

Conduct Unbecoming

Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court. By Edward P. Lazarus. New York: Times Books, 1998. Pp. 576. \$27.50.

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Every July and August, three dozen of the nation's most promising young lawyers begin service as law clerks to the Justices of the United States Supreme Court. Being a Supreme Court clerk is the most prestigious job to which a law school graduate can aspire. Those selected spend a year observing and participating in the decisionmaking processes of our nation's highest court, an experience most lawyers can only dream of. A Supreme Court clerkship is a ticket to the best jobs in the legal profession and in academia. It is a source of pride for the rest of the lawyer's career.

Until the publication of *Closed Chambers*¹ last year, it was well understood that whatever a clerk learned about case deliberations during his term of service would never be disclosed outside the Court. This was made clear to the new clerks during conversations with the Justices, and it was part of the institutional ethos—the bedrock of assumptions shared by those working within the Court. During the 1988 Term, it was embodied in a written Code of Conduct for Supreme Court Law Clerks which provides: “A law clerk should never disclose to any person any confidential

† Judge, United States Court of Appeals for the Ninth Circuit. Chock-full of disclosures: I know many of the people described in this book, including the author, who clerked for one of my colleagues a decade ago. I clerked for Justice (then Judge) Kennedy, who is ill-treated in the book, and one of Justice Kennedy's clerks, who is portrayed as a cross between Don Corleone and Freddie Krueger, clerked for me prior to his tenure at the Supreme Court. I also clerked for Chief Justice Burger, who is briefly though brutally savaged, and I know and respect Chief Justice Rehnquist, several of the Associate Justices, and a number of their former clerks who are mentioned unfavorably.

I am grateful for the valuable comments of a number of people, particularly Professor Gerard Lynch of Columbia Law School; Professor Lynch and I clerked together at the Court, he for Justice Brennan. And a special thanks to my law clerk Bill Burck, who has spent countless hours on this project and has made a substantial number of useful comments and edits.

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

information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain."²

Edward Lazarus, who clerked for Justice Blackmun during the 1988 Term, pokes a sharp stick in the eye of this tradition when he declares on the front cover of his book that he has written "The First Eyewitness Account of the Epic Struggles Inside the Supreme Court."³ The point is driven home by the dust jacket blurb, which declaims in breathless prose:

Never before has one of these clerks stepped forward to reveal how the Court really works—and why it often fails the country and the cause of justice. In this groundbreaking book, award-winning historian Edward Lazarus, a former clerk to Justice Harry A. Blackmun, guides the reader through the Court's inner sanctum, explaining as only an eyewitness can the collision of law, politics, and personality as the Justices wrestle with the most fiercely disputed issues of our time. . . . Unprecedented in its revelations and unparalleled in the brilliance of its analysis, *Closed Chambers*⁴ is the most important book on the Supreme Court in a generation.

While much of the book consists of sober, sometimes turgid, analysis of the Court's case law concerning the death penalty, the right to privacy, and affirmative action, the book is also a memoir of Lazarus's life and times at the Court. He thus fulfills his publicist's promise by disclosing many communications—oral and written—that supposedly took place within the Court during his tenure there. This raises a number of questions: Has Lazarus violated any ethical norms? Are the disclosures justified because they serve an important public purpose? Does the book contribute to our understanding of the Court and its processes? I take up these questions below.

I. NO ONE HERE BUT US CHICKENS

Contrary to the claims of his publicist, Lazarus has denied he did anything out of the ordinary: "This idea of absolute silence is really a myth," he told the *Washington Post*.⁵ "Clerks speak to reporters all the time. The difference is they don't put their names to it," he told the Associated Press.⁶ Lazarus has likened himself to former clerks who have

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

3. LAZARUS, *supra* note 1, at front cover.

4. *Id.* at book jacket.

5. Joan Biskupic, *Ex-Supreme Court Clerk's Book Breaks the Silence*, WASH. POST, Mar. 4, 1998, at A8 (quoting Lazarus).

6. Laurie Asseo, *Book on Supreme Court Under Fire*, AP ONLINE, Apr. 6, 1998, at 1, available in LEXIS, News Library, Curnws File. In the *Wall Street Journal*, Lazarus claimed that

written about cases decided during their clerkships,⁷ about the clerking process,⁸ or about their Justices.⁹ Lazarus also points to the fact that Supreme Court Justices have released their working papers, sometimes very soon after their death or retirement.¹⁰

On this point—whether Lazarus did something unprecedented—the book jacket has it exactly right. The claim that “former clerks . . . routinely talk to the press” is simply not true; clerks may have spoken anonymously on occasion, but the overwhelming majority do not because they consider it ethically improper. In any group there are those who break the rules; they remain anonymous because they are doing wrong. Such surreptitious disclosures no more legitimize Lazarus’s wholesale (and highly profitable¹¹) release of confidential information than petty shoplifting legitimizes armed robbery.

Nor can Lazarus find cover in the work of academic scholars who have written about the Supreme Court. Using one’s understanding of cases as a basis for scholarly discourse is very different from quoting internal Court memoranda, describing the Justices’ conduct, and telling stories about how law clerks supposedly interacted with their Justices and each other. Finally, Lazarus cannot sanitize his actions by pointing to the fact that the Justices themselves have released their papers. Justices enjoy a different status from Court employees, and it is misleading and presumptuous for Lazarus to try to shoehorn himself into the same category.

Just how far Lazarus has departed from accepted norms of law clerk conduct is illustrated by the fact that not a single former Supreme Court clerk has come to his defense—none of the three dozen who clerked with Lazarus during the 1988 Term; none of the ninety or so former Blackmun clerks; not even one of the thousand other living former clerks now serving in law practice, academia, and the judiciary. At the same time, a number of former clerks have responded to press queries or written articles expressing

“former clerks . . . routinely talk to the press.” Edward Lazarus, Letter to the Editor, WALL ST. J., Apr. 23, 1998, at A19.

7. See *Interview with Edward Lazarus*, in JURIST, May 1998, at 3 (visited Nov. 24, 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm>> [hereinafter JURIST].

8. Lazarus specifically mentions *Serving Justice* (1974), written by now Chief Judge J. Harvie Wilkinson of the Fourth Circuit after Wilkinson clerked for Justice Powell in October Term 1973. See *id.* at 3-4.

9. See *id.* at 6.

10. Lazarus says:

Thurgood Marshall, very shortly after his retirement, gave his papers to the Library of Congress; they include draft opinions, the internal memos of the justices, even his clerks’ bench memos. Justice Brennan has given full access to journalists to his papers.

So, I think that a lot of [the time the information must be kept confidential] is not really determined by any hard-and-fast rule, but just by practice.

Id. at 6.

11. Lazarus received a six-figure advance for the book, see *id.* at 13, which had a first print run in the neighborhood of 50,000 copies, see *id.* at 3.

outrage.¹² If Lazarus's conduct were benign and ordinary, as he claims, some of the hundreds of others who have served at the Court—among them Lazarus's friends and colleagues—should have rallied to his defense. That none have, despite repeated public statements impugning his honor,¹³ is a fair indication that Lazarus went where no clerk has gone before.

II. IT'S OK BECAUSE I HEARD MYSELF SAY IT

Lazarus states unequivocally that he “‘violated absolutely no legal or ethical obligations.’”¹⁴ He elaborates upon this in his author's note:

[I]n describing the private decision-making of the Justices, I have been careful to avoid disclosing information I am privy to *solely* because I was privileged to work for Justice Blackmun. In other words, I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews conducted over the last five years.¹⁵

The word “solely” is emphasized because it is crucial to Lazarus's ethical hairsplitting. Lazarus takes the position that he did not breach any confidences because all the inside information he discloses, he learned—or relearned—after he left the Court. In that respect, he argues, he is just like an investigative journalist who develops sources, conducts interviews and examines documents provided by others.

There are a number of difficulties with this position, the most basic of which is that we must believe Lazarus about where he got his information. But why should we? Lazarus provides no proof for the implausible proposition that when he tells us things he saw and heard while at the Court, he is not relying on his own perceptions and recollections, but on accounts of the same events he gathered from others. In fact, the book contains several passages where Lazarus reveals information he could not have obtained from other sources.¹⁶ For example, Lazarus describes in some

12. See, e.g., *infra* text accompanying notes 273-274.

13. See, e.g., *id.*

14. Pamela A. MacLean, *New Book Furor: Kozinski Says Author Can't Argue Before Him*, DAILY J. (L.A.), June 29, 1998, at 1 (quoting Lazarus). Elsewhere, he claims that “[t]hese ethical charges are demonstrably false.” Edward Lazarus, Editorial, *The Supreme Court Must Bear Scrutiny*, WASH. POST, July 6, 1998, at A19; cf. Interview with Edward Lazarus (June 14, 1998) (visited Nov. 24, 1998) <<http://www.booknotes.org/transcripts/50467.htm>>.

15. LAZARUS, *supra* note 1, at xi (emphasis added).

16. Lazarus differs from Professor Dennis Hutchinson, who published an unauthorized biography of Justice White, see DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998), but chose to discuss three Terms when Hutchinson was not at the Court, thereby avoiding the suspicions aroused by Lazarus's disclosures.

detail a telephone conversation with Justice Blackmun concerning *Spallone v. United States*.¹⁷ He discloses the advice he gave the Justice, and he tells us that he knew Justice Blackmun “opposed granting the stays.”¹⁸ Only Lazarus and Justice Blackmun were parties to this conversation. Lazarus also tells us that the Blackmun clerks were given instructions (presumably by the Justice) concerning the handling of death cases, “including explicit warnings not to be overly influenced by abolitionists from the Brennan and Marshall Chambers.”¹⁹ Elsewhere,²⁰ Lazarus quotes at length from a memorandum he wrote to Justice Blackmun concerning *Webster v. Reproductive Health Services*.²¹ Finally, Lazarus describes the scene in Justice Blackmun’s office after the conference in *Webster*.²²

Disclosures such as these would not breach confidentiality if Justice Blackmun had consented to them. But Lazarus does not claim the Justice consented, and it is almost certain he did not. Lazarus claims to have discussed the book with Justice Blackmun on numerous occasions, but never “‘the intimate details.’”²³ And why not? One would think that personal loyalty—if not an actual professional obligation—would have prompted Lazarus to consult Justice Blackmun before writing “The First Eyewitness Account” from inside the Supreme Court.

When news of the book first broke, an enterprising journalist called the Supreme Court and reported as follows: “Blackmun retired in 1994 but still goes daily to his office at the Court, and some people close to him said he was unaware until yesterday that his former clerk was publishing a book.”²⁴ Justice Blackmun has never retracted this disavowal of knowledge, even though he and Lazarus have since corresponded.²⁵ It is thus a fair inference that the Justice consented neither to disclosure of his conversations with Lazarus, nor to Lazarus’s quotation from the bench memo.²⁶ Because

17. 487 U.S. 1251 (1988).

18. LAZARUS, *supra* note 1, at 45-46.

19. *Id.* at 269. Justice Stevens’s clerks were supposedly given identical instructions, though we have no clue how Lazarus knows this.

20. *See id.* at 396.

21. 492 U.S. 490 (1989).

22. *See* LAZARUS, *supra* note 1, at 401. In various other subtle ways, Lazarus seems to reveal inside information about Justice Blackmun’s private views and conversations, as well as the internal processes of his chambers. *See infra* notes 199, 204, 242 and accompanying text.

23. *Interview with Edward Lazarus*, *supra* note 7, at 4.

24. Biskupic, *supra* note 5.

25. When asked whether he has spoken with Justice Blackmun since the book was published, Lazarus responded, “‘We’ve written, but not spoken.’” *Interview with Edward Lazarus*, *supra* note 7, at 4.

26. Lazarus might take the position that it is only a breach of confidence to divulge what the Justice said to him, not the advice he gave the Justice. But a lawyer must maintain confidential all portions of a communication with a client, including the advice he gives. *See, e.g.*, ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 55:301, Practice Guide No. 118 [hereinafter ABA/BNA LAWYERS’ MANUAL] (“The ethical obligation [of confidentiality] protects all information regarding the representation, regardless of the source, not only information given to the lawyer in confidence by the client.”). In any event, Lazarus also discloses some of Justice

Lazarus cannot reasonably claim to have obtained these confidential details from independent sources, it is fair to ask how many other passages in the book were based on Lazarus's personal recollection rather than his "investigative journalism."

But even if Lazarus did reconstruct everything by talking to others, it seems absurd to argue that a former clerk honors his own duty of confidentiality by inducing other clerks to betray theirs.²⁷ Moreover, Lazarus admits he made full use of his insider status in piecing together his "reconstruction." In his author's note, he tells us that his "experience as a law clerk for Justice Harry A. Blackmun was indispensable" in writing the book.²⁸ He continues:

The clerkship gave me unusual access to sources knowledgeable about the Court and armed me with questions others might not think to ask. It also gave me a significant advantage in evaluating and interpreting publicly available primary source material about the Court, in particular the unpublished draft opinions and memorandum contained in the paper of various former Justices. Finally, the clerkship left me with specific memories and a general view of life at the Court against which to evaluate the information I subsequently gathered.²⁹

A little later on, he explains that he did his best "to sift out information that was not independently corroborated or inherently credible in light of [his] own experience."³⁰

This kind of "reconstruction" is very different from what an ordinary journalist would do. A journalist who set out to write an insider account of what transpired during the 1988 Supreme Court Term would call people who worked at the Court—primarily former law clerks—and try to get them to talk about their experiences. Since publication of *The Brethren* in 1979, former clerks have been especially skittish about discussing Court confidences with the press, so the journalist would have to spend much time and effort cultivating sources and persuading them to part with documents illicitly taken from the Court.³¹ Lazarus, by contrast, only had to call his former colleagues and chat.

Blackmun's words and thoughts. See, e.g., *infra* note 78 and accompanying text. For a discussion of the similarities between the lawyer-client and clerk-judge relationships, see *infra* note 38.

27. Professor Stephen Gillers explains that "the ethical prohibition against voluntary use or disclosure [of confidential information] generally continues even if persons other than the lawyer know of the information, whether through the client or otherwise." STEPHEN GILLERS & NORMAN DOVSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 288 (1985).

28. LAZARUS, *supra* note 1, at xi.

29. *Id.* (internal citations omitted).

30. *Id.* at xii.

31. Woodward and Armstrong said they talked to over 170 former law clerks and dozens of former Court employees, but it is not clear how many gave them confidential information. See

Would former clerks have been willing to discuss events at the Court during their mutual time there? Certainly, as there is no wall of confidentiality between law clerks of the same vintage as to matters that were common knowledge within the Court.³² Clerks contacted by Lazarus would have assumed he was familiar with the events himself and was talking to them to refresh his recollection or gain a new perspective. No clerks, unless specifically warned, would have guessed that Lazarus was speaking to them as a constructive *tabula rasa*—an outsider—just like an investigative journalist. Nor would any clerks have imagined that Lazarus would publish a book discussing events that transpired during his tenure at the Court; no clerk in history had done anything like this—it was quite unthinkable.³³ Lazarus does not claim that he alerted fellow clerks that they should treat him as if he were an ordinary journalist. Without such a warning, he cannot claim that the disclosures made to him by fellow clerks were independent of his own status as former clerk.³⁴

Lazarus's reconstruction also has a far greater air of authenticity than that of an ordinary journalist. This is no trivial point. An investigative reporter starting from scratch cannot be certain that any story he picks up is accurate or complete. Reputable journalists therefore require multiple sources or tangible corroboration. Lazarus by contrast provided his own corroboration; he himself functioned as an automatic second source.³⁵ Readers, moreover, would find disclosures from one who was there inherently more credible than those pieced together by an outsider.³⁶

BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 3 (1979). More recently, Professor Dennis Hutchinson interviewed former clerks while writing a biography of Justice Byron White, but none provided him with Court documents and “[m]ost of the clerks were fairly unhelpful.” Tony Mauro, *Ex-Clerk Writes Biography of Byron White*, *RECORDER*, June 22, 1998, at 1 (quoting Hutchinson). The difference may well be in the heightened wariness about speaking to the press after *The Brethren*.

32. There is a continuing duty of confidentiality as to matters that transpired within chambers, and former law clerks do not normally discuss such matters except with former clerks from the same chambers and the same vintage.

33. See Gretchen Craft Rubin, *Betraying a Trust*, *WASH. POST*, June 17, 1998, at A27 (“Perhaps only the Justices themselves and former clerks . . . can appreciate just what a break with tradition this book represents.”).

34. Even those who applaud Lazarus recognize that he “took advantage of law clerks’ natural tendencies to talk more freely to fellow clerks than they would to outsiders.” See Tony Mauro, *Looking into Closed Chambers: A Journalist’s View*, *AM. LAW.*, May 1998, at 42. Lazarus, in fact, wants it both ways: He claims the special status of an insider for purposes of selling the book, see *supra* text accompanying notes 28-30, but he wants to be just Joe Journalist when it comes to his ethical responsibilities, see *supra* notes 14-15 and accompanying text.

35. See LAZARUS, *supra* note 1, at xi (“[T]he clerkship left me with specific memories and a general view of life at the Court against which to evaluate the information I subsequently gathered.”).

36. This worsens the ethical violation, in the opinion of Professor Stephen Gillers, who was an expert witness in the case of *Grutman Katz Greene & Humphrey v. Goldman*, N.Y. L.J., June 11, 1996, at 27 (N.Y. Sup. Ct., June 10, 1996). The reply brief of the party on whose behalf Gillers testified summarizes his views:

Lazarus and his publicist play up this fact when explaining why *Closed Chambers* is superior to other books that have plowed this terrain.³⁷

The flaws in Lazarus's reconstruction theory are highlighted by comparing him to a lawyer who writes a book disclosing client confidences.³⁸ Like Lazarus, the lawyer claims he breached no ethical duty because he assumed the role of journalist and then had a long conversation with his co-counsel, during the course of which the other lawyer revealed every piece of confidential information that found its way into the book.³⁹ Would we accept this as an adequate excuse for the disclosure? Certainly not. Similarly, even if Lazarus got his information from interviewing other clerks, he would still have breached his obligation not to divulge confidential information he learned during his clerkship.⁴⁰

Prof. Gillers [testified at trial that] no matter how widely reported a statement about a client might be, as a fiduciary, an attorney has a duty to "refrain from joining in the chorus." Because a lawyer "has a special place as someone deserving of credibility" with respect to his own client, a lawyer's remark about a client or a client's affairs lends weight to the information beyond the content of the remark.

Reply Brief for Defendant-Respondent/Cross-Appellant Lillian Goldman, N.Y. L.J., June 11, 1996, at 15.

37. See LAZARUS, *supra* note 1, at book jacket; *Interview with Edward Lazarus*, *supra* note 7, at 3-4.

38. The analogy between the lawyer-client relationship and the clerk-Justice relationship is not perfect, but it is close enough to provide useful guidance. Law clerks perform many of the functions of lawyers: They research the law, provide legal advice, and draft legal documents. Moreover, there is a tradition of confidentiality that is very similar to that of the lawyer-client relationship. One might wonder whether a law clerk's true client is not the public, rather than the Justice. Clerks, however, are hired for the express and singular purpose of assisting the Justices in performing their judicial duties. Clerks have no independent responsibility to further the rule of law or explicate constitutional principles; rather, they must provide the Justices with the support they need to accomplish these goals. Clerks are, of course, obligated to disclose any observed criminal activity (such as the taking of a bribe), but a lawyer is similarly required to disclose criminal activity he observes during the course of representation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) (1997).

39. In *Goldman*, N.Y. L.J., June 11, 1996, at 27, a lawyer named Norman Grutman published a book that discussed in highly unflattering terms matters related to his representation of Lillian Goldman, a former client. Grutman claimed he revealed nothing in the book that was not already public; Goldman identified 11 passages in the book "that disclose[d] secrets, ridicule[d] her or lie[d] about her." *Id.* at 30. The court ruled for the client, relying on the ABA *Model Code of Professional Responsibility* DR 4-101:

[The confidences entrusted by Goldman to Grutman] constitute verbal and non-verbal information that were [sic] imparted only because of the trust and confidence that Mrs. Goldman as client reposed in Mr. Grutman as her lawyer. He was told more than once not to use her secrets, confidences or anything else about her for publicity purposes. He did not heed these admonitions. Instead, he used the information for his own personal aggrandizement and profit. This was a breach of his fiduciary duty.

Goldman, N.Y. L.J., June 11, 1996, at 33-35.

40. Lazarus's legal and ethical failings are discussed in greater detail by Professor Richard Painter in a forthcoming issue of the *Michigan Law Review*. See Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. (forthcoming 1999) (manuscript on file with *The Yale Law Journal*); see also Richard W. Painter, Editorial, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23 [hereinafter Painter Editorial]. Painter is an authority on legal ethics. See, e.g., JOHN T. NOONAN JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER (1997). On the other hand, Dean Anthony Kronman, another

While claiming he breached no confidences because he got all his information from other sources, Lazarus also claims he breached no confidences because he was free to disclose everything he learned during his clerkship.⁴¹ But his disclosures violated several provisions of the Code of Conduct for Law Clerks of the Supreme Court of the United States. Canon 2 explains that “[t]he law clerk owes the Justice and the Court complete confidentiality, accuracy, and loyalty.”⁴² Canon 3(C) states that “a law clerk should never disclose to any person any confidential information received in the course of the law clerk’s duties.”⁴³ The prohibition is straightforward and categorical: If the confidential information is received during the course of the clerk’s duties, it may not be made public. There is no exception where the clerk also obtains the information from another source.⁴⁴ Of course, if the information were already public, the law clerk would not be divulging it. But Lazarus boasts that his insider account is superior precisely because he uses insider documents that are not generally available.⁴⁵ His disclosures thus fall squarely within the ambit of this prohibition.

authority, *see* ANTHONY KRONMAN, *THE LOST LAWYER* (1993), found no cause for criticism when he gave the book a warm dust-jacket endorsement: “In this well-researched and wonderfully-written book, Edward Lazarus opens the Court to our inspection and takes us on a revealing tour of its hidden routines.” Some have read this as approving Lazarus’s conduct. *See, e.g.*, Professor Gideon Kanner, Letter to the Editor, *WALL ST. J.*, Apr. 23, 1998, at A19.

41. *See supra* notes 5-10 and accompanying text; *infra* note 53 and accompanying text.

42. The relevant portion of Canon 2 is as follows:

The law clerk owes the Justice and the Court complete confidentiality, accuracy, and loyalty. The Justice relies upon the law clerk’s research in reaching conclusions on pending cases. The Justice relies on confidentiality in discussing performance of judicial duties, and the Justice must be able to count on complete loyalty.

.....

Separate and apart from the duty owed by each law clerk to the appointing Justice is the duty owed by each law clerk to the Court as a body. Each law clerk is in a position to receive highly confidential circulations from the chambers of other Justices, and owes a duty of confidentiality with respect to such material similar to the duty owed to the Justice employing the clerk.

SUPREME COURT CODE OF CONDUCT, *supra* note 2, at Canon 2.

43. *Id.* at Canon 3(C). The full text reads as follows:

The relationship between a Justice and law clerk is essentially a confidential one. A law clerk should abstain from public comment about a pending or impending proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk’s duties, nor should the law clerk employ such information for personal gain. The law clerk should take particular care that Court documents not available to the public are not taken from the Court building or handled so as to compromise their confidentiality within chambers or the Court building in general.

Id.

44. *Cf. Brennan’s Inc. v. Brennan’s Restaurants*, 590 F.2d 168, 172 (5th Cir. 1978) (holding that the ethical obligation to guard the confidences and secrets of clients “exists without regard to the nature or source of information or the fact that others share the knowledge” (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1970))); *Kaufman v. Kaufman*, 405 N.Y.S.2d 79, 80 (N.Y. App. Div. 1978) (same); *see also supra* note 36 (discussing the *Goldman* case).

45. *See, e.g.*, LAZARUS, *supra* note 1, at 402.

Lazarus also violated Canon 3(D), which states that a law clerk “should not purport to interpret or try to explain” the actions or opinions of the Court.⁴⁶ Lazarus uses inside information to explicate certain cases decided by the Court during his tenure, as Canon 3(D) prohibits. Finally, Lazarus either committed, abetted, or profited from a violation of Canon 3(C), which prohibits the removal of nonpublic documents from the Supreme Court building.⁴⁷ Some of the documents Lazarus discusses and quotes (such as his memorandum in *Webster*⁴⁸) he most likely removed himself. Others, such as a draft purportedly circulated by Chief Justice Rehnquist in *Webster*—and the correspondence concerning that draft⁴⁹—were probably removed by someone else, but made public by Lazarus.⁵⁰ Even if Lazarus himself did not remove the documents from the building, somebody must have done so in contravention of the Supreme Court Code of Conduct, and possibly in violation of federal criminal law.⁵¹ It is unethical for a former law clerk—particularly one who is now a federal prosecutor—to profit from items procured in such an illicit fashion.⁵² To take possession of the

46. See SUPREME COURT CODE OF CONDUCT, *supra* note 2, at Canon 3(D). The relevant part of this provision reads:

After the Justice acts, the action and, if there is an opinion, the reasoning underlying the action are matters of public record. Except as authorized, the law clerk should not purport to interpret or try to explain them. 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.

Id.

47. Removal of documents from the Supreme Court is not a peccadillo; it is a serious violation of an important rule with which every Court employee is familiar. Part of every law clerk’s orientation at the Court consists of an introduction to the ubiquitous “burn bags”—specially marked paper sacks in which all drafts and other discarded documents must be put. The bags are regularly collected and (contrary to their name) shredded. As the *Supreme Court Code of Conduct* notes: “The law clerk should take particular care that Court documents not available to the public are not taken from the Court building or handled so as to compromise their confidentiality within chambers or the Court building in general.” SUPREME COURT CODE OF CONDUCT, *supra* note 2, at Canon 3(C).

48. See LAZARUS, *supra* note 1, at 395-96.

49. See *id.* at 401-02.

50. Lazarus’s reliance on nonpublic documents may be more extensive than it appears. Many of the documents one would expect to find in the Marshall Papers are not there. See, e.g., *infra* note 217. A request for copies of nonpublic documents on which Lazarus relied in writing the book has remained unanswered. See Letter from Alex Kozinski to Edward Lazarus (Sept. 17, 1998) (on file with *The Yale Law Journal*).

51. See Richard W. Painter, *Keeping Confidences: A Response to Edward Lazarus*, in JURIST, *supra* note 7, at 29-30. That a criminal law may have been violated does not mean that a United States Attorney would prosecute. Still, in considering the culpability of Lazarus and his sources, it matters that someone in the chain of possession may have violated the law.

52. Lazarus claims that his position as a federal prosecutor is irrelevant because the book was completed (though not published) before he became an Assistant United States Attorney (AUSA) for the Central District of California. See Interview with Edward Lazarus, *supra* note 14. Yet his status as an AUSA is mentioned both in the author’s note and the dust jacket. This may well give additional weight to the charges of misconduct Lazarus hurls at the Justices and their clerks, and it may lend credibility to Lazarus’s claim that he did nothing wrong.

purloined documents and seek fame and fortune from publishing them is the moral equivalent of trafficking in stolen merchandise.

Lazarus dismisses the Supreme Court Code of Conduct as no longer applicable to him.⁵³ He relies on the final paragraph of the Code, titled “Effective Date of Compliance”:

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

This provision specifies when the law clerk’s obligations commence, which is why it is called “Effective Date of Compliance.” It says not a word about when obligations cease. Lazarus reads the command that clerks comply with the Code “throughout [their] clerkship” as cutting off all obligations on the day the clerkship ends. But the phrase says nothing of the sort; at most it is a negative pregnant. By contrast, Canon 3(C) states categorically that clerks must “never” disclose confidential matters learned during the clerkship. If there is a tension between the two provisions—and it is not clear that there is—Canon 3(C)’s explicit “never” trumps the weak implication of the effective date of compliance provision.⁵⁵ This reading is also consistent with longstanding tradition at the Supreme Court and with the analogous rule as to the duration of lawyer confidences: “The ethical duty to keep information confidential outlasts the term of a lawyer’s employment and continues indefinitely.”⁵⁶

Can Lazarus elide his obligation to the Supreme Court by donning a journalist’s hat? Not any more than a lawyer can shed ethical obligations by quitting the bar. While a lawyer can change professions and become a full-time journalist, when he writes about matters he learned in confidence as a

53. Lazarus has made this argument in various places. In a letter to the *Wall Street Journal* he said, “As this and other code provisions make clear, it applies to clerks only during their service at the Court (not to former clerks who routinely talk to the press).” Lazarus, *supra* note 6, at A19. Lazarus has not argued that the Code does not apply to him because it was not in effect when he started his clerkship; nor could he. The Code was adopted, or promulgated, during the course of his clerkship, and some of the events he discloses occurred after the Code was in place. The Code, in any event, merely made explicit what was generally understood to be the rule all along.

54. SUPREME COURT CODE OF CONDUCT, *supra* note 2.

55. “Never” is a simple English word with a fixed meaning, no more subject to misinterpretation than other simple English words like “is,” “alone,” and “six.”

56. See ABA/BNA LAWYER’S MANUAL, *supra* note 26, at 55:301; see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 111 cmt. c (1990) (“The duty [of confidentiality] extends beyond the end of the representation.”). Lazarus acolyte Tony Mauro seems to see significance in the fact that the Supreme Court rules are not legally enforceable. See Tony Mauro, *Supreme Court Tightens Secrecy Rules for Clerks*, USA TODAY, Nov. 9, 1998, at 1A. The rules might well be enforceable by such means as expulsion or debarment from the Supreme Court bar, but even if legally unenforceable, the Code does set a standard for ethical conduct.

lawyer, he cannot discard his lawyerly obligations like a pair of old shoes. Lazarus's entire enterprise—what he calls “develop[ing] sources”⁵⁷—consisted of tracking down former colleagues and inducing them to violate their common trust. Even accepting Lazarus's excuses at face value, his conduct falls far short of accepted ethical norms in the legal profession.

Lazarus also violated the bond of loyalty to his Justice, the other Justices, and his fellow clerks.⁵⁸ During the term of Lazarus's clerkship, everyone at the Court (except Lazarus) acted on the common understanding that what happened within the Court's nonpublic areas would not be made public. The terms of this understanding were not written down and its contours were not crystal clear. As with all rules based on tradition, there was fuzz at the edges, and everyone relied on everyone else's good faith in staying within the limits. Thus, clerks generally felt free to tell endearing or inspiring stories (not disclosing case confidences) in a tribute to their bosses or other Justices. But it was clearly understood that, under normal circumstances, whatever one learned inside the Court—whether or not it was covered by the duty of confidentiality—would not be repeated on the outside, especially if it tended to demean the Court, the Justices, or fellow clerks.⁵⁹

There are those who think the Court should be more open, and perhaps it should be; it is a fair subject for discussion. But it is grossly unfair for Lazarus to change the rules unilaterally, many years after everyone else acted on the common understanding that things would remain confidential. Consider Lazarus's description of an incident involving Justice Marshall:

There were those who had begun to suggest that Marshall was growing senile, but I saw no evidence of it. On the contrary, at the once-a-term lunchtime audience he granted the clerks from other Chambers, he regularly bested his youthful interlocutors. Most memorable was his response to a particularly silly question asking what he would do, if all powerful, to solve the problem of racism in America. After a perfect pause and in perfect deadpan, he gave his response: “Kill all the white people.”⁶⁰

57. Interview with Edward Lazarus, *supra* note 14.

58. See SUPREME COURT CODE OF CONDUCT, *supra* note 2, at Canon 2. A lawyer's duty of loyalty to his client is broader than the duty to protect confidential information. Thus “an attorney's observations during the professional relationship of the behavior, demeanor and conduct of a client” may not be disclosed to the detriment of the client. *Grutman Katz Greene & Humphrey v. Goldman*, N.Y. L.J., June 11, 1996, at 78 (N.Y. Sup. Ct., June 10, 1996) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-11(A)).

59. See Carter Phillips, *Looking into Closed Chambers: A Lawyer's View*, AM. LAW., May 1998, at 42; Rubin, *supra* note 33, at A27.

60. LAZARUS, *supra* note 1, at 278 n.*.

Lazarus says he included this as a tribute to Justice Marshall,⁶¹ but not everyone reads it that way.⁶² Those who knew and admired the Justice would take his comment—delivered off-the-cuff on home turf—with a large shaker of salt. But it is unlikely that Justice Marshall would have been comfortable putting the story in print, to be read by people who did not know him, could not see his facial expression and might take the comment at face value. Certainly he himself never said anything of the sort in public. Justice Marshall would also not have been pleased to read that he was “frequently disengaged”⁶³ and “no longer up to his responsibilities, or even the appearance of being up to them”⁶⁴ so that “[w]ith a minimum of guidance, his clerks did the work.”⁶⁵ Furthermore, he probably would have objected to Lazarus’s report that he once became so confused that he voted to affirm a death penalty and then had to change his vote after a law clerk pointed out the error.⁶⁶ Similarly, Justice Brennan would not have been happy to read that he was supposedly known as “Piggy” for keeping the good opinions,⁶⁷ or Justice Stevens that he is supposedly called the “FedEx Justice” for conducting Court business from afar.⁶⁸ Justices and their clerks would have been a lot more guarded in what they said outside their own chambers had they known that someone in their midst would report (and perhaps distort) their words and deeds to the world.⁶⁹

Even Justice Blackmun does not escape Lazarus’s poison pen.⁷⁰ Although he pays Justice Blackmun a number of effusive compliments,⁷¹ one could easily infer from his book that the Justice is guilty of false modesty,⁷² has a mediocre legal intellect,⁷³ and did a poor job in drafting

61. See Lazarus, *supra* note 6, at A19.

62. See Painter Editorial, *supra* note 40.

63. LAZARUS, *supra* note 1, at 278.

64. *Id.* at 446.

65. *Id.* at 278.

66. See *id.* at 446-47.

67. See *id.* at 310.

68. See *id.* at 279. Professor Kathleen Sullivan remarks that Lazarus’s “derisive characterizations . . . show [him] to be churlish and indiscreet . . .” Kathleen M. Sullivan, *Behind the Crimson Curtain*, N.Y. REV. BOOKS, Oct. 18, 1998, at x.

69. As Gretchen Craft Rubin notes, Lazarus exacerbates the unfairness by telling much more about Justices he did not clerk for than about his own:

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, *supra* note 33, at A27.

70. As long-time Court observer Lyle Denniston notes: “No Justice now serving, and none of the great or near-great of the recent past, escapes the reckless dart-throwing of this resentful, grudge-holding former law clerk. Not even now-retired Justice Harry A. Blackmun . . .” Lyle Denniston, ‘*Closed Chambers*’: *Law Clerk’s Revenge*, BALTIMORE SUN, Apr. 12, 1998, at 5F.

71. See, e.g., LAZARUS, *supra* note 1, at 23, 39.

72. In describing his interview with Justice Blackmun, Lazarus paraphrases the Justice as saying that “his was the least desirable clerkship at the Court, in part because his colleagues were

Roe v. Wade.⁷⁴ In addition, Justice Blackmun comes across as openly contemptuous of lawyers who argued that *Roe* should be overruled,⁷⁵ unwilling or unable to write his own opinions,⁷⁶ obsessed with the survival of his magnum opus,⁷⁷ subject to influence by the press,⁷⁸ prone to melodrama,⁷⁹ and willing to resort to political appeals when it suited his purpose.⁸⁰

Lazarus also breaches the duty of loyalty to fellow clerks. None of those who clerked with Lazarus during the 1988 Term—probably none who ever clerked at the Court—could have imagined that their words and actions (real, imagined, or distorted) would become the centerpiece of a book where the author “tells tales and . . . names names.”⁸¹ In Lazarus’s book, fellow clerks make appearances drafting bench memos,⁸² giving advice to their Justices,⁸³ plotting strategy,⁸⁴ scheming behind their Justices’ backs,⁸⁵ sending intemperate e-mails,⁸⁶ celebrating executions,⁸⁷ acting like bullies,⁸⁸ engaging in “plotting, maneuvering, and warfare,”⁸⁹ planning to fake an unwanted pregnancy in order to “sensitize” Justice O’Connor to the importance of abortions,⁹⁰ “trad[ing] punishing fouls”⁹¹ on the

more intelligent and better teachers than he.” *Id.* at 23. This passage is preceded by the following qualification: “with a self-deprecation hard to imagine (or believe) in a Supreme Court Justice, he insisted . . .” *Id.* The parenthetical tells us that Lazarus himself may not have believed Justice Blackmun’s self-deprecating comment.

73. *See id.* at 279 (“Alone among the liberals, Justice Stevens possessed the pure brains and quickness of mind to counter Scalia.”).

74. *See id.* at 366 (“Presented with the challenge of extending the right to privacy from contraception to abortion, the Court largely skipped the process of interpretation and moved on to announcing its conclusions. While the Court decorated the fringes of its opinion with historical details, it left the center barren.”); *id.* at 367 (“[T]he Court in *Roe* must be doubly faulted for the hollowness of its effort. Such failings raise an obvious question: how, especially in such a monumental case, could the Court have so failed in its responsibility to justify its ruling or even clarify the source of its authority?”). While Lazarus speaks of the Court’s opinion in *Roe*, his criticisms are obviously directed most pointedly at *Roe*’s author. *See id.* at 369-71.

75. *See id.* at 465 (“Preate had barely opened his mouth when Justice Blackmun asked contemptuously whether he had even read *Roe*.”).

76. *See infra* note 242 and accompanying text.

77. *See id.* at 379-80, 410.

78. *See id.* at 155-56 (“Then Blackmun, with the *Times* article on his desk, told his clerks that he had changed his mind . . .”).

79. *See id.* at 418-19, 421, 480.

80. *See id.* at 473.

81. Evan Fray-Witzer, *The End of a Gag Order: A Former U.S. Supreme Court Clerk Breaks a Taboo and Tells a Few Unflattering Tales out of Chambers*, BOSTON GLOBE, Apr. 19, 1998, at N1.

82. *See* LAZARUS, *supra* note 1, at 197.

83. *See id.* at 315, 391-93, 414.

84. *See id.* at 210.

85. *See id.* at 315.

86. *See id.* at 265.

87. *See id.* at 269.

88. *See id.* at 265-66.

89. *Id.* at 419.

90. *Id.* at 384.

basketball court, and falling into a courtyard fountain during a drunken scuffle.⁹² These clerks are divided into warring factions who jockey for influence in disposing of the important cases that come before the Court. The Justices? An inconvenience, the pro forma authors of opinions who must be jollied and bamboozled into doing the canny law clerks' bidding.

No lawyer—and certainly no lawyer who hopes to practice before the Supreme Court—would want any place at all in Lazarus's book. Though most clerks come off badly, even the few who do not are tarred with the suspicion that they must have talked out of school and given Lazarus access to secret documents.⁹³ Clerks have denied some of the book's details,⁹⁴ and Lazarus has retracted one of the most scurrilous stories.⁹⁵ Short of a categorical denial, however, former clerks cannot explain, augment, justify, or put Lazarus's allegations in context without themselves divulging Court confidences. By preying on clerks who cannot respond without violating their own duty, Lazarus has guaranteed himself a free ride.⁹⁶

III. THE ENDS JUSTIFY THE MEANNESS

Why worry about whether Lazarus committed an ethical breach, Lazarus and his defenders have argued, when he has performed an important public service by revealing some of the terrible things supposedly going on within one of our most important public institutions?⁹⁷ A small misstep for Lazarus, a giant leap for mankind.

91. *Id.* at 274.

92. *See id.* at 419.

93. For example, Lazarus reports a discussion within the O'Connor chambers regarding *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See* LAZARUS, *supra* note 1, at 391-94. Who could have divulged this information except the Justice and her clerks? Assuming Justice O'Connor is not the source, that reduces the number of possible sources to four. One of the four was a member of the cabal—a group of conservative clerks much vilified by Lazarus—and therefore beyond suspicion, whittling the number to three. How do these three escape the terrible suspicion that they disclosed conversations with Justice O'Connor and supplied Lazarus with internal chambers documents? *See, e.g., infra* text accompanying note 142.

94. *See, e.g.,* Biskupic, *supra* note 5, at A8 (“[A law clerk], described as the leader of the conservative ‘cabal,’ said he did not know of any champagne celebration of an execution.”); Robert J. Guiffra, Jr., Letter to the Editor, *The Role of Court Clerks*, TIME, Apr. 20, 1998 (stating that *Closed Chambers* “presents a misleading and distorted account of the 1988 Term of the Court, including what he says about me.”); Tony Mauro, *The Hidden Power Behind the Supreme Court: Clerks Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A, 2A (“Several clerks mentioned in the book declined to comment publicly, but said Lazarus’s charge [that a champagne party occurred after Ted Bundy’s execution] is inaccurate.”).

95. *See infra* text accompanying note 127.

96. *See* Rubin, *supra* note 33 (“By being the first flatly to break the code of confidentiality, [Lazarus] vaults himself into the public eye and capitalizes on [other clerks’] sense of their duty to remain silent.”).

97. *See, e.g.,* Ben Gerson, *Inside Out*, L.A. TIMES, June 14, 1998, at A6; Mauro, *supra* note 34, at 42; Lawrence R. Velvel, *Justice at the High Court: Not Blind Enough?*, WASH. POST, June 15, 1998; Tony Mauro, *Lazarus Goes Where Reporters Fear to Tread*, in JURIST, *supra* note 7, at 15.

But Lazarus's substantive points—his shrill criticism of the Supreme Court's internal workings—are tied to his methodology. Because Lazarus offers virtually no supporting citations for most of his claims, it is difficult to know how seriously to take his criticisms;⁹⁸ it all depends on how much one is willing to trust the perception, accuracy and fairmindedness of Lazarus and his unnamed sources. Unfortunately, the book leaves considerable doubt that Lazarus and his sources were, to borrow Robert Heinlein's term, "Fair Witnesses."⁹⁹ While we may never know the truth of many of Lazarus's allegations, some can be checked out. It is also possible to make a rough assessment of Lazarus's fairmindedness by comparing how he treats similar incidents involving Justices and clerks he respects and admires, and those he does not.

One of Lazarus's big claims is that the Justices have yielded too much power to law clerks, and that a group of conservative clerks (calling themselves, tongue in cheek, "the cabal") took advantage of the malleability of some Justices to push a conservative agenda.¹⁰⁰ In essence, this is a criticism of how the Justices run their chambers—the process by which they decide cases and write opinions. But a Justice's chambers are not made of glass; there are no hidden microphones, no secret cameras. What goes on inside—how Justice and clerks interact—cannot be observed by anyone other than chambers personnel: The Justice, the clerks, the secretaries. Outsiders, even ones working in the same building, can make no independent judgment about this process; they must rely on hearsay, rumor or guesswork.¹⁰¹

98. Others have noted this shortcoming. See, e.g., Peter Irons, *Raising Lazarus*, in JURIST, *supra* note 7, at 31, 32-33. Lazarus claims that "[u]nless otherwise noted, [the Marshall Papers] were the source for the many internal Court documents, including the drafts and memos of other Justices, that I quote or refer to in the book." LAZARUS, *supra* note 1, at xi. This appears to be an overstatement. For example, Lazarus describes the contents of a pro-*Roe v. Wade* internal memo written by one of Justice Souter's clerks regarding *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See LAZARUS, *supra* note 1, at 468. Lazarus does not attribute this memorandum to any public source, and it is unlikely that Justice Marshall's papers contain memoranda written by Justice Souter's clerks after Justice Marshall had retired from the Court. Lazarus has refused to share his sources. See *supra* note 50. There is thus no way for anyone to verify Lazarus's claim that this memorandum, if it even exists, convinced Justice Souter to vote as he did in *Casey*.

99. See ROBERT A. HEINLEIN, *STRANGER IN A STRANGE LAND* 99 (1961).

100. The claim is repeated throughout the volume, see, e.g., LAZARUS, *supra* note 1, at 261-87, and in many media appearances Lazarus has made promoting the book. See, e.g., *Booknotes: Interview: Author and Former Supreme Court Law Clerk Edward Lazarus on His Recent Book, "Closed Chambers," and His Experiences as Law Clerk to Justice Harry Blackmun* (National Cable Satellite Corporation television broadcast, June 14, 1998), available in 1998 WL 6616055; *Interview: Author Lazarus Discusses His New Book, "Closed Chambers"* (NBC television broadcast, Apr. 8, 1998), available in 1998 WL 5262655; *Osgood File: Supreme Court Justice Clerk Discovers Lack of Balance on High Court* (CBS radio broadcast, June 15, 1998), available in 1998 WL 5282898; *Weekend Edition: Closed Chambers* (National Public Radio broadcast, Apr. 25, 1998), available in 1998 WL 6284860.

101. Supreme Court practitioner and former clerk Carter Phillips makes the same observation:

Secretaries to Supreme Court Justices are famous for their discretion. Law clerks tend to be very protective of their Justices and will seldom divulge detailed information about interactions within their chambers, just as Lazarus gives us very little insight into what happened within his own Justice's chambers. As Professor Mark Tushnet explains:

Law-clerk accounts of the Court's operations are infected by a serious flaw. Law clerks won't tell what happened inside "their" chambers, and they don't know what happened inside other chambers. Gossip flows freely among the clerks, but information is harder to come by. And, as should be expected, clerks exaggerate—they overstate the importance of their own Justice and, more significantly for present purposes, they overstate the importance of the work they do.¹⁰²

Given the unreliability of his information network, Lazarus would have had to exercise a fair degree of skepticism to get at the truth. Instead, he glommed on to every scrap of flotsam and jetsam washed up from the law clerk rumor mill. For example, he reports that "[i]t was received wisdom among clerks . . . that Justice O'Connor so distrusted Justice Brennan—for having hoodwinked her in some unnamed past case—that she refused to join any of his majority opinions for the Court."¹⁰³ Thrown out as a piece of "received wisdom," this has an air of authenticity that scorns verification; most readers, especially non-lawyers, would accept it as fact. It is also highly damaging, painting Justice Brennan as a sharp operator and Justice O'Connor as thin-skinned and petty. But it is not true. During Lazarus's Term at the Court, Justice O'Connor joined seven of Justice Brennan's eleven opinions for the Court where they were on the same side,¹⁰⁴ and Justice Brennan joined eight of Justice O'Connor's nine.¹⁰⁵ Over the nine

Contrary to Lazarus's depiction, law clerks in one set of chambers have only the most limited access to information in other chambers. Most clerks are careful not to reveal too much about their justice or to portray the justice or themselves in a harmful light. Thus, Lazarus's analyses based on law clerk communications must be skeptically examined in light of the enormous potential for distortion, calling into question all the conclusions he draws from his undisclosed sources.

Phillips, *supra* note 59, at 44.

102. Mark Tushnet, *Hype and History*, in *JURIST*, *supra* note 7, at 22-23.

103. LAZARUS, *supra* note 1, at 277.

104. Justice O'Connor joined in full in the following opinions of the Court written by Justice Brennan: *Lauro Lines v. Chasser*, 490 U.S. 495 (1989); *Mississippi Band of Choctaw Indians v. Holfield*, 490 U.S. 30 (1989); *Northwest Central Pipeline Corp. v. State Corp. Commission*, 489 U.S. 493 (1989); and *Reed v. United Transportation Union*, 488 U.S. 319 (1989). She concurred in part in the following Brennan opinions: *Missouri v. Jenkins*, 491 U.S. 274 (1989); *United States v. Stuart*, 489 U.S. 353 (1989); and *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988).

105. Justice Brennan joined in full in the following opinions of the Court written by Justice O'Connor: *Sullivan v. Hudson*, 490 U.S. 877 (1989); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989); *Bonito Boats, Inc. v.*

years in which they served together, Justices Brennan and O'Connor joined in the same opinion, concurrence or dissent a total of eighty-eight times.

Another "fact" Lazarus reports without skepticism is that Chief Justice Rehnquist delayed the vote on the certiorari petition in *Casey* in an effort to influence the outcome of the 1992 presidential election:

[T]he Chief evidently decided to make some political chess moves of his own. He started "relisting" *Casey*—Court jargon for having consideration of a pending cert. petition deferred until the next conference. Occasionally, a Justice will relist a case when the cert. vote is close and he or she wants a little more time to review the pertinent issues. At other times, a Justice will relist a case in order to complete work on a dissent from the denial of cert. Neither of these customary reasons applied to the Chief's relisting of *Casey*. And, notably, Rehnquist did not relist *Casey* only once; he did it several weeks running (exactly how many is not known).

The only convincing explanation for Rehnquist's highly unusual (and perhaps unprecedented) stalling was to delay the *Casey* cert. vote long enough (about one month) that, given the time necessary for briefing, the Court would have to push off oral argument until the fall. This, of course, would delay a final ruling until sometime in 1993, long after the election.¹⁰⁶

Contrary to Lazarus's assertion, there is no mystery about how often *Casey* was relisted; it is a matter of public record. A call to the Supreme Court Clerk's Office discloses the following: The opposition to the *Casey* cert. petition was filed on December 9, 1991; the case was distributed to the Court on December 18; and it was first scheduled for conference on January 10. The case was relisted exactly once, which means that it was taken up at the January 17 conference.¹⁰⁷ The order granting cert. was filed in the normal course on the following Monday, January 21.¹⁰⁸

Lazarus turns this mundane sequence of events into a morality tale, with Chief Justice Rehnquist repeatedly ("exactly how many [weeks running] is not known") relisting the case, hoping to influence the presidential election, and Justice Blackmun "reportedly joined by Justice

Thunder Craft Boats, Inc., 489 U.S. 141 (1989); *Mesa v. California*, 489 U.S. 121 (1989); and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). He concurred in part in Justice O'Connor's opinion for the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

106. LAZARUS, *supra* note 1, at 462-63. This allegation is particularly damaging because it is highlighted in the book jacket blurb and therefore likely to have been seen by many people who did not read the book.

107. As David Garrow points out in the *New York Times Book Review*, relisting a case once "is standard practice when the Court reformulates the question that a case presents, as it did in *Casey*." David J. Garrow, *Dissenting Opinion*, N.Y. TIMES BOOK REV., Apr. 19, 1998, at 26, 27.

108. All of this information was learned in a June 22, 1998, call to the United States Supreme Court Clerk's Office. If you don't believe me, call (202) 479-3000 and ask for Frank Lorson, who's a great guy.

Stevens,” furiously “confront[ing] the Chief and demand[ing] that he let the *Casey* petition come to a vote.”¹⁰⁹ This dovetails neatly with the themes of Lazarus’s book, but it is sheer fantasy. In a book supposedly brimming with important truths about the Court, Lazarus gets wrong a fact that is entirely public—a fact that anyone with a telephone could check out.¹¹⁰

These are not isolated instances. The book is riddled with factual errors, and critics have had a field day uncovering them: Justice Souter is described as “a vocal dissenter” in *Employment Division v. Smith*,¹¹¹ a case decided six months before he joined the Court. “[I]n his fourteen years,” Lazarus claims, “Rehnquist had pursued a kind of reverse abolitionism, not once voting to overturn a death sentence even on those rare occasions when his colleagues unanimously found that result to be compelled.”¹¹² Again, this “fact” is not true: Justice Rehnquist had voted in favor of the habeas petitioner in five capital cases by the time Lazarus got to the Court,¹¹³ and ten more since.¹¹⁴ In the same vein, Lazarus reports that “no one could even remember the last time . . . Rehnquist voted to stay or to hold a death case, no matter how appropriate.”¹¹⁵ Yet the magic of Westlaw discloses three cases in which Justice Rehnquist issued a single-Justice stay in death cases.¹¹⁶

109. LAZARUS, *supra* note 1, at 463.

110. Lazarus’s animus casts doubt on anything he says about Chief Justice Rehnquist. For example, he recounts the charge raised at Chief Justice Rehnquist’s second confirmation that “the deed to then-Justice Rehnquist’s Vermont summer home, purchased in 1974, contained a covenant prohibiting its sale or rental ‘to any member of the Hebrew race.’” LAZARUS, *supra* note 1, at 193. Lazarus adds: “[I]t was hard to believe that a sophisticated lawyer like Rehnquist would make a major real estate purchase without examining the deed.” *Id.* Why would Lazarus include this detail except to suggest that Chief Justice Rehnquist is anti-Semitic? But as every lawyer knows, such restrictive covenants have not been enforceable since *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nevertheless, pre-*Shelley* covenants often show up during routine title searches. Their unenforceability and the difficulty of removing them from the chain of title were widely noted during Chief Justice Rehnquist’s second confirmation. *See, e.g.,* Laura Kiernan, *Covenant Brings Town Distress: “A Little Late Isn’t It?” Official Asks After Justice Dept. Call*, WASH. POST, Aug. 1, 1986, at A10.

111. 494 U.S. 872 (1990).

112. LAZARUS, *supra* note 1, at 160.

113. *See* Johnson v. Mississippi, 486 U.S. 578 (1988); Satterwhite v. Texas, 486 U.S. 249 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986); Cabana v. Bullock, 474 U.S. 376 (1986); Estelle v. Smith, 451 U.S. 454 (1981).

114. *See* Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998); Bracy v. Gramley, 117 S. Ct. 1793 (1997); Gray v. Netherland, 518 U.S. 152 (1996); Lonchar v. Thomas, 517 U.S. 314 (1996); Simmons v. South Carolina, 512 U.S. 154 (1994); Richmond v. Lewis, 506 U.S. 40 (1992); Riggins v. Nevada, 504 U.S. 127 (1992); Stringer v. Black, 503 U.S. 222 (1992); Dawson v. Delaware, 503 U.S. 159 (1992); Clemons v. Mississippi, 494 U.S. 738 (1990).

115. LAZARUS, *supra* note 1, at 159-60.

116. *See* California v. Braeseke, 444 U.S. 1309 (1980); Lenhard v. Wolff, 443 U.S. 1306 (1979); Evans v. Bennett, 440 U.S. 1301 (1979). Because the votes on stays are seldom made public, it is generally impossible to tell how each Justice voted on a stay application. The exceptions involve the relatively rare cases where the Justices act on the stay application alone or where they dissent from the grant or denial. Votes on whether to hold a case in light of a pending case are never made public. Thus, there may be many more cases where Chief Justice Rehnquist voted to stay or hold a death case.

More errors: Lazarus speculates whether Justice O'Connor's "pregnant daughter" influenced her views on abortion,¹¹⁷ yet Justice O'Connor has three sons, no daughters.¹¹⁸ Lazarus is careless with names: He misspells Judge Douglas Ginsburg's name as "Ginzburg";¹¹⁹ Ninth Circuit Judge Harry Pregerson is "Warren";¹²⁰ Judge Arthur Alarcon is "Richard";¹²¹ Supreme Court Marshal Al Wong is "Arthur."¹²² According to journalist Tony Mauro, in the weeks following the book's release, "it [became] sport in the Court's amiable press room for reporters to swap 'gotcha' examples of minor errors in Lazarus's account."¹²³

Lazarus sometimes trips over his own mistakes. He indignantly disputes Professor Mark Tushnet's analysis of the effect of a mid-Term clerk changeover in Justice Kennedy's chambers:

Tushnet's deconstruction of my account of *Patterson* is unconvincing and erroneous. The "timing" of my tale is not off [as Tushnet argues]. *It is Tushnet's tale that is mistimed, based as it is on the erroneous premise that the clerk changeover in Kennedy's chambers occurred in February.* Actually, the changeover occurred in early January—a perfect fit for my account.¹²⁴

Where could Tushnet have gotten such poor information? Straight from Lazarus's book. At page 314, Lazarus writes: "In February, three of Kennedy's clerks departed and were replaced by three clerks who had served other Justices during the previous term."¹²⁵

Do such errors detract from Lazarus's substantive message? They surely do. The points Lazarus tries to make—of a Court riven by political infighting, of unscrupulous and manipulative law clerks, of weak-willed or politically driven Justices—hinge on insider accounts of what supposedly went on in the chambers of Justices for whom he did not clerk. The reliability of Lazarus's sources and how well he interprets what they told him are pivotal to his conclusions. If Lazarus can accuse the Chief Justice of chicanery based on facts that are demonstrably false, what faith can we have in charges and accusations based on facts we cannot verify?

117. LAZARUS, *supra* note 1, at 159-60.

118. See WHO'S WHO IN AMERICAN LAW 576 (1997); Jeff Bleich et al., *Behind Closed Chambers*, S.F. ATTORNEY, June/July 1998, at 14, 16.

119. See, e.g., LAZARUS, *supra* note 1, at 254.

120. See *id.* at 508. The mistakes as to Pregerson and Alarcon are particularly embarrassing as Lazarus clerked on the Ninth Circuit (one floor above Alarcon and Pregerson) and regularly appears before the court in his capacity as an Assistant United States Attorney.

121. See *id.* at 506.

122. See *id.* at 482.

123. Mauro, *supra* note 97, at 15.

124. Edward Lazarus, *Disturbing Truths*, JURIST, July 1998, at 1, 2 (visited July 7, 1998) <<http://jurist.law.pitt.edu/lawbook/revjul98.htm>> (emphasis added).

125. LAZARUS, *supra* note 1, at 314.

The one instance where insiders seriously challenged Lazarus's insider account, he beat a hasty retreat. This concerns the infamous champagne party incident that Lazarus reported at page 269 of the preliminary draft of *Closed Chambers*. Lazarus there claimed that after serial killer Ted Bundy was executed, "the cabal celebrated with a champagne party." This colorful and highly inflammatory detail provides visceral proof of Lazarus's thesis that the conservative clerks were callous and bloodthirsty. The champagne party incident was widely reported and became the subject of commentary and satire.¹²⁶ Yet when conservative clerks indignantly denied there had been such a party, Lazarus deleted the reference. "I believe [there was a champagne party] but I wasn't there," he explained.¹²⁷ But Lazarus "wasn't there" for most of the interesting things he reports; they are all based on the statements of others that Lazarus should have confirmed. One has to wonder how many other parts of Lazarus's account are built on reports about which he is not so sure.

As troubling as the book's many errors is Lazarus's lack of evenhandedness. Incidents that seem similar are treated very differently depending on whether the author approves or disapproves. For example, Lazarus rebukes Chief Justice Rehnquist for circulating a draft of his *Webster* opinion to the other four conservative Justices, hoping to secure a majority before the liberal Justices could have their say.¹²⁸ Lazarus also chastises Justice Kennedy and his clerk for "auditioning drafts of the Kennedy dissent [in *Patterson v. McLean Credit Union*], lining up support" among the conservative Justices behind the backs of the liberals.¹²⁹ Similarly, he complains that Justice White circulated a memo "behind the liberals' backs" in *McCleskey*.¹³⁰ Elsewhere, however, Lazarus reports that Justice Brennan secretly sent his draft opinion in *Patterson v. McLean Credit Union*¹³¹ to Justice Kennedy in the hope of locking in his key vote¹³² and later circulated a revised opinion only to the liberal Justices,¹³³ yet Lazarus sees no cause here for criticism. Indeed, the book shows that caucusing by factions of the Court is not uncommon, as it also happened in *Gregg v. Georgia*¹³⁴ (Justices White, Stewart, Powell, and Stevens)¹³⁵ and in

126. See, e.g., Biskupic, *supra* note 5; Max Boot, *The Court as Seen by a Courtier*, WALL ST. J., Apr. 8, 1998; Irons, *supra* note 98, at 31, 33; Mauro, *supra* note 94; see also *Who Is This Ted Bundy?*, RECORDER, Mar. 20, 1998, at 4 (depicting, in a political cartoon, a befuddled Chief Justice entering an office in which three clerks are celebrating the execution of Ted Bundy with champagne while Lazarus takes notes in a corner).

127. Marin Berg, *Court Chamber's Cabal?*, L.A. DAILY J., Mar. 19, 1998, at 1, 5.

128. See LAZARUS, *supra* note 1, at 423.

129. *Id.* at 315.

130. *Id.* at 202.

131. 491 U.S. 164 (1989).

132. See LAZARUS, *supra* note 1, at 310.

133. See *id.* at 317.

134. 428 U.S. 153 (1976).

135. See LAZARUS, *supra* note 1, at 116.

Casey (Justices O'Connor, Kennedy, and Souter).¹³⁶ These efforts by certain Justices to secure a controlling position by excluding some of their colleagues from deliberations earn not the least reproof from Lazarus, nor do Justice Stevens's private efforts to influence Justice O'Connor in *Webster*.¹³⁷ Whether or not the Justices should be meeting in secret caucus or passing drafts only to some of their colleagues (more a matter of convention than ethics), there is no principled basis for criticizing the practice only where one disapproves of the objective.

A couple of other examples: Conservative law clerks are criticized for "cook[ing] up" language and feeding it "to Rehnquist's clerks for incorporation in his [*Webster*] draft,"¹³⁸ while no adverse sentiments are expressed when a Powell clerk "approached the clerks in more liberal Chambers hoping to find arguments that might persuade her boss."¹³⁹ When a conservative Kennedy clerk "played to the Justice's strong conservative judicial instincts"¹⁴⁰ this "raised troublesome issues of clerk influence,"¹⁴¹ but not when a moderate O'Connor clerk made a recommendation "in line with two relevant aspects of his boss's record" and "held out a cool and relatively comfortable alternative" to her.¹⁴² When the conservative Justices voted to grant cert. in *Casey* hoping to overrule *Roe*, but Justices O'Connor, Kennedy, and Souter foiled the plan with their famous joint opinion, that was an act of "judicial statesmanship."¹⁴³ But when the liberal Justices voted to grant cert. in *McCleskey v. Zant*¹⁴⁴ hoping to cure an injustice, and the conservatives used the case as a vehicle to cut back on repetitive habeas petitions, it was a hijacking.¹⁴⁵

It is clear that Lazarus was unhappy with his year at the Supreme Court; it was not what he had hoped for. The experience left him bitter and disillusioned, which is why, he says, he has written this book. But it is this very impulse that makes him a poor witness. As a participant in the drama

136. *See id.* at 471-72.

137. *See id.* at 433.

138. *Id.* at 405.

139. *Id.* at 201.

140. *Id.* at 315.

141. *Id.* at 321.

142. *Id.* at 393.

143. *Id.* at 484.

144. 499 U.S. 467 (1991).

145. *See* LAZARUS, *supra* note 1, at 493 ("And, thus, while the liberals granted *McCleskey* in order to correct what they saw as a manifest injustice, within days the conservatives had hijacked the case for the purpose of making another substantial cutback on federal habeas.").

about which he reports, he has a stake in proving a point.¹⁴⁶ We cannot trust him.¹⁴⁷

IV. BUT LET'S SAY WE DID

Let us assume, nevertheless, that everything Lazarus says is accurate and that his account of goings on at the Supreme Court is pretty much on the money. Let's assume all that. Is Lazarus persuasive on his own terms?

First, recall his claim: According to Lazarus, the Justices resort "in many important cases . . . to transparently deceitful and hypocritical arguments and factual distortions as they discard judicial philosophy and consistent interpretation in favor of bottom-line results"; and they "yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve."¹⁴⁸ Worse still, the Justices "disregard the traditions of law, invoke intellectually dishonest arguments, engage in glaring inconsistencies, and reduce their deliberations to the shallow calculus of five votes beats four" and thereby "call their own reason for being into question."¹⁴⁹

These are very serious charges. Does the book, even taken on its own terms, support them? Before considering some examples, it is worth noting that Lazarus's assessment is based on a handful of cases involving the death penalty, race relations, and abortion—the three most divisive areas of constitutional law. But during the 1988 Term, the Court decided 143 cases—some very significant in their own right.¹⁵⁰ Can one gain a complete and fair understanding of the Court by ignoring some ninety percent of its

146. For example, he describes himself as "someone who participated in the trench warfare that has consumed the Court in recent years," *id.* at 12, and he sees his book as "an indictment—a revelation of how a Court can come to lose its essential character," *id.* at 14.

147. See Alex Kozinski, *Commentary: Worthy of Trust?*, JURIST, June 1998 (visited Nov. 22, 1998) <<http://jurist.law.pitt.edu/lawbooks/revju198.htm>>.

148. LAZARUS, *supra* note 1, at 6.

149. *Id.* at 9. The only people who fare worse than the Justices are Lazarus's critics. Richard Painter is a "character assassin[]," Lazarus, *supra* note 6, who launches a "desperate attack" and is "pathological in his attempt to trump up baseless allegations," Lazarus, *supra* note 124, at 1. Gretchen Craft Rubin is guilty of a "tirade," setting up a "smoke screen," and "assassinating [Lazarus's] character." Lazarus, *supra* note 14. Peter Irons engages in "supercilious[]" "tit-for-tat." Lazarus, *supra* note 124, at 2. David Kairys "misstates" Lazarus's views and is an "avowed leftist." *Id.* Mark Tushnet is guilty of "distorting and exaggerating [Lazarus's] claims." *Id.* David O'Brien goes to "remarkable . . . lengths . . . to manufacture errors" in Lazarus's book and is guilty of "nitpicking" and "pettiness" that is "unbecoming and baffling." *Id.* at 3-5. His critics in general are reacting "defensively, almost nonsensically" because Lazarus has "succeeded in touching disturbing truths that no one feels comfortable discussing openly and honestly." *Id.* at 5.

150. See *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 40, 396 (1989).

work product?¹⁵¹ Also, the 1988-1989 Court is not the Court of today. As Lazarus recognizes, abortion is no longer a cause of significant division after *Casey*, and with the departure of Justices Brennan and Marshall, neither is the death penalty, or even race relations; the Justices disagree, to be sure, but not with the stridency of a decade ago. Lazarus thus gives us a severely cropped snapshot of a very different Court and asks us to make judgments about the Court of today. Lazarus claims that “[i]t is still a Court of two camps divided intractably over the pressing issues of the day,”¹⁵² but Supreme Court scholars have not agreed.¹⁵³ The book is thus largely of historical interest rather than a useful guide to the current Court. Still, it remains a harsh indictment of Justices sitting, retired and dead, and it is therefore worth considering whether the points Lazarus makes are valid.

A. *Unprincipled Justices*

One of Lazarus’s big beefs is that the Justices do not engage in sufficient deliberation, that they resort to ideology rather than principle. But the case histories he relates prove just the opposite. Early in the book, for example, Lazarus discusses the case of death row inmate Phillip Tompkins, who challenged his conviction on two grounds: a *Batson* violation¹⁵⁴ in jury selection and a *Beck* error¹⁵⁵ in the instructions.¹⁵⁶ Justice O’Connor was recused and the remaining Justices split on both issues at conference. A firm majority of five found no *Beck* violation; a different (and shakier) majority of five—possibly joined by Justice Scalia as a sixth—voted that there was a *Batson* violation. Justice Stevens eventually circulated an opinion reflecting the vote at conference. Justice Scalia responded promptly by joining the *Beck* portion of the opinion but raising serious objections to the methodology Justice Stevens had deployed for resolving the *Batson* claim. Justice Kennedy then circulated a brief memo saying “I share some of Nino’s concerns.”¹⁵⁷

151. This observation has been made by others as well. *See, e.g.*, Garrow, *supra* note 107, at 26; Mauro, *supra* note 34, at 44.

152. *See* LAZARUS, *supra* note 1, at 514.

153. *See, e.g.*, Garrow, *supra* note 107, at 27; Sullivan, *supra* note 68, at x; Tushnet, *supra* note 102, at 25.

154. *See* *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that prosecutors may not use peremptory challenges to exclude jurors on the basis of race).

155. *See* *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a defendant found guilty of a capital offense may not constitutionally be sentenced to death if the jury was not given the option of convicting for a lesser included noncapital offense and the evidence would have supported such a conviction).

156. *See* LAZARUS, *supra* note 1, at 50-73 (discussing *Tompkins v. Texas*, 490 U.S. 754 (1989)).

157. *Id.* at 63.

After further memos, and a dissent from Justice White on the *Batson* issue, everyone lined up so that Justice Kennedy wound up holding the deciding vote. After some time, Justice Kennedy circulated a memo switching sides as to *Batson*. He had studied the record, he explained, and found reasons there for upholding the judgment of the Texas state courts.¹⁵⁸ As a consequence of this switch, the Court was divided 4-4 on *Batson*, which meant that the ruling below (upholding the conviction) would be affirmed by an evenly divided Court. At that point, Justice Stevens switched his vote as to *Beck*, and the entire case was affirmed without opinion.¹⁵⁹

Lazarus says he “remain[s] stunned by the Court’s handling of *Tompkins*.”¹⁶⁰ He laments that “[a]t the end, the Justices lined up exactly as one might have predicted before the case was briefed or argued—liberals on one side, conservative on the other, a gorge between them and no bridge across even in an easy case.”¹⁶¹ He waxes poetic:

Across a seemingly unbridgeable gap, the Justices yelled back and forth about a number of the most crucial issues affecting our legal culture: race, state court justice, the death penalty, and the extent and use of their own power to do right. Their voices fell short of the

158. See *id.* at 67-68. Lazarus derides Justice Kennedy for changing his mind but does not tell us the Justice’s reasons. Instead, he portrays Justice Kennedy’s memorandum as an artifice: “Kennedy claimed to have found reasons in the record” supporting the prosecutor’s strike of certain black venire members. *Id.* at 68 (emphasis added). In fact, Justice Kennedy’s memorandum is substantive and well documented:

The reasons given by the prosecutors for excusing the relevant venirepersons are borne out by the record evidence. True, the questions were cumbersome and served in large part to educate the jury on one or the other side of the case, but they were also the mechanism for getting some response from the jurors. The questions were asked of white and black jurors alike. It does not appear that black venirepersons were singled out for special treatment in any way. Questions about opposition to the death penalty, the law of parties, causation, premeditation, circumstantial evidence, and the Texas special issues were asked of the excused black venirepersons and also of white venirepersons, including those who actually sat on the jury [29 pin citations to record omitted].

The answers given by the venirepersons who were selected to sit on the jury are noticeably more satisfactory, from the State’s perspective, than those given by the black venirepersons who were excused by the State [six pin citations to record omitted]. Finally, the prosecutors did not limit their exercise of peremptory challenges to black venirepersons, but excused a number of white venirepersons as well [two pin citations to record omitted]. Since the prosecutors’ explanations for their use of peremptory challenges against black venirepersons are neutral, case-related, and supported by the evidence, I believe the trial court did not err in finding that no *Batson* violation was committed.

Memorandum from Justice Anthony M. Kennedy to Justice John Paul Stevens, *Tompkins v. Texas*, No. 87-6405 (May 16, 1989) (available in Justice Thurgood Marshall Papers, Library of Congress; on file with *The Yale Law Journal*).

159. See *Tompkins*, 490 U.S. at 754.

160. LAZARUS, *supra* note 1, at 71.

161. *Id.* at 72.

distance. And a dim-witted man named Phillip Tompkins and the rule of law were left to free-fall.¹⁶²

Purple prose aside, it's hard to see how *Tompkins* supports Lazarus's thesis. Contrary to Lazarus's assertion, the Justices did not line up along ideological lines. Justice Stevens agreed with the conservatives as to *Beck* and never changed his mind.¹⁶³ Justice Kennedy and even Justice Scalia seriously considered joining the liberals on *Batson*. Opinions and memos were circulated raising legitimate, substantive issues; the Justice holding the swing vote carefully studied the record and found reasons there to change his view.¹⁶⁴ This seems to be a model of deliberative judicial decisionmaking.

Lazarus points to no irregularities in the deliberative process, no abuse of internal procedures, to support his claim that the "the rule of law [was] left to free-fall." His vituperative accusations are based entirely on the fact that he disagrees with the conclusions reached by four of the Justices. Surely, however, disagreement with a particular result by someone who clerked for a Justice who was on the other side is no proof that the Court is suffering from an "epidemic of partisanship and lack of character."¹⁶⁵ *Tompkins* is a case where the Justices engaged in a vigorous debate and switched positions as a result of reflection, an exchange of ideas, and a close review of the record—precisely as one hopes conscientious jurists would do in hard cases.

Lazarus is also fond of calling various Justices "insincere,"¹⁶⁶ "dishonest,"¹⁶⁷ or worse,¹⁶⁸ but the examples he gives prove nothing of the sort. Take his discussion of *City of Richmond v. Croson*.¹⁶⁹ The Court there considered an equal protection challenge to Richmond's affirmative action ordinance. Justice O'Connor's opinion employed strict scrutiny in striking down the ordinance. In so doing, she was required to distinguish or overrule

162. *Id.* at 72-73.

163. Justice Stevens switched his vote for tactical reasons. To the end, he maintained that he saw no *Beck* error. *See id.* at 69.

164. Lazarus dismisses Justice Kennedy's stated reasons for changing his mind by speculating that Justice Kennedy was "[a]pparently uncomfortable providing the swing vote against his natural allies on the Court." *Id.* at 68. But Lazarus provides no support for this contention—not even law clerk gossip. In fact, Justice Kennedy's voting record that Term (like *Michael H.*, *Webster*, and *Texas v. Johnson*) and in the 10 years since shows him perfectly willing to provide the swing vote "against his natural allies on the Court"—whoever they be. Lazarus elsewhere mercilessly criticizes Justice Kennedy for this very trait. *See id.* at 515.

165. *Id.* at 7.

166. *Id.* at 323; *see also id.* at 325 ("Instead, the Justices surrendered to insincerity and recrimination.").

167. *Id.* at 9.

168. He also throws around phrases like "corruption in the judicial process," *id.* at 517, "a failure of integrity," *id.* at 13, and "what passed for judging was mostly pretense," *id.* at 422. Does such inflammatory language advance our understanding of the Court and its processes?

169. 488 U.S. 469 (1989).

Fullilove v. Klutznick,¹⁷⁰ where a majority had decided to apply something less than strict scrutiny to a similar federal program.¹⁷¹ Justice O'Connor distinguished *Fullilove* by holding that the Fourteenth Amendment imposes a heavier burden of justification on the states than on the federal government. As Lazarus observes, this approach was not new; it had been suggested by Yale Law School Professor (later Solicitor General) Drew Days III,¹⁷² among others.¹⁷³ Nevertheless, Lazarus calls Justice O'Connor all manner of unpleasant names because "it was practically unimaginable that the Justice subscribed to her own reasoning,"¹⁷⁴ something he thinks was proven six years later when she repudiated this aspect of *Croson*—and overruled *Fullilove*—in *Adarand Constructors v. Pena*.¹⁷⁵

Must a Justice who is a member of a collegial court subscribe to every argument in an opinion she authors or joins? Certainly not. One of the burdens of serving on a multi-judge court is that one must ever balance the need for certainty with the luxury of expressing one's views precisely as one sees fit.¹⁷⁶ Critics, including Lazarus, have wagged their fingers at the Justices for writing splintered opinions rather than struggling to reach common ground.¹⁷⁷ In *Croson*, Justice O'Connor seems to have been confronted with precisely this dilemma. She may have preferred to overrule *Fullilove* outright but did not have the votes.¹⁷⁸ Yet there was a majority to strike down the Richmond ordinance. What is a conscientious Justice to do? Should she try to overrule *Fullilove* by writing an opinion that would fall short of the crucial fifth vote? (Lazarus sharply criticizes Justice Brennan for doing precisely that in other cases.¹⁷⁹) Or should she adopt a rationale

170. 448 U.S. 448 (1980).

171. Precisely what the Court did in *Fullilove* is unclear, as there was no majority opinion. See Drew S. Days III, *Fullilove*, 96 YALE L.J. 453, 466-68 (1987).

172. See LAZARUS, *supra* note 1, at 300.

173. Including yours truly. See *id.* at 300 (citing *Associated Gen. Contractors v. City & County of S.F.*, 813 F.2d 922 (9th Cir. 1987)).

174. LAZARUS, *supra* note 1, at 300.

175. 515 U.S. 200 (1995).

176. Justice Frankfurter observed that "[w]hen you have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammelled by what anybody else may do or not do." See FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 344-46 (Phillips Harlan ed., 1960). Lazarus is aware of Frankfurter's comment but somehow does not see it as applying to Justice O'Connor. See LAZARUS, *supra* note 1, at 323.

177. See, e.g., KRONMAN, *supra* note 40, at 342-47; LAZARUS, *supra* note 1, at 435.

178. Chief Justice Burger and Justices White, Powell, Brennan, Blackmun, and Marshall voted to uphold the federal-funds set-aside program in *Fullilove*, while Justices Rehnquist, Stewart, and Stevens dissented. In *Croson*, Chief Justice Rehnquist and Justices White, Stevens, Kennedy, and Scalia joined or concurred in various parts of Justice O'Connor's opinion. It's therefore likely that Justice O'Connor would have lost Justice White if she had tried to write an opinion overruling *Fullilove*. She would probably also have lost Justice Stevens, whose views on affirmative action seem to have shifted over time: He dissented in *Fullilove*, see 448 U.S. at 532 (Stevens, J., dissenting), and then again in *Adarand*, see 515 U.S. at 242 (Stevens, J., dissenting).

179. See LAZARUS, *supra* note 1, at 310.

distinguishing *Fullilove* in a way she herself might not find entirely convincing, but for which she could get a Court?

This is a question reasonable jurists answer differently in different cases, perhaps depending on the issue and the importance of having a majority. In *Brown v. Board of Education*,¹⁸⁰ Chief Justice Warren thought unanimity was so important that, in Lazarus's words, he "sacrificed the views of several Justices in the majority as well as a complete or even satisfying discussion of the history and legal principles involved in the outlawing of segregated schools."¹⁸¹ Lazarus praises *Brown* as "the outstanding example of [judicial] statesmanship"¹⁸² but finds that Justice O'Connor's *Croson* opinion "fairly reeked of hypocrisy."¹⁸³

Lazarus performs another hat trick when he reduces Justice O'Connor's disagreement with Justice Brennan in *Johnson v. Transportation Agency*¹⁸⁴ and *Price Waterhouse v. Hopkins*¹⁸⁵ to a personality contest. Thus, he describes Justice O'Connor's refusal to join Justice Brennan's opinion in *Johnson* as "a pointed tit for tat," because "Brennan brushed off some concerns she'd expressed about his opinion."¹⁸⁶ He continues: "O'Connor's hard feelings [about *Johnson*] were still evident" the following Term when the Court decided *Price Waterhouse*.¹⁸⁷ Despite Justice Brennan's "courting of O'Connor with half a dozen drafts aimed at garnering her final endorsement," Justice O'Connor "ended up writing her own, modestly different opinion."¹⁸⁸ Lazarus's clear message is that Justice O'Connor's refusal to join Justice Brennan in *Price Waterhouse* was motivated by pique, not principle.¹⁸⁹

180. 347 U.S. 483 (1954).

181. LAZARUS, *supra* note 1, at 323.

182. *Id.*

183. *Id.* at 299. Of course, we do not know what was going on in Justice O'Connor's mind. For all we know—for all Lazarus can tell us—she may have thought *Croson* was right when she wrote it but changed her mind six years later in *Adarand*. It seems a bit over the top for Lazarus to accuse a Supreme Court Justice of hypocrisy based on nothing more than the fact that she changed her position over time. If that were the test of judicial integrity, most Justices would be hypocrites. Cf. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death.").

184. 480 U.S. 616 (1987).

185. 490 U.S. 228 (1989).

186. LAZARUS, *supra* note 1, at 277.

187. *Id.*

188. *Id.* at 278.

189. Is it mere coincidence that Lazarus singles out Justice O'Connor as acting out of "hard feelings" and engaging in "tit for tat" because her concerns had been "brushed off?" Cf. S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1649 (1995) ("The legal profession follows society's role dichotomies. . . . Inferior 'feminine' traits embody what the law is not: irrationality, subjectivity, contextualization, and personalization."). See generally Linda J. Lacey, *We Have Nothing To Fear but Gender Stereotypes: Of Katie and Amy and "Babe Feminism,"* 80 CORNELL L. REV. 612 (1995) (book review).

This must come as quite a revelation to employment discrimination scholars who take Justice O'Connor's *Price Waterhouse* concurrence very seriously. One scholar writes that Justice Brennan's opinion marked a substantial departure from settled precedent, while Justice O'Connor was attempting "to provide a better justification than the plurality's for this departure."¹⁹⁰ Another scholar pays as much attention to Justice O'Connor's concurrence as he does to the plurality opinion and criticizes the plurality (but not the concurrence) as "confusing, perhaps contradictory."¹⁹¹ The experts, not privy to juicy law clerk gossip, were fooled into thinking that Justice O'Connor's differences with Justice Brennan were substantive and meaningful.¹⁹² Lazarus, with his inside knowledge, manages to reduce a substantive disagreement into proof of ill will, pettiness, and lack of principle.

Lazarus's penchant for transforming his disagreement with a result into proof that the Justices are unprincipled is repeated throughout the book. For example, he describes the majority opinion in *Tison v. Arizona*¹⁹³ as an "abomination of result-oriented judging, a senseless trampling of logic and precedent."¹⁹⁴ What on earth could the Justices have done to earn such obloquy?

Tison called for an application of *Enmund v. Florida*,¹⁹⁵ which had held that "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."¹⁹⁶ The Tison brothers had smuggled guns into prison to help their father and another man escape. During the getaway, Tison père used one of the guns to kill a family of four that had stopped to offer assistance; the sons were convicted of murder. In upholding their death sentences, the Court held that *Enmund* was satisfied, even though the sons had not done the killing or intended to kill, because they had shown "reckless indifference to the value of human life."¹⁹⁷

190. Roy L. Brooks, *The Structure of Individual Disparate Treatment Litigation After Hopkins*, 6 LAB. LAW. 215, 219 (1990).

191. Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1126 (1991).

192. As Sullivan writes:

Justice O'Connor disagreed with the plurality on two related points. First, she believed that this burden allocation scheme was really a method of determining but-for causation. Second, and more important, she apparently viewed the plurality's approach to the plaintiff's burden as too permissive.

Id. at 1129.

193. 481 U.S. 137 (1987).

194. LAZARUS, *supra* note 1, at 209-10.

195. 458 U.S. 782 (1982).

196. LAZARUS, *supra* note 1, at 209 (quoting the characterization of *Enmund* in *Cabana v. Bullock*, 474 U.S. 376, 386 (1986)).

197. *Tison*, 481 U.S. at 157.

Tison is an explication of *Enmund*, and not a very surprising one at that. Reckless disregard for human life is often treated as the equivalent of intent; most of us learned this in law school when we studied *Commonwealth v. Malone*.¹⁹⁸ The most one can say about *Tison* is that it was an incremental change in a previously established rule, and maybe not even that. In fact, Justice White, *Enmund*'s author, was in the *Tison* majority. The decision simply does not merit Lazarus's hysterical characterization.

Chief Justice Rehnquist comes in for particularly brutal criticism. One theme Lazarus emphasizes is that the Chief Justice discourages debate within the Court by keeping conference discussions to a minimum.¹⁹⁹ His point seems to be that the Court decides cases without an adequate exchange of views among the Justices. But the examples he gives disprove this. Lazarus discusses in detail six cases from his term (*Tompkins*, *Patterson*, *McCleskey*, *Michael H. v. Gerald D.*,²⁰⁰ *Webster*, and *Teague v. Lane*²⁰¹) plus two cases from a later Term (*Casey* and *McCleskey II*). In each of these cases, there was considerable post-conference debate before a decision was reached. This written debate often raised important new points, as in *Michael H.* where Justice O'Connor wrote a concurrence in which Justice Kennedy joined, declining to endorse Justice Scalia's methodology.²⁰² In other cases, such as *Tompkins* and *Patterson*, Justices

198. 47 A.2d 445 (Pa. 1946). In *Malone*, the Pennsylvania Supreme Court held that [w]hen an individual commits an act of gross recklessness for which he must reasonably anticipate that death to another is likely to result, he exhibits that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty" which proved that there was at that time in him "the state or frame of mind termed malice."

Id. at 447 (citations omitted). This equivalence is not unique to criminal law: reckless indifference to the truth is treated as equivalent to lying in First Amendment defamation law. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). *Tison* does no more than incorporate this long-settled common law principle into *Enmund*. See *Tison*, 431 U.S. at 157 ("This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'").

199. See, e.g., LAZARUS, *supra* note 1, at 285-86 ("The Chief Justice actively discouraged discussion or debate at conference, even cutting off Justices who offered comments out of turn. In his assessment, the Justices' views were determined beforehand, and a lot of talk wasn't going to change anyone's mind."); *id.* at 493 (describing a case as having been decided with "the debate-free efficiency so characteristic of the Rehnquist Court"). Of course, this is something Lazarus could not know firsthand, as only the Justices are present at conference. One has to wonder whether Lazarus is simply repeating views expressed by Justice Blackmun, who, according to Lazarus, regularly reported to his clerks what happened at conference. See *id.* at 60-61; see also Edward P. Lazarus, *The Case of the Severed Arm: A Tribute to Associate Justice Harry A. Blackmun*, 43 AM. U. L. REV. 725, 727 (1994) ("Justice Blackmun would call his clerks in to report on conference. For the argued cases . . . the Justice would summarize the remarks of each of the Justices in order of seniority. It was mesmerizing: Blackmun's rich, gravelly voice rumbling through the comments of his colleagues, punctuated occasionally by a sentence or two of brilliant imitation that never failed to astonish and amuse.").

200. 491 U.S. 110 (1989).

201. 489 U.S. 288 (1989).

202. See LAZARUS, *supra* note 1, at 417.

switched sides.²⁰³ In almost every case, the discussions were pointed, insightful, and substantive. Lazarus disagrees with much of what was said, but the examples he chronicles do not leave the impression of Justices so blinded by ideology that they refuse to consider the arguments raised by the parties or their colleagues. Quite the contrary.

Whether jurists spend a lot of time discussing cases at conference varies from court to court and from panel to panel. Face-to-face debate can sometimes be useful; often it is not. Judges can discuss broad outlines at conference, but the important details of hard cases are usually nailed down only when someone tries to write an opinion. Some judges like long conferences; others feel it is unwise to let egos become engaged, making it harder to reach consensus later. Reasonable jurists differ on this point. Lazarus takes a disagreement as to style and portrays it as a major character flaw in the Chief Justice.

Lazarus's biggest complaint is that "from William Brennan to Antonin Scalia, the Justices abandoned the power of persuasion for the power of declaring partisan victory by sweeping the chess pieces from the board."²⁰⁴ Even today, he claims, "It is still a Court of two camps divided intractably over the pressing issues of the day."²⁰⁵ Yet on the next page he scoffs at Justices O'Connor and Kennedy because "[i]n case after case, these swing-vote Justices write separate concurrences, usually modulating the conservative insurgency, but always bending the Court and the law to their will."²⁰⁶ If the big vice of the Supreme Court is, as Lazarus claims, that the Justices are insufficiently swayed by the facts and circumstances of each case, that they pursue ideological agenda, that they invoke disingenuous arguments to reach desired results, he ought to praise the two Justices who show the most independence of mind. And, indeed, much of Lazarus's book portrays Justices O'Connor and Kennedy as moderate, flexible jurists who pay careful attention to the nuances of hard cases. Does this earn them plaudits from Lazarus? No, it earns them nothing but contempt.²⁰⁷

203. *See id.* at 68-69.

204. *Id.* at 8. Lazarus pins the blame for this on Chief Justice Rehnquist, whom he quotes as saying to a colleague: "Don't bother so much with the reasoning . . . it will only trip you up." *Id.* at 424. As usual, Lazarus gives neither a source nor a context for this quotation. Was this lunchroom banter or serious advice? Moreover, the quotation is not offered as a paraphrase, though it is highly unlikely that it (if it is not an invention) would have survived intact through multiple levels of hearsay on its way to Lazarus. One cannot escape the suspicion that Lazarus here is repeating a story he heard from Justice Blackmun.

205. *Id.* at 514.

206. *Id.* at 515. Poor Justice O'Connor simply cannot win: When she sacrifices her personal view to build consensus in *Croson*, she is a hypocrite; when she writes separately, she is "bending the Court and the law to [her] will." *Id.*

207. I will not repeat Lazarus's personal attacks on these Justices' intelligence and integrity. Lyle Denniston, who has observed the Supreme Court for four decades, terms Lazarus's comments on Justices O'Connor and Kennedy as "absolutely savage." Denniston, *supra* note 70, at 5F.

B. *Unscrupulous Clerks*

Lazarus's other big point is that Supreme Court law clerks have too much power and that "ideologically driven" clerks—particularly conservative ones—use this power to exercise "sometimes inappropriate influence over the law."²⁰⁸ This, in turn, leads him to further criticize some of the Justices as being weak-willed and clerk-driven.²⁰⁹ Once again, these charges are not proven.

Lazarus holds up as a paragon of improper law clerk conduct the actions of a Kennedy clerk who, supposedly, caused Justice Kennedy to switch sides in *Patterson v. McLean Credit Union*.²¹⁰ The issue in *Patterson* was whether 42 U.S.C. § 1981 applies to post-formation conduct under an existing employment contract. The story, as told by Lazarus, is that the Court split 4-4 at conference and Justice Kennedy, as the junior Justice and last to speak, cast the deciding vote. Justice Kennedy noted that "Patterson had produced 'abundant evidence' of racial harassment, which, in turn, suggested that McLean Credit had not entered into her employment contract in good faith."²¹¹ Justice Brennan assigned himself the opinion and chose to write expansively.²¹² Again according to Lazarus, "Brennan took the highly unusual precaution of slipping the opinion to Kennedy for his comment before circulating it to the entire Court."²¹³ "Kennedy reacted badly," largely because Justice Brennan had used legislative history "to expand Section 1981's literal terms to include a separate and independent right to be free from pervasive racial harassment on the job."²¹⁴

Justice Kennedy wrote Justice Brennan "a detailed four-page reply" in which he explained his objections.²¹⁵ Justice Brennan attempted to assuage Justice Kennedy's concerns "without completely abandoning [his] key premise that pervasive on-the-job harassment in and of itself violated Section 1981."²¹⁶ Justice Kennedy continued to have reservations, but thought he could set them aside and join Justice Brennan. Nevertheless, he withheld his assent because he wanted "to have the benefit of whatever

208. LAZARUS, *supra* note 1, at 516.

209. *See id.* at 314-15, 322.

210. 491 U.S. 164 (1989).

211. LAZARUS, *supra* note 1, at 309.

212. *See id.* at 310.

213. *Id.*

214. *Id.* at 310-11. This happened because Justice Brennan's clerks "had a tin ear for phrasing arguments in ways that might appeal to a potential conservative ally." Alas, history might have been written differently had Justice Brennan been wise enough to pick Lazarus as his clerk.

215. *Id.* at 311. Justice Kennedy's memorandum "miffed Brennan's clerks, who had hoped to lock up Kennedy's vote on the first try and thought he was shifting ground on them." *Id.* On them?

216. *Id.*

comments and suggestions our colleagues will have after full circulation.”²¹⁷

On December 3, Justice Brennan circulated his revised draft to the full Court and, in due course, Justice White circulated a dissent that contained “objections that were a more extreme version of Kennedy’s.”²¹⁸ Later, the liberal Justices joined Justice Brennan and the conservatives joined Justice White, but Justice Kennedy remained silent. Finally, at the end of April, Justice Kennedy circulated a dissent expressing the view that “Section 1981 simply had nothing to do with an employer’s conduct after the formation of an employment contract”; that kind of misconduct, in Justice Kennedy’s view, was covered exclusively by Title VII.²¹⁹ Four other Justices eventually joined Justice Kennedy’s dissent, which then became the majority opinion.

This internal history is told in numbing detail by Lazarus who then points the (now stiff) finger of blame at a Kennedy law clerk who supposedly exercised improper influence over his boss.²²⁰ According to Lazarus, Justice Kennedy’s switch was occasioned by a “midterm changeover in [Justice Kennedy’s] clerk coterie and the machinations of the cabal that followed.”²²¹ One of the three clerks who joined Justice Kennedy’s chambers at midterm had earlier served as a law clerk for Justice Scalia²²² and proceeded to “play[] to [Justice Kennedy’s] strong conservative judicial instincts.”²²³ Worst of all, this Machiavellian clerk “put together a draft dissent—a highly textualist interpretation that might appeal to his boss.”²²⁴ Lazarus lards his story with hints that the clerk collaborated with the Scalia clerks—and perhaps with Justice Scalia himself—in preparing the draft and later shopped it around to other conservative chambers in order to line up support.²²⁵ Lazarus complains that the draft “did not even reflect [the clerk’s] own conviction about the best or most accurate interpretation of the statute.”²²⁶

It is hard to read this portion of *Closed Chambers* without wondering whether Lazarus lost his compass. Last point first: How does a law clerk bend a Justice to his will by drafting an opinion that does not even reflect

217. *Id.* at 312 (quoting a memorandum from Justice Kennedy to Justice Brennan). It is impossible to verify any of this since neither Justice Brennan’s original draft nor Justice Kennedy’s four-page reply are in the Marshall Papers. As noted earlier, Lazarus has refused to produce the documents from which he quotes. *See supra* note 50.

218. LAZARUS, *supra* note 1, at 312.

219. *Id.* at 313.

220. *See id.* at 315.

221. *Id.* at 314.

222. Even earlier, he served as my law clerk.

223. LAZARUS, *supra* note 1, at 315.

224. *Id.*

225. *See id.*

226. *Id.* at 322.

the clerk's own views? And since when is it improper for a clerk to give advice that conforms to his Justice's judicial philosophy and to prepare a draft "that might appeal to his boss?"²²⁷ Most people think that is what law clerks are paid to do.²²⁸ As to the charge of collaboration with the Scalia chambers, this is entirely consistent with Lazarus's report that Justices Scalia and Kennedy were very close.²²⁹ Lazarus provides no evidence that the clerk collaborated with Justice Scalia's chambers behind Justice Kennedy's back.²³⁰

But put these details aside and consider Justice Kennedy's substantive position. According to Lazarus, Justice Kennedy had taken the view right from the start that section 1981 dealt with the employer's state of mind at the time the contract was entered, not conduct during the course of employment; that is what he had said at conference back in November.²³¹ Justice Brennan's draft took a very different approach and, despite Justice Brennan's attempts to appease Justice Kennedy, the latter never fully assented to the Brennan view.²³² The draft that Justice Kennedy eventually came up with—the one that became the majority—tracks precisely what had been Justice Kennedy's view all along.

As Professor Tushnet points out, moreover, the timing of events undercuts Lazarus's charge that Justice Kennedy was turned around by his clerk.²³³ Justice Brennan circulated his opinion in early December and the new law clerk did not arrive until February.²³⁴ By that time, Justice Kennedy had waited for two months, which is "an extraordinarily long time

227. *Id.* at 315.

228. *See, e.g.*, Phillips, *supra* note 59, at 44.

229. Typically, Lazarus portrays this in the worst possible light: "[Justice Kennedy] in his first full term on the Court so regularly consulted Scalia and so often followed his lead that clerks joked about how thin the carpet had worn between their Chambers." LAZARUS, *supra* note 1, at 63.

230. Referring to this incident, Professor Tushnet writes:

Lazarus doesn't persuade me that the plots he describes were anything more than gossip. I did have some uneasiness on reading that a law clerk in one chambers prepared a draft memo that he carried over to another chambers for the law clerk there to present to the Justice. But then I realized that I didn't know—and neither does Lazarus—whether the first law clerk's Justice knew about this beforehand.

Tushnet, *supra* note 102, at 24.

231. *See* LAZARUS, *supra* note 1, at 309 ("In Kennedy's view [at conference], the failure to make a contract in good faith *did* violate Section 1981.").

232. As Professor Tushnet notes, "The evidence seems clear that Kennedy was bothered by his vote from the outset, and his misgivings were not allayed by Brennan's draft opinion." Tushnet, *supra* note 102, at 23.

233. *See id.*

234. Lazarus now disowns the February date and claims the clerk arrived in early January. *See supra* text accompanying notes 124-125. Because I am assessing the book, I use the February date, which appears therein. Even moving the date back to January does not help Lazarus much. Justice Brennan had circulated his opinion a full month earlier, which is still a very long time in an environment where assenting Justices usually join an opinion within days, sometimes hours, of its circulation. As Lazarus must know from his time at the Court, when a Justice fails to join an opinion for a full month, this almost always means he is having serious doubts.

for a justice to withhold a vote.”²³⁵ Justice Kennedy had clearly formed his doubts about Justice Brennan’s approach long before the new law clerk arrived.

Stripped of its conspiracy rhetoric, the story of *Patterson* is rather straightforward.²³⁶ Justice Kennedy had “studied the history of Reconstruction during the summer recess”²³⁷ and had formed the firm view that section 1981 applies to the formation of the contract only. When Justice Brennan circulated his revised opinion, Justice Kennedy was tempted to abandon this view, but he was not fully persuaded and therefore temporized. Eventually, he decided to stick with his original view and, because neither Justice Brennan’s nor Justice White’s opinion reflected it, Justice Kennedy wrote separately. Far from proving undue influence on the part of the clerk—or Justice Kennedy’s “malleability”²³⁸—the story shows that Justice Kennedy had done his homework and had a firm grasp of the issues. Under no reasonable interpretation of the facts does this story support Lazarus’s scurrilous assertions.

Lazarus’s other examples of supposed improper law clerk influence (always on the part of conservative clerks, never liberal ones) also prove nothing at all. Members of the cabal—including one of Justice O’Connor’s law clerks—supposedly tried to influence her vote in *Webster*,²³⁹ but “of course, in the end Justice O’Connor did what *she* wanted, not what the cabal wanted.”²⁴⁰ In Justice Kennedy’s chambers, a conservative and a liberal clerk sparred before the Justice, and the Justice followed the liberal clerk’s advice.²⁴¹ In fact, despite some braggadocio and intemperate language, the clerks—conservative and liberal—seem to have been effective only when they were advancing the views of their Justices.

Lazarus also criticizes the Justices for giving up too much authority to inexperienced law clerks, especially by allowing them to write first drafts of opinions. However, Justice Blackmun also had his clerks write first drafts of opinions,²⁴² but, according to Lazarus, he kept firm control of their

235. Tushnet, *supra* note 102, at 23.

236. I rely entirely on events described in *Closed Chambers*, as I have no independent knowledge of what transpired within the Court.

237. LAZARUS, *supra* note 1, at 308.

238. *Id.* at 322.

239. *See id.* at 390-94.

240. Tushnet, *supra* note 102, at 23; accord LAZARUS, *supra* note 1, at 413.

241. *See id.* at 394-95. As Professor Tushnet put it:

When a Justice resolves the uncertainty in a conservative direction, as in *Patterson*, Lazarus says it was the result of the cabal’s influence; when he or she resolves it in a more liberal direction, as in *Webster*, Lazarus suggests that it was the result of fair-minded consideration of the merits.

Tushnet, *supra* note 102, at 24.

242. In the book, Lazarus admits this by implication, when he states that Justices Scalia and Stevens were the only two who wrote their own first drafts. *See* LAZARUS, *supra* note 1, at 271.

content through thorough editing.²⁴³ Why Lazarus believes other Justices do not maintain control by carefully editing the drafts prepared by *their* law clerks is a mystery.

Whether, and to what extent, Justices and judges should do their own primary drafting is an interesting issue, but it is largely academic. During the nine-month period of the 1988 Term, the Justices authored about 3800 pages of opinions, concurrences and dissents—some 425 pages per Justice, or the equivalent of a forty-seven-page law review article a month. Though the Court now takes fewer cases, the Justices still wrote some 2500 pages of opinions (278 pages per Justice or thirty law review pages per month) during the 1994 Term. This is an extraordinary amount of writing for Justices to do on a year-in-year-out basis.

Indeed, very few judges in the federal judiciary write all—or even a substantial number—of their opinions from scratch. Does this surrender too much authority to law clerks? It can, but it need not. Judges generally maintain control by giving law clerks detailed instructions and carefully editing and revising the drafts prepared by the clerks.

If this is a problem—and it may not be—it is a widespread one, brought on by the flood of cases that have made their way into the federal courts in recent years. The problem might be ameliorated for the rest of the federal judiciary by appointment of more judges,²⁴⁴ but one cannot increase the number of Justices and maintain a workable institution. The alternative would be for the Court to take fewer cases, but some have argued that it is taking too few cases already. Lazarus thus may have raised a legitimate issue, but he offers no solution—only scorn.²⁴⁵

By and large, though, the problem seems to be overstated, as Lazarus himself proves. Much of his discussion of what happened in various cases shows that the Justices are intensely aware of the importance of language and deeply involved in shaping the key passages of the opinions they author or join.²⁴⁶ During the course of thirty-four years at the Supreme Court,

When pressed by a reporter, he also said it expressly. See Interview with Edward Lazarus, *supra* note 14.

243. See Interview with Edward Lazarus, *supra* note 14.

244. Or it might not. Some have suggested that hiring more judges would not cause more work to be done, or that it would not cause work to be done any better. See, e.g., J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., Feb. 9, 1998, at A19.

245. Others have raised this issue, but without Lazarus's demeaning tone. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 107, 131-34 (1994); KRONMAN, *supra* note 40, at 320-28, 347-51; Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 ARIZ. L. REV. 211, 214-16 (1990); Andrew J. Kleinfeld, *Politicization: From Law School to the Courts*, ACAD. QUESTIONS, Winter 1993-1994, at 9-10.

246. See, e.g., LAZARUS, *supra* note 1, at 310-12 (discussing *Patterson*); *id.* at 401 (discussing *Michael H.*); *id.* at 408-17 (discussing *Webster*); *id.* at 468-80 (discussing *Casey*).

Justice Brennan wrote a remarkably coherent body of case law,²⁴⁷ though he may not have drafted every word of it himself, as did Justice Marshall during his twenty-four years. No one has accused Justice White of having been the patsy of his clerks, or Justices Powell or Blackmun either. The Justices' views, honed over many years and many issues, shine through their opinions despite the motley parade of clerks that marches through their chambers. In the end, it is hard to disagree with long-time Court observer Lyle Denniston: "Emotionally overwrought, captivated by the hilariously foolish notion that the Supreme Court is really run by scheming clerks, Lazarus tries to pass off histrionics as history."²⁴⁸

V. IS THIS BOOK REALLY NECESSARY?

Lazarus claims special leverage for his ferocious assault on the Supreme Court because he was there and able to observe the Justices and their minions at work. But such insider knowledge—even if it were accurate and fairly portrayed—gives us very little useful insight. Courts speak through their judgments, and those are freely available for everyone to review and criticize. In controversial cases, the process of deconstruction is aided by dissenting and concurring opinions, which highlight the majority's flaws and weaknesses. If the Court's opinions are coherent, understandable, respectful of precedent, internally consistent, and sound of judgment, the Court should be judged well, even if it gets there by political maneuvering, as happened in *Brown v. Board of Education*.²⁴⁹ If its opinions lack these qualities, the Court should be judged harshly, no matter how regular the process by which they were derived.²⁵⁰

Of course, deep divisions and lack of mutual respect among the Justices will mar the Court's work product. But we have no need for insider accounts to understand the Court's opinions; academics and lawyers have managed to analyze and critique judicial opinions without any access to special sources; their criticism has been copious, insightful, and pungent.²⁵¹

247. See Massachusetts Associate Justice Charles Fried, Speech at U.S. Supreme Court Memorial for Justice William Brennan (May 22, 1998) (transcript on file with *The Yale Law Journal*).

248. Denniston, *supra* note 70, at 5F.

249. 347 U.S. 483 (1954).

250. It is not clear that a collegial Court can operate (or ever has operated) without reference to political considerations. As David Kairys explains: "The central problem for Lazarus and this book—and for this dominant mode of legal scholarship—is to document the norm, compared to which the injection of politics can be described as a deviation." David Kairys, *Reason Worship*, in *JURIST*, *supra* note 7, at 18. In four elegant paragraphs, Kairys demonstrates that the opinions Lazarus praises—*Brown v. Board of Education*, *Marbury v. Madison*, *Griswold v. Connecticut*, and Justice Harlan's dissent in *Poe v. Ullman*—were born of the same political polarization and gamesmanship that Lazarus critiques.

251. See, e.g., Paul Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673 (1990); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J.

Indeed, as Lazarus demonstrates, knowing the story behind the opinion only clouds the critic's vision and confuses the analysis.

Consider Lazarus's big scoop—the revelation that Chief Justice Rehnquist circulated a secret draft of *Webster* to the conservative Justices, hoping to lock in a majority before the liberal Justices had a chance to comment. Lazarus reports that “Chief Justice Rehnquist sought deceitfully and surreptitiously to overturn the most significant decision of the previous generation” in an opinion that “ignored the monumental legal issues at stake . . . and that offered transparently silly or undefended justifications for its unprecedented conclusions.”²⁵² Because I do not have a copy of the Chief Justice's draft,²⁵³ I must rely on Lazarus's characterization of it, if such a draft even exists. But let us assume he is right. What purpose does this revelation serve except to generate contempt for the Chief Justice?

By Lazarus's own account, none of the Justices was actually deceived, and small wonder. Contrary to Lazarus's claim that the draft was “deceitful,” the Chief Justice appears to have been quite clear about what he was doing: He retained *Roe* as a precedent but significantly weakened the standard of review so as to allow greater regulation of abortions.²⁵⁴ The other Justices—no dummies they—read the draft and quickly grasped its implications. Justice O'Connor objected,²⁵⁵ and Justice Kennedy too expressed “real concerns.”²⁵⁶ Justice Kennedy eventually joined, but only after asking for revisions that watered down Chief Justice Rehnquist's new standard. The changes did not satisfy Justice O'Connor, and she wrote separately, denying the Chief Justice a majority.

Lazarus's pejoratives aside, what does all this tell us that we do not already know based on the public record? It is impossible to read *Webster* without recognizing the great fissures within the Court on the abortion

920, 949 (1973); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Efforts To Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998); Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

252. LAZARUS, *supra* note 1, at 423.

253. It's not in the Marshall Papers, as Lazarus proudly tells us, *see id.* at 402, and Lazarus refuses to produce his copy for inspection. *See supra* note 50.

254. Lazarus may also be saying that Chief Justice Rehnquist's draft was deceitful because it stopped short of overruling *Roe* but so changed the standard as to gut it effectively. Again, Lazarus's personal feelings get in the way of reasoned analysis. From what one can tell of the Chief Justice's *Webster* draft, it would have kept *Roe* in place to preclude outright prohibitions on abortion, such as those challenged in *Roe* (Texas) and *Doe* (Georgia). This was not nearly as broad a right as had developed since those cases were decided, but it is surely an overstatement to say that Chief Justice Rehnquist's draft would have overruled *Roe* altogether. Nor is it unusual for the Court to weaken a precedent without overruling it outright. For example, *Lochner v. New York*, 198 U.S. 45 (1905), the most reviled opinion since *Plessy v. Ferguson*, 163 U.S. 537 (1896), has never been overruled, yet everyone knows it is a dead letter. Is that deceptive? No, it is just one of the techniques courts employ to deal with precedents they find troublesome.

255. *See* LAZARUS, *supra* note 1, at 405-06.

256. *Id.* at 407.

issue. If the Justices are to be faulted in *Webster*, it must be for the fragmented and sometimes rancorous opinions they issued that day; many commentators have done so without the aid of insider sources or secret drafts.²⁵⁷ Lazarus's insider account—dripping with contempt and bristling with fury—adds nothing useful. Indeed, the facts Lazarus reports blunt the sting of his invectives by showing that the Justices were not buffaloed into signing onto an opinion that did not reflect their views.

Other insider stories that Lazarus divulges are equally unenlightening. He criticizes Justice Powell's opinion in *McCleskey I* pretty much on the same grounds many others have,²⁵⁸ and the same goes for his discussion of *Casey*,²⁵⁹ *McCleskey II*,²⁶⁰ and several other cases.²⁶¹ In a book that lays claim to brilliance and scholarship,²⁶² Lazarus comes up with not a single new insight about the Supreme Court or the areas of law he discusses.²⁶³ Instead, he rehearses arguments developed by others²⁶⁴ and tries to make his mark by spicing up the story with insider gossip.²⁶⁵

Nor is it clear that Lazarus tells us anything useful—as opposed to merely titillating—about the Court. Even assuming the truth of Lazarus's worst charges, he does not explain what we are supposed to do with the “information” he provides—except to feel contempt for various Justices.

257. See, e.g., David M. Smolin, *Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries*, 20 CUMB. L. REV. 71 (1990); Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 BYU L. REV. 403.

258. Compare LAZARUS, *supra* note 1, at 205-07, with Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1408-13 (1988), and *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 158 (1987).

259. Compare LAZARUS, *supra* note 1, at 483-85, with Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 80 (1995).

260. Compare LAZARUS, *supra* note 1, at 494-95, with *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 77, 319 (1991).

261. For example, Lazarus's argument that *Roe* should have been decided on equal protection grounds is painfully familiar. See, e.g., Daly, *supra* note 259, at 149-50.

262. “Unprecedented in its revelations and unparalleled in the brilliance of its analysis, *Closed Chambers* is the most important book on the Supreme Court in a generation.” LAZARUS, *supra* note 1, at book jacket.

263. See Irons, *supra* note 98, at 32-33; Tushnet, *supra* note 102, at 22, 25.

264. Lazarus travels over ground that has been well-plowed by other scholars. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (1988); JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.*, (1994); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* (1996); JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995); MARK TUSHNET, *MAKING CONSTITUTIONAL LAW* (1997). Peter Irons, David O'Brien, and Mark Tushnet all note the book's lack of originality. See Irons, *supra* note 98, at 31, 33; David O'Brien, *Breaching Confidences, Court Bashing, and Bureaucratic Justice*, in *JURIST*, *supra* note 7, at 19, 19; Tushnet, *supra* note 102, at 25.

265. Contrast Professor Kathleen Sullivan's review of *Closed Chambers* in the *New York Review of Books*, where, in less than 1500 words, she offers a subtle and original analysis of the Court's dynamic during the same period covered by Lazarus. See Sullivan, *supra* note 68, at x.

Perhaps Lazarus wants to teach us to pick “better” Justices, but he does not explain how the tales he tells out of school will help engender this happy outcome. Justice Souter, whom Lazarus seems to admire, was picked pretty much by the same people and for the same reasons as Justice Kennedy, whom Lazarus disdains. Yet both Justices confounded the politicians on the abortion issue by joining in the *Casey* triumvirate. Indeed, history shows that Justices are a remarkably unpredictable lot and that the great hopes, and worst fears, of those supporting and opposing their appointment are dashed with regularity.²⁶⁶ Lazarus gives no hint how the information he purports to disclose can help us make better or more informed decisions concerning judicial selection.

It is an article of faith among the post-baby boom generation that more information is better than less, and that democracy abhors the vacuum of a secret institution. Lazarus pushes these bromides hard, but he does not pause to consider whether they hold true when applied to the courts. While we expect openness of deliberation in our legislative and administrative bodies, adjudicative processes have traditionally been secret. Not just in the Supreme Court, but in every other court in the country. Not just today, but dating back to the earliest days of the Republic and before.²⁶⁷ Not merely in this country or in the other common law jurisdictions, but almost without exception in the civilized world.²⁶⁸ This tradition of deliberative secrecy—which applies both to judges and lay factfinders—leads to an openness of discussion that enhances deliberations. While an argument from tradition does not trump every other consideration, those who would undermine a tradition so well-established and widely accepted must overcome a heavy presumption. Lazarus does not even try. He simply trots out Justice Brandeis’s aphorism that “sunlight is the best disinfectant”²⁶⁹ as if the Supreme Court were a dank basement steeped in mildew.

Closed Chambers ends with a vacuous plea that the Justices “restore the character of the Court and . . . repair its inner processes” by mustering

266. See Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 743-44 (1998).

267. See, e.g., Kevin C. Milne, Note, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213, 214 (1987) (“The accounts of delegates who participated in the Constitutional Convention of 1787 reveal that the doctrine of judicial privilege finds legitimacy in the delegates’ struggle to define the judiciary’s role within the new system of government.”).

268. See, e.g., COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, SELECTED INSTRUMENTS RELATING TO THE ORGANIZATION, JURISDICTION AND PROCEDURE OF THE COURT 61 (1993) (explaining the duty “to preserve the secrecy of the deliberations of the Court”); Mitchel de S.-O.-l’E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1357 (1995) (“The rapports [written by the judges] may also be protected by the secrecy of judicial deliberations, and therefore protected by law as a part of the judicial system’s internal workings, which are not open to the public.”).

269. David Gergen Interviews Edward Lazarus, *The NewsHour with Jim Lehrer* (PBS television broadcast, June 15, 1998) (transcript on file with *The Yale Law Journal*).

“open-mindedness and intellectual integrity.”²⁷⁰ But the book’s most likely effect will be to make communications within the Court more guarded and less productive.²⁷¹ After all, you never know whether the next Edward Lazarus is lurking within the chambers down the hall—or within your own. *Closed Chambers* is likely to become a self-fulfilling prophecy.

VI. THE SORCERER’S APPRENTICE

Early on in *Closed Chambers*, Lazarus gives a thumbnail sketch of life at the Supreme Court. Unlike employees in other government offices in Washington, who must wear badges or show I.D. to enter their place of employment, Supreme Court employees—including the three dozen new faces that arrive every summer—are waved in by guards who recognize them on sight.²⁷² This is no accident; according to long-standing tradition, every officer of the Supreme Court police force studies pictures of the new clerks before they come on board. It is a small gesture, but it is symbolic of the Court’s special atmosphere. A Supreme Court clerkship is not simply a job, a great honor, or a stepping stone to plum jobs in the legal profession—it is membership in a family, with correlative rights and responsibilities. As in other families, the responsibilities are not precisely defined—until 1989 they were not even written down—but there is a common understanding as to what they mean: The clerk has a duty of diligence, loyalty, and confidentiality both to the Justice who appoints him and to the other Justices. He also has a duty of loyalty to his fellow clerks and to other Court employees. In exchange, the clerk gets to work in the headiest environment to which any young lawyer could aspire and enjoy the luxury of open, robust, and unbridled debate about our nation’s most pressing legal issues, not only with the Justices, but with the sharpest legal minds of his own

270. LAZARUS, *supra* note 1, at 517-18. As Lyle Denniston notes, “Lazarus appeals plaintively to the better natures of the Justices—after having labored to prove they have none. One wonders why he is not honest enough about his cause to suggest impeachment for the lot of them.” Denniston, *supra* note 70.

271. Rubin has also made this point:

The irony of *Closed Chambers* is that it will exacerbate the problems that Lazarus decries. He urges Justices to deliberate more searchingly, but he is only encouraging greater reserve. The previously unthinkable possibility that some clerk is sneaking out copies of sensitive documents and jotting down every word is certain to hamper communications. Lazarus laments the suspicion he sees among the Justices and among the clerks; his book won’t promote trust among colleagues. He rails against the growing politicization of the clerks; future clerks, certain to read his book before starting, will arrive expecting to find—and therefore more likely to create—a courthouse filled with scheming co-workers. He urges the Court to act like a court, not like the political branches; following his example, why not leak a conference memo to the *New York Times* to pressure a Justice to reverse position in a pending case?

Rubin, *supra* note 33.

272. See LAZARUS, *supra* note 1, at 24.

generation. Until *Closed Chambers*, everyone counted on the good faith of everyone else to stay well within the Court's written and unwritten rules.

It is no surprise then that former Supreme Court clerks have reacted with dismay and fury to *Closed Chambers*. The sentiment is summarized by Gretchen Craft Rubin, who opened an op-ed piece in the *Washington Post* as follows:

Edward Lazarus, a former clerk for Justice Harry A. Blackmun, has betrayed a fundamental tenet for people who hold such jobs by discussing the Supreme Court's inner workings in his new book, "*Closed Chambers*." Perhaps only the Justices themselves and former clerks (of whom I am one) can appreciate just what a break with tradition this book represents.²⁷³

Similar sentiments were expressed by Supreme Court practitioner and former Supreme Court clerk, Carter Phillips, who opened his review in the *American Lawyer* as follows:

Let me be plain: Edward Lazarus's reliance in the book *Closed Chambers* upon confidential, internal communications among Justices and their law clerks at the Supreme Court during the year that he was a law clerk for Justice Blackmun is wrong and offensive.²⁷⁴

The anger has been directed at some of the gratuitous and intemperate remarks Lazarus hurls at the Justices and his fellow clerks, but even more at the change this is likely to bring about in the culture of the Supreme Court. There has always been some risk that what goes on within the Court would become public through books like *The Brethren*. But the damage from such accounts is necessarily limited. As one journalist put it: "It is . . . one thing when someone from the 'cheap class of newspaper hangers-on' writes a book; it is another thing entirely when the author is a former Supreme Court law clerk."²⁷⁵

Lazarus has done much more than write a seriously flawed book; he has staked out a claim that it is perfectly acceptable for law clerks to do this. Indeed, he claims he is performing a great public service by exposing to scrutiny the inner workings of an institution long shrouded in secrecy. Of course, there is nothing special about Edward Lazarus or his time at the Court; if it is acceptable for him to do this, then it is fine for any other clerk

273. Rubin, *supra* note 33.

274. Phillips, *supra* note 59, at 42.

275. Fray-Witzer, *supra* note 81, at N1.

who, in Lazarus's words, thinks he "ha[s] something important to say."²⁷⁶ Lazarus thought that ten years was a decent interval before he would answer the "call of history,"²⁷⁷ but other clerks might think five years or three years is time enough. And, if it's acceptable for Supreme Court clerks to do it, there can be no legitimate objection to having clerks of other courts do it as well. If Lazarus's claim of legitimacy prevails, he will have ushered in a new era in the sordid age of the media lawyer—the media law clerk.

But as *Closed Chambers* demonstrates, law clerks are not in a good position to give us useful information about the institution they serve. Though they work within the Court, they gain little reliable information as to what goes on inside other Justices' chambers. They must rely, instead, on rumor, hearsay, and the claims of other clerks with "a grossly inflated view of their own worth."²⁷⁸ Like Lazarus, they get deeply involved—sometimes overwhelmed—by the drama that unfolds around them, and they pick up the prejudices and blind spots of the Justice they serve. Eager for fame and fat advances, and egged on by zealous publicists, the Lazaruses of the world will try to gain notoriety and settle old scores by filling their books with the type of hurtful and irrelevant claptrap that found its way into *Closed Chambers*. Are we truly wiser about the workings of the Supreme Court by learning that a conservative and a liberal law clerk—both named—came to blows and fell into one of the courtyard fountains?²⁷⁹

Closed Chambers is at its best in those passages discussing events where Lazarus was not present and where he is not relying on inside information. In the chapters discussing the history of the death penalty²⁸⁰ and the evolution of the right to privacy,²⁸¹ the book is eminently readable, though not particularly original. But when Lazarus turns to his time at the Court—which is what he and his publicist claim makes the book so special—it is as if the scholar in him is overcome by the frustrated law clerk who imagines how he could do a much better job than those appointed to the office.²⁸² It is a common fantasy—every clerk has had it—but most of us have the good sense not to turn our private daydreams into media events.

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

277. See Mauro, *supra* note 56, at 1A.

278. Phillips, *supra* note 59, at 45.

279. See LAZARUS, *supra* note 1, at 419.

280. See *id.* at 77-217.

281. See *id.* at 329-42.

282. As Carter Phillips notes:

What makes the effort particularly unseemly is that the confidential communications largely add nothing to the narrative. They merely provide a "kiss and tell" element to a labored effort that offers a gratuitously mean-spirited and largely unsupported criticism of the Court and some of its members.

Phillips, *supra* note 59, at 42.

But then, few knowledgeable readers will conclude that *Closed Chambers* reflects an abundance of good sense.