

# CLERKING FOR GROWN-UPS: A TRIBUTE TO

## JUDGE ED CARNES

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In writing about the Honorable Ed Carnes—“my” judge, as the clerkship lingo tellingly puts it—I am confined by a constraint that is mostly of my own making, although Judge Carnes bears some share of responsibility for it as well. I will try to respect that constraint, but hope I will be forgiven for straying from it from time to time.

I would *like* to write a straightforward tribute to Judge Carnes of the kind that so many clerks have written for so many judges: affectionate, admiring, glowing—almost worshipful. I would paint him in warm hues as a stalwart defender<sup>1</sup> or extender<sup>2</sup> of the law. In this portrait, Judge Carnes would come across as both more and less than human: as a kind, decent father figure on the one hand, and a bold and dashing figure on the other, bestriding the world of the law like a Colossus.<sup>3</sup> The words “hero” or “heroic” would figure prominently.<sup>4</sup> Indeed, in many respects the urtext not

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1. This is the standard format for admiring portraits by former clerks for so-called “conservative” judges. *See, e.g.*, Richard W. Garnett, *Personal Reflections on the Chief*, 10 TEX. REV. L. & POL. 283, 287–88 (2006); Henry L. Parr, Jr., *Warren E. Burger: A Law Clerk’s Reminiscences*, 74 TEX. L. REV. 225, 226–27 (1995); Jeffrey S. Sutton, *Remembering Justice Scalia*, 69 STAN. L. REV. 1595, 1598–1600 (2017).

2. This is the format for admiring portraits of so-called “liberal” or “progressive” judges. *See, e.g.*, Susan Low Bloch, *Thurgood Marshall: Courageous Advocate, Compassionate Judge*, 80 GEO. L.J. 2003, 2003–04 (1992); Evan Caminker, *Morning Coffee With Justice Brennan*, 7 B.U. PUB. INT. L.J. 3 (1998); E. Joshua Rosenkranz, Foreword, *Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. 1, 5–7 (1999). Because both the legal academy and the world of elite law review editors lists leftward, this is a far more common format.

3. *See* WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2. In the clerkship culture, and the legal academic culture more generally, which is not much given to intentional irony and yet often falls prey to accidental irony, this line, which is delivered bitterly and as a warning, would be treated as straightforward praise.

4. *See, e.g.*, Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge’s Perspective*, 70 OHIO ST. L.J. 825, 825 (2009) (calling Ginsburg “a true American hero”). Rubin did not clerk for Ginsburg, but

only for law review tributes from former clerks to their judges, but also for a good deal of legal scholarship more generally, is the famous dedication of John Hart Ely's seminal book *Democracy and Distrust*: "For Earl Warren. You don't need many heroes if you choose carefully."<sup>5</sup> The clerkship culture is one of hero-worship.

The problem is that I have spent a decade and more criticizing this culture. To take a recent example, I have written on *Prawfsblawg*:

[T]here is a kind of extended or eternal adolescence problem in the American legal academy and profession, one marked especially by the clerkship culture and the tendency to speak worshipfully of one's "judge" for decades after one's clerkship has ended. The legal academy and profession tend to reject, at least by outward show but I think inwardly as well, the adage that no man is a hero to his valet. I think this is unhealthy and ultimately bespeaks a deep immaturity in the American legal culture, as well as a certain amount of insecurity and credentialism (a credentialism that takes the form of seeking greatness by association, and thus requires one continually to rekindle the flame at the altar of one's idol, so that one shines in the reflected light).<sup>6</sup>

I have suggested, by contrast, that a far preferable model can be found in Judge Richard Posner's memorial tribute to the judge for whom he clerked, Justice William Brennan.<sup>7</sup> That piece "acknowledged and praised Brennan's warmth and decency as a boss and a person,"<sup>8</sup> but also offered a "cool evaluation" of Brennan and his influence,<sup>9</sup> one that assessed not only the reasons for Brennan's success as a judge but also "the limits of that success."<sup>10</sup> As Posner noted, it ought to be possible for a former clerk to

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was a Supreme Court clerk (for Justice David Souter) and certainly does not stray in this tribute from the general norms of the clerkship culture.

5. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, at v (1980).

6. Paul Horwitz, *How to Mark Judge Posner's Retirement*, PRAWFSBLAWG (Sept. 3, 2017, 12:28 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/09/how-to-mark-judge-posners-retirement.html> [hereinafter *How to Mark Judge Posner's Retirement*]. For a more recent example, inspired both by current events and by this Essay itself, see Paul Horwitz, *Clerkships Are, Or Can Be, Just Jobs. Maybe it's Better That Way.*, PRAWFSBLAWG (Dec. 11, 2017, 9:58 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/12/clerkships-are-or-can-be-just-jobs-maybe-its-better-that-way.html> [hereinafter *Clerkships*].

7. See Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9 (1997).

8. *How to Mark Judge Posner's Retirement*, *supra* note 6.

9. Posner, *supra* note 7, at 9 (emphasis added).

10. *Id.*

discuss the judge for whom he or she worked in a way that “mingle[s] affectionate tribute with critical assessment.”<sup>11</sup>

There is nothing unkind about Posner’s memorial. Even so, the very fact that it is *critical*—that it treats Justice Brennan and his legacy as a fitting subject for measured, critical intellectual *assessment* rather than as an occasion for unstinting praise or an attempt to enshrine and entrench Brennan as a “constitutional hero”<sup>12</sup> for the ages—makes it stand out from the common run of clerk tributes. It is only conjecture, but I suspect that Posner’s short piece was not warmly received by other Brennan clerks, nor by the legal academics who make up a major part of the clerkship culture more generally.<sup>13</sup>

But those former clerks, for Brennan or others, who did not take kindly to Posner’s “cool assessment,” and certainly have not followed his approach in their own tributes, are wrong, and Posner was right. To borrow from myself again, federal judges hardly “require flattery, praise, and hero-worship.”<sup>14</sup> They already enjoy “[life] tenure, the robe, the large chambers, the deferential treatment of clerks and marshals and lawyers,” and other perquisites of the job.<sup>15</sup> “They have entirely too many uncritical valets.”<sup>16</sup>

The tendency of clerks to maintain a lifelong allegiance to their judges, and a lifelong commitment to burnishing their reputations, has a “distorting effect on what ought to be a more mature and independent and less personality-oriented, worshipful, elite-establishment-oriented legal culture.”<sup>17</sup> As that invaluable academic spoiler Pierre Schlag has written, “For many legal academics, the [judicial] clerkship is a defining moment—one from which they never recover. They become clerks for life.”<sup>18</sup>

The influence of the clerk-for-life model can affect and infect the legal academic enterprise in general. Whole legal academic careers are spent—with “spent” in this case meaning both “employed” and “wasted”—as

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11. *Id.* For a recent example of a tribute to a judge by a former clerk that combines “affectionate tribute with critical assessment,” see Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111 (2016).

12. See E. Joshua Rosenkranz, *Remembering a Constitutional Hero*, 43 N.Y.L. SCH. L. REV. 13, 13 (1999) (transcript of recollections of Brennan as part of a symposium that sought to “put [ ] together a program that befits a great man and a great jurist”).

13. See, e.g., *id.* at 25 n.32 (remarks of former Brennan clerk Roy Schotland scoring Posner for casting doubt on the practical legacy of Brennan’s seminal contributions to reapportionment jurisprudence). I was not in the legal academy at the time, but my subsequent experience as a law professor suggests that if Posner’s “tribute” to Brennan was not well-received, the evidence for that would be found less in print and more in faculty-lounge gossip and other such places.

14. *How to Mark Judge Posner’s Retirement*, *supra* note 6.

15. *Id.*

16. *Id.*

17. *Id.*

18. Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2056 (1993).

acolytes to the judge for whom one clerked years or decades ago. The clerk-for-life spends years writing serial justifications of that judge's worldview and decisions, or engaging in proxy warfare on behalf of the judge. The legal academic influenced by the formative experience of the judicial clerkship makes a "primal identification with the persona of the judge"<sup>19</sup>—his or her judge, to begin with, but judges more generally as well. This tendency "has very serious implications for the construction of the 'law' of the [legal] academy."<sup>20</sup> As Schlag writes, "In their identification with the organizing source-persona of the judge, legal academics engage in the legitimation and rationalization of judicial opinions."<sup>21</sup> They write briefs and apologia, not what I would consider true, deep scholarship. Law clerks for individual judges are sometimes known as "elbow clerks."<sup>22</sup> Many legal academics spend a lifetime as elbow clerks attached to the side of an invisible, nominal judge. Understandably, the ghost of a judge whom they continue to serve often bears a strong resemblance to the one they worked for in the dawn of their legal career.

The problem with this is not that the work produced by such clerks-for-life is necessarily bad or unproductive. Far from it. Ely's classic *Democracy and Distrust* has been described as an effort to provide the theoretical justification and refinement of the lifework of "his" judge, Earl Warren, and the jurisprudence of the Warren Court.<sup>23</sup> The result has been

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19. *Id.* at 2067, 2056 ("Not surprisingly, the 'law' of the academy bears the marks of the subject formation, the judge . . . . The judicial opinion and the judicial persona provide the implicit framing and orientation for the presentation and elaboration of the 'law' of the academy.").

20. *Id.* at 2056.

21. *Id.* at 2063.

22. *See, e.g.*, Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983) (distinguishing between "'elbow clerks,' who are chosen by and work under the direct supervision of a particular judge," and staff attorneys who belong to the central staff of a court and whose primary duties consist of preliminary screening of cases for the court as a whole).

23. *See, e.g.*, Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 153 (2004) ("The Warren Court ended in 1968, and John Hart Ely took up the cudgels in its defense. Ely expressed both unabashed admiration for Earl Warren and support for what that Court had done. He also saw the vulnerability of the Warren Court's project, and hence the need to justify that project in theoretical terms."); Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1365 n.15 (1979) (describing Ely's work as a "process-oriented apologia for Warren Court activism"). For a more complex description of Ely's work as an effort to work out a justification of *two* mentors—both Warren and Alexander Bickel, a Warren Court critic—see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle of Legal Theories*, 83 U. CHI. L. REV. 1819, 1826 (2016) (noting that *Democracy and Distrust* "developed a justification for 'representation-reinforcing' judicial review that attempted to square the Warren Court's apparent revival of natural law jurisprudence with the late-stage legal process theory of Ely's mentor, Professor Alexander Bickel"). For an implicit suggestion that more than one Warren Court-era clerk spent his or her whole career engaged in the task of justifying and defending the judge and court with which they identified, see David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 45 (2011) (arguing that "[t]he singular concern of those who studied the Warren Court was to find a domestic

described with ample justification as “one of our greatest projects of constitutional theory.”<sup>24</sup>

But even great work can be less than it could and should be, and even great thinkers can employ their skills in the service of lesser ends. So it is with clerkship culture and, insofar as judicial clerkships mold the elites within legal practice and the legal academy,<sup>25</sup> the American legal culture itself. The danger of the clerkship culture, as William Simon argued three decades ago, is that it threatens to “prolong the style of adolescence to which privileged Americans tend to become compulsively habituated.”<sup>26</sup>

Former clerks like to speak of the clerkship process as having been an important part of their maturation as lawyers and individuals.<sup>27</sup> But the “starry-eyed post-adolescents whom we call law clerks”<sup>28</sup> may remain at least somewhat frozen in that state well into, or even throughout, their professional careers. They may absorb, and perpetuate, the system and the pathways that were responsible for their own clerkships rather than stand outside and critique them. Their judges may deliberately select for and mold law clerks with a tendency to become lifelong acolytes and advocates for their views and their reputation as judges.<sup>29</sup> Molded in this fashion at an

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legal justification for the Court’s decisions,” and citing the work of two Warren Court-era clerks: Ely, who clerked for Chief Justice Warren, and Frank Michelman, who served Justice Brennan).

24. Friedman, *supra* note 23, at 153.

25. See William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129, 132–33 (1986) (noting the importance of clerkships to advancement in the legal profession, including law teaching). Simon argues that the clerkship’s career-advancing power has faded within the legal academy. See *id.* With the benefit of an additional 30 years, and on the basis of my own experience, I would say it has not faded much. It is true that other qualifications—published work most prominently, but also other qualifications, such as doctorates in other fields—have attained greater importance; no longer can a former Supreme Court clerk expect an offer of a plum teaching position simply by virtue of having clerked. But clerkships remain an important credential for would-be law professors, and the number of applicants competing for teaching jobs makes it possible for law schools to insist on a clerkship as well as other credentials.

26. *Id.* at 136.

27. See, e.g., Evan Caminker, *Morning Coffee with Justice Brennan*, 7 B.U. PUB. INT. L.J. 3, 3–4 (1998) (crediting Justice Brennan with “foster[ing] the maturation and inspiration” of his clerks); Max Nathan, Jr., *Tribute to Judge John Minor Wisdom*, 69 TUL. L. REV. 1431, 1437 (1995) (“[O]ne of John Wisdom’s most enduring legacies will be the long line of bright, capable young men and women who have learned, matured, and developed at his knees.”). One hesitates to read too much into a figure of speech, but the filial phrase “at his knees” is indicative of the problem I am discussing here.

28. Hon. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 407 (1994).

29. See, e.g., Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 742 (2003) (“By cultivating a platoon of overachievers, justices like Holmes, Brandeis, Stone, and Cardozo effectively created a corps of highly-placed alumni who would for years sing their praises and burnish their reputations.”); *id.* at 740 (“Great judges project their influence into the future—in ways that are beyond the printed word—through their law clerks.”) (quoting ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 145 (Harper & Rowe 1965)); I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119, 121 (1999) (arguing that Holmes fostered an approach to clerkships involving an “intergenerational bargain” in which “wisdom,

impressionable age and stage in their careers, and perhaps even selected either for their predisposition to agree with the judge<sup>30</sup> or for their willingness to attract and above all *serve* a series of powerful mentors,<sup>31</sup> the objects of this shaping process may not even *recognize* the extent to which they have been thus molded, and are unlikely to object to it, at least publicly, even if they do recognize it. They tend to honor their end of the “intergenerational bargain.”<sup>32</sup>

This phenomenon, I suggest, is part of and contributes to a certain degree of immaturity in the American legal profession and culture. That immaturity has multiple causes. It may have to do with our approach to history, which often treats “the Founders’ relationship to us [as] that between wise parents and immature children”<sup>33</sup> and positions us permanently as a “generation of midgets.”<sup>34</sup> It may have to do with path-dependence and the reproduction of hierarchy in the legal profession.<sup>35</sup> It may have to do with influences and traditions, including a preference for generalists over specialists and persuasive rhetoric over social science, that lead American law to “lag[] alarmingly behind a wave of genuine

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advice, and a certain amount of social capital are exchanged by an elderly judge for the companionship and affection of an ambitious young lawyer,” resulting in lifelong loyalty and a vision of Holmes as “a heroic American that his apprentices would one day project to the public and to posterity”); *id.* at 122 (“Holmes deployed mentorship as a weapon in his campaign to enhance his judicial reputation, and in so doing inspired other American judges at the state and federal levels to do the same.”); William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1761 (2009) (noting the pathmaking approach of Justice Louis Brandeis, who “applied his liberalism to the office of the Supreme Court clerk by transforming young men into acolytes who would assist him, while at the Court and later, even after his own death, in achieving [his] liberal ends”).

30. See generally David J. Garrow, *Acolytes in Arms*, 9 GREEN BAG 2D 411 (2006).

31. Success at winning judicial clerkships does not favor the hermit. In addition to academic qualifications, successful clerkship applicants generally require strong recommendations from law professors whom they have served and perhaps cultivated, and been cultivated in return. Such recommendations are more likely to go to law students who have worked for or formed close relationships with their professors, a process that is repeated if the clerk forms a close relationship with his or her first judge and secures a recommendation for the next, “higher” clerkship. The clerkship culture, and the clerkship process, arguably *selects* for individuals with a tendency toward serving and advancing powerful senior figures.

32. Messinger, *supra* note 29, at 121.

33. Jack M. Balkin, *The American Constitution as “Our Law,”* 25 YALE J.L. & HUMAN. 113, 147 (2013). Balkin argues against this that “each generation must see the Constitution—in part—as the work of its own hands.” *Id.* But even those who believe they see the Constitution this way may in fact have internalized a similar parental relationship with the judge whom they served, one that is less remote in time but similar in substance.

34. Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997). For observations on this point, see Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 497–98, 498 n.231 (1998).

35. See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

professionalism” in other areas of human activity.<sup>36</sup> It may be related to the American tendency to see law in heroic political and partisan terms, which contributes to its energy but retards disinterested thinking about law as a practice, often mundane, that is just one of many vehicles for social action and organization and not always the best one, and that is in need of rationality rather than rationalization or glorification. It is almost certainly connected to the general tendency of legal academics, and many practitioners, to view the law from the perspective of the judge.<sup>37</sup> Perhaps the problem is a general one, characteristic of American culture and society as a whole, and its appearance in law is just a symptom of a larger tendency.<sup>38</sup>

Certainly some—especially, as I have suggested, those who were molded by this system and have achieved positions of high status within it—will disagree with my conclusion, perhaps defensively and hostilely, and perhaps in good faith. Nevertheless, my strong impression of American law and the legal profession and academy is of an enduring adolescence, a failure to achieve full adulthood and independence. And the clerkship culture is an important part of this failure.

That adolescent tendency is especially striking to me in my main area of study, constitutional law and theory. As I have already observed,<sup>39</sup> John Hart Ely’s masterwork *Democracy and Distrust* is in substantial part an

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36. Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 1 (1998); see *id.* at 15 (“[T]he entanglement of law with ethics, and politics, and rhetoric may indeed be permanent, and the path to complete professionalization [in the law] therefore permanently obstructed.”).

37. See Schlag, *supra* note 18.

38. I do not speak entirely *de haut en bas* here. Part of my perception has to do with having been born, raised, and educated outside the United States, and so it is an outsider’s perspective rather than that of a condescending elite insider. (Doubtless, I am not unmarked by that status either, however, even if I came to it from the outside.) Insofar as I came to the United States and have built my life here because I was attracted to it—to its energy and ambition and even to its immaturity—my conclusion is sincere and not intended to be simply sneering or dismissive. I note that some Canadian friends, including both those who clerked for the Supreme Court of Canada and those who work closely with former clerks, responded to some of my semi-private writing on this subject—that is to say, Facebook posts—with bewilderment at the whole American culture of clerks’ hero-worship of their judges. They simply did not think of their judges that way. They understood themselves as employees serving their judges, albeit in an important role, and did not romanticize either their judges or the clerkship experience. Although the difference is surely *au fond* a cultural one, a number of concrete factors no doubt contribute to it. They include the fact that Canadian Supreme Court judges are generally appointed to the Court at an older age; that they serve for blessedly limited tenures and are subject to a mandatory retirement age; and that although there are certainly Canadian legal elites, the culture is less obsessed with credentialism, prestige, and the fine gradations of prestige and elite status that enable and encourage American legal elites to draw absurd distinctions between, say, the “fifth-ranked” American law school and the “ninth-ranked” school. Given that the Canadian Supreme Court and the Canadian legal system, including its system of legal education, function at least as well as, and perhaps better than, the corresponding American systems and institutions, this observation should at least suggest to critics of this Essay, and root-and-branch defenders of the American clerkship and judge-exalting culture, that the American way of doing things is hardly the *only* way, or necessarily the best one.

39. See *supra* p. 666.

effort to defend and rationalize the Warren Court, and thus Ely's own former boss, Earl Warren. Its emblem is that book's dedication to Warren as Ely's great hero. One finds similar sentiments in Gerald Gunther's statement, delivered when he was well into his sixties, that his former boss Learned Hand "remains my idol still."<sup>40</sup> Although much of constitutional theory since *Democracy and Distrust* has involved critique or rejection of Ely's *theory*, it is remarkable how much of it implicitly adopts Ely's apologetic *mission*.

It is a commonplace that "[t]he purpose of constitutional theory is largely justificatory,"<sup>41</sup> and that "the cottage industry of constitutional theory" frequently consists of "apologetics."<sup>42</sup> Of course, many of these theories offer, or purport to offer, justifications for particular approaches to constitutional interpretation, or justifications of judicial review as such. Such works are, or purport to be, derived from first principles, or history, or other sources that are not dependent on any given person or moment in the Court's history.

As a practical and biographical matter, however, many constitutional theories and theorists are actually attempting to justify the work of *particular* judges, justices, and courts. Judges have neither the time, the inclination, nor necessarily any particular skill for engaging in theoretical justification of their decisions. They have to decide cases in a timely fashion, and it is enough that they do so. Academic theorists of constitutional law come along afterwards and "refine the raw materials" provided to them by the judges through their decisions.<sup>43</sup> "[C]onstitutional theorists develop justificatory theories that provide a more comprehensive account of the judges' actions than the judges themselves could offer."<sup>44</sup> They may hope to guide and constrain the future practices of those and other judges, or simply to "provide ammunition for the less theoretical

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40. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, at xviii (1st ed. 1994); see John F. Wirenius, *Helping Hand: The Life and Legacy of Learned Hand*, 25 SETON HALL L. REV. 505, 526 (1994) (questioning "Gunther's insistence on burnishing Hand's tarnished liberal halo" and suggesting that "Gunther's admiration for his subject may have led him to cling to Hand's reputation for liberalism, to overestimate the degree to which Hand stood for values which Gunther himself holds"); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 520 (1994) ("I would rate Hand's contribution to constitutional thought slight. Gunther's pretense to the contrary is an aspect of the hero worship that informs the book.").

41. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 561 (1999).

42. L.H. LaRue, *The Self That Governs*, 5 GREEN BAG 2D 225, 226 (2002).

43. Mark V. Tushnet, *Judges and Constitutional Theory: A View From History*, 63 U. COLO. L. REV. 425, 426 (1992). Much of Tushnet's essay consists of the argument that "the relation between constitutional theory and judicial practice" is both more complex and more limited "than the conventional account indicates." *Id.* at 425, 435. I agree, but the point is not relevant to my concerns here, which have to do with the academic and not the judicial enterprise.

44. *Id.* at 426.

combatants” on and off the bench.<sup>45</sup> At the least, they may desire to provide a firmer grounding for and justification of what the judges have already done.<sup>46</sup>

For Ely, and a host of theorists of the same generation, the justificatory program had to do with the Warren Court. Ely wrote to defend Warren and his Court’s work; Frank Michelman attempted to articulate—or create after the fact—“Justice Brennan’s constitutional philosophy”; and so on.<sup>47</sup> That program has set the pattern for much that has followed, with later theories and theorists aiming to “explain” and defend other courts and individual judges and justices.

One element of this phenomenon in the modern era is the focus on swing justices—first Justice O’Connor, and now and especially Justice Kennedy. Thus, Cass Sunstein’s brief in favor of “judicial minimalism” “help[ed],” or perhaps sought, “to produce a reconstruction and defense of the claim that seems to me to animate much of Justice O’Connor’s work,”<sup>48</sup> along with that of other key justices of her era—and, not incidentally, of various cases that he wishes to defend.<sup>49</sup>

The *reductio ad absurdum* of this tendency is the vast literature within academic constitutional law and theory whose primary goal seems to be to defend and shore up Justice Kennedy and his vital but, to put it politely, “undertheorized” decisions on LGBT rights, same-sex marriage, and other issues.<sup>50</sup> Of course, most of these writers are not former Kennedy clerks.

45. Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 771 (1987).

46. See Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1184 (2011) (“[T]he primary function of constitutional theory is not to motivate constitutional doctrine but to validate it.”).

47. Fontana, *supra* note 23, at 25; see also note 23 and sources cited therein.

48. Cass R. Sunstein, *Problems With Minimalism*, 58 STAN. L. REV. 1899, 1903 (2006); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9 (1999).

49. See Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2298 (2001); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 9 (1996) (defending the minimalist bona fides of the Court’s decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Virginia*, 518 U.S. 515 (1996)); see also Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 830 (2008) (defending *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and its refusal to overrule *Roe v. Wade*, 410 U.S. 113 (1973), on the minimalism-related ground that judges may come to “[i]ncompletely theorized agreements” that certain cases are justified and ought not be overruled); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1742 (1995) (same).

50. See, e.g., William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 CATO SUP. CT. REV. 111, 132 (2014–2015) (“In my view, a pluralism-facilitating approach to judicial review . . . help[s] explain features of [Justice Kennedy’s *Obergefell*] opinion that are otherwise elliptical”); Jane S. Schacter, *Obergefell’s Audiences*, 77 OHIO ST. L.J. 1011, 1017–18, 1022 (2016) (acknowledging that Justice Kennedy’s gay rights decisions “have a shared quality of doctrinal obscurity” and that their “ambitious rhetoric is not matched by doctrinal clarity or strength,” but arguing that Kennedy and the Court were attempting to reach and persuade a wider public audience, and that “[t]his self-conscious mission of instruction offers explanatory context for *Obergefell*’s emphasis on rhetoric over doctrine”); Tobias Barrington Wolff, *The Three Voices of Obergefell*, 38 L.A. LAW. 28, 32

But their project—pick a favored justice, or a justice responsible for some set of favored outcomes, and build a constitutional theory or approach around his or her—is consistent with the general point I am making here. Insofar as it consists of seeing the law through the judge’s eyes, and serving as something between a nominal law clerk and an apologist for that judge, that project has something of the eternal adolescent or assistant to it, even if there are practical reasons to pursue it.

In short, even as many scholars have rejected or criticized Ely’s *book*, they have pursued the project symbolized by its *dedication*, with their own or some other judge substituted as the object of hero-worship and apologetics. Personally, I prefer the reverse: I think Ely’s *substantive* arguments have much to recommend them,<sup>51</sup> and that pursuing judicial hero-worship as a scholarly project or motivation does not. We should take more inspiration from his book and far less from his dedication.

Some of this lifelong, somewhat adolescent attachment to judges—particularly the judge for whom one clerked, although this can set a general pattern for a scholar’s life and work—has to do with two particular and perhaps related factors stemming from the clerkship and the judge-clerk relationship itself. Many judges, sincerely or otherwise (I am happy to concede their general sincerity, although judges may also be aware of and exploit the strategic, reputation-enhancing value of this approach),<sup>52</sup> cultivate a close and lifelong relationship with their clerks. The literature is replete with law clerk remembrances of judges who treated their law clerks as their “family.”<sup>53</sup> Especially given that such relationships begin at a

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(2015) (defending the “poetry” of Justice Kennedy’s opinions in *Obergefell* and other key gay rights decisions as “play[ing] a vital part in realizing the promise of *Romer*”); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 169 (2015) (describing Kennedy’s decision in *Obergefell* as “fashion[ing] a fully realized vision of how liberty analysis should proceed”). See generally Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1443–44 (2001) (noting a “cottage industry among liberal law professors devoted to rewriting cases [whose outcome they favor] that seem to have been inadequately reasoned,” and noting that it would be perfectly possible and likely for conservatives to undertake similar post-hoc justificatory projects); Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 107 (2007) (“Swing Justices tend to spawn a cottage industry [of academic and other work] purporting to interpret swing opinions but amounting to little more than paeans to the powerful.”). In fairness, it is also true—and not without reason—that “[a]ttacking Justice Kennedy’s opinions for sloppiness and lack of rigor had become a cottage industry even before *Obergefell*.” Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 961 (2016).

51. See, e.g., Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in Adler v. Duval County*, 63 U. MIAMI L. REV. 835 (2009).

52. See, e.g., Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1352 n.119 (2005) (one way for judges to “burnish their reputations” is “to hire excellent law clerks who, presumably, think highly of the judge and subsequently cultivate the judge’s image in academia or other circles”).

53. The examples are truly too numerous to mention. See, e.g., John David Fassett et al., *Supreme Court Law Clerks’ Recollections of Brown v. Board of Education*, 78 ST. JOHN’S L. REV. 515, 523 (2004) (recollection of former Frankfurter clerk Frank Sander) (“[H]e had no children, so his law

formative point in the law clerks' careers, the loyalty, and the spirit of the valet or protégé, that is cultivated during the clerkship can last for decades.

The other factor is the sense of common ideological or political goals that can exist between a judge and his or her clerks. Judges or Justices may and, on the evidence, increasingly do select law clerks who share their basic ideology and goals.<sup>54</sup> That tendency is enhanced by the Justices' frequent use of "feeder judges" on the lower courts, who may themselves be well-known as leading conservative or liberal judges and who will attract similarly inclined clerks. Their success in placing law clerks with the Justices will enhance or entrench this tendency toward ideological kinship between judges or Justices and their law clerks. It will also be enhanced by the increasing number of indicators of or proxies for ideology that appear on would-be law clerks' applications, including association with the (generally conservative) Federalist Society or (generally liberal or progressive) American Constitution Society, the mentorship of particular ideologically oriented law professors, and internships and other work for various groups on various issues.<sup>55</sup> Law clerks who share their judge or Justice's sense of a liberal or conservative judicial "mission"—and who may be selected for that reason and encouraged in that thinking—are more likely both to have a strong sense of loyalty and kinship to the judge for whom they clerk and to persist in that view for years.

A third factor, harder to pin down but no less real, is the nature of elite lawyering, lawyers, and law clerks and their selection in the United States. While elite status in an already deeply hierarchical and elite-status-seeking

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clerks really were part of his family and there was a very close relationship between us and the Justice.”); David G. Leitch, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 20, 22 (2005) (Rehnquist clerks were “privileged to consider ourselves members of the extended family”); Hon. Robert E. Payne, *The Honorable Robert R. Merhige, Jr.: A Colleague Remembered*, 40 U. RICH. L. REV. 23, 25 (2005) (“Judge Merhige’s extended family included 56 law clerks whom he regarded as his children. He nurtured them, helped them in their careers where he could, and kept them close to his heart always.”) (quoting from a memorial resolution of the Judicial Conference of the United States Court of Appeals for the Fourth Circuit); Stephen Wermiel, *Justice Brennan and His Law Clerks*, 98 MARQ. L. REV. 367, 383–85 (2014) (discussing the strong familial bond formed between Brennan and his law clerks and the way in which annual clerk reunions served as “a point of unity”). See generally Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 106 (2009) (noting that “[m]any Justices cultivate intense bonds of affection and loyalty” with their law clerks).

54. See, e.g., Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 335 (2014) (noting an increased tendency since the mid-1970s for “liberal Justices to hire clerks whose lower court service was with liberal judges and a corresponding tendency for conservative Justices”); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 355–56, and citations therein (noting a “markedly stronger” tendency since the 1990s for “Justices to take ideology into account” in hiring law clerks).

55. See generally Baum, *supra* note 54; Garrow, *supra* note 30.

profession<sup>56</sup> is likely to indicate high performance at a highly ranked law school and *may* indicate a high level of intelligence, it is not synonymous with independence of mind or breadth of experience.

Nor are the fruits of clerkships associated with that status necessarily evenly distributed to the independent-minded and the less independent-minded alike. Famously, former President Barack Obama, already interested in pursuing his own ambitions, turned down the opportunity of a clerkship with a feeder judge, a decision his friends and classmates considered crazy.<sup>57</sup> Would-be law clerks may be especially ambitious; conventionalist in their approach to amassing credentials and accordingly narrow in their life experience, having moved without pause from one elite training ground to the next; eager to experience a relationship with a mentor and skilled at cultivating and flattering such figures; and prone to over-identify with such figures at the expense of their own independent growth and development.<sup>58</sup>

The combination of these factors does not lead inexorably to bad people, bad law clerks, or (if they take the academic route) bad law professors. It *certainly* does not mean they will be unintelligent, in a profession that often places extreme and perhaps undue value on intelligence, especially given the possibility that it will be a glib and facile form of intelligence.<sup>59</sup> The lawyers and law professors who emerge from this process may be superb, although one may ask: superb at *what*, and by what metric?

To the extent that anyone other than Judge Carnes reads this (and, if I know him at all, he may well have lost patience already and put down this Essay), it is likely to be my fellow legal academics, who, as I have

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56. See generally Olufunmilayo B. Arewa, Andrew P. Morriss, & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941 (2014).

57. See DAVID J. GARROW, *RISING STAR: THE MAKING OF BARACK OBAMA* 391–92 (2017).

58. Cf. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 193 (1998) (“[L]aw clerks are professional neophytes and occasionally sycophants who have just finished law school, have little knowledge of or experience in the law, and are often selected by judges on the basis of their similar political outlooks.”). Former Judge Alex Kozinski (on whom more later) has written of the clerkship interview that judges want independent thinkers and thus that “[w]hile enthusiasm and genuine expressions of interest make an interview more enjoyable and improve the applicant’s chances, a student who crosses the dangerous line into sycophancy, or who is too eager to agree with the judge’s views, is probably digging a syrupy grave for himself.” Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1726 (1991). This may moderate my point but also supports it: The successful clerkship applicant, on this view, is by implication skilled at showing just the right amount of “enthusiasm and genuine expressions of interest” without either “cross[ing] the dangerous line into sycophancy” or being disagreeably different from the judge in his or her views. *Id.*

59. See generally Martha Nussbaum, *Cooking for a Job*, 1 GREEN BAG 2D 253 (1998). Obviously, all things considered, one wants intelligent lawyers and legal academics and may consider that a basic qualification. But there are different forms of intelligence. They may be more or less deep, self-critical, independent, questing and questioning, and so on. And intelligence is, of course, no guarantee of either wisdom or common sense.

suggested, are likely to model some of the behaviors and tendencies I have described. Although I am willing to draw their disagreement, I have no desire to offer them gratuitous insults. Moreover, as I am one of them, whatever I write here constitutes self-criticism as much as it does criticism of others. Nevertheless, there is no guarantee that they will be the *best* possible law clerks, according to some measures, let alone that the tendencies and traits that won them a clerkship will lead them to become the best possible legal *academics*. The qualities it takes, in our credential-obsessed profession, to become a law clerk or a law professor are not necessarily the same qualities that lead one to become the most mature or independent clerk—or law professor. One may worry to the contrary, to return to Schlag’s point, that their traits make them “clerks for life,” inside and outside of the legal academy.

This discussion—or digression, if you prefer—brings me back to Judge Carnes and my opening suggestion that he bears some responsibility for my inability to write a straightforward paean to him. I offer these observations with some care, and some concern lest they be misunderstood, by him or by others. Nor do I want to simply project my own views and values onto him. But I would suggest that the qualities that made my clerkship for Judge Carnes less than the “ideal” clerkship that is often described by others, especially in their flattering tributes to “their” judges, were qualities of profound personal and professional value in the long run.

For one thing, one understood that clerking for Judge Carnes was a *job*. To serve as his law clerk was to assist him in his duties: nothing more and nothing less. Judge Carnes took, and takes, his job very seriously, but understands that his job is just that.<sup>60</sup> The workload being what it is, he certainly took his *work* home with him, but that is not quite the same as saying he took his *job* home with him, let alone his judicial office. I think he takes his job seriously and loves it, but I do not think he *lives* for it. I am not sure I would say that of every federal judge, including some Justices who seem determined to leave their chambers feet first.<sup>61</sup> The law is

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60. Cf. William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U. COLO. L. REV. 1291, 1294 (2003) (“Being a Justice of the Supreme Court of the United States, [White] explained, was ‘just a job.’”). I could no more imagine Judge Carnes than Justice White inviting a reporter to sit with him on the day of the announcement of a decision as he compared himself grandiloquently to “Caesar about to cross the Rubicon.” Devins & Baum, *supra* note 54, at 349 (quoting Terry Carter, *Crossing the Rubicon*, CAL. LAW., Oct. 1992, at 39–40).

61. If I were to make a personal list of the most important modern Supreme Court justices, I would place Justice David Souter at or near the top of the list, for the simple reason that he actually retired from the Supreme Court at a reasonable age and after a reasonable length of time (just under 20 years) on the Court. His actions offer the important, if often ignored, lessons that while judicial service, including service as a Supreme Court justice, is an important responsibility and an honor, it need not be the whole of or the apotheosis of one’s life; that life tenure is not a *requirement* that one serve for life; that a desire to preserve one’s judicial legacy through sheer stubborn longevity on the Court is not

important. But so are playing the drums, and bowling, and Hank Williams, and barbeque, and one's community. There are more ways to have and shape a life, and to contribute one's talents, than through lawyering—or judging. There is a time to put down one's papers and pick up something else. Judge Carnes's law clerks worked hard, or at least were reputed to do so according to the clerks of other Eleventh Circuit judges. (I found the job demanding, but not nearly as all-consuming as legal practice at a large law firm.) But they were not encouraged to think of being a law clerk as a twenty-four-hour job, either in terms of the labor required or in terms of one's *sense* of the job. When the work was done, it was time to go home and do something else, not to brood on one's own importance, on the stakes of the day's work, or on anything else. It was important work; but it was still just work.

Surely related to this is that, while we liked him and I think he liked us, neither Judge Carnes nor his clerks thought in terms of or enacted a “familial” relationship. He already has a family, and is not looking for another one. We were his law clerks—also known as “employees”—not his second family.

This should not be misunderstood, not least by the Judge himself, or by those readers who are contemplating applying for a clerkship with him. We had a good time and got along well together—provided we got our jobs done. As with most clerkships, there was the occasional outing (in our year, most notably, the opening of a museum in Montgomery dedicated to the blessed memory of Hank Williams), many a lunch (including some wonderful outings for Alabama barbecue), and various courthouse events. My memories of the clerkship year are very positive.<sup>62</sup>

But the general mythos of the judicial clerkship as “family” is incredibly pervasive. Just as winners write history, so clerks whose judges cultivated a familial or mentoring relationship with them are the ones most likely to write the tributes that appear in law reviews, even if those kinds of relationships are rare in the federal judiciary and its clerkship system as a whole.<sup>63</sup> It can thus be a surprise to the neophyte clerk to discover that you

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necessarily a virtue or early retirement a vice; and—if this were still needed after the lessons of Justice William Douglas's tenure—that one's judicial legacy, and the lessons taught to other justices, can have as much to do with the manner of one's leaving the bench as with one's behavior on it. “Important” is not the same thing as “influential,” of course, and there is not much current evidence that other justices have been influenced by Souter's choice.

62. As with many or most clerkships, many of those fond memories concern not just the judge but his “judicial assistant,” Blanche Baker, although that label does not do full justice to how essential Blanche was to his work, having served with him even before he took the bench. She was and is one of the finest, warmest people I have ever met, and it is a privilege to know her. I am confident that all of Judge Carnes's clerks would agree.

63. On the Supreme Court, Justice Byron White, though doubtless friendly with his clerks and open to debate and discussion, apparently had a more work-oriented and formal relationship with them

are *not* a member of your judge’s “chambers family,” but were actually hired to be of some specific use, a tool to the hand of the individual with the actual judicial commission. The discovery that you are simply one of four or so fine but fungible young individuals, chosen to do a particular (if particularly interesting and enviable) professional job for a particular year, and not to enter history or join a second family—that you are useful but not special—can come as a letdown in the face of so many tributes trumpeting the clerk-as-substitute-son-or-daughter narrative. It can even be a disappointment.

With the benefit of the years, I can say emphatically that it should not be seen as a disappointment, but as a virtue and a valuable learning experience of its own sort. What we may have lost in not having the kind of judge who embraced and “cultivated” his clerks, we certainly gained in independence, perspective, and realism. Other than the image of the gruff but fairly good-humored boss, we did not feel the need to imbue Judge Carnes with any sort of mythos or grandeur, and his homespun style, in person and in print, would have made it hard to do so in any case. We saw our job as taking an assisting role in discussing and disposing of cases, not engaging in epic moments in history or “crossing the Rubicon.” That is how most judges understand their jobs—and should. We may have been charmed by him, but we understood that it was our job to work for him and not his to charm us. We may have worked on important cases, but it was the work that counted. No glow of importance attached to us, or him, by virtue of the nature of particular cases.

And, of course, most cases, however important they may be to the people involved, are not grand or “important” in a world-historical sense. They are mundane: more or less difficult, but still concrete disputes and

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than many other Justices of his era. This, one former clerk has suggested, helps account for the fact that his reputation shines less brightly than that of some of his colleagues. See David C. Frederick, *Justice White and the Virtues of Modesty*, 55 STAN. L. REV. 21, 21–23 (2002) (describing White’s simple relationship with his clerks); *id.* at 24 (“[White] did not work to plant his law clerks in places that could solidify his place in history. Rather, he expected his law clerks to make their own way, as he had, though with the substantial benefit provided by a clerkship with him. Consequently, on his retirement and on his death, no legions of intellectual adherents mourned his passing. The reaction has been respectful, but decidedly muted.”). Some White clerks, perhaps accurately and perhaps unconsciously echoing the expected law-clerk narrative, have spoken more fulsomely of their time with him, but even then in tellingly modest terms that fairly describe my own sense of a clerkship with Judge Carnes: “Although reserved in demeanor, the Justice managed to convey to his clerks the genuine warmth he felt for them.” Kevin J. Worthen, *Shirt-Tales: Clerking for Byron White*, 1994 BYU L. REV. 349, 361 (1994); see also David M. Ebel, *Justice Byron R. White: The Legend and the Man*, 55 STAN. L. REV. 5, 7–8 (2002) (“[White] never sought to be a mentor to his clerks (though many, including myself, came to look upon him as such). . . . This led to a bit of a disconnect with many of his law clerks. As young, impressionable law clerks, most of us desired—even yearned for—a mentor. . . . The only problem was that he viewed such teachings on these personal matters as an unwarranted intrusion into our lives (and perhaps into his).”).

legal questions to be disposed of before one moves on to the next case. The judge or law clerk who brings an epic sense of glory or history to these tasks must perform bring it him- or herself, with a touch of or taste for self-dramatization. It is not inherent in the workaday task of deciding cases. We saw ourselves as part of a working judicial chambers, not more or less than that. We did not see ourselves as co-stars in a judicial epic.

This leads to my final point. A couple of paragraphs above, I deliberately used the word “independence,” and just as deliberately omitted words like “mission.” It is evident that some judges and justices are committed to judging as a mission. That mission is obviously often tied to deeper views of justice and judicial method, including the nature and interpretation of the Constitution. To be sure, it is rarely if ever *nakedly* political. Judges are not immune from politics by any means, but neither are they free to *write* in a purely political fashion. Fairness and charity require us to say that for many judges, what it means to be a “political” judge is not to be a shallow partisan, but to fight for a vision of justice that they understand to be demanded by or immanent in our law. Insofar as they are fighting for a vision of justice that calls on deeper substantive political and constitutional values, however, neither is it uncharitable to say that some judges see their mission as importantly “political” in some sense. Some judges certainly see that mission as involving the defense or extension of principles of justice against forces—other judges, presidential administrations, Congress, and perhaps the public culture—that threaten to thwart the achievement of (their conception of) “justice.”<sup>64</sup> Their vision of the judicial mission is thus grand, epic, perhaps a little self-important,<sup>65</sup> and combative or adversarial.

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64. For illustrative self-descriptions, drawn from the writings of one judge, that suggest both this sense of mission and the combative nature of this vision, see, e.g., Hon. Stephen Reinhardt, *Life to Death: Our Constitution and How it Grows*, 44 U.C. DAVIS L. REV. 391 (2010); Hon. Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L.J. 18 (2003); Hon. Stephen Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat From Fairness*, 14 HARV. J.L. & PUB. POL’Y 142 (1991); Hon. Stephen Reinhardt, *Liberal Judges*, FED. LAW., Feb. 1997, at 46. I do not mean to pick on Judge Reinhardt. (I should note, too, that this contribution was written, but not published, before Judge Reinhardt’s death in March of this year.) Indeed, although my own sense of the judicial role differs from his, I do not mean this as a criticism or as a normative point at all. In any event, he might have welcomed such a description rather than rejecting it. I also do not mean to suggest that this sense of mission and of judicial combat against one’s adversaries on the bench is limited to “liberal” or “progressive” judges and does not include conservative or libertarian judges. Far from it.

65. This sense of self-importance and combativeness can infect the clerks as well, of course. See Baum, *supra* note 54, at 347 (noting evidence of “strong rivalries between sets of conservative and liberal law clerks” on the Supreme Court). See generally Nelson et al., *supra* note 29, at 1766. It is evident, for example, in the heavily clerk-centered perspective of Bob Woodward and Scott Armstrong’s notorious book *The Brethren: Inside the Supreme Court* (1979). It is also on display in the behind-the-scenes account in *Vanity Fair of Bush v. Gore*, 531 U.S. 98 (2000), which was based on extensive leaks from law clerks from the October 2000 Term. Those clerks justified breaking their duty of confidentiality with the rather grandiose and self-centered explanation that the Court had “broke[n]

That sense of mission can affect their selection of law clerks, the role of those clerks, and the clerks' own conception of their mission. Judges of this stripe treat "[t]he judge-clerk relationship [as] the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair."<sup>66</sup> They seek law clerks who are "single-mindedly committed to easing the judge's burden and advancing *the judge's cause* in the multitude of disputes and disagreements that naturally arise on a collegial court."<sup>67</sup> Their clerks are expected to be "loyal and unambiguously committed" to them.<sup>68</sup> By and large, given their sense of themselves as engaged in a mission, and as having a "cause" to advance, one that is defined in part by opposition to their ideological adversaries on the court, they seek ideological kinship from their law clerks, and vice versa.<sup>69</sup> At the level of elite law schools and elite judges, that phenomenon is facilitated by the network of relationships between judges and like-minded elite law professors, and by the numerous, albeit imperfect, proxies for ideology—

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its promise to them" by "deciding the case as it did," and that "[o]ur secrecy was helping to shield some of those actions." David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310. Their self-proclaimed sense of duty, of the importance of their own role in the process, and of the Court's breach of its "promise" to them apparently did not lead them so far as to actually speak to Margolick without a guarantee of anonymity. High and noble duties and a perceived "affirmative duty to speak out" apparently have their limits and do not preclude professional self-preservation. David Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863, 865 (2005). As with any act of civil disobedience, their actions, and their proclamation that duty compelled them to speak, would have been much more powerful had they done so openly and publicly and with a willingness to bear the consequences of breaching confidentiality.

66. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

67. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991) (emphasis added).

68. Wald, *supra* note 66, at 153.

69. See, e.g., Stephen Reinhardt, *Good Judging*, 2 GREEN BAG 2D 299, 299–300 (1999) (describing the post-clerkship careers of his clerks and describing himself as being "interested in having law clerks who will go out and do things in society that will benefit it"). Given the post-clerkship careers he spotlights, it is evident that one could add to that sentence the implicit message "that will benefit society in a way that I understand as socially beneficial." See also Hon. Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 2D 57, 57–58, 63 (1998) (noting that although Kozinski hired some liberal law clerks, and recognized the value of clerks who are able to argue with their judges, Kozinski had a special interest in "conservative and libertarian law students" and believed that "having a clerk who basically agrees with me makes for an easier year," and paraphrasing a similar view from Judge Reinhardt); Justice David R. Stras, Judge Diane S. Sykes, & Judge James A. Wynn, Jr., Panel Discussion, *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 445–46 (2014) [hereinafter Panel Discussion] (remarks of Judge Diane Sykes) ("I'm looking for a subjective fit with my chambers. . . . I'm looking for a general, philosophical fit with my chambers and my own decision-making approach."). See generally Baum, *supra* note 54 (showing and discussing an increased tendency toward ideological linkage between Supreme Court justices and their law clerks); Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 296 (2014) ("[A]pplicants and judges alike, through conscious and unconscious selection, show a tendency to make ideological matches."); *id.* at 296 n.34 (citing sources).

membership in the conservative Federalist Society or the liberal American Constitution Society, for example—that facilitate ideological sorting.

Not every judge has this sort of sense of mission. Even if all judges have ideological or political views, not all of them see those views as central to their own role as judges. They do not all see *advancing* those views as a central part of their judicial “mission.” Although some multi-member courts, such as the Sixth and Ninth Circuits and the Wisconsin Supreme Court, have at times bristled with political tension and nasty exchanges, not all judges define their job as one of war by other means against their ideological opposites on the same court. And certainly some, or even many, judges do not select their clerks on the basis of political agreement.<sup>70</sup>

But even if this is the norm, it is not much in the spotlight. Much of the oxygen and attention inside and outside the legal world is taken up by the most forceful and outspoken judges and justices, those most identified with outcomes and powerful opinions that are imbued with politics or deal with hot-button political and cultural issues. A larger number of “feeder judges,” those federal appellate judges whose clerks regularly go on to the Supreme Court, are more easily identifiable as politically or judicially liberal or conservative than the common run of judges. And the former clerks for these judges and justices are more likely to eventually occupy some of the higher rungs of the legal academy and the legal profession, or to engage in more high-profile political work of various sorts. These individuals, who of course are shaped by their own experiences and influenced by their own engagement with and in politics, have a disproportionate role in framing the narratives and myths of judging and clerking alike. Law reviews are not filled with tributes to plain, workaday judges.

In suggesting that Judge Carnes is closer to a workaday judge—a description I think he would not mind, and would more likely welcome—I do not mean to diminish him, to whitewash his own ideological or jurisprudential priors, or to construct a counter-mythology with which to enshrine him. A recent student note from his alma mater described him as a “moderate conservative.”<sup>71</sup> Other lawyers would describe him more robustly as clearly conservative, and his confirmation hearings certainly painted him as an extreme conservative,<sup>72</sup> although sensible people do not

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70. See, e.g., Panel Discussion, *supra* note 69, at 446–48 (remarks of Minnesota Supreme Court Justice David Stras and Fourth Circuit Judge James Wynn).

71. See Menno Goedman, Note, *The Power to Appoint FISA Judges: Evaluating Legislative Proposals to Reform 50 U.S.C. § 1803 and Improve the Surveillance Court*, 51 HARV. J. ON LEGIS. 365, 386 (2014).

72. For both points see the entry on Judge Carnes in the *Almanac of the Federal Judiciary*. See *Edward E. Carnes*, ALMANAC OF THE FEDERAL JUDICIARY (2018), Westlaw, 2018 WL 248710.

pay undue attention to the kinds of things that are said during the judicial confirmation process. He is often so identified, or caricatured, because of his work as a lawyer for the state of Alabama on death penalty issues and cases prior to his judicial appointment.

Whatever his own political or jurisprudential views may be, I did not then and do not now get the sense of Judge Carnes as seeing himself as a man on a mission to advance those views or enshrine and entrench them in the law. Nor do I get the sense of someone who views himself as engaged in trench warfare with colleagues who hold different views. One may agree or disagree on political or other grounds, sometimes strongly, with his votes and opinions in various cases. Although I can name decisions in which his vote or opinion would surprise anyone inclined to see him as a rigid or monolithic “conservative,” that is true of most if not all judges, and it is possible that those are exceptions to an otherwise generally “conservative” run of decisions and outcomes.<sup>73</sup>

Even assuming that he is a conservative judge, however, I do not think Judge Carnes is a man on a conservative *mission*. And if he is, he certainly does not show any sign of treating his law clerks as partners and allies in that kind of mission, as some judges emphatically do. Doubtless clerkship hiring practices can change over time for individual judges, and I clerked for Judge Carnes relatively early in his judicial career, in 1998–99. I cannot speak to his current views or practices. At least at that time, however, he did not insist on ideological fitness or litmus tests. My co-clerks and I had varied backgrounds and political views and interests, and differing jurisprudential views as well. As they were not identical with each other, so they were not identical with the judge’s own views.

A salient example, though not the only one, concerns the death penalty. Because of his former career as a death penalty prosecutor, he has been viewed as a champion of the death penalty on and off the bench.<sup>74</sup> But I do

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73. I cannot speak more definitively because I have not read most of Judge Carnes’s opinions. Some former clerks no doubt read most of what their own former judge writes. A few lawyers and legal academics stay remarkably up to date on the doings of the lower federal courts in general and seem to at least peruse almost everything that appears in Westlaw’s federal judicial opinion databases. I find that admirable; it may even be a duty for legal academics to do so. Exactly *how* admirable it is depends on what they are *not* reading as well. It is not clear to me that staying up-to-date on every judicial opinion is more valuable than staying current on, say, the legal academic literature, economics, history, or legislative and regulatory developments, or being well-versed in classic literature of various sorts, from Aristotle to Zola. In any event, it is almost certainly true that most legal academics cannot keep pace with the *academic* literature in their own specialties, let alone the vast number of *American federal* judicial opinions, which still leaves out agency opinions, state court cases, or the decisions of courts outside the United States.

74. See, e.g., Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 470 & n.30 (2009) (following a description of Judge Carnes’s opinion in a non-capital Fourth Amendment exclusionary rule case with a digressive footnote discussing Carnes’s pre-judicial career as a death penalty prosecutor); Stephen B. Bright et al., Panel, *Breaking the Most Vulnerable*

not recall him asking any questions about capital punishment in my clerkship interview with him.<sup>75</sup> As it turned out, all four of us that year were in some measure opposed to the death penalty, for various reasons ranging from moral and religious to prudential and policy-oriented.

We were *willing* to work on those cases, even if the outcome would contribute to the “machinery of death.”<sup>76</sup> That was our job as we understood it, and we did not refuse to perform it. That is not true of every law clerk or, some charge,<sup>77</sup> every judge. Although it is strongly arguable that our willingness to do so was in accord with our duty as law clerks, and most lawyers would so view it, the fact that even one individual might refuse to do so, or, more meaningfully, might decline to serve as a law clerk altogether because of the law’s involvement with capital punishment, means that we must accept our rather small but indefeasible share of moral responsibility for our actions.<sup>78</sup> But that is not relevant to the point I make here, which is that the judge did not quiz us on, or insist that we share his supposed view concerning, one of the issues with which he has been most closely associated professionally.

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*Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 130–31 (1999) (remarks of Stephen B. Bright, Executive Director of the Southern Center for Human Rights) (describing Judge Carnes as the Eleventh Circuit’s “most outspoken judge on capital punishment and habeas corpus issues” and again raising his background in the area). The writings of the late Michael Mello, a law professor and former defense attorney in capital cases, were even more vituperative in accusing Judge Carnes of an active and unprofessional attachment to the death penalty on the bench. These writings can be found easily enough and I thus do not feel compelled to cite to them here. Never having met Professor Mello, not wishing to speak ill of the dead, and being fully appreciative and admiring of the vital, difficult, and emotionally taxing work of defense counsel in capital cases, I can only say that his charges must be viewed in light of his deep immersion in these cases, which produced a set of ostensibly academic writings that were often lengthy autobiographical screeds of little actual academic value.

Note that I say “viewed as.” Other than the obvious fact that he was willing to work as a capital prosecutor and achieved prominence for his work on capital cases and issues when in practice, and the fact that he is willing to uphold death sentences on appeal—which is of course consistent with the law he must obey as a judge—I know little or nothing about Judge Carnes’s personal views on capital punishment. I could *guess*. But it would only be a guess.

75. Cf. Kozinski & Bernstein, *supra* note 69, at 60 (discussing Judge Kozinski’s practice of asking prospective clerks during hiring interviews whether they were willing to work on death penalty cases that could result in executions).

76. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

77. See Hon. Alex Kozinski & Stephen Bright, Debate, *The Modern View of Capital Punishment*, 34 AM. CRIM. L. REV. 1353, 1374 (1997) (remarks of Judge Kozinski) (“Lower court judges are not able to be quite so straightforward. But I have colleagues, they know who they are, you know who they are, who have never ever voted to uphold the death penalty and never will. Not ever.”). The situation of lower court judges engaging in such action is arguably both distinguishable from and more serious—more of a departure from judicial duty—than the case of Supreme Court justices who explicitly dissent in all cases upholding the death penalty.

78. Moral, not ethical. From the standpoint of professional ethics, we of course acted properly. A judge or law clerk who applied the law incorrectly or disingenuously so as *never* to have to accept the lawfulness of a capital sentence might be acting morally, but would *not* be acting ethically as a lawyer.

That was true across the board. Judge Carnes applied no litmus tests to prospective law clerks, so far as I can tell. He certainly did not demand that we share his views. He did not seek to enlist us as recruits in any sort of “mission,” or as allies in a fight against opposing views or particular judges on his court. The bench memos we prepared for cases scheduled for oral argument were expected to give the law of the circuit and the right answer, as best we understood it. We were not asked or expected to anticipate his own views or inclinations and write accordingly. He might or might not agree with our conclusions. But he expected us to reach them independently, and was not bothered if our independent views differed from his. I think he would have been *more* bothered if we had treated such assignments as an exercise in ventriloquism, or used them to engage in internecine warfare with his judicial colleagues, or given him the answer we thought he would like rather than our own answer.

This taught us something about both independence and the limited role and significance of a law clerk, for related reasons. Judge Carnes is a smart man and a talented lawyer and he knows his own mind. He certainly knows the law of the circuit better than we did.<sup>79</sup> He neither needed nor required us to tell him what he thought. He did not forget which occupant of the chambers had gone through the nomination and confirmation process and thus had the ultimate duty to decide (him), and who had not (the rest of us). Neither did we. He respected us and valued our contribution to the work product of the chambers. But we understood that we were subordinates: employees, hired to assist in that work, and not co-equals or junior circuit court judges. Knowing that, and understanding that we were not partners in some sort of glorified mission, freed us to be independent in our views, provided we did the work required. Similarly, his understanding of his own role and confidence in his own judgment meant that Judge Carnes did not need or demand a clique of clerks.

Doubtless this approach comes with a cost for the law clerk. He or she loses out on some of the sense of camaraderie and *esprit de corps*, of being

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79. Unlike some judges, Judge Carnes did not require us to read every new slip opinion from our circuit. I have been sadly light on criticism in this tribute, so I will add that I thought at the time, and continue to think, that he should have. Of course we could have done so anyway, and doubtless we read a fair number of them on our own. But making it a part of the job would have been a good thing—not, as with some judges, to look for cases to attempt to take en banc, which happens relatively rarely in the Eleventh Circuit, but simply for its educational value and to acculturate us to the Eleventh Circuit and its jurisprudence. Cf. Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. F. 601, 604–05 (2011–2012) (discussing the use of en banc calls); Kozinski & Bernstein, *supra* note 69, at 60 (noting the frequency of calls for en banc review on the Ninth Circuit and adding that “[i]n some chambers, the clerks spend a significant portion of their time helping their judges prepare memoranda meant to win votes for or against rehearing [en banc]”); Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk’s View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 900 (1998) (discussing the review of slip opinions by “[b]oth judges and clerks”).

a chambers collective of happy warriors, that is present in some clerkships. It is that sense that contributes to the lifelong nostalgia that some clerks have for their clerkship year, and that can be felt so strongly in many clerks' glowing law review tributes to their judges. Clerks for judges who do not cultivate this sort of spirit miss out on that warm glow. They have a job, not a mission; a boss, not a second parent; friends and colleagues in their fellow clerks, not allies or fellow crusaders. Their experience is more mundane and less romantic.

But this more mundane approach has lasting benefits as well. It cultivates a grounded and measured perspective on judges, clerking, and the profession of law. It does not prevent one from aiming to "live greatly in the law,"<sup>80</sup> as Holmes famously wrote. But it does, perhaps for worse but mostly for better, cut down on the melodrama and puffed-up sense of self in which such ambitions so often express themselves, with their talk of the "bitter cup of heroism."<sup>81</sup> American lawyers, judges, and legal academics—perhaps Americans more generally—already possess more than their share of adolescent self-dramatization. We hardly need add to it.

And it encourages independence in one's life in the law. If Holmes was right that "[n]o man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen,"<sup>82</sup> then one may wonder about the claims to either serious intellectual ambition or genuine independence of those who start their legal careers steering by someone else's star, and sometimes spend the whole of their careers doing so. It is a fine thing, and a lucky one, to find a hero early in one's legal career. But to be the "hero of [one's] own life," one may need to learn to live without heroes.<sup>83</sup> Or, perhaps, it is fine to have heroes, but one must learn not to follow them forever, to worship them almost blindly, or to exempt them from serious criticism. It is hard to live a full and independent life if one lives it as a permanent acolyte.

That independence is especially relevant for legal academics, so many of whom come from the ranks of law clerks.<sup>84</sup> As Peter Byrne has written,

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80. OLIVER WENDELL HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29, 30 (1920).

81. *Id.*

82. *Id.* at 31.

83. CHARLES DICKENS, *DAVID COPPERFIELD* 5 (Wordsworth Editions 1992) (1850).

84. See, e.g., Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506, 508 (2016) (studying entry-level law school hires between 2011 and 2015 and finding that 77 percent of entering professors defined as "J.D.-only," which includes holders of advanced degrees in law, see *id.* at 515 n.44, had judicial clerkship experience, while 50 percent of "J.D.-Ph.D.s" had clerked); Richard E. Redding, "Where Did You Go to Law School?" *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600 (2003) (surveying entering tenure-track law professors between 1996 and 2000 and finding that 57 percent of them clerked for federal or state judges).

“The scholar . . . must acknowledge the hard resistance of the subject matter, the inadequacies of friends’ arguments, and the force of those of her enemies. That is what scholars mean by disinterested argument.”<sup>85</sup> To be disinterested is not to be *uninterested*. It is to be willing to follow one’s scholarly muse or vocation wherever it leads, and not simply to chart a predetermined course, or a safe course that avoids upsetting one’s jurisprudential or political friends or allies, powerful and influential scholars who can advance one’s career, or fellow supporters of some cause. It involves criticizing friends and agreeing with enemies, where that is what one’s thinking leads to, and not remaining prudently silent at such moments for political, prudential, or careerist reasons. It certainly does not involve a professional life spent writing amicus briefs to one’s favorite judge or justice, improving or rewriting their opinions as if one is still in chambers, or jealously guarding the reputation of one’s judicial or professorial mentors.

I do not mean to suggest that this sort of independence is impossible to achieve for alumni of the kinds of clerkships that cultivate a sense of mission or of a familial relationship with one’s judge. Nor, as I wrote earlier, do I mean to suggest that former clerks for such judges, many of whom include leading lights in the academy and the legal profession, do not or cannot go on to do great things. Felix Frankfurter, it has often been observed, “was adept at relations with mentors, whom he flattered, and with students and law clerks, whom he instructed,” and whose status as friends and acolytes he surely deliberately cultivated.<sup>86</sup> Frankfurter’s achievements are obvious, and his former students and law clerks went on to achieve equally remarkable things.<sup>87</sup> That certainly includes those clerks who fell deeply under his spell. And surely not everyone did. Few former law clerks from “familial” chambers are likely to write the kind of unsparing “tributes” that Posner did for his former boss William Brennan. But some of them may eschew writing tributes of any sort—not because they disliked their judge or their clerkship, but because they have moved on

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85. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 259 (1989).

86. Kent Greenawalt, *Variations on Some Themes of a “Disporting Gazelle” and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter*, 100 COLUM. L. REV. 176, 181 n.27 (2000).

87. Although, to repeat what I also said earlier, the relevant and rarely asked question of such figures is whether they would have produced more, better, or more independent scholarship had they come from a different sort of clerkship. One may spend a lifetime publishing excellent work that nonetheless still amounts to an extension of one’s clerkship. To the extent that such judges and justices attract conventionally brilliant and hard-working young lawyers, that they will produce excellent work as academics seems more inevitable than unlikely. But one may wonder how much *more* they would have accomplished had they never been enchanted by their clerkship and become lifelong “clerks in the maze.”

and have no particular interest in mythmaking or flattery. They may be too prudent or too concerned with their own reputations and relationships to write something critical. But they may decline to participate in the tradition of flattery at all.

Still, as special as such clerkship experiences are, one may worry that they pose a burden or barrier to a genuinely mature and independent career, especially as a legal academic. Our elite legal culture remains careerist and hierarchical. Some of the ostensibly best and brightest law students seek out and flatter professorial mentors, who exhibited the same traits in their own youth, and who in turn take this next generation under their wings, and then send them on to clerkships for judges with similar personalities, where this process of mutual cultivation is repeated. Such a process may generate success but not maturity; intelligence and skill but not independence of thought; ambition but not self-awareness. And it may have other dangers too—dangers that have become more apparent in recent months.<sup>88</sup>

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88. Here I finally note what many readers no doubt will already have observed: A number of the illustrations of the familial or mission-oriented judge that I have provided here involve former Judge Alex Kozinski, who retired from the bench in December 2017 after a bevy of accusations of improper conduct toward female clerks, both his own and others. Without rendering any judgment on those allegations, I do note that among other things, the descriptions of him offered by his accusers presented a picture of the judge as a totalizing influence, one who went so far as to tell his clerks what to read and what not to read, and to tell them that for the length of their clerkship, “I control what you read, . . . what you write, when you eat. You don’t sleep if I say so. You don’t *shit* unless I say so.” Heidi Bond, *Judge Kozinski*, COURTNEYMILAN.COM, <http://www.courtneymilan.com/metoo/kozinski.html> (last visited Jan. 19, 2018) (description by former Kozinski clerk Heidi Bond). It seems to me that this kind of totalizing approach is reminiscent not only of a cult, but of the kinds of demands that might be made within a “family” relationship, albeit an unhealthy or abusive one. And it is echoed in Kozinski’s initial response to the accusations, in which he said, “I treat all of my employees as family and work very closely with most of them.” Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.5decebbc6b84](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.5decebbc6b84).

Judge Carnes would never have told me what to read or what not to read, nor would he have told me that I belonged to him twenty-four hours a day, 365 days a year, while I was his law clerk. That kind of demand is inconsistent with a workaday employment relationship. If he had, I would probably have laughed in his face—and, because of the more formal and less familial nature of my employment relationship with him, it would have been easier and (I think) less perilous to do so. I obviously do not mean to suggest that many judges who adopt a familial model of the clerkship, or treat their clerks as more-than-full-time members of a “team” engaged in a common mission, engage in the sorts of obvious abuses of power of which Kozinski stood accused. But I think that it would be a mistake to treat Kozinski separate completely Kozinski’s alleged behavior from the totalizing, familial model of clerkship he favored, and that some other judges, including some of the most widely admired and beloved federal judges or Justices, also follow to varying degrees. Judges are powerful enough as it is. They become even more powerful in a broader system in which prestige and advancement are connected to one’s association with famous and powerful judges. And that power is still less constrained when the legal culture tends so frequently to celebrate charismatic judges and to admire, rather than question, clerkships that adopt the familial model, rather than treating the judicial clerkship as a more mundane employment relationship. It is difficult enough under the best circumstances to speak out against a boss who abuses his or her power. It may be even more difficult when one has been

One does not want to be unkind, overbroad, or—given my own frank ambitions for advancement—self-destructive. But, from my own insider/outsider perspective,<sup>89</sup> there does indeed seem to be a perpetual adolescence problem in elite American legal culture. The popular familial and shared-mission-based version of the clerkship process, while hardly the sole contributor to that problem, is part of it.

Part of me regrets not having had that sort of clerkship experience, with its elements of camaraderie, closeness, access to power, and romance—not to mention the opportunities for professional advancement that clerkships with such famous and “heroic” judges provide. But another part of me wonders whether I was not fortunate in avoiding it. It was certainly not the sort of experience that Judge Carnes offered. I’m sure that what Judge Carnes provided—a job, not a mission; a good experience and decent relationship but not a familial one; an education in the law, but not conscious cultivation or mentorship; interesting legal work but not recruitment into a romantic battle for justice—he did for his own reasons and out of his own inclinations, not as some deliberate effort to force or encourage his clerks to be grown-ups. But that was the result, and I’m grateful for it.

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encouraged, both by the culture of a particular chambers and by the legal culture more generally, to treat the clerkship as a family relationship and the judge as a hero or second parent. As any member of a family knows, it can be more difficult to navigate and resist power relationships in intimate relationships with loved ones than in more formal and bureaucratic relationships with relative strangers. The Kozinski story is—one hopes—exceptional. But it also provides additional reasons to question the American clerkship culture—or at least those aspects of the culture that encourage hero worship, admire exceptional or charismatic judges and give them greater license, and treat clerkships as familiar rather than formal employment relationships—and to wonder whether a more mundane and less totalizing clerkship relationship would not be better and less subject to potential abuses, both for law clerks and for the judges themselves, and for the legal culture more generally.

89. I am surely a tenured law professor, the beneficiary of connections with some elite law schools and a federal appellate clerkship, a member of what has been called the “professional-managerial class,” and so on. I am hardly one of the “out-freyn.” FRANK HERBERT, *DUNE*, at xxi (1965) (“Galach for ‘immediately foreign,’ that is: not of your immediate community, not of the select.”). But I am also a Canadian, who came to the American game of success later in life and was not steeped in the race to accumulate social capital that begins for elite Americans almost from the cradle; I did not fully participate in or absorb all the conventional wisdom about success and advancement that one learns as a J.D. student at a top five U.S. law school; I have spent time at elite law schools but do not teach at one, as fine and highly “ranked” as my own institution is; I live in the Deep South, outside the usual centers of power and influence on the coasts; I have relationships with, but not a fully developed network of, career-advancing powerful friends; and my own personal tendencies run toward fascinated but somewhat clinical observation of elite institutions rather than enthusiastic immersion in them.