
VIRGINIA LAW REVIEW

VOLUME 94

OCTOBER 2008

NUMBER 6

TRIBUTES

A TRIBUTE TO EARL C. DUDLEY, JR.

*John C. Jeffries, Jr.**

EARL Dudley joined the Law School faculty in 1989. It is not unusual for new professors to arrive with a few years of practice experience, but Earl had an entire career before he entered teaching. Earl graduated from the Law School in 1967, where he was, on any reckoning, the most distinguished student. He served as Editor-in-Chief of the Law Review and received the Hyde Award given annually to the graduate “whose scholarship, character, personality, activities in the affairs of the school, and promise of achievement” most warrant special recognition. He immediately went to the Supreme Court, nominally as law clerk to retired Justice Stanley Reed, but actually spending most of his time with the Chief Justice of the United States, Earl Warren.

At the Supreme Court, Earl worked on *Terry v. Ohio*¹ and *Powell v. Texas*²—both cases still taught in law school today. After a year at the Court, Earl began a remarkably varied and successful practice career, embracing both private firms and public service. He started at Wilmer, Cutler & Pickering in Washington, D.C., then moved to Williams & Connolly, one of the nation’s premier litigation firms. There Earl honed his skills as a courtroom lawyer. He also successfully represented the Democratic National Commit-

* David and Mary Harrison Distinguished Professor of Law, the University of Virginia.

¹ 392 U.S. 1 (1968).

² 392 U.S. 414 (1968).

tee in a credentials fight over the Mississippi delegation to the 1972 Convention.

In 1975 Earl left Williams & Connolly to become General Counsel of the House Committee on the Judiciary. After two years in government, Earl returned to private practice, first in the firm of Seymour & Dudley and then with Nussbaum, Owen & Webster, both in D.C. By the time he left Washington for Charlottesville, Earl had spent two full decades in the practice of law at the highest levels.

The phenomenon of an accomplished senior lawyer, with vast experience in private practice and important government service, entering law teaching used to be common. Today, it is rare. In itself, that is not surprising. Like every other field of endeavor, law is becoming more and more a collection of specialties. Increased specialization is usually said to reflect increased complexity, but law firm size and structure may also play a role. Whatever the reasons, specialties within the legal profession are becoming more separate and distinct—and that includes academic law. Today, a senior lawyer moving from practice to the academy (or vice versa) would be every bit as unusual as one shifting from litigation to tax planning or from ERISA to domestic relations. For better and for worse, the specialties within law dominate and confine the careers of those who practice them.

Earl Dudley is a grand exception. He is one of the last of the great generalists, one of the last exemplars of the long tradition of lawyers who entered the academy after a full career of accomplishment elsewhere. That's reason enough to honor Earl on the occasion of his retirement, but also, perhaps, to pause and reflect on the value of that tradition and on what it provided for generations of law students.

The critical point is that what Earl Dudley did in his second career here at the Law School benefited enormously from his first career in private practice. Earl showed the colors of a true generalist in what he taught—which was practically everything. His staples were Evidence and Constitutional Law, but he also taught Civil Procedure, Criminal Procedure, Trial Advocacy, the Prosecution Function, and the American Jury System. All these offerings were informed by Earl's wide experience as a lawyer. He was not merely teaching students subjects of importance to law; he was teaching

2008]

Earl C. Dudley, Jr.

1283

them how to be lawyers. In his person and in his classroom, Earl captured the connections between the intellectual discipline taught in law schools and the cultural, social, political, and institutional contexts in which the lawyer's skills are brought to bear. His teaching was informed in ways that very few of us can hope to equal.

And how the students responded. They took Earl to heart, respected him, admired him, talked to him—really talked with him, as they do not do with many teachers—and sought his advice on every imaginable subject. In the end, they loved him.

Earl and his friend George Rutherglen, with whom Earl had scholarly and other collaborations, taught a seminar on Leading Lives in the Law. The readings were biographies of great lawyers. The lessons were lessons in legal ethics, not in the narrow sense of the Code of Professional Responsibility, which is essentially a list of thou-shalt-nots for the practice of law, but rather in the broader sense of the ethical responsibilities of the lawyer as citizen. This proved so successful that we now have a whole program, called Seminars in Ethical Values, modeled on the Dudley-Rutherglen offerings. Of course, no one contends that talking about ethical responsibilities renders our students immune to temptations to misconduct, but it does help ensure that ethical issues do not catch them unawares. And every such conversation reiterates the important message that we in this institution *care* about integrity.

Earl Dudley exemplified that commitment and personified it for our students. His transition from practice to the academy was a blessing for the Law School and especially for the generations of young women and men who learned from Earl what the “lawyer as citizen” really means.

*George Rutherglen**

SOME would take the retirement of a valued colleague and friend as an occasion to celebrate his virtues and remark upon his achievements; to sum up what he has contributed and how much he will be missed. Worthy as these aims are, I am tempted to take this opportunity to get in the last word on several continuing disagreements. Some of these arise from articles that we have co-

* John Barbee Minor Distinguished Professor of Law and Edward F. Howrey Research Professor, University of Virginia School of Law.

authored and in which we managed to maintain an uneasy truce on questions that divided us: Is Chief Justice Warren's opinion in *Hanna v. Plumer*¹ the definitive statement of the *Erie* doctrine? Did Justice Frankfurter make any enduring contribution to the jurisprudence of the Supreme Court? Other disagreements come from the Ethical Values Seminars that we co-taught over many years: Was Richard III framed by Shakespeare (and others),² or did he really arrange for the murder of the princes in the Tower of London? Is Scott Turow's novel of murder and prosecution, *Presumed Innocent*,³ a valuable guide to the ethical issues raised by criminal prosecutions or is it only a shabby little shocker? We also disagree, with increasing stubbornness and negligible research, over whether it was Tom Lehrer or Victor Borge who first observed, "It is a sobering thought that when Mozart was my age, he had been dead for two years."

These particular disputes perhaps are not consequential outside the legal academy, but there is a fundamental difference of opinion, approach, and perspective that does divide us: the distinction between Theory and Practice. I retain some faith in general principles as a guide to solving the problems confronted by the legal profession. Earl remains skeptical of legal theory, placing greater faith in judgment and experience. Character, for him, is more important than method; concrete cases are more revealing than abstract propositions; and difficult decisions are a truer test of legal ability than brilliant generalizations. If that is the dogma that he believes, it is entirely characteristic of him that he is not at all dogmatic about it. Many conversations with him have returned invariably to this theme, and if he has not talked me out of my academic prejudices, at least he has made me see their limitations. As so many of his colleagues and friends will attest, it is more pleasant and more rewarding to disagree with Earl than it is to reach agreement with almost anybody else.

Earl came by his faith in judgment and experience honestly. Few members of the legal profession, and even fewer faculty members, have the range and depth of experience that he does. He came to

¹ 380 U.S. 460 (1965).

² As Josephine Tey supposes in her novel, *The Daughter of Time* (1951).

³ Scott Turow, *Presumed Innocent* (1987).

2008]

Earl C. Dudley, Jr.

1285

law school after a stint as a reporter for United Press International in New York—a brief career outside of law that has, I’m convinced, influenced his much longer career within it. Seeing the variable stories that different actors told about the same events gave Earl a preference for staying close to the facts and the evidence rather than rashly building a large conceptual structure upon them. Another formative experience, at about the same time, was working for Armistead Boothe, a liberal Democrat in Virginia, when liberal Democrats were hard to find. He was a leading opponent of Massive Resistance and a tenacious supporter of civil rights, whose political career ended when he dared to oppose the Byrd machine by running for the Senate against Harry Byrd, Jr., in 1966. Earl’s work for Boothe convinced him that there were no lost causes in politics, no matter how limited the short-run prospects for success were. Integrity for Boothe was the measure of a politically engaged lawyer, and he was the exemplar of the public-spirited professional.

At the Law School, Earl served as the Editor-in-Chief of the Virginia Law Review and then went on to receive a clerkship at the Supreme Court. Earl’s editorship was marked by an accomplishment no outsider could discern: he and his colleagues on the Law Review published twice as many issues as were ordinarily scheduled for a year, making up a one-year backlog in the Review’s publications. This led to what could charitably be called “irregular” class attendance. As a consequence, his preparation for final exams was less in the nature of review and more like *de novo* findings of the facts and law—a situation that could only be made more problematic, as it was, by the birth of Earl and Louise’s son, Will, in the middle of his final exam period. But he survived the experience—and prospered.

Earl’s clerkship at the Supreme Court was, in form, with Justice Reed, but because of Reed’s retirement, it was, in fact, with Chief Justice Warren. The Warren Court had even then acquired a degree of notoriety, making the term one of praise (or abuse) depending upon one’s political and jurisprudential views. For Earl, who had seen it up close, it was the achievement of a thoroughly pragmatic innovator—a former prosecutor and governor who brought to the judicial role an understanding and appreciation of the vicissitudes of political life. Indeed, Earl’s misgivings about the

Supreme Court since then have had less to do with the characterization of its decisions as conservative or liberal, than with the experience of its members. All current justices have served previously as judges, but none has served in elective office, depriving them, in Earl's opinion, of a direct understanding of the immediate need and the practical possibility of change in the American system of law and governance.

From his clerkship, Earl went into a variety of positions in the Washington bar, joining Williams and Connolly when it was still a firm of less than 20 lawyers, then moving to his own firms where he served as partner. Edward Bennett Williams was the guiding light to lawyers of Earl's generation at Williams and Connolly, and many of them are still among his close acquaintances. They learned the art of litigation at a virtuoso level. I'm told that three maxims, as applied to criminal cases, were the key to Williams' pre-eminence in the Washington bar: Get the money up front. Fight like hell to keep the client out of jail. But if anyone goes to jail, make sure it's the client and not the lawyer.

These maxims might be stated a little bluntly, as all maxims are, but they made Williams "The Man to See," as his biography was aptly entitled.⁴ The same, I believe, is true of Earl. In Washington, he went from private practice to serve as General Counsel to the House Judiciary Committee. He then became an Assistant Independent Counsel when the constitutionality of that office was challenged, and subsequently upheld, by the Supreme Court.⁵ And all of this occurred while he served as an adjunct faculty member, before he was appointed to our faculty. But no sooner had he arrived at Virginia than his advice was sought on a wide range of sensitive matters arising within the University—from an investigation of athletics by the NCAA, to cases of wrongful discharge, academic freedom, and affirmative action.

In the midst of all these commitments, Earl launched a brand new career as a full-time teacher and scholar. I have been privileged to be a part of it, although I cannot claim to have his understanding of the realities of litigation nor his rapport with students. This has been, as I said, all to my personal benefit. His article, *Get-*

⁴ Evan Thomas, *The Man to See* (1991).

⁵ *Morrison v. Olson*, 529 U.S. 598 (2000).

2008]

Earl C. Dudley, Jr.

1287

*ting Beyond the Civil/Criminal Distinction*⁶ has been cited several times by the Supreme Court, and another article, *Federalism and Federal Rule of Evidence 501*⁷ offers a subtle analysis of one of the most complicated problems in the law of evidentiary privileges.

Earl's reputation as a teacher was truly enviable. I discovered this time and again as he elicited comments in our Ethical Values Seminar. He has a way of gaining the confidence of students by serving as their role model. They saw in him what they wanted to become, and many came to him to seek guidance about their careers, the ways of the legal profession, and many other subjects as well. As I've said, students weren't alone in seeking him out. Fellow faculty members, administrators at the Law School and the University, and other members of the bar all came to him for advice.

He's "the man to see" in this sense: not to fix your problems for you, but—like a true teacher—to instruct you how to solve them for yourself. During many of these encounters, I know that Earl had a strong opinion about what was the right thing to do, but he never used it as an excuse to cut the conversation short, or to avoid asking the next question. And he never failed to give a candid response—one that might be necessary, but not necessarily welcome. Many people affiliated with the Law School have some of Earl's abilities and experience. I know of no one who has them all. If he was the quintessential Washington lawyer, he was also the loyal alumnus of the Law School. If he was an accomplished advocate, he was also a scholar deeply interested in the nuances and structure of the law. If he could be an exacting critic, he was also a good friend and colleague. The Law School has benefitted from his deep connection to this institution, as have all of us who have shared his time here with him. Lawyers with his qualifications and experience rarely make their way onto law faculties in this day and age. We should therefore be all the more grateful to him for returning to the Law School at the end of his career, with qualities unusual enough in themselves, but now not likely to be seen together again in a member of our profession.

⁶ Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 Va. L. Rev. 1025 (1993).

⁷ Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law, 82 Geo. L.J. 1781 (1994).