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ESSAY

SELECTING LAW CLERKS

*Patricia M. Wald**

I. "APRIL IS THE CRUELLEST MONTH"

April may indeed have been "the cruellest month"¹ this year for federal judges and their prospective clerks. For a decade now, federal judges have been trying — largely without success — to conduct a dignified, collegial, efficient law clerk selection process. Because each federal judge has only to choose two to three clerks each year, and there is a large universe of qualified applicants graduating each year from our law schools, this would not seem an insurmountable task. And because each federal judge has choice first-year positions to offer and has no need or ability to dicker on salary or hours or perks, one would expect the process to go quickly and smoothly. Not so. To the contrary, the yearly clerk caper has been variously described as a "frenzied mating ritual,"² "madcap decisionmaking,"³ "positively surreal, the most ludicrous thing I've even been through . . . brilliant, respected people . . . behaving like 6-year olds"⁴ and a "process . . . in which the law of the jungle reigns and badmouthing, spying and even poaching among judges is rife."⁵

This state of affairs is ironic. In the circuit courts of appeal, for example, it is not unusual for a judge to receive 300-400 clerk applications, most from top-drawer candidates. Why then the intense competition among judges, the unreasonable short-fuse deadlines for acceptance, the covert maneuvering by judges and applicants, and the judiciary's frustrating inability to devise an orderly process that comports with the seriousness of the job and the dignity of the relationship between judge and clerk?

After eleven years as a judge and a participant in numerous unsuccessful efforts at reform, let me suggest a few reasons for the highly

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1. T.S. ELIOT, *The Waste Land*, in *THE WASTE LAND AND OTHER POEMS* 25, 27 (1971).

2. Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash*, N.Y. Times, Mar. 17, 1989, at B4, col. 1.

3. Internal correspondence.

4. Margolick, *supra* note 2 (quoting a Stanford student).

5. *Id.*

charged atmosphere in which clerk searches are conducted. The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. Unlike lawyers in law firms or government bureaucracies, the federal judge (I speak now primarily of an appellate judge) works in small, isolated chambers with a minimum of work contacts outside. She is totally dependent on herself, her law clerks, and her staff, for an output of forty or more published opinions a year and dozens of unpublished, nonprecedent-setting opinions. Although she may talk to and confer with other judges and sometimes their clerks in the opinion-writing process, her work will basically reflect the efforts of her own chambers. If for any reason one of her clerks proves significantly deficient, she, or the other clerks, must take up the slack; she cannot turn to other chambers or other court personnel. Although, as our legal journals chronicle, judges on occasion have fired law clerks during the year, it is a rare occurrence devoutly to be avoided. As a rule, judges live with their misjudgments. But an excellent versus a mediocre team of clerks makes a huge difference in the judge's daily life and in her work product. Indeed, a judge sometimes decides whether to file a separate opinion or to dissent in a case based — at least in part — upon the support she can anticipate from her clerks. Or she may ask for, or beg off, responsibility for a particular opinion assignment because of the availability or nonavailability of a particular clerk to work on the case. Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers. Her clerks are basically the only persons a judge can talk to in depth about a case. Her colleagues have their own opinions to write; after the initial post-argument case conference, there is usually little time for extended discussions about fine points of an opinion they are not writing. The judge to whom the opinion is assigned is expected to produce a draft for her colleagues to critique. If she is in doubt, troubled, or just plain frustrated, the clerk is her wailing wall. Most of us are not Holmes or Cardozo; we are often unsure of our analyses or even our conclusions. We need to test ideas before exposing them to the hard probing of colleagues. We need assurances, but even more important, criticism from knowledgeable persons who are loyal and unambiguously committed to us. We have, on occasion, to let our guard down, to speculate, to experiment, to argue, even to make frank and sometimes uncharitable appraisals of our colleagues' drafts and suggestions. Despite trendy criticism of undue law clerk influence over judges, my view is that our jurisprudence

is better for the give and take among judges and law clerks than if judges had to go it alone.

Different judges use clerks differently, some only to exchange ideas, or to check footnotes, or to research records, others, after discussion, to draft opinions. I am not sure that one method is better or truer to the ideal of a good judge than the other. The aim in the opinion-writing effort is to produce a cogent, coherent rationale for a majority or a dissenting opinion, and to accommodate that rationale to existing law, or even, on appropriate occasions, to move existing law forward. If the clerks' efforts advance that goal and are acceptable to the responsible judge, I do not see what difference it makes as to whose words are whose in the opinion. Given the size of records and the inexorable increase in caseloads, precious few of us can perform without staff support.

So, in the final analysis, although federal judges' income lags by comparison with their private peers, they have few perks, no chauffeurs or limousines, and minimal expense accounts, they do have access to the "best and brightest" helpers — albeit for only a year at a time. That is why good clerks are so valuable, and why many judges find them worth "going to war" for.

But why the fervent competition for a handful of young men and women when our law schools spawn hundreds of fine young lawyers every year? Very simply, many judges are not looking just for qualified clerks; they yearn for neophytes who can write like Learned Hand, hold their own in a discussion with great scholars, possess a preternatural maturity in judgment and instinct, are ferrets in research, will consistently outperform their peers in other chambers and who all the while will maintain a respectful, stoic, and cheerful demeanor.

And, candidly, there is another factor in the calculus of many appellate judges who lead the annual chase. A judge's reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner so that he can maintain a reputation as a "feeder" of clerks to the Supreme Court. Correlatively, the stronger an appellate (or a district) judge's reputation for channeling clerks to the high court, the more attractive he will be to many understandably ambitious, qualified clerk applicants. Some judges have long friendships with justices so that their clerks have an edge simply by virtue of that relationship. Others become feeders because they consistently are able to recruit the law review editors and top students from prestigious schools; not surprisingly, they want to keep it that way. Thus, in any year, out of the 400 clerk applications a

judge may receive, a few dozen will become the focus of the competition; these few will be aggressively courted by judges from coast to coast. Early identification of these "precious few" is sought and received from old-time friends in the law schools — usually before the interview season even begins.

Why is the race so much more frenzied for positions within the federal courts than at pricey law firms or in choice government agencies, or even in the Supreme Court, which manages to hire its clerks each year with decorum and no evidence of unseemly competition? Generally, firms and government agencies are hiring a number of new associates or staff attorneys; a misjudgment as to any one is not terribly costly. And because the Supreme Court has only thirty-seven clerkships in all, there are top applicants to accommodate every justice without jostling. I have never heard of an applicant turning down a justice's offer or even calling another justice for a counteroffer. Each spot has equal prestige — no comparative shopping is necessary; there is no higher clerkship to feed into.

In their less-harried moments, lower court judges realize that there is plenty of talent out there and that the way we pick clerks now is not a sure indicator of their performance. One of our ablest federal appellate judges commented during the most recent selection process that "top grades don't necessarily predict who will end up doing the best job, and the professors don't know either." He is right, and I would add that the best performing appellate clerks are not always the ones who go on to the Supreme Court. However, the myth of the superstar clerk lives on, and like the pied piper continues to lure pursuing judges.

II. FAILED EFFORTS TO REIGN THE BEAST

Until the last decade, it seemed that federal appellate judges were content to recruit clerks at an easy pace. There were fewer judges, and fewer clerkships; judges had one, later two clerks; judges' caseloads were lighter, their dependence on clerks less critical. Because of the small numbers, a clerkship, though always a valuable career asset, was not considered as crucial to certain careers in the law, like teaching, as it apparently is now. I was hired in 1951 as a clerk to Second Circuit Judge Jerome Frank in May of my third year on the recommendation of a law school professor who knew us both. No formal letter of application was made, no heavy appendix of sample work attached. The interview, if such it was, was conducted in the hallway of the law school where Judge Frank taught a weekly seminar. A few judges still do it that way or commandeer faculty friends or panels of their ex-

clerks to pick out the new clerks. But the majority of judges I know do otherwise: they meticulously weed out applications according to grades, law review positions, faculty recommendations, writing samples, winnowing the list down to a week or so of interviews (anywhere from five to fifty); they then make offers, and reoffers if the first choices do not accept.

In an open market, where there is no prior agreement on when the selection process may begin or end, the preemptive striker sets the time frame for those judges who want to compete. Over three decades, the selection time has crept forward from late in a student's third year to midway in his second year. Early-bird judges skim off those applicants with the brightest credentials. This clearly bothers not only other judges but the top clerk candidates themselves who have their own preference about whom they wish to clerk for. So upon receiving an early offer from a less-favored judge, the candidate may call his first choice, apprise her of the offer, and solicit a counteroffer. And the race is on. Clerk candidates, by the way, are not themselves without guile; they learn quickly to hedge, to answer some calls earlier than others, to avoid some calls altogether, and to solicit time in which to seek competing offers. Judges, in turn, sometimes are unseemly in their pursuit. They make "short-fuse" offers that lapse if the clerk does not respond within a specified time. Without any agreed upon guidelines among judges, the process over the years has peaked earlier and earlier and become ever more frenzied.

For almost a decade now, judges have complained that the clerkship selection process is undignified, even demeaning. Law school deans and faculties have echoed the lament: students' concentration on studies is disrupted mid-term; faculties are thrown into internal competition and forced to make evaluations on inadequate academic records. Since the early 1980s there have been sporadic attempts to establish ground rules. The Judicial Conference of the United States established an ad hoc committee in 1982 that recommended a schedule for beginning interviews in September of the candidates' third year but set no fixed, enforceable time within which to make offers. Many judges abided by the recommended guideline but a substantial number did not. Because of the consequent tensions, the effort was abandoned. In successive years, judges in several circuits agreed to deadlines on offers in April or July, but again, many judges were unwilling to accept these constraints.

Throughout the eighties there were, alternatively, open-season years (judges were free to make an offer at any time) and years in which many (but not all) judges in many (but not all) circuits agreed

to hold to a specified deadline. Skepticism and cynicism about the effectiveness of these efforts grew. Newly appointed judges expressed dismay at how ruthlessly the process worked. Veterans said they were disinclined to join yet another voluntary compact.

During this time the role of the law schools came under fire as well. "Back-channel" efforts to place favored students were scored, as was the failure of law schools to encourage students to hold to voluntary deadlines. Proposals were made — and rejected — that judges themselves condition their consideration of applications on a student's pledge not to consider an offer before an agreed-upon date.

Attempts to enlist the support of the Supreme Court in halting the rush have been unavailing. Not experiencing the same pressures itself, the Court remains aloof; apparently, the justices consider it a problem that lower court judges must resolve for themselves.

In 1989, after a particularly scathing article in the *New York Times* comparing federal judges to "sheiks looking for luxury cars," sprinkled with references to the annual "mad dash" for clerks, and "judicial decorum left in the dust,"⁶ a group of judges, including several circuit chiefs, undertook a campaign to have the Judicial Councils, the governing bodies for the circuits, adopt deadlines for clerkship offers. Recognizing that it was unlikely such a directive could be enforced against an errant judge, it was still hoped that a policy directive from the Councils would carry more weight than an informal agreement of judges. In the spring of 1989, the District of Columbia Judicial Council passed the following Resolution:

Commencing in 1990, the D.C. Circuit Council is committed to the practice that no job offers, tentative or final, shall be made to law clerk applicants before May 1st of the applicant's second year.

In some Circuits, the Resolution talked in terms of the "sense" of the Council; in one, it was reported that a substantial number of judges was willing to go along but "two or three stridently independent types are indulging in forensic displays of Article III independence." One dubious circuit judge called the proposal a "shot in the dark" and suggested that sometimes doing nothing was the best alternative available. A second complained that smart applicants could confound the system: "A judge is not going to know how many people to call on May 1st." A third prophesied that the plan would fail because there would always be noncompliance.

In the end, the D.C., Federal, First, Second, Third, Fourth, Sixth, Eighth, Tenth, and a majority of judges on the Ninth adopted some

6. *Id.*

form of limiting resolution. The Fifth, Seventh, and Eleventh declined. There were two variations in the resolutions: some, but not all, contained a provision that the offers remain open for twenty-four hours; some made compliance with the May 1st deadline contingent upon the concurrence of all other circuits; some agreed unilaterally.

Following the adoption of the resolutions, notices were sent out to all major law schools. The Association of American Law Schools, in turn, urged its faculty members to withhold letters of endorsement until April 1 so that interviewing would be limited to the one month before May 1. The scheme, however, did not (and could not) prohibit students from contacting judges, and so the flood of requests for interviews actually began in late February and early March to coincide with law schools' spring breaks. On the notion that applicants paying their own travel fares should not have to make repeat visits, most judges began the interviewing process in early to mid-March; the law schools fell in line and in many circuits the interviews were largely over by April 1.

There were some early defections among judges in March, but a relative few. Many of the restive judges of earlier years stayed the course in 1990. But there was predictable unhappiness with those circuits that had not adopted resolutions, where judges had the field to themselves. In some cases, complying judges rationalized that, in meeting the offer of a noncomplying judge, they were not violating the agreement. In early April, one of the major circuits withdrew, its judges lamenting that "most large cartels break down" and suggesting that it may be necessary "simply to let chaos reign." And a committee of complying judges in one circuit declared that it was "within the spirit of the rule" for judges' law clerks to contact students on their judges' "short lists" to indicate continuing interest and to give the students an opportunity to prioritize their choices. After such notification, it would be fair to expect that students would act promptly when a firm offer was made.

As Mayday approached, complying judges grew increasingly anxious; efforts to get agreement on a twenty-four-hour waiting period for acceptances failed. One judge pleaded for at least a short period to allow students to make a phone call or two before committing themselves to a particular clerkship. "They will learn," he said, "that it makes little difference in the long run which clerkship they choose." By consensus, a one-hour waiting period was fixed.

Savvy clerk applicants meanwhile played their own hands. They (or sometimes their sponsoring professors) called chambers in advance to announce that that particular judge was the first choice. This news

permitted the judge confidently to make the applicant an offer if he did it promptly at 12:00 EST (the agreed-upon hour for opening offers); if he waited, however, he was likely to receive a call that the applicant had another offer and could only hold out for a few minutes. So, without violating the agreement and making an offer ahead of time, the judge had only limited control. One venerable judge refused to enter the May 1 roundup, which he compared to "buying a yearling at an auction."

What actually happened on May 1? A few judges weakened at the end and made calls ahead of the deadline. This, in turn, provoked the students to call other judges they preferred before the noon deadline, so there was a destabilizing flurry of predeadline transactions. But the major complaint was the frenzy with which offers had to be made and accepted. Those judges who gave their choices time to reflect found themselves severely disadvantaged. The one-hour window collapsed as applicants felt constrained to accept the first offer tendered. A judge who did not get through to an applicant at 12:00 noon was often too late. "I got my first choice," one judge complained, "and, after that, having given the applicant a half hour, I found my next 8 or 9 choices gone." By 12:15 virtually all of the bidding in the D.C. Circuit was over. Between 12:00 and 12:15, judges were making offers on one line as calls came in on a second from frantic applicants trying to learn if they were to get an offer before they responded to the offer of another judge.

Afterwards, a few judges said they thought that postponing the selection date to May 1 was a gain; some also said the interviewing process had been more pleasurable and comprehensive since it was not conducted under the threat of preemptive offers by other judges. A number of applicants commented favorably that they got to meet and interview more judges than they might have in other years.

But overwhelmingly, the critics seemed to prevail.⁷ Judges commonly complained that because all offers were postponed until May first and interviewing began in March, they interviewed more candidates than they wanted since they could not be sure their first choices would accept. From their point of view, the time would have been better spent on the work of the court. And several applicants complained about the increased cost of interviewing with numerous judges. Given the intense competition for clerkships, most applicants

7. A questionnaire is presently being circulated among federal judges to ascertain more precisely their reactions to last year's experiment.

felt compelled to interview with many judges; under the old system, an early offer could save the applicant much of this expense.

Leaders of this year's efforts recognize that it will not likely be repeated. Some judges who complied have already declared that they will not do so again. There appear to be three basic options for change. The first is a return to "complete deregulation." Let those who wish to compete do so on their own terms, however early they begin the process or however arbitrarily they act during it. One critic of this year's experiment points out that judges who are prone to act entirely at their own discretion will do so no matter what the rules are. Thus — the deregulators say — the best way is to let judges do what they want, even if it does not always look decorous to the public. There is considerable support for this position.

A second option is *more* regulation: set a definite but shortened time for interviews immediately preceding the offer deadline, perhaps April 1-30, and require that the offer remain open for a fixed period, perhaps one to two hours. But adherents concede that it will not work unless it can be enforced, and no such control over fiercely independent judges presently exists. A simpler variation has been suggested and appears to have the greatest support: all circuits agree not to interview until a certain date, preferably in the fall of the students' third year; once interviews begin, offers can be made at any time. Some West Coast judges, not unreasonably, balk on the ground that it would give East Coast judges a natural advantage; offers will be made to the most desirable East Coast candidates before they embark on expensive interviewing trips West.

III. IS THERE A DOCTOR IN THE HOUSE?

For the past several years, and especially in the months since May 1, judges have talked reverently, if often vaguely, about the "medical model" — a matching program that has been used for forty years to match up medical resident applicants with hospital residencies here and in Canada.⁸ In fact, a committee of the D.C. Circuit, headed by District Judge Louis Oberdorfer, is exploring the feasibility of such a system for law clerks. The committee has sought the advice of the Association of American Law Schools, and firms that design and implement match systems in the medical profession. While recognizing a

8. It has also been used in the Toronto-Vancouver Law Firm Matching Program which matches law school graduates to firms in those two cities where they must "article" for a year before becoming eligible for the bar. The program runs under the auspices of the Law Society of Upper Canada and the Vancouver Bar Association and processes 900 applicants for over 800 positions with approximately 150 employers.

host of problems, the project participants are moderately optimistic about the feasibility of such a system for clerk selection.

The basic algorithm for all matching programs is the same, although software must be customized to address the specific requirements of each program. The system works like this: applicants apply to any program they are interested in; interviews are conducted completely independently of the match. But no offers can be made during the specified interview time. By a predetermined date, each applicant submits a Rank Order List of programs he or she would accept in order of priority; in the case of law clerks it would be a rank order of preferences among judges. The judges, in turn, submit similar lists of their "true preferences." In our case, the matching clearinghouse would then simulate the making of offers by judges and the acceptance or rejection of these offers by applicants based on the information in the rank sheets. Each judge would receive acceptances from her highest ranked applicants who have not already received offers from judges that the applicants prefer. A match between an applicant and a judge would constitute a binding commitment. Following the match, information on positions that remain available would be provided to applicants who had not been matched to a position; correlatively, information on unmatched applicants would be provided to judges with unfilled positions. They could then contact and negotiate with each other at will. All ranking information would be kept confidential.

Selecting law clerks poses special problems to the application of a matching system. First to mind is the need for flexibility to accommodate most judges' personal desires for diversity among their clerks. Thus, assuming a judge has a clear first preference, she may not have a clear number two or number three choice regardless of whether number one accepts. Rather, she may be thinking in terms of a blend of law schools, gender, race, ethnicity, backgrounds. If she gets her number one choice, she may know who she wants for number two. If she gets number two as well, she may have number three picked. But if she misses on number one, her number two may be altogether different, and even if she gets number one but not number two, her next choice for number two and for number three may vary. Thus the ranking of "true preferences" may work for the student applicant but not for the judge.

In fact, this problem surfaces in medical matches as well. Without getting into the complexities, other programs have found that it is possible to structure the simulated match to accommodate attempts to recruit a particular distribution based on specific applicant characteris-

tics. The prospective employer can divide positions into separate categories and submit ranking orders for each type. Thus contingent rank-ordered preferences would allow judges to submit a different set of preferences if their first (or second) choices are not available.⁹ Whether, however, the subtle factors that enter into a judge's choices of three clerks can be objectivized sufficiently in advance to be susceptible to simulated choices will remain unknown until a proposed working model is exposed for comment.

One aspect of matching systems — strict confidentiality — could be attractive to the judiciary. The matchmaker would not disclose either the judge's or applicant's rank preferences and mutual promises of "I'll pick you first if you pick me first" would not be enforced. This confidentiality would protect judges from what they often consider the embarrassment of having their known first choices prefer other judges. If they did not disclose their choices voluntarily, they would not be known. There is no question that collegiality now suffers when a judge loses his first choice to another judge that the applicant chose or even solicited in preference to him. The match system is designed to minimize such situations. Of course, it is naive to think that preferences will not be communicated even if not enforceable. And an applicant who leads one judge into thinking he is her first choice may well be quite reluctant to rouse that judge's pique *in futuro* by downgrading him on her preference list even if she is given assurances of confidentiality. So even the computerized match may not entirely eliminate preemptive strikes by some judges. But it would certainly soften the harshness of the Mayday market.

More fundamentally, a judge may feel that a candidate's genuine desire to clerk for him is a valid element in the judge's own decision. A highly motivated clerk will often out-produce a less motivated one, and the relationship with a clerk who truly admires the judge can be more satisfying than with one who got only her second choice. There is no great attraction for a judge to list his first five "true preferences" without knowing whether there is any reciprocal preference. The judge could end up with the least of both worlds — clerks who were not his top choices and who did not choose him as theirs.

The match system as presently practiced also means that participating parties are bound by the simulations. That may be too much to expect of article III judges who are notoriously independent critters.¹⁰

9. The National Matching Service reports that the Vancouver and Toronto programs have matched 73% of applicants and 76% of law firms to their first or second choices.

10. And perhaps too much patience; after priority lists have been submitted by both sides, the results of a match typically take 2-1/2 weeks to announce.

Perhaps the biggest unknown is whether a match system can work if not all applicants and judges participate. It would not be surprising to encounter many "wait-and-sees" the first time around, particularly among judges. One estimate is that it would take participation by at least seventy percent of the judges on the most aggressive courts and at least the same percentage of candidates in the principal law schools to make a match system work.

In existing matching programs, not all applicants or employers participate, but even the nonparticipants are bound by some rules. Thus, in the Toronto-Vancouver apprenticeship match, nonparticipating firms may make offers to participants only up to the time that the participants submit their rank lists, and they must leave any existing offers to participating applicants open until that date. Students, in turn, may accept an offer only up to the date they submit their lists, not afterwards. If they have accepted an offer, they may not submit a list. It is not clear — indeed it is quite murky — whether nonparticipating article III judges would agree to abide by any such rules, or even whether all participating students or judges would stick to them.

In the past, a handful of independent judges have been unwilling to accept fixed selection dates. Those same judges may defeat a match system as well, unless other judges are willing to abide by a scheme that does not have 100% compliance, and hence risks losing a few superstar applicants. My own feeling is that the match system deserves at least a fair trial as a last hedge against the anarchic open market so many judges and law schools now deplore. But it is surely no panacea; it cannot eliminate all of the human variables that beset the present system. Maybe judges have to look harder into their own realities and perceptions to see if the gamesmanship at which a few excel is really worth the angst and perceptions of unseemly competition that now cloud the clerkship selection process. We shall see.