

THOUGHTS ON LAW CLERK DIVERSITY AND INFLUENCE

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INTRODUCTION

It is my great good fortune to have been asked to comment on the remarkable Article *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals* by Judge Jeremy D. Fogel, Professor Mary S. Hoopes, and Justice Goodwin Liu.¹ Drawing on a rich vein of data gathered pursuant to a carefully crafted research design and extensive interviews, the authors provide the most detailed account to date regarding the selection criteria used by federal appeals court judges to select their law clerks. The authors pay special attention to the role that diversity plays in picking law clerks,² an important element that heretofore has not been fully explored. Before sharing my thoughts about the Article, I want to offer a short history lesson on the lack of diversity among law clerks in the federal and state courts. The employment barriers facing women, ethnic minorities, and Jewish law clerks throughout the twentieth century help place in context the current interest judges have in hiring candidates from diverse backgrounds; I believe that this interest includes an appreciation of the value of diversity, a sincere desire to rectify discriminatory hiring practices from earlier generations of judges, and a concern that not expanding clerkship selection criteria will draw public scrutiny. I will then turn my attention to Fogel, Hoopes, and Liu's findings and offer some thoughts about future research questions.

I. A BRIEF HISTORY REGARDING THE LACK OF DIVERSITY IN THE SUPREME COURT LAW CORPS

A. *Gender, Racial, and Ethnic Diversity Among Supreme Court Law Clerks*

Although Supreme Court Justices started employing law clerks in the late 1880s,³ the first female law clerk at the Supreme Court was not

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¹ See generally Jeremy D. Fogel, Mary S. Hoopes & Goodwin Liu, *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals*, 137 HARV. L. REV. 588 (2023).

² See, e.g., *id.* at 611–34 (discussing various dimensions of diversity among law clerks).

³ Todd C. Peppers, *Birth of an Institution: Horace Gray and the Lost Law Clerks*, 32 J. SUP. CT. HIST. 229, 231 (2007).

hired until 1944.⁴ Her name was Lucile Lomen, a graduate of the University of Washington School of Law who was selected by Justice Douglas because qualified male candidates were serving in the military.⁵ Justice Douglas took his time extending an offer to Lomen despite her strong letters of recommendation and sterling credentials,⁶ and he reached out to such trusted sources as former law clerk Vern Countryman to see “how [he thought] a girl would fare as a law clerk in these surroundings.”⁷ By all accounts, Lomen was a superb law clerk. In a letter of recommendation written after her clerkship, Justice Douglas described Lomen as possessing “a fine mind and a firm foundation in the law . . . She has a great capacity for work, is thorough, reliable and dependable in every respect.”⁸

Despite Justice Douglas’s success in hiring a first-rate female law clerk, his colleagues were not inspired to embrace gender diversity. Judge Kravitch of the Fifth and Eleventh Circuit Courts of Appeals graduated second in her class at the University of Pennsylvania School of Law in 1943.⁹ After having no success applying to clerk for Third Circuit judges, Judge Kravitch sent a clerkship application to Supreme Court Justice Murphy.¹⁰ “I was told [by Justice Murphy] that preference would be given to a male student because there never had been a female clerk,” Judge Kravitch recounted.¹¹

But after the interview he told me it was his birthday, and his secretary had bought him a cake. The other justices were all coming in to share and [he asked] would I do him the honor of staying and slicing the cake. So I did not get the clerkship but I played hostess.¹²

She was also rejected by one law firm after they learned that she was Jewish.¹³ Judge Kravitch later became the first woman to be named to the Fifth Circuit Court of Appeals.¹⁴

In 1960, another young Jewish law school graduate named Ruth Bader Ginsburg was rejected for a Supreme Court clerkship by Justice

⁴ David J. Danelski, *Lucile Lomen: The First Woman to Clerk at the Supreme Court*, 23 J. SUP. CT. HIST. 43, 43 (1999).

⁵ See *id.* at 43–44.

⁶ See *id.*

⁷ *Id.* at 44–45.

⁸ *Id.* at 48.

⁹ Daniel E. Slotnik, *Phyllis Kravitch, Judge Who Opened Doors for Herself, Dies at 96*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/us/obituary-phyllis-kravitch-dead-court-of-appeals-judge.html> [<https://perma.cc/3PWC-NUBQ>].

¹⁰ Interview by Anne Emanuel with Phyllis A. Kravitch, Judge, U.S. Ct. of Appeals for the Eleventh Cir. (July 17, 2013), *transcribed in* COMM’N ON WOMEN IN THE PRO., ABA, ORAL HISTORY OF PHYLLIS A. KRAVITCH 6, https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/phyllis-kravitch-interview-1-071713.pdf [<https://perma.cc/MK2J-XS5E>].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ Bill Rankin, *All-Female Bench Makes History at 11th Circuit*, ATLANTA J.-CONST., Feb. 1, 2002, at D4.

Frankfurter.¹⁵ Chief Justice Bender of the Supreme Court of the Fort McDowell Yavapai Nation clerked for Justice Frankfurter from 1959 to 1960, and he remembered the Justice's reaction to having a woman in chambers:

One day during the term Justice Frankfurter comes into our office and announces "guess who [Harvard Law School Professor] Al Sacks wants to send me as a law clerk next year — Ruth Bader Ginsburg." My co-clerk and I told him that it was a wonderful idea, but Justice Frankfurter replied that "she has a couple of kids [(Ginsburg had a daughter)], and her husband has been ill [(Martin Ginsburg had recovered from cancer)], and you know that I work you guys very hard, and I do curse sometimes" as reasons why it wouldn't be a good idea. Well, that wasn't the case. We had the softest job of all the law clerks at the court — we didn't work nights or weekends — and the Justice did not use four letter words. I concluded that the Justice wasn't comfortable with a female law clerk.¹⁶

Justice Ginsburg was not surprised by Justice Frankfurter's decision, although she was disappointed. "There were no antidiscrimination laws on the books when I graduated from law school and men of a certain age were not accustomed to dealing with women in a work setting,"¹⁷ Justice Ginsburg noted. She added that having a young child also undercut her chances of receiving a clerkship offer.¹⁸

Twenty years after Judge Kravitch "played hostess" for Justice Murphy, not much had changed at the Supreme Court. Although Stanford Law School student Brooksley Born was at the top of her class and the first female editor-in-chief of the law review,¹⁹ the Stanford Law School clerkship committee did not recommend Born for a Supreme Court clerkship.²⁰ Undeterred, Born wrangled interviews with Justices Stewart and Goldberg.²¹ Justice Stewart told Born that he "wasn't ready" for gender equity in his chambers, while Justice Goldberg declined to extend a clerkship offer but penned a note in support of her lower court clerkship applications.²² Born ended up clerking for Judge

¹⁵ Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <https://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html> [https://perma.cc/DT43-8BRX].

¹⁶ Telephone Interview with Paul Bender, C.J., Sup. Ct. of the Fort McDowell Yavapai Nation (May 29, 2009) (notes on file with the Harvard Law School Library).

¹⁷ Letter from Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., to author (Oct. 13, 2016) (on file with the Harvard Law School Library).

¹⁸ *Id.*

¹⁹ When Born was selected to head the *Stanford Law Review*, the *San Francisco Examiner* ran the headline "Girl to Edit Law Review." *Girl to Edit Law Review*, S.F. EXAM'R, May 16, 1963, at 17.

²⁰ Manuel Roig-Franzia, *Credit Crisis Cassandra*, WASH. POST (May 26, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502108_pf.html [https://perma.cc/W7WZ-DC7C].

²¹ *See id.*

²² *Id.*

Edgerton of the United States Court of Appeals for the District of Columbia — at the time, the only federal judge in the circuit to hire female law clerks — before joining Arnold & Porter.²³

A year later, Yale Law School graduate Barbara Paul Robinson also discovered that attending an elite law school and holding an editorial position on a top law review was not sufficient to overcome gender bias in clerkship applications.²⁴ She had two “painful” interviews with Supreme Court Justices, neither of whom extended an employment offer.²⁵ “I kind of wondered if they were doing this to be polite to whoever arranged it,” Robinson recalled.²⁶ Instead of clerking, Robinson took a position at Debevoise & Plimpton, eventually becoming the first female partner in the firm’s history.²⁷ It would not be until 1966 that the second female law clerk at the Supreme Court — Margaret Corcoran — was hired by Justice Black.²⁸ While Justice Black should be lauded for selecting a female clerk, her selection had less to do with gender equity and more to do with Justice Black’s friendship with Margaret’s father, former New Dealer and prominent Washington lawyer Tommy “the Cork” Corcoran.²⁹ Two years later, Justice Fortas hired Martha F. Alschuler as the third female law clerk at the Supreme Court.³⁰

The Supreme Court was slow to embrace racial diversity in law clerks as well. Harvard Law School graduate William T. Coleman, Jr., was the first African American to clerk at the Court.³¹ Despite graduating magna cum laude from law school, Coleman struggled to find legal employment because of his race — a fact that he bluntly shared in a clerkship application to Justice Black: “Despite my training, owing to the fact that I am a Negro I have encountered considerable difficulty in getting a suitable position.”³²

²³ Sean Groom, *Legends in the Law: Brooksley Born*, WASH. LAW., Oct. 2003, at 32, 34.

²⁴ See Telephone Interview with Barbara Paul Robinson, Retired Partner, Debevoise & Plimpton (July 19, 2022) (on file with the Harvard Law School Library).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ellen Rosen, *Female Lawyers Set Sights on Yet One More Goal: A Seat on a Board*, N.Y. TIMES (Apr. 6, 2007), <https://www.nytimes.com/2007/04/06/business/06board.html> [<https://perma.cc/C85B-VHF6>].

²⁸ *Names and Faces in the News: Margaret Corcoran*, BOS. GLOBE, Feb. 9, 1966, at 10. In 1950, Sarah Livingston Davis applied for a clerkship position with Justice Black. Letter from Hugo Black, Assoc. Just., U.S. Sup. Ct., to Sarah Livingston Davis (Oct. 17, 1950), in Hugo L. Black Papers, Library of Congress, box 442. Although Justice Black did not have an opening, he told Davis that he was not opposed to hiring a woman: “I should have no objection whatever to appointing a woman clerk provided she met the qualifications desired.” *Id.*

²⁹ See TODD C. PEPPERS, COURTIFIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 20–21 (2006).

³⁰ *Id.* at 21.

³¹ *Frankfurter’s Negro Clerk to Be First in Court History*, WASH. POST, Apr. 27, 1948, at 1.

³² WILLIAM T. COLEMAN WITH DONALD T. BLISS, COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA’S PROMISE 73 (2010).

Coleman was hired in 1948 by Justice Frankfurter (the same Justice Frankfurter who declined to hire a female clerk).³³ Justice Frankfurter's choice made news headlines around the country.³⁴ Decades later, Coleman explained that he was the beneficiary of changing attitudes toward race:

I knew that I was the first . . . but I knew that under different circumstances Charlie [(Charles Hamilton)] Houston and Bill [(William H.)] Hastie would have been the first because they were brighter, more able people . . . but they lived in a different time and didn't have the same opportunities.³⁵

The times, however, were not changing fast enough. Almost two decades passed before Tyrone Brown became the second African American law clerk when he joined Chief Justice Warren's staff in 1967.³⁶ Brown did not apply for the clerkship but was nominated for the position by a Cornell Law School professor.³⁷ When asked if the Chief Justice had sought to hire a minority law clerk, Brown said:

I would be very surprised if it weren't the case that Chief Justice Warren had said that it would be nice to have a qualified negro law school graduate on the Court . . . but I don't have any indication that Warren "put out a net" for qualified black students.³⁸

Brown later described Chief Justice Warren as a "dear man" and one of his heroes.³⁹

When the first Black law clerk, William Coleman, clerked at the Supreme Court, Jim Crow segregation laws barred him from dining at Justice Frankfurter's preferred restaurants.⁴⁰ In contrast, Tyrone Brown recounted that the Chief Justice routinely took his law clerks to lunch at the University Club, which remained segregated in the late 1960s.⁴¹ The practice continued when Brown joined the chambers.⁴²

³³ *Id.* at 76–77.

³⁴ See, e.g., *Frankfurter's Negro Clerk to Be First in Court History*, *supra* note 31. When Justice Frankfurter received letters applauding his selection of Coleman, the Justice replied as follows: "You are kind to write me, but I do not think a man deserves any praise for doing what is right and abstaining from the wrong." Todd C. Peppers, *William Thaddeus Coleman, Jr.: Breaking the Color Barrier at the Supreme Court*, 33 J. SUP. CT. HIST. 353, 359 (2008).

³⁵ Peppers, *supra* note 34, at 359 (quoting Interview by Renee Poussaint with William T. Coleman, NAACP Legal Defense Fund (Apr. 8, 2003) (transcript on file in the National Visionary Leadership Project Interviews and Conference Collection, Library of Congress, box 4/39)).

³⁶ PEPPERS, *supra* note 29, at 22.

³⁷ *Id.* at 241 n.13.

³⁸ *Id.*

³⁹ Interview by Laura McCreery with Tyrone Brown, in Washington, D.C. (Aug. 2, 2005), *transcribed in* BANCROFT LIBR., THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: TYRONE BROWN 14, https://digitalassets.lib.berkeley.edu/roho/ucb/text/brown_tyrone_2014.pdf [<https://perma.cc/S7QE-S99D>].

⁴⁰ See Peppers, *supra* note 34, at 363.

⁴¹ See Interview by Laura McCreery with Tyrone Brown, *supra* note 39, at 14.

⁴² *Id.*

“Earl Warren loved taking me in for lunch,” said Brown. “What were they going to do?”⁴³

The first African American woman to clerk on the Court was Karen Hastie Williams, who was hired by Justice Marshall in 1974.⁴⁴ Williams later described Justice Marshall as not only her godfather, but also “a mentor and an inspiration.”⁴⁵ In discussing her clerkship for an oral history project, Williams argued for the importance of hiring law clerks from diverse backgrounds:

I think that it is very important that the clerks at the court represent a broad cross-section of American society because the cases being heard and the opinions that are being written are going to affect Americans all across the country and I think that for the court to really be fully representative of all of the American citizens that having clerks who come from a number of different backgrounds means that the dialogue of the clerks with the Justice and the clerks with each other the dialogue is going to look at different perspectives.⁴⁶

Williams stated that Justice Marshall also valued diversity amongst his law clerks.⁴⁷ “[He said,] ‘I want my clerks to be representative of the American population. I want women clerks and I want clerks of color, but that doesn’t mean that it has to be all four clerks woman or four clerks of color.’”⁴⁸ She acknowledged, however, the criticism that Justice Marshall did not hire enough minority clerks.⁴⁹ “I think that he was aware of the criticism that was being made but his objective was to do everything he could to get a strong representative group within his group of clerks.”⁵⁰

The hiring of minority and female law clerks at the Supreme Court increased in the 1970s and 1980s.⁵¹ But, as noted in the Article by Fogel, Hoopes, and Liu,⁵² by the late 1990s Supreme Court law clerks were

⁴³ *Id.*

⁴⁴ See *White Males Dominate Court Work Force*, COM. APPEAL (Memphis), June 11, 1979, at 17.

⁴⁵ Martin Weil & Stephanie Griffith, *Marshall Transformed Nation in the Courts*, WASH. POST, Jan. 25, 1993, at A11.

⁴⁶ Interview by Ginger Patterson with Karen Hastie Williams (Apr. 26, 2006), *transcribed in* COMM’N ON WOMEN IN THE PRO., ABA, ORAL HISTORY OF KAREN HASTIE WILLIAMS 16, https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/karen_hastie_williams_interview_2_of_3.pdf [<https://perma.cc/JLY2-XZXU>].

⁴⁷ *See id.*

⁴⁸ *Id.* at 16–17.

⁴⁹ *See id.* at 17.

⁵⁰ *Id.*

⁵¹ See PEPPERS, *supra* note 29, at 21; *id.* at 22 (noting that despite marginal increases, “the precise number of African Americans or other minorities hired in the 1970s and 1980s . . . proved more elusive than gender parity”).

⁵² See Fogel, Hoopes & Liu, *supra* note 1, at 595.

still predominately male and white.⁵³ Moreover, some Justices on the Rehnquist Court — including Chief Justice Rehnquist and Justices Kennedy, Scalia, and Souter — had yet to hire a Black law clerk.⁵⁴

B. Law Clerk Diversity in the Federal Courts of Appeals

Given the lack of comprehensive employment data on gender and race in these positions, it is harder to determine when women and minorities started to be hired as law clerks in the lower federal and state courts. Using newspaper archives and law review articles, I attempted to collect accurate clerkship records by using a combination of search terms (such as “first female” or “first woman” and “law clerk”). Given the racial terms of the day, both terms “first black” and “first negro” were also utilized, along with “law clerk.”⁵⁵ While I believe that my data collection efforts have uncovered many of the “firsts,” any hirings of law clerks from diverse backgrounds not covered by newspapers or memorialized in legal journals would not have been captured.

A second problem in identifying the incidence of law clerks from underrepresented backgrounds arises from the early ambiguity of the term “law clerk.” Justice Holmes referred to his young assistants as legal secretaries, although the Harvard Law School graduates who worked for Justice Holmes did substantive legal work.⁵⁶ Others who worked at the Court and were called law clerks were actually stenographers.⁵⁷ And some newspaper accounts use the phrase “law clerk” to refer to individuals who worked in clerks’ offices. Finally, accounts of the early law clerks’ job duties are lacking and cannot affirmatively support the conclusion that, regardless of holding the title “law clerk,” such individuals were performing substantive legal work.

Federal appeals court judges were first authorized to hire law clerks in 1930.⁵⁸ While historical accounts have commonly identified Carmel

⁵³ See Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, NAT’L L.J. (Dec. 11, 2017, 4:00 AM) [hereinafter Mauro, *Mostly White and Male*], <https://www.law.com/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks> [<https://perma.cc/B3K3-S8ZV>]; Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998 [hereinafter, Mauro, *Corps of Clerks*]. A 2017 study by Tony Mauro showed substantial gains in gender diversity, but that racial diversity remained low. Mauro, *Mostly White and Male*, *supra*.

⁵⁴ Mauro, *Corps of Clerks*, *supra* note 53; Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 MARQ. L. REV. 361, 361–66 (2014).

⁵⁵ While antisemitism permeated the legal profession in the first decades of the twentieth century, it has proven difficult to identify the first Jewish law clerks. Ironically, the only newspaper accounts that identify a law clerk’s religion revolve around the appointment of Justice Black to the Supreme Court. Facing a firestorm of controversy over his membership in the Ku Klux Klan, someone in Justice Black’s inner circle let the press know that Justice Black’s secretary was Catholic and his law clerk Jewish. See *Jew and Catholic Work for Black*, DAILY MAIL (Hagerstown, Md.), Oct. 13, 1937, at 12.

⁵⁶ See PEPPERS, *supra* note 29, at 58.

⁵⁷ *Id.* at 84.

⁵⁸ See Act of June 17, 1930, Pub. L. No. 71-373, 46 Stat. 774.

Prashker Ebb as the first woman to clerk in the appeals courts,⁵⁹ there is evidence to suggest that Florence Anna de Haas Dembitz was the first woman to achieve that honor.⁶⁰ A 1934 graduate of Columbia Law School, and the daughter of a prominent Zionist leader, Dembitz was, according to newspaper accounts written at the time of her death, working as a “legal assistant”⁶¹ or law clerk for Judge Mack of the Second Circuit Court of Appeals.⁶² If Dembitz was a law clerk, it was a short-lived position; by the end of 1934, she was working for prominent New York attorney and reformer Adolph A. Berle, Jr.⁶³ Dembitz subsequently held multiple legal positions in New Deal agencies before her tragic death in a car accident in 1955.⁶⁴

If Dembitz was not the first female federal appeals court clerk, then the title likely goes to Ida Oranovich Creskoff.⁶⁵ In 1914, she graduated among the top four in her class from the University of Pennsylvania Law School.⁶⁶ In the following fifteen years, Creskoff practiced law and was a law clerk for Judge Thompson of the Third Circuit Court of Appeals from 1937 to 1938.⁶⁷ Creskoff subsequently worked as a law clerk for Judge Maris of the Third Circuit Court of Appeals from 1939 to 1947.⁶⁸ Creskoff described Judge Maris as an “intolerant” man — “intolerant of injustice, intolerant of prejudice, intolerant of insincerity.”⁶⁹ She was later appointed clerk of the court for the Third Circuit,⁷⁰ a position that she held until 1966.⁷¹ When she retired, Creskoff reflected on her trailblazing career. “Nowdays [sic] women breaking into law have less problems, are taken for granted, which is all one can ask for,” she told the *Philadelphia Daily News*.⁷² “The law firm that hired me when I was in private practice had courage, so did the judges that appointed me to the court in 1947.”⁷³

⁵⁹ See, e.g., Debra Cassens Weiss, *First Female Clerk to a Federal Appeals Judge Dies at 94*, ABA J. (Feb. 12, 2019, 1:40 PM), <https://www.abajournal.com/news/article/first-female-clerk-to-a-federal-appeals-judge-dies-at-the-age-of-94> [<https://perma.cc/K2C7-EEVL>].

⁶⁰ See *Mrs. Dembitz, Attorney, Crash Victim*, WASH. POST & TIMES HERALD, Aug. 6, 1955, at 18.

⁶¹ *Id.*

⁶² *Woman Lawyer Dies in Wreck*, EVENING STAR (D.C.), Aug. 5, 1955, at A1.

⁶³ See *Mrs. Dembitz, Attorney, Crash Victim*, *supra* note 60, at 18.

⁶⁴ See *Woman Lawyer Dies in Wreck*, *supra* note 62, at A1.

⁶⁵ *1st Woman Named Clerk of Court*, PHILA. INQUIRER, Aug. 16, 1947, at 11.

⁶⁶ Charlie Bannister, *U.S. Court's Chief Clerk Leaving Post*, PHILA. DAILY NEWS, Sept. 14, 1966, at 26.

⁶⁷ *1st Woman Named Clerk of Court*, *supra* note 65, at 11; *She's in the News*, WIS. JEWISH CHRON., Jan. 29, 1937, at 4.

⁶⁸ *1st Woman Named Clerk of Court*, *supra* note 65, at 11.

⁶⁹ Dolores K. Sloviter, *Albert Branson Maris, 1893-1989*, 62 TEMP. L. REV. 471, 474 (1989).

⁷⁰ *Woman Law Clerk Appointed to U.S. Circuit Court Berth*, SCRANTON TIMES-TRIB., Aug. 16, 1947, at 4.

⁷¹ *Ida Creskoff*, PHILA. INQUIRER, Sept. 21, 1982, at 5-B.

⁷² Bannister, *supra* note 66, at 26.

⁷³ *Id.*

At approximately the same time that Creskoff was clerking for Judge Thompson, Mildred M. Spalding started clerking in the Sixth Circuit.⁷⁴ Spalding worked as a legal secretary for federal district court Judge Hamilton and “read [the] law.”⁷⁵ Spalding had previously worked for Judge Hamilton in his private law practice, and she was a trusted member of his legal team; she was assigned substantive duties (such as collecting the histories of criminal defendants prior to sentencing) and was referred to as Judge Hamilton’s “virtual ‘law partner.’”⁷⁶ Spalding was promoted to law clerk when Judge Hamilton was elevated to the Sixth Circuit Court of Appeals in 1938.⁷⁷ Judge Hamilton clearly valued Spalding’s dedication; when he died in 1946, he left Spalding a bequest of two thousand dollars.⁷⁸ Spalding finished her career working as a secretary for federal district court Judge Shelbourne.⁷⁹

These progressive hiring practices in gender diversity started to slowly spread across the circuits. Like Spalding, Nell Rhodes Fisher started her legal career as a secretary for Federal Judge Murrah.⁸⁰ After Judge Murrah suggested that she become an attorney, Fisher enrolled in night law school while continuing to work as a secretary and raising a son as a single parent.⁸¹ Fisher’s secretarial duties were not limited to filing and taking dictation; on one occasion she was temporarily appointed to be an acting assistant United States Marshal and tasked with transporting a female prisoner by train to a federal prison in West Virginia *without* the benefit of a sidearm.⁸²

Upon Fisher’s graduation from law school in 1940, Judge Murrah promoted her to law clerk.⁸³ “I think it was a shock to the men,” Fisher remarked about the start of her “avant-garde” legal career.⁸⁴ Her grandson Tad Rhodes recalls that balancing work and family obligations was

⁷⁴ See *Hamilton Takes Oath Today as Circuit Judge*, LOUISVILLE COURIER-J., Apr. 1, 1938 (§ 1), at 3.

⁷⁵ Marjorie Taylor, *Private Secretaries Who Clicked*, LOUISVILLE COURIER-J., Aug. 13, 1939 (§ 2), at 4; see also Richard Renneisen, *Defendants Aren’t Strangers Here*, LOUISVILLE COURIER-J., Dec. 13, 1936, at 7.

⁷⁶ Renneisen, *supra* note 75, at 7.

⁷⁷ *Hamilton Takes Oath Today as Circuit Judge*, *supra* note 74, at 3. The article states that Spalding was “sworn” in as Judge Hamilton’s law clerk and Mrs. J. Edward Watson was appointed his secretary. *Id.*; see also Taylor, *supra* note 75, at 4.

⁷⁸ *Judge’s Estate Given Children*, LOUISVILLE COURIER-J., Oct. 4, 1945 (§ 1), at 13.

⁷⁹ *U.S. Judge’s Secretary to Resign This Month*, LOUISVILLE COURIER-J., Oct. 3, 1956 (§ 2), at 1.

⁸⁰ Telephone Interview with Tad Rhodes (June 23, 2022) (notes on file with the Harvard Law School Library).

⁸¹ *Id.*

⁸² See *Women Prisoners to Travel in Style*, OKLA. NEWS, Sept. 16, 1937, at 8; *Judge’s Secretary to Be Marshal*, DAILY OKLAHOMAN, Sept. 15, 1937, at 20.

⁸³ See Telephone Interview with Tad Rhodes, *supra* note 80.

⁸⁴ Heather Saucier, *Feminist Group Correcting Image on 30th Birthday*, TULSA WORLD, June 23, 1996, at D-1.

challenging for Fisher.⁸⁵ Rhodes described his grandmother as a “tough and flinty” woman who didn’t mince words: “[We w]ent out to dinner after I took the bar. ‘Better men than you failed the bar on their first attempt.’ That is what [my] grandmother said to me at dinner. She was salty.”⁸⁶

While Carmel Prashker Ebb was not the first woman to clerk for a federal appeals court judge, she was the first to publicly discuss her experience.⁸⁷ After Ebb graduated from Columbia Law School in 1945, she was hired by Judge Frank of the Second Circuit.⁸⁸ “[F]emale graduates couldn’t expect to be recommended as law clerks to sitting judges, no matter how well their records stacked up against their male classmates,” wrote Ebb.⁸⁹ Undeterred, Ebb put her new advocacy skills to use:

So I was delighted to read an article in the *Saturday Evening Post* by Judge Jerome Frank of the 2nd U.S. Circuit Court of Appeals at New York, opining that women were as intellectually competent as men, and that there was no reason not to hire a woman to do what was traditionally a man’s work. . . . Having read Frank’s encouraging words, I wrote him a letter describing my credentials and ambitions . . . and to my astonishment, I received an invitation to come talk to him. It was love at first encounter, and Columbia confirmed that I was qualified to be a law clerk, although it would never have proposed me.⁹⁰

Despite her appellate clerkship with a judge of Jerome Frank’s caliber, Ebb’s efforts to subsequently clerk on the United States Supreme Court were also thwarted by her gender; while Ebb interviewed with a Justice, the Justice told her that his wife would not let him work in chambers with a woman.⁹¹ Ebb took pride, however, in the fact that her husband subsequently served as Chief Justice Vinson’s law clerk.⁹²

Ebb’s two-year clerkship may have led Judge Frank to hire his second female clerk, future D.C. Circuit Court of Appeals Judge Wald.⁹³ There is a familiar pattern to Judge Wald’s story. A 1951 graduate of

⁸⁵ Telephone Interview with Tad Rhodes, *supra* note 80 (“I know that the clerkship was tough as she felt torn between working full-time and being a single mother.”).

⁸⁶ *Id.*

⁸⁷ See Kim Ebb, *A Life of Legal Firsts — Including Romance and Marriage*, ABA J. (Dec. 4, 2018, 6:30 AM), https://www.abajournal.com/voice/article/a_career_of_legal_firsts_including_romance_and_marriage [https://perma.cc/5R7P-DRUB].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Weiss, *supra* note 59.

⁹² See Carmel “Kim” Prashker Ebb, *A Life of Legal Firsts*, reprinted in *OF COURTIER AND PRINCES* 163, 165 (Todd C. Peppers ed., 2020).

⁹³ See Interview by Nancy Morawetz with Patricia M. Wald, C.J., U.S. Ct. of Appeals for the D.C. Cir. (Feb. 9, 2018), transcribed in N.Y.U. SCH. OF L., *ORAL HISTORY OF DISTINGUISHED AMERICAN JUDGES* 19–20, https://www.law.nyu.edu/sites/default/files/Wald%20Transcript%20%20Final%20WO%20Line%20Numbers_508.pdf [https://perma.cc/TZ7H-7LKP].

an elite law school⁹⁴ and a member of its law review, she struggled to find legal employment.⁹⁵ Judge Wald recounted an interview she had with a top New York law firm and the role that gender played in the decision not to hire her: “It’s really a shame,” she recalled the man [(a hiring partner)] saying. “If only you could have been here last week.” A woman had been hired then, she was told, and it would be a long time before the firm considered bringing another on board.⁹⁶ At the time of her appellate clerkship in 1951, Judge Wald was the only female law clerk in the entire Second Circuit. “Frank was very, very pro-women,” she explained.⁹⁷ “[A]head of his time.”⁹⁸

In a 2018 oral history interview, Judge Wald explained the importance of diversity in selecting law clerks:

I had 70 law clerks over the period of 20 years. Incidentally, half of them were women, roughly half. I did make it a point to get as many fairly women. I tried to get some from the non-fancy elite law schools, so I had several over the period. I tried as much to get diversity. It wasn’t always easy because some of the best candidates that came to us in diversity went to other judges who were better “feeders” than I was to the Supreme Court.⁹⁹

Judge Wald’s observations about gender and academic diversity and the challenges facing judges who want to select diverse candidates echo those captured in the Article authored by Fogel, Hoopes, and Liu.

In 1947, the Court of Appeals for the D.C. Circuit joined the Second, Third, and Sixth Circuits by hiring its first female law clerk when Chief Judge Stephens hired University of Michigan Law School graduate Cornelia Groefsema Kennedy.¹⁰⁰ While a pioneer in terms of female law clerks in the D.C. Circuit, she was not a legal pioneer in her own family — Kennedy’s sister, Margaret Groefsema Schaeffer, graduated from the University of Michigan Law School before Kennedy and accepted a clerkship with Sixth Circuit Judge McAllister.¹⁰¹ Kennedy credited her

⁹⁴ Judge Wald was a graduate of Yale Law School. Adam Bernstein, *Patricia Wald, Pathbreaking Federal Judge Who Became Chief of D.C. Circuit, Dies at 90*, WASH. POST (Jan. 12, 2019, 12:10 PM), https://www.washingtonpost.com/local/obituaries/patricia-wald-pathbreaking-federal-judge-who-became-chief-of-dc-circuit-dies-at-90/2019/01/12/6ab03904-1688-11e9-803c-4ef28312c8b9_story.html [<https://perma.cc/2WMA-V6C3>]. Harvard Law School did not start accepting female law students until 1950. *Women at HLS: 60 Years of Transformation*, HARV. L. SCH., <https://exhibits.law.harvard.edu/women-hls> [<https://perma.cc/U3FD-8FSG>].

⁹⁵ Bernstein, *supra* note 94.

⁹⁶ *Id.*

⁹⁷ Interview by Judith A. Winston with Patricia M. Wald, Chief Judge, U.S. Ct. of Appeals for the D.C. Cir. (June 5, 2006), *transcribed in* COMM’N ON WOMEN IN THE PRO., ABA, ORAL HISTORY OF PATRICIA M. WALD 34, <https://purl.stanford.edu/zj195yf579> [<https://perma.cc/U7LH-L2BL>].

⁹⁸ *Id.*

⁹⁹ Interview by Nancy Morawetz with Patricia M. Wald, *supra* note 93, at 106.

¹⁰⁰ *Cornelia Groefsema Becomes a D.C. Circuit Law Clerk (1947)*, JOHN Q. BARRETT (June 25, 2014), <https://johnqbarrett.com/2014/06/25/cornelia-groefsema-becomes-a-d-c-circuit-law-clerk-1947> [<https://perma.cc/RFG7-5FAH>].

¹⁰¹ *Id.*

sister Margaret with helping her get a clerkship.¹⁰² “My judge had never had a woman law clerk before,” Kennedy explained.¹⁰³ “I really got my job because I was Margaret’s sister and Judge McAllister had written to Judge Stevens to recommend me.”¹⁰⁴ Judge McAllister must have been impressed with Kennedy’s talents because he wrote the letter of recommendation *after* Kennedy declined his own clerkship offer (she wanted to live on the East Coast).¹⁰⁵ Kennedy added that that she had suspected that Judge McAllister’s wife also pushed him to hire a female clerk.¹⁰⁶

In a joint interview, the sisters recalled the prevailing gender discrimination of the day.¹⁰⁷ During their clerkships on the Sixth and D.C. Circuits, neither sister recalled seeing a female attorney argue an appeal,¹⁰⁸ and, when they entered private practice together, new clients assumed that they were secretaries.¹⁰⁹

The two sisters continued their parallel career paths, with Kennedy later serving as a federal district court judge before being appointed to the federal appeals court and Schaeffer sitting on a state court bench.¹¹⁰ They were very likely to be the first sisters to serve as judges.¹¹¹ Judge Kennedy was the first female appointed to the federal district court bench in Michigan and was later on the short lists of Presidents Nixon, Ford, and Reagan to be the first woman to sit on the Supreme Court.¹¹²

Even on the appellate bench, Judge Kennedy was reminded of the gender discrimination facing women in the law:

Arriving at her new post in Cincinnati, Judge Kennedy was startled to be presented with a hot plate. The only previous female judge [(Florence Allen)] to have served on the Sixth Circuit had used it while male colleagues dined at the University Club of Cincinnati, which excluded women then. Judge Kennedy was eventually the first woman to be admitted to the club¹¹³

¹⁰² Interview by Allison A. Miller with Cornelia Groefsema Kennedy, Judge, U.S. Ct. of Appeals for the Sixth Cir. (Jan. 12, 2012), *transcribed in* COMM’N ON WOMEN IN THE PRO., ABA, ORAL HISTORY OF CORNELIA GROEFSEMA KENNEDY 44, https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/kennedy_interview_1.pdf [<https://perma.cc/YSC2-6W7N>].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 45.

¹⁰⁵ *Cornelia Groefsema Becomes a D.C. Circuit Law Clerk (1947)*, *supra* note 100.

¹⁰⁶ Interview by Allison A. Miller with Cornelia Groefsema Kennedy, *supra* note 102, at 45.

¹⁰⁷ Katie Vloet, *Sisters in Law*, U. MICH. L. QUADRANGLE, Fall 2012, at 37–39.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* at 38.

¹¹⁰ Interview by Allison A. Miller with Cornelia Groefsema Kennedy, *supra* note 102, at 56, 82, 92.

¹¹¹ *Id.* at 56, 130.

¹¹² Douglas Martin, *Cornelia G. Kennedy, A Pioneering Federal Judge, Dies at 90*, N.Y. TIMES (May 23, 2014), <https://www.nytimes.com/2014/05/25/us/cornelia-g-kennedy-pioneering-federal-judge-dies-at-90.html> [<https://perma.cc/Y4WX-QHM7>].

¹¹³ *Id.*

*C. Law Clerk Diversity in the Federal District
Courts and State Supreme Courts*

Federal district court judges were first authorized to hire clerks in 1936,¹¹⁴ and similar to their appellate counterparts, they were slow to embrace gender parity in law clerk hiring. However, unusually high concentrations of female law clerks could be found in some federal trial courts in the 1950s and 1960s. Judge Burnita Shelton Matthews, the first female federal district court judge, only hired women as law clerks because none of the other judges would hire women.¹¹⁵ And in the mid-1950s, all five federal judges in the Eastern District of Michigan had a female law clerk.¹¹⁶ In a 1952 issue of the *Women Lawyers Journal*, Chief Judge Lederle discussed the academic backgrounds and accomplishments of each clerk as follows:

From the wealth of this experience in working with women legal assistants graduated from various universities, coupled with our knowledge of the admirable judicial services of our good friend, Judge Florence E. Allen, of our Sixth Circuit Court of Appeals at Cincinnati, and our observation of women practicing before us, we know that women have earned an honored place in the legal profession.¹¹⁷

Chief Judge Lederle couldn't hide his pride when he discussed his own law clerk, Ruth Riddell, who had worked by his side for fourteen years.¹¹⁸

The federal judges in the Eastern District of Michigan continued to hire female law clerks, which caught the attention of the *Detroit News*.¹¹⁹ The judges interviewed for a 1966 article lavished praise not only on their own clerks, but also on female attorneys in general.¹²⁰ "Women intuitively have a feeling for the law that most men don't have," said Judge Thornton.¹²¹ His comments were seconded by Judge Machrowicz. "I feel that women enjoy and do a better job of reading and finding the law than their male counterparts."¹²² The female law clerks of both judges had served in their positions for over a decade.¹²³

In the spring of 1959, Judge Palmieri of the Southern District of New York made a fateful decision that subsequently impacted not only the professional career of a young law school graduate but arguably also the

¹¹⁴ See Act of Feb. 17, 1936, Pub. L. No. 494, 49 Stat. 1140.

¹¹⁵ Polly Wirtzman Craighill, *Clerking for the Honorable Burnita Shelton Matthews: A Southern Gentle Woman*, in *OF COURTIERS AND PRINCES*, *supra* note 92, at 95.

¹¹⁶ See Arthur F. Lederle, *Wayne State University Confers First Master's Degree on Detroit Law Clerk*, 38 *WOMEN LAWS J.* 18, 18 (1952).

¹¹⁷ *Id.* at 19.

¹¹⁸ See *id.* at 18.

¹¹⁹ See, e.g., John A. Gallagher, *Women Law Clerks Put Dents in Male Bulwark*, *DETROIT NEWS*, Sept. 11, 1966 (§ F).

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

future of the Supreme Court — he extended a clerkship offer to then-attorney Ruth Bader Ginsburg.¹²⁴ Hiring a law clerk with such a diverse background was not an aberrant decision by Judge Palmieri:

[I]n his first ten years on the federal bench, three of his law clerks were Jewish women (Jeanne Ritchie Silver, Ruth Bader Ginsburg, and Malvina Ha[ll]berstam) and four were Jewish men (Benjamin M. Sheiber, Alvin Hellerstein, Alvin Schulman, and Gordon I. Gordon). These law clerks were all exceptionally strong students who had attended either Columbia or Yale Law School.¹²⁵

Judge Palmieri's track record of law clerk diversity is remarkable given the existing gender and religious discrimination of the day.

Nevertheless, discriminatory hiring practices were prevalent in the federal courts. Women and minorities faced many of the same religious and gender barriers in the hiring process for lower federal court clerkships as they did at the Supreme Court.¹²⁶ When Justice Ginsburg decided to search for a clerkship position during her third year at Columbia Law School, she was rebuffed by both Justice Frankfurter and Second Circuit Judge Learned Hand.¹²⁷ She later explained:

In the 1950s, few judges would even interview women for law clerk positions. (Judge Palmieri's most excellent and cherished friend, Judge Learned Hand, for example, wanted no woman as a law clerk in his chambers and did not hesitate to say so.) In my case, there was some hesitation on Judge Palmieri's part. I was a woman, and that was not a problem for him. But I was also the mother of a four-year-old child. To my great good fortune, upon the urging of one of my teachers at Columbia Law School, Judge Palmieri decided to take a chance on me. He thereafter engaged other mothers, content that they could do the job.¹²⁸

By all accounts, Judge Palmieri was delighted by his decision to hire Justice Ginsburg.¹²⁹ She clerked with Judge Palmieri for two years, and he became a lifelong mentor and friend.¹³⁰ While it is impossible to know if Justice Ginsburg would have enjoyed the same level of remarkable professional success without the Palmieri clerkship, it is not beyond the pale to argue that, without a Judge Edmund Palmieri, there might not have been a "Notorious RBG."

¹²⁴ Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> [<https://perma.cc/PHQ5-U8RG>].

¹²⁵ Todd C. Peppers & Bridget Tainer-Parkins, *Supplementing the Record: The Life and Career of Judge Edmund L. Palmieri* 29 (unpublished manuscript) (on file with the Harvard Law School Library).

¹²⁶ *See, e.g., id.*

¹²⁷ Ruth Bader Ginsburg, *Remembrance of Judge Edmund L. Palmieri*, in *OF COURTIER AND PRINCES*, *supra* note 92, at 121–22.

¹²⁸ *Id.* at 125–26.

¹²⁹ *See id.* at 124.

¹³⁰ *Id.*

With the exceptions listed above, few women clerked in the lower federal courts in the 1950s and 1960s;¹³¹ when women started to be hired as law clerks in greater numbers, the newspaper stories chronicling their successes were sexist, condescending, and fixated on their physical appearances.¹³² The *Boston Globe* ran the headline “Don’t Call Her ‘Lady Lawyer’” when Sandra Lynch became the first woman to clerk in the Rhode Island federal courts.¹³³ The article described Lynch as a “tall, slender” woman with “big hazel eyes, long brown hair, and a soft voice.”¹³⁴ The *Los Angeles Times* informed its readers that the first woman to clerk on the Ninth Circuit (Lana Ruth Borsook) had brown hair and eyes,¹³⁵ while the *Charlotte News* observed that the first woman hired by a federal district court judge in North Carolina (Sally Hall) “looks like a model but thinks like the lawyer she is” and “reads Glamour Magazine and can’t live without Vogue.”¹³⁶

The *Tampa Times* was fixated on physical appearance and femininity when it covered the hiring of Stella Louise Ferguson by federal district court Judge Simpson.¹³⁷ “Lawyers and court attaches are bound to notice that she is an attractive blonde, 24-year-old woman with a winning smile and quietly friendly personality,” reported the newspaper.¹³⁸ The article went on to further describe her height, build, and eye color and was accompanied by a picture of Ferguson, with the caption “Career Girl.”¹³⁹ The newspaper reassured its readers that Ferguson was “better looking than her picture shows.”¹⁴⁰ Based on this misogynistic account, is it any surprise that “try as she will, Miss Ferguson won’t be able to separate her femininity from her work?”¹⁴¹

The *Asbury Park Sunday Press*, however, outdid its competitors. It ran multiple photographs of newly hired law clerk Kathy Flicker in her swimming suit and called her “a girl [who] has everything going for her” and who “considers herself very feminine” despite her athletic career as

¹³¹ See, e.g., Anne Rodgers & Todd C. Peppers, *Being in the Room Where It Happens: Celebrating Virginia’s First Female Law Clerks*, WASH. & LEE J. C.R. & SOC. JUST., Spring 2023, at 41, 46; Todd C. Peppers & Hannah Wilk, *Celebrating the Lives of New Mexico Legal Pioneers 13* (unpublished manuscript) (on file with the Harvard Law School Library) (discussing the hiring of Ruth Cooper Streeter, the first woman to clerk in New Mexico’s federal courts — Streeter clerked for Judge Carl Hatch in the 1950s).

¹³² See Rodgers & Peppers, *supra* note 131, at 46.

¹³³ Gloria Negri, *Don’t Call Her “Lady Lawyer,”* BOS. GLOBE, Sept. 13, 1971, at 1.

¹³⁴ *Id.*

¹³⁵ *First Woman on Staff: Coed, 23, Appointed Circuit Court Clerk*, L.A. TIMES, Mar. 10, 1968, at B1.

¹³⁶ Martha Rainey, *Sally the Lawyer Doesn’t Look Part*, CHARLOTTE NEWS, Aug. 3, 1974, at 1A.

¹³⁷ F.T. MacFeely, *She Grew Up to Law*, TAMPA TIMES, Aug. 9, 1965, at 15.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

a competitive swimmer.¹⁴² The article closed with the reporter quizzing Flicker about the attributes her “‘ideal man’ would consist of.”¹⁴³

Some female lawyers found state court judges to be more willing to embrace gender-neutral clerkship hiring practices than their federal counterparts. For example, New Mexico Supreme Court justices hired multiple female law clerks in the 1930s.¹⁴⁴ They included Marcia Hertzmark Freed, who was one of the first women to clerk on any American court.¹⁴⁵ And in the 1940s and 1950s, the majority of the law clerks on the Louisiana Supreme Court were women — several of whom would spend decades working at the high court.¹⁴⁶

African Americans slowly found clerkship opportunities in the lower federal and state courts. Before being the first Black man to clerk at the Supreme Court,¹⁴⁷ William Coleman clerked for federal appeals court Judge Goodrich in 1947.¹⁴⁸ He is likely the first racial minority to clerk at a federal court of appeals. As with his Supreme Court clerkship,¹⁴⁹ Coleman’s hiring was covered by the media. “The day I started work with Judge Goodrich, both Philadelphia daily newspapers . . . carried pictures of Judge Goodrich and me, noting in the caption that I was the first nonwhite law clerk in the entire federal court system in the United States,” Coleman recalled.¹⁵⁰

¹⁴² *Diving Champ Surfaces in Favor of Law Career*, ASBURY PARK SUNDAY PRESS (N.J.), Apr. 25, 1971, at B1.

¹⁴³ *Id.*

¹⁴⁴ See, e.g., *Marcia Hertzmark to Wed Max Freed of Albuquerque*, SANTA FE NEW MEXICAN, Sept. 8, 1947, at 2; *Lillian Scott Opens Law Office*, ALBUQUERQUE TRIB., Jan. 13, 1940, at 2; *Law Clerk Named to Supreme Court Justice*, ALBUQUERQUE TRIB., Nov. 15, 1938, at 1.

¹⁴⁵ *Marcia Hertzmark to Wed Max Freed of Albuquerque*, *supra* note 144.

¹⁴⁶ Todd C. Peppers, *From Natchitoches to Nuremberg: The Life of Legal Pioneer Lyria Dickason*, LOY. L. REV. F. (Apr. 24, 2023), <https://loynolawreview.org/theforum/from-natchitoches-to-nuremberg-the-life-of-legal-pioneer-lyria-dickason2442023> [https://perma.cc/6CZS-J5WM]. The list of the first women to clerk in the state courts includes Mary Schmitt (Idaho Supreme Court, 1941), *Mary Schmitt Takes Law Clerk Position*, IDAHO DAILY STATESMAN (Boise), Sept. 16, 1941, at 2; Dorothea Clarson Watson (Florida Supreme Court, 1942–1943), *Fifty Year Members — 1942–1992*, FLA. BAR NEWS, June 1, 1992, at 21; Brereton Sturtevant (Delaware state courts, 1949), *Woman Appointed to Patent Job Normally Man’s*, NEWS J. (Wilmington), July 3, 1971, at 6; Margaret Sparks (Alabama Supreme Court, 1954), *Alabama Graduates Given Court Posts*, DOTHAN EAGLE (Dothan, Ala.), Nov. 24, 1953, at 12; Dianne McKaig Walden (Kentucky Supreme Court, 1954), *Malcolm Patterson, First Woman Hired by High Court as Clerk Sees Success as Way to Help Other Girls*, LEXINGTON HERALD (Ky.), Apr. 26, 1954, at 2; Rose Bird (Nevada Supreme Court, 1965), *Woman Chief Justice Started Career as Nevada Law Clerk*, RENO GAZETTE-J., Mar. 16, 1977, at 22; Penelope Coffman (Virginia Supreme Court, 1966), *Rodgers & Peppers*, *supra* note 131, at 62; Elizabeth Cochrane (North Carolina Supreme Court, 1974), Susan Spence, *Woman Judge Hires Woman Law Clerk*, NEWS & OBSERVER (Raleigh), Oct. 28, 1974, at 8; and Diane Barz (Montana Supreme Court, 1968), *MONT. STANDARD* (Butte), Mar. 21, 1979. Donna Seare Adams was likely the first woman to clerk on the Utah Supreme Court in 1942. *State Names Clerk in Supreme Court*, SALT LAKE TRIB., Mar. 6, 1942, at 20.

¹⁴⁷ See *Frankfurter’s Negro Clerk to Be First in Court History*, *supra* note 31.

¹⁴⁸ COLEMAN WITH BLISS, *supra* note 32, at 75–77.

¹⁴⁹ See *Frankfurter’s Negro Clerk to Be First in Court History*, *supra* note 31.

¹⁵⁰ COLEMAN WITH BLISS, *supra* note 32, at 75.

In the fall of 1948, Temple University Law School graduate and law review editor Clifford R. Moore was tapped to clerk for Judge Forman of the District of New Jersey.¹⁵¹ Remarkably, Moore worked as Judge Forman's bailiff while attending law school.¹⁵²

There are scattered media accounts of African Americans being selected to clerk in federal and state courts in the 1940s and 1950s.¹⁵³ The appointment of Harvard Law School graduate Herbert O. Reid, Sr., to clerk at the Supreme Court of Massachusetts in 1945 was covered by newspapers across the country,¹⁵⁴ which suggests that Reid was likely the first male minority to clerk on *any* court. Of Reid's hiring, Chief Justice Field told a local newspaper that Reid was "selected on his merits and on the basis of information we had in respect to him."¹⁵⁵ The Chief Justice made no mention of race. A North Carolina newspaper did clumsily address race, however, when it noted that Reid, like his father (a messenger to the Speaker of the United States House of Representatives), "brought honor to his race."¹⁵⁶ Reid later taught for forty-one years at Howard University Law School.¹⁵⁷

The earliest accounts of females belonging to racial minorities clerking in the federal courts harken back to 1964, when then-federal district court Judge Higginbotham hired Yale Law School graduate Eleanor Holmes Norton to work as his law clerk.¹⁵⁸ Some newspapers, however, have erroneously identified Norton as the first woman to clerk for a federal district court judge.¹⁵⁹ Judge Higginbotham was one of the first African American judges appointed to the federal bench, and he prized diversity amongst his law clerks:

¹⁵¹ *Negro Name [sic] First Law Clerk*, OHIO DAILY-EXPRESS (Dayton), Sept. 25, 1948, at 1.

¹⁵² *Id.*

¹⁵³ See, e.g., *First Negro Admitted to New Mexico Bar*, ALBUQUERQUE J., Aug. 20, 1965, at E-9 (discussing Reginald Alleyne's 1959 federal court of appeals clerkship); *Higginbotham's First Case with FTC May Be Complex Anti-trust Matter*, THE NEWS (Paterson, N.J.), Oct. 12, 1962, at 17 (explaining that Higginbotham clerked for state court judges in 1952); *First Federal Law Clerk Here*, DETROIT TRIB., May 22, 1954, at 1 (discussing the hiring of Harry Hackett as the first Black law clerk in Michigan's federal courts); *Supreme Court Justice Appoints Negro as Law Clerk*, ALA. TRIB. (Montgomery), Dec. 2, 1955, at 6 (documenting James M. Harkless's selection to clerk on the Supreme Judicial Court of Massachusetts); *Negro Law Clerk of Mass. Court*, BRATTLEBORO DAILY REFORMER (Vt.), Nov. 30, 1945, at 7 (stating that Herbert O. Reid was picked to be the first African American clerk on the Massachusetts Supreme Court).

¹⁵⁴ See, e.g., *Negro Named Clerk in Bay State High Court*, BENNINGTON EVENING BANNER (Vt.), Nov. 30, 1945, at 4; *Negro Law Clerk of Mass. Court*, *supra* note 153, at 7; *Reid's Father Serves as Special Messenger*, NEWS & OBSERVER (Raleigh), Dec. 2, 1945, at 16X; *Negro in Court Job*, N.Y. DAILY NEWS, Nov. 30, 1945, at 8.

¹⁵⁵ *Negro Law Clerk of Mass. Court*, *supra* note 153, at 7.

¹⁵⁶ *Reid's Father Serves as Special Messenger*, *supra* note 154, at 16X.

¹⁵⁷ *H. Reid, Sr., Civil Rights Lawyer, Adviser to Former D.C. Mayor*, ARIZ. REPUBLIC (Phoenix), June 16, 1991, at B3.

¹⁵⁸ See Maida Odom, *Higginbotham: A Revered Insider for the Outsiders*, PHILA. INQUIRER, Dec. 20, 1998, at E3.

¹⁵⁹ See, e.g., *id.*

In my 29 years on the federal bench, I hired more than 50 law clerks. This pluralistic mix included African American women and men, white women and men, Asian Americans and Hispanics. For some of them, I had to look beyond what people consider the list of legitimate credentials to see their talent.¹⁶⁰

Describing Judge Higginbotham's clerks as "the rainbow coalition,"¹⁶¹ former law clerk Margaret Chon notes that "[t]he Judge demonstrated that there is a large pool of qualified, competent minority law clerks available for those willing to look past elitist and exclusionary criteria."¹⁶² Chon penned these remarks in 2000, foreshadowing similar conclusions of the Article by Fogel, Hoopes, and Liu.¹⁶³

Joyce Hughes, the first Black woman to graduate from the University of Minnesota Law School, was selected to work for federal district court Judge Larson in 1965.¹⁶⁴ Hughes's desire to go to law school was sparked by an encounter that she had with a law school recruiter as a Carleton College student.¹⁶⁵ "I ended up going to law school because I was angry at a recruiter from Columbia Law School who suggested I [(a *Phi Beta Kappa* graduate)] could not be a lawyer," Hughes explained.¹⁶⁶ In comments about her career, Hughes observed how her gender secured her a longer clerkship:

When my appointment was heralded only because of my race, its significance for women was overlooked. . . . [T]he judge received a benefit due to my being a female. What was to have been the then customary one-year clerkship expanded to two years, when draft deferments for federal judicial clerks were no longer available because of the Vietnam War. The male chosen to succeed me thus became immediately eligible to be drafted. . . . [A]nd I agreed to serve another year.¹⁶⁷

Female law school graduates seeking clerkship positions benefited from the Vietnam War and the conscription of their male counterparts. Penelope Dalton Coffman, the first woman to clerk on the Virginia Supreme Court, was interviewed and subsequently hired by Justice Spratley in 1966, after the Justice lost two law clerks to the draft and

¹⁶⁰ A. Leon Higginbotham, Jr., *Thomas, Spin Artist Extraordinaire*, *NEWSDAY* (Hempstead, N.Y.), Aug. 10, 1998, at A23.

¹⁶¹ Margaret Chon, *A Symposium Tribute to Judge A. Leon Higginbotham, Jr.: The Mentor and His Message*, 33 *LOY. L.A. L. REV.* 973, 975 (2000).

¹⁶² *Id.* at 976.

¹⁶³ See Fogel, Hoopes & Liu, *supra* note 1, at 629; see also *id.* at 616 (noting that work product quality is not necessarily tied to school prestige).

¹⁶⁴ *Miss Hughes Is First Negro Federal Law Clerk in State*, *MINNEAPOLIS STAR*, Aug. 2, 1965, at 10B; *Univ. of Minn. Law School Co-ed, First Race Female to Win LL.B.*, *PITTSBURGH COURIER*, July 10, 1965, at 5.

¹⁶⁵ Shanice Harris, *Q&A with Joyce Hughes: A Pioneer in Law*, *NW. PRITZKER SCH. L.* (Apr. 13, 2020), <https://news.law.northwestern.edu/qa-with-joyce-hughes-a-pioneer-in-law> [<https://perma.cc/RX6B-6LVN>].

¹⁶⁶ *Id.*

¹⁶⁷ Joyce A. Hughes, *Black and Female in Law*, 5 *RUTGERS RACE & L. REV.* 105, 106 n.5 (2003) (citation omitted).

requested that William & Mary Law School recommend a clerkship candidate who was “non-draftable.”¹⁶⁸ Coffman fit the bill.

African Americans selected for clerkship positions remained prominent headline news throughout the 1970s.¹⁶⁹ These newspaper articles help document the incremental gains made by minority candidates in both federal and state courts as well as the motivations of the jurists who helped end discriminatory hiring practices. When Monmouth County Superior Court Judge Yaccarino was interviewed in 1973 about his decision to hire Lawrence Lawson, he carefully summarized Lawson’s talents and credentials before addressing the question of race: “He had worked very hard and was very active at law school, and I figured it was about time we had a black law clerk.”¹⁷⁰

In conclusion, racial and gender diversity in law clerk hiring developed slowly in the federal and state courts. While one can use specific search terms to trace the hiring of women and African American law clerks, it is more challenging to document the demands for, and the presence of, other types of diversity — such as religious, academic, socioeconomic, or sexual orientation.¹⁷¹ Some of the difficulty stems from the fact that some diverse law clerks remained hidden because of prejudice and hatred — such as clerks who belonged to the LGBTQA+ community. *New York Times* reporter Adam Liptak writes that there were no law clerks at the Supreme Court who publicly self-identified as gay prior to the 1990s, but that today clerks are more willing to reveal their sexual orientation.¹⁷² Both a former law clerk and the official biographer for Justice Powell, Professor John Jeffries has observed that “[e]verything in the world has changed. The fact of gay clerks is a grain of sand in that beach.”¹⁷³ Given current attitudes towards sex orientation and gender fluidity, however, it is a safe bet that many clerkship candidates remain closeted and thereby undercut efforts to further diversify the law clerk corps.

¹⁶⁸ Rodgers & Peppers, *supra* note 131, at 64.

¹⁶⁹ See, e.g., *Black Law Clerk*, MONTGOMERY ADVERTISER, Aug. 30, 1978, at 2; Hallie Schraeger, *A First for Monmouth County: A Judge Has Black Law Clerk*, DAILY REG. (Red Bank, N.J.), June 19, 1973, at 13; *County “First,”* PITTSBURGH PRESS, Oct. 20, 1971, at 50; Pat Welch, *Young Lawyer Questions Decision*, NASHVILLE TENNESSEAN, Aug. 30, 1970, at 2-B; *Daye Named Judge’s Aide*, DURHAM SUN, Sept. 11, 1969, at B1.

¹⁷⁰ Schraeger, *supra* note 169, at 13.

¹⁷¹ Occasionally, a law clerk who is uniquely diverse will make the news. See, e.g., Peter Hall, *Parkland Grad Who Became First Blind Supreme Court Clerk Testifies in Amy Coney Barrett Hearing*, MORNING CALL (Oct. 15, 2020, 5:59 PM), <https://www.mcall.com/2020/10/15/parkland-grad-who-became-first-blind-supreme-court-clerk-testifies-in-amy-coney-barrett-hearing> [<https://perma.cc/R5WS-JS59>]; Tony Mauro, *Disabled Clerk Might Be a First for High Court*, USA TODAY, Nov. 9, 1998, at 4A.

¹⁷² Adam Liptak, *Exhibit A for a Major Shift: Justices’ Gay Clerks*, N.Y. TIMES (June 9, 2013), <https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html> [<https://perma.cc/9A9V-RV8T>].

¹⁷³ *Id.*

II. THE CURRENT DEMAND FOR LAW CLERK DIVERSITY IN THE FEDERAL APPEALS COURTS

This historical appreciation of the lack of diversity amongst federal and state court law clerks brings critical context to *Law Clerk Selection and Diversity* by Fogel, Hoopes, and Liu. As noted above, the Article provides a comprehensive analysis of how federal appeals court judges select and hire law clerks.¹⁷⁴ Some of the selection criteria are not surprising. Judges want bright (top of their class), hard-working, and well-educated clerks (strong academic pedigree and law review experience) who excel at legal research, writing, and analysis.¹⁷⁵ And judges want clerks who can work together as a team, which the Article's authors refer to as "assembling an ensemble."¹⁷⁶

The authors' findings that "nearly every judge . . . reported valuing diversity" are fascinating.¹⁷⁷ The reasons for valuing diversity vary across judges, from those who believe that selecting diverse candidates affords groups traditionally underrepresented in law school the opportunity to benefit from a federal clerkship to those who think that clerks with a range of backgrounds and experiences impact the quality of the decisions that judges make and the opinions that they write.¹⁷⁸ Surely, judges are also impacted by changes across the federal courts in clerkship hiring practices.¹⁷⁹ And some may be motivated by the negative publicity that comes with nondiverse hiring practices.¹⁸⁰ Given the historic lack of diversity among law clerks in the federal courts, and the undeniable implication that past generations of federal judges either followed discriminatory hiring practices or did not value diversity in their hiring decisions, this finding alone is heartening.

Recognizing that "diversity" is a vague term, the authors also carefully unpack the different dimensions of diversity (such as academic, racial, gender, socioeconomic, sexual orientation, and ethnic) and the emphasis that judges place on various forms of diversity in the hiring process.¹⁸¹ The Article also explores the links between the judges' own diverse backgrounds, their goals to have a diverse chambers staff, and how applicant self-selection can undercut or assist the judge's efforts to hire diverse candidates.¹⁸² This discussion is invaluable because it helps

¹⁷⁴ See *supra* note 2 and accompanying text.

¹⁷⁵ See Fogel, Hoopes & Liu, *supra* note 1, at 610–11.

¹⁷⁶ *Id.* at 611.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 611–13.

¹⁷⁹ See *id.* at 645 ("Yet the lack of discussion [on hiring practices] does not mean judges are uninterested in each other's practices. To the contrary, many judges said they pay attention to the clerks hired by their colleagues. Some white judges expressed interest in learning from their minority colleagues how to hire more minority clerks.").

¹⁸⁰ *Id.* at 612 ("[M]any judges said that diversity enhances public perception of the judiciary's integrity.").

¹⁸¹ See *id.* at 611–41 (discussing the findings of the authors' survey as they relate to these categories).

¹⁸² See, e.g., *id.* at 612, 614, 619, 623, 634–35.

the reader (which hopefully includes federal judges) appreciate how judges place weight on different dimensions of diversity and the fact that wanting diverse law clerks (however diversity is defined) is a necessary but not sufficient condition for hiring diverse clerks.

Unlike many academic studies, which seem to stop short of offering solutions to the problems they dissect, the Article concludes with some practical suggestions of how judges, who are independent and do not often discuss their hiring processes with their peers, can share their best clerkship selection practices and achieve their goals of a diverse corps of law clerks.¹⁸³ Given the fact that the judges interviewed by the authors self-reported some success in attracting diverse candidates,¹⁸⁴ sharing tips on attracting and hiring diverse candidates is an important first step in selecting law clerks who more accurately reflect our rich and complex society.

If the authors continue their groundbreaking work on the role that diversity plays in hiring law clerks, they should consider the tension among law clerk diversity, substantive job duties, and ideological matching. My own research on law clerks confirms the Article's findings¹⁸⁵ that judges are less willing to search for diverse or nontraditional clerkship candidates if they routinely assign their law clerks substantive job duties. In other words, judges are afraid to deviate from the familiar if they fear negative consequences regarding subpar chamber work.

Consider the following example. The late Justice Scalia was once asked by an American University Washington College of Law student how she could be "outrageously successful" without the requisite insider connections.¹⁸⁶ Although Justice Scalia urged her to "work hard and be very good," he conceded that a Supreme Court clerkship was out of reach given her law school's ranking:

By and large . . . I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can't make a sow's ear out of a silk purse. If they come in the best and the brightest, they're probably going to leave the best and the brightest.¹⁸⁷

To further make his point, Justice Scalia mocked the fact that he shared law clerk and now-federal appeals court Judge Sutton with retired Justice Powell, and that Judge Sutton would never have been selected by Justice Scalia. "For God's sake, he went to Ohio State! And he's one of the very best law clerks I ever had."¹⁸⁸

¹⁸³ See *id.* at 652–59.

¹⁸⁴ See, e.g., *id.* at 592 (describing the particular success Black judges have in hiring Black clerks).

¹⁸⁵ Cf. *id.* at 634 (noting judges saw hiring clerks from traditional schools as "the path of least resistance").

¹⁸⁶ Adam Liptak, *On the Bench and Off, The Eminently Quotable Justice Scalia*, N.Y. TIMES (May 11, 2009), <https://www.nytimes.com/2009/05/12/us/12bar.html> [<https://perma.cc/735K-PYE9>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Why do judges like Justice Scalia need “the best and brightest”? Because judges require their law clerks to review and summarize certiorari petitions, prepare bench memoranda, and write opinion drafts. Because of these responsibilities, the goal of hiring law clerks who are guaranteed to be “the best and the brightest” trumps the goal of hiring more clerks from diverse backgrounds, such as clerks who don’t come from a small handful of elite law schools or who haven’t had previous experience clerking for a small group of trusted feeder judges.

Like Supreme Court Justices, federal appeals court judges have delegated significant job responsibilities to their clerks. In a survey that my colleagues and I submitted to Court of Appeals judges, we found that almost all respondents reported that they required their law clerks to prepare the first draft of opinions and that the majority of respondents had their clerks review opinions drafted by other chambers.¹⁸⁹ Federal district court judges reported similar delegation of substantive duties.¹⁹⁰ These practices will undoubtedly remain the same as federal judges continue to struggle with rising caseloads. A relevant question to ask: While judges sincerely want diverse candidates, do they believe that they can afford to take chances, real and imagined, on clerks from unfamiliar law schools? Do other types of diversity raise similar concerns for federal judges?

The Article also raises questions about law clerk influence. The authors write that “[t]he judges we interviewed uniformly described their clerks as essential to the quality of their chambers’ work product.”¹⁹¹ But do these same federal appeals court judges worry about the influence that law clerks wield over judicial outputs? While there is no evidence to suggest that federal judges have handed over their decision-making authority to their clerks, the process of drafting an opinion — and interpreting how the law supports a preferred outcome — has been assigned to relatively young, green attorneys.

The notion that judges discover, rather than make, law has been challenged by generations of legal scholars. In situations where the traditional tools of legal interpretation do not work — such as textualism, Framers’ intent, and stare decisis — alternative theories of judicial decisionmaking have been proposed and tested. Social background theory posits that a judge’s personal characteristics — from gender and race to

¹⁸⁹ Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in “Appellate Triage,”* 98 MARQ. L. REV. 313, 321 (2014).

¹⁹⁰ See generally Todd C. Peppers, Michael W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Clerks,* 71 ALB. L. REV. 623 (2008).

¹⁹¹ Fogel, Hoopes & Liu, *supra* note 1, at 610.

religion and birth order — help explain judicial outcomes.¹⁹² The attitudinal model asserts that judges consult their own political preferences in deciding winners and losers.¹⁹³ The strategic model of judicial decisionmaking holds that jurists take into account institutional rules and the preferences of other actors in crafting a judicial opinion.¹⁹⁴

If we assume that a judge’s personal attributes, political preferences, and strategic choices help us explain and predict judicial behavior, then the same argument can be made about law clerks.¹⁹⁵ And if judges themselves appreciate that background characteristics and preferences creep into the court’s work, then wouldn’t their hiring decisions take into account the relationship between who they hire to clerk and judicial outcomes? In short, candidate ideology is relevant in hiring. “I won’t hire clerks who have profound disagreements with me,” Justice Thomas once explained.¹⁹⁶ “It’s like trying to train a pig. It wastes your time, and it aggravates the pig.”¹⁹⁷ Instead, Justice Thomas concentrates on recruiting “mates in a foxhole.”¹⁹⁸ These mates may be diverse in terms of gender, race, and sexual orientation, but they lack ideological diversity. And scholarship suggests that ideological compatibility is prized by all the Justices.¹⁹⁹

Does the fact that the judges who participated in the Fogel, Hoopes, and Liu study claim that clerk ideology is not significant in law clerk selection (a claim that is also reflected in my own work on the selection of federal appeals court clerks) cut against the suggestion that law clerks

¹⁹² For a general discussion of social background and personal attribute models, see Tracy E. George, *From Judge to Justice: Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333 (2008).

¹⁹³ For the seminal work on the impact of judicial preferences on outcomes, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). As the title indicates, Professors Jeffrey Segal and Harold Spaeth apply the attitudinal model to the Supreme Court. But many of their arguments about how political preferences impact decisionmaking could apply to lower federal courts, albeit with less explanatory force because of different institutional realities.

¹⁹⁴ See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997). The efficacy of the strategic model has been challenged when it comes to lower court judges. See generally Jennifer Bowie & Donald Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Court of Appeals*, 62 POL. RSCH. Q. 393 (2009).

¹⁹⁵ See generally, e.g., Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the Supreme Court*, 35 J.L. ECON. & ORG. 1 (2019); Ryan C. Black et al., *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 MARQ. L. REV. 75 (2014); Timothy R. Johnson et al., *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21 (2014); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Analysis*, 58 DEPAUL L. REV. 51 (2008).

¹⁹⁶ Adam Liptak, *A Sign of the Court’s Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 6, 2010), <https://www.nytimes.com/2010/09/07/us/politics/07clerks.html> [https://perma.cc/UJ7L-C8NT].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Fogel, Hoopes & Liu, *supra* note 1, at 648–49. See generally Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkages Between Judges and Justices*, 98 MARQ. L. REV. 333 (2014); Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869 (2001).

have the power to shape decisions to reflect their own policy preferences? Are these judges loathe to admit that ideology, not the law, shapes decisionmaking? I hope that Fogel, Hoopes, and Liu continue their impressive research and explore whether law clerk duties, and the related question of influence, are in tension with diverse hiring practices.