Law Clerks Gone Wild

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I. INTRODUCTION

The title of this Article promises too much (but I'll bet it did catch your attention, and it doesn't even have a colon!).[1] As a career law clerk for more than ten years in three different courthouses,[2] I've never seen a law-clerk colleague do anything that would come close to raising an eyebrow at a spring-break fun-in-the-sun spot.[3] But I have developed a pret-

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1. *See* John Charles Kunich, *Shock Torts Reloaded*, 6 APPALACHIAN J.L. 1, 25 n.43 (2006) ("[T]he textbook approach to writing law review articles demands that there be a colon buried somewhere within the title"); Joshua Deahl & Bernard A. Eskandari, *Before & After the Colon*, 10 GREEN BAG 2D 7, 7 (2006) ("There are few patterns more noticeable in law review articles than the abundant use of colons in titles."); Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 19 (2001) ("In the few law review articles I have written, I have always struggled to avoid titles with colons."); Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311, 1317 (1998) ("One unique characteristic of Professor [Shakila] Matumba's scholarship is in the way she titles her articles. She calls them 'bold statements with no subtext.' Professor Matumba claims that she is one of a number of young scholars using 'in your face' writing to wake up a sleeping academy. Consequently, she refuses to use sub-titles and colons as she names her pieces."); Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 143 n.a1 (1997) ("The author wishes to thank . . . Roger Bearden, J.D. Candidate, Harvard Law School, Class of 1998, for suggesting that the title *not* consist of two parts separated by a colon"); Sidney W. DeLong, *: An Appraisal*, 41 J. LEGAL EDUC. 483, 483 (1991) ("Like a staple in the belly of a centerfold, the colon is an intrusive and disconcerting element in the title of a law review article. . . . Like the fang marks of a pit viper in the neck of a still-quivering tapir, the colon evidences a fatal internal conflict in the title of a law review article. . . . Like an overdrawn, self-referential metaphor in the first sentence of an article that you already know is going to be a dud, the colon in the title of a law review article confirms the author's insecurity with himself and his subject."); Erik M. Jensen, *Food for Thought and Thoughts about Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?*, 65 IND. L.J. 639, 643 n.21 (1990) ("On the digestion process, see . . . the titles of just about every other law review essay ever written (importance of colon)."). Perhaps I digress. But can you blame me? I'm a law clerk, after all, and in my line of work, opportunities for frolic and detour are precious and few.

2. In addition to my current position in a U.S. District Court, I spent two years clerking in the New Hampshire Superior Court and one year clerking in the New Hampshire Supreme Court.

3. That, I hasten to add, is much to the credit of the several dozen law clerks with whom I have worked, including my long-time (and perhaps long-suffering) co-clerk, Robert J. "Kyle" Finn.

ty good understanding of the contours of a work life conducted in judicial chambers, where one of the principal principles is law-clerk anonymity.[4] Thus, whenever I see the term "law clerk" appear in a judicial opinion, it catches my attention. And, believe it or not, that term appears in more than 10,000 opinions in the Westlaw ALLCASES database. Even after subtracting the hits that result from cases involving prison law clerks and disputes over the allowable billing rate for private-firm law clerks when attorneys' fees are at issue, there are hundreds, if not thousands, of opinions in which judicial law clerks have been mentioned, either by title or by name. And, as I said, every time I see a law clerk mentioned in a judicial opinion, my eyes open up just a wee bit wider.

Perhaps this is a version of the little thrill I got, years ago, when, as a graduate student in archaeology, I saw my first Indiana Jones movie. But, of course, Indy is a fictional character and his exploits with a pistol and a bullwhip bore little resemblance to what I did, day after day, with a trowel and a dustpan.[5] The same disjunction between fiction and nonfiction holds true for law clerks. We do show up in popular culture, but as commentators have noted, quite correctly, the several dozen fictional law clerks who have appeared on television, in the movies, or in novels, are rather unlike the several thousand real law clerks who quietly work, with a minimum of drama, in state and federal courthouses across the country.[6]

In any case, this Article grows out of my delight in seeing fellow law clerks break through the paper curtain and onto the pages of the *Federal Reporter*, the *Federal Supplement*, or some other compendium of judicial opinions. While my fascination with law clerks as the subjects rather than the instruments of judicial writing is probably not universal, I have selected the opinions I discuss in this Article with an eye toward entertaining—and maybe even instructing, if only slightly—the clerki-

4. That anonymity is illustrated by statements such as this: "The Court has set its even-numbered law clerk to work to take a preliminary look at that question . . . ." United States v. Montana, 149 F. Supp. 2d 368, 371 (N.D. Ill. 2001). Given the norm of anonymity, it always takes me aback to see sentences like this in the *Federal Supplement*: "The Law Clerk assigned to this case is MIKE McSHEA." Rosser v. Pipefitters Union Local 392, 885 F. Supp. 1068, 1072 (S.D. Ohio 1995).

5. And, just for the record, I am not the first law clerk to jump out of a test pit and into a judge's chambers. In *Oregon v. Bureau of Land Management*, 676 F. Supp. 1047 (D. Or. 1978), Judge Edward Leavy reported the defendant's suggestion that "[t]he decision of this case on its merits will compel the Court to become a judicial archaeologist, unearthing the 'bones of the past' to reconstruct transactions better left to history," *id.* at 1052, and then (foot)noted: "My law clerk, Julia Follansbee, holds an M.A. in archaeology from the University of Oregon," *id.* at 1052 n.1.

6. *See, e.g.*, John B. Owens, *The Simple Truth About* 9 Scorpions *and* The Tenth Justice*: Supreme Court Law Clerks in Legal Suspense Novels*, 88 CAL. L. REV. 233 (2000).

gentsia[7] and the judiciary.[8] So, with that audience in mind, I set off in search of law clerks who had gone wild enough to be written about, understanding, of course, that what I was searching for was a special kind of wildness—not the kind that sells suspense novels (or videotapes advertized on late-night television), but nonetheless, a kind of wildness that is likely to resonate with anyone who has ever been a law clerk or seen one in action.

Given my interest in law clerks who have strayed—or been directed—off the beaten path, or off the reservation entirely, I mouse-clicked right past several kinds of law clerk references: (1) instrumental references directing law clerks[9] or attorneys[10] to take some action or another; (2) references to run-of-the-mine law-clerk duties such as communicating with parties,[11] communicating with other courts,[12] conducting legal research,[13] participating with a judge in meetings in chambers,[14]

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7. The clerkigentsia consists of former law clerks, current law clerks, and those aspiring to be law clerks. To my ear, "clerkigentsia" sounds better than "clerketariat," "clerkocracy," or "clerkoisie." John Owens favors the term "clerkarazzi." *See id.* at 237.

8. My other selection bias was for opinions in federal cases, which reflects my attempt (sincere, if ineffectual) to keep the length of this article in check, as well as my own heightened interest in federal courts, which springs, no doubt, from my current position as a federal law clerk. Call it navel gazing by proxy.

9. *See, e.g.*, Jones v. City of Buffalo, 867 F. Supp. 1155, 1172 (W.D.N.Y. 1994) ("FURTHER, that upon delivery to the Pro Se Law Clerk, the Pro Se Law Clerk shall conduct an initial review of such submissions to determine if their subject matter is connected with Walter Jones' prior lawsuits discussed in this Decision and Order. FURTHER, that the Pro Se Law Clerk shall submit to an available district court judge, as designated by the Clerk of the Court, a recommendation as to whether such submissions should be filed by the Clerk of the Court.").

10. *See, e.g.*, Brooks v. Quinn & Quinn, 257 F.R.D. 415, 418 (D. Del. 2009) ("On or before July 2, 2009, counsel for defendants shall contact Nancy Rebeschini, Esq., the court's pro se law clerk, to schedule a date and time for the written deposition.") (emphasis omitted).

11. *See, e.g.*, United States *ex rel*. Vuyyuru v. Jadhav, 555 F.3d 337, 344 (4th Cir. 2009) ("As best we can discern from the appellate briefs and the record below, Judge [Richard] Williams (through his law clerk) informed the parties that he would not issue a pretrial order . . . until after disposition of the motions to dismiss had occurred."); *see also In re* Intermagnetics Am., Inc., 101 B.R. 191, 193 n.2 (C.D. Cal. 1989) ("[T]he incidence of telephone calls to chambers, seeking substantive advice from law clerks, is markedly increasing. Such calls are in effect ex parte communications with the judge and suffer the same vice as any ex parte contact.").

12. *See, e.g.*, United States v. Poole, 531 F.3d 263, 268 (4th Cir. 2008) ("The call was followed up by a letter from one of the federal district court's law clerks, asking Maryland state Judge Missouri 'to provide us with an official position from the [Maryland] Circuit Court as to the legal effect of the April 21, 1997 order.'").

13. *See, e.g.*, United States v. Gonzales, 257 F. App'x 932, 937 (6th Cir. 2007) (quoting the trial judge's statement: "Gentlemen, in anticipation of the renewal or the argument on the motion . . . I asked this afternoon for my law clerks to . . . pull out some cases from the Sixth Circuit."); N.E. Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 64 n.10 (D. Mass. 1998) ("My law clerk and a librarian ventured to the nether regions of the Social Law Library, the most comprehensive in Boston, and, after plowing through layers of dust and cracking the spines of untouched tomes of Canadian law, found no reliable compendium of the Quebecois Code.").

and working with a judge on jury instructions;[15] and (3) references in which a judge talks about law clerks hypothetically or rhetorically, to make a point about something else altogether.[16] I also gave a wide berth to opinions in cases in which a party called for the disqualification of a judge, based upon a real or perceived conflict of interest created by the past or future employment of a law clerk;[17] the law on that issue is

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14. *See, e.g.*, de Silva v. Pitts, 481 F.3d 1279, 1287 (10th Cir. 2007) ("the magistrate judge interviewed Jonathan *in camera* with her law clerk and the court reporter present . . . .").

15. *See, e.g.*, United States v. May, 145 F. Supp. 2d 57, 59 (D.D.C. 2001).

16. *See, e.g.*, United States v. Todd, 584 F.3d 788, 792 (9th Cir. 2009) ("Just as a mother who has had one child in school and prepared his lunch knows that she will prepare the school lunch for her second child, just as a judge knows that his law clerks will use Westlaw, so Jerome Todd knew that he would use coercion to cause his sex workers to make money for him."); United States v. Johnson, 247 F. App'x 357, 360 (3d Cir. 2007) (reporting the trial court's explanation to the jury: "[I]f I take my magic marker and I give it to my law clerk, and now my law clerk has actual possession."); *In re* Brooks, 383 F.3d 1036, 1046 (D.C. Cir. 2004) (criticizing actions of special master, explaining: "Indeed, if Balaran could properly serve as special master advising the district court whether to initiate contempt proceedings, then it would seem equally permissible for a judge presiding over a criminal proceeding to dispatch his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings."); Virgin Enters. Ltd. v. Am. Longevity, No. 99 CIV. 9854(CSH), 2001 WL 897178, at *14 n.9 (S.D.N.Y. Aug. 8, 2001) ("These considerations prompted my law clerk and I to discuss whether I should write a letter to the Nobel authorities, nominating my clerk for the Nobel Peace Prize, so that his resume, in addition to a reference to his judicial clerkship, could also state that he was a Nobel Peace Prize nominee. We have decided not to pursue this course.").

Perhaps the most chilling hypothetical reference to a law clerk is this one, from Judge David Warriner:

> My law clerk, I suppose, has a right to go down to some political rally and make a speech for his favorite candidate for office; but I suppose that if he did it, he would be fired. It is clear that the First Amendment entitles one to engage in political debate but he would be fired just the same. He would be fired because his speechmaking would be detrimental to my decisionmaking.

Funn v. Winston, 484 F. Supp. 923, 924 (E.D. Va. 1980). While I blanche at the thought of a law clerk being fired, for obvious reasons, it is equally obvious that the hypothetical law clerk in *Funn* would have had nothing to complain about, given the code of conduct under which law clerks operate. Even more political, but rather less hypothetical, is this:

> I and every other judge employ law clerks based upon a subjective judgment as to whether I think they will or they will not do a good job. A part of the judgment here is based upon statements made by the plaintiff as to her desire to participate in the packing phase of the assembly line work. . . .
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> The plaintiff here said she wasn't very interested in doing the work of packing, that she would rather do something else and she wouldn't work at that very long. This affected the supervisor's judgment in much the same way my judgment was affected when I had a law clerk tell me he didn't believe in the Vietnam war and he wouldn't work on any draft cases. I didn't hire the law clerk.

Salton v. W. Elec. Co., No. C-3738, 1972 WL 293, at *4 (D. Colo. Dec. 14, 1972).

17. *See, e.g.*, United States v. Ruff, 472 F.3d 1044, 1045 (8th Cir. 2007) (criminal defendant unsuccessfully sought recusal of trial judge, based on judge's hiring of law clerk who had previously handled his prosecution while working as Special Assistant United States Attorney).

Ruff is a relatively ordinary opinion of this genre, but there are some humdingers. One opinion that really hums is Judge Robert McNichols's opinion in *Bishop v. Albertson's, Inc.*, 806 F. Supp. 897 (E.D. Wash. 1992), in which the defendant argued that the judge's order on a summary judg-

straightforward, well settled, and amply discussed in the secondary literature.[18] There are plenty of references that fall into the foregoing categories, but they don't involve the level of wildness necessary to gain admission into the main portion of this Article.

Hitting a bit closer to the mark, but still outside the bull's-eye, are opinions describing unusual things that have happened to law clerks, such as being investigated by the United States Attorney on suspicion of having leaked the outcome of a patent-infringement case,[19] finding mysterious powder in the morning mail,[20] receiving threatening telephone

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ment motion had been tainted as a result of his law clerk's representation of the plaintiff in a grievance proceeding brought on her behalf by the union to which she belonged and for which the law clerk had once worked, but not as a lawyer, *id.* at 899. Before reporting that he had reassigned the case to another law clerk, Judge McNichols described the institution of the law clerk in considerable detail, introducing his discussion this way: "[B]ecause Mr. Allen [the law clerk] takes offense at the suggestion that his integrity is anything less than what both he and the Court know it to be, a few words about law clerks." *Id.* Judge McNichols continued:

> Having laid the groundwork, this memorandum will come to the point. Mr. Allen is troubled by the slur on his integrity. The Court is troubled by the implicit slur on its judgment. The Court is further troubled by the inference that the motion was not decided by an Article III judge. It was.

Id. at 902. After describing the workings of his own chambers, Judge McNicols concluded:

> The case has been reassigned to another law clerk. This is not being done because of any improper conduct on the part of Mr. Allen, but because now that his former relationship with plaintiff has surfaced, he would be the first to agree that his continued involvement would be inappropriate.

Id. at 903.

18. *See, e.g.*, 32 AM. JUR. 2D *Federal Courts* § 70 (2007); Wesley Kobylak, Annotation, *Conduct or Bias of Law Clerk or Other Judicial Support Personnel as Warranting Recusal of Federal Judge or Magistrate*, 65 A.L.R. FED. 775 (1983).

19. *See* Aguirre v. SEC, 551 F. Supp. 2d 33, 40 (D.D.C. 2008). Happily for the law clerk, "the SEC declined to investigate the situation." *Id.*

20. *See* United States v. Adamson, 237 F. App'x 492, 493 (11th Cir. 2007) ("On or about December 12, 2005, [the defendant] sent a greeting card from prison to a federal district judge that contained a white powder. Not surprisingly, the law clerk who opened the envelope became concerned about the nature of the powder and called a HAZMAT team, but the powder tested negative for biological agents, apparently because it was foot powder.").

The litigant mailings at issue in *United States v. Blohm*, 579 F. Supp. 495 (S.D.N.Y. 1984), were even more disturbing, and included the following:

> 1. A letter to the judge's law clerk stating that "This court's penchant for secretiveness is very disturbing. If it would respond to my efforts to influence it I should not try to intimidate it."
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> 2. A "complaint" charging Judge Stewart with conspiring to suppress evidence sought by Blohm in the litigation before Judge Stewart; the "complaint" stated that the Judge Stewart, Richard Nixon and Arnold Palmer were all in the conspiracy, because "they all play golf."
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> . . . .
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> 5. A letter to Judge Stewart stating "THE DIFFICULTY I FIND MYSELF IN AT THE PRESENT TIME IS NOTHING COMPARED TO THE DIFFICULTY YOU WILL FIND YOURSELF IN WHEN THIS THREAT MATTER IS ADJUDICATED IN COURT. YOUR DAYS AS A FEDERAL JUDGE, AND THOSE OF YOUR COLLEAGUES ON THE 2ND CIRCUIT COURT OF APPEALS, ARE NUMBERED.

calls from litigants,[21] being badgered by a plaintiff in a civil action,[22] being forced to watch a litigant disrobe in chambers,[23] receiving "a communication by telephone from the plaintiff . . . reporting that he [the plaintiff, not the law clerk] had developed two lumps in his groin area,"[24] being harassed by a judge,[25] being handed a poem written by a juror,[26]

> I SEEK NOTHING MORE THAN YOUR REMOVAL FROM THE BENCH, THE 'TRUE' THREAT IN THIS MATTER, AND YOU KNOW IT. IF YOU EVER HAD THE FEAR OF GOD, YOU'D BETTER HAVE IT NOW. AT THE VERY LEAST, YOU'LL BE INDICTED IN THE PRESS."
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> This stream of letters culminated in the actions that were the basis for Blohm's criminal indictment. He mailed a letter addressed to Judge Stewart, care of his law clerk, stating "IF I DON'T GET THE RELIEF I SEEK FROM THE U.S. COURT OF APPEALS, I'LL BRING A SAWED OFF SHOTGUN TO THE U.S. COURTHOUSE FOR THE PURPOSE OF ASSASINATING. . .". He also mailed an envelope addressed to Judge Stewart and his law clerk containing a shotgun shell box and a holder for firearms ear plugs.

Id. at 497. Yikes.

21. *See* Negron v. Horizon Ins. Co., No. 84 Civ. 4563 (MJL), 1986 WL 13448 (S.D.N.Y. Nov. 18, 1986). In that case:

> [O]n November 10, 1986, Negron called this Court and stated that "Judge Lowe is running a risk" and that "one day he would come here boiling mad and blow someone's fucking head off." Several minutes later, a law clerk for Judge Cannella called and informed this Court that Negron had just telephoned them and made threats against both Judge Cannella and this Court.

Id. at *3 n.6.

22. *See* Klimek v. Hunter, 624 F. Supp. 886, 890 n.1 (E.D. Va. May 26, 1985). After characterizing Adam Klimek as a "continual badgerer" and a "pest," but noting that "he [had] never been obstreperous," Judge Warriner wrote:

> Whether Adam Klimek is simply a nut, I don't know. But I do know that he is behaving like one before this Court and I don't intend to deal with him as a serious person. I intend to take appropriate action to end this abuse of the judicial process.

Id. at 890–91. That action consisted of dismissing six pending actions filed by Klimek and placing restrictions on future filings. *Id.* at 891. Those filings restrictions were vacated on appeal, subject to the trial court conducting a hearing. *See* Klimek v. Hunter, 819 F.2d 1138 (unpublished table decision), 1987 WL 35977, at *4 (4th Cir. May 26, 1987).

23. *See* Raz v. Mueller, 389 F. Supp. 2d 1057 (W.D. Ark. 2005). The incident in *Raz* was described as follows:

> On October 20, 1998, after being released from LSUMC, Raz went to the Shreveport chambers of Judge Henry A. Politz, Chief Judge of the United States Court of Appeals for the Fifth Circuit. He wanted to show Judge Politz the injuries he had sustained in the incident of October 13, 1998. Raz was still suffering the physical and mental effects of that incident, and its aftermath when he was medicated at LSUMC. He testified that he looked "horrible" and that his speech was slurred and difficult to understand.
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> The visit to Judge Politz's chambers went predictably awry when Raz began removing his clothing in the presence of the law clerks in order to reveal his injuries. Court security officers were called, and Raz was taken to the United States Marshal's Office to be questioned.

Id. at 1067.

24. Basis v. D.C. Dep't of Corr., CIV. A. No.88-2908 (RCL), 1989 WL 13367, at *1 (D.D.C. Feb. 10, 1989).

25. *See* Matter of Seaman, 627 A.2d 106 (N.J. 1993) (suspending superior court judge for sixty days, without pay, for sexual harassment of law clerk).

being handed a note from counsel during trial,[27] being driven from the courtroom by an onrushing criminal defendant,[28] being verbally threatened in the courtroom by a criminal defendant,[29] being involved in the resuscitation of a criminal defendant who had attempted to hang himself in a holding cell,[30] being eyeballed by a witness during trial,[31] being in-

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26. *See* Colo. Interstate Gas Co. v. Natural Gas Pipeline of Am., 661 F. Supp. 1448, 1480 (D. Wyo. 1987). Sadly, the opinion in *Colorado Interstate Gas* does not include the juror's poem, but does include the following judicial commentary on the meaning of the poem:

> NGPL exaggerates the significance of the poem. Interpreting the poem as a criticism of NGPL's witnesses is pure speculation. The poem reflects fatigue caused by a lengthy trial requiring the jurors' intense concentration. It does not suggest that the jury was biased or improperly formed an opinion. Indeed, the poem is not cognizable evidence of juror misconduct.

Id. (citations omitted).

27. *See* Johnson v. Trueblood, 476 F. Supp. 90 (E.D. Pa. 1979). The note was not even accurate:

> One final example of Mr. Cherry's discourteous and undignified conduct occurred during opening arguments. I had asked counsel how much time they would need for opening speeches and then had imposed time limits accordingly. Mr. Krimsky was allotted thirty minutes. After Mr. Krimsky had been speaking for precisely eighteen minutes, Mr. Cherry, in full view of the jury, approached the Bench and passed a note to my law clerk which stated "Thirty minutes have expired." Shortly thereafter, Mr. Cherry interrupted Mr. Krimsky's opening remarks to state that he had exceeded his time limit. Because I had been keeping careful record of the time expired, I knew that this was not the case. These actions on the part of Mr. Cherry were, at the least, rude and impertinent. At most, they were a deliberate attempt to harass and distract Mr. Krimsky and prejudice the jury.

Id. at 97. For the indiscretion described above, along with "other occurrences . . . too numerous to recount," *id.* at 97–98, Judge Daniel Huyett revoked Attorney Cherry's permission to appear *pro hac vice*, *id.* at 98. The court of appeals vacated Judge Huyett's order, holding that Attorney Cherry was entitled to "some type of notice and an opportunity to respond." Johnson v. Trueblood, 629 F.2d 302, 303 (3d Cir. 1980).

28. *See* United States v. Blount, 364 F.3d 173, 176 (4th Cir. 2004), *vacated*, 125 S. Ct. 990 (2005) ("Blount broke free from the security officers and rushed toward the front of the courtroom. . . . Judge Friedman pressed the panic button at the bench and hastened from the courtroom with his law clerk.").

29. *See* Coe v. Bell, 89 F. Supp. 2d 922, 951 (M.D. Tenn. 2000) ("Petitioner's screaming [in court] consisted of obscenities and threats directed at the Court, the court clerk, the capital case law clerk . . . .").

30. *See* United States v. Chandler, No. 98 C 2599, 1999 WL 47020, at *1 & n.2 (N.D. Ill. Jan. 25, 1999) ("While in the courtroom holding cell awaiting a pretrial proceeding in the underlying criminal case, Chandler attempted suicide by hanging. As a result of the quick response on the part of a law clerk and a court reporter sitting in the courtroom before a hearing, Chandler was saved.").

31. *See* United States v. Armijo, 781 F. Supp. 1551, 1554–55 (D.N.M. 1991) ("Indeed, when asked to identify the Defendant in the courtroom, the informant, appearing puzzled, briefly studied the Hispanic defense lawyer, the Defendant and, after turning completely around in the witness chair and intently concentrating on the Court's law clerk, also obviously Hispanic, embarrassedly stated he was unable to determine which Hispanic was the Defendant.").

volved in an automobile accident while traveling with a judge,[32] and surviving an airplane crash.[33]

Also close, but not quite worthy of the proverbial cigar, are opinions that simply describe but do not comment on the propriety of law-clerk duties that are somewhat out of the ordinary,[34] such as holding a stopwatch on attorneys during trial,[35] watching an attorney during trial and asking him to sit up when he lounged back in his chair and closed his eyes,[36] being sworn in as a bailiff,[37] being deputized as a county clerk,[38] overseeing a country law library,[39] contacting the editorial department at West Publishing to ascertain its policies and procedures regarding the removal of statutory language from the United States Code Annotated,[40] monitoring the behavior of a juror during trial,[41] taking a juror to the hospital,[42] reconstructing a note sent by a judge in response to a jury question,[43] questioning a member of a sequestered jury to determine

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32. *See* LePatourel v. United States, 463 F. Supp. 264, 267 (D. Neb. 1978) ("At the time of the accident Judge Denney was operating his vehicle between court points in Nebraska while on official business. . . . The readily discoverable fact that Judge Denney's law clerk and secretary were with him when the accident occurred would have indicated that Judge Denney was then on official business.").

33. *See* Abdulghani v. V.I. Seaplane Shuttle, Inc., 746 F. Supp. 583, 588 (D.V.I. 1990) ("The next thing that Abdulghani remembered was that he was floating in the water. He sank below the surface three times, and then a law clerk who had been a passenger on the same plane pulled him to a broken part of the plane's wing."). It remains unclear to me why the judge in *Abdulghani* saw fit to mention that the plaintiff's rescuer was a law clerk.

34. My perspective on "out-of-the-ordinary" law-clerk duties is, of course, framed by my own experience; the duties I find the most unusual are those that are the most unlike anything I have ever been asked to do.

35. *See* Caitpovic v. Peoples Cmty. Health Clinic, Inc., 401 F.3d 952, 958 (8th Cir. 2005) ("By pretrial order, the district court limited the trial time to thirty hours, dividing the time equally between plaintiff and defendant. . . . The court told counsel, '[W]hen you're on your feet, the clock is running.' The stop-watch was kept by the judge's law clerk.").

36. *See* United States v. Nuculovic, No. S3 04 Cr. 1110(DLC), 2006 WL 3591930, at *10 & n.15 (S.D.N.Y. Dec. 12, 2006).

37. *See* United States v. Griffith, 756 F.2d 1244, 1251 (6th Cir. 1985); *see also* Reazin v. Blue Cross & Blue Shield of Kan., Inc., 663 F. Supp. 1360, 1438 (D. Kan. 1987) ("[M]y law clerk, acting as bailiff, informed the jury they could take a break from deliberating . . . .").

38. *See* Koby v. United States, 208 F.2d 583, 592 (9th Cir. 1954).

39. *See* Turiano v. Schnarrs, 904 F. Supp. 400, 406 (M.D. Pa. 1995).

40. *See* Espino v. Shalala, Nos. EP-92-CA-312H, 93-004R-01, 1993 WL 773860, at *12 n.14 (S.D. Tex. Oct. 7, 1993).

41. *See* Johnson v. Nicholson, 349 F. App'x 604, 605 (2d Cir. 2009).

42. *See* United States v. Wecht, Crim. No. 06-0026, 2008 WL 2048350, at *9, *12 (W.D. Pa. May 8, 2008) ("the Court's Senior Law Clerk (serving as the other bailiff) called Mr. Albright [a juror] about his condition" and subsequently accompanied him to the emergency room).

43. *See* United States v. Glickman, 604 F.2d 625, 631 n.4 (9th Cir. 1979) ("[T]he original note of the trial judge has been lost. Sometime after trial, the judge's law clerk attempted to reconstruct the content of the note. . . . At a hearing on June 1, 1978, the trial judge stated that the law clerk's reconstruction 'doesn't sound like the note that had been written,' although he could not recall what the note actually said. We assume, Arguendo, that the law clerk's reconstruction is accurate.").

whether he had seen a certain newspaper article,[44] tracking down attorneys outside the courthouse,[45] searching the courthouse to locate a party ordered to attend a hearing,[46] spending the night, with a judge, in a jail cell (for research purposes),[47] observing and recording the actions of a criminal defendant during trial,[48] explaining the rationale of a judge's decision to counsel,[49] assisting a party at trial,[50] writing a brief setting out

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44. *See* United States v. Brasco, 385 F. Supp. 966, 979 n.8 (S.D.N.Y. 1974) ("Mr. Aponte was subsequently interviewed by telephone on October 22, 1974 at approximately 6:00 P.M. and was questioned at that time by my law clerk, Mr. Kaplan, in the presence of my other law clerk, Mr. Danilow.").

45. *See* McKnelly v. Sperry Corp., 642 F.2d 1101, 1104 (8th Cir. 1981) ("The court directed the clerk to summon counsel. An attorney for Sperry reported promptly in response to a call, but the clerk could not reach McKnelly's counsel at their hotel number. A law clerk was sent to search the hotel's lobby and public areas.").

46. *See* DIRECTV Inc. v. Quintero, No. 04-03623 CW, 2005 WL 901213, at *1 n.1 (N.D. Cal. Apr. 19, 2005).

47. *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 678 (D. Mass. 1973) ("In addition, with the full cooperation of jail officials, the trial judge and his law clerk took a view of nearly every area of the facility and, without advance notice, stayed overnight in a cell."). As Judge Arthur Garrity reported:

> When we spent the night there, the wall valve serving as a faucet for the sink in our cell jammed while the water was running and we narrowly averted a flood by bailing the overflowing sink into the toilet with a small paper cup while our law clerk freed the valve, after several unsuccessful attempts, by hammering on it with the heel of his shoe.

Id. at 680 n.5. Judge Garrity and his law clerk make the judge and law clerk in *Dohner v. McCarthy*, 635 F. Supp. 408 (C.D. Cal. 1985), look like they were on a trip to Club Med, *see id.* at 411 n.6 ("My inspection of the units on July 27 included a brief stay in a locked double cell with my law clerk.").

As it happens, law clerks—that is, those who have *not* been convicted of crimes—have made their way into the big house more often than one might imagine. *See* Preston v. Thompson, 589 F.2d 300, 303 (7th Cir. 1978) ("The district judge personally visited Pontiac prison, and later appointed a law clerk to observe the shakedown procedure."); Bruscino v. Carlson, 654 F. Supp. 609, 612 (S.D. Ill. 1987) ("My law clerks and I made an unannounced visit and toured the institution [Marion Penitentiary] on December 11, 1986."); Africa v. Pennsylvania, 520 F. Supp. 967, 971 (E.D. Pa. 1981) ("On Wednesday, August 19, 1981, I visited Graterford Prison with Daniel D. Pipitone, Esquire, law clerk to me . . . ."); Chapman v. Rhodes, 434 F. Supp. 1007, 1011 (S.D. Ohio 1977) ("Shortly before the trial of this case, the plaintiffs moved that the Judge who presided at this trial 'view the premises.' That motion was granted and, in the company of a law clerk and with practically no notice, the facility was toured for approximately four hours just a few days before trial. The time expended was ample, since we are no stranger to Lucasville by reason of prior inspections and one 'on the spot' civil rights case hearing."); Aikens v. Lash, 371 F. Supp. 482, 485 (N.D. Ind. 1974) ("It is unusual, to say the least, for a United States District Court to move its deliberations inside a State Prison wall and there to inquire into the practices and proceedings of the institution . . . . Mention should also be made of the fact that our presence there made possible an unannounced inspection trip through the two segregation units involved in this controversy. With the prior knowledge and approval of all counsel and flanked only by a law clerk and one prison guide, it was possible for the Judge to walk the 'range' on both floors of both units, located in separate buildings a short walk from the courtroom.").

48. *See* United States v. Green, 544 F.2d 138, 143 (3d Cir. 1976).

49. *See* Benton-Volvo-Metaire, Inc. v. Volvo Sw., Inc., 479 F.2d 135, 137 n.2 (5th Cir. 1973) ("When counsel were asked at oral argument how they arrived at their conclusion that the constitutionality of the statute was critical to the decision below, their only reply was that the district judge's

the arguments against the government's ex parte request to unseal grand jury materials,[51] opposing a petition for a writ of mandamus filed in an appellate court seeking the law clerk's judge's recusal,[52] modeling the baseball chest protector at issue in a patent-infringement suit,[53] demonstrating the bowl-lifting mechanisms of commercial mixers during trial,[54] witnessing the judicial sale of a ship,[55] forwarding documents that appeared to be forgeries to law-enforcement officials,[56] mediating pretrial disputes,[57] questioning counsel on behalf of the court during a claim-construction hearing in a patent case,[58] conducting preliminary pretrial conferences,[59] or helping a judge to write a poem[60] or a song.[61] Perhaps the most ill-used law clerk I came across in my research was the unnamed amanuensis in *Humphreys v. DEA*,[62] whose judge had a physician prescribe controlled substances for him in the names of various court-

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law clerk had indicated to them that this was what the law clerk thought the judge had considered in granting summary judgment.").

50. *See* Carmalt v. Gen. Motors Acceptance Corp., 302 F.2d 589, 591 (3d Cir. 1962) ("This was a long, hard trial. The plaintiff insisted on being his own attorney and it appears from the record that the only help he would accept was from the judge's law clerk.").

51. *In re* Grand Jury Disclosure, 550 F. Supp. 1171, 1174 (E.D. Va. 1982).

52. United States v. Amico, 486 F.3d 764, 771 (2d Cir. 2007).

53. *See* Everything Baseball v. Wilson Sporting Goods Co., 611 F. Supp. 2d 832, 834 (N.D. Ill. 2009).

54. *See* Hobart Corp. v. Welbilt Corp., No. Civ. A. No. 1:98CV1726, 1989 WL 449696, at *2–*3 (N.D. Ohio Oct. 4, 1989).

55. *See* Dynamic Marine Consortium S.A. v. M/V LATINI, 120 F. Supp. 2d 595, 605 (E.D. La. 1999) ("Dr. Kewalramani's sale bid in the amount of $1,010,000.00 was in fact made at the March 25th, 1999 judicial sale and witnessed by all in attendance, including this Court's law clerk.").

56. *See* Creek v. Weber, 598 F. Supp. 2d 1004, 1014 (D.S.D. 2009).

57. *See* Adams v. United States, No. CV-03-0049-E-BLW, 2007 WL 3208591, at *2 (D. Idaho Oct. 29, 2007) ("The court will have its Law Clerk Dave Metcalf continue to mediate disputes.").

58. *See* Semiconductor Energy Lab. Co. v. Chi Mei Optoelecs. Corp., 531 F. Supp. 2d 1084, 1102 n.5 (N.D. Cal. 2007) ("Mr. Taub, one of the court's law clerks at the time, is questioning counsel on behalf of the court in this exchange.").

59. *See* Ctr. for Bio. Diversity v. U.S. Dep't of Hous. & Urban Dev., 241 F.R.D. 495, 505 (D. Ariz. 2006) ("A second Rule 16 telephonic conference will be held in the above entitled action on June 23, 2006 at the hour of 10:00 a.m. before Judge Jorgenson's law clerk, Kevin Rudh . . . .") (emphasis omitted).

60. *See* Omnipoint Comms. Enters., L.P. v. Zoning Hearing Bd., 189 F. Supp. 2d 258, 261 n.1 (E.D. Pa. 2002) ("Appended to this Opinion is a rhyming synopsis of the Telecommunications Act claim. With apologies to Ernest L. Thayer, the author of 'Casey at the Bat,' my law clerk, Anna Marie Plum, and I adapted the poem to address this issue."); *see also* Solomon v. Liberty County, 957 F. Supp. 1522, 1525 (N.D. Fla. 1997) (beginning the opinion with a poem, titled "Gingles Jingle," attributed to "Jeana Peeler Hosch, Law [C]lerk to District Judge Robert Propst").

61. In *Rimes v. Curb Records, Inc*., 129 F. Supp. 2d 984 (N.D. Tex. 2001), all but the introductory paragraph of the opinion is presented as lyrics to various songs recorded by LeAnn Rimes. Judge Jerry Buchmeyer duly noted his collaborator: "Credit for both the words and the lyrics in this opinion goes entirely to my law clerk, Elizabeth Falk, who is now a devoted LeAnn Rimes fan." *Id.* at 988 n.23.

62. 105 F.3d 112 (3d Cir. 1996).

house employees, including his secretary and law clerk.[63] But again, beyond the foregoing passing reference in this introduction, cases describing unusual law-clerk happenings and duties did not make it any further into this Article.

What, then, was I searching for, if not the situations described above, or law clerks in wet T-shirts hanging from hotel balconies while drinking beer through funnels? The quintessential law clerk gone wild is one who ended up as a participant—or even an issue—in a case on which he or she was working, ostensibly behind the scenes, and those cases are the subject of Part II. Part III is devoted to the substantially larger number of cases in which parties have been rebuffed in their attempts to make law-clerk conduct an issue. Part IV consists of a brief conclusion.

II. ONE STEP OVER THE LINE (SWEET LAW CLERK)[64]

Now that I have made all the necessary introductions, it is time to light this firecracker and take a look at a couple of dozen law clerks who have crossed the line by doing things they shouldn't have, things that had an adverse effect on the cases they were working on. But, and again I must apologize for my title, very little of that line-crossing has been initiated by law clerks themselves. For the most part, when we go wild, it is because we have been directed to do so by the judges who employ us. That said, I begin with the heartwarmingly small number of cases—three, count 'em, three—in which law clerks have taken it upon themselves to do things they should not have, with definitively detrimental results. (Part-lette II-A, *infra*, documents additional instances of self-directed law-clerk misconduct that did not result in reversal or remand). Then I turn to the rather larger number of cases in which law clerks have veered off into the weeds at the direction of their judges. My caveat here is qualitative; I am not all that interested in cases where a law clerk messed up by performing an appropriate duty poorly[65]—the Article is not called "Law Clerks Gone Wrong." Rather, my focus in this Part is on law clerks who have erred by doing things that they could not have done properly under any circumstances, because they fall so far outside the law-clerk job description.

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63. *Id.* at 113.

64. I don't *think* I've got a messiah complex . . .

65. *See, e.g.*, Cal. Coast Dev. Grp., Inc. v. Malloy (*In re* Royal Palms Ret. Ctr.), 201 F.3d 444 (unpublished table decision), 1999 WL 1021479, at *3 (9th Cir. Nov. 9, 1999) ("Complicating this history was the law clerk's misleading advice as to timing."); Ham v. Smith, 653 F.2d 628, 630 n.5 (D.C. Cir. 1981) (pointing out inadequacies in law clerk's letter to a party); Heuss v. Rockwell Std. Corp., 495 F.2d 1207, 1209 (6th Cir. 1974) ("While the jury was deliberating, however, the trial judge's law clerk-crier inadvertently delivered a number of exhibits to the jury in an envelope that disclosed by label that Travelers was a party plaintiff in the case.").

A. Misguided Initiative

As noted above, this section—which is the only part of the Article that fully and completely delivers on the promise of my title—reports on just three cases. The first two involved trial-court law clerks, the third an appellate clerk, so at least there's something for everyone.

Riley v. Deeds[66] involved a petition for habeas corpus relief under 28 U.S.C. § 2254. During the jury deliberations in Raymond Riley's state-court criminal trial, "the jury sent a note to the court requesting a readback of [certain] testimony."[67] Here's what happened next:

> The parties agree the judge was not in the courthouse at the time this request was made, and he could not be located. In the judge's absence, his law clerk convened the court. He explained to the jury that the court reporter would read Leatrice's testimony from the trial transcript, and instructed the foreman to raise his hand when the jury had heard enough. At the conclusion of Leatrice's direct examination, the foreman raised his hand and the readback terminated.
>
> Riley was found guilty and sentenced to life in prison with the possibility of parole. He is currently out on parole.[68]

In his petition, Riley argued that he was "entitled to habeas relief because the judge's law clerk, rather than the judge, granted the jury's request to have the victim's direct examination read back and presided during that proceeding."[69] That argument cut no ice with the district court,[70] but was sufficient to sway the court of appeals.[71] As that court explained:

> The abuse of discretion standard presupposes the trial judge exercised some judicial discretion in the matter under review. In this case, the judge was not present when the jury requested that the testimony be read back, nor does the record reflect he was consulted about the matter. From what we can tell from the record, the judge's law clerk made the decision to grant the jury's request to read back the testimony. . . .
>
> When trial testimony is read back to a jury without the judge's approval, outside the judge's presence and when he is unavailable, the error cannot fairly be characterized as mere trial error. . . .

66. 56 F.3d 1117 (9th Cir. 1995).
67. *Id.* at 1119.
68. *Id.*
69. *Id.*
70. *Id.* at 1122.
71. *Id.*

> A conviction obtained after a proceeding in which no judge presided and no judicial discretion was exercised is "abhorrent to democratic conceptions of justice." *Hays v. Arave*, 977 F.2d 475, 481 (9th Cir. 1992). . . . In short, the error is structural and is not susceptible to harmless error analysis.
>
> . . . .
>
> Nor can we say, as the state urges, that by failing to make a timely objection Riley waived his right to object to the readback and to the trial judge's absence from the proceeding. It is true that no contemporaneous objection was made, but that is beside the point. There was no opportunity to make any meaningful objection. To whom would the objection have been made? The law clerk?[72]

When serving as a law clerk, being a self-starter can sometimes be a reversible error rather than a praiseworthy character trait.

Kennedy v. Great Atlantic & Pacific Tea Co.,[73] an appeal from a plaintiffs' verdict in a slip-and-fall case,[74] is another example of law-clerk initiative run amok. In that case, Edwin Kennedy sued to recover for injuries he received when he fell in a store operated by the defendants.[75] Three days into his trial, Kennedy died, from causes other than his fall, and the judge declared a mistrial.[76] Then, the trial judge's intrepid law clerk sprang into action:

> [S]ome five weeks before the second trial, James Madison, who was currently serving the trial judge as his law clerk, and who had heard the trial proceedings until the mistrial, decided he would satisfy his curiosity by taking a look at the premises. He passed the store on June 6, during a heavy rain. The following day, while on the way to dinner with his date, a Miss Friend, he drove around to the back of the store where the entrance was, through which Mr. Kennedy had entered the premises, found the door locked but found a crack wide enough to permit him to look inside. Miss Friend also looked inside. They later testified that they both saw a puddle of water on the floor near the place where Mr. Kennedy had fallen.[77]

The law clerk's participation in the case continued:

> A few days after the "view," Madison called on defense counsel and told him what he and Miss Friend had seen. Counsel protested and informed Madison that in his opinion, Madison should not have

72. *Id.* at 1120–21.
73. 551 F.2d 593 (5th Cir. 1977).
74. *Id.* at 59394.
75. *Id.* at 594.
76. *Id.*
77. *Id.*

> brought the matter to his attention and that he should not disclose the matter to the trial judge. Thereupon, Madison reported that it was on the trial judge's instruction that he had brought the matter to the attention of defense counsel with the thought that it might assist in effecting a settlement of the case. Madison also stated that the trial judge had instructed him not to inform the plaintiffs' counsel of the matter.[78]

Notwithstanding the judge's hopes for a settlement, the case went to trial again. Remarkably, both the law clerk and his friend, Miss Friend, testified.[79] One of the defendants objected, to no avail.[80] More specifically: "In response to defendant's motion that the two witnesses not be permitted to testify, the trial court made comments as to the trustworthiness of Mr. Madison to counsel in his chambers which might well have been calculated to curb the normal zeal of opposing counsel to conduct searching cross-examination." Here is what unfolded at trial:

> Mr. Madison and Miss Friend were called to the witness stand on the third day of the trial. After Madison was sworn, the court made the following comment to the jury:
>
> > Members of the jury, Mr. Madison is serving and has served since last August as law clerk to this judge. The court instructs you that you should not give any greater or any lesser weight to his testimony than you would that of any other witness simply because he occupies that position. As we told you in qualifying you to sit as jurors in this case, that you, and you alone, are the judges of the facts. You are the only ones who will make the final determination of the facts and by applying the laws [that] will be given to you by the court in its final instructions reach a fair and impartial verdict.
>
> Subsequently at the conclusion of Madison's testimony, the court addressed him and said: "Mr. Madison, just to make it perfectly clear, did I request you to go by the store in any way, shape or form?" The witness answered "No, Sir." Thereupon, the court said: "Did I know anything about it until you reported it to me later?" The witness answered, "No, Sir."
>
> . . . .
>
> Subsequently just after Miss Friend was called as a witness and was sworn, the court interjected and stated the following: "I want to

78. *Id.* at 595.
79. *Id.*
80. *Id.*

> tell you that whatever Mr. Madison testified to is not necessarily the opinion of the Court. Even if you think the Court has an opinion on the facts that is not binding on you at all."[81]

The court of appeals was not impressed:

> It is impossible to believe that the jury must not have attached some special significance to this testimony of the judge's law clerk who stated that he had been in court during the first trial of the case, as a result of which his curiosity caused him to have a private view of the site of the injury. Whereas normally, little weight might be attached to the condition of the inside of a vacant building some twenty-seven months after an accident had occurred when it was occupied by a self-service grocery store, the jury must have thought that for the judge's law clerk to take the trouble to go out and see the property to satisfy himself about this one fact it must have some special importance. Ordinarily, one who learns about an injury resulting from an accident doesn't take the trouble to go and look it up. What was the jury to think about this young man's injecting himself into the controversy after having heard the case being tried in the court in which he was playing a significant part?
>
> In addition, there was the imprimatur of character, credibility and reliability that was automatically implied as coming from the court itself when the trial judge introduced the witness as his present law clerk.
>
> . . . .
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> . . . [I]t seems clear that the potential for prejudice to the defendants' case was too great for us now to conclude that the trial court's overruling of the defendants' motion to prohibit the testimony of Mr. Madison and Miss Friend or, in the alternative, to disqualify himself from continuing in the trial was harmless error.[82]

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81. *Id.* at 597–98.

82. *Id.* at 598–99. As the court further elaborated:

> [T]he very fact that the witness was the judge's law clerk who had heard the evidence pro and con at the first trial would, it seems to us, make the cross-examination a very delicate matter for defense counsel. Any challenge of Mr. Madison's credibility or reliability as a reporter of facts would probably be totally unavailable, but more particularly, under our adversary system of justice, it was unacceptable that the most damaging evidence against the defendants in this case was brought about by the intervention of a court official in the accumulation of evidence. The law clerk learned of the litigation and of the disputed issues by virtue of his employment as law clerk to the trial judge. It was his duty as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation.

Id. at 596.

So, as a public service to any trial-court law clerk who may be reading this Article, I offer this bit of advice: Resist the urge to collect evidence on your own. Curiosity killed the cat, and it didn't work out all that well for law clerk Madison.

And from *Kennedy*, where law clerk Madison got his curious kitty in a wringer, I move to what is probably the most high-profile law-clerk case of all time, *Lamprecht v. FCC*.[83] While the law-clerk misconduct in that case did not have an adverse impact on the case itself, the misconduct was so egregious, and brought the institution of law clerking into such disrepute, *Lamprecht* could only be placed in the section of this Article dedicated to the worst of the worst law-clerk misconduct. In *Lamprecht*, the court invalidated, on constitutional grounds, an FCC policy giving preference to female applicants for permits to build radio stations.[84] The court's opinion was penned by Circuit Justice Clarence Thomas.[85] While the opinion was being written, drafts of it were leaked to the press, prompting Judge James Buckley to comment, in his concurrence:

> This litigation deals with a sensitive subject, and it is not surprising that it should have aroused some passions. Unfortunately, this case has also proven the occasion for a most serious breach of trust. I refer to an article that appeared on September 30, 1991, in *The Legal Times*, which purported to report in some detail on the contents of preliminary drafts of the majority and dissenting opinions. The issuance today of those opinions in their final form will demonstrate the general accuracy of the information divulged to *The Legal Times*.
>
> The seriousness of this violation cannot be overstated. Each member of this panel has been aggrieved by it, as have the parties who brought this case to us for adjudication. Moreover, because one or more of their number has been guilty of a willful breach of trust, this incident must cast a shadow over the dozen or more able young law clerks who had become privy to the preliminary drafts. I say "willful" because the information in the published reports was too detailed to have been the product of inadvertent disclosures.
>
> We cannot, of course, repair the damage that may already have been done to one or more of the parties as a result of this premature disclosure. But we can and must take steps not only to ensure against a repetition in the future, but to demonstrate the seriousness with which we take this violation. I believe the appropriate measure

83. 958 F.2d 382 (D.C. Cir. 1992).
84. *Id.* at 383.
85. *Id.*

> is for this court to initiate a formal investigation in an effort to identify the source or sources of this disclosure, and I urge my colleagues to do so.[86]

Judge Buckley was not the only jurist who got worked up over the law-clerk leakage in *Lamprecht*.

In his initial, unpublished opinion in *Bishop v. Albertson's Inc*.,[87] which involved a law-clerk-related conflict issue, Judge Robert McNichols wrote: "It does not take a wealth of imagination to appreciate that a corrupt law clerk could retire young."[88] Under that statement, he dropped this footnote:

> It is amazing the system works. Judges, magistrates, U.S. Attorneys and their assistants, and law enforcement personnel all undergo rigorous FBI background checks prior to being entrusted with such sensitive information. Law clerks, like Li'l Abner, merely swear to do good and avoid evil. The case law reflects occasional lapses of judgment. *See, e.g.*, *In re Corrugated Container Antitrust Lit.,* 614 F.2d 958, 967–68 (5th Cir.), *cert. denied,* 449 U.S. 888 (1980); *Miller Indus. v. Caterpillar Tractor Co.,* 516 F. Supp. 84, 88–89 (S.D. Ala. 1980) and authorities cited therein. But the Court is aware of no published decision involving the commission of a corrupt act by a law clerk. That is a better record than judges have.[89]

After Judge McNichols wrote that footnote, number four, *Lamprecht* came out, and Judge McNichols exhibited just a little bit of judicial wildness:

> The memorandum which follows was initially entered on April 19, 1991. Trial judges on occasion are tempted to publish dated opinions when authority later issues supporting their views; *viz.*, the I-wrote-it-first syndrome. Publication in this case has been prompted by a quite contrary consideration. Research in connection with another case revealed *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992). *Lamprecht* establishes conclusively that footnote 4 herein is dead wrong. It was not in April of 1991, but it is now. Some might question burdening the Federal Supplement with material known to be flawed, but the purpose of doing so should become apparent in due course.
>
> Whatever one might think of the merits of the controversy swirling around Justice Thomas and his confirmation hearing, few

86. *Id.* at 403 (Buckley, J., concurring).
87. 806 F. Supp. 897 (E.D. Wash. 1992).
88. *Id.* at 901.
89. *Id.* at 901 n.4 (parallel citations omitted).

fair-minded observers would disagree with the proposition that the circus atmosphere cheapened the process by which individuals are selected to serve as the final arbiters of the law. Beyond the process itself, some of the participants therein, and the Supreme Court as an institution, there was yet another casualty.

Among the potholes in the road to confirmation was then-Judge Thomas' involvement in a controversial and emotionally charged appeal challenging FCC policy in favoring female applicants for broadcast licenses. The policy would ultimately be struck down on equal protection grounds. *Lamprecht, supra.* The merits of the decision are of no moment to this discussion, but the procedure which attended it is. The case was argued in January of 1991 and remained under submission during the confirmation hearing. Chief Judge Mikva and Judges Thomas and Buckley already knew what the outcome would be and preliminary drafts of the disposition had been circulated among the members of the panel. In keeping with standard practice, no one else outside of the three judges' immediate staff should have known.

Suddenly, everyone knew when the press reported, with stunning accuracy, what the ruling would be and that Judge Thomas would author it. Judge Buckley makes no bones about who leaked the preliminary drafts. It was one of the twelve law clerks working for the panel members. 958 F.2d at 403 (Buckley, J., concurring). Not only were the drafts released but an unnamed source employed by the Court opined that the decision was being "delayed by Judge Thomas so as not to imperil his nomination." *The New York Times*, Feb. 20, 1992, Section A; Page 1; Column 1. The nomination was already in trouble for reasons too widely publicized to bear reiteration. That Judge Thomas would put his suspected anti-affirmative action views into practice in *Lamprecht* would not help him in some circles. The accusation that he might delay releasing the opinion to serve political ends was even more damaging.

The scope of possible culprits expanded geometrically when it developed that one of Judge Thomas' law clerks distributed the preliminary drafts to the chambers of other circuit judges not on the panel. *The New York Times,* Feb. 21, 1992, Section A; Page 12: Column 5. From there, of course, the drafts could have been further disseminated by any number of individuals affiliated with the D.C. Circuit.

Judge Buckley describes such leakage as a "willful breach of trust" which "cast[s] a shadow" over every law clerk privy to the drafts. 958 F.2d at 403. So it is, and so it does. The leak could not have been motivated by a well-meaning but empty-headed desire to enlighten the public as to what the law was or would be. The mo-

> tive, rather, could only have been to defeat Judge Thomas' nomination. Judge Buckley goes nowhere near far enough in his characterization or condemnation. A law clerk who employs his or her unique privity with the judicial process in an effort to subvert the political process violates the most sacrosanct of canons and is guilty of nothing less than official corruption . . . .
>
> . . . .
>
> So viewed, footnote 4 is wrong. With confidence that this sorry episode is an example of the exception proving the rule, the following nineteen-month-old memorandum will be dusted off and submitted for publication.[90]

The take-away lesson from *Lamprecht* (and *Bishop*) seems pretty self-evident.

Judge McNichols' footnote four may be wrong, but not by a great margin, even in light of the common perception that the distance between zero and one is far greater than the distance between one and two. That is, *Riley*, *Kennedy*, and *Lamprecht* are the only three cases I found in which law clerks, acting on their own initiative, have been identified in reported cases as having engaged in law-clerk wildness by doing things they should not have.

B. Faulty Guidance

On the other hand, more than a few law clerks have been identified as having done things they should not have on the instructions of the judges for whom they worked. So, while the previous section is aimed directly at law clerks, this more extensive collection of cautionary tales may prove useful to both law clerks and their judges. That said, the stories of judge-guided law-clerk wildness in this section are divided into three categories: wildness in dealing with counsel, evidentiary wildness, and wildness with juries.

1. Carousing with Counsel

In addition to getting a robe and a gavel, the judge also gets the last word, but on occasion, some judges have used their words to issue marching orders to their law clerks, only to watch their obedient clerks march right off the cliff and into the sulfurous abyss of reversible error.

In *Connolly v. National School Bus Service, Inc.*,[91] Judge George Lindberg "ordered the parties to meet with his law clerk in order to me-

90. *Id.* at 898–99.

91. 177 F.3d 593 (7th Cir. 1999).

diate the dispute."[92] The attorney for one party "refused to allow his client to meet with the law clerk,"[93] and when the judge reduced that attorney's award of attorney's fees, he "cited [the attorney's] refusal to mediate as one of the reasons he believed [the attorney] to have unreasonably delayed the disposition of the case."[94] The court of appeals held that the attorney "had no obligation to mediate before the judge's law clerk and that reduction of his attorney's fee award on this basis was therefore an abuse of discretion."[95]

The law clerk in *Sanders v. Union Pacific Railroad Co.*[96] did a little bit more than the law clerk in *Connolley*. In *Sanders*, Judge James Ideman directed his law clerk to preside over a final pretrial conference.[97] At the time the conference was held, the plaintiff was in violation of several provisions of the court's pretrial order.[98] After the law clerk "told counsel for both parties that the trial date would be vacated and that the court would probably set the matter for hearing on an order to show cause,"[99] Judge Ideman "issued a written order vacating the trial date and dismissing the case pursuant to Federal Rule of Civil Procedure 41(b)."[100] The court of appeals reversed, and, in an opinion by Judge Pamela Rymer, explained:

> This is a unique case. Suffice it to say that where, as here, the district judge allows his law clerk to conduct the final pretrial conference, declines to give counsel an opportunity to be heard before the court, and then dismisses the action sua sponte with prejudice, we cannot let the dismissal stand.

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92. *Id.* at 598.

93. *Id.*

94. *Id.*

95. *Id.* The court of appeals elaborated:

> We do not know how common it is for a district court to order parties to mediate before a law clerk, but believe the practice to be relatively rare. . . . [W]e are unable to discern from Judge Lindberg's opinion the frequency with which parties are ordered to mediate before his law clerk in his courtroom. In any case, and regardless of the frequency with which law clerk mediation is undertaken, we believe the practice to be improper.
>
> . . . [W]e do not believe that Fed. R. Civ. P. 16(a), which gives district court judges the power to conduct pretrial settlement conferences, allows a district court judge to delegate this power to a law clerk. Law clerks serve as judicial adjuncts. Their duties and responsibilities are to assist the judge in his work, not to be the judge. A judge's law clerk may therefore properly assist the judge in the judge's settlement efforts, but to allow the clerk rather than the judge to conduct a settlement conference is to confuse the adjunct with the judge.

Id. at 598–99.

96. 193 F.3d 1080 (9th Cir. 1999).

97. *Id.* at 1081.

98. *Id.*

99. *Id.*

100. *Id.*

> Counsel was plainly derelict in meeting his Rule 16 obligations, but so was the district judge. . . . Accordingly, we vacate all orders entered after the pretrial conference and remand for another district judge to consider afresh how to proceed.[101]

Judge Ideman is not the only judge to have assigned hearings to his law clerks. In *Parker v. Connors Steel Co.*,[102] the court of appeals held that Judge Seybourn Lynne violated 28 U.S.C. § 455 by failing to recuse himself when, among other things, his law clerk "held a hearing with counsel in the absence of the district judge and later reported the results of the hearing to the judge."[103] In the court's view, "when Somerville [the law clerk] held a hearing in Judge Lynne's absence and later reported the results of the hearing to the judge this contributed to the appearance of impropriety."[104] While the court ruled that Judge Lynne had

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101. *Id.* at 1082. Judge Atsushi Tashima concurred in the majority opinion, but wrote separately to address an additional point:

> As the majority opinion points out, the so-called pretrial conference was presided over by a law clerk. I do not believe there can be any doubt that a law clerk cannot preside over a pretrial conference. . . . A law clerk is not a judicial officer and cannot conduct a judicial proceeding, including a final, Rule 16(d) pretrial conference.
>
> Judge Ideman must have been aware of these strictures because he appears to have taken steps to ensure that the pretrial conference did not become a matter of record. There is no entry on the docket of this case, no Clerk's Minute Order, that a pretrial conference was ever held. Nor, contrary to the requirement of the Court Reporters Act, which requires all proceedings of the district court to "be recorded verbatim," 28 U.S.C. § 753(b), were the pretrial conference proceedings reported by a court reporter or recorded verbatim in any other way. There simply is no record in the district court that a pretrial conference ever took place.
>
> Yet, in spite of the *sub rosa* nature of the pretrial conference, Sanders was visited with the ultimate sanction—dismissal of his case with prejudice—because his attorney failed to prepare for it. In my view, the pretrial conference was a nullity. A law clerk purported to preside (undoubtedly at the direction of the judge) over a proceeding from which, although held in a district court courtroom, the district judge completely absented himself, and which was not reported. Such a renegade, *ultra vires* procedure cannot be sanctioned.

Id. at 1082–83.

102. 855 F.2d 1510 (11th Cir. 1988).

103. *Id.* at 1523. The other factors the court of appeals considered were: (1) the close familial relationship (i.e., father/son) between Judge Lynne's law clerk and a senior partner in a firm representing one of the parties in the case, *id.* at 1524; (2) the fact that the senior partner in question had also clerked for Judge Lynne, *id.*; and (3) the footnote Judge Lynne placed in his order crediting his law clerk "for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue," *id.* at 1523. As the court explained: "We express no opinion on whether any of the above facts standing alone would rise to the level of a § 455(a) violation. We merely conclude that all of these facts taken together raise the appearance of impropriety and may cause one to reasonably question Judge Lynne's impartiality." *Id.* at 1524–25.

104. *Id.* at 1524.

erred by failing to recuse himself, it went on to determine that the error was harmless.[105]

Trial judges have also been criticized by appellate courts for having their law clerks become overly involved in dealing with issues related to jury instructions. In *United States v. Sloan*,[106] the court of appeals had this to say:

> The record is silent regarding compliance with this portion of Rule 30 [which pertains to jury instructions]; however, at oral argument counsel agreed that instructions were settled with a law clerk and not the judge. We regard the import of the rule to be plain; that is, the *judge* must resolve all the issues pertaining to the instructions, for it is the sole responsibility of the *judge* to see to it that the jury is correctly instructed upon the law. While this departure from the norm has not been raised as error in the case, and thus has no direct effect on our decision, it appears to have been a contributing factor to the issue with which we deal; thus, we deem it significant enough to warrant at least passing comment.[107]

And, in *Jazzabi v. Allstate Insurance Co.*,[108] the court of appeals pointed out that "at several points during the instruction [session], the court discussed the substance of the instruction with a law clerk in a way that seemed to add to the juror's uncertainty."[109]

Law-clerk activities of another sort were at issue in *Eisemann v. Greene*.[110] Here is what happened:

> After the entry of summary judgment, the parties, both of whom had indicated a desire to file a motion for reconsideration, contacted the judge's chambers, and jointly discussed with his law clerk the likely bases for their planned motions for reconsideration. The conference call with the law clerk was presumably undertaken pursuant to Rule 2(b) of the judge's individual rules . . . . After discussing the basis for each motion, the law clerk, purporting to speak on behalf of the judge, granted permission to file the motions but advised both counsel that all grounds for reconsideration, with the exception of one argument advanced by defense counsel, did not appear "reasonably likely" to comply with the governing standards for filing motions for reconsideration under Rule 6.3 of the Local Rules of the United States District Court for the Southern and Eastern Districts of New York. The judge's law clerk also warned that

105. *Id.* at 1526.
106. 811 F.2d 1359 (10th Cir. 1987).
107. *Id.* at 1362 n.2.
108. 278 F.3d 979 (9th Cir. 2002).
109. *Id.* at 987.
110. 204 F.3d 393 (2d Cir. 2000).

> the filing of any frivolous motion would result in sanctions. Eisemann's attorney nevertheless filed his motion for reconsideration. Defendant responded to the Eisemann motion by filing a "motion for sanctions for having to respond to plaintiff's frivolous motion for reconsideration." The District Court granted defendant's motion and imposed a sanction of $1000 on Eisemann's counsel, pursuant to both 28 U.S.C. § 1927 and the Court's "inherent supervisory power."[111]

The court gave two reasons for imposing sanctions, Eisemann's counsel's bad faith and "the fact that counsel 'persisted' with his motion for reconsideration after he had been forewarned by the Judge's law clerk during the telephone conference that counsel's contentions were on their face inappropriate for reconsideration."[112] The court of appeals reversed, based upon the trial court's failure to "make sufficiently specific factual findings to support its conclusion that Eisemann's motion for reconsideration, or any other motion filed in the course of this litigation, was 'entirely without color and . . . taken for reasons of harassment or delay or for other improper purposes.'"[113] The court also noted that "imposing sanctions, in part, for failing to heed the Court's 'advice' as to whether a motion is appropriate amounts to establishing an unacceptable requirement that parties obtain the Court's prior authorization before filing a motion."[114] Regarding the law clerk's participation in giving the court's "advice," the court had this to say:

> Indeed, we have noted that holding pre-motion conferences *with a judge* "may serve the useful purpose of narrowing and resolving conflicts between the parties and preventing the filing of unnecessary papers." *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987), but we have not encouraged—and do not now consider—the practice of having litigants confer on the merits of cases with law clerks or other chambers personnel.[115]

If, however, the court had considered the practice of having litigants confer on the merits of their cases with law clerks, it is not difficult to imagine the (negative) view it would take.

Finally, in *Johnson v. Schmidt*,[116] the issue was not so much dealing with counsel, but being the counsel. In that case, "Judge [Charles] Wolle

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111. *Id.* at 395 (footnotes omitted).

112. *Id.* at 396.

113. *Id.* at 396–97 (quoting Dow Chem. Pac. v. Rascator Mar. S.A., 782 F.2d 329, 344 (2d Cir. 1986)).

114. *Id.* at 397.

115. *Id.* at 397 n.4.

116. 83 F.3d 37 (2d Cir. 1996).

requested two *pro se* law clerks employed by the District Court for the Eastern District to assist [Jonathan] Johnson as 'standby counsel,' his request for appointed counsel having been previously denied."[117] The court of appeals gave a ringing un-endorsement of Judge Wolle's approach to providing standby counsel for Johnson:

> Since a new trial is required, we take this occasion to express serious concern about the District Judge's enlistment of two court employees to act as standby counsel for appellant. The designation of standby counsel has been authoritatively approved, *see Faretta* [*v. California*], 422 U.S. [806,] 835 n.46 [(1975)]; *see also McKaskle v. Wiggins,* 465 U.S. 168, 178–79 (1984) (delineating role of standby counsel). But the use of court employees to fill that role is at best a dubious practice. If the employment relationship comes to the attention of the jurors, as it did here, there are risks of prejudice either for or against the *pro se* litigant. The jurors might think that the Court is somehow siding with the party whom the court employee is assisting. On the other hand, the jurors might think the Court is belittling the worth of the *pro se* litigant's case by assigning as standby counsel a court employee, rather than a lawyer unaffiliated with the Court, as would normally occur. There is also the further risk that a *pro se* litigant's subsequent displeasure with the advice of standby counsel, whether justified or not, places the litigant in the awkward position of asking the Court to assess the performance of one of its own employees.
>
> In the pending case, standby counsel were two employees of the District Court's *pro se* office. Though such employees frequently give helpful advice to *pro se* litigants concerning the general procedures to follow in filing a complaint or motion, or taking an appeal, it is quite beyond their appropriate role to render specific advice to a litigant concerning the variety of legal issues that arise in the course of a trial. Moreover, *pro se* law clerks are often young attorneys, lacking any significant trial experience.
>
> We can appreciate that the limited availability of counsel willing to accept court appointment in civil cases or to act as standby counsel might sometimes prompt a District Court to enlist the aid of a court employee to act as standby counsel for a *pro se* litigant, but we strongly recommend against use of such personnel for this purpose.[118]

Practice makes perfect, it is said, but for law clerks, practicing law is an imperfection to be avoided.

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117. *Id.* at 38.

118. *Id.* at 40 (parallel citations omitted).

2. Evidentiary Wildness

At least one law clerk has been driven by his or her judge to participate in an evidentiary mishap.

In *Espinoza v. Dunn*,[119] four sheriff's deputies appealed a jury verdict against them in a civil-rights action. In so doing, they challenged various evidentiary rulings made by the trial judge.[120] One of the issues in the case was one plaintiff's behavior once he had been handcuffed and placed inside a police car. The plaintiff testified that "he kicked at the inside of the car door and hit it with his shoulders," after he saw officers strike his pregnant sister with a flashlight.[121] Then, he testified, officers entered the car, tied his legs to his handcuffs, took him out of the car and repeatedly dropped him on the pavement from a height of three to four feet, and, finally, hit him in the head with a flashlight, causing him to lose consciousness.[122] For their parts, the defendant deputies[123] testified that "after [the plaintiff] was placed in the car, he began hitting his head against the passenger window and the rear window" and that they "removed him from the car to keep him from damaging it or himself."[124] In the face of that contradictory testimony, Judge Spencer Letts took a rather unusual step:

> After the conclusion of most of the deputies' testimony, the court asked defendants if they could bring to the court building a car similar to the one in which Gilbert had been placed. The next court day, when defendants had done so, the trial judge explained that he wanted his law clerk to sit in the car and form an opinion as to whether there would be any value in having the jury view it.[125]

In response to various defense objections to the demonstration, the judge stated: "I will not tolerate before me testimony that is not objectively possible. I will test what is objectively possible."[126] Here is what happened next:

> The next court day, the trial judge discussed logistics with defense counsel, explaining that he would orchestrate the viewing and that a law clerk would perform the demonstration. . . .
>
> At some point, whether on that same day or earlier, the law clerk performed a preliminary inspection of the car, and was unable

119. 48 F.3d 1227 (unpublished table decision), 1995 WL 21601 (9th Cir. Jan. 18, 1995).
120. *Id.* at *1.
121. *Id.*
122. *Id.*
123. Not to be confused with deputy defendants, which are something else altogether.
124. 48 F.3d 1227, 1995 WL 21601, at *1.
125. *Id.* at *2.
126. *Id.*

> to strike her head against the rear window. The trial judge thereafter informed the jurors that there would be a demonstration. He told them that he had decided that it would be "unnecessarily difficult" for them to consider the evidence relating to Gilbert's arrest and placement in the car without seeing the car and seeing somebody in the car. The judge also explained that one purpose of the demonstration was to attempt to refresh the deputies' memories, but that the jurors should not, in their own minds, put the deputies on the spot. Finally, the court described some limitations on the scope of the demonstration. There would be no attempt to reproduce the struggle, and there would be no effort to reproduce "the manner of putting down," in part because the testimony on this point was not altogether consistent.
>
> The demonstration was held in a parking garage. On site, the court explained to the jury that the law clerk was roughly the same size as Gilbert had been at the relevant time. The court also explained that the clerk would not be doing any kicking or thrashing, although "there [wa]s testimony about a lot of kicking and a lot of thrashing." The clerk then put her hands behind her back, got into the car, and attempted to bang her head against the rear window. Apparently she was unable to do so. The court invited any defendant whose memory had been refreshed to add to his testimony. Instead, defense counsel handcuffed Deputy Okamoto, who got into the car and banged his head against the rear window. The court asked if the jurors had taken note, pointing out that "the place the head struck" was an area of "potential conflict," and noting that Deputy Okamoto was taller than the law clerk.
>
> The clerk then got back into the car. The court again asked the deputies if their recollection was refreshed, and pointed to positions around the car where the deputies, consistent with their testimony, would have been standing on the night of the incident. The clerk was lifted out of the car by two fellow clerks; according to defense counsel, she lay limply in their arms. She was placed on the ground; the positions of the deputies around her were indicated; she was told to kick. Defense counsel posited that the bulk of the kicking had taken place in the air. Soon thereafter, the demonstration ended.[127]

The jury returned a plaintiffs verdict.[128] The court of appeals reversed, identifying two problems with the demonstration. First, the court noted a glaring and dispositive dissimilarity between the demonstration and the

127. *Id.* at *2–*3 (footnote, citations to the record omitted).
128. *Id.* at *1.

events it was intended to depict, namely, the judge's instruction to the law clerk not to "kick and thrash."[129] As the court explained:

> [W]hile plaintiffs argue that the head-banging demonstration was damaging but fair, since it merely revealed the falseness of the deputies' testimony, in fact the dissimilarity may have lead the jurors to erroneously conclude that the deputies' version of the events was physically impossible. Quite simply, while a stationary law clerk could not bang her head on the rear window, a clerk thrashing about as Gilbert allegedly did might well have been able to do so. If so, the inference the jurors were invited to draw (i.e., that the deputies were lying) would have been incorrect.[130]

Then, the court identified a second problem, the fact the judge "was unwilling to perform the demonstration without first determining what the results of the experiment were likely to be," by means of his law clerk's "pre-screening."[131] That, according to the court of appeals, placed the judge more in "the role of an advocate, not a judge,"[132] and constituted reversible error.[133]

3. Getting Jiggy with the Jury

From time to time, law clerks—at the behest of their judges—have crossed over the line in their dealings with juries.

On the front end of the jury process, Judge Paul Cassell conducted a somewhat unusual voir dire in *United States v. Visinaiz*.[134] Specifically, with his approval, "counsel and court personnel determined the peremptory challenges."[135] While the court of appeals found no reversible error,[136] it did mention "the unusual practice of having court staff handle the peremptory challenges,"[137] and dropped this footnote: "We do note

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129. *Id.* at *4.

130. *Id.*

131. *Id.* at *6.

132. *Id.*

133. *Id.*

134. 428 F.3d 1300 (10th Cir. 2005).

135. *Id.* at 1313. In the meantime, he (the judge) decided to "take advantage of the captive audience" for the ten minutes he expected the process to take. *Id.* He then discussed federal jurisdiction; the nature and size of his caseload; Utah federal court personnel; his teaching activities; a new federal courthouse; and a lawsuit that might involve historic preservation, civil-case management, and other matters with the jury, all the while asking counsel—at least four times—about their progress. *Id.* (citation to the record omitted).

136. *Id.*

137. *Id.*

that reliance on law clerks or other court personnel to handle the peremptory challenges with the attorneys is generally considered improper."[138]

Standard Alliance Industries, Inc. v. Black Clawson Co.[139] involved law-clerk involvement at the back end of the jury process. In that case, "trial on liability was separated from trial on damages; the same jury, however, was to hear both."[140] Black Clawson contended that "immediately after the liability verdict, Standard Alliance's counsel improperly approached two jurors as they were approaching an elevator in the Federal Courthouse and thanked them for their verdict."[141] Then:

> Black Clawson claimed improper contact and promptly filed a motion for mistrial, with accompanying affidavits as to what had transpired. Instead of summoning the attorneys and interrogating the jurors on the record or otherwise proceeding to openly test the validity of the motion, the district court, without notice to either party, sent his law clerk to interview the jurors about the alleged incident. The court concluded, on the basis of this ex parte communication, that any jury contact which had taken place had been trivial.[142]

While noting that resolution of that issue was unnecessary to its decision,[143] the court of appeals was concerned enough to write about it anyway, pointing out that "[e]x parte contact between judge and jury raises a presumption of reversible error,"[144] and concluding:

> Here, the length and nature of the law clerk's contact with the jury is unknown. No record was kept, not [sic] notice was given to the parties. Under these circumstances, the presumption of prejudicial error cannot be rebutted. This alone would have required reversal, at least of the damages verdict rendered by the same jury after the incident took place.[145]

The lesson of this section is that any law-clerk interaction outside chambers, especially those with attorneys and jurors, can be pretty risky business.

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138. *Id.* at 1313 n.4 (citing Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1464 (10th Cir. 1994); FED. R. CRIM. P. 24(b)).

139. 587 F.2d 813 (6th Cir. 1978).

140. *Id.* at 828.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 828–29.

II-A. NO HARM, NO FOUL

It is difficult to imagine that there is a judge alive who has not, from time to time, given thanks for the doctrine of harmless error. In this Part-lette, I describe several stern finger wags directed toward law-clerk acts that were bad enough to constitute error, but were committed in circumstances that rendered the error harmless.

In *In re Corrugated Container Antitrust Litigation*,[146] the defendants in a civil antitrust action sought recusal of the judge assigned to the case for a variety of reasons, several of which flowed from the fact that he had previously presided over a criminal case in which one of them had been a defendant.[147] Relevant to this Article, the defendants argued that the judge was disqualified because, after the criminal trial, his law clerk had "told an attorney representing [one of the defendants] in substance that defendants did not deserve to win the criminal trial and that plaintiffs' counsel in the civil cases would do a better job than the government counsel did in the criminal cases,"[148] and had given comments to a representative of a trade magazine that ended up in print.[149] The court of appeals held that the law clerk's comments did not disqualify the judge for whom she worked,[150] but cast a jaundiced eye toward the actions of the law clerk, questioning the propriety of her post-trial comments to counsel,[151] and opining that by giving an interview to the press, she probably breached her duties under Canons 3 A(6) and B(2) of the Federal Code of Judicial Conduct.[152]

The law clerk in *Knop v. Johnson*,[153] at the request of his or her judge, made several telephone calls to a witness for the plaintiffs, to collect "further background materials"[154] concerning "the impact on Prison Legal Services of frequent prisoner transfers necessitated by overcrowding,"[155] a matter on which the judge had solicited a memorandum from the witness at trial.[156] On the basis of the law clerk's telephone calls, the defendant moved for a new trial.[157] The court of appeals affirmed the trial court's denial of the motion.[158] It noted the impropriety of a judge

146. 614 F.2d 958 (5th Cir. 1980).
147. *Id.* at 962–63.
148. *Id.* at 968 n.20.
149. *Id.*
150. *Id.* at 968.
151. *Id.*
152. *Id.* (citing United States v. Haldeman, 559 F.2d 31, 134 (D.C. Cir. 1976)).
153. 977 F.2d 996 (6th Cir. 1992).
154. *Id.* at 1011.
155. *Id.* at 1010.
156. *Id.*
157. *Id.*
158. *Id.* at 1011.

directing a law clerk to have ex parte communications, but determined that the judge's error in that case was "relatively harmless" because the recipient of the law clerk's requests was scrupulous in providing counsel for the other side with copies of her letters responding to the judge's requests for information.[159] In *United States v. Loya*,[160] jury instructions were presented to counsel during "an informal conference presided over by the district court's law clerk,"[161] and "[n]o objection was made to the fact that the law clerk presided over the conference on instructions."[162] While the court of appeals had "serious questions as to the constitutionality of the procedure employed by the district court,"[163] the instructions ultimately given "did not result in prejudicial error."[164]

United States v. Kabir[165] involved a colorful set of facts:

> During the trial, just prior to final arguments and the giving of jury instructions by the district court, the trial judge advised counsel for the defendants that a juror had informed her law clerk that two women on the jury expressed concern because they believed the defendants were sketching them. Defendants' counsel presented the court with various papers demonstrating that the defendants had in fact been engaged in what the court then described for the record as "standard doodlings." The judge then asked counsel whether it would be proper for her clerk, who had received the information originally, to explain to the jury that "doodling" was all that was involved. The district judge then, without objection, requested her clerk to "explain that to the jury" and to "[g]ive them the standard instruction."
>
> Later, Batin with whom Kabir joined, moved for a mistrial based upon the jurors' concerns or, in the alternative, for a voir dire of the jurors to determine their state of mind. The law clerk, called into the courtroom to explain what had transpired, related that she

159. *Id.*

160. 807 F.2d 1483 (9th Cir. 1978).

161. *Id.* at 1490.

162. *Id.* at 1491.

163. *Id.* at 1492. Judge George Lindberg harbored no such concerns in *United States v. D'Arco*, No. 90 CR 1043, 1992 WL 121603 (N.D. Ill. May 18, 1992), in which he wrote:

> Defendant contends that the preliminary jury instruction conferences conducted by his law clerk violated defendant's constitutional rights and were an impermissible delegation of Article III power.
>
> The court was entitled to the assistance of his law clerk during the preliminary jury instruction conferences. Defendant had ample opportunity on the record to make his arguments and object to each and every instruction tendered at the jury instruction conference with the court. Defendant's Article III objection is frivolous.

Id. at *16.

164. *Loya*, 807 F.3d at 1493.

165. 865 F.2d 261 (unpublished table decision), 1988 WL 138963 (6th Cir. Dec. 28, 1988).

> had been told by a gentleman on the jury that some of the women jurors found the perceived sketching to be "somewhat intimidating." The district court deferred action until after a verdict was returned. She instructed the jurors, however, to base their verdict "solely on the testimony and evidence in the case, without prejudice or sympathy," making no direct reference to the sketching incident.[166]

The jury returned guilty verdicts, and "the defendants moved for a new trial, arguing that members of the jury had been intimidated by their misapprehension that the defendants were sketching them."[167] The trial judge then conducted a voir dire,[168] and denied the motion. On appeal, the defendants challenged, among other things, the manner in which the trial court handled the issue of jury bias.[169] The court of appeals "perceive[d] no constitutional deficiency in the manner in which [the trial judge] chose to proceed,"[170] but also said: "[W]e do not approve the district court's use of her law clerk in regard to jury contact."[171]

Jury contact was also at issue in *United States v. Griffith*.[172] In that case, after the jury retired to deliberate, "the trial judge's law clerk was sworn as the bailiff."[173] Less than two hours into its deliberations, the jury asked the law clerk for a dictionary, which he or she provided, "without the consent or knowledge of the judge or counsel."[174] Shortly thereafter, Judge Stewart Newblatt shifted into full damage-control mode:

> When the judge learned what had occurred, the law clerk was ordered to retrieve the dictionary. The judge then notified all counsel of the problem.
>
> The judge sent a note to the jury room inquiring why the dictionary had been requested. The foreman sent a note to the judge indicating that the jury wished to define the word "organized." The judge then responded with a note admonishing the jury to consider no materials other than the evidence and instructions presented and to disregard anything they read in the dictionary.
>
> After the jury completed their deliberations but before they were dismissed, the court conducted an in-chambers voir dire of each juror in order to determine what use had been made of the dic-

166. *Id.* at *2–*3.
167. *Id.* at *3.
168. *Id.*
169. *Id.*
170. *Id.* at *4.
171. *Id.*
172. 756 F.2d 1244 (6th Cir. 1985).
173. *Id.* at 1250.
174. *Id.*

> tionary. The court determined that a juror had looked up and read aloud the definition of "organization" and "organize." Half of the jurors indicated that they had not heard the definitions. None of the jurors indicated that he or she had been influenced by the definitions or had failed to rely on the instructions.[175]

While the court of appeals had little trouble concluding that the jury's use of the dictionary was error,[176] it ultimately ruled that Judge Newblatt did not abuse his discretion by denying the defendant's motion for a mistrial, and based its decision, in large measure, on Judge Newblatt's extensive efforts to cure the error.[177]

An overly helpful law clerk also created a spot of trouble in *United States v. LaSpesa*,[178] by answering a juror's question when a politely zipped lip would have been a better response. In that case, three jurors were playing cards during a recess in the trial, and the district judge's law clerk went into the jury room to fill a water pitcher.[179] Then:

> One of the jurors asked the law clerk whether, if appellants were convicted, they had a right to appeal. The clerk replied, "Normally, if the government loses, that's the end of the case. There's no right of appeal for the government. But if the defendants should lose, they have a right of appeal as a matter of right."[180]

Like Judge Newblatt in *Griffith*, Judge Walter Hoffman notified counsel of his law clerk's contact with the jury. And, like Judge Newblatt, Judge Hoffman denied the defendants' motion for a mistrial.[181] While deeming the law clerk's remark "improper,"[182] the court of appeals held "that the district court adequately investigated the possibility of prejudice from the law clerk's remarks and did not abuse its discretion in refusing to grant a mistrial."[183] In so holding, the court determined that "[t]he district court properly found that the clerk's remarks were not sufficiently prejudicial to justify a mistrial,"[184] and also pointed out the court's instruction that the jury "was not to consider matters relating to the ultimate disposition of the case, nor any extraneous comments heard outside the trial context."[185]

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175. *Id.* at 1250–51.
176. *Id.* at 1251.
177. *Id.* at 1252.
178. 956 F.2d 1027 (11th Cir. 1992).
179. *See id.* at 1032.
180. *Id.*
181. *Id.*
182. *Id.* at 1034 n.4.
183. *Id.* at 1033–34.
184. *See id.* at 1033.
185. *Id.*

I conclude this Part-lette with another colorful fact pattern that pretty much speaks for itself:

> In its first point of error, Bayou Fleet claims that it was denied its First Amendment right of access to the courts because of a law clerk's improper participation in the non-jury trial. Bayou Fleet claims that the law clerk directed the district judge during the course of proceedings to the extent that the law clerk effectively presided over the trial. It argues that the law clerk's participation denied it meaningful access to the courts.
>
> Bayou Fleet points to several instances in the trial record that it claims are representative of the law clerk's leading role in the proceedings. First, the law clerk interrupted the judge regarding the time when the judge could rule on a motion. After the judge answered an attorney's question regarding the time when he would rule on a motion, the law clerk interjected stating, "Judge, there is no way we can rule on it by 1:30 today because I am sitting in the courtroom right now." To which the judge replied to counsel, "It will have to be later."
>
> Second, Bayou Fleet complains that the law clerk questioned witnesses and corrected the judge's ruling on the defendants' motion for summary judgment. The judge stated that the motion for summary judgment was denied, and the law clerk interrupted stating, "Judge, it's not the merits that are denied, it's denied because they set it after trial. The merits of the motion will be addressed in the opinion." Bayou Fleet argues that this exchange clearly indicates that the law clerk was ruling on the motion instead of the judge.
>
> Finally, Bayou Fleet points out that the judge interrupted court for two days so the law clerk could travel out of town to visit her mother. Bayou Fleet alleges that the court's decision to postpone the trial suggests that the judge was incapable of presiding over the trial without the law clerk present.
>
> The [defendants] insist that Bayou Fleet has taken the law clerk's behavior out of context. The [defendants] assert that the judge intervened and ruled on objections throughout the trial without the clerk's assistance. They claim that, in any event, after two years of pretrial proceedings that culminated in several published and unpublished opinions, Bayou Fleet cannot convincingly argue that it was denied access to the courts.[186]

186. Bayou Fleet, Inc. v. Alexander, 234 F.3d 852, 857 (5th Cir. 2000) (footnote omitted).

After ruling that "Bayou Fleet was not denied meaningful access to the courts," the court of appeals concluded: "We . . . can not say that in this case that staff usurped the judge's role in the decision-making process of the trial. The involvement of the judge's law clerk in the trial was unfortunate and the judge should take whatever action is necessary to make sure that it does not recur."[187] I can't quite decide whether the judge (and law clerk) in *Bayou Fleet* dodged a bullet, or avoided reversal by the skin(s) of their teeth. Or both.

IV. NOT SO FAST SCHMEDLAP

It takes a certain amount of *chutzpah*[188] for a litigant or an attorney to go *mano a mano* with a judge, and given the well-understood inefficacy of vinegar as fly bait,[189] most attorneys understand that criticism of a decision maker is rarely a useful prelude to a prayer for relief from that selfsame decision maker.[190] Those considerations, in conjunction with Judge Learned Hand's famous description of his law clerks as "puny judges,"[191] may explain why it is not so uncommon for an attorney to attempt to gain an advantage by taking aim not at the judge in his or her case, but at the judge's unrobed mini-me.[192] This Part is devoted to opinions in cases in which attorneys have pointed to law clerks and said,

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187. *Id.* at 858.

188. "*Chutzpah*" is Yiddish for "*cajones*." When I wrote that sentence, I thought I was being clever and original. But then I found this: "In US slang, *cojones* denotes 'brazen, brave attitude', pronounced /kə□ho□ne□z/ and /kə□hu□nəz/ in English. Contextually, its usage is like that of the Yiddish *chutzpah* (nerve) and the Finnish *sisu* (perseverance). A common euphemistic mis-spelling of *cojones* is *cajones* (furniture 'drawers' and 'wooden box drums', see *cajón*)." WIKIPEDIA, http://en.wikipedia.org/wiki/Cojones (last visited Aug. 5, 2010). Damn you, Wikipedia.

189. *See* Parker B. Potter, Jr., *Dropping the K-Bomb: A Compendium of Kangaroo Tales from American Judicial Opinions*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 9, 19 & n.60 (2006).

190. It is hard to imagine how the advocate who made the following statement, in an affidavit, thought the statement would help his client: "It is our information and belief that the Judge before entering the order of dismissal informed his law clerk that he intended to dismiss the cause and instructed the law clerk to find some basis for the decision." Investors Thrift Corp. v. Sexton, 347 F. Supp. 1207, 1212 (W.D. Ark. 1972). One also wonders just what was the basis for the affiant's information and belief.

191. Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 634 (1999) (citing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 141 (1994)). For his part, "Justice Oliver Wendell Holmes . . . termed law clerks 'puisne judges.'" Bear v. Potter, 89 F. Supp. 2d 687, 691 (W.D.N.C. 1999) (quoting Fredonia Broad. Corp. v. RCA Corp., 569 F.2d 251, 255 (5th Cir. 1978), *overruled on other grounds by* Riquelme Valdes v. Leisure Res Group, Inc., 810 F.2d 1345 (5th Cir. 1987)). Given the choice, I'd rather be thought of as "puisne" than "puny." But that's just me.

192. You will have to agree, I am sure, that the mental image inspired by the phrase "unrobed mini-me" is far less disturbing than the one conjured by the phrase "disrobed mini-me." (No offense intended, Mr. Troyer.)

"J'accuse," only to be told by a judge, "Not so fast, Schmedlap."[193] Specifically, I consider four kinds of unsuccessful challenges based upon law clerk attributes or actions: challenges to the institution as a whole, attempts at law-clerk shopping, charges of misconduct (i.e., charges that a law clerk did something outside his or her job description), and charges of incompetence (i.e., charges that a law clerk undertaking a permitted activity simply did it poorly).

A. Institutional Challenges

Notwithstanding all the insulation placed between law clerks and the litigants and attorneys who appear before their judges,[194] some enterprising litigants have attacked the institution of clerkship itself, suggesting that it has somehow tainted or diluted the justice they have received.[195] That argument is just about always DOA.[196]

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193. A particularly illustrative "not so fast" came from the pen of Judge Bailey Brown in *Blanton v. United States*, in his explanation of the maxim that "possession of a law license does not a 'counsel' make." 896 F. Supp. 1451, 1460 (M.D. Tenn. 1995). In the words of Judge Brown:

> The Petitioner's attorney provides a perfect example. In his memorandum to this court, he states:
>
> > Counsel wishes to inform the Court that the Court has misread *United States v. Whitesel,* 543 F.2d 1176 (6th Cir. 1976). *Whitesel* is clearly factually distinguishable, and the relevant *dicta* supports Petitioner. *From the Court's comments at the hearing, Petitioner's counsel can only believe the Court's law clerk read only the West's Publishing Company's "headnotes", [sic] particularly note 2, and the Court, in reliance upon the law clerk's representations, then cited the case to Petitioner's counsel.*
>
> *R. Doc. No. 157* at 8 (emphasis added).
>
> This is an unusual sort of advocacy. Most attorneys would not attempt to win their case by libeling the judge who decides it. The petitioner's attorney has done just that, though, and his law license did not provide him with the wisdom to refrain. Of course, the above quotation is bewildering rather than prejudicial, but it is nevertheless not something one would expect from a competent advocate.

Id.

194. As an example of that insulation, Magistrate Judge David Wall once barred counsel in a case from making telephonic contact with chambers because the attorney for one side phoned, after hours, saying "that she 'would very much like the law clerk who wrote the order dated the 18th to call [her] briefly to speak with [her] about it.'" Macaluso v. Keyspan Energy, No. CV 05-0823(ADS)(WDW), 2007 WL 1041662, at *12 (E.D.N.Y. Apr. 3, 2007). In *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D. Fla. 1992), another attorney exhibited spectacularly substandard telephone manners: "Following the ruling, counsel for the Plaintiffs engaged in *ex parte* telephonic communication with chambers, wherein she unjustifiably accused the undersigned of abdicating his judicial responsibilities to his law clerk. Such allegations are unfounded and this type of behavior shall not be tolerated in the future." *Id.* at 1570 n.1.

195. *See, e.g.*, Switzer v. Coan, 261 F.3d 985, 987 (10th Cir. 2001) (affirming dismissal of claims under *Bivens* and RICO based on allegations that plaintiff was "the victim of a denial of meaningful access to the courts and [an] obstruction of justice conspiracy perpetrated by the defendants because of his status as a pro se litigant in that Orders and Opinions issued by the defendant Article III judges are actually authored by the defendant staff attorneys and law clerks and signed by the defendant Article III judges who have not bothered to read what their clerks and staff attorneys

In *Smith v. Campbell*,[197] a petition for a writ of habeas corpus, the petitioner opined that he had been prejudiced by the work of a magistrate judge's law clerk:

> Magistrate Sandridge [sic] has long suffered from physical disabilities of vision. He sees only in winks and blinks, as lightning in a night[']s storm, it is reflected in his Recommendation and opinions as follows, denying your petitioner his full day in court. *Fact from fiction:* Many here have complained on the Magistrate. This petitioner's work is definitive and distinctive, and please credit me accordingly with what I submit to this Honorable Court. It has been contended that Mr. Sandidge, the magistrate, is "beyond" the potential to properly analyze & review cases that contain in depth factors relating to numerous issues. While I do *not* conclusively think that his analytic capabilities are impaired or handicapped by his *age* & mental state, I *know* that an unconstitutional process produced the magistrate's decision. Could some law clerk have interjected too much influence in this case?[198]

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have written."); Budrow v. McCalla, 21 F. App'x 315, 316 (6th Cir. 2001) (affirming dismissal of habeas corpus petition in case when petitioner, on appeal, "cast[ ] aspersions on the authorship of the district court's opinion and claims to have been denied due process of law because her case was assigned to a law clerk or staff attorney").

196. *See, e.g.*, Tollestrup v. Tel Am. Long Distance, 95 F. App'x 290, 293 (10th Cir. 2004) ("Ms. Tollestrup's argument that the district court's decision was drafted by a law clerk is of no significance. Nothing in the record suggests the district court judge did not participate in the decision.").

197. 781 F. Supp. 521 (M.D. Tenn. 1991).

198. *Id.* at 525 n.3. If not definitive, petitioner Smith's style of argument was plainly distinctive:

> Your petitioner scopes the totality of the Majestrates [sic] opinion and recommendations as a whole and avers it echoes the Hellenized—*akin to harmony*—of the Tennessee justice system that it is wanting, and is 3000 years behind the times and as dead as ancient Greece where it was born and died according to its ways of underminding [sic] truth and holiness in justice, and the citizens of state.
>
> Notwithstanding a Hellenized justice system of Greece put to death Socrates, Anaxagoras and Anaxagoras [sic] three of the greatest thinkers in the Pericean age. For religious reasons, solely, as, in Tennessee courts *akin to harmony,* hearing-only-what they want to hear-in-a matter. Being fiction and not truth before them.
>
> This is 1991, and your petitioner has long awaited his day in court. Expecting a 1776 Constitutional day, a 200 year old Bill of Rights in 1991 to unfold, and what does he get, not even a English type due process, nor the holiness of scripture law of the Sanhedrin court of Israel our constitution was molded after, but, as, found a decision as, if, out of Greece 3000 years ago, Rome 1900 years ago or even France before the revolution.
>
> We have here as Egyptian inscription-plagurized [sic]-reading of phansty [sic] as Egypt inventing their past to make them (defendants) look good-at-its-core, as the Mayan writings of South America unreadable or undecipherable to the all seeing eye but to impress the Hellenized reader it so favors contrary to Constitutional law.

Id. I couldn't have said it better myself.

District Judge John Nixon didn't think so, and denied the petition.[199] In *United States v. Keiser*,[200] the defendant made a similar argument, "that law clerks frequently act as *de facto* judges, that judges inappropriately delegate non-delegable duties to the law clerks and that law clerks have usurped the duties of Article III judges."[201] Judge Ralph Erickson responded:

> While it is not customary for courts to discuss at great length how they utilize their law clerks, the Court notes without reservation that each of these complaints, if real, would constitute a serious abuse of the law clerk system and would be grounds for grave concern.
>
> Nothing leaves this Court's chambers that is not the opinion of the judge. Right or wrong, the work is the Court's and law clerk input is limited to research and writing under the direct supervision and control of the Judge. Frankly, if there are errors in this Court's work, they are the honest mistakes of the judge himself. The parties may place blame wherever they wish, but the unvarnished truth is that from the most mundane spelling errors to erroneous holdings on critical rulings the errors are mine alone and I take full responsibility for them. The Court strives mightily to get all decisions it makes right, but if they are in error there should be no question as to who made the decision, because the undersigned makes all of the decisions that come out of this chambers.[202]

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199. *Id.* at 535.

200. No. 3:05-cr-80, 2006 WL 3751452 (D.N.D. Dec. 19, 2006).

201. *Id.* at *3.

202. *Id.* at *3–*4. Judge Erickson was similarly unmoved by the defendant's request that the court "keep time records for his personal uses." *Id.* at *4. As he wrote:

> The Court knows of no legal authority for such an invasion of the Court's independence. The deliberative processes of the Court will be set forth in its rulings as is the long tradition in our legal system. The Defendant's request is, frankly, insulting and strikes at the heart of the dignity of the [sic] our legal system. Decisions in courts are not the product of a minimum number of hours of work—but the product of a deliberative process that is essentially dependent on the complexity of the issues raised.
>
> In the case at bar, the Court has read every word of every document that the Defendant has filed. Much of what has been filed is not germane to the issues before the court, is confused and the product of an obviously non-law trained person, and overtly irrelevant—but it has all been closely read and considered. When the Court rules on the various motions pending before it the parties can be assured that it will do so based on the law of this Circuit and the facts as developed in the record. The Court can further assure the parties that the Court will do all research and review necessary to make the best decisions humanly possible; however, the Defendant should be aware that the lack of art in the pleadings in this case raise issues that would not ordinarily be present in a case of this sort. It would be helpful to the Court if the Defendant would pay more attention to what the United States Court of Appeals for the Eighth Circuit has said on the various issues he intends to raise and less attention to general observations on the law made by Lord Mansfield in 1768. It would be a rare case indeed, that turned on a 250 year old observation by a Law Lord made in Privy Council. Merely cobbling together centuries old axioms and

In *Bear v. Potter*,[203] the plaintiff argued "that the use of staff attorneys and law clerks constitutes a fraud on the court."[204] In response, in an order that may or may not have been drafted by a law clerk, Judge Lacy Thornburg gave a brief history of law clerking[205] and then stated: "The undersigned is unable to fathom how the 100-year old tradition of law clerks constitutes a fraud on the courts."[206]

In a critique that is somewhat more personal than institutional, the pro se plaintiff in *Lineberry v. United States*[207] argued "that the Fifth Circuit has 'hired low level law clerks, forcing them to deny all *pro se* petitions.'"[208] Judge David Folsom was not persuaded.[209] Similarly unavailing, albeit on procedural grounds, was the plaintiff's claim, in *Lowe v. United States*,[210] "that the United States has failed to properly train its judicial law clerks and that consequently, he has been denied his constitutional rights through the actions of these clerks."[211] Inventive, but also unsuccessful, was the petitioner's argument, in an appeal from the denial of a habeas corpus petition, "that the district court did not conduct a *de*

> asking the Court to take an action which appears to be completely without modern precedent is not ordinarily a prevailing strategy.

Id.

203. 89 F. Supp. 2d 687 (W.D.N.C. 1999).

204. *Id.* at 691. *See also* Lee v. Mullen, No. 3:99CV180, 1999 WL 907537 (W.D.N.C. Sept. 2, 1999) (raising identical claim). In the hands of creative litigants, "fraud on the court" is, if nothing else, a flexible theory. In *Johnson v. United States*, 952 F.2d 406 (unpublished table decision), 1991 WL 276390 (9th Cir. Dec. 23, 1991), the plaintiff-appellant argued that the government committed fraud on the court, but his argument lost traction when, among other things, the court of appeals noted that the "ex parte" communication Johnson complained of was "nothing more than a memorandum to the district court judge from one of his own law clerks." *Id.* at *2.

And, in *Cannon v. North Carolina*, 110 F.3d 59 (unpublished table decision), 1997 WL 151769 (4th Cir. Apr. 2, 1997), the court of appeals denied the appellant's motion "for copies of law clerks' memoranda to the court concerning this appeal and Appellant's prior appeals." *Id.* at *1.

205. *Bear*, 89 F. Supp. 2d at 691.

206. *Id.* Moreover, Judge Thornburg is far from alone in being unable to fathom such claims. *See, e.g.*, Kashelkar v. Bluestone, No. 06 Civ. 08323(LTS)(THK), 2007 WL 2791432, at *7 (S.D.N.Y. July 25, 2007) (dismissing as "patently frivolous" plaintiff's claim that "the 'decisions' [dismissing his cases] were not even made by the Judges but have been made by their Law Clerks and deputies' . . . . That is nothing but absolute frauds"); Stewart v. Thomas, No. 3:02CV57-WLO, 2002 WL 32144764, at *1 (W.D.N.C. Mar. 28, 2002) (dismissing as frivolous "complaint alleging various requests for relief, including a request that ghostwriting of judicial opinions be declared unconstitutional, the prevention of law clerk participation in assisting the judge, and requiring that the assigned judge punch in and out on the clock establishing a record of time spent on Plaintiff's motion").

207. No. 5:08cv72, 2009 WL 499763 (E.D. Tex. Feb. 27, 2009).

208. *Id.* at *3.

209. *Id.*

210. No. 2:08cv466-MEF, 2008 WL 2705124 (M.D. Ala. July 9, 2008).

211. *Id.* at *1.

novo review of the magistrate judge's decision . . . because the same law clerk assisted the judges in making their decisions."[212]

B. Shopping for Law Clerks

Most savvy litigators have, at one time or another, considered the venerable practice of forum shopping. And more than a few have attempted the finer-grained variant of forum shopping, judge shopping.[213] Some enterprising attorneys have even gone one step further by trying to shop for law clerks.

In *Day v. Apoliona*,[214] five native Hawaiians filed suit to challenge "the manner in which the office of Hawaiian Affairs ('OHA') has been and is spending money."[215] They objected to having a Hawaiian law clerk work on their case:

> At the hearing on this matter, Plaintiffs asked whether a Hawaiian or native Hawaiian law clerk was working on this case. Plaintiffs had noticed that the case docket referred to "kmk." By going from the docket sheet to the Notice of Electronic Filing, one could see that "kmk" referred to Kanoelani M. Kane. Plaintiffs inquired whether that was a reference to a Hawaiian law clerk. The court explained that Ms. Kane is a law clerk working on this case and is Hawaiian, and that Ms. Kane's father is native Hawaiian. The court also explained that neither the law clerk nor her father is currently seeking funds or other benefits from OHA, and neither has a present intent to seek benefits from OHA in the future. The court noted that the court reporter reporting on the case is also Hawaiian and that the courtroom manager is married to a native Hawaiian and has Hawaiian children. The court opined that barring Hawaiians and native Hawaiians from working on the case would eliminate a large number of people employed by the court. It would also eliminate one senior district judge. Plaintiffs said they were objecting only to the Hawaiian law clerk, alleging that the law clerk has a personal interest in the outcome of this case.[216]

Judge Susan Mollway rejected the plaintiffs' argument: "Because the law clerk and her family have no current interest in the outcome of this case,

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212. Sattiewhite v. Scott, 53 F.3d 1281 (unpublished table decision), 1995 WL 295892, at *2 (5th Cir. Apr. 20, 1995).

213. However, as many judge shoppers have learned, to their regret, conflicts do not roll uphill. Rather, "when a judge's law clerk has a possible conflict of interest . . ., it is the clerk, not the judge, who must be disqualified." Lawal v. RTM, 260 F. App'x 149, 152 (11th Cir. 2006) (quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1525 (11th Cir. 1988)).

214. 451 F. Supp. 2d 1133 (D. Haw. 2006).

215. *Id.* at 1134.

216. *Id.* at 1137.

Plaintiffs' objection arises solely because the law clerk is Hawaiian. Recusal based solely on race is unwarranted and improper."[217]

The plaintiff in *Shiplet v. Veneman*[218] was equally unsuccessful in a rather audacious attempt at law-clerk shopping:

> The Court notes that Plaintiff's Counsel, Terry Schaplow, contacted this Court's Law-Clerk, and requested that she, rather than her male colleague, work on this case. The Court cautions Counsel that such a request is highly unusual and patently inappropriate. The Court is fully capable of assigning cases before it to law clerks. In addition, the Court finds it particularly inappropriate that Counsel would make such a request in the context of a gender discrimination case. Counsel is encouraged to make no such requests in the future.[219]

I'm torn between "Wow" and "Yikes." On second thought, perhaps Attorney Schaplow has earned one of each.

And then there is Jerry Read, law clerk to Judge Lyonel Senter of the Southern District of Mississippi. In two different cases arising out of disputes concerning insurance coverage for damage from Hurricane Katrina,[220] State Farm Fire and Casualty Company moved to disqualify Read, on grounds that "Read's having filed suit against his property insurer, Allstate Insurance Company (Allstate), for property damage, he, Read, sustained in Hurricane Katrina reasonably [brought] into question his, Read's, ability to discharge his duties as law clerk in the context of Katrina litigation."[221] After determining that his law clerk had no insurance coverage with State Farm, Judge Senter rejected State Farm's argument, twice.[222]

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217. *Id.* at 1138 (citing MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 138 F.3d 33, 37 (2d Cir. 1998) ("A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group.")).

218. 620 F. Supp. 2d 1203 (D. Mont. 2009).

219. *Id.* at 1205 n.1. Law-clerk gender played a slightly different role in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997). In that case, David Duffy sued a panel of United States District Judges who selected a female applicant, rather than him, to serve as Chief United States Probation Officer. *Id.* at 1029. In ruling that Duffy had "made a prima facie case of employment discrimination," *id.* at 1037, the court of appeals noted, among other things, "that two members of the Panel had usually hired female law clerks," *id.* While the court of appeals held that evidence to be sufficient to support Duffy's prima facie case, it went on to rule that the district court did not abuse its discretion in ruling that the Panel's law-clerk hiring practices were irrelevant as evidence that the Panel's stated reasons for not hiring him were pretextual. *Id.* at 1039.

220. Eleuterius v. State Farm Fire & Cas. Co., No. 1:06CV647 LTS-RHW, 2007 WL 1745292 (S.D. Miss. June 13, 2007); Guice v. State Farm Fire & Cas. Co., No. CIVA106CV001 LTSRHW, 2007 WL 601208 (S.D. Miss. Feb. 23, 2007).

221. *Guice*, 2007 WL 601208, at *1.

222. *See Eleuterius*, 2007 WL 1745292, at *2; *Guice*, 2007 WL 601208, at *1.

C. Accusations of Misconduct

In this section, I canvass cases in which law clerks have been accused of doing things they should not have done, only to be exonerated, either by their own judges or by their judges' appellate overseers. In other words, I focus on things law clerks can do without worrying about getting their judges in trouble or compromising the cases on which they are working. Moreover, this section is about actual verified law-clerk conduct, rather than unfounded accusations of law-clerk misconduct which, while often colorful,[223] have relatively little educational value. In trying to gain an advantage by picking on law clerks, attorneys have focused on a variety of conduct, including but hardly limited to the performance of activities typically conducted by judges, law-clerk research, contact with attorneys and parties, contact with jurors, and conduct in court.

1. Acting as a Judge

In light of decisions such as *Riley v. Deeds*,[224] it is not surprising that parties have sought relief based upon claims that law clerks have exercised powers above their pay grade. Such a claim went nowhere in *United States v. Long*.[225] In that case, a criminal defendant argued that "the district court's law clerk announced the jury's impasse when neither [he] nor the trial judge were present, which improperly convened the court and created a structural defect requiring all of the forfeiture verdicts to be vacated."[226] The court of appeals disagreed:

> The record before us does not show that the law clerk actually "convened" court in Judge Wanger's absence. Judge Wanger informed the parties that he had to leave the court-house but had arranged for Judge Coyle to preside over the jury's deliberations. The defense timely objected. Outside the presence of the jury, the law clerk informed the parties that Judge Coyle was still home due to a misunderstanding. The jury had a question for the court, and the

223. *See, e.g.*, *In re* Sokol, 108 F.3d 1370 (unpublished table decision), 1997 WL 138440, at *1 (2d Cir. Mar. 21, 1997) ("Sokol has failed to present any credible evidence to support his theory, under Rule 60(b)(3), that the district court's law clerk worked in collusion with the State's attorney."); Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1410–11 (5th Cir. 1994) ("They alleged, *inter alia,* that Judge Mentz's law clerk and Travelers' counsel made 'false statement[s] of material fact to the court', intentionally misled the court in violation of the Rules of Professional Conduct, and otherwise committed 'ill practices'. In light of the unrestrained accusations and innuendos we have seen in these actions, these charges simply reinforce the perception of the reckless attacks in which the Liljebergs and their counsel have engaged.").

224. 56 F.3d 1117 (9th Cir. 1995).

225. 301 F.3d 1095 (9th Cir. 2002).

226. *Id.* at 1107.

> law clerk asked defense counsel if she wanted Judge Wanger or Judge Coyle to come in. Defense counsel stated that she did not want a mistrial, and asked for Judge Coyle to come in and give an *Allen* charge. . . .
>
> The law clerk then read the jury's question into the record. The law clerk then discussed which version of the *Allen* charge the parties wanted. Judge Coyle then arrived.
>
> Unlike the cases Long cites, the law clerk in this case did not actually "convene" court as to create reversible constitutional error. Instead, the law clerk merely facilitated communication between the parties until Judge Coyle arrived. Furthermore, it is clear from the transcript that the law clerk's conversation with the lawyers was all outside the presence of the jury.[227]

So, while a law clerk ought not convene court, the long and the short of it is that doing what the *Long* clerk did fell short of causing a problem.

2. Researching off the Reservation

While the intrepid investigative law clerk in *Kennedy v. Great Atlantic & Pacific Tea Co.*[228] put himself in a bit of a pickle by playing Law Clerk PI, several other law-clerk investigators have gotten away unscathed, if only barely.

Perhaps the most famous is the unnamed law clerk in *Price Brothers Co. v. Philadelphia Gear Corp*.[229] In that case:

> Philadelphia Gear alleged that prior to the trial the trial judge's law clerk had traveled from Dayton, Ohio, to Beacon, New York, and had observed the operation of the pipe wrapping machine that is at the center of this controversy. Philadelphia Gear argued that the law clerk's observations were presumably reported to the trial judge, and speculated that this report may have been relied on by the judge in making his findings. . . . Philadelphia Gear argues that the fact finding potentially based on the nonevidentiary observation by the law clerk is clearly erroneous as a matter of law.[230]

On the case's first trip up the appellate ladder, occasioned by Judge Carl Rubin's decision not to amend the judgment to reflect his law clerk's visit to New York,[231] the court of appeals expressed its belief "that, where a suit is to be tried without a jury, sending a law clerk to gather

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227. *Id.* at 1107–08.
228. 551 F.2d 593 (5th Cir. 1977).
229. 649 F.2d 416 (6th Cir. 1981).
230. *Id.* at 419.
231. *See* Price Bros. Co. v. Phila. Gear Corp., 629 F.2d 444 (6th Cir. 1980).

evidence is so destructive of the appearance of impartiality required of a presiding judge that we must remand this case for an evidentiary hearing to determine the truth of Philadelphia Gear's allegation."[232] On remand, a different district judge held a hearing,[233] and the case found its way back to the court of appeals. In its second *Price Brothers* opinion, the court explained:

> It is imperative that a finder of fact avoid off-the-record contacts that might bias its judgment or otherwise impair its ability to fairly and objectively weigh the evidence properly submitted at trial. A judge presiding at a bench trial may not directly or indirectly, through his law clerk or by any other means, conduct an investigation outside the record and use the results of that investigation in determining the facts of a case. It need hardly be mentioned that what a judge cannot do in person he may not do by proxy. The fact that the clerk rather than the judge made the trip and observed the machine in no way alters the problem.[234]

After describing the circumstances of the law clerk's view of the machine, the court of appeals determined that the law clerk's view "created a presumption of prejudice to the defendant in the trial judge's determination of facts that [had to] be rebutted before his decision [could] stand."[235] Then, the court of appeals declared the presumption to be rebutted:

> Based on the undisputed testimony produced at the hearing on remand, we conclude that the presumption of prejudice arising from the law clerk's report of off-the-record observations has been overcome. The law clerk's testimony and the statement of the trial judge establish that the sole purpose of the clerk's trip was to observe the operation of the pipe wrapping machine and describe it to the judge so that he might be better able to understand the evidence to be produced at trial. There is no indication that the trial judge considered the law clerk's report as evidence or that the judge was improperly influenced in his fact finding by the clerk's report. Since the trial judge's fact finding was not based on the off-the-record contact of the clerk's view, any error that may have occurred in not obtaining the parties' consent to that view did not result in prejudice and was harmless. We therefore conclude that the specter of prejudice created by the judge's off-the-record contact with ma-

232. *Id.* at 446.
233. Price Bros. Co. v. Phila. Gear Corp., 649 F.2d 416, 420 (6th Cir. 1981).
234. *Id.* at 419.
235. *Id.* at 420.

> terial evidence has been removed, and that the trial judge's findings were not biased by his law clerk's view of the wrapping machine.[236]

While the court of appeals appears to have drafted up a pretty nice get-out-of-jail-free card for judges and law clerks inclined to conduct their own discovery, the whole enterprise still seems fraught with peril.

Price Brothers involved rather traditional sleuthing techniques; the electronic age has created a whole new realm of law-clerk research. At least one litigant has objected. In *Lisson v. O'Hare*,[237] the unsuccessful plaintiff in an action for copyright and trademark infringement argued "that the magistrate judge was required to recuse himself after his law clerk viewed publicly accessible portions of [his] website, InsiderCV.com, which was the subject of [his] infringement and fraud claims."[238] While acknowledging its own previous decision in *Kennedy*, the court of appeals disagreed:

> Lisson cites no case in which this court has made it plain that a judge must recuse himself simply because he or his law clerk has viewed a website that is the subject of default proceedings to prove damages. Although one case cited by Lisson, *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593, 596 (5th Cir. 1977), bears some superficial similarities to the facts in his case, it also presents significant differences. In *Kennedy*, a law clerk took a private view of evidence for purposes related to determining fault and then, on instruction of the district judge, communicated to defense counsel what he had seen, eventually resulting in (a) the district court's having to advise plaintiff of the viewing and of the ex-parte communication and (b) plaintiff's calling the clerk to testify. *See Kennedy*, 551 F.2d at 597. We held that "the potential for prejudice to the defendants' case was too great . . . to conclude that the . . . overruling of the defendants' motion to prohibit" the clerk from testifying before the jury "or, in the alternative, to disqualify [the district judge] from continuing in the trial was harmless error." *Id.* at 598–99. Here, however, there was no chance of prejudicing a jury, and Lisson adduced no admission or other proof that the law clerk ever related anything about the website to the magistrate judge other than the fact of his visit. Moreover, "[m]ere prior knowledge of some facts" germane to a suit "is not in itself necessarily sufficient to re-

236. *Id.* at 420–21; *see also* Harris v. Jam. Auto Repair, Inc., No. 03-CV-417(EBK), 2009 WL 2242355, at *1 (E.D.N.Y. July 27, 2009) (rejecting defendant's argument that certain records obtained by subpoena "should be excluded as 'the fruit of improper and unauthorized discovery' conducted by Court's law clerk").

237. 326 F. App'x 259 (5th Cir. 2009).

238. *Id.* at 260.

> quire disqualification." *United States v. Seiffert*, 501 F.2d 974, 978 (5th Cir. 1974).[239]

The plaintiff in *Lisson* appears to be the exception; as often as not, it seems that litigants are disinclined to kick up a fuss when law clerks let their fingers do the walking.[240]

Another kind of law-clerk information gathering has, however, upset several litigants or their attorneys. In *In re Charges of Judicial Misconduct*,[241] attorneys in the Connecticut Division of Criminal Justice and the Office of the Chief State's Attorney filed a judicial misconduct complaint against Chief Judge Robert Chatigny of the District of Connecticut based upon things he did in two actions challenging the execution of Michael Ross, who had been convicted in the state courts of Connecticut.[242] Specifically, the complainants asserted that Judge Chatigny "abandoned the role of neutral and detached magistrate and instead became an advocate for the position held by the parties who were seeking to stop the execution"[243] by, among other things, having his law clerk attend three days of hearings in the state court on the issues of competency and volitional capacity, "due to the possibility that the issues being decided might return" to his court.[244] The Judicial Council of the Second Circuit adopted a report by a Special Committee that recommended dismissing all the charges against Judge Chatigny, including the one based in part on send-

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239. *Id.* at 260–61. The trial court was similarly unpersuaded by Lisson's argument:

> Plaintiff is requesting damages based on Defendant's alleged copying and "invasion" of his website, yet at the same time he is complaining that the Court's law clerk actually visited the website. The Court must wonder aloud how, exactly, Plaintiff thought the Court was going to determine if he was legally entitled to damages for improper use of his website without at least receiving some sort of evidence about what it is and the information it contains, and thus why Plaintiff is concerned by the Court's law clerk having visited the site.

Lisson v. O'Hare, Civ. No. A-05-CA-114-LY, 2007 WL 1742188, at *1 (W.D. Tex. June 14, 2007).

240. *See, e.g.*, Mitchell v. Potter, Civ. No. 05-5191, 2006 WL 2715042, at *1 (W.D. Ark. Sept. 22, 2006) ("Being skeptical of plaintiff's assertions that she was unable to learn the postmaster's mailing address by visiting the U.S. Postal Service's website, the Court directed its Law Clerk to make a similar attempt."); Alexander v. Klem, No. CIV.A. 04-2174, 2004 WL 2601079, at *1 (E.D. Pa. Nov. 16, 2004) ("This Court's law clerk has performed an independent electronic search of the Appellate Court Web Docket Sheets available to the public at the website of the Administrative Office of Pennsylvania Courts."); Robert Diaz Assocs. Enters. v. Eleste, Inc., No. 03 Civ. 7758(DFE), 2004 WL 1087468, at *3 (S.D.N.Y. May 14, 2004) ("On March 25 and April 8, 2004, my law clerk accessed Elete's website."); Malletier v. WhenU.Com, Inc., No. 05 Civ. 1325 (LAK), 2007 WL 257717, at *4 (S.D.N.Y. Jan. 26, 2007) ("My law clerk's internet research shows that Lushbag.com's website no longer exists.")

241. 465 F.3d 532 (2d Cir. 2006).

242. *Id.* at 534.

243. *Id.* at 536.

244. *Id.* at 550.

ing his law clerk to observe state-court hearings.[245] In response to a similar challenge, Judge Raymond Broderick declined to recuse himself from *United States v. Romano*,[246] notwithstanding the defendant's argument "that the presence of one of the court's law clerks at the oral argument on [her] appeal to the Third Circuit Court of Appeals indicate[d] a 'personal, extrajudicial interest' in her case."[247] As Judge Broderick wrote:

> The presence of one of a court's law clerks at an appellate argument is evidence only of the law clerk's interest in the appellate review of the case. Indeed, the very arguments made by and before the appellate tribunal will presumably be reflected in the decision ultimately rendered by that tribunal and transmitted to the trial court. As previously stated, for a motion to recuse to be granted, defendant must allege bias or prejudice from sources other than the judicial proceedings in the case and must show that the bias is personal as opposed to judicial. *See United States v. Falcone*, 505 F.2d 478, 485 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975). We conclude that a law clerk's attendance at arguments before the Third Circuit Court of Appeals of a case is not a basis for disqualification of the trial judge.[248]

Based on *Charges of Judicial Misconduct* and *Romano*, it would seem that judges have free rein to send their law clerks out to watch other judges in action.

3. Contacting Attorneys

It is well understood that judges, and by extension law clerks, must be circumspect in their dealings with attorneys, and that ex parte contact with attorneys is to be avoided. Thus, it should be no surprise that from time to time, parties in litigation have attempted to gain advantage by charging law clerks with having inappropriate contact with the attorneys on the other side.[249] And, in at least one case, a party complained about

245. *Id.* at 533.

246. CRIM. No. 87-00030, 1988 WL 117844 (E.D. Pa. Oct. 31, 1988).

247. *Id.* at *4.

248. *Id.* (parallel citation omitted); *see also* SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1156 n.15 (D.C. Cir. 1978) (rejecting appellant's contention that District Judge John Pratt erred by having his law clerk telephone the United States District Court in Dallas to inquire about docket congestion in that court).

249. Happily, however, at least for those obligated to defend against a claim that their counsel had inappropriate contact with a law clerk, proof of a single ex parte communication between an attorney and law clerk does not raise a reasonable inference that there were more such communications. *See* Kaufman v. Am. Fam. Mut. Ins. Co., 601 F.3d 1088, 1095–96 (10th Cir. 2010).

contact between a law clerk and her own attorney.[250] This section describes cases in which such claims have failed, sometimes spectacularly.

In *LaChapelle v. City of El Cajon*,[251] the court of appeals held that "[t]he discussion between appellee's counsel and Judge Jones's law clerk regarding scheduling the summary judgment motion was not an improper ex parte communication, and did not violate LaChapelle's due process rights."[252] In another case involving face-to-face contact with a law clerk, the plaintiff in *Trammel v. First Bank of Searcy*[253] "moved to recuse the judge based on the 'appearance of impropriety'"[254] after he learned that one "Mr. Davis [president of the defendant bank] and one of the district judge's law clerks, who had begun work two days earlier, were friends and attended the same weekly Bible study class."[255] The district court denied the motion, and the court of appeals ruled that the district court did not abuse its discretion by doing so, noting that "Mr. Trammel acknowledged . . . that the judge never had a professional or personal relationship with Mr. Davis, and the court assured the parties

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250. In response to a litigant's claim that she and her counsel had been mistreated by the court, through its law clerk, Judge David Arceneaux had this to say:

> The undersigned judge must first note that his law clerks simply are not permitted to speak to parties. Neither this judge nor his law clerk, therefore, have had any contact with Ms. Livaccari and, furthermore, have not "mistreated" her in any manner whatsoever.
>
> As a courtesy to the bar, the undersigned judge does permit his law clerks to speak with counsel. Plaintiff's counsel, however, abused this courtesy and, in this instance, the law clerk acted appropriately in instructing Mr. Roy Raspanti that further communications with the court should be in the form of formal motions. Prior to the incident complained of in Plaintiff's memorandum relative to the undersigned's law clerk, Mr. Raspanti had called chambers a number of times seeking information on procedural matters and, at one point, even asking the court's intentions with respect to the motion to remand pending before it.
>
> This judge stood nearby the day his law clerk told Mr. Raspanti not to telephone chambers in the future. Under the circumstances, the restraint shown toward Mr. Raspanti by this judge's law clerk should be commended. Furthermore, in the court's view, the requirement that this Plaintiff's counsel only communicate with the court through written motion has alleviated any further misunderstandings or incidents complained of here.
>
> Plaintiff, therefore, again fails to persuade the court. Disqualification is not warranted because Plaintiff's counsel does not appreciate the manner in which a law clerk spoke to him or the fact that he must seek relief through formal motion practice.

Livaccari v. Zack's Famous Frozen Yogurt, Inc., Civ. A. No. 92-1936, 1992 WL 236950, at *3–*4 (E.D. La. Aug. 31, 1992).

251. 142 F.3d 444 (unpublished table decision), 1998 WL 196678 (9th Cir. Apr. 22, 1998).

252. *Id.* at *1 (citing Alexander Shokai, Inc. v. Comm'r, 34 F.3d 1480, 1484–85 (9th Cir. 1994)).

253. 345 F.3d 611 (8th Cir. 2003).

254. *Id.* at 612.

255. *Id.*

that the law clerk had not and would not have 'any involvement whatsoever' with the court's handling of the case."[256]

On several occasions, telephone calls have served as the basis for unsuccessful litigant complaints about ex parte contact with law clerks. In *Walsh v. WOR Radio*,[257] the trial court ruled that when its "law clerk called defendant's counsel to confirm that the correct document had been received,"[258] the call was simply a procedural inquiry "to ascertain that the public record . . . in the Court's official file was complete,"[259] and thus, was not an improper ex parte communication. Similarly, under the heading "Arguments Without Merit," Judge Kimba Wood rejected the plaintiff's claim that the court had an improper ex parte communication with counsel for the defendant when the trial judge's law clerk telephoned the defendant's counsel to confirm that the defendant did not object to including in the record a document that the plaintiff had requested be included and that the defendant had, in fact, provided.[260]

I conclude with a case in which a charge of inappropriate contact not only failed, but also boomeranged back on the attorneys who made it. In *Williams v. Phillips Petroleum Co.*,[261] Judge Jerry Smith wrote:

> Plaintiffs' attorney, Julius J. Larry, III, contends that Phillips's outside attorney, Kerry E. Notestine, engaged in improper *ex parte* communications with the district judge, the magistrate judge, and their law clerks. The record is singularly devoid of evidence that the contacts were improper. Moreover, these same accusations were briefed and rejected in the district court. Lacking any evidence that the contacts were improper, the accusations of plaintiffs' counsel are scurrilous, frivolous, and contrary to the duties of an officer of the court. Larry's legal arguments are also frivolous and independently deserving of sanctions.[262]

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256. *Id.* at 613.

257. 537 F. Supp. 2d 553 (S.D.N.Y. 2008).

258. *Id.* at 556.

259. *Id.*

260. Maharam v. Patterson, No. 04 CV 9569(KMW), 2008 WL 1886062, at *1 (S.D.N.Y. Apr. 28, 2008); *see also* AIB Baker Shopping Ctr. Props, LLC v. Deptford Twp. Planning Bd., No. Civ.A. 04-5849FLW, 2006 WL 83107, at *12 (D.N.J. Jan. 10, 2006) (terming ex parte communications "anathema in our system of justice" and then rejecting party's claim that a law clerk engaged in ex parte communication by receiving telephone call to chambers on procedural matter from counsel for the other side) (quoting *In re* Kensington Int'l Ltd. 368 F.3d 289, 309 (3d Cir. 2004)); United States v. Wecht, Crim. No. 06-0026, 2008 WL 2048350, at *18–*19 (W.D. Pa. May 8, 2008) (denying defendant's motion for recusal which was based, in part, on the judge's law clerk's having opened a letter addressed to the defendant (and sent "care of" the courthouse), pursuant to courthouse safety procedures implemented in response to the events of September 11, 2001).

261. 23 F.3d 930 (5th Cir. 1994).

262. *Id.* at 938.

One example of Attorney Larry's tactics should suffice to demonstrate the basis for the court's obvious ire:

> Reviewing each of the allegedly improper contacts, Larry's duplicity in imputing unethical conduct to Notestine becomes apparent. For instance, in his brief on appeal, Larry reproduces the first contact as follows:
>
> | | | |
> |---|---|---|
> | 4/14/93 | 1.80 (Hours) | Telephone conference with clerk to Judge Harmon. |
>
> The record indicates that this excerpt should read:
>
> | | | |
> |---|---|---|
> | 4/14/93 | 1.80 (Hours) | Telephone conference with clerk to Judge Harmon re: status; telephone conference with Rob Fries re: same; preparation of discovery response to sent to other side; review of reply to defendants response to plaintiff's motion for leave to supplement their complaint; transmitting same to client. |
>
> Comparing Larry's excerpt with the accurate report, Larry plainly intended to mislead this court into believing that Notestine spoke with [sic] for almost two hours with Judge Harmon's law clerk. The context of the full billing report, however, indicates that the phone conversation occupied only a small portion of the time. Moreover, because this entire issue was already briefed in the district court, Larry knew that Notestine's communication was actually with Judge Harmon's case manager, not any law clerk. Larry admits that contacts with a case manager are permissible. Despite recognizing that the time sheet should read "case manager" rather than "law clerk," he doggedly and irrelevantly continues to argue that law clerks should not communicate with parties.[263]

The court went on to describe four more examples of Attorney Larry's misleadingly sliced-and-diced billing records, accused him of "attempt[ing] to mislead the court by blatantly misrepresenting the record,"[264] and concluded that "[h]is only discernable motive is to cast brickbats and to 'poison the well' by tattling on his opponent."[265] For Attorney Larry's "baseless allegations and his attempt to lie to [the] court

263. *Id.* at 938–39.
264. *Id.* at 940.
265. *Id.*

regarding what is in the record,"[266] the court of appeals deemed the appeal frivolous,[267] and sanctioned Attorney Larry, and his client, to the tune of "$20,000.00 and attorneys' costs of $3,039.22, plus double taxable costs on appeal."[268]

4. Contacting Jurors

Just as they should avoid inappropriate contact with attorneys in the cases they are working on, so too, should law clerks avoid improper contacts with jurors. In this section, I describe several cases in which charges of improper juror contact have been raised only to be rejected on grounds that the contact that took place was not improper.

In *United States v. Finze*,[269] the Ninth Circuit ruled that "[n]either plain nor structural error occurred when the district judge, whose throat was affected by illness, had his law clerk, with Finze's consent, read aloud the jury instructions."[270] In the court's view, "[t]he clerk was simply a ministerial mouthpiece, exercising no Article III power over a critical stage of the trial."[271]

Similarly ineffective was the defendant's claim, in *United States v. Brilliant*,[272] a habeas corpus petition under 42 U.S.C. § 2255, that "there was an unauthorized communication with the jury during its deliberations by the Court's law clerk."[273] In *Brilliant*, Judge Leo Rayfiel ruled that there was nothing amiss when the trial judge's law clerk, during the judge's absence from chambers, "replied to [a] jury[ ] question, [in a note signed by counsel for both sides] with the consent of counsel for both sides."[274] In *United States v. Balderas*,[275] the court of appeals held that the district court judge did not abuse his discretion in denying the defendant's motion for a new trial when a juror, concerned about information she learned about a fellow juror during deliberations, notified the jury commissioner, who brought the juror to the trial judge's law clerk, who informed the judge of the juror's concerns.[276] And, in *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*,[277] the court of appeals ruled that Judge Patrick Kelly did not err by having his law clerk ask the jury about

266. *Id.*
267. *Id.*
268. *Id.* at 941.
269. 234 F. App'x 803 (9th Cir. 2007).
270. *Id.* at 805.
271. *Id.* (citing Gomez v. United States, 490 U.S. 858, 876 (1989)).
272. 172 F. Supp. 712, 713 (E.D.N.Y. 1959).
273. *Id.*
274. *Id.*
275. 27 F.3d 567 (unpublished table decision), 1994 WL 144449 (6th Cir. Apr. 21, 1994).
276. *Id.* at *1.
277. 899 F.2d 951 (10th Cir. 1990).

its progress toward reaching a verdict and did so with "the prior knowledge and approval, or at least acquiescence, of counsel."[278]

Another common area of concern is contact between law clerks and jurors in the context of evidence.[279] In *United States v. Yago*,[280] the court of appeals rejected the defendant's contention that the trial court "created the impermissible appearance of endorsing the credibility" of a witness by telling the jury that the person reading the translation of a transcript of the witness's tape-recorded statement was a law clerk.[281] And, in *United States v. Holton*,[282] the court of appeals declined to presume harm when a law clerk replayed audiotapes to the jury in the courtroom, during the course of its deliberations.[283]

Finally, in *United States v. Velasquez-Carbona*,[284] the court of appeals ruled that it was not plain error for the trial court to deny the defendant "an evidentiary hearing to determine whether his due process rights were violated when the trial judge's law clerk gave one of the jurors a ride to a bus stop"[285] on the final day of trial, when the closing arguments ran late.[286] As Judge Andrew Kleinfeld wrote: "We do not presume prejudice where a court or its staff show courtesy to citizens serving as jurors. The district court's failure to order an evidentiary hearing on this ground, when none was requested by Velasquez, did not constitute a miscarriage of justice or an affront to the integrity and reputation of the judicial process."[287]

5. Acting Out in Court

Parties have also been known to complain, generally without success, about the conduct of law clerks in the courtroom, during trial.

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278. *Id.* at 978–79 (quoting Reazin v. Blue Cross & Blue Shield of Kan., Inc., 663 F. Supp. 1360, 1442 (D. Kan. 1987)).

279. In *Thompson v. Greene*, an appeal from the denial of a petition for a writ of habeas corpus under 42 U.S.C. § 2254, the petitioner complained of the trial court's "permitting the jury to review evidentiary videotapes during its deliberations in the presence of the court's law clerk." 427 F.3d 263, 265 (4th Cir. 2005). The court of appeals never reached that issue, however, because the trial court had determined that it had been procedurally defaulted. *Id.* at 266 n.3.

280. 122 F.3d 1076 (unpublished table decision), 1997 WL 547960 (9th Cir. Sept. 4, 1997).

281. *Id.* at *3.

282. 116 F.3d 1536 (D.C. Cir. 1997).

283. *Id.* at 1545. In reaching that decision, the court noted that both parties were informed beforehand of the procedure the law clerk would follow, *id*., and that there was "in fact no evidence suggesting that the law clerk either made independent decisions about whether or how to replay tapes or remained in the courtroom while the jury was deliberating, except for the actual playing of the tapes, *id.* at 1545–46.

284. 991 F.2d 574 (9th Cir. 1993).

285. *Id.* at 576.

286. *Id.* at 575.

287. *Id.* at 576.

In *United States v. Alexander*,[288] the defendant moved for a new trial on three grounds, including his allegation that "the jury may have been prejudiced . . . by remarks made among [the trial judge's] law clerks and [the trial judge] while sitting near the jury box during the presentation of the defendant's expert witness."[289] After denying relief on that theory on grounds that the defendant had waived it, by failing to object at trial,[290] Judge Morey Sear continued:

> Even were the objection not waived, where defense counsel's affidavit does not even directly assert that anything was said within the hearing of the jury, and I am confident that the jury could not possibly have overheard anything that may have been whispered among my law clerks and myself, it would seem that the objection would be overruled without even holding a hearing.[291]

In *United States v. Conners*,[292] the defendant did object, at trial, to "the facial expressions of one of the court's [law] clerks during [his] presentation of his case."[293] Then:

> In response to Conners' charge that one of the court's clerks made inappropriate facial gestures in the presence of the jury, the court again offered to poll the jury. When Conners rejected this offer, the court interrogated both the juror who had complained of the clerk's expressions and the clerk himself. The court found that no "evi-

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288. Crim. No. 85-243, 1988 WL 6333 (E.D. La. Jan. 22, 1988).

289. *Id.* at *2.

290. *Id.* at *8.

291. *Id.* at *8 n.17 (citing United States v. Sedigh, 658 F.2d 1010 (5th Cir. 1981); United States v. Carter, 433 F.2d 874, 876 (10th Cir. 1970)). A similar claim met a similar fate in *Gibson v. Total Car Care Franchising Corp.*, 223 F.R.D. 265 (M.D.N.C. 2004). In a motion for post-judgment relief, the defendant argued that it was prejudiced by the conduct of the court's law clerk during the testimony of one of its witnesses. *Id.* at 278. Specifically, the defendant "assert[ed] that the Court's law clerk shook her head and rolled her eyes during portions of Mr. Evans' testimony." *Id.* at 278 n.9. Judge Carlton Tilley rejected that claim on grounds of the defense counsel's failure to "make a contemporaneous objection nor motion for mistrial based on the law clerk's asserted actions even though he claimed to have seen it more than once during Evans' testimony." *Id.* at 278. Then, Judge Tilley addressed the merits anyway:

> Even if the issue had been properly preserved, there would be no grounds for action. The physical dimensions and configuration of the courtroom make it unlikely that a member of the jury would have been able to see the law clerk or her reactions to testimony. The law clerk was not within the field of view of someone sitting in the jury box and looking towards the witness stand. Additionally, from the jury's perspective, the law clerk was positioned behind a person taller than herself, the courtroom deputy clerk. There is no reason to believe that, even if the incident occurred, it would have had any effect on the jury.

Id.

292. 894 F.2d 987 (8th Cir. 1990).

293. *Id.* at 992. In *Krankowski v. O'Neil*, No. 08-CV-1595, 2010 WL 1329033, at *1 (M.D. Pa. Mar. 26, 2010), the plaintiff mentioned, but did not actually litigate, a law-clerk smirk.

> dence or suggestion of a comment from the Court" had been made. The court then immediately cautioned the jury that the actions of the court staff should not be interpreted as commentary, and further instructed the jury that "no act or gesture by the Court or its staff is designed to suggest or convey in any way or manner any intimation of what verdict I think you ought to find." The court's findings and curative instructions demonstrate that it did not abuse its discretion in refusing to grant Conners further relief on his complaint about the facial expressions of the clerk.[294]

Sadly, the opinion in *Conners* sheds no light on how or why a juror came to complain about a law clerk's facial expressions, not to mention "the clerk himself." The case does, however, remind us that a trial-court law clerk is well advised to wear a poker face to court.

6. Other Bad Stuff

Falling outside the categories enumerated above are two more unsuccessful claims of law-clerk misconduct. In *Estes-El v. Long Island Jewish Medical Center*,[295] the plaintiff accused the trial judge's law clerk of practicing law, a claim which Magistrate Judge Andrew Peck soundly rejected:

> By letter dated August 29, 1995 to plaintiff, Corporation Counsel stated that in response to his letter to the Court requesting a pre-motion conference, "Judge Kaplan's law clerk informed me that I should make a motion seeking the stay." Plaintiff Estes-El expresses outrage that "The Judge's law secretary is practicing law for the City of New York by advising the City Corporation Counsel what motions to file" and alleges that this violates plaintiff's rights. Plaintiff Estes-El misunderstands the Court's procedures. Many judges of this Court require a party to seek a pre-motion conference before the party can file a motion. When defense counsel here sought such a pre-motion conference, Judge Kaplan's chambers instructed him that defendants could file their proposed motion without the need for a pre-motion conference. The judge's chambers was not in any way practicing law for or advising defendants' counsel.[296]

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294. *Conners*, 894 F.2d at 993 (citations to the record omitted). Conners's habeas corpus petition, under 42 U.S.C. § 2255 was no more successful than his direct appeal. *See* Conners v. United States, 989 F.2d 504 (unpublished table decision), 1993 WL 72388 (8th Cir. Mar. 17, 1993).

295. 916 F. Supp. 268, 270 (S.D.N.Y. 1995).

296. *Id.* at 270 n.3. A similar argument went nowhere in *Donahue v. Matrix Financial Services Corp.*, 86 F.3d 1161 (unpublished table decision), 1996 WL 266490 (9th Cir. May 17, 1996). In that case, the plaintiff, Donahue, produced a letter from the judge's law clerk to defendant Matrix's counsel and then argued that "as a[n] outcome of the district court law clerk's *ex parte* legal advice,

Equally ineffective was the plaintiff's motion to recuse Judge Gene Brooks's law clerk in *Johnston v. Amax Coal Co.*,[297] which Judge McKinney described as follows:

> On July 6, 1994, Defendant Amax Coal Company, Inc. ("Amax" or "Company") filed its motion for summary judgment, which Judge Brooks granted in an order dated August 11, 1995 ("August Order"). Subsequently, Plaintiff Charlotte Johnston filed a motion to reconsider coupled with a motion to recuse Judge Brooks' law clerk. Essentially, Judge Brooks had made the parties aware that one of his clerks, Kevin Patmore, had rendered substantial assistance in the behind-the-scenes analysis of the summary judgment motion. In an article appearing in the October 31, 1994 edition of the *Evansville Press,* this same clerk made certain comments regarding the admission of women to the Citadel. Because Patmore's comments reflected a negative view toward allowing women in a previously all-male institution—a situation somewhat analogous to Johnston's claim against Amax—Johnston feared that Patmore's personal views might have tainted the Court's analysis of the summary judgment materials. Accordingly, she requested that Judge Brooks personally reconsider Amax's motion. In an order dated August 30, 1996, Judge Brooks granted Johnston's motion to reconsider but refused her request to recuse Patmore from this reconsideration. Judge Brooks has since retired, and the matter has been reassigned to this Court.[298]

Unfortunately, at least for the development of law-clerk jurisprudence, Judge Brooks's retirement mooted the predicament posed by Patmore's purported pedagogical patriarchal prejudice.

D. Accusations of Incompetence

From the accusations in the previous section, that law clerks did things that law clerks are not supposed to do under any circumstances, I turn, in this section, to unsuccessful accusations by litigants that they were harmed in some way by law clerks engaged in permissible law-clerk activities, but who executed them poorly. In the first instance, parties have claimed that they are entitled to relief for procedural missteps because they were led into error by relying on the advice of law clerks. In the second instance, parties have claimed that they are entitled to relief because they said something or another to a law clerk which, in their

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the district court ruled in favor of [Matrix]." *Id.* at *3. Unfortunately for Donahue, "Matrix's counsel did not follow the law clerk's recommendation." *Id.* But why let a mere fact get in the way of a juicy argument?

297. 963 F. Supp. 758 (S.D. Ind. 1997).

298. *Id.* at 761–62.

view, was sufficient to put the court on notice of whatever it is they told the law clerk. Neither approach has much to recommend it.

1. Law Clerks Say the Darndest Things, or, The Law Clerk Made Me Do It[299]

The pages of the *Federal Reporter* are amply endowed, if not littered, with opinions soundly rejecting pleas for relief from litigants claiming that they made various procedural missteps because they were directed to do so by the law clerks on whom they relied for guidance.

In *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*,[300] the defendants "argued that the time for filing a motion under [Rule 4(a) of the *Federal Rules of Civil Procedure*] should be tolled because of their alleged reliance on statements of the trial judge's law clerk . . . ."[301] The court of appeals disagreed, on grounds that "[t]he ten-day limitation on the time for making such motions may not be waived by the trial judge."[302]

Judge Alvin Rubin, in *Environmental Defense Fund, Inc. v. Alexander*,[303] discussed in more substantive terms the perils of relying on law-clerk advice:

> The argument that the district court denied plaintiffs due process by giving assurances that laches was not an issue lacks any foundation in the record and is indeed belied by it. Buttressed only by factual affidavits filed in this court for the first time, in disregard of our function as an appellate court, one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the hearing and that all other issues including affirmative defenses would be heard later. We repeat the argument in order to give it express condemnation: courts speak to litigants by orders or minute entries or judgments or, on occasion, at conference in chambers. Ex parte communications with judges are generally disfavored. Code of Judicial Conduct for United States Judges, Canon 3 A(4). A fortiori, neither ex parte communication with a judge's clerks nor reliance upon such communication can be condoned.[304]

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299. And, yes, I do recognize the spiritual tension between "One Step Over the Line, Sweet Law Clerk" and "The Law Clerk Made Me Do It."

300. 579 F.2d 786 (3d Cir. 1978).

301. *Id.* at 790.

302. *Id.* (citing FED. R. CIV. P. 6(b)).

303. 614 F.2d 474 (5th Cir. 1980).

304. *Id.* at 480–81.

Judge Rubin's plain statement that reliance on law-clerk communications is no defense to a procedural error has not dissuaded other attorneys from running such arguments up the flagpole, only to watch, disappointed, as judges fail to salute.

In *United Coin Meter Company v. Seaboard Coastline Railroad*,[305] Judge Pierce Lively was moved to write: "As with the oral withdrawal of a written motion, the reliance on a conversation with the district judge's law clerk rather than the record in the clerk's office to determine the date of withdrawal is an unsatisfactory practice."[306] Similar arguments have failed in situations where an attorney "contend[ed] that he did not submit [certain medical] reports before the Magistrate issued his finding because the Magistrate's law clerk lulled him into a 'false sense of security' by representing that the Magistrate had a backlog of Social Security cases,"[307] and where a "clerk responded favorably [to an attorney's statement that he intended to seek an extension of the time to file motions] and, representing that he was speaking for the court, advised counsel that 'any reasonable extension beyond the three weeks would [also] be granted.'"[308]

And then there is this, from Judge Kathleen O'Malley, in a case involving application of the statute of limitations to members of the plaintiff class in a class-action lawsuit:

> Plaintiff's counsel argues that [a particular filing] date should govern because he informed one of the Court's prior law clerks that he was collecting consents for collective filing so as not to impose an administrative burden on the Court, and the Clerk effectively approved this procedure. The Court gives no weight to this argument. First, no law clerk would have the authority to approve a practice not authorized by applicable law. Second, law clerks in these chambers do not "authorize" any unusual procedures without first consulting the Court. And third, counsel has no right to seek legal

305. 705 F.2d 839 (6th Cir. 1983).

306. *Id.* at 843. *See also* McTevia v. Cape (*In re* Bryn Mawr Apts. of Ypsilanti, Ltd.), 815 F.3d 76 (unpublished table decision), 1987 WL 36486, at *3 (6th Cir. Feb. 27, 1987) ("Thus, even if the law clerk and the appellants *had* agreed over the phone to vacate the schedule, the appellants should have realized the necessity of filing a written motion to extend the time for filing their brief. Reliance on an *ex parte* conversation with the judge's clerk is not justified."); McKethan v. Tex. Farm Bureau, 996 F.2d 734, 739 n.10 (5th Cir. 1993) ("While we recognize that some courts permit communications with law clerks, they are not a substitute for the requisite papers to be filed with the court and notice or other response from it.").

307. Mobley v. Shalala, 50 F.3d 1032 (unpublished table decision), 1995 WL 136111, at *1 n.1 (5th Cir. Mar. 7, 1995).

308. United States v. Canova, 412 F.3d 331, 346 (2d Cir. 2005).

> advice from a law clerk; he has an obligation to research the law on his own.[309]

Notwithstanding the low batting average achieved by counsel arguing for relief based upon allegedly faulty law-clerk advice, an attorney brought that argument to the plate as recently as 2007, in *American Safety Indemnity Co. v. Official Committee of Unsecured Creditors* (*In re American Safety Indemnity Co.*).[310] Yet again, the argument struck out:

> The wisdom of *Bowles* is confirmed in this case by the mischief that would be spawned by excusing untimeliness on the basis of law clerk statements. Litigants should not seek legal advice from judges or judicial staff, and in any case, attorneys should know better than to rely on such advice. Moreover, ad hoc inquiries regarding purported advice are difficult to conduct, lead to uncertain results and meddle in the internal workings of judges' chambers.[311]

The rule is unmistakable: claiming to have been misled by bad advice from a law clerk is never a successful defense to a procedural mistake.

I conclude this section with what must be the most amazing example of misplaced reliance ever. In *United States v. Gonzalez*,[312] the defendant sought post-conviction relief from Judge Whitman Knapp, which he denied.[313] The case was then reassigned to Judge Michael Mukasey, before whom the defendant mounted an attack on Judge Knapp's order.[314] Among other things, Gonzalez "assert[ed] that Judge Knapp was not competent at the time he heard and decided" the motion for post-conviction relief.[315] Judge Mukasey found that argument devoid of merit.[316] He noted that before Judge Knapp decided the issue, he suggested he might reassign the case, and that, in response, Gonzalez's counsel vigorously objected, on grounds that Judge Knapp was "the only person in a position to assess the credibility of the witnesses who appeared . . . and make the appropriate findings of fact"[317] and was "uniquely positioned to make the factual findings necessary to apply the controlling legal principles."[318] Gonzalez's counsel then "most respectfully request[ed] that

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309. Whipkey v. R.R. Donnelley & Sons Co., No. 1:02CV1030, 2006 WL 840371, at *2 n.3 (N.D. Ohio Mar. 28, 2006).

310. 502 F.3d 70 (2d Cir. 2007).

311. *Id.* at 73 (citing Bowles v. Russell, 551 U.S. 205, 214 (2007)).

312. 421 F. Supp. 2d 727 (S.D.N.Y. 2006), *vacated in part by* 291 F. App'x 392 (2d Cir. 2008).

313. *Id.* at 730.

314. *Id.*

315. *Id.* at 735.

316. *Id.*

317. *Id.*

318. *Id.*

[Judge Knapp] see this motion through to its conclusion"[319] and closed his memorandum of law "with the 'sincere[ ] hope that [Judge Knapp] will maintain this motion on [his] docket and that [he] will make the factual findings necessary to resolve it.'"[320] While Judge Mukasey was perhaps amused by Gonzalez's dramatic one-eighty, he was not persuaded:

> In the reply memorandum in behalf of Gonzalez, Eisemann advances an explanation for this inconsistency that is, if anything, an even bigger jaw-dropper than the inconsistency itself. That reply memorandum, backed now by an affidavit, asserts, as did the initial memorandum that "Judge Knapp's law clerk deliberately telegraphed that Judge Knapp viewed defendant's *per se* conflict claim favorably," and, if this court thinks the obvious contradictions between the 2003 correspondence [asking Judge Knapp to decide the issue] and Gonzalez's current position are material, seeks a hearing at which counsel would prove the "subjective motivation" for their letters to Judge Knapp, as follows:
>
> > It was certainly not because they believed Judge Knapp was mentally competent at the time. Instead, it was because they believed he had already decided to rule in defendant's favor at a time when he had still been competent and had made that clear to his law clerk and counsel expected chambers to follow that direction.
>
> In other words, Eisemann and Young seek a hearing where they would establish that both of them lied to a court once in order to protect an anticipated victory, but that they would not lie to a court again in order to reverse an actual defeat.
>
> Although there may exist somewhere on this globe a tribunal that could summon just the right blend of cynicism and naivete necessary to support that finding, our law provides a doctrine to make sure that this tribunal isn't it. That doctrine is called judicial estoppel . . . .[321]

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319. *Id.*

320. *Id.*

321. *Id.* at 735–36 (citation to the record omitted). Judge Mukasey further seasoned his already spicy exegesis with this footnote:

> I leave lying where it fell Eisemann's suggestion that if Judge Knapp "had already decided to rule in defendant's favor when he had still been competent and had made that clear to his law clerk," it was the proper function of "chambers"—otherwise unidentified—to file an opinion in Judge Knapp's name later on embodying that decision, whether or not Judge Knapp was competent to sign it.

Id. at 736 n.1 (citation to the record omitted).

2. If I Told You Once . . ., or, The Law Clerk Should Have Done It

The key lesson of the previous section is that the mouth of a law clerk is not the mouth of the court. In this section, I focus on cases in which litigants have learned, to their detriment, that the ears of a law clerk are not the ears of the court.

In *Glenn v. Cessna Aircraft Co.*,[322] the appellant argued, on appeal from a jury verdict in favor of the defendant, "that the trial court erred in limiting the time for opening statement and closing argument."[323] The court of appeals began its analysis by considering "whether plaintiffs sufficiently preserved the issue for appeal,"[324] and held that they did not:

> Although no objection to the court's limitations on opening statement and closing argument appear in the record, plaintiffs assert that they raised a sufficient objection with the trial judge's law clerk. Plaintiffs allege that an objection to the limitations was pursued with the law clerk pursuant to the court's instructions and that the clerk reported that the judge denied plaintiffs' request for additional time. Reliance upon a law clerk to resolve such matters, generally, is improper.[325]

Similarly, as the Fifth Circuit once explained, objections to jury instructions are not preserved when made only to a law clerk:

> A "formal objection is not necessary if the trial judge was fairly apprised of the nature of the objection." Appellants objected to the instructions "to the extent any charge [they] requested was not given by the Court." This is little more than a nod to Rule 51; it is not sufficient to inform the trial court of a perceived problem. Appellants also suggest that they objected to the materiality instructions in a conference with the district court's law clerk. Such communication with a law clerk may assist the court in its preparation of the charge. It is not a legally sufficient objection. Moreover, this "conference" with the law clerk was not included in the record on appeal. In sum, we find no adequate objection and without an objection, we will listen only to plain error.[326]

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322. 32 F.3d 1462 (10th Cir. 1994).

323. *Id.* at 1464.

324. *Id.*

325. *Id.* (citing Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990)).

326. Bolton v. Tesoro Petroleum Corp., 871 F.2d 1266, 1272 (5th Cir. 1989) (quoting Bass v. U.S. Dep't of Agric., 737 F.2d 1408, 1413 (5th Cir. 1984)).

The issue in *United States v. Combs*[327] concerned the court's responses to a pair of questions posed by the jury during its deliberations.[328] After the jury sent out its questions:

> The court, through its law clerk, notified counsel for all parties that it was inclined to answer "yes" to the first question, and "no" to the second. The law clerk directed counsel to submit any comments or objections to the proposed responses to him, rather than to the court. The record does not reflect any such objections, although the defendants unsuccessfully attempted to supplement the record after trial with an objection purportedly given to the law clerk by [defense] counsel.[329]

The trial court gave the responses the law clerk had discussed with counsel, and the jury convicted the defendants on one of the four counts against them.[330] On appeal, they argued that the court erred in its response to the jury questions, but the court of appeals held that the objection had not been properly preserved:

> During oral argument, Snow's counsel contended that she had attempted to object to the proposed supplemental instructions by communicating her comments to the district judge through his law clerk. Both counsel admitted, however, that they never asked to have the district judge take the bench, nor did they otherwise try to create a record of their objections, if any. Despite claimed obstacles, it always is the duty—and right—of trial counsel to make a *verbatim* record on any matter germane to the trial, particularly matters as vital as objections to jury instructions and supplemental instructions.
>
> Here, the record does not reflect any attempt to create a contemporaneous record articulating objections to the proposed supplemental instructions. Allegations by Snow's counsel, long after the fact, that she lodged an objection with the district judge's law clerk cannot suffice to preserve her objection.[331]

If you want the judge to hear something, tell it to the judge. Accept no substitutes. And if you want something filed, send it to the folks who file things:

> As to Plaintiff's first request, Plaintiff states that he mailed copies of his brief to chambers on April 25, 2005, with a note asking

327. 33 F.3d 667 (6th Cir. 1994).
328. *Id.* at 668.
329. *Id.*
330. *Id.* at 669.
331. *Id.*

> the Judge's law clerk to file a copy with the Clerk's office. The brief was not filed until June 20, 2005 and Plaintiff asks that the date on which it was filed be changed to April 25, 2005, the date it was mailed. Under L. Civ. R. 7.1(d)(3) the moving party is responsible for delivering a reply brief to the Clerk's office. The judge's law clerk is not responsible for filing papers that are mailed directly to chambers. Therefore, Plaintiff's first request is denied.[332]

Law clerks do a lot, but we don't do filing.[333]

IV. CONCLUSION

So there you have it, the remarkably short (dis)Honor Roll of law clerks who have gone astray on their own, the somewhat longer list of law clerks who took missteps at the behest of their judges, and a sizeable collection of cases in which litigants or their attorneys have tried, unsuccessfully, to gin up issues based on law-clerk conduct. Practically speaking, this Article provides a very small helping of very obvious advice for once and future trial-court law clerks (i.e., don't convene court as in *Riley*, and don't conduct freelance investigations as in *Kennedy*), and exactly half as much advice for current and prospective appellate law clerks (i.e., don't leak draft opinions to the press as in *Lamprecht*). But that's a rather paltry payoff for all the effort you've invested in reading this far. Perhaps, however, the fact that this Article appears to have little value as an appendix to the Law Clerk Code of Conduct makes a more important point. Commentators have had plenty to say about the deleterious effects of the rise of the clerkigentsia.[334] But, based on my research, the really scary law clerks are entirely fictional. Law-clerk conduct that threatens the basic integrity of the American legal system is all but absent from the pages of the *Federal Reporter* and the *Federal Supplement*, and can be found only on the fiction shelf, in books such as *The Simple Truth*,[335] *9 Scorpions*,[336] and *The Tenth Justice*.[337] That might be a small comfort, but it's nothing to sneeze at in a day and age when integrity can sometimes seem in short supply in both the public and private sectors.

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332. Walzer v. Muriel Siebert & Co., No. 04-5672 (DRD), 2006 WL 454368, at *1 (D.N.J. Feb. 23, 2006).

333. And, at least in the courthouses where I've worked, we don't do windows, either.

334. *See, e.g.*, Wichern, *supra* note 191.

335. DAVID BALDACCI, THE SIMPLE TRUTH (1998) (Supreme Court law clerk intercepts petition for certiorari in the mail room, before it can be filed with the court).

336. PAUL LEVINE, 9 SCORPIONS (1998) (Supreme Court law clerk seduces her judge in order to influence the outcome of a case before the Court for her former lover).

337. BRAD MELTZER, THE TENTH JUSTICE (1997) (Supreme Court law clerk leaks the result in a pending case prior to publication of the Court's opinion).