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The Law Clerks: Profile of an Institution*

Paul R. Baier**

The law is not made by judge alone, but by judge and company.—Jeremy Bentham

I. INTRODUCTION

Every ten years or so someone in the literature writes about the law clerks. In the fifties, a flurry of articles appeared in U.S. News & World Report and in the New York Times focusing on law clerks who serve Justices of the United States Supreme Court.1 The questions considered were whether these clerks were a “second team,” and whether, as a result, the opinions of the Court were really only the apocrypha of the law clerks. If so, shouldn’t this otherwise unnoticed influence be exposed and condemned? A recent appointee to the United States Supreme Court and former clerk himself, Justice William Rehnquist, was a principal in the effort, arguing under the title “Who Writes Decisions of the Supreme Court?” that clerkship “influence” did exist, particularly on the Court’s handling of petitions for certiorari, and that “because of the political outlook of the group of clerks that I knew, its direction would be to the political ‘left.’”2 Several articles were written rebutting these allegations, all

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* This paper was read as the invocation address at the first Law Clerk Institute, Louisiana State University Law Center, Baton Rouge, Louisiana, Aug. 30 to Sept. 1, 1972. The Institute is sponsored by the Appellate Judges Conference of the Division of Judicial Administration of the American Bar Association and by the Louisiana State University Law School. The program is now an annual event. The second Institute was held this past August again at Louisiana State University, and several contributors to this symposium issue participated as faculty, including Professor Baier, Justice Robert Braucher, Chief Judge Lesinski, and Judge Eugene Wright.

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A suspicion has grown at the bar that the law clerks . . . constitute a kind of junior court which decides the fate of the certiorari petitions. This idea of the law clerk’s influence gave rise to a lawyer’s waggish statement that the Senate no longer need bother about confirmation of justices but ought to confirm the appointment of law clerks.

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authored by equally distinguished men and former clerks to Justices of the Supreme Court.

William Rogers, who once clerked for Justice Reed, wrote that during his service he never witnessed a law clerk exercising any substantial influence on the decision making of the Justices. It was Rogers's thesis that because the duties of the clerks were often on the technical rather than the policy side of judgment, undue influence was improbable:

The law clerks perform the drudgery of judging—looking up citations, examining old cases for apt quotations, general research. This liberates the Justices for their own important work. Theirs is the ultimate responsibility to decide and vote yea or nay on each case. And this vote is cast in secret conference of the Justices, from which the law clerks are rigorously barred.3

A different point, but one still in rebuttal, was that of Professor Alexander Bickel of the Yale Law School. Analyzing the charge of influence, Professor Bickel's response was to concede it, but only after carefully detailing the "larger function" of the law clerk, a function that includes more than just running the research errands. In Bickel's depiction, the law clerk is the young intellectual collaborator, fulfilling Bentham's dictum, "the law is not made by judge alone, but by judge and company." Properly understood, the law clerk's contribution—even if labeled "influence"—is toward enhancement of the intellectual integrity of the judicial process. The clerkship, according to Bickel, "is in its modest way one of the influences that keep judicial law rationally responsive to the needs of the day."4

No doubt the delegation issue makes for colorful journalism. Indeed, it provides a nice beginning here too, for hopefully you are now on the edge of your seat willing to listen to me further. I should think if anything can pique your legal ears at the outset, it is the thought that for the ensuing year you will find yourself acting, de facto, as a jurist. But all of this must await later discussion. There is first the need to detail just what it is the law clerks do. We then will be in a better position to see how the clerk's duties measure up against traditional notions of the judicial function. We need not wholly abandon the delegation issue, however, to find an appropri-

ate beginning, a sort of theme for the remarks that follow. Mr. Justice Rehnquist concluded his rejoinder to the good Professor Bickel and Mr. Rogers with this paragraph:

The resolution of these disagreements must await a thorough, impartial study of the matter by someone who is not personally involved. Meanwhile, every expression of a point of view by someone who was on the scene, even in as small a way as we were, is bound to contribute to a better understanding of this phase of the judicial process.5

Under the terms of my charge at this first Law Clerk Institute I am supposed to sketch the history of the clerkship institution, the duties generally associated with the task of clerking, and the importance of the position in judicial administration. I will also add something of my own about the discoveries you can expect to make, and retain for yourselves, as fledgling participants in the judicial process. Where appropriate I plan to season my observations with personal recollections drawn from my own clerkship experience—no doubt to an excess, but I simply can’t resist the opportunity.

I speak to you as fellow law clerk, but unlike you who have it all to anticipate, I must look back almost three years to reflect again on my clerking days. It was my good fortune to clerk for Judge John H. Gillis at the Michigan Court of Appeals, the intermediate, workhorse appellate level in Michigan. Although this was not work for any status court, the job was clerking nonetheless. Out of the experience was born my present interest in the judicial process generally and in the law clerkship as aid to that process. It was at the Michigan Court of Appeals that I first met T. John Lesinski, Chief Judge of the court and official consultant to this Institute.6 Judge Lesinski first mentioned the idea of a workshop for prospective clerks before they begin their tenure.7 He also suggested that there should be a manual on clerking available for use in both state and federal courts across the country.8 I always thought these ideas were sound ones, especially since it was not until midyear in my clerkship—perhaps not until the very end—that I first felt secure as a clerk and knowl-

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6. Judge Lesinski is currently Chairman of the Appellate Judges Conference, Section of Judicial Administration of the American Bar Association.
7. The origin of the idea and the planning for the first Law Clerk Institute is recounted more fully in the Appendix to this article.
8. The Law Clerk Institute has begun preparation of such a manual. All clerks attending the first program were asked to bring with them whatever written instructions they had received from their court on beginning their clerkship. From these and other information to be collected it is hoped a comprehensive manual on law clerking will result.
edgeable in the “art” of law clerking. The word is chosen intentionally. The ropes of clerking are hard enough to learn without the added burden of approaching the task in ignorance. Yet the traditional approach—the casual suggestion to the novitiate to “take a crack at it”—hardly seems fit to nurture sound performance of the job from the start. I remember thinking near the end of my stay how strange that I should leave the court with—to use a former law professor’s phrase—the eagles perched on my shoulders, only to make room for my purblind successor.

In the view of its planners, this Institute offers a real chance to improve the performance of the clerkship function. My efforts at description of the clerkship institution are only the first in a program designed to immerse you in the process of law clerking, as is apparent from the Institute’s prospectus. The end in view is the important one of getting the job of clerking done at the next term of appellate courts throughout the nation more efficiently than at the last. The goal is to provide guidance at the outset, rather than allowing experience to serve as exclusive tutor. Our expectations are not grandiose. We only hope to send next year’s clerks to the business of clerking knowing from the start something about the tasks ahead and how best to accomplish them.

I cannot resist one final introductory remark. I have it on the best authority, indeed from the Justice himself, that despite his earlier criticisms of the law clerks, Mr. Justice Rehnquist now employs the maximum allotment of three. And each prepares memoranda on certiorari petitions and assists in the drafting of opinions. It appears there is no escape from resort to the clerkship institution in aid of the judicial process whenever the press of the case load leans heavily on the judge.

II. **Up From “Secretary”**: The History and Etiology of the Clerkship Institution

We begin with the calmer, less colorful historical question:

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9. Brudney & Wolfson, *Mr. Justice Rutledge—Law Clerks’ Reflections*, 25 Ind. L.J. 455, 456 (1949). I received similarly limited instructions as Judge Gillis’s clerk. He simply called me into chambers, handed me the file containing the briefs on appeal, directed me to the record in the case, and said that I was to prepare a draft opinion by the end of the week.

10. For its content and the curriculum of the first Law Clerk Institute see the Appendix to this article.


When and where did the law clerk originate? Why has the office acquired its present institutional status? What accounts for the importance of the institution to judicial administration?

Most of what is known about the history of law clerks, at least those serving the United States Supreme Court, was traced during the nineteen sixties by Chester Newland, a political scientist and student of the Supreme Court. Professor Newland's article "Personal Assistants to Supreme Court Justices: The Law Clerks," published in the Oregon Law Review in 1961, represents that decade's most comprehensive study of the clerkship as an important aspect of the judicial process in our nation's foremost tribunal. Perhaps unwittingly, the article represents a scholarly response to Mr. Justice Rehnquist's earlier call for an impartial study of the clerkship institution. However, as is almost universally true of the various surveys of the law clerks, Professor Newland's work is confined to tracing the emergence of the clerkship in the Supreme Court of the United States. While it is important to examine law clerking at this pre-eminent level, it can be said with some assurance that not all clerking is like that experienced by Supreme Court law clerks. Our inquiry, particularly our focus on the duties of the law clerks, must be broader and should include clerking as practiced at both intermediate and final appellate tribunals throughout the country. Any description of the clerkship function limited to the personal assistants of Supreme Court Justices is too narrow to suit our purposes. The Institute is national in scope, and the shape of law clerking may vary considerably as we pass from the Supreme Court to state courts of last resort and to state intermediate appellate tribunals. Nonetheless, for purposes of historical analysis, it is easier to focus on the Supreme Court because of the availability of the National Archives and other historical sources.

A. History

A safe estimate is that almost 100 years have elapsed since law clerks were first employed by Supreme Court Justices. Professor Newland and others attribute clerkship at this highest level of the

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13. 40 Ore. L. Rev. 299 (1961) [hereinafter cited as Newland]. I have relied heavily upon Professor Newland's article for the historical development of the clerkship institution.
14. See text accompanying note 5 supra.
15. See Newland, supra note 13, at 299 n.*.
16. See id. at 305-06.
judiciary to Justice Horace Gray, who ascended to the bench in 1882. Gray came to the Supreme Court from Massachusetts, where he served as Chief Justice of the Supreme Judicial Court, and where in that capacity he began the practice of employing an honor graduate of the Harvard Law School at his own expense as "secretary." Thus, apparently, the clerkship owes its earliest appellation, "secretary," to the terminology of Justice Gray.18 This was in 1875, and if these dates are correct, what has emerged as the institution of law clerking is almost a century old.

The practice of hiring a young law graduate to serve as secretary, of changing the clerk annually, and of making him a responsible participant in the office aspects of the judiciary was continued by Justice Holmes, who succeeded Gray, and by Justice Frankfurter. Professor Llewellyn ranks it as Frankfurter's greatest contribution to our law that "his vision, energy, and persuasiveness turned this two-judge idiosyncrasy into what shows high possibility of becoming a pervasive American legal institution."19

In the century that has passed, the law clerk has evolved in name as well as in substance. One might describe this evolution as "up from 'secretary,'" for the law clerk, after escaping Justice Gray's initial characterization, has been relabeled periodically, passing from secretary to the more attractive "law clerk," "law assistant," "research aide," and "legal assistant."20 Wisconsin calls its clerks "law examiners."21 There is, however, occasional slippage on this point: consider the designation "brief reader."22

By statute, the term "law clerk" is a secure characterization in the federal courts, and it is this term that is generally utilized to describe the office today. Although historically the first official ref-

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(1960): S. WILLISTON, LIFE AND LAW 87 (1940) [hereinafter cited as WILLISTON].
18. See Newland, supra note 13, at 301 n.5.
22. The question just what to call the law clerk has always been troublesome. The terms "secretary" and "clerk" suggest a typist or file clerk, and at one time there may have been good reason to use this designation since the tasks in the beginning were indeed on the secretarial side. However, as the institution matured in the tasks assigned it, the designation "clerk" became a misnomer if taken too literally. This would often require the young graduate to explain the substance of his first employment, at least to his parents, lest they think that the past 3 years had produced a file clerk, not an attorney. As a result, we have been told one state changed the designation from law clerk to "briefing attorney" to satisfy its clerks' request for a little more prestige. Johnson, WHAT DO LAW CLERKS DO?, 22 TEXAS B.J. 229 (1959). A fair inference is that a similar purpose underlay the various changes in terminology described in the text.
ference to the office was in terms of “stenographic clerk,” the United States Code authorizes appointment by the Justices of “law clerks and secretaries whose salaries shall be fixed by the Court.” Thus the dichotomy between the law side and the clerical side, even the term “law clerk” itself, is frozen in the pages of the Federal Code. Interestingly enough, in explaining just what it is that Supreme Court clerks do, one former clerk points out that this entry in the Code carries the distinction of never having been construed by the very judiciary the institution serves.

At first blush it might appear significant to one acquainted with the traditions of judicial administration that the law clerk’s genesis has been attributed to Horace Gray while he sat as Chief Justice of the Massachusetts Supreme Judicial Court. The office of chief justice has always been considered responsible for innovations in the internal operating procedures of the court, and it would seem natural that a chief justice should be the one responsible for introduction of the law clerk as an aid to the justices. Such is not the history of it, however, and the truth of the matter shatters the cynic’s notion that those interested in efficient judicial administration are always incompetent as jurisprudences. I for one would have thought it highly unlikely that John Chipman Gray, Harvard’s celebrated legal philosopher, would have contributed anything toward improving the administration, as well as the abstraction, of justice. But history has it that it was Gray the philosopher who passed to

23. Congress first authorized clerical assistants for Supreme Court Justices in the Sunday Civil Act of Aug. 4, 1886. The Act provided “for stenographic clerk for the Chief Justice and for each associate justice of the Supreme Court, at not exceeding one thousand six hundred dollars each . . . .” 24 Stat. 254 (1886). This first authorization was in response to Attorney General A.H. Garland’s request to Congress in his Annual Report of 1885 that the Justices be given clerical assistance because of the press of the Court’s judicial business. See Newland, supra note 13, at 301.


25. Johnson, supra note 22, at 229.

26. The work of the late Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court is the paradigm. Among Vanderbilt’s many writings on judicial reform see THE CHALLENGE OF LAW REFORM (1955) and MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949). For details concerning other renowned chief judges and their work toward improving judicial administration see JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY, Mar. 11-14, 1971, at x-xii, and Pringle, The Role of the State Chief Justice, id. at 80. See generally Burton, Judging Is Also Administration, 21 TEMP. L.Q. 77 (1947).

27. For the origin of this word see K. LLEWELLYN, THE BRAMBLE BUSH 10 (1960).

his half brother, Chief Justice Horace, the thought of using a young law graduate as legal secretary. 29

B. Etiology

There is one tenet of judicial administration that remains straight and true when measured against the growth of law clerking. The etiology of the clerkship—the origin of the institution in terms of its causes—again proves the truth of John Frank's observation in *Marble Palace*, his classic biography of the Supreme Court: "As the work load increases, the methods must be streamlined or else the work output will go down." 30 The clerkship represents the judiciary's response, initially fortuitous, to the press of the cases; it is application of the principle of division of labor to the judicial process—an application from which there has been no escape, even for Justice Rehnquist. For better or worse, the clerkship has proved the invariable, now deliberate, response to the growth of appellate case loads throughout the country. 31

Consistent with this etiological thesis, one would guess that around 1882, the date Justice Gray first used law clerks, the Supreme Court of the United States began to experience the case load brunt of the new industrial growth occurring toward the end of the nineteenth century. A second look at *Marble Palace* and Frank's data proves the guess right. When the Supreme Court first met in 1790 there were no law clerks, nor was there any need for them. The first Supreme Court, Frank tells us, had nothing to do; it adjourned. Near the end of the nineteenth century, however, vital changes occurred. The country expanded to its present national borders and increased its population and commerce enormously. And the business of the Supreme Court expanded with the growing country. The Court began to encounter a real demand on its time about 1850. It reached a point of full production and became swamped by about 1875, when it was producing something like 200 opinions a year and could not keep up with the flood of new work. 32 From the data it

29. *See Williston*, supra note 17, at 87.
32. *Frank*, supra note 30, at 12, 288.
appears the introduction of the law clerk in the early 1880's was no historical accident; rather the clerkship sprang up as the Court's own protective response to its burgeoning docket. In this regard, it is significant that Attorney General Garland's 1885 Report to Congress contains the first official mention of clerkship assistance for the Supreme Court Justices, together with criticisms of the delay present in the transaction of the High Court's business and with a plea for remedial measures. To quote Garland:

I believe it would greatly facilitate the business of the Supreme Court if each justice was provided by law with a secretary or law clerk, to be a stenographer, to be paid an annual salary sufficient to obtain the requisite qualifications, whose duties shall be to assist in such clerical work as might be assigned to him.35

The data of the twentieth century also suggest that an increasing case load often requires a change in the method of the Court's business. This time the change was one of degree, not of kind: hiring was doubled. Now there were two clerks, a practice inaugurated in 1941 by Chief Justice Stone in response to further growth in the Court's business.34 By 1947 each Justice was authorized to hire two law clerks, and again one might correctly guess there was something peculiar about the case load that year—it was 1947 when in forma pauperis petitions first began to cause serious problems of docket management.35 Finally, continued encroachment on the time charts of the Justices precipitated the most recent change in the policy of the Court, an allotment of three law clerks to each Supreme Court Justice.36

Were one to broaden the inquiry to include state courts and there test these views about the emergence of law clerks, no significant departure from the federal experience would appear. Recent figures establish that in those states where case loads are comparatively small, little use is made of law clerks. Wyoming, for example, employs none.37 There are four other states—Maine, Missouri, Nebraska, and Vermont—whose appellate judges until recently were also wholly without law clerks.38 None, however, is notorious for any

33. 1885 ATT'Y GEN. ANN. REP. 43.
34. Newland, supra note 13, at 303.
35. Id. at 304.
37. "At this time we have no law clerks, administrators or staff assistance." Letter from Chief Justice John J. McIntyre to Paul R. Baier, Sept. 22, 1972.
38. See COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 80-83 (rev. ed. 1970) [hereinafter cited as COUNCIL]. Justice Harry A. Spencer of the Nebraska Supreme Court,
litigious spirit or case load crisis.

Lately other state courts have also increased previously minimal use of law clerks in response to swelling appellate dockets. For example, the seven justices of the Kansas Supreme Court have increased their staff of clerks from four to nine.39 Similarly, the number of clerks serving the Supreme Court of North Dakota doubled in 1971.40 Finally, the need for more clerks has even touched New Hampshire,41 despite that State’s long tradition of independence exemplified by John Doe, its spirited Chief Justice, who not only wrote for himself without the help of law clerks, but who also was quite ready to write for any of his colleagues willing—or importuned—to let him.42

California, on the other hand, leads the country in the number of law clerks authorized and serving that State’s judiciary. Over 30 clerks serve the California Supreme Court alone.43 Of these, approxi-

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42. See Reid, Doe Did Not Sit—The Creation of Opinions by an Artist, 63 Colum. L. Rev. 59 (1963). Justice William Grimes of the New Hampshire Supreme Court, who was also at the Institute as a faculty member, informed me that Doe’s “New Hampshire Method” was still alive and well in Concord:

“What justice requires” is the test of many things in N.H. law; and if the court has a correct sense of justice, that test is something we need not be afraid of, however unsatisfactory it may be to mathematical and mechanical minds, and to judges who want to avoid the cultivations and laborious use of practical judgment on matters of fact by applying a two foot rule taken from the N.H. Reports.

Letter from Charles Doe to Frank Nesmith Parsons, Oct. 29, 1895, quoted in 63 Colum. L. Rev. at 63.

43. See Council, supra note 38, at 80. Chief Justice Donald R. Wright currently em-
mately half are career employees pursuing a sort of professional clerkship, but that still leaves over two clerks for each of the seven justices. New York is next with sixteen clerks authorized for the seven judges of the Court of Appeals. In both of these States lawsuits are aplenty, and litigation is a way of life. Again it seems the more cases on the docket, the more law clerks. Pennsylvania and Illinois also rank high on the list, with two clerks for each supreme court justice.

To one convinced that the clerkship’s contribution is indeed an enhancement of the rationality of judgment, all these figures could easily tempt a devilish inquiry. I for one recall very few cases of moment from Kansas or from Wyoming. On the other hand, it might be fair to draw a favorable inference about the value of law clerks from the fact that all the great cases in the books are from New York, or from the pen of California’s Traynor—assisted by no lean complement of professional and perennial law clerks. I doubt the number of law clerks has anything at all to do with the quality of a court’s justice. I have my suspicions, however, that it may affect—and for the better—the quantity, indeed even the quality.


44. COUNCIL, supra note 38, at 82 n.d.
45. Id. at 81.
46. Id. at 80, 81.
47. The same conclusion is reached by Judge Winslow Christian in Using Prehearing Procedures to Increase Productivity, Panel Discussion before the Section of Judicial Administration, Appellate Judges Conference, Proceedings of the American Bar Association 93rd Annual Meeting, Aug. 8, 1970, printed in 52 F.R.D. 55, 60 (1971) [hereinafter cited as Panel Discussion]:

[T]he way work is organized and staffed does have a weighty impact on the volume of the court’s product. We cannot produce the increased volume of quality work that the public demands until we teach ourselves, through diligent practice and bold experiment, new ways of organizing our work. Above all, we must learn to adopt in some cases the role of staff supervisor. We must learn to save the personal craftsmanship of the judges for special cases.

Judge Christian is currently on leave from the California Court of Appeal and is serving as Director of the newly established National Center for State Courts. See Reardon, The New National Center for State Courts—Progress and Prospects, 55 Judicature 66 (1971).

48. See Braden, The Value of Law Clerks, 24 Miss. L.J. 295 (1953) (“If a judge has a competent law clerk to help him, his decision ought to be better than would be the case if the judge had to work alone.”). But see Christian, supra note 47, at 60 (“[T]he way staff is used, and the way cases are assigned, are probably neutral factors from the point of view of the quality of the decisional process.”).

A former Solicitor General of the United States, Erwin Griswold, has added his own speculation about the effect of law clerks on the length and quality of Supreme Court opinions. According to Griswold, the law clerks may now in fact perform some of the work traditionally performed by appellate counsel, with the result that more time is spent in post-
of that same court’s judgments. Perhaps those jurisdictions with more law clerks also have better appellate opinions.49 Surely the question is worthy of research, albeit the task would require its master to devise some measure of the quality of appellate court judgments. Until then we are remitted to our own speculations about these matters; any definitive resolution must await a later date.

C. The Nascent Institution

A final aspect of the history of the law clerkship remains for consideration. It brings us back to the present, to this very conference, for in a significant way the Institute contains its own fair measure of history. Your participation here manifests a new plateau in the evolution of the law clerk as participant in today’s judicial process.

There has been much use of the word institution to describe the current status of the law clerks. Much of the writing about them reflects this usage. Even my title proffers what follows as: “Profile of an Institution.” Yet until this conference an important indicum of the clerk’s institutional maturity was missing. This Law Clerk Institute fills the gap. Let me elaborate.

A sociologist would tell us one measures the maturity of an institution by the social distance that separates its human participants from the functions they serve, the roles they play in society. Only humorously, says Webster, is an individual considered an institution.50 Literally, and from the Latin, an institution is something that has set in, a practice that is a persistent element of the life of an organized social group. Take the judiciary for example. It is easy for one unsteeped in the law to think of a judge or court anony-

argument research and discussion. Does this, he asks, in turn “[lead] to longer opinions because of the skill and zeal with which points are raised—and perhaps even [lead] to more dissenting opinions and concurring opinions?” Griswold, Appellate Advocacy, 26 RECORD OF N.Y.C.B.A. 342, 354 (1971).

49. “If the appellate judge is at all pressed for time, the presence of a competent clerk may spell the difference between sloppy and workmanlike opinions.” Braden, supra note 48, at 296.

Professor Carrington has made the point, however, that there is a danger in going overboard here. It would be possible to equip a single judge with a very large staff so that he could then manage the entire appellate business of the federal courts. And it is likely that such an operation would produce very craftsmanlike decisions. But at what cost? Professor Carrington describes it as a loss of “the humanistic emphasis on the individual’s role in the judicial process.” Carrington, The Dangers of Judicial Delegation: Concluding Remarks, Panel Discussion, in 82 F.R.D. 76, 78.

50. WEBSTER’S NEW INTERNATIONAL DICTIONARY 1288 (2d ed. 1936).
mously. Yet to our legal minds the expression "judge" conjures up Lord Mansfield, Holmes, or Cardozo—maybe even Musmanno. To a sociologist these are all personalities. The man is not the office. And, as it matures, it is the office that comes to have identifiable characteristics all its own. Such a step occurred in the evolution of the judge as an institution when the early Italian cities first chose their adjudicators from the outside, from other cities, in order to secure the objective impartiality of a stranger. Similarly, an institution's growth can also be measured by its trappings, by all the froufrou that surrounds it and interposes the necessary distance between social performance and personality. Recall that John Frank titled his institutional study of the Supreme Court not by reference to any of its personalities, but to its marble.

To continue for the moment with the judge, this country's first seminar for appellate judges was conducted at New York University's School of Law in the summer of 1956. Again, this is all froufrou, although as its Director, Professor Robert Leflar, pointed out, "[i]t was a working seminar." Yet for our purposes the idea of a seminar for judges is significant because it reflects the institution of judge, qua judge—apart from the man that is. The goal was better performance of the judicial function, not the improvement of personality.

So it is with the Law Clerk Institute, an event Louisiana State University hopes to continue in the tradition of the Appellate Judges Seminar. With it—and to complete the history—the clerkship as an institution has come of age.

III. SELECTION, TENURE, AND SALARY

A. Selection

It used to be the tradition, at least for the Supreme Court of the United States, that law school professors would recommend to Justices who were personal friends the young men chosen as clerks.
Often, as in the case of Harvard's Williston, these professors had themselves served this same Justice at one time as law clerk. Williston clerked for Horace Gray, who initiated the clerkship practice in the Supreme Court. Holmes, succeeding Gray, continued to accept the recommendations of John Chipman Gray, Horace's half brother and professor. Later Holmes used Frankfurter to appoint his clerks. One of Professor Frankfurter's selections was Barton Leach, who served Justice Holmes in 1925. Like Williston before him, secretary Leach was later to become a law professor, and, happily as it turned out, Leach proved one of Harvard's finest wits, in both senses of the word. To him we owe one of the better published reminiscences about law clerking.

There were other, less savory means of selection, however. On occasion a Justice hired his own son, or the son of a fellow Justice. The first Harlan, for instance, chose his son John Maynard Harlan, father of the second Justice Harlan, as law clerk. However, from what I know of Harlan opinions, both those of the first and of the second—they are always quite good—all this only proves the wisdom of Machiavelli's advice to the Prince about hiring good secretaries: "The first impression that one gets of a ruler and of his brains is from seeing the men that he has about him."

Ordinarily the selection criteria for the position require the prospective clerk to have graduated at or near the top of his law school class, and because of the nature of the tasks to be performed, there has emerged a preference for graduates with law review experience or some comparable research and writing while in law school. Sometimes the idiosyncrasies of a particular judge impose additional requirements. Professor Newland's article reports that Justice McReynolds, for instance, was plagued with troubles in locating and retaining his clerks because he made it a requirement of the office that his secretaries remain single and that they refrain from using tobacco while on the job. Other judges are not such martinetts. Justice Black preferred clerks who could play a good game of

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57. See Williston, supra note 17, at 87.
58. See Newland, supra note 13, at 306.
59. Leach, Recollections of a Holmes Secretary, 1941 Harv. L. School Bull. 12.
60. See Newland, supra note 13, at 306.
62. See Council, supra note 38, at 82-83 nn. c, k, w, a.
63. Newland, supra note 13, at 306-07.
tennis, married or not. Nevertheless, no judge, I am sure, would approve the nasty habit of working with one's shoes off, even with feet tucked carefully beneath a desk crowded with the reports. I was once called to task for that. Somehow I just think better with my shoes off. I quickly changed my ways though, after Chief Judge Lesinski reminded me in no laconic fashion of the adage that it is important that justice appear to be done. This almost tempted another of those curious inquiries, but the Chief Judge quickly added that it was his court. That was enough for me although later research proved that Justice, at least all the statuary I observed, stands barefoot as well as blindfolded.

Further personal preference may confine a judge in his selection to one law school or to a particular geographical area. Justices Gray, Holmes, and Brandeis relied exclusively on Harvard for their clerks. In the main so did Frankfurter after ascending the bench. Similarly, other law schools have had the good fortune of having "their Justice" on the Supreme Court. Each year Chief Justice Taft took his clerks from Yale at the recommendation of its then Dean Charles E. Clark. Michigan was the favorite of Justice Murphy; Minnesota was the source of Justice Butler's clerks. Justice Vinson favored Northwestern, and Justice Minton relied on Indiana. Often these favorites with the Justices were the schools they themselves had attended.

Appointment on the basis of the judge's geographical background is also commonplace. At the Supreme Court Justice Douglas has favored appointees from the West Coast, Justice Black more often than not selected southerners as his clerks, and Justice Whittaker selected his clerks from the Midwest.

At the state level there is, as one would expect, a tendency for the judges to select their clerks from local law schools. A prominent local school often finds appellate judges of the home state particularly willing to hire its top graduates, although not required to do so. In Michigan the situation is probably typical. During the year

64. See Frank, supra note 30, at 116.
65. I have hanging in my office a photograph of the facade of the United States Supreme Court that depicts Themis herself sitting atop a large marble column adjacent to the steps of the Court. This photo clearly shows a rather large naked toe and bare foot jutting out from under her gown. Yet she is not even studying the reports. For those who would insist on a more formal citation, Themis's foot is similarly displayed au naturel in Compilation of Works of Art and Other Objects in the United States Capitol 289 (U.S. Gov. Print. Office 1965).
66. See Newland, supra note 13, at 308.
67. See id. at 309.
just ended, of that State's twenty law clerks for both its Supreme Court and its Court of Appeals, eighteen were from Michigan law schools, including the Universities of Michigan and Detroit, Wayne State, and the Detroit College of Law. Sometimes a judge will buck the local schools and opt for a graduate of a national law school. The two remaining clerks in Michigan last year were from Yale and Northwestern. Where the judge is fortunate enough to have two clerks, he will often split the difference.

Little is known about the mechanics of selection in the state courts, although the latest national survey of state court systems provides some general information. In most states law clerks are selected by individual judges, but the specific criteria and requirements are unknown. In my own case I just happened across a letter soliciting a clerk posted on a special bulletin board at the law school. Most law school placement offices maintain a file of clerkship solicitations.

In some states the court as a whole selects the clerks through a special procedure or agency. In Maryland, for instance, the court's administrative office first interviews prospective clerks. In Massachusetts a single justice screens all the clerkship candidates. Another jurisdiction, after group selection for the court as a whole, follows the practice of assigning the clerks to individual judges by lot. Some jurisdictions use a committee of judges appointed by the chief judge to interview prospective clerks and to make recommendations to the entire court. Judge Lesinski's court in Michigan has an extensive recruitment program designed to solicit clerks from across the nation. Each year a committee of the judges personally interviews candidates throughout Michigan, and a special trip is


The situation in Michigan, however, might be regarded as exceptional by some, especially University of Michigan law alumni. No denigration is intended since I put Michigan in the "national" category—whatever that is. No doubt Michigan alumni would prefer that Ohio be taken as illustrative. Accordingly, in Ohio last year the 8th District Court of Appeals judges selected their clerks from Case-Western, Cleveland State, Ohio State, Cornell, and Wisconsin. Letter from Judge Jack G. Day to Paul R. Baier, Aug. 25, 1972. Judge Day informed me at the Institute that the absence of Michigan clerks was fortuitous, since each year his court tries to recruit Michigan graduates as clerks. His own interest in good judging, I was told, "rises above all that nonsense alumni rivalry." And, I would add, Judge Day's presentation at the conference proved him hardly a man interested exclusively in football. Judge Day was the Institute's resident jurisprudence, tendering to the clerks his thoughts on "Logic and Judicial Reasoning." Very heavy stuff indeed.

69. See Council, supra note 38, Table XIV, at 83 nn.j.l,n,p.
made to the East Coast as well. Finally, one jurisdiction selects its clerks on the recommendations of a law school placement board. Finally, one jurisdiction selects its clerks on the recommendations of a law school placement board.

### B. Tenure

The brevity of the clerkship is one of its institutional characteristics. The tradition is for a short term, usually one year. And there is the view that this period is purposefully short, allowing fresh blood to circulate anew each year in the judiciary. The idea is that with the rapid turnover the judges are kept in touch with what is happening at the law schools—doctrinally, that is. Equally important, with each new cub of independent spirit the judge obtains all the enthusiasm and zeal the young graduate brings to his first job. Karl Llewellyn puts it this way:

> [T]he recurring and unceasing impact of a young junior in the task is the best medicine yet discovered by man against the hardening of a senior's mind and imagination. "A new model every year" may have little to commend it in the matter of appliances or motorcars or appellate judges, but it has a great deal to offer in the matter of appellate judges' clerks; there then arrives yearly in the judge's chambers a reasonable sampling of information and opinion derived from the labors, over the three past years, of an intelligent group of men specializing in the current growth and problems of our law: the faculty which has reared the new apprentice. This is a time-cheap road to stimulus and to useful leads.

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70. Interview with N. Otto Stockmeyer, Director of the Michigan Pre-Hearing Division, in Baton Rouge, Aug. 29, 1972. Mr. Stockmeyer was also on the faculty of the Institute.

71. See Council, supra note 38, Table XIV, at 83 n.s. Another member of the faculty, Judge Robert T. Mann of the Florida Court of Appeal, 2d District, informed me that it was his practice to hire clerks on the recommendation of University of Florida Law School professors.

72. "The law clerks are the only employees of the Supreme Court for whom a tradition of short-term employment has developed. The one-year terms common for clerks today are in contrast to the distinguishing concept of continuity that attaches to everything else about the court." Newland, supra note 13, at 305. See also id. at 316.

73. "A recent graduate from law school is, to be sure, innocent in the practical way of the law, but he is also likely to be learned in what may be called the frontiers of the law, the new ideas being evolved in the halls of the scholars of the law. The law develops, as it must if it is to meet the needs of a changing society, and the judges who pronounce the law need all the help that they can get in keeping the law abreast of the times." Braden, supra note 48, at 267; see text accompanying note 4 supra.

I wonder whether there is not room for the law clerk to keep his judge in touch with what is happening literally too. See People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972); Frank, supra note 30, at 149-50.

"How to keep Justices appointed for life themselves in tune with the throbbing life of the American people and to prevent their becoming remote high priests of a mysterious ritual has concerned some of the best minds in the country since 1790." Frank mentions the abandoned practice of circuit riding for the Justices and also social gatherings. Id. at 150, 152. But the law clerk is not mentioned as a possible conduit of the Zeitgeist.

74. K. Llewellyn, supra note 17, at 322.
While the tradition of yearly appointment promotes the infusion of new ideas and vigor into the judicial process, the time-drain of breaking in a new clerk each year must be reckoned with. One way is the practice of having the retiring clerk inform his successor of the ways of the office. This Institute represents a second, more concerted effort in the same direction. There is nothing quite like actually doing the job, however, and thus a natural tension exists between the ideal of a short term and an interest in retaining the experienced clerk. It seems a particularly wasteful scheme to employ a clerk for only one year, for at the very moment he steps down he has his best feel for the art. It would appear more efficient to continue the clerk for another year, and another—perhaps even permanently.

Some clerks remain on for quite some time. Justice McKenna’s first clerk was with him for twelve years, until the clerk’s death. There are also cases in which an enduring tenure is finally ended by the death of the judge, rather than the clerk. One of Butler’s clerks worked for sixteen years until the Justice’s death in 1939.

Clearly some tradeoff is necessary between efficiency and the advantages of yearly rehire. It was Chief Justice Stone who inaugurated the practice of overlapping terms for his two clerks, making one the “senior,” the other the “junior” law clerk. The senior was always a carryover junior, who was then allowed to test his experience against a second year, serving at the same time as mentor for his junior. In the state courts the line is usually drawn at the end of the first year, and in most jurisdictions today the law clerk serves for one year.

A further tradition is that the clerk’s tenure runs with the judge, not with the office. Justice Holmes once referred to this in a letter confirming the appointment of one of his clerks. Saving the Government harmless from suit, Holmes quipped at the end, “I assume you realize that I reserve the right to die or resign.”

C. Salary

What about salary? How much is the other fellow making? This

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75. However, “[w]hat the judge gains in ease of administration he loses in quality of service.” Braden, supra note 48, at 298.
76. See Newland, supra note 13, at 307.
77. See id. at 304.
78. Council, supra note 38, Table XIV, at 80-82.
79. Leach, supra note 59, at 13.
is another of those topics somehow inherently capable of rousing interest. In California in 1972 some of the other fellows were drawing 30,564 dollars a year. Surely this is the type of pronouncement that pushes you off your seat as well as toward the edge. But these are the career clerks, the permanent "Principal Attorneys" who work in the California system. A safe guess for law clerks in the traditional sense is that they earn between 10,000 and 15,000 dollars for their year with the court. Anything more specific I would leave to other authors, for the rewards I am interested in detailing have nothing to do with money.

IV. DUTIES

We reach that favorite question of these surveys: What do law clerks do? Undoubtedly the question will be put to you at least once during your clerkship by some curious interlocutor. Perhaps by

80. Letter from Ralph N. Kleps, Court Administrator, California Supreme Court, to Paul R. Baier, Oct. 19, 1972. This represents an increase of $4,416 since 1970. See COUNCIL, supra note 38, Table XIV, at 80.
81. See COUNCIL, supra note 38, Table XIV, at 82 n.d.
82. Those who have written on the clerkship often point out that because of the confidential nature of the job it is difficult accurately to discuss the scope of the duties of the clerk. Professor Newland notes: "Because of the confidential nature of the court's inner operations, it is impossible to describe the duties of the clerks in exacting detail." Newland, supra note 13, at 311 n.36. Newland attributes the lack of information to the confidentiality of the position, quoting Justice Brandeis's instructions to his clerk Louis Jaffe: "He once told me that I was never to let anyone know what we were working on, not even the secretaries of the other Justices." Id. But it might be asked whether a distinction can be drawn between the tasks of clerking and the questions under judicial consideration—something like the procedure-substance dichotomy. That is to say, why should confidentiality of things sub judice close the mouths of the clerks as to the nature of their job? Judge Medina of the Second Circuit Court of Appeals has asked the same question: "Why is this? Are we all living in a world of sham? Is there some point in pretense or illusion, all in the cause of the dignity of the courts?... And so I ask the question: thus working together is it possible that my law clerk has no influence on my views of the law? I think it is not possible; of course he has some influence on the decisional process in which I participate; and that is the very reason I have him as my law clerk. Why deny it?" Medina, Some Reflections on the Judicial Function at the Appellate Level, 1961 WASH. U.L.Q. 145, 154, 155.

I suspect the low visibility of the clerk's duties in the literature is not a product of the confidentiality of the case load itself. Rather, an interest in preserving the symbolism of the judicial office is at work here. The traditional image is one of the judge working alone without the aid of any staff, and probably those faithful to the judicial process share the view that this image should be maintained in the public's eye. See Carrington, The Dangers of Judicial Delegation: Concluding Remarks, Panel Discussion, Am. Bar Ass'n Annual Meeting, Aug. 8, 1970, 52 F.R.D. 76, 78. As a consequence, confidentiality of the case load engulfs the process of decision-making as well, including the role of the law clerks, in order to maintain the appearance of "individualized justice."

then you will have accumulated enough of your own personal experience to provide an answer; maybe you will even decide to record a formal response in the local bar journal. I would encourage the practice. There is too little hard data about this distinctly American institution, and much of what we do know about performance of the clerkship function comes from the personal reminiscences of former clerks. At least take the time toward the end of your clerkship to return the Institute's questionnaire about the matter. We intend to improve the Institute's program in the future and, hopefully, to extrapolate some consensus from your responses about the most efficient way a judge can use his clerk.

But to return to our interlocutor, the short answer is that given by one former clerk: You provide a second pair of hands and legs for your judge. There are reports to retrieve and lots of bags to tote. Further, I would add that you also tender a second mind, although there is some controversy about this. You should find the next year filled with much collaborative thinking between you and your judge. Law clerking, at least law clerking at its best, requires much conversation and hard thinking between judge and clerk. I recall such a

84. In England there are no law clerks. There is a very good reason, however, since "law clerks" in the American tradition would have nothing to do in England. Typically, English appeals are submitted without briefs and most judgments are rendered extemporaneously from the bench immediately after oral argument. Thus there would be no research or writing for the clerk to do. There are, however, a group of barristers who perform some of the functions accomplished by American law clerks. These are the law reporters, who are responsible for checking the citations and improving the language in any opinions that are published in the Law Reports. See D. Karlen, Appellate Courts in the United States and England 145 (1963).

85. Frank, supra note 30, at 116.

86. One former clerk notes that it may very well be a pervasive view among the Bar that 2 heads are better than one except when one of the heads is fresh out of law school. Illustrative of such a view is the following, quoted in Braden, supra note 47, at 295: "Of course, it may be that we are getting to the point where we have to have a certain number of law clerks, but I think most counsel feel that they would like to argue before the judge who is hearing the case, and not have it decided by some young fellow out of law school, any more than we can help." Similarly, Justice Tom Clark has remarked: "[D]uring my 10 years on the Court I have been asked by prominent lawyers, who should know better, to please speak to my law clerks about their petitions." Clark, Internal Operation of the United States Supreme Court, 43 J. Am. Jud. Soc'y 45, 48 (1959).

87. "Discussion of a case serves to clarify a man's thoughts, and a clerk can be of great value to a judge by asking pointed questions, posing alternatives, and generally acting as a devil's advocate. The net result of this sort of collaboration may be that the law as handed down differs in some respect from what would be the case were there no clerk with whom to discuss the case. But this is no reason to oppose clerks, for the law as handed down may differ if a judge engages in a greater or lesser amount of research . . . ." Braden, supra note 48, at 296.
moment, during a long drive back to Detroit from Grand Rapids, Michigan, where my judge had just heard a week of oral argument, I proved a poor chauffeur. We were in the quick, the left lane of the Interstate; somehow my efforts at verbal collaboration got the best of me. Although he willingly encouraged an exchange of views on other occasions, Judge Gillis finally interrupted me this time and asked whether it was possible for me to drive faster than 40 miles per hour. Not only do I think better with my shoes off, but it seems I tend to do a better job with my foot off the gas pedal as well.

You should also find this thinking between judge and clerk somehow follows you home from the office and envelops an evening. A good judge uses his clerk as sounding board to test the roots of judgment. In turn, sometimes a clerk will discuss the matter with another clerk, or on return home from the office he will use his wife as his own Confidential to test his latest efforts. All of this is meant in the end to assure that the judge's yea or nay is cast as close to the mark as possible.

A. Reminiscences

I have mentioned that one obtains a fairly decent picture of the duties of a law clerk from the personal reflections of former clerks. I should like to add my own account in a moment, together with some commentary about the influence of a court's operating procedure on the shape of a clerk's duties. What you will do next year

Perhaps the best description in the literature of the ideal relationship between judge and clerk is that of Professor Philip Kurland, who served Judge Jerome N. Frank: “With Frank there was never a question of your working for him; you always worked with him. There was a job to be done which needed the best efforts of both and, so far as he was concerned, your contribution was as essential as his.” Kurland, Jerome N. Frank: Some Reflections and Recollections of a Law Clerk, 24 U. Chi. L. Rev. 661, 662-63 (1957).


I owe some substantive criticism to Mary Lou Crowley, law clerk to Judge Frank Del Vecchio, New York Supreme Court, Appellate Division. She put the question to me whether it was appropriate for a clerk to discuss his work with his fellows, or even his wife, in light of the confidential nature of the job. I had to confess that perhaps my remarks were too loose; and, indeed, later research disclosed that some judges explicitly instruct their clerks not to discuss their work with anyone, including their wives. See note 82 supra. In turn, I put the question to Justice Albert Tate of the Louisiana Supreme Court, who spoke on the ethics of the clerkship at the Institute. Justice Tate was of the view that so long as the confidential nature of the discussion is understood by both parties, there is nothing wrong with an exchange of ideas between clerks about cases currently pending before the court, or with an after-office dialogue between husband and wife, often unavoidable anyway. Telephone conversation with Justice Albert Tate, Sept. 22, 1972.
depends to some extent on where you are going and how your court conducts its judicial business. First, however, it is expedient and instructive to quote from some of these recorded reflections.

Samuel Williston described his work for Justice Gray in his autobiography *Life and Law* as follows:

... My task was to aid Judge Gray in his preparation of cases to be voted on at the consultation on the ensuing Saturday, and in his writing of the opinions that were assigned to him.

. . . When he returned from court each day he would hand me the records and briefs of any cases in which the arguments had been completed, and would tell me to look over these "novelettes," as he called them, and see what I thought of them. This I would do, often being compelled to work in the evening in order to be prepared to make my reports. When I made them, the Judge would question me to bring out the essential points, and I rarely learned what he thought of a case until I had been thoroughly cross-examined. I would also frequently be asked to write an opinion on the cases that had been assigned to the Judge. I do not wish, however, to give the impression that my work served for more than a stimulus for the judge's own mind. He was a careful man and examined cases for himself, and wrote his own opinions; my work served only as a suggestion.

It was my duty also to read over the opinions prepared by the other justices which were passed around in proof to all members of the Court for criticism before they were ultimately delivered. Courtesy to brother justices sometimes prevented Judge Gray from making all the criticisms that seemed to me appropriate, coming, as I had, fresh from law school theorizing."

In *Marble Palace* John Frank wrote about his work for Justice Black:

The tasks of the clerks are also very much the product of the whims of their Justices. In general, it is the job of the clerk to be eyes and legs for his judge, finding and bringing in useful materials. This can involve an immense amount of work, depending upon how curious the Justice is. It is a legend that Justice Brandeis once asked a clerk to look at every page of every volume of the United States Reports looking for a particular point. The clerks may also have semi-social duties, like those who visited with Holmes or took walks with Stone or played tennis with Black, or superintended the circulation of the guests at the Brandeis Sunday teas. All of this is in the spirit of an amiable relationship between a wise, elderly man and a young cub at the bar.

In respect to the more serious business of the Court, some of the Justices use their clerks to summarize the petitions for certiorari, or the applications to be heard. Other Justices prefer to do this themselves.

The function of the clerks in relation to the writing of the opinions also varies widely. In the early 1940's, at least, Justice Black wrote the first draft of all his opinions, except that toward the end of the year he would let the youngster try his hand at one first draft of something extremely unimportant. In my own case, the day of glory came when I did the first draft of a lone dissent on a minor point of statutory construction, which the Justice then revised and which no one has ever noticed since. Sometimes a Justice writes the first draft of one opinion while the clerk writes the first draft of another, and the opinions

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89. WILLISTON, supra note 17, at 91-92.
are then exchanged and the clerk writes a second draft of his Justice's opinion while the Justice writes a second draft of the clerk's. Sometimes clerks are allowed to do the bulk of the serious writing for the Justice.

The extent to which Justices use clerks as ghosts is largely unknown because of the traditional secrecy that surrounds each office. It is known that Justice Douglas gives his clerks next to nothing to do in this area, preferring to keep more of the office work in his own hands than does any other Justice. On the other hand, there were rumors that the excellent clerks of Justice Murphy did more of the office writing than was commonly thought proper; there is no corroboration of this, however, and the style of many Murphy opinions shows a consistency over the years indicating that they came from only one hand. The most notorious rumors concern Chief Justice Vinson, who is said to have done all his "writing" with his hands in his pockets, outlining to his clerks generally what he wanted, and then criticizing this bit or that in a clerk's draft and making suggestions for revision.90

Another of Justice Black's law clerks, now Professor Daniel Meador of the University of Virginia, adds the following:

As in the other Justices' offices, the clerks get the weekly distribution of certiorari petitions. The task is to prepare a short memorandum on each. Year-round these come on an average of twenty to thirty a week. Besides the "cert memos," the major work is in the preparation of opinions. Here the clerk's role is that of a combination research assistant, critic, sounding board, and tenderer of suggestions—occasionally a point of substance but more often matters of punctuation, phraseology or organization.

When "the Judge," as his clerk's [sic] call him, is assigned a case for an opinion he dives into reading the record and all briefs. He absolutely masters the facts and the arguments. Then he moves into the relevant literature—cases, statutes, treatises, and law reviews. The clerks often read along with him or dig out additional material and feed it to him. The issues will be discussed intermittently. After a while Black will feel that he is ready to do a first draft of the opinion, assuming he has not changed his mind and decided to vote the other way, and this occasionally happens. The draft is then turned over to the clerks, and, with all the confidence of youth, they work it over.... Often revisions result; sometimes a clerk can get a word or comma accepted, but the substance and a decision are never anything but Black's alone.91

Finally, Norman Dorsen, who clerked for Justice Harlan, completes our depiction of the duties generally performed by clerks at the Supreme Court:

Some law clerks also prepare memoranda summarising [sic] the contending arguments in cases about to be heard by the court; these are known informally as "bench memos" because the justices use them in preparation for oral argument. Such memoranda outline the precedents and possible lines of approach to the case and often suggest questions for counsel. The clerks may also provide help on written opinions, such as research on legal points not covered or covered inadequately in the briefs of counsel.92

90. Frank, supra note 30, at 116-18.
92. Dorsen, supra note 56, at 268. Professor Dorsen also clerked for Judge Calvert.
A look at the federal courts of appeals discloses no great disparity in the principal work of the clerk—"reading, research, first drafts, revisions, footnote supplementation, proofreading, and the checking of galley proof incident to any publishing operation." In his survey Dorsen reports that a frequent practice in the federal circuits is for each judge, after oral argument but before a formal vote is taken, to circulate a memorandum among his brothers expressing his views, and that law clerks may assist in preparation of these memoranda.

Passing to state appellate courts, the literature of recollection is rather threadbare. There is one good piece, however, written by two former clerks of the Wisconsin Supreme Court. From their description I would guess the duties of Wisconsin's "law examiners" are typical of those performed by clerks in other jurisdictions:

The primary duty of each clerk is to prepare a legal memorandum on each of the cases assigned to his justice. The cases are assigned by the chief justice from the monthly docket, which consists of a maximum of 28 cases. These assignments usually are made in the last week of the preceding month when the briefs have been filed.

The memos consist of a summary of the facts, an enumeration of the issues, and a discussion analyzing the facts and law on each issue. They may be relatively short or quite lengthy, depending upon the complexity of the case, and are concluded by the clerk's recommendation. During the course of memo preparation the clerk may discuss the cases with his justice, but his conclusions and recommendation are usually independent. His justice, of course, may not agree with the conclusions reached.

During the preparation of his memos each clerk must carefully check the validity of the authorities cited by each side, and then Shepardize the relevant cases. Too often incorrect authorities are cited in briefs....

The clerks are usually expected to read through parts of the record and check it against the statement of facts and appendices in the briefs....

In analyzing the legal arguments in the preparation of a memo, some independent research is usually required, even when the briefs are well prepared. In some cases the parties do not discuss, or adequately discuss, a crucial issue or issues. Then, under the Court's supervision, the clerk must dig out the law and attempt to consider the possible contentions on each side as to its application.\*\*

Magruder of the First Circuit before serving Justice Harlan. It has become somewhat prevalent today that Supreme Court clerks work a year at the intermediate appellate level before serving their Justices.


Certainly it appears from these recollections that any consensus of the duties of the law clerk would include the task of preparing memoranda on cases about to be heard, or on those that have been heard, in the appellate forum. These reports serve to apprise the judges of the nature of the appeal and the issues presented, and in those jurisdictions where the reports are prepared prior to oral argument, they contribute to a more effective discussion between the court and counsel at the hearing in the case.96

B. The Baggage Tasks

It is also clear that any profile of the law clerk's duties would include those tasks that, although clearly a part of the job, somehow are not felt befitting the young law graduate, who arrives at the court with J.D. in hand only to find some menial task waiting in the wings. Take barbering for instance—an example drawn from the historical accounts. Our predecessor in title was the messenger, the fellow hired by the judge because literally there were messages to deliver and bags to carry. Professor Newland mentions the messenger as historical antecedent of today's clerk and notes the typical services required. In one particular he refers to a messenger described in a letter to Justice Gray as "the best servant I ever saw and withal a good barber."97

Today the law clerk's job has been formally bifurcated from that of messenger and even from the position of stenographic clerk. But the "baggage tasks" remain. In Michigan they were called "Silver Mercuries" after the judges' cars. There was even a trophy presented each week by the Chief Judge to the clerk who had gone out of his way to serve his judge. My best effort was to drive about 400 miles to bring emergency motions to my judge. It was not good enough to take the trophy, however. Some clerks really put out—it's all part of the job. I remember washing my judge's car—I used his credit card—and, more curiously, the afternoon when in the middle of some research I was called to the bench during orals and handed a note by my judge that read: "We've been on the bench for almost five hours. I'm hungry. Get me a corned beef on rye." I did, and on my return the court took a short recess.98 Perhaps there is more to

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96. See note 124 and text accompanying notes 126 & 127 infra.
98. Had Judge Gillis also instructed me to find some precedent for the recess, true to
the notion of gastronomical jurisprudence than most pundits of the judicial process are willing to admit.

From the history it appears the law clerk always has been associated with the secretarial side of the dichotomy—in the literal sense of the word. Again, the first official reference to the institution, Garland’s report, suggested to Congress that this new employee was “to be a stenographer...whose duties shall be to assist in such clerical work as might be assigned to him.”199 This sounds almost exclusively like the secretarial side of the job. The Attorney General continued however:

The labor of the judges of the court in investigating questions and preparing their opinions is immense, and while the heads of Departments and Senators have this assistance, I do not think there is any good reason that the judges of this court should not also have it, and I therefore recommend that such provisions be made.100

This, by contrast, is the work more closely aligned with the law clerkship in the finest tradition of the institution. Here Garland’s words suggest participation by the clerk beyond the menial tasks—the barbering of the job. He anticipates the clerk serving his judge as an aid in research and in opinion writing. It is to these latter aspects of the job that any sketch of the law clerk’s duties eventually turns, for here the clerk makes his most substantial contribution to the administration of appellate justice.

C. Research

You should find the ensuing year full of legal research. Whatever effort you put into the course at law school, or into the Review if you were a member, you will probably find mirrored in your work for the court, and this time on each appeal. The research required is monumental. To see where your case fits in, you often will find yourself tracing far back into the reports, sniffing out the birth, growth, and perhaps the demise of legal doctrine. I made it as far back as 1 Michigan in the official reports—even further unofficially. All of this you must accomplish for yourself this time, without the aid of a casebook editor. But generally yours is the best library the

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199. 1895 ATT’Y GEN. ANN. REP. 43, quoted in Newland, supra note 13, at 301.
100. Id.
fresh graduate ever encountered. Barring some baggage task, I recommend that you spend your first hours at the court browsing through the library's titles. I had never heard of Appleman on Insurance as a student, yet if you look you will discover it has 26 volumes. And it is best to browse at the start of the job—it saves time and effort. I recall learning of Appleman's treatise halfway through my first insurance appeal. And what about Cooley on Constitutional Limitations? I never had heard of Michigan's pre-eminent Chief Justice either, until working as a clerk. All students have heard of Casner's American Law of Property. Even I had, although I had never leafed through it for fear of its size. But can you imagine, there is even a treatise on the Fundamentals of Hotel Law? Or on the Law of Sheriffs, Coroners, and Constables? All of these will become famous to you as clerk. Or infamous. 101

In the grand tradition of the institution you should also find yourself writing the footnotes—like Dean Acheson, who served Justice Brandeis:

He wrote the opinion; I wrote the footnotes. My footnotes up to that time were the Mount Everest of footnotes. Today, Justices of the Supreme Court write textbooks as marginal annotations of their opinion, but up to that time I had written the greatest footnotes, fifteen pages of footnotes.

And what were we trying to do? We were collecting all the legislation and all the decisions of the forty-eight states and the Territories of the United States as to what was an intoxicating beverage. The purpose of this, of course, was to show that when Congress said "one half of one per cent of alcohol by volume is intoxicating," that that was reasonable, because all the states had said everything in the world beside that. And compared to the confusion of the states, this was Reason Incarnate. So I went to work on the opinion. 102

101. It was suggested to the new clerks that they obtain a copy of Tate & Hebert's, Treatises for Judges (1971), an accumulation of even the most esoteric titles. Reading it tends to frighten the ordinary, unbibliographic mind. However, those who heard Justice Tate's presentation at the Institute would realize his is hardly the bibliographic mind. Perhaps something of the "New Hampshire Method," see note 42 supra, is alive in Louisiana as well. No doubt had Justice Tate touted his own book he would have added that good bibliography is essential but not sufficient. See generally Tate, The Law-Making Function of the Judge, 28 La. L. Rev. 211 (1968).


Sometimes what is said in the footnotes proves more important than the text of the opinion itself. The best example is Justice Stone's famous Carolene Products footnote. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). But it was probably Stone himself who wrote the note. Nonetheless, it is important to realize that sometimes the notes are just as potent as the body of the opinion. To the extent that the clerks have a hand in fashioning the footnotes, there remains a serious problem of delegation. See text accompanying notes 158 & 159 infra. Justice Frankfurter, however, has criticized the Court's footnote.
No doubt some of you will be sent by your judge to research the entire National Reporter System with the curious instruction, for instance, to amass all the authorities demonstrating that when parties stipulate in their contracts that "time is of the essence," they do not mean it, and even if they do, courts need not enforce the clause.\(^{103}\) At least such were the judicial ways of Judge Charles Levin of the Michigan Court of Appeals, that court's premier footnotist. He even has his own trophy for it, given him by his colleagues on the bench.\(^{104}\)

At first you may find these research demands strange. This is research like no other you have experienced. It follows the decision, not the other way round—you seek out precedent sustaining the judgment, not determining it. It is probably here, in the disquiet of initial research, that the clerk first tastes the judicial process for himself.

Finally, all this research inevitably nudges the clerk to side deliberations about the nature of the adversary system and about the functions of courts as well as his own. You will wonder whether, because of the weakness of the briefs, it is the judge's job to protect the litigants. Is a State's confession of error on a criminal appeal jurisdictional? Or is the court obliged on its own to scrutinize the record in the case and the applicable law in order to assure the validity of the concession? When the advocacy is all one-sided, is it the judge's job to fill in the balance?\(^{106}\) In this regard, a former Solicitor General of the United States, Erwin Griswold, questions "whether the law clerks are in fact performing some of the aspects


104. The idea was Judge Gillis's. The trophy is a framed piece of parchment covered with columns of asterisks, or "Ampernils" as they are designated on the award. An ampernil, according to Judge Gillis, is a nonsense word for footnote, signifying to the reader that he need not bother with the extensive marginal annotations so often appearing at the bottom of judicial opinions, especially those of Judge Levin. All of this naturally was meant in good fun. Judge Levin, now a Justice of the Michigan Supreme Court, is highly regarded for his scholarship on the court—sometimes footnotes notwithstanding. Telephone conversation with Judge John H. Gillis, Sept. 26, 1972.


I know of one court where it frequently happened that records were so confused and briefs so inadequate that the court would depute one commissioner to make a statement and argument for appellant and another to do the like for appellee. It is not often that courts are so anxious to do exact justice to parties who do not present their cases as they should. But even if a busy court cannot go so far, the waste of time in trying to dispose adequately of a case inadequately presented is no small item in apportioning the energy of almost any reviewing court.
of the work that has traditionally been done by counsel." Similarly, how free is the clerk to suggest to his judge—and how free is the court—to rest the decision on a rationale unmentioned by the parties?

D. Writing

From the very first reference to the office, the literature always has focused on the draftsmanship of the clerk. How much writing is accomplished by the clerk? And how much is appropriate? At one extreme, some judges permit nothing written by the clerk to appear in the opinion of the court. In some courts, the clerk is relegated to the job of snipping, rearranging, and pasting his judge’s draft to provide more logic and flow. One of Stone’s clerks recalls the cutting task this way:

Accordingly, he directed his clerk to go through the opinion and outline the points, arranging them in a logical order. That done, and Stone having revised the outline, the next job was to take the printed proof and a pair of scissors and arrange the material according to the outline, deleting and where necessary combining and rewriting, to remove duplications, and introducing each point by a topic or transitional sentence.

In my case there was much writing. Happily for me, Judge Gillis was not a judge determined to place every comma or complete every sentence for himself, although his was always the final draft. The experience is far more rewarding for the clerk this way, even if it means enduring the pangs of his judge’s criticism. Arguably it is also the more liberating for the judge, for he is then free for the harder task of judging. And that task of judging, as opposed to verbalizing the opinion, was never mine—either by statement or even by suggestion. Let me say categorically, as have other clerks unanimously before me, that the judgments were always Judge Gillis’s. And this sometimes required him to reject whole sent-

107. Cf. United States v. Falstaff Brewing Corp., 410 U.S. 526, 574-75 (1973) (Rehnquist, J., dissenting) (“For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation and appellate review.”).
108. See text accompanying note 100 supra.
110. See, e.g., Frank, supra note 30, at 118: “Even on those rare occasions when the clerk does the writing, the judge does the deciding. The ultimate matters of yes or no, affirm or reverse, the judges invariably keep in their own hands . . . in my own year as a law clerk, my Justice made approximately one thousand decisions, and I had precisely no influence on any of them.” But see Rehnquist, notes 2 & 5 supra. See also text accompanying notes 90 & 91 supra.
ences—even words—from his clerks’ tentative drafts.

It was my task nonetheless to prepare first drafts. At the beginning of each monthly term of court, Judge Gillis would receive the call of next month’s complement of cases, usually 21, from the clerk’s office, including the briefs in each case and the complete transcripts in the seven to ten cases he was assigned to write. The assignments were made pro rata by the Chief Judge among the panel’s three judges. The next few days were ones of little communication between the judge and me. He would spend quiet, undisturbed hours either at home in his study or in the office, with the briefs of counsel and his case call. I was right in guessing that these were the hard hours of judgment. Finally, he would emerge from his silence and return with all the papers, which then fell into my hands, save one—the case-call list. At this point it was my function to prepare seven draft opinions and to have them ready by the end of the month if at all possible. The task, at least at the outset, was the hardest I have ever faced. Judge Gillis had little time to instruct me; he delegated the instruction to my predecessor in office, who unfortunately was too busy himself to temper the uncertainty that literally frightens one in the beginning. It is no light task to reach an informed conclusion of law on the facts and then to verbalize it as would Cardozo or Hand. I soon discovered there was hardly room for law as literature in Judge Gillis’s office;111 there simply was too little time, although the office continued to make the attempt.

This brings me to an important point. It is the only advice I insist you underscore with the student’s nota bene. There is a tendency at the start of the job—call it “Treatise-itis”—for the clerk to incorporate all the law of search and seizure for instance in his first suppression draft. Perhaps this is inevitable. Nevertheless resist the temptation. The reports are full enough of reiterated law.112 My own experience was to trace the law of search and seizure from Harris to Rabinowitz to Chimel.113 This was the fruit of my research. It took almost a week of reading the cases. Naturally I thought all of this belonged in the opinion to reflect my efforts. Not Judge Gillis. And his, I am convinced, was the greater wisdom. Treatises

111. See Law and Literature, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDozo 339 (M. Hall ed. 1947).
112. Cf. Lumbard, Current Problems of the Federal Courts of Appeals, 54 CORNELL L. REV. 29, 40 n.15 (1969) (judge usually expands the clerk’s facts by about 100% and reduces his law by about 50%).
have no place in appellate opinions, albeit too many are written that way. Moreover, it was not Judge Gillis's institutional function to write treatises. His was an intermediate appellate court where all appeals, civil and criminal, are taken as of right. In such a forum, the cases do not warrant, nor does the case load permit, seven treatises a month.

I have mentioned the one paper I would never see, the monthly call list. I learned that on it Judge Gillis recorded his initial decision in each case, after reading the briefs of the parties and working alone on the matter. His annotations were quite simple: A for affirmance, R for reversal, or dubitante when undecided. Sometimes he would ask me to read the transcripts in certain cases in the month ahead with an eye toward particular issues and to report my findings. But I never knew while working on the drafts whether my conclusions matched the A's or R's on the call list. Finally at the end of the month, Judge Gillis would leave his office for the hearing, often in another city, with his work product and mine in hand. Sometimes I

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114. B.E. Witkin notes that the most consistent and sustained of all the complaints of critics, lay and legal, is that opinions are much too long. *Appellate Court Opinions, Syllabus* 53 (1966). See Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362, 364 (1948) ("The primary purpose of an opinion is to decide a case. It is not to expound legal philosophy or to be an ideal piece of legal literature. Nor is it necessary to exhaust all the law and cite all the cases."); McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 A.B.A.J. 382 (1949).

115. If the court is an intermediate appellate court, its institutional function may preclude preparation of extensive opinions in all cases. In such a forum, the immediate task at hand is to write the correct opinion, that is, that which is proper, justice is done in each particular case. Broad declarations of policy are more appropriately left to the elaborate precedential function of the high court. See R. Pound, *supra* note 105, at 3-4; B. Witkin, *supra* note 114, at 17-19. See generally J. Joiner, *The Function of the Appellate System*, in *JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY* 97 (1971).

The case of People v. Ramsey, 385 Mich. 221, 187 N.W.2d 887 (1971), rev'd 25 Mich. App. 576, 181 N.W.2d 553 (1970), is illustrative. Ramsey's conviction for armed robbery was reversed by the Michigan Supreme Court because the trial judge had looked at the preliminary examination in the case, which had not been introduced as evidence, thus violating the accused's right to confront and cross-examine the witnesses against him. The Court of Appeals had affirmed the conviction on the ground that, even assuming error, this defendant had not been prejudiced because a review of both the preliminary examination transcript and the trial transcript revealed no testimony given at the former hearing that was not repeated at trial subject to confrontation and full cross-examination. This may very well have been justice in Ramsey's particular case, but what about good trial practice in the criminal courts of the State? Arguably, this was for the Michigan Supreme Court alone, in light of its distinct institutional role as framer of system-wide principles of general application. See Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. Cal. L. Rev. 901, 910 (1971). And, indeed, the Supreme Court's opinion in the case suggests an approach transcending any limited concern for the correctness of the judgment below. Rather, the court announced an absolute rule of good criminal procedure, regardless of prejudice *vel non*, and adopted prophylactic of reversal to enforce it. See 385 Mich. at 222, 187 N.W.2d at 889.
went along to tote the bags or was invited to hear the orals. The anxious moment was the Judge’s return home after the argument. It was then I first learned Judge Gillis’s view. If the judges were agreed on the judgment after their post-argument conference and if my draft was acceptable with some collegial retouching, then the case went down straight away. Those were proud moments for me. They were few, but they made the work, especially the evening work, all the more rewarding. Usually cases were held up, however, for further reflection among the panel and redrafting by the clerks. There were other occasions when I was not so fortunate, when the draft R simply didn’t jibe with Judge Gillis’s and the panel’s A. On the Judge’s return I was invited into chambers to argue the point, and argue I did, sometimes quite loudly. I only succeeded once, and that occasion was unusual because I received help from Judge Quinn, another Judge of the Court of Appeals. The panel was about to hear the case in Detroit. The question was the sufficiency of the evidence to prove an intent to steal; the breaking and entering were conceded. In my view there was not enough, and I was called in on the matter by Judge Gillis, who had read my recommendation to reverse. On arrival I received one of those substantive exposures that makes up the clerk’s post-graduate legal education—on this occasion a fatherly discourse on circumstantial evidence. Judge Quinn dropped by and was asked his opinion; he was also on the panel. Judge Quinn’s view matched mine for reasons he explained to Judge Gillis. I must say I was rather piqued at how attentively my judge listened to Judge Quinn’s view when he had rejected mine out of hand. But such was the nature of Judge Gillis’s A’s when pitched against his clerks R’s. And, reflecting on the point, the question of circumstantial evidence is one best remitted to the judgment of experience, rather than to the theorizing of a fledgling law graduate. Judge Quinn had had quite a few years on the trial bench.

On questions of theory, however, on those rare appeals raising matters res integra as he called them, Judge Gillis would always consult his clerks even if his views were somewhat fixed. Here theorizing is useful, and there is one concurring opinion in the Michi-
gan Reports that represents the reciprocal work of judge and clerk in the grand tradition of the clerkship institution.\textsuperscript{117}

Finally on this writing point, what agony to redraft an opinion wholly the other way. Yet I assure you, you will discover that it can be done and almost always without sacrificing either the precedent or, indeed, even one’s sense of what is right in the case. It was my function to verbalize my judge’s judgment. With his redrafting the task was complete. I thought it curious at first that each time I was assigned the task of writing full circle the other way I found it could be done, and done quite legitimately on the precedent and values involved. After enough of this I discovered first hand the teaching of the \textit{Bramble Bush}:

\begin{quote}
[It] is a mistaken idea which many lawyers have about it—to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law. In fact the available correct answers are two, three, or ten. The question is: \textit{Which} of the available correct answers will the court select—and \textit{why}? For since there is always more than one available correct answer, the court always has to select.\textsuperscript{118}
\end{quote}

And almost always there inheres in the eventual adjudication a delicate balance:

There is in nearly every case an area of choice. How a judge marks out and determines that area largely determines the type of judge he is. In this area, most matters are ones of degree, ones of more or less. They are not black and white.

\ldots That is what judges are for. Within this area, it may not be possible to give a purely logical demonstration that one result is better than another. A judge has to call on all the resources of his experience and wisdom in coming to a conclusion. Some judges hew rather closely to the line; some are more free-wheeling.\textsuperscript{119}

\begin{footnotes}


Finally, I learned that "the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law." 120

Had I not tasted the judicial process for myself I would only read these words as words, not for the important thoughts they surely are. Perhaps you have only heard them as words too. Read them anew at the end of your clerkship. You will have made a discovery of inestimable value to you later, as practitioner, professor, or whatever. It is a disclosure that the institution allows its clerks to retain as individuals, and you are privileged to make that discovery for yourselves.

E. Internal Operating Procedure

This brings us back to the impact of a court's operating procedure on the shape of its clerks' duties. To reiterate: the tasks performed by a law clerk often depend on the particular forum he serves and on its internal operating methods. Those who have surveyed the clerkship always make the point that the duties of a clerk depend primarily on the personal wishes of his judge.121 Leach, who served Justice Holmes, tells us for example that early in Holmes's judicial career the petitions for certiorari, or "Petes for Cert" as Holmes called them, were always handled by the Justice himself, although he later adopted the practice prevalent among the other Justices of having his clerk prepare memoranda on such petitions.122 If no certiorari petitions were ever filed in our prospective clerk's court, the question of an appropriate allocation of this task between judge and clerk would never arise. Thus there are institutional constraints at work here that must also be considered. The personal whims of judge alone are not entirely controlling.

Some of the specifics should be obvious. Unless a clerk is working for a court whose jurisdiction is discretionary, he can never be asked to report on whether the court should take the case. If the court is an intermediate appellate court, the clerk's work will not include preparation of "cert memos." Rather, in such a forum all appeals are generally brought to the court as of right; there is no

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120. E. LEACH AN INTRODUCTION TO LEGAL REASONING 2 (1949).
121. "One characteristic common to the work of the clerks has apparently been that their duties have been determined entirely by their individual justices." Newland, supra note 13, at 311. See also text accompanying note 90 supra.
122. Leach, supra note 59, at 12-13.
discretion to exercise. The judge and his clerk must somehow face all cases alike.

In addition to these jurisdictional considerations there are less visible factors, internal to the court's operation, that affect the shape of the clerk's function. To continue for the moment with the certiorari example, even when the court's jurisdiction includes the discretionary grant, the law clerk may not find himself working on such petitions, not because of the personal preferences of his judge, but on account of the operating methods of his court. To illustrate: several state courts of last resort whose jurisdiction is discretionary employ a staff wholly separate from the law clerks, usually commissioners, to perform the certiorari or screening function. Again, in such courts the clerk's duties would never include preparation of certiorari memoranda.

The internal decision-making process of the appeals court also will affect its clerks' duties. It used to be the general practice in appellate courts that the judges obtained their first knowledge of a case at oral argument. The idea was for the judges to approach each case with an open mind and without any view of the merits. Today, although there may be exceptions, the standard practice is for the judges to apprise themselves before oral argument of the nature of the appeal and of the issues presented. Immediately after the orals

123. For example, the Michigan Supreme Court uses commissioners to review all applications for leave to appeal, to prepare a digest of the facts, and to make recommendations on disposition of the applications. COUNCIL, supra note 38, Table XIII, at 76; see The Office of Commissioner of the Michigan Court of Appeals and Its Role in the Appellate Process, 48 F.R.D. 355 (1970). See generally AMERICAN JUDICATURE SOCIETY, SOLUTIONS FOR APPPELLATE COURT CONGESTION AND DELAY, Inform. Sheet No. 24, at 8-9 (1963); Lilly & Scalia, Appellate Justice: A Crisis in Virginia?, 57 VA. L. REV. 3, 31-34 (1971).

124. The judges generally learn of the case by reading the briefs and sometimes the record on appeal. M. SCHICK, supra note 116, at 90-91; see Hopkins, Small Sparks from a Low Fire: Some Reflections on the Appellate Process, 38 BROOKLYN L. REV. 551, 567 (1972) ("A 'hot' court—that is, one that is familiar with the facts and questions in the appeal before argument—is notably better equipped to stimulate a more effective discussion between the court and counsel and to narrow the issues."). Justice Tate informed me that at the first Intermediate Appellate Judges Seminar in 1959 only 2 out of 20 judges made it a standard practice to study the briefs and record in advance of the orals in the case. Today, appellate judges almost unanimously read the briefs of the parties before oral argument. Interview with Justice Albert Tate, Jr., in Baton Rouge, Sept. 1, 1972.

Sometimes allegiance to the older practice of approaching each appeal "cold," that is, without any prior knowledge of the case, moves a senior judge to chastise an upstart junior who comes prepared for the orals. Judge Medina describes his first day on the Second Circuit as follows:

I could hardly wait to be up there on the bench listening to the arguments. So I read all the briefs and what we call appendices in the cases coming up for argument, and on the big day I marched up to the bench from the robing room at the end of the procession.
or in some jurisdictions before the argument, a conference of the judges is held at which a tentative decision is reached in the case. Typical of these conference systems is that described by Judge Molinar in his article The Decisionmaking Conference of the California Court of Appeal. Judge Molinar notes that the success of the system depends on the strength of the calendar memoranda prepared in the cases and written, where the conference system is employed, by the law clerks. These are the bench memos, or prehearing memoranda. The important point here is that when a court is committed by its internal operation to preparation in advance of the orals, its clerks' duties are shaped accordingly. Should the prospective law clerk be destined to serve such a forum—known as a “hot court” in the jargon of judicial administration—he will probably spend many hours preparing these prehearing reports.

An emerging ideal now exists in the forefront of appellate court administration, an ideal that eliminates standardized, undifferentiated treatment of all appeals. The principal rationale of this development is that with differentiation, with a screening mechanism “separating the wheat from the chaff and treating each accordingly,” there comes a liberation of the judges for the better performance of their duties, together with an improvement in the

with a pile of briefs and appendices under my arm. To make matters worse, I asked a number of questions during the arguments. At the end of the session we returned to the robing room and one of the older judges said: “Trying to impress the populace, I see.” That was shock number one. Surely a judge has the right to read the briefs and records in advance of the arguments, if he chooses to do so, and he has the right to ask questions. too.

Medina, supra note 82, at 148-49.


126. “This memorandum, which is prepared by one of the judges in conjunction with his law clerk, consists of a detailed statement of the facts in the case (with transcript references), the contentions of the parties, an analysis of the cases and authorities relied upon by the parties, and the results, if any, of independent research. When completed this memorandum is distributed to each of the judges, together with copies of the briefs.” Id. at 608.

127. The jargon should be changed to read “boiling court” instead. Justice Tate corrected my usage, pointing out that in a “hot court” the judges prepare themselves in advance for the argument, but only by reading the briefs and sometimes the record on appeal. The addition of a prehearing report and a proposed memorandum opinion in the case if warranted—the so-called “Michigan plan”—serves to kindle the degree of preparedness; the court then “boils,” so to speak. Interview with Justice Albert Tate, Jr., in Baton Rouge, Sept. 1, 1972.


quantity and quality of appellate justice. This ideal is best illustrated by the internal operations of Chief Judge Lesinski's court in Michigan, a court nationally respected for its development of effective screening techniques.\textsuperscript{139}

In the Michigan Court of Appeals a staff of professional employees, the Pre-Hearing Division, exists entirely separate from the law clerks. Its principal function is threshold scrutiny of all appeals in order to sift out those that can be disposed of by a short per curiam opinion. The Division utilizes a pool of specially trained "Research Attorneys" to prepare prehearing reports on all appeals. These reports are like those usually prepared in other jurisdictions to apprise the court of the nature of the appeal, but unlike other jurisdictions they are not the work of the law clerks.\textsuperscript{131} As a result of this refinement of internal operations, I never personally prepared a prehearing memo. Rather, a report from the Pre-Hearing Division accompanied the briefs and record in each case when Judge Gillis turned it over to me. It was then my custom if time allowed to work on each appeal without reference to this report. After forming my own views of the case I would check them against the recommendations of the report. Such a system, where it exists, offers the judge a built-in method of checking the recommendations of his clerk.

\section*{V. Value of the Clerkship}

What about the value of the institution itself to the clerks? What does the law clerk carry with him—this time in his own bags—as he leaves the court? We have already brushed over some of the more important points. To emphasize them again: During his stay, the research required for the job will expose the clerk to wide areas of substantive law, and there are occasions when the judge himself will likely take the time to fill in some of the gaps. This is a fine post-graduate education; much is learned about appellate procedure. For instance, nothing is really extraordinary about a writ of prohibition or superintending control until the clerk sees a trial cut short for himself. Sometimes all this exposure prompts the clerk to write his own treatise, or at least a practice manual, on the appellate

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\item[130.] See Christian, supra note 47, at 60; Judicial Council of California, 1970 Report to the Governor and the Legislature 24-26, 34-35.
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The more nostalgic clerks are satisfied to reminisce about their work, purporting all the while to study the clerkship as an institution. After a year of reading briefs, the clerk is probably a better brief writer for it. He will have heard good orals and bad and probably knows the difference for himself now. And from all the transcripts he may even have learned something of good trial practice.

But there is exposure of a different kind too. It has nothing to do with substantive law, or even with the substance of appellate procedure. Rather, you come face to face with the sublime truths of this law job. Dean Acheson did, working for Justice Brandeis: “Justice is a method; justice is a method by which results are reached. And when that method is followed . . . then you have Justice as perfect as man can ever give.”13 Again, after your clerkship you will recognize these words for the magnificent insight they are.

There is the important lesson of the Bramble Bush in the clerkship. We have already mentioned this.13 I would sketch in a further emphasis, however. To those of you who will serve an intermediate appellate court, yours is the better tier from which to learn the secrets of the judicial process. At the least you will be the better opinion reader because of it. After you have sweated through the briefs of counsel and the record in the case for yourself, after your judge has weighed all the nuances in the balance and the opinion is out, keep your eye on how the case is handled On High. The view is irresistible. A proud moment comes if further review is denied, but the apocalypse comes the other way round, after the grant of review and reversal. Read the final opinion slowly, carefully. After your work you are in a position like few others to test the legitimacy of the final articulation. And it may come as a surprise at first to see whole lines of argument passed over by the high court. All the good intermediate handiwork, all the precedent culled from the reports, may very well be ignored. It rests forgotten on the shelf. That, you will learn, is the privilege of final judgment. And the discovery is exhilarating. It makes teachers of us all.

Finally, the clerk leaves the court with an especial fondness for his judge. He has come to know him as a man now and as a friend. Recently on Justice Harlan’s death, one clerk expressed the feelings that stick with you after you leave your judge:

133. Acheson, supra note 102, at 366.
134. See note 118 supra and accompanying text.
[W]hen I saw the Justice recently in his hospital room, and he spoke to me even in his discomfort with a warmth and lilt that showed he was ready once again to give of himself, the bonds of affection that have been building through the years of our acquaintance were brought suddenly to tension and pressed me to tears for this estimable man.\textsuperscript{135}

Reading this, any clerk who has been through it for himself might very well share those tears.

VI. \textbf{Law Clerk as Judge: The Delegation Question}

In the end we return to the delegation question: Is it possible that the institution has usurped its master's function? Has the law clerk become the judge? The inquiry seems inevitable whenever the conversation turns to the law clerk. The only answer, it seems to me, must rest more on faith than on anything concrete,\textsuperscript{136} although there is room enough for some hard analysis of the issue. Those who would insist on proofs about the matter will never be satisfied.

As put, the question has the clerk become the judge appears a bit broad for intelligent response. A narrower, more profitable line would first ask: Are there any tasks \textit{at all} that can be delegated to the clerks without infringing the integrity of the judicial process? Take baggage toting for instance. Surely even the most zealous guardian of the judicial function would agree there is nothing judicial about the clerk's carrying of the bags. But what of the other tasks performed by the clerks as we move up from secretary? What of those tasks generally associated with the grander tradition of the clerkship institution?

There is much reading in this clerking business.\textsuperscript{137} Yet it is hard to see how a judge is less a judge merely because he makes good use of his clerk's eyes, as well as his legs. Transcripts on appeal are often quite thick\textsuperscript{138} and if the question, for example, is the sufficiency of

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\textsuperscript{135} Nesson, \textit{Mr. Justice Harlan}, 85 Harv. L. Rev. 390, 391 (1971).

\textsuperscript{136} A legal philosopher might very well say the same thing for justice itself. Indeed, Morris Cohen has written, "That in the long run justice will triumph in the law is a matter of faith not of knowledge." M. COHEN, \textit{My Philosophy of Law} 41 (1941).

\textsuperscript{137} Delmar Karlen's description of the work of the law assistants at the Appellate Division of the New York Supreme Court provides some figures on this account: "In view of the fact that the briefs in a typical appeal are likely to run 50 to 60 pages in length and the record on appeal another 350 or 400 pages, the job of merely studying the papers submitted is a very large one." D. KARLEN, supra note 84, at 18. The largest record I encountered consisted of 1143 pages of trial transcript that had to be read from front to back on an allegation of insufficiency of the evidence to warrant submission of a negligence question to the jury. Similarly, the rumor circulated in our court that a Sixth Circuit clerk in Detroit had been assigned the task of wading through 11 volumes of trial transcript to assure the sufficiency of the evidence to prove a criminal conspiracy.

\textsuperscript{138} "One of the sighs frequently exhaled by appellate judges occurs upon viewing the
the evidence to prove elements of the crime, they must be read from front to back, a task of no slight physical effort. If the clerk concludes that the evidence is sufficient, his judge can still test the validity of this conclusion against the specifics of the clerk’s memorandum—those pages of testimony said by the clerk to permit the jury to find the necessary elements. Nonetheless, some critics would insist that the judge read every page for himself. No doubt there are some appellate judges who make it a point of honor to scrutinize the entire transcript, at least in criminal cases. But scrutinize for what? Appeals, even criminal appeals, require allegations of error; and when an allegation directs the court’s attention to the instructions only, what need is there to examine the voir dire? Those few cases in which broad inspection would disclose plain error might not warrant the time.\(^\text{139}\) Furthermore, institutional considerations might cut the other way; is it the court’s function to notice error not raised by counsel on appeal?\(^\text{140}\) All of this might even suggest leaving the job of discovering plain error to the law clerks. But to return to the allegation of instructional error, is it really a threat to the judicial function to allow the clerk to read the transcript and to report to his judge that the case was not tried to the jury with bad instructions, but to the court with none at all? I have discovered such a case in the reports.\(^\text{141}\) Admittedly, such a gross aberration of appellate advocacy is rare, but the pattern of alleging error unsupported in the record is not an infrequent one. To use one judge’s characterization, many appeals, particularly criminal appeals, “melt when

\(^{139}\) Some jurisdictions have statutes or court rules expressly or by construction allowing appellate courts sua sponte to notice plain error, that is, error manifest on the face of the record itself. See, e.g., 28 U.S.C. § 2106 (1970); Fed. R. Crim. P. 52(b). Thus in these jurisdictions appellate courts are at least empowered to notice plain error without assignment by counsel on appeal. Whether as a matter of policy these same courts should make it standard practice to search every record for such error is another question, however. Perhaps the doctrine is, or should be, limited to saving appellate counsel from omissions at trial, at least when the point is sufficiently raised on appeal.

\(^{140}\) There is the strict view that unassigned errors will not be considered on appeal. State v. Burns, 82 Conn. 213, 219, 72 A. 1083, 1085 (1909) (“[The court] cannot be expected to examine several pages of evidence and numerous exceptions in a search for errors which counsel have not pointed out either in their appeal or their argument.”). See generally 5 Am. Jur. Appeal & Error § 654 (1962).

the records are opened to the light of day." When this is the case, the situation is especially amenable to preliminary screening by nonjudicial personnel rather than by the judge. To put it simply, there is little reason why a judge’s time should be spent wading through thick transcripts to verify the record basis of assignments or allegations of error.

What about research? Is this reading different in kind? I doubt it. There is the suggestion today that all legal research be computerized to facilitate both advocacy and judgment. Yet no one has seen a threat to the integrity of the courts in this. The same is true of the clerk’s legal research. It is just too hard to imagine Justice Brandeis himself—rather than his clerk—researching every page of the United States Reports looking for that particular point. A judge’s time chart simply won’t allow it, and, one suspects, Justice Brandeis probably had little pause about delegating the job to his clerk anyway.

We reach writing. What about the judge who turns to his clerk for first drafts? Is he less faithful to his office for it? This aspect of the delegation calculus is more troublesome; an analysis of the point proves more involved. First, it is no answer to say that the judges are unable to write for themselves in every case because of the press of time. This may be true, but it has nothing to do with our normative inquiry. If by allowing his clerk to write a judge pro tanto abdicates his office, then we should have more judges, fewer clerks, and no drafts at all. Nor can we condemn the practice simply because some of our noblest judges would have none of it. Justice Holmes, for example, never allowed his clerk to turn a Holmesian phrase, or even to try. With Holmes the clerk’s job was to fill the opinion with citations of Holmes’s favorite author, meaning Holmes himself. Similarly, try to discern any of the clerk’s handiwork in the orchestrations of Justice Musmanno. Still, these same judges must be asked why they refuse to allow their clerks to prepare the drafts. Unless the reasons given for the refusal relate to the scope of the judicial function, no inference about the legitimacy of the

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143. See McCabe, Automated Legal Research, 54 JUDICATURE 283 (1971).
144. See text accompanying note 90 supra.
146. See Leach, supra note 59, at 13.
delegation is permissible either way. In Holmes's case,\textsuperscript{117} and surely in Musmanno's, the reason for the refusal is pride of authorship. There are judges who like to write for themselves because to them the opinion rings true only when cast in their own language. One wonders about the judgment, however. Pride of authorship and the judicial office may not run along mutually inclusive lines. Is a decision any less a judicial pronouncement because the clerks had a hand in the explication? Perhaps it is significant on this point that nowhere in the literature has a judge taken the position that his exclusive authorship is essential to the integrity of the judicial office. Some judges come very close however. The views of Judge Edwards of the Sixth Circuit are illustrative:

Law clerks are the most obvious aid to time-pressed appellate judges. I use the two which the federal government now allows me to save time in every way I can think of \textit{consistent with judicial duty}. But no law clerk has ever—or will ever—write an opinion for me. And I likewise reject the incorporation in an opinion of language from any law clerk memorandum. If I write a sentence I know for certain what I mean. If I copy a sentence, I am by no means so sure. \textit{And I believe lawyers and litigants are entitled to judicial opinions}.\textsuperscript{148}

Certainly in these words there is at least the suggestion, if not an assertion, that writing is for the judge and that copying even a sentence of the clerk's memorandum is inconsistent with judicial duty. And this time the reason assigned for the refusal has nothing

\textsuperscript{117} "I have been asked whether I ever wrote an opinion for the Justice. The answer is an emphatic NO. He had a great pride in his highly individual literary style and any measure of ghost-writing would have been abhorrent to him." \textit{Id.}

\textsuperscript{148} Edwards, \textit{The Avoidance of Appellate Delay}, Panel Discussion, in \textit{Improving Procedures in the Decisional Process}, 52 F.R.D. 51, 68 (emphasis added). Nonetheless, Judge Edwards gives his clerks substantial work to do. His description continues:

But my clerks live with the cases assigned to me in much the same way I do. I never encourage their recommending any disposition in preliminary work on a case. But I do require them to write a prehearing memo on each case and after assignment of a case to me for opinion writing, I may assign specific legal issues for in-depth research. I encourage them at this point to think toward disposition—and freely to argue for whatever point of view they may come to.

\textit{Id.}

Judge Learned Hand, who called the law clerks "puisne judges" (see Kurland, \textit{Jerome N. Frank: Some Reflections and Recollections of a Law Clerk}, 24 U. CH. L. \textbf{Rev.} 661, 663 (1957)), also refused to allow his clerks to write even a sentence: "[He] wouldn't even let a law clerk write a sentence, not one sentence. He would let the law clerk criticize. He would hand what he had written to the law clerk and let him make all the suggestions he wanted to make. But not one word of that opinion was anybody else's but Learned Hand's." Medina, \textit{The Decisional Process in the United States Court of Appeals, Second Circuit—How the Wheels Go Round Inside—with Commentary}, Address before New York County Lawyers' Association Forum Evening, Apr. 26, 1962 (typewritten), at 27, \textit{quoted in M. Schick, supra note 116, at 107 n.92}.
at all to do with pride of authorship. Rather, a judge should write
for himself because only then can he know for sure what he means.
But I wonder whether Judge Edwards is really serious about this
reasoning. Surely he is not so poor a student of the legal process to
think that lawyers and litigants read judicial opinions according to
what they think the judge intended. Any private unexpressed mean­
ing of the judge is institutionally irrelevant. The opinion is read
instead by reference to what it says; indeed it should be read only
that way. To illustrate: Lord Nottingham once stated his was the
better construction of the Statute of Frauds because, “I had some
reason to know the meanings of this law; for it had its first rise from
me.” Yet, as has been pointed out, this view is quite erroneous:
“If Lord Nottingham drew it, he was the less qualified to construe
it, the author of an act considering more what he privately intended
than the meaning he has expressed.” Thus one might argue that
the very reason tendered by Judge Edwards for rejecting his clerk’s
handiwork cuts in precisely the opposite direction. The young law
graduate fresh from Legal Writing or the Review might be the one
ideally qualified to mesh what his judge means with what the opin­
ion says. And this might even include an occasional Musmanno
opinion.

What then remains of Judge Edwards’s view? I suspect he
has already heard of Lord Nottingham, and if not he would probably
adhere to his own beliefs at any rate. There is just something intui­
tive, he would say, that tells him he must write his own opinions.
Again, nothing concrete seems in the offing on this point. I can only
add my own remaining intuitions.

It seems to me too easy an answer to suggest that so long as the
judge decides the case there is no delegation of the judicial function

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150. 4 J. Campbell, Lives of the Lord Chancellors and Keepers of the Great Seal
of England 228 n.3 (1885). I owe the reference to Professor Lon Fuller, who first put these
thoughts into my head. See L. Fuller, The Morality of Law 86 n.41 (rev. ed. 1969). I have
always thought, however, that if one has enough sense to recall these things on his own, he
can rightfully claim them for himself. So did Llewellyn. See K. Llewellyn, The Bramble
Brow 8 (1930).
151. “If lawyers looking for all shades and nuances of meaning read the judge’s words
with a magnifying glass. A well-trained law clerk, especially one who has had considerable
law journal experience, can aid his judge in polishing the language of opinions and in spotting
ambiguities and other slips that may return to plague the court later. Even a judge who is a
precise and clear drafter can use an editor, for the best of us can be misled by our own words
and feel sure that what is crystal clear to us is equally clear to all who read.” Braden, supra
note 48, at 297-98.
in the draftsmanship of the clerk. Just what is a decision in a case anyway, if not the opinion itself? Is it so clear that the court's opinion is severable from its judgment? Perhaps the nature of the judicial process is such that judgment emerges only as the opinion is written. More than enough students of the law, even the jurisprudences, have had trouble keeping the concepts of decision, opinion, and judgment straight and clear of each other. Their borders are too impalpable, too plastic; these concepts shade into one another. Accordingly, the solution that writing is not judging seems to me too facile. It is at least possible, then, to talk sensibly about whether a clerk should be allowed to prepare the drafts, acknowledging this time that some of his sentences may come close to the ratio, to the heart of the judicial process itself. This, as best I can put it, is what may very well be bothering those who intuitively would insist that the judge write it all for himself.

Yet even with the inquiry thus redrawn we can proceed along analytical lines only one step further. The rest is all a matter of faith. There are sentences, and there are sentences. Some are like baggage toting—they can be drafted by the clerk and incorporated into the opinion without endangering the judge's integrity, qua judge. Other sentences, however—indeed even a naked word—may commit the court along paths of law the judges themselves are unwilling to travel. These are the sentences that strain the legitimacy of the writing delegation the hardest. Let me flesh in all this disquisi-

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152. Albeit this is the answer generally given in the literature. See, e.g., M. Schick, supra note 116, at 107: "Law clerks probably exaggerate their influence because most of them do in fact draft some opinions; they fail to recognize that this is not the same as deciding the outcome of appeals."


154. The jurisprudences also have been confused about just what this term means. See Goodhart, The Ratio Decidendi of a Case, 22 Modern L. Rev. 117 (1959); Simpson, The Ratio Decidendi of a Case, id. at 453; Stone, The Ratio of the Ratio Decidendi, id. at 597. Cf. Cohen, supra note 153, at 844 n.82.

155. At the Institute Judge Jack Day of the Ohio Court of Appeals opened his presentation with the remark that he never allows his clerk to draft opinions for him. I later asked why, and he suggested that, indeed, to him writing is judging and that sometimes draftmanship may come too close to judging. For this reason he prefers to keep all the writing to himself, without belittling those judges who allow their clerks to draft some of the opinion. Judge Day confessed an inconsistency in his position, however, since he requires his clerk to prepare the first draft of the Syllabus in each case, which in Ohio alone is the law. Judge Day delegates this task, however, because he puts Ohio's Syllabus practice in the same category as football. Telephone conversation with Judge Jack G. Day, Sept. 20, 1972. See note 68 supra.
ition with some specifics. What harm to the judicial process to allow the clerk to state the facts? Any first-year student knows the facts are not the law. What harm to allow the clerk to state in a draft that the action is one *ex contractu*, omitting Mrs. Quickly's details about the white hat and sea-coal fire? Yet there is controversy even here. It was Justice Holmes himself, I think, who said that if permitted to state the facts, judgment in his favor would necessarily follow. Passing over this difficulty, think of the constitutional judgment implicit in the single word "penumbra." I know it was Justice Holmes who said that words are not like crystals, forever unchanged and transparent. A word "is the skin of a living thought." And the thought may prove more law than literature.

If all of what I have said is true, then as an abstract matter as well as a day-to-day reality there would appear nothing wrong in the draftsmanship of the clerk, provided the judge has the good sense to retouch the draft to eliminate any sentences or words not to his liking. And the retouching process is essential—it not only protects an individual interest in style, but it also guarantees the judge's fidelity to law. It determines whether the course of judicial duty will run straight and true. It is precisely here that one must abandon further analysis and rest final opinion on faith alone: can the judges be trusted to weed out any writing that smacks of judgment?

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The judge's selection, stress and arrangement of "the facts" can make the most peculiar case look like routine. We know from life that most cases are, before this fact-manipulation begins, peculiar. Manipulation—nay, perception—of "the facts" is all-important; judges, like witnesses, observe differently according to temperament and circumstances. Judges read the evidence they get with an eye to their views of justice; "the facts" take shape in court in the light of the result to be achieved.

Perhaps the importance of this fact perception is what Judge Medina of the Second Circuit had in mind when he explained his refusal to allow his clerks to state the facts on appeal: "I do not believe [that] is the kind of thing you can turn over to a law clerk who has not had experience appraising facts." Medina, *The Decisional Process in the United States Court of Appeals, Second Circuit—How the Wheels Go Round Inside: with Commentary*, Address before New York County Lawyers' Association Forum Evening, Apr. 26, 1962 (typewritten), at 22, quoted in M. Schick, supra note 116, at 106.


160. See Medina, supra note 82, at 154:

There is no reason under the sun why a judge should not have his law clerk draft an opinion for his revision and approval, nor is the law apt to suffer in any substantial measure if the judges are not constantly striving to emulate the style of a Holmes, or a Learned Hand or a Cardozo.
The suggestion that judges are incapable of deciding for themselves or even that their judgments are unconsciously influenced by the clerks has always left a bad taste in my mouth. There is just something too Machiavellian about these ideas. In preparing my remarks I thought it might be interesting to see if Niccolò himself had anything to say on the question. I discovered an entire chapter, "Of the Secretaries of Princes," on the subject. I have already mentioned the idea that a good secretary reflects favorably on the prudence of his prince. But there are some more thoughts that for me are more than an ironic twist. They put an end to our delegation inquiry:

There was nobody who knew Messer Antonio da Venafro as the minister of Pandolfo Petrucci, Prince of Siena, who did not consider Pandolfo to be a very prudent man, having him for his minister. There are three different kinds of brains, the one understands things unassisted, the other understands things when shown by others, the third understands neither alone nor with the explanations of others. The first kind is most excellent, the second also excellent, but the third useless. It is therefore evident that if Pandolfo was not of the first kind, he was at any rate of the second. For every time the prince has the judgment to know the good and evil that anyone does or says, even if he has no originality of intellect, yet he can recognize the bad and good works of his minister and correct the one and encourage the other; and the minister cannot hope to deceive him and therefore remains good.

In my own experience Judge Gillis had the brain that understands things unassisted, although he often let me believe he understood better with my help. And after working out all these thoughts about delegation in my own mind I have come to respect him all the more for Judge Gillis was wise enough to strike out of the draft any incautious words sprinkled along the way. From my own year I am certain he always made the decisions. But of equal import, Judge Gillis's was always the pen of final judgment. Furthermore, I would accept it on faith that all judges are like Pandolfo; that as individuals they possess the essential qualities of their social office; that they possess the good sense to recognize the bad and good work that their clerks do or write; and that all judges, like Judge Gillis for me, correct the one and encourage the other.

And what of the clerk? Not only is he unable to deceive his

161. See text accompanying note 61 supra. In his letter to the Times commenting on Professor Bickel's article, see note 4 supra, Judge Hofstadter detailed the historic precedents for staff assistance:

Leonardo's students worked on his canvases; Dumas had his assembly line of co-authors; and Herbert Spencer drew on a group of collaborators. . . . And even Einstein and Bohr built on the work of a host of research assistants.

judge, but I would add, he would not try. A good clerk knows good law when he sees it; he recognizes that before good judgment there is the need for much hard thinking and that when judgment finally comes its rationale must rise to the surface in a written opinion. I am sure, although you must accept this on faith too, that the clerk’s work—be it recommendation, memo, or draft—will reflect these essential qualities of law itself, and that amidst all the explication there is hardly room for deception. Finally, I am convinced that those called to the institution bring to it the personal qualities of the good minister:

For a prince to be able to know a minister there is this method which never fails. When you see the minister think more of himself than of you, and in all his actions seek his own profit, such a man will never be a good minister, and you can never rely on him; for whoever has in hand the state of another must never think of himself but of the prince, and not mind anything but what relates to him.163

I for one would accept the assertion that all clerks think only of their judges; and that the clerk, like his judge, struggles daily to serve our own prince: the Law.164

APPENDIX

The idea of a formal training program for law clerks was first given serious consideration by several judges of the Louisiana Courts of Appeal, Judges M.D. Miller and John T. Hood in particular. Originally the plan was to hold a conference for Louisiana’s law clerks alone. Judge Lesinski, who eventually served as consultant to the first Law Clerk Institute, was exposed to the idea after meeting these judges at one of the yearly Appellate Judges Seminars. Judge Lesinski thought the idea of a workshop for clerks a sound one, and in his official capacity as Vice-Chairman of the Appellate Judges Conference and a member of its Education Committee he contacted Associate Dean Francis Sullivan, of the Louisiana State University Law School, to plan for a national conference of prospective clerks. After several consultations with Judge Lesinski, the program for the first Institute was established and a prospectus was sent to appellate judges throughout the country, together with a schedule of fees.

The response to the first Law Clerk Institute far exceeded the expectations of its planners. Notwithstanding a substantial fee per

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163. Id. at 114-15.
164. "The greatest influence of these clerks, by and large, has been the rare but desirable one of relentless scholarship." Newland, supra note 13, at 317.
registrant, almost 70 law clerks were sent by their judges to participate in the program.

The curriculum for the first Institute was spread over three days and consisted of the following subject areas. Faculty are listed in the adjacent column.

<table>
<thead>
<tr>
<th>Subject</th>
<th>Faculty</th>
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<tbody>
<tr>
<td>The Law Clerks: Profile of an Institution</td>
<td>Paul R. Baier, Assistant Professor of Law, Louisiana State University</td>
</tr>
<tr>
<td>Judge and Clerk: Ethics of the Job</td>
<td>Honorable Albert Tate Jr., Associate Justice, Louisiana Supreme Court</td>
</tr>
<tr>
<td>Logic and Judicial Reasoning</td>
<td>Honorable Jack C. Day, Judge, Ohio Court of Appeals</td>
</tr>
<tr>
<td>Working Tools, Appellate Structures, New Approaches</td>
<td>N.O. Stockmeyer Jr., Research Director, Michigan Court of Appeals</td>
</tr>
<tr>
<td>English: Classical Structure and Style of Writing</td>
<td>Dwight W. Stevenson, Professor of English, College of Engineering, University of Michigan</td>
</tr>
<tr>
<td>Opinion Writing</td>
<td>Honorable Robert T. Mann, Judge, Florida Court of Appeal</td>
</tr>
<tr>
<td>Writing Exercise: Critique of Draft Opinions</td>
<td>Paul R. Baier, Assistant Professor of Law, Louisiana State University</td>
</tr>
<tr>
<td></td>
<td>Honorable Albert Tate Jr., Associate Justice, Louisiana Supreme Court</td>
</tr>
<tr>
<td>Impact Decisions (3 faculty)</td>
<td>Honorable William A. Grimes, Associate Justice, New Hampshire Supreme Court</td>
</tr>
<tr>
<td></td>
<td>Cheney C. Joseph, Assistant Professor of Law, Louisiana State University</td>
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</tbody>
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Except for the welcoming and invocation addresses, each presentation was intended to be informal; the exchange of questions and answers between clerks and faculty was encouraged. The subjects were taught in small seminar rooms at the Louisiana State University Law Center, and because the number of registrants exceeded anticipated enrollment, the clerks were split into two groups of about 30 each. Faculty schedules were then rearranged to require two classes per subject area in order to keep the sessions as small and informal as possible.

An important part of the Institute was a writing exercise requiring the clerks to prepare a draft judicial opinion in advance of the program. The case used in the exercise was People v. Henley, 26 Mich. App. 15, 182 N.W.2d 19 (1970). Clerks were instructed to assume that they worked for the Michigan Court of Appeals on remand of the appeal from the Michigan Supreme Court, see People v. Henley, 382 Mich. 143, 169 N.W.2d 299 (1969); they were told to prepare a draft opinion in the case resolving the question of double jeopardy raised on appeal by defendant Henley. A hypothetical trial transcript was sent to each clerk in advance of the Institute, to-
together with a collection of relevant research materials. No independent research was required. Although the Henley appeal had been decided and an opinion was published in the case, the clerks were asked for pedagogical purposes not to read the actual report until their own work was complete. These drafts were then critiqued as a portion of the Institute’s program.

Although the work required to complete the writing exercise was substantial, more than 50 percent of the participants turned in their drafts before the program, reflecting a sincere desire to improve clerkship performance. Although at times the critique session was hotly critical of some of these proposed opinions, the spirit was one of complete candor. All willingly participated, including those subject to the greatest criticism, again in the interest of upgrading performance of this important aspect of the clerk’s function.

During their three-day stay at the Institute, the law clerks were housed together as a group in Pleasant Hall, a residence dormitory on the Louisiana State University campus near the Law Center. Two of the faculty, Justices Grimes and Tate, lived with the clerks during their stay in an effort to expose the new clerks, perhaps for the first time, to the important conception of the judge as human being, as well as jurist. Toward the same end, all the clerks, judges, and other faculty spent an informal evening together, beginning with a seafood buffet and ending with much conversation between clerk and judge.

At the conclusion of the program Judge Lesinski chaired a critique session among the Institute’s planners and faculty. Several judges of the Louisiana Courts of Appeal, who had been present as observers during the three days, also attended. It was the consensus that a sound beginning had been made and that the first effort proved worthwhile. It was decided that the Institute should continue as an annual event. Suggestions for improvement of the program in the future were tendered and discussed.

Before leaving, each clerk was instructed to critique the program himself after actually working for a while as a clerk and to offer suggestions about reshaping the Institute’s curriculum in the future. Although it is too early to report the reactions of the participating clerks, some preliminary comments indicate that they too considered their time and effort well spent. In particular, one clerk wrote: “I personally felt a good deal stronger in commencing my job the following week.”

Throughout the program one theme was reiterated whenever possible: The law clerks are an institution. Hopefully with that in
mind and with a sense of commitment to the traditions of the office the participating clerks set about their work, the Institute behind them, on a stronger footing.

The following is a list of the courts represented at the first Institute. The listing is alphabetical by state, together with the names of judges who sent their clerks and the clerks’ names.
1973]

PROFILE OF AN INSTITUTION

Alabama
Associate Justice Hugh Maddox
Supreme Court of Alabama
John W. Parker
Associate Justice Pelham J. Merrill
Supreme Court of Alabama
Clellon K. Baeder

Arizona
Chief Judge Herbert Kruczer
Court of Appeals, Div. 2
Harley Kurlander
Judge James D. Hathaway
Court of Appeals, Div. 2
Robert Mantiel
Judge Lawrence Howard
Court of Appeals, Div. 2
Phyllis Sugar

Florida
Associate Justice Hal P. Dekle
Supreme Court of Florida
Michael Hastings
Chief Judge Sam Spector
1st Dist. Court of Appeal
Cynthia Turnicliff
Judge John S. Rawls
1st Dist. Court of Appeal
Elaine Duggar
Chief Judge Thomas Barkdull, Jr.
3rd Dist. Court of Appeal
Robert C. Markey

Illinois
Justice Glenn Seidenfeld
Appellate Court, 2nd Dist.
Laurence Templer
Justice Harold Trapp
Appellate Court, 4th Dist.
Ann Blandford
Justice Caswell Crebs
Appellate Court, 5th Dist.
William Thomas
Justice George Moran
Appellate Court, 5th Dist.
Frank Mansfield

Indiana
Associate Justice Donald H. Hunter
Supreme Court of Indiana
David Gotshall

Iowa
Chief Justice C. E. Moore
Supreme Court of Iowa
Bill O'Brien

Kansas
Chief Justice Harold R. Fatzer
Supreme Court of Kansas
Edwin P. Carpenter
Associate Justice A.S. Schroeder
Supreme Court of Kansas
Douglas C. Richards

Kentucky
Chief Justice Samuel Steinfeld
Court of Appeals of Kentucky
Max Schwartz
James A. Bailey
Associate Justice Scott Reed
Court of Appeals of Kentucky
Robert Walker
Associate Justice John S. Paimore
Court of Appeals of Kentucky
Julia K. Tackett

Louisiana
Associate Justice John Dixon
Supreme Court of Louisiana
Robert Szabo
Associate Justice Albert Tate, Jr.
Supreme Court of Louisiana
Vance Andrus
Todd Gremlion
Judge Frederick Ellis
1st Circuit Court of Appeal
Maurice LeGardeur
Judge C. Lenton Sartain
1st Circuit Court of Appeal
James H. Morgan
Judge H.W. Ayres
2nd Circuit Court of Appeal
Jean T. Drew
Judge Pike Hall, Jr.
2nd Circuit Court of Appeal
Edwin L. Cabra
Judge Jesse Heard
2nd Circuit Court of Appeal
Alex Rubenstein
Judge O.E. Price
2nd Circuit Court of Appeal
Stephen Glassell
Judge Minos D. Miller, Jr.
3rd Circuit Court of Appeal
Eugene Callaway

Judge James C. Gulotta
4th Circuit Court of Appeal
Kay K. Norman

Judge Harry T. Lemmon
4th Circuit Court of Appeal
Celeste Tanner

Judge Edward Stoulig
4th Circuit Court of Appeal
John R. Ates

Judge L.C. Bertrand
Judge Douglas J. Nehrbaas
15th Judicial District Court
Dale Martin

Judge William T. Bennett
20th Judicial District Court
Phil Miley

Judge Fred S. Bowes
24th Judicial District Court
Harry T. Hardin

Judge Joseph A. LaHaye
27th Judicial District Court
Patrick Morrow

Judge James C. Terrell
30th Judicial District Court
Fred Chevalier

Michigan
Chief Judge T. John Lesinski
Court of Appeals
Philip M. Stevens

Judge John W. Fitzgerald
Court of Appeals
Ernest Phillips

Minnesota
Associate Justice Donald Peterson
Supreme Court of Minnesota
Burton Hanson

Missouri
Chief Justice James A. Finch, Jr.
Supreme Court of Missouri
Richard Brownlee

Associate Justice Robert T. Donnelly
Supreme Court of Missouri
Patrick Doherty

Associate Justice Joseph J. Simeone
St. Louis Court of Appeals
Mary Ann Weems

Nevada
Chief Justice David Zenoff
Supreme Court of Nevada
Sally S. Davis

New Hampshire
Chief Justice F.R. Kenison
Supreme Court of New Hampshire
Charles Doleac

New Mexico
Associate Justice John B. McMannus, Jr.
Supreme Court of New Mexico
William Prim

New York
Judge Frank Del Vecchio
Supreme Court, Appellate Division, 4th
Dept.
Mary Lou Crowley

Oklahoma
Judge Tom Brett
Court of Criminal Appeals
Penn Lerblanc

Judge Robert D. Sims
Court of Criminal Appeals
C. Michael Zacharias

Rhode Island
Chief Justice Thomas H. Roberts
Supreme Court of Rhode Island
Richard Licht

Associate Justice A.H. Joslin
Supreme Court of Rhode Island
Donald Miller

Associate Justice Thomas Kelleher
Supreme Court of Rhode Island
Edward Radlo

Associate Justice Thomas Paolino
Supreme Court of Rhode Island
Angelica Bevilacqua

Associate Justice William E. Powers
Supreme Court of Rhode Island
Stephen Famiglietti

South Carolina
Associate Justice J.M. Brailsford, Jr.
Supreme Court of South Carolina
Kenneth Woodington

Associate Justice Bruce Littlejohn
Supreme Court of South Carolina
Camden Lewis
Tennessee
Judge Charles Galbreath
Court of Criminal Appeals
William Bozeman

Texas
Chief Judge John Onion, Jr.
Court of Criminal Appeals
Russell Busby
Judge Leon Douglas
Court of Criminal Appeals
John Drolla
Judge W.A. Morrison
Court of Criminal Appeals
Bertha S. Ross
Judge Wendell A. Odom

Court of Criminal Appeals
G. Michael DeGeurin
Judge Truman Roberts
David Cook
Commissioner Carl E.F. Dally
Don Nelson
Commissioner Thomas G. Davis
Herman Little
United States Court of Appeals
Chief Judge Clement F. Haynsworth, Jr.
4th Circuit Court of Appeals
James D. Myers
ition with some specifics. What harm to the judicial process to allow the clerk to state the facts? Any first-year student knows the facts are not the law. What harm to allow the clerk to state in a draft that the action is one *ex contractu*, omitting Mrs. Quickly's details about the white hat and sea-coal fire? Yet there is controversy even here. It was Justice Holmes himself, I think, who said that if permitted to state the facts, judgment in his favor would necessarily follow. Passing over this difficulty, think of the constitutional judgment implicit in the single word "penumbra." I know it was Justice Holmes who said that words are not like crystals, forever unchanged and transparent. A word "is the skin of a living thought." And the thought may prove more law than literature.

If all of what I have said is true, then as an abstract matter as well as a day-to-day reality there would appear nothing wrong in the draftsmanship of the clerk, provided the judge has the good sense to retouch the draft to eliminate any sentences or words not to his liking. And the retouching process is essential—it not only protects an individual interest in style, but it also guarantees the judge's fidelity to law. It determines whether the course of judicial duty will run straight and true. It is precisely here that one must abandon further analysis and rest final opinion on faith alone: can the judges be trusted to weed out any writing that smacks of judgment?

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The judge's selection, stress and arrangement of "the facts" can make the most peculiar case look like routine. We know from life that most cases are, before this fact-manipulation begins, peculiar. Manipulation—nay, perception—of "the facts" is all-important; judges, like witnesses, observe differently according to temperament and circumstances. Judges read the evidence they get with an eye to their views of justice; "the facts" take shape in court in the light of the result to be achieved.

Perhaps the importance of this fact perception is what Judge Medina of the Second Circuit had in mind when he explained his refusal to allow his clerks to state the facts on appeal: "I do not believe [that] is the kind of thing you can turn over to a law clerk who has not had experience appraising facts." Medina, *The Decisional Process in the United States Court of Appeals, Second Circuit—How the Wheels Go Round Inside* with Commentary, Address before New York County Lawyers' Association Forum Evening, Apr. 26, 1962 (typewritten), at 22, quoted in M. Schick, supra note 116, at 106.

160. See Medina, supra note 82, at 154.

There is no reason under the sun why a judge should not have his law clerk draft an opinion for his revision and approval, nor is the law apt to suffer in any substantial measure if the judges are not constantly striving to emulate the style of a Holmes or a Learned Hand or a Cardozo.