

## ONE KIND OF LEGACY: JUDGE SPROUSE'S LAW CLERKS

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An appellate clerkship, which offers a brief, precious period in which to consider law can be a profoundly instructive experience. With appropriate guidance, a clerkship enriches the foundation established in law school by providing an unparalleled view of the judicial process. Judge Sprouse took seriously the education of his law clerks and provided an exceptional experience for those who clerked for him. He was the consummate guide, involving his clerks at every stage of the appellate process, relating judicial procedure to abstract principles, and ensuring that each emerging lawyer was exposed to a wide range of legal issues. An inveterate teacher, Judge Sprouse gave special attention to developing the skills of constructing legal arguments and of writing them persuasively — often to the discomfiture of the clerk.

In addition to this formal training,<sup>1</sup> Judge Sprouse offered his clerks an opportunity to reach a deeper understanding of the law. Judge Sprouse brought his clerks to live in Lewisburg, West Virginia, a tiny town in the once-remote mountains of Greenbrier County. Judge and Mrs. Sprouse, concerned with helping clerks adjust to this simpler life,

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\* Associate Professor, University of Houston Law Center. B.S. University of Illinois, 1964; M.S. Bucknell University, 1989; J.D. American University, 1991. As a former clerk for Judge Sprouse, I share the legacy, having benefitted from the selection standards discussed in this article. I am grateful to Catherine Mulrow for an insightful reading, to Christine Wichers and Pearl Eldridge White for assembling the information on Judge Sprouse's clerks, and to Evie Norwinski for providing the data relating to the United States Court of Appeals for the Fourth Circuit.

1. The educational benefits of clerking are almost universally recognized. See Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765, 768 (1993) (discussing benefits of clerkship); J. Daniel Mahoney, *Law Clerks for Better or for Worse?*, 54 BROOK. L. REV. 321, 344-45 (1988); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1161-63 (1973). But see generally William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. OF LEGAL EDUC. 129 (1986) (disputing advantages of clerking).

welcomed new clerks to their home. Lewisburg became a lesson about the region and its people, learned while walking its rivers, exploring its caves and white water, joining community festivals, and lunching with Judge Sprouse. An entertaining story-teller, Judge Sprouse spoke and taught about life and law: childhood in a mountain mining town during the Depression, travel in Europe after the war, the practice of labor law, the vagaries of West Virginia's Democratic Party, cases from the years on West Virginia's Supreme Court, the pleasures of gentleman farming, the adventure of gubernatorial campaigns in 1968 and 1972, and the personalities of state and national political leaders. In this manner, Judge Sprouse generously imparted a sense of place, period, and indeed, the person, from which his clerks could view the appellate process.

From that grounded vantage point, one soon realized that Judge Sprouse was guided by an innate sense of fairness informed by a hard-won, pragmatic understanding of how the world works. Under his tutelage, one came to accept the great limitation of the law, that legal concepts do not always lead to a single or, indeed, to a just resolution. On a less global level, it became a habit to place the case in context and so to appreciate that the lives of real people were affected by choices between abstract legal principles. And one shared Judge Sprouse's regret when esteemed principles harmed rather than remedied.

Judge Sprouse's experience and sense of fairness appear also to have influenced his selection of law clerks. A realistic person, Judge Sprouse understood that a clerkship is of great value to a fledgling attorney, not only because of what is learned, but also because a clerkship affords certain professional advantages.<sup>2</sup> Service as a judicial clerk brings obvious and immediate benefits that include a better choice of the crucial first position, greater flexibility in moving between firms

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2. Of course, the benefits of clerking run both ways, as the judicial system derives significant value from the work accomplished by law clerks. See Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153-54 (1990); Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J. OF LEGAL EDUC. 150, 151 (1986); Richard A. Posner, *Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 768-74 (1983).

and federal and state government positions, the opportunity of law school teaching, the potential for a high income, and greater influence within the profession. Moreover, in this hierarchical profession, a clerkship is a career-long credential.<sup>3</sup>

Most judges choose clerks who mirror their own experience.<sup>4</sup> The isolation of a federal judge, the dependency of the clerk, and the requirements of the judicial task — deciding and writing — generate a mentoring, quasi-familial relationship.<sup>5</sup> At the same time, the closeness of the relationship, the debate of closely-held principles, and the intensity of joint writing may uncomfortably expose judges to their clerks. Judge Sprouse departed from the typical pattern and assumed the risk of a less than comfortable year, choosing clerks whose backgrounds, values, and viewpoints might not mirror his. For reasons of personal experience, a sense of fairness, or a realistic worldview, his choice of clerks mirrored instead a recognition of the unique opportunity which was his to offer.

During his sixteen-year tenure, Judge Sprouse hired forty-four clerks. Eighteen, or 41 per cent, are women, one of whom is an African American.<sup>6</sup> At least sixteen of Judge Sprouse's clerks had entered

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3. See Mahoney, *supra* note 1, at 321-22 (noting opportunities available to former clerks).

4. Hiring is based on such formal criteria as academic standing, ability to do legal research, analyses, and writing, and faculty recommendations. See Posner, *supra* note 2, at 774; Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 VAND. L. REV. 1197, 1198-99 (1973).

But judges also use other criteria. For instance, some judges prefer graduates of the law schools they attended. See *id.* at 1197. Others prefer law review editors and/or graduates of elite institutions. See Wald, *supra* note 2, at 154 (noting that judges may choose "highly credentialed" clerks in order to enhance their reputations among fellow judges). See also Sylvia A. Law, *Good Intentions are Not Enough: An Agenda on Gender for Law School Deans*, 77 IOWA L. REV. 79, 84 n.16 (1991) (noting clerkship selection perpetuates predominantly white male mentoring networks between judges, former clerks, and law professors).

5. See Wald, *supra* note 2, at 153 (noting that the judge-clerk relationship is "the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair"); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708-09 (1991) (agreeing with characterization); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1099 (1992) (same).

6. Data on the race, gender and demographic composition of federal clerks are not available. The Equal Employment Office of the United States Courts does not collect dis-

law school as mature students after a significant period in another career. Twenty-seven, or 61 per cent, are from institutions that are not ranked among the top twenty-five law schools,<sup>7</sup> such as American University, Colorado, Howard, Kentucky, New Mexico, Northern Illinois, Rutgers, Toledo, Tulsa, and West Virginia.<sup>8</sup> Women, blacks, mature graduates, and graduates of non-elite schools are not usually candidates of choice for clerkships.<sup>9</sup> In contrast, Judge Sprouse's selection criteria resulted in an annual influx into his chambers of individuals of different backgrounds, genders, and ages, extending to them the valuable training and credential they are too often denied.<sup>10</sup>

Supplementing his democratic choice of clerks, Judge Sprouse

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crete information on the law clerks. See Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 992 (1994) (recommending reorganization of data collection system). Budgetary constraints and respect for judicial autonomy preclude plans to gather data concerning law clerks in the future. Telephone Interview with Charles V. Sords, Administrative Office of the United States Courts (September 12, 1995).

A benchmark comparison is provided by data from the United States Court of Appeals for the Fourth Circuit for the 1991-92 term. At the beginning of the term, excluding Judge Sprouse's clerks, only ten (27%) were women. A second point of comparison is the record of Retired Justice Harry A. Blackmun, who hired 32 women (33%) as Supreme Court clerks, at the time of his retirement more than any other Supreme Court Justice. See Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 19 n.29 (1994).

7. See *The Top Twenty-five Law Schools*, U.S. NEWS & WORLD REPORT, March 20, 1995, at 84 (reporting survey results).

8. Again, as a point of comparison, during the 1991-92 term, excluding Judge Sprouse's clerks, only 11 (32%) of the Fourth Circuit clerks whose law schools were identified were from law schools that are not among the top twenty-five institutions. See also Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. 23, 28 (Special Issue, May 1986) (as of 1986, 75% of Supreme Court clerks graduated from eight law schools).

9. It is generally agreed that women and minorities are under-represented among law clerks. See Norris, *supra* note 1, at 773-74 (noting that hiring fails to mirror the diversity of the potential applicant pool); Law, *supra* note 4, at 84 n.16 (1991) (citing Yale Law School study indicating that women students do not obtain the federal judicial clerkships predicted by their scholastic records); Janice S. Robinson, *Unlocking the Doors to Legal Education: Rutgers-Newark Law School's Minority Student Program*, N.J. LAW, Nov./Dec. 1992, at 18 (law school arranges internships with judicial clerks to encourage hiring minority students as clerks).

10. See generally, Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27 (1995).

offered the opportunity to as many graduates as possible by hiring new clerks every year. A two-year clerkship reduces the time spent selecting and interviewing candidates and allows a judge a greater benefit from the extended training period. In fact, many judges stagger two-year terms so that second year clerks train new clerks, providing continuity and reducing overall disruption. Despite these advantages of the two-year term, Judge Sprouse hired every year, extending the opportunity and advantages of clerking to more graduates.

Although the backgrounds of Judge Sprouse's forty-four clerks were not always typical, their subsequent careers are similar to those of other appellate clerks. Most entered large law firms upon leaving their clerkship; two became Supreme Court clerks. As of May 1995, twenty practice in either large law firms or in large cities; only four chose small firms or small towns. Three former clerks are law school professors. Eight are employed by state and federal government agencies. A few left law for careers in businesses such as investment banking.

Certainly, the experience of clerking for Judge Sprouse will have enriched their personal and professional lives. In addition to legal expertise, Judge Sprouse imparted to his clerks — and to the bench — a rich humanity marked by a joy in living in a less than perfect world and an appreciation of the problems people face in that all too real world. Along with their individually diverse backgrounds, Judge Sprouse's law clerks share this legacy.