Puppeteers or Agents? What Lazarus’s Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court

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Written by a former law clerk to Justice Harry Blackmun, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court is a lively and well-written clerk’s-eye view of the U.S. Supreme Court during a pivotal and contentious term, 1988–89. Lazarus vividly evokes what it feels like to participate in the day-to-day business of the Court. That powerful first-person narrative is reminiscent of William H. Rehnquist’s account of his days clerking for Justice Jackson in 1952 (1987). Rehnquist’s book blends the high drama of being present in Washington and inside the marble tower for the landmark case of Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952), with his highly personal narrative of the young man from the West (Arizona and Stanford) having his first piece of pie in the cafeteria of this great institution and agonizing over the briefs in his first case.

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0897-6546/00/2501-185$01.00
The parallels, however, end there. Lazarus, unlike Rehnquist, has sharply critical things to say about the way the Court does its work, individual justices, and outcomes in particular cases, and he intersperses these criticisms with deeply unflattering gossip. The mere fact of publishing his account, his telling the tale, the arguments criticizing the Court, and the gossip have all generated a furor in the legal community over the book, a firestorm stoked by dust-jacket copy and press release.

Lazarus makes three principal arguments. First, he claims that both liberals and conservatives on the Court abandoned their obligations as judges to offer principled legal reasons for decisions. Instead, he maintains that they now merely generate ex post facto rationalizations for preferred policy outcomes that show no respect for precedent or even consistency with their own previous writings. Second, justices have failed to fulfill their obligation as judges to deliberate with open minds and work collegially. He claims that they currently labor in isolation, divide into rigid factions, and harbor petty bitter resentments. Since all pretense at collegiality has broken down, and justices have failed to both reason and deliberate, we can no longer justify transferring political decision making from democratically elected majorities to an unelected body of nine. Third, Lazarus argues that law clerks such as himself have far too much power. The excessive power of law clerks is both a cause and an effect of the breakdown of reason and deliberation.

Rather than covering all the important cases of the 1988–89 term, Lazarus gives a detailed account of three important issues: abortion (Webster v. Reproductive Health Services, 492 U.S. 490 [1989]), race discrimination (Patterson v. McClean Credit Union, 491 U.S. 164 [1989]), and the death penalty (Tompkins v. Texas, 490 U.S. 754 [1988]), and precedes the contemporary behind-the-scenes story by a succinct and well-written history of the law and politics of these three issues. He freely shares his opinions on nearly every case discussed, often attributing the outcome of any case “wrongly” decided to one of three causes: lack of intellect (usually of the swing members Justices O’Connor and Kennedy), deliberate dishonesty and hypocrisy (he directs this charge at both liberals and conservatives), or undue clerk influence, rather than attributing the outcome to principled disagreement on important fundamental legal and political issues about

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1. In an interview with Ronald Collins, Lazarus makes this extraordinary claim: “what there is in the book are details in service of an argument. There’s no titillation in the book” (1998d, 13). Drahosz comments: “That the press reports have focused on the law clerk gossip in the book is not surprising. First, it is the part that is new. No other Supreme Court clerk has written a book like this one. Second, it is the part that people find really interesting. The public can relate to tales of right-wing conspiracies, a fist fight in a fountain, secret email networks, and the like much more easily than they can to strict scrutiny versus rational basis tests for constitutionality” (1998, 134).

2. I think commentators are right to point out that his sample is hardly representative of the cases of that term, let alone the Court in general (Irons 1998, 32). Is it accurate to characterize the deliberations of the Court by the most difficult cases?
which reasonable people disagree. Lazarus sees race as the enduring fault line of both Supreme Court and American politics and explains jurisprudential postures by the causal factor of geography—Justice Souter is a pro-Union Yankee, Justice Blackmun’s grandfather fought for the Union in the Civil War, and Chief Justice Rehnquist and Justice O’Connor are from the cowboy “born free” West and therefore fail to see the dangers to African Americans of deferring to state governments and state courts (Gerson 1998, 6). He confidently assigns motives as to why justices act the way they do with a certainty that would give even individual biographers pause, let alone someone who had had personal contact with the justices intermittently for only one year.3

This essay considers the book itself, and the subsequent outpouring of reviews and critiques that resulted.4 The “text” of the book itself quickly splinters into three texts, which I shall argue contradict each other: the promotional material about the book (dust jacket, press release), the claims made within the covers of the book, and the statements Lazarus made in the many interviews promoting the book. Clearly the economic success of the book turns on distinguishing it from the many excellent scholarly accounts of the contemporary U.S. Supreme Court5 and hyping it as a titillating tell all—“the first eyewitness account of the epic

3. Sullivan offers a more careful and persuasive account of Justices Kennedy, O’Connor, and Souter’s concern for the legitimacy of the Court as an institution and concludes, “In short, just as there is more to the Court’s recent history than an ideological divide, so there is more to the ideological divide than can be captured in what Lazarus calls the shift from the “spirit of Scottsboro” to the “spirit of federalism” (1998, 17).

4. I read more than 50 reviews and review essays and the transcripts of more than 10 interviews.

5. A continuing theme in the commentaries is that Lazarus offers nothing new to Supreme Court watchers. O’Brien finds “little new here apart from tales of clerks’ infighting.” Lazarus’s other findings are well documented in John C. Jeffries, Jr.’s biography (1994); Savage (1992); Schwartz (1996); and Simon (1995) (O’Brien 1998b, 214). Of course, of continuing frustration to the careful scholar is the greater attention controversial and deeply flawed books receive compared to the attention paid to careful and wise works of scholarship. Feminist scholars have long been frustrated with the mainstream media’s indifference to scholarly works while they seize on iconoclastic (and often second-rate) scholarship attacking feminism or the women’s movement (such as works by Camille Paglia, Daphne Patai and Noretta Koertge, Katie Roiphe, and Christina Hoff Sommers). While I may agree that Closed Chambers is one of the most controversial books on the Court in the decade, I cannot agree with the dust jacket that it is the “most important book on the Supreme Court in a generation.” Lazarus brushes aside all criticisms, asserting that the fact that people have criticized him must mean he is right; “That so many people, even ones such as O’Brien and Tushnet who have written fine books of their own, react so defensively, almost nonsensically to my book only convinces me that I have succeeded in touching disturbing truths that no one feels comfortable discussing openly and honestly” (1998a, 4).

6. Lazarus’s overblown claim that the 1988–89 term was unique in its importance undermines his claim to be approaching the evidence as an historian. That term was an important turning point for the Court. It was tense. But was it more important than the change in the constitutionality of the New Deal? Of apportionment and Brown v. Board (347 U.S. 483 [1954])? Of abortion and women’s rights? And was it more tense than the Court deciding Dred Scott (60 U.S. 393 [1857])? I think not. O’Brien observes that, even in the past 10 years, the 1991 term, when Casey was decided, is a candidate for most important term, and the 1989
struggles.” While I am primarily interested in the question of what Lazarus adds to our knowledge of law clerks at the U.S. Supreme Court, I also consider whether he should have published his account and assess the merits of his criticisms of particular justices and the Court in general. Last, I make some observations on epistemology and method.

Who is Edward Lazarus? He graduated from Yale Law School, having grown up in Washington, D.C. His father argued an Indian rights case before the Court (coincidentally, Justice Blackmun wrote the opinion) that later became the subject of Lazarus’s first book (1991). He clerked first for Judge William Norris on the Ninth Circuit, and then in 1988–89 for Justice Harry Blackmun. He has worked as a freelance writer, including writing a screenplay about the U.S. Supreme Court. Politically, he is a liberal. He is currently a federal prosecutor in Los Angeles.

From a broader perspective, Closed Chambers can be read as a text of our time, or at least a text of our time 10 years ago. Lazarus contends that the failure to confirm Bork poisoned the atmosphere on the Court,

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7. Lazarus’s claim to being first is odd. The press release for the book says, “Never before has one of these clerks stepped forward to reveal how the Court really works.” As I mentioned, Chief Justice Rehnquist wrote of his experience clerkship for Justice Jackson. Woodward and Armstrong interviewed 170 clerks and several justices to produce their account in The Brethren (1979). H. W. Perry interviewed 64 former clerks and 5 justices for Deciding to Decide (1991). And J. Harvie Wilkinson’s Serving Justice: A Supreme Court Clerk’s View (1974), tells of his work with Justice Powell, although Wilkinson sought to avoid disclosures of confidences (Drabozl 1998, 123). In fact, as I later discuss, Lazarus attempts to use the argument that many clerks have written essays on their experiences as an argument against the claim that he has violated a powerful taboo in speaking out. In an interview (1998d, 3–4) Lazarus says it is the first eyewitness account of the epic struggles (i.e., his term), not the first eyewitness account.

8. Lazarus tells us that he is pro-choice, and more important, believes the Constitution protects women’s right to choose. Yet he believes that Roe v. Wade was wrongly decided on privacy rather than equality grounds (a familiar argument by now, but one that must be understood in historical context [Law 1984; MacKinnon 1987, 93–101]). He does not believe that the Constitution prohibits the death penalty, though he believes that the death penalty is implemented in a racially discriminatory way, and that many criminal justice processes, particularly in the South, are deeply unfair. Although he is skeptical of the application of the death penalty in practice rather than opposed to it in principle, he has disdain for those who labor to defend capital cases (p. 114). Despite the central importance he places on race as the issue of American politics, and although his experience with the racism of death penalty cases leads him to believe that the criminal justice system is hopelessly flawed, his support for affirmative action emerges from the deficiency thesis—minorities need a hand up to compensate for their previous disabilities—rather than seeing merit systems themselves as inherently racist, sexist, and subjective.

9. Lazarus repeatedly attributes the depth of infighting and polarization to the failure of the Senate to confirm Robert Bork. But Tushnet (1998, 25) argues that Lazarus’s perspective
particularly among the clerks his year. He reports to being “haunted” by his experience on the Court and, when he concluded after the Clarence Thomas hearings that the bitter divisions on the Court were likely to continue, he wanted to know how the Court came to be so bitterly divided (1998d, 3). The description of the “Cabal,” the self-ascribed label for a group of conservative clerks who dined together weekly and maintained a separate email network, will be familiar to every feminist and progressive at a major law school or university department in the 1990s, familiar with “the swagger of ascendent conservatism” — another good example of Lazarus’s ability to turn a phrase.¹⁰ The gloves have come off in the dialogue about race and federalism and choice, among other issues. Lazarus’s diagnosis of the malaise as specific to an institution he loves, and attributable to the failure of individuals (clerks and justices who lack integrity), is one of the shortcomings of the book—not seeing the Court as embedded in the larger political and social context.

Although Lazarus does not shy away from attributing motive to others, it is hard to clearly identify his motive in writing the book, a book that has made him a pariah among the legal community. He argues that writing the book is an act of “devotion not disloyalty” by holding the justices accountable to high ideals (1998c, A19).¹¹ What is his real objective? To recount his experience? To expose wrong? To criticize the Court? To call for change? Are we convinced that his stated motive is genuine? And more important, do we agree with his position that the public interest justifies his revelations?

I. THE ROLES AND POWERS OF CLERKS

Four broad overlapping sources inform our understanding of the process of selection and work of law clerks in the United States. Historical essays plot the emergence of the institution and describe its growth and change over time.¹² Essays in law reviews include the ruminations by former clerks

¹⁰ For a powerful example, see the incident over the Harvard Law Review, that Lazarus describes in a footnote on pages 265–66.

¹¹ On the Today Show, he told Katie Couric of his “deep love” of the Court and its “breach of faith” (8 April 1998).

¹² Of these, Newland (1961) is the most thorough. Swann condenses much of that information (1992) and adds information about the gender of clerks. I am also indebted to David Weiden’s paper (1998) for drawing additional sources to my attention and O’Connor and Hermann’s comprehensive review (1993). See also the 17 reprinted articles in the Spring 1995 issue of The Long Term View devoted to “Law Clerks: The Transformation of the Judiciary” and the 1973 Vanderbilt Law Review.
about their experiences (usually to honor their former bosses by telling endearing anecdotes or to claim credit for particular accomplishments). Journalists write investigative reports or exposés based on interviews with current or former law clerks. And social scientists have studied the role of clerks in the legal process. A growing body of literature examines the rise of permanent law clerks on state and lower federal courts, but for this essay I shall largely examine the literature about so-called elbow clerks—personal staff serving only one justice.

A. The Emergence of the Institution

Oakley and Thompson describe law clerks as the “subordinate, anonymous, but often quite powerful lawyers who function as the noncommissioned officers in the army of the judiciary” (1980, 2). At the Supreme Court, the practice began when Justice Gray hired the first law clerk in 1882, and Justice Oliver Wendell Holmes continued the practice (Newland 1961, 300–301). The 1922 Appropriations Act allowed for each justice to have a paid clerk. Between 1946 and 1969 most associate justices employed two clerks. By 1970, most justices employed three. By 1980, most justices had four (O’Connor and Hermann 1993, 4).

While some states and federal courts have experimented with a more permanent staff of law clerks (Oakley and Thompson 1980; Stow and Spaeth 1992), most appellate court law clerks serve only one, or at most two years. In many cases (90%), clerks for the U.S. Supreme Court have clerked previously for a federal appellate court for one year (Brown 1996, 378). A few clerks have clerked for many years. Some justices have at least one senior clerk, someone who is serving his or her second year of service for the justice (Brenner and Palmer 1990, 70; Newland 1961, 305–8; Swann 1992, 160; Wasby 1984, 55).

B. How Justices Select Their Clerks and Who They Are

We have anecdotal evidence about how Supreme Court justices select their law clerks, drawn from the papers of the justices, comments of sitting justices, accounts of the clerks, and debates about the process itself by lower court judges, law school deans, and journalists. The process is intensely competitive (Kozinski 1991; Wald 1990). Justices now receive 250 to 300 applications, although many have preferred recommenders (O’Connor and Hermann 1993, 5). Harvard Law Professor John Chipman Gray referred a new graduate of Harvard each year to his half brother, Justice Gray, the

originator of the institution. Oliver Wendell Holmes continued the practice three years after taking his seat. Felix Frankfurter continued the referrals to Holmes when Gray died. Chief Justice Taft obtained his referrals from the Dean of the Yale Law School; Harlan Fiske Stone took a Columbia graduate each year (Oakley and Thompson 1980, 15–17).

More recently, several scholars have tried to investigate systematically the demographics of Supreme Court law clerks. Swann gathered data (unpublished—yet incorporated in O'Connor and Herman 1993) about the first women clerks, and Brown compiled and published more recent data. The largest number of law clerks have come from Harvard—almost 90% have come from the top 16 law schools (Brown 1996, 365). Chief Justice Rehnquist, a Stanford graduate, commented that he makes a concerted effort to include students from the western states, as did Justice Douglas (Douglas 1980, 170) and Chief Justice Warren; Justice Black preferred clerks from Alabama (O'Brien 1993, 168); Justice Minton took at least one from Indiana (U.S. News and World Report 1957, 46). Justices may also select their clerks from those who have clerked in the lower federal courts, particularly the D.C. Circuit Court of Appeals (Brigham 1987, 124; O'Brien 1993, 168).  

Now that they hire four clerks, some justices seek a balance of sexes, races, law schools, and backgrounds. Justice Douglas selected the first woman clerk in 1944, 15 Justice Frankfurter hired the first African American, William Coleman, in 1949 (O'Connor and Hermann 1993, 6; Mauro 1992a, 10A; O'Brien 1993, 159). Justice O'Connor and former Justice Blackmun have hired the largest percentages of women clerks (about 42% in the 1980s [Brown 1996, 382]). Chief Justice Rehnquist and Justices Scalia and Kennedy had the lowest percentages, far below what one would expect given the qualified applicant pool (Brown 1996, 383; Sturgess 1991). 16 Personal compatibility and, for some, ideological compatibility are important selection criteria (O'Connor and Hermann 1993, 6). Although the claim has been that justices tended to choose the most promising students, surely ideological compatibility has been an important consideration for at least some justices at some times.

Serving as a law clerk is a mark of elite status (Rhinehart 1994, 575). We know, for example, that after leaving the Court, clerks may receive a

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14. Lazarus talks about the 20 or so influential “feeder” judges (p. 19); see also Brigham 1987, 123; Kozinski 1991, 1729; Lauter 1987.
15. Brown attributes Justice Douglas’s wartime selection of Lucille Lomen to World War II’s impact on the labor force. The second woman clerk was not appointed until Margaret J. Corcoran was hired by Justice Black in 1966 (Brown 1996, 362–63).
16. Rhinehart documents the underrepresentation of women as clerks at all court levels and conducted a survey of third-year law students in top-10 institutions to identify barriers to women’s full participation in this important gateway to elite legal jobs (1994). She discusses the respondents who reported that judges made inappropriate comments or asked inappropriate questions during the interview.
$35,000 bonus on top of generous salaries law firms offer to attract them in a frenzy of competition between firms that O'Connor and Hermann liken to the NBA draft (Biskupic 1994; Chambers 1988; Kerlow 1990; O'Connor and Hermann 1995, 247; McGuire 1993, 163). They also found former clerks twice as likely as their counterparts to argue cases before the Court or participate as amicus, thereby forming an interesting subgroup of “repeat players” (Galanter 1974) whose specialized knowledge arguably advantages them as legal advocates. Not only do firms identify clerks as the cream of the crop because justices have asked them to clerk, but firms may think that clerks have important insights into the certiorari process, the minds of their individual justices, and how arguments are generally received by the Court as a whole (McGuire 1993, 162). Perhaps this is why the solicitor general is so keen to hire former clerks.

Admissions committees of law schools, selectors for law reviews, procurers of law clerks for judges, and judges themselves in choosing clerks exercise gatekeeping functions that winnow the elite of the legal profession. And these choices have race, class, gender, and regional implications for the legal profession and the judiciary. Scholars are only beginning to document the implications of how the distribution of these prizes—positions in the solicitor general’s department, legal teaching, and elite law firms—affect the legal profession.18

Lazarus adds little to the sociology of the professions’ approach to law clerks or to our historical understanding of the gender and race integration of (or failure to integrate) the Supreme Court, the judiciary, and the legal profession more generally.19 He compares clerking at the Supreme Court to receiving a Rhodes scholarship, “a title . . . that distinguishes you for life” (p. 20) and also understands the feudal nature of the relationship: “a clerk is forever marked by the judge for whom he or she worked, bonded to that judge’s reputation and inevitably dependent on that judge for many years of professional and personal references” (p. 18). Because he goes on to argue that clerks have wielded excessive power and poisoned the atmosphere among the justices, he does recognize that who the clerks are matters, although he does no systematic analysis of his class or clerks in general. He notes as important that 4 of the clerks his year had previously clerked for Judge Robert Bork, that another had been a research assistant on Bork’s

17. O’Connor and Hermann found that women clerks were more likely to enter academia (1993, 15).

18. “In return for the grueling hours and dogged loyalty necessary to their task, clerks are guaranteed immediate entry into America’s legal elite. They practice in the nation’s best law firms, teach in its best law schools, hold plum public-sector appointments, and on occasion rise again to the Supreme Court (Rehnquist, White, Stevens, and Breyer)” (Brown 1996, 362).

19. I have argued elsewhere that law clerks (référendaires) at the European Court of Justice have important advantages in legal scholarship on European Community law (Kenney, forthcoming).
book (p. 264), and that the conservative justices have tended to hire members of the Federalist Society (10 of 36 clerks during Lazarus's time were members).

C. What Law Clerks Do

What do we know about the work that law clerks do? How justices use their clerks has varied over time and between justices. Clerks perform research functions, summarize the contents of briefs, make recommendations on cases, edit, check cites, or even draft preliminary opinions. They discuss cases with their justice, argue about them with other law clerks, attend conferences, run errands, file documents, and perform library maintenance (University of Pennsylvania Law Review 1981, 1234).

Holmes . . . took a clerk largely as a companion. Brandeis used a clerk as researcher for the voluminous footnotes often found in his opinions. Stone would dictate his opinions, and when he stated a principle of law he would say in parentheses “CITE cases.” The draft would go to the clerk, who would then look for the cases supporting Stone’s position. . . . Justice Murphy . . . relied heavily on [his law clerk] in preparing the first draft of his opinions for the Court. The philosophy was Murphy’s and the final draft was Murphy’s. . . . I [Justice Douglas] used my law clerks primarily to certify the accuracy of my opinions as to facts and precedents. . . . The law clerk would write a memorandum on each petition for certiorari and on each jurisdictional statement, but I went over each case independently of him. . . . At times I asked him to draft a concurring or dissenting opinion for me, which I in turn would revise or rewrite. But Court assignments—opinions I had been chosen to write on behalf of the majority—were always my own creation. . . . Frankfurter used his law clerks as flying squadrons against the law clerks of other Justices and even against the Justices themselves.

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20. Lazarus summarizes the tasks as follows: “At every stage, with the exception of the Justices’ private conference, the clerks had some role to play—reading, assessing, commenting, advising—and (in our case) communicating with Blackmun through the impersonal medium of typed ‘Mr. Justice notes’ placed on the top of a file cabinet at the entrance to his inner sanctum. . . . To give some idea of what goes on during the dog days of the term—March and early April—what follows is a list of the functions a law clerk typically performs during this period: drafting majority opinions, drafting dissents, drafting concurrences . . . writing ‘bench memos’ (which help a Justice prepare for a case the Court is about to hear), writing post-oral argument memos (which amend views set forth in bench memos), commenting on draft opinions, dissents, and concurrences circulated by other Chambers, recommending which new petitions for certiorari the Court should grant, and advising on emergency applications, often including last-minute requests for stays of execution” (pp. 28–29).
Frankfurter, a proselytizer, never missed a chance to line up a vote. (Douglas 1980, 171–73)\(^{21}\)

1. They Discuss Cases with Their Justices

From the beginning, the justices themselves praised the use of recent law graduates as a way of bringing the latest legal thinking to sitting judges (Bickel 1958, 65; Coffin 1980, 71; Oakley and Thompson 1980, 138).\(^{22}\) Their recent exposure to elite law professors provides the judge with a continuing seminar. Justice Douglas opposed Chief Justice Burger’s innovation of having one permanent clerk:

Under [a more permanent clerk] system the law clerks would acquire more and more power, with no fresh minds coming in annually to ventilate the old stuffy chambers; under such a system the ideas of the “boss,” usually stuffy and stereotyped, would never be challenged. That movement would mean the end of the seasoning of the pudding—it would eliminate the spice that fresh young minds [bring] to the job. (Douglas 1980, 175)

Law clerks are the sounding boards for judges (Bickel 1958, 64; Coffin 1980, 60–62).\(^{23}\) Court of Appeals Judge Wald refers to her clerks as “her wailing wall” (1990, 153). Since clerks are among the few people the judge can openly discuss cases with (“making individual decisions is the core of a judge’s job, and it is a solitary and remote undertaking” [Crump 1986a, 48]), and since they share in and mitigate the crushing workload, the relationship between judges and clerks can be intense (Perry 1991, 73).\(^{24}\) Judge Patricia Wald calls the relationship “the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair” (1990, 153). It is precisely because justices view their clerks as their inner circle, a place to vent and try out ideas, a place where they may rail against colleagues or

\(^{21}\) O’Brien noted that Justice Frankfurter’s former student at Harvard Law School, William Brennan, also relied on his clerks to discover what the other justices were thinking so that he could pitch his arguments at conference accordingly (1993, 170).

\(^{22}\) Crump, however, sees this as a two-edged sword, with clerks too likely to have been swept up in the latest law school fad and having too little exposure to the world. The judges, then, are “to a degree the prisoner of his (sic) law clerk’s education” (1986b, 239)—particularly in the clerk’s sense of what cases are important.

\(^{23}\) Kosinski comments: “you must have law clerks who will talk back to you precisely because everyone else will not” (1991, 1726).

\(^{24}\) Crump calls this “the need that lawyers and judges have in common with most of the human race: the need for a collegial atmosphere, in which one’s work is shared with other people” (1986b, 240). What is worrisome is that those other people are less and less the other justices on the bench.
opinions without self-consciousness, that Lazarus's book must feel to them like such a betrayal.

Lazarus claims that clerks hold too much influence over their justices—they succeed in persuading the justice to accept the clerk's view. It seems to me, however, that the argument about undue clerk influence is at odds with the argument about justices failing to deliberate. Setting aside for the moment whether the justices should be deliberating with each other rather than with clerks, I think clerks do have a positive influence on the justices and the Court by bringing fresh ideas and providing a close-knit group wherein justices can reconsider their positions if they choose to do so. Being persuaded by clerks to reconsider a position or accept an argument is very different from being manipulated by them.25 Justices are influenced by what they read, discussions at the law schools they visit, views pressed on them by family and friends, and films, television, and so on. I think this is a good thing. I think it is also unlikely that neophyte law school graduates will, through force of reason and intellect, persuade justices to reject a long-held position or approach to constitutional interpretation. But in the application to a new question, or technical matters (Rogers 1958, 115), whether it is telecommunications or consideration of the privacy rights of gays and lesbians,26 justices may be attentive to what appear to be generational shifts in attitudes. Lazarus wants justices to keep their minds open to new arguments, but then seems to condemn them for being persuaded by others, particularly clerks, and especially, clerks from the Cabal (the clique of conservatives). The extended case that Lazarus does consider, McClesky v. Kemp, 481 U.S. 282 (1987), is actually evidence against his assertion of undue clerk influence. Lazarus argues that the clerks, even those strongly in favor of the constitutionality of the death penalty and its desirability or at least necessity as a public policy, were troubled by the Baldus evidence showing that those who killed whites were more likely than those (black or white) who killed blacks to receive a capital sentence. Lazarus reports, however, that even conservative clerks made no headway in altering the positions of the justices, who seemed to have a shockingly poor grasp of elementary statistics. Nor could the Cabal persuade Justices O'Connor or Kennedy to overrule Roe in Webster (Lefkowitz 1998, 29).

26. Justice Powell, when deliberating on his position in Bowers, was alleged to have reported to a closeted gay clerk that he had never met a homosexual (Gerson 1998, 6). I hypothesize that clerks may have greater influence in cases that ask justices to consider issues new to them, but again, I see that influence as a good thing.
2. They Screen Petitions for Certiorari

Perhaps the most important function law clerks at the U.S. Supreme Court now serve, and the one we know the most about, is summarizing the petitions for certiorari, thereby assisting the justices in their decision as to which of the 6,000–8,000 petitions will become one of the 100–150 cases the Court hears each year (Baum 1993; Brenner 1992; Brenner and Palmer 1990; Caldeira and Wright 1988; Perry 1991). Eight justices in the so-called cert pool, begun in 1972, divide the work among their clerks (Sturley 1992, 133). Although Justice Stevens does not rely on the cert pool, he does rely on his clerks: “I do not even look at the papers in over eighty percent of the cases that are filed,” he has said publicly (Crump 1986a, 43). Approximately a third of the clerks’ time is devoted to this task (Donahue 1995, 79). Perry’s informants recalled dread when describing the process:

Fortunately, the Clerk of the Court censors many of the petitions that have technical problems. If they exceed page limits for example, they are sent back to the litigants. But the ones that pass are tied up in a bundle of red tape. That is an unintended pun. There actually is a red tape that ties them up. They are put on the cart and it is walked around from chamber to chamber. You could hear it coming. You sit there and listen woefully as it rumbles down the hall. (Perry 1991, 41)

Lazarus describes the “hair-raising thwunk” as the clerk slammed down a large stack of cert petitions, shrugged, and left (p. 30).

Clerks write on average four pool memos per week that circulate among the justices to aid them in creating the “discuss list”—the list of prospective cases considered at conference. Each justice then routinely assigns one clerk to go over the memo and make a recommendation (O’Brien 1993, 173). In nearly all cases, the justice reads only the memos rather than referring back to the original papers, although they may investigate care-

27. The growth in the docket is astounding. Twenty-five years ago, the Court received just 5,000 petitions and heard 150 cases a term (O’Brien 1998b, 217). Law clerks also play an important role in examining petitions in forma pauperis, the rise of which first justified Chief Justice Stone’s increase in clerks (Douglas 1980, 174; Newland 1961, 304). The chief justice no longer solely considers those petitions. For a discussion of the negative consequences of delegating the sifting process to central staff attorneys at the court of appeals and state courts, see McCree 1981.

28. When Lazarus was clerking, only six justices were in the pool; Justices Marshall, Stevens, and Brennan were not (p. 31).

29. Chief Justice Rehnquist maintains that several thousand petitions had no merit and relies on his clerks to help focus his attention on those that do. “As soon as I am confident that my new law clerks are reliable, I take their word and that of the pool memo writers as to the underlying facts and contentions of the parties in the various petitions, and with a large majority of the petitions it is not necessary to go any further than the pool memo. In cases that seem from the memo perhaps to warrant a vote to grant certiorari, I may ask my law clerk to further check out one of the issues, and may review the lower court opinion, the petition, and the response myself” (1987, 264–65).
fully those cases on the “discuss list.” The explosion of petitions makes it impossible for each justice to go through the papers him or herself and, as Crump rightly points out: “It is probably inevitable that discretionary review will prompt heavy reliance on clerks, because the task is tedious” (Crump 1986b, 239).

Social scientists have begun to examine rigorously whether law clerks attempted to sway justices or mirror the justice’s mind (Brenner 1992) by examining the effectiveness of law clerks’ recommendations on certiorari (Brenner and Palmer 1990) and clerks’ bench memos30 (Brenner 1992). Brenner and Palmer (1990) and Brenner (1992) find support for the claim that law clerks attempt to “mirror the mind of the Justice” in writing recommendations for cert in both the Vinson and Jackson papers. In reflecting on his own clerk experience for Justice Jackson, Rehnquist agreed, although he admitted the possibility of unconscious bias (1957, 75). In the overwhelming majority of cases, justices follow the recommendations of their clerks. Clerks, like the justices themselves, identify the same cues of case importance, the most important of which is a conflict between the circuit courts (Caldeira and Wright 1988; Giuffra 1991, 6; Perry 1991, 127–28; Ulmer 1984).31

What does Lazarus’s evidence contribute to the debate over whether clerks wield too much power in sifting through petitions for certiorari, and thus, in setting the Court’s agenda? As noted above, justices rely extensively on clerks to sift the meritorious from the nonmeritorious petitions—they do not review the individual papers but rely, at least for the first cut, on the cert pool memoranda. Yet, in the end, Lazarus moves away from the claim of undue clerk influence:

What effect our cert. process machinations really had is difficult to gauge. In the first place, each side checked the other’s work and, where necessary, called slanted or inaccurate cert. pool memos to the attention of their respective Justices. More important, each of the Justices usually had a good idea of what issues in what kinds of cases they wanted the Court to hear, especially in contentious areas of law. With the possible exception of one or two on each side, I doubt the Court granted any cert. petitions because of something clerks did and, if some clerks did manage to bury a few cases along the way, the same issues,

30. “Bench memos outline pertinent facts and issues, propose possible questions to be put to participating attorneys during oral arguments, and address the merits of the cases” (O’Brien 1993, 174).

31. Weiden argues that “clerks, lacking institutional memory and a broad outline of the Court’s trends, began to focus upon observable features of a case that could be justified as being ‘cert-worthy’” (1998, 23). He argues, thus, that clerks are relying too much on this one factor to identify important cases for the justices to discuss. In addition to a conflict among the circuits, Caldeira and Wright identified amicus curiae briefs, particularly those filed by the solicitor general, to increase the likelihood that the Court would grant cert (1988).
assuming they were worth the Court’s time, were sure to resurface. (Pp. 267–68)\textsuperscript{32}

Although clerks do have the potential to slant or frame a question in certain ways in order to enhance or reduce the likelihood that a petition will be granted,\textsuperscript{33} two factors mitigate against them doing so. First, as Coenen argues, “producing written work that brings disrepute on themselves and their chambers is little less than a heart-stopping prospect” (1993, 185); clerks are terrified that their work might bring embarrassment to themselves or their justices. Second, Lazarus argues that given the poisonous atmosphere of Libs against Cabalists, each was vigilantly checking each other’s work and quick to cry foul if any deviation from objectivity occurred. What Lazarus identifies as a concern occurs after he left the Court: with more justices in the cert pool (all but Justice Stevens), clerks have no one with whom to check their work. Lazarus reported that it was helpful to check his memos with the clerks assigned the petition in the Stevens and Marshall chambers. Justices Blackmun and Kennedy have both expressed concern for a checking function. Justices Scalia and Kennedy have proposed reforming the system for precisely those reasons (p. 31; Mauro 1998c).\textsuperscript{34}

3. They Talk with Each Other

Lazarus’s argument about certiorari is less that clerks wielded too much influence but rather that the skirmishes over certiorari between the “dreaded Libs” and the “Cabal” further contributed to the poisonous atmosphere at the Court. I think this is one of Lazarus’s most important assertions: that law clerks, particularly a group that was as polarized as was his class, seriously impeded collegial relations between the justices and therefore undermined the deliberative process that is the essence of judging in a collegiate court.\textsuperscript{35} Law clerks may tell their justices unflattering things that

\textsuperscript{32} In an interview, Lazarus says, “I think scholars have over-emphasized the problem—the issue of clerk influence in the cert. pool—at the expense of emphasizing clerk influence in other aspects of Court life. The issue of whether clerks are doing too much opinion-drafting is much more significant than the cert. process” (1998d, 7).

\textsuperscript{33} McGuire (1993, 179–80) suggests clerks may give more attention to petitions written by former clerks who are important “repeat players,” either because of the name of the individual or because, in part but not solely because they have been clerks themselves, the briefs are well-crafted. But certainly the clerks are no different from the justices themselves in noticing a brief by a famous advocate, responding to a particularly well-crafted argument, or noticing interest group briefs urging the granting of certiorari or briefs by the solicitor general (Giurfa 1991, 6).

\textsuperscript{34} As has Kenneth Starr, a former Burger clerk (1993a; 1993b, A17). For the opposite position, see Coenen 1993. I think Lazarus’s charges may be more true of lower courts (Glaberson 1999, 1; Mahoney 1988, 332–34).

\textsuperscript{35} In an interview with Marcia Coyle of the National Law Journal, Lazarus said, “I interviewed many, many clerks. I think what I wrote reflects their views. I don’t consider the thesis
other justices and clerks are saying about them. They may also provide a buffer and a community that may prevent justices from talking to other justices. Lazarus reports that clerks often communicate with their justices by writing. Anyone who has ever been a member of a faculty who fought by memos (and now email) knows how quickly differences can escalate, and how easy it is to be inflammatory in writing while face-to-face interactions may lead to greater civility. Lazarus shows how the clerk back channel that justices used in the past as a way of gathering intelligence, a way of feeling out another justice’s intensity of feeling or willingness to compromise, facilitated consensus building. During 1988–89, that channel had the opposite effect (p. 275).

One thing that is not well addressed in the literature is the role that clerks may play in sharing information and even negotiating between chambers. Douglas reports that Frankfurter deployed clerks in this way. Lazarus argues that clerks acted collectively to persuade (manipulate? trick?) the justices into taking a position consistent with their views.6 Although Lazarus inadvertently acknowledges that liberal clerks formed a social group (“the dreaded Libs”) and discussed cases and, presumably, strategy together, it is the conservative clerks whose communications rise to the level of sinister collusion and conspiracy. Lazarus charged the Cabal with policing its members in a form of groupthink and in reaching out to influence other chambers, specifically through the “infiltration” of Justice Kennedy’s chambers by Paul Cappuccio, a former Scalia clerk (p. 266).

Once again, I interpret the evidence differently from Lazarus. Celebrating executions (with or without champagne) IS unseemly, particularly to those of us who oppose the death penalty (although surely the Libs would have celebrated a decision to declare the death penalty unconstitutional). It does not, however, support the proposition of undue clerk influence, but rather evidences a realignment of the Court against reviewing capital cases—a realignment of the justices that results in the presence of strongly pro-death penalty clerks. Clearly, for 12 years, presidential staff screened prospective nominees to the Court to be closer to Chief Justice Rehnquist than Justice Marshall on this issue. And finally, just before Lazarus arrived, the pendulum swung the other way. Chief Justice Rehnquist’s position, which Lazarus carefully describes—a position he had consistently taken at least since he joined the Court—at last became ascendant.37 The bitterness of my book to be that clerks run the court. People have exaggerated my claims. The point is, we did seriously exacerbate the divisions among the justices. I do believe during the term I was there, justices frequently hadn’t had the opportunity to review the papers for emergency death stays and were dependent on clerk assessments” (Coyle 1998, A10).


37. I confess to being heavily influenced by Lazarus’s account of Chief Justice Rehnquist’s role in the changes in constitutional doctrine on the death penalty, although Lazarus’s account is not new. I did know that the Court had greatly circumscribed habeas corpus, but I had not read all of the cases. While no one who studies sex discrimination, as I do, can see
between clerks mirrored rather than caused the bitterness between justices, and all concerned were stressed by the volatility of this emotional constitutional issue.\textsuperscript{38}

4. They Research, Edit, and Draft Opinions

Perhaps the most controversial task clerks perform is drafting opinions.\textsuperscript{39} According to one former clerk, Williston, the practice of having clerks draft opinions was as old as Justice Gray, the first to use clerks, although Williston notes that most drafts did not withstand Justice Gray’s scrutiny and ended in the wastebasket (Williston 1909, 159). Williston clearly viewed the final opinions as the work product of the justices themselves. As clerical and stenographical clerks (who also cut hair, delivered messages, and performed other personal services) evolved into legal clerks, Justice Hughes worried that others would believe the clerks had written the opinions (Bickel 1984, 82 n.323, citing Hughes’s papers). As clerk to Justice Brandeis, Dean Acheson claimed credit for writing the footnotes of opinions (Acheson 1957, 364), as did Louis Lusky, a former law clerk of Justice Stone, who claimed credit for footnote four in United States v. Carolene Products Company (U.S. News 1957, 48).\textsuperscript{40} Justice Douglas charged that under the Burger Court, clerks did much of the work of the justices and “that was not right” (Douglas 1980, 175).

Controversy about all-powerful clerks who write opinions seems to appear almost cyclically.\textsuperscript{41} In 1957, U.S. News and World Report referred to clerks as “ghost-writers” of opinions—the “second justices” on the Court, “not subject to the usual security or loyalty checks,” and the magazine asserted that the clerks exercised an influence on the opinions of the justices (1957, 45). While the chief objection of the magazine was that clerks, not justices, were writing opinions, the article elevates the menacing

\begin{flushright}
Chief Justice Rehnquist as an ally, Lazarus’s description of him in toto—from death penalty opinions (p. 134) to his administrative actions, such as assigning Justice Brennan to an isolated office and stripping him of his car after he stepped down, despite his walking problems (p. 26)—profoundly changed my assessment of him.
\end{flushright}

38. Other examples of clerk collusion do not always include only the Cabal. O’Connor’s clerks are alleged to have contemplated having one of them pretend to be pregnant so O’Connor could experience the agony of the choice issue at closer quarters (p. 384).

39. According to Oakley and Thompson and Crump, at lower levels of the federal courts and on state courts, law clerks routinely write first drafts of opinions. Although Crump is quick to point out that if the “judge handles the delegation properly, and deals adequately with the result, the judge remains the decision maker” (1986b, 238).

40. U.S. News relies on Alpheus Thomas Mason’s biography (1956). Although Lusky concluded that it would be “a great mistake indeed to suppose that any law clerk ever got anything into the Justice’s opinions which he didn’t want there himself. He could not be pushed or persuaded against his own judgment” (U.S. News 1957, 48).

41. Although the first scandal did not involve clerks writing opinions, but one of Justice McKenna’s clerks being indicted for leaking information regarding an unannounced decision of the Court (Newland 1961, 310).
possibilities of the unvetted (by FBI or Senate committee) as also a serious
danger, although it is hard now to look at these short-haired, white,
bespectacled (black frames—no wire rims) men from Harvard in black ties
and black suits as flaming Communists.

William Rehnquist responded by describing his experience as a clerk
for Justice Jackson:

The role of the clerks in the preparation of written opinions deciding
cases in which the Court had already agreed to decide varied far more
from Justice to Justice than did their role in handling of petitions for
certiorari. . . . Robert H. Jackson had one of the finest literary gifts in
the history of the Supreme Court. Even a casual acquaintance with his
opinions during the 13 years he served on the Court indicates that he
neither needed nor used ghost writers. The great majority of opinions
which he wrote were drafted originally by him and submitted to his
clerks for their criticism and suggestions. Frequently such a draft would
be batted back and forth between the Justice and the particular clerk
working on it several times. The contributions of the clerk by way of
research, organization and, to a lesser extent, method of approach, was
often substantial. But the end product was unquestionably the Justice’s
own, both in form and in substance.

On a couple of occasions each term, Justice Jackson would ask
each clerk to draft an opinion for him along lines which he suggested.
If the clerk were reasonably faithful to his instructions and reasonably
diligent in his work, the Justice could be quite charitable with his black
pencil and paste pot. The result reached in these opinions was no less
the product of Justice Jackson than those he drafted himself; in literary
style, these opinions generally suffered by comparison with those
which he had drafted. . . . The specter of the law clerk as a legal Rasputin,
exerting an important influence on the cases actually decided by the Court,
may be discarded at once. (Rehnquist 1957, 74–75, emphasis added)\footnote{42}

Alexander Bickel, too, responded:

First, that the law clerks are in no respect any kind of a powerful
kitchen cabinet, though they are not to be dismissed as just messenger
boys either; second, that their political views and emotional prefer-
ces, while they enliven the lunch hour, make no discernible differ-
ce to anything in their work; and third, that as a group the law clerks
will no more fit any single political label than will any other eighteen
young Americans who are not picked on a political basis. (1958, 16)

\footnote{42. O’Brien (1998b, 217) reads Rehnquist as conceding that clerks, who were more lib-
eral than the justices, hold “too much sway.” I think Rehnquist’s claim is more modest. See
Rogers (1958, 115).}
Newland surveys other memoirs of clerks who describe the tasks their justices asked them to perform. Although he mentions the rumors circulating that Chief Justice Vinson, and Justices Murphy, Burton, Black, and Clark relied too much on their clerks for opinion writing, he argues that the written evidence for such assertions is weak (Newland 1961, 311–13). First, clerks have firsthand knowledge only of what occurs in their own justice’s chambers. Second, clerks may also overstate the importance of their own contributions. Perhaps most important, no matter who writes the first draft or the footnote, the justices and the Court as a whole are ultimately responsible for published opinions and must defend their decisions against criticism. The clerk is not, as Chief Justice Rehnquist says, “off on a frolic of his [sic] own, but is instead engaged in a highly structured task which has been largely mapped out for him by the conference discussion and my suggestions to him” (Rehnquist 1987, 300). One of Justice Butler’s clerks (of 16 years), according to Newland, “wrote first drafts of many opinions, expressing the justice’s views so accurately that the drafts often required few changes”; Justice Butler did not regard his chambers as a debating society and did not want to hear any disagreement from his clerks (Newland 1961, 312). Justice McKenna would not tolerate the slightest word change. O’Brien’s evaluation of several of the justices’ papers reveals a back-and-forth written interaction with clerks drafting memos and making arguments, more or less under instruction depending on the justice, and justices editing, responding, and rewriting (O’Brien 1993, 428 n.78–90).

The publication of Woodward and Armstrong’s The Brethren in 1979 revived the charges that clerks write opinions. In my view, neither Closed Chambers nor The Brethren succeeds in demonstrating that law clerks write decisions or unduly sway their bosses. What both do, however, is pull back the curtain and report gossip and conjecture about the behavior of the justices and the purity of their decision-making processes. They also raise the question of whether clerks should speak to journalists and whether what the journalists report is indeed true. Depictions of justices watching porno movies in the Court basement (to decide obscenity cases), switching votes after conference to stay in the majority, horse trading between cases or on drafts, or staying on the bench long after they were well enough to perform their duties are unseemly, and courts have rarely been subject to this sort of scrutiny (although the presidency has long been plagued by sensational “kiss

43. David O’Brien, however, subsequently found support for this position in Justice Murphy’s papers (1993, 169), although he argued that Justices Butler, Byrnes, and Murphy were on the extreme edge of the spectrum in delegating responsibilities to clerks.

44. For a discussion of the accuracy of The Brethren’s findings, the methods of journalists, as well as a discussion of the appropriateness of clerks talking to journalists, see Abramson 1980; Adler 1979; Ashman 1980; Kurland 1979; Marshall 1980; Twining 1981.
and tell" books by former staffers). I believe the most damning revelation of The Brethren was not that the justices were demonstrated to be the puppets of the clerks—but that the justices were portrayed as human, with human shortcomings, and as people who are motivated in their decision making by considerations other than legal principle.

The anecdotal evidence does tend to suggest that the institutional culture is more tolerant than previously of greater delegation to clerks in the writing of opinions and that the practice was more widespread by 1988 than in the 1950s, 60s, and even 70s (Kozinski 1995, 56–57; O'Brien 1993, 164–79; Posner 1995, 25; Vining 1981, 252; Weiden 1998, 13). Although in 1987 Chief Justice Rehnquist quoted Justice Brandeis as attributing the high prestige of the U.S. Supreme Court compared with the other branches of government to the fact that justices do their own work (Rehnquist 1987, 261), Chief Justice Rehnquist seemed to rely more on his clerks for writing than Justice Jackson relied upon him. Wade McCree, former judge and solicitor general, argues that the problem is not the use of clerks per se, but their increasing number combined with the dramatic growth in workload. He argues that judges cannot meaningfully supervise more than two clerks without crossing the line into excessive delegation (1981, 786–87).

Lazarus argues that the justices delegate too much responsibility to their clerks to write opinions:

As extreme as this might seem, the broadest exercise of what has become known politely as clerk influence occurs not on the death watch but in the Court's written rulings. For while it is, of course, true that only the Justices cast votes at the Court and that no Justice would ever circulate or publish an opinion that he or she has not approved, during October Term '88 the vast majority of opinions the Court issued were drafted exclusively by clerks. Indeed, only Justices Stevens and Scalia made it a regular practice to participate in first drafts. The other

45. As Alexander M. Bickel wrote in his response to the U.S. News and World Report article, the "American people have always had a consuming and not very sympathetic curiosity about confidential advisers to their high officers of government" (1958, 16).

46. Philip Kurland quipped about The Brethren: "I do not mean to deny the validity of the primary effect of the book, a demonstration that the Emperor is in fact naked. That the Justices have—and have expressed—distrust for the one another, that they bicker and engage in petty annoyances, that each regards himself as the keeper of the Holy Grail, that some lack the learning or intelligence necessary to an adequate performance of their functions, that irrationality often replaces rationality as the measure of judgment, that politics in its lowest form plays a role in adjudication, all of these things cannot be gainsaid. The fact is, however, that the Emperor has been naked almost since he came to power" (1979, 192).

47. Edwards, however, disputes Vining's claims that judges are delegating more responsibility for opinion drafting to clerks (1981, 264–65).

48. Abramson, however, came to this conclusion based on The Brethren: "Time and time again, the justices themselves apparently did not do the kind of legal work that a case demanded," referring explicitly to Justice Douglas (after he could no longer read), Justice Burger, Justice Stewart, and Justice Marshall (Abramson 1980, 404).
Justices consigned themselves to a more or less demanding editor's role. (P. 271)

Lazarus briefly summarizes a handful of commentaries that criticize the increasing length of opinions, the law-review style of lengthy footnotes and jargon, the proliferation of concurrences and dissents, and the increased emphasis on balancing tests and that also lament the absence of the great opinions of the legendary legal minds of old, blaming law clerks for these problems (pp. 271–72). But once again, Lazarus fails to either give us detailed evidence for his bold declarations or explains how he knows about the practices of the chambers he most criticizes.

The charge of undue clerk influence ultimately dissolves into the recurring claim that the justices are failing to reason and deliberate. Lazarus argues that a chasm separates writing and editing and that unless justices are writing first drafts, they are not really grappling with the great legal questions (p. 272). Only through writing first drafts can one encounter an opinion that "won't write," the experience of which causes a justice to interrogate her position and contemplate change. In Lazarus's view that is vastly different from an opinion that "won't read." Furthermore, stating that the "devil is in the details," he asserts that the construction of the argument—how the author frames it and summarizes precedent—is vital and does not get the scrutiny of justices too focused on bottom-line results. For the most part, law clerks are well-intentioned yet overeager novices who lack the depth of understanding of the case law and desperately want to make their mark on the law, perhaps at the expense of faithfully executing their justice's will (pp. 271–72). Lazarus also argues, however, that some

49. Chen, a former Thomas clerk, makes the same point about framing both for petitions for certiorari and first drafts (1994, 300–301; see also Mauro 1992b). An exchange with Katie Couric on the Today show is instructive:

Mr. Lazarus: Well, I don't want to suggest, Katie, that the justices are—are the puppets and the clerks are the puppeteers.

Couric: Well, you kind of do in your book.

Mr. Lazarus: Well, I know . . . .

Couric: You describe them as fairly lazy and disengaged I think.

Mr. Lazarus: In—in some chambers too disengaged, and—and I would emphasize that the power of the first draft is enormous. When you are a clerk writing a first draft, you're choosing what cases to—you know, which precedents to use, how to characterize them, how to characterize the facts. These are all very, very important choices. Depending on how careful an editor a justice is in an ideologically charged atmosphere, it allows for too much leeway for very inexperienced—listen, I was 28. I had one year of a previous lower-court clerkship as my experience in the law. You know, maybe I had taken a couple of years off between college and law school. I wasn't up to that, and it is a disturbing fact . . . .

Couric: And coming up later this morning . . . the latest in decorating Easter eggs." (8 April 1998)

50. Without noticing any apparent contradiction, Lazarus claims that the problem with justices editing rather than writing first drafts is that the clerks will be too faithful to the justice's previous position and therefore not provide the justice the opportunity to reconsider
clerks are not well-meaning and have overstepped the bounds ("many infractions have been egregious" [p. 274]). They miscite cases, mischaracterize facts, stir up bad feelings between the justices, and insert wild theories in the hope that some will survive the editing process. I think framing and construction are important, and I agree with Lazarus that more of that work should be done by the justices. I am not convinced, however, that justices are duped or that the reasoning in important cases reflects the views of the clerks and not the justices. I think his account does lend support to the argument that clerks are preparing more first drafts than they did in the past, and that the justice's role may have shifted more from writer to editor. It is hard to know if that is more true as the justices age (and therefore more true of Justices Marshall and Brennan during Lazarus's time than it had been for them in the past) or if it is increasingly true of all the justices.

In the section discussing opinion writing, Lazarus targets Justices O'Connor and Kennedy as especially vulnerable to clerk influence (although he also criticizes Justice Marshall later). What is the evidence that Justices O'Connor and Kennedy delegate too much power to clerks and fail to even perform the task of opinion editing properly? The evidence seems to be that they are centrists, not captured reliably by either faction, and select law clerks who are liberals and conservatives, making the clerk infighting in their chambers especially intense (the conservative clerks are then the object of Cabalist pressure, or members of the Cabal). But even though I do not agree with Justice O'Connor's undue-burden test for fundamental rights, I am loathe to attribute it to a clerk without strong evidence. Lazarus makes bold, damning declarations, but he does not give us details of either where justices failed to edit conscientiously or where clerks deliberately misled them. All supervisory situations contain the possibility of excessive delegations to underlings; however, this does not mean that it routinely occurs.

For evidence that clerks write opinions with only the most minimal checks by their bosses, Lazarus appears to rely on an article by Eastland in National Review that criticizes Justice Marshall for watching too much television and calls on the "over the hill justices" (all conveniently liberals) to resign (Eastland 1989, 24). Eastland's article, however, goes on to note how carefully Justices Marshall and Brennan chose clerks whose views coincided with their own and how diligently the clerks sought to represent the views

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51. Lazarus goes on, then, to repeat rumors he believes to be untrue: that clerks invaded the computers of colleagues to alter opinions or colluded with Justice Department officials (p. 274). Although Lazarus claims to repeat these serious charges only to show how paranoid his colleagues were during this polarized time, even while reporting that these are false charges, Lazarus is able to bolster the impression that clerks and justices are unprincipled (Drahos 1998, 133).
of their justices. Justice Marshall apparently joked that if he died, his clerks were to prop up his body and keep on voting (p. 278), but this situation is not a structural problem with the existence of clerks (although I take Eastland’s point that without clerks, justices might not be able to hang on so long), but it is a function of the age of particular justices.

5. They Process, Screen, and Summarize Petitions for Stays of Execution

The role of clerks has changed dramatically in death penalty cases since The Brethren and other examinations of law clerks. Only 94 people had been executed in the 12 years since the reauthorization of the death penalty in Gregg v. Georgia, 428 U.S. 153 (1976), in 1975. When the Supreme Court ruled against the equal protection argument in McClesky v. Kemp just before Lazarus came to work for Justice Blackmun, more than 2,000 people awaited execution on death row (p. 119). In that pivotal term then, recent appointments precluded any possibility that the death penalty would be declared unconstitutional in any general sense, and lawyers for the condemned had to make arguments more particular to their individual cases.

Lazarus’s chapter entitled “The Death Watch” is a gripping account of the role clerks play as lawyers for those facing a death sentence file their last appeals. The final hours before executions, almost always scheduled between midnight and dawn, found the clerks assigned to the case alone in chambers as others left for the day. These clerks would consider any last minute appeals and face the agony of trying to persuade other clerks to wake up their justices and issue a stay if they believed the appeals had merit. Those advocating a stay waited alone for the votes from other chambers in the form of written memoranda that came in under the door with a whoosh

52. The Brethren, on the other hand, portrays Marshall as completely dependent on his clerks.
53. O’Brien, too, found that some justices relied on their clerks more as they aged. Justice Holmes relied on his clerks more as his eyesight faded. And Justice Reed relied on them more for drafting as he aged and case loads increased (O’Brien 1993, 171). See Baum’s review of David N. Atkinson’s Leaving the Bench: Supreme Court Justices at the End (1999, 287).
54. Other texts such as Perry’s consider the role of clerks in one area of the Supreme Court’s decision making, namely agenda setting, but I know of no thoroughgoing examination of the role of clerks in death penalty cases. Lazarus commented in an interview, “I also think earlier clerks are skeptical about the influence of today’s clerks because they didn’t have that influence; they didn’t have the same responsibilities” (Coyle 1998, A10).
55. For the complicated discussion of the procedural issues in stays of execution versus certiorari in an individual case, see pages 150–65.
(p. 121)—an awesome responsibility for anyone, let alone someone so young.

Lazarus argues each case turned on four justices in the middle, the other five having made up their mind already to vote for every stay or no stays. And Lazarus clerked for one of those justices, Harry Blackmun (although Justice Blackmun eventually took the position in 1994 that the death penalty could not be fairly administered and that he would no longer “tinker with the machinery of death,” *Callins v. Collins*, 510 U.S. 1141, 1145 [1994]).

Certainly, the ultimate power to grant or deny a stay rested with the Justices. Still, when the final arguments reached the Court, the Justices were almost always long since home for the night, isolated from the tall stacks of paper in which the crucial elements of the case lay buried. The Justices counted on their clerks to distill for them the essence of the case, the facts, the issues, and the precedents that should inform their vote. They relied on us for advice... Those of us who worked for Justices Blackmun, Stevens, O’Connor, and Kennedy, despite the different inclinations of our bosses, shared a middle ground where, in many cases, no fixed rule or policy dictated our Justice’s vote. Accordingly, our choices and judgments were even more complicated and consequential than our colleagues’. How we described a given case, which facts we put in and which we left out, how we characterized the competing arguments, and how insistently we put forward our own points of view—these things mattered deeply and, at least in a few instances, undeniably made the difference between life and death. (pp. 122–23)

But the power of clerks was not to decide who lived and died but which cases, based on instructions from their justices, merited Supreme Court review. Total victory for the defense would be a new trial rather than acquittal. Clerks were arguing whether to examine the decisions of

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56. In this chapter, as elsewhere, one has to wonder about whether relying on written memoranda for votes, draft opinions, criticisms, and so on diminishes the Court’s ability to deliberate.

57. I believe the death penalty cases more strongly support his arguments about failure to reason and deliberate than they support his claims of undue clerk influence. And, if his reportage is accurate, I agree it is unfortunate (although understandable) that opinion within the Court was so polarized by the time he arrived that little discussion on the merits of individual cases took place. Nor did five of the justices whose positions were clear collectively or in smaller groups continue to debate the constitutionality of the death penalty (p. 129)—engaging instead in what Lazarus calls “a silence of mutual scorn” (Simon 1998). Lazarus blames those who opposed the death penalty on principle (abolitionists) for “crying wolf”—arguing for procedural errors when they really opposed the death penalty itself—and argues that their strategy so alienated the justices who believed in the constitutionality of the death penalty that they would no longer entertain arguments of injustice in particular cases (p. 217). On the other side, those who viewed the death penalty as unconstitutional already knew their position on each case, although they still had to deliberate about strategy—which cases to fight, which to concede—deliberations that, presumably, the clerks would participate in (p.
many others in the judicial chain and to overturn them, not to decide the question de novo. But more important, the clerks of the four middle justices possessed this power because their bosses delegated it to them—that is, their justices decided matters on a case-by-case basis. The power of the clerk was the power to get the justice’s attention—to say, “take a closer look”—and the power to persuade, not the power to decide independently of the justices. No evidence exists that the justices in these chambers routinely deferred to clerks, rubber stamping their recommendations. Their power was to screen, draw attention, and make arguments. A pro-death penalty clerk would have no influence in the Brennan or Marshall chambers, nor would an abolitionist clerk wield power in the chambers of Rehnquist, or Scalia, and now Thomas.

The strongest evidence of clerk influence on the death penalty is Lazarus’s deeply unflattering portrait of Justice Kennedy—and to a lesser extent, Justice O’Connor—as a ditherer, in contrast with his portrait of Justices Blackmun and Stevens as judicious and open minded, admirably deciding each case on its merits. Lazarus alleges that Justice Kennedy especially hated to be the deciding vote in these cases (who wouldn’t?), and so his clerk would try to get him to commit to a position early in the process before all the votes had been decided (p. 270). And the clerk, a member of the conservative Cabal, allegedly tried to get him to commit early to the position of allowing an execution to go forward. Like most of the important information in the book, Lazarus does not tell us how he comes to know this “fact” or how often this scenario occurred. The claim in its strongest form is that Cabal members, some of whom had “infiltrated” the O’Connor and Kennedy chambers, so relished executions that if they drew the case, no arguments no matter how sound would ever persuade them to issue a stay.

The death penalty cases may be a good example of how direct personal experience can sometimes skew one’s overall judgment. I have no doubt

123). In a later interview, he blames Justices Brennan and Marshall for frustrating the right so much that they refused to consider justice in individual cases (Coyle 1998, A10).

58. As Pike wrote, “Eugene Volokh, a clerk in the 1993–94 term for Justice Sandra Day O’Connor and now a professor at UCLA Law School, disputed Lazarus’s charge that his former boss was susceptible to being manipulated by law clerks fresh out of school. ‘She worked her way up in the legal profession when it was very difficult for women, and made her way on her own in Arizona politics,’ Volokh said. ‘The idea that she is going to be excessively influenced by some law clerk half her age strikes me as ridiculous’” (quoted in Pike 1998, 5).

59. Recall for a moment Rehnquist’s account of his own awe at reading his first briefs as a law clerk and struggling to make a recommendation. Juxtaposing Lazarus’s and Rehnquist’s accounts of awe in the face of the importance of the decisions they are asked to participate in raises some interesting questions. The strongest evidence that clerks have slightly more power in drafting opinions, calling for stays of execution, and summarizing petitions for certiorari than they did in Rehnquist’s time as a clerk is Lazarus’s feelings that he had too much power. I recall similar feelings as a congressional staffer drafting legislation (albeit very minor legislation), drafting committee reports, and preparing questions for hearings. But feeling like you have too much weight on your shoulders and not enough supervision is not the same thing as the reality of having power. Rehnquist had the same feeling, though he concluded that Justice
that what happened on the night of executions was as Lazarus describes it: that Libs were literally screaming at recalcitrant Cabalists in the wee hours, frustrated at failing to get the much-needed last vote for a stay, and feeling that it was capricious—that because of the luck of the draw, a man would be executed. But the clerks possessed this power only because Justices O'Connor and Kennedy did not share Justices Brennan, Marshall, and ultimately Blackmun's abhorrence of executions and suspicion of justice meted out by state courts and reviewed by federal courts. Although Justices Kennedy and O'Connor may have been the only possible "persuadables," I would argue that the clerks of Chief Justice Rehnquist and Justice Scalia had influence because their justices had influence over Justices O'Connor and Kennedy.\textsuperscript{60} If they were on the fence, they were more disposed toward the right than the left, however infuriating that might have seemed to a law clerk on the left.

6. Conclusions: New Evidence of Clerks' Powers?

O'Brien characterizes Lazarus's difference from previous writings on the Court by stating that "no other book attributes so much of the Court's work to its law clerks" (1998b, 217). The dust jacket of Closed Chambers states that "Justices grant . . . excessive power to immature, ideologically driven clerks, who then use that power to manipulate their bosses and the institution they ostensibly serve." After describing the controversy about clerk influence in the 1950s generated by U.S. News, Lazarus disagrees sharply with Bickel's dismissal of the charge of undue clerk influence: "I can say with certainty that Rehnquist's mild suggestion of unconscious liberal bias in the cert. process does not even begin to capture either the very significant power that clerks wielded at the Court during my time (and in the several years subsequent) or the very conscious and abusive manner in which clerks wielded that power for partisan ends" (p. 263). Lazarus, however, equivocates on two questions—in which areas and to what extent clerks wield power:

\textsuperscript{60} See Lazarus's discussion of Patterson (1998a, 2).
Although I think law clerks play a larger and more disturbing role than Tushnet (see, for example, our disagreement over *Patterson v. McLean Credit Union*), I agree with him that they rarely affect the bottom-line outcome of big cases. Indeed, I specifically discount some common clerk-centric theories about the Court, such as the charge that a Laurence Tribe disciple, Michael Dorf, convinced Justice Kennedy to change his view of *Roe v. Wade* in *Planned Parenthood v. Casey*. My point in *Closed Chambers* is not to suggest that clerks are puppet masters, but rather that they (we) mirrored and exacerbated the polarization and partisanship among the Justices—thereby adding to the breakdown in the Court’s decisional culture. (1998a, 2)

While I do not share Lazarus’s conclusion that clerks wield too much power at the U.S. Supreme Court (although I am more persuaded by the evidence that lower-court judges have delegated too much power and responsibility), I do agree that clerks affect how the institution operates. And in fact, one of my complaints about Lazarus is that by focusing the debate on whether clerks do or do not write opinions and manipulate justices, he deflects our attention from the significant impact clerks do have on how the Court does its work and how it organizes itself to respond to its growing workload. O’Brien, and others, have warned of the dangers if justices function as opinion-writing bureaus rather than as one deliberative body. Without question, the presence of and increase in number of clerks allows justices to write more separate concurring and dissenting opinions than they could otherwise and to spend more time supervising staff than writing themselves or interacting with colleagues. The opinions themselves have changed with the increasing number of clerks and as justices have delegated more responsibility to them for writing first drafts. The opinions have lengthened (the U.S. Supreme Court Reports went from 2,133 pages in 1960 to 4,269 pages in 1983 [Crump 1986a, 47]) and became more fragmented into concurring and dissenting opinions. “Between 1969 and 1972—the period during which the justices each became entitled to a third law clerk . . . the number of opinions increased by about 50 percent and the number of words tripled.” The opinions increased in length again after a fourth clerk was added in 1980 (Posner 1985, 114).

To conclude, I do not believe that Lazarus provides the evidence to support his sweeping claims of widespread abuse of power on the part of law clerks. Like the earlier literature however, his book does raise some serious concerns. Although I believe that using law clerks for many tasks is a natural response of an organization trying to manage its workload, as that workload increases, the dangers of bureaucratic justice are real (Jacob 1983;

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61. David Weiden disagrees, attributing the change in clerk functions to a “final shift away from the legal apprentice/mentor model of legal education that had been imported from England” (1998, 2).
Krislov 1983). Most evidence confirms that several factors limit the power of clerks on the Supreme Court. First is the clerks' youth and inexperience. Law clerks are often law students or recent law school graduates rather than skilled litigators, legal scholars, or political negotiators. Second, justices need to gain a consensus, and consequently, they do the bargaining. Third is their short term—almost always only one year. Fourth, evidence suggests that both justices and law clerks see the job as one of mirroring the views of the justice rather than putting forth a personal viewpoint (Brenner and Palmer 1990; Brenner 1992; Phillips 1998, 45). Lazarus's term was a particularly polarized one, even if it was not as historically significant as he might claim. The Court changed and overturned important doctrines and precedents, and the justices differed profoundly in their views on particular significant legal issues and approaches to constitutional interpretation. The clerks, I believe, reflected those profound differences rather than caused them, although they may have reinforced and exacerbated the alienation between the justices.

II. THE ETHICS OF THE EXPOSÉ

Much of the commentary on Closed Chambers in the legal community has focused on the question of whether Lazarus was wrong to write it. Did Lazarus betray his ethical duty of confidentiality to the Court, to Justice Blackmun, and to the other clerks? After the publication of The Brethren, when it became clear that many clerks had spoken with Woodward and Armstrong (if only to confirm or deny what another source had told them), the Court issued guidelines, a Law Clerk Code of Conduct, making it explicit that clerks were to keep the confidences of their justices and the institution in perpetuity. Although commentators at the time criticized the clerks for talking to journalists (and for journalists in taking at face value the clerks' inflated claims of importance), fewer argued that the Court should be somehow immune among governmental institutions from the scrutiny of journalists or that the journalists had acted unethically. Although Lazarus at

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62. Bickel argues: "Yet we can surely start with the presumption, as far as specific results are concerned, that it is likely to be beyond the power of these inexperienced young men, as it would be beyond the power of wiser and older heads, to turn the minds of the generally stronger, experienced and able lawyers and statesmen [sic] who sit on the Supreme Court" (1958, 64).

63. Crump, quoting Gerald Abraham, former law clerk (1986a, 46). See also Chen (1994, 297).

64. The Code says this: "The temptation to discuss interesting pending or decided cases among friends or family, for example, must be scrupulously resisted. Even discussions with law clerks from other chambers should be circumspect" (quoted in Kozinski 1999, 844, n.46; see also Rubin and Bartell 1989, 17, 21).

65. Many did, however, question whether their methods produced accurate information on the Court, and they identified factual errors. Others argued that Woodward and Arm-
times tries to straddle the categories of participant observer, journalist, and historian, his ethical and legal obligations to the Court as a former clerk differ from those of journalists like Woodward and Armstrong. Legal commentators discussed whether Lazarus violated his obligations under legal professional ethics. Judge Kozinski, for example, compares Lazarus's ethical misconduct to violating a lawyer's duty of confidentiality to a client (1999, 842 n.38). In his defense, Lazarus asserted that his obligation of confidentiality only applied while he was working at the Court (1998b, 1998c), or at best, some time after leaving (1998d, 6), and second, that he is not alone in talking about the internal dynamics of the Court.66

A third argument Lazarus offers in his defense is more interesting. He argues that he has not violated his duty of confidentiality to Justice Blackmun and the Court because he has not relied on his experiences as a clerk as an independent source of information. Instead, his experience merely provided the necessary interpretative framework for information he gleaned from interviews and public sources such as the Marshall papers. He discloses very little of what occurred within the Blackmun chambers. He does not identify which opinions he drafted that Justice Blackmun excessively deferred to,67 which cert petitions he managed to get accepted or rejected because of his personal interventions, or which men's executions were stayed because he persuaded a Kennedy or O'Connor clerk. He levels few criticisms at Justice Blackmun, though he does criticize the reasoning in Roe.

Finally, Lazarus argues that airing his criticisms of the Court serves the public interest—that he answers “a call of history” (Mauro 1998e, 1).68 In my view, only this defense has any merit. Clearly, the clerk's duty of confidentiality, while perhaps not legally enforceable, is an institutional expectation with no statute of limitations.69 Lazarus has clearly violated both the shared norm and the specific Court guidelines (Coffin 1980, 73–74; Giuffra 1998, 7; Painter 1998a, A23; Phillips 1998, 42). I am not persuaded,

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66. Lazarus pointed out that both clerks and the sitting justices themselves talk and write about internal matters. Justice Brennan, for example, spoke to journalists about what was happening on the Court, and the Marshall papers reveal much about the internal machinations that expose sitting justices to scrutiny. He also notes that law clerks tell stories, talk to journalists, or publish accounts of their time serving the Court (1998d, 6). But see Wermiel (1998, 34).

67. He does tell Lamb that Justice Blackmun was a “meticulous editor” (Lamb 1998).

68. Lazarus attributes criticisms of his ethics to “shooting the messenger,” as people avoid the immense power of his argument by trying to focus on what he did wrong (Berg 1998, 5).

69. Tony Mauro reports that the Court made it clear to this year’s class of clerks that “their obligation to keep the court’s secrets lasts forever,” though it is not legally binding (1998e, 1A).
however, that it is as legitimate for clerks as it is for justices to talk to journalists and members of the legal profession; subordinates have a very different institutional role. Many reminiscences of clerks reveal little about the justices' decision making, or are about former rather than sitting justices. Lazarus's book, however, differs only in quantity and accessibility from self-aggrandizing or titillating asides of clerks to friends, students, or colleagues about the internal workings of the Court. In my mind, the transgression is somewhat less than the CIA agent who writes a book about covert operations (and who may violate specific statutes in so doing) and somewhat more than memoirs of presidential aides or legislative staffers (at one point, Lazarus compares himself to Richard Holbrooke, a fellow whistleblower [1998c]). The claim that he does not rely on his own personal experience is harder to evaluate, since he tells us so little about the sources for his claims, a shortcoming I discuss below.70

I am more interested in the ethical issues confronting the social scientist than the former Court employee. I am not persuaded that the Court's decision-making procedures should somehow be immune from scrutiny, or that the justices themselves should be above criticism as public servants. For me, the ethical issue is less whether Lazarus betrayed his obligations to an institution than whether he betrayed his friends and former boss.71 Ethnographers, social scientists, and journalists who do participant observation are well aware that people reveal things to the researcher that are unflattering, embarrassing, or even potential causes of action (Kenney 1992; Oakley 1981; Pierce 1995; Reinharz 1992, 18–75; Ribbens 1989).72 They are also more likely to identify somewhat with their subjects and to feel conflicted about accounts that will hurt them, personally or as a group. Both fiction writers and those who write autobiographical essays grapple with the fact that the stories they tell expose those close to them as well as themselves. I have not systematically interviewed former U.S. Supreme Court law clerks, but I have encountered several over the past year and asked them about Lazarus. He has clearly violated a strongly held norm—particularly by identifying clerks by name. Others have noticed the absence of any clerks who

70. This claim is also hard to square with the hyperbole about "the first eyewitness account."

71. The comparison to Linda Tripp springs to mind (former Brennan clerk Gerard Lynch drew the same parallel [Cohen 1998, 31]). What kind of a friend tapes her friend's intimate conversations about sex?

72. This is exactly what we all count on, which is why, for example, I preferred to go to Luxembourg to study the European Court of Justice for a month rather than to just stay home, conduct a survey, and interview judges—you learn as much in the lunchroom and the cocktail party as in the cabinet (chambers). Even though people know you are doing a study, they forget and treat you like a coworker. Responsible researchers avoid the cheap shot, which damages their rapport with the interview subjects and jeopardizes the openness of the institution to future research.
defend the book or his right to speak (Kozinski 1999, 837). Such defenses, although rare, have come almost exclusively from journalists (Boot 1998; Cheves 1998; Mauro 1998a; but see Haines 1998, 23). The dean of the Yale Law School, Anthony Kronman, wrote a blurb for the book, although he now appears to have recanted (Reno 1999). Lazarus tells us he obtained information talking to clerks after he left the Court (although the book reports on the behavior and comments of clerks while he was on the Court, for example quoting from their email messages), yet he does not tell us what he told those clerks. Did he phone and say, “I’m writing a book. What happened in Justice O’Connor’s chambers when she was drafting her concurring opinion in Casey?” I fear the more likely sequence of events was that clerks and former clerks confided in him as a friend and coworker, one of the few people, by virtue of being members of the same club, with whom they felt they could talk freely. And what of Justice Blackmun (who was silent after publication of Closed Chambers and who recently passed away)? What did he feel about having his former clerk say in print that Justice Brennan was known as “piggy” for keeping the good opinions for himself (p. 310), or that Justice Stevens was known as “the Fed Ex justice” for being away from the Court so much (p. 279), or that Roe v. Wade is a badly reasoned opinion? Lazarus tells us that Justice Blackmun was aware that he was writing a book, but that they had not spoken about it before or after publication (Lamb 1998). Clearly, many human relationships require trust. And justice–law clerk, clerk–clerk friendships are two of them. Most of us operate on the assumption that our close personal employees, although not legally required

73. As Gretchen Craft Rubin, a former O’Connor clerk, wrote in an op-ed piece for the Washington Post, “Perhaps only the justices themselves and former clerks (of whom I am one) can appreciate just what a break with tradition this book represents” (1998, 27). See also Biskupic 1998, A8; Drahovzal 1998, 122; Painter 1998b, 30; Mauro 1998b, 2A; Pike 1998. For an exception, see Velvel 1998.

74. The dean of the Columbia School of Journalism, Tom Goldstein, however, calls it “the most fundamental breach of confidentiality you can think of” (Cohen 1998, 31).

75. USC law professor and friend of Lazarus, Erwin Chemerinsky, also defends him (Cohen 1998, 31).

76. The ethics of quoting from email messages arose, too, with the publication of Christina Hoff Sommers’s book, Who Stole Feminism? where she quoted from wunst-l, a listserv for women’s studies faculty (1994, 100 n.23). While the ethics of citing from the Internet are still being debated, a listserv is a much more public forum than a list of fellow employees, or even a subcategory of clerks, such as friends.

77. If he were doing funded research at a university, he would have had to have obtained human-subjects approval for his project, as I did for my study of law clerks at the European Court of Justice. Not only would he have had to tell the committee what questions he intended to ask, he would have had to make clear what would tell interviewees about what he would do with the information and what right of confidentiality they could expect. Lazarus claims that many of his sources were the conservatives, not the liberals (i.e., his enemies rather, as many may have assumed, his friends), though he implied that they opened up to him because they liked to brag rather than because they knew of or supported his writing the book.
to do so, will keep our confidences—will not publish accounts of our personal foibles. And we conduct our business accordingly. In U.S. v. Nixon, 418 U.S. 683 (1974), the Supreme Court recognized that for the presidency to function, the president needed to have confidential advice, although such executive privilege was not the only constitutional value and, in that case, did not outrank the necessity of obtaining evidence in a criminal proceeding. Thus, each reader must ask, “is what Lazarus has to say so important (as he argues) that institutional norms and trust should be sacrificed to serve the public’s need to know?” Must he reveal this information in order to make his argument persuasive? Or does he include the sensational material merely to sell more books? Are his motivations really personal revenge and greed?

III. EPISTEMOLOGICAL ISSUES

I have questions about the information that Lazarus reports as fact. Commentators have pointed out numerous errors (Garrow 1998, 27; Glenn 1999, 111; Kozinski 1999, 851–55; O’Brien 1998b, 214–16; Sullivan 1998, 15). He retreated on the claim that the Calab had a champagne celebration of the execution of Ted Bundy between the page proofs and the final print (Berg 1998, 5). Some of his claims can be checked against public documents, and his errors on these points lead me to be skeptical about his

78. It is understandable that public people, whether they are popular fiction writers, such as Patricia Cornwell, or the royal family in Britain, or ex-spouses such as U.K. Foreign Secretary Robin Cook, want to keep people from revealing personal details about them that are embarrassing or unflattering, whether or not such gag contracts are legally enforceable.

79. Christopher R. Drabecal, who clerked for Byron White during the same term as Lazarus, put it this way: "Ultimately, the justification Lazarus falls back on for writing the book is that, in his words, 'I felt I had something important to say.' As I understand this justification, it is a variation on the 'public has the right to know' rationale used to justify The Brethren and every kiss-and-tell book ever written. The only difference is that as Lazarus states it—in good 'Me Generation' fashion—the focus is on the public and what it should know, but instead on 'me' and what 'I have to say' (1998, 130).

80. Reading all the reviews (more than 50), reading the interviews (I read more than 10, talked with him briefly, heard him speak), talking to people about Lazarus and the book, and reading his written responses to his critics led me to the conclusion that Lazarus is a profoundly arrogant person—not necessarily in the sense of having an unduly high sense of his own abilities (what one might expect of Supreme Court clerks and Yale Law graduates) but in the sense of not really having a recognition that reasonable people can disagree and he might be wrong—the very quality he insists judges have. He just cannot accept that principled smart people hold different opinions from himself—whether those people are justices, clerks, or book reviewers.

81. Jurist quoted Lazarus as saying he received a six-figure advance for the book (1998d, 13).

82. Lazarus concedes some mistakes in Jurist, but disputes others (1998a, 3). Kurland raised similar concerns about The Brethren: “Doubts must exist as to the truthfulness of the tattling. The sources of the stories are unidentified, allegedly because the tattlers were unwilling to be known for their breaches of confidence. The book consists largely of hearsay, or hearsay once-, twice-, or thrice-removed” (1979, 192).
assertion that he relied on public documents or interviews rather than secondhand accounts and firsthand personal experience. For example, Chief Justice Rehnquist did not hold over *Webster* for more than one conference. Justice O'Connor did not refuse to join any of Justice Brennan's opinions because he had double-crossed her in the past (in fact the record shows she joined several). Justice O'Connor does not have daughters, only sons. Journalists whose beat is the U.S. Supreme Court allegedly played "Gotcha," competing with each other to spot the factual errors in the text (Mauro 1998d, 15).

What professional standards of truth does Lazarus abide by? How do we assess his knowledge claims? Despite the promotional material trumpeting "the eyewitness account," Lazarus has witnessed firsthand few of the events described in *Closed Chambers*. In fact, Lazarus would be much more convincing if he wrote about what happened in Justice Blackmun's chambers and made more tentative claims about what he knew secondhand from other clerks. Instead, Justice Blackmun for the most part gets a bye, and the acts in the book that receive scathing criticism are those done by other justices and clerks in other chambers.

Although Lazarus claims to be a historian, much of the account clearly does rely on his personal experience; for example, he tells us about his interview with Justice Blackmun when he was being considered for a clerkship. Lazarus, however, never interrogates his own subject position, so to speak—he does not question whether his interpretation of the Court as a neophyte, a clerk, or a liberal is partial or distorted. He is not reflexive or skeptical about how he knows what he knows. An observer can report one version of what happened, even if we want to concede that others may have different accounts and that any account is certainly amenable to different interpretations. Even things we ourselves observe can be subject to multiple

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83. Many commentators questioned what law clerks really "know" about the institution and what is merely hearsay (Drahosel 1998, 121).
84. His portrait of Justice Brennan, for example, as scheming and manipulative is at odds with most other accounts (Eisler 1998, 26). For example, a former Brennan clerk who later became a conservative judge, celebrated Justice Brennan's capacity for maintaining friendship across a political divide (Posner 1990, 14).
85. Rubin makes this same point: "Perversely, Lazarus's vow of confidentiality enables him to cloak his boss in a secrecy that he strips away from the other Justices. We learn about conversations, daily routines and decision-making in other chambers, but not in the one chamber Lazarus knows firsthand. It's not clear why Lazarus feels that it's more honorable to disclose confidential information about other Justices than about his own" (Rubin 1998, A27). Lazarus told Lamb that including information from substantive conversations with Justice Blackmun would have violated a confidential obligation (Lamb 1998).
86. Bickel counsels against relying on clerks' immediate impressions: "Yet some general matters have become common knowledge, based in large part on historical information that has emerged after the longish period of incubation imposed by the requirements of the judicial process. There is, one might add, also some information that has been let out before the period of incubation has run. Naturally, this information is half-incubated, or as some might say, half-baked" (1958, 64).
interpretations. For example, one of the first few times I visited the European Court of Justice in Luxembourg I had a brief courtesy meeting with the British judge. As he left the meeting, he turned to his clerk (référendaire) and said, “now, what is this case about?” Having just served as a congressional staffer, where my congressman turned to me on the floor of the House and asked me basic factual information about the bill under consideration (admittedly, a very unimportant one), I was struck by the parallels. I began an investigation on the role of référendaires at the European Court of Justice, hypothesizing that given the short term of judges (six years), their lack of experience in European Community law, and the many ceremonial and public speaking responsibilities in their own member states, perhaps their staff, like legislative staff, were the ones more intimately involved in the details of cases. Knowing what I know now, I did see something, but I interpret it much differently. First, I now know much more about the English legal system and some judges’ preferences for hearing oral arguments as a cold bench (i.e., not having read the briefs in advance) (Paterson 1982, 36–37). I know that most European Court of Justice judges are experts in Community law (Kenney 1999). And several insiders have informed me that even if my initial interpretation was correct, the situation was not typical. And even though I thought the judge knew little of the case, I do not even really know that. Maybe he had read all the papers and was grilling a new référendaire? Or asking for a reminder? To make a long story short, observers too often think they understand what they have seen with their own eyes when, given alternative accounts, or more complete information, the meaning of the event could be quite different.

Just because two people said something happened does not mean that it did, but a journalist may feel justified in printing it. Although Woodward and Armstrong occasionally take a fiction writer’s license in pulling their narrative together, they claimed to have maintained journalistic standards of determining how they knew what they knew—two sources for every “fact.” Historians, unlike fiction writers, need evidence to attribute mental states to their subjects, and many do so only cautiously. The Brethren, like Closed Chambers, strayed from both journalistic and historian’s rules of evidence by casually attributing mental states to justices and clerks without any explanation of how the author arrived at that attribution (Marshall 1980, 153).

One can imagine (since Lazarus does not identify sources) that one of Lazarus’s principal sources of information and guide to interpretation is Justice Blackmun himself. Lazarus did not attend conferences. But he reports Justice Blackmun returning from conference to give his clerks a “blow by blow” account of events, complete with quite impressive impersonations of the other justices (p. 60). Chief Justice Rehnquist, too, reported that Justice Jackson returned from the conference on Youngstown to say to his clerks,
“Well boys, the President got licked” (1987, 92). But Lazarus never offers the slightest glimmer of awareness that his sense of events may be filtered through Justice Blackmun’s eyes and reflect Blackmun’s opinion of events and personalities.

Although Lazarus does not take up this point, his account does raise interesting epistemological questions about institutional knowledge. We have all experienced getting the “low down” when we join a new organization only to learn that our informer is inaccurate, a bad judge of character, dishonest, or has an axe to grind. The reflective person, when pressed about how she knows things, will recognize the tenuous basis of this knowledge. Certainly the scholar or person who wants to write an authoritative account will question how she knows what she knows, and whether it can be verified. If Lazarus questioned what he knows, he does not reveal so in the text. Outgoing Blackmun clerks briefed him (p. 261). He presumably was part of an extended network of former Blackmun clerks and former Supreme Court clerks more generally. He had friends and colleagues with whom he traded confidences while on the Court and upon leaving. And, as I said, he no doubt had access (direct or assumed) to Justice Blackmun’s opinion on virtually every legal issue before the Court and every person working there. So when Lazarus reports that Stevens was known as the “Fed Ex” justice, for example, we must wonder by whom? The Blackmun clerks in his year? The justices themselves? Justice Blackmun? How do we “know” that Justice Kennedy was overly concerned with “the Greenhouse effect”—whether Linda Greenhouse will criticize his opinions in her columns in the New York Times (p. 428)? Since Lazarus is doing more than gossiping, but is using the unflattering information to make serious charges—that justices on the left and right are unprincipled and care only about outcomes, not reasons—we need to know more about the evidence that supports the claim.

Interpretations of conflicts and causes are highly contested terrain, and I am not persuaded that Lazarus has wisely captured what is “really going on.” I think that those who join a movement (or institution, such as the Supreme Court) long after a dispute has occurred, as is the case with all three of Lazarus’s issues—abortion, affirmative action, and the death penalty—are more likely to see strong evidence of the personality issues driving the dispute. To his credit, Lazarus devotes considerable attention to the history (political and doctrinal) of the three issues, but in the end, I believe he gives too much weight to personal rather than principled differences between the justices. To ultimately be persuasive in the interpretive contest over the meaning of events internal to the U.S. Supreme Court, Lazarus must do more than strongly assert his position. He must tell us how the specific evidence supports his position. And, for us to weigh the evidence, he must tell us how he knows what he knows. And that he does not do. For

the scholar, then, let alone one who is not already favorably disposed to his argument, the compression of those last two stages into the first will render the overall argument unconvincing, however riveting and illuminating the story may be.

IV. NATURE OF JUDGING AND HUMAN INSTITUTIONS

At bottom, Lazarus's criticisms of individual justices and the Court as a whole stem from an unarticulated position on the nature of judging and his idealistic views on how human institutions should work. Justice Blackmun comes closest to his judicial ideal, Justice Powell a close second. Justices Brennan, Marshall, Scalia, and Chief Justice Rehnquist deviate from the ideal by having made up their minds already on all the key issues, refusing to be open to persuasion, and employing unprincipled and inconsistent legal justifications for outcomes that are mere ex post facto rationalizations that conflict with ex post facto justifications in other opinions they have authored. Justices O'Connor and Kennedy deviate from the ideal in the opposite respect, not knowing their own minds, being intellectually weak, dithering, and, as a consequence, being susceptible to pressure from clerks, other justices, or public opinion. I cannot share Lazarus's ideal either in principle or as a realistic possibility. I do not believe that truly neutral and objective people exist or, if they do, that they necessarily make the best judges, though I agree with Lazarus that, to the extent humanly possible, judges do have the obligation to listen, to question their positions, to consider alternative arguments carefully, and to remain open to the possibility of persuasion. Lazarus's condemnation of Justices O'Connor and Kennedy is inconsistent with his deification of Justice Blackmun for being open-minded, especially since he reports that other justices criticized Justice Blackmun for being an "agonizer"—one whose positions on cases do not come easily. And I cannot share his condemnation of the others as being unjudicial for having strong principles,\(^88\) even though I may not endorse their particular principles.

Lazarus contradicts himself, too, in analyzing deviations from his judicial ideal of deliberation and consensus seeking.\(^89\) Lazarus is appalled at how little the justices interact with one another. He holds Chief Justice Rehnquist responsible for failing to bring the Court together in general and to command a principled majority in Casey in particular. Yet, setting aside for

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\(^88\) As Sullivan points out, "The moral of this story, as Lazarus tells it, is that both sides should lay down their arms in favor of a conception of adjudication in which political ideology would have no place at all" (1998, 15).

\(^89\) One commentator quipped, "Lazarus appeals plaintively to the better natures of the justices—after having labored to prove that they have none" (Denniston 1998, 5).
a moment Justice Blackmun, the consensus seekers on the Court get very harsh treatment by Lazarus. Justices Kennedy, O'Connor, and Souter, in seeking to find a middle ground in Casey, are criticized as sneaky and unprincipled. Justice Brennan is characterized as a manipulator rather than a charismatic person who could lead other justices toward a shared position. On the one hand, Lazarus demands that the Court deliberate until it find a singular consensus position that would be good law. On the other, he savages those members of the Court who alter their principled position in order to command a greater following on the Court, thereby perhaps taking a position inconsistent with a previous opinion.

In 1958, Justice Harlan told Potter Stewart—who had expected that the Supreme Court would be like one law firm with nine partners, the law clerks being the associates—that what he would find instead was “nine firms, sometimes practicing law against each other” (quoted in O'Brien 1993, 164). Holmes described it as nine scorpions trapped in a bottle, while Posner labels it an “arranged marriage in a system with no divorce” (1990, 14). If Lazarus had more experience in collective workplaces, I think he might be more hesitant in demanding that the justices continue to debate the same fundamental issues. While perhaps the Court should try to emulate a utopia of continuous open discussion, it is an unrealistic expectation of small human institutions, whether they be courts, families, or academic departments. Is it reasonable to expect real debate to occur at conference rather than one-to-one, or not at all once justices have staked out their positions? And it is just as unrealistic to expect the Court as a whole to find a peaceful consensus on these issues (anymore than Chief Justice Taney could manufacture it in Dred Scott, despite his best intentions) when the country is so severely divided.90

V. NATURE OF LAW AND POLITICS

I believe Lazarus to have a fundamentally flawed conception of the dichotomy between law and politics.91 Lazarus is an idealist in what he expects of the human beings in the institution. He believes they can set aside all questions of personal difference and, more important, that they can set aside their principles and life experiences, hear each case fresh, and continue to deliberate on issues that, in their own minds, are settled.92 I believe

90. As Tushnet says, “the ‘struggles inside the Supreme Court’ were not really all that epic when seen not from the clerk’s eye-view but from the historians” (1998, 22).
91. His restrictive and negative definition of politics as distinct from justice comes through in the press release: “Closed Chambers will become required reading for every law student, lawyer, and anyone who cares about the lines between justice and politics.”
92. Kairys comments: “Lazarus worships reason and integrity, which he finds lacking in the high priests and priestesses of the law, and in almost everyone else but himself” (1998, 17).
it is possible but unlikely that people, let alone justices, change their positions on such fundamental law and policy issues as abortion, affirmative action, and the death penalty after having arrived at a position based on careful reflection. But more important, I do not believe that law is distinct from politics, although I think there are many kinds of political considerations, from supporting one’s partisan cronies, to acting on political ideology, to acting on how one sees the world. At one point, Lazarus endorses Mauro’s argument that “justices fall prey to the same political and ideological forces that distort the working of the other branches of government” (Mauro 1998d, 15, emphasis added). Lazarus believes that the Court can and should be an arena of pure reason, as if legal reasoning alone can settle the most thoroughlygoingly political questions of our time.

VI. CONCLUSIONS

Although I find unconvincing Lazarus’s arguments that law clerks wield excessive power, some of his other arguments are more persuasive. He does carefully analyze what is wrong with the Court’s current majority position on abortion, affirmative action, and the death penalty (though I doubt few will be persuaded from the opposite position by reading this book). His portrait of Chief Justice Rehnquist is devastating—he is neither a great chief justice nor an intellectual or organizational leader. The rise in cert petitions and the consolidation of more justices in the cert pool is troubling; the Court should come up with a system that might permit some greater checks and balances. The Court was, and to a lesser extent is, polarized on the great issues of the day, but unlike Lazarus, I see this polarization less as a failure of the justices to reason or compromise and more as a reflection of differences within the country. When justices isolate themselves from one another and when clerks foment bad feelings between chambers, it is harder for the Court to function as an institution. The Court as an organization should reflect on trying to reduce its workload and developing structures for interaction other than written memoranda. The interpersonal chemistry between justices on the Court (p. 27), as between people in any human organization, does matter, though unlike Lazarus, I believe the personality differences are more often a result of principled legal differences than the cause of them.

In the end, however, Lazarus does not support his three principal arguments, and furthermore, I have serious questions about the ethics of how he obtained his information as well as doubts about its accuracy. Many Supreme Court opinions merit criticism, but they do not necessarily arise from evil motives. Contrary to Lazarus, I would argue that the justices are not, on the whole, unprincipled actors who have failed in their responsibility as judges. They are, instead, rather deeply divided. Frequent changes in
the doctrine of the Court and the fragmentation of the reasoning are 
problems, but they are predictable ones given divisions within the country 
and the changes in the presidency. Most important, law clerks are agents, 
not puppeteers, even if everything Lazarus says about them is true. Because, 
in the end, Lazarus’s arguments are not persuasive, and he does not suffi-
ciently serve the public interest to justify his cheap personal attacks on the 
members of the Supreme Court community, however entertaining I find 
reading them—or however much I experience what Kathleen Sullivan aptly 
calls “the prurient thrill of insiderdom” (1998, 15).

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