LAW CLERKING WITH A STATE SUPREME COURT: VIEWS FROM THE PERSPECTIVE OF THE PERSONAL ASSISTANTS TO THE JUDGES*

CHARLES H. SHELDON**

This study of a typical state court of last resort (Supreme Court of the State of Washington) relies upon questionnaire responses from 166 former law clerks who served with the court since 1937. Recruitment, tasks, roles, advantages, disadvantages, and contributions are all investigated. Law clerking involves less of an idiosyncratic relationship between justice and clerk and more of a common experience for most of the clerks. The contribution of clerking to the judges is unique, however. Despite the importance of clerks, it is not inevitable that they be part of the "hidden judiciary."

Introduction

The practice of appellate judges hiring bright young law graduates as personal assistants is over a century old. The earliest record of the use of "legal secretaries" or law clerks is when Judge Horace Gray, while a member of the Massachusetts Supreme Judicial Court, awarded a one-year appointment in 1875 to an honor student from Harvard to assist in research and judicial deliberations. When elevated to the Supreme Court of the United States by President Arthur in 1882 he continued the practice (Newland, 1961). Today, nearly all federal and state appellate judges employ personal assistants to help them with their work (Barnett, 1973).[1] Although a common and established institution, law clerking at the state appellate levels has received very little analysis from legal scholars (see, e.g., Braucher, 1973; Bremson et al., 1978; Hastings, 1970; Marvell, 1978; Oakley and Thompson, 1979 and 1980: 18-20; Wold, 1979).

Two perspectives dominate the few accounts of law clerking. Much of the political and journalistic literature borders on the polemic; the authors are overly concerned with the possibility of clerks being part of a "hidden judiciary" and of bright young audacious lawyers fresh from law school manipulating their elderly, tired, overworked and outdated judges (Bird,

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**Professor of Political Science, Washington State University.

1. The most complete bibliography on law clerking is found in Oakley and Thompson (1980: 157-171).

1978; Rehnquist, 1957; Woodward and Armstrong, 1980). Rushing to the defense, many commentators scoff at this Machiavellian image but neither side convincingly quiets the other (Clark, 1959; Wilkinson, 1974; Rogers, 1958). A second type of discussion focuses upon the administrative perspective, one most often discussed by judges and law professors. These discussions generally avoid the "hidden judiciary" debate and describe instead what clerks do, how effective they are, how the clerk-judge relationship can be enhanced, and whether some of the tasks clerks now do can be better performed by clerk-interns or permanent research attorneys (Hamley, 1973; Hellman, 1980; Oakley and Thompson, 1980; Sheldon, 1980; Wright, 1973).

One common thread, however, holds these two perspectives together. Both seem to regard clerking as a personalized activity, the nature of which is dependent upon the individual needs and desires of the judge. One former law clerk expressed the individualization of clerking as he recalled his year with the Supreme Court of the State of Washington:

> Each judge has different work patterns, different handicaps, different skills. The individual propensities and limitations of the individual judge should and always will be the major factors that determine how a judge utilizes his clerk. For example, Judge _____ suffered from loss of sight that limited his reading of records, transcripts, and briefs. Judge _____ was extraordinary (canny) in his ability to analyze facts, to apply to them what he thought the law was or ought to be and to articulate key issues. He seemed to be short on tedious, legal scholarship and exhaustive legal research. He had to lean heavily on his clerk to furnish this essential ingredient. Other judges were considered by the clerks . . . to have been too wordy, ungrammatical, and generally clumsy and obscure in their written work. Properly utilized, their clerks improved substantially the quality of their written opinions.

This paper investigates law clerking within a typical state court of last resort. It concerns itself with both the political and administrative perspectives, but it primarily directs its attention toward ascertaining the institutional nature of the law clerking endeavor. If law clerking turns out to be more predictable than idiosyncratic, the institution becomes manageable. It can be researched, understood and, if need be, changed to provide greater service to the judges.[2]

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2. With but two recent exceptions (Oakley and Thompson, 1979, 1980; Marvell, 1978), the studies of law clerking have been from the perspective of one clerk, one judge or, at best,

The Supreme Court of the State of Washington is a fairly typical state appellate court. A study of clerking with this court should supply some insights into law clerking generally. A brief description of the court and its decisional processes indicates how this court conforms to those in other states. The nine members of the high bench serve staggered 6-year terms. Selection by nonpartisan elections is provided, although most of the justices are initially appointed to fill a vacancy until the next general election when the appointment must be confirmed by the voters. The incumbent is nearly always confirmed and uncontested elections are common. The senior justice in the last two years of his 6-year term serves as chief justice. He is saddled with important administrative duties, but his powers are few (Ducat and Flango, 1976; McConkie, 1976).

The court organizes its business around three terms (Fall, Winter, and Spring), with the clerk's office randomly assigning each of the justices (except the chief who need not accept case assignments) approximately twenty cases throughout the three terms. Pre-hearing memos are prepared by each justice on the cases assigned him (he is designated the "reporting" judge) and circulated to the entire court before oral arguments. All hearings are held in the state capitol. Ordinarily each side is granted one-half hour to present its case and the justices often pose questions during the oral arguments.

Immediately following the open hearing the justices meet in conference to discuss the day's cases and cast a tentative vote on disposition. The "reporting" judge leads the discussion on the case previously assigned him, and should his view prevail, he is responsible for drafting the majority opinion. Otherwise, the chief makes the writing assignment even if in the minority. The intent to draft a concurrence or dissent is indicated at conference by the recusant justices.

The chief justice supervises the circulation and filing of opinions. The drafts are circulated immediately after completion, including concurrences and dissents. Some give-and-take is evident during circulation. When all nine justices sign one or another of the opinions, they are filed with the clerk's office. Rarely are rehearings granted (Mueller, 1975; Sheldon, 1977).

The justices of the Washington Supreme Court have employed law clerks since 1937 when the first three assistants were brought to the Temple of Justice in Olympia. Previously, one or another of the judges

several clerks with one judge. Clerking appeared to be a unique experience, the lessons of which could not be generalized. However, with data from a great number of clerks who served a number of judges on a typical appellate bench over several years, the predictability of clerking can be determined.

availed themselves of the insights and advice of a permanent legal "secretary" or "bailiff," but the kind of clerking with which we are now familiar was unknown. The clerks were appointed for one-year terms and initially served two or three judges, with some jurists foregoing the opportunity to share their tasks with these young law graduates. By 1950 all of the justices were employing these assistants.[3] The purpose for the clerks was to help the judges with the increasingly heavy caseload. Without an intermediate court of appeals and without the use of pro tempore jurists, the nine supreme court judges were finding it increasingly difficult to keep up with the docket.

To gain an understanding of the character of the law clerking institution at the state level, 219 of the approximately 264 clerks who had served since 1937 were located and contacted; 166 (76%) of these responded to a mailed questionnaire. The following account is based upon their responses. From an administrative perspective, we want to know from where these "elbow clerks" came and how they arrived at the court, what tasks they performed, what roles they assumed, and what benefits accrued to them and to the judges. From a political perspective we want to know whether they became part of the "hidden judiciary." Did they assume important positions at decisive points in the decisional process? Finally, were their duties and roles entirely a product of the needs and desires of the judges for whom they served or were other factors important in giving shape to the institution of the law clerk?

Law Clerk Recruitment

Assuming that law clerks retain characteristic attitudes and perspectives acquired from family, school, and friends, the methods of recruitment could become important. Different means of recruitment could result in the selection of clerks with contrasting backgrounds or perspectives. Three systems of recruitment characterize the selection of law clerks.

Personal recruitment results from special consideration for the candidate because of friendship, kinship, or because of an "old boy" system and leads to a relatively closed recruitment process. Sixty-nine (42%) of the clerks were selected because of special personal circumstances. Although not limited to the decade of the 1950s, a leading role then was played by an incumbent or former law clerk. Many assisted in designating their successors. Twenty-five (15%) of the clerks recognized that a recommendation

3. One justice has had the same law clerk for nearly all the 27 years he has served on the Court.

from an incumbent or former clerk was decisive to their appointments.[4] A quote from one of the former clerks illustrates the "old boy" network:

> I was recruited as a clerk by my predecessor as a clerk. I did not know Judge _____ prior to my first interview with him which was set up by my predecessor. Without question, my predecessor was instrumental in bringing me to the attention of the judge. It is my impression that this kind of passing the job on is not the current practice among the members of the court.

Seven (4%) clerks served when their fathers were on the high court bench and most worked for their fathers.[5] Twenty-one (13%) had been recommended by a close friend or relative of the judge; twenty-eight (17%) were acquainted in some way or another with the judge or his family; and a few had been recommended by a judge at another level, the bar association, or the law librarian. Thus, somewhat fewer than half of the clerks had some personal attribute or were found in some special circumstance which placed them highest on the recruitment list. This personal recruitment has been part of the selection system from early times to today, although the importance of the incumbent law clerk's recommendation was greatest in the 1950s.

Academic recruitment has also been a common system of selection. Thirty-five (21%) of the clerks say they were selected primarily because of the efforts of a law professor or the dean at their law school. Academic recruitment was most common during the beginnings of law clerking with the court (1937-1950).

The law school's role in recruitment means more than simply posting an announcement of openings and setting up interviews. A recommendation of the dean or a trusted faculty member was tantamount to selection. For example, one clerk wrote that

> [I was] recommended by Professor _____ of the University of Washington Law School faculty. That recommendation was endorsed by my predecessor. . . . I was hired solely on those recommendations and a short personal interview. I would *NOT* have been selected . . . without Professor _____'s recommendation.

In some cases one faculty member assumed sole responsibility for selecting

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4. The percentages equal more than 100 because some clerks are found in more than one of the favorable personal categories.
5. One former clerk responded as follows to the series of recruitment questions: Did you know the judge previous to your appointment? "Yes." How were you recruited as a law clerk? "By my father. Since the judge was my father, it was not too difficult." Who was instrumental in bringing you to the attention of the judge? "My mother."

a judge's clerk. For example, the Deans of the University of Washington and Gonzaga Schools of Law often sent their best students to the high court. In contrast with personal recruitment, the judges were not acquainted in any way with the recruits and the reliance upon the judgment of the academicians was complete.

Competitive recruitment is the common means of selection today, although merit was rarely if ever disregarded in earlier times. With very few exceptions today the candidates contact the supreme court directly (the court clerk's office prior to 1975 and now the commissioner's office), often prompted by an announcement at the law school placement office. Vitae are offered, interviews arranged, and selections made by the judges themselves, sometimes assisted by the court commissioner or the incumbent law clerk who may do some initial screening. Members of the law review are encouraged to submit their applications. Some of the judges travel to the respective law schools on specific days to conduct a series of interviews or, more commonly, the candidates are invited to the Temple of Justice in Olympia for a personal audience. About one-third (59) of all the clerks were recruited by this competitive and open process, and this is the dominant style of clerk selection today (Barnett, 1973; Braucher, 1973).

Although slight differences in backgrounds arise among the clerks recruited by the three contrasting methods, the similarities are more striking. Nearly half (45%) of all the clerks attended private colleges prior to law training. Half the clerks received their law degrees from the University of Washington, another 21% were from Gonzaga, and 13% graduated from top flight national law schools (Harvard, Yale, Stanford, Michigan, etc.). Eighty percent ranked in the top third of their law classes, and two-thirds of them were awarded two or more academic and activity honors while in school. Up to 1977 only 8% of the clerks were women.

Nearly 15% of the clerks' fathers were attorneys, and another one-third were in other professional and technical occupations. Sixteen percent were self-employed businessmen, managers, or officials. One-fifth of the clerks' mothers were either attorneys or were in other professional or technical occupations. The selection process obviously brings to the supreme court a fairly accomplished and privileged group of recruits.

Law Clerking Tasks

What did the clerks do once they accepted the offer to serve one of the justices and reported to the court (Bremson, 1978; Hamley, 1973; Lesinski and Stockmeyer, 1973; Sheldon, 1980)? It is evident that they are personal assistants to a singular jurist, who requires or desires characteristic counsel and aid. Nonetheless, while a clerk's specific duties depend on the

dictates of the justice, the duties they all perform share much in common (see Table 1).

Table 1.
Law Clerking Tasks

Question: "Listed below are a variety of clerking tasks. Please indicate how frequently you were involved in each of these tasks."

Task	Frequency (mean)*	Standard Deviation
Reading records and transcripts of lower court cases	4.5	0.8
Drafting opinions	4.3	1.1
"Shepardizing" and legal footnoting	4.3	1.0
Editing opinions	4.1	1.2
Preparing pre-hearing memos	4.0	1.3
Preparing memos on petitions for review	2.7	1.6
Preparing memos on draft opinions of other judges	2.7	1.2
Researching extraordinary writs	2.5	1.3
Preparing memos on motions presenting substantive issues	2.4	1.2
Other legal tasks	2.4	1.6
Writing memos on petitions for rehearings	2.1	1.0
Non-legal tasks	2.0	1.2
Administrative duties (dockets, records, etc.)	1.7	1.1
Preparing memos on transfer-retain appeals	1.7	1.3
Secretarial (transcribing, typing, phoning, letters, filing)	1.7	1.1
Research on matters other than cases (for articles or speeches, etc.)	1.6	0.9

*5 = very frequent, 4 = frequent, 3 = sometimes, 2 = seldom, 1 = never.

The frequency with which the clerks participate in various chores seems not to be limited to any particular point in the decisional process. They are involved as much in pre-argument preparation as in post-conference functions. The study of petitions for review, preparation of pre-hearing memos, and the review of lower court records constitute the assistant's efforts to prepare the judge for the oral arguments and conference. After the initial

but decisive conference vote, the clerks assume important duties with the drafting, "Shepardizing," and editing of opinions.

Due to the changing demands on the judges and clerks, some chores have recently been de-emphasized, while others have gained in importance. For example, preparing memos on petitions for review was an uncommon assignment for clerks in earlier times, but it became quite common in the late 1960s and early 1970s. Until 1969 the Supreme Court had little control over its own docket and had to accept virtually all of the serious appeals made from the trial courts of general jurisdiction (Superior Court). Thus, memos on transfer-retain appeals (whether the high court should keep a case or send it to the Court of Appeals) were not a factor prior to the institution of the Court of Appeals in 1969. Now, the court has discretionary review over about 50% of the appeals filed. Preparing pre-hearing memos, while an insignificant duty in earlier times, has today become one of the leading tasks for clerks, now that the court hears only the important cases. Secretarial chores also have been more frequently assigned recently. The clerking tasks are obviously assigned by the judges, but institutional requirements dictate common duties. Although some of these duties have changed over time, most have remained stable. The establishment of an intermediate court of appeals in 1969 accounts for much of the change.

Law Clerking Roles[6]

Are there common clerking roles assumed by the young judicial assistants? A review of the scattered literature on clerking with federal and state appellate benches suggests that clerking is indeed an institution, possessing some common characteristics rather than a number of unique relationships between clerk and judge. Several possible roles appear to be available to the clerks. The distinctions among these hypothesized roles depend upon the clustering of the clerk's primary tasks around a particular point in the decisional sequence. If oral arguments and the secret conference discussions and vote are placed at the center of the decisional process, the clerks have distinct pre-conference and post-conference responsibilities. Clerks assuming pre-conference or *preparatory* roles would provide the judges with the information necessary for them to gain from and contribute to oral arguments and conference discussions (Hamley, 1974; Lesinski and Stockmeyer, 1973; Oakley and Thompson, 1980: 107-8). Some

6. A "role" can be defined as behavior which is a function of the interaction of two persons occupying specific statuses or positions in a particular situation surrounded by constraining norms. (For a general introduction to role theory, see Biddle and Thomas, 1966; Glick and Vines, 1973.)

judges, especially those designated the "reporting judge," may have completed up to 80% or 90% of the research and decisional efforts prior to oral argument. Being responsible for presenting their findings on the assigned case to the other justices at conference and for the queries during oral arguments, they must complete preparatory research and review and reach tentative conclusions before open court hearings.

Other judges conduct most of the necessary legal research and documentation after oral presentations and conference deliberations. Their decisional styles are reactive. Following the initial vote in conference, which is the most decisive stage in the decisional process, these judges assign their clerks consummating or *assistant* roles in which the results of the judges' conference votes are researched, documented, and rationalized (Llewellyn, 1960; Marvell, 1978). The initial decision is honed into a finished product with the appropriate logic, legal authorities, footnotes, and style.

Still other judges assume special responsibilities in which they involve their clerks. For example, the chief justice has special administrative duties as well as unique legal tasks. Not only does he coordinate the employees of the court, but he sits as head of both departments when the court membership is divided in order to expedite decisions on procedural matters. He alone handles the extraordinary writs and special motions, and need not be responsible for "reporting judge" duties. His clerk, then, may have unique assignments. Also, many of the apprentices may act as glorified legal secretaries or stenographers (Danelski and Tulchin, 1973: 163; Frank, 1964: 183). Clerks who deal primarily in these matters assume an *attendant* role by aiding the judge in these subsidiary and clerical areas.

Finally, some judges have special personal needs. For example, they do not or wish not to drive their own automobiles. Some are in great demand as public speakers on the banquet circuit or are in the midst of a re-election campaign requiring extensive travel. Many are deeply involved in social and civil affairs and may need the assistance of the clerk to aid in these extra-court responsibilities. Chauffeuring, clerical duties, social arrangements and appointments, speech writing, researching, editing or ghost-writing law review articles, or in an indirect way assisting in the organization of a re-election campaign may consume the bulk of a clerk's year with the supreme court. These *extra-legal* functions would constitute a distinct role also. Thus, four role types can be hypothesized: the *preparatory* role, the *assistant* role, the *attendant* role, and the *extra-legal* role.

Which of these hypothesized roles best describes clerking with a state appellate court? It seems likely that since 1937, with the Washington Supreme Court's responsibilities remaining stable, the average tenure of the judges holding steady, and the clerk socialization process developing

with incumbent clerks training the new recruits, several clerking roles would become evident. Factor analysis lends itself well to suggesting answers to these original inquiries about roles and to generating further questions.

Factor analysis is a statistical manipulation that determines the degree to which certain variables cluster together. Here those variables are the clerks' responses to survey questions. In order to determine the factors, those questions which tend to elicit identical or similar responses are

Table 2.
Hypothesized Roles and Factors

	Factors and Roles				
Items	I Attendant	II Assistant	III ?	IV ?	V ?
Extraordinary writs	.76	−.04	.24	.04	−.08
Motions on substantive issues	.73	−.06	.25	.25	−.01
Transfer-retain memos	.63	−.15	−.10	.06	.07
Memos on petitions to review	.44	−.07	−.07	.32	.34
Editing opinions	−.07	.66	−.03	.13	−.03
Shepardizing	−.10	.55	−.03	.07	−.11
Drafting opinions	−.11	.51	.04	−.18	.32
Reviewing lower court records	.11	.13	.01	.03	−.22
Memos on other judges' opinions	.08	.29	.31	.23	−.33
Administrative	.29	−.08	.54	−.16	.03
Other legal tasks	−.03	.00	.61	.15	.16
Rehearing memos	.24	.14	.05	.72	.00
Pre-hearing memos	.11	.07	.04	.13	.49
Secretarial	.05	.01	.16	−.05	.32
EIGENVALUES	2.36	1.27	.89	.75	.47
PERCENT OF VARIANCE	41.7%	22.4%	14.1%	13.3%	8.4%

isolated. If, for example, a significant number of the clerks answered three questions in the survey with the same or nearly the same answer, but varied in their responses to three other questions, the first three would tend to have enough in common to be regarded as a set (or "factor"). Something holds the first three together; some commonality or underlying logic accounts for the clustering. In the present research, it is hypothesized that the commonality or shared logic is the clerks' perceptions of "roles." Table 2 displays how fourteen clerking task items cluster with the factor loadings of each.[7]

Table 2 indicates that only two significantly *distinct* roles are assumed by the clerks during their short tenures with the supreme court. Nearly two-thirds (64.2%) of the variation in the responses of the former clerks to the questions dealing with the fourteen possible clerking tasks can be accounted for by the clerks' emphases on only two sets of tasks, sets which coincide with two of the hypothesized roles. A modified form of the "attendant" role accounts for 41.7% of the variance and the "assistant" role adds another 22.4%. Those clerks who may have performed duties that would classify them as "preparatory" or "extra-legal" were not sufficiently concentrated on the corresponding chores to create distinct roles. Although they and their fellow clerks were frequently involved in preparing bench memos for oral arguments or reviewing the draft opinions of the other judges, these tasks were common to most of the clerks and did not statistically distinguish one group of clerks from another.

Several explanations can be introduced for the attendant role assumed by many of the clerks.[8] First, those clerks who loaded heavily on the four "attendant" factors served their judges while the latter were chief justices or acting chief justices. They were, thus, responsible for chores not commonly offered to the other clerks. Special motions, extraordinary writs, and transfer-retain appeals were primarily the responsibility of the chief, something he shared with his clerks.[9]

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7. Each variable is, through factor analysis, assigned a factor loading which is the measurement of the strength of the association of that variable to the underlying commonality. The reason a single item "belongs" to a particular factor is that the item loads the heaviest (and positively) on that one factor out of the five factor possibilities. For example, "Reviewing lower . . . " loads heaviest on Factor II. "Memos on other . . . " loads strong on Factor II but even heavier on Factor III and therefore "belongs" to the latter grouping (see Kim and Mueller, 1978). Generally, factors (or roles) which have an eigenvalue of less than 1.0 are regarded as too weak for serious consideration.
8. The following analysis is based on those clerks who were in the top quartile of the loadings on Factor I for the "attendants" and Factor II for the "assistants." Thus, they represent the strongest incumbents of these two roles.
9. For the first two years after the establishment of the intermediate court of appeals (1969), the law clerks assisted the Chief Justice in determining whether to keep an appealed case

Second, some of the "attendants" served pro tempore judges and were, thus, also responsible to the chief justice and assisted the chief when their services were not needed by the temporary jurists.[10] A pro tem judge usually was assigned less crucial and unanimous cases and more often than not did not use the clerk extensively. Being on the high bench for a short time only, the pro tempore jurists took special pride in their short-lived contribution to state law, relinquishing little of the opinion drafting to their clerks. Additionally, the temporary judges were not under the pressures of the crowded docket as were the regular members of the court. Also, because of their temporary situation, they likely were not familiar with the use of clerks. One clerk illustrated the unique character of these two attendant clerking circumstances:

> I worked in the first half of my term with Judge _____ as well as the pro tem [judge]. . . . He, as Chief Justice, reviewed special writs and I, as law clerk, was responsible for reading over the writs and making my recommendations.
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> I was [also] privileged to be one of the first pro tem law clerks. . . . [T]he pro tem program was instituted in the Supreme Court whereby senior judges from the various Superior Courts came and spent two months at the Supreme Court and worked on a number of cases. . . . My duties, and other pro tem clerks' duties, were somewhat different than the typical law clerk. . . . [T]he judges, since they were there for such a short time, tended to do more of their own work and had the law clerks do less than the other judges did, which resulted in a lower time allocation per case. In addition, the pro tem judges were not given the en banc cases.

Third, several of the judges for whom the "attendants" worked were serving their first year on the supreme court. They were not yet familiar with the clerking roles and with the varied decisional and research tasks which the clerk could perform. They retained the opinion drafting tasks for themselves. Further, these new judges, like the pro tems, were not yet under the pressure of backlogs, unfinished opinions, and increasing case assignment. They, therefore, might well underutilize their assistants, assigning them only the "attending" chores.

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in the supreme court or to transfer it to the lower court. The clerk of court then assumed these transfer-retain responsibilities until 1975 when the staff attorneys in the newly created supreme court commissioner's office took over these tasks.

10. The history surrounding the use of pro-tempore judges is found in Sheldon and Weaver (1980: 54-57).

Finally, some of the "attendants" served with three judges who insisted on doing their own opinion drafting, leaving little of substance for the clerks. Of course, all three consulted in various ways with their clerks and did expect other chores to be completed, but more often than not they molded their clerks into "attendants," reserving for themselves the post-conference decisional duties.[11]

The "attendants" are as much a product of the responsibilities of, and the circumstances surrounding, the judge as they are of the judges' personalities and working styles. Chief justiceship, pro tempore assignments, and newness on the bench account for the "attendants" as much as the personal preferences and decisional habits of the judges.

The more traditional role of "assistant"[12] was assumed by many clerks but only one judge assigned some of his clerks this role exclusively. A clerk of this one justice described his working relationship and also gave form to the assistant role:

> [I]t was Judge _____'s practice to have his clerk review the entire transcript, review all briefs, hear oral argument and prepare a complete opinion which was then delivered to him, sometimes without interim discussion and sometimes after substantial interim discussion. Some relatively routine opinions were adopted almost totally by him. Others of a more complex nature were returned with modification varying from moderate to total.

Another "assistant" described, again, the close working relationship between clerk and judge:

> It was typically our procedure to sit down after the original briefing had been completed, and argue the case between ourselves. Each of us would take one of the two positions. At the conclusion, we would switch sides and reargue the matter. Justice _____ would then make a decision as to his position on the case. . . . The judge would inform me as to those areas he

11. Typical of one if not all of these justices was the large and boldly scrawled word "IMPERTINENT" across a pre-hearing memo of a clerk who had the audacity to recommend disposition of the case to the judge.

12. The "assistant" role is more akin to the "puisne judge" type of Judge Learned Hand. Judge Eugene A. Wright, U. S. Court of Appeals, Ninth Circuit, describes the "puisne judge" role:

> The law clerk is intended to work with and complement this complex decision-making organism that is the appellate judge. Indeed, Learned Hand characterized law clerks as "puisne judges," and correctly so, for they are not just secretaries or mere assistants. They are the extra hands and legs which, when coupled with an inquiring mind, are indispensable to a judge in the performance of his most difficult obligation. (Wright, 1973; see also Kurland, 1957: 663)

wished to discuss in his opinion. I would write a rough draft and then proceed to discuss it sentence by sentence with him.

The "assistant" role appears to be susceptible to some criticism, for the judge relinquishes some of his crucial decisional powers to a young, untrained and unofficial clerk. In simple numbers, the "assistant" role is, however, not overwhelming. Roughly one-third of the judges covered by these data had this close decisional relationship with their clerks, and these judges did not always, term after term, give their clerks such trust. For example, one justice served for over 20 years but allowed only six of his clerks to assume such assistant duties. Thus, the clerking role appears to depend upon the meshing of the judge's needs and the clerk's talents, rather than exclusively on the persistent needs of the jurist.

What clerk attributes are associated with the differences between these two clerking roles? The differences possibly are related to the kinds of young assistants that are hired. The judge may have to alter his clerk assignments to fit into the clerk's strengths or to avoid his weaknesses. Perhaps over time the court rules, jurisdictional requirements, and institutional dictates also force changes in the roles available to the clerks.

Those clerks who assumed either an attendant or assistant role tended indeed to have different backgrounds from the other clerks.[13] The "attendants" tended to come from more prestigious law schools than other clerks, to graduate in the top third of their class, to have received more activity honors while in school, and to be Democratic in their politics. Their fathers were in occupations of lower status than those of the other clerks. More of them regarded themselves as liberals and activists while serving as clerks.[14] On the other hand, the "assistant" clerks tended to graduate nearer the top of their class than had the other clerks. However, the status

13. Crosstabulations were run on each of the variables with the factor loadings on the assistant and attendant roles serving as one dimension of the table and the background variable as the other. Kendall's Tau C was the statistic used to measure the degree of association. Any association with a $P \leq .05$ is regarded as statistically significant. Those associations not achieving this level are unreported.

14. Each clerk was asked to place himself and his judge along two philosophical dimensions: liberal-conservative and activist-restraintist. The philosophies were defined for them as follows:

> A *restraintist* judge [or clerk] tends to believe that most cases should be decided on narrow grounds, precedent should be closely followed, deference must be granted to the other political branches, controversial economic, social, and political issues should be avoided, and moral judgments should be eschewed. An *activist* would be disposed toward an opposite approach.
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> A *conservative* judge [or clerk] is apt to view the law as a restraint on rather than an opportunity for human action, the free enterprise system as the best means to improve the condition of society, and a strong "law and order" line toward criminals as necessary. A *liberal* judge is inclined toward contrasting views.

of their law school, number of honors, party affiliation, parents' occupations, and ideology failed to distinguish the "assistants" from their colleagues.

The degree to which the clerks assumed these roles has varied over the years. The incidence of "attendants" has increased in recent times, while the "assistants" have become less common. One possible explanation for the variation between the roles over the years concerns the workload of the justices. As the dockets became congested, the judges were not able to devote the needed time to opinion research and writing and were compelled to share this function with the clerks. However, when the Court of Appeals was instituted in 1969, the caseload of the high court dropped drastically.[15] The need for "assistants" waned and the role of "attendants" waxed correspondingly. Perhaps, also, the administrative duties of the chief justice increased, requiring more aid from his clerks. The trend may have reversed after 1975 when the court commissioner assumed many of the chief's procedural responsibilities. The important observation, however is that, although the clerk-judge relationship is individualized, some common clerking roles have evolved. Forces other than the specific needs and desires of the judge help shape this relationship. The docket pressure, for example, limited the options available to the clerk and the justice. Clearly, however, the nature of clerking is in flux and clerking remains a developing institution.

The Importance of the Clerk's Research

Each of the former clerks was asked to weigh the "importance" of several sources to their justice's final decision.[16] The most important source was "the facts of the case," followed in descending order by "written briefs of the litigants," "judge's knowledge of the law," "judge's feeling of what is right," "judge's own research," "research of the law clerk," "dictates of precedent," "research of reporting judge," "view of the trial court," "views of judge's brethren," "awareness of socio-econ-political environment," and

15. Unresolved or pending cases increased substantially until the instituting of the Court of Appeals in 1969:

Year	Cases Pending	Year	Cases Pending
1966	631	1971	188
1967	712	1972	199
1968	727	1973	205
1969	816	1974	224
1970	442	1975	222

16. The question was: "How do you think your judge would rate the importance of each of the following to his final decision?"

Table 3.
Tasks Clerks Regard as Involving "Research"

Tasks	τ_c*	P**
Editing opinions	.21	.00
Drafting opinions	.18	.00
Shepardizing and legal footnoting	.14	.02
Reading records and transcripts of lower court cases	.13	.02
Preparing memos on petitions for review	.13	.04
Preparing memos on transfer-retain appeals	.11	.05

*The statistic used is Kendall's Tau C.
**The likelihood of finding a relationship of this magnitude by chance with this size sample is less than 5 out of 100, or P ≤ .05.

"oral arguments of lawyers." The leading sources for the judge's final decision were regarded as only slightly more important than the clerk's research. Those sources ranking below the clerk's research dropped off significantly in importance, however.

At least two questions are generated by this list of decisional sources. First, what does a clerk do when he or she does "research"? Second, what decisional habits of a justice benefit the most from a clerk's research?

As the statistics in Table 3 indicate, when a clerk does "research" he or she performs an assistant role by editing, drafting, Shepardizing, and footnoting the opinion. Research also involves the preparatory role duties of reviewing trial court records and preparing memos on petitions for review and transfer-retain appeals.[17]

Table 4 documents that a clerk's research makes its greatest contribution to the efforts of a justice who relies upon the recommendations of the "reporting" judge, *stare decisis,* his own research, and the view of the trial court, and who is not reluctant to write a dissenting opinion.

When a justice tends to assume that the "reporting" judge has done his job well, he is free to have his clerk concentrate on his own assigned cases

17. Tables III and IV were constructed by simply comparing the clerk's responses as to how important they regarded their research with their reactions to (1) the frequency certain tasks were assigned them and (2) their view of the importance of sources to their justice's decisions. Thus, as Table III indicates, those clerks who thought their research was very important were also those clerks who were more often assigned editing tasks. Kendall's Tau C measures the degree of association between two variables. Any $\tau c > .10$ with a P≤ .05 is regarded as statistically significant.

Table 4.
Judicial Tendencies Benefitting The Most From a Clerk's Research

Judicial Tendency	τ_c*	P**
Reliance on the "reporting" judge	.47	.00
Attention paid to the dictates of precedent	.30	.00
Reliance on judge's own research	.23	.00
Deference given the views of the trial court	.12	.05
Displays no reluctance to dissent	.10	.03

*The statistic used is Kendall's Tau C.
**The likelihood of finding a relationship of this magnitude by chance with this size sample is less than 5 out of 100, or $P \leq .05$.

and on his own drafts (majority, concurring, or dissenting). Also, justices who do much of their own research will likely wish close editing, Shepardizing, and footnoting from the clerk. The justice who grants deference to precedent needs assistance in tracing that precedent. In addition, the justice who puts considerable weight on the trial record, again, needs the clerk to review that record carefully. Finally, the justice who is not reluctant to write dissents often assumes additional burdens beyond the normal workload. Reliance upon research by the clerk simply spreads out that additional work.

Many of the anticipated relationships between the clerks' research contribution and other variables fail to be statistically significant. The philosophical stance (liberal or conservative) of the justice is not related to the importance of the clerk's research. Whether one's politics is left or right apparently matters little to the degree of clerking assistance.[18] Whether the judge is an activist or restraintist also is not important and likely should not be. One would be hard pressed to prove that one or another of these stances requires more clerking research. Whether the clerk's and justice's philosophies coincide also fails to be significant. This lack of coincidence defies the suggestion of one clerk:

> [It is very] important that the philosophy of the judge and the clerk coincide. I almost always argued with Judge _____, however. I noticed some clerks who had problems in this regard,

18. The philosophy of the clerks was at the center of the controversy over the importance of clerks in the late 1950s. The Warren Court's activist-liberal tendencies, it was claimed, were in large measure due to the liberal orientation of the Ivy League clerks serving the justices. (See, e.g., Gordon, 1960: 53-56; Rehnquist, 1957.)

> which resulted in a communications breakdown between clerk and judge.

The class standing and the number of honors received in law school also are not related significantly to the clerks' contribution, nor were family, college, and law school backgrounds. If the clerks' research assists the judges, it apparently is not related to any backgrounds the clerks bring with them.

Effectiveness of Clerking

Did the law clerks feel that they had been used effectively while with the state's high bench? What suggestions did they have for improving their use and enhancing their contribution? Each respondent was asked: "Do you think your skills were effectively utilized by the judge for whom you clerked?" and "What suggestions do you have about improving the use of law clerks?" Three-fourths of all the clerks felt that their skills had been effectively utilized. Interestingly, those critical of their experiences expressed two extremes. Some elbow clerks thought they had been grossly underused and some thought that they had too much awesome responsibility.

The laments about a lack of responsibility dealt more with the justices' styles than with assignments given the clerks. Most of the clerks who expressed a concern for their underutilization complained of a lack of a direct and periodical contact with their justices. They thought they had some important legal skills that should have been tapped by the justices, but they were rarely consulted. For example,

> [The justice] did not talk very much with his law clerk about his opinions and about his feelings. Consequently, I often found myself in the dark regarding the direction that he wanted to take and the manner in which he wanted to get to the final conclusion.

Another argued for

> more one on one oral discussion and interchange between law clerk and judge including broader philosophical implications of selected cases . . . a more reflective approach.

These clerks wanted an "increased dialogue" and conferences with the judge "before draft opinions." Clerks should act as the jurists' "sounding board for all cases." They should be encouraged to state their "opinions as a move to stimulate direction from the judge for lengthier research." One former clerk summarized the role he thought should be assumed by him and his colleagues:

> The primary function of a law clerk should be to alert his judge, and through him the court, of [legal trends in other states and

> the impact on other fields of law] so they may be taken into account. . . . A secondary function . . . should be to assure that sloppy language does not find itself into an opinion. The other judges do not very often have time to do so. Proper use of the law clerks would go far to minimize these problems.

At the other extreme, however, several clerks expressed a concern for the awesome responsibilities placed on their young and inexperienced shoulders:

> My only criticism is that perhaps I was given *too much* responsibility for my stage of development. Even the brightest of law school graduates is extremely "green." Some of the opinions I drafted have "come back to haunt me" in my legal career.

Another clerk quickly overcame his humility, however: "At first I was quite shocked at the amount of responsibility I had. Then I simply enjoyed it."

In sum, the criticism of those who felt they were not effectively used or who had urged some improvement emphasized the lack of periodic and direct contacts with their justice. They wanted to be more a part of his decisional style and make their contribution by sharing their knowledge and skills with him repeatedly, regularly, and personally.

Interestingly enough, the lack of satisfaction with clerking or the criticism of the experience did not come from the clerks of one or two specific justices. When the clerk's personality or style meshes with a judge—any judge—a fruitful association is most likely. This coalescence of needs and talents appears to involve adjustments on the part of judge as well as clerk. In the words of one former clerk:

> I felt much respect, even love, for "my judge," an opinion I have heard other clerks express many times. The clerkships were very much a personal relationship with the judges. The law itself was very much part of the personal relationship. I think the jurists and the clerks feel very much a part of the law. There is a sense of "history in the making." I have the utmost regard for the late Judge _____, as a man and as a jurist. I did not always agree with him of course (although now I probably would agree more often than I did as a young clerk).

Advantages and Disadvantages of Law Clerking as Seen by the Participants

There are advantages and disadvantages of law clerking to both the clerks and to the jurists. The advantages to the clerks are personal, professional, and practical. Development of confidence, maturity, contacts, and lasting friendships describes the personal attributes gained from the clerk-

ing experience. A considerable number of the clerks referred to a development of confidence through their clerking experience. Going to the highest court in the state immediately upon graduation, working intimately with highly respected and competent justices, hearing the arguments and reading the briefs of the best appellate attorneys (and some of the worst), drafting opinions and sharing ideas that were accepted and became part of the *Washington Reports,* and being treated as an equal among accomplished attorneys and jurists all led to the development of confidence.

Professionally, the short tenure with the high court was invaluable. The clerking experience added to their credentials, was instrumental in subsequent employment and advancement, provided them with a high status among their colleagues, and allowed them time to survey the options in the law before committing themselves, to mix with the lawyers and leaders of the bar, and to weigh employment opportunities while at the center of the appellate process. It was viewed as an ideal transition between law school and private practice.

Finally, from the practical view, the clerks acquired important lawyering skills. Virtually all of them attributed to clerking the development of research proficiency, refinement of writing skills, and the acquisition of knowledge of the rules, procedures, and decisional process of the appellate courts. They felt they learned how to be better brief writers, advocates at oral arguments, and perceptive counsel because they knew what judges want. Interestingly, many of the former clerks opined that their year or so with the supreme court developed an appreciation for trial advocacy. They recognized the importance of "protecting the record" or making a complete record at the trial in case of an appeal. Preparing for trial with an appeal in mind assisted many of them in their practice. One clerk wrote:

> Having served as a law clerk . . . has provided me with two definite advantages. . . . The first of these is a deeper understanding of the appellate process. I do not believe that a person can be a successful trial lawyer without also having a deep insight into the appellate process. Clerking taught me not only the technical rules of procedure on appeal, but more importantly, those factors which the court actually looked to in making a decision and how the decision comes about. Secondly, and closely related to the first, clerking sharpened my skills in briefing and the writing of appellate briefs. It is my firm belief that cases are won or lost on appeal by virtue of the memorandums filed, not the oral argument.

Many viewed their clerkship as an "internship," a "post-graduate" semes-

ter, or a "refinement" of their law training. It was clearly a timely respite in their careers and of great practical value.

But what of the disadvantages? Very few of the former clerks expressed any serious drawbacks, but some referred to "poor pay," delay in one's career, learning judicial skills "instead of advocacy," "lack of preparation for private practice," and the year not being counted toward tenure for partnership in a firm.

Virtually all of the former clerks felt that the advantages far outweighed the disadvantages and, given the opportunity, they would opt for clerking again. All the several categories of advantages were summarized well by one former clerk:

> It was a personal and professional inspiration to be associated with the Justice for whom I worked directly, as well as to associate with and talk with the other justices on the Court. The experience also permitted me to sharpen my research techniques, write concise legal memoranda, hear good and bad arguments of counsel, read good and bad briefs. Indirectly, the experience also . . . provided me an opportunity to study good and bad trial techniques which later were translated into actual experience when I was a trial lawyer and when I was a judge.

It is clear that the clerks gain considerably from their short stay with the state's high court. But do the justices gain from the experience and could the clerks be replaced by long-tenured research attorneys or career law clerks without any great loss to the court?

The major justification for beginning the clerkships back in 1937 was to expedite the court's work and to bring the docket current. The actual benefits, while quite important, seem to have been unanticipated and thus different from what the judges and others had expected.

Fresh from the "answer rooms" of law school, the clerks bring to their assignment a unique perspective and a singular spirit. Judicial thinking, even more than other forms of reasoning, thrives on continued challenge simply because it is the product of an adversary environment. Clerks are particularly situated to challenge. Unencumbered by a long-term loyalty to justice and court, clerks can more easily assume an independent and critical stance. Second-guessing, prediction, and anticipation born of a long personal relationship fail to dull the thrust and force of critical questioning. The enthusiasm and youth of recently graduated honor students adds to the critical role.

Additionally, the authority of the courts is enhanced as each year the experienced clerks take up their practice of law. They take with them not only their newly acquired skills but also a deep respect for the appellate

system, the justices, and the law. Karl Llewellyn (1960: 322), one of the more astute observers of the appellate system, expressed this enhancement quite succinctly:

> The spread of this institution spills out annually into the bar a batch of young lawyers—future leaders—who *know* from the inside that the appellate courts move with continuity, and move with responsibility, that they answer to their duty to the "law," that they move not as individuals or as persons, but as officers; a batch of young lawyers who have learned to see growth, and yet to feel the stability, the reckonability of the lines of growth—or of growth-resistance.

As a case progresses from trial to appellate levels it gains precedential value. Certainly, a great number of appeals are soon forgotten but now and then some cases must be carefully placed into a logical progression of precedent and, perhaps, cast out into a new direction (Cardozo, 1960). It is here that the clerk's unique perspective recently honed in law school makes its impact. The clerks provide the bridge between the theory of law school learned from the bright minds of today's law professors and the problems of real legal disputes. The jurisprudential perspective recently gained is not yet dulled under the pressures of everyday and often mundane practice of the law on one side of the bench or the other. Consequently, the clerks are often able to suggest where to place the legal issue facing the justice within the broad framework of the law and to explain the very latest in legal theory. The law clerks provide the conduit for the scholarship, intellectual spirit, and creative problem solving of today's law schools to find their way to appellate courts and, of course, then to the common law (Dorsen, 1963: 270; Llewellyn, 1960: 322; Oakley and Thompson, 1980: 36-39). Perhaps, in the long run, this will be the most meaningful contribution of the clerking institution.[19]

Summary and Conclusion

The recruitment, roles, responsibilities, and behavior of law clerks with state courts of last resort, if the Supreme Court of the State of Washington

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19. Of course, for the clerks to make their unique contribution to the appellate process, the law schools must provide them with the necessary tools. Some legal educators are worried. In response to the query, "What do you think the area of greatest deficiency [in legal education] is?", Professor Robert S. Summers (1979) of the Cornell School of Law convincingly argued:

> Neglect of general theory and perspective—not only traditional jurisprudence but also such subjects as legal process, legal history, general sociological theory about law, comparative law, and legal philosophy.

If this deficiency is widespread, we may be expecting too much of the law clerks. The clerks may be unable to make their unique contribution to appellate decision-making.

is any example, seem not to be altogether different from those clerks serving with the more visible Supreme Court of the United States. The appointment as clerk goes to the high achievers in law school and enhances their prestige, future employment, lawyering skills, and respect for the courts.

The relationship between clerk and justice is clearly personal, but common tasks are assigned in varying degrees to the clerks, allowing for generalizations. Two major roles emerge from the pool of alternatives: the "attendant" and the "assistant" roles. Enough of the clerks are placed in these roles to distinguish them from each other and from other clerks, although a number of common tasks are performed frequently enough by all the clerks to bring them all together into a common group. These roles are products of the court's institutional demands and the particular mix of clerk talents and judicial personalities as much as they are products of the desires and needs of the respective justices.

Important research by the clerk involves drafting, editing, and Shepardizing the justice's opinions. The clerk also makes a significant research contribution by reviewing the trial record and writing memos on petitions for review and on whether to transfer a case to the court of appeals or to retain the case at the supreme court. This research is more important to a justice who relies upon the reporting judge, precedent, the trial judge's views, and his own research. A clerk's efforts are also important to a justice who is not reluctant to dissent.

The advantages that accrue to the clerk from the year's stay with the state's high court are many. But the justice also benefits from the influx of creative ideas brought by the young clerk directly from the "answer rooms" of the law schools. Perhaps no other institution could adequately link the intellectual advances of academia with the practical world of the courts as well.

Given this picture, does it provide evidence bearing on the allegation that the law clerk is becoming part of the "hidden judiciary," that the clerk, through his or her anonymity and through the increased pressures on the judge, has assumed important decisional responsibilities? There is nothing inevitable about a law clerk becoming part of the hidden judiciary. As each judge readjusts each year to a new clerk, tasks are redefined and responsibility reasserted. As Baier (1973) suggests, we must trust that the judge delegates tasks and retains responsibility. It is obvious that it is the judge who makes the crucial decision by his vote in conference, his approval of the opinion, and the placement of his signature on the final opinion. The clerk merely *confirms* that decision through his or her drafting and editing activities. However, if judging is an incremental process whereby the

initial vote, although rarely reversed, grows and is given shape by subsequent research, drafting, and revision, the clerk assuming an assistant role *creates* much of the substance of a decision. Although the clerk gives form to the decision, the responsibility can, however, remain with the judge.

> There would appear nothing wrong in the draftsmanship of the clerk, provided the judge has the good sense to retouch the draft to eliminate any sentences or words not to his liking. And the retouching process is essential—it not only protects an individual interest in style, but it also guarantees the judge's fidelity to the law. It determines whether the course of judicial duty will run straight and true. It is precisely here that one must abandon further analysis and rest final opinion on faith alone; can the judges be trusted to weed out any writing that smacks of judgment? (Baier, 1973: 1169)

The preparatory role also presents an opportunity for the clerk to join the "hidden judiciary." By assistance as a keeper of the gates of the judicial process, the clerk plays an important part in what subsequently transpires. The responsibility of the justice is carefully to orient the clerk about the kinds of issues that are of interest to the judge. Standards are then set for the summaries of and recommendations on petitions for review and transfer-retain appeals. The justice must also caution the clerk to present balanced summaries in bench memoranda.

Whether or not law clerking has developed into something unintended, it continues to complement appellate judging and has an irreplaceable position in the judicial system. Because of its contribution to appellate decision-making, the institution requires more attention and study by legal scholars as well as social scientists. Judges and their assistants must also be more willing to participate in such research. Many meaningful queries remain. Are clerks at the trial level assuming similar roles? How is their research contribution made? What are the viewpoints of the judges regarding the tasks assigned their clerks? Do they consciously alter their assignments when confronted with varying responsibilities, varying clerk personalities and talents? Can means be designed to isolate the unique contribution of the clerk from that of a permanent research attorney, the judge, or an attorney for the litigants before the high bench? Are law schools consistently endowing their students with the skills to bridge the gap between theory and practice and the old and new? Clearly, we need to know more about this common and crucial adjunct to our court system.

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