"Get a Life!": On Interviewing Law Clerks*

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Law clerks are a relatively underutilized yet potentially valuable resource for researchers. Their firsthand knowledge and practical experience provide much information about judges' decision making. Drawing on our experiences in studying clerks at both the U.S. Supreme Court and U.S. Courts of Appeals, we focus on written surveys and in-person interviewing. We discuss both theoretical and practical aspects of interviewing clerks, including how to approach potential respondents, the types of questions to ask, and issues about clerk-judge confidentiality.

In this article, we explore some aspects of interviewing judges' law clerks and discuss both face-to-face interviews and written questionnaires, including online survey instruments. This exploration is important for several reasons. First, although there has been an increase in attention to law clerks, particularly at the U.S. Supreme Court (Peppers, 2006; Ward and Weiden, 2006) but also in the U.S. courts of appeals (Wasby, 2007, 2008) and at state high courts (Swanson and Wasby, 2008), there is still much that we do not know about them, including their relations to the judges and institutions they serve. Second, although some aspects of interviewing law clerks are not dissimilar from comparable aspects of any other elite interviewing, there are some problems specific to interviewing law clerks. Those specific elements may also be applicable to interviewing staff of other leading political actors, such as legislative assistants to members of Congress and to state legislators. Third, although graduate programs in political science once included elite interviewing in courses on research methods, the displacement of "methods" by statistics has meant that few graduate students are taught either about the pros and cons of interviewing or about how to interview effectively. Thus our experience is that many who wish to interview key actors find they have to seek assistance from colleagues and "seniors" (see, e.g., Bennett, Barth, and Rutherford, 2003; Schwartz-Shea, 2003).

Therefore, we provide both the "why" and "how to" on clerk interviewing. In doing so, we draw both on our respective experiences at both the U.S. Supreme Court and the courts of appeals and on what others who have interviewed clerks have written about their experiences. Furthermore, we relate the specifics of interviewing law clerks to the larger literature on interviewing—and elite interviewing specifically—and discuss both the similarities and, more crucially, the differences between interviewing law clerks and interviewing other respondents.

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WHY INTERVIEW?

Why would we want to interview law clerks? First and foremost, perhaps, is a desire to understand the functioning of the judicial system more thoroughly, and law clerks are an understood part of that system. As noted above, much remains to be learned about them. Thus, we know relatively little about staff attorneys in appellate courts—those who work "for the court" rather than serve as an "elbow clerk" to an individual judge—and we know virtually nothing about law clerks and other "judicial assistants" to trial judges. Of course, there are many topics about which we do not know much and which may not be worth knowing, like the joke about the man of whom it was said, "He is humble. He has much to be humble about." Yet, as to clerks, it is not only that we do not know enough but also that the absence of knowledge has not prevented people—commentators on the courts, including members of the media, and even clerks themselves when they have spoken to authors of exposés (Woodward and Armstrong, 1979; Lazarus 1998; Margolick, Peretz, and Shnayerson 2004)—either from speaking as if judges "did it all on their own," as if all work that issued from a judge's chambers was from the judge alone, as if clerks did not exist, or, in the other direction, from overestimating a clerk's importance to the judge, including claiming that clerks are a malign force usurping the judge's authority. Thus, an important reason for seeking information from clerks is to explore, and challenge, myths about their work. To be sure, interviewing clerks about their own work will not by itself provide a definitive answer to such claims, but it makes sense that their own understanding of what they do would be a necessary part of a valid picture of their role.

"Perhaps the major goal of elite interviewing," as Goldstein (2002:669) points out, is to "gather[] information from a sample of officials in order to make generalizable claims about all such officials' characteristics or decisions." Indeed, the pathbreaking work of Richard Fenno (1978; 1990) and John Kingdon (1989) on the U.S. Congress exemplifies this technique, and one can interview a sample of clerks to make generalizations about their behavior in the context of law and courts. Learning about clerks will also help us learn more about the judges, the focus of the work of most law-and-courts researchers, but about whom, as noted above, we often speak as if they worked alone, without assistance. Moreover, to learn about law clerks, one may well need to seek the views of both clerks and judges. Depending on the questions being asked, one without the other may be incomplete. And we note here that for a complete view of the operation of judges' chambers, one must include the secretaries (see Wasby, 2005).

We would add that there is also the practical matter that, because relatively little research has been undertaken on clerks, particularly below the U.S. Supreme Court, they are an almost completely untapped resource, and, in an age where certain populations (e.g., members of Congress) are "over-interviewed," it is important to realize that there are some actors in the governmental system whose views have not been sought, an important matter for researchers to keep in mind when they think of "what new topics can I explore?"

Hence the data gleaned from interviews with law clerks can provide not only a window on their role in the judicial process but also information concerning the nature of the judicial process more broadly. One only has to consider the different goals of trial and appellate courts, civil courts and criminal courts, or military courts and civilian courts to realize how interviews of clerks working in different contexts can provide data on a broad range of questions.

Having spoken to the "Why interview?" question, we now devote some attention to what we might want to know about law clerks. In so doing, we provide some examples of useful findings from our own interviewing, because, while these substantive findings do not speak explicitly to interviewing, some were derived from it. However, more important, we are hoping that this article will prompt people to devote more research to clerks. We then turn to some of the "nuts and bolts" of interviewing—specifically, how to approach law clerks who are potential subjects. This includes exploring areas of resistance, particularly the clerks' view that confidentiality prevents their talking even to academic interviewers, and how to conduct the interviews. Then we briefly discuss how one might analyze clerk data from interviews and questionnaires, the issue of analyzing interview responses generally, and, more broadly, of conducting qualitative research in general.

What We Want to Know

There are a variety of matters about clerks that we want to know and as to some of which we have already learned "a bit." We might start with their backgrounds, not only the types of law school they attended, but also any work experience they had between college and law school or, in the relatively few instances when someone does not clerk immediately after law school, their work experience in that period. Previous law-related work would be part of this picture, including prior clerkships and the patterns followed by those who clerked in lower courts and then "moved up." Whether clerks differ in these regards from one type of court to another would be important, as would whether their characteristics change over time. In addition to knowing the clerks' backgrounds, we should not ignore the question of why they wanted to be clerks, as the answer may not be obvious, as when we see that some did it to avoid career decisions (Wasby, 2007). The flip side of this line of inquiry is the post-clerkship activities of former clerks. Are some career paths more common than others? Why or why not?

Enumeration of clerkship tasks—there are many—is another matter of interest, which started with the attention Sheldon gave to their categorization (Sheldon, 1981, 1988-89). However, we want to know far more than what a list of tasks provides: we need to know how clerks carry them out in chambers, and how the performance of those tasks might vary across chambers (including across different types of courts). Indeed, throughout we should be looking for "similarities and differences" among courts at the same and differing levels in the judicial hierarchy. Having learned what the tasks are and how they are performed, we want to see whether it makes a difference, usually stated as the question, "Do clerks influence their judges?" Here findings

are crucial both for the empirical question of influence—are judges, given their personal and political maturity and their experience, "in charge" or are they swayed by young, bright, ambitious clerks full of current theories of the law?—and for the normative argument that judges should remain fully in charge, with the clerks providing only "staff" support.

Among the other matters we might want to know is the information to which clerks are privy, namely, particular issues, institutional processes, and judicial behavior. Clerks have long been sources for scholars seeking to understand how and why a case or issue was decided. For example, in *The Warren Court and American Politics* (2000:534), Lucas A. Powe, Jr. noted, "I did contact a small number of ex-law clerks to ask them specific questions about a case or an issue. There was nothing systematic about how I did this. If I had a question and thought an ex-clerk I knew might be able to help, I then tried to get in contact with that person." Clerks have also been useful in helping scholars understand the Court's internal workings (e.g., Perry, 1991; Schwartz 1996). In his study on Supreme Court agenda setting, H. W. Perry, Jr. (1991:8) explained that elite interviewing done well "is particularly useful for developing general understandings of processes." And for his book on how the Court functions, David M. O'Brien (2005:xix) noted, "Interviews and discussions of my tentative conclusions saved me from some (though possibly not all) errors of judgment." In addition to what we can learn from them about policy and process, clerks have been an important source for studying the behavior of judges. Judicial biographers have tapped clerks to help illuminate the puzzle of why judges behave the way they do and why they make the decisions they make. For example, for his biography *Super Chief* (1983:xii), Bernard Schwartz noted, "I interviewed some thirty former law clerks of Chief Justice Warren (including at least one from each Court term during the Warren years), as well as clerks of other Justices."

Despite the valuable information that clerks can provide, some researchers are skeptical of them. One researcher who has interviewed a justice's clerks told us, "I found by and large that the clerks were worthless as sources, either about questions of fact or about reflections on their experience, but perhaps you have had better luck (I talked to about 50 of [the justice's] ex-clerks)." Journalist Joan Biskupic, who wrote the biographies *Sandra Day O'Connor* (2005) and *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (2009), commented, "My experience—when interviewing former law clerks, at least—is that there is a wide range of reliability here. Memories fail; competing agendas emerge. Despite my interest in interviewing as many law clerks as possible, I'll take documents any day" ("A Conversation Among Legal Biographers," 2008:5). Similarly, G. Edward White—who wrote *Earl Warren* (1982)—explained why as a general matter he is not eager to interview clerks:

> I want to disclose some prejudices about oral history sources. I could have interviewed several of Warren's clerks whom I knew quite well. I chose not to interview any, but I consulted written reminiscences or comments about Warren by his clerks or fellow justices. Why? First, in order to have an effective oral history interview, one needs to know as much or more about

> the matters one discusses with a subject than the subject does. That means such interviews need to take place late in the process of a biography, when one may no longer need the interview. Second, oral interviewing is very inefficient. Subjects tend to talk about themselves rather than the person whose life is being written about. Also, subjects often have different versions of events from others, and there is really no way to check their credibility on the spot (short of being rude). Unless an oral interview is the only way to get information about the subject of a biography, I don't do them ("A Conversation Among Legal Biographers," 2008:5).

Despite this skepticism by some, Stoker (2003:15) argues that first-person narratives or stories can help compensate for the difficulty of interpreting meaning from language in traditional survey research. Phillipa Strum, author of *Louis D. Brandeis* (1984) and *Brandeis* (1993), explained how biographers can be confident that their clerk-obtained data are reliable: "Oral history can be an invaluable addition to the biographer's toolbox if it is used wisely; it frequently gives us a sense of the human being that papers and judicial opinions do not. When we use articles written by former law clerks or colleagues, or even the justices' conference notes, why should we assume those are more reliable than interviews? In all cases, we need verification. When we have six different people quite separately remembering Brandeis's asceticism, for example, I think we can take that trait as a given" ("A Conversation Among Legal Biographers," 2008:5).

When a researcher attempts to use interviews of clerks to go beyond learning about the clerks' backgrounds or their specific jobs, caution must be exercised. It has been our experience that clerks are extremely reluctant not only to discuss the way in which specific cases were decided but also to reveal personal information about their judges, and this is particularly so if the clerkship was recent. This is not surprising given clerks' ongoing professional and personal relationships they have with "their" judges. Researchers should tread lightly on this ground should their projects require such information. For example, in his study on Supreme Court law clerks, Todd C. Peppers (2006:xiv) noted, "I discovered that as law clerks aged and their justices retired, the former clerks were more willing to talk about their clerkship experiences. While the older law clerks were hesitant to divulge information about specific cases, constitutional issues, or personality quirks of the justices (topics not relevant to my project), they were willing to discuss how they were selected and what job duties they held." This suggests that researchers will have an easier time obtaining information on backgrounds and job responsibilities than they will on cases and judges.

Mechanics

In what follows, we discuss how to approach potential respondents, their areas of resistance, and how to conduct the interview or survey. We also discuss the related issue of institutional review board approval of projects involving interviews of clerks. Some of the practices we suggest for use in interviewing law clerks are similar to those used in interviewing any other officials, while some may be specific to the clerks themselves or have to be applied with particular attention to their specific situation.

Interviewing or Survey. Use of questionnaires sent by mail, e-mail, or the Internet is likely to be necessary in any study of clerks, because their short tenure means that, after one or two years as a clerk, they will have moved on to a variety of positions in widely scattered locations. However, using interviews would be feasible if one wanted to study clerks serving all the judges of an appellate court at a particular time. Even if one is going to use a mail survey, it is wise to conduct at least some interviews, preferably in person but by telephone if traveling to the clerk's location is not feasible. For one thing, there is no better way to learn if questions that make clear sense to the researcher resonate with respondents than to ask the question directly and encounter puzzled looks and unexpected answers suggesting that, however valuable those answers, the respondent was not understanding what you had intended. Thus conducting a few interviews before sending the mail survey can be a useful way to debut your survey protocol. Even for interviews conducted later, while the survey is underway, face-to-face exchange provides a strong basis for understanding what is important to the clerk respondents, and this should aid interpretation of the responses from those completing questionnaires.

Furthermore, with the advent of new electronic options such as e-mail and Web-based survey programs, researchers may want to consider whether traditional snail-mail communication and surveys are appropriate (see, e.g., Alvarez, Sherman, and VanBeselaere, 2003). The answer to this may lie in the population of clerks to be surveyed. More recent clerks may feel perfectly comfortable with, and even prefer, electronic communication to more traditional forms. Our experience in communicating with recent clerks, as well as those who clerked as long ago as the 1930s, suggests that "older" clerks expect written communication on letterhead, while "newer" clerks prefer e-mail exchanges. It may make sense to hedge one's bets as to the means of communication one uses. If one chooses to implement an electronic survey, one should give respondents the option to send a reply by snail mail. Indeed, some respondents will want to record their thoughts in a letter rather than be restricted by a survey protocol.

While e-mail and online surveys cannot replace the give-and-take of face-to-face (or even telephonic) interviews, they do have advantages, including convenience for time-pressed respondents. Researchers have identified the many benefits of online surveys: "low marginal cost per completed response, capabilities for providing respondents with large quantities of information, speed, and elimination of interviewer bias" (Berrens et al., 2003:1). However, the "paper trail" generated through electronic surveys may make some respondents reluctant to divulge as much as they might during phone or in-person interviews. One clerk reported that she would feel more comfortable participating in an in-person interview than completing a written survey because the former would give her "more control." In this sense, clerks and other elite respondents may be less willing to participate in online and written surveys than nonelites. What we are suggesting is that researchers need to think carefully about their population and the type of data they are seeking to maximize their response rate.

Approaching Potential Respondents. The way one introduces oneself is crucial in turning prospective respondents into actual respondents. This is true whether one is contacting someone to request an interview or is mailing a questionnaire; in both situations, the initial letter or other communication is very important. For those being asked to complete a questionnaire, the letter will be their first introduction to you, and, for those you wish to see or to telephone, it is essential to "get you in the door." We speak of a letter, sent by snail mail, because it may be difficult to compile an accurate list of clerks' e-mail addresses but one should be able to obtain lists of their names. For example, the Public Information Office at the U.S. Supreme Court has provided researchers with such lists, and many U.S. court of appeals judges maintain lists of their past clerks and may, if approached properly, be willing to share those lists. Nonetheless, learning the current locations of earlier clerks is potentially problematic. One useful source and a good starting point, although not a complete resource, is www.martindale.com, which provides current work addresses, phone numbers, and Web sites through their "lawyer locator."

A letter seeking an interview should be sent on university letterhead. It should be kept reasonably short, preferably no longer than a full single-spaced page. It should include the following information:

- a brief statement of who you are ("a political science graduate student who studies the courts" or "a professor who . . .");
- a brief, clear statement of the project, at a general level ("I am examining the role of the law clerk");
- a request to interview, with an indication of how much time you believe the interview will consume;
- the basis of the interview in terms of whether the subjects will be treated anonymously in any resulting publications and of who will have access to the data so that confidentiality is preserved;
- an indication that *the researcher* will shortly contact the respondent; and
- your contact information (mail address; e-mail; telephone).

In describing one's topic, one should perhaps avoid mentioning potential areas of controversy, so it may be inadvisable to say, "I'm looking at how clerks influence judges." And one may want to indicate that there will not be questions on certain matters, such as pending cases ("I'm interested in the process, not in particular cases, and I won't ask about pending cases."), although respondents often unwittingly tell stories about them in the course of answering other questions. In suggesting the length of the interview, be careful not to ask for a long time; a good interview that "bumps up against" the amount of time sought will usually continue past that time or can be concluded by telephone.

The suggestion that one contact the clerk places the burden where it should be—on the researcher to follow through, not on the potential respondent to reply, because the interviewer should be doing as much of the work for the respondent as possible. As

Perry (1991:10) explained, "My typical approach was to write clerks letters explaining my research and then call them to try to arrange an interview. With one clerk, no sooner had I begun to explain my project than he responded, 'I know who you are. You don't do something like this in Washington without everybody knowing about it. I've already heard that you are okay.'" Perhaps more important, your following up means that you do not have to try to interpret a clerk's nonanswer: Did the clerk not receive the letter? Did the clerk forget to respond? Is no response a "No"? All of this can be avoided if you initiate the post-letter contact. However, providing your contact information allows the potential respondent to contact you, and some will not wait for your call.

The covering letter for a questionnaire will be modified slightly. Instead of a "request to interview," there is a request that the clerk complete the instrument and return it to you. While not reaching out to contact the respondent, one should provide contact information and an offer to answer questions that might arise. The returns are not in as to whether one should include a self-addressed stamped envelope with the questionnaire, and whether one is included may be a function of the budget for your research project. One might surmise that law clerks could use the judge's outgoing mail to return the survey or that former clerks, now lawyers, could afford to have their law firm pay for the postage, but one must keep in mind that any additional action the respondent must take to return the instrument may decrease the response rate, and in effect asking them to address an envelope may be such an action. Of course, the use of online survey instruments renders this issue moot.

Resistance. With any busy people—and judges' clerks are definitely busy—there is reluctance to set time aside for an interview, and even more to finding the time to fill out a questionnaire, even if afterwards it is experienced as more "fun" than anticipated. That goes with the territory when one interviews busy people; it has little specific to do with the fact that they are, or were, law clerks. One unique obstacle to elite interviewing is that elites may have little or no experience with academic interviewers and base their initial judgments on journalistic queries, with which they may be more familiar. Hence the interviewer needs to gain the trust of the respondent—in this case, the former clerk—by demonstrating knowledge through the questions asked and behaving in a nonthreatening manner no matter what curves the respondent may throw (Rubin and Rubin, 1995). To repeat a point, it is the interviewer who is to do the work so that the respondent does not have to do so; thus "putting respondents at ease" and "gaining rapport" is an important technique for the *interviewer* (Leech, 2002:665; McCracken, 1988:38). There are, however, other bases for resistance that are more specific to clerks.

One is that they may be concerned that questions will touch on pending cases, which they are quite properly reluctant to discuss, or that in their answers to general questions about their work, they will unwittingly offer information about such cases. The biggest reason for resistance is the matter of *confidentiality* (see Lane, 2005). Clerks believe that the work they do in chambers should be kept in confidence, at times even from clerks in other offices. When they began their clerkship, "their" judge

may have spoken to them about the need for keeping in the office what was discussed in the office. While former clerks have opposing views about what they can and cannot say, there is a debate about how long confidentiality lasts. An indication that there is no established set of rules on the matter is a disinclination to talk about anything relating to their job, even if it has to do only with general process—and, we might add, even if the judge were to approve.

It is important to keep in mind that the relationship of confidentiality between judge and clerk is basically for the *judge's* benefit, so that the judge can obtain honest, open, and straightforward input from clerks as cases are discussed. A judge may well feel that there is no problem in clerks talking about how they do their work or, some years after their clerkship, talking about cases long since concluded; at least a fair number of judges feel that way. And, for some clerks, the approval of "their" judge is sufficient to lead them to accept an interview. Indeed, we have had a number of instances in which clerks agreed to speak with us *only* after the judge's approval. However, not only do not all judges feel it is acceptable for their clerks to talk, even long after the fact, but, even when the judge approves, the clerk may not be willing. Thus, even when the judge has indicated approval of the project and this has been conveyed to the clerks, the clerks may decline to participate; one of us had the experience in which potential respondents, after receiving a letter of request to interview, contacted the judge to ask if it was acceptable to talk (although the letter said the judge approved of the project). Even though in this instance the judge reiterated that the researcher was acceptable and suggested they participate, they still did not do so. This is illustrative of the clerks' taking confidentiality more seriously than do the judges.

An instance where this difference in perspective came into public view was at the time that the late Justice Thurgood Marshall's papers were released; Marshall had said his papers could be available upon his death, he died soon thereafter, and the papers were released by the Library of Congress. Some of his clerks were quoted as saying that this should not be. After the editorial board of the *New York Times* supported the decision to make the papers public, one former Marshall clerk responded that "the Library of Congress has seriously and grievously abused the discretion that [Marshall] bestowed on it by releasing his private papers so soon after his retirement from the Supreme Court and his death. His passionate wish to preserve the confidentiality of the Court conference room and his colleagues' debates was clear to all of us who were close to him" (Bloch, 1993). That leads one to ask, "Whose papers are they?" The answer is clearly "not the clerks" but this answer will not make such super-protective clerks grant interviews.

Indeed, ten years after Marshall's death, one of us received a response to a written-survey request from a former Marshall clerk, "Though others may take a different view, I do not believe I am at liberty to discuss my Justice's practices, beliefs or the internal workings of our chambers." Similarly, another response to the questionnaire by a former Douglas clerk, "I have answered some of the questions. With respect to questions I did not answer, I believe that my response would be an invasion of the

privilege that exists between a judge or justice and his or her law clerks. I believe that that privilege is basically the same as the attorney-client privilege that exists in American law. While I understand the importance of scholarly research, I do not believe that I should violate that privilege." Thirty years after the death of Justice John Marshall Harlan II, one of his former clerks responded, "Despite your commitment to confidentiality, your questions ask for information that is, simply, none of your business." Still another clerk wrote back, "I decline to participate in this project. A Justice's decisions were his own and he espoused the opinions containing his name. It is a disservice to the Court to focus on the law clerks to Justices."

The related matters of confidentiality and anonymity raise the question of the applicability of human-subject research protocols to research on law clerks. As the process of review of research designs by institutional review boards (IRB) is intended for the protection of vulnerable subjects (see, e.g., Cumming, Sahni, and McClelland, 2006; Hochhauser, 2005), one might ask whether—given that the subjects of law clerk studies are mature adults who are lawyers, that is, elite respondents rather than the typical respondent in general surveys—the potential respondents are vulnerable. However, as university researchers are expected to submit any research protocol for IRB review, even if only for what is referred to as "expedited review" by a compliance officer, it is important that the researcher *address*, in the human-subjects submission, such matters as anonymity and confidentiality; where transcripts, tapes, or e-mail messages will be kept; and who will have access to them. We should note that in our own research, we have not sought IRB review as the "subjects" under study were elite attorneys whose expertise we have sought out to learn about their job duties (see, e.g., Dexter, 2008), and our position is that, at most, expedited review is all that is required.

In addition to matters of confidentiality, another aspect of resistance may be related to the "prominence" of the former clerk. It may be that the more politically prominent the former clerk, the less likely they will be to participate. Consider this 2001 response from former Transportation Secretary William T. Coleman, Jr.—the first African-American Supreme Court law clerk:

> Today I received your letter. . . . I immediately threw it into the wastebasket, but after thinking about it, I thought at least I should answer your letter. I do not intend to reply to your inquiry. I served as one of two law clerks of Mr. Justice Felix Frankfurter during the 1948 Term. I thought it a very confidential, special and personal relationship and one which imposed upon me the responsibility never to talk about anything that happened during that year. I won't have much respect for those law clerks who answer your questions. There are relationships which are based upon trust and confidence and I hope this is a standard that young people don't deviate too far from, even in today's climate, where many things which, at the knees of my mother and father, I was taught were private, now people seem perfectly willing to publicly discuss.

Resistance of this sort—indeed, even former clerk's general resistance—may be somewhat mitigated by how clerks are to be identified in the researcher's published article or book: Will it be by clerk's name or judge's name or will it be without even that latter, more anonymous, identifier. In existing writing, clerks have been identified in a variety of ways depending on the purpose of the project and the extent to which

they agreed to be identified. In one project, one of us chose to identify Supreme Court clerks based on the justice clerked for and the decade in which they clerked, as in "a Scalia clerk from the 1980s." This was appropriate to determine judge-level differences as well as historical developments while protecting the anonymity of the particular clerk. In short, granting some degree of anonymity may be necessary to counteract the problems—real or perceived—with confidentiality.

Somewhat related to confidentiality as a reason for declining an interview is that clerks may not wish to paint "their" judge or justice in a negative light, and they may believe that if they discuss work-in-chambers, it will serve to do so. One of us had the befuddling experience of sitting down with a reluctant former clerk to Justice William O. Douglas over two decades after Douglas's death. After initially agreeing to be interviewed and appearing in his firm's conference room at the agreed-upon time, the clerk explained that he did not want to participate in the interview. After being assured that the interview would not be recorded and that the former clerk would not be identified by name, but only as a former Douglas clerk, he hesitatingly sat down at the conference table. After the first "softball" question about his general duties, he shot up from his chair, said that he could not continue, and left the room.

While some resistance is inevitable, there may be further techniques the researcher can use to gain access to clerks. To be sure, the perceived trustworthiness of the researcher will likely have a bearing on the clerk's willingness to participate. Senior scholars with established track records may be viewed more favorably than relatively new researchers. Fair or not, the junior scholar may need to "work harder" or be creative to establish credibility with respondents. One junior colleague informed us that she has sent potential respondents her previously published research to meet this challenge, and a distinct help is an ability to draw on knowledge about the clerk's court in asking follow-up questions, which serves to indicate that one has done one's homework.

This brief discussion of pitfalls is not meant to be discouraging. Other former clerks at the law firm with the resistant respondent had no problem speaking "on the record" about their experiences, and in some detail to boot. For every "no" that we have heard from clerks, we have had dozens of productive interviews and extremely useful returned questionnaires. Clerks have appended letters or memos providing stories about "their" judge or justice, or have offered to have the interviewer contact them again with further questions. One former clerk happily scheduled interviews for one of us at his firm with a number of clerks who also worked there. Indeed, having one clerk "introduce" you to other clerks can have a dramatic effect. One clerk said that getting a call from another co-clerk introducing the researcher would probably make the difference in her agreeing to do an interview. She likened the difference to that between a "cold" phone call from a solicitor for a charity and a friend's asking for a donation.

This discussion of resistance leads us to the flip side of not wanting to paint the judge in a bad light: namely, that clerks will "gild the lily" as they "accentuate the pos-

itive" and "eliminate the negative," thus skewing responses. Clerks of a controversial judge may fall into this category, and those who are thought to "misuse" their clerks do, likewise. A recent article about Justice William O. Douglas's clerks illustrates both elements (Small, 2007). Earlier work on Douglas, certainly a controversial justice because of his liberal positions, political ambitions, and multiple marriages, had portrayed him as abusive to his clerks, including "firing" them for small errors and generally being unfriendly in chambers (see Murphy, 2002; see also Urofsky, 1990). Out of a reunion of Douglas's clerks came a brief article with a much longer appendix containing comments by the former clerks rebutting, so the author said, the earlier claims. Apart from the fact that the responses of many clerks serve to *reinforce* rather than undercut the picture that Douglas was a hard person for whom to work, the article is flawed in that the questions asked were general and not well-developed. Moreover, in drawing conclusions, the author failed to examine the extent to which Douglas worked his clerks harder than did other justices or whether other members of the Court were also "all business" in chambers, much less to compare treatment of clerks with that of legislative staff by, for example, senators, where there is considerable variation.

Location, Location, Location. One must weigh the costs and benefits of traveling to speak to clerks in person. An important consideration as to face-to-face interviews is the respondents' location. However, many clerks are concentrated in major urban areas such as Washington, D.C., and Manhattan, as well as in particular firms or law schools in those areas. For example, H. W. Perry, Jr. (1991:9) reported:

> The sixty-four clerks interviewed came from all nine chambers. For the October terms 1976-1980 there were a total of one hundred and sixty-one clerks. Unfortunately, cost constraints kept me from interviewing nationwide. Most former clerks, however, are located in Washington, D.C., or New York, with several others located in Chicago and at various law schools. I did all of the interviewing in these three cities, or at law schools located elsewhere. As such, there may be some selection bias, but I suspect that it is not important for the way I use the data. I did not try to sample clerks randomly. I interviewed anyone who would talk to me.

And those clerks who have served the courts of appeals are likely to be found concentrated in the key cities in the circuit. Discussing how one "gets in the door" for elite interviews in general, Goldstein (2002:671) reports, "Washington, DC is really a small town when it comes to politics and the more time one spends there, the more likely it is that one will make connections that can help one schedule an interview."

While we recognize that face-to-face interviews are more labor-intensive and that conducting them is potentially more costly than telephone interviews or written surveys, we have found that in-person interviews with clerks can lead to unexpected rewards. Personal interaction can set respondents at ease and sends a message that one is undertaking serious research. Clerks who initially agree to a brief interview may talk at length; may introduce you to other clerks, either on the spot or later by way of introduction or recommendation; or may be more likely to cooperate in general.

Interview Rules. We set forth here some "rules" (or strong suggestions) as to the conduct of actual interviews. At the beginning of an interview, it is wise to repeat

cautions about the rules of the game, such as anonymity and confidentiality. Some respondents may prefer to remain anonymous throughout the entire interview, although some of them may then say, "Oh, you can quote me about that." The converse is that a respondent may indicate a willingness to be "on the record for the whole thing" and then ask to be "off the record" for particular stories being told. The beginning of an interview may also be the time to ask if, upon completion of the study, the respondent would like to receive a copy of any paper or article that results from the research. Following through on this is important not only for "goodwill" but also to facilitate your own entrée should you undertake a follow-up study, and it will also soften the path for your colleagues in the discipline who might undertake to interview the clerks subsequently for a different project.

One question to consider about the conduct of a face-to-face interview is whether to record the session. In "olden times," when tape recorders were bulky and their presence was obvious, when tapes quickly ran out, and when the machines often malfunctioned, a strong argument could be made against using them. As technology now provides small recorders, which can be set unobtrusively on a desk and which have both good pickup and little need to change tapes in mid-interview, those arguments recede. However, the question of whether one should ask to record remains.

Some believe that elite respondents prefer not to be recorded in order that they can more easily say that they were misquoted, as is indeed more likely if the interviewer is taking notes. For example, Oakley and Thompson (1980:50) explained, "The subject knows that even in the event of an accurate report of words which by breach of faith or confidence are attributed to him, he can simply deny having said what he later regrets. . . . If remarks attributed to the person prove embarrassing, and if there are no means of determining indisputably just what was said, human psychology and the ego of most public figures combine to allow the subject to deny the accuracy of the quotation with all the conviction of one who has convinced himself of what he wishes to convince others of: that he would never have said anything of the sort."

However, some respondents may prefer that the interviewer "get right" what the respondent has said and, thus, would prefer to be recorded, with the recorder likely to be ignored after the interview starts. We have had this experience with a number of clerks, and there are many instances of research based on recorded interviews with clerks. Judicial biographer Tinsley Yarbrough (2008:xiii) noted in the introduction to his recent book on Justice Harry Blackmun, "A number of Justice Blackmun's clerks, as well as his longtime secretary Wanda Martinson, generously shared their memories of the justice in recorded interviews." We therefore conclude that researchers might suggest recording interviews but should remain flexible when the clerks decline the request.

To be prepared for those clerks who decline to be recorded, so that one must hastily scribble notes during the interview session, one must be sure to allow time immediately after each interview to go over the notes and use "recent memory" to fill in the holes; one should then prepare a transcript as soon as possible thereafter. As Perry (1991:9-10) explained, "An overwhelming majority refused to allow me to tape-record

them, so I took notes on all informants and as soon as possible dictated a transcript of the interview onto tape. . . . To be sure, my first interviews are spotty. But one soon learns many tricks, particularly the ability to get important statements verbatim; and after awhile, one becomes very proficient at reconstruction."

Types of Questions. As one constructs one's interview or questionnaire protocol, one needs to think hard about the types of questions to be used. The literature on elite interviewing suggests that there are three types of questions that the researcher should consider: grand tour questions, example questions, and prompts. Spradley (1979:86-88) explains that the grand tour question asks the respondent to give the interviewer a verbal tour of something they know well. So one might ask a clerk to describe a typical day during the clerkship or to walk us through a particular process, topic, or event. An example question is a more specific form of the grand tour question, in which the interviewer follows up on an act or event identified by the respondent and asks for an example. For example, one might ask a clerk to give an example of a typical certiorari memorandum or bench memorandum they composed or of a typical interaction with their judge in the agenda-setting process. The third type of question involves prompting the respondent, with triggers used to keep the respondent talking and to help the interviewer when responses are less than helpful. Informal—and often instinctive—prompts include the conversational "yes" or "how interesting," but they can also be more directed, such as "How?" "Why?" and "And then . . . ?" (Leech, 2002:668; McCracken, 1988:35).

The type of question to be used, closed-response or open-ended, is to some extent a matter of the researcher's taste and to some extent a function of the topics being pursued. However, we think it best to work with a combination of fixed-response and open-ended questions, in both interview and questionnaire situations. Indeed, Stoker (2003) argues that moving from closed to open-ended questions can help insulate researchers from imposing their own beliefs and commitments and instead more accurately discover or interpret the respondent's views. Having some fixed-response questions also allows for at least some elementary numerical statements as to frequency of elements in a clerk's background or the frequency with which certain tasks are performed. Hence, we think a combined approach may be best. And because question order has been shown to have an effect on responses (see, e.g., Lacy, 2001), interviewers will want to carefully structure question order to increase the validity of responses.

It may be advisable to start with questions about general background or demographic information before one turns to topics that may be more controversial. Hence one might begin with "softball" questions about whom the clerk worked for, when the clerkship took place, and what the clerk did before and after the clerkship before turning to the more potentially charged topics of clerk duties and impressions. Particularly if clerks' responses are to be compared across interviews, we suggest there should be some common structure to the interviews, even if respondents' answers do not fit the sequence in which questions are set up in a written questionnaire. Because clerks may start responding to an interview by telling a story that does not fit the protocol neat-

ly—and indeed may answer questions the interviewer intended to ask at different times—the interviewer must have some notion of the sequence in which to proceed. A capable interviewer should be able to steer the conversation (for that is what a good interview is) in such a way as to cover all designated topics. In short, the interviewer must be prepared with a next question, whatever pattern of responses occurs.

Listening is a crucial interviewing skill, particularly if one is using open-ended questions, because one must think "on one's feet" quickly to come up with an appropriate follow-up question. Of course, one is in a better position to ask follow-up questions in an interview situation than when one uses a survey instrument, where one needs to anticipate where follow-up will be needed ("If so, did you . . .?"). However, this matter of follow-up items in questionnaires need not be a problem, as lawyers who wish to say something that does not fit the questions asked will find a means of doing so; they will write a separate letter or memo to attach to the survey when they return it.

A Short Note on Interpreting Clerk Interview Data

Of course, planning for and conducting interviews are only the initial steps in research on law clerks. Interpreting what former clerks have reported and ultimately presenting your findings in a convention paper or article are arguably the most important aspects of the process. In interpreting clerks' responses to your interviews or questionnaires, you will need to ask: How will the data be coded? Will a quantitative data set be assembled? How useful are typologies for the project? Should interview data be supplemented with information gleaned from other approaches? While these are matters that arise in interpreting data, they are also matters that should be considered as the interview/questionnaire protocol is constructed, because the types of questions asked will help determine the types of data analysis utilized.

The first issue to be confronted by researchers using interviews is whether to compile a quantitative data set from their results or to treat the data qualitatively (see Creswell, 1998; Silverman, 2001; Aberbach and Rockman, 2002; Stoker, 2003). We have used a combination of both techniques with closed interview responses. Demographic information provides quantifiable data, while responses to open-ended questions can be used to illuminate the quantitative analyses. Of course, there are potential problems with interpreting open-ended interview responses. As Berry (2002:679) has noted about "the paradox of elite interviewing . . . the valuable flexibility of open-ended questioning exacerbates the validity and reliability issues that are part and parcel of this approach." Hence researchers must make an extra effort to ensure that their data are both reliable and valid, which means, at the very least, that interviewers should be aware that they may be engaged in an interaction with respondents that jointly produces the research data (Stoker, 2003:14).

In analyzing data from interviews and surveys, researchers should also consider constructing typologies of two of more categories (see Wolcott, 2001). While the researcher may have specific typologies and categories in mind before conducting the

interviews or constructing the questionnaire—and indeed, while constructing the survey instrument, one should have in mind the types of responses sought—we have also found that typologies can "bubble up" from the data itself through a grounded theory approach to interpretation (see Glaser and Strauss, 1967; Strauss, 1987; Strauss and Corbin, 1992; Glaser, 1992). For example, after interviewing Supreme Court clerks about the opinion-writing process, Ward found that clerks discussed the process in three different ways: "delegation" where justices assigned the writing to clerks, "retention" where justices wrote the opinions themselves, and "collaboration" where both justices and clerks worked together toward a final product (Ward and Weiden, 2006:213).

Finally, to what extent should researchers rely on interview data alone? We suggest that interview data gleaned from clerks, while valuable in and of itself, should be supplemented with data developed through additional methodological approaches. Stoker (2003:15) cautions that "survey research is incapable of fully revealing meaning because it relies merely on self-reports . . . and ignores how meaning is represented" in other activities that require direct observation. To be sure, political scientists and others have employed field research and observation to great effect (see, e.g., Fenno, 1990, 2002), but use of this technique for law and courts researchers interested in the practices which take place in justices' and judges' chambers may not be practical. Unfortunately, observing the work of clerks and judges will be virtually impossible for researchers, as in-chambers work is routinely closed to outsiders. Still, one might attempt to seek access, as there are great benefits, and a potential gold mine of observation data, for the researcher who gains access and can, for example, sit in on a session in which an appellate judge and clerks prepare for the next week's argument calendar, as one of us has. More realistically, the obvious corollary source, used by many law and courts scholars, is the papers of the justices, which often contain clerk-written memoranda. A clerk's recollection of a particular topic can be checked against the contemporary evidence contained in the papers and we recommend that law and courts scholars use both sources whenever possible.

CONCLUDING COMMENTS

We have written this article in part in the hope we could encourage others to learn from the experiences we have recounted and the advice we provide here. Our hope is that researchers will interview judges' law clerks in a variety of venues, including the trial courts, so that a broader picture of what clerks do in the judicial system can be obtained, because we might well find differences between the role of clerks in appellate courts, where research has to date been focused, and in the trial courts; we know there are differences, but they are almost totally unexplored.

In seeking to provide a brief "how to" for conducting interviews with law clerks and interpreting clerk data, we also hope that our primer inspires others to pursue interviewing—both in-person and through written communication—as a valuable research method. Not only is there much to learn from clerks about the roles they play

and the potential influence they have, but there is also much they can tell us about the judges they work for and the institutions they serve. We believe that clerks remain a relatively untapped resource for law and courts research. And while there are certainly hazards and hurdles to overcome in elite interviewing generally, and with regard to clerks specifically, we maintain that the benefits far outweigh the costs. While scholars will no doubt have their inquiries and projects deemed "asinine" and be told to "Get a Life!" by some respondents, as we were once scolded, we can assure future researchers that they will encounter many more interviewees who will be forthcoming. The "life" of an interview researcher may not be for everyone, but it can be a fruitful one if done right. **jsj**

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