelson, a former colleague from the University of Missouri Law School. Nelson also collaborated with Whitman on a treatise in the real estate finance field, *Real Estate Finance*. "It was actually a revision of George Osborne's mortgages hornbook. The two books make a nice package because they are on the same subject, by the same

authors, and follow the same organizational pattern. Each of them feeds the other. We also did a student outline book for West as part of its black-letter series in real estate finance, *Land Transactions and Finances*. Now there is a complete set—a book for everybody in the field.”

The fourth book Whitman co-authored was a property hornbook, *The Law of Property*, with William Stoebe of the University of Washington and Roger Cunningham of the University of Michigan. It has been “a good, solid book,” says Whitman, “and it is used by a lot of judges and lawyers, because it is the only modern one-volume hornbook in the field.”

The same authors reconvened with Grant Nelson and Olin Browder in 1989 and revised an existing property book, *Basic Property Law*, bringing the number of books Whitman has been involved with to five.

Whitman’s scholarship has had and will continue to have an effect on the Law School. In 1975, when Whitman was working on his first book, he made this comment in an article in BYU’s Law School newspaper: “To the extent that this book gets adopted by other law schools around the country, people will associate the name of BYU with what is hopefully a good product. That, in the long run, rubs off and creates a good reputation for the school on a national level that will help all of our graduates over time.”

With his return to BYU, Whitman’s work will again be associated with this law school, and students will

have the opportunity to use texts in the area of real property written by one of their professors.

Whitman is now working with Grant Nelson on the *Restatement of the Law of Mortgages* for the American Law Institute. This is the first Restatement covering the mortgage field the Institute has done in its near-75-year history. “We have to go through a very elaborate process to get our work approved,” Whitman explains. “But, on the other hand, the reporters are the authors, and if they can get the membership of the Institute to vote for what they do, it becomes the Restatement.”

Whitman says it is important to make the Restatement as complete, comprehensive, and accurate as possible because it will probably have a life of about 50 years. “I think I am probably taking greater pains and working harder to get every word right with the Restatement than I have with any of the other books.”

Whitman also shared his perspective on legal education. He says he believes that “perspective” is one of the important aspects that law students—and lawyers—need to incorporate into their lives. He questions whether “we deal enough in law school with ethical and moral issues. I don’t mean legal ethics. I don’t mean formal ethics. I mean how you approach your profession as part of your overall life. How much time do you spend at it, how do you allocate your effort between that and your family, church, and the other responsibilities. Many

lawyers have problems with that. They tend to be workaholics. Law is a difficult profession to manage. Part of the reason is that your income depends almost exactly on how much time you spend at it. So there is always the temptation to spend more time and make more money, no matter what you’re giving up.

“I wonder if perhaps we ought to be talking more with our students about those issues,” Whitman continues. “They don’t really come up officially in any class, and they tend to get lost in the shuffle. It’s also hard to discuss these issues with the students because until a person has actually practiced law it’s difficult for that person to appreciate the dilemmas associated with practicing law. It’s a hypothetical discussion until you have been there.”

Whitman’s former students continue to keep in touch with him, asking him questions and keeping him on his toes. “I like to hear from my students because they usually raise interesting questions,” he says. “Sometimes they are even questions that I can use in class. Since I don’t practice myself, except by consulting for other lawyers, I think a moderate amount of consulting is helpful. It keeps me in touch with issues that are arising in the real world. It’s also fun just to see how people’s careers have worked out.”

Will Stoddard, a former student, along with members of Stoddard’s Las Vegas law firm—Albright, Stoddard, Warnick & Albright—consult with Whitman regularly about

complex legal issues relating to real property. “His superb ability to quickly understand the facts, analyze issues, and then render counsel, advice, and opinions is unequaled,” says Stoddard. “Indeed, his national reputation and expertise, coupled with his unique ability to communicate in clear and concise language, make him an invaluable asset to BYU.”

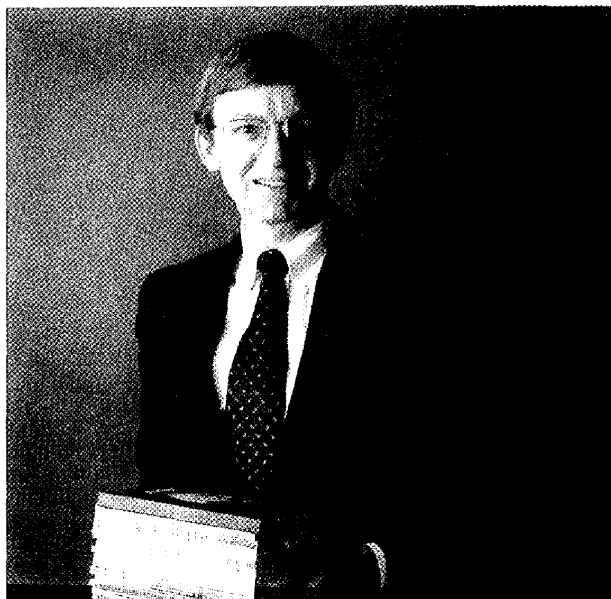
Former student Bill Marsden, currently with the law firm of Jardine, Linebaugh, Brown & Dunn in Salt Lake City, agrees, saying, “I use what I learned in Dale Whitman’s course more than anything else I learned in law school. My partners and I use the Whitman/Nelson hornbook on a daily basis. It’s the best one-volume reference in the property field.”

Lee speaks for Whitman’s former students and colleagues when he says that Whitman’s return is “one of the most significant days in the history of the Law School.” A sentiment the *Clark Memorandum* believes will be shared by Whitman’s future students and colleagues.

#### **PROFESSOR NAMED EDITOR OF BYU STUDIES**

John W. Welch, a professor of law at BYU since 1980 and a noted religious studies scholar, has been named editor of *BYU Studies* by President Rex Lee and Provost Bruce Hafen.

Welch will replace Edward A. Geary, a professor of English who has served eight and a half years in the post.



John W Welch

Welch says it is an honor to edit the university's main scholarly journal, which, with 32 years of service to LDS scholars and general readers, "is the oldest and holds a significant place of honor among all LDS scholarly journals

"I have always viewed *BYU Studies* as a voice for a broad community of LDS scholars," the new editor says "I remember how impressed I was with *BYU Studies* when I was an undergraduate here at BYU in the late 1960s. I even stood outside the Smith Fieldhouse during registration as a volunteer trying to sell subscriptions to students. I think it fills an important function, giving perspective to many Latter-day Saint issues. I hope to see it grow in scope, relevance, and readership.

"We live in dynamic times," Welch adds, "and the gospel gives needed orientation as the world faces a steady stream of new challenges. The Law School and every department at BYU are poised to be active con-

tributors in these developments, offering meaningful insights that emerge from the interaction of faith and scholarship "

Hafen notes that *BYU Studies*, which is a quarterly journal, is being expanded to offer a wider range of material and to extend an interdisciplinary, scholarly dialogue about religious topics

"Jack Welch is superbly qualified to direct such an enterprise," Hafen says "He himself is an astonishingly productive scholar in multiple disciplines, and he has both the imagination and the leadership skill to direct the work of other scholars with both creativity and rigorous standards "

In addition to serving on the Law School faculty, Welch is director of special projects for the BYU Religious Studies Center He is one of the editors of the recently completed *Encyclopedia of Mormonism*, published by Macmillan

Welch is general editor of *Collected Works of Hugh Nibley* and *Ancient Texts and Mormon Studies*

He is director and former president of the Foundation for Ancient Research and Mormon Studies and has had more than 60 scholarly works published He is responsible for organizing the first-year professional seminars at the Law School and creating and teaching a course on ancient Near Eastern law in the Bible and Book of Mormon

The Boston native earned simultaneous bachelor's and master's degrees in history and classical languages at BYU, studied Greek philosophy at Oxford University, and obtained his juris doctorate at Duke Law School, where he was articles editor of the *Duke Law Journal*

At BYU, he was awarded "Highest Honors" by the Honors Program, was named a Woodrow Wilson Fellow, was appointed valedictorian in the College of Social Sciences, and was named Outstanding History Senior.

Many plans are now under way to enhance and expand *BYU Studies*, Welch says "While working on the *Encyclopedia*, I became aware of much that has been written in the past, but I also saw that much remains to be done. There are some surprising gaps in our collective scholarly coverage of important topics. I hope we can fill a few of those gaps "

Welch says he plans to produce a cumulative index of the journal from 1959 to the present and to make the best of past issues widely

and inexpensively available, including on computer disks. "We are also exploring the possibility of holding workshops, sponsoring projects, and giving the publication a larger format, with more departments, more reviews of a wider range of books, improved graphics, and broader appeal to general readers For example, I would like to publish a special issue of *BYU Studies* on law, religion, morals, and the legal professional "

*BYU Studies* accepts articles, essays, short stories, poetry, historical documents, analytic notes, work studies, book reviews, and other items of interest to a general Latter-day Saint audience Many people think of *BYU Studies* as an esoteric journal written at BYU, about BYU, and for BYU, Welch says "But its purpose is much broader than that I think it is appropriate to describe *BYU Studies* as the flagship of all LDS journals "

Past editors have included Clinton F Larson, Dean B Farnsworth, Charles D Tate, and Edward A Geary Guest editors of special issues have included Truman G Madsen, Spencer J Palmer, Ray C Hillam, Neal A Lambert, Lamar C Berrett, Dean D Jessee, Ronald W Walker, and Edward L Kimball.

*BYU Studies* is regularly placed in 295 scholarly libraries, and subscribers are located in almost every state and 23 foreign countries The subscription rate is \$10 per year For further information, contact Welch at 522 JRCB, BYU, Provo, UT 84602; (801) 378-3168

**MONROE G. MCKAY  
INSTALLED AS CHIEF  
JUDGE**

With a reminder from Justice Byron R. White that the job of chief judge can be "tough," the position of chief judge of the U.S. Court of Appeals for the 10th Circuit was handed over to Judge Monroe G. McKay in a ceremony at BYU's J. Reuben Clark Law School in September.

Judge McKay, who was a member of the BYU law faculty when he was appointed to the appellate bench in 1977 by President Jimmy Carter, replaces retiring Judge William J. Holloway, Jr.

Justice White of the Supreme Court presided over and conducted the investiture. "I've seen chief

judges come, and I have seen chief judges go, but I always wonder how a chief judge could stand to do the jobs they do. It's a tough job," White said.

McKay is the first former BYU faculty member to hold both the position of appellate judge and chief judge in a federal court. He is also only the second member of the LDS Church to hold the position of chief judge. The first is Chief Judge Clifford Wallace of the U.S. Court of Appeals for the 9th Circuit.

As chief judge, McKay will oversee the activities of the 12 other judges in the 10th Circuit, which includes Utah, Colorado, Wyoming, New Mexico, Kansas, and Oklahoma. He will also become a member of the Judicial Conference of the

United States, the 27-member governing body of the nation's federal courts.

Elder James E. Faust of the Council of the Twelve of the LDS Church spoke at the ceremony along with Judges James K. Logan and John P. Moore of the 10th Circuit. Additional remarks were given by BYU President and former Law School Dean Rex E. Lee, former U.S. Congressman Gunn McKay, and Judge Holloway.

Elder Faust told of McKay's pioneer heritage and the long service of his family. He spoke specifically of Bessie McKay, who was left a widow when Monroe was a boy, and of how she taught her children to always "remember who you are and what you stand for."

A native of Huntsville,

Utah, the 63-year-old McKay graduated from BYU in 1957 and from the University of Chicago Law School in 1960, where he was named to the Order of the Coif and Phi Kappa Phi honor societies.

After a clerkship in the Arizona Supreme Court, McKay practiced law in Phoenix from 1961 to 1974, taking a two-year break to serve as director of the Peace Corps in the southern African nation of Malawi from 1966 to 1968.

In 1974, he joined the faculty of the newly formed

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*Senior Judge Robert H. McWilliams (left) and Justice Byron R. White attended the investiture of Chief Judge Monroe G. McKay (right).*





J. Reuben Clark Law School, where he taught courses in trial procedure and property until his appointment to the appellate court

Active in many legal and philanthropic organizations, McKay is a member of the American Law Institute and the Arizona State Bar. He served as president of the Arizona Association for Health and Welfare from 1970 to 1972 and as president of the Maricopa County Legal Aid Society from 1972 to 1974

**BILL OF RIGHTS  
SYMPOSIUM  
HIGHLIGHTS ANNUAL  
MEETING**

by Stephen R. Kelly

A symposium on the Bill of Rights highlighted the third annual meeting of the J. Reuben Clark Law Society and the BYU Law School Alumni Association on September 27, 1991. Other sponsored events included the annual dinner at the Excelsior Hotel, where Provost Bruce C. Hafen was the featured speaker (His address, "The Coriolanus Syndrome: Is it Virtuous to be Obstinate?" begins on page 20.) Several class reunions (1976, 1981, 1986), a softball game between the classes of 1981 and 1986, and a BYU football game made up the balance of the activities

In addition, Gary S. Anderson was elected president of the J. Reuben Clark Law Society. Anderson, who joined the San Francisco firm of Farella, Braun & Martel in

1968, has distinguished himself as a trial lawyer in a variety of practice areas. He received his bachelor's degree from BYU and his juris doctorate from Boalt Hall School of Law, University of California at Berkeley.



Gary S. Anderson

Nearly 300 participants attended the symposium, gaining information and insights on the Bill of Rights, as well as receiving continuing legal education credit. Scholars and special guests discussed the history, current impact, and import of the Bill of Rights and considered the struggles that the Supreme Court and Congress have had with the interpretation and meaning of the document.

President Rex E. Lee opened the symposium and introduced the keynote speaker, Chief Judge Monroe McKay of the United States Court of Appeals for the 10th Circuit. Other speakers included Bruce Reese, executive vice president of Bonneville Communications; Tim Slover, BYU professor of theater and film and writer of the screenplay, *A More Perfect Union*; and BYU Law

School Professors Cole Durham, Frederick Gedicks, Michael Goldsmith, James Gordon, Edward Kimball, and Richard Wilkins.

In his remarks, Lee noted that the Bill of Rights has stood the test of time and is now a foundation stone for "our American way of life and our American system." He said that it is interesting and important to make the comparison between the perspectives we have on the Bill of Rights and those that existed when the Bill of Rights was written in 1787. Much of the discussion throughout the symposium focused on comparing and contrasting these perspectives, as well as studying their effects on individual versus community rights.

Arguing for original intent, Richard Wilkins maintained that the advocates of states' rights believed that a Bill of Rights was necessary to protect the sovereign states from undue intrusion by the federal government. However, he said, this protection has become "an engine for further subjugation of state power." He said he believes that the advantages of America's federal structure have been undermined by its continued emphasis on a centralized government and that the structure of the nation has been undeniably altered by ceding the residual power retained by the states following the Constitutional Convention.

Wilkins said he agrees with Justice Sandra Day O'Connor, who in *Gregory v. Ashcroft* pointed out that a dual system of government

*assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.*

Wilkins argued that a substantial number of innovations in the federal government had first been implemented at the state or local level and that a disregard for states' rights may interfere with state as well as federal experimentation.

Judge McKay, on the other hand, explained that he is not persuaded by "original intent" arguments and espouses a modern approach to interpreting the Bill of Rights. He contends that those who pretend to recapture 18th-century constitutional interpretation are missing the spirit and significance with which people ought to be approaching the Bill of Rights. Knowledge of "original intent," according to McKay, disappeared almost immediately after the Bill of Rights was written. Furthermore, he said, even those who—for whatever reasons—wish to go back and discover "that elusive notion of original intent would not tolerate the society that it would impose upon them."

Unlike Wilkins, McKay said he believes that Americans must "get to the 14th Amendment to fully understand the scope of the Bill of Rights, because the

Bill of Rights is more than just those 10 amendments. It is the context in which those amendments have been applied."

McKay also maintained that it is incorrect to cite James Madison as opposing the Bill of Rights. He said that a more correct view was that Madison failed to support the Bill of Rights because he did not think it was necessary. Madison felt that the states, rather than the federal government, were the greatest threat to fundamental human rights. He believed the federal government had no power to abuse those rights. Yet history, according to McKay, has shown that Madison was "just dead wrong."

McKay further emphasized his position that the Bill of Rights has survived because, on the whole, people can find redress in the federal courts if they believe that they are or have been tyrannized as a minority. He believes that many of us are the beneficiaries of this without knowing it and that much of the personal security Americans have is due to the Bill of Rights.

Other symposium speakers, however, argued that the specific provisions of the Bill of Rights, originally designed to regulate the interaction of the government with the individual, have been expanded to direct or even control the purely personal interaction of private individuals through the doctrine of "privacy" or "autonomy." One might argue that this broad interpretation of the Bill of Rights does not provide all Americans with an equal feeling of personal security, said Wilkins, par-

ticularly if a person is one of those "individuals" who has not yet been deemed an "individual" or if a certain right that a person deems "fundamental" has not yet been deemed "fundamental" by whoever is defining the terms at the time.

Wilkins quoted BYU Provost Bruce C. Hafen, who has said, "It is easy for the contemporary mind to forget that the concepts embodied in the Bill of Rights were originally intended to define only the political relationship between individual citizens and the [Government]—not the domestic and personal relationships among the citizens themselves."

This generalized "right of privacy" lies at the heart of the current role of the Bill of Rights, said Wilkins. He argued that even though the Supreme Court in *Griswold v. Connecticut* clearly recognizes a right of privacy, one cannot be certain of the precise constitutional niche for the result announced in that case. Possibly more troubling are questions pertaining to what the privacy right includes and who decides which rights are fundamental. There are currently two opposing views: the first approach would permit justices to *create* rights they deem fundamental; the second approach would restrict the right of privacy to rights that have been historically and traditionally recognized as fundamental. It is simply not clear, said Wilkins, which of the two approaches dominates.

Citing the example of *Bowers v. Hardwick*, Wilkins said that a majority of the Supreme Court adhered

closely to the second approach, concluding that "homosexual conduct was not entitled to heightened constitutional protection, because, far from being 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition,' homosexuality had long been rejected by Western culture as deviant behavior."

Justice Blackmun, by contrast, concluded that history and tradition were irrelevant, because state prohibition on homosexual conduct intrudes upon "the most comprehensive of rights and the right most valued by civilized men—the right to be let alone." In this context, autonomy—not history, tradition, or community values—determines the content of the privacy right.

In *Roe v. Wade*, the Court adhered to the first approach, deciding that the "right of privacy" included the right to terminate a pregnancy and that all considerations except the woman's own reproductive desires were irrelevant. As a result, the interests of all other individuals affected by a pregnancy (including the biological father and the unborn child), as well as society's traditionally held interest in protecting unborn life, were ignored. These divergent approaches to defining the content of the privacy right raise difficult questions for the future.

While many would champion the Court's decision in *Bowers v. Hardwick* or a likely reversal or limitation on the Court's holding in *Roe v. Wade*, others believe that these so-called

"victories" by the religious conservatives have distracted some on the religious right from less congenial developments by the Court in recent years. Frederick Gedicks, in his address, said that "the Supreme Court's recent treatment of the religion clause can only be understood as a product of the return to the 19th-century relationship of church and state, while retaining the rhetoric of 20th-century secularism." This, he said, "is the reason for a series of weird opinions—results aside."

Gedicks said he believes that 19th-century Americans generally understood the Constitution to require separation of church and state only at the institutional level (meaning that the constitutionally prohibited establishments of religion were created when the government coerced funding of a particular denomination or conformity to its practices). Beyond these measures, the people did not see any reason to restrict religion to private life. As a result, from shortly after the founding era until early in the 20th century, church/state relationships were governed by what Mark De Wolfe Howe termed "the de facto Protestant establishment," the premise being that Protestant values were the foundation of civilized society. These assumptions came under serious political pressure early in the 20th century.

This shift from the de facto Protestant establishment to secularism—or "secular neutrality"—plays itself out first in the free

exercise cases and then in the establishment cases, according to Gedicks. The free exercise clause is centered upon whether or not individuals can be excused from complying with laws that contradict their religious beliefs. This exemption permits believers to ignore any law that requires them to perform any act prohibited by their beliefs and, conversely, allows them to ignore any law that prohibits them from performing any act required by their religious beliefs.

In *Reynolds v. United States*, the Court refused to find a constitutionally compelled exception for Mormon polygamists. This important case was the first articulation of the belief-action doctrine, which essentially says that while the government may not punish people for their beliefs, it has full authority to regulate religiously motivated actions as long as it has a rational basis for doing so. As history has shown, the government can always come up with a good reason for regulating the actions of individuals. The belief action doctrine was perfectly tailored to enable state and federal governments to regulate and to penalize religions whose members strayed too far from the generally accepted cultural baseline of Protestant piety.

This doctrine was thought to have been dismantled by two more recent decisions. The first of these was *Sherbert v. Verner*, in which the Court ordered the state to pay unemployment benefits to a Seventh-day Adventist who refused to make herself available for employment on Saturday

(her Sabbath) as state law had required in order to receive these benefits. The Court in *Sherbert* held that the government could burden a fundamental right like the free exercise of religion only if it was protecting a compelling interest by the least intrusive means. In *Wisconsin v. Yoder*, the Court held that the Amish were not required to send their children to public school past the eighth grade, because it violated their religious beliefs. Here the *Sherbert* doctrine was further strengthened by requiring the state to "justify its denial of an exemption to religious objectors by a compelling interest."

Gedicks maintained that "both *Sherbert* and *Yoder* are consistent with the Warren and Burger Courts' respective emphases on individual rights," while *Reynolds* "clearly assumes that society is more important than the individual." The de facto establishment posited traditional Protestant values as the basis of society. Those who did not live in accordance with those values, such as polygamous Mormons, were "challenging the very foundations [of] society" and thus not deserving of any relief from law that "burdened their subversive religious practices." By contrast, the secular neutrality regime tries to "remain aloof from the choices that religious Americans make in their private lives." In this view, even those religious practices that would be viewed as subversive by the de facto establishment would be protected by secular neutrality unless they "clearly threaten important and legitimate state interests."

In *Employment Division v. Smith*, the more "conservative" Court "brought free exercise jurisprudence full circle by reaffirming the belief-action doctrine," said Gedicks. In *Smith*, the Court upheld a state's denial of unemployment benefits to two Native Americans who were dismissed from their jobs for smoking peyote as part of tribal religious rituals. The opinion expressly stated that the only protection offered by the free exercise clause was in its prohibition of laws motivated by a desire to disadvantage religion, on the theory that such laws impose an intentional burden, not merely an incidental one.

*Smith* did, however, approve of the legislative practice of writing religious exemptions into laws. Hence, there still remains a constitutionally permissible exemption under the establishment clause. Gedicks, who said he is alarmed by such an exemption, noted that this exemption may only protect politically powerful religions that are able to lobby successfully for exemptions, while the free exercise of politically powerless religions—those most in need of constitutional protection—will be wholly dependent upon the goodwill of political majorities. "*Reynolds* and *Smith* themselves are evidence that politically powerless religions will often fail to obtain legislative exemptions for their religious practices," he explained.

Evidence of this reliance on the goodwill of political majorities is found in opposition to the Religious Freedom Restoration Act,

designed to re-establish the *Sherbert/Yoder* doctrine by statute, which the LDS Church supports. The act is being opposed by politically powerful groups, such as the Roman Catholic Church, because they fear it could be used to bolster abortion rights, even if *Roe v. Wade* is overturned. Gedicks said he believes that while such groups can "afford to give politics a higher priority than survival," those religions with relatively little political power—like the LDS Church—may suffer greatly if the Court were to decide that any practice of a church had strayed too far from the generally accepted cultural baseline of the community as a whole.

As demonstrated by the differing viewpoints presented at the symposium, any interpretation of the Bill of Rights presents difficulties that must be addressed by both legal practitioners and members of society. These interpretations or ideals raise continuing and complex questions about the proper role of federalism in America and indicate a need to address the effect of modern interpretations of the Bill of Rights.

The symposium speakers helped listeners reassess their views of individual versus community rights and the role the Bill of Rights has played in providing (or taking away) those rights. Other Bill of Rights' issues involving the religion clauses will be the focus of the next annual meeting of the J. Reuben Clark Law Society and the BYU Law School Alumni Association, scheduled for October 9, 1992.

J. Reuben Clark Law Society  
J. Reuben Clark Law School  
Brigham Young University