BOOK REVIEW

"THE LOWEST FORM OF ANIMAL LIFE"?:[1] SUPREME COURT CLERKS AND SUPREME COURT HISTORY†

David J. Garrow‡

CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT. By *Edward Lazarus.** New York: Times Books, 1998. Pp. xi, 576. $27.50.

THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE. By *Dennis J. Hutchinson.*** New York: The Free Press, 1998. Pp. 577. $30.00.

INTRODUCTION

Early in 1980 the author and attorney John P. Frank, a former October Term 1942 clerk to Justice Hugo L. Black, decried the extent to which former Supreme Court law clerks had supplied so much of the behind-the-scenes fodder for Bob Woodward and Scott Armstrong's book *The Brethren.*[2] Prior to *The Brethren,* Frank asserted:

> There have been no significant breaches of confidences by the young persons employed in that capacity for the 90 or so years since the custom originated. There have been anecdotes—I have published some myself and so have others—but none of these has gone

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1 Melvin I. Urofsky, *William O. Douglas and His Clerks,* 3 W. LEGAL HIST. 1, 17 (1990) (quoting Justice Harry A. Blackmun's recollection of Justice William O. Douglas, "One time he said to me, 'Law clerks are the lowest form of animal life'"); *see also* Tony Mauro, *Justices Give Pivotal Role to Novice Lawyers,* USA TODAY, Mar. 13-15, 1998, at A1 (quoting former Blackmun clerk Pamela Karlan as calling Supreme Court clerks "little beasts").

2 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

> to details of particular cases or to work habits and attitudes of justices as they relate to other justices.[3]

Eighteen years later similar complaints greeted the publication of *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, a book by Edward P. Lazarus, a former October Term 1988 clerk to Justice Harry A. Blackmun.[4] The well-known Supreme Court journalist Tony Mauro announced that "Lazarus' book may be even more damaging than *The Brethren*,"[5] and *Closed Chambers* immediately generated a host of denunciations from commentators who asserted that Lazarus had violated a sacred personal duty to the Court.

Time magazine quoted Columbia University School of Journalism Dean Tom Goldstein as calling Lazarus's book "the most fundamental breach of confidentiality you can think of."[6] Columbia Law Professor Gerard E. Lynch, a former October Term 1976 clerk to Justice William J. Brennan, Jr., equated Lazarus's "personal loyalty" to that of former Monica Lewinsky friend Linda Tripp,[7] and Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit declared that Lazarus "does not impress with his sense of duty."[8] Lazarus, Kozinski added, "betrayed his trust to make a quick buck, to make fame and fortune at the expense of the Supreme Court."[9]

One fellow clerk from October Term 1988 who figures prominently in *Closed Chambers*, Andrew McBride, told the Associated Press that "Lazarus has breached . . . [an] ethical obligation to confidentiality for a few bucks and some reflected glory,"[10] and another October Term 1988 clerk, Robert J. Giuffra, Jr., wrote to *Time* magazine that "Lazarus has violated his duty of confidentiality to the court for money."[11] One law professor suggested that Lazarus, in publishing his

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3 John P. Frank, *The Supreme Court: The Muckrakers Return*, A.B.A. J., Feb. 1980, at 160, 163.

4 EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

5 Tony Mauro, *Clerk Tells Tales out of Court*, LEGAL TIMES, Mar. 16, 1998, at 7.

6 Adam Cohen, *Courting Controversy*, TIME, Mar. 30, 1998, at 31.

7 *Id.*

8 Paul Elias, *Is Kiss 'n' Tell Book a Supreme Betrayal?*, THE RECORDER, Mar. 13, 1998, at 1 (quoting Kozinski).

9 Briefly . . . , NAT'L L.J., July 13, 1998, at A5 (quoting Kozinski); *see also* Alex Kozinski, *Worthy of Trust?*, JURIST: THE LAW PROFESSORS' NETWORK (June 1998) <http://jurist.law.pitt.edu/lawbooks/revjun98.htm> (criticizing Lazarus's "egregious breach of duty to the Supreme Court").

10 Laurie Asseo, *Ex-Clerk's Book Rankles Some as Breaking Confidentiality Rule*, AP, Apr. 6, 1998 (on file with author).

11 Robert J. Giuffra, Jr., Letters, *The Role of Court Clerks*, TIME, Apr. 20, 1998, at 11, 11. None of the 1998 critics who complained about Lazarus's alleged financial motive—"a quick buck," "a few bucks," "money"—noted a 1992 *Newsweek* report that Lazarus had received a $300,000 advance with which to undertake the book. "Lazarus hopes to interview all the justices and vows he won't write a gossipy, kiss-and-tell-book." *More Justice*, NEWSWEEK, May 18, 1992, at 6.

book, might have violated one or more federal criminal statutes,[12] and *The Economist* magazine characterized the book as "an act of betrayal" and a "betrayal of trust."[13]

In perhaps the most prominent condemnation of *Closed Chambers*, Gretchen Craft Rubin, a former October Term 1995 clerk to Justice Sandra Day O'Connor, lambasted Lazarus on the op-ed page of the *Washington Post*. Rubin cited specifics from the Supreme Court's Code of Conduct for law clerks—"A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain"—that she believed "clearly bar the writing of his book."[14] Noting that "Lazarus could have made his principal arguments without violating any confidences," Rubin concluded that "it's a poor sort of courage to betray the trust of your colleagues for your own advancement."[15] In reply, Lazarus repeatedly asserted that the "Code of Conduct, including its confidentiality provision, applies only to clerks during their time at the court (to protect deliberation on pending and impending cases) and has no bearing on the propriety of a former clerk writing a book."[16] Chief Justice William H. Rehn-

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12 *See* Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23 [hereinafter Painter, *Clerk Betrays the Court*] (citing 18 U.S.C. § 641 and 18 U.S.C. § 2071); *see also* Richard W. Painter, *Keeping Confidences: A Response to Edward Lazarus*, JURIST: THE LAW PROFESSORS' NETWORK (May 1998) <http://jurist.law.pitt.edu/lawbooks/revmay98.htm> (arriving at "the unfortunate conclusions that ethical obligations probably were breached and that somebody may have broken the law"). Painter's *Wall Street Journal* column stimulated a letter from Gideon Kanner, Professor Emeritus at Loyola Law School, who observed:

> The prize in this fiasco, however, must go to Anthony Kronman, dean of Yale Law School, for his "blurb" on the dustjacket of Mr. Lazarus's book, lauding this breach of confidentiality. Yale Law School sends a disproportionate number of its graduates to serve as clerks of Supreme Court justices. Are these youngsters to take it on the authority of their dean that betraying the confidences of the justices whom they undertake to serve is a good thing?

Gideon Kanner, Letters to the Editor, *Justices Should Blink in the Sunlight*, WALL. ST. J., Apr. 23, 1998, at A19. Kronman's quote on the rear jacket of *Closed Chambers*, to which Kanner refers, reads, "[T]his well-researched and wonderfully written book . . . gives us a disturbing portrait of a Court whose inner life has become politicized to a dangerous degree . . . ." LAZARUS, *supra* note 4 (dust jacket).

13 Book Review, *Legitimate Inquiry?: An Insider's Account of America's Supreme Court*, THE ECONOMIST, May 2, 1998, at 78.

14 Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, June 17, 1998, at A27.

15 *Id.*

16 Edward Lazarus, Editorial, *The Supreme Court Must Bear Scrutiny*, WASH. POST, July 6, 1998, at A19; *see also* Mark Davis, Editorial, *There Are Other Topics To Be Irate About*, FORT WORTH STAR-TELEGRAM, Apr. 15, 1998, at 13 (quoting Lazarus as asserting, "I owed the Court confidentiality until the day I left in 1989"). *But see* Tony Mauro, *Furor Persists over Ex-Clerk's Book*, LEGAL TIMES, Nov. 9, 1998, at 7 (quoting Lazarus as asserting, "I never said the clerk's obligation of confidentiality ends with the clerkship"); *cf.* Tony Mauro, *Supreme Court Tightens Secrecy Rules for Clerks*, USA TODAY, Nov. 9, 1998, at A1 (reporting that "independent sources confirm the court made it clear to this term's clerks that their obliga-

quist obliquely disagreed, however, telling a Vermont audience, "I think for someone that recently a law clerk, there are some problems with the book that have nothing to do with the opinions he expressed."[17]

James N. Gardner, a former October Term 1975 clerk to Justice Potter Stewart, succinctly summarized the widespread conventional wisdom when he spoke of "the lifelong obligation of confidentiality to which Supreme Court law clerks have historically adhered with remarkable consistency."[18] But Gardner's perception of "remarkable consistency," just like John P. Frank's 1980 declaration that prior to *The Brethren*, no former clerk's public recollections had ever "gone to details of particular cases or to work habits and attitudes of justices as they relate to other justices,"[19] is seriously in error. A careful review of former clerks' published writings and "on the record" interview comments readily and repeatedly reveals that various "little beasts" have been telling "inside" stories "out of school"[20] since long before Edward Lazarus even was born.

I
THE HISTORICAL RECORD

The Supreme Court's tradition of utilizing young law clerks began in 1882, when newly confirmed Justice Horace Gray brought the practice with him from his prior judgeship on the Massachusetts Supreme Judicial Court.[21] An 1886 act of Congress[22] provided the first government funds (as much as $1,600 annually) for one "stenographic clerk" for each of the nine Justices.[23] The practice continued annually without interruption until 1919-1920, when Congress expanded the appropriation and explicitly authorized the employment of both a "law clerk" and a stenographic clerk.[24]

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tion to keep the court's secrets lasts forever, not just the year they typically serve at the court").

17 Tony Mauro, *This Biography Is No Whitewash*, LEGAL TIMES, June 22, 1998, at 8 (quoting Rehnquist's remarks at Middlebury College as broadcasted by C-SPAN).

18 James N. Gardner, *Faction Figures: Inside the Supreme Court*, OREGONIAN (Portland), Aug. 9, 1998, at E6; *see* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 835 (1999) ("Until the publication of *Closed Chambers* . . . , it was well understood that whatever a clerk learned about case deliberations during his term of service would never be disclosed outside the Court." (footnote omitted)).

19 Frank, *supra* note 3, at 163.

20 Cohen, *supra* note 6, at 31; *see infra* note 247 and accompanying text.

21 *See* Samuel Williston, *Horace Gray*, *in* 8 GREAT AMERICAN LAWYERS 137, 157-60 (William Draper Lewis ed., 1909); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301 & n.5 (1961).

22 Act of Aug. 4, 1886, ch. 902, 24 Stat. 222, 254.

23 *See* Newland, *supra* note 21, at 301.

24 *See id.* at 302-03; *see also* FRANCIS BIDDLE, MR. JUSTICE HOLMES 11-12 (1942). For more general historical surveys, see Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26

The only untoward notoriety occasioned by the Justices' employment of law clerks came in late 1919, when one Ashton F. Embry, who had served for nine years as clerk to Senior Associate Justice Joseph McKenna, was discovered to have leaked advance word of at least one forthcoming case decision, *United States v. Southern Pacific Co.*,[25] to three co-conspirators who utilized the information to garner stock market profits of $1,412.50. Word of the scheme reached the Court, which in turn notified the Department of Justice. Embry resigned his clerkship on December 16, 1919, and four months later he was criminally indicted for "conspiracy to defraud the Government of its right of secrecy concerning the opinions."[26] He and his three fellow defendants unsuccessfully challenged the indictment, contending that they had violated no actual law. The District of Columbia trial court sustained the charges and both the D.C. Court of Appeals and the Supreme Court refused review.[27]

VAND. L. REV. 1125, 1129-32 (1973); JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 10-17 (1980). *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 102-119 (1985) (providing a general history of the evolution of law clerks); Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PENN. L. REV. 1230 (1981). A well-written but utterly nonanecdotal article by a former two-year law clerk at New York State's highest court is Mario M. Cuomo, *The New York Court of Appeals: A Practical Perspective*, 34 ST. JOHN'S L. REV. 197 (1960).

25 251 U.S. 1 (1919).

26 *Four Are Indicted for Court "Leak,"* N.Y. TIMES, Apr. 1, 1920, at 1.

27 *See Bars Stock Tips on Supreme Court*, N.Y. TIMES, June 18, 1921; at 15 (reporting that on June 17, Justice Frederick L. Siddons of the District of Columbia Supreme Court sustained the indictment); *"Leak" Appeal Fails*, N.Y. TIMES, July 28, 1921, at 13 (reporting that on July 27, the District of Columbia Court of Appeals refused an appeal of Siddons's ruling); Embry v. United States, 257 U.S. 655 (1921) (denying certiorari).

A *nolle prosequi* was eventually entered in *United States v. Embry*, Criminal No. 36363 (Sup. Ct. D.C.), on November 20, 1929, *see* Newland, *supra* note 21, at 310 n.29, but no newspaper reports of the case subsequent to 1921 have been located. Embry went on to operate a successful Washington bakery business for many years and, according to his grandson, had very warm recollections of his years at the Court. *See* E-mail from Ashton F. Embry III to Garrow (Aug. 21, 1998) (on file with author). "In fact when he died in the early 60s (he was 83 . . .) he requested his ashes be strewn on the court property, a task which my uncle Lloyd . . . carried out under the cover of darkness." *Id.* Embry adds that his grandfather, who went by the nickname "Bobo," was "very 'entrepreneurial.'" *Id.* The one scholarly study of McKenna makes no mention of either Embry or the "leak" scandal. *See* MATTHEW MCDEVITT, JOSEPH MCKENNA: ASSOCIATE JUSTICE OF THE UNITED STATES (1946).

One news story reported that

> Supreme Court officials said the indictments were the first ever returned in connection with charges of a leak in the Supreme Court. Reports of leaks have been circulated a number of times, but unofficial investigation showed them to be without basis. The secretary to one of the justices was reported to be giving out advance information regarding decisions about fifteen years ago, but the charges were never substantiated and no action ever was taken.

Four Are Indicted for Court "Leak," supra note 26.

Some commentators might like to see Edward Lazarus go the way of Ashton Embry,[28] but among Supreme Court law clerks, historical forerunners to Edward Lazarus have been both far more numerous and decidedly more illustrious than the long-forgotten Ashton Embry. Indeed, perhaps the first true precursor to Lazarus among former clerks was one of Justice Gray's own early appointees, Samuel Williston, who later served for many decades as one of the most distinguished members of the Harvard Law School faculty.[29] Writing in a 1940 memoir, Williston explicitly and revealingly recalled how during his October Term 1888 clerkship, "I would also frequently be asked to write an opinion on the cases that had been assigned to [Justice Gray]."[30] Williston quickly added that Justice Gray nonetheless "wrote his own opinions" and that Williston's drafts "served only as . . . suggestion[s]."[31] Yet Williston underscored his belief that he was not obliged forever to remain publicly silent about private exchanges to which he had been privy as a clerk when he forthrightly volunteered that "[Justice] Gray's comments on his colleagues were often free, and after the lapse of many years it may no longer be indiscreet to mingle some of them with my own impressions of those who were the members of the Court."[32] For instance, Williston recounted how, in private, Gray would call Justice Samuel F. Miller, who sometimes committed "gross blunders on elementary questions of private law," the "little tycoon."[33]

The frank recollections of other, even more prominent pre–New Deal clerks more than match those of Professor Williston. Future Secretary of State Dean Acheson, who had clerked for Justice Louis D. Brandeis during both October Term 1919 and October Term 1920, volunteered that he had prepared the first drafts of some Brandeis opinions.[34] In the fall of 1919 Acheson began keeping a detailed notebook recounting his conversations both with Brandeis and with other Justices. In his autobiography Acheson reprinted verbatim both his notes of a November 29, 1919 conversation with Justice Oliver

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28 *See, e.g.*, Painter, *Clerk Betrays the Court*, *supra* note 12 (suggesting that Lazarus may have violated the Code of Conduct and certain federal statutes).

29 *See Prof. Williston, Law Expert, Dies*, N.Y. TIMES, Feb. 19, 1963, at 8 (Williston's obituary); In Memoriam, *Samuel Williston*, 76 HARV. L. REV. 1321 (1963) (memorial tribute articles to Williston).

30 SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 92 (1940).

31 *Id.*

32 *Id.* at 94.

33 *Id.* at 95.

34 *See* DEAN ACHESON, MORNING AND NOON 80 (1965); *see also* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 92 (1957) (quoting Acheson's December 7, 1955 letter to Bickel describing how Brandeis assigned Acheson some of his opinions); Dean Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW. 355, 361-62 (1957) (recounting an anecdote describing the nature of Acheson's clerkship under Brandeis).

Wendell Holmes at Holmes's home[35] and selected excerpts of his regular discussions with Justice Brandeis:[36] "Each day we talked. I pumped him on the headlined news and usually drew him out. For a time . . . I kept notes."[37] Acheson explained that "[f]or years I was convinced, and often said, that I had burned it [the notebook] when my wife pointed out the dubious propriety of making notes of confidential conversations," but he later discovered that he had not.[38] Acheson had no hesitancy about including his notes of Brandeis's comments in his autobiography, explaining that "giv[ing] [Brandeis's] views now after forty-five years involves no impropriety."[39] One brief excerpt reported Brandeis's private comments about the purpose and importance of his (and Justice Holmes's) dissenting views in the Espionage Act cases.[40] Another segment offered a brief inside account of how Justice Holmes managed to retain his five-to-four majority in the 1919 *Arizona Employers' Liability Cases*[41] only because of Justice Pitney's persuasiveness with Justice Day.[42] Perhaps most memorably of all, Acheson quoted Justice Holmes's private, disparaging characterization of the intellect of former Justice John Marshall Harlan: "Harlan's mind was like a vise, the jaws of which did not meet. It only held the larger objects."[43]

Just a few terms after Acheson's two years of service, law clerks' public recollections of internal Court matters expanded even further. One October Term 1924 clerk to Chief Justice William Howard Taft, C. Dickerson Williams, disclosed years later that the initial December 1924 conference vote on the landmark legislative investigatory power case of *McGrain v. Daugherty*[44] had been contrary to how the Court eventually (and unanimously) decided the case twenty-five months later. The initial vote would have affirmed the district court's ruling that the Senate lacked investigatory power.[45] In the end, however, the *McGrain* Court reversed the district court's holding and recognized that the power to investigate was an "essential and appropriate" part of Congress's legislative powers.[46] Williams wrote in 1989 that

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35 *See* ACHESON, *supra* note 34, at 63-64.

36 *See id.* at 94, 99-102.

37 *Id.* at 99.

38 *Id.* at 64-65.

39 *Id.* at 99.

40 *See id.* at 94.

41 250 U.S. 400 (1919).

42 *See* ACHESON, *supra* note 34, at 67-68; *see also* BICKEL, *supra* note 34, at 62-76 (describing in detail how Brandeis influenced Pitney in *Arizona Employers' Liability Cases*).

43 ACHESON, *supra* note 34, at 65.

44 273 U.S. 135 (1927).

45 *See Ex parte* Daugherty, 299 F. 620, 638-40 (S.D. Ohio 1924), *rev'd sub nom.*, McGrain v. Daugherty, 273 U.S. 135 (1927).

46 *McGrain*, 273 U.S. at 174.

> So far as I am aware, it has never previously been revealed that the original vote of the Court had been to affirm. I never mentioned the subject because I thought it confidential. As over sixty years have passed and all the parties (except perhaps some law clerks of that day) are dead, I think it now a matter of history. . . .[47]

The following October Term 1925 produced two law clerks who, in subsequent years, publicly recounted significant behind-the-scenes stories from their year of service. In 1946 Alfred McCormack, a former clerk to Justice Harlan Fiske Stone, provided a detailed rendition of how Stone successfully rewrote the entire opinion that Chief Justice Taft subsequently handed down on behalf of a six-to-three Court majority in the famous executive power case of *Myers v. United States*.[48] According to McCormack, after reading Taft's initial draft Stone said, "'There is nothing left to do with this opinion . . . except to rewrite it.' Accordingly he directed his clerk [McCormack] to go through the opinion and outline the points . . . ."[49] Once Stone completed his rewrite, the Chief Justice accepted the revision as a replacement for his earlier draft.[50]

McCormack also described how Justice George Sutherland in the still well-known case of *Village of Euclid v. Ambler Realty Co.*[51] "was writing an opinion for the majority . . . , holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, . . .) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld."[52]

McCormack further recounted how Justice Stone would return from conference and say, "'Holmes and Butler had another spat today,'" and then proceed to "tell the story."[53] But that recollection was far less memorable than several that October Term 1925 colleague James M. Landis, who had clerked for Justice Brandeis prior to serving as dean of Harvard Law School from 1937 to 1946, offered in a 1957 public talk. Recalling how he once had asked Brandeis why seven of Brandeis's eight colleagues—all except Holmes—were refusing to ac-

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47 C. Dickerman Williams, *The 1924 Term: Recollections of Chief Justice Taft's Law Clerk, in* YEARBOOK 1989, at 40, 49 (Supreme Court Historical Soc'y ed.); *see also* Wolfgang Saxon, *C. Dickerson Williams, 97, Free-Speech Lawyer, Is Dead*, N.Y. TIMES, Aug. 30, 1998, at 37 (Williams's obituary).

48 272 U.S. 52 (1926).

49 Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 711 (1946).

50 *See id.*

51 272 U.S. 365 (1926).

52 McCormack, *supra* note 49, at 712. The first argument in *Euclid* took place on January 27, 1926, its reargument occurred on October 12, 1926, and Sutherland's six-to-three majority opinion—Justices Van Devanter, McReynolds, and Butler dissenting—was handed down on November 22, 1926. *See Euclid*, 272 U.S. at 365, 397.

53 McCormack, *supra* note 49, at 713.

knowledge dispositive evidence in a maritime case, Landis quoted Brandeis's reply: "'Sonny, when I first came to this Court I thought I would be associated with men who really cared whether they were right or wrong. But sometimes, Sonny, it just ain't so.'"[54]

More humorously, Landis quoted another private conversation in which Brandeis had poked fun at the notoriously rude Justice James C. McReynolds. Following an oral argument at which McReynolds had hectored a lawyer, McReynolds told Brandeis and the other Justices, "'That lawyer must think I'm a damn fool.' Then after a short pause McReynolds added: 'Maybe he's right.' Brandeis said to me with a twinkle in his eye: 'I was tempted to tell McReynolds that his "maybe" was wrong, but I decided it was better to hold my tongue.'"[55]

Those October Term 1925 law clerk stories are hardly exceptional. Professor Newland, in his landmark 1961 article on law clerks, recounted how "[o]ne of Justice Butler's clerks, . . . who remained with the justice for sixteen years[, an occasional practice during the pre–World War II era], wrote first drafts of many opinions, expressing the justice's views so accurately that the drafts often required few changes."[56] Even one of the most proper and discreet of former Brandeis clerks, Harvard Law Professor Paul A. Freund, who worked for the Justice during October Term 1932, publicly revealed how "[o]n occasion some sentences in the law clerk's memoranda would find their way into the opinion [Brandeis issued]."[57]

Ambrose Doskow, who had clerked for Justice Benjamin N. Cardozo during October Term 1933 and later became a senior partner at the New York law firm of Rosenman, Colin, Freund, Lewis & Cohen, openly recited Cardozo's comments on the famous Contract Clause case of *Home Building & Loan Association v. Blaisdell*:[58] "After the conference at which the case was decided, he smilingly told me how Justice Van Devanter had spoken at length, reciting the facts in all the early contract clause cases which he regarded as controlling precedents for invalidating the statute"[59]—an argument that Van Devanter lost by a vote of five to four.[60]

Cardozo's clerk three years later, Joseph L. Rauh, Jr., who subsequently became a leading Washington, D.C. civil rights attorney, re-

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54 James M. Landis, *Mr. Justice Brandeis: A Law Clerk's View*, 46 PUBLICATION AM. JEWISH HIST. SOC'Y 467, 469 (1957).

55 *Id.* at 471.

56 Newland, *supra* note 21, at 312 (citing a 1959 interview with John Francis Cotter).

57 Paul A. Freund, *Historical Reminiscence—Justice Brandeis: A Law Clerk's Remembrance*, 68 AM. JEWISH HIST. 7, 10 (1978).

58 290 U.S. 398 (1934).

59 Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 16 (1979).

60 *See Home Building*, 290 U.S. at 483.

lated similar comments that Cardozo made upon returning from the Court's conference on *NLRB v. Jones & Laughlin Steel Corp.*[61] Rauh recalled how Cardozo remarked that Chief Justice Charles Evans Hughes and Justice Owen J. Roberts had voted to uphold the National Labor Relations Act without mentioning the Court's, as well as their own, utterly incompatible stance in *Carter v. Carter Coal Co.*,[62] which the Court had decided just nine months earlier: "Justice Cardozo simply reported that he 'considered it quite an achievement to make the shift without even a mention of the burial of a recent case.'"[63]

Justice McReynolds's law clerk during that same October Term 1936, John Knox, subsequently authored an extremely revealing and impressively detailed (but as yet unpublished) 978-page memoir of his year at the Court.[64] Knox's generally charitable appraisal of McReynolds, however, was not universally representative of former clerks' attitudes towards the individual Justices they once served. Justice Brandeis's October Term 1935 clerk, David Riesman, who later became a world-famous Harvard social science professor, bluntly told a 1981 interviewer that he had concluded that if Brandeis was not actually "dishonest," he was at a minimum "a legal trickster."[65] Similarly, Max Isenbergh, who had clerked for Justice Hugo L. Black during October Term 1941, offered an outspokenly critical evaluation of Black in a 1986 interview: "I thought that Justice Black conducted himself on the Court as he had in the Senate—as a politician who voted his political views."[66]

Justice Stone's October Term 1937 clerk, Louis Lusky, confessed his authorship of the famous "footnote four" in *United States v. Carolene Products Co.*,[67] which "Stone adopted . . . almost as drafted," in a 1952 letter to Stone biographer Alpheus T. Mason.[68] That same year, one of by then Chief Justice Stone's two October Term 1945 clerks, Her-

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61 301 U.S. 1 (1937).

62 298 U.S. 238 (1936).

63 Rauh et al., *supra* note 59, at 8 n.8.

64 *See* John Knox, Experiences as Law Clerk to Mr. Justice James C. McReynolds of the Supreme Court of the United States During the Year that President Franklin D. Roosevelt Attempted to "Pack" the Court (October Term 1936) (March 29, 1976) (unpublished manuscript, on file with author). The one modern study of McReynolds makes surprisingly limited use of Knox's remarkable manuscript. *See* JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF [SIC] JUSTICE JAMES CLARK MCREYNOLDS (1992) (Justice McReynolds served only as an Associate Justice during his years on the Court.).

65 STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS 237 (1994) (quoting Riesman).

66 JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 117 (1989) (quoting Isenbergh).

67 304 U.S. 144, 152 n.4 (1938).

68 ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 513 (1956) (quoting Lusky's letter to the author); *see also* LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 108-12 (1975) (analyzing the famous footnote).

bert Prashker, gave Mason an even more detailed account of the preparation of Stone's 1946 dissent in *Girouard v. United States*:[69]

> On at least two occasions during the two-week period while the opinion was in preparation . . . the Chief made the long stomp from his office to our office on the other side of the conference room to talk about *Girouard*. [Fellow clerk Eugene] Nickerson and I thought he was wrong, and I think Nickerson (who was helping on the dissent and who wrote parts of it) made an [unsuccessful] effort to get him to change his mind.[70]

Former clerks' willingness to acknowledge publicly that they had performed much of the Court's opinion-drafting in the post-war years was far from exceptional. William T. Coleman, Jr., a subsequent Secretary of Transportation and prominent Washington attorney who had clerked for Justice Felix Frankfurter in October Term 1948, told an early 1970s interviewer,

> After a conference, Frankfurter would ask my co-clerk, Elliot Richardson, or me to draft an opinion. While we worked on it, he would come in with suggestions or ask us if we had looked up a certain case. Then we would come in with a draft and discuss it. I could not say that there was any opinion that was my own. They all expressed his views.[71]

Only eight years after his clerkship with Justice Frankfurter during October Term 1945, prominent University of Chicago Law Professor Philip B. Kurland publicly revealed that one of Frankfurter's fellow Justices during Kurland's term, Frank Murphy, as well as Stone's successor as Chief Justice, Fred M. Vinson, had both been "absolutely dependent upon their law clerks for the production of their opinions."[72]

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69 328 U.S. 61 (1946).

70 MASON, *supra* note 68, at 804-05 (quoting Prashker's letter to the author). Prashker later became a senior partner at the New York law firm of Proskauer, Rose, Goetz & Mendelsohn. *See Herbert Prashker, 63; Practiced Labor Law*, N.Y. TIMES, Nov. 28, 1985, at B7 (obituary).

71 *Quirks and Clerks: A Short History*, JURIS DR., Mar. 1972, at 41, 41 (quoting Coleman).

72 Philip B. Kurland, Book Review, 22 U. CHI. L. REV. 297, 299 (1954). Murphy's biographer later confirmed the accuracy of Kurland's assertion, writing that "Murphy expected his clerks to play a major part in the writing of his opinion[s]. . . . Frequently, the clerks wrote the opinion[s] with very little if any guidance from the justice, and Murphy then revised the draft or perhaps accepted it without change." SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 162 (1984); *see also* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 159-60 (4th ed. 1996) (discussing the importance of Murphy clerk Eugene Gressman); DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 206 (1998) (noting that during October Term 1946, "Vinson was one of two justices who did none of his own opinion writing; the other was Murphy, whose clerk, Gene Gressman, did all of his writing"). Several other former Vinson clerks refrained from such disclosures. *See Chief Justice Vinson and His Law Clerks*, 49 NW. U. L. REV. 26, 30 (1954) (stating that "the details of the Chief's action with

Like former clerks from the 1920s and 1930s, clerks from the late 1940s and early 1950s also subsequently felt free to quote publicly once-private remarks that their Justices had made about the Court's deliberations on particular cases. One October Terms 1951 and 1952 clerk to Justice Robert H. Jackson, who later became perhaps the best-known former clerk in Supreme Court history, future Chief Justice William H. Rehnquist, publicly recounted in a 1987 book how, in May of 1952, Jackson had returned from the Justices' private conference on the famous executive power steel seizure case of *Youngstown Sheet & Tube Co. v. Sawyer*[73] to tell Rehnquist and his co-clerk, "'Well, boys, the President got licked.'"[74]

October Term 1952 and October Term 1953 clerks have offered far more substantive private revelations concerning the Court's two-year consideration of *Brown v. Board of Education*.[75] William K. Bachelder, who had clerked for Justice Sherman Minton during October Term 1952, told author Richard Kluger in 1974 of private Court accounts of how several of Chief Justice Vinson's judicial colleagues "would discuss in his presence the view that the Chief's job should rotate annually and . . . made no bones about regarding him—correctly—as their intellectual inferior."[76] Regarding details of the case itself, Alexander M. Bickel, who had clerked for Justice Frankfurter during October Term 1952 and later served as Sterling Professor at Yale Law School, recounted to Kluger how Frankfurter's "main concern during the '52 Term . . . was to prevent the Court from taking a premature vote"[77] on the substantive constitutional merits of *Brown*'s challenge to the "separate but equal" doctrine of *Plessy v. Ferguson*.[78] Bickel related how Frankfurter, after returning from a late May 1953 conference of the Justices, had said,

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respect to particular cases cannot now be disclosed insofar as they go beyond the public record").

73 343 U.S. 579 (1952).

74 WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 91-92 (1987); *see also* HUTCHINSON, *supra* note 72, at 207 (quoting Francis A. Allen, an October Term 1946 and October Term 1947 clerk to Chief Justice Vinson, recounting the relationship between Vinson and Justice Frankfurter: "I have never seen anything like it . . . . Vinson began the term deferring to Felix and within six weeks couldn't wait to find a case in which he could vote against him"); Francis A. Allen, *Remembering* Shelley v. Kraemer*: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 719-20 (1989) (providing insight into how Chief Justice Vinson arrived at his decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

75 347 U.S. 483 (1954).

76 RICHARD KLUGER, SIMPLE JUSTICE 585 (1976) (quoting Bachelder) (alteration in original). *See generally* David N. Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U. L. REV. 716, 722 (1974) (quoting one unnamed former Minton clerk as stating that "some of his [Minton's] conduct on the bench was pretty crude and unjudicious").

77 KLUGER, *supra* note 76, at 600 (quoting Bickel).

78 163 U.S. 537 (1896).

> [I]t looked as if we could hold off a decision that term, that no one on the Court was pushing it, that no vote had actually been taken throughout the term—and that if we could get together some questions for discussion at a reargument, the case would be held over until the new term.[79]

Similarly forthcoming with Kluger was John D. Fassett, who had clerked for Justice Stanley F. Reed during October Term 1953. Fassett told Kluger that shortly before Chief Justice Vinson's sudden death on September 8, 1953, he had asked Justice Reed whether the Court would reach the *Plessy* question. "[Reed] replied in the affirmative . . . and added, '*They* know they have the votes and they are determined to resolve the issue.'"[80] Reed also said that he expected both Chief Justice Vinson and one other Justice, perhaps Minton, to join him in dissent in *Brown*.[81]

Fassett also recounted to Kluger how, after the arrival of Vinson's successor as Chief Justice, Earl Warren, Reed had told him that Warren would be with the *Brown* majority and that Reed probably would be alone in dissent.[82] Fassett's co-clerk for Reed that term, George V. Mickum III, surpassed even Fassett's firsthand frankness, telling Kluger how he had witnessed perhaps *the* crucial face-to-face interchange between Warren and Reed regarding *Brown*. The Chief Justice, Mickum related, had said, "'Stan, you're all by yourself in this now . . . . You've got to decide whether it's really the best thing for the country'" if Reed went ahead with a solo dissent, thereby depriving the *Brown* Court of unanimity.[83] Mickum told Kluger that Warren's demeanor during the conversation with Reed "was quite low-key and very sensitive to the problems that the decision would present to the South," but that the Chief Justice nonetheless "was quite firm on the Court's need for unanimity."[84]

A decade after *Simple Justice* first appeared, John Fassett, the Reed clerk whose forthrightness had contributed greatly to Kluger's book, published a 1966 speech he had delivered to a Connecticut legal audience that recounted details of *Brown* as well as other inside-the-Court

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79 KLUGER, *supra* note 76, at 614 (quoting Bickel). For the order that set such questions for reargument, see *Brown v. Board of Education*, 345 U.S. 972 (1953). For a later (October Terms 1955 and 1956) Frankfurter clerk's rejection of Bickel's historical forthrightness, see Andrew L. Kaufman, *The Justice and His Law Clerks*, *in* FELIX FRANKFURTER: THE JUDGE 223, 225 (Wallace Mendelson ed., 1964) ("The confidential nature of the law clerk's job of course forbids any 'inside story' about the details of the Court and its work.").

80 KLUGER, *supra* note 76, at 656 (quoting Fassett).

81 *See id.*

82 *See id.* at 691-92.

83 *Id.* at 698.

84 *Id.*

memories.[85] Recalling a time when the Justices' weekly private conference took place on Saturdays, Fassett said,

> I . . . have vivid recollections of several Saturday evenings when Justice Frankfurter stormed in to see the Justice [Reed] while he and I were conversing to continue some debate that Felix had lost in conference. One time in particular, Justice Reed had to make a dinner and he left Justice Frankfurter and me to argue for 15 minutes about procedures for en banc hearings in Courts of Appeals.[86]

Justifying his comfort in detailing these "inside" stories, Fassett asserted, "Justice Reed ha[d] never told me that it is his desire that the facts I have related to you be forever confidential."[87] Fassett further opined, "I reserve little doubt that eventually the true facts should be available to historians."[88] Indeed, Fassett explained:

> At the end of my tenure [as Reed's law clerk], I considered asking the Justice whether he wanted my folder marked 'segregation' but I had the feeling that such would result in destruction of the materials and I had doubts such irrevocable result was desirable.[89]

But the unique historical status of *Brown* did not cause Reed and Frankfurter clerks, such as Fassett and Bickel, to become dramatically more forthcoming than were Reed and Frankfurter clerks from subsequent, less exalted terms of the Court. Roderick M. Hills, a prominent attorney who clerked for Justice Reed during October Terms 1955 and 1956, readily told the *Los Angeles Times* fifteen years after his clerkship how "he wrote an opinion [in a 1957 case] by himself" that, according to Hills, "'was probably the least significant case decided that term.'"[90] More notably, Richard N. Goodwin, a subsequently well-known presidential speech writer who clerked for Justice Frankfurter during October Term 1958, graphically recounted in a memoir thirty years later the evaluation that Frankfurter had offered him of Justice William O. Douglas. According to Goodwin, after Douglas

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85 *See* John D. Fassett, *Mr. Justice Reed and* Brown v. The Board of Education, *in* YEARBOOK 1986, at 48 (Supreme Court Historical Soc'y ed.).

86 *Id.* at 54.

87 *Id.* at 62.

88 *Id.*

89 *Id.* Some years later, in a note appended to his comprehensive 1994 biography of Justice Reed, Fassett added that "[a]ttitudes toward confidentiality of Supreme Court activities have moderated since the 1953 term. At that time, it would have been considered unethical to publish any information regarding the inner workings of the Court or relationships among justices while any of the justices involved was still active." JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 637 n.7 (1994).

90 Linda Mathews, *Supreme Court Clerks: Fame in a Footnote*, L.A. TIMES, Jan. 5, 1972, at 1 (quoting Hills). While the case was described by the *L.A. Times* as a "federal poaching law" case, Hills no doubt was speaking of *United States v. Howard*, 352 U.S. 212 (1957). *Howard* dealt with the Federal Black Bass Act of 1926 and Justice Reed wrote the opinion on behalf of a unanimous Court. *See id.* at 213.

failed to attend the August 1958 Special Term argument of the Little Rock school desegregation case, *Cooper v. Aaron*,[91] Frankfurter told Goodwin, "'That man [Douglas] is an opportunist and a malingerer. He's more concerned about his public personality than the work of the Court. In fact, he doesn't do his work. He just decides who he wants to win and then votes—a lazy, contemptible mind.'"[92]

The years 1957 and 1958 also witnessed the first highly visible press coverage of the law clerks' roles at the Supreme Court since Ashton Embry's indictment thirty-seven years earlier. In mid-1957 both *U.S. News & World Report*, in an article entitled *The Bright Young Men Behind the Bench*,[93] and the *New York Times*, in a story whose second headline announced *Recent Law Graduates Aid Justices with Their Facts but Not Their Decisions*,[94] drew prominent attention to the Court's clerks. The *New York Times* piece betrayed its purpose all too visibly, for the unnamed reporter declared, "It has been suggested that the clerks have an important influence on the court, but former clerks say in persuasive language, that nothing could be further from the truth."[95]

One former clerk, however, publicly dissented from the *New York Times*'s claim by writing a two-page essay in *U.S. News & World Report* provocatively headlined, *Who Writes Decisions of the Supreme Court?*[96] William H. Rehnquist, who had clerked for the now-deceased Justice Jackson during October Terms 1951 and 1952, and who in 1957 was practicing law in Phoenix, readily volunteered that "[o]n a couple of occasions each term, Justice Jackson would ask each clerk to draft an opinion for him . . . [and i]f the clerk were reasonably faithful to his instructions and reasonably diligent in his work, the Justice could be quite charitable with his black pencil and paste pot."[97]

However, Rehnquist's most controversial assertion was not his disclosure of opinion-drafting practices within Justice Jackson's cham-

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91 358 U.S. 1 (1958).

92 RICHARD N. GOODWIN, REMEMBERING AMERICA 28-29 (1988). Goodwin also recounts a long argument he had with Frankfurter immediately after the conference at which the Justices had voted on *Barenblatt v. United States*, 360 U.S. 109 (1959), and *Uphaus v. Wyman*, 360 U.S. 72 (1959). *See* GOODWIN, *supra*, at 35-37.

93 *The Bright Young Men Behind the Bench*, U.S. NEWS & WORLD REP., July 12, 1957, at 45.

94 *New Clerks Begin High Court Tasks: Recent Law Graduates Aid Justices With Their Facts but Not Their Decisions*, N.Y. TIMES, Oct. 14, 1957, at 29.

95 *Id.*

96 *See* William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74.

97 *Id.*; *see also* Hon. William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 533 (1980) (stating that "like most of his other law clerks, I worked closely with him on several opinions which he wrote, but it would be as inappropriate now as it would have been twenty-five years ago to reveal any confidences which passed between us in the course of such efforts").

bers, but his characterization of his fellow clerks. Rehnquist claimed that "the political cast of the clerks as a group was to the 'left' of either the nation or the Court," and that "a majority of the clerks I knew [exhibited] extreme solicitude for the claims of Communists and other criminal defendants."[98] Rehnquist conceded that he knew of no "conscious" effort on the part of his fellow October Terms 1951 and 1952 clerks to employ their own ideological biases in their winnowing of the thousands of petitions for certiorari that they reviewed, but because he felt that "unconscious bias did creep" into his own certiorari petition work, Rehnquist contended that the same must have been true for "many of my fellow clerks."[99]

Both the Associated Press ("AP") and the *New York Times* found Rehnquist's essay newsworthy, and the *New York Times* published the AP's dispatch under the headline *'Sway' of Clerks on Court Cited.*[100] The essay quickly generated a rejoinder from William D. Rogers, who had clerked for Justice Reed during October Term 1952.[101] Characterizing Rehnquist's contention that "politically biased" clerks had "an impact on the work of the Court" as "a grave and a serious charge,"[102] Rogers deftly contended that "it would be possible to view all the law clerks who worked during the 1952 [T]erm of Court as 'left' only from a 'far right' position."[103] Emphasizing that no Justice had "changed" their "vote" because of clerk influence[104]—something Rehnquist had not contended[105]—Rogers noted how some "[r]esponsible critics of the Court have suggested legislation requiring congressional approval of law-clerk appointments."[106] Rehnquist's po-

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98 Rehnquist, *supra* note 96, at 75.

99 *Id.* (emphasis omitted).

100 *"Sway" of Clerks on Court Cited*, N.Y. TIMES, Dec. 10, 1957, at 23. As a postscript, a 1979 newspaper article reported that "[m]any years later, after a Princeton student confessed to Justice Rehnquist that he had not read the [1957 *U.S. News & World Report*] article, the justice responded that the student had not missed much. 'Like most young men I had an exaggerated opinion of my own importance.'" Walter F. Murphy, *Spilling the Secrets of the Supreme Court*, WASH. POST BOOK WORLD, Dec. 16, 1979, at 1 (reviewing WOODWARD & ARMSTRONG, *supra* note 2). Professor Murphy does not indicate whether he himself witnessed the conversation or whether his account is secondhand. Other former clerks have expressed similar sentiments. *See, e.g.*, David F. Pike, *Ex-Clerks Say Book Betrays Trust*, L.A. DAILY J., Mar. 19, 1998, at 1 (quoting John Roberts, an October Term 1980 clerk to Justice Rehnquist, as observing, "You only appreciate with the passage of time that your role was not as grandiose as you thought").

101 *See* William D. Rogers, *Do Law Clerks Wield Power in Supreme Court Cases?*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 114.

102 *Id.*

103 *Id.* at 115.

104 *Id.*

105 *See* William H. Rehnquist, *Another View: Clerks Might "Influence" Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116 ("I rejected, quite as emphatically as Mr. Rogers, the thought that a clerk could exercise any sway over the views of a Justice.").

106 Rogers, *supra* note 101, at 115.

sition, Rogers added, "would justify such a step."[107] Three months later Democratic Senator John C. Stennis of Mississippi went public with a speech on the Senate floor.[108] Quoting at length from Rehnquist's essay on law clerks, Stennis advocated both a shift to more experienced, longer-term appointees and suggested that Congress "determine whether or not Senate confirmation should be required for these positions of ever-increasing importance and influence."[109]

The *New York Times* covered Stennis's remarks in a news story entitled *Stennis Is Wary of Court's Clerks,*[110] and *U.S. News & World Report* immediately reprinted the speech in full.[111] No further debate occurred on Stennis's suggestions, however, and the six-month-long public debate on the influence of law clerks faded from the headlines.[112]

The public controversy of 1957-1958 had seemingly little effect, if any, on the willingness of subsequent clerks to enrich the historical record with regard to inside-the-Court developments.[113] Justice Douglas's October Term 1965 clerk, Jerome B. Falk, Jr., related in a 1988 interview how he completely had rewritten and reoriented Douglas's initial draft of the majority opinion in *Elfbrandt v. Russell*[114] after discovering that Douglas's draft had relied upon an erroneous statutory

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107 *Id.*

108 John C. Stennis, Speech on the Senate Floor (May 6, 1958), *reprinted in Investigate Supreme Court's "Law Clerk" System?*, U.S. NEWS & WORLD REP., May 16, 1958, at 117.

109 *Id.* at 119.

110 *Stennis Is Wary of Court's Clerks,* N.Y. TIMES, May 7, 1958, at 27.

111 *See* Stennis, *supra* note 108.

112 *U.S. News and World Report*'s pronounced interest in the issue of clerk influence and Stennis's suggestion that the appointing process for clerks be changed both occurred as congressional unhappiness with the substance of Court rulings, especially in Communist-related cases, reached its peak. *See generally* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960 (1961) (discussing congressional efforts to limit the power of the Supreme Court). However, Pritchett makes no mention of either the public debate concerning law clerks or Senator Stennis's proposal. *See id.*; *see also* Alexander M. Bickel, *The Court: An Indictment Analyzed,* N.Y. TIMES, Apr. 27, 1958, § 6, at 16 (discussing the "ill-intentioned scrutiny" to which the Supreme Court clerks recently had been subjected).

113 *See* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 29-31 (1997) (noting how one Brennan clerk from October Term 1960, Richard S. Arnold, kept a highly detailed daily diary of case developments and events); Richard S. Arnold, *A Remembrance: Mr. Justice Brennan—October Term 1960,* 1991 J. SUP. CT. HIST. 5; *see also* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *Roe v. Wade* 192-93 & 768 n.85 (1994) (discussing clerk Richard Arnold's drafting of Justice Brennan's separate concurrence in *Poe v. Ullman,* 367 U.S. 497 (1961)). For clerk comments and contributions from October Terms 1960, 1964, 1970, 1971 and 1972, see GARROW, *supra,* at 176, 181-86, 190-93 (October Term 1960); *id.* at 245-52 (October Term 1964); *id.* at 480 (October Term 1970); *id.* at 542, 548, 551 (October Term 1971); and *id.* at 581-82 (October Term 1972).

114 384 U.S. 11 (1966).

quotation from the appellant's brief.[115] Douglas accepted the metamorphosis without complaint.[116]

Far more remarkably, Laurence H. Tribe, one of Justice Potter Stewart's clerks in October Term 1967, later offered an unusually frank and unforgettable account of the origins of one of Justice Stewart's most memorable and oft-quoted statements:

> One of the exciting things about the clerkship was that he [Justice Stewart] would let his law clerks, if he liked their style, write drafts and very often the drafts would become the opinion. A number of opinions I worked on that term are really almost exactly as I drafted them; cases like *Katz* v. *United States* [389 U.S. 347 (1967)] dealing with the fact that electronic eavesdropping is a form of search even though there's no physical trespass. I wrote some of the key phrases thinking that this is what Stewart would want to say, and it turned out to be exactly what he wanted. '[T]he Fourth Amendment protects people, not places' [389 U.S. at 351] is a line from my draft in *Katz*.[117]

Kenneth Bass, an October Term 1969 clerk to Justice Hugo L. Black, offered a more general acknowledgment similar to that of Tribe in an interview that took place less than two years after his own clerkship:

> With the possible exception of one case, what my co-clerk and I did had no *substantive* effect on what the justices did. The real influence of law clerks was not on the result, but on the decision used to explain the result. A lot of the wording in the opinions comes from the clerks.[118]

Despite these statements, Thomas Krattenmaker, an October Term 1970 clerk to Justice John M. Harlan, has asserted to Harlan biographer Tinsley Yarbrough that the clerks did have a decisive "substantive effect" in one notable case.[119] *Boddie v. Connecticut*[120] first had been argued in December 1969, and the Court held it for reargument in November 1970.[121] Chief Justice Burger assigned the majority opinion to Justice Harlan, and according to Krattenmaker, "a clerk in Justice Marshall's chambers, at the urging of Thomas Krattenmaker, the Harlan clerk responsible for *Boddie* in the 1970 term, persuaded

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115 *See* Urofsky, *supra* note 1, at 12.

116 *See id.*

117 Andrea Sachs, *Laurence Tribe*, CONST., Spring-Summer 1991, at 24, 28 (quoting Tribe).

118 Steve Sarshik, *The Supreme Court and Its Clerks: Bullets or Blanks for the Hired Guns?*, JURIS DR., Mar. 1972, at 40, 43.

119 *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 314-15 (1992).

120 401 U.S. 371 (1971).

121 *See id.*

Marshall to agree to a due process holding, giving Harlan a majority for his rationale as well as the Court's decision."[122]

In stark contrast to such frank former clerks as Tribe, Bass, Krattenmaker, and precursors reaching all the way back to Williston, is J. Harvie Wilkinson III,[123] who clerked for Justice Lewis F. Powell during October Terms 1971 and 1972. Wilkinson is the only former clerk other than Lazarus ever to publish a book addressing his clerkship experiences, and he managed to do so without describing a single historically significant story.[124] Indeed, Wilkinson's *Serving Justice* revealed so little that other former clerks who reviewed it—such as Eugene Gressman, who had spent five terms (1943-1947) assisting Justice Frank Murphy—dismissed it as "a compendium of the obvious, without any critical or incisive examination of the Court, the Justices or their law clerks."[125] Benjamin W. Heineman, Jr., whose service with Justice Potter Stewart had overlapped Wilkinson's time with Powell, described *Serving Justice* as "a politic and discursive memoir, not a revelatory or analytical one. And since its dominant mode is the sonorous generality, counterpointed by nonsubstantive anecdotes, the book adds very little to our perception of the operation of the Supreme Court in general, or of the Burger Court in particular."[126] Heineman added, "[I]t is hard to believe that Wilkinson's book reflects his true understanding of the Supreme Court, unless he is irredeemably panglossian."[127]

But of course the book that drew the most attention to the experiences of Supreme Court law clerks was not Wilkinson's memoir but Bob Woodward and Scott Armstrong's *The Brethren*.[128] Published in late 1979, *The Brethren* offered an "inside the Court" account of Justices' deliberations from October Term 1969 through October Term 1975. Yet because *The Brethren* never identifies by name a single for-

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122 YARBROUGH, *supra* note 119, at 314-15. A potentially serious flaw in Krattenmaker's account, which Professor Yarbrough fails to address, is that Justice Harlan's majority opinion in *Boddie* drew the full support of *six* justices—Harlan, Burger, Stewart, White, Marshall, and Blackmun—not merely five, thus indicating that at least in the end, Justice Marshall's vote alone was not decisive. *See Boddie*, 401 U.S. at 371.

123 Now Chief Judge of the Fourth Circuit.

124 *See* J. HARVIE WILKINSON III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974).

125 Eugene Gressman, Book Review, 34 FED. B.J. 102, 102 (1975); *see also* Eugene Gressman, Book Review, 52 FORDHAM L. REV. 711, 714 (1984) (asserting that "[l]aw clerks . . . have no moral authority, even after they leave the Court, to make public disclosure of documents, draft opinions or conversations of a decision-making nature that came to their attention in the course of their duties").

126 Benjamin W. Heineman, Jr., Book Review, 88 HARV. L. REV. 678, 678-79 (1975).

127 *Id.* at 685.

128 WOODWARD & ARMSTRONG, *supra* note 2. Dennis Hutchinson, however, accurately comments that "the driving engine behind the project, and the principal source for much of the detailed material that gave the book its resonance, was not a clerk but a justice—Potter Stewart." HUTCHINSON, *supra* note 72, at 385.

mer clerk "source," critics such as *New York Times* columnist Anthony Lewis were able to mount blistering critiques of the underlying factual accuracy of several clerk-based stories.[129] *The Brethren* did allow academic commentators such as Professor Philip B. Kurland to renew[130] and expand their complaints about how "more and more of the [Court's] opinions are written by the law clerks rather than their Justices."[131] Kurland asserted that "too much of the business of the Court is not conducted by the Justices but rather by their law clerks."[132] Former Justice Arthur J. Goldberg, however, warned that one ought to discount *The Brethren*'s clerk-based description of the Court, because law clerks "lack the maturity, experience and perspective to evaluate what they are told and what really takes place."[133]

II

EDWARD LAZARUS AND *CLOSED CHAMBERS*

Reviewers and commentators examining Edward Lazarus's *Closed Chambers* ought to have cited repeatedly Justice Goldberg's warning about Woodward and Armstrong's *The Brethren*, but to date no other critic has done so. Far too much attention and energy has focused on Lazarus's supposed ethical shortcomings,[134] and far too little has addressed the way in which *Closed Chambers*'s overheated and melodramatic denunciations of the Justices mortally detract from Lazarus's credibility as an analyst and critic of the Court.

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129 *See* Anthony Lewis, Book Review, *Supreme Court Confidential*, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 3. Lewis's response triggered an exchange between Woodward and Armstrong and Lewis. *See* Letter to the Editors, *The Evidence of* The Brethren*': An Exchange*, N.Y. REV. OF BOOKS, June 12, 1980, at 47 (letter by Armstrong and Woodward). Lewis undertook his own on-the-record interviews with Paul R. Hoeber, an October Term 1971 clerk to Justice William J. Brennan, Jr., in order to challenge Woodward and Armstrong's account of *Moore v. Illinois*, 408 U.S. 786 (1972). *See id.* at 48-50 (reply by Anthony Lewis). Woodward and Armstrong replied that Hoeber was also *their* original on-the-record source for the description in question. They rejected the contention that they had misconstrued Hoeber's comments, claiming that Hoeber had no doubt changed his story after it proved controversial. *See id.* at 47-48 (letter by Armstrong and Woodward).

130 Kurland first complained about the Court's opinion-writing process in 1954. *See* Kurland, *supra* note 72, at 299.

131 Philip B. Kurland, Book Review, 47 U. CHI. L. REV. 185, 197-98 (1979). For comments from former clerks supporting Kurland's observation, see Glen M. Darbyshire, *Clerking for Justice Marshall*, A.B.A. J., Sept. 1991, at 48, 50 ("Perhaps more than any other justice, he [Thurgood Marshall] gave his law clerks creative freedom in drafting opinions."); Pierce O'Donnell, *The Hands of Justice: A Law Clerk Fondly Remembers Byron R. White*, 33 WASHBURN L.J. 12, 16 (discussing "drafting the Justice's opinions"); Kevin J. Worthen, *Shirt-Tales: Clerking for Byron White*, 1994 BYU L. REV. 349, 352 n.7 (discussing "the first drafting assignment that I received").

132 Kurland, *supra* note 131, at 197.

133 Arthur J. Goldberg, *A Former Justice on* The Brethren*,'* NAT'L L.J., Jan. 21, 1980, at 14.

134 *See supra* notes 6-20 and accompanying text.

The historical record of the past six decades demonstrates that a host of professionally respected and academically celebrated former clerks have recounted, by name and "on the record," stories of (1) case-specific intra-Court incidents,[135] (2) private remarks of one Justice about another,[136] and (3) their influence in the drafting and construction of important, well-known opinions.[137] In *Closed Chambers*, Edward Lazarus recounts only a modest amount of the first, little if any of the second, and absolutely none of the third. Indeed, Lazarus's refusal to offer any substantive details of his own interactions with Justice Blackmun, aside from the most predictable and mundane,[138] deprives *Closed Chambers* of its *potentially* richest and most memorable material.[139]

This author already has written an early, critical review of *Closed Chambers*, and its contents will not appear here.[140] Knowledgeable Court-watchers have dismissed *Closed Chambers* as "riotously flawed"[141] and "painfully inept"[142] as a result of Lazarus's inflating what he claims are "controversial revelations"[143] about "a Court where Justices yield great and excessive power to immature, ideologically driven clerks"[144] who "manipulate their bosses."[145] But Lazarus's indictment of the Court focuses less on the supposed power of the law clerks than on the professional and personal failings of the Justices themselves. Lazarus accuses the Justices of using "transparently deceitful and hyp-

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135 *See supra* notes 47, 49, 52, 59, 63, 70, 74, 77, 79-80, 83, 122 and accompanying text.

136 *See supra* notes 33, 43, 54-55, 76, 92 and accompanying text.

137 *See supra* notes 56, 68, 70, 72, 90, 97, 118-19 and accompanying text.

138 *See, e.g.*, LAZARUS, *supra* note 4, at 45-46 (recounting a phone conversation with Blackmun concerning a stay application).

139 Lazarus has previously published two brief law journal essays paying tribute to Justice Blackmun, as well as an "op-ed" essay on Blackmun's personal qualities and a brief letter to the editor defending the evolution of Blackmun's death penalty jurisprudence. *See* Edward Lazarus, *The Voice of (A) Justice*, 1990 ANN. SURV. AM. L. xli; Edward P. Lazarus, *The Case of the Severed Arm: A Tribute to Associate Justice Harry A. Blackmun*, 43 AM. U. L. REV. 725 (1994); Edward Lazarus, *Breakfast with Harry Blackmun*, WASH. POST, Apr. 7, 1994, at A27; Edward Lazarus, Letter to the Editor, *Blackmun Has Acted on the Death Penalty*, N.Y. TIMES, June 29, 1994, at A22. *The Case of the Severed Arm*, *supra*, at 727-28, does recount some inside-the-Blackmun-Chambers details concerning the unheralded case of *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

140 *See* David J. Garrow, Book Review, *Dissenting Opinion*, N.Y. TIMES, Apr. 19, 1998, § 7, at 26.

141 Lyle Denniston, Book Review, *'Closed Chambers': Law Clerk's Revenge*, BALT. SUN, Apr. 12, 1998, at 5F.

142 Bruce Fein, *Tendentious Glimpse Behind the Big Bench*, WASH. TIMES, Aug. 1, 1998, at C1.

143 LAZARUS, *supra* note 4, at xi. *But see* Edward Lazarus, *Rush to Judgment*, CAL. LAW., Sept. 1998, at 96 (denying that *Closed Chambers* is "anything resembling a tell-all").

144 LAZARUS, *supra* note 4, at 6.

145 *Id.*; *see also id.* at 263 (noting "the very significant power that clerks wielded at the Court during my time" and "the very conscious and abusive manner in which clerks wielded that power for partisan ends").

ocritical arguments and factual distortions"[146] to flesh out "opinions the Justices knew to be wholly inadequate and unconvincing."[147]

As Professor Stephen Wermiel accurately has noted, Lazarus's "most pronounced problem is his hyperbole."[148] Perhaps the most notable example comes when Lazarus declares that his own year of service, October Term 1988, "must rank with the New Deal watershed of 1937 and the year of *Brown*, 1954, as the most decisive in this century."[149] Not surprisingly, this assertion already has attracted widespread ridicule and scorn.[150] Complementing his hyperbole, and almost equally problematic, Lazarus repeatedly fails to state precisely whether his assertions apply to the Supreme Court of 1998, or only to the Court of 1988-1989. In most instances, Lazarus writes as if his representations apply just as much to today's Court as to that of October Term 1988: "[T]he Justices on the Rehnquist Court have broken into self-contained ideological factions who exchange, almost routinely, increasingly harsh accusations of hypocrisy and illegitimacy."[151] At other times, Lazarus implicitly qualifies the sweep of his characterizations, once stating that "The story of the Court in the late 1980s and early '90s is of this spirit of faction and recrimination."[152] But whenever Lazarus addresses what he insists are the "fundamental similarities"[153] between the 1988 and 1998 Courts, he stumbles just as badly as when he absurdly compares 1988-89 to 1953-54.

One topic, however, where Lazarus's comments *are* right on target concerns the authorship of the Court's opinions. Lazarus's use of the phrase "editorial Justices"[154] already has drawn attention,[155] and the way in which Lazarus challenges the Court's opinion-writing process hits the mark. While Lazarus reveals nothing explicit in *Closed Chambers* about opinion-drafting procedures within Justice Blackmun's Chambers, he does stress that during October Term 1988, "the vast majority of opinions the Court issued were drafted exclusively by clerks."[156] "Drafted" is, of course, the crucial word. Lazarus accurately asserts that it is "in wielding the enormous power of the first

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146 *Id.* at 6.

147 *Id.* at 8.

148 Stephen J. Wermiel, *Hear Ye, Hear Ye*, A.B.A. J., June 1998, at 94.

149 LAZARUS, *supra* note 4, at 262.

150 *See, e.g.*, Garrow, *supra* note 140, at 26; Wermiel, *supra* note 148, at 94; Kathleen M. Sullivan, *Behind the Crimson Curtain*, N.Y. REV. OF BOOKS, Oct. 8, 1998, at 15, 17 ("*Closed Chambers* got stuck in time a decade ago.").

151 LAZARUS, *supra* note 4, at 8.

152 *Id.* at 13.

153 *Id.* at 262.

154 *Id.* at 273.

155 *See, e.g.*, Garrow, *supra* note 140, at 26.

156 LAZARUS, *supra* note 4, at 271; *cf.* Wermiel, *supra* note 148, at 94 ("[I]t is no secret that clerks have drafted the overwhelming majority of opinions the past 40 years.").

draft and, specifically, in the selection of words, structure, and materials, that clerks may exercise their greatest influence. . . . Rarely do the Justices disassemble the drafts they've been given to examine the crucial choices that went into their design."[157]

Despite this illuminating point, Lazarus's self-destructive penchant for pretentious hyperbole—"I see many of the Justices' opinions, on both sides, not as just logically wrong and morally inadequate but as fundamentally dishonest, either by design or through gross negligence"[158]—unfortunately is coupled with a pronounced proclivity for errors. Some serious mistakes already have been highlighted elsewhere,[159] but the profusion of smaller errors—misnaming (1) former Texas Governor William Clements as "Gov. Jim Clemons";[160] (2) former Georgia Attorney General Arthur Bolton as "William Bolton";[161] (3) U.S. Circuit Judge Douglas Ginsburg as "Ginzburg";[162] (4) Dr. James Hubert Hallford, an intervening plaintiff in *Roe v. Wade*,[163] as "Halliford";[164] (5) former federal District Judge Gerhard Gesell as "Gerhardt" Gesell;[165] and (6) Supreme Court Marshal Alfred Wong as "Arthur"[166]—indicates that Lazarus is a sloppy rather than painstaking researcher.[167]

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157 LAZARUS, *supra* note 4, at 273.

158 *Id.* at 288.

159 *See* Garrow, *supra* note 140, at 26-27 (noting publicly available evidence contradicting Lazarus's erroneous claims that (1) Justice O'Connor, during October Term 1988, refused to join any of Justice Brennan's majority opinions, and (2) Chief Justice Rehnquist repeatedly "relisted" the landmark abortion case of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in an attempt to delay its decision); *see also* Kozinski, *supra* note 18, at 853 (noting five cases which contradict Lazarus's claim that as of 1988 Chief Justice Rehnquist had "not once" voted to overturn a death sentence, LAZARUS, *supra* note 4, at 160, and noting three cases from 1979-1980 to contravene Lazarus's assertion that "no one could even remember the last time . . . Rehnquist voted to stay or to hold a death case," *id.* at 159-60).

160 LAZARUS, *supra* note 4, at 70.

161 *Id.* at 98. To support his error, Lazarus cites page 114 of Michael Meltsner's *Cruel and Unusual*. *See id.* at 523 n.26. In fact, Meltsner correctly identifies Bolton on page 124. *See* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 124 (1973).

162 LAZARUS, *supra* note 4, at 254.

163 410 U.S. 113 (1973).

164 LAZARUS, *supra* note 4, at 347 n.*. On the same page Lazarus also refers to the Mexican town of Piedras Negras as "Pierdas Negras." *Id.* at 347.

165 *Id.* at 349.

166 *Id.* at 482.

167 *See, e.g.*, *id.* at 101 (identifying former Supreme Court nominees Clement F. Haynsworth and G. Harrold Carswell as "Clement Haynesworth and Harold Carswell"); *id.* at 492 (containing Lazarus's erroneous reference to "the circuit court chief judges who make up the Judicial Conference" of the United States); *id.* at 486 (illustrating Lazarus's incorrect characterization of *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997), as representing "the definitive denial in 1997 of a right to physician-assisted suicide"); *id.* at 511 (calling Justice David H. Souter "a vocal dissenter" in *Employment Division v. Smith*, 494 U.S. 872 (1990), a case that was decided before Souter joined the Court); *see also* Jeff Bleich et al., *Closed Chambers: Has the Integrity of the Supreme Court Been*

As Professor Peter Irons correctly suggested, the vast majority of *Closed Chambers* represents not an "inside-the-Court" memoir of a former clerk, but a document-based work of recent legal history that any knowledgeable writer could have composed by searching the readily available case-file riches of the Thurgood Marshall Papers at the Manuscript Division of the Library of Congress.[168] Professor Irons emphasized that *Closed Chambers* treats only five October Term 1988 cases at any length,[169] and addresses two of those—*City of Richmond v. J.A. Croson Co.*[170] and *South Carolina v. Gathers*[171]—only in terms of their final, published opinions.[172] Lazarus devotes some sixteen pages to an explication of *Croson*,[173] but aside from one passing reference to the alleged involvement of an O'Connor clerk,[174] Lazarus's account appears to rely entirely upon public record materials. Similarly, in his less-than-four-page rendition of *Gathers*,[175] Lazarus does not explicitly utilize any nonpublic information, although one paragraph's characterization of the certiorari grant in *Gathers* may derive implicitly from knowledge that Lazarus acquired as a clerk.[176]

One of the three remaining October Term 1988 cases Lazarus discusses in detail, *Tompkins v. Texas*,[177] involved a death penalty challenge in which an equally divided Court affirmed the judgment below without opinion. Lazarus devotes twenty-four pages to *Tompkins*,[178] and approximately fifty percent of his account is a summation of the case's history prior to its reaching the Supreme Court.[179] Without attributing his description of the Court's internal line-up explicitly to Justice Blackmun's account of how each Justice voted at Conference, Lazarus nonetheless details those votes.[180] He then summarizes the

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Breached?, OR. ST. B. BULL., July 1998, at 15, 19 (noting Lazarus's reference to Justice Sandra Day O'Connor's "pregnant daughter," LAZARUS, *supra* note 4, at 384, and observing that "O'Connor, in fact, has three sons and no daughters"); Kozinski, *supra* note 18, at 854 (noting that Lazarus identifies Ninth Circuit judges Arthur Alarcon and Harry Pregerson as "Richard Alarcon" and "Warren Pregerson," LAZARUS, *supra* note 4, at 506, 508).

168 *See* Peter Irons, *Raising Lazarus*, JURIST: THE LAW PROFESSORS' NETWORK (May 1998) <http://jurist.law.pitt.edu/lawbooks/revmay98.htm>; *see also* Bleich et al., *supra* note 167, at 18 ("[T]he historical parts that are reliable are not original, and the parts that are original are not reliable.").

169 *See* Irons, *supra* note 168.

170 488 U.S. 469 (1989).

171 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

172 *See* Irons, *supra* note 168.

173 *See* LAZARUS, *supra* note 4, at 291-306.

174 *See id.* at 300 (asserting that O'Connor's argument in *Croson* "was a favorite of Federalist Society members" and was "cleverly deployed by O'Connor's cabalist clerk").

175 *See id.* at 445-48.

176 *See id.* at 445.

177 490 U.S. 754 (1989).

178 *See* LAZARUS, *supra* note 4, at 50-73.

179 *See id.* at 50-60.

180 *See id.* at 61.

first-draft majority opinion that Justice Stevens circulated, the ensuing correspondence, and additional draft opinions that Justices Blackmun and Marshall circulated. All of these documents could have been drawn either from the Marshall Papers or from some collection of *Tompkins* materials that Lazarus had retained after his departure from the Court. Lazarus's minimalist footnoting[181] of his *Tompkins* chapter, however, includes no citations whatsoever to these documents. A reader quite reasonably may conclude, in light of Lazarus's more general declarations, that all of these materials indeed did come from the Marshall Papers.[182]

Lazarus's account of the Court's internal handling of *Tompkins* includes at least one discussion that could have come only from clerk-to-clerk scuttlebutt,[183] and he readily volunteers, "I worked many hours on Phillip Tompkins's case."[184] Yet anyone with a good understanding of death penalty appellate litigation and with time to peruse the Marshall Papers could have written almost all of his story.

Thus, Professor Irons correctly identifies Lazarus's lengthier accounts of the two other, extremely well-known October Term 1988 cases—*Patterson v. McLean Credit Union*[185] and *Webster v. Reproductive Health Services*[186]—as comprising almost all of the "inside" information *Closed Chambers* offers regarding the year Lazarus clerked at the Court. Lazarus's entire treatment of *Patterson*, in two separate segments, totals some twenty-six pages.[187] Aside from the narration of information that was publicly reported at the time, virtually all of Lazarus's account of the Court's private exchanges concerning *Patterson* comes from either the publicly available Marshall Papers or from James F. Simon's *The Center Holds*,[188] which relied upon the papers of Justice William J. Brennan, to which Lazarus did not receive access.[189]

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181 *See id.* at 520-21 (showing that Lazarus used only 17 footnotes (numbers three to 19) to cover his 24-page discussion of *Tompkins*).

182 *See id.* at xi n.* ("Unless otherwise noted, these [Marshall Papers] were the source for the many internal Court documents, including the drafts and memos of other Justices, that I quote or refer to in the book."); *id.* at 68 n.* (commenting on how "the record in *Tompkins* is buried in Marshall's papers").

183 *See id.* at 67-68 (discussing a visit by Justice Kennedy to Justice Marshall's chambers).

184 *Id.* at 70.

185 491 U.S. 164 (1989).

186 492 U.S. 490 (1989).

187 *See* LAZARUS, *supra* note 4, at 255-61, 306-25.

188 JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995).

189 Invocation of Simon's book should not be misconstrued as any endorsement. *See* David J. Garrow, *The Center Folds*, NEWSDAY, Aug. 13, 1995, at 32, *reprinted in* David J. Garrow, *Simple Simon: Supremely Sanguine, Supremely Stubborn*, 40 N.Y.L. SCH. L. REV. 969, 978-80 (1996) (arguing that the Court's exceptionally conservative record during October Term 1995 disproved Simon's predictions).

Lazarus's initial, six-page section on *Patterson* quotes two words from a "private" letter to Chief Justice Rehnquist from Justice Kennedy without footnoting a source for the quotation.[190] Yet, the same words appear in *The Center Holds* in a longer quotation from the same letter.[191] When Lazarus resumes his discussion of *Patterson* forty-seven pages later, he states in an endnote: "[M]y reconstruction here of internal events at the Court is based in very large part on the Thurgood Marshall Papers and on extensive interviews with former clerks."[192] He further acknowledges that his "reconstruction of *Patterson*" also relies upon Brennan material that he "gratefully borrowed" from Simon's book.[193]

Lazarus's account of the Justices' October 1988 Conference discussion of *Patterson* derives entirely from accounts that Simon provided.[194] The same holds true for Lazarus's rendition of Justice Kennedy's private criticisms of Justice Brennan's initial draft opinion for the *Patterson* Court's precarious five-vote majority, Brennan's responses, and Kennedy's eventual decision to circulate a separate opinion of his own.[195] Lazarus's account diverges from Simon's and from the Marshall Papers only when it accuses a newly hired Kennedy clerk, who previously had clerked for Justice Scalia, of decisively influencing Justice Kennedy's decision in *Patterson*.[196]

After Lazarus makes this unsourced allegation, he returns to a narration of *Patterson*'s internal "paper trail" that again fully tracks the story that *The Center Holds* and the Marshall Papers already offered.[197] Then Lazarus again denounces how "Justice Kennedy's decisive switch in the case was engineered in major part by a clerk acting in pursuit of his own legal agenda and that of his former boss, Justice Scalia."[198] However, at no point in his treatment of *Patterson* does Lazarus ever offer any evidence to support his accusation.

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190 *See* LAZARUS, *supra* note 4, at 260 (indicating that Kennedy informed Rehnquist that he found the dissents "most disappointing").

191 *See* SIMON, *supra* note 188, at 40 (indicating that Kennedy wrote Rehnquist, "'I might add the dissents do not sit well with me, and are most disappointing'").

192 LAZARUS, *supra* note 4, at 536 n.37.

193 *Id.*

194 *Compare id.* at 308-09, *with* SIMON, *supra* note 188, at 46-49. It is highly unlikely that Lazarus gleaned any information about the conference discussion from the Marshall Papers. Anyone who has reviewed Justice Marshall's docket sheets can attest that Justice Marshall virtually *never* took notes in conferences and that reconstruction of conference discussions based upon the Marshall Papers is all but impossible. *But see* Lazarus, *supra* note 16, at A19 (asserting erroneously that Marshall's Papers "include his notes on the justices' private conferences").

195 *Compare* LAZARUS, *supra* note 4, at 311-14, *with* SIMON, *supra* note 188, at 56-64.

196 *See* LAZARUS, *supra* note 4, at 314-15.

197 *Compare id.* at 316-21, *with* SIMON, *supra* note 188, at 64-67, 71-73, 75-79.

198 LAZARUS, *supra* note 4, at 322.

Even Lazarus acknowledges that *Patterson*'s legal importance was short-lived because two years after the decision the Civil Rights Act of 1991 effectively reversed the case. The truly big news about Lazarus's "inside" story of *Patterson*, however, is that he adds absolutely *no further* documented details to the history of the case beyond those that *The Center Holds* and the Marshall Papers already had made available.

That leaves *Webster v. Reproductive Health Services*[199] as the only possible October Term 1988 case about which Lazarus's "eyewitness account" might expand upon earlier narratives. Lazarus devotes some fifty-eight pages to the story of *Webster*.[200] After a brief, scene-setting précis with details that only could come from personal knowledge,[201] Lazarus dedicates the first third of his *Webster* chapter to a doctrinal introduction.[202] Then, for the first and only time in his book, Lazarus discusses the Court's internal deliberations by invoking private documents and information that have not previously been part of the public record. Focusing on the chambers of Justice O'Connor, and specifically identifying Daniel Mandil as the O'Connor clerk who was responsible for *Webster*, Lazarus recounts in exceptional detail the three "bench memos" that Mandil and two of his co-clerks, Andrew McBride and Jane Stromseth, prepared for Justice O'Connor.[203] Lazarus summarizes each of those documents, which are available in no other Justice's papers or archive, but he never explicitly or directly *quotes* from any of the memoranda.[204] Perhaps Lazarus obtained copies of the documents under an express agreement that he could use the memos but not quote them.

Lazarus then briefly characterizes Justice O'Connor's comments in a meeting with her four clerks,[205] before offering a more detailed rendition of a similar in-chambers session that Justice Kennedy conducted with his clerks. Lazarus's account specifically highlights the remarks of one particular Kennedy clerk, Harry Litman.[206] After a three-page summation of the oral arguments in *Webster*,[207] Lazarus provides an account of the Justices' conference discussion that is considerably less detailed than that which Simon drew from Justice Brennan's notes.[208] Lazarus's account diverges slightly, but it expands

199 492 U.S. 490 (1989).

200 *See* LAZARUS, *supra* note 4, at 329-34, 373-424.

201 *See id.* at 333-34 (naming which of his co-clerks wrote the "cert. pool" memorandum on *Webster* and describing how Justice Blackmun related the conference vote to his clerks).

202 *See id.* at 373-84.

203 *See id.* at 391-92.

204 *See id.* at 391-93.

205 *See id.* at 394.

206 *See id.* at 394-95.

207 *See id.* at 396-98.

208 *Compare id.* at 399-400, *with* SIMON, *supra* note 188, at 132-33.

upon Simon's only when it refers to—yet again without quoting—a post-conference letter from Justice Kennedy to Chief Justice Rehnquist.[209] Lazarus then mentions "another dramatic meeting in Kennedy's Chambers,"[210] again highlighting the comments of Kennedy clerk Harry Litman, before proceeding to a long narrative summary of Chief Justice Rehnquist's initial draft of a *Webster* opinion.[211] The Chief Justice circulated the draft only to prospective members of his *Webster* majority—Justices White, O'Connor, Scalia, and Kennedy—and it hence does not appear in either the Marshall or Brennan Papers.

Lazarus's account is a significant if modest addition to our understanding of *Webster*'s internal history, but contains no earthshaking revelations even for the few of us who specialize in abortion-rights historiography. Lazarus scores a more notable coup, however, when he presents and quotes from Justice O'Connor's subsequent letter to Chief Justice Rehnquist in which she states that she could not accept his initial draft because of how it "effectively overrule[d]" *Roe v. Wade*.[212] Lazarus also summarizes other *Webster* reaction letters from Justices Kennedy and Scalia, which, like O'Connor's, do not appear in either the Marshall or Brennan Papers.[213] When Lazarus's narrative then progresses to Rehnquist's circulation to the entire Court of a slightly revised draft opinion, his account largely returns to territory fully described in Simon's *The Center Holds*.[214]

Lazarus provides a more detailed and better-informed description of the subsequent opinion circulations and revisions in *Webster* than does Simon. Yet, his account rests almost exclusively upon Justice O'Connor's and perhaps Justice Kennedy's *Webster* case files and is only marginally informed by any information Lazarus gained during his clerkship with Justice Blackmun. Lazarus likewise provides a more edifying understanding and analysis of the *Webster* opinions than does Simon,[215] but the bottom line, as even Lazarus readily admits, is that "in *Webster* the Court had done nothing,"[216] and that *Webster*'s enduring significance, especially after the Court's landmark 1992 ruling in *Planned Parenthood v. Casey*,[217] is extremely modest indeed.

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209 *See* LAZARUS, *supra* note 4, at 400 n.*.

210 *Id.* at 401.

211 *See id.* at 401-05.

212 *Id.* at 405.

213 *See id.* at 406-08.

214 *Compare id.* at 409, 411, 415, *with* SIMON, *supra* note 188, at 135-38.

215 *See* LAZARUS, *supra* note 4, at 415-19.

216 *Id.* at 419.

217 505 U.S. 833 (1992).

Nevertheless, Lazarus erroneously insists that *Webster* "still speaks volumes about the Court that sits today."[218] He makes this assertion even though his account of the Court's deliberations in *Casey* appears to rest upon one or another Justice's private conference notes,[219] as well as a copy of a bench memo to Justice David H. Souter in the summer of 1991.[220]

All told, the preceding discussion is just about the sum total of "inside" information about the Supreme Court's private deliberations contained in Lazarus's *Closed Chambers*.[221] Unlike many earlier clerk-told "tales out of school," Lazarus presents no quotations of one Justice privately bad-mouthing another and no self-aggrandizing claims that he or some other clerk is the real author of some notable opinion or oft-quoted phrase of judicial prose. Too many readers, in response to the deluge of personal insults and denunciations that Lazarus heaps upon the Justices, have assumed wrongly that *Closed Chambers* contains at least *some* substantive revelations and embarrassments. It does not. Aside from its modest contribution to an enriched historiography of *Webster*, there is, as David O'Brien correctly observed soon after the book's publication, "little new here apart from tales of clerks' infighting."[222]

Lazarus ham-handedly has tried to harm the personal and professional reputations of former fellow clerks whom he dislikes,[223] and he no doubt unintentionally has embarrassed several possible friends whom he all but explicitly "outs" as cooperative sources.[224] What is

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218 LAZARUS, *supra* note 4, at 420; *see also id.* at 484-85 (acknowledging *Casey* as a "much-needed act of judicial statesmanship" which is, "at least for the foreseeable future, the Court's last word on abortion").

219 *See id.* at 467.

220 *See id.* at 468-69.

221 Moreover, any additional "inside" stories are rather brief. *See, e.g., id.* at 498-502 (presenting a four-page account of *Teague v. Lane*, 489 U.S. 288 (1989), based primarily on a bench memo by an O'Connor clerk).

222 David M. O'Brien, Book Review, *A Disturbing Portrait*, 81 JUDICATURE, Mar.-Apr. 1998, at 214, 214; *see also* Sullivan, *supra* note 150, at 15 ("Some of Lazarus's apparent scoops turn out to be hokum . . . . [T]he book is not the tell-all it has been cracked up to be."). Professor Kanner sums up this view when he states: "[T]he picture the book paints is not so much of epic struggles as it is of petty backbiting by ideologically driven clerks." Gideon Kanner, *"Holy Shit, I'm Going to Write the Law of the Land,"* 1 GREEN BAG 2D 425, 425 n.1 (1998). Kanner goes on to note how "[m]uch of the book's factual content, far from being the revealing expose it was touted to be, is a rehash of facts about the Court and its high-profile decisions that are well-known." *Id.* at 426; *see also* Carter G. Phillips, *Looking into Closed Chambers: A Lawyer's View*, AM. LAW., May 1998, at 42, 42 ("[T]he confidential communications largely add nothing to the narrative.").

223 *See, e.g.*, LAZARUS, *supra* note 4, at 315, 322, 419.

224 *See, e.g., id.* at 391-95, 406; *see also* Kozinski, *supra* note 18, at 849 (noting how the few named clerks whom Lazarus does not criticize are "tarred with the suspicion that they must have talked out of school and given Lazarus access to secret documents").

new and memorable about *Closed Chambers* is its name-calling, not any revelatory contents.

Far too many reviewers who have little if any specialized knowledge of the Supreme Court have praised *Closed Chambers* for being "thoughtful,"[225] "impeccably researched,"[226] and "astonishing."[227] One knowledgeable Supreme Court journalist, Tony Mauro of *USA Today* and *Legal Times*, has served as a one-person cheering squad for Lazarus. In *Legal Times* Mauro welcomed *Closed Chambers* as "a very important book about the Court—persuasively written and compelling in its conclusion."[228] He followed with more praise in *USA Today* and at a Website, calling the book "important and worthwhile"[229] and arguing that "much of what Lazarus writes rings true and should command our attention."[230] In contrast to Mauro's praise, another well-informed Supreme Court correspondent, Lyle Denniston of *The Baltimore Sun*, denounced what he termed "the reckless dart-throwing of this resentful, grudge-holding former law clerk" who "tries to pass off histrionics as history."[231] Other reviewers also have dismissed the book as "lifeless, gossipy and banal"[232] or "tendentious and amateurish."[233] As noted previously, however, far too much commentary on

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225 John Anderson, *More Bark than Bite: Tales out of Court by a Former Clerk*, AM. LAW., Apr. 1998, at 15, 15; *see also* Michael G. Radigan, Book Review, N.Y. L.J., May 8, 1998, at 2 (describing *Closed Chambers* as "penetrating and powerful" and a "thoughtful and eloquently written critique").

226 Evan Fray-Witzer, Book Review, *The End of a Gag Order*, BOSTON GLOBE, Apr. 19, 1998, at N1; *see also* Jay Lefkowitz, Book Review, *Treason of a Clerk*, WKLY. STANDARD, Apr. 27, 1998, at 29, 33 (stating that the "description of the role of Supreme Court clerks is unprecedented and illuminating"); William C. Kellough, Book Review, *Peak Proves Federalism Works*, TULSA WORLD, July 26, 1998, at 4 (describing it as "a painstakingly researched and well-balanced history"); Daniel E. Troy, *Liberalism's Guilty Conscience*, NAT'L REV., June 1, 1998, at 55, 55 (stating it is "generally fair and well-written").

227 Jane Goldman, Book Review, *Breaking Precedent*, NEWSDAY, May 10, 1998, at B9; *see also* Kathleen Kahn, Book Review, *Disorder in the Supreme Court*, S.F. CHRON., June 4, 1998, at E5 (describing the book as a "page-turning drama"); Ross C. Reeves, Book Review, *Disorder in the Court: Former Clerk Describes Tumult in the Supreme Court*, VIRGINIAN-PILOT (Norfolk), June 7, 1998, at J2 (describing it as "an outstanding review" that is "lucid, insightful and remarkably balanced"); Dan Seligman, *The Illiteracy of the Supreme Court*, FORBES, Sept. 21, 1998, at 134, 136 ("[A] fascinating inside-baseball account of how things get done at the Supreme Court.").

228 Mauro, *supra* note 5, at 7.

229 Tony Mauro, *Clerks Supreme Inside 'Chambers,'* USA TODAY, Apr. 16, 1998, at D4.

230 Tony Mauro, *Lazarus Goes Where Reporters Fear to Tread*, JURIST: THE LAW PROFESSORS' NETWORK (May 1998) <http://jurist.law.pitt.edu/lawbooks/revmay98.htm>. For Mauro's characterization of book reviews of *Closed Chambers*, see Mauro, *supra* note 5, at 9 ("The reviews seem to fall in two categories: favorable ones written by people not connected to the Court, and critical ones by reviewers who were former clerks or have some other connection to the Court.").

231 Denniston, *supra* note 141, at 5f.

232 Sam A. Mackie, Book Review, *Slap at High Court Is Unjust*, ORLANDO SENTINEL, June 21, 1998, at F6.

233 Fein, *supra* note 142, at C1.

Closed Chambers has focused on Lazarus's supposed ethical violations rather than on the book's serious flaws and profound limitations.[234]

Once *Closed Chambers* became the subject of public commentary and debate, Lazarus had no choice but to respond to the serious implications that his rhetorical hyperbole created. An early effort to extricate himself on NBC's *Today* show turned into an embarrassing debacle. When Lazarus told interviewer Katie Couric, "I don't want to suggest, Katie, that the Justices are . . . the puppets and the clerks are the puppeteers," Couric refused to accept the implicit retraction, stating, "Well, you kind of do in your book. . . . You describe [the Justices] as fairly lazy and disengaged I think."[235] Lazarus was somewhat more successful during a National Public Radio interview, telling host Scott Simon, "I don't think that I put the clerks at the center of the Court at all."[236] On the other hand, on C-Span's *Booknotes*, interviewer Brian Lamb successfully utilized one of Lazarus's broadside characterizations of the Court to push Lazarus onto ground upon which he did not want to tread. Lamb asked, "Your own boss, Harry Blackmun, didn't write the first draft [of his own opinions]?"[237] "That's correct," Lazarus agreed.[238] Lazarus got away easily when Lamb revisited Couric's query: "Do the Justices work hard, in your opinion?" Lazarus succinctly responded, "Yes."[239] However, Lamb landed at least one crippling punch: "Which Justices—or two Justices dislike each other the most in the current Court, from your knowledge of watching them?"[240] Lazarus answered, "I really don't know enough about the current Court to answer that."[241] In other venues, though, Lazarus continued to claim that his account of October Term 1988 also applied to today's Court, as when he told CBS's Charles Osgood that "it's still a shattered place."[242]

But the most threatening and difficult questions Lazarus has faced have been those that have challenged his loyalty and integrity. He insisted from the outset that he has not violated any legal or ethi-

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234 *See supra* text accompanying note 134.

235 *Today* (NBC television broadcast, Apr. 8, 1998), *available in* 1998 WL 5262655; *cf.* LAZARUS, *supra* note 4, at 278 (contending that Justice Marshall "was frequently disengaged"). Lazarus's statement to Couric was notably at odds with certain assertions in *Closed Chambers*. *See, e.g., id.* at 6 ("It is . . . a Court where Justices yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses . . . .").

236 *Weekend Edition-Saturday* (NPR radio broadcast, Apr. 25, 1998), *available in* 1998 WL 6284860.

237 *Booknotes* (Nat'l Cable Satellite Corp. television broadcast, June 14, 1998), *available in* 1998 WL 6616055.

238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.*

242 *The Osgood File* (CBS radio broadcast, June 15, 1998), *available in* 1998 WL 5282898.

cal obligations in publishing *Closed Chambers*,[243] while readily conceding that former clerks do "have certain ethical obligations"[244] and "certain obligations of circumspection."[245] In one interview, Lazarus stressed, "I think in the choices I made about what to include and what not to include, I honored those ethical obligations. For example, . . . there is nothing in the book about substantive discussions between me and Justice Blackmun or the cases."[246] Emphasizing that "[t]here's a difference between Day 1 after your clerkship and nine years later," Lazarus insisted that "[t]here is nothing in the book that is tales out of school."[247]

Hard as it may be for some of Lazarus's most vituperative critics to accept, a careful comparison of *Closed Chambers*'s mundane "revelations"[248] with history's extensive track record of clerk-told tales and self-aggrandizing assertions shows that Lazarus accurately and convincingly defends himself on this score.[249] *Closed Chambers* is repeatedly guilty of name-calling, gratuitous insults, and inane exaggerations, but measured against the historical record of what former clerks have and have not subsequently disclosed about case deliberations, Justices' private remarks, and opinion-drafting practices during their clerkships, Lazarus has violated no norm or standard. In the long history of Supreme Court clerkships reaching back to Samuel Williston and Dean Acheson, Lazarus's inclusion in any "rogues' gal-

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243 *See* Lazarus, *supra* note 16, at A19 (asserting that the "Code of Conduct, including its confidentiality provision, applies only to clerks during their time at the Court . . . and has no bearing on the propriety of a former clerk writing a book").

244 Interview by Ronald K.L. Collins, Editor, *Books-on-Law*, with Edward P. Lazarus (Apr. 10, 1998), *available at* <http://jurist.law.pitt.edu/lawbooks/revmay98.htm>.

245 Lazarus, *supra* note 16, at A19.

246 Collins, *supra* note 244.

247 *Id.* In interviews, Lazarus also has emphasized that "[t]he issue of whether clerks are doing too much opinion-drafting is much more significant than [the role of clerks in] the cert. process." *Id. But see* Kenneth W. Starr, *Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23 ("Disband the cert pool."). Tony Mauro endorses Starr's point by quoting Justice John Paul Stevens as saying,

> "When a clerk writes for an individual justice, he or she can be more candid. . . . You stick your neck out as a clerk when you recommend to grant a case . . . . The risk-averse thing to do is to recommend not to take a case. I think it accounts for the lessening of the docket."

Mauro, *supra* note 1, at 2A. Stevens also told Mauro, "'I had a lot less responsibility [when clerking for Justice Wiley Rutledge in October Term 1947] than some of the clerks now. They are much more involved in the entire process now.'" *Id.* On the issue of the Court's shrinking docket, see David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997).

248 LAZARUS, *supra* note 4, at xi.

249 Lazarus's own responses to his critics again betray his dramatic proclivity for overstatement. *See* Edward Lazarus, *Disturbing Truths*, JURIST: THE LAW PROFESSORS' NETWORK (July 1, 1998) <http://jurist.law.pitt.edu/lawbooks/revjul98.htm> ("I won't bother to answer Richard Painter's desperate attack on my ethics[, *see supra* note 12,] except to ask why he is so pathological in his attempt to trump up baseless allegations . . . .").

lery" would require a rather crowded group photo, with Lazarus himself on the far end of the back row.

If *Closed Chambers* contains any detectable violations of behavioral norms or standards for former clerks, it is the former clerks of Justices O'Connor[250] and Kennedy,[251] and perhaps of Justice Souter, who have committed them, not Edward Lazarus.[252] Lazarus has disclosed absolutely nothing of any substantive import that ever occurred in the Blackmun Chambers, or between Justice Blackmun and any of his colleagues, during his clerkship. Lazarus could not have written certain segments of *Closed Chambers* without (1) access to copies of October Term 1988 documents from the O'Connor Chambers that one or more former clerks retained after the conclusion of their clerkship, and (2) detailed renditions of conversations within the Kennedy Chambers recalled by another former clerk.[253] In both of these instances, other former clerks have heeded a far less demanding standard for intra-chambers circumspection than Lazarus has imposed on himself concerning memos and conversations within the Blackmun Chambers.[254] Perhaps some might want to charge Lazarus with entic-

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250 *See supra* notes 203-05 and accompanying text.

251 *See supra* notes 206, 209-11 and accompanying text.

252 *See supra* note 220 and accompanying text.

253 *See* Mauro, *supra* note 5, at 8 ("[I]f Lazarus is to be accused of breaking the code of silence, it is clear that he had help from other clerks . . . ."); Christopher R. Drahozal, *The "Arrogance of Certainty": Trust, Confidentiality, and the Supreme Court*, 47 U. KAN. L. REV. 121, 126 (1998) (book review) ("Some clerk . . . apparently collected this material while clerking and then took it with him or her at the end of the term."). Drahozal clerked for Justice Byron R. White during October Term 1988. *But see* Erwin Chemerinsky, *Sunlight on the Supreme Court: A Response to the Critics of* Closed Chaimbers, JURISTS: THE LAW PROFESSORS' NETWORK (Jan. 1999) <http://jurist.law.pitt.edu/lawbooks/reviews.htm> (asserting there is no evidence "that Lazarus illegally removed documents from the Court or ever *came into possession* of them" (emphasis added)).

254 *See, e.g.*, Hon. Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG 2D 57, 58 (1998). Kozinski, speaking of his October Term 1976 clerkship with Chief Justice Warren Burger, volunteers that

> I saw my job as trying to figure out what his philosophy was, based on his earlier opinions, and to draft current opinions accordingly. More than once, he gave me an instruction to come out one way, and I went back and read his earlier opinions and decided he'd be more consistent if he came out the other way, so I'd write him a memo saying, "I've read your opinions in x and y, and I think the other result is more consistent with your earlier views." Sometimes he would switch, and sometimes he wouldn't.

Id. Public statements such as these suggest that, in real life, not even Judge Kozinski can abide by the standards he espouses. *Compare id.* at 59 (speaking of his earlier clerkship for then-Circuit Judge Anthony M. Kennedy, and of co-clerk Richard K. Willard, and volunteering that "there was certainly more than one occasion when Richard talked the judge out of a position I thought I had persuaded him to take"), *with* Kozinski, *supra* note 18, at 837 (criticizing Lazarus for "telling stories about how law clerks supposedly interacted with their justice and each other"), and *id.* at 841 n.32 ("There is a continuing duty of confidentiality as to matters that transpired within chambers, and former law clerks do not normally discuss such matters except with former clerks from the same chambers and the same vintage.").

ing other former clerks to violate an obligation of confidentiality to their Justices, but if that is the charge, the number of former clerks and the number of eagerly complicit historians who will be standing alongside Lazarus—as the long historical record of talkative "little beasts" shows—will be very large indeed.

III
DENNIS HUTCHINSON AND "WHIZZER WHITE"

Nothing more starkly illuminates how both Edward Lazarus *and* those other former clerks who actively aided him in the preparation of *Closed Chambers* fully and accurately emulated the historical norms for former clerk behavior than Dennis J. Hutchinson's even more recent book, *The Man Who Once Was Whizzer White*—a biography of Justice Bryon R. White.[255] Hutchinson clerked for Justice White during October Term 1975, but he makes no visible use of any confidential information obtained during his clerkship. He also does not hesitate to critique White's judicial service.[256] Hutchinson received no active cooperation from Justice White,[257] nor did Hutchinson have any access to what remains of White's Court papers and case files.[258] In fact, less than thirty percent of Hutchinson's biography deals with Byron R. White's thirty-one years as an Associate Justice (1962-1993).[259] Hutchinson occasionally offers some implicitly inside information.[260] However, the primary sources for two of Hutchinson's three principal

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255 HUTCHINSON, *supra* note 72.

256 *See, e.g., id.* at 441 (noting "White's opaque writing style and occasionally flip concurring opinions"); *id.* at 7 (stating that "White's writing has often been elliptical, even opaque"); *id.* at 359 (indicating that White had "an opinion style that was intentionally opaque and self-effacing"); *id.* at 363 ("White wrote opinions that were often densely presented and no better than implicit about their theoretical premises. To some extent, he went out of his way to be obscure.").

257 *See id.* at 5 (quoting White as saying, "'You are on your own . . . . I would not like to do anything to suggest that what you are doing is an authorized biography'").

258 *See id.* at 3 ("White destroyed the bulk of his papers prior to the beginning of October Term 1986.").

259 *See id.* at 325-457. Hutchinson also details how White had clerked for Chief Justice Fred Vinson during October Term 1946, 15 years before his own ascension to the Court in April 1962. *See id.* at 194-220. Indeed, "in White's first few weeks on the Court [in 1962] one of his clerks overheard him complain alone to himself in his office that the same issues that [he remembered from] 1947 are still here, and Hugo [Black] still runs the Court." *Id.* at 339 (emphasis omitted).

260 *See id.* at 368 (stating that one remark in White's dissent in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), was a "remarkably insensitive sentence . . . that would tear old friendships and even, twenty years later, cause a former colleague to refuse to participate in a *Festschrift* in his [White's] honor at retirement"). For White's sentence, see 410 U.S. at 221 (White, J., dissenting) ("The common claim before us is that for any one of such reasons, or for no reason at all, . . . any woman is entitled to an abortion at her request . . . ."). White nonetheless "told several law clerks late in his career that if he had been a legislator he would 'have been pro-choice.'" HUTCHINSON, *supra* note 72, at 368.

chapters on White's judicial service—profiles of White and the Court during October Terms 1971 and 1981—come from the document holdings of the William O. Douglas, Thurgood Marshall, and William J. Brennan Papers.

Far and away the most remarkable chapter in Hutchinson's well-written and thoroughly researched biography[261] is his twenty-five page account of October Term 1991.[262] That term featured such important rulings as *United States v. Fordice*[263] and *Planned Parenthood v. Casey*.[264] No publicly available sources have documented their "internal" stories, as the active service—and ergo the case files—of Justices Brennan and Marshall end with October Terms 1989 and 1990 respectively.

But Hutchinson has succeeded in acquiring "inside" information on the events of October Term 1991—presumably from two or more[265] of the four clerks[266] who worked for Justice White that year—that puts Edward Lazarus to shame. For example, Hutchinson reports that early in the term, newly confirmed Justice Clarence Thomas sent White a note changing his vote in one of the first three cases in which Thomas had heard argument, *Foucha v. Louisiana*.[267] It was "the first time in thirty years that White could recall losing a vote from his proposed opinion for the Court before the draft circulated."[268]

One month later, the Court heard argument in *Franklin v. Gwinnett County Public Schools*,[269] and Hutchinson not only describes the Justices' votes at conference and how White assigned the majority opinion to himself, but also details how "[w]hen White sat down with his law clerk to outline the structure of the opinion, it was apparent

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261 Other early reviewers have agreed with this statement. *See* Mark Tushnet, Book Review, *Byron White: The Football Player as Supreme Court Justice*, 1 GREEN BAG 2D 419, 419 (1998) (praising it as "splendid"); Walter Barthold, Book Review, N.Y. L.J., July 31, 1998, at 2 (calling the book a "splendid, readable display of scholarship and writing skill"); Laura Kalman, Book Review, *John Kennedy's Nonconformist*, N.Y. TIMES BOOK REV., Aug. 23, 1998, at 10 (calling it "absorbing," a "compelling picture of the changing rhythms of the court," and a "fascinating account of a remarkable life"); Edward Lazarus, Book Review, *Measuring Up*, CHI. TRIB., Aug. 30, 1998, § 14, at 1 (calling it "an elegant, insightful and balanced portrait"); David Stebenne, PLAIN DEALER (Cleveland), Aug. 2, 1998, at I11 (calling it "scrupulously fair . . . a meticulously researched, clearly written and very interesting account").

262 *See* HUTCHINSON, *supra* note 72, at 407-31. Only fifteen pages (417-31) actually focus on October Term 1991 itself.

263 505 U.S. 717 (1992).

264 505 U.S. 833 (1992).

265 *See* HUTCHINSON, *supra* note 72, at 517 (stating that among his interviews with "[m]ore than fifty former clerks of Justice White," there were "at least two clerks from each of the three focal terms").

266 *See id.* at 475 (identifying White's four October Term 1991 clerks as Charles Eskridge, David Frederick, Jeffrey F. Pryce, and Susan A. Weber).

267 504 U.S. 71 (1992).

268 HUTCHINSON, *supra* note 72, at 417.

269 503 U.S. 60 (1992).

that precedent controlled his view of the case."[270] Furthermore, Hutchinson reports that White added "somewhat laconically that he did not care if he obtained only four votes for the view, because it was correct."[271]

In another case, *Burson v. Freeman*,[272] Hutchinson recounts how Justice Blackmun's initial draft of the majority opinion left at least one colleague unhappy: "Justice Scalia was appalled by the reasoning and treatment of the Court's case law and telephoned White to urge him to work with Blackmun on an alternate theory."[273] White declined the request.[274]

Hutchinson provides an even more notable inside-the-Court account when he describes the handling of *Jacobson v. United States*,[275] a well-known case in which a five-to-four majority reversed a child pornography conviction that had resulted from a federal "sting" operation.[276] "White successfully pushed for the Court to grant Jacobson's petition for certiorari,"[277] Hutchinson explains, but after argument the "vote at conference was 7-2 to affirm Jacobson's conviction, with White and Stevens dissenting."[278] Justice O'Connor received the majority opinion assignment, but "White produced a powerful dissent that picked up Justices Blackmun and Thomas rather readily. Then two months went by before Justice Souter switched his vote and provided White with a majority."[279]

Even more intriguing is Hutchinson's account of the Court's internal deliberations in *United States v. Fordice*,[280] an important case concerning the desegregation of Mississippi's public colleges and universities. Hutchinson describes the Justices' private deliberations:

> When the justices met in conference to vote on whether to sustain the Fifth Circuit, there was no consensus on the appropriate outcome or analysis—"nine different takes," according to one clerk in another chamber. The chief justice assigned the case to White and told him lightly to "figure it out."[281]

Hutchinson then describes how White's colleagues reacted to his *Fordice* draft:

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270 HUTCHINSON, *supra* note 72, at 418.
271 *Id.*
272 504 U.S. 191 (1992).
273 HUTCHINSON, *supra* note 72, at 420.
274 *See id.*
275 503 U.S. 540 (1992).
276 *See id.* at 541-52.
277 HUTCHINSON, *supra* note 72, at 420.
278 *Id.* at 421.
279 *Id.*
280 505 U.S. 717 (1992).
281 HUTCHINSON, *supra* note 72, at 426.

> White did not circulate a draft in *Fordice* until February 17. . . . Justice Stevens notified White three days later that he would join the opinion, then a long silence set in. Justice Blackmun provided a third vote for the opinion a month after it circulated. Justice O'Connor had reservations about White's formulation of the standard of liability, wrote a letter detailing her concerns in early March, and then visited White to discuss her concerns but did not commit herself pro or con on his opinion.[282]

Resolution of the case remained unsettled for over two more months, with only Chief Justice Rehnquist joining White's initial threesome.[283] Then White's opinion found more support:

> Justice Thomas visited White on June 5 to discuss, for the first time, his views of the case, and he left White's chambers with a promise to join the proposed opinion for the Court as long as one sentence—referring to the historical context of racially segregated colleges—was omitted from the circulating draft.[284]

Matters finally jelled when both Justices O'Connor and Kennedy formally joined White's opinion on June 16, with Justices Thomas and Souter following thereafter.[285]

Lastly, Hutchinson offers some novel inside details concerning the Court's consideration of *Planned Parenthood v. Casey*.[286] The respondent, the State of Pennsylvania, had petitioned the Court to address whether the Court should overrule *Roe v. Wade*,[287] "but Justice Souter convinced his colleagues to rephrase the questions [presented] solely in terms of the specific provisions of the statute reviewed below. Only four—the bare minimum—voted to hear the case: White, Stevens, Scalia, and Souter."[288] After oral argument, at conference on April 24, five Justices—Rehnquist, White, Scalia, Kennedy, and Thomas—voted to "uphold all of the challenged aspects of the Pennsylvania law."[289] But, as is now well known, in early June three Justices—O'Connor, Kennedy, and Souter—circulated a joint draft of an opinion that left the Chief Justice with only a four-vote minority. Hutchinson declares that "[t]he key man was Kennedy, who changed his vote. . . . Kennedy's decision triggered hard feelings between some chambers; Justice Scalia's staff canceled a group outing with the Kennedy staff to see the [Baltimore] Orioles play at Camden Yards when Scalia suddenly refused to go."[290] The final five-to-four

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282 *Id.*
283 *See id.*
284 *Id.* at 427.
285 *See id.*
286 505 U.S. 833 (1992).
287 410 U.S. 113 (1973).
288 HUTCHINSON, *supra* note 72, at 428.
289 *Id.* at 428-29.
290 *Id.* at 429.

resolution of *Casey*—with Justices Blackmun and Stevens joining the O'Connor-Kennedy-Souter trio to preserve *Roe v. Wade*—came on June 29.[291]

Even though Dennis Hutchinson barely devotes fifteen pages to inside events at the Supreme Court during October Term 1991, he provides more descriptive and revealing details about previously unpublicized Supreme Court case deliberations and opinion drafting than Edward Lazarus does in the entire 518 pages of *Closed Chambers*.[292] Furthermore, Hutchinson has done so thanks to the age-old practice of "little beasts" offering their recollections (and perhaps copies of documents that they retained). Such a tradition, for decade after decade, greatly has enriched public historiography concerning the United States Supreme Court.

In one postpublication interview, Hutchinson told the ubiquitous Tony Mauro that when it came to interviews, "[m]ost of the clerks were fairly unhelpful. . . . They were either old enough for mental lapses or young enough to still be reticent about talking."[293] This statement seems less than fully frank, for Hutchinson's extremely striking case-specific details about internal deliberations throughout October Term 1991 undoubtedly have come from one or more former White clerks and, according to Hutchinson's own account, from at least one non-White October Term 1991 clerk as well.[294]

Unlike Edward Lazarus, however, Dennis Hutchinson is no one's potential renegade. Hutchinson is a law professor at the University of Chicago and an editor of the *Supreme Court Review*. Moreover, his book has received the public endorsement of perhaps the best known, and certainly the most prolific, member of the federal circuit bench—Judge Richard A. Posner.[295] It is difficult to imagine that any of the critics who so energetically have denounced Edward Lazarus for telling inside stories will mount a similar onslaught against Professor Hutchinson.

CONCLUSION

A careful and impartial comparison of *Closed Chambers* and *The Man Who Once Was Whizzer White* that focuses on what each book dis-

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291 *See Casey*, 505 U.S. at 833.

292 *See, e.g.*, HUTCHINSON, *supra* note 72, at 429-30 (reporting that Justice White originally had been assigned the majority opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), but "lost" his majority to Justice Scalia).

293 Mauro, *supra* note 17, at 8.

294 *See supra* note 273 and accompanying text.

295 Seventh Circuit Judge Richard A. Posner has described *The Man Who Once Was Whizzer White* as "[o]ne of the very best judicial biographies ever written. It is fascinating on both the human and professional level, beautifully structured and written, and wisely and resolutely nonjudgmental." HUTCHINSON, *supra* note 72 (dust jacket).

closes about previously nonpublic details of internal Supreme Court deliberations reveals two similarities: (1) both Lazarus and Hutchinson have used exactly the same methods to make almost exactly the same sorts of novel disclosures, and (2) both authors' successes in persuading former clerks to disclose details about once-private events are simply the most recent manifestations of the long-standing historical tradition that has developed over the past sixty years.

Anything new and revelatory in *Closed Chambers* about internal Supreme Court decision making and opinion drafting comes not from any confidences that Edward Lazarus violated, but solely from Lazarus's success in persuading other former clerks to relate and document private developments that occurred in their chambers, primarily during October Term 1989. Similarly, Dennis Hutchinson has not violated any confidences stemming from his own October Term 1975 clerkship with Justice White. His most notable chapter in *The Man Who Once Was Whizzer White* stems from his ability to induce several former clerks from the relatively recent October Term 1991 to provide strikingly detailed descriptions of the Court's consideration of many significant cases and the Justices' personal interactions concerning them. As to which book and author have more extensively recounted previously undisclosed internal Supreme Court deliberations, Dennis Hutchinson's *The Man Who Once Was Whizzer White* decisively trumps Edward Lazarus's *Closed Chambers.*

But even more important than the as yet publicly-unappreciated historiographical (and ethical or professional) parallels between Edward Lazarus's and Dennis Hutchinson's books, one must recognize that both authors' use of former clerks' recollections concerning case-specific details and Justice-to-Justice interchanges stand firmly within a long and rich historical tradition. This tradition reaches back to Samuel Williston[296] and Dean Acheson,[297] and likewise includes such major portraits of internal Court decision making as Richard Kluger's *Simple Justice.*[298] The conventional wisdom, at least that propounded by John P. Frank in 1980[299] and James N. Gardner in 1998,[300] is utterly and demonstrably wrong. For decades now, dozens of talkative little beasts have made significant and highly detailed contributions to Supreme Court historiography and judicial biography. One must ap-

296 *See supra* notes 30-33 and accompanying text.

297 *See supra* notes 35-43 and accompanying text.

298 *See supra* notes 76-84.

299 *See* Frank, *supra* note 3, at 163 ("There have been anecdotes . . . but none of these has gone to details of particular cases or to work habits and attitudes of justices as they relate to other justices.").

300 *See* Gardner, *supra* note 18, at E6 (referring to "the lifelong obligation of confidentiality to which Supreme Court law clerks have historically adhered with remarkable consistency").

preciate present-day manifestations of this custom as just that—simply the latest chapters in a long-standing historical tradition. Everyone with a scholarly and historical interest in the United States Supreme Court, including Edward Lazarus and Dennis Hutchinson, has benefitted from this under-appreciated tradition. Indeed, we no doubt will continue to benefit for as long as little beasts continue to play a role in the October Terms of the future.