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Judges Gone Wild

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Articles

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I. INTRODUCTION

In previous articles, I have written about law clerks who have gone off the tracks entirely[1] or who have pulled into some pretty unusual stations such as the witness boxes in their judges' courtrooms.[2] While unearthing judicial opinions in federal cases that discussed law clerks gone wild or law clerks out of context, I came across another group of opinions, those in which judges have gone wild – at least a little bit – by writing about law clerks (generally their own) in unconventional ways. Opinions penned by those wild judges are the focus of this article.

As a general rule, law clerks are the least visible actors in the judicial system. In court, we are typically seen but not heard, and on paper we are even less apparent, lurking as ghostly presences behind the orders and opinions signed by our judges. Given our lack of visibility, it always catches my eye when a judge refers to a law clerk in a written opinion. My interest is even greater when the law-clerk reference is entirely gratuitous, that is, when it appears in an opinion in a case in which law-clerk conduct is not an issue. This article collects and analyzes opinions in federal cases that contain gratuitous law-clerk references. One reason for writing about these opinions is simply to highlight some particularly colorful judicial language,[3] which, in turn, serves as a useful reminder that every judicial opinion – even the driest of the lot – was produced by a living breathing human being (often aided by several others). My second reason for writing this article is to shine an additional beam of light on several dozen law clerks who have been singled out by their judges for special recognition. If one bit of recognition is good, then it is pellucid[4] a second bite at being the apple of a judge's eye would be twice as nice.

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1. *See* Parker B. Potter, Jr., *Law Clerks Gone Wild*, 34 SEATTLE U. L. REV. 173 (2010).

2. *See* Parker B. Potter, Jr., *Law Clerks Out of Context*, 9 U.N.H. L. Rev. 67, 94-118 (2010).

3. One of the more unusual law-clerk references I have ever seen – and one that does not fit neatly into any of the categories that organize this article – was penned by Judge Charles Richey: "When the Court's law clerk went to the Courtroom on that day to hear the argument, it learned that the case had been stayed on March 3, 1986 [.]" Hammon v. Barry, Civ. A. No. 84-0903, *et al.*, 1986 WL 31593, at *1 (D.D.C. Apr. 3, 1986). I've read hundreds of opinions in which the writing judge refers to him- or herself as "the court" and to the court as "it." But I've only read one opinion – this one – in which a judge has referred to his law clerk as "it." Of course, there is another possibility, but I am loathe to ascribe to Judge Richey such a monumental error in the application of the rules that govern the placement of pronouns.

4. To anyone who has ever read more than a handful of First Circuit opinions, it should be pellucidly pellucid that I have pilfered "pellucid" from the richly stocked lexicon of Judge Bruce Salya. *See, e.g.*, Ahern v. Shinseki, 629 F.3d 49, 55 (1st Cir. 2010). Judge Selya, in turn, seems to have found that word while hunting verbal snipe of a medical type. *See* Steadman's Medical Dictionary 1337 (27th ed. 2000).

In Part II, I examine opinions in which judges have criticized law clerks in print, usually, but not always, in a humorous manner. Part III focuses on opinions in which judges have protected their law clerks, in one way or another, from attacks launched from precincts beyond the friendly confines of chambers. In Part IV, I discuss opinions in which judges have praised their law clerks. That Part concludes by focusing on Judges Seybourn Lynne, Arthur Tarnow, and Milton Shadur, who are, by a wide margin, the leaders of the federal judicial pack when it comes to pegging the law-clerk "kudo-meter."

II. THROWING THE LAW CLERK UNDER THE BUS

When judges go wild enough to write about law clerks, it is usually in an effort to sing their praises.[5] From time to time, however, judges have thrown law clerks under the bus, either in earnest or in an attempt to make a joke.[6]

A. Dissing the Clerk

It is probably fair to say that law clerks, on the whole, hold themselves in fairly high regard. As Judge Richard Arnold once wrote:

> In fact, I used to be a law clerk, and I think it's maybe the best job I ever had. Of course the law clerks tend, at least I did when I was one, perhaps to overestimate their own importance. We thought we knew everything. The judge that I worked for was smart enough to know that I didn't know everything.[7]

In *Brown v. Sullivan*,[8] Judge John Elfvin was on the same page as Judge Arnold's former judge. When ruling on an application for attorney's fees, Judge Elfvin knocked all law clerks down a peg when he wrote: "Mr. Duane asserts that he has 'extensive experience' in disability law based upon his review of numerous Social Security disability actions as a federal law clerk in this Circuit. This Court, however, is dubious whether clerking experience qualifies as experience in the field."[9] Judge Elfvin's skepticism,

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5. *See infra*. Part IV.

6. Often, of course, those attempts at humor lead to more head scratching than belly laughing. *See* George R.Smith, *A Primer of Opinion Writing, for Four New* Judges, 21 ARK. L. REV. 197, 210 (1967) ("Judicial humor is neither judicial nor humorous.").

7. Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 542 (1995).

8. 724 F. Supp. 76 (W.D.N.Y. 1989).

9. *Id*. at 80 n.7 (citation to the record omitted); *see also* Thompson v. Speedway SuperAmerica, LLC, No. 08-CV-1107 (PJS/RLE), 2009 WL 2998163 (D. Minn. Sept. 15, 2009) (agreeing with defendants that $175 per hour, rather than the $300 per hour requested by the plaintiffs, was appropriate

however, has a rather fancy pedigree, as evidenced by the following quotation in Justice Brennan's opinion in a case in which the United States Supreme Court held that magistrate judges were not authorized to conduct evidentiary hearings in habeas corpus proceedings:

> A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these (post-conviction review) applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.[10]

In addition to noting the lack of experience most law clerks bring to their duties (or, perhaps more appropriately, the experience law clerks are simply unable to bring to their duties,) some judges have also cast a jaundiced eye on the quality of law-clerk writing. In an opinion rejecting a claim that the description of the operative facts in an administrative decision did not comport with the requirements of the Administrative Procedure Act, Judge Charles Wyzanski explained that

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hourly rate for attorney with less than one year of experience, notwithstanding his service as a judicial law clerk for one year after graduating from law school). Other judges, however, have expressly noted the value added to an attorney's resume by the law-clerk experience. *See*, *e.g.*, Nat'l Diagnostics, Inc. v. Dollar Gen. Corp., No. 3:09-CV-80-W, 2010 WL 1418217, at *4 (W.D.N.C. Apr. 5, 2010) (taking into account attorney's two-year state-court appellate clerkship in determining reasonable hourly rate for calculating award of attorneys' fees); Virgin Islands v. Francis, No. CR.F105/2008, 2009 WL 3535414, at *7 (D.V.I. Oct. 5, 2009) ("Prior to and upon taking and passing the Virgin Islands Bar, trial defense counsel was employed as a law clerk at the Territorial Court, now Superior Court [.] As a law clerk, trial defense counsel became quite familiar with procedural rules in criminal cases.").

10. Wingo v. Wedding, 418 U.S. 461, 473 n.18 (1974) (quoting S. REP. NO. 90-371, at 26 (1967)); *see also* Rudenko v. Costello, 194 F. Supp. 2d 163, 164 (E.D.N.Y. 2000) (noting that habeas corpus is "particularly difficult for law clerks, who serve only one year, to master"); Yascavage v. Weinberger, 379 F. Supp. 1297, 1304 (M.D. Pa. 1974) (applying S. REP. NO. 90-371 to Social Security cases). Notwithstanding the one-year term of many clerkships, there is much that a term clerk can do, as Judge Mark Wolf has aptly noted:

> I have also had a succession of law clerks. They only stay for one year. None of them could have a panoramic view of this case. I am reluctant to single out any one of them because they have all contributed significantly. However, Dan Weintraub, who was here during the hearings in 1998, has come back today. He had many assignments concerning this case. Among other things, every day he made a list of what I had ordered the parties to do, including a list of what I had ordered the government to produce. Day after day, month after month, at the bottom of the list, unaddressed, were the issues of the Brian Halloran documents and then the John McIntyre documents. But for Dan's meticulous attention to detail at a tumultuous time, perhaps those Halloran documents would still be in Mawn's desk.

United States v. Flemmi, 195 F. Supp. 2d 243, 253 (D. Mass. 2001).

> to prescribe for every fact-finder the mechanical process for which complainants plead would in all probability cause agency heads, judges, and others with like responsibility to depart further from the pungent, individualized standard of the best Anglo-American judicial writing and to delegate more than they now do to anonymous law clerks.[11]

One of the most remarkable appraisals of the abilities of law clerks, or at least some law clerks, is the statement of a magistrate judge reported in *Hall v. Small Business Administration*,[12] in which the magistrate's impartiality was called into question, based upon the conduct of his law clerk. In *Hall*, the magistrate judge first stated that the law clerk was "little more than an amanuensis in th[e] case"[13] and then explained: "I don't think that any female law clerk is going to give me a lot of input on how to decide a case."[14] Whoa, Nellie!

Somewhat more hypothetically, Chief Judge Gerald Tjoflat pointed to the possibility of law-clerk error in making the following point:

> Our humble task is to determine whether the Confrontation Clause mandated the admission of the evidence in question, and, if so, whether its exclusion was harmless beyond a reasonable doubt. In carrying out this task, we do not care *why* the trial judge excluded the evidence – e.g., whether he did so because he flipped a coin, his law clerk gave him bad advice, he had a spiritual vision, or he interpreted the rape shield statute.[15]

While I find it hard to wrap my head around the idea of a law clerk giving bad advice, I am comforted by Chief Judge Tjoflat's authorial decision to sandwich his invocation of law-clerk malfeasance with descriptions of judicial coin flipping and vision questing.

Moving from the general to the specific, I have found two opinions in which a judge in one case called out the law clerk in another case for falling

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11. Gilbertville Trucking Co. v. United States, 196 F. Supp. 351, 359 (D. Mass. 1961). Making a similar point, I think, Judge Murray Guerfein once wrote:

> The Court is intentionally sparing of citations, being mindful of two things: (1) that every District Court decision in this area depends on congeries of facts, the precise language used rarely being strictly relevant to decision in a different case; and (2) that the repetition of what are by now simply truisms, accompanied by string citations, is of little use except as a reward for the diligence of law clerks.

Loeb v. Whittaker Corp., 333 F. Supp. 484, 488 n.2 (S.D.N.Y. 1971).

12. 695 F.2d 175 (5th Cir. 1983).

13. *Id*. at 178.

14. *Id*.

15. Jones v. Goodwin, 982 F.2d 464, 471 (11th Cir. 1993).

down on the job. In the earlier of those opinions, Judge Henry Friendly wrote:

> A goodly number [of federal decisions] are cited in an elaborate footnote to the opinion in Michelsen [v. Penney], 135 F.2d [409,] 416 n.2 [(2d Cir. 1943)]. However, Judge Clark's law clerk failed him in one respect; the cases, other than Curtis v. Connly, cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.[16]

As a law clerk in a trial court, I can think of few things more mortifying than having one of my typographical errors pointed out in an appellate opinion. The law-clerk criticism in *Smith v. Gibson*[17] is a bit more pedestrian; in his order on Richard Tandy Smith's habeas corpus petition, Judge David Russell simply noted that the record demonstrated that a state-court judge received misinformation about Smith from one of his court's law clerks and that the effect of the misinformation had been corrected by Smith's counsel.[18]

On occasion, judges have also been known to throw their own law clerks under the bus. For example, Judge Reggie Walton recently wrote: "The Court apologizes for the delay in ruling on this motion. The law clerk assigned to this case inadvertently overlooked the pending motion[.]"[19] Judge Irving Ben Cooper expressed similar sentiments in *Ferguson v. United States*,[20] in which he wrote: "A misfiling of this case in the office of our law clerks accounts for this belated disposition; we are distressed by and regret it."[21] Judge E.B. Haltom also fingered his law clerk in *Shoals T.V. & Appliance, Inc. v. Auto Owners Insurance Co.*,[22] but took pains to soften the blow; after explaining, in a footnote, what his law clerk had done, he concluded by saying: "This footnote is not inserted to criticize the law clerk involved."[23] To the law clerk involved, Judge Haltom's disclaimer probably felt a bit like shutting the barn door long after the (scape)goat had left the building.

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16. Int'l Rys. of Cent. Am. v. United Fruit Co., 373 F.2d 408, 414 n.6 (2d Cir. 1967).
17. No. Civ 991329R, 2005 WL 1185815 (W.D. Okla. May 17, 2005).
18. *Id*. at *20.
19. Halcomb v. Office of Sergeant-At-Arms, Civ. A. No. 01-01428(RBW), 2007 WL 2071684, at *1 n.1(D.D.C. July 13, 2007).
20. 447 F. Supp. 1213 (S.D.N.Y. 1978).
21. *Id*. at 1214 n.1.
22. 791 F. Supp. 283 (N.D. Ala. 1992).
23. *Id*. at 287 n.1.

Then there is the diss that got away. In *FTC v. R.R. Donnelley & Sons Co.*,[24] Judge Stanley Harris observed that a motion filed by the plaintiff was "rather remarkable in the extent to which plaintiff's counsel accurately predicted what the Court's conclusion would be."[25] Judge Harris underscored his amazement by saying: "In fact, if the undersigned had not written the Memorandum Order [which the plaintiff's motion had accurately predicted] over the past weekend, the undersigned might have wondered if his law clerk had inadvertently provided plaintiff's counsel with an advance copy of the draft."[26] The plaintiff's counsel was surely pleased by the compliment, but I wonder how the Judge Harris's law clerk felt when he realized that his judge was willing to wonder about his or her ability to hold draft opinions close to the vest (or wherever else they are supposed to be stored.)

B. Joshing the Clerk[27]

In my twelve years as a law clerk, I have yet to see a judicial robe decorated with a boutonniere that shoots water or a bench equipped with a seltzer bottle. The attempts at judicial humor described in this section may explain why judges are not so outfitted.[28] On the other hand, the judges I discuss below do deserve credit for their target selection; if a jurist needs to make a joke, far better for it to be at the expense of a law clerk than at the expense of a litigant.[29]

Judges have used their opinions to razz their law clerks for all sorts of things, such as slovenliness,[30] geekishness,[31] and an appreciation for adult

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24. No. 90-1619 SSH, 1990 WL 193665 (D.D.C. Aug. 29, 1990).

25. *Id*. at *1.

26. *Id*. at *1 n.1.

27. One can only presume that Judge Jack Weinstein's 2003-2004 law clerk, Joshua Hill, was immune to judicial joshing, having been joshed by his parents at birth. *See In re* Habeas Corpus Cases, 298 F. Supp. 2d 303, 305 (E.D.N.Y. 2003):

> Fourth, I should particularly like to express gratitude for the work of my previous law clerks, Katherine L. Ashenbrenner and Aram Schvey; my present law clerks Joshua Hill and Jennifer Murray; and student interns Jill Rogers, Elizabeth Nash, Jason M. Schloss, Anthony P. Dykes, Jennifer Bernstein, Andrea Anderson and Derrick Toddy.

28. *See* WILLIAM PROSSER, THE JUDICIAL HUMORIST vii (1952) ("Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one [.] He [or she] just is not funny.").

29. *See* Smith, *supra* note 6, at 210 ("A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down."); PROSSER, *supra* note 28, at vii ("The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.").

30. *See* Faulk v. Owens-Corning Fiberglass Corp., 48 F. Supp. 2d 653, 657, 657 n.3 (E.D. Tex. 1999) (referring to "this Court's (occasionally) trusty law clerk. . . " and explaining that "[u]se of copy

entertainment.[32] The most common subject of judicial levity directed toward law clerks, however, is their law school training.

In what I presume to have been an attempt at humor, Judge Richard Cudahy recently wrote: "In fact, one of my law clerks was asked to answer this very question on a civil procedure exam in 1999. Unfortunately, however, he does not recall the answer, so we must review the issue *de novo*."[33] Judge Thad Heartfield made a somewhat more biting joke about his law clerk's law school experience in *Thurmond v. Compaq Computer Corp.*,[34] in which the defendant moved for his recusal because his law clerk once purchased a Compaq computer and complained to Compaq when he found it to be missing some software.[35] In denying the recusal motion, Judge Heartfield explained: "[T]his Court takes judicial notice that the law clerk purchased his Compaq computer roughly five years ago for law school (which he repeatedly assures the undersigned he attended despite occasional reservation)."[36] Finally, in *Glen Holley Entertainment, Inc. v. Tektronix, Inc.*,[37] one party "argue[d] that the district judge's off-the-cuff suggestion that he would not hire any other law clerks from Yale disparaged the law clerk's work in [that] case."[38] The appellate court disagreed: "For whatever purpose the district court intended this remark, it does not demonstrate that

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files prevents spoilation of the original files by this Court and its unke[m]pt law clerks (who are rarely permitted to venture beyond the library).").

31. *See* Moore v. King City Fire Protection Dist. No. 26, No. C05-442JLR, 2006 WL 2645182, at *4 n.3 (W.D. Wash. Sept. 14, 2006):

> At the insistence of the court's law clerk, who is what the court will refer to as a 'math geek,' the court notes that the word 'hyperbolae' is the plural of 'hyperbola,' which is the term for the locus of points on a plane for which the difference of the distances from two fixed points is constant. 'Hyperbolae' are formed by certain intersections of a plane with a right circular cone. 'Hyperbole' is formed when a person (often, but not necessarily, an attorney) engages in gross exaggeration.

32. *See* Dr. John's Inc. v. City of Sioux City, 305 F. Supp. 2d 1022, 1027 n.3 (N.D. Iowa 2004):

> This court has rather limited knowledge of adult entertainment establishments. However, for the entire nine plus years that the undersigned has been a U.S. District Court Judge in Sioux City, Iowa, there has been one such establishment directly across the street from the federal courthouse where the undersigned has his chambers. At the undersigned's request – and without the need for a lot of prompting – one of the undersigned's law clerks walked out of the courthouse to note the appearance of that adult book store's storefront today.

33. Olden v. LaFarge Corp., 383 F.3d 495, 499 (6th Cir. 2004).

34. No. 1:99CV0711(TH), 2000 WL 33795081 (E.D. Tex. Feb. 28, 2000).

35. *Id*. at *4.

36. *Id*. at *4 n.9. In addition, in a law-clerk reference that is difficult to characterize, Judge Heartfield observed that the Fifth Circuit had noted that law clerks "are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be," *id*. at *3 (quoting Hall v. Small Bus. Admin., 695 F. 2d 175, 179 (5th Cir. 1983)), and then added the footnote: "There's a scary thought." *Id*. at *3 n.7. Scary for whom, he does not say.

37. 352 F.3d 367 (9th Cir. 2003).

38. *Id*. at 382.

the judge is biased against a party or otherwise unfit to preside over proceedings on remand."[39]

III. WRAPPING THE LAW CLERK IN THE WARM BLACK ROBE

For every judge who has made a law clerk the butt of a (lame) joke, there are two or three others who have wrapped their robes around their law clerks and kicked the butts of litigants, attorneys, or others who have engaged in law-clerk abuse. Such butt-kicking has taken the form of both words and deeds.

A. Judicial Words

In *Cochran v. Celotex Corp.*,[40] Judge Richard Mills defined the role of the law clerk and also offered his clerk – and all the rest of us – a bit of prophylactic protection:

> As noted before, Mr. Baron was in frequent contact with the Court on the eve of trial, trying to finesse the Court into granting the concessions he sought. In contacting the Court for those purposes, though, Mr. Baron spoke with the Court's law clerk, as do all other counsel in similar circumstances. That is as it should be – the law clerk is the Court's eyes and ears, and in all respects acts for the Court. The law clerk is – quite literally – an "elbow clerk." When speaking to a Court's law clerk, counsel are speaking with the Court itself, and must therefore act accordingly.[41]

Thank you, Judge Mills. Judge Curtis Joyner offered his law clerks an even thicker layer of protection when he wrote in an amended scheduling order:

> Letters or written communications (which are discouraged) shall be directed to the Court and not to law clerks or the deputy clerk. Telephone calls to law clerks are discouraged. Law clerks are not permitted to render advice to counsel and have no authority to grant continuances or to speak on behalf of the Court.[42]

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39. *Id*.
40. 123 F.R.D. 307 (C.D. Ill. 1988).
41. *Id*. at 311 n.1.
42. Christy v. Pa. Tpk. Comm'n, 160 F.R.D. 49, 51 (E.D. Pa. 1995); *see also* O'Connell v. Town of Farmington, No. 02-CV-6205 CJS, 2004 WL 1698629, at *1 (W.D.N.Y. Feb. 19, 2004) (noting that a Town Judge had "upbraided plaintiff for having made harassing phone calls to [the judge's] home and to his law clerk.").

In addition to proactively protecting their law clerks, a number of judges have proffered verbal support after a false accusation or other improper communication had been directed toward a law clerk. For example, in *Vanzant v. R.L. Products, Inc.*,[43] Judge James Paine expressed "serious[ ] doubts" about whether his law clerk made a particular statement that the defendants said the law clerk had made.[44] In *Epperson v. United States*,[45] an attorney suggested during a hearing that "it is possible that Your Honor's law clerk in preparing these [jury instructions] forgot to strike it out,"[46] to which Judge John Reynolds responded: "No, we wouldn't do that."[47] Similarly, Magistrate Judge Nita Stormes gave her law clerk a strong vote of confidence when she wrote:

> [T]he Court advises Plaintiff's counsel that law clerks may not, and in this case did not, authorize actions by attorneys that are not in compliance with the Federal Rules of Civil Procedure or this Court's Local Civil Rules; nor may a law clerk, nor the [sic] did the Court's law clerk in the instant case, advise either attorney to proceed in a manner procedurally inappropriate or contrary to the Court's own Scheduling Order.[48]

Judge David Arceneaux offered similar support in response to a claim that his law clerk had mistreated a party and her counsel:

> The undersigned judge must first note that his law clerks simply are not permitted to speak to parties. Neither this judge nor his law clerk, therefore, have had any contact with Ms. Livaccari and, furthermore, have not "mistreated" her in any manner whatsoever. As a courtesy to the bar, the undersigned judge does permit his law clerks to speak with counsel. Plaintiff's counsel, however, abused

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43. 139 F.R.D. 435 (S.D. Fla. 1991).

44. *Id*. at 438 n.4. Then, for good measure, Judge Paine explained:

> [L]aw clerks are instructed not to comment on the merits of cases. In fact, the attempt to elicit such information via telephone constitutes impermissible *ex parte* communication with chambers. *In Re Intermagnetics America, Inc.*, 101 B.R. 191, 193 n. 2 (C.D. Cal. 1989); *Hegwood v. Shepherd*, No. 85 C 8422, 1986 WL 9193, at *2 (N.D. Ill. 1986). Moreover, any reliance placed upon a law clerk's telephonic statements is unreasonable. *Cf. Dixon v. City of Lawton*, 898 F.2d 1443, 1447 (10th Cir. 1990).

Id.

45. Civ. A. No. 71-C-265, 1973 WL 713 (E.D. Wis. Nov. 24, 1973).

46. *Id*. at *8.

47. *Id*. Not only is Judge Reynolds's vote of confidence a beautiful thing, but you've also got to love his use of the first person plural.

48. Am. Tower Corp. v. City of San Diego, No. 07cv0399 LAB (NLS), 2007 WL 2815183, at *3 n.2 (S.D. Cal. Sept. 25, 2007).

> this courtesy and, in this instance, the law clerk acted appropriately in instructing Mr. Roy Raspanti that further communications with the court should be in the form of formal motions[.]
>
> This judge stood nearby the day his law clerk told Mr. Raspanti not to telephone chambers in the future. Under the circumstances, the restraint shown toward Mr. Raspanti by this judge's law clerk should be commended.[49]

In *Abraham v. Super Buy Tires, Inc.*,[50] Magistrate Judge Stormes cautioned counsel against "bad language, sarcastic comments, innuendos or any further gratuitous commentary that impugns the integrity of . . . the Court."[51] This came in response to conduct that included "an outrageous comment contained in an email Plaintiffs' counsel sent to defense counsel which intimated that defense counsel Osborne has some sort of special relationship with the judge or her law clerk."[52] In an unsigned *per curiam* opinion, the Fifth Circuit struck a similar note when it cautioned counsel that accusations "besmirching the name and character of the district judge's clerk unfairly"[53] were "unsubstantiated and intemperate attacks on the

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49. Livaccari v. Zack's Famous Frozen Yogurt, Inc., Civ. A. No. 92-1836, 1992 WL 236950, at *3-*4 (E.D. La. Aug. 31, 1992).

50. No. 05cv1296-B (NLS), 2007 WL 173846, at *4, *5 (S.D. Cal. Jan. 10, 2007).

51. *Id*. at *5.

52. *Id*. at *4.

53. Mata v. S. San Antonio Indep. Sch. Dist., 7 F.3d 230, 1993 WL 413927, at *4 (5th Cir. Oct. 15, 1993) (unpublished table decision). The court described the incident that precipitated counsel's besmirchment in the following way:

> On January 12, 1993 Mata's counsel filed and served a notice of deposition for Mata along with a motion to perpetuate testimony. The deposition was set for January 27th. Counsel, by his own admission, called the district court every day to determine if the motion had been granted. At no time, however, did counsel notify his client, Mata, that the deposition was scheduled for that date. Sometime on the 26th, the district court granted the motion to perpetuate testimony. The school district's attorney called the district court early the next day to inquire as to the status of the motion. The judge's clerk informed the school district's counsel that the motion had been granted and the deposition would proceed as scheduled. When the school district's attorney arrived, however, Mata was not present for the deposition, and his counsel was unaware that the motion had been granted.
>
> The school district's attorney sought sanctions for the failure to hold the deposition as arranged. Mata's counsel responded with allegations of ex parte communications between the school district's attorney and the law clerk, allegations amounting to a charge of conspiracy. The pleading, which contained pejorative subtitles, such as "continuing pattern of chicanery," alleged, inter alia, that "the trial court's clerk is biased against the plaintiffs and the plaintiff's cause of action . . . . "[T]he Honorable Clerk 'clearly manifested commitment to the Governmental entities construction of relevant events." Mata's only evidence to support his allegations were that: (1) he had never been informed that the particular clerk was involved and (2) the clerk to whom Mata's counsel had repeatedly spoken did not inform him that the motion had been granted. This "evidence" proves nothing

integrity of the court [that] constitute[d] sanctionable violations of the duties owed by Marta's attorney" and that similar conduct in the future could result in disciplinary sanctions.[54]

B. Judicial Deeds

It is often said that actions speak louder than words,[55] and there are many examples of actions that judges have taken either to protect their law clerks or in response to things that had been done to their law clerks by parties, attorneys, or others.

In *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*,[56] pro se plaintiff Victoria Ullmann submitted an affidavit asserting that she "saw Theresa Haire, the magistrate's [law] clerk, squeeze up her nose, wiggle her shoulders, and repeat silently testimony [Ullmann] had just given."[57] Magistrate Judge Michael Merz characterized Ullmann's statement as "a gratuitous, immaterial, and unfair attack on the professional character of [his] law clerk,"[58] intended to cover Ullmann's inability to litigate her case.[59] In response to Ullman's statement, the Magistrate Judge noted:

> Needless to say, the record does not reflect any such conduct by Ms. Haire and Miss Ullmann utterly failed to note any such conduct when it could have been made a matter of record. Competent trial counsel, observing non-verbal courtroom conduct which causes alarm, would note the matter then and there for the record so that others who were present could contribute their perceptions and the Court could make a correction, rather than waiting until six weeks later to start a "war of affidavits." Ms. Haire's Affidavit, filed contemporaneously herewith, denies categorically any such conduct. The Court finds Ms. Haire's affidavit credible and Miss Ullmann's incredible.

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more than: (1) the judge has more than one clerk authorized to advise whether a motion has been granted, and (2) Mata's attorney failed to determine that the motion had been granted. Certainly, that "evidence" falls far short of supporting the serious impropriety alleged, even by inference.

Id. at *3-*4.

54. *Id*. at *4.

55. A Westlaw search on the phrase "actions speak louder than words" in the ALLCASES directory results in more than 700 hits. That common-sense principle may not, however, be the law of the land; the United States Supreme Court appears never to have adopted it.

56. 123 F.R.D. 253 (S.D. Ohio 1987).

57. *Id*. at 262.

58. *Id*.

59. *Id*. at 262-63.

> The Court further finds Plaintiff's conduct in making this allegation against Ms. Haire to be a violation of Fed. R. Civ. P. 11 in that it is ungrounded in fact, totally meaningless as a matter of law, and interposed for an improper purpose, to wit, to harass and ridicule without cause a dedicated public servant. Since as Plaintiff herself points out, the Court may impose Rule 11 sanctions *sua sponte*, it shall do so for this baseless attack unless Plaintiff shows good cause to the contrary on or before October 15, 1987. Plaintiff may purge herself of this violation by withdrawing the allegation and apologizing in writing to Ms. Haire.[60]

Subsequently, Ullmann "refused to withdraw the allegation,"[61] but "did admit . . . that no one but she saw [Ms. Haire's 'disapproving body language'] and that it was probably unconscious behavior on Ms. Haire's part."[62] "Ullmann was also unable to state the legal relevance of the conduct."[63] Consequently, Magistrate Judge Merz found Ullmann's allegation to be in violation of Rule 11 of the Federal Rules of Civil Procedure and reprimanded her for it.[64] On appeal, the Sixth Circuit held that the magistrate's imposition of sanctions did not require his recusal and affirmed his decision enforcing a settlement agreement between Ullmann and the defendants.[65]

In *Woodruff v. McLane*,[66] the "[p]laintiff's repeated calls to [the] Court's law clerks prompted the Court to write Plaintiff a letter instructing him not to contact these individuals."[67] In a similar vein, another court placed an individual on limited-filer status for behavior that included "us[ing] foul and disgusting language, calling court staff, including deputy and assistant clerks, law clerks, secretaries, magistrates, and judges, racially derogatory names, hurl[ing] epithets, and otherwise utiliz[ing] abusive language disrespectful of the court and all in his presence,"[68] while a third court took the same step against an individual for harassing law clerks,

60. *Id*. at 263.

61. Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher, 123 F.R.D. 559, 563 (S.D. Ohio 1987).

62. *Id*.

63. *Id*.

64. *Id*.

65. Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher, 857 F.2d 1475, 1988 WL 92416, at *4 (6th Cir. Sept. 2, 1988) (unpublished table decision).

66. No. Civ.A. 704CV96HS, 2005 WL 1127135 (M.D. Ga. May 6, 2005).

67. *Id*. at *1.

68. *In re* Tyler, 677 F. Supp. 1410, 1411 (D. Neb. 1987).

albeit in some unspecified way.[69] In *United States v. Persico*,[70] Judge Sterling Johnson put the kibosh on a criminal defendant's motion

> for leave to conduct further inquiry into the pending employment application of Elliot F. Kaye, Esq. (the "Law Clerk"), current law clerk to this court and the law clerk presently assigned to this case, for the position of Assistant United States Attorney with the United States Attorney's Office for the Eastern District of New York.[71]

Finally, in *Velez v. Hayes*,[72] Judge Victor Marrero noted that in an earlier order Chief Judge Michael Mukasey had prohibited Michael-Tony Velez from bringing claims against Justice Robert Hayes of the New York State Supreme Court or Justice Hayes's law clerk.[73]

The pro se plaintiff in *Day v. Allstate Insurance Co.*[74] "defied numerous court orders, . . . abused court personnel, [and] directed calumnies at judges, law clerks, administrators, and litigants[.]"[75] As a result, his claim was dismissed,[76] and he was ordered to pay attorney's fees and[77] sanctions, all of which was upheld on appeal.[78] Dismissal was also the sanction imposed on the pro se plaintiff in *Scherer v. Washburn University*.[79] In that case, the plaintiff insulted every level of the federal judiciary.

> In addition to the insults stated earlier, plaintiff has added attacks against the chambers staff of the undersigned judge. Plaintiff hypothesizes: [s]ome of the orders appealed were not actually written by the judge himself. Instead, those orders were delegated to less experienced law clerks acting on behalf of the presiding judge. It appears the judge might be venting for their errors and subsequent appeals of those simple errors both in fact and law. I should be punished for what is happening in chambers[.][80]

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69. *See* Scott v. Weinberg, No. C06-5172 FDB, 2007 WL 963990, at *4 (W.D. Wash. Mar. 26, 2007).
70. No. 04 CR 911 SJ, 2006 WL 2792761 (E.D.N.Y. Sept. 7, 2006).
71. *Id*. at *1.
72. 346 F. Supp. 2d 557 (S.D.N.Y. 2004).
73. *Id*. at 559.
74. 788 F.2d 1110 (5th Cir. 1986).
75. *Id*. at 1115.
76. *See id*. at 1113.
77. *Id*. at 1114.
78. *See id*. at 1111.
79. No. 05-2288-CM, 2007 WL 4322789 (D. Kan. Dec. 7, 2007).
80. *Id*. at *4. The "insults stated earlier," *id*., include the following:
In the time since October 11, 2006, plaintiff filed several documents. At best, plaintiff's filings are short and present his unsupported interpretation of the law. At worst, plaintiff's

Judge Carlos Murguia was neither persuaded nor amused, and Thomas Scherer paid the price; his case was dismissed.[81] Perhaps the harshest sanction against a pro se litigant for law-clerk abuse came in *United States v. Henry*.[82] In that case, Magistrate Judge Michael Urbanski appointed a prosecutor to pursue criminal contempt charges against William White.[83] The prosecutor, in turn, was to focus on "two aspects of criminal contempt: (1) the alleged destruction of computer files subject to subpoena as detailed herein and in Exhibit A; and (2) White's emailing of a derogatory and inflammatory email to the court's law clerk on June 18, 2008."[84] Regarding the latter incident, Magistrate Judge Urbanski explained:

> The email, attached as Exhibit B, is vile, contumacious and laced with expletives. While the invective in the email is not directed at the court, it was communicated directly to the court's law clerk.

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filings are mean-spirited rants that attack the integrity and intelligence of opposing counsel and every level of the Federal Judiciary.

. . . .

Plaintiff's arguments and behavior related to this motion to reconsider demonstrate his disrespect for federal courts. While sending a copy of his motion to the Assistant United States Attorney, plaintiff addressed the envelope to "loser." In his reply brief, plaintiff: (1) refers to the actions of the government as "preposterous" and "nonsense"; (2) refers to the Assistant United States Attorney as the "king of the ad hominem attacks" and a "proverbial spoiled child"; (3) accuses the clerk of this court of "pick[ing] and choos[ing] what filings/pleadings they will, or will not accept, on a whim"; and (4) accuses judges of this district of only providing "rationalization permitting . . . unlawful, unallowable conduct."

In other recent filings, plaintiff has continued his diatribe against federal courts. Plaintiff: (1) believes that "federal judges are complicit with any fraud or fallacious argument imaginable put forward by the United States Attorney"; (2) claims that in this court "reality does not matter"; (3) accuses this court of "ignor[ing] upholding statutory compliance with the law" and caring only about "dumping cases, so there is no action required"; and (4) accuses the Tenth Circuit of "refus[ing] to abide by its own rules and amendments." Plaintiff also filed documents referring to Magistrate Judge O'Hara's orders as "freaking unbelievable" and accusing the undersigned judge of "ignor[ing] reality and evidence of record."

. . . .

Plaintiff then reverts back to attacking opposing counsel, misstating resolved legal issues, and accusing the undersigned judge of bias. Notably, plaintiff ponders the possibility of the undersigned judge harboring political animus based on the associations of the siblings of the undersigned judge. Plaintiff also perceives that "most of the erroneous orders both in fact and law were caused by delegation to administrative staff to write orders by the direction of the presiding judge." Plaintiff then accuses the staff of this chambers – whom he believes to be of "limited experiences" – of personal attacks and "shocking" conduct in relation to orders in "direct circumvention by omission to the supreme law of this nation." Plaintiff concludes by instructing this court on what it can do to earn his respect.

Id. at *1-*2 (footnotes omitted).

81. *Id*. at *5.

82. Civ. A. No. 7:08mc003, 2008 WL 2625359 (W.D. Va. June 30, 2008).

83. *Id*. at *5.

84. *Id*.

> Plainly, such statements would be contemptuous if uttered in open court. The court sees no difference in making such statements in an email sent to the court's law clerk as they are plainly disrespectful and constitute an insult to the dignity of the court and an affront to our system of justice.[85]

Sadly, at least for me, the unredacted version of Exhibit B was filed under seal.[86]

While most sanctions for law-clerk abuse have been directed toward pro se litigants, attorneys, too, have had to pay the price for behaving inappropriately toward law clerks. For example, in the case of *In re Katrina Canal Breaches Consolidated Litigation*,[87] Judge Stanwood Duval noted that in a previous case, attorney Ashton O'Dwyer had been "ruled into court to show cause why he should not be sanctioned for having filed into the record a disparaging e-mail concerning the undersigned and his law clerk."[88] In *Betts v. Attorney Registration & Disciplinary Commission*,[89] Judge Paul Plunkett ordered John Betts's counsel to show cause "why [he] should not be sanctioned in the amount of $1,000.00 for filing frivolous pleadings."[90] The pleadings were described in the following way:

> In his Motion to Alter or Amend, Betts claims that the rationale for our decision was "just nonsense," and "totally defies logic." In his Memorandum in Support, he continues in kind, calling one of our findings "utter nonsense." Even more disturbing is the following attack on our finding that public policy supports the decision of the bankruptcy judge:
>
> > Another reason public policy decision [sic] are just bad is because the mechanics of how decisions get written. It's touchy ground here but it's also a fact of life that court decisions are written by law clerks with little or no experience in the real world and entered after a cursory review by the Judge. The bulging court dockets don't allow for a lot of options. But because of how the decisions come to life, the wisdom of a "brand new lawyer law clerk" should not be making public policy.

85. *Id*.
86. *Id*. at *6.
87. Civ. A. No. 05-4182, et al., 2008 WL 533991 (E.D. La. Feb. 22, 2008).
88. *Id*. at *2 n.7.
89. 167 B.R. 107 (N.D. Ill. 1994).
90. *Id*. at 110.

> Finally, in the Reply to his still unnoticed Motion, Kozel switches his approach from simply insults to condescension. He opens with "Maybe this attorney just did not make himself clear enough." After instructing the Court to "follow along," Kozel says, "Judge Plunkett is an old prosecutor. Let me try a more simplified approach." He then continues to harp on unsupported arguments we have explicitly found to be meritless, and winds up with "the opinion was poorly researched, poorly written and failed to address each of the matters raised on appeal." He ascribes this to the facts that "there is clearly a problem with Judge Plunkett's support staff."[91]

Judge Plunkett responded:

> This unprofessional conduct simply cannot be ignored. Kozel, unable to find legal arguments to support his case, turns to accusations of conspiracy and incompetence that border very closely upon criminal contempt of this Court[.]
>
> If we have wrongly decided the merits of Betts' appeal, we have no doubt that the Seventh Circuit will correct us. However, if Kozel thinks that he can bully this Court into changing its disposition by making personal accusations, he is sorely mistaken. We caution Mr. Kozel that in the event he elects to respond to the Rule to Show Cause he moderate his tone. Another pleading of the ilk of the last two may result in more substantial sanctions.[92]

Judge Alexandro Castro, writing for the Supreme Court of the Commonwealth of the Northern Mariana Islands, went a step further in *Saipan Lau Lau Development, Inc. v. Superior Court*.[93] In that case, the court extended its previously imposed suspension of attorney Theodore Mitchell for a variety of unprofessional conduct, including this:

> Even after his suspension, Mitchell continued to disrupt the Court's ability to rule on the simple matter of whether a writ should issue. He filed a premature appeal to the Ninth Circuit of several of the Court's orders. He moved to stay the proceedings pending disposition of the appeal. He filed another round of motions for

91. *Id*. at 109 (footnote and citations to the record omitted).
92. *Id*. at 110 (footnote omitted).
93. No. Civ.A. 97-107, 2001 WL 34883529 (N. Mar. I. Mar. 8, 2001).

> disqualification of the entire panel. Then, after the Court set a hearing on its Order to Show Cause, in a display of particularly egregious and disruptive conduct, Mitchell attempted to delay the hearing by first moving to continue, then by attempting to depose each panel member, two Supreme Court law clerks and a former law clerk, a former Chief Justice, the current Chief Justice, and several of his family members. Mitchell has also sharply and unjustifiably criticized a Supreme Court law clerk whom he cannot even prove worked on this case.[94]

In the case of *In re Moity*,[95] the Fifth Circuit affirmed the one-year disbarment of an attorney "for his conduct towards a judicial law clerk during a telephone conversation, for making misrepresentations to the court during a contempt hearing, and for impugning the integrity of two federal judges in a prior brief before [that] court."[96]

I conclude this section with a rather remarkable case, *Garcia v. Williams*.[97] In that case, Herminia Garcia sued her former employer, United States District Judge Spencer Williams, for discharging her.[98] Among the reasons Judge Williams gave for terminating Garcia was "the friction she caused with the law clerks."[99] The plaintiff described the judge's charge of law-clerk friction in her complaint:

> On September 5, 1986, JUDGE WILLIAMS called plaintiff into his office, without any previous warning, and told her, in a rambling and lengthy conversation which he taped simultaneously on two tape recorders, that she had caused friction with the law clerks; in particular he recited a list of accusations against her, the most serious of which were that she had hidden one law clerk's light bulb

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94. *Id*. at *15 (footnote and citation to the record omitted).

95. 320 F. App'x 244 (5th Cir. 2009).

96. *Id*. at 244-45. Attorney Moity's bad telephone manners included "yelling," speaking "in a very angry tone," and using "a very ugly tone." *Id*. at 245. Those characterizations came from a "Certification of Contempt" prepared by Magistrate Judge Methvin, which was based on detailed notes taken by law clerk Stacey Blanke. *Id*. Moity objected to reliance on Blanke's notes, to no avail:

> The law clerk, Stacey Blanke, would later rely on detailed notes she took to recount the conversation to the magistrate judge. As his second issue on appeal, Moity argues that the law clerk must have engaged in misconduct by surreptitiously taping the conversation, as her report was too detailed to have been based strictly on contemporaneous, handwritten notes. We reject that issue now, as there is no evidence to support Moity's speculation.

Id.

97. 704 F. Supp. 984 (N.D. Cal. 1988).

98. *Id*. at 987.

99. *Id*. at 995.

> and that a year earlier she had hidden another law clerk's paycheck.[100]

Happily for me, in more than a decade as a law clerk, I have never had anything hidden by any of my colleagues in chambers, and I have always been given access to the supply closet where the light bulbs are stored.

IV. SINGING THE LAW CLERK'S PRAISES

I have saved the best for last. In this section, I focus on opinions in which judges have gone wild by spicing up their opinions with a loud, clear "Atta-Clerk!"[101]

A. In Memoriam

While this article generally takes a lighthearted approach to its subject, this section is a somber exception. Here I report two tributes to law clerks inspired by their untimely deaths. In *Jackson v. Baldwin-Lima-Hamilton Corp.*,[102] Judge Charles Kraft noted that "[t]he sudden and unexpected death of [his] esteemed law clerk of many years necessitated [his] absence to attend his funeral services on the afternoon of September 30, 1965."[103] And then there is this from Judge David Faber: "This opinion was drafted for the court on October 8, 2003, by Spencer B. Dennison, Law Clerk to Chief Judge David A. Faber. Mr. Dennison died on October 9, 2003, as a result of injuries sustained in an off-road vehicle accident on October 8."[104] In an article devoted in large measure to bringing law clerks out of the shadows, it seems only fitting to repeat the words of Judges Kraft and Faber.

B. General and Specific Praise

Of all the law-clerk references I encountered while researching this article, the ones that prompted the biggest smile were the ones in which a judge thanked a law clerk, either by name or anonymously, for his or her

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100. *Id*. at 1002.

101. As one might surmise, my initial impulse was to call this section "Atta-Boy," but, of course the "boy" in "atta-boy" is inappropriately diminutive, and a switch to "atta-man" would leave unresolved a rather glaring gender problem. Hence, I chose to go with the multiply politically correct "atta-clerk." Sadly, my familiarity with the Turkish legal system and my knowledge of that country's former leaders leaves me ill prepared to ascertain whether any of that country's jurists ever had the occasion to write or say "atta-clerk Atatürk."

102. 252 F. Supp. 529 (E.D. Pa. 1966).

103. *Id*. at 531.

104. Fleeman v. Toyota Motor Sales, U.S.A., Inc., 288 F. Supp. 2d 726, 727 n.1 (S.D. W. Va. 2003).

assistance with an opinion.[105] Some of these "shout-outs" are memorable because the judicial praise is so fulsome.[106] Who would not want to be referred to in print as "[m]y very excellent law clerk,"[107] "my very able senior law clerk,"[108] "the district judge's perceptive law clerk,"[109] "this Court's able law clerk,"[110] "this Court's conscientious law clerk,"[111] "my brilliant young law clerk[ ],"[112] or some other equally emphatic term of endearment? By the same token, any law clerk would be thrilled to be publicly recognized for exerting "yeoman efforts,"[113] making "remarkable and inspiring contributions,"[114] contributing "tireless efforts,"[115] providing "tireless assistance . . . [and] consistently mak[ing] the most difficult tasks appear easy,"[116] offering "diligent, conscientious, and scholarly services."[117]

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105. *See, e.g.*, Martinez v. Trainor, 435 F. Supp. 440, 441 n.1 (N.D. Ill. 1976) ("This decision is the product of a legal memorandum prepared by my second year law clerk Thomas E. Johnson.").

106. *See, e.g.*, Nelson v. Quarterman, 472 F.3d 287, 316 n.1 (5th Cir. 2006) (Dennis, J., concurring) ("I am grateful to my law clerks who worked with me on these opinions and especially to three, Kevin Kneupper, Jelani Jefferson, and Bradley Meissner, who helped in preparing this en banc concurring opinion.").

107. United States v. Puche, 155 F. App'x 487, 490 (11th Cir. 2005) (reporting trial judge's comment about David Lance, at criminal defendant's sentencing hearing).

108. United States v. McGlown, 150 F. App'x 462, 465 (6th Cir. 2005) (reporting trial judge's statement at criminal defendant's suppression hearing).

109. United States v. Albanese, 195 F.3d 389, 398 (8th Cir. 1999) (Heaney, J., dissenting).

110. Taylor v. Facility Constructors, Inc., 360 F. Supp. 2d 887, 891 n.3 (N.D. Ill. 2005) (acknowledging efforts of unnamed law clerk to ascertain filing date for state-court action by printing out information from that court's docket).

111. Kolesar v. Shalala, No. 93 C 3834, 1994 WL 142974, at *2 (N.D. Ill. Apr. 15, 1994) (comparing, in ruling on a request for fees, an attorney's "extremely modest work product requiring a correspondingly modest expenditure of time in relation to the result achieved" with the work of the law clerk and the judge "who were responsible for the lengthy and detailed analysis reflected in the Opinion").

112. Palmigiano v. DiPrete, 737 F. Supp. 1257, 1265 (D.R.I. 1990) (crediting those law clerks and J. Michael Keating, a court-appointed master, for giving him the ability "to issue orders and forge opinions which received the approbation of the First Circuit Court of Appeals"). Interestingly, while referring to his court-appointed master by name, Judge Raymond Pattine called his young law clerks "brilliant," but delivered their compliment in the equivalent of a brown paper wrapper; he never mentioned their names. *Id.*

113. Mohsin v. Ebert, 626 F. Supp. 2d 280, 288 n.2 (E.D.N.Y. 2009) (acknowledging unnamed law clerk for spending "considerable time and effort untangling the mess that counsel had created").

114. United States v. BCCI Holdings (Luxembourg), 69 F. Supp. 2d 36, 63 (D.D.C. 1999) (giving "special thanks" to law clerks Frank E. Kulbaski, Michael J. Francese, Mark J. Yost, and Michael W. Carroll).

115. Am. Socy. for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 677 F. Supp. 2d 55, 59 n.5 (D.D.C. 2009) (acknowledging, with "sincere appreciation," the work of several law clerks in the chambers of District Judge Emmet Sullivan and Magistrate Judge John Facciola).

116. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 585 n.63 (D. Md. 2007) (acknowledging "with gratitude" the work of law clerk Kathryn Widmayer (along with "exceptionally talented law student interns, Ms. Puja Gupta and Mr. Ben Peoples"), at the end of a fifty-page memorandum opinion).

117. Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1460 n.i (N.D. Ala. 1997) ("claim[ing] the opportunity to express appreciation for . . . Law Clerk, Brian Roberts Bostwick, not just when assisting in the preparation of this opinion, but in all other tasks assigned during the past year.")

producing "able and extensive research,"[118] undertaking "exhaustive research and careful analysis,"[119] locating "an iceberg of cases,"[120] performing "an independent search that has cast further light on the subject by locating some additional cases,"[121] giving "extraordinary and invaluable assistance in reviewing the massive record in this case, conducting extensive research, and initial drafting of this opinion,"[122] or reining in an errant judge.[123]

If simply stated praise is good, it stands to reason that more extensive praise is better, which explains my appreciation for the following appreciation:

> Three law clerks have assisted the last three judges who have been assigned to this case. These superb lawyers, Phyllis Shapiro,

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Judge C. Lynwood Smith further noted: "He saw his duty, and he discharged it well. He will be missed." *Id*.

118. Zanders v. La. State Bd. of Educ., 281 F. Supp. 747, 773 n.60 (W.D. La. 1968) (acknowledging, "with much gratitude" the assistance of "our law clerk, Mr. Robert A. Seale, Jr., B.A., '64, J.D., '67, Louisiana State Univeristy"); *see also* Barnes v. Gov't of the Virgin Islands, 415 F. Supp. 1218, 1231 (D.V.I. 1976):

> I would also be woefully ungrateful were I not to include in this expression of gratitude and credit the work of my law clerk, Gary Dixon, a recent honor graduate of the University of Virginia Law School, in his extensive research, in advising and counseling the Commission and myself and in drafting this Memorandum Opinion.

119. Cone v. The Fla. Bar, 626 F. Supp. 132, 137 n.* (M.D. Fla. 1985) (acknowledging Luther M. Dorr, Jr., Law Clerk).

120. Dewick v. Maytag Corp., 296 F. Supp. 2d 905, 909 n.7 (N.D. Ill. 2003) (noting the work of an unnamed law clerk). On reflection, however, I suppose I would prefer a different metaphor, given the propensity of icebergs to melt and, presumably, turn chambers into a soggy mess.

121. United States v. Mooney, 123 F. Supp. 2d 442, 443 (N.D. Ill. 2000).

122. Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 540, 583 n.55 (D. Md. 2009) (acknowledging, with "sincere appreciation," the work of Nicholas Mitchell).

123. Ciba-Geigy Corp. v. Thompson Med. Co., 672 F. Supp. 679, 690 (S.D.N.Y. 1985) ("I think the next thing I have to say is dictum. . . . I say this is dictum because I have been persuaded by my law clerk that there are limits on the power of a federal judge and that I cannot reach beyond the case in controversy.").

In *Duncan Energy Co. v. United States Forest Service*, No. A1-93-033, 1993 WL 664644 (D.N.D. Sept. 30, 1993), case about the rights to minerals located underneath federally owned land, Judge Patrick Conmy did not bend to the will of his law clerks but did go so far as to conclude by noting: "The Court's law clerks have disavowed any agreement with or participation in this matter, feeling that if the Court is in fact correct in analysis of the law, it should not be." *Id*. at *3. For what it is worth, the court of appeals was as uncomfortable as Judge Conmy's law clerks; it reversed and remanded. *See* Duncan Energy Co. v. U.S. Forest Serv., 50 F.3d 584 (8th Cir. 1995).

Rather more cryptic than *Duncan Energy* are cases in which judges have noted a lack of law-clerk participation without indicating why their law clerk(s) did not participate, or why the litigants would care whether or not the law clerk(s) participated. *See, e.g.*, Cohen v. Long Island Lighting Co., No. CV-84-0588 (LDW), 1986 WL 9961, at *1 n.1 (E.D.N.Y. May 10, 1986) ("Roberta Kotkin, Esq., Law Clerk to Magistrate Jordan, took no part in the preparation of this decision."); United States v. Mattiace Indus., Inc., No. CV 86-1972 (HB), 1987 WL 47784, at *2 n.* ("The magistrate judge's law clerk took no part in the preparation of this decision."), & *2 n.** ("The magistrate's law clerk took no part in this decision."). Like *Cohen*, *Mattiace Industries* was written by Magistrate Judge David Jordan. *Id*. at *1.

> Tracey Litz and Bonnie Day, have had a devotion to duty far beyond what is expected of their office. Their challenging suggestions, warm manner, keen analysis and quick grasp of problems and tender of solutions have assisted the judges for whom they worked in extraordinary fashion.[124]

Another fashion-forward approach to law-clerk acknowledgment was trotted down the runway by the judge who posted the following mini resumes:

> We wish to note that two of our law clerks, Thomas R. Streifender, Case-Western Reserve University, A.B., 1970; Marquette University Law School, J.D., 1980; and William F. Brown, University of Wisconsin, B.A., 1977; Harvard University Law School, J.D., 1980, have worked closely with us on this project, and that their contributions to our efforts have been considerable.[125]

Considerable consideration was also contributed to the small school of law clerks involved in *United States v. State of Washington*,[126] a case about fishing rights. In 1978, Judge George Boldt "express[ed] [his] sincere appreciation to Andrew D. Gill, Esq., law clerk . . . for his outstanding effort over an extended period of time, in assisting the court in summarizing, editing and assembling these orders."[127] And more than seven years later, in the same case, Judge Walter Craig "express[ed] [his] sincere appreciation to Shelly K. McIntyre, Esq., law clerk to the court, for her outstanding work in assembling, condensing and editing these orders for publication."[128] In another long and complex case, Judge Earl Carroll extolled the contributions of the same law clerk at least three times. He began by writing: "I take this opportunity to acknowledge the assistance of Kristen Rosati, my second year law clerk, in research and preparation of this order. She has also been able to devote substantial time towards pretrial issues and the Court's preparation for Phase II in this case."[129] He essentially repeated

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124. Liddell v. Bd. of Educ., No. 4:72CV100 SNL, 1999 WL 33314210, at *8 (E.D. Mo. Mar. 12, 1999).

125. Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 639 n.5 (E.D. Wis. 1982).

126. 459 F. Supp. 1020 (W.D. Wash. 1978). One cannot help but be impressed by a judge who assigns a case about fishing rights to a law clerk named Gill.

127. *Id*. at 1027 n.1.

128. 626 F. Supp. 1405, 1416 n.* (W.D. Wash. 1985).

129. Masayesva *ex rel*. Hopi Indian Tribe v. Zah *ex rel*. Navajo Indian Tribe, 793 F. Supp. 1495, 1532 n.165 (D. Ariz. 1992).

that acknowledgment in another order less than three months later.[130] And then, three months after that, he elaborated:

> Kristen Rosati, the law clerk who worked tirelessly on this case and pending proceedings involving the 1882 Reservation for a full year, has honored me by her outstanding efforts in those regards. She asked for the assignment when it became available, little suspecting I am sure what it would entail. Her interest, commitment to the development of a thorough explication of the record in Phases I and II, and her thoughtful analysis of the statutes and case law, represent the best a district judge could expect of a law clerk.[131]

Judge Anita Brody, in an order construing the claims of a patent, offered an especially enchanting endorsement of her law clerk: "My law clerk Sabrina Fève requests that I disclose that she now despises patent law. I cannot believe that anyone who displays such competence in a field of inquiry feels so vehemently. Her response must be less than forthcoming: the traditional line between love and hate lives on."[132] Perhaps the most exuberant statement of thanks I found, or at least the most metaphorical, is this one, penned by Judge Milton Shadur:

> Even apart from Schwab's frivolous argument under Section 5(e), very little of the charting of the wilderness reflected in this opinion may be ascribed to the submissions of the parties. Left to their devices, the Court would still be lost in the outer reaches of an extraordinarily complex (and opaque) statutory and regulatory scheme. Special thanks are due to the map-making efforts of student extern Carlos Saavedra and this Court's law clerk William Von Hoene.[133]

More interesting, however, than praise for doing things that law clerks are expected to do, even when bountifully or colorfully dispensed, is praise

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130. Masayesva *ex rel*. Hopi Indian Tribe v. Zah *ex rel*. Navajo Indian Tribe, 794 F. Supp. 899, 929 n.186 (D. Ariz. 1992).

131. Masayesva *ex rel*. Hopi Indian Tribe v. Zah *ex rel.* Navajo Indian Tribe, 816 F. Supp. 1387, 1437 n.52 (D. Ariz.1992).

132. Ill. Tool Works, Inc. *ex rel.* Simco Div. v. Ion Sys., Inc., 250 F. Supp. 2d 477, 505 (E.D. Pa. 2003).

133. Allen v. Schwab Rehab. Hosp., 509 F. Supp. 151, 155 n.5 (N.D. Ill. 1981). Judge Shadur's shout-out was presented in a footnote to this equally colorful bit of exposition: "This excursion through some of the wilderness of Title VII has resembled nothing so much as a voyage to Lilliput (including the dispute between the Big-Endians and the Little-Endians." *Id.* at 155. Sadly, for purposes of Judge Shadur's metaphor, Title VII does not appear to proscribe discrimination based on size. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868 (2011).

in which a judge identifies a law clerk's expertise in an area that was probably not covered in law school or tested on the bar exam. It is no secret that most law clerks do quite a lot of drafting.[134] But in *Fuller v. Fuller Brush Co.*,[135] Judge Terence Evans thanked his former law clerk for draftsmanship of a sort rarely seen in chambers, a sketch he made during a hearing: "The sketch was made by my former law clerk, Richard J. [Sankovitz], B.A., Marquette University, 1980; J.D., Harvard Law School, 1983. Although Mr. Sankovitz's talents as an artist are considerable, his skills as a lawyer are even more impressive."[136] I don't know about Attorney Sankovitz's legal skills, but his drawing skills are on display for all to see in the *Federal Supplement.*[137] Judges have also praised their law clerks for their language skills. In the case of *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation*,[138] Judge Carl Rubin, at a hearing in open court, credited his law clerk Mrs. Ringenback with coining the phrase "Blue, Blue Ribbon Jury."[139] And in *Boyter v. Shreveport Bank & Trust*,[140] Judge Thomas Stagg noted his reliance on his francophone law clerk: "I wish to acknowledge, with thanks, the research and translation by

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134. Many judges recognize the skill that law clerks bring to their draftsmanship. None, however, has done so quite as colorfully as Judge Frederick Motz:

> Many excellent writers, including some law clerks and former law clerks, take the position that an " 's" must be added to a name ending in "s" when using the possessive form. Strunk and White so command. William Strunk, Jr. & E.B. White, *The Elements of Style* 1 (3d ed. 1979). Others never add an " 's". There is also authority permitting what might be called a hybrid approach: adding an " 's" when the "s" in the possessor's name sounds like an "s" but omitting the "s" where (as here) the sound of the "s" in the possessor's name is "z." *The Chicago Manual of Style* § 6.30 (Univ. of Chi. Press, 14th ed. 1993).
>
> For example, during the top of an inning at Camden Yards, "Markakis's catches" in right may be applauded while "Jones' throws" from center are cheered. This hybrid approach has the virtue of marrying the written word and the spoken tongue and contributes to the growth of English as a living language, unconstrained by archaic and inflexible rules.
>
> The Supreme Court is divided on this important issue. *See Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (Thomas, J.) (omitting "s" when using the possessive form of words ending in "s"); *id.* at 2541 (Souter, J., dissenting) (adding "s" universally to the possessive form of words ending in "s"); *id.* at 2529 (Scalia, J., concurring) (following the hybrid approach). Presumably, my adoption of the hybrid approach is subject to a deferential standard of review, even by those more classically inclined.

United States v. Dinkins, 546 F. Supp. 2d 308, 309 n.1 (D. Md. 2008).

135. 595 F. Supp. 1088 (E.D. Wis. 1984).

136. *Id*. at 1091 n.4.

137. *See id*. at 1091.

138. 624 F. Supp. 1212 (S.D. Ohio 1985).

139. *Id*. at 1217.

140. 65 B.R. 944 (W.D. La. 1986).

senior law clerk Marie Breaux Stroud. My stumbling, junior college French would never survive publication. I trust that hers will."[141]

Like Judge Stagg, Judge David Porter, in *Board of Education v. Department of Health, Education & Welfare*,[142] acknowledged the usefulness of a law clerk's non-legal background: "This task was facilitated by the research and drafting assistance given this Court by its law clerk, Martha H. Good, J.D., Ph.D. (Political Science). Her background suited her ideally to work on this difficult case, and her contribution has been outstanding."[143] Presumably with tongue in cheek, Judge Samuel Kent has also noted reliance on his law clerks' knowledge of geopolitical nomenclature:

> Although the jurisdiction of this Court boasts no . . . foreign offices, a somewhat dated globe is within its possession. While the Court does not therefrom profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused

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141. *Id*. at 949 n.4. In a similar situation, Judge Constance Motley found herself out of luck. As she wrote: "neither the undersigned nor her capable law clerks speak much Thai." Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc., 215 F. Supp. 2d 395, 403 (S.D.N.Y. 2002). Of course, Judge Motley's understated observation leaves readers wondering exactly how much Thai she and her law clerks do speak, and what they talk about when they express themselves in that language. Pad thai, I would suspect, but I have never had the pleasure of dining with Judge Motley and her law clerks.
Judge Jerry Buchmeyer and his law clerks were also out of luck, linguistically, when they ran into an impenetrable little tumbleweed of Lone Star lingo:

> Defendant contends that this definition [of the term "one medical incident"] is "as clear in meaning as the locally recognized phrase, 'One riot; one Ranger.' " Luckily for the Defendant, the definition truly is clear and unambiguous since neither the "local" law clerk nor the "foreign" law clerk assigned to this case recognized or understood this expression.

Harris Methodist Health Sys. v. Emp'rs Reinsurance Corp., No. 3:96-CV-0054-R, 1997 WL 446459, at *6 n.30 (N.D. Tex. 1997) (citation to the record omitted).

142 655 F. Supp. 1504 (S.D. Ohio 1986).

143. *Id*. at 1514 n.7. Judge William Young had a background of a different sort in mind when he wrote the following about his law clerk, in an opinion in a copyright infringement case in which he explained the Learned Hand abstractions test by using, as an example, Charles Frazier's Civil War novel *Cold Mountain*. *See* Situation Mgmt. Sys. v. ASP Consulting Group, 535 F. Supp. 2d 231, 237-38 (D. Mass. 2008). In the midst of his example, Judge Young dropped an extensive footnote describing the Battle of the Crater, fought outside Petersburg, Virginia, and concluded his footnote this way: "It is appropriate to note that law clerk Alex Ewing, Esq., the creative analyst behind this opinion, is the great-greatgrandson of George Washington Condrey, a sergeant in Lane's North Carolina Brigade, who believed until his dying day that he had accidentally shot Stonewall Jackson." *Id*. at 238 n.3.

> some real, initial confusion until the Court conferred with its law clerks.[144]

Rather more sophisticated assistance was provided by a law clerk in *Brown v. North Central F.S., Inc.*,[145] about whom Judge Mark Bennett wrote:

> An 'idée fixe,' so my law clerk who once studied music history tells me, is 'a recurring musical theme or phrase, representing a person or idea, in a large musical composition.' . . . For those persons not inclined simply to take my law clerk's word for it, he suggests recourse to the NEW HARVARD DICTIONARY OF MUSIC 389 (Don Michael Randel, ed. 1986), the CONCISE OXFORD DICTIONARY OF MUSIC 59 (2d ed.; John Owen Ward, ed., 1964), LANGENSCHEIDT'S STANDARD DICTIONARY OF THE FRENCH AND ENGLISH LANGUAGES 253 (Kenneth Urwin, ed., 1968), and a really good recording of Berlioz's *Symphonie fantastique*, preferably by a French orchestra using period instruments.[146]

Judge Shadur also acknowledged, albeit in passing, the sophistication of one of his law clerks when he indicated that he was troubled by "what has appeared in the newspapers and from what [his] law clerk has reported that he heard on National Public Radio."[147]

Moving precipitously from highbrow to lowbrow – or perhaps to somewhere below lowbrow – Judge Joseph Goodwin drew on the film *Caddyshack* to explain the unfairness of the covenant not to compete at

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144. Republic of Bolivia v. Philip Morris Co. Inc., 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999). Judge Kent, it should be noted, is the author of *Bradshaw v. Unity Marine Corp. Inc*., 147 F. Supp. 2d 668 (S.D. Tex. 2001), one of the most notorious judicial opinions of all time, and surely the opinion most frequently circulated among law clerks. To quote just some of the hilarity:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.

Id. at 670.

145. 173 F.R.D. 658 (N.D. Iowa 1997).

146. *Id*. at 661 n.1. Judge Bennett's footnote was intended to explain his opinion's opening sentence: "Failure to plead fraud with particulartiy is the *idée fixe* of the defendant grain elevator's motion to dismiss [.]" *Id*. at 661.

147. In re Amino Acid Lysine Antitrust Litig., No. 95 C 7679, MDL No. 1083, 1996 WL 197671, at *1 (N.D. Ill. Apr. 22, 1996).

issue in *McGough v. Nalco Co.*[148] and (perhaps disingenuously) identified his law clerk as the source of the reference:

> [Carl] Spackler's favorite grass is a hybrid, 'a cross, ah, of Kentucky Bluegrass, Featherbed Bent, and Northern California Sensemilia.' *Caddyshack* (1980). I credit my esteemed law clerk, Matt Gatewood, for the *Austin Powers* and *Caddyshack* references. They are apt and perhaps will serve to stir the likely somnolent readers of this lengthy opinion.[149]

In *United States v. Bramlet*,[150] Judge William Bauer described the law-enforcement response to a small-town bank robbery in this way: "Roger Walker, an Illinois State Trooper and the only peace officer in this sleepy little community, responded to an emergency call to his home only to discover that the rear tires of his squad car had been slashed."[151] He then elaborated, in a footnote:

> As described by my law clerks – members of the T.V. generation – the situation is one reminiscent of some television programs

148. 496 F. Supp. 2d 729 (N.D. W. Va. 2007).

149. *Id*. at 751 n.12. For inquiring minds that need to know, the Austin Powers reference involved Frau Farbissina, Virtucon, and the range of Virtucon's business activity, which included "a factory in Chicago that makes miniature models of factories." *Id*. at 747 n.10; *see also* AFL Phila. LLC v. Krause, 639 F. Supp. 2d 512, 517 n.1 (E.D. Pa. 2009) ("The Undersigned [Judge Michael Baylson] wishes to credit his law clerk for her helpful knowledge of popular music in drafting this memorandum.").
The hypothetical example in *McGough* based on *Caddyshack* is, in fact, an explanatory hole in one:

> For example, assume Bushwood Country Club hires Carl Spackler as the assistant greenskeeper. Bushwood's president, the Honorable Judge Elihu Smails, orally hires Spackler to work for $100 a week. A few days later, Judge Smails delivers a contract to Spackler containing a covenant not to compete or disclose trade secrets. Judge Smails and members of the Bushwood establishment would hate to see other golf-related businesses obtain access to Bushwood's techniques for growing grass. After watching Spackler's uncanny ability to grow grass and keep gophers off the course for nearly a decade, Judge Smails decides to promote him to head greenskeeper and increases his salary to $200 per week. As head greenskeeper, Spackler is more independent and may implement the techniques he feels will improve Bushwood's grass-growing abilities. Because each hole on the course gets a varied amount of sunlight, different types of grasses work better on some holes than others, but Judge Smails trusts Spackler to find the right grass for each one. Spackler's creative ingenuity becomes recognized and he is appointed to replace Mr. Porterhouse as the clubhouse manager, a job that pays $300 per week and carries enhanced responsibilities, such as shining the Judge's shoes frequently. Finally, once some of Bushwood's progressive members force Judge Smails to retire, they appoint Spackler to become president. Spackler, after serving a few years, leaves Bushwood and goes to work for Czervik Country Club, Bushwood's chief competitor. Bushwood, claiming Spackler is bound by the noncompetition agreement **and nondisclosure agreement** he signed thirty years earlier as an entry-level employee, brings suit against Spackler.

Id. at 750-51 (citation omitted).

150. 820 F. 2d 851 (7th Cir. 1987).

151. *Id*. at 852.

> involving one Deputy Fife. I am informed that such things happen to Deputy Fife with heart-sinking regularity and while he kicks at his useless tires one Aunt Bee looks on worriedly. (No Aunt Bee is cast in the present opus.)[152]

In an intellectual property case involving the rights "to market and sell a reproduction of a necklace portrayed in Fox's recent motion picture 'Titanic',"[153] Judge Whitman Knapp acknowledged and relied on the popular-culture expertise of one of his law clerks:

> Our law clerk, Rana, tells us that working on this motion has put her in mind of her reaction – as a teenager – to the movie *Gone With the Wind.* She – and most of her teenage friends – repeatedly kept being drawn back to the four hour epic in the absurd but persistent hope that it would ultimately turn out that Rhett Butler did not walk out on Scarlett O'Hara. For present purposes, we shall assume that similar fantasies among teenagers and others is what keeps them going back (and bringing friends with them) to buy tickets to "Titanic." We shall further assume that it is the sight of the "Heart of the Ocean" necklace – which reminds them of that extraordinarily dramatic moment when Jack is sketching Rose – that is the focus of this yearning to revisit the film.[154]

Law clerks. We're not just for legal research anymore.

C. Judge Lynne: The Father of Praise

Among the judges who have praised their law clerks in opinions, Judge Seybourn Lynne of the Northern District of Alabama deserves special recognition as the progenitor of the genre. In what appears to be the first of approximately twenty published law-clerk acknowledgments, Judge Lynn wrote: "Credit is due William G. Somerville, Jr., Law Clerk to the Court, for the preparation of this opinion."[155] In what appears to be Judge Lynne's final law-clerk acknowledgment, he wrote: "This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, in which the Court fully concurs."[156] Thus, the father of law-clerk acknowledgment bookended

152. *Id*. at 852 n.1.

153. Twentieth Century Fox Film Corp. v. Suarez Corp. Indus., No. 98 Civ. 1711(WK), 1998 WL 126065, at *1 (S.D.N.Y. Mar. 19, 1998).

154. *Id*. at *2.

155. U.S. Fid. & Guar. Co. v. Slifkin, 200 F. Supp. 563, 582 n.1 (N.D. Ala. 1961).

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

his career as a law-clerk cheerleader by putting feathers in the caps of a father and his son.

In between Somerville the Elder and Somerville the Younger,[157] Judge Lynne paid tribute to William L. Hinds, Jr.,[158] Robert L. Potts,[159] Kirby Seiver (thrice),[160] E. Mabry Rogers (thrice),[161] Jerry W. Powell,[162] Larry B. Childs (twice),[163] Jay Guin,[164] Maibeth J. Porter,[165] Michael R. Pennington (four times),[166] and Luther M. Dorr, Jr.[167] Judge Lynne is not remarkable for publically praising his law clerks or even for the number of times he singled out his law clerks for praise – he has been surpassed by at least two other judges in that department.[168] Rather, what causes Judge Lynne to

157. Or Somerville père et fils, for those who might fancy a soupçon of je ne sais quoi.

158. Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3, 12 n.12 (N.D. Ala. 1966) ("Credit is due William L. Hinds, Jr., Law Clerk to the Court, for the preparation of this opinion.").

159. Terry v. Elmwood Cemetery, 307 F. Supp. 369, 377 n.46 (N.D. Ala. 1969).

160. Hodgsdon v. Mauldin, 344 F. Supp. 302, 314 n.32 (N.D. Ala. 1972) ("The foregoing opinion was originally prepared as a memorandum for the Court by Kirby Sevier, Law Clerk, who was present at the evidentiary hearing. Since its excellence in form and content could not be improved upon, it has been reproduced in its entirety as the considered opinion of the Court."); United Steelworkers of Am. v. McGraw-Edison Power Sys. Div., No. 71-647-S, 1971 WL 870, at *8 (N.D. Ala. Dec. 13, 1971); Bailey v. United States, Civ. A. No. 71-191, 1971 WL 434, at *1 (N.D. Ala. Oct. 22, 1971) ("In conformity with the thoroughly excellent memorandum prepared by Kirby Sevier, Law Clerk, a copy of which is attached hereto, in which the Court concurs[.]").

161. Se. Fin. Corp. v. Smith, 397 F. Supp. 649, 655 n.4 (N.D. Ala. 1975); Long v. U.S. Fid. & Guar. Co., 396 F. Supp. 966, 970 n.11 (N.D. Ala. 1975); Tyler v. Ins. Co. of N. Am., Inc. 381 F. Supp. 1356, 1362 n.6 (N.D. Ala. 1974).

162. Nat'l Bank of Commerce of Birmingham v. Ala. Football, Inc., Civ. A. No. 75-L-0567-S, 1976 WL 1068, at *1 (N.D. Ala. May 11, 1976).

163. Chichester v. United States, Civ. A. No. 77-L-0185-S, 1978 WL 1225, at *1 (N.D. Ala. May 1, 1978); Fuller v. Daniel, 438 F. Supp. 928, 930 n.4 (N.D. Ala. 1977) ("Credit is due to Larry B. Childs, Law Clerk, for the preparation of this opinion in collaboration with the Court.").

164. Jacklitch v. Redstone Fed. Credit Union, 463 F. Supp. 1134, 1136 n.* (N.D. Ala. 1979) ("This opinion in major part was drafted by Jay Guin, Law Clerk, which the Court is quick to acknowledge.").

165. Myers v. United States, Civ. A. No. 79-L-5248-NE, 1980 WL 1733, at *5 (N.D. Ala. Dec. 30, 1980) ("The Court fully concurs in the superb memorandum prepared by Maibeth J. Porter, Law Clerk, a copy of which is attached hereto.").

166. Philips v. Amoco Oil Co., 614 F. Supp. 694, 694 n.* (N.D. Ala. 1985) ("This opinion was prepared by Michael R. Pennington, Law Clerk. Its excellence is self-evident. It accurately reflects the considered judgment of the Court as to each issue discussed therein."); Justice v. Bankers Trust Co., 607 F. Supp. 527, 527 n.* (N.D. Ala. 1985) ("The Court acknowledges the exceptional contribution of Michael R. Pennington, Law Clerk, to the preparation of this opinion."); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353, 353 n.* (N.D. Ala. 1984) (same); Pepsi-Cola Bottling Co. of Ft. Lauderdale-Palm Beach, Inc. v. Buffalo Rock Co., 593 F. Supp. 1559, 1560 n.* (N.D. Ala. 1984) ("The basis of this opinion is the sensitive memorandum prepared for the court by Michael R. Pennington, Law Clerk.").

167. Cone v. The Fla. Bar, 626 F. Supp. 132, 137 n.* (M.D. Fla 1985) ("This opinion is the product of exhaustive research and careful analysis by Luther M. Dorr, Jr., Law Clerk.") Judge Lynne was sitting in the Middle District of Florida by designation. *Id*. at 133.

168. *See infra* Part IV.D-E.

stand out from the black-robed crowd is the degree to which he regarded at least some of his law clerks as co-equal collaborators, placing him outside the mainstream, well up the bank and heading fast toward the hundred-year flood line. Instead of mentioning the contributions of his law clerks in a generic way, Judge Lynne went considerably further. He acknowledged law-clerk draftsmanship and, in several opinions, treated law-clerk drafts much in the way a district judge sometimes treats a magistrate judge's report and recommendation by adopting and reproducing them it full, without alteration, as his or her own opinion.[169] Even more remarkable are those situations in which Judge Lynne reproduced a law-clerk memorandum and then stated that he concurred in it.[170]

Judge Lynne's approach to law-clerk acknowledgment did not fly below the radar of appellate attention. In *Parker v. Connors Steel Co.*,[171] the court of appeals noted that Judge Lynne "has regularly included such footnotes [acknowledging the assistance of law clerks] in published opinions as far back as 1961."[172] The court then went on to point out a potential problem:

> Judge Lynne's practice of giving credit to his law clerk in a footnote may erroneously lead some to believe that the law clerk decided the case. While it has not been suggested that the decision in this case was made by Judge Lynne's law clerk and we have no reason to believe that it was, it is not unreasonable to believe that the public may come to this conclusion. . . . It goes without saying that it would be improper for a judge to delegate the adjudicative function of his office to one that was neither appointed by the President nor confirmed by the Senate.[173]

Judge Lynne appears to have read between the lines of *Parker*; he never again credited a law clerk in a footnote. But it seems that Judge Lynne's influence lived on in the Northern District of Alabama. Judges Lynwood Smith and E.B. Haltom both published law-clerk acknowledgments very similar to Judge Lynne's even after *Parker* was decided.[174]

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169. *See, e.g.*, *Hodgsdon v. Mauldin*, 344 F. Supp. 302, 314 n.32 (N.D. Ala. 1972) ; *Se. Fin. Corp. v. Smith*, 397 F. Supp. 649, 655 n.4 (N.D. Ala. 1975).

170. *See, e.g.*, *Nat'l Bank of Commerce of Birmingham v. Ala. Football, Inc.*, Civ. A. No. 75-L-0567-S, 1976 WL 1068, at *1 (N.D. Ala. May 11, 1976).

171. 855 F.2d 1510 (11th Cir. 1988).

172. *Id*. at 1523 (citations omitted).

173. *Id*. at 1524 (citations omitted).

174. *See* Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1460 n.i (N.D. Ala. 1997) (in which Judge Smith acknowledged law clerk Brian Roberts Bostwick); Green Tree Fin. Corp. v. Holt, 171 F.R.D. 313, 319 n.5 (N.D. Ala. 1997) (in which Judge Haltom "acknowledge[d] the excellent re-

D. Judge Tarnow: A Recipient of "Quality Research Assistance"

A rather more circumspect approach to law-clerk acknowledgment is illustrated by the footnotes frequently dropped by Judge Arthur Tarnow of the Eastern District of Michigan. For example, in *Johnson v. Sadzewicz*,[175] Judge Tarnow wrote: "The Court acknowledges the substantial contributions of Law Clerk Amy J. Humphreys to this Report and Recommendation."[176] But Amy J. Humphries was no Amy Harwell.[177] Harwell, another of Judge Tarnow's law clerks, appears to be the most decorated law clerk of all time. In just under twenty-one months, the following sentence was published eight times in the *Federal Supplement* and once in *Federal Rules Decisions*: "Law Clerk Amy Harwell provided quality research assistance."[178] Those nine published accolades place Harwell ahead of six other Tarnow law clerks[179] and the entire Somerville clan.

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search and suggestions made to this HM Judge by his Law Clerk Clay Staggs prior to the drafting of this Memorandum Opinion"); Lackey v. Gateway Homes, Inc., 944 F. Supp. 870, 873 n.3 (N.D. Ala. 1996) (in which Judge Haltom wrote: "The legal research on the issue here addressed and decided has been conducted by Senior Law Clerk Sara Creed who is now in her fifth year as a valuable member of the staff of this HM Senior United States District Judge."). Meanwhile, down in the Southern District of Alabama, Judge Richard Vollmer has adopted a more generic approach to acknowledging the work of law clerks. *See* Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295, 1315 n.31 (S.D. Ala. 2000) ("As in every case, the Court acknowledges the able assistance of his law clerks in the preparation of this order.").

175. 426 F. Supp. 2d 635 (E.D. Mich. 2006).

176. *Id*. at 638 n.1.

177. Unless, of course, Ms. Harwell married someone named Humphreys, and took her spouse's last name . . .

178. McClain v. Coverdell & Co., 272 F. Supp. 2d 631, 633 n.1 (E.D. Mich. 2003); Norgren Auto, Inc. v. SMC Corp. of Am., 261 F. Supp. 2d 910, 911 n.1 (E.D. Mich. 2003); United States v. Bowlson, 240 F. Supp. 2d 678, 679 n.1 (E.D. Mich. 2003); Carter v. United States, 211 F.R.D. 549, 549 n.1 (E.D. Mich. 2003); Campbell v. United States, 266 F. Supp. 587, 587 n.1 (E.D. Mich. 2003), aff'd, 364 F.3d 727 (6th Cir. 2004); Mich. Bell Tel. Co. v. Level 3 Commc'ns, 218 F. Supp. 2d 891, 892 n.1 (E.D. Mich. 2002); Mich. Bell Tel. Co. v. Chappelle, 222 F. Supp. 2d 905, 906 n.1 (E.D. Mich. 2002), aff'd, 2004 U.S. Dist. LEXIS 5985 (6th Cir. Mar. 23, 2004); Coddington v. Langley, 202 F. Supp. 2d 687, 688 n.1 (E.D. Mich. 2002), rev'd, 2003 U.S. App. LEXIS 20859 (6th Cir., Oct. 9, 2003); United States v. Thornton, 177 F. Supp. 2d 625, 625 n.1 (E.D. Mich. 2001).

179. In addition to Humphreys and Harwell (assuming that they are, indeed, two different people . . .), Judge Tarnow has also dished out published praise for "quality research assistance" to Kevin Carlson, *see* Giles v. Wolfenbarger, No. 03-74073, 2006 WL 176426, at *1 n.1 (E.D. Mich. Jan. 24, 2006), *rev'd and vacated by* 239 F. App'x 145 (6th Cir. 2007), Barbara Miltner, *see* McWright v. Gerald, No. Civ. 03-70167, 2004 WL 768641, at *1 n.1 (E.D. Mich. Mar. 26, 2004), Carlos Bermudez, *see, e.g.*, Dow Chem. Co. v. Fireman's Fund Ins. Co., 217 F. Supp. 2d 816, 818 n.1 (E.D. Mich. 2002), Rita Foley, *see, e.g.*, Sallier v. Scott, 151 F. Supp. 2d 836, 838 n.1 (E.D. Mich. 2001), Philip M. Cavanagh, *see, e.g.*, Kvaerner U.S., Inc. v. Hakim Plast Co., 74 F. Supp. 2d 709, 711 n.1 (E.D. Mich. 1999), and Emily Klarman, *see* Mitchell v. Mason, 60 F. Supp. 2d 655, 656 n.1 (E.D. Mich. 1999), *judgment vacated by* 536 U.S. 901 (2002). (Side note to Kevin and Emily: Sorry I had to cite *Giles* and *Mitchell*, in which your judge got reversed, but as he mentioned each of you only once, I had no choice.)

E. Judge Shadur: A Fountain of Kudos

My brief survey of judges who have liberally ladled laudatory language on their law clerks concludes in the Northern District of Illinois at the tip of the pen of Senior District Judge Milton Shadur.[180] Judge Shadur is good for one or two footnotes like this one, right around Labor Day each year:

> Once again this Court opts for publishing this opinion in what might be thought of (other than by the litigants, of course) as an otherwise pedestrian case. That election has been made to provide this Court with the opportunity for public acknowledgment of the outstanding work that has always been done by its outgoing law clerk Georgia Alexakis during the year now ending. Some better appreciation of the extraordinary quality of Georgia's work can be gained by reading this Court's majority opinion for the panel in *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008) and its opinion in *Whiting v. Harley-Davidson Fin. Servs.*, 534 F. Supp. 2d 823 (N.D. Ill. 2008), in each of which cases (as always) her research and analysis provided substantial value beyond that furnished by the counsel in the case. This Court hastens to add (as it invariably does when it is appropriate to pay such a tribute to one of its exemplary law clerks) that it has carefully reworked each sentence in this and other draft opinions produced by Georgia, as well as having read each cited case, so that each end product is this Court's own. If then any errors have found their way into any final

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Judge Tarnow's gratitude is not limited to law clerks. Over the years, he has also acknowledged the "quality research assistance" provided him by four staff attorneys: Cheryl Takacs Bell, *see, e.g.*, Dorchy v. Jones, 320 F. Supp. 2d 564, 567 n.1 (E.D. Mich. 2004), Daniel H. Besser, *see, e.g.*, Satterlee v. Wolfenbarger, 374 F. Supp. 2d 562, 563 n.1 (E.D. Mich. 2005), Marty Caldwell, *see, e.g.*, Robinson v. Stegall, 343 F. Supp. 2d 636, 627 n.1 (E.D. Mich. 2004), and Mary Beth Collery, *see, e.g.*, Wade v. White, 368 F. Supp. 2d 695, 696 n.1 (E.D. Mich. 2005).

180. I'm not quite sure what it says about Judge Shadur, or me, but this is not the first time that one of my research expeditions has landed me in a Sargasso Sea of Shadur-ism. *See* Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L.J. 519, 550 n.177 (2004) (discussing Judge Shadur's use of Shakespeare's "paint the lily" metaphor); Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 216-18, 226 n.202, 272 (2005); Parker B. Potter, Jr., *Wondering About Alice: Judicial References to* Alice in Wonderland *and* Through the Looking Glass, 28 WHITTIER L. REV. 175, 177 n.7, 185, 208 (2006); Parker B. Potter, Jr., *Take Me Out to the Metaphor*, 5 PIERCE L. REV. 313, 314 (2007); Parker B. Potter, Jr., *If Humpty Dumpty Had Sat on the Bench . . .: An Eggheaded Approach to Legal Lexicography*, 30 WHITTIER L. REV. 367, 392 n.40 (2009). When it comes to scholarship concerning judicial writing, it seems that all roads lead to Judge Shadur.

> version, the sole responsibility must be laid at this Court's doorstep and not Georgia's.[181]

Judge Shadur's best-ever law-clerk-pat-on-the-back footnote is probably this one:

> Not much courage is needed for a law review editor to disagree – even to the extent of the sharpest criticism – with any court, including the most exalted in the jurisprudential hierarchy. Indeed, such disagreements have been the stock in trade of student-edited law reviews from the very beginning. When the law review editor becomes a judicial law clerk, however, the change in roles (and in responsibilities) obviously carries with it the need for far greater caution – for the recommendation to a District Judge that he or she should reject out-of-circuit precedent from a respected Court of Appeals should not be undertaken lightly. It is typical of the fine work of this Court's first-rate law clerk Kathryn Price that she has had both the courage and the perceptiveness to recommend that this Court disavow what the Ninth Circuit held and said in *Spun Steak*, a disavowal that also calls for staking out a legal position that has not been espoused by any appellate court. As this opinion shows, this Court has found that recommendation to be entirely sound and well-taken. It should of course be understood (as this Court invariably makes clear in paying tribute to its always outstanding law clerks) that this Court has not only arrived at its own independent conclusion on the subject but has painstakingly reworked each sentence and read each case cited in this opinion, so that this end product is totally this Court's own. If then any errors have found their way into the final version of this opinion, the sole responsibility is this Court's and not that of its law clerk.[182]

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181. Patino v. Astrue, 574 F. Supp. 2d 862, 874 n.10 (N.D. Ill. 2008). Georgia must have been really hot stuff; she got a double dip. *See* Love v. Frontier Ins. Co., 526 F. Supp. 2d 859, 861 n.3 (N.D. Ill. 2007):

> This Court is doubly indebted to Honorable Marsha Berzon, author of the *Hawthorne* opinion, with whom this Court has previously been honored to sit by designation in the Ninth Circuit – both for that opinion's analysis and because one of this Court's two fine law clerks this year, Georgia Alexakis, came to the current clerkship after having spent the prior year clerking for Judge Berzon (and earning a well-deserved recommendation from her).

182. EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 915 n.10 (N.D. Ill. 1999) (citing Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993)). Judge Alfred Wolin once paid a similar compliment to one of his law clerks: "A note of gratitude is extended to my law clerk, David Yawman, whose insight and clear vision permitted the Court to advance a novel theory of fee allocation that,

Happily for Judge Shadur and Kathryn Price, the perky little flag Westlaw has unfurled in the margin above *Synchro-Start* is yellow, not red.

While his annual law-clerk thank-you (foot)notes would have been enough to make Judge Shadur the toast of the clerkigentsia,[183] his references to the work of his law clerks – which number well over 150 – go far beyond the sparkling send-offs he gives each fall.[184] Most notably, Judge Shadur is not shy about criticizing attorneys by comparing them unfavorably to his law clerks.[185] In *Atkins v. City of Chicago*,[186] he noted that "little time and

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notwithstanding its novelty, comports with substantial justice and embraces the public interest." *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572, 594 n.51 (D.N.J. 1997).

183. The clerkigentsia consists of former law clerks, current law clerks, and those aspiring to be law clerks." Potter, supra note 1, at 175 n.7.

184. *See, e.g.*, Club Assistance Program, Inc. v. Zuckerman, 594 F. Supp. 341, 347 n.9 (N.D. Ill. 1984) (pardoning law clerk Tom Shreve for including a string citation in a draft opinion). Along with absolution for his string cite, Tom Shreve also received several Shadur-style pats on the back. *See* Frye v. Gen. Fin. Corp., 35 B.R. 742, 743 n.* (N.D. Ill. 1983) ("As this opinion reflects, the analysis necessary for disposition of the issues involves the complex interaction of a number of concepts. Unfortunately the conceptualization owes nothing to counsel's contribution. Instead the vast bulk of the lawyering had to be done by this Court's law clerk Thomas Shreve, Esq."); Tarkowski v. Penzoil Co., 100 F.R.D. 37, 38 n.* (N.D. Ill. 1983) ("this opinion owes more to this Court's law clerk, Thomas Shreve, than to the litigants"). You go, Tom!

185. Judge Shadur is not the only jurist to take this tack and, in fact, he may have been out-Shadured by a colleague in his own district when Judge Ilana Rovner wrote, in an order on an application for attorney's fees:

> Moreover, the Court may have been more willing to excuse the duplication of efforts evident here if the hours expended had produced materials more helpful to the Court's resolution of the issues presented. The Court certainly is aware that quality legal memoranda cannot be drafted in a day, and it is the view of this Court that sufficient time should be expended by counsel to ensure that the highest quality materials are produced for filing with the Court. However, given the inordinate amount of time expended here, plaintiff and his counsel failed to meet the exacting standards for legal memoranda which this Court regularly expects from its litigants. In fact, this Court and its law clerks are largely responsible for plaintiff's success in this action. It was this Court which brought to the attention of the parties the Seventh Circuit's opinion in *Black*, which provided the basis for plaintiff's estoppel claim. Moreover, it was this Court which conducted the research and uncovered the major cases supporting plaintiff's claims. Although the briefs submitted by plaintiff and his counsel helped to establish the necessary factual predicate, they were of little help to the Court in the resolution of the legal issues presented here. Given the magnitude of plaintiff's fee petition, the Court would only desire that its staff could be compensated so handsomely for the hours expended in researching the issues presented by plaintiff's claims. In short, counsel simply is undeserving of an award in the magnitude of that requested here.

Lockrey v. Leavitt Tube Emps.' Profit Sharing Plan, No. 88 C 8017, 1991 WL 255466, at *6 (N.D. Ill. Nov. 22, 1991) (footnote omitted). You have to love a judge who laments her staff's low pay. Expressing similar sentiments, Judge Shira Scheindlin recently wrote:

> I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties—namely deciding cases on the merits.

effort was needed for this Court's able law clerk to locate what counsel had *not* provided, even though he had been duty bound in the first instance to have furnished this Court with adverse as well as favorable precedent on the subject at issue[.]"[187] He was even more blunt in *First Defense Legal Aid v. City of Chicago*,[188] where he wrote:

> It took this Court's law clerk all of five minutes to locate an example of the obvious proposition that while a case may fail to state a claim under two other provisions of the Bill of Rights (in that case the Fifth and Eighth Amendments), the case will still survive in terms of a First Amendment claim.[189]

Similarly, in *Camelot Care Centers, Inc. v. Planters Lifesavers Co.*,[190] he wrote: "Yet as indicated earlier, neither litigant called that parallel or those regulations to this Court's attention. Instead it took the perceptive independent research of this Court's law clerk, Jon Loevy, to uncover that valuable source of insight to the problem."[191] And then there is this:

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., 685 F. Supp. 2d 456, 472 n.56 (S.D.N.Y. 2010).

In what might be characterized as an instance of damning with faint praise, Judge Marvin Aspen, also of the Northern District of Illinois, declined to adopt a magistrate judge's report and recommendation assessing Rule 11 sanctions, noting that an attorney did not need to meet the "very thorough research . . . standard this Court's law clerks are held to" in order to avoid sanctions. Singh v. Curry, 122 F.R.D. 27, 29 (N.D. Ill. 1988).

186. No. 05 C 6109, 2009 WL 528472 (N.D. Ill. Mar. 2, 2009).

187. *Id*. at *1. Judge Shadur wrote to similar effect in *United States v. Mooney*:

> As this court explained orally during the earlier proceeding in the case in which it addressed its findings and conclusions reached in consequence of the conclusion of Mooney's bench trial, its own research and that of its law clerk – and not that of either side's attorneys – had uncovered the opinion[.]

No. 99 CR 485, 2001 WL 293938, at *1 (N.D. Ill. Mar. 27, 2001).

188 209 F. Supp. 2d 935 (N.D. Ill. 2002).

189 *Id*. at 938 n.2. The source of Judge Shadur's ire is described in the paragraph to which he appended the footnote quoted above:

> Thus defense counsel (including those working for and representing State's Attorney Devine, who surely ought to know better) persist in urging the impermissible notion that only one set of rights is protected by the First, Fifth and Sixth Amendments – that if no claim exists under either the Fifth or the Sixth Amendment, ergo there is no viable claim under the First Amendment. Just which one or more law schools has or have failed in their educational task by enabling their graduates to emerge with such a bizarre understanding (more precisely, a lack of understanding) of the Constitution is unclear – but if any such law school does exist, it might have been expected that the graduates' ongoing practice of law and their hoped-for reading of cases would have dispelled such a fundamental misconception.

Id. at 938.

190. 836 F. Supp. 545 (N.D. Ill. 1993).

191. *Id*. at 549 n.6.

"Plaintiffs really owe their survival to this Court's law clerk, Sheila Finnegan, whose perceptive research uncovered what counsel had not."[192]

Perhaps the snarkiest of Judge Shadur's unfavorable comparisons of counsel to a law clerk is this one:

> In keeping with his frequent practice (noted in the Opinion, 681 F. Supp. at 554 n.9, 556 n.16), counsel for P.M.F. garbled his attempt to cite *Markus* – erring as to (1) the defendant's name, (2) the reporter volume *and* (3) the court! Courts are generally pleased to consult authorities on which a party wishes to rely. But first the court must be able to find them. Here wholly independent research by this Court's law clerk happened to come across the case despite counsel's misleading trail, but counsel may not be so lucky next time.[193]

I'm sure that I speak for thousands of my fellow law clerks in thanking Judge Shadur for pointing out the kind of thing that drives us crazy but usually passes without comment due to our own self-censorship or the blue pencils of the cooler heads at whose pleasure we serve. But, as perusal of Judge Shadur's *oeuvre* amply demonstrates, snarkiness is not the only implement that hangs from his rhetorical tool belt; he also seems to pack a baseball bat:

> From this point forward the analysis owes nothing to the efforts of the litigants. All the authorities supporting Triangle's view were uncovered not by its lawyers but by this Court's law clerk, C. Steven Tomashefsky, Esq. (Triangle having made a bald conclusory statement lacking a single supporting authority). Action's non-Chicago counsel were no better. Their two-page Reply Brief simply denied the applicability of UCC § 2-201(3) without citing even one case or treatise, again foisting on this Court's clerk the job of finding all the authorities for this Court's review and analysis. If lawsuits were decided as law school exam papers were graded, the result here would be the same as that predicted by the late sportswriter Warren Brown after watching the

192. Gutfreund v. Christoph, 658 F. Supp. 1378, 1383 n.8 (N.D. Ill. 1987); *see also* Meditech Int'l Co. v. Minigrip, Inc., 648 F. Supp. 1488, 1495 n.14 (N.D. Ill. 1986):

> Given the ease of retrieval of the *Alberta Gas* case via Lexis (a research tool Minigrip specifically used in providing this Court with some less relevant authority), it is troubling that neither litigant cited such a squarely applicable precedent[.] Instead, this Court's law clerk Sheila Finnegan uncovered both those authorities.

You go, Sheila!

193. P.M.F. Servs., Inc. v. Grady, 687 F. Supp. 398, 402 n.11 (N.D. Ill. 1988).

> wartime Chicago Cubs and Detroit Tigers warm up for the 1945 World Series: Both sides would lose.[194]

The reason for Judge Shadur's impatience with poor attorney work product is well illustrated by the following discussion:

> [D]elinquency on the part of both counsel is really unfair to this Court's law clerks, who have the responsibility for generating first drafts of opinions for this Court's further research and sentence-by-sentence revision. In the decisional process the available resources are much like a funnel, with the very wide mouth being the time of lawyers for the litigants in all the cases on a judge's calendar, and the very narrow tube that provides input for the judge being the time of the two law clerks. To force the law clerks (let alone the judge) to do the lawyers' work is to waste the second scarcest resource in the system (the scarcest, of course, is the judge's own time, and the lawyers' default in that respect often causes a waste of the judge's time as well).[195]

Stated more simply – but still metaphorically – Judge Shadur has explained that "[i]t is not the function of the Court's law clerk Richard Levy, or the

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194. Triangle Mktg., Inc. v. Action Indus., Inc., 630 F. Supp. 1578, 1582 n.7 (N.D. Ill. 1986); *see also In re* Mandalay Shores Coop. Housing Ass'n, Inc., 63 B.R. 842, 846 n.7 (N.D. Ill. 1986):

> This is not the first time (though it may be the last, for his term is approaching its end) this Court's law clerk C. Steven Tomashefsky, Esq. has shaped (let alone reshaped) a welter of misperceived or unanalyzed arguments by lawyers into a coherent draft that rechannels the issues into their correct course, then resolves the issues as properly posed.

Am. Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n, 633 F. Supp. 201, 203 n.1 (N.D. Ill. 1986):

> It is appropriate at the opening gun to express special thanks to this Court's law clerk C. Steven Tomashefsky, Esq. for his efforts on this opinion [.] [I]n this case the Herculean job of distilling a manageable first draft of an opinion from nearly 400 pages of briefs (supplemented by some 60 pages of statements of facts under this District Court's General Rule 12(e) and 12(f)) – and all this after wading through an 18-inch-thick pile of evidentiary submissions – was Mr. Tomashefsky's.

Hartnett v. Heckler, 625 F. Supp. 1405, 1407 n.2 (N.D. Ill. 1986):

> [T]he burden has improperly been shifted from the litigants (where it belongs) to this Court's law clerk, C. Steven Tomashefsky, Esq. (where it does not). Though he has – unsurprisingly – responded to the need, that should never have happened. Clearly the litigation system really breaks down when the major work has to be performed by a resource in short supply (a law clerk with responsibility for half this Court's calendar) rather than by the lawyers who have responsibility for just the case at issue (and who are able to control their caseloads by accepting or rejecting cases, as this Court and its clerks are not.

You go, C. Steven!

195. Clark v. City of Chicago, 595 F. Supp. 482, 485 n.4 (N.D. Ill. 1984).

Court itself, to pull counsel's chestnuts out of the fire[.]"[196] And heaven help the poor attorney who tries to cram his or her chestnuts down the funnel leading into Judge Shadur's chambers.[197]

Judge Shadur's solicitousness of his law clerks is well illustrated by this seeming apology: "Because this court is well aware that district court decisions do not make precedent, this opinion has eschewed citing a number of such decisions this Court's law clerk located – all holding the same way."[198] Even when Judge Shadur writes something that sounds like he's throwing a law clerk under the bus, he jumps on the grenade himself: "Ironically, the misplacing of those notes was the result of this Court's request that its law clerk place its bulky chambers files in a more ordered condition – in order to facilitate the location of documents in this multifaceted (almost hydra-headed) litigation!"[199] With the possible exception of the odd hydra head, Judge Shadur's chambers sound pretty much like Shangri-La for the law-clerk set.

V. CONCLUSION

Of all the ways I could conclude this article, it is probably best to end with a disclaimer. Most of the judicial wildness I report here takes the form of praise for law clerks in written opinions. I am certain that the recipients of those warm words were heartily heartened to hear their praises sung in print,[200] and those shout-outs certainly make for fun reading. But, I want to be very clear that I am not, repeat NOT, suggesting that all judges need to follow the lead of Judges Lynne, Tarnow, and Shadur, and the other "kudo-mongers" I spotlighted in Part IV. Most former law clerks will say that clerking was the best job they ever had.[201] Indeed, the rewards of a

196. Int'l Adm'rs, Inc. v. Life Ins. Co. of N. Am., 553 F. Supp. 82, 84 n.4 (N.D. Ill. 1982) (emphasis omitted). In a subsequent case on which Richard Levy worked as a law clerk, Judge Shadur noted that "[n]either party . . . has referred this Court to a directly controlling precedent emanating from our own Court of Appeals." Bounds v. Ill. Prisoner Review Bd., 556 F. Supp. 675, 676 (N.D. Ill. 1983). He then further (foot)noted: "[T]his Court thanks its own law clerk, Richard Levy, who both found *Garrett* [*v. Illinois*, 612 F. 2d 1038 (7th Cir. 1980)] and then strove valiantly to generate an analysis that would escape it." *Id.* at 677 n.4.

197. I apologize if the mental image conjured by my metaphor is too intense for younger audiences.

198. Burton v. Kuchel, 865 F. Supp. 456, 465 n.15 (N.D. Ill. 1994).

199. Zip Dee, Inc. v. Dometic Corp., No. 93 C 3200, 1995 WL 506064, at *2 n.1 (N.D. Ill. Aug. 4, 1995).

200. How's that for a mixed-up metaphor? Perhaps my willingness to commit such a metaphor to print explains why no judge has ever dropped a Shadur-esque footnote on me. Oh well.

201. *See, e.g.*, Elizabeth Surgent Minnotte, *A Tribute to Ralph J. Cappy, Chief Justice, Pennsylvania Supreme Court, Retired*, 47 DUQ. L. REV. 605, 605 (2009) ("For twenty years, I declared to anyone within earshot that I had the best job in Pennsylvania. I served as the Chief Law Clerk to Pennsylvania Supreme Court Justice, Ralph J. Cappy."); Richard L. Pemberton & Paul S. Almen, *Significant Weight:*

clerkship are bountiful. Those rewards include having the chance to work side by side with a judge, learn the inner workings of a courthouse, discover the kinds of advocacy that do (and do not) persuade judges, earn a credential that will continue to carry weight ten or twenty years down the line, be targeted by law-firm headhunters, and, last but not least, collect a tidy bonus from a post-clerkship employer. In short, serving as a judicial law clerk is ninety-nine and forty-four one-hundredths percent wonderful.[202] Although everyone loves to get a little sugar, law clerks are pretty near the bottom of the list of those who need a sucrose supplement. As I see it, serving as a law clerk is already quite the tasty torte, covered with plenty of icing and a nice dusting of sprinkles. The judges I mention in Part IV went wild by finding a way to sweeten the sprinkles on the icing on the cake. That's some conspicuously creative confection, tasty when it turns up on a law clerk's plate, but always a lagniappe.

The Impact of the Minnesota Court of Appeals upon Civil Litigation, 35 WM. MITCHELL L. REV. 1297, 1313 (2009) ("Most former court of appeals law clerks remember fondly their time with the court and suggest that is unfortunate that every attorney cannot have the same experience. In fact, many suggest that it is the best job that they ever had."); Alan A. Matheson, *Judge William C. Canby, Jr.: A Tribute*, 33 ARIZ. ST. L.J. 1, 3 (2001):

> As a sign of his continuing loyalty and commitment to the school, Judge Canby faithfully names an ASU graduate as one of his personal law clerks [.] Some years ago, one of these clerks said she cried for days when her clerkship with the Judge ended because, 'she would never have the best job in the world again.

202. For a brief discussion of the remaining fifty-four hundredths of one percent, *see* Potter, *supra* note 1, at 183 (discussing various calamities that have befallen law clerks in the line of duty); *see also* Potter, *supra* note 2, at 127-129 (discussing *Jakomas v. McFalls*, 229 F. Supp. 2d 412 (W.D. Pa. 2002), in which a law clerk was preemptively fired by his judge, who feared that the law clerk was on the verge of reporting him for, among other things, taking the bench while intoxicated).