

# Confessions of a Bad Apple

Alex Kozinski†

"People of the same trade seldom meet together, even for merriment and diversion," Adam Smith observed, "but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."<sup>1</sup> So too it is with federal judges, particularly during the early part of each year when they select their law clerks. Preoccupied with the task of sorting through stacks of resumes, burdened by time-consuming interviews, distracted from the weighty responsibilities of writing opinions and dispensing justice, frustrated by the need to make important staffing decisions on the basis of incomplete information, federal judges complain bitterly to each other about the shortcomings of the selection process and start musing, dreamily, that there must be "a better way."

And a better way there *would* be, they claim, if not for certain renegades within the ranks, certain unrepentant vigilantes who flaunt their Article III independence by ruthlessly undermining any and all reform efforts.<sup>2</sup> As a consequence, students must interrupt their law studies to fly all over the country in mid-semester; professors are deluged by requests for letters of reference when they have barely finished grading first semester exams; and judges are forced to make premature, half-baked decisions and to behave in an undignified, noncollegial and downright rude manner. A few bad apples spoil it for everyone.

When they complain about the bad apples, they're usually talking about me, although I'm far from alone. Nevertheless, as the self-appointed spokesperson for this bushel of spoilsports, I will undertake to answer the charges. As I see it, there is nothing at all wrong with the current law clerk selection process; everything is hunky-dory. Efforts at so-called reform cannot, will not and should not succeed. The Shangri-la that many of my colleagues envision—the "orderly process that comports with the seriousness of the job and the dignity of the relationship between judge and clerk"<sup>3</sup>—is neither attainable nor desirable. Efforts to impose an artificial structure on law clerk selection can only exacerbate the unavoidable tensions, burdens and disillusionments of a process

---

† Judge Kozinski sits on the United States Court of Appeals for the Ninth Circuit. He authored this Essay even as he was embroiled in the 1992-93 clerkship season. See Fed. R. Evid. 803(1).

1. A. SMITH, AN INQUIRY INTO THE NATURE OF THE WEALTH OF NATIONS 55 (Great Books ed. 1952) (1776).

2. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 163 (1990).

3. *Id.* at 152.

that, by and large, is healthy and constructive. The time has come to say: Leave well enough alone.

My Essay is not written in a vacuum. It is, essentially, a response to Judge Patricia Wald's essay, *Selecting Law Clerks*, recently published in the *Michigan Law Review*.<sup>4</sup> Judge Wald not only is one of the country's outstanding jurists, she is also a leading proponent of the type of reform I take on here. Her articulate, thoughtful and, in most respects, accurate observations provide a worthy focal point for my own views. While I have the greatest respect and admiration for Judge Wald, I believe she is misguided on this subject. She and I and all of our colleagues, as well as clerkship applicants and law school faculty, would be far better off if efforts at reform were put to rest once and for all.

#### I. CLERKSHIP SELECTION: I KNOW 'EM WHEN I SEE 'EM

Judge Wald is at her most convincing when she explains why law clerk selection is so highly charged and competitive. The judge-clerk relationship is, indeed, "the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair."<sup>5</sup> For the reasons articulated by Judge Wald,<sup>6</sup> judges have a very substantial stake in selecting clerks who are not merely competent, but brilliant; not merely articulate, but lightning fast and prolific; not merely thoughtful, but persuasive and tactful; not merely dedicated, but driven; not merely cooperative, but single-mindedly committed to easing the judge's burden and advancing the judge's cause in the multitude of disputes and disagreements that naturally arise on a collegial court.

And make no mistake about it: There are *substantial* differences among clerks. The difference between having clerks that are merely good and ones that are awesome can be the difference between a bad year and a wonderful one. "The myth of the superstar clerk,"<sup>7</sup> as Judge Wald puts it, is no myth at all. I have been fortunate in having many clerks who were superstars, but have had some who were not. I prefer the former, as do my colleagues, and that's much of what the competition is about.

But not all. What Judge Wald doesn't adequately articulate are the very significant intangible aspects of the judge-clerk relationship. In many ways, these are as important as the tangible ones Judge Wald so ably describes. The relationship between judge and clerk is professional only in part; it is also a close human relationship, one that endures long after the clerkship ends. By accepting a judge's clerkship offer, a young lawyer becomes part of the judge's extended family, a disciple, an ally, quite possibly a friend. Important as it is

---

4. *Id.*

5. *Id.* at 153.

6. *Id.* at 153-55.

7. *Id.* at 155.

to have a clerk who is competent, it is no less important to have one you can get along with, preferably someone you like.

We are, each of us, human beings, with all the preferences, shortcomings and peculiarities inherent in being part of the human race. Indeed, I suspect that judges as a group—and particularly judges who enjoy the constitutional protection of life tenure—display far more of those personal idiosyncracies than the population at large. Year in and year out, we take on a complement of law clerks that make up more than one-half of our work force (three out of five for circuit judges, two out of three for district judges). Getting a good fit, both among the incoming clerks and between the clerks on the one hand and the judge and secretaries on the other, is absolutely indispensable.

Nor is the clerkship decision without consequence for the student. While some clerks eventually become judges themselves, for the vast majority the year they serve will be the sum and substance of their experience as court insiders. The degree to which a particular judge takes her clerks into her confidence, consults with them in making decisions, lets them observe the workings of the court, is generous with her time and seriously considers their advice—all of these will make a vast difference in the type of experience a particular clerk will have. A good clerkship is a joyful, maturing experience; a bad clerkship is a year in purgatory. And, of course, there is the matter of how involved a judge is willing to become in a clerk's immediate and future career advancement. Some judges stand aloof; others take a much more hands-on approach. A young lawyer's choice of a clerkship can have a significant impact on his further career development.

Judge and law clerk are in fact tethered together by an invisible cord for the rest of their mutual careers. The judge will forever appear on the clerk's resume as his first permanent professional employer; she will receive many inquiries about the clerk's performance and character. The law clerk is the judge's emissary to the world; although sworn to secrecy about the court's substantive work, clerks often comment, expressly or by knit of the brow, about the character, work habits, fairness and generosity of the judges they clerked for. Mutual trust and respect are not merely desirable, they are essential.

Given the crucial role clerkship decisions play in the professional life of judge and clerk, it is little wonder that the clerkship selection process is intense, time-consuming and fraught with pain and disappointment. There are better prospective clerks and worse ones; there are more desirable clerkships and less desirable ones. Not every judge can reel in the best clerks; not every young lawyer can land the best clerkships. Equally important, not every prospective clerk will fit well with every judge, and everyone has a serious stake in avoiding a mismatch. As with pudding, there is no foolproof way of telling just how smooth a particular judge-clerk relationship will be, except by trying it. The best we can do is to exercise judgment after getting as much information as reasonably possible.

Information, as economists are fond of reminding us, is costly. Time and effort can buy more information, reducing uncertainty. But the cost of delay may be the loss of opportunity, as some candidates receive offers from judges who believe they can make reasoned judgments on the basis of less information. To be sure, we would all prefer to know *precisely* how a particular student will do during the full six semesters he spends in law school. If a decision could magically be delayed until after graduation, we would have all of an applicant's grades as well as the potential input of a large battery of law school professors. Also, we could be better informed about the student's performance in various extracurricular activities. Did she do an excellent job as a law review editor? Did she publish and, if so, what does the product look like? Did he compete in moot court and, if so, how high did he place? Did he serve as a research assistant to a distinguished scholar; if so, what is her assessment of the student's work? All of these would be mighty helpful hints when picking clerks.<sup>8</sup>

A reasoned judgment can, however, be made on far less than a complete record. Performance in a substantial number of law school courses is usually a pretty good proxy for a complete transcript. Election to a significant law review board position is proof of a student's commitment and perseverance, and a tribute to his ability to work with—and gain the trust and respect of—others. Comments from a few professors are usually fairly indicative of what other members of the faculty will wind up thinking about the student.

Absent some special circumstance, such as where judge and student have a preexisting relationship, the breakpoint for many judges in making clerkship decisions comes around February or March of a student's second year of law school. At that time several things come to pass. Perhaps most important, the student's third semester grades become available. Also, many students will have developed relationships with members of the faculty by working as research assistants, participating in individual research projects, writing papers or participating in seminars. By that time as well, students will have had a fair opportunity to show commitment to their law reviews by participating in the editing process or doing substantial work toward publication of their comments. For those of us who care about such things—and there are many—law review board elections are conducted around that time. While more information would be very nice indeed, by the time a student has completed half of his law school

---

8. Implicit throughout this Essay, as well as Judge Wald's, is the assumption that students who have the best law school records, as judged by traditional standards, will make the best clerks. Not all judges share this assumption and many of our colleagues find excellent clerks by employing nontraditional criteria. Nevertheless, in my own experience and that of many of my colleagues, academic record is the single best predictor of clerkship performance. This may not be entirely fair to students who choose not to participate in the law school ratrace. Nevertheless, in a world where information is scarce, law school performance is an objective standard by which one can select from a multitude of apparently competent candidates. At the very least, a student who is able to compete effectively in traditional law school activities displays the type of drive and determination—as well as imperviousness to pain—many judges look for in a clerk. All that having been said, most judges do also consider a lot of other factors. *See infra* p. 1722.

career, enough information is usually available so that one can predict with some confidence what type of clerk he is likely to be.

There is one very important factor law school performance can predict only imperfectly: the fit between a particular judge and applicant. Recommendations from professors, particularly ones who know the judge well, can be helpful, but nothing can take the place of the personal interview. A thorough, searching interview, conducted with mutual candor, can tell judge and applicant a great deal about each other. The interview should involve not merely the judge but also his staff. The judge's law clerks can help probe the applicant's abilities, and the judge's secretaries—who see law clerks come and go—can provide valuable input about a clerk's demeanor and attitude.

The clerk too can learn much from an office interview. Are the secretaries brusque and condescending or friendly and obliging? Are the law clerks genuinely enthusiastic or are they delivering platitudes through clenched teeth? Does the judge seem aloof and distant, or is there a warm ambience that suggests familiarity and teamwork? Does the judge's perception of himself match that of his staff? Are the judge's work habits consistent with the applicant's own?<sup>9</sup> An alert applicant can gather a wealth of information about the judge and the type of office he runs, provided he is not so dazzled by the experience that he shuts his mind to the readily observable clues.

To get the most out of an interview, judge and applicant must first do their homework. The prudent judge will call professors who have written letters of recommendation; she will probe the degree of their enthusiasm and elicit any reservations that might not have found their way onto the written page. Calls to other faculty members can often be most revealing. If the student has submitted a writing sample before the interview, the judge or someone on her staff should read the piece and analyze it; some of the most telling discussions during an interview concern subjects the student is researching for a law review comment or seminar.

The student, for his part, would do well to read some of the judge's opinions, particularly dissents or concurrences. These will tell the student a great deal about the judge's philosophy and writing style, as well as about the clarity of her thinking. At the same time, judges are not immune to flattery; by taking

---

9. The question of work styles is far more significant than most students realize. For example, it is widely known that my clerks are on call 24 hours a day: "More than one former [Kozinski] clerk remembers getting a call from the judge in the wee hours of the morning for a quick question as he works through a draft." Reuben, *The Amazing Kozinski*, CAL. LAW., Mar. 1991, at 32, 38.

Another important issue is the pace with which work percolates through the office. Contrast, for example, the divergent approaches of my distinguished colleague Harry Edwards and myself. Having had the pleasure of sitting with Judge Edwards during an occasional visit to the D.C. Circuit, I have been awed by the extraordinary speed with which he circulates high-quality, polished opinions in major cases. I am more of a noodler. My clerks and I normally go through 20-30 drafts of an opinion; 50 or 60 drafts is not uncommon as I polish and revise, shift footnotes and add rhetorical flourishes over the course of weeks, sometimes months. Clerks who relish Judge Edwards' greased lightning approach would probably be driven nuts by my plodding.

the time to study the judge's writings, an applicant shows that his interest in the judge is genuine and particularized, an important consideration in the promiscuous era of the personal computer.

None of this is easy. It certainly isn't cheap, particularly for students who must board flights for cross-country interviews on short notice. It takes a vast amount of time, much of it exploring relationships that, for one reason or another, never materialize. But, in my judgment, it is unavoidable and ultimately well worth the effort. If the judge-clerk relationship is to continue to be a close-knit, mutually beneficial, professionally satisfactory and personally uplifting experience, no shortcut is possible. The time, the cost, the disappointments, the anxiety, the pain all fade into insignificance when judge and clerk find a good match.

## II. IF IT AIN'T BROKE . . .

What then is wrong with the current system? Why the anguished caterwauls from so many judges and law school professors? It is in this respect—defining the perceived problem—that Judge Wald and the other critics of the status quo fall far short. Except for the opening paragraph of her essay, where she asserts that “[f]or a decade now, federal judges have been trying—largely without success—to conduct a *dignified, collegial, efficient* law clerk selection process,”<sup>10</sup> Judge Wald gives only the vaguest hints as to the nature and extent of the problem. The only support my distinguished colleague provides for her assertion that the current system is undignified, noncollegial and inefficient is three quotes, two from a short newspaper column and one from something cited as “internal correspondence,”<sup>11</sup> presumably a memorandum circulated among those judges who advocate reform.

With all respect, three quotes from largely unidentified sources do not a problem make. Judge Wald does not analyze the nature and source of the problem; she simply assumes its existence. Yet unless we understand what the problem is, if indeed there is one, it is hard to judge the need for, and the likely efficacy of, any proposed solution.

---

10. Wald, *supra* note 2, at 152 (emphasis added).

11. *Id.* at 152 n.3. The ether of “internal correspondence” in fact is chock full of eloquent expressions of opinion on all sides of the issue. Responding to an inquiry about the desirability of standardizing law clerk selection procedures, for example, Judge J.L. Edmondson of the Eleventh Circuit wrote as follows:

As you know, this circuit has declined to participate in programs limiting the starting date for clerkship offers or interviews. To the best of my knowledge, judges in this circuit have over the years had no difficulty in getting good law clerks, with each judge proceeding at his or her own convenience. Law clerk selection is just not a problem.

I continue to oppose any nationally-mandated starting time because I am unconvinced that it benefits either students or judges.

Letter from Judge Edmondson to Judges Becker, Breyer, Oakes and Wald 1 (Dec. 6, 1990) (on file with author) [hereinafter Edmondson letter].

A word first about two of Judge Wald's stated concerns—dignity and collegiality: It is important to note that they are different in kind from the third concern—efficiency. Efficiency is a concept that readily lends itself to assessing a process. For example, a system that requires law students to make multiple cross-country trips for interviews can be said to be less efficient than one where students need make only a single trip. All things being equal, it is better to have a more efficient system than a less efficient one, although everyone surely agrees that efficiency is only one of many values any system must reconcile.

Dignity and collegiality are very different concepts; they describe less the system as a whole than the behavior of those who participate in it. A particular system may be conducive to undignified behavior or it may reward lack of collegiality. But whether a particular individual—be he a judge, a student or a professor—acts in a dignified or undignified manner, whether he respects or violates principles of collegiality, is the choice of that individual. Indeed, the more a system allows for individual differences in attitudes or behavior, the more it forces individual actors to reveal whether they are willing to abide by the dictates of propriety. A system that forecloses participants from acting in an undignified manner—or from revealing any other trait of character—conceals important information; it puts the cads on an equal footing with the saints.

In judging whether the current system needs fixing, it is important to identify those problems that *no* system can solve. There is no system at all that will eliminate the pain and disappointment an applicant feels when she is denied the clerkship of her choice; nor can any system save a judge from the blow to his ego that comes from being rejected in favor of a colleague. Bruised feelings inevitably result from a competition where the players are prizes and the prizes are players.

Nor can any system be devised that will substantially lessen the anxiety, distraction and uncertainty most participants suffer in awaiting the answer to their quest. At whatever point clerkship decisions are made, there will be some period immediately before it when judges and applicants will live with uncertainty, and uncertainty as to such a momentous matter as a clerkship will inevitably lead to anxiety, preoccupation and distraction. *C'est la guerre*.

Nor, it seems to me, can any system substantially reduce the costs of information. There are about 1000 federal judges who, in the aggregate, hire about 2200 clerks every year.<sup>12</sup> Law schools are located in most states and the clerkship market is largely national in scope. There is no way to avoid some travel for interviews, how much depending upon how aggressive or insecure individual students and judges happen to be.

---

12. These figures include judges on the federal district and circuit courts. For simplicity, I exclude from the discussion clerkships with judges on other federal courts (the Claims Court, Tax Court, Court of International Trade, Court of Military Appeals, Court of Veterans Appeals) and the state and territorial courts. These clerkships, however, represent another market, one that may compete for some of the same candidates.

So too, letters of recommendation—two, three or more for each applicant—will have to be written. Delaying clerkship selection may increase the pool of faculty members who can speak knowledgeably about a student's performance, but it will not lessen the number of letters each professor will be asked to write. Indeed, the later the clerkship season starts, the more letters will probably be written, as each student will feel comfortable asking more professors to write.

Nor can much be done about the disruption in studies. Law schools operate on different schedules, as do courts. Efforts at finding a period when everyone is on break have failed because no such period exists. Indeed, I find it curious that "[l]aw school deans and faculties"<sup>13</sup> have complained so bitterly about clerkship selection when law schools gleefully cooperate in the fall interview season which results in far more massive disruptions.

To my mind, no arguments based on efficiency can carry the day in favor of a more structured law clerk selection process because no system can be devised that is materially more efficient. Indeed, prior reform efforts have generally resulted in greater costs and more uncertainty.<sup>14</sup>

What then is left? At bottom, the concerns that drive the reform train center around the dignity and collegiality issues alluded to by Judge Wald. As the critics see it, the current system encourages professors, applicants and judges to act in an undignified and noncollegial manner, inspiring comments such as those related in David Margolick's column in the *New York Times* to which Judge Wald took umbrage.<sup>15</sup> That article quoted a law clerk applicant as describing his (or her) interview experience as follows: "'positively surreal, the most ludicrous thing I've ever been through . . . brilliant, respected people . . . behaving like 6-year olds.'"<sup>16</sup> Comments such as these make many judges uncomfortable as they might reflect badly on the reputation of the federal judiciary.<sup>17</sup>

Some of my colleagues bristle at the idea that federal judges should get off their pedestals and compete with each other by making early offers, enlisting faculty members to lobby applicants or having current and former clerks sing the judge's praises. I don't understand why. Law clerk selection is a normal, healthy competitive market process where the parties bargain with each other on roughly equal footing. Applicants certainly do not hesitate to ask professors to write or call on their behalf, nor should they. Applicants willingly spend a

---

13. Wald, *supra* note 2, at 156.

14. See *id.* at 159-60.

15. See *id.* at 157.

16. Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash*, N.Y. Times, Mar. 17, 1989, at B4, col. 1, quoted in Wald, *supra* note 2, at 152.

17. I happen to know the young lawyer who gave that unflattering description of the law clerk selection process; he (or she) wound up clerking for me. As he (or she) explained it, the comment was not an indictment of all federal judges; it was a description of the way *certain* judges acted during the interview process. It is possible that the student took this behavior into account in deciding which clerkship to accept.



lot of time and money shuttling around the country in response to a judge's phone call. Is there any reason judges should adopt a detached, disinterested attitude about a matter that is so vital to the success of their mission? So long as competition is carried on in a fair and dignified manner—and acting unfairly or without dignity carries its own costs—the market operates most efficiently if judges as well as applicants reveal their preferences.

Particularly irksome to many of my colleagues are commentaries such as Margolick's<sup>18</sup> that poke mild fun at the competitive clerkship selection process.<sup>19</sup> That article refers to the clerkship process as “a frenzied mating ritual” and compares judges to “sheiks looking for luxury cars.”<sup>20</sup> Judge Posner—the only federal judge other than me willing to speak on the record—is quoted as saying, “‘It’s a little humiliating that judges are so desperate for these young people, who you would think would play only a peripheral role in a system.’”<sup>21</sup> So troublesome was the Margolick article that, according to Judge Wald, it precipitated yet another round of reform.<sup>22</sup>

I am astonished that my colleagues would take such umbrage at this type of publicity. To be sure, Margolick is a clever writer and managed to tweak the judicial nose a bit. So what? One of the burdens and benefits of a free press is that public officials occasionally come under scrutiny. To the extent the criticisms are justified—for example, complaints about “badmouthing, spying and even poaching among judges”<sup>23</sup>—we should all try to do better. But surely

18. Margolick, *supra* note 16.

19. The different attitudes Judge Wald and I bring to such press may be reflected in the fact that what I characterize as poking mild fun she considers “particularly scathing.” Wald, *supra* note 2, at 157.

20. Margolick, *supra* note 16, at B4, col. 1.

21. *Id.* In the interests of full disclosure and fair play, I feel compelled to acknowledge that the Margolick article spends some time discussing my own hiring practices. Margolick describes me as the “consummate player” in the clerkship game and notes that I “landed” three very desirable clerks “by beating them at poker, losing to them at chess, calling them during ski vacations, introducing [them] to current clerks, wining and dining, bageling and loxing.” *Id.* He also quotes me as saying: “‘It’s a constant job of selling yourself . . . You may be the greatest judge since Learned Hand, but the person [you’re] interviewing wouldn’t necessarily know Learned Hand from Learned Foot.’” *Id.* All this has raised eyebrows among my colleagues and may have contributed to Judge Wald’s unhappiness with the article.

All I can say is, it’s all true; I was not misquoted. I believe I have a very good clerkship to offer ambitious, committed applicants, perhaps the best in the country. But law students will not necessarily know this and I refuse to rely entirely on the law school rumor mill to carry the word. Information is scarce for law students no less than for judges and I think we have some responsibility to reduce the costs of information by letting them know why a clerkship would be of particular advantage to them.

As for bageling and loxing and all that sort of stuff, it’s simply a matter of trying to find an informal setting that avoids the stilted ritual of the office interview. If I can see the applicant in an informal context where she feels comfortable—during a chess game, or over pizza, or while visiting the Magic Castle—we will often establish a much better rapport than in the office. And, since my clerks and I do these sorts of things, it gives applicants a taste of the more informal aspects of the clerkship. This type of interview reveals as much about me as about the applicant; an applicant who finds me hard to take in such settings would also hate clerking for me.

22. Wald, *supra* note 2, at 157.

23. Margolick, *supra* note 16, at B4, col. 1.

we ought not abandon practices that are perfectly legitimate because the press chooses to characterize them in an unflattering way.<sup>24</sup>

What precisely is the conduct that prompts such adverse responses? While an exhaustive catalogue would go beyond the scope of this Essay, a few choice examples are illuminating. The tactic law clerk applicants probably consider the most abusive is what they affectionately call the exploding offer. It works something like this: The judge settles on a particular applicant and pops the question: "Sally, I have looked at your record and spoken to your references. I have read your writing sample. I have thought it over carefully and you are exactly the type of clerk I am looking for. Will you come work for me?" If Sally says yes on the spot, everything is honey and roses; judge and applicant shake on it (or mutually congratulate each other if the conversation is by phone) and live happily ever after.

But what if the applicant is not sure? She may prefer another judge; she may have other interviews lined up and feel obliged to go through with them; she may wish to discuss the matter with a professor, a significant other or a classmate. For whatever reason, she may just not be ready to sign on. "How long do I have to think about it?" she asks.

A wounded silence follows.

"Why, Sally, I thought you really wanted to clerk for me. As I'm sure you realize, there are *dozens* of highly qualified applicants hovering near their phones just hoping I will call, but I picked you instead. If you are *that* much in doubt, perhaps I should move on to another applicant who is as interested in me as I am in her."

Naturally, this puts the applicant in a tough spot. The offering judge may be second or third on her list; he may be first, but she may feel awkward about canceling pending interviews on short notice. She hesitates, but eventually says yes. Deep down, however, she feels abused; the judge-clerk relationship is off to a shaky start.

A first cousin of the exploding offer is the vanishing offer. An actual case involves a student who got an offer from an east coast judge one morning. The student demurred on the ground that he had promised a judge on the west coast he would call before accepting another offer. The student asked the offering judge whether he could have until early afternoon eastern time to call the west coast judge as he had promised. The east coast judge agreed but half an hour later his secretary called the student to say that the offer had been withdrawn.

---

24. My colleagues may be concerned that criticism of the clerkship selection process could tarnish the public's image of the judiciary, undermining the moral suasion on which our authority ultimately rests. Were this a realistic concern, I would sympathize with it; there is much judges do or refrain from doing precisely to preserve the public's perception of an unbiased judiciary. I simply cannot buy into the notion, however, that aggressive law clerk recruiting undermines the public's perception of the judiciary. Our system is surely more resilient than all that.

Needless to say, the student has been less than an ardent fan of that judge ever since.

Another common complaint concerns judges who interfere with other judges' interview schedules. A student may be getting ready to board a flight to see Judge X when Judge Y calls and insists on an interview at a conflicting time. Or, a judge may call another judge's chambers while an applicant is interviewing and ask to speak to the applicant. There are many variations of this and they all cause a good bit of friction.

Then there is the matter of one judge (or his staff) showering an applicant with adverse information about another judge: "He's a tyrant to work for"; "She's never in the office"; "He's dumb as dirt." And this is only the mildest stuff. Judges are particularly annoyed by this practice, viewing it as not merely noncollegial but as reflecting badly on the judiciary.

Nor are judges the only ones who act in an undignified or improper manner. I still recall vividly and with chagrin—though several years have passed—an applicant with sterling credentials from a midwestern law school. She was one of several candidates I was seriously considering and I asked one of my law clerks to call her to set up an interview. Whenever my clerk called, he got her answering machine; his messages were never returned. In an effort to locate the student, my clerk called the law school and was told the applicant was visiting her family out of town and no one knew when she would return. I instructed my clerk to leave a detailed message on the applicant's answering machine indicating we needed to know whether she would be coming out for an interview so we could decide how many others to schedule. My clerk made the call fairly late that night, thinking no one would be home. As it turned out, a sleepy applicant answered the phone, which led to an awkward conversation. The bottom line was that the applicant had been called for an interview with a judge in another circuit and wanted to see me only if she did not get an offer there. Fair enough. But the applicant had not wanted to spoil her chances by telling me she valued another clerkship more; instead, she played hide and seek, causing me a fair bit of delay and inconvenience.

Professors are not above the fray. Years after the event I learned from one of my law clerks that a particular faculty member who had spoken to me about her in glowing terms, and had encouraged me to go all out to hire her, had, all the while, strongly urged her to reject my offer. And, of course, it is not uncommon for professors to write glowing letters of recommendation but then express serious reservations when pressed over the phone.

Interludes such as these play themselves out by the dozen each interview season. Justifiably, they leave the participants with a bad taste in their mouths. The natural tendency is to look for another way, one that will minimize or eliminate the need and the opportunity for such undignified behavior.

Even assuming one could devise a system that would eliminate such conduct, one must first answer the question, is that such a good thing? No one,

least of all me, will condone exploding offers, back-stabbing and other abuses. But it is not clear to me that suppressing such conduct is desirable. The way people respond to the pressure of the current selection process is very revealing; it is valuable information that can help the other actors reach a decision. A student confronted with a short-fuse offer is doubtless put in a difficult position, but by making that kind of offer the judge reveals something about the way she operates; it is an indication of how empathetic, fair-minded and generous an individual she really is. It is, after all, not that difficult to be just when resolving other people's disputes; the real test is how a judge acts when her own vital interests are at stake.

Similarly, what a judge can learn about an applicant from a law school record, a writing sample and letters of recommendation is limited. How a student reacts to the pressures, uncertainties and disillusionments of the interview process can be far more revealing. Professors, too, have reputations to safeguard. An unreliable recommendation or other kind of perfidy will weaken the force of a professor's recommendation in future clerkship seasons.

When all is said and done, clerkship selection is not all that different from the job we are trained to do as lawyers or, indeed, from life in general. How the various participants react to the pressure is a valuable proxy for how they will perform in chambers. More applicants than I can count have sealed their fates by being too persistent, or too cocky, or by exhibiting other character traits I or my staff found annoying. Others greatly improved their chances by acting in a dignified, restrained, yet enthusiastic manner in situations where poise was difficult to come by. Similarly, I know of many applicants turned off by judges who acted in ways they didn't cotton to.

And, of course, the word spreads. Judges talk to each other about applicants and awkward scenes in one judge's office get recounted again and again to other judges and their staffs. Judges too pay for improper or undignified behavior that aggrieved students and faculty members are not reluctant to recount and embroider upon. In a world where information is scarce and momentous decisions must be made on the basis of imperfect knowledge, I am suspicious of any effort to diminish the amount of relevant information the parties are able to obtain about each other.

The relationship between judge and clerk is not the ordinary relationship between employer and employee. It calls for an uncommon degree of trust, respect and goodwill. The process by which the relationship is forged—the way the parties behave, the tactics they employ, the degree of candor and enthusiasm they display—can get the relationship off to a good start or a bad one. The current system has worked reasonably well in achieving these goals, given the difficulties inherent in the process. Those who propose a change must carry a significant burden in justifying their efforts at reform. To my mind, they have not done so.

## III. BRAVE NEW WORLDS

A friend of mine is fond of saying that if given the choice between making up the substantive rules that govern a dispute or making up the procedural rules, he would take procedure every time because he who controls procedure controls the outcome. Perhaps this is an overstatement, but you don't have to be Charles Alan Wright to figure out that procedure counts. In judging any proposal for reform of the clerkship selection process, one must consider whether it is possible to construct an outcome-neutral set of rules, one that will not only promote fairness and efficiency (which, for reasons already explained, I doubt can be done) but also will not unduly favor any particular group of judges or applicants.

It is a painful matter for many of my colleagues to contemplate, but not all clerkships are created equal. Geography plays a role. Judges on the east coast enjoy the advantage of proximity to many of the country's best law schools. Prestige counts. Some circuits, the D.C. Circuit in particular, tend to draw a disproportionate share of the nation's top applicants. Seniority matters. Judges with many years on the bench naturally have an advantage over upstarts like me who have to work hard at achieving a national reputation. The problem with many reform proposals is that they tend to reinforce these patterns by decreasing the means by which less-favored clerkships can compete for desirable applicants.

An example will illustrate the point. For several years there were proposals to regularize the clerkship process by having judges hold off interviews until a particular date in the spring. By and large these dates had the widest support among judges on the east coast; judges in the mid-west and west objected on the ground that this would put them at a procedural disadvantage, or so they believed. The reason is simple: The dates selected for interviewing fell during the time many law students were in school. This posed less of a problem for east coast judges, who are within an hour's plane ride of many top schools. For judges further away, it was a distinct disadvantage not to be able to conduct interviews during semester breaks when students could avoid missing two or three full days of classes. Similarly, students on the west coast felt at a disadvantage in interviewing with judges on the east coast. A seemingly neutral rule turned out to have important substantive consequences.

More recent reform plans, which would allow interviewing at any time but require judges to hold off making offers until a particular date, raise problems of their own. Aside from the fact that they may not work (widespread cheating and confusion erupted last year when a substantial number of judges agreed to withhold offers until May 1), such plans eliminate a very important bargaining tool for judges competing for the most gifted clerkship candidates—the ability to make offers early and entice applicants into ending the anxiety and uncertainty by accepting early.

As Judge Wald notes, the pay and benefits for federal clerks are standardized so that judges are unable to "dicker on salary or hours or perks."<sup>25</sup> But there *are* things judges can dicker about. A very significant one, from the point of view of an anxious applicant who wants to put the process behind her, is the possibility of ending the agony by accepting an early offer. As noted, giving out an offer too early is not without its costs; by doing so, the judge forgoes the ability to obtain further information about the applicant. If the offer is accepted, the judge misses out on better candidates who might apply later. Nor is the acceptance of an early clerkship always without costs to the student. By accepting an early offer, the student gives up a shot at a more attractive clerkship down the road. Yet, some judges and clerks will always find it to their mutual advantage to end the misery by shaking hands early and going on with their lives.

Many judges are uncomfortable with the fact that other judges make early offers. Their first concern is that judges who make early offers will skim off the cream, leaving thin milk for their colleagues.<sup>26</sup> The second concern is usually phrased in terms of, "Where will it all end? Pretty soon we'll be hiring them out of kindergarten."<sup>27</sup> Both concerns are misplaced.

It is simply not true that making early offers assures a judge the very best candidates. For one thing, the earlier the offer is made, the more wobbly a foundation it is based on. An early offer and acceptance may lock in a clerk who started off well in law school but trailed off thereafter; it happens all the time. More important, the concept of cherry-picking perpetuates a pernicious myth about the clerkship selection process: It suggests that judges are free to make offers any time they please and be sure they will be accepted. Alas, the reality is much more complex.

As a practical matter, there is no way a judge can force an applicant to accept a premature offer. The candidate—an intelligent, independent human being—can just say no, or ask for time to interview with other judges. Indeed, landing an early offer may persuade a student that she is pretty hot stuff and embolden her to hold off until something better comes along or simply to obtain more information. A judge who is too persistent may lose the fish he has on the line and gain a bad reputation to boot. This too happens more often than judges like to admit. And, as discussed earlier, there are inherent limits on how soon clerkship offers can be made.<sup>28</sup>

In the final analysis, receiving an early offer broadens a student's choices; it cannot diminish them. From the judge's perspective, making an early offer allows him to differentiate himself from his colleagues and attract candidates who might not otherwise seriously consider him for a clerkship. For both

---

25. Wald, *supra* note 2, at 152.

26. *See id.* at 156.

27. *See id.*

28. *See supra* pp. 1710-11 (discussion of information breakpoint).

parties, early offer and acceptance can minimize the cost, uncertainty, anxiety and distraction of a full interview season. It thus seems to be an entirely rational and efficient device for allocating scarce resources within a free market. In short, it is the type of thing any self-respecting bureaucrat is bound to hate. Small wonder then that many judges and law school professors consider the early offer as tantamount to a judicial hijacking.

Deserving of special mention—or condemnation—is the latest brainchild of the there-must-be-a-better-mousetrap brigade: the “Let’s Imitate Medical Placement” (LIMP) plan. This plan, described by Judge Wald in her essay,<sup>29</sup> has been kicked about by those interested in such issues as the last, great hope for reform, the Maginot Line against “the anarchic open market so many judges and law schools now deplore.”<sup>30</sup>

Given the mindset of the central planner, LIMP is just what the doctor ordered. To begin with, it has a certain panache because of its interdisciplinary origins, always a plus when you’re trying to sell something that would otherwise be wholly unacceptable: “See here, don’t be so narrow-minded. We might learn something useful if only we look beyond our limited horizons.” Then, too, LIMP carries with it the promise of modern technology: The computer has made us efficient in so many other ways; surely it can solve this problem as well. Finally, LIMP holds out the illusion of fairness. After all, what could be fairer than giving every judge and clerk their highest choice who also chooses them?

Judge Wald’s perceptive discussion mentions a number of the most obvious objections to the plan, objections that technology alone cannot answer.<sup>31</sup>

---

29. Wald, *supra* note 2, at 160-63. A computer program has been used for 40 years to match up medical residency applicants with hospitals. See NATIONAL RESIDENCY MATCHING PROGRAM, HANDBOOK FOR STUDENTS 2 (1990). Students may apply to any program they are interested in. The hospitals then conduct interviews, but cannot extend offers during the interview period. By a specified date, students and hospitals submit confidential, rank-ordered lists of their preferences to the matching program. A computer algorithm then simulates the usual selection process by which hospitals make job offers to applicants and continues doing so until all positions are filled. A match constitutes a binding commitment. Students who do not get matched up by the computer can contact hospitals with unfilled positions. For a recent evaluation of this system, see Roth, *New Physicians: A Natural Experiment in Market Organization*, SCIENCE, Dec. 14, 1990, at 1524.

30. Wald, *supra* note 2, at 163.

31. See *id.* at 161-63. One of the serious drawbacks of LIMP is that it would dramatically multiply the number of interviews that would have to be conducted. Judge Edmondson made this point in voicing his objection to last year’s experiment:

I do not want to spend time interviewing students to whom I cannot make an offer at the conclusion of the interview if I wish to do so. The May 1 process that I understand was used in many places last year would seem to require that I interview considerably more people than is ordinarily the case to assure that on May 1, someone I like may still be available to work for me. I feel that my time is valuable; and if I can interview three applicants who seem qualified, offer them jobs, have them accept, and be done with the process quickly, I regard this as a good thing.

Edmondson letter, *supra* note 11, at 2.

Judges and students would bear the additional time burden equally but students would bear a grossly disproportionate share of the additional travel costs. The amounts required to finance travel for 20-30 interviews are substantial enough that some students might be edged out of desirable clerkships by colleagues who are able to pay for more trips.

Particularly intractable will be the problem of the clerkship mix, that is, each judge's desire to have a balanced workforce who get along with each other. Assuming there is no collusion or cheating—serious problems during the last grand experiment<sup>32</sup>—judges will have no idea who their clerks will be and therefore will be seriously hampered in making meaningful choices about the character of their personal staff.

Judge Wald's suggestion that judges can quantify their criteria by arranging candidates in "contingent rank-ordered preferences"<sup>33</sup> will not solve the problem. To begin with, the characteristics judges consider relevant in selecting a law clerk mix vary widely. Many judges consider geographical, racial and gender balance to be important, but not necessarily crucial, provided other criteria are met. Other judges may want at least one clerk who has served on a law review, or who has taken certain courses, or who comes from a particular school. Age and nonlaw experience may be an important factor in the mix; if you have two young, male hot dogs you may deem it particularly important to have a third clerk who is a bit older, or female, or who has had a prior career. Equally important are the intangible factors: How will a particular set of clerks get along with each other and the rest of the judge's staff?

The mathematics of the situation can be overwhelming. Assuming a judge has 25 candidates he is seriously considering for 3 spots—not at all an excessive number given the uncertainty associated with the proposed system—there would be no fewer than 2300 possible combinations of clerks that might emerge from the computer. Raise the number of serious applicants to 30 and the combinations will exceed 4000. To be sure, a lot of those combinations might be perfectly acceptable to the judge, but there will also be quite a few that are not. I'm not at all certain of how a judge would identify the acceptable combinations except by going through the possibilities one at a time.

And how would a judge identify combinations that, though not unacceptable, nevertheless are of a much lower preference than a linear application of the judge's criteria would suggest, e.g., where two of the candidates come from the same law school? How does the judge tell the computer how much to downgrade that particular combination? How can the judge even know?<sup>34</sup>

But there is a more fundamental issue here, one that would persist even if it were possible to solve the mechanical problems, obtain the cooperation of all of the participants and devise a substantially foolproof way of detecting cheaters. The function of medical matching is much different from that of

---

32. See Wald, *supra* note 2, at 159.

33. *Id.* at 162.

34. Here's an illustration of this particular type of discontinuity: Assume that a computer match would assign to a judge candidates number 1, 5 and 7 on his preference list. Assume also that candidates 1 and 7 are from the same school. The judge might well be willing to skip over candidate 7 and go on to number 8, 9 or 10, but she might not be willing to go to, say, number 15 in her order of preference. The judge may feel much different about the matter if she gets candidates 1 and 2; under those circumstances, she might be willing to go down as far as number 20 for the third slot.



clerkship selection because the relationship between a resident and his hospital is much different from that between a clerk and his judge. Although residents work closely with the doctors who train and supervise them, particularly in the smaller programs, the forging of an intense one-on-one relationship is not fundamental to the success of the mutual enterprise. The resident is searching for the best overall training program; the supervising doctors are just one of many factors he considers. Indeed, a good residency program will probably expose a young doctor to a variety of mentors over the course of his training. The relationship between the resident and any particular doctor cannot fairly be described as "the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair."<sup>35</sup>

In chambers, the success or failure of the one-on-one relationship is everything: A clerk gives the judge advice, debates with him, serves as his eyes and ears, lobbies for him, travels with him and may draft his opinions. The two work side by side every day for a year and need to function as a highly integrated unit. The match that is sought through the clerkship process is infinitely more delicate and complex than that involved in medical residency programs.

My concern with LIMP is not that it may fail, as it probably will, but that it may succeed, and in so doing undermine the judge-clerk relationship in subtle but important ways. The highly personal relationship between judge and clerk does not spring into existence full blown, like Athena from the head of Zeus. The selection process—for all its expense and pain and disappointment and hardship—is the crucible wherein the foundation of that relationship is forged. The time the judge spends talking to professors and reading draft law review notes; the student's efforts devoted to reading the judge's opinions; the time judge and clerk spend in interviews; the weighing of competing possibilities—all these help bring the parties psychologically to the point where they are ready to make a commitment to each other. Waiting and wanting and worrying, even despair, can help make that offer and acceptance so much sweeter when it finally does come.

Having served on both sides of the judge-clerk relationship—and having suffered my share of disappointments and enjoyed my share of triumphs—I can say there are few things quite so electrifying as hearing (or uttering) the words: "Yes, judge, I accept." It is a moment laden with anticipation and pleasure; it is the end of a process and the beginning of a lifetime relationship; it is a meeting of two minds and a mutual commitment. Who on earth would want to swap all this for a computer-generated letter telling you where and when to show up for work?

The desiccated, antiseptic, machine-driven process Judge Wald proposes might, conceivably, increase efficiency, but at what cost? How will the bond between judge and clerk be affected when offer and acceptance are so imper-

---

35. Wald, *supra* note 2, at 153.

sonal? How will the emotional content of the relationship be diminished by the inherently protracted delay between interview and computer communication? And what about judges and candidates who find the computer-generated match unacceptable in reality, even though it might have seemed acceptable as a remote contingency far down a list of happier possibilities? Under the current system there is at least one moment in time when the parties have a meeting of the minds; LIMP guarantees no such meeting of the minds as perceptions and preferences may change between the time of listing and the time of notification.

The fact of the matter is, the current system works remarkably well. Most judges seem happy with the clerks they select and I have met very few clerks who have given the slightest indication, no matter how subtle or tacit, that they wish they were clerking for somebody else. Despite the enormous pressure on everyone involved, the current system succeeds more than two thousand times every year in inspiring relationships of mutual trust and respect, usually lasting well beyond the one-year, in-chambers experience. When tested by the standard that really matters, the clerkship selection process has an enviable record of accomplishment.

Proponents of reform must meet one simple, fundamental criterion before they can make any claim to serious consideration of their proposal: They must provide some assurance that the change they propose will not jeopardize what lies at the core of the system by altering the judge-clerk relationship. LIMP has not managed to hobble past the starting gate because its proponents have failed to address the issue or even acknowledge its significance. Until this issue is addressed and resolved—if it can be—the proponents of LIMP or any other reform measure cannot legitimately claim we should give it a whirl and see what happens.

#### IV. CONSTRUCTIVE FIDDLING

Is there nothing, then, we can do to ameliorate what, after all, is a harrowing experience for many of those involved? The answer is yes, so long as the goals are realistic and the expectations modest. This is the market that determines the career paths of some of the country's smartest and most promising young lawyers; it would be astounding if it were conducted with the gentility of a minuet. We are, after all, training courtroom gladiators not ballroom dancers.

As I see it, the real culprits in the clerkship selection process are the law schools; any meaningful improvement must start there. I cannot understand why law school administrators are willing to put so much effort each fall into placing students with law firms and other employers, yet choose to take a

largely hands-off approach to the clerkship process.<sup>36</sup> It is true that only some students clerk, but a school's success in placing students in prestigious clerkships has a disproportionate impact on its own prestige, influence and reputation.

The ways law school faculty and administrators (not all, but a substantial number) betray the interests of their students, and make life more difficult for the rest of us, are simply appalling. Take, for instance, the orientation meeting where many law schools purport to give students the "lowdown" about law clerk selection. It has been a fact of life for some years now that a substantial number of judges begin to consider and hire law clerks as early as January. Orientation, if it is to help students decide to whom and when to apply, and give them adequate time to prepare applications and obtain letters of recommendation, would be most useful if held some time in November or December. For reasons best understood only by law school administrators, most schools obstinately refuse to hold orientation meetings until January or February.

I have remonstrated about this with law school faculty and usually get answers like: "Well, the students are too busy taking exams in December"; or, "Professors are too busy grading exams and we don't want them deluged with requests for recommendations"; or other such twaddle. What's really going on is that law school administrators are among the strongest advocates of restraint and reform, and therefore bristle at holding orientation meetings at a meaningful time lest they be accused of contributing to the problem.

The difficulty, of course, is that if law schools refuse to disseminate information, students will seek advice through other channels.<sup>37</sup> Pretty soon the savviest students manage to get their applications in without their law school's help and some may start getting calls for interviews or even offers.

Pandemonium erupts. Students who had been patiently awaiting the orientation meeting where "all will be disclosed" suddenly discover the clerkship train is leaving the station and they're stranded on the platform sucking their thumbs. In lieu of a reasoned, relatively calm decision as to which judges to focus on, panicked students fire up their computers to generate a dozen, two dozen, a gross of applications. Law school faculty who, with more time and leisure, might have been approached gingerly, now find themselves badgered by stud-

---

36. The systems for permanent placement and clerkship placement are like night and day. Most schools have permanent placement offices and staff that work like beavers all year to make the fall interviewing season a success. The task of supervising clerkship placement is usually buried within this office or assigned to junior professors who are often happy to give up the job once they have earned their spurs. Placement offices systematically gather information on law firms from a variety of sources: recruiting literature from the firms, secondary sources such as the National Association for Law Placement guidebook and legal periodicals, and student evaluations. Few do the same regarding clerkships. In particular, few maintain up-to-date, comprehensive files of student evaluations of clerkship experiences. To my knowledge, no school maintains information regarding *interview* experiences with various judges.

37. At some schools, the placement office insists on collecting the letters of recommendation so that all may be sent at a "proper date." Streetwise students avoid this pitfall by asking their recommenders to send letters directly to the judges.

ents seeking quick advice and a recommendation: "And please, please, *please* get it off tomorrow, Professor, by Federal Express. Rumor has it Kozinski has already hired two of his clerks."

An even more serious failing on the part of law schools concerns the accuracy of the information they disseminate to their students once they do get around to it. If they were selling securities, rather than merely influencing the career paths of the best and the brightest in our law schools, many law school administrators and professors would be in big trouble. The most common, most pernicious piece of misinformation disseminated year in and year out by our law schools is this: "If you get an offer from a federal judge, you accept on the spot. It would be offensive and improper to ask for time to think about it, and totally unseemly to shop the offer." As clerkship applicants have become more sophisticated, fewer and fewer believe this, yet I continue to see a surprising number of extremely qualified applicants who have been programmed to believe you just don't say no to a federal judge. Indeed, many students are reluctant to apply to judges they are not sure about, lest they get corralled by an unwanted offer. This, of course, undercuts the information-gathering function of the application process.

Such incorrect advice not only does a serious disservice to the student who gets trapped by an early offer from a judge she does not particularly care for, it also promotes the delusion that clerkship selection is a one-way street where the judges are choosers and the applicants stand idly by waiting to be taken, much the way apples get picked from a fruit stand.

Other prejudicial bits of misinformation that circulate around law schools are the following: Keep resumes down to one page, as if judges are too dumb or too uninterested to read past page one. Or, don't send more than two letters of recommendation. It is true that acknowledging hundreds of letters of recommendation is one of the most burdensome aspects of law clerk selection; but as to those candidates in whom I am genuinely interested, *no* number of letters is too many.

Then there is the time-worn suggestion that students should not be too aggressive during an interview; after all, judges are not used to being contradicted. There may, indeed, be those among my colleagues who like clerks with marshmallow personalities, but most realize that you *must* have law clerks who will talk back to you precisely because everyone else will not. While enthusiasm and genuine expressions of interest make an interview more enjoyable and improve the applicant's chances, a student who crosses the dangerous line into sycophancy, or who is too eager to agree with the judge's views, is probably digging a syrupy grave for himself.

Given the awe and apprehension law students feel at the prospect of meeting—much less sizing up and dickering with—federal judges, some of whom have authored opinions they read in their casebooks, this type of advice dispensed by law schools is naive and wholly counterproductive. Professors and

administrators who observe this process year after year surely know better. No one—not the judges, not the students, not the law schools—is served when clerkship candidates fail to treat the clerkship selection process as a mutual opportunity for judge and prospective clerk to get to know each other, ask tough questions and make a reasoned, mutually acceptable decision.

The law schools also generate a small mountain of misinformation about particular judges. For a while I stopped receiving applications from one major law school because the word had gotten around somehow that I would never hire anyone from that school. A rumor that I take my clerks to Hawaii every year prompted a rash of applications from another school. During the course of interviews I hear all manner of outrageous falsehoods about one or another of my colleagues, either bearing no relationship at all to reality, or bearing such a tenuous connection as to be worse than useless.

One serious problem is the haphazard way information about clerkships is disseminated in law schools. Few, if any, make the effort to gather and synthesize information about clerkships;<sup>38</sup> no effort at all is made to separate fact from fabrication, scuttlebutt from verified data. The unreliability of the information flow makes skittish students even more nervous, as they die a thousand deaths when they hear through the grapevine that their favorite judge has finished picking his clerks, or some other baseless nonsense.

Worse perhaps than the fact law schools are hotbeds of misinformation is that few schools routinely disseminate the type of useful information and guidance that could really help applicants. Relatively few applicants seem to understand what should and should not be put into a cover letter or a resume; few understand the purpose of an interview or what attitude to take toward the judge's staff; most are far too reluctant to ask hard questions, not ever having been told that an interview is a two-way street.

But those are only the basic issues, ones where a bright applicant might well fend for herself. How about the really messy stuff—like what do you say when you get an offer from a judge who is not your first choice, or when you just aren't sure? Or, if your favorite judge does make you an offer, do you have an obligation to go through with previously scheduled interviews? What happens if you accept an offer and then have second thoughts? Is there any graceful way to withdraw once you've accepted?<sup>39</sup> How do you deal with a

---

38. This is particularly true about clerkships in the state courts, Claims Court, Tax Court, etc. Few schools present these as real options to students. Because most law schools largely ignore these clerkships, they get ignored by students, many of whom wind up not clerking at all.

39. If you answered this question with a horrified "No!"—think again. A few years back I interviewed a student during a visit to a law school campus. Although it was still very early, I liked him, and his record looked terrific, so I made him an offer. Somewhat flustered, he accepted. A few days later, however, he called me and confessed he had been premature and withdrew his acceptance. I was miffed at first but eventually came to the realization that the fault was more mine than his. As the one with far more experience, I should have realized that the student was not psychologically ready to make a decision. I should have insisted that he think about it. Somewhat eager to close the deal, I did not take that important precaution and paid the price by losing a promising prospect.

dual career problem when a clerkship in a remote city may mean a year-long separation in the relationship or require finding the clerk's spouse a job or academic slot in the new location? What if the spouse is not yet a spouse, or not even an intended spouse? Is that the kind of thing you can discuss with a federal judge and in what terms?

Finally, why are the data so sparse in the law schools about judges who act harshly or rudely, who give exploding offers, who treat their clerks in an abusive manner, who are lazy or snide or arrogant or unreasonable? By and large, federal judges are intelligent, fair-minded and hard-working. But, like any other group, we have members who are less than perfect. I know who they are; it's not really a big secret. Why then don't law schools do a better job of compiling such information from people who have suffered through miserable interviews or clerkships?

On the flip side, few, if any, law schools systematically gather information about the positive experiences students have had during the interview process and during clerkships. Or if, as Judge Wald suggests, students are concerned about landing clerkships with so-called Supreme Court feeder judges, why does no law school compile the relevant information—issued on an annual basis by the Supreme Court—for a period of three, five or ten years? If schools don't provide these types of hard data to their students, what constructive purpose *do* they serve?

A final word about law school professors. *No one* plays a more decisive role in influencing clerkship selection. The grades they hand out and, even more telling, the written and oral recommendations they provide can make or break a clerkship candidate. Judges and professors communicate on a complex and very sophisticated level. A letter of recommendation that, to the untrained eye, may seem to be glowing, in fact may damn with faint praise. A few well chosen words—"She's better than you were" from one of my former professors usually does it for me—can cause a judge to pick up the phone and extend an offer. Professors, many of whom have clerked themselves, can also serve as mentors to students, providing helpful advice, as well as realistic assessments of their chances with a particular judge.<sup>40</sup>

---

Different by far is the situation of the young man who accepted an offer with Judge (now Justice) X and then attempted to elicit an offer from Judge Y in the same courthouse. Judge X, on learning about this, unceremoniously canceled the commitment.

Incidents where law clerks wriggle out of commitments with judges are more common than one would guess. They are usually predicated on some changed circumstances but sometimes reflect merely a change of heart. Even under the best of circumstances, it is an extremely delicate matter and the judge's reaction might well turn on whether he relied on the clerk's commitment in turning away other qualified applicants.

40. The decisive influence a single faculty member can wield is illustrated by my own experience. While in law school at UCLA, I had firmly made up my mind *not* to clerk and let the normal application season pass me by. One of my professors, Norm Abrams, refused to accept my decision; he kept after me, gently prodding, questioning, raising doubts. When a young federal judge by the name of Anthony M. Kennedy was appointed to the Ninth Circuit late in my third year of law school, Professor Abrams made his final push and I relented. Thanks Norm.

The ability to influence clerkship decisions gives faculty members a good bit of power and prestige. Just as the clerkship process is filled with lore about feeder judges, so every name-brand law school has its resident professor or professors who fancy themselves as feeders to prestigious court of appeals judges and even Supreme Court Justices. As Judge Wald notes, the reputation of being a feeder is somewhat self-sustaining; a feeder professor will attract the most accomplished and aggressive research assistants who are the kind of people that judges and Justices look for anyway. The aura of being a feeder therefore is a real benefit, and professors who have it work very hard to maintain it.

By and large professors use their influence over the clerkship process in a responsible and constructive fashion. But not always. Indeed, some law school professors—perhaps intent on preserving the mystique surrounding their relationship with the judiciary—can be the purveyors of a good deal of misinformation. Professors are at their worst when they attempt to play the role of brokers—strong-arming or cajoling reluctant judges or students to make or accept offers.<sup>41</sup> Professors are at their best when they give both sides reliable, hard-headed information and serve as a conduit between judges with whom they enjoy a relationship of trust and students in whom they have confidence.

Improvements to the system can indeed be made, but not in the direction urged by the central planners. The way to improve the clerkship process is to strengthen the market by which young lawyers and judges search each other out, look each other over and forge life-long relationships. Much can be done to make the process more open, less shrouded in fear and mystery; judges, law schools and students can all help in that regard. We must find better ways to detect and punish perfidy, strong-arm tactics and other unethical behavior. Indeed, criticisms such as those cited by Judge Wald have already led to improved behavior, as no judge wants to act in a way that an applicant would describe as the behavior of a six-year-old.<sup>42</sup>

Those of us who participate in the process year in and year out—judges and professors—have a special duty of fairness to the thousands of young people who must make their only shot count. We must all act with dignity and decorum, not as aloof, disinterested oracles, but as human beings with human interests, frailties and emotions. Improvements must, first and foremost, take into account that this is a market in human relationships, not pork bellies.

---

41. As I have been privileged to work with faculty from many law schools in identifying excellent law clerks over the years, I make these remarks with some trepidation, lest they be misunderstood as applying to any of them. Suffice to say, I only call for advice those professors whom I trust.

42. See Wald, *supra* note 2, at 152.

## CONCLUSION

It is ironic that while much of the world is looking for ways to privatize and decentralize economic behavior, many in the United States judiciary are looking for a better way to build a cartel. What makes this effort even more ironic is that the market for clerkships provides none of the normal justifications for centralization: The commodity in question is certainly important, but it is not a human necessity like food, shelter or medication; the market players on both sides are among the most sophisticated participants in any economic system; the two sides have roughly equivalent bargaining power, as judges need clerks every bit as badly as clerks need judges; the market is nationwide in scope, providing judges and clerks a large pool to draw from, yet both sides are served by fast, efficient and affordable means of communication and transportation; information about the market is readily available directly, through published sources and through intermediaries; the trading season is annual and more or less well-defined; and the result achieved through this process year in and year out—the actual matching of clerks to judges—has, by all accounts, been satisfactory to all involved. This, then, is the “anarchic open market so many judges and law schools now deplore.”<sup>43</sup>

But, surely, before we interfere with what is essentially a system of free exchange among mutually consenting adults, one that works pretty darned well, we must have more of a justification than concern about “the angst and perceptions of unseemly competition that now cloud the clerkship selection process.”<sup>44</sup> Until the proponents of reform explain *why* an overhaul of the current system is necessary and *how* the proposed overhaul would improve the situation, all we really have is a series of solutions in pursuit of a problem. The best course under the circumstances is to do nothing.

Laissez faire.

---

43. *Id.* at 163.

44. *Id.*