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Open Chambers?

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OPEN CHAMBERS?

*Richard W. Painter**

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

Edward Lazarus¹ has written the latest account of what goes on behind the marble walls of the Supreme Court. His book is not the first to selectively reveal confidential communications between the Justices and their law clerks. Another book, Bob Woodward and Scott Armstrong's *The Brethren*² achieved that distinction in 1979. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, however, adds a new twist. Whereas *The Brethren* was written by journalists who persuaded former law clerks to breach the confidences of the Justices, Lazarus was himself a law clerk to Justice Harry Blackmun.

Closed Chambers is a well-written book. Lazarus's prose is concise and colorful. His doctrinal discussions are alive with details from the lives of the persons who brought cases before the Court. Many of these were African-American capital defendants in the South ranging from the Scottsboro Boys in the 1930s, nine men who almost certainly did not commit the crime of rape for which eight of them were sentenced to die in Alabama (pp. 77-85), to Warren McCleskey, who was executed in 1991 for murdering an Atlanta police officer while participating in a robbery, although he may not have fired the fatal shots (pp. 170-81). The book's use of historical material provides perspective on how social norms and politics influence the Justices, as well as the Court's history of confrontation with other branches of government, from Chief Justice Taney's pernicious use of substantive due process to flout the Missouri Compromise in *Dred Scott* (pp. 246-47) to the Court's dismantling of state death penalty statutes in the 1960s and 1970s (pp. 86-118). Far

* Professor, University of Illinois College of Law. B.A. 1984, Harvard; J.D. 1987, Yale. Professor Painter graduated from Yale Law School with Edward Lazarus and several of the former Supreme Court clerks mentioned in *Closed Chambers*. — Ed. I am grateful to Dean Anthony Kronman for helpful comments on this Book Review and to Tiffany Yonker for helpful research assistance.

1. Mr. Lazarus is an Assistant United States Attorney for the Central District of California.

2. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979). *But see infra* note 84 (discussing memoirs written before *The Brethren* in which former clerks made limited disclosures, usually years after the death of the Justices for whom they clerked).

from being a digression, anecdote and history aptly frame Lazarus's portrait of the Court in the late 1980s and early 1990s.

Nonetheless, many reviewers have criticized the book for a variety of inaccuracies³ and exaggerations.⁴ Others question the reality

3. See, e.g., David J. Garrow, *Dissenting Opinion: A witness from inside the Supreme Court is not impressed*, N.Y. TIMES, Apr. 19, 1998 (book review) at 26 ("Closed Chambers is a worthwhile book for students of Supreme Court history, but it is not a book general readers should rely upon for an accurate and dependable contemporary portrait."). Several reviews, cited separately below, appear at JURIST: BOOKS-ON-LAW (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm>>. Ironically, most of the book's inaccuracies are not in the historical material, but in Lazarus's account of the Court's more recent past. Lazarus describes Justice Souter as "a vocal dissenter in [*Employment Div. v. Smith*]," p. 511 n.*, even though Justice Souter was not even on the Court when *Smith* was decided. See David M. O'Brien, *Breaching Confidence, Court Bashing, and Bureaucratic Justice*, JURIST: BOOKS-ON-LAW (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm#Brien>> (pointing out this error); Edward Lazarus, *Disturbing Truths*, JURIST: BOOKS-ON-LAW (July 1998) <<http://jurist.law.pitt.edu/lawbooks/revjul98.htm#Lazarus>> (acknowledging this error in response to book reviews). Lazarus also reports that Justice O'Connor "so distrusted Brennan — for having hoodwinked her in some unnamed past case — that she refused to join any of his majority opinions for the Court," p. 277, a statement disproved by the fact that Justice O'Connor joined seven of Brennan's majority opinions in the year of Lazarus's clerkship alone, while Brennan joined seven of hers. See Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 851 n.104 (reviewing *Closed Chambers*) (citing seven majority opinions by Justice Brennan joined by Justice O'Connor); *id.* at 851 n.105 (citing seven majority opinions by Justice O'Connor joined by Justice Brennan); see also Garrow, *supra* (same).

Lazarus reports that Chief Justice Rehnquist "relisted" *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), postponing consideration of the petition for certiorari until the Justices' next weekly conference, because Rehnquist hoped "to push off oral argument until the fall . . . [and] delay a final ruling until sometime in 1993, long after the [1992] election." P. 463. According to Lazarus, "Rehnquist did not relist *Casey* only once; he did it several weeks running (exactly how many is not known)." P. 463. A call to the office of the Supreme Court Clerk, however, confirms that the petition in *Casey*, originally scheduled for conference on January 10, 1992, was relisted exactly once, for the conference on January 17, and that the order granting certiorari was filed on January 21. See Kozinski, *supra*, at 852; see also Garrow, *supra* (reporting that relisting "is standard practice when the Court reformulates the question that a case presents, as it did in *Casey*. Rehnquist may or may not have wanted to delay *Casey*, but he did not do what *Closed Chambers* says he did.").

Toward the end of the book, Lazarus states that, when convicted murderer Robert Alton Harris was strapped in a chair in California's gas chamber, "two minutes later, astonishingly, the phone rang. It was Judge Warren Pregerson of the Ninth Circuit, issuing yet another stay." P. 508. What is astonishing about this account is not Judge Pregerson's telephone call (the Ninth Circuit issued several last minute stays in this case alone), but the fact that Lazarus, who clerked for Judge William Norris on the Ninth Circuit when Judge Pregerson was his colleague, apparently does not know that "Warren" appears nowhere in the name of Judge Harry Pregerson. Two pages earlier, Lazarus states that a Ninth Circuit panel "consisting of Judges Richard Alarcon, Melvin Brunetti and John Noonan" granted, over Judge Noonan's dissent, the State of California's petition to dissolve a district court's stay in the *Harris* case. P. 506. This is true, except for the fact that Judge Alarcon's first name is Arthur, not Richard. See Kozinski, *supra*, at 854 & n.120 (noting that this error is "particularly embarrassing as Lazarus clerked on the Ninth Circuit (one floor above Alarcon) and regularly appears before the court in his capacity as an Assistant United States Attorney for the Central District of California"). Lazarus would have benefited enormously in his discussion of the *Harris* case — in more respects than simply getting the judges' names right — if he had read Judge Noonan's detailed discussion of the case in the *Stanford Law Review*. See John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993). Apparently, however, Lazarus settled for reading, and referring to, Judge Noonan's brief editorial in the *New York Times*. Pp. 508 & 546 n.21 (citing John T. Noonan, Jr., *Should State Executions Run on Schedule?* N.Y. TIMES, Apr. 27, 1992, at A17).

of Lazarus's vision of nonpoliticized Supreme Court decisionmaking, based on "good faith and self-denial,"⁵ which he believes to have been "vanquished" by the Robert Bork confirmation hearings.⁶ Finally, Lazarus has been taken to task for overstating the

Errors such as these could have been avoided if Lazarus had given as much attention to detail as he gave to his prose.

4. The most egregious exaggeration in the book is Lazarus's statement that the Court's October Term 1988 "must rank with the New Deal watershed of 1937 and the year of *Brown v. Board of Education*, 1954, as the most decisive in this century." Pp. 261-62. The 1988-89 Term did include some important cases. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that provisions of the Sentencing Reform Act of 1984 that direct the federal Sentencing Commission to set Sentencing Guidelines did not violate the separation of powers doctrine); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down Richmond's preference for minority contractors); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a state statute prohibiting flag burning); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (interpreting the Establishment Clause to bar a holiday display on government property); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (partially affirming *Roe v. Wade*). The 1988-89 Term, however, did not include any of the decisions that rank with the 1954 decision in *Brown v. Board* as forming the foundation of modern constitutional law, such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966), both of which dramatically expanded the rights of criminal defendants; *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that a statute prohibiting sale of contraceptives violated a substantive due process right to privacy; *Roe v. Wade*, 410 U.S. 113 (1973), which expanded this right to cover abortion; and *New York Times v. Sullivan*, 376 U.S. 254 (1964), which (happily for Lazarus) made it extraordinarily difficult for public figures, such as Supreme Court Justices, to sue for libel.

As far as "watershed" constitutional crisis is concerned, the 1988-89 Term was insignificant, particularly when compared with President Roosevelt's frontal assault on the Court in the 1930s, President Eisenhower's decision to enforce the Court's desegregation decrees with federal troops in the 1950s, and the Court's unanimous order that President Nixon turn White House tapes over to federal prosecutors in 1974. Lazarus's exaggeration of the importance of his clerkship Term simply is not in line with historical reality. See Garrow, *supra* note 3 ("Lazarus's characterization of his own year [in such language] is risible."); O'Brien, *supra* note 3 (concluding that this characterization of Lazarus's own term "raises questions about Lazarus's sense of judgment — judgment of history and other matters").

5. P. 249. See David Kairys, *Reason Worship*, JURIST: BOOKS-ON-LAW (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm#Kairys>> ("The central problem for Lazarus and this book — and for this dominant mode of legal scholarship — is to document the norm, compared to which the injection of politics can be described as a deviation."). Kairys correctly points out that most of the Court's opinions that Lazarus admires, such as *Brown v. Board*, involved a heavy dose of politics, not mere legal reasoning. In another example, Lazarus claims that the Court of Chief Justice John Marshall "overcame sharp divisions and succeeded in separating the interests of the Court and of the Constitution from politics." P. 10. Kairys points out, however, that Chief Justice Marshall, in the most famous case of that era, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was under threat of impeachment by the Republicans if he did not rule in their favor. Marshall's opinion thus "weaves through a range of issues to establish judicial review without really using it," and is "not an opinion one can hold up as free of contemporary politics, faults of legal reasoning, or close attention to practical and political results." Kairys, *supra*.

6. P. 249. Politicized confirmation battles, however, are nothing new. The acrimony and accusation that characterized the hearings for Robert Bork in 1987 and Clarence Thomas in 1991 echoed the atmosphere surrounding Justice Abraham Fortas's resignation and President Nixon's unsuccessful nomination of two conservative jurists, Clement Haynsworth and Harrold Carswell, to the Court in 1969. Indeed, President Wilson in 1916 triggered what was probably the most divisive confirmation battle of the Twentieth Century by nominating Louis Brandeis, a Boston lawyer who was viciously attacked for being both a Progressive and a Jew. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 466-67 (1946).

role of clerks in influencing the decisions of the Court.⁷

Surprisingly, despite some glaring parallels to more recent confirmation battles, the Brandeis nomination goes virtually unmentioned in Lazarus's lengthy historical exposé. At his confirmation hearing, belated charges of ethical impropriety were raised against Brandeis by accusers who, at the time the alleged conduct occurred over six years earlier, had publicly said nothing critical of him, but who now, with the encouragement of several Senators and their staff, came forward in the Senate committee room. The accusations — that Brandeis had been dishonest as well as disloyal to his clients — fit conveniently into anti-Semitic stereotypes. The testimony of Brandeis's accusers, however, revealed the hypocrisy of Boston's predominantly Protestant bar, which showed no greater sensitivity to conflicts in legal representations. The accusations were more about politics than ethics, and the vote to confirm Brandeis was strictly along party lines. See *Hearings on the Nomination of Louis D. Brandeis Before the Senate Comm. on the Judiciary*, 64th Cong. (1916), reprinted in part and discussed in JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* 382-423 (1997).

Although the Bork confirmation fight resembled the Brandeis episode in its focus on the nominee's ideology, the Thomas nomination was a closer parallel in two other aspects: a transparent role of race and ethnicity in the deliberations and last-minute accusations of impropriety against the nominee. President Bush chose Thomas to replace Thurgood Marshall, and many civil rights groups that had opposed Bork were reluctant to oppose Thomas, even though they detested his judicial philosophy. Pp. 451, 455. The hearings took their accusatory turn after Senate Judiciary Committee staff members leaked to the press excerpts from an FBI interview in which Anita Hill said that Thomas had sexually harassed her seven years earlier when she had worked for him at the EEOC. Thomas flatly denied Hill's accusations and for good measure accused the committee of subjecting him to a "high tech lynching." P. 454. Passions were inflamed and Thomas's approval rating in the black community soared. See Henry Louis Gates, Jr., *Putney Swope Is Dead*, *NEWSDAY*, Nov. 8, 1992, at 40 (reporting that immediately following the last round of hearings, "Thomas' approval rating among black Americans, previously hovering at 54 percent, soared to 80 percent"). It was also apparent that, for some members of the Senate, hypocrisy was in the air, and that this might only be the first round in a political war of attrition over sexual harassment allegations, which when denied under oath, can be compounded by allegations of perjury. After all was said and done, the 52-48 vote to confirm was mostly along party lines, with 41 Republicans and 11 Democrats voting to confirm and 2 Republicans and 46 Democrats voting no.

7. See Garrow, *supra* note 3 ("Lazarus's writing is often better than his judgment. Clerks often suffer from an exaggerated sense of their own importance."); O'Brien, *supra* note 3 (criticizing Lazarus's portrayal of the Court "as 'clerk driven' and composed of 'editor Justices'" in part because "clerks do not write on entirely clean slates and their drafts must pass muster with the justices"); Mark Tushnet, *Hype and History*, *JURIST: BOOKS-ON-LAW* (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm#Tushnet>> ("I'd offer . . . [a] 'null hypothesis' to test Lazarus's account: No law clerk has a substantial impact on the outcome — a Justice's vote — in any significant case, and no law clerk has a more-than-trivial impact on the core legal rules stated in the Court's opinions. Nothing in Lazarus's account persuades me that the null hypothesis is false."); Lyle Denniston, *Closed Chambers: Law Clerk's Revenge*, *BALTIMORE SUN*, Apr. 12, 1998, at F5 (describing the book as "captivated by the hilariously foolish notion that the Supreme Court is really run by scheming clerks").

Dean Anthony Kronman and Kenneth Starr, among others, have correctly pointed out that judges delegate too much of their work, particularly opinion writing, to clerks. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 347-51 (1993) (discussing the "increasingly important role that law clerks play in the process of opinion writing" and noting both "their immaturity and own self-conscious lack of judgment"); Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 *ARIZ. L. REV.* 211, 214-16 (1990). Lazarus converts this observation into a conspiracy theory and dwells on unattributed accounts of how a "cabal" of conservative clerks, most of whom he knew personally, plotted to influence a few cases. See, e.g., pp. 251-87 (a 36-page chapter entitled "The Cabal Against the Libs"); pp. 314-15 (describing cabal influence in the Kennedy chambers in *Patterson*); pp. 321-22 (same); p. 391 (describing efforts by Andrew McBride, an O'Connor clerk who "presided over the cabal," to persuade O'Connor to reverse *Roe* in *Webster*); p. 405 (describing cabal influence on the Rehnquist chambers in *Webster*); p. 419 (describing a shoving match be-

Although these criticisms collectively cast doubt on the substantive merit of *Closed Chambers*, this review will not embark on already well-traveled ground by dissecting the book in search of further inaccuracies. Rather, this review will address ethical lapses in the book that have troubled the author of this review⁸ and others, ranging from Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit and Anthony Kronman⁹, the Dean of the Yale Law School to Tom Goldstein, the Dean of the Columbia School of Journalism.¹⁰

tween McBride and a liberal clerk that drove them both into the courtyard fountain); p. 501 (describing efforts by cabal members to shrink the Court's *habeas* docket). Both conservative and liberal commentators, however, point out that Lazarus fails to demonstrate any specific influence such a "cabal" actually had. See Kozinski, *supra* note 3, at 866-71; Tushnet, *supra* ("Lazarus doesn't convince me that there was anything special about the cabal, or even that it was particularly influential."). In *Webster*, for example, although Lazarus asserts that an O'Connor clerk presided over the cabal, p. 391, Tushnet observes that "in the end, Justice O'Connor did what *she* wanted, not what the cabal wanted." Tushnet, *supra*. With respect to *Patterson v. McClean Credit*, Tushnet points out that the circumstantial evidence all suggests that Justice Kennedy made up his own mind to change his vote and deny Brenda Patterson's claim under the 1866 Civil Rights Act for racial harassment on the job, rather than collapsing, as Lazarus claims, pp. 314-15, under pressure from the cabal. Tushnet, *supra*.

A less glamorous but more useful exercise than publishing this courthouse gossip would have been to compare clerks' draft opinions and bench memoranda in the publicly available Brennan and Marshall papers with the final product in the *United States Reporter*. Another useful endeavor would have been to look at the more technical areas of the law — securities, antitrust, and other areas of statutory interpretation — in which the Justices do not always have a firm grasp of the relevant subject matter, and are more likely to rely on clerks to formulate legal reasoning. See, e.g., Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153 (1998) (criticizing the Court's confusing and incoherent body of case law governing insider trading). Discussion of cases in these areas, which go unmentioned in *Closed Chambers*, might have further supported the point that clerks' influence is excessive.

8. See Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 23, 1998, at A23 (criticizing Lazarus for betraying the Court's confidences); see also Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, June 17, 1998, at A27 (making same point).

9. See Kozinski, *supra* note 3, at 838-49. Dean Kronman wrote an endorsement for the back cover of *CLOSED CHAMBERS* but has subsequently expressed concern about the serious and troubling ethical issues raised by Lazarus's reporting of events during his clerkship. See Letter from Anthony T. Kronman, Dean, Yale Law School, to Richard Painter, Professor, University of Illinois College of Law (Mar. 26, 1999) (on file with author) ("[I]t is now my settled view that the only workable rule regarding the disclosure of confidences by law clerks is one that requires them to treat as confidential (and hence nondisclosable) any information not in the public record that pertains to events occurring during the period of their clerkships—regardless of the source of the information (firsthand or indirect) and regardless of the time it is received (during the clerkship or after). As the debate surrounding *CLOSED CHAMBERS* demonstrates, it is impossible to determine, after the fact, where a clerk who reveals confidences learned them, and when he or she did. A blanket prohibition against disclosure seems to me the only sensible approach."). Dean Kronman's written endorsement of *CLOSED CHAMBERS* has been withdrawn and will not appear on the paperback edition of the book. See Tony Mauro, *Yale Dean Caught in Book Controversy: Head of Law School Apologizes for Blurb on High Court Tell-All*, USA TODAY, May 10, 1999, at 10A.

10. See Adam Cohen, *Courting Controversy*, TIME, Mar. 30, 1998, at 31 ("It seems to me the most fundamental breach of confidentiality you can think of." (quoting Tom Goldstein) (internal quotation marks omitted)).

To the extent Lazarus disclosed confidential communications that took place during his clerkship, he breached not only the trust of the Justices, but a longstanding expectation of confidentiality that is now embodied in a written Code of Conduct for Supreme Court Clerks.¹¹ Because portions of the book quote extensively from nonpublic documents,¹² somebody also may have violated federal statutes prohibiting unauthorized removal of documents from the Supreme Court building.¹³ Unfortunately, Lazarus darkens the cloud of suspicion by refusing to reveal his sources, many of whom are probably former Supreme Court clerks, and by refusing to disclose where he got the nonpublic documents that he discusses in *Closed Chambers*.

These ethical lapses are the principal focus of this review for two reasons. First, legal scholars, particularly those who teach professional responsibility and recommend students for judicial clerkships, need to ascertain the rationale for and extent of a law clerk's duty of confidentiality. Second, efforts to conceal breaches of that duty by Lazarus and his sources are responsible for the book's most significant substantive shortcoming, its lack of verifiability.

Lazarus is loath to disclose his sources, and does not even provide the complete text of documents that he obtained from the Court's files. His readers, therefore, must take at face value his representations about what was said or written, by whom, and in what context. The usual support provided for a scholarly work, citation to specific documents in the public domain or interviews with identified persons, is absent, and Lazarus acknowledges this weakness in his introduction.¹⁴ The usual safeguard for journalists' stories in magazines and newspapers, careful scrutiny by fact checkers,¹⁵ presumably was not employed here, and in any event

11. See CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES [hereinafter CODE OF CONDUCT] CANONS 2, 3 (1989).

12. See *infra* notes 27-29 and accompanying text.

13. See 18 U.S.C. § 641 (1994) (providing criminal penalties for "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record . . . of the United States or of any department or agency thereof," and "[w]hoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted"); 18 U.S.C. § 2071 (1994) (providing criminal penalties for anyone who "willfully and unlawfully conceals, removes . . . or, with intent to do so takes and carries away any record . . . document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States"). These statutes are discussed *infra* in text accompanying notes 40-43.

14. P. xii ("I recognize that this approach makes it more difficult for the reader to evaluate some of my assertions, but I have made this sacrifice in order to further shield the identity of those who helped me.")

15. Recent high-profile fabrication incidents have highlighted the need for this safeguard. See Robin Pogrebin, *Columnist's Ouster Pushes Editors to Look Inward*, N.Y. TIMES, June 22, 1998, at D7 (discussing impact of the *Boston Globe* columnist Patricia Smith's resignation because of fabricated stories); Robin Pogrebin, *Rechecking a Writer's Facts, A Magazine Un-*

would not have been successful given Lazarus's reliance on so many anonymous sources. Indeed, it is unlikely that anyone other than Lazarus himself has comprehensive knowledge of the sources he used.

Finally, Lazarus's breach of confidence raises an unsettling question that undermines his work's credibility: If Lazarus and his sources betrayed the Justices' trust, how can readers easily dismiss the possibility of fabrication somewhere along his undisclosed chain of information? Under the circumstances, and given the substantive inaccuracies that other reviewers have already identified in the book,¹⁶ this reviewer finds such a leap of faith to be unfathomable.

Part I of this review discusses specific ways in which the author and his sources breached confidence. Section I.D responds to the author's arguments in defense of his enterprise. Sections I.E, F, and G then discuss how these disclosures undermine rather than enhance the substantive merits of *Closed Chambers*, and conclude that those portions of the book that rely on the public record are the strongest while the portions that rely on insiders' disclosures are the weakest. Lazarus's recounting of confidential communications adds little to his account, and his obsession with the clerks rather than the Justices themselves is a distraction that undermines what could have been an insightful account of an important juncture in the Court's history.

Part II discusses the relationship between Justice and law clerk and the importance of confidentiality to that relationship. Part II also addresses an argument that is sometimes made for narrowly construing the duty of confidentiality in the Justice-clerk relationship: the importance of scholarly and public scrutiny of the Supreme Court.¹⁷ Ultimately, however, this argument is unpersuasive, in part because substantial damage to the Justice-clerk relationship ensues from such breaches of confidence, and in part because there is relatively little value in selective disclosures by former clerks. Disclosures about the Court's decisionmaking process are better made by the Justices themselves, as when they give or

covers *Fiction*, N.Y. TIMES, June 12, 1998, at A1 (recounting how writer Stephen Glass was fired when the *New Republic* discovered that he made up part or all of 27 of 41 articles over three years).

16. See *supra* note 3.

17. See Cohen, *supra* note 10, at 31 (quoting Erwin Chemerinsky, Professor of Law at the University of Southern California and a friend of Lazarus, as saying that back-room politics that affect case outcomes is "exactly what should be exposed to the public"). Professor Chemerinsky has written a review of *CLOSED CHAMBERS* that is more positive than most other reviews of the book, and that is devoted in substantial part to refuting claims made by Judge Kozinski and the author of this review that the book improperly breaches confidences and relies upon improperly obtained documents. See Erwin Chemerinsky, *Opening CLOSED CHAMBERS*, 108 YALE L.J. 1087 (1999).

bequest their papers to libraries or engage in cooperative endeavors with biographers.

I. CLOSED CHAMBERS

A. *The Breaches of Confidence*

Lazarus begins his book acknowledging that “[t]he clerkship gave me unusual access to sources knowledgeable about the Court and armed me with questions others might not think to ask” (p. xi). He goes on to insist, however, that

I have been careful to avoid disclosing information I am privy to *solely* because I was privileged to work for Justice Blackmun. In other words, I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews conducted over the past five years.¹⁸

In addition, in various public statements, but not in the book itself, Lazarus has claimed that Justice Blackmun knew about the book while it was being written.¹⁹ Justice Blackmun, who died a year after the book’s publication, did not confirm or deny prior knowledge of the book, although persons in his office denied that he knew about it prior to publication.²⁰ There is no evidence that Justice Blackmun gave Lazarus permission to use confidential communications in writing the book, and Lazarus himself acknowledges that Justice Blackmun was unaware of the details of the book.²¹

Unfortunately, portions of *Closed Chambers* directly repudiate Lazarus’s claim that he has not disclosed information he was privy

18. P. xi (emphasis added). As Judge Kozinski points out, “The word ‘solely’ is emphasized because it is crucial to Lazarus’s ethical hairsplitting. Lazarus takes the position that he did not breach any confidences because all the inside information he discloses, he learned — or relearned — after he left the Court.” Kozinski, *supra* note 3, at 838. In a later editorial, Lazarus claims that he “omitted from my book matters I knew only because I served as a clerk (including every discussion I had with my boss, Justice Blackmun).” Edward Lazarus, *The Supreme Court Must Bear Scrutiny*, WASH. POST, July 6, 1998, at A19. At least with respect to Lazarus’s conversations with Justice Blackmun, this claim is demonstrably false. See *infra* text accompanying notes 22-24.

19. See Ronald K.L. Collins & David M. Skover, *The Interview with Edward Lazarus*, JURIST: BOOKS-ON-LAW (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm#Trans>> [hereinafter Collins & Skover, *Interview with Lazarus*] (“Justice Blackmun has known since the book’s inception that I was writing it, and we discussed the book and corresponded about it on many occasions.”). The exact moment of the book’s “inception” is unclear, although Lazarus claims to have been inspired to write the book during the confirmation hearings for Justice Thomas. See *id.*

20. See Joan Biskupic, *Book Breaks Silence of Supreme Court*, WASH. POST, Mar. 4, 1998, at A8 (“Blackmun retired in 1994 but still goes daily to his office at the court and some people close to him said he was unaware until yesterday that his former clerk was publishing a book.”). Despite protestations to the contrary by Lazarus, see Collins & Skover, *Interview with Lazarus*, *supra* note 19, *The Washington Post* has not retracted this story.

21. See Collins & Skover, *Interview with Lazarus*, *supra* note 19 (“I never discussed with the Justice the intimate details of the book, and he was not a source for the book.”).

to solely because of his clerkship.²² Lazarus reports that early in his clerkship he had a telephone conversation with Blackmun in which he advised Blackmun how to vote in a case, and that Blackmun took Lazarus's advice:

I told Blackmun that I thought [Justice] Marshall's dissent [from the stay in *Spallone v. United States*, 487 U.S. 125 (1988)], though fairly convincing, felt premature to me and also prejudged some legal issues We talked for a while, back and forth, question and answer

In the end, the Justice chose not to join Marshall's dissent. [p. 46]

Lazarus also reveals that as a clerk for Justice Blackmun, he was given "exacting instructions about how to handle the emergency death cases, including explicit warnings not to be overly influenced by abolitionists from the Brennan or Marshall chambers" (p. 269). Later in the book, Lazarus discusses Justice Blackmun's reaction to the conference in which the Justices decided which issues to hear in *Webster v. Reproductive Health Services*,²³ then quotes from a bench memo he wrote to Blackmun about *Webster* (pp. 395-96), and finally relates Blackmun's tepid reaction to the Justices' conference on the merits of *Webster*.²⁴

Lazarus's disclosure of his own conversations and correspondence with Justice Blackmun, however, is less significant than his reports about communications between other clerks and their Justices. Lazarus may have overheard some of these communications when he was at the Court. In many instances, however, other clerks may have told Lazarus about their own communications with their Justices. In still other instances Lazarus's account may be based on second- and third-hand reports of what clerks remember having overheard. Because Lazarus does not identify his sources, there is no way for the reader to tell which is which.

For example, Lazarus gives a detailed account of a meeting between Justice Kennedy and two of his clerks, Paul Cappuccio, formerly a Scalia clerk, and Harry Litman, formerly a Marshall clerk, in which the two "vied for his critical vote" in *Webster* "with absolute abandon":

Cappuccio, much like McBride in O'Connor's Chambers, pressed for Kennedy to overturn *Roe* and adopt Scalia's *Michael H.* approach to due process. Over and over, Cappuccio reminded Kennedy that the Court's foray into *Roe*-style substantive due process had originated in

22. Lazarus also discusses his initial interview with Justice Blackmun. In the interview, Blackmun "asked me how I would feel about working for the man who had written *Roe*." P. 334. Justice Blackmun also "insisted that his was the least desirable clerkship at the Court, in part because his colleagues were more intelligent and better teachers than he." P. 23.

23. See p. 334 ("I still remember Justice Blackmun telling us about the conference vote, his face impassive, his voice wavering between defiance and resignation.").

24. See p. 401 ("In any event, I stayed in my office and waited for Blackmun to come through my door on the way to his own. I caught his eye as he slipped quietly by, and he gave a little shake of his head, then whispered, 'We'll see.'").

the abomination of *Dred Scott*. . . Cappuccio insisted that substantive due process — as evident from both *Dred Scott* and *Roe* — was a doctrine that corrupted law with political judgment. Accordingly, overturning *Roe* was not only proper but imperative.

On the other side, Litman's argument focused on the consequences of overruling *Roe*. As a jurisprudential matter, Litman suggested that there could be no meaningful line drawn between *Roe* and *Griswold*, the contraception case Kennedy had referred to approvingly at his confirmation hearings. Both decisions were based on the same elastic Harlanesque concept of due process and, indeed, relied on many of the same precedents. . . . [L]ogically, dumping *Roe* meant dumping *Griswold* and everything in between.

. . . .

The meeting was among the most dramatic of the term, a tug-of-war for Kennedy's mind, conducted by two of the Court's smartest and fastest-thinking clerks (who notably, were also good friends). Still with oral argument upon them, the discussion ended inconclusively. [pp. 394-95]

Lazarus himself could not have witnessed what was said at this private discussion between Justice Kennedy and his clerks.²⁵ Nor is the discussion a matter of public record in the Brennan or Marshall papers, or anywhere else. Lazarus could have learned about the discussion from a Kennedy clerk who was present, or from someone else who overheard the discussion or heard about it from someone who was present. If so, someone breached Justice Kennedy's confidence in order for Lazarus to learn what was said. Alternatively, someone may have made this discussion up.²⁶ Breach of confidence, fabrication, or perhaps a little of both, underlies Lazarus's account, but without disclosure of his sources, we have no way of knowing what was said and whether confidences were breached. What we do know is that any such discussion between Justice Kennedy and his clerks, if it occurred, almost certainly was intended to be confidential.

With respect to the documents that Lazarus used to write the book, he initially represents that his sources are the publicly available Brennan and Marshall papers "[u]nless otherwise noted" (p. xi, n.*). However, in discussing *Webster v. Reproductive Health Services*, Lazarus explicitly claims to be using documents, including a draft opinion purportedly written by the Chief Justice, that are not part of the public record:

25. Lazarus claims not to have known about goings on in Justice Kennedy's chambers at the time: "In the Blackmun Chambers, I remember having only a relatively vague sense of the tempest brewing in these decisive quarters." P. 395.

26. It is also possible that Lazarus reconstructed the argument from bench memoranda obtained from the Kennedy chambers, in which case there may have been no actual conversation at all.

Previous “insider” accounts of *Webster* have made no mention of this draft or the crucial correspondence that followed it. They pieced together their versions of the story based mainly on the Thurgood Marshall or William Brennan Papers, neither of which, for obvious reasons, contain the private letters sent within the conservative caucus of the Rehnquist Court. *Webster* is only one example, albeit a glaring one, of how dramatically the presently available paper trail can seriously mislead students of the Court. [p. 402 n.*]

Lazarus thus goes beyond “the presently available paper trail” to discuss a draft opinion and “crucial correspondence” that somebody obtained from the Court’s confidential files. Lazarus also cites and discusses a post-conference letter on *Webster* from Kennedy to Rehnquist that is not a part of the public record:

Other commentators have suggested that Kennedy’s position was less firm in rejecting *Roe*: for example, that while disapproving of *Roe* he favored standing by the decision because of stare decisis concerns. See James Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York, Simon & Schuster, 1995) pp. 135-36. This is an error, and an important one given the key role Kennedy subsequently played in preserving *Roe* in *Planned Parenthood v. Casey*. As Kennedy characterized his own view in a postconference letter to Rehnquist, he explicitly favored overturning *Roe*. Past commentators have been misled at least in part by the fact that the confirming Kennedy letter does not appear in the Thurgood Marshall Papers because, as with other telling correspondence, it was circulated only to the Court’s conservatives. [p. 400 n.*]

Lazarus insists that he knew nothing about these documents when he clerked for the Court the year *Webster* was decided.²⁷ Once again, however, his refusal to identify his sources makes his statements in his own defense impossible to verify.

How did Lazarus, years after his clerkship, examine documents that he acknowledges are still not available to the public? If he did not remove the documents from the Court during his clerkship, two other possibilities remain: either someone permitted him to enter the building to review these documents after his clerkship was over (an unlikely possibility) or someone removed the documents from the Court and allowed Lazarus to examine them. In either case, the

27. See Collins & Skover, *Interview with Lazarus*, *supra* note 19 (“I didn’t know, for example, that the conservative Justices in *Webster v. Reproductive Health Services* were caucusing behind the backs of the liberals, and circulating internal drafts that the liberals never saw on it, and that never made it into the Marshall papers. I learned that years after I left the Court. So, obviously, I’m not breaking any ethical obligation of mine by publishing that in a book.”). Professor Chemerinsky in his review raises the possibility that Lazarus never saw the documents in question but reconstructed them from interviews with “[i]ndividuals with strong recollections of the documents.” Chemerinsky, *supra* note 17, at 1101. This, however, is very unlikely given the detailed paraphrasing and extensive quotation from these documents in *Closed Chambers*. Furthermore, even after the removal of these documents was raised by the author of this review, see Painter, *supra* note 8, Lazarus has not denied having seen the documents and refuses to elaborate on how he came to know of their contents.

conduct in question could have been authorized by one of the Justices. Lazarus himself, however, points out that these documents existed only in the files of the conservative Justices (pp. 400, 402), making authorization for their use in a book by a former clerk to Justice Blackmun, the author of *Roe v. Wade*, very unlikely.²⁸

Other portions of the book appear to be based on written memoranda and e-mail communications taken by somebody, or by several persons, from the Supreme Court building.²⁹ Once again, it is possible that a Justice authorized their removal. If, however, there was no authorization, the same issues as with the *Webster* papers come to the fore. Were these materials removed from the Supreme Court without authorization and, if so, by whom?

B. *The Code of Conduct*

In March 1989, during Lazarus's clerkship, the Supreme Court promulgated a Code of Conduct for Supreme Court Clerks.³⁰ Canon 1 of the Code provides that "[a] law clerk should observe high standards of conduct so that the integrity and independence of the judiciary may be preserved" and that "[t]he provisions of this Code should be construed and applied to further that objective."³¹ Canon 2 provides that a "law clerk owes the Justice and the Court

28. Speculation has focused on the chambers of Justice O'Connor, several of whose clerks from the 1988-89 term are featured prominently in the book. See Garrow, *supra* note 3 (stating that Lazarus's account of *Webster* is based "upon copies of documents obtained from O'Connor's file"). Of the O'Connor clerks, one, Daniel Mandil, "had primary responsibility for the case." P. 391.

29. See, e.g., p. 265 (quoting an e-mail from Andrew McBride to his fellow conservatives in mid-September 1988, as stating "Every time I draw blood I'll think of what they did to Robert H. Bork"); p. 269 (quoting and identifying the exact date of a cabal member's exhortation to his comrades to increase the number of successful executions, but not disclosing the medium of communication used to relay this message); see also Letter from Judge Alex Kozinski to Edward Lazarus (Sept. 16, 1998) (on file with author) (requesting copies of documents referred to in *Closed Chambers* but apparently unavailable in the Marshall Papers or in any other public source, including:

- 1) All correspondence between Justice Kennedy and other Justices in *Patterson v. McLean Credit Union*; in particular, all correspondence between Justices Kennedy and Brennan. Pages 309-12.
- 2) With respect to *Tompkins v. Texas*, a copy of Justice Kennedy's memo explaining his switch on the *Batson* issue and any other documents written by Justice Kennedy explaining his views of this case. Pages 67-68.
- 3) Andrew McBride's memo regarding *Teague v. Lane*. Pages 499-502.
- 4) The memos written by Justice O'Connor's clerks espousing competing views of how *Webster* should be decided. Pages 390-94.
- 5) Chief Justice Rehnquist's draft of the *Webster* opinion and the correspondence among the Justices regarding this draft. Pages 402-07, 423.
- 6) Justice Kennedy's letter to Chief Justice Rehnquist [about *Webster*].
- 7) The Court's internal correspondence concerning *Planned Parenthood v. Casey*. Pages 462-81.).

30. CODE OF CONDUCT, *supra* note 11.

31. CODE OF CONDUCT, *supra* note 11, Canon 1.

complete confidentiality, accuracy and loyalty,"³² and that "[t]he Justice relies on confidentiality in discussing performance of judicial duties."³³ Canon 2 also states that each law clerk "is in a position to receive highly confidential circulations from the chambers of other Justices, and owes a duty of confidentiality with respect to such material similar to the duty owed to the Justice employing the clerk." Canon 3 reiterates that the "relationship between Justice and law clerk is essentially a confidential one" and provides that "[a] law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain."³⁴ Canon 3 also states specifically that "[t]he law clerk should take particular care that Court documents not available to the public are not taken from the Court building or handled so as to compromise their confidentiality within chambers or the Court building in general."³⁵

In 1981, the Judicial Conference of the United States promulgated a Code of Conduct for Law Clerks,³⁶ and in 1996 a Code of Conduct for Judicial Employees³⁷ which applies to clerks and other employees of the Judicial Branch other than employees of the Supreme Court. The Code of Conduct for Judicial Employees mandates confidentiality,³⁸ and more explicitly states a point that is also obvious from any fair construction of the Supreme Court's Code: "A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee."³⁹

C. Federal Statutes

Unauthorized removal and use of documents from the Court's files are governed not only by the Supreme Court's Code of Con-

32. CODE OF CONDUCT, *supra* note 11, Canon 2. Canon 2 later states that "[s]eparate and apart from the duty owed by each law clerk to the appointing Justice is the duty owed by each law clerk to the Court as a body."

33. CODE OF CONDUCT, *supra* note 11, Canon 2. The Code explicitly analogizes the relationship between Justice and law clerk to a relationship between two lawyers: "The relationship between the Justice and the law clerk has several facets: employer-employee, teacher-student, and lawyer-lawyer." CODE OF CONDUCT, *supra* note 11, Canon 2.

34. CODE OF CONDUCT, *supra* note 11, Canon 3.

35. CODE OF CONDUCT, *supra* note 11, Canon 3.

36. CODE OF CONDUCT FOR LAW CLERKS (Jud. Conf. of the United States 1981).

37. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES (Jud. Conf. of the United States 1996).

38. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, *supra* note 37, Canon 3(D) ("A judicial employee should never disclose any confidential information received in the course of official duties . . . nor should a judicial employee employ such information for personal gain.").

39. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, *supra* note 37, Canon 3(D). Lazarus has argued to the contrary that the Supreme Court's Code does not require a clerk to keep the confidences of the Justices once the clerkship is over. *See infra* text accompanying notes 51-55.

duct, but also by the United States criminal code. 18 U.S.C. § 641 provides criminal penalties for “[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record . . . or thing of value of the United States or of any department or agency thereof,” and “[w]hoever receives, conceals, or retains the same with intent to convert it to his use or gain knowing it to have been embezzled, stolen, purloined or converted.” Government employees have been convicted under this provision for unauthorized photocopying and dissemination of confidential documents.⁴⁰ 18 U.S.C. § 2071 provides criminal penalties for anyone who “willfully and unlawfully conceals, removes . . . or, with intent to do so takes and carries away any record . . . paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States” On their face, these statutes appear to prohibit unauthorized removal of confidential records from a federal court, although the few courts that have interpreted section 2071 have limited its application to mutilation, destruction, or permanent removal of documents, while section 641 has broader applications.⁴¹ Both of these statutes are explicitly

40. See *United States v. DiGilio*, 538 F.2d 972, 977 (3d Cir. 1976) (holding that a file clerk’s unauthorized photocopying of confidential documents in FBI office constituted a violation of the statute) (“A duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen.”); see also *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), cert. denied, 507 U.S. 1003 (1993) (statute not unconstitutionally vague when applied to unauthorized disclosure of government bid information); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (convicting defendant under § 641 for acquiring carbon papers used in typing secret grand jury transcripts and passing the information contained therein to grand jury targets, even though the government did not lose possession of informational property); *United States v. Jones*, 677 F. Supp. 238 (S.D.N.Y. 1988) (holding statute not unconstitutionally vague when applied to unauthorized sale of nonpublic information that the defendant overheard concerning a federal criminal investigation). Several cases have reserved for future decision the issue of whether § 641 would be constitutional in a “Pentagon Papers scenario” where information is leaked to a newspaper for public consumption. See *Jeter* 775 F.2d at 682; *Jones*, 677 F. Supp. at 242 n.5. But see *United States v. Morrison*, 844 F.2d 1057, 1060-62, 1076-77 (4th Cir. 1988) (military intelligence employee convicted under § 641 for unauthorized transmittal of satellite-secured photographs to a British periodical, even though the defendant contended that he did not steal the photographs for private use but in order to give them to the press for public dissemination and information). For a criticism of the government’s use of § 641 in the Pentagon Papers case, see generally Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 315-23 (1974). Even if § 641 were found to be constitutionally overbroad when used to criminally prosecute persons who gratuitously “leak” information or even documents to the press, such leaks are distinguishable from the situation in which a former government employee receives royalties from a book that he himself wrote based on documents that were removed from his government employer’s files without authorization.

41. See, e.g., *Martin v. United States*, 168 F. 198 (8th Cir. 1909) (holding that § 2071 did not apply to defendant’s hand copying from a roll of Indian tribe members that was kept in a government office vault); *United States v. Rosner*, 352 F. Supp. 915, 919-21 (S.D.N.Y. 1972) (examining the legislative history and “previous application” of § 2071 and concluding that it would only apply to permanent mutilation, destruction, or removal of documents). The lan-

cited at the beginning of the Code of Conduct for Judicial Employees.⁴²

First Amendment concerns would complicate, although probably not prevent, prosecution of a clerk who removed documents from the Court's files and gave them to the press or to a person writing about the Court. Admittedly, it would be difficult to prevent the publication by a newspaper or author of documents obtained in violation of these statutes,⁴³ but limitations on prior restraint do not necessarily bar prosecution of the perpetrator. The most significant obstacle to such a prosecution is that the perpetrator cannot be identified if the recipient of the purloined documents is permitted to refuse to disclose his sources.

The feasibility of prosecution or prior restraint, however, is not the point when it comes to evaluating whether conduct is legal and ethical, particularly when one or more perpetrators are now members of the bar entrusted with, among other things, confidential documents from their clients. It makes matters worse if the person who uses purloined documents in a book is a federal prosecutor who could now be entrusted with yet more confidential information by the United States government. While journalists sometimes refuse to reveal their sources, prosecutors are charged with upholding the law, not with concealing possible violations of the law.⁴⁴

D. *Arguments and Responses*

Both in television and radio interviews following publication of *Closed Chambers*⁴⁵ and in a letter to the *Wall Street*

guage of § 2071, however, like § 641, does not explicitly limit the statute's reach to original documents, and the construction of the statute in *Rosner* acknowledged that "legislative history is almost wholly lacking." See 352 F. Supp. at 919. The *Rosner* court furthermore pointed out that had the defendants in that case been indicted under § 641, the government's reasoning with respect to unauthorized photocopying of government records "would [have been] fully applicable." See 352 F. Supp. at 922; see also *supra* note 40 (case law applying § 641 to copies of government documents as well as originals). Some of the correspondence removed from the Supreme Court and relied upon in *Closed Chambers* could have been original copies, in which case both § 641 and § 2071 would apply. There is simply no way of knowing unless Lazarus opens his files for inspection.

42. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, *supra* note 37, Canon 3(A).

43. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that prior restraint on newspaper's publication of excerpts of confidential Pentagon papers concerning the conduct of the Vietnam War required the government to meet a heavy burden of showing justification, and that the government had not met that burden). See also *supra* note 40 (discussing unresolved constitutional issues that would arise in a prosecution of the perpetrator).

44. The different ethical standards observed by lawyers and journalists are discussed *infra* in the text accompanying notes 126-36.

45. See, e.g., *The Today Show* (NBC television broadcast, Apr. 8, 1998) (interview with Edward Lazarus by Katie Couric); *CBS News, The Osgood File* (television broadcast, June 15, 1998) (interview with Edward Lazarus by Charles Osgood); *McNeil-Lehrer Productions, The News Hour with Jim Lehrer* (PBS television broadcast, June 15, 1998) (dialogue between David Gergen and Edward Lazarus).

Journal,⁴⁶ Lazarus has defended himself against the charge that he breached a confidential relationship that he had with the Justices of the Supreme Court. He has made the following arguments in defense of *Closed Chambers*. After each, a response follows.

1. *Argument: Closed Chambers Merely "Reconstructs" Information Learned in Confidential Communications.*⁴⁷

Lazarus stands on weak ground when he claims that he may reveal a confidence that he reconstructed from other unnamed sources. First, Lazarus's knowledge of confidential information makes the act of reconstruction easy and thus the distinction between reconstruction and direct revelation mostly academic. Second, Lazarus's unwillingness to disclose the sources from which he "reconstructed" makes his claim that he used a source other than himself impossible to verify. Finally, such a distinction has little grounding in the law governing confidential communications. The Model Code of Professional Responsibility, for example, specifically points out that a lawyer's ethical obligation to keep the confidences of a client "exists without regard to the nature or source of information or the fact that others share the knowledge."⁴⁸ The Comment to ABA Model Rule 1.6 likewise states that the confidentiality rule applies to "all information relating to the representation, whatever its source."⁴⁹ Allowing a lawyer to reveal his client's confidences by using his inside knowledge to squeeze the same information from other sources would eviscerate the lawyer-client relationship. The relationship between Justices and their clerks would be similarly destroyed if clerks could so easily circumvent their obligation to keep confidences.⁵⁰

46. Edward Lazarus, Letter to the Editor, *WALL ST. J.*, Apr. 23, 1998, at A19.

47. See p. xi ("I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews conducted over the last five years."); see also Collins & Skover, *Interview with Lazarus*, *supra* note 19 ("I'm quite explicit in my book that I think that being a former clerk helped my book in any number of ways; that maybe people were more likely to talk to me, I think it's quite possible. But, even more than that, I knew how to read the paper trail; I knew what questions to ask . . .").

48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE] EC 4-4 (amended 1989).

49. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 1.6 cmt. 5 (1993).

50. By analogy, federal insider trading laws do not permit a person with inside information about a company to trade in the company's securities simply because the trader "reconstructed" the information from other nonpublic sources besides herself, particularly if these sources were themselves breaching a duty to the issuer or its security holders. See *Dirks v. SEC*, 463 U.S. 646, 660 (1983) (holding that a tippee can be liable for trading on material nonpublic information while knowing that his tipper breached a duty by disclosing the information to him).

2. *Argument: The Confidentiality Provisions of the Code of Conduct Do Not Apply to Former Clerks.*

The Code of Conduct for Supreme Court Clerks, Canon 3, provides that “a law clerk should *never* disclose to any person any confidential information received in the course of the law clerk’s duties, nor should the law clerk employ such information for personal gain.” Presumably the word “never” in Canon 3 means what it says, and it would defeat the Code’s purpose to argue that a law clerk is no longer bound by these Canons and may reveal confidential information after his clerkship ends.

Lazarus, however, in his comments to *Time*,⁵¹ in a letter to *The Wall Street Journal*,⁵² and in an editorial in *The Washington Post*,⁵³ has stated that the Code of Conduct no longer applies to him. To prove this point, he seizes upon its last provision:

Effective Date of Compliance A person to whom this Code becomes applicable shall comply with it immediately upon commencement of his or her clerkship and throughout such clerkship. Violations of the Code by a law clerk may be disciplined by his or her appointing Justice, including dismissal.⁵⁴

Lazarus argues that the confidentiality provisions in Canon 2 and Canon 3, like other provisions of the Code, therefore “appl[y] to clerks only during their service at the court (not to former clerks who routinely talk to the press). This is why the explicit penalty for Code violations is limited to dismissal as a clerk.”⁵⁵ Lazarus, however, fails to name a single former Supreme Court clerk (besides himself) “who routinely talk[s] to the press” about the Court’s confidences. Furthermore, his attempt to turn the “Effective Date of Compliance” clause into a release from the Code’s confidentiality provisions fails.

First, the mere fact that a clerk can no longer be fired by a Justice does not mean that the clerk is permitted to violate his ethical obligation of confidentiality to the Court. The plain purpose of the “Effective Date of Compliance” provision in the Code is to establish when and how the Court will discipline a clerk for a violation, not to relieve clerks of their duty to keep confidences as soon as

51. See Cohen, *supra* note 10, at 31 (“Lazarus argues [the confidentiality provision of the Code] applies only when a clerk is actually employed by the Justice.”).

52. Lazarus, *supra* note 46, at A19 (responding to Painter).

53. Lazarus, *supra* note 18, at A19 (“[T]he Law Clerk Code of Conduct, including its confidentiality provision, applies only to clerks during their time at the court (to protect deliberation on pending and impending cases) and has no bearing on the propriety of a former clerk writing a book.”).

54. CODE OF CONDUCT, *supra* note 11, Canon 6, *quoted in* Lazarus, *supra* note 18, at A19, and Lazarus, *supra* note 46, at A19.

55. Lazarus, *supra* note 46, at A19. Professor Chemerinsky makes a similar argument. See Chemerinsky, *supra* note 17, at 107.

they move on to a new job. By analogy, a lawyer has an obligation to keep the confidences of his clients, and ending a lawyer-client relationship or even moving to another jurisdiction hardly permits the lawyer to disclose those confidences.⁵⁶ Even if the lawyer can no longer be punished for breach of professional conduct rules in the former jurisdiction, the second jurisdiction may punish the breach. More importantly, the lawyer has acted unethically. In like manner, the Court's relinquishment of the power to discipline a clerk at the conclusion of his clerkship does not automatically release the clerk from all ethical obligations he might otherwise have to the Court.

Second, the "Effective Date of Compliance" provision affirmatively states when a clerk must comply with the Code in its entirety, including provisions such as the one (immediately above it on the same page) stating that a clerk should not seek political office.⁵⁷ Nowhere does the Code indicate when a clerk's obligation to obey the Code shall cease. Common sense suggests that many of the Code's obligations (such as not to run for political office) do expire with the clerkship. Common sense also tells us, however, that a confidential relationship, whether it be lawyer-client, doctor-patient, priest-penitent, or any other, would not exist if confidences could be breached as soon as the relationship is over. Lazarus's construction of the Code simply defies logic.

Finally, construing the "Effective Date of Compliance" provision as a release of the confidentiality obligation upon termination of a clerkship creates a glaring conflict with the language of unlimited duration (the word "never") that is used in Canon 3 to state when a clerk may disclose the Court's confidences. Indeed, the

56. See MODEL RULES, *supra* note 49, Rule 1.6 cmt. 21 ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). The Justice-clerk relationship is in many ways similar to the relationship of a client and lawyer, particularly that of a government official and the government lawyer he consults in order to carry out the duties of public office. The Justice has the power to hire and fire the clerk, much as the client has the power to hire and fire the lawyer. The Justice relies on the clerk for advice about the law, much as the client relies on the lawyer for advice. The clerk must avoid political or other obligations which conflict with the clerk's duties to the Justice, much as the lawyer must avoid representing clients with conflicting interests. Finally, and most importantly for the present analysis, the Justice expects the law clerk not to disclose her confidences without her permission, much as the client expects her lawyer to keep her confidences. The Justice and client both engage in free and frank discussion when seeking advice from the law clerk and lawyer respectively because this duty of confidentiality protects what they say from being disclosed without their permission. There are some differences between the two relationships, the most important being that the clerk is not the legal representative of the Justice as the lawyer is the legal representative of the client. The clerk thus does not enter appearances, take depositions, file pleadings, or carry out other representative functions on behalf of the Justice. These differences have little bearing, however, on the value of confidentiality to the relationship, and insofar as the duty of confidentiality and its underlying rationale are concerned, the analogy between the Justice-clerk and client-lawyer relationships is an apt one.

57. See CODE OF CONDUCT, *supra* note 11, Canon 6.

Code of Conduct for Judicial Employees promulgated by the Judicial Conference of the United States, and applicable to every federal law clerk outside the Supreme Court, makes this point even more explicit: "A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee."⁵⁸ Lazarus apparently is arguing that if a Court of Appeals clerk later clerks for the Supreme Court, the clerk may, as soon as his clerkship is over, publicly discuss details of how the Justices decided a case and need only keep the confidences of the judges who decided the case below. Lazarus is too intelligent actually to believe an argument so absurd.

3. *Argument: There Is No Basis for the Suspicion That Closed Chambers Uses Documents That Were Illegally Removed from the Supreme Court Building.*⁵⁹

Canon 3 of the Code of Conduct prohibits removal by a clerk of documents from the Court,⁶⁰ and the United States Code prohibits unauthorized removal and use of records from a federal court.⁶¹ There is no conclusive proof that the nonpublic documents used in *Closed Chambers* were removed from the courthouse without authorization. Lazarus's repeated reliance on such documents, however, coupled with his refusal to disclose their source, warrants serious concern. This refusal makes it difficult to confirm or dispel the suspicion of misuse, and if documents were removed from the Court without authorization, we cannot tell who the culprit was.

Nonetheless, even if Lazarus did not personally take the Chief Justice's draft opinion in *Webster* and related correspondence out of the courthouse, it is still important to determine how he got them. A lawyer should not use illegally purloined material in writing a book any more than in preparing a case,⁶² and now that he is a federal prosecutor, Lazarus should have taken care to make certain that nobody violated the Code of Conduct or any provision of the federal criminal code by providing him with documents. The author of this review has sought assurance from Lazarus that none of the nonpublic documents discussed in *Closed Chambers* was re-

58. CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, *supra* note 37, Canon 3(D).

59. See Lazarus, *supra* note 46, at A19 (calling "outrageous and false" the charge that he may have misused government documents).

60. See CODE OF CONDUCT, *supra* note 11, Canon 3.

61. See 18 U.S.C. § 641 (1994); 18 U.S.C. § 2071 (1994); *supra* text accompanying notes 40-44. Although the few courts that have interpreted § 2071 have held that it only applies to originals of documents, § 641 has repeatedly been applied to copies. See *supra* note 41 and accompanying text.

62. See MODEL RULES, *supra* note 49, Rule 4.4 (stating that an attorney shall not "use methods of obtaining evidence that violate the legal rights of [another] person"); Rule 4.4 cmt. ("It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.").

moved from the Supreme Court without authorization, but Lazarus has given no such assurance and, in particular, refuses to discuss where he examined the draft opinions and correspondence in *Webster*.⁶³ Lazarus claims that he did not see these documents when he clerked for the Court the year *Webster* was decided,⁶⁴ but he will not disclose who apparently gave him access to these documents years later.⁶⁵ His willingness to discuss the secrets of the Court stands in stark contrast to his reticence about his sources.

E. Anonymity, Verifiability, and Credibility

Although not the principal focus of this review, the substantive merit of *Closed Chambers* is worthy of some discussion, at least insofar as it benefited or suffered from use of confidential communications. From the standpoint of the book's quality alone, were the breaches of trust that went into it worthwhile?

The answer appears to be "no." Apart from the Chief Justice's draft opinion and the memoranda he exchanged with other conservative Justices in *Webster* (pp. 466-69), and perhaps some of the memoranda exchanged among the Justices in *Planned Parenthood v. Casey* (pp. 484-86) and *Patterson v. McLean Credit Union* (pp. 309-12), Lazarus has uncovered little new documentary material.⁶⁶ The nonpublic documents that Lazarus does disclose for the first time have little value, because he selectively quotes and paraphrases without reprinting them in an appendix or completely disclosing when they were written, to whom they were circulated, and the complete subject matter discussed therein. For scholars of the Court, Lazarus's documentary disclosure will be paltry and unilluminating.⁶⁷

Lazarus has, however, disclosed, or at least alleged, a significant amount of information that might embarrass the Justices. The book tells us that Justice Stevens was away in Florida so often that he

63. See Telephone Interview with Edward Lazarus (Apr. 8, 1998) [hereinafter Telephone Interview with Lazarus].

64. See *id.*; Collins & Skover, *Interview with Lazarus*, *supra* note 19.

65. See Telephone Interview with Lazarus, *supra* note 63.

66. Justice Brennan's draft opinions in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), are discussed, pp. 310-24, but presumably are also included in Justice Brennan's publicly available papers. A portion of Justice Kennedy's correspondence with other Justices about *Patterson*, however, may not be publicly available, although it is discussed in *Closed Chambers*. See Letter from Judge Alex Kozinski to Edward Lazarus, *supra* note 29. Justice Stevens's draft opinion in *Tompkins v. Texas*, 490 U.S. 754 (1988), and the correspondence among the Justices about the case are discussed, pp. 62-69, but, as Lazarus points out in a footnote, "the record in *Tompkins* is buried in Marshall's papers," p. 68. Some of the memoranda written by Justice Kennedy on this case and discussed in *Closed Chambers* may not be publicly available. See Letter from Judge Alex Kozinski to Edward Lazarus, *supra* note 29.

67. See Tushnet, *supra* note 7 ("Lazarus provides rather little evidence to support the book's most publicized 'revelations.'").

“became the FedEx Justice” (p. 279), that Justice Marshall watched soap operas in his office (p. 278), and that Justice Kennedy, while driving, listened to audiotaped briefings of cases prepared by his clerks (p. 394). Many of these tales have been told before, some in print⁶⁸ and some by word of mouth. Whether true or false, such gossip is of relatively little value to our understanding of the Court, and most of it is unworthy of inclusion in a book that aspires to scholarly importance.

Perhaps more important, several Justices, most notably Justices Marshall, Thomas, Kennedy, and O'Connor, are portrayed throughout *Closed Chambers* as being heavily influenced by clerks who frame their ideas and even tell them how to vote. A “frequently disengaged” Marshall, for example, “cast his vote and that was about all” as “with a minimum of guidance his clerks did the work” (p. 278). His successor, Justice Thomas, “looked uninterested, often not bothering to remove the rubber band from his stack of briefs,” and took both his ideas and a “hand-me-down” law clerk from Justice Scalia (p. 457). Conservative clerks secured Justice Kennedy’s vote against stays of execution by getting him to vote early (p. 270), and a “hypocritical” Justice O’Connor was easily influenced by her clerks in crucial decisions (pp. 299, 391-94). Once again, substantiation of these claims is lacking because Lazarus does not disclose from whence this information came.

Finally, there is the infamous conservative clerks’ “cabal,” which, Lazarus alleges, conspired to rig crucial votes — although he fails to specify how. He attributes statements, often in quotation marks, to other clerks by name, but does not cite a source.⁶⁹ He sometimes does not even explain whether an attributed statement was made in a conversation, a memo, or an e-mail.⁷⁰ The words used and their context could have been as he reports or could have been different; we simply have no way of knowing. In many cases, statements attributed to one clerk could have been made by another or could have been made up by somebody along the way.⁷¹ The fact that Lazarus refuses to reveal his sources compounds the problem with his use of multiple hearsay. The fact that most other former clerks strictly observe their obligation to keep confidences

68. As Lazarus acknowledges, the stories about Justice Marshall had been published before. See p. 278 (citing Terry Eastland, *While Justice Sleeps*, NATL. REV., Apr. 21, 1989, at 24). Lazarus merely adds that “[Marshall’s] clerks could fume and accuse the cabal of talking to journalists out of school, but they could not deny.” P. 278.

69. See, e.g., p. 265 (quoting an e-mail by Andrew McBride from “mid-September” 1988).

70. See, e.g., p. 269 (quoting exhortation to increase the number of executions in death penalty cases attributed to an alleged cabal member).

71. For example, the colloquy alleged to have taken place between Paul Cappuccio and Harry Litman in Justice Kennedy’s chambers (pp. 394-95) may have happened the way Lazarus says it did, may have happened differently, or may not have happened at all. See *supra* note 26 and accompanying text.

also makes it exceedingly difficult for anyone to say that what Lazarus reports isn't so.⁷²

In sum, many of Lazarus's revelations are supported by little more than his representations about documents he will not allow his readers to see and interviews with persons, undoubtedly former clerks, whose names he will not reveal. With respect to the Chief Justice's draft opinion and Justice Kennedy's correspondence in *Webster*, for example, he is in effect saying to his readers, "Trust me." After hearing Lazarus's arguments around his duty to keep the confidences of the Justices,⁷³ not every reader will want to take this leap of faith.

F. *Lazarus's Lost Perspective*

Closed Chambers also suffers from the loss of perspective that came with Lazarus's decision, perhaps at the urging of his publisher, to write a book centered on his clerkship rather than on the Court itself. Although most of the book is organized topically and chronologically, Lazarus persistently breaks from the sequence to discuss his clerkship and to remind the reader that he was an insider.⁷⁴ Lazarus also believes that he is disclosing a significant amount of important new information about the Court, and points to the controversy surrounding his book as proof of this fact,⁷⁵ but he fails to understand that disclosure by a former clerk of any confidential information, however unimportant, will attract attention simply because the disclosure itself is ethically controversial.

Finally, Lazarus lacks perspective because he was a participant in many of the events he describes, ranging from the battle over the Bork nomination⁷⁶ to the cases decided during his clerkship. Lazarus's participation, however, was that of a clerk, not a Justice, and he is handicapped by his obsession with disputes among

72. Clerks whom Lazarus casts in an unfavorable light and other clerks who witnessed what happened cannot answer his claims without themselves breaching confidences in violation of the Code of Conduct.

73. See *supra* text accompanying notes 45-65.

74. Lazarus's interview with Justice Blackmun and the early days of his clerkship are discussed, pp. 21-46, *before* a lengthy historical exposé on the death penalty that begins with *Scottsboro* and ends with a chapter on the Burger Court entitled "Backlash," pp. 77-118. The book picks up again in 1988 in a chapter entitled "The Death Watch" which begins with the words, "When I started clerking for Justice Blackmun in July 1988 . . ." P. 119.

75. Lazarus, *supra* note 3 (responding to on-line book reviews) ("That so many people . . . react so defensively, almost nonsensically to my book only convinces me that I have succeeded in touching disturbing truths that no one feels comfortable discussing openly and honestly. That is satisfying indeed.")

76. See p. 247 ("During the [Senate] hearings, my [Ninth Circuit] co-clerks and I had spent more than a few off-hours thinking up and funneling to friends on the Senate committee staff questions that would expose the weaknesses and contradictions in Bork's positions.").

clerks.⁷⁷ His account, although intriguing when he examines the Justices' deliberations in the years prior to his clerkship, deteriorates markedly when he turns to the Court in the late 1980s and 1990s. His discussion of these years would have been more insightful if he had continued to focus on communications among the Justices, which abound in publicly available papers, and had avoided more trivial communications between Justices and clerks, and particularly among the clerks themselves.

G. *Lazarus's Motive*

Why does Lazarus breach his own confidences with Justice Blackmun, repeat statements made by clerks who are also breaching confidences, and quote from confidential documents, particularly when *Closed Chambers* would have been just as strong a book, and probably a stronger book, if he had not done so? Unfortunately, promotional objectives, at least in the mind of Lazarus's publisher, appear to have dominated concerns about both ethics and editorial quality. The front of the book's cover boldly advertises that Lazarus is a "Former Supreme Court Clerk," while the back cover crows, "A Rare Clerk's-Eye View of the Supreme Court." The review copy boasted that "[f]or the first time ever, a former Supreme Court clerk reveals what really goes on at the world's most powerful legal institution" and that "[n]ever before has a Supreme Court clerk told the true story of how the Court decides cases." The inside-cover synopsis of the published version promises that Lazarus will "guide[] the reader through the Court's inner sanctum, explaining as only an eyewitness can the collisions of law, politics, and personality." All this makes it appear that sales and hype got the better of good judgment. For a book that is so well written, by an author of such promise,⁷⁸ this is tragic.

Unfortunately, the promotion effort may not end there. Lazarus has already given television and radio interviews about *Closed Chambers*,⁷⁹ and according to the inside front cover of the review copy, he was commissioned by Warner Brothers to write a screenplay about the Court. In a subsequent interview Lazarus pointed out that his screenplay was commissioned in 1991 and is

77. The most outlandish revelation in *Closed Chambers* does not pertain to any specific case before the Court, but to a fight between two clerks, a liberal and a conservative, that ended when both fell into the fountain in the Court's courtyard. P. 419. While amusing, this anecdote only underscores the immaturity of at least some of the Court's clerks, not their level of influence over the more serious issues that were before the Justices.

78. Lazarus's first book, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* (1991), was favorably reviewed in several publications, including the *Harvard Law Review*. See, e.g., Recent Publications, 106 HARV. L. REV. 810, 811 (1993) (book notice).

79. See *supra* note 45 (citing radio and television interviews with Lazarus).

fictional.⁸⁰ Nonetheless, the prospect of a former Supreme Court clerk selling to Hollywood a story about the Court and then writing a book disclosing the confidences of the Justices is probably not what the Justices contemplated when they first invited recent law graduates into their chambers over a century ago.

II. CLERKS AND CONFIDENCES

A. *The Relationship Between Judges and Law Clerks*

Chief Judge Horace Gray of the Massachusetts Supreme Judicial Court in 1875 became the first judge to employ law clerks, most of whom were recent graduates of the Harvard Law School where his brother John Chipman Gray was a professor.⁸¹ When Justice Gray was appointed to the United States Supreme Court in 1882, he brought his clerk to Washington.⁸² The other Justices eventually followed suit, and by 1939 all were employing clerks.⁸³ For years, a clerk's obligation to keep the confidences of the Court was an unwritten rule, and a foundation of the Justice-clerk relationship.⁸⁴

80. See Collins & Skover, *Interview with Lazarus*, *supra* note 19.

81. See J. Daniel Mahoney, *Law Clerks: For Better or For Worse?* 54 BROOK. L. REV. 321, 322 (1988); see also JOHN OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* 10 (1980); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1129-30 (1973); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301 (1961).

82. See Mahoney, *supra* note 81, at 322-23.

83. See *id.*

84. See *id.* at 325. David Garrow, in his review of *CLOSED CHAMBERS*, recounts past incidents of public disclosures by former Supreme Court law clerks and concludes that Lazarus's conduct is entirely in keeping with this "under-appreciated tradition." See David J. Garrow, "*The Lowest Form of Animal Life?*" *Supreme Court Clerks and Supreme Court History*, 84 CORNELL L. REV. 855, 893-94 (1999) (book review). Garrow recites a long list of illustrious former clerks, including Secretary of State Dean Acheson and Harvard Law School Dean James Landis, who presumably breached confidences, and even goes so far as to suggest that "the first true precursor to Lazarus among former clerks was one of Justice Gray's own early appointees, Samuel Williston." *Id.* at 860. A careful review of Garrow's examples, however, reveals that almost all of these former clerks publicly discussed or wrote about their clerkships 30 to 60 years after their clerkships ended and after the Justices to whom they owed the duty to keep confidences were dead, along with most if not all of their colleagues on the Court. These include Samuel Williston, *see id.* at 860, who clerked for Justice Horace Gray in October Term 1888 and then wrote about his clerkship 52 years later in a 1940 autobiography (Justice Gray died in 1902); Dean Acheson, *see id.* at 860-81, who clerked for Justice Louis D. Brandeis in October Terms 1919 and 1920 and then wrote about his clerkship 45 years later in a 1965 autobiography (Justice Brandeis died in 1941); C. Dickerson Williams, *see id.* at 861-62, who clerked for Justice William Howard Taft in October Term 1924 and then wrote about his clerkship 65 years later in a 1989 article (Justice Taft died in 1930); Alfred McCormack, *see id.* at 862, who clerked for Justice Harlan Fiske Stone in October Term 1925 and then told a few stories from his clerkship 21 years later in a 1946 law review article (Justice Stone died that same year); and James M. Landis, *see id.* at 862-63, who clerked for Justice Brandeis in October Term 1925 and then told some humorous anecdotes from his clerkship 32 years later in a 1957 public talk. Although the duty to keep confidences arguably survives the death of the Justices to whom that duty is owed, *see infra* text accompanying notes 140-41, it is understandable that some former clerks have taken a different view.

Clerks have usually been careful about preserving confidentiality, but the Justices have on occasion had to remind them of its importance, as Justice Stone did in a memorandum to his clerks in the 1930s:

Washington is infested with a cheap class of newspaper hangers-on who at times have cultivated the law clerks of the justices and picked up scraps of conversation or remarks which are harmless enough in themselves, but which, when distorted and published, tend to discredit the Court or its member[s] in public estimation. Much of this has been the result of idle gossip which goes on among the law clerks themselves, and when it is ultimately published, after being several times repeated, bears little resemblance to its original form.⁸⁵

Justice Stone went on to say that he believed his clerks were mature enough "to appreciate this fact and refrain from commenting to outsiders about the observations which they gain from the intimate association into which they have been invited."⁸⁶

B. *The Brethren*

Few clerks openly admit having breached the confidences of their Justices.⁸⁷ In 1979, however, Bob Woodward and Scott Armstrong compiled a book from interviews with former Supreme Court clerks and from documents delivered to them by some of

These examples are clearly distinguishable from the conduct of Lazarus and his sources, whose disclosures were published only nine years after their clerkships ended and while almost all of the Justices for whom they had clerked were still alive.

Furthermore, only one of Garrow's examples involves what was arguably unauthorized use of confidential documents from Supreme Court files. John D. Fassett, who clerked for Justice Stanley Reed in October Term 1953, gave a 1966 speech to "the Benchers," a group of Connecticut lawyers and judges about Justice Reed's position on *Brown v. Board of Education*. See Garrow, *supra*, at 868 (citing John D. Fassett, *Mr. Justice Reed and Brown v. Board of Education*, 1986 SUP. CT. HIST. SOC'Y. Y.B. 48, 48 (publishing the text of Fassett's 1966 speech)). In the speech, Fassett quoted internal Court memoranda from a folder marked "segregation" that Fassett had removed from the Court without asking permission from Justice Reed. Fassett, however, specifically asked his audience to advise him on when he should make these details public, to respect his confidence, and not to publicly discuss the content of the speech in the meantime. Fassett, *supra*, at 49. Fassett's conduct, although not necessarily commendable, is distinguishable in several respects from the apparent conduct of sources used for CLOSED CHAMBERS. First, in 1953 there was no express prohibition on removal of documents from the Court similar to that in the Code of Conduct. Code of Conduct, *supra* note 11, Canon 3C. Second, Fassett recognized the ethical concerns raised by his revelations, asked his audience to keep his remarks confidential, and postponed publication of the speech until 20 years after it was delivered, and six years after the death of Justice Reed in 1980.

85. George Gold, *Loose Tongues*, A.B.A. J., Oct. 1985, at 28 (quoting a memorandum from Justice Stone to his law clerks filed in Box 48 of Stone's papers in the Library of Congress).

86. *Id.*

87. Even though the book jacket and review copy of *Closed Chambers* tout the book as an insider exposé, see *supra* text accompanying note 77, Lazarus has gone to great lengths to argue that he has not breached the Court's confidences. See arguments listed *supra* Section I.D.

those clerks.⁸⁸ Woodward and Armstrong were journalists, not lawyers, and anticipating that the conduct of their sources would come under attack, refused to reveal their names.⁸⁹

Reaction was swift and much of it harsh. Anthony Lewis wrote that *The Brethren* was “character assassination” amounting to “hit and run journalism,” and that “significant factual errors” raised questions about whether the authors knew what they were talking about.⁹⁰ A review by John Leonard in the *New York Times* pointed out that the book “read[s] everybody’s mind without identifying a single source.”⁹¹ Commentators, liberal and conservative alike, including Gerald Gunther, James Kilpatrick, George Will, and Floyd Abrams, were even more critical of the former clerks who had breached confidences and apparently saw themselves as being at the center of the Court’s work.⁹² These condemnations, however, did not discourage some former clerks from talking yet again, and in 1983 Bernard Schwartz published *Superchief*,⁹³ an account of the Court under Chief Justice Earl Warren which also drew on information from former clerks, although less so than *The Brethren*. After publication of these books, it is not surprising that, when the Court decided to promulgate a written Code of Conduct for its clerks in 1989, the longstanding confidentiality rule was embodied in Canons 2 and 3 of the new Code.⁹⁴

C. Previous Accounts by Former Clerks

In their writings, as well as spoken words, former clerks have generally been careful in what they say about the Court. One departure from this tradition was a 1987 interview with the *Harvard Law Review* in which a former Frankfurter clerk, Philip Elman, disclosed conversations he had with Justice Frankfurter about *Brown*

88. See WOODWARD & ARMSTRONG, *supra* note 2.

89. See *id.* at 3-4.

90. See Alexander Wohl, *Those Who Do Not Remember the Past . . . Closed Chambers — An Eerie Echo Eighteen Years After The Brethren*, JURIST: BOOKS-ON-LAW (May 1998) <<http://jurist.law.pitt.edu/lawbooks/pamay98.htm>> (quoting a review by Anthony Lewis in the *New York Review of Books*).

91. *Id.* (quoting a review by John Leonard in *The New York Times*).

92. See *id.* (“When I clerked for the Supreme Court I felt it was a damned confidential job. Both the skill of Woodward and Armstrong and the insensitivity of the law clerks show a significant and depressing change of standards.” (quoting Gerald Gunther commenting to *Macleans*)); *id.* (“If there be scandal in *The Brethren*, . . . this is it. Clerks are retained by members of the Court under conditions of absolute confidence. . . . Many of them, it seems apparent, learned much law but nothing of honor.” (quoting James Kilpatrick, reviewing the book for the *National Review*)); *id.* (“Many clerks betrayed not merely their institution, but also standards of common decency.” (quoting George Will, writing in *Newsweek*)); *id.* (“[T]he law clerks now think that they run the place — or that they should.” (quoting Floyd Abrams, writing for *Fortune*)).

93. BERNARD SCHWARTZ, *SUPERCHIEF* (1983).

94. See CODE OF CONDUCT, *supra* note 11, Canons 2 & 3.

v. Board of Education and other cases that were before the Court in the 1950s.⁹⁵ These conversations, however, took place *after* Elman's clerkship, and his revelations were controversial not because the conversations were confidential, but because they took place while Elman was filing amicus briefs on behalf of the Solicitor General's office in these very same cases. The longstanding prohibition on *ex parte* contacts suggested that these conversations never should have occurred in the first place.⁹⁶

Other former clerks have written books about the Court. These include J. Harvie Wilkinson, now Chief Judge of the Fourth Circuit Court of Appeals, who in 1974 wrote a book about his clerkship for Justice Powell,⁹⁷ but was careful to respect the Court's confidences.⁹⁸ Professor John Jeffries, another former Powell clerk, in 1994 also wrote a book about Justice Powell, who cooperated by giving Jeffries access to his files and his memories.⁹⁹ Jeffries also spoke with nine of Justice Powell's colleagues on the Court.¹⁰⁰ Neither of these authors concealed the identity of their sources or disclosed confidential memoranda or draft opinions without authorization. In 1998, Professor Dennis Hutchinson, a former clerk for Justice Byron White, published an unauthorized biography of Justice White.¹⁰¹ The book relies on interviews with White's former

95. See *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987) (interview by Norman Silber with Phillip Elman).

96. See CANONS OF PROFESSIONAL ETHICS CANON 3 (1908) ("A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause . . ."); MODEL CODE, *supra* note 48, DR 7-110 (prohibiting *ex parte* contacts); MODEL RULES, *supra* note 48, Rule 3.5(b) (same).

97. See J. HARVIE WILKINSON, III, *SERVING JUSTICE* (1974).

98. See *id.* at xiii ("Much of what goes on within the Supreme Court must be kept in confidence if the spirit of frank and informal exchange there is to continue to prevail. The need for such confidence in the Court's deliberations will always be important, and I have tried in every instance to respect it.")

99. See JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* ix (1994) ("Many people helped make this book possible. The greatest debt is owed to Lewis F. Powell, Jr., who generously gave me access to his files and his memories without attempting to control what I wrote.")

100. See *id.* ("Other than Justices William O. Douglas and Potter Stewart, both of whom died before this project began, I have spoken with all of Powell's colleagues on the Supreme Court. They include Chief Justices William H. Rehnquist and Warren E. Burger and Associate Justices William J. Brennan, Byron White, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia.")

101. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998). David Garrow claims that "both Lazarus and Hutchinson have used exactly the same methods to make almost exactly the same sorts of novel disclosures." Garrow, *supra* note 84, at 893. Garrow also suggests that Hutchinson may have been offered copies of documents that other former clerks retained after their clerkships. See *id.* at 892. The first of these statements is simply wrong. Hutchinson wrote about events that occurred outside his clerkship year. See Letter from Anthony Kronman to Richard Painter, *supra* note 9 ("I do think a different and more difficult question arises when a former clerk reports confidences pertaining to events that occurred either before or after his or her clerkship year."). Furthermore,

clerks, but does not use confidential documents from the Court's files.¹⁰²

Other former clerks, including Professors Richard Revesz and Pamela Karlan,¹⁰³ have written law review articles about cases that were decided during their Term on the Court, but they have been careful not to disclose confidential communications with the Justices and only to use documents from the public record. Lazarus himself in 1994 wrote a four-page law review tribute to Justice Blackmun in which private conversations within Blackmun's chambers were disclosed,¹⁰⁴ but presumably this was done with Justice Blackmun's permission, and the article did not disclose confidential communications from the chambers of other Justices.

D. *The Extent and Limits of Confidentiality*

Lazarus goes outside the parameters of ethical conduct by disclosing communications made directly to him and to other clerks by Justices of the Court, and by using documents that may have been illegally removed from the Supreme Court building.¹⁰⁵ Although some former clerks have written or spoken about confidential communications decades after their clerkships, and generally after the Justices to whom they owed the duty to keep confidences were dead,¹⁰⁶ most former clerks who have written about the Court limited themselves to the public record or that which they were permitted to disclose, and have not cast suspicion on themselves by refusing to reveal their sources.

Nonetheless, there is still some ambiguity, perhaps too much ambiguity, in the duty of confidentiality that law clerks owe to their Justices. Because dismay over *Closed Chambers* should be turned to more constructive ends than mere condemnation, this review

there is no evidence whatsoever that Professor Hutchinson was given, or has used, any non-public Supreme Court documents. Edward Lazarus did use nonpublic documents (dating from the year in which he clerked) that somebody apparently removed from the Supreme Court building. See *supra* text accompanying notes 27-29.

102. Much of the book is about White's life before he joined the Court, including his career as a football star. Hutchinson avoids discussing the 1975 Term in which he clerked for White and focuses on three of the Court's other Terms: 1971, 1981, and 1991.

103. See Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068-109 (1988) (discussing erosion of non-majoritarian court rules in the death penalty stay process during the 1980s).

104. See Edward P. Lazarus, *The Case of the Severed Arm: A Tribute to Associate Justice Harry A. Blackmun*, 43 AM. U. L. REV. 725 (1994) (discussing Blackmun's dissent in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989)). This brief article was mostly based on the public record, including the Marshall papers, but did include a brief discussion of a post-conference meeting of Justice Blackmun with his clerks. See *id.* at 727-28.

105. See *supra* text accompanying notes 22-29.

106. See Garrow, *supra* note 84, at 860-75; *supra* note 84 (discussing some of Garrow's examples).

seeks to begin a dialogue on the parameters of this duty. Interesting questions abound.

1. *Communications by Law Clerks*

May a clerk disclose his own side of a communication with a Justice so long as he does not disclose what the Justice said or did in response? Once a confidential relationship is shown to exist, as it clearly does exist between a Justice and her clerks, the zone of confidentiality is defined by whether the parties to that relationship would reasonably expect a communication to be kept confidential.¹⁰⁷ Most communications from a law clerk to a Justice fall within the ambit of communications for which confidentiality is expected.

Draft opinions and bench memoranda prepared by clerks are usually kept confidential, sometimes even from the chambers of other Justices.¹⁰⁸ Draft opinions by definition contain the ideas of one or more Justices, and bench memoranda reveal what topics a Justice has asked her clerk to research. Public disclosure of draft opinions and bench memoranda would also allow an outsider to reconstruct whether a Justice was influenced by another Justice or by a clerk and how. Finally, widespread expectation of confidentiality is demonstrated by the fact that the contents of draft opinions and bench memoranda are almost never disclosed to outsiders by clerks or former clerks, except by those who are unwilling to identify themselves.

With respect to oral communications, a law clerk who discloses his own or another clerk's side of a conversation with a Justice, but not what the Justice said in response, merely puts some guesswork into discerning the Justice's thoughts. Also, the clerk's advice itself should be confidential. A lawyer would act unethically if he disclosed to outsiders the advice he gave to a client (such advice is also

107. Most cases defining which communications in a confidential relationship are in fact confidential have been decided under the various evidentiary privileges, principally the attorney-client privilege. See, e.g., *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("It is vital to a claim of privilege that the communication have been made and maintained in confidence. . . . The assertor of the privilege must have a reasonable expectation of confidentiality, either that the information disclosed is intrinsically confidential, or by showing that he had a subjective intent of confidentiality." (quoting *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976))), cert. denied 118 S. Ct. 731 (1992). The lawyer's duty to keep the confidences of a client is, of course, broader than the privilege, and even if communications between a Justice and her clerk were not privileged at all, the clerk still has an ethical duty not to voluntarily disclose confidences. See *supra* text accompanying notes 38-39.

108. Lazarus points out, for example, that Chief Justice Rehnquist's draft opinion in *Webster* was purportedly circulated only to the Court's more conservative Justices. P. 402. It is even more common for bench memoranda and similar work product of clerks not to be circulated beyond a Justice's chambers.

routinely covered by the attorney-client privilege).¹⁰⁹ Likewise, the words “complete confidentiality” and “loyalty” in Canon 2 of the Code of Conduct cannot fairly be construed to permit a clerk to divulge to outsiders the nature of the advice he gave to a Justice.

Finally, the Justices depend on their clerks for advice, making frank communication from clerk to Justice even more important than frank communication the other way around. Clerks will not tell the Justices what they really think if they fear revelation, perhaps to future clients or employers, of communications overheard by other clerks. If such disclosure were allowed, much of the value to the Court of clerkships would be lost.¹¹⁰

2. *Communications Between Law Clerks*

Are communications *between* law clerks covered by the duty to keep confidences? Canon 3 of the Code of Conduct refers to “highly confidential circulations *from the chambers* of other Justices,” that the clerk may “never” disclose.¹¹¹ This language clearly implies that confidential relationships exist not only between Justices and clerks, but also between clerks and persons in each Justice’s chambers, including other clerks. The Code, however, does not define which communications from a Justice’s chambers are confidential and which are not. Once again, this distinction turns largely on whether the parties to the relationship, in this case the sender and recipient of a communication, would reasonably expect it to be kept confidential.

It could be argued that memoranda and oral communications from law clerks to each other are subject to a lower expectation of confidentiality, assuming they do not directly or indirectly reveal communications by or to one of the Justices. However, if the Code means what it says about confidential communications from *the chambers* of the Justices, not just from the Justices themselves, clerks and other employees of the Court expect a zone of confidentiality as well. Although this zone of confidentiality might not extend to clerks’ discussion of their personal lives or jokes exchanged in the Court’s cafeteria (neither of which should interest a serious

109. See MODEL RULES, *supra* note 49, Rule 1.6 (“A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . .”); MODEL RULES, *supra* note 49, Rule 1.6 cmt. 5 (“The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”); MODEL RULES, *supra* note 49, Rule 1.6 cmt. 5 (discussing the attorney-client privilege as a related body of law).

110. It is entirely possible that the content of such communications may come to light years later if the Justice leaves papers to a public repository. For example, memoranda written by William Rehnquist when he was clerking for Justice Jackson about *Brown v. Board of Education* and other civil rights cases were a source of perceived embarrassment in Rehnquist’s own confirmation hearings for Chief Justice in 1986. P. 146.

111. CODE OF CONDUCT, *supra* note 11, Canons 2 & 3 (emphasis added).

scholar of the Court anyway), it should extend to clerks' statements about their work on the Court.

It is true that lawyers practicing in a firm do not, at least under codes of professional responsibility,¹¹² owe each other a strict duty of confidentiality with respect to intrafirm conversations that do not contain confidential client information, disclose a lawyer's planned strategy on behalf of a client, or otherwise injure the lawyer-client relationship. This is, however, one area where the analogy to lawyer-client confidences is not on point. The principal objective of attorney-client confidentiality is unfettered disclosure of factual information by the client to the attorney, whereas the principal objective of confidentiality within a court, and particularly the Supreme Court, is unfettered communication of ideas about the law among persons who have a substantial role in interpreting the law. It is often helpful for clerks to ask each other about a case or an area of the law, and frankly discuss their opinions with each other, before communicating with their Justices. Clerks who fear adverse consequences of unpopular ideas will not honestly express opinions to each other and may as a consequence be less likely to communicate informed opinions to their Justices.

3. *Electronic Communications*

Is there a legitimate expectation of privacy in e-mail communications between Justices and clerks, and between the clerks themselves? For example, would it be a violation of the Code of Conduct for a clerk to forward an e-mail from a Justice, or from another clerk, to a friend working outside the Court?

The answer to both of these questions is "yes." E-mails between clerks and Justices or between clerks themselves, whether about a case or about an area of the law such as the death penalty, are subject to an expectation of confidentiality. Unauthorized interception of an electronic communication, including e-mail, is a felony under federal law,¹¹³ and the Supreme Court's internal e-

112. Although codes of professional responsibility do not specifically require lawyers to keep each other's confidences, apart from their duty to keep client confidences, partnership or other law governing a firm's organizational structure might create such a duty among lawyers practicing together in the firm.

113. See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1989) (codified as amended in scattered sections of 18 U.S.C.); 18 U.S.C. §§ 2510-2521 (1994); 18 U.S.C. § 2701 (1994) (criminal penalties including up to five years in jail for repeat offenders); 18 U.S.C. § 2707 (1994) (civil relief including equitable and declaratory relief, damages, and attorney's fees); see also Lucy Schlauch Leonard, *The High-Tech Legal Practice: Attorney-Client Communications and the Internet*, 69 U. COLO. L. REV. 851, 859 (1998) ("Interception of electronic communications is a federal felony under the Electronic Communications Privacy Act ("ECPA") . . . [which was] passed in 1986 as an amendment to the 1968 Federal Wiretapping Act in an effort by Congress to close loopholes in the Act that had been created by advances in technology. The ECPA provides criminal and civil penalties for the unauthorized access of stored electronic communications.").

mail system presumably should carry an even higher expectation of privacy than e-mail sent over the Internet. Users of that system also do not expect that a recipient of an e-mail would disseminate it outside of the courthouse. Furthermore, although there is some debate over whether e-mail communications between lawyers and their clients are protected by the attorney-client privilege,¹¹⁴ there is little disagreement that e-mail communications from a client are subject to the attorney's obligation to keep confidences and should not be voluntarily disclosed by the attorney.¹¹⁵ Likewise, downloading e-mail from the Supreme Court's system and giving it to a newspaper or author clearly violates a zone of expected confidentiality. Such is not acceptable conduct for a clerk or anyone else.

4. Actions

Should a Justice have a legitimate expectation of privacy regarding matters such as whether he listens while driving to audiotapes on pending cases prepared by his clerks,¹¹⁶ whether he watches television in his chambers,¹¹⁷ or where he travels and how often?¹¹⁸ Given the potential of such revelations to undermine the relationship between Justices and their clerks, there are reasons to believe that both parties would expect such information to be kept private.

In the lawyer-client relationship, the actions of the client ordinarily are not protected by the attorney-client privilege. For example, a court can force an attorney to divulge the amount of a bill the

114. In several recent decisions, courts have extended the privilege to e-mail communications. See *National Employment Serv. Corp. v. Liberty Mut. Ins. Co.*, 3 Mass. L. Rptr. 221 (1994) (stating that e-mails between a party's corporate counsel and outside counsel were made in the outside counsel's professional capacity, and therefore were privileged and undiscoverable); *State ex rel. United States Fidelity & Guar. Co. v. Canady*, 460 S.E.2d 677 (W. Va. 1995) (e-mail communications held privileged). See generally Colleen L. Rest, Note, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 CASE W. RES. L. REV. 309, 336-37 (1998).

115. Some jurisdictions even provide that the attorney's duty to take reasonable steps to assure confidentiality of client communications includes use of encryption or similar technology. See, e.g., Iowa Supreme Court Board of Professional Ethics and Conduct, formal op. 96-1 (1996) (stating that the duty to maintain client confidences under DR 4-101 requires attorneys to encrypt or provide similar protection for "sensitive material" sent to or from clients). Most jurisdictions, however, allow an attorney to decide on the appropriate level and method of protection on a case-by-case basis.

116. See p. 394 (reporting that Justice Kennedy "did not ask for much in the way of written briefings on the cases, but, while driving, he sometimes listened to audiotapes his clerks prepared summarizing the essentials").

117. See p. 278 (confirming a report that Justice Marshall watched afternoon soaps in his office).

118. See p. 279 (reporting that Justice Stevens was in Florida "for weeks at a time" and that "Stevens became the FedEx Justice, sometimes even telephoning his votes in to the Justices' weekly conference").

client paid and probably even the whereabouts of the client.¹¹⁹ However, such information is covered by the broader ethical obligation of the lawyer to keep confidences learned in the course of the representation.¹²⁰ Turning to another analogy, Secret Service agents can be required to testify about the conduct of the President.¹²¹ Few, however, would argue that a former Secret Service agent can ethically write a tell-all book about the President's sex life. Similarly, the close relationships that Supreme Court Justices develop with their clerks suggest an expectation on the part of both parties that clerks will not divulge details about a Justice's personal life. Furthermore, most information of this sort does not help us understand the Court, and its disclosure by a former clerk usually serves little purpose other than to satisfy fascination with gossip.

5. Use of Confidential Information

May a former law clerk use confidential information that he does not directly disclose? Rules concerning the use of confidential information are more amorphous and context-specific than rules prohibiting its disclosure,¹²² and the particular use to which the former clerk puts the information is a critical determinant of whether or not the use is proper.

By way of illustration, it would be unethical and illegal for a clerk to trade in the securities markets based on non-public information learned from his clerkship.¹²³ At the other extreme, it would be permissible for a clerk to make a decision about his career based on information learned at the Court — for example, accepting a clerkship with another Justice for the following year based on observations of that Justice's approach to particular cases. Be-

119. See NOONAN & PAINTER, *supra* note 6, at 106 ("The identity or whereabouts of a client also are usually not protected; if demanded by a court or in a lawful subpoena this information must be disclosed by the lawyer.").

120. See MODEL RULES, *supra* note 49, Rule 1.6 (a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . ."); MODEL RULES, *supra* note 49, Rule 1.6 (a) cmt. 5 ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); MODEL CODE, *supra* note 48, DR 4-101 (providing that a lawyer shall not knowingly "reveal a confidence or secret of his client" and defining a "confidence" to be "information protected by the attorney-client privilege under applicable law" and a "secret" to be "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client").

121. See *In re Sealed Case*, No. 98-3069, 1998 U.S. App. LEXIS 16289, at *1 (D.C. Cir., July 16, 1998) (per curiam) ("[The Department of] Justice has not made a sufficient showing that irreparable harm will result unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges.").

122. Compare, e.g., MODEL RULES, *supra* note 49, Rule 1.6 (prohibiting disclosure of confidential information without client consent) with Rule 1.8 (prohibiting use of client information to the disadvantage of the client without client consent).

123. See generally Painter et al., *supra* note 7.

tween these two extremes lie the many ways in which former law clerks, many of whom become law professors, use information from their clerkships to enrich articles and books about the Court and the cases it decides. In this area, there are few clear rules other than those prohibiting publication of confidential communications, although common sense suggests that additional caveats should be observed as well.

First, indirect or covert disclosure of confidential information, for example by attributing it to unidentified sources or attributing truth to previously published rumor, is as reprehensible as direct and overt disclosure. There is little difference between a former clerk to Justice Breyer saying, "Justice Breyer told me that he has strong reservations about affirmative action" and the same clerk saying without citation to any specific source, "it is known at the Court that Justice Breyer has strong reservations about affirmative action." In the latter case, the author's statement, assuming it is true, is presumptively based on communications made by Justice Breyer to the author or to another clerk who then repeated them to the author. There is also little difference between a former clerk for the Court saying "Justice Marshall watched soap operas while his clerks wrote opinions" and saying that the *National Review* published such a rumor that his clerks could protest but "could not deny" (p. 278).

Second, a former clerk should either avoid writing about cases decided during his clerkship or carefully explain how he arrives at conclusions about those cases. If a former clerk for Justice Breyer writes of a case decided while he was a clerk, "Professor Smith's theory on why Justice Breyer changed his vote is wrong," the statement implies that the writer knows this from his experience as a clerk, unless the writer clearly states how his conclusion is based on interpretation of another publicly available source, such as the case itself or another case. Clarifying one's reasoning and specifying one's sources avoids the appearance that confidential information is being misused or disclosed.

On the other hand, it is permissible for a former clerk to use in later scholarly work the ideas that he formed while working on a case,¹²⁴ so long as the clerk does not reveal what he said or wrote to the Justices about the case or what was said in response. Identification of memoranda and draft opinions that are not already in publicly available papers also would be improper. Similarly, in situations where the ethics of proper attribution require acknowl-

124. Both the Code of Conduct and federal criminal statutes, however, prohibit unauthorized removal of records from the Supreme Court building. See *supra* notes 35-42 and accompanying text. These prohibitions arguably apply to bench memoranda, making it difficult to rely extensively on one's own work product in a later scholarly work.

edgment of the original but confidential ideas of others, whether clerks or Justices, the ideas should not be used.

Finally, a former clerk has more latitude when writing about terms other than the term during which she clerked, in part because events that happened during her clerkship are not likely to be central to her analysis. Nonetheless, Justices do tell their clerks what they think about past cases and how they might decide an issue in the future, and the former clerk should be careful not to give the impression that she is conveying information about the content of these communications. Furthermore, former clerks from earlier or later years may be more likely to talk to another former clerk about what transpired during their terms simply because she can be expected to keep what is said (including hearsay about what the Justice said) confidential. Regardless of whether it is proper for clerks from different terms to have such conversations about the Court,¹²⁵ the practice is tolerated precisely because the parties to the conversation, and the Justices themselves, expect that information imparted when former clerks exchange "war stories" will not be communicated to a broader audience. These expectations should be respected.

6. *Role Change: Former Law Clerks as Journalists*

The roles of a law clerk and a journalist are very different. The clerk is charged with informing the Justice for whom he works, and occasionally other members of the Court, about the law and facts in cases before the Court. As discussed above, confidentiality between clerk and Justice is critical to effective performance of this role. The journalist, by contrast, is charged with informing the public about newsworthy events, such as cases before the Court. Confidentiality is important to the journalist's role only insofar as it is needed to protect the identity of sources who, without assurance of anonymity, would not divulge what the journalist wants to know.

The roles of a lawyer and a journalist are also very different. The lawyer, like the journalist, has an obligation to pursue truth. The lawyer, however, pursues a partisan truth and works within the framework of a legal system which imposes restraints that the lawyer must observe.¹²⁶ Law and legal process are particularly impor-

125. Exchanging "war stories" in this manner is technically a violation of the confidentiality provisions of the *Code of Conduct*, see *supra* text accompanying note 111, and would be a more serious violation if it were known that one of the parties to the conversation would disclose the content of the conversation to a broader audience.

126. See generally Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law Schools*, 44 A.B.A. J. 1159 (1958).

tant for the lawyer,¹²⁷ and a lawyer is responsible for assuring that the persons she works with obey the law.¹²⁸ The journalist, on the other hand, should obey the law in gathering information, but has a lesser responsibility for assuring that her sources comply with the law.¹²⁹ Courts, for example, have usually refrained from enjoining publication of information that a journalist obtained because of someone else's violation of the law.¹³⁰

Sometimes these roles, and their respective ethical obligations, collide because a person performs one role and then seeks to perform another. Specific rules address the common changeover from the role of a law clerk to that of a lawyer, for example by disqualifying a former clerk from cases on which she worked during her clerkship.¹³¹ The transition from law clerk to journalist, however, is not so easy, and is even more difficult if the clerk-turned-journalist also becomes a lawyer, as Lazarus did when he joined the bar in the midst of his work on *Closed Chambers*. Needless to say, the situation becomes even more precarious when the clerk-turned-journalist-turned-lawyer chooses to be a federal prosecutor, who is sworn not only to uphold the law, but to enforce the law.

It is not always easy to distinguish when these roles — sometimes assumed in succession and sometimes assumed concurrently — are separable along with the duties that flow with them. May a clerk-turned-journalist embrace the ethics of journalism, which permit him to use information disclosed unethically by others? Must a lawyer carry the morals of the legal profession, which prohibit her from gathering evidence illegally or encouraging others to do so,¹³² into her work as a journalist, or may she take off her lawyer's hat and put on that of a journalist? In any of these situations, should there be more tolerance for successive role conflicts (the clerk-

127. See MODEL RULES, *supra* note 49, pmb1. 4 (“A lawyer’s conduct should conform to the requirements of the law A lawyer should demonstrate respect for the legal system While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.”).

128. See, e.g., MODEL RULES, *supra* note 49, Rule 5.3 (stating that a lawyer is “responsible for conduct of [a non-lawyer employed or retained by or associated with the lawyer] that would be a violation of the rules of professional conduct if engaged in by a lawyer” if the lawyer orders or ratifies the conduct involved).

129. See Felicity Barringer, *New Rules, New Caution: Telling a Journalistic Coup from a Crime*, N.Y. TIMES, July 26, 1998, § 4, at 1 (“For journalists, it is second nature to draw a line between stealing information (forbidden) and accepting pilfered information (fine). . . . Questions about the origin and highly classified status of the Pentagon Papers didn’t keep The New York Times and The Washington Post from publishing them in 1971. In fact, The Times was awarded a Pulitzer Prize for public service.”).

130. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

131. See, e.g., MODEL RULES, *supra* note 49, Rule 1.11 (“Successive Government and Private Employment”).

132. See MODEL RULES, *supra* note 49, Rule 4.4 (stating that a lawyer may not use methods of obtaining evidence that violate the legal rights of another person).

turned-journalist) than for conflicts that are concurrent (the clerk or lawyer who simultaneously works as a journalist)?¹³³

A few general observations. First, new ethical obligations do not erase old ones that would otherwise survive the termination of a past relationship (such as the duty to keep confidences). When new ethical obligations cannot be carried out without infringing upon old ones, the actor should withdraw from her new role. For example, if a journalist cannot write a factually accurate story without breaching confidences from a prior clerkship, she should seek another assignment. New role-specific obligations usually are not forced upon actors, as new roles can be turned down.

Second, when ethical obligations do not conflict, an actor may assume a second role, but with the caveat that conflict might occur in the future. A clerk-turned-journalist will experience few problems if she writes about something other than the term in which she was a clerk.¹³⁴ If she does write about cases decided by the same court in the same term, she should use only the public record and carefully identify her sources. A former clerk who instead offers anonymity to a source in return for information (journalists are not required to make such an offer) has no way of convincing her critics that she is not herself supplying the information and attributing it to an unnamed source. If the clerk-turned-journalist is also a lawyer, she confronts an additional dilemma if her source has violated the law or is a lawyer who has acted unethically, and she does not report him to the appropriate authority.¹³⁵

133. Such a distinction is made in the client conflicts area. Compare MODEL RULES, *supra* note 49, Rule 1.7 ("Conflict of Interest: General Rule") (prohibiting concurrent representation of a client with an interest adverse to another client in any matter) with Rule 1.9 ("Conflict of Interest: Former Client") (prohibiting successive representation of a client with an interest adverse to a former client in the same or a substantially related matter).

134. The analysis is more ambiguous if the former clerk-turned-journalist is writing about a Term other than the one during which she clerked. Assuming the former clerk is not a lawyer, and thus has no continuing duty not to encourage or take advantage of ethical breaches by others, *see supra* text accompanying note 62, she arguably stands in a position no different from that of Woodward and Armstrong, the authors of *The Brethren*, when she interviews former clerks who are themselves breaching confidences. Her conduct may be particularly unseemly in view of the obligations that she previously had to the Court, but it is her sources, not she, who are breaching ethical obligations. Nonetheless, she probably crosses the line when she receives from her sources documents that were improperly removed from the courthouse, *see supra* text accompanying notes 26-29. This concern is particularly serious if the documents existed at the time of her clerkship and she has no way of proving that she did not herself remove them from the building. Furthermore, the former-clerk-turned-journalist acts unethically if she takes advantage of her status as a former clerk to induce other former clerks to disclose facts that they would not ordinarily disclose to outsiders, particularly if she does not inform them in advance that the information imparted will be disseminated publicly. *See supra* text accompanying note 125, concerning former clerks exchanging "war stories" that neither they nor the Justices expect to be shared with outsiders.

135. See MODEL RULES, *supra* note 49, Rule 8.3 (requiring a lawyer to inform the appropriate professional authority if she has knowledge of another lawyer's violation of the rules of professional conduct that "raises a substantial question as to that lawyer's honesty, trust-

She can avoid many of these problems, however, if she refrains from obtaining confidential information from sources who are unwilling to be named.

Third, like anyone, a former clerk should be careful not to assume too many roles at once. Although the Code of Conduct prohibits disclosure of the Court's confidences regardless of a clerk's subsequent status, Lazarus's assumption of the additional roles of lawyer and prosecutor only heightened his ethical obligations with respect to protecting the Court's confidences and the documents within its files. His publisher advertised his position with the United States Attorney on the dust jacket of *Closed Chambers*, but it was Lazarus's responsibility to ascertain and carry out the ethical obligations that this new position entailed.¹³⁶

7. *How Long Does the Duty Survive?*

Lazarus has incorrectly argued that the Code of Conduct does not survive a clerkship,¹³⁷ but he apparently does recognize some obligation of confidentiality, albeit an amorphous one, that survives the clerkship.¹³⁸ His interpretation of this obligation, however, refuses to define temporal boundaries and rests on a dubious distinction between that which is current and that which falls "into the realm of history,"¹³⁹ the latter category apparently to be defined by each clerk-turned-historian according to his own moral compass. As a practical matter, this distinction admits just about any statement that a former clerk wants to disclose into the realm of permissible disclosure.

Nonetheless, one may legitimately inquire as to whether there are any qualifications to the word "never" in the Code of Conduct. In particular, does the duty of confidentiality survive the death of the Justice who imparted a confidence? If not, does it still survive

worthiness or fitness as a lawyer in other respects"); MODEL RULES, *supra* note 49, Rule 8.4 (stating that it is professional misconduct for a lawyer to "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "(d) engage in conduct that is prejudicial to the administration of justice"); MODEL RULES, *supra* note 49, Rule 8.4 cmt. 3 ("A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust . . .").

136. See *supra* text accompanying notes 44, 62, 135.

137. See *supra* text accompanying notes 51-58.

138. See Collins & Skover, *Interview with Lazarus*, *supra* note 19 ("[Q:] If it is to be an institution of fair adjudication, how much secrecy does the Supreme Court need, in your view? Lazarus: Well, I think a good starting point, it seems to me — during the time that a case is pending, it is absolutely imperative that the deliberative process be secret. And, on the other hand, at the other extreme, it seems to me that at some point, these things fall into the realm of history. And it's a little bit like one of Zeno's paradoxes: How many grains of sand does it take to make a sandhill? Where is the line? . . . Somewhere between the time when the case is pending and a substantial time period later is the point where it does fall into the realm of history.").

139. See *id.*

the death of all of the Justices on the Court at the time the communication was made? The answer should be grounded in the expectations of the Justices themselves, and the Court's 1998 ruling that the attorney-client privilege survives the death of the client¹⁴⁰ suggests that the Justices might also expect that their own confidences would be kept posthumously. Arguably, a Justice might have an even greater interest in keeping a communication, particularly a controversial communication, confidential after her death than when she is alive to explain it.¹⁴¹ On the other hand, communications about specific cases might no longer be sensitive years after those cases are decided, particularly if the Court is composed predominantly of new Justices. However, the decision about when confidences expire, if at all, is perhaps best made by the Justices themselves.

8. *Exceptions to Confidentiality*

Some exceptions to confidentiality are necessary. For example, in appropriate circumstances a court, prosecutor, or Congress should have the power to compel testimony by a former clerk about communications with a Justice. Evidence of judicial misconduct should be disclosed, whether in a criminal trial or impeachment hearing. A clerk should also disclose information necessary to inform other members of the same court or another court about impermissible conflict of interest or bias on the part of a judge or Justice hearing a case. Finally, a clerk should perhaps disclose statements by a judge that directly contradict the judge's subsequent sworn statements in a confirmation hearing for her own nomination to a higher court or other office.¹⁴²

140. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

141. The author of this review objected in a *Wall Street Journal* editorial that Lazarus published an unsubstantiated report that Justice Marshall once responded to an inquiry about the solution to racism by saying "Kill all the white people." See Painter, *supra* note 8 (quoting p. 278). Lazarus responded in his letter to the *Journal* that the remark was intended to be a "jest," and that *Closed Chambers* had given a "compliment" to Justice Marshall by reporting that he had said it. See Lazarus, *supra* note 46. This author does not share Lazarus's sense of humor. In any event, this is surely a compliment that Justice Marshall could do without. Lazarus also gives no specifics as to time, place, or names of witnesses. Furthermore, whatever Justice Marshall said he almost certainly said with the expectation that nobody in the room would repeat his remarks publicly. He is not alive to defend himself, and his expectation of privacy should have been respected.

142. Yet one more exception to the law clerk's duty to keep confidences should be disclosure that is necessary for the clerk to defend herself against a negative performance review or reference letter from the judge. It would be unfair for the judge to document his difficulties working with the clerk while the clerk is estopped from explaining her side of the story. Indeed, the Model Rules contain an analogous exception to the lawyer's duty to keep client confidences. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998) (providing that a lawyer may reveal information necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client").

Arguments can be made for extending an evidentiary privilege to clerk-judge communications in at least some of these contexts.¹⁴³ Indeed, Lazarus's current employer, the Department of Justice, has unsuccessfully asked the Supreme Court to extend such an evidentiary privilege to the relationship between the Secret Service and the President.¹⁴⁴ However, when a court, a prosecutor, or Congress seeks for good cause to compel testimony about a Justice, the importance of disclosure to the integrity of the judicial system is more compelling than when a former clerk writes a book about the Court. The evidentiary privilege generally is narrower than the duty to keep confidences,¹⁴⁵ and it should be here as well.

9. *Disclosure by a Justice*

Regardless of whether Justice Blackmun knew about *Closed Chambers* while Lazarus was writing the book, important questions about the Justices' own duty to keep confidences have been raised when Justices assist biographers, give or bequest their papers to public repositories, or allow scholars access to the same. Do the Justices owe each other a duty of confidentiality with respect to oral and written communications amongst themselves? May a Justice consent to disclosure by a law clerk or other person in her employ? Does such consent apply only to communications between the Justice and the clerk or also to communications by other Justices? May a Justice work with a biographer, or allow outsiders access to his papers without the permission of his fellow Justices? Unlike the obligation of clerks to keep confidences, these questions are not addressed by the Supreme Court's rules, although perhaps they should be.

143. There is reason for concern. Assume the following: Conservative groups remember the short-lived initiative in the 1960's to "impeach Earl Warren" and once again call for Congress to investigate "activist judges" with an eye toward impeachment for abuse of power. The House Judiciary Committee decides to investigate, and begins to collect information on a dozen judges on the appellate courts and two Supreme Court justices (pick any two). Former clerks are asked for information about how their bosses made decisions, the things they said in chambers, and anything else that could be used against them in impeachment hearings. Some former clerks turn the information over voluntarily. Others hope to avoid subpoenas by Congress. Query: It is ethical for the former clerks to voluntarily report on confidential communications with their judges or justices? The Code of Conduct would prohibit the disclosure, *see* CODE OF CONDUCT, *supra* note 11, Canon 3, and provides no exception to the ethical obligation to keep confidences, even where the information could be useful to Congress, which alone has the power to remove judges with life tenure. The more difficult question, and one that cannot be addressed fully in this book review, is whether there is, or ought to be, an absolute or qualified privilege that would prevent the former clerks from being subpoenaed and forced to testify.

144. *See In re Sealed Case*, No. 98-3069, 1998 U.S. App. LEXIS 16289 (D.C. Cir., July 16, 1998) (per curiam).

145. *See* MODEL CODE, *supra* note 48, EC 4-4 (1983) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client.").

There are reasons why Justices should respect each other's confidences, the most important being that candid communication among the Justices is critical to sound judicial decision making. A potential breach of confidence might even affect the outcome of a case in which a Justice would reverse her vote after private discussions with her colleagues, but would adhere more steadfastly to her original position if she knew that the process by which she changed her mind would be aired publicly. Unilateral disclosure, if it became the norm while Justices were still sitting on the Court, could also be used by individual Justices to coerce their colleagues or score points in the press. The threat of public disclosure of confidences could thus become a weapon in the deliberative process itself, distorting results and causing Justices rarely to disclose to each other what they really think. Another concern is that a Justice, probably through a wholesale gift of unsorted papers to a public repository, could inadvertently disclose confidential communications that would embarrass a colleague while adding little to our understanding of the Court.

On the other hand, public knowledge of how the Justices arrive at decisions is important. Interested persons include scholars of the Court and voters, as well as the President and Senators who shape the Court's future whenever they appoint and confirm a new Justice. Public revelations concerning the competency of a Justice, for example, might encourage an incompetent Justice to retire. Public revelations also might disclose that an excessive number of certain types of cases — for example death penalty cases — are interfering with the Court's other work, making statutory reform or creation of an intermediate appellate court an urgent necessity. Finally, revelations that make the political component of the Court's decision-making more transparent help its critics form an opinion about whether the Court should go in another direction.

Regardless of how these factors in favor of and against disclosure balance out, the Justices are in a better position than their clerks to weigh them and decide. The Justices have a greater interest in the Court as an institution and thus an incentive not to make disclosures that undermine the Court's deliberative process. The Justices also are more likely to make comprehensive disclosures rather than disclosures pertaining only to a particular term. The Justices furthermore are less likely to be influenced by extraneous factors, such as financial gain or fame from disclosing each other's confidences. Finally, the law entrusts the Justices with responsibility for the Supreme Court as an institution, whereas clerks have no such authority or responsibility. Some decisions, such as which law clerks to hire, are made by the Justices individually. Others, such as the Court's procedural rules, are made collectively. It could be debated whether one or all of the Justices who are part of a confiden-

tial communication should consent to its disclosure, but the notion that a clerk has authority to make this determination on par with that of a Justice is absurd.

CONCLUSION

Lazarus's breach of trust not only raises ethical concerns, but contributes to the principal substantive weaknesses of the book: the obsession with goings on among law clerks, the failure to disclose sources, and the lack of credibility that both the book's author and his anonymous sources have earned. Many of these concerns would have been mitigated had Lazarus disclosed only that information which he and his sources were ethically entitled to disclose, and he had then divulged the names of his sources and the complete text and origin of all documents that he used. Lazarus's commitments to his sources may now be an obstacle to his disclosing their identity. Still, however, Lazarus would enhance the credibility and quality of his account in *Closed Chambers* if he were to open his own files and make his disclosure complete.