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TRUTHINESS AND THE MARBLE PALACE

Chad M. Oldfather^{*}

Todd C. Peppers^{**}

INTRODUCTION

Tucked inside the title page of David Lat's *Supreme Ambitions*, just after a note giving credit for the cover design and before the copyright notice, sits a standard disclaimer of the sort that appears in all novels: "This is a work of fiction. Names, characters, places, and events either are the products of the author's imagination or are used fictitiously. Any resemblance to actual persons, living or dead, events or locales is entirely coincidental."¹ These may be the most truly fictional words in the entire book. Its judicial characters are recognizable as versions of real judges, including, among others, Alex Kozinski, Goodwin Liu, Stephen Reinhardt, Antonin Scalia, and Clarence Thomas. Real-life bloggers including Tom Goldstein and Howard Bashman appear as themselves,² and a blog called *Beneath Their Robes*, a clear reference to the blog that was Lat's initial claim to fame³ (this time run by one of the protagonist's bitter rivals) play a pivotal role in the plot.⁴

Supreme Ambitions' observations about judging, clerking, prestige and the culture of elite law schools likewise reflect core truths, albeit via storylines and characters that are often exaggerated almost to the point of caricature. The result is a strong form of what Stephen Colbert calls "truthiness."⁵ This is not a

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¹ DAVID LAT, *SUPREME AMBITIONS* (2015).

² *Id.* at 121.

³ See Jonathan Miller, *He Fought the Law. They Both Won*, N.Y. TIMES (Jan. 22, 2006), <http://www.nytimes.com/2006/01/22/technology/22njCOVER.html>; Jeffrey Toobin, *SCOTUS Watch*, NEW YORKER, Nov. 21, 2005, <http://www.newyorker.com/magazine/2005/11/21/scotus-watch>.

⁴ See LAT, *supra* note 1.

⁵ See Nathan Rabin, *Stephen Colbert*, A.V. CLUB (Jan. 25, 2006, 1:26 PM), <http://www.avclub.com/article/stephen-colbert-13970> (Colbert has defined truthiness as follows: "It used to be, everyone was entitled to their own opinion, but not their own facts. But that's not the case anymore. Facts matter not at all. Perception is everything. It's certainty."); see also Ben Zimmer, *Truthiness*, N.Y. TIMES MAG. (Oct. 13, 2010), <http://www.nytimes.com/2010/10/17/magazine/17FOB-onlanguage-t.html> ("What he was driving at wasn't truth anyway, but a mere approximation of it—something *truthish* or *truthy*, unburdened by the factual.").

handbook for budding law clerks or newly appointed judges. It is instead an entertaining tale of legal egos run amok, a distorted picture of reality seemingly designed to invite the reader to reflect critically on all that it surveys.

Among the more clichéd pieces of advice to those who would write fiction is “write what you know.” Clichés, however, attain that status for a reason, and *Supreme Ambitions* bears that out. David Lat knows this material, and there is perhaps no person to whom the cliché would better apply when the topics are judges, clerkships and status. Lat gained his initial fame as the anonymous “Article III Groupie,” who published the blog *Underneath Their Robes*,⁶ which was dedicated to “[n]ews, gossip, and colorful commentary about the federal judiciary.”⁷ From there Lat moved to the blog *Wonkette*,⁸ and then *Above the Law*,⁹ where he remains a keen observer of the federal bench, with extra emphasis on the Supreme Court and what he refers to as “the Elect”—those selected as clerks for the justices.¹⁰ Finally, Lat knows the highs and lows of the clerkship process, having succeeded in obtaining a prestigious federal appeals court clerkship while failing to earn a clerkship on the Supreme Court.¹¹

Supreme Ambitions tells the story of Audrey Coyne, a young Yale law student (whose biography bears more than an incidental similarity to Lat’s)¹² gripped with the fervent desire to clerk on the Supreme Court.¹³ Audrey’s path to a Supreme Court clerkship runs through the chambers of Judge Christina Wong Stinson, a federal court of appeals judge with her own covetous eye on the Supreme Court.¹⁴ Judge Stinson’s motto is “[t]o be a successful professional woman, you need to be a little monstrous”—a theory which Audrey puts to the test as she uses sex, alcohol, and blackmail in pursuit of a clerkship with the nation’s highest court.¹⁵

⁶ See UNDERNEATH THEIR ROBES, <http://underneaththeirrobes.blogs.com> (last visited Dec. 14, 2015)

⁷ *Id.*

⁸ WONKETTE, <http://wonkette.com> (last visited Dec. 14, 2015).

⁹ ABOVE THE L., <http://abovethelaw.com> (last visited Dec. 14, 2015).

¹⁰ See Toobin, *supra* note 3.

¹¹ *Id.*

¹² Compare Miller, *supra* note 3, with LAT, *supra* note 1, at 1–4.

¹³ LAT, *supra* note 1, at 25, 87.

¹⁴ Judge Stinson does not directly state her ambition, but its existence is strongly implied. *Id.* at 25–26, 84–85, 103.

¹⁵ *Id.* at 136, 147–51, 188–90.

Writing a book about judicial clerks presents an immediate difficulty for an author. The authors of this Essay both served as clerks, and understand the challenges inherent in explaining the job to those who are unfamiliar with it. The job's title is an immediate source of confusion, since "clerk" typically connotes a clerical position rather than one with significant responsibilities.¹⁶ Lat uses two characters as devices to explain the role of the clerk and otherwise set the stage for the tale of boundless ambition.¹⁷ The book opens with Audrey walking to a pizza joint while engaged in a phone call with her mother, reporting the news that she will soon be flying to Los Angeles to interview with a federal appeals court judge.¹⁸ The plot device succeeds in introducing the reader to the concept of a judicial clerkship and the processes of obtaining one, though the prose is occasionally clunky. During the call, Audrey's mother transitions from a position of near-complete unfamiliarity with, and confusion about, the world of elite law firms and clerkships ("Audrey, I don't understand why you want to do this 'clerky' thing")¹⁹ to lecturing Audrey on the quality of her credentials—complete with a clumsy reference to the alleged cinematic preferences of Justice Clarence Thomas ("Of course a supreme judge will want to hire you. Like that black one, the one who likes the dirty movies. Ha!").²⁰

At the restaurant Audrey meets her law school classmate, friend, and fellow *Yale Law Journal* articles editor Jeremy Silverstein.²¹ This conversation, too, sets up some key aspects of the clerkship application process.²² The two are able to discuss their applications with one another because they are neither romantically involved (Jeremy is "cute" but gay, much to Audrey's disappointment) nor clerkship rivals.²³ They are instead what serves at Yale Law as political opposites—he is liberal and she, as a moderate, counts as conservative.²⁴ Because applicants typically apply to judges who share their political and jurisprudential philosophies, they are not in competition for the same positions.²⁵ Audrey and Jeremy are foils in other ways as well.²⁶ She is a

¹⁶ *Id.* at 1–2.

¹⁷ *See generally id.*

¹⁸ *Id.* at 1–10.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 4.

²¹ *Id.* at 4–5.

²² *See id.* at 5–10.

²³ *Id.* at 5.

²⁴ *Id.* at 4.

²⁵ *Id.* at 5; see Stephen L. Wasby, *Why Clerk? What Did I Get Out of It?*, 56 J. LEGAL EDUC. 411, 413 (2006).

child of the working class, the daughter of an Irish father and an immigrant Filipina mother.²⁷ He is a child of privilege, with a father who is the managing partner of Jenner & Block and a mother on the University of Chicago law faculty.²⁸ Their conversation about their pending interviews allows for a discussion of the relative prestige of courts, the implications of geography, the notion of “feeder court judges” (those judges who consistently send their clerks onto the Supreme Court) and contrasting judicial philosophies.²⁹ The following exchange illustrates the latter point:

[Audrey:] “Judge Stinson [(Audrey’s dream judge)] and her allies just want to interpret the law faithfully, to apply the law as written. It’s not a matter of pushing an agenda, from the left or the right. It’s about the text of the Constitution, the statutes, and the precedents. The job of the judge is to apply the law to the facts.”

[Jeremy:] “Oh, Audrey, don’t be so naïve. ‘The law’ isn’t some pure thing floating out there in the ether. What ends up being ‘the law’ is affected by a million things other than the text. . . . It’s affected by how the judges interact with the lawyers, and with each other. And yes, like it or not, it’s affected by the political beliefs and policy preferences of the judges. Hell, as the old saying goes, sometimes the law depends on what the judge had for breakfast.”³⁰

This give-and-take over pizza foreshadows the education that awaits the ambitious but idealistic Audrey, and effectively introduces the issues that the book explores. *Supreme Ambitions* raises a host of important questions, extending into most facets of the judicial process, and thus presents many potential angles of approach for reviewers. We are not literary critics, but rather academics who study judicial behavior and institutions. The old adage “write what you know” applies to us too, and so we will primarily address the following two sets of issues raised by the book: First, we consider the book’s reflections on some of the broader pathologies of legal education and the legal profession, including the elitism and ambition that pervade many corners of the legal world, as well as the book’s treatment of challenges faced by women judges and lawyers. Second, we explore the book’s depiction of the processes of judging, including its specific treatment of the clerkship institution, and the implications of clerks and their role for the doing of the work of the judiciary.

²⁶ See LAT *supra* note 1, at 1–4, 9.

²⁷ *Id.* at 1–4.

²⁸ *Id.* at 9.

²⁹ *Id.* at 5–10.

³⁰ *Id.* at 9–10.

I. PRESTIGE AND ELITISM

Supreme Ambitions reflects the status obsession that pervades the legal profession, and the many contexts in which it manifests itself. It begins even before law school, with the *U.S. News & World Report* rankings casting a long shadow over colleges and graduate schools alike.³¹ Because law school deans face steep consequences in connection with a fall in the rankings,³² a wide range of administrative decisions reflect a calculus driven by the *U.S. News* formula.³³ That formula includes a reputation component, determined by surveying a subset of law faculty nationwide, which has contributed to if not caused the reality that most new faculty members across the run of law schools are graduates of a handful of elite law schools.³⁴ These people tend almost by definition to be socialized to value prestige and the accumulation of a standard set of brass rings. In the meantime, the reputedly high status segment of this world remains insular and closed. The crassness of Internet discourse is such that one could be forgiven for imagining that there are two types of law schools—the “T14” (those schools that have held a lock on the top spots since the rankings’ inception), and the vast, undifferentiated “TTTs” (the category of “third-tier toilets” that seems, according to the common usage, to be at best loosely tied to an actual ranking in the third-tier).³⁵

³¹ See generally Amanda Griffith & Kevin Rask, *The Influence of the U.S. News and World Report Collegiate Rankings on the Matriculation Decision of High-Ability Students: 1995–2004*, 26 ECON. EDUC. REV. 244 (2007).

³² See, e.g., Mary Moore, *Law School Deans Mull Declines in U.S. News Rankings*, BOS. BUS. J. (Mar. 17, 2014, 10:54 AM), <http://www.bizjournals.com/boston/news/2014/03/17/law-school-deans-mull-declines-in-u-s-news.html>; Elie Mystal, *Some Students Want Their Deans Fired After Poor Showing In The U.S. News Rankings (And One Head That’s Already Rolled)*, ABOVE THE L. (Mar. 14, 2013, 11:20 AM), <http://abovethelaw.com/2013/03/some-students-want-their-deans-fired-after-poor-showing-in-the-u-s-news-rankings-and-one-head-thats-already-rolled/>.

³³ See, e.g., Olufunmilayo B. Arewa, Andrew P. Morriss & William Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 1006 (2014) (“Although some consequences of the law school ranking competition, such as reduced student/faculty ratios, are likely positive, many law schools spend considerable effort gaming *U.S. News* rankings. This effort is in large part a consequence of this ‘arms race’ that has characterized law schools’ responses to *U.S. News* rankings.”). Some of those decisions go too far. See, e.g., Jodi S. Cohen, *A University of Illinois Law Dean Resigns After Report Details Manipulations of Admissions Data*, CHI. TRIB. (Nov. 8, 2011), http://articles.chicagotribune.com/2011-11-08/news/ct-met-u-of-i-law-school-1108-20111108_1_isat-score-test-scores-data-analysis.

³⁴ See, e.g., Scott Jaschik, *Hiring Themselves*, INSIDE HIGHER ED (Nov. 13, 2013), <https://www.insidehighered.com/news/2013/11/13/study-finds-law-schools-perpetuate-elite-legal-education-values-faculty-hiring>.

³⁵ See, e.g., Bitter Staff, *Eight Hallmarks of a TTT Law School*, BITTER EMPIRE (Apr. 10, 2009), <http://bitterempire.com/eight-hallmarks-of-a-ttt-school/>.

Given how entrenched these perceptions seem to be within the law school world, it is hardly surprising that this dynamic extends beyond the walls of the law schools. Credentials do not entirely determine one's career, but there is no doubt that one fights an increasingly steep uphill battle as the entries on one's resume become less impressive. Large law firms—"Biglaw," as they have come to be known³⁶—likewise tend to draw from the elite schools. And while many, perhaps even most, large law firms will hire from local or regional law schools, it is comparatively more difficult to land such a position from the latter.³⁷ A firm that might be willing to look at candidates from the top half of Harvard's class, perhaps generously defined, will look at only the top handful from the third-tier school across town. Anecdotes suggest that the effect persists beyond initial entry into the job market, such that some positions effectively remain off-limits for graduates of non-elite schools.³⁸

Unsurprisingly, this obsession with prestige extends into the clerkship process. This is easy to appreciate from the perspective of the aspiring clerk. Some courts and judges are more prestigious than others, and thus are inherently more desirable to the competitive, Type-A people who tend to seek clerkships. Those clerkships in turn provide an advantage when it comes to getting subsequent jobs, whether at a top law firm or as a law professor.³⁹ Because of the perceived stakes, clerkship applicants try to strategically sequence their interviews in an effort to avoid having an offer from a less desirable judge before an interview with a more desirable one.⁴⁰ (Turning down an offer is generally viewed as bad form.)⁴¹ Less obviously, perhaps, the effects appear on the hiring side of the process as well, as judges compete with one another for the best clerks, with "best" defined in terms of a cluster of markers of prestige: law school, class rank, position on law review, and recommendations from appropriately connected professors.⁴²

³⁶ See, e.g., Sekicho, Post to *Biglaw*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=biglaw> (last visited Dec. 15, 2015).

³⁷ See Arewa et al., *supra* note 33, at 1014–15.

³⁸ See, e.g., William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, ABA J. (July 1, 2012), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession/.

³⁹ See, e.g., Marcia Coyle, *This Year's Squadron of High Court Clerks*, NAT'L L.J., Oct. 9, 1989, at 16.

⁴⁰ George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123, 156 (2005).

⁴¹ See Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1768 (1995).

⁴² Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 MARQ. L. REV. 313, 317 (2014). A recent survey of federal appeals court judges reveals that law school ranking as one of the most important

This should not surprise us. The judicial role is structured so as to remove most of the incentives that exist in other jobs, such as the prospect of merit-based raises or, for most judges, promotion.⁴³ The thinking behind this is noble—that judges will feel free to follow the law wherever it leads them. But the competitive urge is not so easily eliminated, at least for some judges, and manifests itself in other areas, including the competition for clerks.⁴⁴

The process perpetuates itself as the clerkship then becomes another marker of prestige. Law firms pay large bonuses to new associates coming out of clerkships, because having a large number of former clerks around boosts the prestige of the firm.⁴⁵ In the last year alone, bonuses for former Supreme Court law clerks have reached a staggering three hundred thousand dollars.⁴⁶ The marker persists through a career. The plum clerkship is no guarantee of sustained success, but even those whose subsequent professional lives are undistinguished retain a certain “could have been a contender” aura that distinguishes them from the run of their colleagues. The discussion so far has omitted one key point. The phenomena we have discussed relate almost exclusively to federal court clerkships. That is where the prestige lies. State court judges and clerkships, in contrast, are, to quote no less an authority than David Lat’s alter ego Article Three Groupie, “ghetto” and “icky.”⁴⁷

Supreme Ambitions captures all of this, from the perspective of both the judges and the clerks. And it not only captures the existence of these biases but also the extent to which they permeate certain corners of the legal profession. Those who find themselves at the top of the class at elite law schools tend to be the sort of people who have a talent and a taste for the academic game, and who have accordingly scooped up all the available accolades on their journey.

factor in the selecting process. Other important variables include law school rank and law review experience.
Id.

⁴³ See RICHARD A. POSNER, *HOW JUDGES THINK* 139–40 (2008) (noting that the federal judicial role is created in such a way as to minimize the operation of incentives and constraints, which “creates a space for weak ones to influence behavior. People care about their reputation even when it is not a potential source of tangible rewards”).

⁴⁴ David Margolick, *Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust*, N.Y. TIMES, Mar. 17, 1989, at B4. For a defense of the “undignified” competition amongst judges for clerks, see Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991).

⁴⁵ Charles Lane, *Former Clerks’ Signing Bonuses Rival Salaries on the High Court*, WASH. POST, May 15, 2006, at A15; David Lat, *The Supreme Court’s Bonus Babies*, N.Y. TIMES (June 18, 2007), <http://www.nytimes.com/2007/06/18/opinion/18lat.html>.

⁴⁶ *Supreme Desire: The Curiously Strong Market for Supreme Court Clerks*, ECONOMIST (Aug. 17, 2013), <http://www.economist.com/news/business/21583667-curiously-strong-market-supreme-court-clerks-supreme-desire>.

⁴⁷ See Miller, *supra* note 3.

Given all this, it is unsurprising that law students and judges should conspire to bring about a world featuring hierarchies and jockeying for position on them. Many positions on the hierarchy are debatable. Is the Second Circuit better than the Ninth? Than DC? (We do know that “[t]he Ninth wasn’t as uniformly prestigious as, say, the D.C. Circuit.”⁴⁸) Where does the Seventh fit in? When does a district court clerkship beat out one on a circuit court?

This debate is reflected in the book’s early conversation between Audrey and Jeremy. Upon learning that Audrey applied to a federal trial court judge, Jeremy is quick to observe that “district court is district court, and circuit court is circuit court. In district court, you’ll spend all your time dealing with crap like motions practice and discovery disputes. . . . [w]ouldn’t you rather be clerking for an appeals court, drafting opinions on big sexy issues of law?”⁴⁹ While Audrey denounces Jeremy as a “snob,” she admits to herself—and the reader—that

some people at Yale, both professors and students, quietly looked down upon district-court clerkships. There were some exceptions to this rule—it was okay to go district if you really wanted to be a trial lawyer, if you clerked for the right judge on the right district, if you followed it up with an appeals-court clerkship—but it generally held true.⁵⁰

Jeremy is much more impressed with the fact that Audrey has also applied to Judge Stinson, although Jeremy adds that Stinson is a “[f]eeder judge to the Dark Side.”⁵¹

From the judges’ side, too, one imagines a largely unspoken array of factors. What’s better, highest GPA or editor-in-chief of the law review? Does a strong letter of recommendation from a faculty superstar trump everything else? And in both cases it seems clear that much of what creates desirability is the fact that everybody else seems to want it.⁵² Certain judges and certain students will become highly sought after, sometimes, it seems, for no reason beyond the fact that they developed an initial aura of desirability that became

⁴⁸ LAT, *supra* note 1, at 2.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Laurie A. Lewis, *Clerkship-Ready: First-Year Law Faculty Are Uniquely Poised to Mentor Stellar Students for Elbow Employment with Judges*, 12 APPALACHIAN J.L. 1, 21 (2012).

self-fulfilling.⁵³ Just as our society has its Hiltons and Kardashians—members who are famous simply for being famous—so, too, in the world of law.

Whatever the precise nature of the scrum in the lower federal court hiring process, everyone—students and judges alike—understands that the Supreme Court is the place where all egos are gratified. The judges dream of one day being elevated, or at the very least becoming known as a “feeder” judge—the sort who reliably sends clerks on to One First Street.⁵⁴ From the ambitious applicant’s perspective, landing a position with a feeder judge trumps all other considerations.⁵⁵ Pick your improbable state, and if a circuit court judge located there has a track record of placing clerks on the Supreme Court, the world—or at least the Type-A, elite-law-school-educated segment of it—will beat a path to her door. Of course, landing a clerkship with a feeder judge serves to bring about yet another round of competition. Because no feeder judge has a perfect track record, only some clerks get to take the big, next step. As a result, the clerks must compete among themselves to gain the favor of the judge in the hopes that they will be the one who gets fed.

Judges are surely aware of their clerks’ ambitions, and those ambitions of course provide a substantial incentive for clerks to produce good work and put in long hours. In Judge Stinson, Lat has created a boss who uses manipulation and contrived competition to spur her clerks to work longer and harder.⁵⁶ After admonishing Audrey for forgetting to italicize a period after the “id” citation in a draft opinion, Judge Stinson warns her chastised clerk that a recommendation for a Supreme Court clerkship is a glittering prize which must be earned:

When I recommend one of my clerks to the Supreme Court, I am putting my credibility on the line. I am making a representation and a warranty. I am telling the justices: this is a clerk who is self-sufficient. This is a clerk who knows how to do the job.⁵⁷

There is something unsavory about all this competition and elitism, as well as the assumptions underlying them. *Supreme Ambitions* does not overlook this. The primary vehicle of critique is a character named Harvetta Chambers.⁵⁸

⁵³ See *id.*

⁵⁴ See Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 295 (2014).

⁵⁵ See Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 MARQ. L. REV. 181, 217 (2014).

⁵⁶ See LAT, *supra* note 1, at 87.

⁵⁷ *Id.*

⁵⁸ See *id.* at 31–34.

Audrey's descriptions of her run heavy on the stereotypes.⁵⁹ Harvetta is an African-American woman whose mannerisms (Harvetta slaps her "prodigious thighs" when she laughs) and profane dialogue (phrases like "are your ears as small as your tiny white ass" and "[y]ou were just checking out my big black booty" are par for the course, and the F word is thrown around with reckless abandon)⁶⁰ leave the reader uncertain whether to regard her as simply crudely drawn or rather so overdrawn as to caricature the sort of lazy stereotyping that Audrey exhibits.

Audrey first encounters Harvetta while the latter is reading a copy of the *Stanford Law Review* by the pool in the apartment building where they both live.⁶¹ Their meeting foreshadows much of the dynamic that will develop between them. Audrey stands, staring through the gate around the pool area, unsure what to make of a large African-American woman in a polka dot bikini reading a law journal.⁶² As she debates how to approach the situation, the gate she is leaning on gives way and Audrey loudly stumbles through. Harvetta responds with what registers to Audrey as a confrontational, "Girl, what you looking at?"⁶³ When Audrey, rendered speechless, does not respond, Harvetta pushes again, asking "are your ears as small as your tiny white ass?"⁶⁴ Audrey responds with a smile, an extended hand, and an apology—which Harvetta accepts by playfully suggesting that Audrey was "just checking out [her] big black booty."⁶⁵ Relieved, Audrey wonders to herself whether Harvetta would become her "Sassy African American Friend."⁶⁶

Underestimating Harvetta becomes a habit for Audrey. Harvetta turns out to be a graduate of McGeorge Law, which Audrey has barely even heard of, and a clerk for a state-court judge, which is likewise something with which Audrey is only vaguely familiar.⁶⁷ This continues throughout the book—even as Harvetta feeds Audrey the legal theories she needs to stand out in her

⁵⁹ *Id.*

⁶⁰ *Id.* at 31–33.

⁶¹ *Id.* at 30–31.

⁶² *Id.* at 31.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 32.

clerkship,⁶⁸ Audrey condescendingly wonders to herself whether Harvetta has even heard about Supreme Court clerkships.⁶⁹

Most puzzling of all to Audrey is the seeming purity of Harvetta's motives. Early in their first conversation Audrey references Harvetta's choice of reading material by the pool—"No offense to the *Stanford Law Review*, but I go with *Us Weekly* when working on my tan."⁷⁰ It's an early suggestion that Harvetta is motivated by a love of the law. She—who attended McGeorge despite her incredibly high GPA and LSAT score because her advisors were not very knowledgeable⁷¹—reads law review articles because she enjoys them, and she regards her clerkship as a job that happens to be interesting rather than as a marker of prestige.⁷² Audrey, meanwhile, is focused on the superficial, motivated by the desire to acquire status even as she parrots lines about judicial restraint and the honor of following the law.⁷³ She attributes her failure to get a Rhodes scholarship to her stomach growling during the interview, and regrets it because a Rhodes scholarship is the sort of thing that "gets mentioned in your obituary."⁷⁴

The cumulative effect is to lead the reader to question elite legal culture and its obsession with prestige, whether in the context of the law school, the clerkship, or beyond. It is a surprising thing coming from David Lat—a graduate of Harvard College and Yale Law, a former Ninth Circuit clerk who did not quite make it to the Supreme Court,⁷⁵ a person whose livelihood centers around the chronicling and celebrating of status and prestige.⁷⁶ Yet it is an effective critique, and it should leave the attentive reader mulling over Audrey's priorities.

There is another wrinkle, however, which arises from the fact that most of the main characters in the book are minority women who did not grow up in privileged circumstances. Both Audrey and Judge Christina Wong Stinson are biracial children of modest origin with mothers who were nurses' aides.⁷⁷ The latter two want desperately to move up in a world that applies double standards

⁶⁸ *E.g., id.* at 78–79.

⁶⁹ *See id.* at 34, 111, 172

⁷⁰ *Id.* at 31.

⁷¹ *Id.* at 64.

⁷² *Id.* at 31–32.

⁷³ *Id.* at 23, 178, 230–31.

⁷⁴ *Id.* at 11–12.

⁷⁵ Miller, *supra* note 3.

⁷⁶ *Id.*; *see generally* ABOVE THE L., <http://abovethelaw.com> (last visited Dec. 15, 2015)

⁷⁷ LAT, *supra* note 1, at 12, 26–27.

to ambitious women.⁷⁸ And their ambition is unbounded, a point Judge Stinson makes clear (for the first time) during Audrey's interview by admonishing her that "[t]here is *always* somewhere else to go."⁷⁹ A short while later Audrey tells Judge Stinson, "I'm you. I'm smart, I'm ambitious, and I'm relentless. I came up from a humble background and made something of myself. Some people underestimate me—they expect me, as an Asian American woman from modest means, to be some sort of wallflower—but then I prove them wrong. Big time."⁸⁰

So begins a mentoring relationship that flourishes early in Audrey's clerkship, and that reaches its apex in a meeting between them shortly before Audrey is scheduled to interview with a Supreme Court Justice.⁸¹ Audrey asks Judge Stinson whether it is ethical to take "advantage of someone's feelings to get ahead professionally."⁸² Judge Stinson crisply assures her that it is par for the course.⁸³ "This is the legal profession. People use other people all the time; it's called billing by the hour. Clients use their lawyers, lawyers use their clients, and everyone uses everyone else. You need to use everything in your power to get ahead, because rest assured your rivals are doing the exact same thing."⁸⁴ The message is that selfish, mercenary behavior is what it takes to get a Supreme Court clerkship. Or so it seems.

II. THE PROCESSES OF JUDGING AND THE TREATMENT OF THE CLERKSHIP INSTITUTION

For all the cynicism that pervades legal education and the profession more generally, and despite the fact that "we are all realists now,"⁸⁵ the culture of the law remains one that regards judges as somewhat Olympian figures. Perhaps this is part wishful thinking and part acknowledgement of raw power. Perhaps it is born out of a sense that judges truly are different, whether because judicial selection processes manage to produce the right people for the job, or because the structures, processes, and customs of the role, from the robes to the codes of ethics, channel judges' behavior toward some dispassionate ideal. Whatever

⁷⁸ LAT, *supra* note 1, at 99–100, 132, 135.

⁷⁹ *Id.* at 25–26.

⁸⁰ *Id.* at 27.

⁸¹ *Id.* at 198.

⁸² *Id.* at 199.

⁸³ *Id.*

⁸⁴ *Id.* at 199–00.

⁸⁵ See, e.g., Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 & n.2 (2005) (citing various authorities for the formulation).

it is, we, as lawyers, are conditioned to respect and defer to judges. Even Yale Law School teaches that one must “always laugh at a judicial joke (or anything resembling one).”⁸⁶

Of course, that deference is not blind. Because we are all Realists, we understand that judges cannot be thoroughly neutral arbiters of law, both because of the law’s underdeterminacy⁸⁷ and because judges, as fallible human beings,⁸⁸ are susceptible to bias and other hidden influences. Judges, like the rest of us, often resort to mental shortcuts, *heuristics* that reliably skew thought away from what rationality would dictate.⁸⁹ What is more, a tremendous amount of research reveals a strong relationship between the ideological preferences of judges and the ideological valence of their decisions, even when those things are quite crudely determined.⁹⁰ What is unclear is whether, and to what extent, this relationship is the product of manipulation designed to achieve personal goals or preferred policy outcomes versus, in one alternative formulation, a subconscious connection between some underlying set of values and the way in which judges interpret legally significant facts.⁹¹

Nearly a century ago Justice Cardozo acknowledged

the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.⁹²

⁸⁶ LAT, *supra* note 1, at 20.

⁸⁷ See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987).

⁸⁸ See, e.g., Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125 (2007).

⁸⁹ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

⁹⁰ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

⁹¹ See generally Dan M. Kahan, “*Ideology in*” or “*Cultural Cognition of*” *Judging: What Difference Does it Make?*, 92 MARQ. L. REV. 413 (2009).

⁹² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).

Modern judicial biographers likewise confirm, often much less charitably than Justice Cardozo, such suspicions about the humanity and flaws of judges.⁹³

Judicial philosophy stands as one possible antidote to judicial fallibility, and a major selling point of most philosophies is a claim that its proponents have found the best recipe yet for minimizing the extent to which judges may inject their personal preferences into their decision making. Proponents of originalism such as Justice Scalia, to take just one example, claim that while originalism will not entirely prevent judges from “mistak[ing] their own predilections for the law,” it at least minimizes the effect by establishing “a historical criterion that is conceptually quite separate from the preferences of the judge himself.”⁹⁴ The response, in the case of originalism, is to contend that this is an illusion, and that originalist methodology serves merely to obscure rather than to eliminate the influence of the sorts of factors that Cardozo identifies.

Supreme Ambitions plays with this conundrum throughout. In the book, it is Audrey’s friend Jeremy who serves as the vehicle of critique. They introduce the conflicting perspectives in their discussion at the pizza place.⁹⁵ Audrey’s interview with Judge Stinson allows for further exploration, as Audrey sycophantically praises the judge’s writings on judicial restraint, and the judge holds forth on the significance of jurisdiction as a limit on courts’ power.⁹⁶ Judge Stinson later raises the same point, during the oral argument of the case that stands at the center of the plot as well as the battle for Audrey’s soul. Jeremy, meanwhile, tells Audrey, “your boss is a fucking hack. She claims to just want to ‘follow the law,’ but when the law leads her to a result she doesn’t like, she just cooks up some bullshit for not applying it.”⁹⁷

In the character of Judge Stinson, Lat has offered a judge who invites the reader to accept the cynical view that there are some judges who operate that way, in contrast to other judges—also represented in the book—who judge in good faith. Stinson is a combination of Lady Macbeth (without the regret) and Sandra Day O’Connor. She believes that the “real world” of the legal

⁹³ Recent “warts and all” judicial biographies include BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988); BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003); and KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007).

⁹⁴ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989).

⁹⁵ See LAT, *supra* note 1, at 4–10.

⁹⁶ *Id.* at 24.

⁹⁷ *Id.* at 96.

profession requires lawyers and judges to “use other people all the time”⁹⁸ and that the law “is just politics by other means.”⁹⁹ Stinson has a “rule of thumb” in immigration cases—“when in doubt, the immigrant loses”¹⁰⁰—and manipulates her handling of a key case with an eye toward improving her own chances to make it to the Supreme Court.¹⁰¹ She even enlists Audrey in her efforts to take down a legal blog which is critical of the judge.¹⁰² In the wake of manipulated colleagues, broken law clerks, and results-oriented jurisprudence, the judge reminds Audrey at the end of the book that there is nothing else in the world “besides power and prestige.”¹⁰³

The book’s portrayal of the judicial clerkship as an institution also merits comment.¹⁰⁴ A judicial clerkship is a unique form of apprenticeship. A clerkship brings together, for a term of one to two years, two individuals at opposite ends of the legal profession—a newly minted lawyer and a seasoned, often battled-scarred judge. Done right, the arrangement benefits both sides. The judge gets the clerk’s labor as well as the fresh perspective supplied by both her youth and her recent exposure to the legal academy.¹⁰⁵ The clerk gets experience in the law, gets to see the world through the eyes of the judge, and, if she is lucky, gains the sort of mentor who will serve in that role well into her career.¹⁰⁶ The profession benefits, too, as new clerks bring into practice not only fresh knowledge about *how* things work, but also, one hopes, the knowledge *that* things work.¹⁰⁷

While the institutional rules surrounding the clerkship vary from chamber to chamber (such variation includes whether a judge employs a combination of administrative assistants, permanent clerks, and short-term clerks),¹⁰⁸ one fact

⁹⁸ *Id.* at 199.

⁹⁹ *Id.* at 127.

¹⁰⁰ *Id.* at 68

¹⁰¹ *Id.* at 76.

¹⁰² *Id.* at 145–51

¹⁰³ *Id.* at 280.

¹⁰⁴ For a brief overview of some of the longstanding debates over judicial clerkships, see Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1 (2014).

¹⁰⁵ See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 322 (1960).

¹⁰⁶ See Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 637 (2008).

¹⁰⁷ See LLEWELLYN, *supra* note 105, at 322.

¹⁰⁸ For discussions of the differing ways in which judges use their law clerks, see generally David R. Stras, Diane S. Sykes, James A. Wynn, Jr., & Chad M. Oldfather, *Judges’ Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441 (2014); David R. Stras, *Secret Agents: Using Law Clerks*

remains constant—the judge is the dominant personality, and her temperament, habits, and idiosyncrasies cast a long shadow over the clerkship experience. Some judges are renowned as terrific mentors who take a personal interest in their clerks both during and after their clerkships.¹⁰⁹ At the other extreme are the tyrannical judges who yell and scream, belittle and harangue, play law clerks off one another, threaten firings on a weekly basis, and otherwise exhibit an utter lack of emotional maturity.¹¹⁰

The history of federal clerkships is replete with examples of judges of both types. Law clerks for justices like Oliver Wendell Holmes, Jr., Louis Brandeis, Felix Frankfurter, and Hugo Black became surrogate children and disciples who burnished their justices' reputations and spread their justices' constitutional jurisprudence.¹¹¹ Clerks for justices like James McReynolds, in contrast, prayed to make it through a term without being fired.¹¹² One of the authors of this Essay recalls hearing of a judge whose clerks were so miserable that they had a running joke about hoping they would get hit by a bus on their way to work so they could avoid having to deal with their judge. Judge Stinson falls closer to the category of “dangerous” judge, although Audrey is initially bewitched by the Judge's physical appearance (“a petite, stunningly attractive Eurasian woman”), designer clothes (“I admired how the cut of her pearl-gray knit suit flattered her body”), and lavishly decorated chambers.¹¹³

Judges also vary in how they utilize their clerks.¹¹⁴ Some judges operate their chambers like graduate school seminars. Under this model, each clerk has an opportunity, and may even be expected, to provide input on every case.

Effectively, 98 MARQ. L. REV. 151 (2014); Stephen L. Wasby, *The World of Law Clerks: Tasks, Utilization, Reliance, and Influence*, 98 MARQ. L. REV. 111 (2014).

¹⁰⁹ See *infra* note 111.

¹¹⁰ See *infra* note 112.

¹¹¹ Todd C. Peppers & Beth See Driver, *Half-Clerk, Half-Son: Justice Felix Frankfurter and His Law Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 141 (Todd C. Peppers & Artemus Ward eds., 2012); Todd C. Peppers, *Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks*, 34 J. S. CT. HIST. 75 (2009); Todd C. Peppers, *Justice Hugo Black and His Law Clerks: Match-Making and Match Point*, 36 J. S. CT. HIST. 48 (2011); Todd C. Peppers, *The Care and Feeding of Justice Oliver Wendell Holmes, Jr.*, SUP. CT. HIST. SOC. Q., Nov. 2014, at 8.

¹¹² See Clare Cushman, *Beyond Knox: James C. McReynolds's Other Law Clerks, 1914–1941*, in OF COURTIERIERS AND KINGS: MORE STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 131 (Clare Cushman & Todd C. Peppers eds., 2015); THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 136–37 (Dennis J. Hutchinson & David J. Garrow eds., 2002).

¹¹³ LAT, *supra* note 1, at 19–21.

¹¹⁴ See generally TODD C. PEPPERS, COURTIERIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

Other judges treat each clerk as an autonomous actor; the professional interactions take place primarily between the judge and the individual clerk with little cross-pollination among the clerks as a whole.¹¹⁵ Still others have a senior clerk charged with responsibility for overseeing the work of the junior clerks.¹¹⁶

With rare exceptions, however, judges rely upon their law clerks to draft their judicial opinions.¹¹⁷ What happens after that varies. Some judges are deeply involved in the process, taking drafts through multiple rounds of editing and paying close attention to phrasing and style. Others are content to ensure that the draft reflects, in broad form, the minimal directions the judge gives the clerk at the outset of the drafting process. Certainly there exist examples of judges and justices who have leaned too heavily on their law clerks. In modern history, scholars have pointed to Chief Justice Fred Vinson and Associate Justice Frank Murphy as jurists who took little interest in the work product of their chambers.¹¹⁸ Some have suggested that, toward the end of his career at least, Justice Blackmun's clerks exercised too much influence.¹¹⁹

This development in the opinion-writing practices of judges has come in for criticism. One objection stems from the formalistic complaint that it is the judge who was appointed by the President and confirmed by the Senate, and who is thus the only one entitled to exercise the judicial power under Article III.¹²⁰ On this view the drafting of opinions is a key component of the judicial role, and one not to be delegated.¹²¹ Other objections focus less on the simple fact that someone other than the judge is drafting the opinion, and more on the perceived systemic effects arising out of the increased role of clerks. Clerks, the reasoning goes, will write opinions that differ in material ways from those that judges would draft because of their inexperience and corresponding lack

¹¹⁵ See *supra* note 108.

¹¹⁶ Ruggero J. Aldisert, *A Nonagenarian Discusses Life as a Senior Circuit Judge*, 14 J. APP. PRAC. & PROCESS 183, 195 (2013).

¹¹⁷ Of all the justices on the Rehnquist Court, only Justice John Paul Stevens consistently prepared first drafts of opinions. PEPPERS, *supra* note 114, at 195. Stevens' explanation for why he followed that practice was simple: "I'm the one hired to do the job." See, e.g., A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627, 1640–42 (1995).

¹¹⁸ PEPPERS, *supra* note 114, at 110, 135–38.

¹¹⁹ David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May–June 2005, at 26.

¹²⁰ See, e.g., Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

¹²¹ For a powerful argument, rooted in judicial ethics, that judges should write their own opinions, see David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 514 (2001).

of confidence.¹²² Over time, these differences will change the nature of the law itself.¹²³

While *Supreme Ambitions* does not feature a judge who writes her own opinions, it does offer a contrast between judges who are involved in the process to varying degrees. Judge Stinson explains to Audrey that she never immerses herself in the details of opinion writing: “Some judges enjoy getting down in the weeds, arguing with their clerks over the meaning of some patch of dicta in a Supreme Court case, or how to word a particular case parenthetical in a footnote. These judges are actually insecure—they feel they have something to prove.”¹²⁴ Judge Stinson denounces such involvement in the opinion-writing process as “judicial self-indulgence,” casting herself as “the CEO”¹²⁵ of her chambers who doesn’t “concern myself with trivialities.”¹²⁶ “I use my expert judgment and accumulated wisdom to make the big, important decisions Legal analysis is for little people.”¹²⁷

In this respect she stands in contrast to her Ninth Circuit colleague M. Frank Polanski, a “huge feeder judge” who captivates Audrey with his old-world charm and less-than-politically-correct terms of endearment.¹²⁸ Polanski also demands much of his clerks, but, unlike Stinson, he immerses himself in the details of his opinions and works nearly as hard as his clerks.¹²⁹

For those who worry about the influence of law clerks, Judge Stinson represents the culmination of their fears. Granted, the judge has not abdicated her decision-making authority in an ultimate sense. She decides who will win and who will lose. In doing so, however, she comes off as an overly political, highly partisan judge whose results-oriented jurisprudence and lack of interest in legal analysis allow her law clerks to wield great influence the development and interpretation of federal law: “I decide hundreds of cases each year,” indignantly announces the judge.¹³⁰ “Do you think I have the time to write each one of those opinions myself?”¹³¹ Given the fact that the individual

¹²² See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 347–50 (1993).

¹²³ *Id.*

¹²⁴ *Id.*, *supra* note 1, at 139–40.

¹²⁵ *Id.* at 139.

¹²⁶ *Id.* at 93.

¹²⁷ *Id.* at 139.

¹²⁸ *Id.* at 59–60.

¹²⁹ *Id.* at 182–83.

¹³⁰ *Id.* at 139.

¹³¹ *Id.*

Supreme Court Justices write far fewer opinions than the fictitious Christina Wong Stinson,¹³² and have traditionally had more law clerks,¹³³ the practice of modern Supreme Court justices in farming out opinion drafting to their law clerks is worthy of continued discussion and debate.¹³⁴

CONCLUSION

As former federal court law clerks, we can say with a high degree of confidence that our clerkships would not captivate any audience: drafting bench memos and summary judgment orders, poring over trial court transcripts, and struggling to stay awake during sentencing hearings is not the stuff of a good potboiler. Our judges did not have a craven desire for additional power, and our fellow clerks did not spin Machiavellian plots of professional advancement. Of course, we did not clerk for feeder judges, and a spot as a Supreme Court clerk was not something on our minds.

In those respects, our clerkships were surely more typical than what is depicted in *Supreme Ambitions*. Even if it is true that elbows grow sharper as the perceived stakes get higher, *Supreme Ambitions*' characters are distortions, each a distilled essence of the pathologies that often afflict the young, ambitious, and talented. It is neither a handbook nor an accurate portrayal of the federal judiciary, its judges, or its law clerks. This is perhaps necessary to make the book work as an entertaining read, and one also often has the sense that Lat had the screenplay in mind as he wrote it.

Though it must be taken with a grain of salt, beneath *Supreme Ambitions* breezy exterior there is a core of "truthiness" to the book which invites the reader to reflect seriously on a number of important topics, including not only the roles of judges and law clerks, but also on legal education and the legal profession more generally. We hope that readers will accept that invitation.

¹³² See Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 29 (1993).

¹³³ Lewis, *supra* note 52, at 18 ("Supreme Court Justices may have four clerks."). Until relatively recently, most circuit judges allocated their five staff positions between three clerks and two administrative assistants. Nowadays, however, most have shifted to four clerks. See Stras, *supra* note 108, at 174.

¹³⁴ See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 143 (1996) ("The increased delegation of the judicial function does not have the same inevitability in the Supreme Court as in the courts of appeals, and provides therefore a more just focus of criticism.").