

Women Supreme Court Clerks Striving for “Commonplace”

By Cynthia L. Cooper

Each summer, 37 lawyers arrive at the U.S. Supreme Court for year-long stints. They are the law clerks: a quartet for each justice and one extra for the Chief Justice.

“I probably will never have a year that intense in my life again,” says Jeannie Suk, who clerked in 2003–04 for Justice David H. Souter. “You feel every day that you are in touch with the history and the future of the country. It’s very profound,” notes Suk, now a professor at Harvard Law School.

“What the clerks have in common is that they are people who really care about the law,” Suk continues. “The law clerks need to be nice, polite, have a sense of humor, and not let the pressure get to them. The effectiveness

of law clerks at the Supreme Court can lie in how well they get along with others in and across chambers. It’s very collaborative.”

But exactly who the clerks are and how they are chosen is almost as much of a mystery as the justices’ private deliberations. The clerks boast high-flying profiles. They are from elite schools, top of their classes, editors of their law reviews, researchers for key professors, and alums of prestigious federal appellate court clerkships. They also get benefits: signing bonuses at big firms, opportunities in academics, and a rarified professional network.

Within this narrow group, the clerks share another characteristic: They are predominantly male. Even

though law schools have been turning out classes of nearly 50 percent women, only 19 to 40 percent of the Supreme Court clerks in the past 14 terms have been women. Of course, the bench itself has only had two women—Justices Sandra Day O’Connor and Ruth Bader Ginsburg.

Where Are the Women?

Why women have a lesser share of clerkships is a subject of intense speculation.

“It’s a good question. I wish I had a good answer,” says Kirsten Solberg, who advises judicial clerkship candidates at Harvard Law School and is chair of the Judicial Clerkship Section of the National Association for Law Placement (NALP). “It bubbles up as an issue among students from time to time. Without concrete reasons behind the discrepancy, it’s hard for students to know what to make of it.”

Solberg notes that of the eight Harvard law grads clerking on the Court in 2007–08, one is a woman.

The topic broke into public consciousness in 2006 when the number of women took a nosedive to seven clerkships, the lowest in 12 years. Through the 1990s and early 2000s, typically one-third of the clerks were women.

Still, this is an improvement over the all-male years before Justice William O. Douglas hired the first woman clerk in 1944, according to a speech by Justice Ginsburg at Wellesley College in 1998. A second woman was not employed until 1966, said Ginsburg, describing her own experience. “In 1960, one of my law teachers, who selected clerks for Justice Frankfurter, suggested that I might do. The justice was told of my family situation—I was married and had a five-year-old daughter. For whatever reason, he said no,” Ginsburg said during her speech.

Not until the early 1970s did the total number of women clerks reach double digits. “After the 1973 term, women law clerks no longer

appeared as one-at-a-time curiosities,” Ginsburg said. From 1973 to 1980, 24 of the 248 clerks, or 9.7 percent, were women, and from 1981 to 1996, 26.6 percent of the 608 clerks were women.

The sudden dip in 2006 landed on the front page of *The New York Times* in an article, “Women Suddenly Scarce Among Justices’ Clerks,” by Linda Greenhouse. Justices Souter and Stephen Breyer said the dip was due to a random variation in the 1,000-member applicant pool, according to the article.

Questions circulated. Are women treated unequally by the nation’s top judges? Does a conservative political bent reduce women’s opportunities? Is there a clog in the pipeline? Susan Estrich, who clerked for Justice John Paul Stevens in 1978, delivered a scorching judgment, writing that the low number of women is the result of “insidious and pervasive unconscious discrimination.”

The topic raged on the Internet. David Lat, editor of the popular *Abovethelaw.com*, says, “There’s a certain glamorous aspect to Supreme Court clerkships. They’re mini-celebrities in their own right.” Lat publishes the names of Supreme Court clerks from tips months before an official list is released. “The number of women varies a lot from justice to justice. The thing that’s strange about Supreme Court clerk hiring is that the selections are very personal and not strictly meritorious in that regard,” Lat notes.

Women clerks did bounce back in 2007 and 2008, filling 13 positions in each term. But the puzzle remains as to why women are still stuck at the one-third mark.

When all clerkships are considered, women claim a higher share. “Over time, women are more likely to take clerkships than men,” says James Leipold, executive director of NALP. Of law school graduates in 2006, the most recent year analyzed, 11.4 percent of women became judicial clerks after law school, compared with 9.4 percent of men.

In fact, more concern exists about minorities—only 8.3 percent of the minority law students enter judicial clerkships, compared with 11.7 percent of nonminorities, Leipold says.

What’s the Big Picture?

Piercing possible gender difficulties at the high court is touchy and some top law schools, such as Yale and the University of Chicago, refused to comment. The Supreme Court itself does not release details about the applications, leaving dogged researchers searching for details.

One report by the Administrative Office of the U.S. Courts offers some clues. The Judiciary Fair Employment

The puzzle remains as to why women clerks are still stuck at the one-third mark on the Supreme Court.

Practices report of 2007 included, for the first time, a gender breakdown for clerks in the federal bankruptcy, district, and appellate courts, says Dick Carelli, senior public affairs specialist. In the bankruptcy courts, 64.7 percent of the clerks were women in the 2005–06 term, and in district courts, women held 59.89 percent of the clerkships. But the picture changes at the federal court of appeals. There, only 42.4 percent of the law clerks were women, narrowing the pool from which the Supreme Court draws.

Other bits of information fill out the picture. Blogger Brian Leiter tracked the “feeder” schools that place clerks at the high court, finding Harvard first with 74 places from 2000 to 2007, followed by Yale with 54, and the University of Chicago with 30. The SCOTUS blog studied “feeder” courts known to supply clerks to the high court. The D.C. Circuit is the best-known feeder, but Fourth Circuit Judge Michael Luttig was first,

placing 95.6 percent of his 45 clerks from 1991 to 2006.

With this research, two professors in law and statistics developed a statistical model to sniff out gender bias. David H. Kaye of the law school at Arizona State University and Joseph L. Gastwirth of George Washington University studied whether women are equally represented in top positions on the flagship law journals and found they comprised only one-third of the officers at Yale (35 percent) and the University of Chicago (36 percent), for example. They mapped people from feeder schools to feeder judges, discovering that only 32 percent were women.

Looking at individual variations among justices, the professors concluded the patterns are “not consistent with the simple picture of gender-neutral hiring.” But judicial philosophy did not predict outcomes. Conservative Justice Clarence Thomas hired 42.9 percent women clerks from 2000 to 2006, while moderate Justice Anthony Kennedy had only 10.14 percent. On the other hand, the fewest women hires were by conservative Justice Antonin Scalia, with 7.14 percent women. The more liberal Justice Breyer had the best record, with 53.57 percent women.

Kaye and other observers hypothesized about other factors: fewer mentors among key professors, lesser mobility, lower ambition, family concerns, and the reliance of justices on familiar networks. “Most likely, it’s a mix of a lot of things,” says Kaye, speaking from China, where he is a visiting professor. “Some prejudice against women is part of the mix but I can’t say how much of it.”

Some law schools try to shore up women applicants. “We make a

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Good Reading

The Supreme Court: A Place for Women, by the Honorable Ruth Bader Ginsburg at Wellesley College, November 13, 1998.

www.wellesley.edu/PublicAffairs/Releases/1998/111098.html

THE ABA GOAL IX COMMISSION REPORTS

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population consisting of lawyers with disabilities, or (3) at least five CLE faculty with a disability.

A Model for Achieving Change

The infusion of diversity into the ABA and its leadership ranks has made a difference in the work of the Association and the priorities of its sections. As proponents of diversity have long argued, the addition of individuals from varied life backgrounds and experiences brings a range of concerns and perspectives that significantly enriches decision making. So, too, the opportunity for more women, lawyers of color, and lawyers with disabilities to exercise leadership roles has given them visibility and contacts that have had significant professional payoffs.

The Goal IX strategy also has become a model for how to achieve change in contexts in which women and minorities remained grossly overrepresented at the bottom and underrepresented at the top. Some local bar organizations have since launched related tracking efforts and enlisted law firms and corporate counsel offices to meet diversity goals and timetables. These efforts have confirmed what management experts have long noted: Organiza-

tions get what they measure, and one of the best ways to achieve a level playing field is to promote accountability among those in decision-making positions. That, in turn, requires systematic ways to measure and reward progress and to name and shame where efforts are lacking.

In the long run, however, to increase significantly the representation of women, minorities, and persons with disabilities at leadership levels in the bar will demand more fundamental strategies. Despite considerable efforts, the law remains less diverse than many other elite professions, and the problems start early. The inadequacies of elementary and secondary education restrict the pool of students who are in the pipelines for law schools, and over-reliance on standardized test scores as admission criteria has compounded the difficulty.

Unconscious bias and other obstacles unrelated to merit continue to impede the progress of many individuals of ability. Substantial evidence makes clear that qualities associated with leadership still reflect racial and gender stereotypes. Women often remain subject to a double standard and a double bind. What is assertive in a male professional is abrasive in a female, and aspiring women leaders risk seeming too feminine or not feminine enough. Lawyers of color,

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conscious effort to bring in women judges and to work with the women's law association," says Ilene Strauss, who directs judicial placement at Columbia University School of Law. Columbia will have one clerk, a woman, as a Supreme Court clerk next year.


Suk informally advises students at Harvard. "There are so many hoops to jump through to get oneself in a reasonable position to apply that, along

the way, many reasonable students say, 'What's the point?' Much of it is in the decision to apply and in planning your law school career," Suk explains.

Northwestern University School of Law currently has three women clerking for the Supreme Court and no men. "We try to encourage every competitive applicant to apply, and our women applicants are just as competitive," says Allison Heverin of the Career Strategy Center at Northwestern.

Some justices may be taking matters into their own hands. Justice Samuel Alito signed a woman

for their part, may lack the presumption of competence granted to white male colleagues.

If lawyers are truly committed to a diverse profession, we will need to invest more effort in recruiting and preparing talented students from underrepresented groups for a career in law. Some firms and law schools have undertaken partnerships with local high schools and colleges to do just that and to provide, on a sustained basis, tutoring, mentoring, and related programs for potential applicants. Expanded efforts along these lines, as well as increased scholarships and resources, might help us realize our aspirations to a truly representative profession—one of which we can all be proud. 


Deborah L. Rhode is the Ernest W. McFarland Professor of Law and director of the Center on Ethics at Stanford University. She is a former president of the Association of American Law Schools and a former chair of the Commission on Women in the Profession (2000–2002).

Diane C. Yu is chief of staff and deputy to the president of New York University, New York, N.Y. She is a member of the board of directors for the Minority Corporate Counsel Association and a former chair of the Commission on Women in the Profession (2002–2005).

Endnote

1. The coauthors note that the ABA recently established the Commission on Sexual Orientation and Gender Identity (SOGI). Because that new Commission has not yet published a Goal IX Report, we are unable to include a reference to statistics or progress with respect to issues that may be reported by the SOGI Commission in the future. Such a review will, we hope, occur at a later time.

clerk for 2008 who is already a professor of law, having graduated from Yale Law School in 2002.

Justice Ginsburg noted in 1998 that the "evolving enlightenment" of the Supreme Court justices continues to dawn and grow. "I strive," she said, "to make women's participation at our Court and in all manner of legal work, indeed in all manner of the world's work, not 'momentous,' but 'commonplace.'" 

Cynthia L. Cooper, an independent journalist in New York City, is a former lawyer who writes frequently about justice topics.