Stanford Law Review

Volume 69 March 2017

In Memory of Shirley Mount Hufstedler

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Both the federal judiciary and Harvard Law School were male-dominated institutions when, as a second-year law student, I first encountered Shirley Hufstedler in the fall of 1971. Judge Hufstedler was the only woman sitting on a United States Court of Appeals anywhere in the country and only the second woman ever to do so: Florence Ellinwood Allen was the first, appointed by President Franklin Roosevelt in 1934. There were, of course, no women on the United States Supreme Court; although there were a handful of women serving on the federal district courts, none was on the bench in any of the states within the Ninth Circuit.

The situation was not too different at Harvard Law School: only about 10% of my classmates were women; the class ahead of us, slightly less; the class behind, slightly more. The regular faculty—professors and assistant professors—was exclusively male. There were two female lecturers in law: one an expert in international tax; the second an expert in sex discrimination, Ruth Bader Ginsburg.

At the Ames Moot Court Competition finals that fall, the two institutions came together. The judges for the final competition were Justice Harry Blackmun, Judge James Oakes from the Second Circuit, and Judge Hufstedler. As anyone who ever saw her on the bench would expect, Judge Hufstedler's performance that evening was absolutely breathtaking. She asked incisive, clearly articulated questions, but phrased pleasantly; she displayed a sense of humor while not diminishing the importance of the event to the participants; and she demonstrated both respect and support for the student advocates. The buzz following oral argument—and for days afterward—was all about Shirley Hufstedler: what an extraordinary appellate judge she must be. That she was a woman now seemed almost entirely beside the point.

The timing of Judge Hufstedler's participation in the Ames Moot Court Competition was especially serendipitous for me. Shortly after her visit to the law school, I applied to be one of her law clerks following my graduation. To

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my delight I was offered the position. The offer came in a letter in Shirley's own beautiful handwriting, something of a trademark for her; I have kept that letter as one of my most treasured mementos.

A year working as a Hufstedler clerk was the best postgraduate training a new lawyer could have. Shirley's writing was not only clear and concise but also frequently poetic. One of my first tasks as a new law clerk was to do the final proofreading for her now-famous opinion dissenting from the denial of a rehearing en banc in *Lau v. Nichols*, a case that involved Chinese-speaking students in San Francisco who sought access to bilingual education.[1] Rejecting the majority's conclusion that "state action [wa]s absent because the state did not directly or indirectly cause the children's 'language deficiency,'" she wrote,

> The state does not cause children to start school speaking only Chinese. Neither does a state cause children to have black skin rather than white nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created. . . . [T]hese children are more isolated from equal educational opportunity than were those physically segregated blacks in *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)]; these children cannot communicate at all with their classmates or their teachers.[2]

The following year the Supreme Court reversed the Ninth Circuit decision, concluding under section 601 of the Civil Rights Act of 1964,[3] as Shirley had argued, that the school system denied Chinese-speaking students an equal opportunity for education by not providing programs to adequately deal with their language difficulties.[4]

In another dissent she authored the year of my clerkship, in *Holmes v. Burr*,[5] an electronic surveillance case, Shirley began her analysis by writing,

> The fate of any one man enmeshed in the criminal process is never inconsequential. But this is one of those cases in which the issues involved far transcend the particular factual setting in which the constitutional battle is fought. The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteen Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?[6]

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1. 483 F.2d 791, 805-08 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of hearing en banc), *rev'd*, 414 U.S. 563, 566 (1974).
2. *Id.* at 805-06.
3. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 251 (codified at 42 U.S.C. § 2000d (2015)).
4. *Lau*, 414 U.S. at 566.
5. 486 F.2d 55 (9th Cir. 1973).
6. *Id.* at 63 (Hufstedler, J., dissenting).

Eloquent language she penned more than four decades ago frames questions as applicable to today's world as they were to the case before her in 1973.

In addition to the power of tightly written prose, Shirley taught her law clerks the importance of thorough preparation. She never relied on bench memoranda from her clerks, as did her colleagues; she read all the briefs herself and did her own oral argument preparation.

Shirley also firmly believed it was important to listen to her colleagues, particularly those whose views on the law and society were different from her own. She frequently told us, "You can learn from everyone if you are prepared to listen." She would add, however, that you need to take what some folks say with a grain of salt and note, with a smile, that a little salt in the diet didn't hurt—as long as it wasn't too much.

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One of the special things about working with Shirley was her willingness to share her life experiences and her ideas with her law clerks. Whenever she returned to Los Angeles from a trip or a few days out of the office, rather than going directly to her desk when she arrived at the courthouse, even though her work had piled up, she would pull up a chair in one of her law clerks' offices, call the second one of us in, and talk about what symposium she had attended the day before, what dignitary she had dined with, what mountain trail she had trekked, or simply what good book she had just started to read on the airplane. These stories revealed Shirley's wide range of interests and accomplishments and underscored her belief that being a skilled lawyer or judge was not enough. You had to contribute to your profession and your community, and you also had to give yourself the opportunity to continue to grow and to learn.

Perhaps the most important thing I learned from Shirley in that year was that deciding cases with intellectual honesty does not require you to disregard your sense of fairness, decency, and compassion. For the most part, Harvard Law School in the 1970s believed in the neutral principles model of judging, as exemplified by the opinions of Justices Felix Frankfurter and John Harlan, which essentially requires a judge to apply the law without considering the fairness of the specific outcome or the larger policy implications of the decision. I was trained that way, but the concept was foreign to Shirley, who understood—and taught those of us who were fortunate enough to work with her—that legal decisionmaking was a human enterprise that should produce a fair result and, ultimately, benefit society.

After her service as Secretary of Education for President Carter ended in 1981, Shirley returned to private practice at Beardsley, Hufstedler & Kemble, the law firm where her husband Seth was the senior partner. I was also a partner at the firm and had the good fortune to once again work with, and

learn from, this remarkable person. Shirley practiced law the old-fashioned way. For many years she did her own research, pulling case reporters and treatises off the library's bookshelves, finding the relevant authority, and then dictating the initial draft of her brief with books spread in front of her on her desk. And what a marvelous thing those initial drafts were—far better than the polished final versions of what the rest of us could do. But first drafts, no matter how good, never satisfied Shirley. She edited and reedited (whether her first draft or mine), shortening the arguments, tightening the prose, and making it all both more accessible and more persuasive. As powerful as those briefs were, however, Shirley's oral advocacy was even more striking. Just as she did when she was sitting on the bench questioning lawyers in front of her, Shirley, when presenting an appellate argument, went to the heart of the hard issues in a case, identified the problem, posed alternative responses, and selected as the proper answer the one that achieved a fair and satisfying result (and, not incidentally, most often led to a victory for her client).

While I treasured our time together at the law firm, as the Hufstedler firm grew and then migrated to Morrison & Foerster, Shirley's role as a senior lawyer became especially important for the women at those firms. Shirley was both a mentor and an inspiration to them. She took time to discuss the challenges she had confronted and that they continued to face as women in our profession and gave them practical advice—individually and in small groups—about overcoming those obstacles and becoming the best lawyers and the best people they could be.

I have a host of fond memories from my more-than-forty-year relationship with Shirley, but two in particular help define for me the essence of who she was. With a large team of other lawyers from several firms, Shirley and I represented McDonnell Douglas in a dispute with the Northrup Corporation over the rights to foreign sales of the Navy's F-18 fighter jet. One early morning, Shirley and I were on the tarmac in St. Louis, waiting with the company's associate general counsel to travel to Washington, D.C. to meet with experts. When the corporate lawyer pointed out an F-18 nearby, Shirley promptly said, "Can I take a look inside?" Somewhat stunned, the lawyer said, "Well, I guess so"—Shirley had the necessary security clearances—and Shirley just walked over, climbed up the ladder, and looked inside the cockpit. If she was curious, Shirley satisfied that curiosity.

Some time later, several years before I was appointed to the bench, I was at a meal with Shirley, complaining about feeling burned out, tired of complex litigation with its seemingly endless rounds of discovery disputes and motion practice. Shirley's suggestion to me was not that I should concentrate more on appellate work so that I could spend longer periods in the library, or even that I take a nice long vacation, but rather that I should find the UCLA Extension catalogue and enroll in a class on creative writing or European architecture or opera. For Shirley, learning was the way to recharge your batteries. She never

stopped growing and believed those around her should not stop growing either.

In the end, Shirley Hufstedler was the consummate teacher—to the students in the seminars she led at Stanford and other law schools, the newly minted law school graduates who served as her law clerks, the lawyers at the Hufstedler law firm and Morrison & Foerster who worked with her, and the scores of others she touched through her many activities on behalf of children throughout the nation. She will be deeply missed, but wonderful memories of her will continue within all of us who were lucky enough to have known her.