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A COURT OF CLERKS, NOT OF MEN:¹ SERVING JUSTICE² IN THE MEDIA AGE³

INTRODUCTION

For most of your lives, you've been running a never-ending race to succeed. Let me tell you something I hope you'll take seriously. The race is over. You've won. You are law clerks of the Supreme Court of the United States.

. . . .
[Y]ou represent the best and the brightest of the legal community After screening thousands of applications from the country's top law schools, the justices of this Court selected you. What does that mean? It means your lives are forever changed. Recruiters will offer you jobs, headhunters will take you out to expensive dinners, and potential employers will do everything in their power to hire you. You are members of the country's most elite fraternity. The current secretary of state was a Supreme Court clerk. So was the secretary of defense. Three of our nine Supreme Court justices were former Supreme Court clerks, which means that someone in this room has a pretty good shot at becoming a Supreme Court justice. From this moment on, you are the hottest property on the board. You're Boardwalk *and* Park Place. And that means you have power.

. . . .
This is an important job—probably more important than any job you'll ever have. For over two hundred years, the Supreme Court has steered our country through its greatest controversies. Congress may pass the laws, and the president may sign the laws, but it's the Supreme Court that decides the law. And starting today, that power is yours. Alongside the justices, you will draft decisions that change lives. Your input will constantly be sought, and your ideas will certainly be implemented. In many instances, the justices will rely entirely on your analysis. They'll base their opinions on your research. That means you affect what they see and what they know. There are nine justices on this Court. But your influence, the power that you hold, makes you the tenth justice.⁴

1. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (philosophizing that we have “a government of laws and not of men”). See also *infra* note 34 (commenting on the historic lack of women hired for clerkships).

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

3. Steve France, *A Penchant For Privacy: Court Discourages Advocates Angling For Openness*, A.B.A. J., Dec. 1998, at 38, 38-39 (stating that the fact that the Supreme Court has escaped the “media-saturated celebrity culture” is “a little magic trick that gets more amazing every year”).

4. BRAD MELTZER, *THE TENTH JUSTICE* 3-4 (1997).

Judicial clerks have been criticized for inflating their importance within the judicial milieu. Nevertheless, clerks have been influential in judicial decision-making, certainly to a significant degree. Finding to what degree has inspired a body of literature about clerk participation in the judicial process. Tales of the role of judicial clerks reside in various mediums, including case law, law review volumes, newspaper articles, and both fiction and non-fiction books. The crescendo of debate concerning clerks mirrors their prominence in history, increasing steadily throughout the years.⁵

Justice Louis Brandeis believed unelected United States Supreme Court Justices commanded public respect because they “do their own work.”⁶ However, there has been a slow fade of the romantic images of a Justice Oliver Wendell Holmes or a Judge Learned Hand laboring in solitude to handcraft an eloquently written opinion to endure the ages. Today, clerks often take up their judge’s pen.⁷ Coinciding with this delegation of judicial responsibility to clerks has been the desire to peer behind the mysterious curtain of judicial chambers. Particularly, the increased addition of these young, ambitious lawyers to the Supreme Court-town has fanned society’s curiosity.⁸

In American practice, a judge, in part, is a wordsmith. Jurists study the stories of the interested parties, examine the law related to their complaints, and use that law, public policy, and their life experiences to determine an appropriate outcome. All of these steps in the decision-making process are significant. The judge’s written product is of equal significance because it endures. In modern times, the legal profession has come to rely on written opinions to effectively serve their clients.⁹ Indeed, written opinions are one of the primary sources an

5. See JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* 2 (1980) (“Writing about law clerks, like writing about sex, has only recently become respectable.”).

6. ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 201 (1958).

7. See *infra* note 58 and accompanying text.

8. The Supreme Court has recently been described by a former clerk as a “minisociety unto itself, not unlike a small town—insular, intensely private” EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 24 (1998). See Robert Marquand, *Junior Scribes of High Court*, *CHRISTIAN SCI. MONITOR*, July 13, 1998, at 1 (stating that the Supreme Court clerks and Justices are “all inside a hermetically sealed federal building where the work is shrouded in secrecy”).

9. Early on in our nation’s history, the question “was not who wrote the decisions but whether they were written at all.” WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 31 (1996). The Supreme Court did not issue written opinions on a regular basis until the appointment of Chief Justice John Marshall. *Id.*

attorney has to work with—all of it crafted within judicial chambers.¹⁰ As mentioned, in many instances it appears that clerks are the original authors of the opinions published in the United States Reports. This has moved critics to question whether opinion-writing bestows upon clerks a responsibility too great. While an array of responses have been proposed, one theme is common—the position of a clerk within the judicial-town is an institution unlikely to die in the near future.¹¹

At the most, this Comment's purpose is to encourage judges, specifically the nine Justices of the Supreme Court,¹² to reclaim the responsibility of writing opinions; at a minimum, it is to inspire clerks to rethink their role in the media age. Heavy dockets may make opinion-writing by judges wholly impractical. However, judges who defer to their clerk's pen must maintain a clear set of limits to ensure a proper image for the courts. When judges fail to take affirmative steps, clerks themselves must confine their efforts to better serve the consumers of court opinions, namely practitioners, historians and judicial biographers, and the public.

Part I of this Comment outlines the historical evolution of the clerk and considers the functions of judicial opinion-writing in society.¹³ Part II discusses why judges have relinquished their dominance in opinion-writing, how clerks should handle their duties, and why the law's consumers should be concerned about clerk opinion-writing.¹⁴ Through examining the tasks judges delegate to clerks, society can begin to define tolerable parameters for clerkships. In light of the concerns that practitioners, historians, and the public should have about clerks, Part III assesses the impact clerks will continue to have on soci-

10. A glimpse at *The Bluebook* informs users that “[c]ertain kinds of authorities are considered more useful—or authoritative—than other kinds” and that “[i]f more than one authority is cited in support of a proposition, these supporting authorities are usually listed so that the more authoritative ones appear first.” *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 5 (16th ed. 1996). Cases fall in line after “Constitutions,” “Statutes,” and “Treaties.” *Id.* at 25. *But see* Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1349 (1986) (accusing *The Bluebook* of being “part of the surprising juvenescence of the legal profession; students study the laws laid down by other students, and teachers teach the law laid down by their just-graduated students, the judges’ law clerks”).

11. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 158 (1996) [hereinafter *CHALLENGE AND REFORM*]; David Crump, *Law Clerks: Their Roles and Relationships With Their Judges*, 69 JUDICATURE 236, 238 (1986). For information about clerking at the Supreme Court, see *Guide to Law Clerks and Clerking at the U.S. Supreme Court* (visited Oct. 6, 1999) <<http://jurist.law.pitt.edu/clerk.htm>>.

12. Out of necessity, the focus of this Comment hinges on the functioning of the United States Supreme Court. The Supreme Court's place in the structure of the judicial system, coupled with the multitude of information it generates, were considerations in choosing this lens. However, many of the issues discussed touch, at least minimally, on all court levels, both state and federal.

13. *See infra* notes 16-198 and accompanying text.

14. *See infra* notes 199-308 and accompanying text.

ety and how judges and clerks may adjust their practices to halt the unintended consequences of the media age.¹⁵

I. BACKGROUND

A. *The History Of The Clerk*

1. *An Institution Is Born*

In 1875, Horace Gray, then Chief Justice of the Massachusetts Supreme Court, began hiring highly-ranked, recent Harvard Law School graduates as clerks.¹⁶ When Gray was appointed to the United States Supreme Court in 1882, he continued the practice.¹⁷ Justice Gray paid his clerks' salaries out of his own pocket.¹⁸ Not until the 1922 Appropriation Act did Congress authorize each Justice to employ one clerk at an annual salary of \$3,600.¹⁹ In 1924, the law clerk position at the Supreme Court became permanent.²⁰ Scholars have correlated the introduction of clerks with the burgeoning docket which began to overwhelm the Court.²¹ States soon mimicked the Supreme Court's practice, and by 1942, approximately fifty percent of top state courts employed clerks.²²

As the caseload of the Supreme Court expanded, so did the number of clerks.²³ A Supreme Court clerk's early responsibilities included serving as a secretary, an assistant, and sometimes a chauffeur.²⁴ Over time, clerks were transformed into an invaluable screen of information for the increasingly busy Justice.²⁵ Today, each of the nine Supreme Court Justices has the liberty to hire as many as four law clerks per October Term.²⁶ Including the Supreme Court, there are

15. See *infra* notes 309-322 and accompanying text.

16. See Martha Swann, *Clerks of the Justices*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 159 (Kermit L. Hall ed., 1992).

17. See *id.*

18. See *id.* at 160.

19. See *id.*

20. See *id.*

21. See Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 *VAND. L. REV.* 1125, 1133 (1973); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 *OR. L. REV.* 299, 301 (1961).

22. See OAKLEY & THOMPSON, *supra* note 5, at 18.

23. See *id.* at 21.

24. "One clerk was recommended to one Justice for his skills as a barber." John G. Kester, *The Law Clerk Explosion*, *LITIG.*, Spring 1983, at 20, 22. Perhaps the days of acting as chauffeur are not yet over. See *United States v. Velasquez-Carbona*, 991 F.2d 574, 575-76 (9th Cir. 1993) (holding that it was not prejudicial to the case for a law clerk to drive a juror to the bus stop after arguments ran late on the final day of a trial).

25. See Baier, *supra* note 21, at 1163-71.

26. See Crump, *supra* note 11, at 238.

approximately one thousand federal judgeships.²⁷ The federal system employs over two thousand clerks to assist these judges with their important work.²⁸

Federal judges have complete discretion in selecting their elbow clerks. Hundreds of applications flood chambers each year, the exact number depending on the judge and his or her place in the judicial hierarchy.²⁹ Judges vie for clerks who are "superstars."³⁰ The clerk selection process has been described as an "undignified"³¹ and "demeaning"³² "frenzied mating ritual."³³ The chosen few have consistently been alumni of the most prestigious schools³⁴ and have grad-

27. See ADMINISTRATIVE OFFICE OF THE UNITED STATES, REPORT OF THE DIRECTOR: ACTIVITIES OF THE ADMINISTRATIVE OFFICE 6 (1990).

28. See *id.*

29. Some judges have a reputation as a "feeder" judge, which means the individuals they hire as clerks generally go on to clerk for a Supreme Court Justice. LAZARUS, *supra* note 8, at 19.

30. "When it comes to hiring law clerks, there is no collegiality." David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash with Judicial Decorum Left in the Dust*, N.Y. TIMES, Mar. 17, 1989, at B4. One student commented, "[the clerkship process] was positively surreal, the most ludicrous thing I've ever been through. . . . Here are these brilliant, respected people - they're Federal judges for God's sake - and they're behaving like 6-year olds." *Id.* For a more complete foray into the rigorous debate surrounding the clerk selection process, see, for example, Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991) (arguing that reform is unnecessary because the free market system elicits the finest candidates); Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J. LEGAL EDUC. 150, 152 (1986) ("I think some of my colleagues are frequenting maternity wards to make sure they get the 'best' clerks."); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765 (1993) (contributing to the argument that the medical model would reduce costs and increase information in clerk selection); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L. REV. 1097 (1992) (replying to Kozinski's article to argue that the medical model would bring more respect to the otherwise demeaning selection process); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990) (advocating that judges should reform the clerk selection process to model medical matching programs).

31. See Wald, *supra* note 30, at 156.

32. See *id.*

33. See *id.* at 152 (citing Margolick, *supra* note 30, at B4).

34. See LAWRENCE BAUM, *THE SUPREME COURT* 18 (1995) ("[I]n the 1993 term, three-quarters of the clerks had degrees from four law schools (Yale, Chicago, Stanford, and Harvard)."). In the 1960s, 56% of the Supreme Court's clerks had attended Harvard, Yale, or Stanford. Mark R. Brown, *Gender Discrimination In The Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 369 n.43 (1986). In the 1970s, 51% were graduates of Harvard, Yale, Stanford, or Virginia. *Id.* In the 1980s, 52% were alumni of Harvard, Yale, Chicago, or Columbia. *Id.* The 1990s have witnessed 60% of clerks from Harvard, Yale, or Chicago. *Id.*

The few number of women chosen to clerk has been a source of debate. Justice William Douglas hired Lucille Lomen to clerk in 1944, probably due to the impact on America's work force during the Second World War. *Id.* at 362. Another female clerk was not hired until 1966 when Justice Hugo Black hired Margaret J. Corcoran. *Id.* at 363. Amazingly, during the revolutionary 1960s, only two of the 169 clerks hired by the Supreme Court were female. *Id.* Even Justice William Brennan, known for his defense of minorities, never hired a female clerk until the last two years he sat on the Court. See Marquand, *supra* note 8, at 1. See also Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 19 n.29 (1994) (finding

uated at the top of their class.³⁵ Most Supreme Court clerks have served a lower federal court judge for at least one year before a tour of duty at the Court.³⁶ Completing a clerkship, particularly at the Supreme Court, translates into substantially enhanced career opportunities.³⁷

that Justice Harry Blackmun hired 32 female law clerks by the time of his retirement—more than any other Justice at that time); Sylvia A. Law, *Good Intentions are Not Enough: An Agenda on Gender for Law School Deans*, 77 IOWA L. REV. 79, 84 n.16 (1991) (arguing that the clerkship selection process fosters predominantly white male mentoring networks between judges, former clerks, and law professors); Richard C. Reuben, *Not 'Year of the Woman' For Supreme Court Clerks*, CHI. DAILY L. BULL., Oct. 6, 1992, at 2 (reporting that the Supreme Court hired the least number of female clerks during that term compared to the rest of the decade). See generally *Hall v. Small Bus. Admin.*, 695 F.2d 175, 178 (5th Cir. 1983) (quoting a magistrate as saying, “I don’t think that any female law clerk is going to give me a lot of input on how to decide a case”).

Furthermore, Supreme Court critics have noted that relying on these few schools for clerks has caused there to be only a small number of minority clerks. See Linn Washington, Jr., *Bringing More Blacks To Clerking*, A.B.A. J., Feb. 1999, at 60, 60. One commentator wrote:

Fatima Purdie is something of an anomaly among those who clerk for federal judges. Neither male nor white, she attended neither Harvard, Yale nor any other top-20 law school.

....

[Perhaps many] factors [have] led to the current, dismally low number of minorities holding judicial clerkships.

....

Despite disagreement over the role of racism in Court hiring practices, many on both sides of this issue share the belief that justices do discriminate by favoring applicants from a few elite law schools

Id. at 60-61. See Frank H. Wu, *Examining The Supreme Court's Clerkship*, CHI. TRIB., Nov. 19, 1998, at 31 (reporting that thousands gathered on the steps of the Supreme Court to protest the lack of minority clerks).

35. See BAUM, *supra* note 34, at 18. “They are the top of the top 1 percent in law school. Ivy Leaguers, more often than not. Best grades. Best recommendations. Top guns of the emerging generation of legal minds. Constitutional Wunder-kinder, cocky and sure.” Marquand, *supra* note 8, at 1.

36. See BAUM, *supra* note 34, at 18.

37. See Kozinski, *supra* note 30, at 1709 (instructing that a “young lawyer’s choice of a clerkship can have a significant impact on his further career development”); Stewart Maculay, *The Judge as Mentor: A Personal Memoir*, 36 J. LEGAL EDUC. 144, 144 (1986) (“There is a mythical picture of a judicial clerkship that floats in the culture of American law schools.”); J. Daniel Mahoney, *Forward: Law Clerks—For Better or For Worse?*, 54 BROOK. L. REV. 321, 321-22 (1988) (revealing that the “most prestigious law firm” and “teaching jobs and government positions” are open to clerks); Norris, *supra* note 30, at 769 (noting that a clerkship is an important credential for teaching because almost two-thirds of Harvard’s tenure-track faculty once clerked for federal judges); Oberdorfer & Levy, *supra* note 30, at 1100 (lamenting that “[s]tudents should not want to clerk merely for prestige and access to future career opportunities . . . [but should want to clerk] as an opportunity for public service”); Karen O’Connor & John R. Hermann, *The Clerk Connection: Appearances Before The Supreme Court By Former Law Clerks*, 78 JUDICATURE 247, 247 (1995) (writing that law firms have a “yearly competition to sign clerks that rival[s] the NBA draft”); Wald, *supra* note 30, at 155 (stating that the small number of clerkships available make them crucial to certain careers in law, such as teaching); Joan Biskupic, *Clerks Gain Status, Clout In The ‘Temple’ of Justice*, WASH. POST, Jan. 2, 1994, at A1 (revealing that

Historically, the relationship between judge and clerk has been a very close one.³⁸ A bond forms because of the intensity of working together on complex issues as well as from the deep need for complete confidentiality and trust. Confidentiality and trust are necessary for the judge-clerk relationship to effectively function.³⁹ Clerks become so intertwined with their judge that clerks have enjoyed absolute immunity when their actions are determined to be part of the judicial function.⁴⁰ However, on occasion, a clerk's actions have been found to undermine the propriety of a judge's decision-making capacity.⁴¹ As a result, judges have had to recuse themselves or dismiss their clerk from working on a particular case.⁴²

In light of these developments, some scholars have deemed clerking an "institution"⁴³ and the clerk's role in the judiciary as part of a

Supreme Court clerks are "guaranteed near-reverence," "a fat salary," as well as "power and influence," and that "[l]egal academia is dominated by former clerks," and "big law firms" "collect them like trophies"). Indeed, a clerk may dream that their clerkship will eventually lead them back to the Supreme Court as a Justice as it did for Chief Justice William H. Rehnquist (clerk for Justice Robert H. Jackson October Term 1952), Justice John Paul Stevens (clerk for Justice Wiley B. Rutledge October Term 1947), Justice Byron R. White (clerk for Justice Fred M. Vinson October Term 1946), and Justice Stephan Breyer (clerk for Justice Arthur Goldberg October Term 1964). *But see* William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129, 130 (1986) (disputing the advantages of clerkships and describing how elite law school culture leads students to overestimate the clerkship's value).

38. *See* Wald, *supra* note 30, at 153 ("The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.").

39. Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1189 n.38 (1973) (proposing that confidentiality has been "an honored tradition among law clerks").

40. *See, e.g.*, *Oliva v. Heller*, 670 F. Supp. 523, 526 (S.D.N.Y. 1987) (holding that for the "purposes of absolute judicial immunity, judges and their law clerks are as one"); *DeFerro v. Coco*, 719 F. Supp. 379 (E.D. Pa. 1989) (holding that a judicial clerk was entitled to absolute immunity because he acted pursuant to a judge's instructions). *See also* Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 6-7 (1990) (stating that clerks are entitled to share in judicial immunity because clerks' work is judicial in nature).

41. *See* *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (stating that a clerk's continued "participation with the magistrate in a case in which her future employers were counsel gave rise to an appearance of partiality"); *Courting Conflict?*, LEGAL TIMES, May 13, 1996, at 2 (criticizing Justice Clarence Thomas for hiring a Senate Judiciary Committee counsel as a clerk because cases challenging legislation the clerk worked on might have arisen while he clerked at the Court).

42. *See generally* *PepsiCo, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) (deciding that accidental contact by clerks with "headhunters" from firms with cases before judge mandated recusal); *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593 (5th Cir. 1977) (finding that the clerk's visit to the scene of accident and report to judge about his findings mandated recusal); *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980) (discovering that a clerk's acceptance of a job with plaintiff's firm during trial mandated recusal).

43. *See* CHALLENGE AND REFORM, *supra* note 11, at 158.

growing cancerous "bureaucracy."⁴⁴ Generally, as institutions expand, it becomes increasingly difficult to control individual members.⁴⁵ With more clerks roaming within judicial chambers, less personal contact is possible, which can translate into decreased overall communication between a judge and clerk.⁴⁶ The absence of adequate communication can ultimately stifle the quality of the work produced by the relationship. As a result of the increase in caseload, along with the growth in the number of clerks hired, the role of clerk has evolved considerably since its inception.

2. *The Evolution Of Responsibilities*

Today, clerks are bound not only by the Rules of Professional Conduct,⁴⁷ but also by the Code of Judicial Conduct,⁴⁸ and the more stringent Code of Conduct for Law Clerks.⁴⁹ However, no statutory provisions have been enacted to guide what functions clerks can and cannot perform. Within the existing strictures, each judge has reign over the development of his or her clerk's particular role. Throughout history, judges have assigned clerks to perform a myriad of functions.⁵⁰ At times, judges have been accused of going too far in dele-

44. See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) (discussing the problems that may arise when judges rely on law clerks) [hereinafter *CRISIS AND REFORM*]; Harry T. Edwards, *A Judge's View on Justice, Bureaucracy, and the Legal Method*, 80 MICH. L. REV. 259 (1981) (rebutting Joseph Vining's arguments *infra*); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983) (applying Max Weber's and Hannah Arendt's analyses of bureaucracy to the federal judiciary); Richard B. Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60 (1982) (concluding that since "we have entrusted judicial tasks to judges—not to law clerks," bureaucratization is "an inappropriate course for the courts"); Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981) (discussing generally the problems that arise with growth in judicial staff); Gilbert S. Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469 (1983) (responding to Fiss's article); Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344 (1985) (reviewing *CRISIS AND REFORM*); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980) (recognizing the increase of institutional judging); Joseph Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981) (commenting on the need to look closely at the legal method in light of the possible bureaucratization of the courts); Patricia M. Wald, *The Problem With the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766 (1983) (defending the increased staff as helpful to the administration of justice).

45. See *CHALLENGE AND REFORM*, *supra* note 11, at 176.

46. See *id.* at 177.

47. MODEL RULES OF PROFESSIONAL CONDUCT (1995).

48. MODEL CODE OF JUDICIAL CONDUCT (1990).

49. CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (1989).

50. See WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975*, 171-72 (1980).

Holmes . . . took a clerk largely as a companion. Brandeis used a clerk as researcher for the voluminous footnotes often found in his opinions. Stone would dictate his opin-

gating judicial duties.⁵¹ Overall, most of the tasks performed by clerks are not controversial and are universal among chambers.

One of the principal responsibilities of a clerk has been to perform legal research. Verifying citations included in the parties' briefs can be a tedious task, but an important one. This research provides judges with information necessary to make an informed decision.⁵² This role has been the subject of some controversy because a clerk's research can skew a judge's perspective.⁵³ However, due to the rise in the caseload, a judge's time is better spent on other pursuits. Furthermore, Supreme Court clerks participate in a heavily debated practice known as the "cert pool system."⁵⁴ More than seven thousand petitions for writs of certiorari arrive at the doorstep of the Supreme

ions, and when he stated a principle of law he would say in parentheses "Cite cases." The draft would go to the clerk, who would then look for the cases supporting Stone's position.

....

Justice Murphy . . . relied heavily on [a clerk] in preparing the first draft of his opinions for the Court.

....

I used my law clerks primarily to certify the accuracy of my opinions as to facts and precedents The law clerk would write a memorandum on each petition for certiorari and on each jurisdictional statement, but I went over each case independently of him [A]t times I asked him to draft a concurring or dissenting opinion for me, which I in turn would revise or rewrite.

Id.

51. See *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1446-47 (10th Cir. 1990) (finding that a law clerk settled the jury instructions and that this was an improper function for the clerk); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523-24 (11th Cir. 1988) (deciding that having a law clerk preside over a hearing gave rise to the appearance of impropriety); *United States v. Sloan*, 811 F.2d 1359, 1361 n.2 (10th Cir. 1987) (remarking that having a law clerk settle the instructions in a criminal case was improper, although parties did not raise the issue); *Starshock, Inc. v. Shusted*, 370 F. Supp. 506, 507-08 (D.N.J. 1974) (commenting that the tasks of fact finding and reporting to judges about allegedly obscene nude dancing are "a far cry from the routine duties of a judicial law clerk").

52. See Hon. Jerry A. Brown, *John Minor Wisdom: Reminiscences of an "Old" Law Clerk*, 69 TUL. L. REV. 1411, 1413 (1995).

53. See Swann, *supra* note 16, at 160 (writing that clerks "research questions of law" and that "justices often rely on their clerks' summaries and recommendations").

54. The cert pool was created in 1972 "when Chief Justice Warren Burger and Justices Byron White, Harry Blackmun, Lewis Powell, and William H. Rehnquist pooled the efforts of their clerks." Michael F. Sturley, *Cert Pool*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 133 (Kermit L. Hall ed., 1992). The 1980s and 1990s brought Justice Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Steven Breyer, and Ruth Bader Ginsburg to the Court and the cert pool. See *id.*; Tony Mauro, *Ginsburg Plunges into the Cert Pool*, LEGAL TIMES, Sept. 6, 1993, at 8. Justice John Paul Stevens has consistently refused to take the plunge into the cert pool. See LAZARUS, *supra* note 8, at 31. The practice has been controversial because clerks hold the power to decide whether a case is "certworthy." *Id.* Essentially, clerks choose which cases the Court will potentially hear. See Kenneth W. Starr, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23; Kenneth W. Starr, *Rule of Law: Trivial Pursuits at the Supreme Court*, WALL

Court each term.⁵⁵ Clerks sift through these thousands of petitions to identify the small number of cases which are considered "certworthy."⁵⁶ The participating Supreme Court clerks then write "pool memos" for the participating Justices.⁵⁷ These memos usually include a brief summary of the case, a selective statement of the facts, the lower court disposition, an analysis of the information, and a recommended disposition. Due to the vast number of cert petitions, the Justices generally rely solely upon the clerk's memo when making their decision as to whether to grant cert.

Supreme Court clerks also write opinions.⁵⁸ The opinion-writing process is complex.⁵⁹ Chief Justice William Rehnquist has openly described the opinion-writing procedures he has delineated for his

St. J., Oct. 6, 1993, at A17. Opinion-writing, coming later in the judicial process, and the focus of this Comment, is similarly controversial because of the potential influence clerks may hold.

55. See LAZARUS, *supra* note 8, at 31 (estimating "more than 6,000 petitions"); Marquand, *supra* note 8, at 1 (counting "7,500 petitions").

56. LAZARUS, *supra* note 8, at 31.

57. *Id.*

58. See *id.* at 271 (writing that during the October Term of 1988, "the vast majority of opinions the Court issued were drafted exclusively by clerks"); DOMNARSKI, *supra* note 9, at 30 (stating that "the law clerks of the Supreme Court Justices are fully institutionalized in the opinion-writing process"); LOUIS LUSKY, *OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA* 156 (1993) (admitting that the Justices "now function . . . as managing partners of five-member law firms" and "often delegate to law clerks the task of drafting full opinions"); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 148 (1990) ("[M]ost judicial opinions are written by the judges' law clerks rather than by the judges themselves."); BERNARD SCHWARTZ, *SUPER CHIEF EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 340-413 (1984) (revealing that Justice Felix Frankfurter's opinion in *Abel v. United States* and his dissents in *Baker v. Carr* and *Elkins v. United States* "[were] almost entirely the clerk's work"); Crump, *supra* note 11, at 238 (acknowledging that judges commonly delegate to clerks the task of writing a first draft of an opinion); Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 *UCLA L. REV.* 75, 120 (1998) ("Our society frequently indulges the fiction that United States Supreme Court Justices write the opinions that bear their names."); Mahoney, *supra* note 37, at 339 (admitting that "[l]aw clerks are often responsible for a judge's first draft"); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. CHI. L. REV.* 1371, 1373 (1995) [hereinafter Wald, *Judicial Writings*] (arguing for increased disposal of cases without opinions because "[o]nly the parties and their lawyers read them, and for the most part, law clerks, not judges, draft them"); Wald, *supra* note 30, at 154 (using clerks to draft opinions is routine); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 *EMORY L.J.* 1147, 1171 (1994) (noting the delegation of opinion-writing to clerks due to increased demands on judges); Philip Kurland, *Making and Remaking the Law of the Land*, *N.Y. TIMES*, Sept. 20, 1987, at 3 (writing that clerks enjoy an extraordinary role in the writing of opinions that become the "law of the land" and that Justice Louis Brandeis would be "aghast").

59. Clerks have dense information at their disposal in preparing to draft an opinion, including transcripts and lower court opinions. However, clerks have been warned by some courts not to wander outside certain parameters in gathering information. See *Knop v. Johnson*, 977 F.2d 996, 1011 (6th Cir. 1992) (finding that clerk's ex parte request for information from counsel should not have been made); *Price Bros. v. Philadelphia Gear Corp.*, 649 F.2d 416, 419 (6th Cir. 1981) (finding off-the-record view of plaintiff's plant by clerks was presumptively prejudicial but ulti-

clerks. At conference, a Justice is assigned to write the majority opinion.⁶⁰ Since clerks are barred from attending this conference, the Chief Justice speaks with his clerks afterward about the discussion and decision made at the conference.⁶¹ Justice Rehnquist provides his clerks with a summary of the conference discussion, a description of the result reached by the majority, and his or her views on how to write the opinion.⁶² His clerks are then required to prepare a first draft within the next ten days.⁶³ Typically, Justice Rehnquist, similar to the other Justices, edits and revises his clerks' work product.⁶⁴

Although Justice Rehnquist revises the clerks' drafts, he admits that the "practice of assigning the task of preparing first drafts of Court opinions to law clerks who are usually just one or two years out of law school may undoubtedly and with some reason cause raised eyebrows in the legal profession and outside of it."⁶⁵ The Chief Justice, however, assures that his clerks are not set loose to "frolic" on their own.⁶⁶ When Justice Rehnquist is satisfied with the opinion, it is circulated to the other Justices for review.⁶⁷ After reviewing the opinion, the Justices and their clerks suggest changes, agree with the opinion, or de-

mately overcome); *Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593, 596-98 (5th Cir. 1977) (finding that testimony at trial by clerk regarding visit to site was prejudicial).

60. The Justices meet twice a week to deliberate on cases currently before the Court. See Robert J. Janosik, *The Conference*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 174-75* (Kermit L. Hall ed., 1992). The Chief Justice initiates the discussion and it proceeds in order of seniority. *Id.* If four Justices agree to grant review, the case is scheduled for briefing and oral argument. *Id.* No formal records are typically kept of the conferences because of the need for secrecy. *Id.* See WILLIAM H. REHNQUIST: *THE SUPREME COURT, HOW IT WAS, HOW IT IS* 295 (1987) (conveying his view that the purpose of conference "is not to persuade one's colleagues through impassioned advocacy to alter their views, but instead by hearing each justice express his own views to determine therefrom the view of the majority of the Court").

61. No clerks, secretaries, or visitors are permitted behind the closed doors once a conference has started. See Janosik, *supra* note 60, at 174; see also Edward P. Lazarus, *The Case of the Severed Arm: A Tribute to Associate Justice Harry A. Blackmun*, 43 AM. U. L. REV. 725, 727 (1994) (recalling that Justice Blackmun would "summarize the remarks of each of the justices").

62. See REHNQUIST, *supra* note 60, at 298.

63. See *id.* Edward Lazarus, former clerk to Justice Blackmun, described how Justice Rehnquist placed a "premium on efficiency." LAZARUS, *supra* note 8, at 285. Justice Stevens has reportedly complained to Justice Rehnquist that his assembly-line approach to opinion-writing was having an "adverse effect on quality." *Id.* at 286.

64. See REHNQUIST, *supra* note 60, at 298-99. This judicial breed, the so-called "Editor-Judge," has been criticized as one that transforms a judge from a craftsman into an editor. See *infra* note 303. There are some judges who do not assign this task to their clerks, but these judges are becoming rarer with time.

65. REHNQUIST, *supra* note 60, at 299.

66. See *id.* at 300.

67. See *id.* at 301-02.

cline to join the opinion.⁶⁸ Essentially, clerks have evolved from secretaries to opinion-writers.

B. *The Relationship Models*

Given the diversity of judges, each judge-clerk relationship carries unique expectations; nonetheless, the varying work styles of clerks have formed certain patterns. Some aspects of these clerkship models are molded from the true tasks clerks have undertaken, while others have grown up around myth. Mystery has surrounded the judiciary due to the secrecy clouding the third branch of government.⁶⁹ Given the mystique, myths are, at times, the only source of information one can gather about the Supreme Court. The image of the judiciary has become a great concern. Even published case law has demonstrated

68. *See id.* at 302-03.

69. The introduction to *The Brethren* speaks of the secrecy surrounding the Court as justification for publication of the ground-breaking book.

For those nearly two hundred years, the Court has made its decisions in absolute secrecy, handing down its judgments in formal written opinions. Only these opinions, final and unreviewable, are published. No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view.

The Court has developed certain traditions and rules, largely unwritten, that are designed to preserve the secrecy of its deliberations. The few previous attempts to describe the Court's internal workings—biographies of particular Justices and histories of individual cases—have been published years, often decades, after the events, or have reflected the viewpoints of only a few Justices.

BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 1 (1979). Another commentator expressed the hidden identity of the Justices as follows:

Each justice is a powerful figure, with the ability to cast one of nine votes in decisions that have considerable impact on the lives of Americans. Yet the justices are hardly famous. In a 1989 survey, people were asked the names of the associate justices; 23 percent mentioned Sandra Day O'Connor, and Anthony Kennedy ranked second at 7 percent. Nine percent of the respondents remembered that William Rehnquist was chief justice; by comparison, 54 percent recalled that the judge of "The People's Court," a television program, was Joseph Wapner.

BAUM, *supra* note 34, at 17-18.

Of course, the recent phenomenon of new "judge" shows (Judge Judy, Judge Mills Lane, etc.) invading the television docket may spark the public's interest in the court system. Great public interest has also been demonstrated for channels such as C-SPAN and COURT TV. The nomination battles over Robert Bork and Clarence Thomas contributed to the increase of public attention to the Supreme Court. For a glimpse into the blossoming debate about whether the Supreme Court should be more open to public scrutiny, see Todd Piccus, Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 *TEX. L. REV.* 1053, 1067-97 (1993); Joan Biskupic, *Marketer of Court Tapes Risks Supreme Censure: Oral Arguments of Famous Cases Were Reproduced Despite Agreement With National Archives*, *WASH. POST*, Aug. 30, 1993, at A6; Eleanor Randolph, *Justices Continue Ban on Courtroom Cameras: Video's Trial Run Proves Unpersuasive*, *WASH. POST*, Nov. 1, 1989, at A23.

that the “appearance” of the courts is key to the legitimacy of the judiciary.⁷⁰ Therefore, both the reality and the myths of how clerks operate are important to our understanding of the role clerks have undertaken, and to the formation of the relationship models.

1. *The Clerkship Ideal: The Sounding Board Model*

Under the “sounding board” model, the judicial clerk brings the adversarial process into the chambers, thereby forcing the judge to justify each step of reasoning.⁷¹ The clerk functions as a legal innovator, introducing new ideas and perspectives, but not chipping away at the judge’s decision-making power. In essence, the clerk is a sounding board. His or her goal is to help sharpen the judge’s view of a case.⁷² A judge asserts a proposition and invites the clerk to intellectually attack it to test potential strengths and weaknesses. A clerk is uninhibited in participating in rigorous debate with the judge.⁷³ The quintessential sounding board scenario is demonstrated by Judge Learned Hand’s relationship with his clerks.

70. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 48, at Canon 2 (“A judge shall avoid impropriety and the appearance of impropriety of the judge’s in all activities.”) (emphasis added); see also *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. 1995) (citing Canon 2); *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (referring to the “appearance of partiality”); *In re Dean*, 717 A.2d 176, 184 (Conn. 1998) (“Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself”); *Abington Ltd. Partnership v. Heublein*, 717 A.2d 1232, 1235 n.9 (Conn. 1998) (citing Canon 2); *In re Green Rivers Forest, Inc.*, 190 B.R. 477, 482 (Bankr. M.S. Ga. 1995) (same); *In re Edwards*, 694 N.E.2d 701, 708 (Ind. 1998) (same); *In re Harris*, 713 So.2d 1138, 1141 (La. 1998) (same); *In re Ferrara*, 582 N.W.2d 817, 820 (Mich. 1998) (cautioning judges to avoid the “appearance of bias”); *Mississippi Comm’n on Judicial Performance v. Spencer*, 725 So. 2d 171, 176-77 (Miss. 1998) (citing Canon 2); *Mississippi Comm’n on Judicial Performance v. Thomas*, 722 So. 2d 629, 630 (Miss. 1998) (same); *In re Tesmer*, 580 N.W.2d 307, 315 (Wis. 1998) (stating that judges must “[avoid] the appearance that the process might be unfair”).

71. See OAKLEY & THOMPSON, *supra* note 5, at 37; George D. Braden, *The Value of Law Clerks*, 24 MISS. L.J. 295, 296 (1953) (“Discussion of a case serves to clarify a man’s thoughts, and a clerk can be of great value to a judge by asking pointed questions, posing alternatives, and generally acting as a devil’s advocate.”).

72. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 289-91 (1994). Part of Gunther’s knowledge of Judge Hand stems from his clerkship for Judge Hand before going on to clerk for Chief Justice Earl Warren at the Supreme Court.

73. See James L. Volling, *Warren E. Burger: An Independent Pragmatist Remembered*, 22 WM. MITCHELL L. REV. 39, 58 (1996) (reminiscing about how Chief Justice Burger often used his clerks as sounding boards). See also WOODWARD & ARMSTRONG, *supra* note 69, at 65 (explaining that Justice White would press his clerks to clarify their own, as well as his, arguments); Kevin J. Worthen, *Shirt-Tales: Clerking for Byron White*, 1994 BYU L. REV. 349, 350 (remembering how Justice White would use clerks as sounding boards so he could “fully consider all possible arguments and points of view”).

a. Judge Hand: The Father of the Sounding Board

In 1924, Judge Hand was appointed to the United States Court of Appeals for the Second Circuit.⁷⁴ He eagerly hired a clerk to serve at his side.⁷⁵ Judge Hand has been described by a former clerk as having “a deep-rooted open-mindedness and skepticism about his work . . . [with] a genuine capacity for listening and indeed a deep-seated desire for points of view different than his own.”⁷⁶ Judge Hand often jokingly referred to his clerks as “puny judges.”⁷⁷ He preferred face-to-face contact with his clerks, unlike most other judges at the time who preferred communication through their clerks’ written work.⁷⁸ Judge Hand’s clerks were expected to familiarize themselves with the cases pending before the court and to discuss them candidly with him.⁷⁹ He primarily used his clerks to sharpen his view on a case.⁸⁰ Judge Hand would press a passive clerk and insist on continuous oral debate.⁸¹ The clerkship model developed by Judge Hand has endured and has been codified in published opinions.

b. *Fredonia*: The Sounding Board Codified

In 1978, the sounding board model was codified in case law in *Fredonia Broadcasting Corp. v. RCA Corp.*⁸² The *Fredonia* case involved a breach of contract for the sale of broadcasting equipment.⁸³ The principle issue on appeal was whether the trial court properly denied RCA’s motion to disqualify either *Fredonia*’s counsel or the presiding judge.⁸⁴ RCA wanted *Fredonia*’s counsel disqualified because

74. See GUNTHER, *supra* note 72, at 288-89.

75. See *id.* at 288. When Judge Hand became a district judge in 1909, he used money allocated for a stenographer to hire a clerk. *Id.* These clerks performed secretarial tasks and legal research. *Id.* Judge Hand eventually abandoned the practice until he was elevated to the Second Circuit. *Id.*

76. Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, From the Perspective of Learned Hand’s Days*, 60 BROOK. L. REV. 505, 510 (1994).

77. GUNTHER, *supra* note 72, at 141.

78. See *id.* at 289.

79. See *id.*

80. See *id.* at 289-90. Hand’s working procedure with his clerks was as follows:

In every case Hand considered at all unclear—and he was uncertain about the proper result in most cases, even after decades of judicial experience—he would spend many hours with his clerk at every stage of the decisional process, before and while writing his pre-conference memoranda, before and while writing his formal opinions, repeatedly asking for the clerk’s criticisms and responses.

Id.

81. See *id.* at 290-91.

82. 569 F.2d 251 (5th Cir. 1978).

83. See *id.* at 253.

84. See *id.* at 254.

he had formerly been a clerk to the trial judge.⁸⁵ RCA argued that Fredonia's counsel had an intimate knowledge of the case because he had served as clerk when the case first came before the judge.⁸⁶ Therefore, he knew the judge's intimate inclinations on the issues.⁸⁷ In resolving the issue, the *Fredonia* court openly discussed the role of law clerks in the judicial process.

The court's opinion noted that clerks perform a variety of functions in assisting a judge.⁸⁸ According to the court, these duties include clerical and administrative chores, research, and drafting memoranda and opinions.⁸⁹ The court accepted the clerk's role as critical to the judge's work.⁹⁰ The court reasoned that barring former clerks from future practice before their employer-judge would be impractical.⁹¹ However, the court decided that "justice must satisfy the appearance of justice."⁹² Due to the nature of the judge-clerk relationship, the trial judge invited some serious questions regarding his impartiality when he refused to recuse himself.⁹³ Decades after Judge Hand's innovative relationship with his clerks, the *Fredonia* opinion codified the sounding board function by stating in a published opinion that "clerks may serve as sounding boards for ideas, often affording a different perspective"⁹⁴

2. *The Clerk-As-Mirror Model*

The best clerks I knew were those who took a Justice's basic philosophy and tried to work within that framework. The least effective course would be to attempt continually to convince a Justice to take positions that, given his personal philosophy and past decisions, were simply inconceivable. . . . [A clerk should] synchronize one's own patterns of thought and expression with those of the Justice, in short, to move on his wavelength.⁹⁵

Under this second model, the "mirror model," a clerk becomes a mirror of the judge's views and predilections. The clerk does not affirmatively challenge the judge, as he would under the sounding board model. Rather, the clerk anticipates and mimics the judge's positions.

85. *See id.*

86. *See id.*

87. *See id.*

88. *See Fredonia*, 569 F.2d at 255.

89. *See id.* at 255-56.

90. *See id.*

91. *See id.* at 256.

92. *See id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

93. *See id.*

94. *Fredonia*, 569 F.2d at 256.

95. WILKINSON, *supra* note 2, at 61-62.

The clerk refrains from championing a personal cause through manipulating his or her tasks as a research assistant and confidant.⁹⁶ Submerging his or her ideological beliefs, the clerk defers to the reasoning of the judge.

The “mirror model” closely parallels the pattern that judges create in their selection of clerks. The majority of judges hire clerks who mirror their own experience and ideals. Judges search for students who have attended their alma mater and who have participated in similar activities, such as the law review.⁹⁷ Due to the closeness of the judge-clerk relationship and the writing responsibilities abdicated to the clerk, judges adhering to this model choose individuals with similar backgrounds, values, and viewpoints. Judges seek these individuals in hopes they will serve as a mirror, reflecting the judge’s thinking and goals.⁹⁸

3. *The Clerk-As-Judge Model*

Judge Hand’s phrase “puny judge” more accurately reflects the characteristics of this model. The “puny judge” model is the most extreme because it contemplates an inexperienced clerk bestowed with the awesome power of a judge.⁹⁹ The clerk operating under this model is intent on influencing the judge’s decision-making and opin-

96. See Saul Brenner, *The memos of Supreme Court law clerk William Rehnquist: conservative tracts, or Mirrors of his justice's mind?*, 76 JUDICATURE 77, 77 (1992). This is the model proposed by our current Chief Justice William Rehnquist, one which, Brenner concludes, Justice Rehnquist followed fairly closely when he clerked for Justice Robert Jackson. *Id.*

97. One scholar wrote, “[s]ome justices have expected their clerks to agree with them philosophically and to share their habits. Justice James C. McReynolds frequently insisted that his clerks be single and not smoke or chew tobacco.” Swann, *supra* note 16, at 160.

98. See Simon, *supra* note 37, at 135 (“[T]he job is not just research, writing, and consulting, it is turning yourself into the kind of person the judge likes to have working for her.”).

99. Judge Posner echoed this possibility when he wrote:

The judges can have assistants who are not themselves judges, but cannot just hand over their authority to those assistants. If they do, the assistants become judges—judges whose conditions of employment violate Article III. A district judge cannot tell his law clerk, “You try this case—I am busy with other matters—and render judgment, and the losing party can if he wants appeal to the court of appeals.” The judge cannot do this even if the parties consent, and even though the statute authorizing federal district judges to appoint law clerks (28 U.S.C. § 752) does not specify the duties of law clerks.

In my example the law clerk is acting as a judge, though not called a judge

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting).

Interestingly, when Richard A. Posner clerked for Justice William J. Brennan during the 1962-1963 Term, he drafted an opinion ultimately adopted by the court.

[Richard Posner] had been asked to prepare a draft opinion in the case of a defendant who wanted a hearing on his second post-conviction petition. Fresh from Harvard Law School, where he had been law review president and valedictorian, and had graduated magna cum laude, Posner took to the task with relish.

ion-writing powers. Whether clerks influence judges profoundly remains to be studied and proven. Regardless, the perception of clerks influencing a jurist so profoundly has become rather pervasive.¹⁰⁰ This perception has been portrayed most renownedly in three recent books about the mysterious Supreme Court. Books, as a populist medium, have placed this image of clerk-as-judge into the mainstream.¹⁰¹

a. Lighting a Candle in the Darkness: *The Brethren*

In 1979, journalists Bob Woodward and Scott Armstrong published the bestseller *The Brethren: Inside the Supreme Court* (“*The Brethren*”).¹⁰² The book detailed events that occurred inside the Supreme Court from 1969 to 1976.¹⁰³ Within the pages, the authors scurried through such important topics of the Court’s jurisprudence as the exclusionary rule, obscenity, abortion, the death penalty, the Watergate tapes, and the Pentagon Papers. To form the narrative, the authors amalgamated interviews with over 200 people, including approximately 170 former law clerks, as well as Justices and other Court employees.¹⁰⁴ *The Brethren*’s journalistic style appealed beyond the legal profession to the general reading public.

Brennan liked the draft, but there was a problem: In conference, the justices had voted to deny a new hearing; Posner’s draft granted it. “It was a complete misunderstanding on my part,” Posner has since recalled. Still, he says, Brennan was both amused at the situation and impressed with his clerk’s reasoning. “I’ll see if I can sell it,” he told Posner. And so it was that in the case of *Sanders v. U.S.*, 373 U.S. 1, the *Supreme Court* was reversed by a 23-year-old clerk and did grant the hearing.

Alexander Wohl, *Paper Trailblazer*, A.B.A. J., Apr. 1997, at 68, 68 (emphasis added).

100. For example, two op-ed columnists charged Justice Anthony Kennedy with being influenced to take liberal positions on cases by a clerk who was a former student of Laurence Tribe. Rowland Evans & Robert Novak, *Justice Kennedy’s Flip*, WASH. POST, Sept. 4, 1992, at A25.

101. For two other prominent books that have thrust the role of the Supreme Court and its clerks into the limelight, see PETER IRONS & STEPHANIE GUITTON, *MAY IT PLEASE THE COURT: TRANSCRIPTS OF 23 LIVE RECORDINGS OF LANDMARK CASES AS ARGUED BEFORE THE SUPREME COURT* (1993); WILKINSON, *supra* note 2, at 10-68.

102. WOODWARD & ARMSTRONG, *supra* note 69, at 2. For criticisms of *The Brethren*, see Burke Marshall, *The Brethren*, 55 N.Y.U. L. REV. 149 (1980); Alpheus Thomas Mason, *Eavesdropping on Justice*, 53 N.Y. ST. B.J. 11 (1981); see also Allan Ashman, *The Court’s latest portrait: overexposed, underdeveloped*, 63 JUDICATURE 346 (1980); William J. Daniels, *The Clerks Talk: Commentary and Analysis of The Brethren*, 44 ALBANY L. REV. 732 (1980); John P. Frank, *The Supreme Court: The Muckrakers Return*, A.B.A. J., Feb. 1980, at 160; Philip B. Kurland, “*The Brethren*”: A Hyped-Up Stunt for “Political Voyeurs,” 85 COM. L.J. 93 (1980); Anthony Lewis, *The Brethren: Inside the Supreme Court—A Review*, 52 N.Y. ST. B. J. 205 (1980); Floyd Abrams, *Trivializing the Supreme Court*, FORTUNE, Mar. 10, 1980, at 129.

103. *The Brethren* reached number one on the New York Times Best Seller list shortly after its publication. See *Best Sellers*, N.Y. TIMES, Dec. 30, 1979, § 7, at 20. It occupied the number one position for a total of nine weeks. See JOHN BEAR, *THE #1 NEW YORK TIMES BESTSELLER 158* (1992).

104. See WOODWARD & ARMSTRONG, *supra* note 69, at 3-4.

The Brethren overflows with tales of clerks influencing the Supreme Court Justices. An example from the book illustrates this point. In the case of *O'Connor v. Donaldson*,¹⁰⁵ Woodward and Armstrong set the scene with Justice Stewart (the cat) away for a day leaving his clerks (the mice) to play.¹⁰⁶ Clerks from other chambers, sans Chief Justice Burger and Justice Rehnquist's clerks, trickled into Justice Stewart's chambers to discuss the case.¹⁰⁷ The clerks feared Chief Justice Burger was "trying to screw the mentally ill" with his "fascist" opinion.¹⁰⁸ The clerks decided to mobilize to ensure no other Justice would sign onto the Chief Justice's draft.¹⁰⁹ The clerks also decided Justice Stewart should write a dissent to turn around the votes and create a new majority.¹¹⁰ Justice Stewart's clerks agreed to present a strong case to influence their boss to undertake this action; the clerks appealed to Justice Stewart to influence their boss to use his power to command a majority.¹¹¹ Justice Stewart agreed to write a short and narrow dissent.¹¹² Eventually, enough of the remaining eight Justices joined Justice Stewart's dissent to turn it into a majority.¹¹³ In this vignette from *The Brethren*, the clerks appear to be orchestrating not only the writing of opinions, but also the decision-making. Certainly, the book has helped to mold the modern image of judicial clerks. Furthermore, the book inspired other authors to tell stories of clerks undertaking a judge's responsibilities.

b. Raising the Curtain: *Closed Chambers*

Edward Lazarus clerked for Justice Harry A. Blackmun during the 1988 Term.¹¹⁴ In 1998, Lazarus published *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* ("*Closed Chambers*"), expounding on his insider view of the Supreme Court. Like the authors of *The Brethren*, Lazarus interviewed other former clerks, reviewed the Justices' private papers at the Library of Congress, and reflected on other scholarly studies to round out his experiences.¹¹⁵ Lazarus witnessed, and wrote at length about, the

105. 422 U.S. 563 (1975).

106. See WOODWARD & ARMSTRONG, *supra* note 69, at 374-76.

107. See *id.*

108. *Id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See WOODWARD & ARMSTRONG, *supra* note 69, at 374-76.

113. See *id.* at 380.

114. See LAZARUS, *supra* note 8, at 119.

115. See *id.* at xi-xii. Lazarus notes his reliance on Justice Thurgood Marshall's private papers, held at the Library of Congress. *Id.* Justice Marshall's papers, which include 173,700 documents,

great power conferred on clerks by the Supreme Court Justices.¹¹⁶ In fact, this was one of Lazarus' main claims in his book. Lazarus conveyed this theme most clearly when he wrote that the Justices "yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve."¹¹⁷

Lazarus asserted that the clerks perform important functions including drafting majority, dissenting, and concurring opinions.¹¹⁸ He also observed that debate among the Justices during voting conferences was nonexistent.¹¹⁹ He claimed that Chief Justice Rehnquist stifled exchange by repeatedly declaring that the details would "come out in the writing."¹²⁰ Key words and phrases were chosen by clerks, and first drafts enjoyed great deference.¹²¹ For clerks, every opinion was an opportunity to make an impression on the law.¹²² Lazarus concluded that the Justices had not drawn a clear line of propriety for the clerks in carrying out their important responsibilities.¹²³

As an example of clerk impropriety, Lazarus described the proceedings in the case of *Patterson v. McLean Credit Union*.¹²⁴ Lazarus writes about a clerk who had made it his personal mission to prevent Justice Kennedy from joining Justice Brennan's draft opinion.¹²⁵ The clerk cunningly developed a three-pronged strategy. One, appeal to Justice Kennedy's conservative instincts regarding the limited judicial role.¹²⁶ Two, instill a distrust of Justice Brennan among the conservatives.¹²⁷ Three, present Justice Kennedy with a draft dissent to sign

were made available just two years after he departed from the Court. See Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1. The release of a Justice's private papers to the general public so soon after retirement is rare in modern Supreme Court history. *Id.* There was concern about the early release because his colleagues were still on the Court and the issues touched upon were still hotly debated. See Daniel Klaidman, *Gold Mine or Land Mine? Marshall Papers Could Alter High-Court Litigation Strategy*, LEGAL TIMES, May 31, 1993, at 1 (discovering that attorneys could examine Justice Marshall's files for internal memoranda revealing individual Justice's thoughts on issues to help determine what will happen in their case).

116. Lazarus disclosed some specific instances of overreaching by clerks and over-delegation by the Justices. See LAZARUS, *supra* note 8, at 262-87, 314-15, 321-22, 384.

117. *Id.* at 6.

118. See *id.* at 29.

119. See *id.* at 285.

120. *Id.*

121. See *id.* at 272-73.

122. See LAZARUS, *supra* note 8, at 271.

123. See *id.* at 271-72.

124. 491 U.S. 164 (1989).

125. See LAZARUS, *supra* note 8, at 314-16.

126. See *id.*

127. See *id.*

onto.¹²⁸ This tale of a careful clerk's planning to attempt to alter judicial decision-making is another example of the perception created of a clerk trying to act as a judge.

c. Is Art Imitating Life?: *The Tenth Justice*

Even popular novelists have turned to entertaining the public with stories¹²⁹ centered on the role of clerks at the Supreme Court. In 1997, Brad Meltzer's novel *The Tenth Justice* became a New York Times Bestseller.¹³⁰ The bulk of the plot concerns an outsider's schemes to personally profit by learning the outcome of certain Supreme Court decisions before they are announced.¹³¹ The intrigue emerges from the outsider's manipulation of a clerk to accomplish his financial goals. Intertwined with the main storyline are significant windows into the role of clerks at the Court.¹³² In many areas, Meltzer's book mirrors the reality of a clerkship. These similarities include how the cert pool is conducted,¹³³ how death penalty stay applications are reviewed,¹³⁴ what methods clerks employ to write opinions,¹³⁵ how the "clerk family" is made up of "conservative" and "liberal" fac-

128. *See id.*

129. For other recent popular novels whetting the public's appetite for Supreme Court intrigue, see JOHN GRISHAM, *THE PELICAN BRIEF* (1992); STANLEY POTTINGER, *THE FOURTH PROCEDURE* (1995); MARGARET TRUMAN, *MURDER IN THE SUPREME COURT* (1982).

130. MELTZER, *supra* note 4. *See* James Barron, *Presumed Best Seller: Law Student Wins Top Money for First Novel*, N.Y. TIMES, May 18, 1996, at 21 (quoting Meltzer as stating, "[y]ou wouldn't believe how many people in that law school are working on novels and screenplays").

131. For those who scoff at this genre of literature, take note that this scenario is not so far fetched because it has been hypothesized before, in a more respected medium—case law.

A law clerk knows for the most part what his judge knows: how motions will be decided, what findings will be entered, and how much in damages will be awarded. They know these things well before the litigants do, and more to the point, *before the stock market closes . . .* It does not take a wealth of imagination to appreciate that a *corrupt law clerk could retire young*.

Bishop v. Albertson's, Inc., 806 F. Supp. 897, 901 (E.D. Wash. 1992) (citations omitted) (emphasis added).

132. Art imitates life in many aspects of Meltzer's novel. The clerks for the make-believe October Term graduated from Stanford, Harvard, and Yale Law Schools. MELTZER, *supra* note 4, at 2-3. *Compare* WOODWARD & ARMSTRONG, *supra* note 69, at 237 (revealing that a clerk of Justice Powell who had spoken with a reporter for the *New York Times* offered to resign, but Justice Powell allowed him to remain), *with* MELTZER, *supra* note 4, at 50-51 (writing that after the clerk's indiscretions were revealed he had to resign from his position).

133. *See* MELTZER, *supra* note 4, at 14-15.

134. *See id.* at 25-38.

135. *See id.* at 105. The two clerks in the novel had developed "an efficient method for writing opinions." *Id.* Ben composed the first draft because of his talent of "crafting original arguments." *Id.* Lisa edited his drafts because she could "see the holes in the most well-reasoned arguments" and was a "stickler for detail." *Id.* When this process was completed, they would send the opinion to their Justice for consideration. *Id.*

tions,¹³⁶ how big firms woo clerks,¹³⁷ and the sometimes coarse relationship between the Justices.¹³⁸

There are many snippets in *The Tenth Justice* that give the impression of clerks acting as judges. First, the opening speech to the incoming Supreme Court clerks declared that the clerks were “the tenth justice” because “[clerks] will draft decisions that change lives” and “the justices will rely entirely on your analysis.”¹³⁹ Second, later in the story one clerk commented that “the older clerks would teach the younger clerks how to sway decisions to their own agenda.”¹⁴⁰ The clerk went on to say that “[w]hen you write a decision, for the most part you can structure it your own way. You can emphasize certain points, or make other points extra ambiguous. It’s a subtle gesture of power, but it’s still power.”¹⁴¹ Finally, one clerk declared that he had “written over thirty decisions since the session began.”¹⁴² These three parts of Meltzer’s novel demonstrate the model of clerks acting as judges, especially in their opinion-writing capacity.

C. *The Importance Of Writing*

1. *Historical Evidence Of Clerk’s Opinion-Writing*

An examination of a number of major cases drafted by clerks provides a deeper perspective on the prevalence and importance of clerk opinion-writing. These cases have either admittedly been written by clerks or have been rumored to have been written by clerks. For example, footnote four to Justice Harlan Stone’s majority opinion in *United States v. Carolene Products Co.*¹⁴³ is the most famous footnote in the universe of constitutional law.¹⁴⁴ During the 1937 Term, Louis

136. *Id.* at 125. Similar to Lazarus’ book, Meltzer touches on the “liberal”/“conservative” divide among the clerks. Both Meltzer and Lazarus describe the “conservative” clerks as obnoxious and deem them the “Cabal.” See LAZARUS, *supra* note 8, at 251-287; MELTZER, *supra* note 4, at 125-26.

137. MELTZER, *supra* note 4, at 125-27.

138. See *id.* at 259. “[S]ome of these Justices are almost seventy years old and they still behave like children. They’re like little kids in a sandbox.” *Id.*

139. See *supra* note 4 and accompanying text.

140. MELTZER, *supra* note 4, at 126.

141. *Id.*

142. *Id.* at 184.

143. 304 U.S. 144, 152 n.4 (1938). *Carolene Products* upheld a federal law barring the interstate shipment of filled milk. *Id.* at 154. The Court declared filled milk to be “an adulterated article of food, injurious to the public health.” *Id.* at 146 (quoting Filled Milk Act of 1923, 21 U.S.C. §§ 61-63). Justice Stone’s majority opinion held that the federal law was within the scope of the congressional power to regulate interstate commerce. *Id.* at 154.

144. See Peter Linzer, *The Carolene Products Footnote And The Preferred Position of Individual Rights: Louis Luskys And John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 277 (1995). See also GERALD GUNTHER, CONSTITUTIONAL LAW 478-79 (13th ed. 1997).

Lusky was a law clerk to Justice Stone.¹⁴⁵ Lusky has repeatedly admitted that he wrote the first draft of the now famous footnote.¹⁴⁶ According to Lusky, Justice Stone revised his work, but retained the majority of Lusky's original words.¹⁴⁷

Reportedly, a clerk of Justice Potter Stewart wrote the opinion for *Schneckloth v. Bustamonte*,¹⁴⁸ an important Fourth Amendment decision involving the nature of consent to searches.¹⁴⁹ The opinion noted that the privacy of an individual may be lawfully invaded by virtue of consent obtained by a third party.¹⁵⁰ In *The Brethren*, the authors revealed that this opinion was written by a clerk. Along with this revelation about the author of *Schneckloth*, the authors told the following anecdote about Justice Stewart's work habits: "Stewart wasn't working too hard . . . he and Marshall passed each other in the corridor most days just before noon—Stewart on his way to work, Marshall on his way home."¹⁵¹ Thus, the narrative behind *Schneckloth* includes the image of not only a clerk writing an opinion, but also the image of Justice Stewart not "working too hard."

2. *Opinion-Writing Issues Discussed In Case Law*

a. Professor as Clerk?

Some courts have grappled with the issues surrounding the role of judge as opinion-writer. In July of 1998, a circuit judge for Milwaukee

145. Linzer, *supra* note 144, at 278. See LUSKY, *supra* note 58, at 119-32; LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 108-14 (1975); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

146. See Linzer, *supra* note 144, at 281.

147. See *id.* at 282. The author acknowledged that Justice Stone circulated his draft opinion and that other Justices suggested changes. *Id.* This process happens with most opinions. Some have argued that the opinion-writing process is safeguarded because other Justices would not join an opinion if a law clerk seriously deviated from an acceptable expression of the facts and law. As argued later in this Comment, the first draft gives the writer great power, and more often than not, the bulk of the original text remains intact, without substantive changes. See *infra* text accompanying note 241.

Footnote four reads as follows:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products, 304 U.S. at 153 n.4 (citations omitted).

148. 412 U.S. 218 (1973).

149. See WOODWARD & ARMSTRONG, *supra* note 69, at 320.

150. See *id.*

151. *Id.*

county was charged with judicial misconduct.¹⁵² The trouble developed when the clerk's work began to disappoint the judge.¹⁵³ A friend of the judge, a law professor at the Loyola University Law School in Chicago, began preparing her opinions.¹⁵⁴ This arrangement continued for approximately three years.¹⁵⁵ The professor had drafted about thirty-two opinions during this time.¹⁵⁶ The court decided that the appearance of fairness had been undermined by this practice.¹⁵⁷ Damage was inflicted upon the court system, upon the litigants in the case, and upon the public perception of the fairness of the judicial system as a whole.¹⁵⁸ The court disciplined the judge because the professor was unconnected with the judicial system.¹⁵⁹ The court reasoned that if a clerk had written the opinions, no disciplinary action would be necessary.¹⁶⁰ In essence, the clerk is part of the judicial system.¹⁶¹

The dissent voiced frustration at the lack of clear rules for clerks, just as Edward Lazarus did in his book.¹⁶² According to the dissent, the lack of guidelines for how to handle clerks and their duties leaves judges adrift as to where lines ought to be drawn.¹⁶³ The dissent proposed that the rule forbidding judges to consult with others in fulfilling their decision-making responsibility should not be read literally.¹⁶⁴ To do so would forbid the use of law clerks, whose role had become an accepted part of judicial operations.¹⁶⁵

A 1978 New York case wrestled with similar concerns.¹⁶⁶ The Chief Judge of the Court of Appeals of the State of New York had been consulting extensively with a number of law professors regarding pending cases.¹⁶⁷ The judge inquired about new developments in the law and sent the professors the litigants' briefs, requesting preparation of bench memoranda and first drafts of opinions.¹⁶⁸ The court con-

152. *In re Tesmer*, 580 N.W.2d 307 (Wis. 1998).

153. *See id.* at 310.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.* at 315.

158. *See Tesmer*, 580 N.W.2d at 318.

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.* (Bablitch, J., dissenting). *See supra* note 123 and accompanying text.

163. *See Tesmer*, 580 N.W.2d at 318 (Bablitch, J., dissenting).

164. *See id.* at 318-19.

165. *See id.* at 319.

166. *See In re Fuschberg*, 426 N.Y.S.2d 639 (1978).

167. *See id.* at 646.

168. *See id.*

cluded that consulting with a disinterested expert on the law was an acceptable practice but had conditions.¹⁶⁹ The parties must be notified as to the identity of the expert and the substance of the judge's consultation with him or her.¹⁷⁰ This would give both parties an opportunity to respond to the judge's choice.¹⁷¹

The court expressed deep concern over the appearance created by the practice of consulting professors without the consent of the parties.¹⁷² According to the majority, the public's confidence in the independence and integrity of the judiciary was impaired by the judge's actions.¹⁷³ The court admitted that law clerks often contribute substantially to the preparation of opinions, however, the court drew a distinction between a law clerk and an outside expert.¹⁷⁴ The law clerk was a court employee, a recognized figure in the judicial institution.¹⁷⁵ The court believed that clerks were familiar to the litigants and fully exposed to the parties and thus did not create the same concern that opinion-writing by a professor did.¹⁷⁶

b. A Clerk's Refusal to Write an Opinion

In *Sheppard v. Beerman*,¹⁷⁷ a law clerk brought a §1983 complaint against a justice of the New York Supreme Court.¹⁷⁸ The judge had ordered his clerk to draft a decision denying a defendant's motion for speedy trial.¹⁷⁹ The clerk refused to draft the decision because he did not want to take part in "railroading" the defendant.¹⁸⁰ The clerk also informed the judge that he had taken extensive notes regarding other misconduct by the judge.¹⁸¹ Following an unpleasant exchange of

169. *See id.*

170. *See id.*

171. *See id.*

172. *See Fuchberg*, 426 N.Y.S.2d at 648.

173. *See id.*

174. *See id.* at 648-49.

175. *See id.* at 648.

176. *See id.*

177. 18 F.3d 147 (2d Cir. 1994).

178. *See id.* at 149. Sheppard's complaint also alleged violation of his free speech rights when fired from his job. *Id.* at 151. The circuit court determined that the speech was a matter of public concern. *Id.* The circuit court held that since Judge Beerman's motive for dismissal was in dispute, the district court improperly resolved the issue on a motion to dismiss on the pleadings. *Id.* Sheppard also claimed that Judge Beerman's search of his files violated the Fourth Amendment. *Id.* at 152. The circuit court, however, ruled that given the intimate nature of the judge-clerk relationships, Sheppard had no reasonable expectation of privacy in his files, desk, cabinets, or other work areas. *Id.*

179. *See id.* at 149.

180. *See id.*

181. *See id.*

words, the clerk was fired.¹⁸² The United States Court of Appeals for the Second Circuit reversed the district court's grant of the judge's motion to dismiss.¹⁸³ The court recognized that a law clerk's protestations about a judge's ethical lapses are potentially a matter of public concern and protected by the First Amendment.¹⁸⁴ Therefore, the court determined that judges do not hold the unbridled power to fire their clerks.¹⁸⁵

D. Naming Names: Mentioning Clerks In Published Opinions

Clerks have made their way into various readable genres, and with increasing frequency. Beyond the glory of writing opinions, clerks have been mentioned in the published opinions themselves. For example, in *Noto v. United States*,¹⁸⁶ decided in 1955, Justice Harlan recognized the possibility of a clerk's assistance in making certain statistical calculations. He wrote, "[t]he foregoing data comes either from the record in the present case or from the research of my Law Clerk."¹⁸⁷ In 1977, in *Lee v. United States*,¹⁸⁸ Justice Marshall, in his dissent, quoted a lower court judge as saying, "I don't know who drafted [the lower court opinion], but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course."¹⁸⁹ Also, in 1977, Justice Stevens mentioned a clerk in a footnote in his dissent. In *Hazelwood School District v. United States*,¹⁹⁰ Justice Stevens wrote:

one of my law clerks advised me that, given the size of the two-year sample, there is only about a 5% likelihood that a disparity this large would be produced by a random selection from the labor pool. If his [the clerk's] calculation (which was made using the method described in H. Blalock, *Social Statistics 151-173* (1972)) is correct, it is easy to understand why Hazelwood offered no expert testimony.¹⁹¹

In 1993, in *Conroy v. Aniskoff*,¹⁹² Justice Scalia wrote in his concurrence:

182. See *id.* at 151. Sheppard called Beerman "corrupt" and a "son of a bitch." *Id.* at 150. Beerman called Sheppard "disturbed" and "disloyal." *Id.* Sheppard apologized and worked the remainder of the day. *Id.* The next day, another court officer informed him he was fired. *Id.*

183. See *Sheppard*, 18 F.3d at 153.

184. See *id.* at 151.

185. See *id.*

186. 76 S. Ct. 255 (1955) (proceedings on application to Mr. Justice Harlan, as circuit justice).

187. *Id.* at 258 n.4.

188. 432 U.S. 23 (1977).

189. *Id.* at 38 (Marshall, J., dissenting) (quoting the trial court record).

190. 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting).

191. *Id.*

192. 507 U.S. 511 (1993).

I confess that I have not personally investigated the entire legislative history—or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task. The other Justices have, in the aggregate, many more law clerks than I, and it is quite possible that if they all were unleashed upon this enterprise they would discover, in the legislative materials dating back to 1917 or *earlier*, many faces friendly to the Court's holding.¹⁹³

Furthermore, in *Conroy*, the majority opinion, in response to the concurrence, mentioned Justice Scalia's clerk in a footnote by surmising that "[h]is 'hapless law clerk,' . . . has found a good deal of evidence in the legislative history"¹⁹⁴ Finally, and most recently, in the 1998 case of *Calderon v. Thompson*,¹⁹⁵ the Supreme Court determined that a lower court could not reverse its denial of a writ of habeas corpus based on a "mishandled law clerk transition" where "the old and the new law clerks assigned to the case failed to communicate."¹⁹⁶

The most blatant recognition of a clerk's role came in a 1986 district court opinion. The judge openly credited a clerk for work well done.¹⁹⁷ The judge wrote that the opinion was "prepared by William G. Sommerville, III, Law Clerk, in which the Court fully concurs."¹⁹⁸ It is particularly interesting that judges have begun to recognize their clerks' efforts in published opinions in light of the importance of opinions to the consumers of the written law.

II. ANALYSIS

When "the Judge," as his clerks call him, is assigned a case for an opinion he dives into reading the record and all briefs. He absolutely masters the facts and the arguments. Then he moves into the relevant literature—cases, statutes, treatises, and law reviews. The clerks often read along with him or dig out additional material and feed it to him After a while [Justice] Black will feel that he is ready to do a first draft of the opinion The draft is then turned over to the clerks, and, with all the confidence of youth, they work it over. Then the fun begins. The two clerks and [Justice] Black gather around his large desk and start through the draft, word by word, line by line Often revisions result; sometimes a clerk can get a word or comma accepted, but the substance and decision are never anything but [Justice] Black's alone.¹⁹⁹

193. *Id.* at 527-28 (Scalia, J., concurring).

194. *Id.* at 518 n.12 (citations omitted).

195. 118 S. Ct. 1489 (1998).

196. *Id.* at 1497-98 (citation omitted).

197. *See* *Acceptance Ins. Co. v. Schafner*, 651 F. Supp. 776, 778 (N.D. Ala. 1986).

198. *Id.*

199. WILKINSON, *supra* note 2, at 90-91 (citing Daniel J. Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57, 59-60 (1962)).

A myriad of issues arise when clerks are delegated the task of opinion-writing. Ideally, a presiding judge should write the first draft of an opinion. As caseloads have grown, this ideal has arguably become unattainable. Through the years, many judges have become attentive editors as clerks have undertaken more and more of their workload. As these duties grow, clerks must shoulder some of the responsibility of being accountable to the consumers of written judicial opinions. These consumers include practitioners, historians and judicial biographers, and the general public. Clerks must acknowledge the potential that as their role evolves from a mere sounding board model to one undertaking more judge-like responsibilities, the more curious these outside consumers will become of the secretive judicial institution. Thus, if clerks are not careful in their role, they could become the catalysts for opening up these "closed chambers" to the purview of the world.

In analyzing the great shift of responsibility to clerks and its consequences on maintaining judicial secrecy, four choices present themselves for consideration. Consumers of judicial opinions must ask whether society should: (1) continue the judge-clerk relationship as it operates today; (2) require judges to wholly reclaim their opinion-writing duties; (3) insist clerks set limitations upon themselves and scrutinize their own actions more carefully; or (4) openly acknowledge the role of clerks so that no one can be accused of impropriety. The most practical choice is the third, given the rise in caseload. Clerks must stop, think, and impose limitations upon themselves. In *Closed Chambers*, author Edward Lazarus ended his judicial exposé with the solemn warning that the remedy to restore and repair the Supreme Court lies with the Justices.²⁰⁰ However, Lazarus' conclusion errs in also not suggesting that the remedy lies to some degree with the clerks, especially in the blossoming media age.

Since the consequence of clerks acting as judges may be that judicial chambers are opened up to stifling outside scrutiny, jurists should be mindful that some transformation in the image of clerks needs to be undertaken. The remainder of this Comment will analyze the problems of accountability which are associated with allowing clerks to write opinions,²⁰¹ why judges have deferred the responsibility of opinion-writing to clerks,²⁰² why the law's consumers should be con-

200. See LAZARUS, *supra* note 8, at 517-18 ("The remedy, the power to restore the character of the Court and to repair its inner processes, lies only in the souls of the Justices themselves. . .").

201. See *infra* notes 206-217 and accompanying text.

202. See *infra* notes 218-239 and accompanying text.

cerned about opinion-writing by clerks,²⁰³ how clerks should operate within judicial chambers in the blossoming media age,²⁰⁴ and the potential consequences if clerks fail to act.²⁰⁵

A. *Let The Sunshine In: Accountability Problems*

The importance of judicial opinion-writing may be uniquely American. Written opinions have been democratically deemed a "text unto the people."²⁰⁶ Simply stated, written opinions hold Supreme Court Justices accountable to our nation.²⁰⁷ When presented in written form, reasoning is open to be questioned and tested. Beyond accountability, writing is also the Supreme Court's power source, as the Court does not control the army or the purse.²⁰⁸

Nonetheless, some commentators have argued that the Justices should not be expected to write their own opinions. These scholars contend that because the President and Congress, the co-equal branches, delegate the writing of speeches and legislation to staff members, the Supreme Court should be free to delegate this function as well.²⁰⁹ However, in such an argument a simple, yet important, distinction is overlooked—the need for accountability. The executive and legislative branches enjoy election by the people. However, the Supreme Court, the most dangerous branch in this respect, does

203. See *infra* notes 240-274 and accompanying text.

204. See *infra* notes 275-308 and accompanying text.

205. See *infra* notes 309-322 and accompanying text.

206. DOMNARSKI, *supra* note 9, at x (quoting former federal district judge Charles Wyzanski).

207. One commentator noted:

I have not found a better test for the solution to a case than its articulation in writing, which is thinking at its hardest. A judge . . . often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957). Some judges are held accountable by the voting public. The Supreme Court Justices, however, are nominated by an elected President and confirmed by an elected Senate.

208. Alexander Hamilton wrote in *The Federalist No. 78* that the "judiciary, on the contrary, has no influence over either sword or purse; no directive either of the strength of the wealth of the society, and can take no active resolution whatever. It may be said to have neither *FORCE* nor *WILL* but merely judgment . . ." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

209. See Thomas Grey, *Holmes' Language of Judging—Some Philistine Remarks*, 70 ST. JOHN'S L. REV. 5, 6 (1996) (justifying clerk written opinions by claiming that "judges today generally do not write their own opinions, any more than Presidents or Senators write their own speeches").

not.²¹⁰ More importantly, a clerk is typically an anonymous player in the judicial system, and thus further insulated from public evaluation.

Over the years, the clerk-author has been accepted as somewhat of a necessary band-aid for an overworked judiciary. Echoing throughout the chambers of our courts are the cries and moans of docket strain.²¹¹ To cope with the workload, clerks have undertaken a greater role. Due to the need for more laborers, few outsiders have questioned the delegation of responsibility to young clerks. However, society must take the time to question this transfer of power. We must ask whether, for the sake of administration, will we concede one of the modern pillars of the American legal profession—judicial opinion-writing?

The answer proposed by the *Tesmer*, *Fuschberg*, *Fredonia*, and *Sheppard* courts seems to be that opinion-writing by judges must be subservient to judicial economy.²¹² Yet, if judicial economy were society's sole concern, we might benefit from allowing law professors to assist judges in their opinion-writing, as was done in *Tesmer* and *Fuschberg*.²¹³ Furthermore, if law professors were allowed to help judges write opinions, a better quality product may result. On one side of the scale is a seasoned professor, schooled in the law and how to envision the bigger legal picture. On the other side is a young clerk, often without practical life experiences.²¹⁴ Seemingly, judicial economy is not society's sole concern.

210. Of course, many state court judgeships are obtained via election. However, the primary focus of this Comment is on Supreme Court clerks. Nonetheless, lower court clerks should still consider the suggestions offered in this Comment.

211. "Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases." Wald, *supra* note 58, at 1374. Judge Wald has also stated:

If the clerks' efforts advance that goal and are acceptable to the responsible judge, I do not see what difference it makes as to whose words are in the opinion. Given the size of records and the inexorable increase in caseloads, precious few of us can perform without staff support.

Wald, *Judicial Writings*, *supra* note 30, at 154.

212. *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir. 1994); *In re Fredonia*, 569 F.2d 251 (5th Cir. 1978); *In re Fuschberg*, 426 N.Y.S.2d 639 (Jud. Ct. 1978); *In re Tesmer*, 580 N.W.2d 307 (Wis. 1998).

213. For a story of a law professor who took a position as a law clerk during his sabbatical, see Joseph P. Bauer, *A Judicial Clerkship 24 Years After Graduation: Or, How I Spent My Spring Sabbatical*, 42 J. LEGAL EDUC. 427 (1992).

214. Lazarus wrote:

The sum total of my legal experience amounted to a one-year clerkship with Judge William A. Norris on the Ninth Circuit Court of Appeals in Los Angeles, seven weeks as a summer associate with a small Washington, D.C., litigation firm, and a semester advising federal prison inmates in Danbury, Connecticut, as part of the Yale Law School clinical program.

LAZARUS, *supra* note 8, at 5. See Marquand, *supra* note 8, at 1 ("Pound for pound, the 36 legal eagles, some of whom may never have held a job, arguably have more power than a senior

However, the *Tesmer* and *Fuschberg* opinions did not focus on the considerations of the experience of clerks and the quality of opinions. Rather, these courts introduced the insider-outsider distinction to justify delegation of opinion-writing to clerks. These courts reasoned that a professor was an outsider and a clerk was an insider in the judicial family.²¹⁵ In the final analysis, little difference exists. Neither law professor nor law clerk should intrude upon the domain of a judge in drafting an opinion. The image of a judge's independence is tarnished if *anyone* other than a judge drafts the opinion. Luckily for judges, insiders, such as clerks, disguise their participation in opinion-writing more clandestinely than outsiders. By retaining responsibility shifting within the walls of chambers, the public is less likely to discover and question the practice of clerk opinion-writing.

The *Tesmer* opinion raised another important issue. The dissent admitted a need for clearer boundaries within the judge-clerk relationship and lamented that judges are left adrift as to where the lines are to be drawn for clerk responsibility.²¹⁶ A discussion of where to draw the line will be undertaken later in this Comment.²¹⁷ For now, however, it is important to note that a judge has acknowledged in a published opinion the lack of guidance given to clerks. This recognition is the first step to questioning the practice and making improvements.

B. *Are Judges Too Busy To Bother With Opinion-Writing?*

As mentioned, some judges and scholars have argued that the strains of business compel judges to delegate some or all of their duties to their clerks, including the writing of opinions.²¹⁸ The Supreme

congressional staffer."); Crump, *supra* note 11, at 238 ("A law clerk, all he's done is get good grades in law school.")

215. The distinction rests on the idea that a clerk is an employee of the court and their loyalty lies with the judge. See *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1015 (11th Cir. 1986) (quoting *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983), and stating that the "clerk is forbidden to do all that is prohibited to the judge").

216. See *In re Tesmer*, 580 N.W.2d at 318.

217. See *infra* notes 275-308 and accompanying text.

218. Objections to the proliferation of clerks have been generally silenced because of the "legend" of the burgeoning caseload. For criticism of the role of clerks, see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 346-51 (1993) (arguing that the growth in law clerks has contributed to the "fractionation of opinions"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 288-89 (1996) (arguing that more law clerks have meant a diminished quality in decision-making and opinion-writing). For scholarship commenting on the burdens caused by the rise in caseload, see Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 882-89 (1983) (disputing that the rise in caseload has meant that the courts operate as a bureaucracy); A. Leo Levin & Michael E. Kunz,

Court Justices already delegate to clerks case screening, cert pool function,²¹⁹ reading of the record, and researching the law. Clerks delve into the facts and the details of the cases. In the end, the clerks have an expertise in the pending cases because they have performed much of the legwork and wrestled with the issues. A Justice may be forced to defer to his or her clerk again when it comes to opinion-writing. These thoughts lead to the question: what are the Supreme Court Justices doing with their time?

Recently, the Supreme Court's "incredibly shrinking" plenary docket has attracted much attention.²²⁰ The Court penned a mere ninety opinions during the 1995-1996 term.²²¹ In the 1971 term, more than 170 cases were granted review, and the number of opinions remained in this range throughout the 1970s.²²² Throughout the 1980s, the docket reached around 180 cases per term.²²³ The high was in the 1981 and 1983 terms, where the Court rendered approximately 184 decisions.²²⁴ Given the drop in the total number of opinions to write, it seems reasonable to conceive that the Justices would be able to reclaim some of their authorial responsibilities. However, the opposite appears to be occurring.

Thinking About Judgeships, 44 AM. U. L. REV. 1627, 1640-42 (1995) (articulating that perhaps the increase in workload has given rise to the increased role of law clerks and questioning their future role if caseloads continue to grow).

219. See *supra* notes 54-57 and accompanying text.

220. See David M. O'Brien, *The Rehnquist Court's shrinking plenary docket*, 81 JUDICATURE 58, 58 (1997). The Supreme Court has almost complete control over its docket through the mechanism of granting or denying writs of certiorari. Evidence of the decreasing caseload can be seen as follows:

Terms	Total	Full Opinions
1973	4,186	140
1978	3,888	130
1983	4,218	151
1988	4,773	133
1990	5,510	112
1991	5,865	107
1992	6,236	107
1993	6,896	84

David O. Stewart, *Quiet Times: The Supreme Court is Reducing Its Workload—But Why?*, A.B.A. J., Oct. 1994, at 40, 40-44.

221. See O'Brien, *supra* note 220, at 58.

222. See *id.* at 59-60.

223. See *id.*

224. See *id.* at 59.

1. *Writing Concurring And Dissenting Opinions*

Time constraints certainly have not inhibited the preparation of concurring and dissenting opinions issued by the Supreme Court.²²⁵ In recent history, the Justices have become increasingly divided in their decisions.²²⁶ Individual opinions have become more prized than institutional opinions.²²⁷ Between the years of 1811-1823, the Supreme Court decided a total of 457 cases.²²⁸ Of these, 437 were unanimous.²²⁹ This form of judicial unanimity is rare today. Yet, as more separate opinions are labored over, more time is spent on opinion-writing. This translates into less time for judges themselves to work on opinions and enables increased judicial delegation of responsibilities to clerks.²³⁰ As discussed later in this Comment, perhaps clerks should use their role as sounding board to mend these divisions and create more unanimous decision-making.²³¹

225. See CHALLENGE AND REFORM, *supra* note 11, at 142.

226. See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 284 (3d ed. 1993). The Supreme Court, in its 1997 Term, produced 93 full opinions, 52 concurring opinions, and 64 dissenting opinions. *The Supreme Court, 1997 Term: Leading Cases*, 112 HARV. L. REV. 122, 366 (1998). The 1996 Term produced 86 full opinions, 40 concurring opinions, and 66 dissenting opinions. *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 197, 431 (1997). The 1995 Term produced 79 full opinions, 46 concurring opinions, and 67 dissenting opinions. *The Supreme Court, 1995 Term: Leading Cases*, 110 HARV. L. REV. 135, 367 (1996). The 1994 Term produced 86 full opinions, 50 concurring opinions, and 64 dissenting opinions. *The Supreme Court, 1994 Term: Leading Cases*, 109 HARV. L. REV. 111, 340 (1995). The 1993 Term produced 87 full opinions, 82 concurring opinions, and 65 dissenting opinions. *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 372 (1994). The 1992 Term produced 114 full opinions, 63 concurring opinions, and 81 dissenting opinions. *The Supreme Court, 1992 Term: Leading Cases*, 107 HARV. L. REV. 144, 372 (1993). The 1991 Term produced 116 full opinions, 75 concurring opinions, and 89 dissenting opinions. *The Supreme Court, 1991 Term: Leading Cases*, 106 HARV. L. REV. 177, 378 (1992). The 1990 Term produced 120 full opinions, 47 concurring opinions, and 95 dissenting opinions. *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 419 (1991).

An example of a dissenting opinion in a case with large ramifications is Justice John Paul Stevens' 31 page dissent in *Printz v. U.S.*, the Brady Gun Control case, in which he rebuts every point in Justice Antonin Scalia's majority opinion. 521 U.S. 898, 939-70 (1997) (Stevens, J., dissenting). An example of a concurring opinion in a case with large ramifications is *Washington v. Glucksberg*, the assisted suicide case, in which Justice Sandra Day O'Connor wrote a concurrence qualifying the majority's opinion by warning that the case did not mean there was a constitutional right to a physician's aid in dying. 521 U.S. 702, 736-38 (1997) (O'Connor, J., concurring).

227. See O'BRIEN, *supra* note 226, at 284.

228. See Gordon Wood, *The Father of the Court*, NEW REPUBLIC, Feb. 17, 1997, at 41.

229. See *id.*

230. Some commentators have even suggested that clerks are the source to blame for the proliferation of separate opinions. See CRISIS AND REFORM, *supra* note 44, at 102-19; Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787, 799 (1983).

231. See *infra* notes 285-299 and accompanying text.

2. Modern "Circuit-Riding:"²³² Lectures, Speeches, Books, Articles

Increasingly, sitting Justices publish books and articles and lecture around the world on important legal issues.²³³ The Justices also travel to attend judicial conferences. Many have ventured overseas under the sponsorship of various educational, governmental, or nonprofit groups. Some commentators have criticized the Justices for participation in these activities.²³⁴ However, overall attendance at these events seems beneficial to our judicial system because it allows judges to en-

232. "The Judiciary Act of 1789 required that the justices of the Supreme Court serve also as judges of the circuit courts." Kermit L. Hall, *Circuit Riding*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 145 (Kermit L. Hall ed., 1992). The Justices complained that circuit riding diverted them from more important duties. *Id.* The practice was ended by Congress in 1911. *Id.*

233. See, e.g., REHNQUIST, *supra* note 60; WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Harry A. Blackmun, *The First Amendment and Its Religion Clauses: Where Are We? Where Are We Going?*, 14 *NOVA L. REV.* 29 (1989); William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 1 (1994); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 *N.Y.U. L. REV.* 535 (1986); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 *HARV. L. REV.* 313 (1986); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 *U. CHI. L. REV.* 473 (1973); Warren E. Burger, *The High Cost of Prison Tuition*, 40 *U. MIAMI L. REV.* 903 (1986); William O. Douglas, *Stare Decisis*, 49 *COLUM. L. REV.* 735 (1949); O. W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897); Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 *ST. LOUIS U. L.J.* 1067 (1996); Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 *COLUM. L. REV.* 1 (1986); Sandra Day O'Connor, Address, *The Life of the Law: Principles of Logic and Experience From the United States the Fairchild Lecture*, 1996 *WIS. L. REV.* 1; Sandra Day O'Connor, *Foreward: The Establishment Clause and Endorsement of Religion*, 8 *J. L. & RELIGION* 1 (1990); Lewis F. Powell, Jr., *Carolone Products Revisited*, 82 *COLUM. L. REV.* 1087 (1982); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 *NW. U. L. REV.* 903 (1991); William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 *CONST. COMMENT.* 319 (1985); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989); Antonin Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881 (1983); John Paul Stevens, *The Freedom of Speech*, 102 *YALE L.J.* 1293 (1993); John Paul Stevens, *Is Justice Irrelevant?*, 87 *NW. U. L. REV.* 1121 (1993); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 *N.Y.U. L. REV.* 1 (1983); Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 *N.Y. ST. B. J.* 346 (1982).

234. See WOODWARD & ARMSTRONG, *supra* note 69, at 204 (criticizing Chief Justice Burger's tendency to spread himself thin by attending too many social, speaking, and ceremonial engagements); John Marshall Fritz & Tony Mauro, *Supreme Court: 'Is It More Equal?' Laws Difficult to Apply to the high court*, *USA TODAY*, Sept. 14, 1992, at A1 (reporting on Justice Scalia's speech regarding the Constitution at a function sponsored by the Kentucky Bar Association and the University of Kentucky law school); Linda Greenhouse, *Supreme Court Justices Enjoy Benefits, Financial Records Show Appointees Take Advantage of Travel Perks*, *L.A. DAILY NEWS*, May 23, 1993, at U1 (revealing the large amount of travel taken by the Justices for speaking engagements); Neil A. Lewis, *Justice Thomas Assails Victim Mentality*, *N.Y. TIMES*, May 17, 1994, at A14 (commenting on Justice Thomas' speech before the Federalist Society and the Manhattan Institute).

gage in contact with others holding diverse viewpoints. These events typically occur during the Supreme Court's off-season and certainly help serve the future of the law. Nonetheless, when held during the Term, these functions can become time consuming and lessen time that could be spent on opinion-writing.

3. *Anecdotes: "Like sands through the hourglass . . ."*

Several anecdotes exist regarding what busy judges really do. One famous anecdote concerned Justice Thurgood Marshall's television habits within his chambers. Legend says that Justice Marshall spent more time watching afternoon soap operas in his office than working on cases.²³⁵ Justice Marshall was also notorious for talking for hours to his clerks about his war stories.²³⁶ When meeting with Justice Marshall, the clerks would often try to leave one at a time so that they could return to their awaiting work.²³⁷

While such stories may be rooted in gossip rather than truth, they carry a certain weight in assessing the work product of courts. At the very least, these stories contribute something important to our image of the judicial system.²³⁸ Furthermore, perceptions can often far exceed reality. A new reality can be born from false impressions. Misperceptions can have very real negative consequences for the judicial process. As the image of clerk-as-judge grows, the more judges and clerks may come to accept the notion that this structure is sound.²³⁹ The more judges defer their opinion-writing responsibility, the easier it may become to defer the important function of decision-making.

235. See Terry Eastland, *While Justice Sleeps*, NAT'L REV., Apr. 21, 1989, at 24. See also LAZARUS, *supra* note 8, at 278 (confirming that "Marshall spent more time watching afternoon soaps in his office than working on cases"); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 260 (1994) (remarking that "[o]pinion writing did not interest [Justice Thurgood Marshall] . . . Marshall himself spent hours each day telling stories and watching daytime television . . . he enjoyed a reputation outside the Court for scholarly opinions, but inside the Court, he often seemed uninformed and disengaged").

236. See WOODWARD & ARMSTRONG, *supra* note 69, at 196-97 (accusing Justice Thurgood Marshall of spending hours telling stories about his early life and litigation experiences, preventing his clerks from doing their work).

237. See *id.*

238. See *supra* note 70 and accompanying text.

239. See Kester, *supra* note 24, at 20 ("Law clerks have invaded the judicial system, affecting the law, the profession, the judiciary and the public.").

C. Who Should Be Concerned . . . And Why?

1. Practitioners

Each word,²⁴⁰ each phrase, each sentence, each page—an attorney busily performs surgery on opinions in search of constructions that will assist their clients. Written opinions are the foundation of important and far-reaching legal structures, such as precedent and stare decisis. A written opinion reflects the past and makes the future more predictable. Opinions also provide guidance to the lower courts. Whoever writes an opinion faces the prospect that his or her word choice will have a far-reaching and lasting impact on legal doctrine, such as in *Carolene Products*.²⁴¹

Consequently, clerk-written opinions may not provide an accurate gauge for attorneys to predict what a court would likely decide in a future case.²⁴² Indeed, the extent to which a particular expression in

240. Words are important to the law because of the concept of stare decisis. Justice Douglas has suggested perhaps this should not always be the case. He stated, “[w]ell I’ve always thought that on a constitutional decision, that *stare decisis*, that is, established law, was really no sure guideline because what did the guys do—the judges who sat there in 1875—know about, say, electronic surveillance? They didn’t know anything about it. . . . Why take their wisdom?” Dorothy J. Glancy, *Douglas’s Right of Privacy: A Response to His Critics*, in “HE SHALL NOT PASS THIS WAY AGAIN”: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 175 n.66 (Stephen L. Wasby ed., 1990). Justice Douglas suggested that the law survives because it adapts to changing situations. Douglas, *supra* note 233, at 746. He believed it was a “healthy practice” for a court to “reexamine its own doctrine.” *Id.*

Other testimonials of the importance of words are telling: “[Clerks wield] the enormous power of the first 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.” LAZARUS, *supra* note 8, at 273. “Every time an opinion came down, some lawyer found an ambiguity . . . [leading to] another round of quibbling.” WOODWARD & ARMSTRONG, *supra* note 69, at 44. “Every word counts in a Supreme Court opinion, and too many of those words are clerk words.” *We Did Seriously Exacerbate the Divisions*, NAT’L L.J., June 1, 1998, at A10. “[T]he reasoning and wording of the opinions—pored over for years to come by lawyers and judges—often are shaped by clerks.” Marquand, *supra* note 8, at 1.

241. See *supra* notes 143-147 and accompanying text.

242. See Holmes, *supra* note 233, at 461 (proposing that law is a prediction of what courts will do). An appropriate anecdote is as follows:

One of the issues that [Justice Thurgood] Marshall enjoyed arguing with his clerks was the question of what was obscene. He loved to take conservative positions with them, maintaining that anything hard-core could be and should be totally banned. What was so important about it? First Amendment principles are not at stake in this case, he would bellow. Dirty pictures are. What about his liberal opinion for the Court in *Stanley*? his clerks would ask. He had meant only to protect people’s privacy in their own homes, he would claim with a grin. Publishers, distributors, sellers could be stopped. But, a clerk once pointed out, “You said that the right to privacy must go further than the home.”

“No,” Marshall retorted. He had never said that.

Yes, the clerk insisted.

an opinion can be attributed to the named Justice is unclear.²⁴³ Although the Justices give clerks general directives on what to include in an opinion, the details are typically produced solely by clerks.²⁴⁴ Ironically, these "details" are the sources of contention for academics and attorneys.²⁴⁵ A classic example is the famous footnote four in *Carolene Products*.²⁴⁶ Recognizing the clerk's role in creating this important footnote, one begins to appreciate the scope of the potential consequences of clerk opinion-writing. Certainly, accountability would be clearer if Justice Harlan had alone written footnote four. If authorship were clear, when legal academics, historians, and other interested parties read *Carolene Products*, they would be able to accurately assemble reasons why it was written and assess the intent behind the author's words. Without first knowing who wrote the famous words, it is difficult to make an honest attempt at answering the important question of "why."

However, clerk-written opinions *do* face *some* accountability. While Supreme Court clerks are absent from the historically secret decision-making conferences,²⁴⁷ a Justice must instruct their clerks on the ideas discussed in the conference and give the clerk a general direction for the draft opinion.²⁴⁸ Generally, a Justice edits a clerk's

No, never, Marshall was sure. "Show me."

The clerk brought the bound opinions.

Marshall read the relevant section.

"That's not my opinion, that's the opinion of [a clerk from the prior term]," he declared.

WOODWARD & ARMSTRONG, *supra* note 69, at 197-98. See also Letter from Judge Charles E. Wyznanski, Jr. to Bethuel M. Webster (Feb. 6, 1958), reprinted in Bethuel M. Webster & William H. Hogeland, Jr., *The Economist in Chambers and in Court*, 12 A.B.A. SEC. ANTITRUST L. 50, 67 (1958) ("[A]ny time any judge uses a first-rate law clerk there is always a kindred danger the law clerk by force of his distinction of mind and youthful energy may play a more decisive role than the parties to a case cherish.").

243. See Mark Tushnet, *Themes In Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 771 (1995) ("Indeed, the extent to which the particular expressions in the opinions can be attributed to the Justices is quite unclear—few of the Warren Court Justices drafted the opinions that appeared under their names.").

244. See *id.* at 771 ("Though they usually gave their law clerks general directives about what to include in the opinions, the details—which are the source for the sophisticated elaborations by legal academics and political theorists—were typically produced by the law clerks.").

245. *Id.*

246. See *supra* notes 143-147 and accompanying text.

247. See LAZARUS, *supra* note 8, at 28 (writing that "[a]t every stage, with the exception of the Justices' private conference, the clerks had some role to play . . .").

248. The conference has been criticized for the lack of debate that has taken place, particularly in more recent times. Judge Wald sits on the United States Court of Appeals for the District of Columbia. She has recognized that on her court

senior judges tend not to . . . spend time explaining or even justifying their votes to colleagues. New judges on the other hand are often disappointed at the absence of

work before it is circulated, under the Justice's name, to the other Justices.²⁴⁹ Subsequently, the other Justices, or their clerks, review the opinion and offer suggestions before adoption.²⁵⁰ Some scholars contend that multiple pairs of eyes reviewing an opinion provide an adequate safeguard to justify clerk opinion-writing.²⁵¹ They argue that other Justices would not join an opinion if a clerk did not appropriately represent the Court's decision.²⁵² However, despite a Justice's careful instructions and editing, the initial drafter of an opinion holds substantial influence over the finished product. The author of the initial draft enjoys great deference. More often than not, the bulk of what was originally written is maintained, without changes.²⁵³

Litigants should be comfortable in the knowledge that their fate rests with a proper judicial officer.²⁵⁴ However, an attorney who believes a clerk played an improper role may face many hurdles in correcting the problem. A litigant who complains about a clerk's participation may have his or her complaint fall on deaf ears. The judge may believe the challenge is a personal insult.²⁵⁵ For example, in one case, a judge wrote, "Mr. Allen [the clerk] is troubled by the slur on his integrity. The implicit slur on its judgment troubles the Court. The Court is further troubled by the inference that the motion was not decided by an Article III judge. It was."²⁵⁶ A complaint about a clerk could cause a party to suffer due to underlying prejudices of a judge who feels he is not trusted by that party. In light

long, scholarly, post-argument conferences, and even shocked when their seniors at conference state a bottom-line position, and leave it at that.

Patricia M. Wald, *Collegiality on a Court*, 40 FED. B. NEWS & J. 521, 524 (1993).

249. See CHALLENGE AND REFORM, *supra* note 11, at 145.

250. See LAZARUS, *supra* note 8, at 62 (referring to *Tompkins v. Texas*, 486 U.S. 1004 (1988)).

251. See Little, *supra* note 58, at 120-22.

252. See *id.*

253. See LAZARUS, *supra* note 8, at 272 (describing the "hands-off" way the Justices would edit the clerks' drafts); CHALLENGE AND REFORM, *supra* note 11, at 145 (admitting that "it is generally true that whoever does the basic drafting of a document will have a big impact on the final product"); Mahoney, *supra* note 36, at 339 (stating that "the initial drafter will have a substantial influence on the ultimate work product"); Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's The Federal Courts: Challenge and Reform*, 73 NOTRE DAME L. REV. 1029, 1035 (1998) (stating that whoever writes the opinion generally forms the approach taken in the opinion); Abby F. Rudzin & Lisa Greenfield, *Ten Brief-Writing Don'ts—The Judicial Clerk's Perspective*, 85 ILL. B.J. 285, 285 (1997) (explaining that when drafting opinions, the "person who gets to take the first crack at it (i.e., the law clerk) may influence the outcome").

254. *Bishop v. Albertson's, Inc.*, 806 F. Supp. 897, 901 (E.D. Wash. 1992) ("It is important that litigants appreciate that decisions are made by a constitutional judicial officer.").

255. See *id.* at 901. See *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523-24 (11th Cir. 1988) ("It is important that judges not feel their discretion has in any sense been delegated or their judgment impaired by soliciting and considering input from their clerks.").

256. *Bishop*, 806 F. Supp. at 902.

of these hurdles, clerks must use their position to remedy possible problems.

2. *Historians and Judicial Biographers: "This Justice Was A Great Jurist Because In This Opinion His Clerk Wrote"*

Concurrently, a judge's writing is of great importance to legal scholars, particularly to historians and judicial biographers. Judicial biographies have earned a significant market in the nonfiction world. In creating a judicial biography, one of the key measurements of greatness is the quality of a judge's opinions.²⁵⁷ Published opinions, at times, are the sole avenue available to begin to understand the thinking and life of a judge. What a person writes conveys a great amount about how that individual thinks. If judges cease writing their own opinions, one of the greatest sources for historians and biographers to judge judges will be skewed.

Current historians and judicial biographers seem compelled to interview former clerks to obtain a clearer picture of the subject Justice and his or her place in history.²⁵⁸ However, relying on the perspective of clerks may contribute to the creation of a different historical picture. The closeness of the judge-clerk relationship certainly may elicit a more personal feeling than the cold published jurisprudence.²⁵⁹ Furthermore, with increased opinion-writing by clerks, future historians

257. See Michael J. Gerhardt, *The Art Of Judicial Biography*, 80 CORNELL L. REV. 1595, 1626 (1995) (defining quality as encompassing the correctness of the judge's opinion, as well as the craftsmanship, creativity, influence, and durability). A recent quote from Lazarus also demonstrates how important opinions are in assessing the greatness of a Justice. Lazarus wrote, "[i]n 30 years, there is scarcely a line of doctrine, area of law, legal test or even memorable phrase that one can associate with [Justice] White." Edward Lazarus, *A Biography of Former Supreme Court Justice Byron White That's Equal To Its Subject—And Then Some*, CHI. TRIB., Aug. 30, 1998, § 14, at 9.

258. Prominent legal scholar and historian Bernard Schwartz often pursued interviews with the Justices' current and former clerks. See Wolfgang Saxon, *Bernard Schwartz Dies at 74; Legal Scholar and Historian*, N.Y. TIMES, Dec. 26, 1997, at D7. Even novelist Brad Meltzer interviewed clerks before writing his book. See Tony Mauro, *For lawyers, clerkship is ultimate job*, USA TODAY, Mar. 13, 1998, at 13A. Clerks have been criticized for viewing themselves as too powerful within the judicial process. See David R. Fine, *Lex, Lies, and Audiotape*, 96 W. VA. L. REV. 449, 459-60 (1993-1994) (book review). Likewise, some criticize scholars who interview clerks to gather information. See Ruggero J. Aldisert, *Super Chief: Earl Warren and His Supreme Court: A Judicial Biography*, 72 CAL. L. REV. 275, 281 (1984) (book review) (criticizing Bernard Schwartz for using law clerks as sources in the biography). However, one of the key issues that should be addressed in a judicial biography is whether clerks have influenced the judge. Gerhardt, *supra* note 257, at 1611.

259. See Lance Liebman, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 13, 13-14 (1993) (stating that "law clerks can be perfect celebrants of a retired judge, but they may be less reliable as analysts of his judicial contribution" because the "year of intimate observation and personal contact may create an emotional lens that distorts clear perception of the published jurisprudence").

and biographers, who may not have the option of interviewing former clerks, will have to turn to published opinions to understand their subject. These consumers will have incomplete materials to assess their subject. The historian and biographer must continuously ask: Is this what the judge thought? Did this opinion receive editing from the judge? Did the clerk influence the outcome, the wording, the style? Today, without access to a judge's papers or interviews with his or her clerks, historic and biographic interpretation could become a more difficult process.

Some clerks have intimate knowledge of how a judge thinks issues through and whether the judge actually wrote their underlying thoughts or deferred to the clerk's pen. Perhaps that is why former clerks have begun to corner the market on publishing judicial biographies.²⁶⁰ Furthermore, as mentioned, non-clerk authors have been interviewing former clerks of the judge in order to paste together a more complete picture.²⁶¹ Seeing the perspective of a law clerk, either through interviews or clerks' writings, allows readers to obtain an insider's look at this mysterious institution. However, the increasing inability to understand a judge through his opinions, because of the blurred lines of authorship, robs biographers of an important analytical tool.²⁶² A judicial biographer, who either does not have access to

260. Dennis Hutchinson recently published a biography of Justice White. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998). Hutchinson clerked for Justice White during the 1975 term. Robert S. Peck, *An Enigma Wrapped in a Mystery* (visited Nov. 11, 1998) <<http://jurist.law.pitt.edu/lawbook/reviews.htm>>. Justice White refused to cooperate in his former clerk's biographical project. *Id.* In fact, when asked upon retirement whether Justice White planned to pen his memories, he indicated that he already had done so in the volumes reporting the decisions he had written over the years. *Id.*

Andrew Kaufman wrote a biography of the famous Justice Cardozo. ANDREW L. KAUFMAN, *CARDOZO* (1998). Joseph Rauh, Justice Cardozo's last clerk, and Justice Frankfurter asked Andrew Kaufman to undertake Justice Cardozo's biography. *Id.* at ix. Kaufman was a former clerk to Justice Frankfurter. *Id.*

Mark Tushnet authored a more general biography of Justice Thurgood Marshall's time on the Court. MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* (1997). Tushnet clerked for Justice Marshall during the 1972-1973 term. *Id.* at viii. However, Tushnet decided not to "systematically interview law clerks" in penning this biography because he believed clerks would have provided little insight due to their short tenure at the Supreme Court. *Id.*

John Jeffries authored a biography of Justice Powell. JEFFRIES, *supra* note 235. Jeffries formerly clerked for Justice Powell. *Id.* at ix. In preparation for the book, Jeffries had access to Justice Powell's papers and held interviews with his family, friends, law partners, and other former clerks. *Id.*

261. See *supra* note 258 and accompanying text.

262. See SCHWARTZ, *supra* note 58 (former clerks discussed details about the writing of cases, including *Brown v. Board of Education*); ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 532 (1997) (interviewed 45 former law clerks of Justice Warren during his research giving readers a deeper look at the Court's decision-making process and who wrote first and

former clerks or who does not want to interview former clerks, is merely left with written opinions to develop his or her work. By relying solely on opinions, a historian or biographer is left to guess at whose thoughts, the judges or the clerks, were enshrined on the paper.

Aside from judicial biographies, writing is important to the field of history in general. If judges did not write opinions, society would not be able to trace the evolution of our nation's mores. The law dispensed by a court in writing is a projection of societal values. When we evaluate a judicial opinion, not only do we begin to understand the individual jurist, but we begin to understand ourselves and our nation's history. Through the words of judges, a history emerges in which racial segregation was the natural state of affairs,²⁶³ freedom of contract prevailed over health and safety conditions,²⁶⁴ war dictated a person's liberty,²⁶⁵ penumbras provided privacy,²⁶⁶ and interracial couples were told to live separately.²⁶⁷ Judges have recorded, and continue to record, our history, through their eyes, in their opinions. To fully understand a judge's perspective on our history, it is imperative to know which words on the paper were actually the judge's.

3. *The Public: Do People Want To See Behind The Curtain?*

Some political theories propagate that democratic-type nations function optimally with an informed public. But, does the public care whether clerks write opinions instead of judges? Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has argued that "Americans do not respect writers anyway, [and] take it for granted that every great figure has a ghostwriter, and in short could not care less whether Supreme Court justices or any other judges write their own opinions or have their clerks write them, provided [the] judges decide the outcome."²⁶⁸ What is the purpose of opinion-writing if we proceed on the notion that Americans do not care? While many Americans may not care, they should. And, even if society does not care, a just system should be maintained by those who do. Perhaps one day more people will care. In fact, a narrower

final drafts); HUTCHINSON, *supra* note 260, at 6, 340, 349, 352, 374-75, 406, 424, 447, 454, 471, 472 (relying heavily on interviews with one of Justice White's first law clerks, Rex. E. Lee).

263. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

264. See *Lochner v. New York*, 198 U.S. 45 (1905).

265. See *Korematsu v. United States*, 323 U.S. 214 (1944).

266. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

267. See *Loving v. Virginia*, 388 U.S. 1 (1967).

268. CHALLENGE AND REFORM, *supra* note 11, at 143. See Grey, *supra* note 209, at 5 (arguing that the language used by judges is not important because "[i]t is the decisions that count, not how they are put").

group of Americans, namely practitioners, legal historians, and biographers, do care.

Certainly, the public has access to the knowledge that clerks play a role in our courts. *The Brethren* and its progeny have given the reading public a powerful image of how clerks operate within judicial chambers. The press surrounding *Closed Chambers* focused on Lazarus' claims of clerk misconduct.²⁶⁹ The image received by the public is one of clerks usurping the Justices' power, given to them pursuant to nomination by the President and confirmation by the Senate.²⁷⁰ Debating about whether this image rings true or false overlooks the ultimate point.²⁷¹ As previously argued, sometimes an image will endure regardless of the truth.

Some may argue that the majority of the general public would not have read a five hundred page plus book, such as *Closed Chambers*, demonstrating the public's lack of interest in and knowledge about judicial clerks. However, even if many did not read the book, reports of the book have appeared on multiple popular mediums, including the Today Show and National Public Radio.²⁷² Newspapers have also communicated to the public the enormous power clerks hold. The Washington Post wrote, "[clerks] have drafted opinions and wielded enormous influence over cases that shaped American law."²⁷³ The Chicago Tribune wrote, "[i]n . . . 'Closed Chambers,' the clerks emerge as ideological advocates who determine not only which cases the Supreme Court will consider but also influence how justices will vote."²⁷⁴ The Supreme Court particularly fascinates the public because of the scant information available about the institution and the fact that the media focuses on the Court. Those who have gotten inside, namely clerks, are intriguing to outsiders because of their intimate knowledge of the judicial process.

269. See *infra* note 283 and accompanying text.

270. Justice Thurgood Marshall would occasionally remind his law clerks that "[he was] the one who was nominated by President Lyndon B. Johnson and confirmed by the Senate of the United States . . . not you." Randall Kennedy, *Fanfare for an Uncommon Man*, TIME, Feb. 8, 1993, at 32.

271. See *supra* note 70 and accompanying text.

272. See Interview with Edward Lazarus, *The Today Show* (NBC television broadcast, Apr. 8, 1998), available in 1998 WL 5262655; Closed Chambers Scott speaks with Edward Lazarus, author of "Closed Chambers," *Weekend Edition-Saturday* (NPR radio broadcast, Apr. 25, 1998), available in 1998 WL 6284860; *Booknotes* (Nat'l Cable Satellite Corp. television broadcast, June 14, 1998), available in 1998 WL 6616055; *The Osgood File* (CBS radio broadcast, June 15, 1998), available in 1998 WL 52828898.

273. Biskupic, *supra* note 37, at A1.

274. Wu, *supra* note 34, at 31.

D. A Simple Plan

Ideally, judges should reclaim their opinion-writing duties. Judges should stand as a positive example for the legal profession and the public. However, given increasing constraints, clerks should respond to help safeguard the appearance of justice. Former Supreme Court clerk Edward Lazarus charged that clerks mirrored and exacerbated the polarization and partisanship among the Supreme Court Justices.²⁷⁵ If this claim is true, clerks should cease mimicking these poor examples. The bulk of the tasks performed by clerks are not improper. Judges should and must depend on their clerks to work in many capacities given the historic closeness of the judge-clerk relationship.²⁷⁶ Instead of writing the first draft of an opinion, a clerk should become the editor and reviser of the judge's initial draft. When this suggestion is not practical, clerks should restrain themselves in acting as judges, steer their role back to a more traditional sounding board, and, if writing opinions is inevitable, write opinions which truly serve consumers of the law.

1. Don't Let Playing "Puny" Judge Go Too Far

"It is important that law clerks not be carried away with delusions of authority they do not have."²⁷⁷ Clerks are young and ambitious. Most have attended the top legal institutions and have built impressive resumes.²⁷⁸ The competition for the selection of the best clerks indicates the level to which judges defer their authority to clerks. Judges want clerks who will make them look more impressive in their written opinions. Likewise, clerks want the cachet of being published under the pseudonym of their judge. Many clerks have openly acknowledged their underlying desire to act as a "puny" judge.²⁷⁹

Testimonials by clerks indicate that they have been more than willing to fill the shoes of their superiors. One former clerk has acknowledged that "[t]he goal (or perhaps dream) of every law clerk that worked for the Judge in those initial years was to get a draft opinion by him relatively unchanged."²⁸⁰ Yet another clerk explained that "[y]ou go back to your office, you take a deep breath, you stare at your computer screen, and you go, 'Holy shit, I'm going to write the

275. See LAZARUS, *supra* note 8, at 190.

276. See *supra* note 38 and accompanying text.

277. *Bishop v. Albertson's, Inc.*, 806 F. Supp. 897, 901 (E.D. Wash. 1992).

278. See *supra* note 34-35 and accompanying text.

279. See Brenner, *supra* note 96, at 81.

280. *Id.* at 81.

law of the land.’”²⁸¹ Meltzer’s book also mimics these testimonials. One of the fictional clerks exclaimed to the other when their first opinion was published, “I can’t believe it! These are our words! This is the law!”²⁸² These feelings are wholly understandable because such power at such an early stage in a career can be very seductive.

Lazarus’ book, *Closed Chambers*, details instances of overreaching by clerks. Some vocal commentators have criticized Lazarus for relying on incidents exclusively from the “law clerk rumor mill” and not grounding his analysis in reality.²⁸³ Nonetheless, Lazarus has undoubtedly made an impression on society’s views of clerks because his book has been read by many. Whether the stories he told are factually accurate is an important consideration, but it is equally important to consider how deep of an impact his views will have on the role of clerks.²⁸⁴ However, Meltzer’s novel, *The Tenth Justice*, is inherently different than *The Brethren* and *Closed Chambers* because it is fiction. Although merely a novel, Meltzer’s book should also trigger deep concern about the public image of judicial clerks. The recent surge in the popularity of legal novels means that books, such as *The Tenth Justice*, are read by many Americans outside the legal community. The publication and popularity of Meltzer’s novel indicates quite a bit about the image that the public may hold of clerks.

2. *The Sounding Board Re-Born*

Clerks make crucial choices about which facts and legal precedent to spotlight in an opinion.²⁸⁵ By delegating the drafting of opinions, Justices miss out on the rethinking and re-examination of their views that flow from having to wrestle with the task of writing. Law clerks have been blamed for many “evils,” from influencing decisions to aiding in the uncontrollable proliferation of the United States Reports.²⁸⁶ Therefore, a transformation of image is in order. To lighten the burden on the bookcases of law libraries and law firms, clerks should help alleviate the growing number of unnecessary concurring and dissent-

281. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 146 (1994).

282. MELTZER, *supra* note 4, at 43-44.

283. O’BRIEN, *supra* note 226, at 214 (cautioning readers about the accuracy of Lazarus’ sources and factual errors); Floyd Abrams, *Trivializing the Supreme Court*, *FORTUNE*, Mar. 10, 1980, at 129 (criticizing *The Brethren*’s focus on law clerks); Alex Kozinski, *Worthy of Trust?* (visited Oct. 18, 1998) <<http://jurist.law.pitt.edu/lawbooks/revjun98.htm>> (claiming that Lazarus and his sources are unreliable).

284. See *infra* note 322 and accompanying text.

285. See *supra* note 58 and accompanying text.

286. CHALLENGE AND REFORM, *supra* note 11, at 146-47; KRONMAN, *supra* note 218, at 349-50. See *infra* notes 300-307.

ing opinions.²⁸⁷ Certainly, some are necessary and helpful to the law's consumers. There would be a very different jurisprudential landscape if Justice Holmes had not been a Great Dissenter.²⁸⁸ Generally, a clerk should question the judge about whether writing separately will accomplish a justifiable goal by asking: would this opinion add something of substance to the law? Along these lines, clerks should engage their judge with any concerns he or she has regarding the boundaries of their responsibilities. By opening the door of communication, the lines and boundaries of the relationship can begin to be more fully defined. Open communication would also preserve the individuality of each judge and clerk in this close relationship and stave off some of the fears of bureaucratization.²⁸⁹

Some commentators have correlated the increase in the number of clerks with the "spirit of separatism that is reflected in the splintering of judicial opinions."²⁹⁰ Passages in *The Brethren* suggest that clerks are bearers of gossip and informal messages among the Justices' chambers.²⁹¹ Thus, clerks should use these communication opportunities to, at a minimum, mend the gaps that create unnecessary concurring opinions. A clerk could use his or her position to incorporate the other Justices' ideas into the opinion of the assigned writer. These attempts may help reduce the number of pages published and also foster more collegiality. Perhaps a return to the sounding board model will bring the unanimity found in the opinions published between 1811-1823.²⁹²

Naturally, the closeness of the clerk-judge relationship is a hurdle to a clerk's individual action. A clerk does not want to step on judicial toes. Instead of fostering conversation, a clerk may fear his or her remarks may lead the judge to lose trust in the clerk. Furthermore, women and minority clerks may feel uneasy questioning their judge because these groups have historically been under-represented in the

287. See *infra* notes 300-307 and accompanying text.

288. See *Olmstead v. United States*, 277 U.S. 438, 469-71 (1928) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

289. See *supra* note 44 and accompanying text.

290. KRONMAN, *supra* note 218, at 351.

291. WOODWARD & ARMSTRONG, *supra* note 69, at 51 (explaining how Justice Marshall sent a clerk to talk to Justice Harlan's clerk to see if a compromise could be reached in a Mississippi desegregation case). See TUSHNET, *supra* note 260, at 57 (describing how the "clerk grapevine" lets the Justices know the thinking of the other chambers); Marquand, *supra* note 8, at 1 (reporting that clerks "act as ambassadors among nine chambers that are often compared to nine different nation-states").

292. See *supra* note 228 and accompanying text.

clerkship role.²⁹³ These individuals would not want to jeopardize future access to clerkships. Trust in the relationship is necessary because the judge opens up to the clerk a full view of his life and his decision-making process. Conversely, the judge may refrain from critically editing a clerk's work out of a sense of loyalty.²⁹⁴ A judge may forego accommodating a colleague's suggestions about a draft opinion so as not to risk insulting their clerk. A clerk should challenge these instincts.

Since a position as a clerk is highly sought after, few clerks want to risk jeopardizing a near guarantee of continued professional accolades.²⁹⁵ Generally, clerks desire to please the judge for whom they work. Few clerks would be inclined to formally complain about their judge. Serious claims by clerks against judges have been filed sparingly. Only a mere handful of clerks have filed sexual harassment claims against judges.²⁹⁶ When clerks have complained, the judges have received "nothing more than a censure, reprimand, or admonishment."²⁹⁷ If claims by clerks as substantial as sexual harassment have not been taken seriously, it is unlikely that a complaint would be raised that a judge improperly deferred opinion-writing to the clerk.

An example of what might occur if a clerk formally complained is displayed in the *Sheppard* opinion.²⁹⁸ Judge Beerman had ordered his law clerk to draft a decision; the clerk refused and was fired.²⁹⁹ According to the facts of the case, the relationship between the judge and clerk seemed to be sour for some time. However, this case raises an

293. See *supra* note 34 and accompanying text.

294. On the subject of loyalty, one commentator wrote:

Moreover – I base this on the word of a very recent law clerk – the natural loyalty of employers to those who work for them frequently leads Justices to resist even small alterations of draft opinions to accommodate the views of their colleagues after circulation of draft opinions inside the Court. That, in turn, partly accounts for the extreme fragmentation that now characterizes (and weakens) the Court's utterances.

LUSKY, *supra* note 58, at 156. Clerks are not the only ones to be faulted with romanticizing their clerkship. Judges may hold the same rosy outlook.

Of the ten clerks the Court has employed over the past twelve years, each has displayed discrete strengths and weaknesses, but there has not been a bad one in the bunch. All have been conscientious in their work habits, unflagging in their devotion to expedition of the Court's calendar, and thoroughly honorable in their approach to ethical considerations.

Bishop v. Albertson's, Inc., 806 F. Supp. 897, 901 (E.D. Wash. 1992).

295. See *supra* note 37 and accompanying text.

296. See Marina Angel, *Sexual Harassment By Judges*, 45 U. MIAMI L. REV. 817, 817 (1991) (emphasizing that the legal response to sexual harassment by judges has been disproportionately low compared to the magnitude of the problem).

297. *Id.*

298. See *supra* notes 177-185 and accompanying text.

299. See *supra* notes 179-182 and accompanying text.

important consideration. A clerk's position is a very delicate one because he or she walks a tightrope between pleasing the judge and serving society. From this case, it may be a safe conclusion that many law clerks would not formally complain about their judge. In light of this, clerks must maneuver within chambers to help create a more consumer-minded judicial process.

3. Write Consumer-Minded Opinions

"The mass of the law is, to be sure, accumulating with an almost incredible rapidity It is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists."³⁰⁰ While it is an American tradition that a judge becomes great via his or her written opinions,³⁰¹ some commentators have trumpeted the demise of the old Holmes model of opinion-writing.³⁰² Today's "Editor-Justice" lacks the distinctive voice of the great Justices of the past.³⁰³ Recently, some scholars have argued that being a great writer is not synonymous with being a great judge.³⁰⁴ Certainly, judges are not required to be Holmes-like to faithfully and honestly serve the law's consumers. Courts simply need to write and publish clearer, shorter opinions.³⁰⁵ Perhaps judges believe they do not have time to write

300. Joseph Story, *Address Delivered Before the Members of the Suffolk Bar*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 198, 237 (William W. Story ed., 1972).

301. For a cross cultural perspective consider Switzerland. Swiss judges generally do not write their opinions. *The Swiss Federal Supreme Court: The Clerks and the Personal Assistants of the Judges* (visited Nov. 11, 1998) <<http://www.admin.ch/tf/e/intro/greffier.htm>>. Instead, a legally trained clerk engages in debate with the judge and crafts the opinions. *Id.* This role stems from a time in Swiss history when clerks were the only legally trained people in the court system. *Id.*

302. See *CHALLENGE AND REFORM*, *supra* note 11, at 151 (surmising that "[t]he growth in the size—and quality—of the federal judiciary will make it more difficult for any modern judge to achieve the prominence of the famous judges of earlier times . . .").

303. *Id.* See *supra* note 64 and accompanying text.

304. "But I want to deny that literary distinction is a necessary condition for judicial excellence. There have been good, even great judges who wrote without distinction, or who let the law clerks do the writing . . ." Grey, *supra* note 209, at 6.

305. See *supra* notes 300-304 and accompanying text; see *infra* notes 306-307 and accompanying text. One commentator said:

[a]ll one needs to do is to read the heavily footnoted, citation laden, characterless, appellate opinions prevalent today to be convinced that these are the work of intelligent and careful, but inexperienced, lawyers . . . compare the opinions of a single judge from year to year to discern obvious differences in style and approach that can only signal a new author or authors.

Motz, *supra* note 253, at 1034. Yet another scholar wrote that the reliance on clerks in opinion-drafting has resulted in opinions which are "all too frequently prolix, unimaginative, indecisive, and less credible." Monaghan, *supra* note 44, at 347. Finally, one scholar determined that "the time of our clerks is spent merely in seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler

opinions because they desire to be Holmes-esque. Generally, judges only speak to the public through their opinions. Opinions do not need to be linguistic art to adequately serve the public. Romanticism aside, literary distinction is not a prerequisite for producing good judging. A judge's greatness should be demonstrated when he or she honestly wrestles with the issues and facts and then writes clearly on the issues presented. The primary function of written opinions should be to inform the law's consumers.

In the final analysis, judicial clerks will probably continue to write opinions. Clerks should acknowledge the damages of the proliferation of unnecessary opinions and exhibit self-restraint by writing shorter and clearer opinions. Clerk-written opinions often are littered with legal jargon and arcane footnotes. Clerks seem to be writing opinions for different reasons than opinions have been written for in the past. Clerks are typically editors of their law schools' journals. Rather than crafting opinions that are useful to a practitioner or to serve the law, clerks seem to write opinions to justify their position to law reviews.³⁰⁶ To temper this situation, clerks must stop and contemplate who will be the consumer of this opinion before placing their fingers on the keyboard. Practitioners and the public are more interested in six pages of reasoning by an experienced judge than forty pages full of citations, precedent, and footnotes sent out under the judge's name.³⁰⁷ Furthermore, if opinions are shortened, then perhaps judges will be more capable of reclaiming some of the first draft writing.

As previously discussed, three judge-clerk relationship models seem to have emerged from the past: (1) the sounding board; (2) the mirror; and (3) the judge.³⁰⁸ Caseload proliferation has arguably overruled the role of clerk as mere sounding board. This romantic role may seem too impractical in the media age. The mirror model may also be

opinion models." Thomas E. Baker, *Intramural Reform: How the United States Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 928-29 (1995).

306. See DOMNARSKI, *supra* note 9, at 89 (stating that "Justices are writing not just for the litigants but for all those who are to be affected by the rights and principles they are resolving and declaring").

307. See Paul M. Bator, *What's Wrong With the Supreme Court?*, 51 U. PITT. L. REV. 673, 697 (1990) (accusing the Supreme Court of not serving consumers of the law and challenging them to provide clear, usable guidelines, and their lawyers with readily applicable doctrine that can be reliably invoke in litigation); Michael J. Gerhardt, *The Art of Judicial Biography*, 80 CORNELL L. REV. 1595, 1630 (1995) (explaining how Justice Black wrote for the public, the ultimate beneficiary of the Court's work); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 133 (1990) (urging her colleagues to exercise greater restraint before writing separate opinions to improve collegiality and the clarity and predictability).

308. See *supra* notes 71-142 and accompanying text.

dead because of the sheer volume of work delegated to clerks. A clerk is unable to spend enough quality time with his or her judge to enable him or her to truly mirror the judge's style. Even if a clerk was to glimpse at opinions from previous years in hopes of mirroring his or her boss, he or she would only find reflections of past clerks. This would create clerks mirroring clerks, mirroring clerks, mirroring judges. Finally, the judge model is unacceptable because of the need for accountability, intellectual honesty, and judicial integrity.

A cycle has crystallized and will probably continue to turn. Clerks write opinions, law reviews critique opinions, clerks shape opinions to please law reviews to invoke less criticism, opinions grow increasingly convoluted in their justifications, practitioners wallow in confusion, more litigation ensues, and thus, more cases arise in which opinions must be written. Clerks have the opportunity to alleviate some of these problems and their consequences, given their unique position within "closed chambers." Therefore, clerks should engage this great opportunity.

III. IMPACT

The proposition of enlarging the federal judiciary to deal with rising caseloads has been contemplated and greatly disfavored because adding more judges translates into a diminished judicial quality.³⁰⁹ Many alternative reforms have been implemented or proposed, ranging from ceasing to issue opinions in written forms to chipping away at jurisdiction.³¹⁰ These remedial avenues also have limitations. The prospect of enlisting more clerks for duty should welcome a similar reaction to the suggestion of appointing more judges. The practical necessity of clerks has transformed their role since Justice Gray and Judge Hand's day. Unless clerks take affirmative steps from within the darkened chambers, their role may undergo drastic changes implemented by outsiders. These young professionals seem to have been delegated every function short of decision-making. As encroachment

309. Many scholars argue that hiring more federal judges would not lessen the workload nor increase the quality of judicial work. See, e.g., CHALLENGE AND REFORM, *supra* note 11, at 132-34 (stating that "[t]he individual judge's influence and status would be significantly diminished by such numerosity"); Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187-88 (1993) (urging the limitation of the federal judiciary to 1000 judges to avoid an inability to perform designated tasks); J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., Feb. 9, 1998, at A19 (stating that increasing the number of federal judges will increase issues of inefficiency, litigiousness, and intrusiveness).

310. See Robert G. Vaughn, *Normative Controversies Underlying Contemporary Debates About Civil Justice Reform: A Way of Talking About Bureaucracy and the Future of the Federal Courts*, 76 DENV. U. L. REV. 217 (1998).

upon the judicial function deepens, new standards may be imposed by outsiders, especially on Supreme Court clerks.

As clerk participation within chambers increases, opinion-writers may be tempted to reference the role of clerks more candidly and more frequently in published majority, concurring, and dissenting opinions.³¹¹ Perhaps judges will follow the bold step of concurring with their clerks on the face of opinions.³¹² Mentioning clerks in opinions would possibly hold judges more accountable and perhaps serve as a deterrence to delegating responsibilities too greatly. The consumers of legal opinions would also be in a better position to evaluate not only the reasoning but also to question any improper procedures undertaken by the judge or clerk. Historians and biographers would be able to more accurately assess their subject and the level of influence of the clerks upon the subject. However, the drawback of openly acknowledging clerks is the possible erosion of respect for written opinions.³¹³ Attorneys could begin to argue the weaknesses of opinions as controlling precedent based on the extent of a clerk's participation in writing the opinion.

In 1958, a United States Senator had the foresight to suggest that judicial clerks should undergo investigation, statutory qualifications, and confirmation by the Senate.³¹⁴ Certainly, if the duties of clerks continue to blossom, this proposal may be rehashed and realized. Demand for clerk accountability by the law's consumers will crescendo as more books in line with *The Brethren*, *Closed Chambers*, and *The Tenth Justice* reach public consumption. As one journalist assessed, "Lazarus' book may be even more damaging than *The Brethren*."³¹⁵ The publication of Lazarus' book was met with harsh criticism, and perhaps the implication of increased insight of clerks' roles has been the force behind this intense criticism.³¹⁶ One of the most vocal critics of Lazarus, Judge Kozinski of the United States Court of Appeals for the Ninth Circuit, has made it clear that he has "nothing but contempt"³¹⁷ for Lazarus and will recuse himself from cases in which Laz-

311. See *supra* notes 186-198 and accompanying text.

312. See *supra* note 198 and accompanying text.

313. Some have argued that going behind opinions can be harmful to the judicial system. See France, *supra* note 3, at 38-39. Justice Powell's statement that his decision in *Bowers v. Hardwick* was "probably a mistake" caused a California judge to declare that he was no longer bound by the ruling, causing disrespect for the written law. *Id.* at 39.

314. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 239 (6th ed. 1993).

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

316. See *supra* note 283 and accompanying text.

317. Tony Mauro, *Supreme Court Tightens Secrecy Rules for Clerks*, *USA TODAY*, Nov. 9, 1998, at 1A.

arus appears.³¹⁸ Perhaps Judge Kozinski realizes the potential implications Lazarus' actions will have on his relationship with his clerks, particularly in the media age.³¹⁹ Lazarus' book, or the next clerk exposé of the mysterious judiciary, may be the catalyst that ushers in a new precedent of looking closely inside judicial chambers.

Of more concern to those interested in maintaining the hermetic nature of the Court, the position of clerks could be used as a tool to begin rolling back the curtains on the Supreme Court stage.³²⁰ The demand for sunshine has partly reached the United States Congress through the medium of C-SPAN. One merely must turn on the nightly and Sunday morning news programs to witness the increasing effect of sunshine on the American presidency. Judges should be particularly careful about their clerks given recent harsh attacks on the judiciary in the political arena.³²¹ For voyeurs who are intent on prying into the mystery of the courts, the insulation of the clerks' position may provide a serious argument for shining bright spotlights behind the judicial curtain.³²²

318. See Kelly Flaherty, *Client Matters: Mayer Brown, Judge Clash Over Conflict*, NAT'L L.J., July 13, 1998, at A5.

319. Lazarus wrote the following about Judge Kozinski in his book:

Judge Alex Kozinski, for example, is uniformly recognized as one of the smartest members of the federal bench, an outspoken conservative with a razor-sharp wit. He is also a former clerk to both the late Chief Justice Warren Burger and Justice Anthony Kennedy—who was still on the Ninth Circuit when Kozinski worked for him. As part of his own [clerk] hiring process, Kozinski is famous for organizing poker games at elite law schools to which he invites leading clerkship contenders. . . . [Kozinski has a] preference for men as well as for members of the Federalist Society

LAZARUS, *supra* note 8, at 19-20.

320. See *supra* note 69.

321. See Bob Dickerson, "Let's Impeach That Damn Judge!," NEV. LAW. 6 (May 6, 1998) (commenting on the increase in the media coverage of unpopular judicial decisions and how more communication is needed between judges and the public); Douglas W. Hillman, *Judicial Independence: Linchpin of Our Constitutional Democracy*, 76 MICH. B. J. 1300 (1997) (reporting on recent political threats to judicial independence); Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299 (1996) (writing about political attacks on judicial independence).

322. "Despite shortcomings, *Closed Chambers* provides an insightful airing of the musty goings-on behind closed Court doors. That politicking and backbiting sometimes exist among nine strong personalities who must share personal space for the rest of their lives ought not be a national secret." Stephan J. Wermiel, *Hear Ye, Hear Ye: Under Strict Scrutiny, Court Clerk's Tell-All Comes Up Short Of Anything New*, A.B.A. J., June 1998, at 94, 94. See Edward Lazarus, *The Supreme Court Must Bear Scrutiny*, WASH. POST, July 6, 1998, at A19. The results of a recent survey asking 70 reporters who cover the Supreme Court what information they would want to have about the Court came out as follows:

83%	Oral transcripts indicating which justice is speaking
80%	Written reasons for recusal
71%	Televised oral arguments
70%	Written reasons for denial of certorari

CONCLUSION

The relationship formed between judges and clerks has been, and continues to be, an instrumental one in our judicial system. However, in recent years, the image of clerks has moved away from the traditional sounding board to one of a clerk acting as a judge. This image of a clerk usurping the power of a judge is improper and must cease to exist. To enhance the propriety of the judicial clerk's insulated position, clerks must question themselves and their role. If clerks do not adjust, the law's consumers may have to act. Prying into the inner sanctum of the judiciary, especially the Supreme Court, has become an increased activity for outsiders. Clerks should resurrect their role as sounding boards to ensure the future integrity of the judiciary and put their dreams of being the "tenth justice" or "puny judge" aside. These adjustments must be made because opinions written today will have lasting consequences on the development of the law.

Nadine J. Wichern

