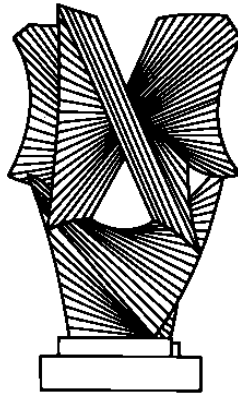


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THE MARKET FOR FEDERAL JUDICIAL LAW CLERKS

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Abstract

In September 1998, the Judicial Conference of the United States abandoned its latest attempt to regulate the timing of interviews and offers in the law clerk selection process. This paper surveys the further unraveling of the market since then, makes comparisons with other entry level professional labor markets, and evaluates some possibilities for reform.

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Prologue: In September of 1998 the Judicial Conference abandoned its most recent attempt to regulate the timing of interviews and offers in the process for hiring federal judicial law clerks. In September of 1999 most prominent law schools abandoned or cut back their attempts to regulate the time at which faculty recommendation letters could be sent. Thus the law clerk hiring process now gets underway at the beginning of the second year of law school, two years before the clerkship positions themselves begin.

What is going on here, and what, if anything, should be done about it? To answer the first question, we present a wide range of new and systematic empirical data from judges and students about their experiences in the market for federal judicial law clerks, and we show how the problems of this market resemble problems in a broad set of other markets in the economy. To answer the second question, about possible reform of the law clerk market, we describe some of the unique features of this market that make reform

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particularly challenging and consider whether there are ways to adapt the reforms that have succeeded in other markets to these unique features.

Federal judicial clerkships represent an important point of entry to many of the most sought-after positions in the legal profession. Every year top students from elite law schools compete for positions with judges who can help them to land Supreme Court clerkships, plum teaching jobs, and competitive law firm positions.¹ At the same time, federal judges depend heavily on their law clerks to aid them with their workload.²

The essential problem with how this important market presently functions is that it is difficult to establish the time at which the market will operate. Any time that is set will tend to “unravel” because judges have an incentive to “jump the gun,” hiring slightly earlier than their competitors, to get the pick of the candidates.³ Students have strong reasons to accept early offers from judges, among other things because they will not know what their other options may be and also because it is, quite simply, difficult and uncomfortable to hold off a federal judge. Judge Kozinski explains the incentive on the judge side: “From the judge’s perspective, making an early offer allows him to ... attract candidates who might not otherwise seriously consider him for a clerkship.”⁴ “[T]he ability to make offers early” is “a very important bargaining tool.”⁵ As described by one respondent to our survey of federal appellate judges:

I live in, and my office is located in, a country town . . .
. . . [I]t is not every young man or woman who will come here
to live; indeed, most won’t. . . .

[Initially] I did not employ law clerks until they had
finished the first term of their senior year of law school. . . . I
soon found out that it was more and more difficult to get law
clerks from the top of the class. . . . But I have found that there
are a few people in the top of the class at most law schools
who had rather be assured of a job early, even in a town this
size, than to wait and enter the contest in becoming clerks for
judges in the larger cities with the larger and better-advertised

¹ See generally Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1709 (1991) (describing judges’ influence over clerks’ future career trajectories).

² See, e.g., Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

³ See Alvin E. Roth & Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 AMER. ECON. REV. 992, 992 (1994).

⁴ Kozinski, *supra* note 1, at 1720.

⁵ *Id.* at 1710.

reputations.⁶

The result of this incentive for jumping the gun is a situation in which judges scheme to out-maneuver one another in the effort to hire desirable clerks. Judges accuse their colleagues of “frequenting maternity wards to make sure they get the ‘best’ clerks.”⁷ The frenzy of hiring has cast the judiciary into disrepute in some eyes—a concern that judges have often voiced over the years, and a concern that is dramatically confirmed by some of the striking stories told by students in response to our surveys. The process by which clerks are hired has other negative consequences as well, as we describe below.

Part I of our analysis provides a normative framework within which to analyze the market for federal judicial law clerks. There is a complicated economics literature on the efficiency of hiring in markets with timing problems; we attempt to distill the essential components of this literature, which have not been reflected in the existing legal literature on the law clerk market, and we highlight some special features of the economics literature that bear on law clerk hiring specifically. Our normative framework provides a context within which to view our empirical results.

A fundamental goal of our project has been to gain an improved understanding of how the market for federal judicial law clerks actually operates. There are many rumors and opinions about this market, and few hard facts. To remedy the lack of systematic knowledge, we have surveyed both judges (including Supreme Court Justices) and students about the law clerk hiring process. The little empirical work that presently exists is quite dated (particularly in this rapidly changing market) and also is much less comprehensive than our effort.⁸ We use our results to present a broad empirical picture of the market from both judges’ and students’ perspective.

Part II describes our empirical findings. On the judge side, we surveyed all federal appellate judges in both 1999 and 2000 and received responses from two-thirds of the judges in 1999 and from 54% of them in 2000. This gives us a reasonably comprehensive picture of the law clerk market as viewed from the judge side. We also sought the input of the nine

⁶ 1999 Judge Survey #26d. For details on our citation practices for survey responses, see *infra* Part II.B.

⁷ Abner J. Mikva, *Judicial Clerkships: A Judge’s View*, 36 J. LEGAL ED. 150, 152 (1986).

⁸ A survey of judges was conducted in the early 1990s, as was a survey of law students. See Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207 (1994) (judge survey); Lynn K. Rhinehart, *Is There Gender Bias in the Judicial Law Clerk Selection Process*, 83 GEO. L.J. 575 (1994) (student survey).

Justices of the United States Supreme Court and received responses from eight of them. On the student side, we conducted surveys in 1999 and again in 2000 about the hiring process. Our results provide a window on how the hiring process is regarded by applicants, how well students are being matched to judges, and how the process is affecting students' decisions to apply for clerkships.

Part III looks at other markets that have had difficulty in establishing the timing of transactions. Markets with such timing problems can be found in a wide range of settings; they include markets for athletic tournaments, markets for medical residents, and markets for social club memberships. Part III attempts to distill from the existing economics literature what has been learned from the extensive study of this other set of markets.

Part IV tackles the question of what, if anything, should be done in the market for federal judicial law clerks. The main possibilities, in their rough contours, are familiar from the existing legal literature: 1) Leave the hiring process unregulated (as at present); 2) Establish start dates for offers and perhaps also interviews (a strategy that has been tried in the law clerk market on numerous past occasions); and 3) Institute some form of centralized matching of judges and clerks. The last approach is the one presently used in the market for medical residency positions (as well as in a variety of other markets), and one of the present authors (Roth) was responsible for the design of the centralized matching process presently used for medical residencies.⁹

Because of the diversity of opinion expressed in the existing literature and in our surveys on the matter of reform, we will not try to focus on any one of these three approaches. Rather we shall attempt to describe, in light of the evidence and insights presented in Parts I through III, how each of these approaches could best be implemented; we will then assess its likelihood of success in light of what we know from our evidence and the experience of other markets. Of the possibilities we consider, the most promising appears to be the use of a centralized matching process *for the limited set of federal appellate clerkships that may feed into Supreme Court clerkships*, with enforcement of the centralized matching requirement by the Supreme Court. We describe this proposal in more detail in Part IV.C below.

I. A Normative Framework

A natural prerequisite for assessing whether what is happening in the market for federal judicial law clerks is good or bad is a set of normative

⁹ See Alvin E. Roth & Elliott Peranson, *The Redesign of the Matching Market for American Physicians: Some Engineering Aspects of Economic Design*, 89 AMER. ECON. REV. 748 (1999).

criteria against which to make that assessment. We begin with the concern most often voiced by judges—that the current process casts the bench into disrepute. We then turn to the question of the efficiency and perceived fairness of the current process of law clerk hiring.

Throughout the discussion it is important to distinguish between two separate, although related, features of the market for law clerks. The first is that hiring tends to occur in a rough-and-tumble manner, with judges making short-fuse offers, trying to out-maneuver each other, and so forth. The second, distinct feature is that hiring tends to occur very early in the student’s law school career. These two things are related in important ways, of course, but for our normative analysis it is important to distinguish between them.¹⁰

Throughout our discussion we focus on the market for *federal*, and especially federal appellate, judicial clerkships. We adopt this focus because the market for federal, and particularly federal appellate, clerkships is the market in which most of the problems with which we are concerned have arisen.

A. Disillusionment with the federal bench.

From judges’ perspective, the biggest concern with the current state of the law clerk market seems to be the disrepute cast upon the bench by the way in which hiring is done. (Judges are also likely to care about some of the other problems we describe below.) Indeed, the impetus for one of the prior reform efforts was an article in *The New York Times* that painted a colorful picture of the judicial “free for all” that occurred as judges “behav[ed] like 6-year-olds” in the “scramble” to hire law clerks.¹¹ One judge likened the process to a “calf scramble,” which is “the low point of many western rodeos. A small number of calves are turned loose in the arena, along with a larger number of adolescent cow persons. The latter attempt to seize, subdue, and carry out the former. The SPCA writes letters to the editor during the following week.”¹² (Presumably the “adolescent cow persons” here are the judges.)

The “judicial disrepute” normative perspective on the law clerk market is relatively simple. A system in which hiring occurred in an orderly and respectable manner would be preferable to a system that can be likened

¹⁰ See generally Hao Li & Sherwin Rosen, *Unraveling in Matching Markets*, 88 AMER. ECON. REV. 371, 372 (1998) (discussing the distinction between strategic behavior in transactions and how early the transactions occur).

¹¹ See Becker, Breyer & Calabresi, *supra* note 8, at 209-10 (quoting David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust*, N.Y. Times, Mar. 17, 1989, at B4).

¹² *Id.* at 210 (quoting Judge Alfred T. Goodwin).

to a “calf scramble.” The fact that hiring occurs early in the students’ law school careers might not be an independent problem on this view; rather it may be merely a symptom of the other problem—that judges are jockeying for position and trying to out-maneuver one another in the competition for the best law clerks.

Other normative criteria turn out to be more complex, as we shall see.

B. Efficiency.

From an economist’s perspective, the natural question to ask about the market for federal judicial law clerks is whether it is efficient. Markets normally give some promise of efficiency if they allow participants to compare the alternatives available in the marketplace. Thus one potential source of inefficiency in the law clerk market is that the “calf scramble” forces judges and students to make choices before they can make real comparisons. A second (related but distinct) potential cause of inefficiency is the early date at which hiring takes place. If the quality of the match between judge and clerk depends on attributes that are not adequately predicted by information available after the first year of law school (and would be better predicted by a student’s full law school record), then hiring may be occurring at an inefficiently early time.¹³

We elaborate on these issues below, considering them in the light of several different possible standards of efficiency.

1. Pareto efficiency.

One standard is Pareto efficiency, which says that an outcome is efficient as long as there is no way to make one or more parties better off without making at least one person worse off. Under this standard, the market for federal judicial law clerks is likely to be efficient. The Pareto standard is notoriously weak, for rarely can one make some people better off without

¹³ Note that salaries are highly regulated in this market. For recent analyses of matching in contexts where salaries are flexible, see Hao Li & Wing Suen, *Risk Sharing, Sorting, and Early Contracting*, 108 J. POL. ECON. 1058 (2000), and Wing Suen, *A Competitive Theory of Equilibrium and Disequilibrium Unraveling in Two-Sided Matching*, 31 RAND J. ECON. 101 (2000). For a discussion of relaxing salary restrictions in the market for federal judicial law clerks, see Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 Md. L. Rev. 129, 167-72 (2000). However, many of the inefficiency results apply both to matching with fixed salaries and to matching with flexible salaries. See, e.g., Roth & Xing, *supra* note 3, at 1034-35 (theorem 2).

making even a single person worse off.¹⁴

To be sure, it is possible that the law clerk market is suboptimal for all participants. It may be that some participants jump the gun because they hope to gain an advantage over the others, but in doing so they create a negative externality for the others that forces them to move early also. In this case it can happen that all participants would be better off if hiring occurred in an orderly manner, at a later time, or both.¹⁵ But it seems more likely that some gun-jumping judges would be made worse off by such a reform, since they would no longer have the bargaining advantage that they seek to get from jumping the gun. (Certainly Judge Kozinski's view in his well-known article *Confessions of a Bad Apple*¹⁶ is that such reform would make him worse off.)

Thus, the remainder of our analysis will consider two other, more useful conceptions of "efficiency."

2. Maximizing the "sum total of satisfaction" of judges and clerks with the match.

If the standard of efficiency is not Pareto efficiency but instead some broader notion of maximizing something like "the sum total of the satisfaction" (however measured) of judges and students with their matches, where some parties' gains can be traded off against others' losses, then several arguments suggest that the current market is likely to be inefficient. We first consider the nature of the process and then the distinct issue of the early time at which hiring is done.

a. The nature of the process.

"[M]uch of the benefit of a market has to do with bringing together many buyers and sellers at the same time, so that they can consider a wide range of possible transactions."¹⁷ But in the present state of the market for federal judicial law clerks, the buyers (of clerks' services) and sellers (of those services) typically can consider very few possible transactions. Indeed, in many instances the sellers can consider only one possible transaction—the one with the judge who first makes them an offer, as we detail in Part II below.

Why are many of the gains of a market lost when participants are not able to consider a range of options? Unlike in a well-functioning market, judges and students are not able to gather information about multiple options

¹⁴ See, e.g., Ronald Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191, 193 (1980).

¹⁵ See Roth & Xing, *supra* note 3, at 10034-35 & Appendix.

¹⁶ Kozinski, *supra* note 1.

¹⁷ Roth & Xing, *supra* note 3, at 992.

and then act on that information to seek out their most preferred alternatives. Choices must be made from a very small set of alternatives and in a very compressed period. Decisions must be reached on the basis of extremely limited information. And participants must consider not only how much they like each potential match, but how much the potential partner likes them, because time spent in ultimately fruitless courtship (for instance, in making an offer that is subsequently refused) means that other candidates will have matched and left the market. All of these features have the potential to introduce substantial inefficiency.¹⁸ In addition, this process may be so unappealing to some judges and clerks that they drop out of the process altogether.

b. Early hiring.

The costs of a rough-and-tumble process exist whatever the timing of hiring; even if such a process occurred at the middle or the end of students' third year of law school, the inability of participants to consider a range of options would reduce the ordinary gains from a well-functioning market. The fact that hiring also occurs very early in students' law school career poses a distinct set of problems. These are mostly related to the limited amount of information that will be available when hiring is done early (wholly apart from the informational limitations that result from a chaotic process).

As will be described more fully in Part II, almost two-thirds of the federal appellate judges responding to our survey about the most recent law clerk hiring season were entirely done with their hiring by January 31 of the applicants' second year of law school. (As noted in Part II.B.3.c, a few students apply for clerkships in their third year, but this is a relatively small number.) Thus decisions for the typical judge were based solely on first-year grades and recommendations (since first-semester second-year grades would not yet be available), together with the student's record prior to law school.

The problem with such early hiring is that two-thirds of the information about the student's academic record in law school, plus virtually all of the information about the student's legal writing, which typically is done in the second and third years, is missing. Obviously assessing the impact of this missing information on the satisfaction of judges and students with their matches is difficult. Is the quality of a student's legal writing well-predicted by the student's first-year grades? Are second- and third-year grades well-predicted by first-year grades?

¹⁸ Such inefficiency is examined in simulations motivated by the market for clinical psychologists in Alvin E. Roth & Xiaolin Xing, *Turnaround Time and Bottlenecks in Market Clearing: Decentralized Matching in the Market for Clinical Psychologists*, 105 J. POL. ECON. 284 (1997).

It is (for obvious reasons) not very easy to get data on grades, but we do have data from a relatively recent Harvard Law School class, comparing first-year GPA to the overall GPA for all three years. The overlap between the two measures in the top of the class is not small, but neither are the discrepancies. Of the students who were in the top 25 (of a class of approximately 550) at the end of the first year, 15 were in the top 25 at the end of the third year. The other 10 who were in the top 25 of their first year class were (in order of decreasing class rank) 29th, 30th, 33rd, 38th, 42nd, 48th, 58th, 62nd, 67th, and 72nd at the end of the third year. The students who were ranked 42nd, 43rd, 48th, 49th, 69th, and 75th would almost certainly not have been competitive for the top clerkships had they held those positions in class rank after the first year. The students who took these 10 students' place in the top 25 by the end of the third year were ranked (again in order of decreasing rank) 26th, 29th, 32nd, 33rd, 42nd, 43rd, 48th, 49th, 69th, and 75th at the end of the first year. Probably the last six of these did not have a shot at the best clerkships based on their first year grades, even though they finished their law school careers comfortably within the top 5% of their class at Harvard Law School. (Indeed, one of these six students ended up graduating 4th in the class.)

In short, early hiring seems to create a real risk of mismatches in both directions: some students hired for the most competitive clerkships on the basis of first-year standing may prove to be less strong than judges had hoped, and some of the most competitive students may not be identifiable on the basis of first-year grades. It is true that large law firms likewise hire for second-year summer positions—which may turn into permanent positions—on the basis of first-year grades, but since law firms have a large range of types of work (ranging from the relatively mundane to the complex), and because they hire a large number of associates each year (versus a small number of clerks in the judicial setting), and because decisions about permanent jobs are made in significant part based on summer performance, errors are likely to be both less serious and less frequent in this market than in the law clerk market.

In assessing the power of first-year grades to predict second- and third-year grades, it should be noted that one cannot be sure what second- and third-year grades would look like if clerkships were *not* decided before these grades are handed out. One possibility is that students who do not receive clerkships (or who, having received mediocre first-year grades, know that they will not receive clerkships) may throw in the towel and stop trying. Another possibility is that students who *get* clerkships may decide that their future is set and thus that they need not try any more. Either phenomenon would distort second- and third-year grades relative to first-year grades; second- and third-year grades would be a less clear measure of “legal ability.” They may also be a less clear measure because of strategic course selection by students. A thought provoking implication of these suggestions is that judges who wait longer to hire their clerks may be “fooled” by the high second- and third-year grades of

those not hired earlier, as those grades may be artificially inflated by less exertion of effort by students who receive clerkships early and by strategic course selection. But in fact slacking off and strategic course selection by students who do *not* get clerkships seem more likely; students who get clerkships, or at least students who get the most prestigious clerkships, are likely to care about grades for other reasons (graduation honors, Supreme Court clerkships, positions in legal academia), which will give them reason not to slack off.

Early hiring does not impose unambiguous costs on the parties. While less information will be available, risk-averse parties will enjoy some benefit from resolving uncertainty earlier and, in effect, insuring themselves against the possibility that things will turn out badly for them.¹⁹ (For students, things could turn out badly if their law school careers do not progress in the way they might hope; for judges, things could turn out badly if they end up being unattractive to students for some reason.) The economics literature on matching shows that with risk-averse parties, early hiring may sometimes create benefits.²⁰ But in other similar contexts we do not seem to think that early transactions for insurance purposes produce a better outcome; for instance, no one argues that students should be admitted to college based on sixth-grade test scores in order to “insure” students against not turning out as well as they might hope or colleges against being less attractive than they might otherwise be. It is equally unclear why such insurance would on balance be desirable in the clerkship setting.

3. Maximizing the “production of justice.”

Until now the efficiency discussion has focused on the well-being of the parties to the clerkship match—judges and students. The emphasis has been on achieving “good,” or desirable, matches from their perspective. Another conception of efficiency focuses on the overall quality of the legal system—whether the law clerk market maximizes the “production of justice” (however defined). This question can be rephrased: Is failing to match the most desired clerkship candidates to the most desired judges—that is, failing to match in accordance with the parties’ preferences—a bad thing or a good thing from the perspective of maximizing the “production of justice”?

If the quality of judicial output is an *additive* function of judges’ and clerks’ ability, then the matching does not matter, holding constant the aggregate pool of clerks hired. If, instead, the output quality of relatively less desired judges benefits from the input of top clerks more than the output quality of relatively more desired judges does, then “mismatches” are actually

¹⁹ See Li & Rosen, *supra* note 10.

²⁰ See *id.*

good for societal welfare. Finally, if the quality of judicial output is a *multiplicative* function of judges' ability (measured by attractiveness to applicants) and clerks' ability, then "mismatches" are likely to reduce societal welfare. There are other factors as well; for instance, a top law clerk may benefit more from the coaching of a more desirable judge, and this may produce broader benefits for society as the clerk goes out and pursues his or her own career. A further effect may be that the matching process may affect students' incentives to put in effort to *become* able in the first place. All in all, it turns out to be quite difficult to say how mismatches affect the overall quality of the legal system. For this reason, we give primary emphasis below to the criterion of maximizing the satisfaction of judges and clerks with the match.

C. Perceived fairness.

Judges and students may care not only about the match that results from the law clerk hiring process but also about the nature of the experience itself. Even if Judge A and student B are quite happy to be paired with one another at the end of the road, if the process of getting to that point was unpleasant, the market may still cause disutility and, thus, may be suboptimal.

We have already discussed judges' distaste for the law clerk hiring process. (See section A.) Our survey results suggest that students may have similar or even stronger feelings. We focus below on a particular form of disutility on students' part: since it is hard for participants in this market to get good information about one another, various forms of personal well-connectedness may come to play a large role, and students (as well as judges) may perceive this to be unfair. We discuss evidence along these lines in Part II.

II. Empirical Results

A. A brief history of the law clerk market.

To understand the story told by our empirical evidence from judges and students, it is helpful first to understand what has gone before. The history of the market for federal judicial law clerks and the attempts to reform it have been described well and fully by others, so we offer only the barest essentials here.²¹

Over the past several decades, the time of hiring of law clerks has moved from the end of the third year of law school to the beginning or middle of the second year. Judge Wald writes of her experience, "I was hired in 1951 as a clerk to Second Circuit Judge Jerome Frank in May of my third

²¹ For a full account through 1994, see Becker, Breyer & Calabresi, *supra* note 8, at 208-221.

year.”²² During the most recent hiring season, by contrast, the process was well underway by mid-fall of the second year, as documented in Part III.C.1.b below.

Each stage in the backward progression in the time of hiring of federal judicial law clerks has been marked by a belief that the market will never move earlier than the present moment—that the process has reached a “natural stopping point” beyond which it will not move. Judge Kozinski, writing in 1991, provides an example:

[T]he 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.²³

Of course, hiring has now moved to a point well before Judge Kozinski’s “breakpoint.”

The past two decades have witnessed a parade of attempted reforms of the market for federal judicial law clerks. These reforms have had in common their inability to solve the problem. The average life of a reform has been about three years.²⁴ The latest reform effort, begun in 1993, involved the imposition of a March 1 start date and initially appeared promising to its sponsors, who stated hopefully after its first year of operation that although “[w]e entertain no illusions that the March 1 Solution is perfect, . . . we respectfully submit that, like democracy with all its flaws, it is the best system that anyone has conceived thus far.”²⁵ However, it was this very reform that the Judicial Conference abandoned in 1998 after an acknowledgement that it was “not universally followed and, therefore, . . . not an accurate reflection of

²² See Wald, *supra* note 2, at 155.

²³ Kozinski, *supra* note 1, at 1710.

²⁴ See Becker, Breyer & Calabresi, *supra* note 8, at 209-15 (describing five failed reform efforts over the period from 1978 to 1991); *infra* text accompanying note 87 (describing the abandonment of the sixth, most recent reform attempt, begun in 1993, in September of 1998).

²⁵ Becker, Breyer & Calabresi, *supra* note 8, at 222.

the practice in the courts.’²⁶

Thus, for the last two years, there has been no official Judicial Conference policy governing the hiring of federal judicial law clerks. In the first year after the abandonment of the March 1 start date, some law schools attempted to enforce a February 1 start date for sending application materials, including faculty recommendations, to judges, but these efforts were largely abandoned the following year (as well as somewhat ignored in the year in which they were nominally in effect). To learn more about what is presently happening in the market for federal judicial law clerks, we surveyed both judges and students about the process.

B. Survey design and response.

1. Survey of Supreme Court Justices.

In October of 1999 we sent a letter to the nine active Supreme Court Justices asking about their law clerk hiring practices and how these might relate to the hiring practices of other federal judges. The letter came from the judge author of the present work (Posner) and promised confidentiality to the Justices. Eight of the nine members of the Court responded. We discuss their responses in connection with our analysis of possible reforms of the law clerk market and the potential role of the Supreme Court in enforcing these reforms.

2. Surveys of Court of Appeals judges.

In September of 1999 and again in June of 2000 we distributed a survey about law clerk hiring to all federal Court of Appeals judges. The judge author of this article (Posner) mailed the surveys to all active and senior judges.²⁷ For confidentiality reasons we requested that the judges return their responses to another of us (Jolls) rather than to him; also, we did not ask for respondents’ names, but we did ask for the judge’s court (First Circuit, Second Circuit, etc.) and the general timeframe in which the judge was appointed, and from this information it would be possible to identify some judges. We therefore assured judges that identifying information would be shielded from the judge author of this work as well as kept confidential from the public at large. The 1999 and 2000 surveys were quite similar, although the 2000 version included a few new questions.

²⁶ Official Report of the Sept. 1998 Meeting of the Judicial Conference of the United States.

²⁷ A small number of senior Court of Appeals judges from the Seventh Circuit were not surveyed because the sender of the survey (Posner), a Judge on that Circuit, knew that they were no longer hiring law clerks.

The 1999 survey yielded 155 responses from judges, a 65% response rate. Of the responses, 103 were from active judges, while 51 were from senior judges (one respondent did not specify seniority). This is almost an exact match to the overall proportion of active judges versus senior judges on the bench (161 active, 77 senior), as shown in Table A1 in the attached Data Appendix. The 2000 survey yielded a similar, although slightly lower, response rate of 54%, perhaps because some judges were disinclined to bother responding a second time. Again the pattern of responses from active and senior judges (84 and 45 responses respectively) was almost an exact match to the overall proportion of active judges versus senior judges on the bench (again see Table A1). Across individual circuits there was somewhat greater, although not enormous, variation in the response rates, as summarized in Table A1. All surveys that were returned to us were assigned numbers, and these are what we use to identify particular responses that we quote or rely upon.

As is obvious from the description just given, our judge data embrace only federal appellate judges; they do not include information on federal District Court judges. While it is true that some of the most elite federal District Court judges probably compete with federal Court of Appeals judges for clerks, the number of such plausible competitors is sufficiently limited, relative to the overall size of the pool of federal District Court judges, to justify the limitation of the distribution of our survey to federal appellate judges.

3. Surveys of students.

In surveying students about the law clerk market, we faced a scope problem similar to, although vastly greater in magnitude than, the problem faced for judges. Having decided to focus on federal appellate judges, our interest on the student side was in students who were potential candidates for clerkships with such judges. At some level, though, that group includes every law student in the country, since students serving in federal appellate clerkships hail from an extraordinary number of schools ranging from Detroit Mercy to St. John's University to Louisiana State to Harvard.²⁸ Because it was obviously impracticable to survey every student at every law school in the country, we were forced to make choices about how to narrow the group. One approach, which was the approach taken in the only existing survey of clerkship candidates of which we are aware, is to limit the sample to students serving on the main law review at one of some suitably defined set of "very good" schools (say, schools in the top ten or twenty).²⁹ The second approach, which is the one we adopted, involves surveying all students, not just members of the main law review, at an even smaller number of schools.

²⁸ See *Judicial Yellow Book*, Spring 2000, at 52, 58, 81, 83 (listing these schools as the alma mater of federal appellate clerks).

²⁹ See Rhinehart, *supra* note 8, at 577-78 & n.12.

Two empirical factors support our focus on all students, not just members of the main law review, at a smaller number of schools. First, membership in a school's main law review does not appear to be of overriding or even particularly great importance in the selection process of Court of Appeals judges. Our 2000 judge survey asked judges to rank the following eight factors in order of their importance to the judges' law clerk hiring decisions: law school grades, recommendations from familiar professors, recommendations from other professors, recommendations from past legal employers, recommendations from current clerks and other "peers," membership in the school's main law review, board position at the school's main law review, and writing sample. (We did not ask judges to rank the importance of the personal interview because it seemed likely to be of substantial importance to almost all of them.) Table A2 in the Data Appendix summarizes the rankings given to membership in the school's main law review. Over half of the judges who provided rankings (55 of 109; seven judges simply indicated that such membership was a factor without specifying its importance) said that membership in the main law review was either in the bottom half of factors in terms of importance or was not a factor in their decisions at all. Only six judges said that such membership was the most important of the eight factors to their decisions.

The second empirical factor that supports looking at all law students at a smaller number of schools as opposed to only members of the main law review at a larger number of schools is that students from the four law schools generally considered to be the most competitive (Chicago, Harvard, Stanford, and Yale in alphabetical order) strongly dominate students from the remaining top ten and top twenty schools in their success in landing federal appellate clerkships. (For the top ten and the top twenty lists, we use the (admittedly controversial) *U.S. News and World Report* rankings. Harvard, Stanford, and Yale are the top three schools according to this ranking; Chicago is sixth.)

Table A3 in the Data Appendix presents the number of students from each group of schools serving in federal appellate clerkships according to data from the most recent edition of the *Judicial Yellow Book*. It is important to emphasize at the outset the limitations of these data: they cover only those judges who choose to report their clerks' schools (approximately one-third do not report), and, much more importantly, the variations in reporting rates across circuits are substantial. As a result of the latter point, the numbers in Table A3 are probably understated (relatively speaking) for the California schools, including Stanford, as well as the Universities of Pennsylvania and Texas, and probably overstated for Chicago, New York University, and Columbia; the reason is that the Third, Fifth, and Ninth Circuits (covering Pennsylvania, Texas, and California respectively) have (along with the Eighth Circuit) the lowest rates of coverage in the *Judicial Yellow Book* (with percentages ranging from 42% to 63%), while the Second and Seventh

Circuits (covering New York and Chicago respectively) have much higher coverage rates (81% for the Second Circuit, 87% for the Seventh Circuit).

Despite the limitations of the *Judicial Yellow Book* data, Table A3, coupled with the information in Table A2, provides support for the approach of looking comprehensively at the very top tier of schools instead of looking only at members of the main law review at a somewhat broader set of institutions. Students from Chicago, Harvard, Stanford, and Yale held 143 clerkships (an average of 36 per school), compared to 93 for students from the next six schools (an average of 16 per school) and 68 for students from the remaining ten of the top twenty institutions (an average of 7 per school). Note that what is relevant for our purposes is the absolute representation of the schools, not how they fare relative to their student body sizes, since our goal is to get information from the largest absolute number of potential federal appellate law clerks.

The remainder of this section provides further detail on how we conducted our student surveys.

a. 2000 survey of second-year students.

In February of 2000 we distributed surveys about the 1999-2000 law clerk hiring process to all second-year students at Chicago, Harvard, Stanford, and Yale. Surveys were placed in student mailboxes, and students were provided with a stamped, pre-addressed envelope in which to return their responses to one of us (Jolls). Students were assured that no potentially identifying information in their responses would be revealed publicly or even to the judge author of this work. Students were not asked to put their names on their responses.

We received a total of 294 responses, a 26% response rate. Presumably the lower response rate for students than for federal appellate judges reflected the fact that while almost all appellate judges hire law clerks, many law students do not apply for federal appellate clerkships. We received 129 responses from students who applied for federal appellate clerkships (and 165 from students who did not; students were asked to return the survey either way), but since we do not know the actual number of students who applied for these positions, we cannot calculate a response rate for the 129 responses. As with the judge surveys, all 2000 second-year student surveys returned to us were assigned numbers, which are used to identify the surveys below.

b. 1999 survey of second-year students

In March of 1999 we distributed surveys to all second-year students at the four law schools surveyed in 2000 and also to all second-year students at three additional schools, Columbia, Michigan, and Vanderbilt. In contrast to the 2000 student survey, which sought mostly quantitative or categorical information (for instance, “in what month did you apply?”, “how many interviews did you do?”), the 1999 survey was largely anecdotal, with mostly open-ended essay or long-answer questions. This survey, administered just as our project was getting underway, provided a natural starting point for our research.

The survey was distributed by multiple means. At schools other than Harvard, it was left in students’ mailboxes with instructions to return responses to a drop box at a specified location; at some of these schools the survey was also distributed via electronic mail. At Harvard the survey was left in students’ mailboxes, again with instructions to return responses to a drop box; in addition some students received copies of the survey in their large “bundled” classes. As with the 2000 survey, students were not asked for their names and were assured of the confidentiality of any possibly identifying information.³⁰

We received a total of 337 responses to the 1999 survey. Table A4 in the Data Appendix provides a breakdown by school and by whether the respondent applied for federal judicial clerkships. (In 1999 we asked whether the student had applied for federal judicial clerkships, appellate or trial level; in 2000 we asked whether the student had applied for federal appellate clerkships specifically. Also, for 2000 we do not have data by school because one school objected to having school identification on the survey in 2000.) In the interest of consistency with the 2000 results, we focus our analysis of the 1999 data on the four schools surveyed in 2000; thus information from the 1999 surveys reported below is from the surveys distributed at Chicago, Harvard, Stanford, and Yale. These schools accounted for 267 of the 337 responses (79%) (see Table A4). As above, we assigned an identifying number to each response.

As just noted, our 2000 survey of second-year students asked whether the student had applied for federal appellate clerkships, and only students who had done so were directed to fill out the body of the survey; the 1999 survey asked whether the student had applied for federal appellate or trial level clerkships, and only those who had done so were directed to fill out the body of the survey. In both cases, however, some of the responses by students in the

³⁰ At the time of the 1999 student survey, one of us (Posner) had not yet become involved in the project. We interpreted the confidentiality promise to students as requiring that no one other than the original three authors (Avery, Jolls, and Roth) see any potentially identifying information.

body of the survey may relate to state court applications or (for the 2000 survey) federal trial level applications, even though those were not embraced in the opening question, because the students may have applied for those positions *in addition to* the ones embraced in the opening question. Obviously we could have chosen to limit subsequent questions (such as “When was your first interview?”, “When was your first offer of a clerkship?”, and “Did you receive other clerkship offers before you rejected your first offer?”) to the category of clerkships embraced in the opening question, but this could have produced misleading or incomplete answers, since other opportunities certainly might have affected the student’s situation in the market for the clerkships covered in the opening question. Nonetheless, the cost of our approach is that the data presented below, while only for students who applied for some sort of federal clerkship—and for 2000 only for students who applied for federal appellate clerkships—may reflect events in other markets as well.

c. The role of third-year students.

There is a widespread perception (which we shared prior to receiving the contrary results from our judge survey) that the early time at which clerkship hiring occurs has significantly increased the frequency of hiring of third-year students, making our focus on second-year students potentially problematic. Dean Anthony Kronman of Yale Law School wrote to the Yale student body about the subject of third-year applications in the fall of 1999, saying that he “suspect[ed] that third-year applications will become increasingly routine” and that he “regard[ed] this development as a healthy one.”³¹ Students would work at a law firm or pursue some other opportunity for a year after finishing law school and then begin a clerkship.

The responses to our judge survey suggest, however, that judges have not intensified their hiring of third-year students in response to the developments in the clerkship market since the 1998 abandonment of the March 1 start date. In our 2000 judge survey we asked how many third-year students, and also how many post-graduates (candidates who had finished law school), judges hired in 1999-2000 and whether these numbers were greater than, less than, or the same as the numbers in previous years. Answers are presented in Table A5 in the Data Appendix. No discernible trend toward increased hiring of third-year students (or post-graduates) appears in this data.

³¹ Memorandum from Anthony Kronman to the students of Yale Law School, Dec. 8, 1999.

C. Is the law clerk market functioning well?

Our survey results allow us to assess the functioning of the market for federal judicial law clerks within the normative framework developed in Part I above. We first discuss findings related to the efficiency of the clerk hiring process and then turn to findings that bear on disillusionment with the federal bench and the perceived fairness of the clerk hiring process.

1. Efficiency: Maximizing the “sum of satisfaction” of judges and clerks with the match.

Part I.B above discussed two separate efficiency criteria for assessing the workings of the law clerk market: maximizing the “sum of satisfaction” of judges and clerks with the match, and maximizing the “production of justice.” Our survey results do not shed light on the second criterion (which we concluded was less useful in any event), but they have much to say about the first.

a. The nature of the process.

We first consider the ways in which the nature of the law clerk hiring process impedes maximizing the “sum of satisfaction” of judges and clerks with the match. The biggest problem is that, as noted above, the process does not permit judges and clerks to consider a range of alternatives before making their decisions.

Our survey results provide strong quantitative evidence of the inability to consider a range of options on both sides of this market. The results show in a systematic way how the clerkship market resolves extraordinarily quickly, with judges and students pairing off in an almost frenetic fashion to avoid being left in the cold. The basic chronology, as described more fully below, is that

- interviews lead very quickly to offers (section i below);
- offers produce very quick responses (section ii);
- responses are generally acceptances (section iii); and
- many scheduled interviews are canceled as a result (section iv).

Thus, students and judges tend to pair off quickly with those with whom they have early interviews. As a result,

- many students limit the judges to whom they apply to avoid being paired off early with a less preferred judge (section v); and
- at least some students who might otherwise be interested in

clerking avoid the process entirely (section vi).

i. First step: interviews lead quickly to offers.

The time between interviews and offers is typically very short, as revealed by responses to our 2000 survey of second-year students. (We did not ask about the gap between interview and offer times in our 1999 survey.) As shown in Table 1, over half of students' first offers of clerkships were made within two days of the offering judge's interview of the student; 34% were made at the conclusion of the interview.

Table 1: Length of Time Between First Offer and Interview with the Offering Judge, 1999-2000

Time between first offer and interview with the offering judge	Percent of responding students
Offer made at end of interview	34%
1-2 days elapsed between interview and offer	23%
3-4 days elapsed between interview and offer	9%
5-7 days elapsed between interview and offer	15%
1-2 weeks elapsed between interview and offer	8%
More than 2 weeks elapsed between interview and offer	11%
Total number of responses: 101 ^a	

Source: 2000 Second-Year Student Survey.

^a 2000 Second-Year Survey #23 did not answer the question about the time elapsed between the student's first offer and the interview with the offering judge, even though this student reported receiving an offer of a clerkship. Therefore we have 101 responses for this question, versus 102 responses for a number of the questions discussed below.

Moreover, our survey results show that the judge who makes the student's first offer typically comes early in the student's interview schedule, as reported in Table 2. In other words, it is not ordinarily the case that students interview with a range of judges and then receive their first offer. As the table shows, 59% of first offers came from the first or second judge with whom the student interviewed, and 36% came from the first judge with whom the student interviewed.

Table 2: Interview Producing First Offer, 1999-2000

Interviewing producing first offer	Percent of responding students ^a
First interview produced first offer	36%
Second interview produced first offer	23%
Third interview produced first offer	19%
Fourth interview produced first offer	8%
Fifth or subsequent interview produced first offer	15%
Total number of responses: 102	

Source: 2000 Second-Year Student Survey.

^a Percentages in this column sum to 101% as a consequence of rounding.

Responses to our judge surveys in 1999 and 2000 also suggest limited time between interviews and offers. As Table 3 shows, approximately three-quarters of active judges started making offers to candidates before they had completed their scheduled interviews.

Table 3: The Practice of Making Offers Before Completing Scheduled Interviews

Group of federal appellate judges	Percent of responding judges who began making offers before completing their scheduled interviews	
	1998-1999	1999-2000
All judges	64%	64%
Active judges	74%	73%
Senior judges	38%	42%
Senior status not listed	0%	N/A
	Total number of responses: 138	Total number of responses: 114

Source: 1999 and 2000 Judge Surveys.

The reasons for the speed of offer behavior are not difficult to understand. In both 1999 and 2000 we asked judges why they made offers before completing interviews, and many of their explanations explicitly mentioned the fear of losing candidates to other judges. In 1999, 76 of the 88 responding judges who started making offers before the completion of

scheduled interviews offered reasons for this behavior, and 42% of those who offered reasons specifically mentioned competition from other judges. These judges' specific responses are listed in Table A6 of the Data Appendix. The situation in 2000 was similar; 54 of the 73 responding judges who had started making offers before the completion of scheduled interviews gave their reason for this choice, and one-third of those who offered reasons specifically mentioned the fear of losing candidates to other judges. Again these judges' specific responses are listed in Table A6. Putting both years together, only a single judge mentioned the desire to save time (by not conducting further interviews) as the reason for making offers before the completion of scheduled interviews, while 50 gave competition from rivals as the reason. In response to a different question on our judge survey, over half of responding judges in both 1999 and 2000 said that competition influenced the time at which offers were made, as reported in the top panel in Table 4 below. As described in sections ii and iii below, offers typically lead to quick responses, which are generally acceptances, so making an early offer tends to give a judge a competitive edge.

Table 4: Facts About Judges' Motivations for Early Offers

	Percent of responding judges	
	1998-1999	1999-2000
Competition influenced the time at which offers were made		
All judges	52%	53%
Active judges	59%	63%
Senior judges	40%	30%
	Total number of responses: 140	Total number of responses: 111
An applicant requested that the timetable be moved up ^a		
All judges	N/A	46%
Active judges	N/A	53%
Senior judges	N/A	31%
		Total number of responses: 115
Timetable was moved up in response to applicant's request ^a		
All judges	N/A	48%
Active judges	N/A	48%
Senior judges	N/A	50%
		Total number of responses: 52

Source: 1999 and 2000 Judge Surveys.

^a These questions were only asked in 2000.

In many instances, judges who made quick offers may have been responding to explicit requests by students to speed up their timetables. Our 2000 judge survey showed that 53% of active judges reported that an applicant had asked them to speed up the process because of a pending interview or offer deadline from another judge, as shown in the bottom panel of Table 4. (We did not ask a similar question in 1999.) Almost half of those who received such a request moved up their timetables, also as shown in the bottom panel in Table 4.

ii. Second step: offers lead quickly to responses.

Not only do interviews lead quickly to offers, but offers lead quickly to responses; this is not a market in which students collect a substantial number of offers and then make their decisions. As Table 5 shows, almost three-quarters of students responded to their first offer of a clerkship within two days of receiving the offer. (This information is from the 2000 survey. We did not ask a parallel question in 1999.) Clearly this is a market in which events move very quickly with little apparent time to consider multiple options. Indeed, 42% of students responded to their first offer immediately.

Table 5: Timing of Student Response to First Clerkship Offer, 1999-2000

Time before responding to first offer	Percent of responding students (cumulative percentages in parenthesis)
Immediate response	42% (42%)
Within 2 days	30% (71%) ^a
3 days to 1 week	21% (92%)
More than 1 week	8% (100%)
Total number of responses: 102	

Source: 2000 Second-Year Student Survey.

^a The cumulative percentage of 71% does not equal the sum of 42% and 30% as a consequence of rounding.

The reasons for the quick response times by students are again easy to understand. Most obviously, many judges impose explicit response deadlines at the time an offer is made. Among respondents to our 2000 judge survey, 25% reported requiring an answer within one day for one or more of their slots. 38% reported requiring an answer within 48 hours, and 69% reported requiring an answer within a week. These numbers are similar to, although slightly higher than, the corresponding numbers from 1999, as shown on Table 6. (An earlier survey of judges by the Administrative Office of the United States Courts found still more dramatic results regarding the time to respond to offers: “Almost one in six [judges] stated that students should have to respond on the spot.”³²) Student responses colorfully revealed the practice of limited-response-time offers, as shown in Table 7. At least one student attempted unsuccessfully to gain additional time from a judge: “I asked for 24 hrs. to consult my wife, but [the judge] said he couldn’t give me 24 hrs. I guaranteed

³² See Louis F. Oberdorfer & Michael N. Levy, *Clerkship Selection: A Reply To The Bad Apple*, 101 YALE L.J. 1097, 1102 n.18 (1992).

him I would accept.”³³

Table 6: Time-Limited Offers As Reported By Judges

Time within which response to offer required	Percent of responding judges	
	1998-1999	1999-2000
Within 24 hours	22%	25%
Within 48 hours	34%	38%
Within a week	67%	69%
	Total number of responses: 108	Total number of responses: 85

Source: 1999 and 2000 Judge Surveys.

³³ 1999 Student Survey #157.

Table 7: Time-Limited Offers As Experienced By Students

Survey	Comment
1999 Survey #154 ^a	A Ninth Circuit judge in California made clerkship offers good for only fifteen minutes.
1999 Survey #105	[A particular judge] made an offer on the spot with no time to decide.
1999 Survey #159	[A particular judge] gave [me] 1.5 hours to decide after being given an offer.
2000 Survey #244	[A particular judge] wanted an answer on the spot.
1999 Survey #118	[A particular judge] extended an offer only until the next morning.
1999 Survey #108	[My] second choice judge g[a]ve an exploding offer on the phone (i.e., I had to give an answer by the time I hung up) before [I was] able to call/talk to my first choice judge.
2000 Survey #247	I had to respond [to a particular judge's offer] by the next morning.

Source: 1999 and 2000 Second-Year Student Surveys.

^a This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

Even when an offer does not explicitly expire after only a very short period, a variety of implicit pressures operate to press for a speedy response by the student. To begin, some judges make offers to more candidates than they have slots available, with the slots going to the first candidates to accept. Not surprisingly, “[u]sually the clerk applicant accepts on the spot.”³⁴ Interestingly, this sort of strategy is explicitly prohibited by the Harvard Law School Office of Career Services for law firms interviewing Harvard Law School students.³⁵

³⁴ 1999 Judge Survey #106. A similar strategy was used in hiring economics professors at Ohio State University in 1970. The university “was authorized to fill six positions, and it made offers to 11 candidates, saying that the offer would remain open only until the first six acceptances were received.” Roth & Xing, *supra* note 3, at 1036 n.78.

³⁵ See Harvard Law School Office of Career Services 1999 Rules and Regulations for Organizations Interviewing Harvard Law Students (“No offer shall be made conditional upon a student’s accepting it before acceptances have been received from other students to whom offers have also been made.”).

In addition, many students may feel the need to respond to an offer quickly if they think there is some chance they would want to accept because a delayed acceptance might start the relationship off on the wrong foot.

I had an offer from one judge that I had to respond to during a short period of time, but I was still waiting to hear from my top choice. My top choice called me half an hour before my deadline with the other judge. I was worried that the first judge would be offended that I waited so long to respond to his offer.³⁶

[A particular judge] [m]entioned how, if he were to give an offer to someone and they didn't immediately accept, it would make him wonder if he had made the right choice and 'almost' ma[k]e him want to withdraw it—but he said he didn't do that, said he might give a little time.³⁷

I was frustrated that my top choice judge hadn't even started interviewing when I got my offer. I felt my only choice was to take the offer, as [I] couldn't make the [offering] judge wait 2 weeks on the chance that I might get an offer [from the other judge].³⁸

The following striking anecdote suggests that the perception about negative impressions from a delay followed by an acceptance or attempted acceptance is likely to be correct for at least some judges:

I have an interview scheduled with my most preferred judge ([Judge C]) on [later date]. [Judge D] calls and wants me to interview on [earlier date]. I ask [Judge D] when she would be making her offers, and she says, "I am going to wait until after I finish all the interviews, talk with my clerks and then decide—so [after the later date of the Judge C interview]." So, I go to interview with [Judge D] on [earlier date]. I explain that I have another interview scheduled on [later date] during the interview. She calls me on [date prior to later date of Judge C interview] with an offer. I like [Judge D], but have my heart set on at least getting to interview with [Judge C]. Because [Judge D] is not willing to wait until at least [later date], I decline saying I would like to interview further before making my decision. [Judge D] gets fairly offended and says,

³⁶ 1999 Student Survey #131.

³⁷ 1999 Student Survey #50.

³⁸ 2000 Student Survey #12.

“you know, students should withdraw right after the interview if they are not going to accept an offer.”³⁹

The perception that one is “obliged to accept every offer”⁴⁰ is part of the reason that, as explained in the following section, students overwhelmingly respond not only quickly but affirmatively upon receiving a clerkship offer.

iii. Third step: responses to offers are generally acceptances—even when other positions would be preferred.

A significant majority (73%) of students responding to our 2000 survey of second-year students accepted the first offer they received, as shown in Table 8. (We did not ask a parallel question in the 1999 survey.) Consistent with this evidence—and presumably in large part because of it—almost 70% of students who received one or more clerkship offers received exactly one, also as shown in Table 8. Once again, the law clerk market does not appear to be one in which students have the opportunity to consider a range of options before making their decisions.

³⁹ 1999 Student Survey #135.

⁴⁰ *Id.*

Table 8: The Practice of Accepting the First Offer Received, 1999-2000

Offer information	Percent of responding students	Cumulative percentage
First offer was accepted (of the 102 students who responded to this question)		
Yes	73%	73%
No	27%	100%
Number of offers (of the 101 students who responded to this question and received one or more offers) ^a		
1	68%	68%
2	25%	93%
3	3%	96%
4	2%	98%
5	1%	99%
6	1%	100%

Source: 2000 Second-Year Student Survey.

^a 2000 Second-Year Survey #12 did not indicate the number of offers received but did answer the question about whether the first offer was accepted; thus we have 101 responses here compared to 102 above.

One might respond at this point that students' first offers may often come from their top-choice judges, so that the inability to consider other options is of little consequence for them. Students certainly have some control over the timing of their interviews, and thus (one might argue) they can arrange to interview first with their top-choice judges. It is clear that at least some students attempt to engage in such behavior; as one student wrote in response to our 1999 survey,

Throughout the process I . . . strategize[d] and manipulate[d] . . . not answering the telephone for fear of being trapped into a less-than-ideal interview early on, and trying to arrange interviews strategically . . .⁴¹

The question is how widespread and, more importantly, how successful these efforts prove to be.

One difficulty in scheduling interviews strategically, so as to meet top-choice judges first, is that prior to interviewing with a number of judges, students may well not know who their top choices are. (And, of course, the same goes for judges.) As one student wrote, "[T]he ability to research the

⁴¹ 1999 Student Survey #112.

federal judiciary in advance so that you know exactly for whom you would and would not accept an offer is impossible. What is the point of the interview on the students' side if it can't be used to further screen for [judge] quality?⁴²

But even given their limited information, our 2000 student survey results make clear that students are not able to arrange their interviews optimally so that an early offer comes from what they regard (based on the limited information they have) as their top-choice judge. As reported in Table 9, in only about one-third of cases was a student's first offer from what the student perceived to be his or her top-choice judge. Yet, as the table shows, 58% of students who received their first offer from a judge who was not their top choice nonetheless accepted that offer. Indeed, correlating these results with the earlier results about the timing of acceptance, 26% of these candidates accepted the offer from the non-top-choice judge immediately! (This last result is not shown on the table.) The results in Table 9 are even more striking since one might expect cognitive dissonance to push students toward the ex post belief that the offers they received or accepted were more desirable than they otherwise might have been thought to be.

⁴² 1999 Student Survey #135.

Table 9: Desirability of and Response to a Student's First Offer, 1999-2000

Desirability of and response to first offer	Percent of responding students
First offer was first choice position	
Of the 102 students who responded to this question:	
Yes	34%
No	66%
First offer was accepted	
Of the 35 students for whom first offer was first choice position:	
Yes	100%
No	0%
Of the 67 students for whom first offer was not first choice position:	
Yes	58%
No	42%

Source: 2000 Second-Year Student Survey.

The results reported in Table 9 are consistent with related evidence from our 1999 student survey. That year we asked students to rank the judges with whom they got interviews from most to least preferred and then asked them to list the lowest judge from whom they would have accepted an offer if they had not yet heard back from more preferred judges. 96% of respondents would have accepted an offer from a judge in the lower half of their list rather than wait for their other scheduled interviews. 44% would have accepted an offer from their least preferred judge. The point is not that a clerkship with the least preferred judge would be an undesirable outcome in an absolute sense (if no other options were available), but that many students are apparently willing to forego any chance at the range of more attractive options to avoid losing the certain opportunity with the least preferred judge. Although the 1999 question, unlike the question from the 2000 survey, has a hypothetical element, it indicates strongly that students will accept offers from less preferred judges even when they are awaiting scheduled interviews with more preferred judges.

As with the practice of speedy responses to the first offer, the reasons for the likelihood of acceptance of the first offer are easy to understand. To begin, many students may fear that declining an offer is an affront to the judge, as already noted. This fear may result among other things from pressure exerted by law professors, who are repeat players with institutional interests and who may feel that immediate acceptances from their school's students enhance the chances for students from that school the following year. Judge

Becker, then-Judge Breyer and then-Dean Calabresi bemoan “the ‘conventional wisdom’ propagated in many law schools that applicants are obliged to accept the first offer tendered,” a state of affairs that the authors “find . . . inexplicable and indefensible.”⁴³ But institutional interests may explain the puzzle; professors may tell students they must or should accept immediately even though some judges do not require this because it serves the broader interests of the institution over the years.

A second critical factor is the strong student aversion to sacrificing a “bird in the hand” for uncertain prospects down the road. Many student comments, quoted in Table 10, suggest that students often accept less preferred positions because they do not know whether they will have other options later on. Apparently, accepting an early offer from a less preferred judge is preferred to waiting out the market. But obviously it may mean that students miss out on the chance to match with preferred judges who may be extremely interested in them.

⁴³ Becker, Breyer & Calabresi, *supra* note 8, at 223.

Table 10: The “Bird in the Hand” Rationale for Accepting an Early Clerkship Offer

Survey	Comment
1999 Survey #46	I was made an offer in late January before the majority of my judges even started interviewing. I chose to accept the offer with a judge who was not in the top ½ rather than take the chance on waiting for a more preferred judge to call.
1999 Survey #120	I was offered an early interview by one judge who, though I knew I would be happy clerking for, was not my top choice. I was led to believe he might offer a position at the interview. I had a difficult time deciding whether to go to the interview (and possibly foreclose other options) or cancel (and possibly lose the bird in the hand). I went. Got an offer. Accepted.
1999 Survey #164	[A]t the end I was in Union Station in DC, waiting to get a bus to Dulles, [Judge A’s] office had me on hold because they said they’d tell me yes/no by [a particular time], and I was missing calling back [Judge B], whose offer exploded at [that same time]. I ended up calling [Judge B] to ask for more time, but realized how rude that would be, so I accepted [Judge B] without knowing [Judge A’s] decision. And I missed my plane!
1999 Survey #5	[W]hile in [southern city] I had received an offer from a district court judge (with 24 hours to reply). I checked my messages at home and found I had been offered an interview with an appellate court judge (I had essentially given up on the appellate court market at this time). But I decided just to take the ‘bird in the hand.’
2000 Survey #246	The day after my offer, I was very interested in the offer, but I also wanted to continue interviewing because I wanted more information to make [my] decision. However, my judge (the one I accepted with) indicated that he would continue to interview and might fill my slot.
2000 Survey #247	I got an offer from a judge who was not my first choice, at the end of an interview, and had to respond by the next morning. I had an interview with my first choice judge scheduled for the next day. I was risk averse and took the exploding offer, but still wonder if I did the right thing.

Source: 1999 and 2000 Second-Year Student Surveys.

iv. Fourth step: subsequent interviews are cancelled.

As a result of the speed with which judges and students pair off early on, both students and judges end up canceling large numbers of previously scheduled interviews. Two-thirds (66%) of the judges responding to our 2000 survey, and 79% of those responding to our 1999 survey, had at least one applicant cancel a scheduled interview, as shown in the bottom panel of Table 11. On average, each judge conducted approximately 8 interviews and experienced approximately 2 cancellations in each year,⁴⁴ so approximately 20% of all scheduled interviews were cancelled by students (2 cancellations for every 10 scheduled interviews). These numbers fit nicely with the student surveys: as reported in Table 12, almost half of the students responding to our 2000 survey reported that they cancelled at least one interview, and a total of 161 of 695 scheduled interviews, or 23%, were cancelled by students.⁴⁵ Presumably judges also cancelled at least some interviews (or at least one would hope that they did), since, as reported in Table 19 below, a substantial number of judges had no clerkship positions left by the time of their last scheduled interview.

Of course, some cancellations of later interviews may be efficient, as when neither judge nor student was at the top of the other's list, and preferred options materialize for both. But, as demonstrated above, at least from the student side, early offers often come from non-top-choice judges, and so applicants are missing out on the chance to consider what might be more preferred alternatives.

Table 11: Interviews and Student Cancellations As Reported By Judges

⁴⁴ These numbers are based on the figures reported in Table 11. The calculations assume the mean value for the ranges reported on the actual survey (for instance, 1.5 interviews for a judge who chose the "1 to 2" option); for the "more than 12" range for interviews conducted, they assume a value of 14, and for the "more than 6" range for interviews cancelled, they assume a value of 8.

⁴⁵ These numbers are based on the figures reported in Table 12. Twenty-eight students who reported the number of interviews they had scheduled did not report the number of interviews they cancelled. This is probably a consequence of our wording of the cancellation question, which said "How many interviews did you schedule and later cancel when you accepted a position?" It seems plausible that students who did not receive any offers did not respond to this question. Such students presumably did not cancel any interviews. The 23% figure in the text thus reflects the assumption that students who responded to the question about the number of interviews scheduled but not to the question about the number of cancellations did not cancel any scheduled interviews.

	Percent of responding judges (cumulative percentages in parentheses)	
	1998-1999	1999-2000
Number of interviews conducted		
1 to 3	8% (8%)	16% (16%)
4 to 6	25% (33%)	26% (42%)
7 to 9	24% (57%)	20% (62%)
10 to 12	25% (82%)	16% (78%)
More than 12	18% (100%)	22% (100%)
	Total number of responses: 134	Total number of responses: 105
Number of cancellations by students		
1 to 2	40% (40%)	31% (31%)
3 to 4	21% (61%)	21% (52%)
5 to 6	13% (74%)	7% (59%)
More than 6	4% (79%) ^a	7% (66%)
None	21% (100%)	34% (100%)
	Total number of responses: 137	Total number of responses: 113

Source: 1999 and 2000 Judge Surveys.

^a The cumulative percentage of 79% does not equal the sum of 74% and 4% as a consequence of rounding.

Table 12: Interviews and Student-Initiated Cancellations, 1999-2000

	Number of responding students	Percent of responding students	Cumulative percentage	Number of interviews
Number of inter-views scheduled				
0	4	3%	3%	0
1	15	12%	15%	15
2	14	11%	26%	28
3	17	13%	39%	51
4	10	8%	47%	40
5	12	9%	57% ^a	60
6	13	10%	67%	78
7	14	11%	78%	98
8	7	6%	84%	56
9	1	1%	85%	9
10	4	3%	88%	40
11	3	2%	90%	33
12	3	2%	92%	36
13	4	3%	95%	52
14	1	1%	96%	14
15	3	2%	98%	45
20	2	2%	100%	40
Total	127			695
Number of inter-views cancelled				
0	42	42%	42%	0
1	16	16%	59% ^b	16
2	14	14%	73%	28
3	13	13%	86%	39
4	6	6%	92%	24
5	4	4%	96%	20
6	1	1%	97%	6
7	1	1%	98%	7
10	1	1%	99%	10
11	1	1%	100%	11
Total	99			161

Source: 2000 Student Survey.

^a The cumulative percentage of 57% does not equal the sum of 47% and 9% as a consequence of rounding.

^a The cumulative percentage of 59% does not equal the sum of 42% and 16% as a consequence of rounding.

v. Corollary: students limit their application pools.

A natural consequence of the speed with which things resolve in the market for federal judicial law clerks is that students have an incentive not to apply to judges within that market in whom they are interested but not *that* interested. Our student survey in both 1999 and 2000 asked, “Did you limit the number of judges to whom you applied based on a concern that some of your less-preferred judges would offer you interviews or positions before you had heard back from your more-preferred judges?” More than half of the respondents (55%) answered “yes” to this question in 2000 (of a total of 128 responses to this question). In 1999 42% answered “yes” (of a total of 108 responses to this question).

It should be noted that the efficiency aspects of this feature of the clerkship market are less clear than the efficiency aspects of the features discussed above. Some desirable matches may not be made—as when a student does not apply to a given judge who would have hired the student, and for whom the student would have liked to clerk, and the student ends up with no clerkship at all—but at the same time, limited application pools save resources that would have been spent by judges, recommenders, and other parties on matches that might never have materialized.

vi. Another corollary: students opt out of the process entirely.

The nature of the law clerk hiring process may also lead some students not to apply at all. More than half (58%) of the students who said in response to our 2000 survey that they did not apply for federal appellate clerkships reported that their decision not to apply was influenced by either the nature or the timing of the market. (We discuss the timing of the market—the early date at which the market takes place—in more detail below.) We did not ask a similar quantitative question of students in 1999, but from that year we have anecdotal evidence, summarized in Table A7 in the Data Appendix, of a similar effect of the nature of the process on students’ decisions to apply. Obviously, if students who choose not to apply are missing opportunities that they would (in a better world) want to pursue, and judges would be interested in some of these individuals, then the nature of the process of law clerk hiring is impeding the satisfaction of judges’ and students’ preferences.

b. Early hiring.

The law clerk market may fail to maximize judges’ and clerks’ satisfaction not only as a result of the nature of the process (the focus of the previous discussion) but also as a result of the early time at which hiring

occurs. As noted in Part I above, when hiring occurs early, judges have less information on which to base their decisions about which clerks would be most attractive to them. Likewise, students have less information about whether and where they would like to clerk. Our survey results show both that the clerkship market has moved progressively earlier in time over the last three hiring seasons and that the early time at which the market moves—like the nature of the process itself—discourages some students from applying at all.

i. Evidence on timing in the 1998-1999 and 1999-2000 clerkship markets.

Our survey results show that the clerkship market moved relatively early in the second year of law school in 1998-1999 and earlier still in 1999-2000; these results thus provide a striking illustration of unraveling in progress. Table 13 compiles the information reported by judges about the timing of the market in these two years. For 1998-1999, 28% of judges had begun interviewing and making offers by the end of January 1999, and 63% had reviewed applications by that time. These numbers are remarkable in light of the policy of the leading law schools during 1998-1999 that applications and recommendation letters from law school faculty were not to be sent prior to February 1. As the data dramatically show, this policy did not hold up. The data also reveal that a substantial number of judges moved earlier in 1998-1999 than they had in 1997-1998, as reported in the penultimate row of Table 13.

Table 13: Timing of the Market As Reported by Judges

	Percent of judges responding (cumulative percentages in parenthesis)					
	Date of Review of Applications		Date of Interviews and Offers			
	1998-1999	1999-2000	1998-1999		1999-2000	
			start date ^a	finish date ^b	start date ^a	finish date ^b
Sept. or earlier	2% (2%)	14% (14%)	1% (1%)	1% (1%)	0% (0%)	0% (0%)
Oct.	2% (4%)	7% (21%)	0% (1%)	0% (1%)	3% (3%)	1% (1%)
Nov.	2% (7%) ^c	22% (43%)	1% (2%)	1% (2%)	12% (15%)	8% (9%)
Dec.	21% (28%)	29% (72%)	7% (9%)	1% (3%)	29% (44%)	22% (31%)
Jan.	35% (63%)	11% (83%)	19% (28%)	16% (19%)	27% (71%)	32% (63%)
Feb.	23% (86%)	4% (87%)	43% (70%) ^d	38% (57%)	10% (80%) ^e	17% (80%)
March or later	14% (100%)	13% (100%)	30% (100%)	43% (100%)	20% (100%)	20% (100%)
earlier than the prior year	28%	55%	34%		56%	
later than the prior year	2%	4%	3%		3%	
Total number of judges responding: 134 for 1998-1999, 112 for 1999-2000						

Source: 1999 and 2000 Judge Surveys.

^a The start date is the date at which the judge started conducting interviews and making offers.

^b The finish date is the date at which the judge finished conducting interviews and making offers.

^c The cumulative percentage of 7% does not equal the sum of 4% and 2% as a consequence of rounding.

^d The cumulative percentage of 70% does not equal the sum of 28% and 43% as a consequence of rounding.

^e The cumulative percentage of 80% does not equal the sum of 71% and 10% as a consequence of rounding.

Things happened even more quickly, and by a substantial margin, in 1999-2000. As shown in Table 13, 72% of responding judges indicated that they had reviewed applications by the end of December, compared to only 28% in 1998-1999. 44% indicated that they had started to interview candidates and make offers by the end of December, compared to only 9% in 1998-1999. By the end of January, 63% were completely done with interviews and offers, compared to only 19% in 1998-1999. Also as shown in Table 13, 55% of responding judges said that they reviewed applications earlier in 1999-2000 than they had in 1998-1999, and 56% said they conducted interviews and made offers earlier in 1999-2000, while almost no judges said they did either step later. By any measure, then, the clerkship market moved substantially earlier in 1999-2000 than in 1998-1999. Table A8 in the Data Appendix provides similar timing information broken down by Circuit.

On the student side, 81% of the students who did one or more interviews in 1999-2000 reported having at least one interview before the end of December of 1999, as shown on Table 14. 57% of the students who received one or more offers during 1999-2000 reported having at least one offer before the end of December of 1999, as also shown on the table.

Table 14: Timing of the Market Reported by Students, 1999-2000

Date	Sent applications	First contact from a judge (among students who received such contacts)	First interview (among students who did interviews)	First offer (among students who received offers)
	(cumulative percentages in parentheses)			
Sept. or earlier	2% (2%)	0% (0%)	0% (0%)	0% (0%)
Oct.	20% (22%)	3% (3%)	2% (2%)	0% (0%)
Nov.	67% (89%)	42% (45%)	24% (26%)	14% (14%)
Dec.	10% (99%)	42% (87%)	55% (81%)	43% (57%)
Jan.	0% (99%)	10% (97%)	15% (96%)	29% (86%)
Feb. or later	1% (100%)	3% (100%)	4% (100%)	14% (100%)
Number of responses	128	124	120	102

Source: 2000 Second-Year Survey.

For skeptics who tend toward the view that the current market for federal judicial law clerks must be operating efficiently, the data presented

here raise serious questions. If 1999-2000 was efficient, then was 1998-1999, when hiring occurred substantially later, also efficient, or was it inefficient? More generally, given how much the timing in this market has bounced around over the years, it seems hard to assert that any current resting point is efficient.

The efficiency argument seems particularly strained for the 1999-2000 market, when the timing of the market clashed with both students' final exams and the law firm recruitment process. Tables A9-1 and A9-2 in the Data Appendix summarize student complaints about these clashes. It seems hard to believe that the 1999-2000 timing was optimal in any respect.

ii. Effects of early hiring on decisions to participate in the market.

As noted above, students may opt out of the law clerk market because of the nature of the hiring process; they may also opt out because of the early time at which hiring occurs. As noted above, we know that more than half (58%) of the students who said in response to our 2000 survey that they did not apply for federal appellate clerkships reported that their decision not to apply was influenced by either the nature or the timing of the market. Also as noted above, for 1999 we have anecdotal evidence from students who did not apply for federal clerkships, and, as shown in Table A7 in the Data Appendix, for a number of these students the early time at which hiring occurs was a significant factor. Thus, the early time at which hiring occurs, like the nature of the process, may reduce the satisfaction of judges and students by dissuading some students from applying at all.

2. Disillusionment with the federal bench.

Moving from the efficiency criterion to the concern with disillusionment with the federal bench, our survey results provide strong support for the view that the rough-and-tumble nature of the clerk hiring process carries risks to the regard in which the federal judiciary is held. A number of respondents to our judge and student surveys emphasized this concern, as summarized by the often poignant comments quoted in Table 15.

Table 15: Law Clerk Hiring and Regard for the Federal Judiciary

Survey	Comment
1999 Judge Survey #7	[T]he current non-system makes applicants see judges behaving in ways which are unseemly, to put it mildly. That view of our behavior will inevitably shape what these people think of the judiciary. To the extent that many of these applicants will become leaders in the bar and in politics, we will as judges reap what we have sown. They will hold us in contempt and will not be wholly wrong.
2000 Judge Survey #11	The unseemly haste to hire law clerks is a disgrace to the federal bench.
2000 Judge Survey #5	The students think our hiring process is foolish. We are presently embarrassing ourselves with our lack of self-control.
2000 Judge Survey #101	The current approach reflects poorly on the judiciary.
1999 Student Survey #111	I can't overstate how disillusioned, disgusted and depressed the whole clerkship application system has left me. . . . [W]atching federal judges panic and lie [and] having interviews canceled after traveling to New York makes me clearly realize that this system needs reform.
1999 Student Survey #154 ^a	Some judges scrapped decorum and even bare civility. One federal district court judge asked a student to sneak into his office on a Sunday in January, through the service entrance. His court had agreed not to conduct early interviews, he explained, and he wanted to cheat in secret.
2000 Student Survey #6	Federal judges (many of them) suffer from immaturity, unprofessionalism, and egotism that I guess should be expected from life-tenured government employees who have no incentive to behave like adults.
2000 Student Survey #43	The gamesmanship that currently pervades the process is incredibly frustrating to students and . . . corrosive of the dignity of the federal judiciary.
1999 Student Survey #104	I accepted an interview offer with a judge on the West Coast and flew out at considerable expense. At the end of the interview, it became evident that the judge had already made enough outstanding offers to fill his slots. I believe that he interviewed me as a 'backup.'

Source: 1999 and 2000 Judge Surveys and Second-Year Student Surveys.

^a This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

The comments in Table 15 are obviously anecdotal. However, quantitative data from our judge surveys make clear that the underlying forms of judicial behavior noted in the table are far from isolated. The practice of interviewing candidates (at the candidates' expense) when no slots remain available is far less rare than we would have guessed prior to the surveys. We would have guessed that this occurred only very occasionally; indeed, one judge wrote in response to our inquiry about whether the judge had at least one slot left by the time of the last scheduled interview, "Yes, of course. What kind of a slug do you take me for?"⁴⁶

The numbers, however, show a striking number of self-confessed "slugs." In 2000, almost one in five responding judges (17%) had *no* slots available by the time of their last scheduled interview with a candidate, as shown in Table 16. Senior judges were more likely to have no slots left than active judges, as the table shows, but still, in both 1999 and 2000, almost one in ten active judges admitted to having no slots available by the time of their last scheduled interview. Some judges presumably cancel scheduled interviews once their slots are filled, but this may or may not spare the candidate the expense of a fruitless trip depending on the refundability of the candidate's airplane ticket.

Table 16: Judges Who Had No Slots Left By the Time of Their Last Scheduled Interview

Group	Percent of responding judges with no slots left by the time of their last scheduled interview	
	1998-1999	1999-2000
All federal appellate judges	11%	17%
Active judges	9%	9%
Senior judges	10%	32%
Senior status not specified	100%	N/A
	Total number of responses: 139	Total number of responses: 110

Source: 1999 and 2000 Judge Surveys.

The lack of open slots by the end of the interview period is a natural tendency of a process under which the great majority of judges start making offers before completing their interviews. In both 1999 and 2000, approximately three-quarters of active judges responding to our surveys had

⁴⁶ 2000 Judge Survey #90.

made at least some offers before the completion of interviews, as shown in Table 3 above. We do not mean to suggest that offering some positions before the end of interviewing is necessarily objectionable, but it does obviously mean that those interviewing later—who may be paying large sums to travel to the interview—are competing for fewer and fewer positions.

Students responding to our surveys expressed not only direct concerns about judges' conduct but also a general disenchantment (voiced in no uncertain terms) with the clerk hiring process. Tables 17-1 and 17-2 provide a sampling of some of the most striking comments. Of course, these responses may not represent a random slice of student opinion; presumably we were more likely to hear from students dissatisfied with the process than from those who were pleased with it. At the same time, it is critical emphasize that, as the right-hand column of the tables reveals, the sources of the negative student comments appear generally to have been quite successful in the clerkship market. This is particular clear for 1999, when we asked for detailed information about the judges from whom the student received offers. Our measure for 2000—the total number of offers the student received—is less informative, but it still seems noteworthy that none of the students quoted failed to receive at least one clerkship offer. Thus, this is not a group of disgruntled students who received no clerkship offers or (at least insofar as 1999 reveals) only offers from relatively unappealing judges.

Table 17-1: Student Reactions to the Law Clerk Market, 1999

Survey	Comment	Student's Outcome
#184	It's terrible. Just about anything, including malicious lies, forcible running with scissors, and active misuse of electric cords, would be better.	No offer.
#119	Craziness.	Two offers from highly prestigious Court of Appeals judges.
#172	Insane.	Three offers from highly prestigious Court of Appeals judges.
#178	Chaotic.	Three offers from top District Court judges in Washington DC and New York City.
#168	Brutal.	Offer from a highly prestigious Court of Appeals judge.
#123	A total mess.	Offers from three prestigious Court of Appeals and District Court judges.
#121	[A] complete mess.	Offers from four prestigious Second Circuit judges.

Source: 1999 Second-Year Student Survey.

Table 17-2: Student Reactions to the Law Clerk Market, 2000

Survey	Comment	Student's Outcome
#26	You will have to arrest me before I will again set foot in [specified courthouse]. I would not wish this process on my worst enemy.	1 offer.
#9	One of the most arbitrary and ill-designed processes I've ever come across.	1 offer.
#20	A crap shoot.	1 offer.
#21	Horrible.	2 offers.
#23	One of the worse experiences at law school.	2 offers.
#25	Chaos.	2 offers.
#28	Absolute hell.	1 offer.
#32	Crazy.	2 offers.
#40	Disorganized and chaotic.	2 offers.
#200	A zoo.	2 offers.
#234	A mess.	1 offer.
#240	The clerkship hiring process is a disgrace. It is everything that we are taught at law school to dislike: inefficient, arbitrary and capricious and designed to benefit those with connections and inside information.	1 offer.
#245	Deeply unfair.	1 offer.
#246	An extremely unpleasant process.	1 offer.
#247	Terrible.	3 offers.
#252	Totally outrageous, . . . stressful [and] chaotic.	2 offers.
#255	Clerkship hiring is like flying through the air without a net, you never know where you'll land, and how hurt you'll be in the process.	1 offer.

Source: 2000 Second-Year Student Survey.

Almost as interesting as some of the quotations in Tables 17-1 and 17-2 was the following remark from a student who had a more positive view of the clerkship hiring process: “I think it benefits law students at privileged schools to be subjected to the same random, difficult job search process that people in other fields have to [undergo].”⁴⁷ Perhaps that is the best argument to be made for the current process, but it does not suggest that this process is one that is likely to cast the federal judiciary in a particularly favorable light.

3. Perceived fairness.

As noted in Part I above, some students may regard the law clerk market as unfair to the extent that the frenzied manner and early timing of hiring lead the market to rely on various forms of personal well-connectedness in matching applicants with judges. Students with relationships to previous high achievers in the legal world and elsewhere may be advantaged in the clerkship competition as a result of the limited information available to judges. Our survey results provide evidence both that personal well-connectedness does matter in at least some cases and that some students (and judges) regard this as unfair. Note that our claim is not that such reliance *is* “unfair” (however defined) but simply that some participants in this market regard it as such and experience disutility as a result. Also, it may be that any process would be regarded as unfair by some, but the fairness objections we describe below appear to be shared by a larger group than would probably be the case under a different system.

a. Peer recommendations.

An intriguing feature of the market for federal judicial law clerks is the role played by other students’ and recent graduates’ recommendations. In some instances clerks or judges solicit the opinions of applicants’ current classmates, as reflected in the survey comments reported in Table A10 in the Data Appendix. These comments show both that peer references from current classmates matter in this market and that at least some students regard this as unfair.

At least as important as recommendations from current classmates are recommendations from recent law school graduates who are currently clerking. Our 1999 and 2000 judge surveys show that two-thirds of responding judges (68% in 1999 and 66% in 2000) use current clerks to screen applications. Table 18 shows that, at least anecdotally, current clerks may rely in part on their personal connections in performing the screening function. Interestingly, at least two of the students quoted in the table (the third and

⁴⁷ 2000 Student Survey #264.

eleventh quotations) seemed to regard the effect of the personal connection as unfair even though they were presumably helped by it.

Table 18: The Role of Connections with Current Law Clerks

Survey	Comment
1999 Survey #109	With [a particular judge] one of his clerks I knew from law school. The judge made it clear that this clerk was rooting for me.
1999 Survey #160	I have a good friend clerking for [a particular judge] who thought we would be a good fit—I'm sure her influence was helpful.
1999 Survey #163	I know the current clerks of [two particular judges with whom the candidate received interviews]. Both have assured me that I received interviews on my merits That's what they say, but I can't help but feel like perhaps they had some influence.
1999 Survey #134	A current clerk [of a judge from whom the student received an offer] is an acquaintance of mine and helped get me an interview.
1999 Survey #115	Current clerks in [two particular judges' chambers, who were graduates of the candidate's law school, played an important role]. I am pretty sure they had good things to say about me to their respective judges.
1999 Survey #49	A [clerk for a particular judge] helped me get an interview.
1999 Survey #55	[Knowing a current clerk for a particular judge] probably expedited my ability to get the interview [with that judge].
2000 Survey #5	[T]wo current clerks with whom I had worked either called me for an interview with their judge or recommended me to another judge in the same circuit.
2000 Survey #12	I knew the current clerk of a judge who interviewed me, I'm sure that clerk played a role in my getting the interview.
2000 Survey #20	I was acquainted with one of the clerks currently working for [a judge from whom this candidate received a clerkship offer].
2000 Survey #32	I think there would have been no chance of me interviewing with [a particular judge] if a friend of mine hadn't been one of her clerks. That made it all the more satisfying when I [later] got an interview with [a different judge] whom I know I have no contact with.

Table 18: The Role of Connections with Current Law Clerks (continued)

Survey	Comment
2000 Survey #39	One of the current clerks [of a particular judge] is an old acquaintance.
2000 Survey #251	The two appellate and six SDNY [Southern District of New York] interviews were all with judges with whom I had some connection through their clerks.
2000 Survey #254	I know, and was not hurt by, a current clerk.
2000 Survey #10	One current clerk for [a particular judge] used to be an acquaintance at school. I think he helped get me an interview.

Source: 1999 and 2000 Second-Year Student Surveys.

b. Faculty “clerkship brokers.”

Clearly law professors play an important role in the clerkship process; their recommendations of students are a significant component in judges’ evaluation of applicants, as shown in Table A11 in the Data Appendix. No one seems to regard that in itself as unfair. But sometimes the role of the faculty member goes beyond the familiar role of recommender. In some instances professors play the role of “interview broker” or “offer broker” in the clerkship market or even choose the clerks themselves. This is reflected in the comments from our student and judge surveys reported in Table A12 in the Data Appendix; it is also reflected more quantitatively in responses to our judge surveys, which showed that approximately 27% of judges in 1999 and 19% in 2000 relied on professors to screen applications.

At least some students and judges seem to regard the sort of “faculty feeding” described in our student and judge surveys as unfair:

I am and was completely repulsed by the “this professor secretly handpicks and recommends a favorite student to a particular judge” routine.⁴⁸

[T]he biggest problem . . . for students [is] the old boy’s network. If you are not the darling of an aged white male professor, who may be severely uncomfortable working with talented women or people of color, you should kiss your chances of a clerkship goodbye and not bother applying. In my [particular school] class, approximately 80% of the students who received circuit court clerkships “applied” as [a]

⁴⁸ 2000 Student Survey #16.

formality only, their clerkships were delivered to them by 2 or 3 faculty members.⁴⁹

The “special deals” between judges and professors violate the spirit if not the letter of attempts to hire in a more orderly way.⁵⁰

c. Other forms of well-connectedness.

Social connections may also aid some applicants, and again this may be regarded as unfair. Table 19 lists student comments suggesting the importance of various forms of social well-connectedness, including connections with friends of a judge or a judge’s former clerks. Some participants in the market are likely to view the role of such connections as unfair; as one student lamented, “I feel that I was not a party to the network.”⁵¹

⁴⁹ 2000 Student Survey #251.

⁵⁰ 1999 Judge Survey #26.

⁵¹ 2000 Student Survey #24.

Table 19: The Role of Various Types of Social Connections

Survey	Comment
1999 Survey #177	A good family friend called [a particular judge], and I received a call from the judge about thirty minutes thereafter. [The student ultimately received an offer from this judge.]
1999 Survey #120	[A] close friend of [a particular judge] made a call on my behalf.
1999 Survey #129	A former [clerk for a particular judge] called [that judge] to recommend me. I think I was [that judge's] top . . . choice based on that clerk's recommendation.
1999 Survey #130	A former clerk of [a particular judge] is a good friend of mine, and played a big role.
1999 Survey #189	With [a particular judge] a family connection helped.
2000 Survey #7	A former clerk who knew me well called her judge for me.
2000 Survey #11	Got an interview (and the offer) in [specified court] because old college friend was ex clerk and talked me up to judge.
2000 Survey #12	One of my best friend's father is a law professor and he put in a call for me to a judge he knows.
2000 Survey #59	A friend of my mother's put in a good word with a judge they knew.
2000 Survey #234	The clerkship I eventually accepted was offered after a professor at another law school (who I know well) made a phone call to the judge.

Source: 1999 and 2000 Second-Year Student Surveys.

In short, the law clerk market appears to rely heavily on various forms of personal well-connectedness, and at least some participants seem to regard this as unfair.

III. The Experience of Other Markets

The law clerk market is far from alone in its difficulty in establishing the timing of transactions, with the variety of efficiency and other problems that result. Table 20 below lists several dozen markets and submarkets that have experienced the unraveling of transaction dates. Table 20 concentrates primarily on markets that, like the law clerk market, are entry-level professional labor markets. Timing problems are particularly easy to identify in these markets because generally employment cannot begin until the

professional has completed his or her education, yet arrangements may be made far in advance. However, timing problems are not restricted to labor markets: the list in Table 20 includes the market for postseason college football bowls. Again timing problems are easy to identify here, since postseason bowl games cannot be played until the end of the regular season. Another good example of timing problems in a nonlabor context is fraternity and sorority rush, where recruitment had at one point moved back into the preparatory schools from which particular colleges drew their students, despite the fact that involvement in the fraternity or sorority did not commence until college.⁵² Yet another example is early admission to college; nearly three-quarters of high school students who go on to attend elite colleges now apply for early admission to one or more colleges in response to incentives offered by colleges.⁵³

⁵² See Roth & Xing, *supra* note 3, at 1019. Indeed, here the unraveling of selection dates has even entered the language in the form of the term “rush.” See Susan Mongell & Alvin E. Roth, *Sorority Rush as a Two-Sided Matching Mechanism*, 81 AMER. ECON. REV. 441, 441 (1991).

⁵³ See Christopher Avery & Richard Zeckhauser, *The Early Admissions Game: The Perspective of Participants* (work in progress).

Table 20: A Selection of Markets with Timing Problems

Market	Organization	Stage ^a
Entry-level medical labor markets:		
American first-year postgraduate (PGY1) positions	National Resident Matching Program (NRMP)	3
Canadian first-year positions	Canadian Intern and Resident Matching Service	3
U.K. regional markets for preregistration positions:	Regional health authorities	
Edinburgh		3
Cardiff		3
Birmingham		4, 1
Newcastle		4, 1
Sheffield		3 or 4, 1
Cambridge		3
London Hospital		3
American specialty residencies:		
Neurosurgery	Neurological Surgery Matching Program	4
Ophthalmology	Ophthalmology Matching Program	3
Otolaryngology	Otolaryngology Matching Program	3
Neurology	Neurology Matching Program	3
Urology	AUA Residency Matching Program	3
Other specialties ^b	NRMP	3 and 4
Advanced specialty positions:		
12 (primarily surgical) specialties ^c	Specialties Matching Services	3
Medical Subspecialties	Medical Specialties Matching Program	3
Four ophthalmology Subspecialties	Ophthalmology Fellowship Match	3
Plastic surgery	Plastic Surgery Matching Program	3

^a The “stages” are explained in the text just below.

^b Anesthesiology, emergency medicine, orthopedics, physical medicine, psychiatry, and diagnostic radiology.

^c Colon/rectal surgery, dermatology, emergency medicine, foot/ankle surgery, hand surgery, ophthalmic plastic and reconstructive surgery, pediatric emergency medicine, pediatric orthopedics, pediatric surgery, reproductive endocrinology, sports medicine, and vascular surgery.

Table 20: A Selection of Markets with Timing Problems (continued)

Market	Organization	Stage
Entry-level legal labor markets:		
Federal court clerkships	Judicial Conferences	2, then 1
American law firms	National Association for Law Placement	1
Canadian articling positions	Articling Student Matching Program	
Toronto		3 and 4
Vancouver		3 or 4, then 1
Alberta (Calgary)		3
Entry-level business school markets		
New MBA's		1 ^d
New marketing professors		1
Other entry-level labor markets:		
Japanese university graduates	Ministry of Labor; Nikkeiren	2
Clinical psychology internships	Association of Psychology Internship Centers	2, then 3
Dental residencies (three specialties and other general programs)	Postdoctoral Dental Matching Program	3
Optometry residencies	Optometric Residency Matching Services	1 and 3
Postseason college football bowls	National Collegiate Athletic Association (NCAA)	1, then 3
Other two-sided matching:		
Fraternity rush		
Sorority rush	National Panhellenic Conference	1 3

Source: Alvin E. Roth & Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 AMER. ECON. REV. 992 (1994).

^d Occasionally.

In many of the markets in Table 20, considerable effort has been expended to halt, reverse, or otherwise control the timing of transactions. The table lists for many of the markets the organization that has been entrusted with this task. Many of these organizations were created expressly for the purpose of controlling the unraveling of transaction times. In many instances these organizations can bring to bear considerable compulsory power. But frequently a solution to the timing problem has nonetheless proved elusive. The difficulties encountered by these other markets may therefore illuminate the problems in the market for federal judicial law clerks and the prospects and potential pitfalls in the road to reform of this market.

A. A Framework: Four stages of unraveling markets.

To make it easy to describe the common phenomena found in a diverse set of markets, Table 20 loosely categorizes each market it describes as most recently being in one of four “stages,” as follows.⁵⁴

Markets that are in the process of unraveling—in which appointment dates are getting earlier from year to year, or in which they have moved to the earliest feasible date—are stage 1 markets. Here is a generic description of stage 1:

Stage 1 begins when . . . the relatively few transactions [in the market] are made without overt timing problems. By the middle of stage 1 . . . some appointments are being made rather early, with some participants finding that they don't have as wide a range of choices as they would like—students have to decide whether to accept early job offers or take a chance and wait for better jobs, and some employers find that not all of the students they are interested in are available by the time they get around to making offers. The trade journals start to be full of exhortations urging employers to wait until the traditional time to make offers, or at least not to make them any earlier next year than this year. Towards the end of stage 1, the rate of unraveling accelerates, until sometimes quite suddenly offers are being made so early that there are serious difficulties distinguishing among the candidates. There is no uniform time for offers to be made nor is there a customary duration for them to be left open, so participants find themselves facing unnaturally thin markets, and on both sides of the market a variety of strategic behaviors emerge, many of which are regarded as unethical practices. Various organizations concerned with the market may have proposed guidelines

⁵⁴ This section draws from Roth & Xing, *supra* note 3, at 996-98.

intended to regulate it, without notable success. As stage 1 ends, influential market participants are engaged in a vigorous debate about what can and should be done.⁵⁵

Although this was not written as a description of the law clerk market, it fits it to a “T”.

Stage 2 markets are those that have instituted regulations specifying the time before which offers and sometimes other contacts cannot be made, and sometimes how long offers must remain open. Stage 2 markets are still decentralized, with employers contacting potential employees directly to make offers. During each of the six attempted reforms of the law clerk market, this market was in stage 2. For instance, the most recent attempted reform specified February 1 as the date before which contacts could not be made and March 1 as the date before which (in effect) offers could not be made.⁵⁶

Stage 3 markets are those that have instituted centralized market clearing procedures, which not only serve to determine the time at which transactions take place, but also organize the transactions (the order in which offers are made and the point at which transactions are finalized). The most common form of stage 3 organization has potential employers and employees contacting each other (via applications, interviews, etc.) in a decentralized way, after which each employer submits a rank ordering of applicants to a central clearinghouse, to which each applicant also submits a rank ordering of positions. The clearinghouse then uses these preference lists, in some pre-specified way (now often formalized in a computer program), to produce a match, and employers and employees are simultaneously informed of the results of the match. Perhaps the largest and best known of the centralized markets is the one by which new medical school graduates are matched to first-year residencies. But, as Table 20 makes clear, lawyers too participate in stage 3 markets; “articling” positions required before being called to the bar in Canada are arranged in this way in several major cities.

Stage 4 markets are those with centralized mechanisms, but in which there has been at least some unraveling prior to the centralized market, as participants jockey for advantage in the centralized procedure.

[T]he unraveling has often taken the form of recruiting students for summer internships (or in the case of some medical specialties for ‘audition electives’), which amount to extensive interviewing opportunities in which the students spends a

⁵⁵ *Id.* at 996.

⁵⁶ Becker, Breyer & Calabresi, *supra* note 8, at 209-15, describe the six attempted reforms. As discussed in Part IV.B below, the March 1 date specified by the most recent reform technically applied to interviews, but most, although not all, judges are reluctant to hire without an interview.

period of weeks or even months at the firm. Because of the length of time involved, students can interview in this way at only a very small number of firms, and firms can interview only a few students in this way. Because the percentage of new employees hired by each firm who were previously summer interns there sometimes becomes quite high, these internships can become a way of moving the recruiting process before the centralized matching mechanism.⁵⁷

These four stages provide a framework within which to discuss the particular markets from Table 20 in more detail. In the next section we offer some vignettes from those other markets.

B. Vignettes.

1. Medical residencies.

A good place to begin is with the history of the market for new American medical school graduates, both because that is the first of these “unraveling” markets to have been studied as such by economists⁵⁸ and because of its role (discussed more fully in Part IV.C below) in various proposals to reform the clerkship market.⁵⁹ But it is not the successful experience of the centralized, stage 3 medical market that we wish to discuss here but instead the period from 1945 to 1951, when the medical market was organized as a stage 2 market.⁶⁰

Prior to 1945 there had been a severe unraveling of appointment dates, so that medical students were being selected for post-graduation employment when they still had two full years remaining of medical school (much like today’s market for federal judicial law clerks). In 1945 the medical schools, working in conjunction with the residency programs, successfully implemented an embargo on letters of reference until a specified date, and this

⁵⁷ Roth & Xing, *supra* note 3, at 997.

⁵⁸ See Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991 (1984).

⁵⁹ See Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1711 (1995); Kozinski, *supra* note 1; Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765 (1993); Oberdorfer & Levy, *supra* note 32; Wald, *supra* note 2. Several of these authors have cited the economic investigation into the medical market in support of their (opposing) positions on reform of the clerkship market. See Kozinski, *supra* note 1, at 1721 n.29; Oberdorfer & Levy, *supra* note 32, at 1101 n.15, 1103 n.27.

⁶⁰ The following description is taken from Roth, *supra* note 58, at 992-95.

proved effective. The date of appointment was successfully moved to one year before employment would begin, and in subsequent years the dates at which letters were released, and appointments made, were moved into the last year of medical school, nearer to the time of appointment.

But the problems experienced by this market did not end when the appointment date was controlled (a stage-2-type solution). There followed a period in which the market was extremely disorderly, with students being called upon to make increasingly prompt decisions whether to accept offers. In 1945 offers were supposed to remain open for 10 days. Each subsequent year that interval was shortened, until by 1949 a grace period of 12 hours had been rejected as too long, and exploding offers were explicitly allowed. What had happened was that hospitals found that if an offer was rejected very near the deadline, it was often too late for them to reach their next most preferred candidates before they had accepted other offers. Even when there was a long deadline, much of this action was compressed into the last moments, since a student who had been offered a position at, say, his or her third choice hospital would be inclined to wait as long as possible before accepting, in the hope of eventually being offered a preferable position. So, regardless of how long offers were to remain open, the period just before the deadline was frenzied, with students seeking to improve on the positions they had been offered by contacting the hospitals they preferred, and with hospitals sometimes pressuring students into early decisions in order not to have to contact students on their waiting lists after the deadline had expired. This of course gave the hospitals that applied such pressure an advantage over those that did not, with a longer deadline possibly compounding the advantage.

A central clearinghouse was proposed and adopted only when these attempts to organize a stage 2 market had been exhausted. With modifications, this kind of central clearinghouse has been used now in the medical residency market for almost half a century. The design of the current medical clearinghouse was directed by one of the authors of this work,⁶¹ and its details are discussed more fully in Part IV.C below.

2. Post-season college bowls.

The American medical market is large and impersonal, and one important feature of this market, both before and after the move to a centralized clearinghouse, is that informal understandings between participants are not always honored. But in smaller markets, in which participants can expect to encounter each other again at later points in time, promises can often be relied on. Paradoxically (since one would ordinarily think that a small market would make an agreement on a fixed starting date for transactions

⁶¹ See Roth & Peranson, *supra* note 9.

easier to sustain), the small size can further increase the difficulty of achieving a stage 2 solution.

The experience of post-season college football bowls is illustrative.⁶² For many years the National Collegiate Athletic Association (NCAA) attempted to control the date at which bowl agreements were signed by specifying a date (commonly called “Pick-Em Day”) before which such agreements were forbidden. The idea was to delay selection until sufficiently late in the regular season that there would be a good chance that teams with the best records at the end of the season would be matched against one another. However, despite the considerable penalties the NCAA can levy on teams and bowls, the fact that informal agreements could be relied upon allowed teams and bowls to make early agreements and avoid penalties.

During the 1991-1991 football season there were highly publicized informal agreements, four weeks before the end of the regular season (and two weeks before Pick-Em Day), which sent Notre Dame to the Orange Bowl, Miami to the Cotton Bowl, and Virginia to the Sugar Bowl. At that time (with four games left to play) Notre Dame, Miami, and Virginia were ranked by the sportswriters' poll as the number 1, 3, and 8 teams in the nation. But, following some losses before the bowl games were actually played, Notre Dame had dropped from number 1 to number 5, and Miami had dropped out of the top 20 altogether. “Because of the substantial penalties for breaking NCAA rules, there are no public accounts of the details of these informal agreements. However, in confidential discussions with participants in this market, great confidence was expressed in the reliability of such agreements once made.”⁶³

The NCAA gave up trying to enforce a date for bowl agreements following the embarrassing experience in the 1990-1991 season. Since then bowl selection has become more centrally organized (a stage 3 model), based on agreements between consortia of football conferences and independent teams and consortia of bowls. Thus, as in the case of the medical market, the attempt at a stage 2 solution proved infeasible, and a more centralized mechanism was adopted.

3. Clinical psychology positions.

One of the longest-running stage 2 markets was the American market for pre- and post-doctoral internships for clinical psychologists, which

⁶² Our discussion here draws on Roth & Xing, *supra* note 3, at 1007-13.

⁶³ *Id.* at 1012 n.22. The authors go on to note: “This is not to say that these agreements are never broken, and we heard of at least one occasion in which a university broke an unofficial agreement with a major bowl and was ostracized by the bowl (and perhaps by some other bowls, although this is less clear) for several years thereafter.” *Id.*

operated as a stage 2 market from the 1970s through the 1997-1998 academic year.⁶⁴ In this market, transactions were all to be made by telephone on “Selection Day” (akin to Pick-Em Day), a specified day in a specified month of each year. The rules required that no offers be made before the “opening time” of the market (9:00 AM Central Standard Time in the early 1990s), and that all offers made during the course of the market and not yet rejected remain open until the “closing time” (4:00 PM Central Standard Time in the early 1990s). That is, both early offers and exploding offers (which require a decision before the end of the market) were not allowed. Programs that still had some positions vacant after the market closed could then make exploding offers to fill them.

This market survived for roughly 25 years despite a certain level of noncompliance, with somewhere between 10% and 25% of students reporting forbidden contacts from employers before the start of Selection Day.⁶⁵ A variety of rules were formulated to discourage employers from soliciting promises from applicants that if offered a job they would accept it, but these too were difficult to enforce. Both the early contacts and the solicitation of promises seemed to be related to the fact that employers had good reason to try to avoid making offers that might be rejected late in the day on Selection Day. The reason is that, at 4:00 PM, students who had offers in hand would accept them before they expired, so that a firm that had an offer rejected just before then might find that many of its more preferred alternate candidates had already accepted positions before they could be contacted. Observations of this market and interviews with participants suggest that, in deciding to whom to make offers, employers were substantially influenced by which students had indicated in advance that they would accept, and that, knowing this, students very often made such an indication to some employer. Early contacts and promises had much less force in the market for medical residencies prior to the move to a stage 3 solution, despite the similar congestion problems that existed, because (among other things) the size of the market means that a student who breaks an informal promise in the medical market may well never to have to deal again with the residency director who elicited it. In the clinical psychology market, by contrast, promises are reliable, since, as one program director said to one of us (Roth), “You see these people again.”⁶⁶

As a result of these problems, the clinical psychology market converted recently to a centralized clearinghouse, modeled on the medical market but adapted to the special features of the clinical psychology market. This centralized market ran for the first time in academic year 1998-1999 for

⁶⁴ This section draws on *id.* at 1016-18 and Roth & Xing, *supra* note 18, at 285-86, 288-91.

⁶⁵ See Roth & Xing, *supra* note 3, at 1017.

⁶⁶ Roth & Xing, *supra* note 18, at 289 n.6.

positions beginning in June 1999. So, once again, the market moved from stage 2 (which proved unsuccessful) to stage 3.

4. Japanese university graduates.

Yet another example of a stage 2 market is the market for graduates of elite Japanese universities.⁶⁷ The unraveling in this market is so persistent and widespread that it has a popular name, *aota-gai*, which translates as “harvesting rice while it is still green.” Although hiring before specified dates is formally prohibited, hiring well in advance of graduation nevertheless persists through informal but effective guarantees of employment known as *naitei*. These informal arrangements are similar to the understandings that brought down the stage 2 approaches in the college football and clinical psychology markets.

After a company has offered *naitei* to a particular candidate, the informal agreement is enforced through an interesting mechanism. Companies that offer *naitei* to students long before the beginning of employment try to prevent them, via physical restraint, from interviewing with other companies or government ministries. For example, a company might invite all of the students to whom it had offered *naitei* to come on a company outing on the day the Finance Ministry was offering its civil service exam, with the understanding that the guarantee of employment would be withdrawn from any student who missed the outing.

Naitei, then, is a very effective means of making arrangements prior to the official date allowed in this stage 2 market. Despite the effectiveness of *naitei*, this market has continued to be organized (officially) as a stage 2 market, although in its practical effects it is probably more akin to a stage 1 market as a result of the role of *naitei*.

5. Canadian articling positions.

Canadian law graduates take an “articling” position following graduation and before being called to the bar. The various regional markets for articling slots have been subject to unraveling, just as has the American market for federal judicial law clerks.⁶⁸ In response to this problem, two of the articling markets, in Toronto, Ontario and in Alberta (primarily in Calgary), are now organized as stage 3 markets employing an algorithm developed in part by one of the present authors (Roth) initially for the medical match.⁶⁹ As described above, stage 3 markets are ones in which

⁶⁷ Our discussion here draws on Roth & Xing, *supra* note 3, at 1014-16.

⁶⁸ *See id.* at 1024.

⁶⁹ *See* Roth & Peranson, *supra* note 9.

matching of applicants to positions occurs through a centralized clearinghouse. Participation in the articling clearinghouses is by a subset of the firms in each regional market; some firms in each market do not participate.

A centralized matching system solves one of the fundamental problems with a stage 2 solution, which is that congestion may occur on the start date. (Recall that this was the reason for the move to a stage 3 solution in the market for medical residency positions.) But the problem of implied or informal agreements in circumvention of the centralized clearinghouse remains. “Offers” and “acceptances” may be communicated outside the match with one side telling the other, “I’ll rank you first in the match if you rank me first.” This effectively moves the match date earlier, even if there is 100% pro forma participation in the centralized process. Applicants and firms will simply submit forms requesting to be matched with the parties with whom they had already agreed months in advance. This is by no means an academic problem; in some failed matches, up to 80% of the matching forms submitted to the centralized mechanism list only one partner, making clear that everything has been settled in advance.⁷⁰

The stage 3 market for articling positions in Canada has taken a number of interesting steps to address the problem of informal agreements. In the Toronto match there are detailed regulations governing the nature of permissible communications between candidates and firms. (The Law Society of Upper Canada regulates the Toronto articling market. It is more difficult to get information about the operation of the Alberta market because it works without the direct oversight of a regulatory body.) The Law Society regulations seek to control the communication between firms and students both before and after interviews occur. Recognizing that, in light of the incomplete coverage of the centralized match and the fact that offers from nonparticipating firms may need to be acted upon before the match date, it is impossible to eliminate completely the discussion of rank orderings among participants—but wishing to prevent students being pressured into “deals” that would subvert the intention of the match—the regulations attempt to define and limit what kinds of communication are allowed when firms and students discuss the upcoming match. The regulations provide that firms may provide ranking information to students in advance of the match, but only within a specified time period.

A.8. Subject to the exception noted below regarding summer students, no communication of ranking intentions shall take place prior to 8:00 a.m. on Monday, August 14, 2000.

Exception: Firms in the matching program may communicate ranking intentions to summer students employed with their

⁷⁰ See Roth & Xing, *supra* note 3, at 1000.

firm in the summer months of 2000 prior to Monday, August 14, 2000.⁷¹

The regulations further specify that students may, but cannot be required or pressured to, provide ranking information to firms:

A.9. Firms shall not request from a student, explicitly or implicitly, information on intentions as to where the student will rank the firm.

Commentary: Voluntary communication of ranking intentions by firms made in accordance with procedure A.8 will be permitted, provided the manner of communication does not impose pressure on students to reciprocate with communication of their own ranking intentions. For example, it is improper for a firm to say to a student “we will rank you within the firm’s complement of students in the match (or first, etc.) if you rank us, or tell us, or commit to us, that you will rank us first”

A.11. Firms communicating ranking intentions to students . . . are strongly encouraged to communicate their ranking intentions using the terminology set out in the Society’s “Guidelines for Firms Participating in the Matching Program re: Communication of Ranking Intentions to Articling Candidates.”⁷²

A major source of the pressure to communicate outside the match in the Canadian articling market has to do with students who have applied both to firms in the match and firms not in the match. Since many more students participate in the match than there are positions offered in the match, the intention of permitting firms to communicate ranking information is to help students to decide whether or not to accept an offer they may have received from a nonparticipating firm.

The centralized clearinghouses in the Canadian articling market seem to be working, although the regulations also show that this market requires some careful maintenance. The central remaining problem with the Canadian articling match is the heavy reliance on summer positions to “audition” articling candidates. In this respect the market has sharp tendencies toward a stage 4 outcome. There is significant interaction between the market for articling positions and the market for summer associateships for students

⁷¹ “Procedures Governing the Recruitment of Articling Students for the 2001-2002 Articling Year,” Law Society of Upper Canada, http://www.lsuc.on.ca/services/services_articlingproc2001_en.shtml (visited 9/18/00).

⁷² *Id.*

who have completed their second year of law school. This is not a recent development but rather one with which the articling market has dealt for a long time. As a partner at the Toronto law firm of Blake, Cassels & Graydon observed roughly a decade ago:

Students now feel virtually compelled to obtain a summer job in Toronto after their second year in law school and as a result, a substantial portion of the articling hiring process has now been placed on the shoulders of the summer program. Students are being hired for summer positions halfway through their second year in law school...Everyone recognizes that this is a back-door method of obtaining an articling position.⁷³

The market for medical residencies is marked by the same stage 4 tendencies in a number of subspecialties, as described just below.

6. Medical residencies (again).

As described above, the medical market adopted a centralized clearinghouse after the failure to organize a successful stage 2 market in the middle of this century. But as in the Canadian articling market, in certain subspecialties the selection process may in fact begin well before the centralized match. In highly competitive areas such as orthopedic surgery and neurosurgery, preference for residency positions is often given to candidates who have done “audition electives” with the program in question.⁷⁴ These “auditions” last six weeks and give the program and student a chance to become acquainted with one another well in advance of the centralized match. Since students can audition with only a few programs, and programs can offer auditions to only a few students, the auditions represent a form of “prematching,” where some selection occurs on both sides well before the centralized match.

Note that sometimes (in other markets, including the American market for new law school graduates) summer or “elective” positions do *not* reflect efforts to circumvent stage 3 mechanisms. These positions may exist even in markets without a stage 3 (or stage 2) regime because they provide employers with useful information about candidates, or candidates with useful information about employers, prior to entry into a more permanent commitment. An obvious example here is summer associate positions at American law firms; these positions do not represent an attempt to “prematch” in advance of a centralized procedure or specified offer date (since neither exists in this market, although once an offer—which may be made at any

⁷³ Roth & Xing, *supra* note 3, at 1024 (quoting correspondence from Barry McGee to Alvin E. Roth, March 25, 1991).

⁷⁴ Our discussion here draws on *id.* at 1022-24.

time—is made, the National Association for Law Placement regulates the amount of time for which it must be kept open⁷⁵). Rather the summer associateship seems to be a way for law firms to gather information about candidates and provide information to them about the firm. Interestingly, though, the dates of appointment for summer associateships at American law firms *themselves* have unraveled over the years;⁷⁶ thus, instead of the summer associateship being a way *around* a mechanism adopted to *control* unraveling, the market for summer associateships is itself subject to unraveling.

IV. Three Decreasingly Modest Proposals for Governing the Market for Federal Judicial Law Clerks- and How Their Chances of Success Can Be Made Less Bleak

What can be done about the law clerk market? The possibilities for reform (or not) are familiar from past experience and the existing literature: 1) Let the market go without attempting to regulate it (so that it will remain at stage 1); 2) Establish a start date for offers and perhaps also interviews (the stage 2 solution, tried several times in the past); and 3) Institute a centralized clearinghouse (the stage 3 approach). As noted above, because there is a range of existing opinion on reform, we consider each of the three possibilities just described rather than focusing on a single one. We attempt to describe how each could best be implemented and what its odds of success are in light of what we know from our empirical evidence and the experience of other markets. Ultimately we conclude that a centralized matching system for federal appellate clerkships that may lead into Supreme Court clerkships holds the most hope for reforming the presently unraveling market.

A. The “do nothing” approach: A decentralized market in which participants are free to act as they wish.

Despite what seems to be a reasonably broad consensus among judges, clerks, and observers that the market for federal judicial law clerks is not working particularly well, a number of judges responding to our surveys expressed strong support, often in colorful terms, for the “do nothing” approach. Their comments are summarized in Table 21. These statements were not made in response to a specific question about the desirability of regulation; they were offered in response to an open-ended question asking judges whether there was anything else they would like to share with us about their views of the law clerk market.

⁷⁵ See National Association for Law Placement, Principles and Standards 33-34.

⁷⁶ Roth & Xing, *supra* note 3, at 1004-05.

Table 21: Judges' Criticism of Efforts to Reform the Market for Federal Judicial Law Clerks

Survey	Comment
1999 Survey #54	I think that it is a waste of time to try to devise 'systems' for this 'process'. I get excellent clerks in the free market and I see no need for regulation (but then I never do).
1999 Survey #51	Cartels do not work. People cheat. Judges cheat. Law schools cheat. Attempts at regulation are an attempt by established eastern law schools, especially Harvard whose professors are conducting this survey, to improve their lock on the market.
1999 Survey #60	Is this an attempt to resurrect the 'East Coast Law School Cabal?'
1999 Survey #12	Forget it! Leave it up to the judges and the applicant when to interview, apply or hire.
1999 Survey #14	The free market should govern the process. Government intervention is not justified. If judges want to make offers on the basis of insufficient data they should be free to do so. If students want to accept clerkship offers after one day of law school thereby passing up better opportunities later the market should allow them to do so.
1999 Survey #37	I would leave it alone and just let judges and law clerks do what they want to. Laissez faire.
1999 Survey #72	I will refuse to be bound by any combination agreement or conspiracy in restraint of trade. All cures are worse than the "disease". . . . Leave it alone and get out of our hair. . . . Free trade is the best. I do not believe the system is either chaotic or bad. Get off it.
1999 Survey #84f	I have no problems and would be happy if nobody tries to impose rigid rules on me or anyone else.
2000 Survey #38	[T]he less regulation[] the better. I have never had any problem handling the process of hiring law clerks. . . . [T]he system is fine as it is.

Source: 1999 and 2000 Judge Surveys.

What is likely to happen if, in accord with these sentiments, the market is left unregulated?

Prognosis. Grim. Hiring will continue to occur in a frenzied manner and is likely to move back even further in the student's law school career, so that even less information is available. As already noted, in 1999-2000 interviewing commenced in the early fall of the second year of law school, and there is no reason in principle why it could not move back until late in the summer after the first year (when, indeed, travel for interviews might be particularly easy); no new information emerges between the late part of the summer (after spring grades, law review selection, and references from professors for whom students may have worked as summer research assistants become available) and the early to middle fall. It is even possible that hiring would move back to the beginning of the second semester of first year, by which time first-semester grades would be available (except at Yale, where all first-semester classes are pass-fail; Yale students would thus be at a significant disadvantage). The good news is that clerkship hiring probably cannot move any earlier than the first semester of law school.

Palliatives. While we are waiting to see how early is early, judges could be encouraged to enter their hiring schedules in a generally available database. Indeed, an approach along these lines was instituted last year by the Administrative Office of the United States Courts.⁷⁷

An information database would, *if* there were a reasonable degree of participation, and *if* participating judges provided accurate dates in a timely manner, ameliorate some of the existing confusion about judges' timing, and this would certainly be a valuable service. However, neither of the two conditions just noted is likely to hold. The judges who move early to gain a strategic advantage over other judges are unlikely to participate in a database for precisely the reasons that drive them to jump the gun in the first place. If it is widely known that they are moving at a given time, other judges are likely to move up their schedules in response, and this will reduce the competitive gain from going early. Consistent with this suggestion, relatively few Court of Appeals judges list hiring times in the new Administrative Office database.

A further reason for limited participation is that once some judges are not participating, other judges will be reluctant to commit to particular dates for hiring clerks because developments in the market may cause them to want to move earlier; alternatively they may specify particular dates in the database but then feel compelled to move earlier as a result of changes in the market. Indeed, even without a centralized database this sort of problem comes up. Before the creation of the Administrative Office database, chambers frequently told law school placement offices that they would begin the hiring process on a certain date but then departed from this date as changes occurred elsewhere in

⁷⁷ See <https://lawclerks.ao.uscourts.gov> (visited 1/29/01).

the market. For all of these reasons, a centralized database is unlikely to address the fundamental problems in the market for federal judicial law clerks.

B. If at first you don't succeed, try again: Set start dates.

If remaining in stage 1 seems unappealing, what about a stage 2 solution? The key feature of a stage 2 approach would be that some authority would set a start date for offers, and perhaps also a start date for interviews, a length of time for which offers must be left open, or both in an effort to govern the market for federal judicial law clerks. Obviously various incarnations of this approach have been tried, and have failed, on several past occasions in this market.⁷⁸ Also, as the vignettes above show, such approaches have been tried, and have failed, in the markets for medical residencies, college football bowls, clinical psychology positions, and Japanese university graduates. Indeed, many of the markets listed in Table 20 have at some points in their history attempted to organize themselves as stage 2 markets but have failed and either have slipped back into stage 1 or have adopted a more centralized (stage 3) organization.

The point is in fact very general: We are aware of no market that has successfully organized itself as a stage 2 market for an extended period without problems of the sort observed in the markets discussed above. The clinical psychology market is the closest case, but even there, as noted above, there were serious problems of congestion and informal agreements prior to the specified Selection Day, and this market moved to a stage 3 organization in 1998-1999.

Do the same factors that explain the failures of stage 2 approaches in the other markets explain the past failures in the law clerk market? Might a new and improved stage 2 approach work in the latter setting?

Prognosis. Grim. There are several problems, illuminated by the experiences of the markets described in Part III.

(I) *Congestion.* The first difficulty is that even if the start date were fully adhered to by all parties (an unlikely outcome, as we discuss below), there would be severe congestion in the market on the start date, and this would preclude participants from considering a range of possible transactions before making their decisions. Our earlier discussion of the medical residency market in the late 1940s is illustrative; the reason that the stage 2 solution failed was not that the start date was not adhered to, but that there was severe congestion in the market on the start date.

Within the category of start-date regimes, there are two main approaches. Under the first, there is an offer start date and then either an earlier

⁷⁸ See Becker, Breyer & Calabresi, *supra* note 8, at 208-21.

start date or no start date for interviews. This was the situation in the clinical psychology market prior to the institution of the centralized match. As described above, substantial congestion occurred on Selection Day in this market. Past reform efforts in the law clerk market likewise demonstrate the problem. Judge Wald's account of the 1989-1990 clerk market, when the Judicial Councils in many circuits had adopted a deadline of May 1 at noon (Eastern Standard Time) for offers, with a consensus on a one-hour minimum response time and no limits on interviews prior to May 1, is representative in its essential features:

[T]he 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.⁷⁹

Congestion problems of this sort are likely to be severe in markets with offer start dates and earlier, or no, start dates for interviews.

The second possible approach is to have the offer start date also be the interview start date. This was effectively the situation under the most recent attempted reform of the law clerk market, under which interviews were not supposed to occur (under a "nonbinding" Judicial Conference guideline) prior to March 1.⁸⁰ Under this guideline there was no official regulation of offer times, but one presumes that most judges would not hire applicants for "the most intense and mutually dependent [relationship] I know outside of marriage, parenthood, or a love affair"⁸¹ without an interview, although a few judges do take this route,⁸² and indeed judges, like other employers, may well systematically overestimate the importance of interview performance relative to other qualities.⁸³

⁷⁹ Wald, *supra* note 2, at 159.

⁸⁰ See Becker, Breyer & Calabresi, *supra* note 8, at 207-08.

⁸¹ Wald, *supra* note 2, at 153.

⁸² See, e.g., 1999 Judge Survey #52.

⁸³ See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 136-37 (1991) (describing tendency to overrely on interview impressions relative to personal background).

The difficulty with a common start date for interviews and offers is that neither judges nor students will be able to conduct or participate in many interviews. The experience with the March 1 regime was that “both interviews and offers bunched around the March 1 date, so students had little latitude in scheduling interviews”⁸⁴ and little opportunity to interview with a range of judges (and conversely for the judges).

(II) *Cheating*. Alongside congestion, the second and equally fundamental problem with a stage 2 solution is that it is virtually impossible to prevent defections from the specified start date. This has happened before in the law clerk market, and it is the overwhelming consensus of judges that it would happen again. Both our 1999 survey and our 2000 survey posed the following question to judges: “If the Judicial Conference established, by rule, a firm start-date for interviews of September 1 of the third year of law school, do you believe that all or virtually all court of appeals judges would adhere to this date (in spirit as well as in letter)?” 72% of responding judges in 1999, and 74% in 2000, stated that they did not believe all or virtually all of their colleagues would adhere. Our survey showed that most judges say they are willing to comply if others are (93% in 1999, and 92% in 2000, said they would comply if “all or virtually all” other Court of Appeals judges were complying), but the problem is that they do not believe that most others will comply.

The problem is the familiar one of trying to sustain a self-enforcing cartel—one in which there is no outside sanction for defection. In general a cartel is much easier to sustain if strong outside sanctions exist to punish defectors. In the case of ordinary cartels, antitrust law denies enforcement of any explicit agreements, thereby eliminating most of the effective outside means of sanctioning those who defect. Likewise in the context of a start date for the law clerk market, the ability of some central authority to mete out punishments to judges who defect is limited by the institutional constraints surrounding the judiciary. Particularly because cheating may be far from explicit (as discussed below), it is difficult to imagine draconian punishments being handed out to Article III judges. The lack of explicitness, as well as other factors, likewise make it difficult to imagine handing out strong punishments to clerkship applicants who were interviewed or hired before the specified date.

So only a self-enforcing arrangement among judges is realistically possible. But of course the difficulty of sustaining such an arrangement is well known. The problem is particularly acute in the clerkship context, since parties cannot compensate those who are disadvantaged by the arrangement for their losses. In an ordinary cartel, conflicts of interest among members, if they exist, can be smoothed over by compensation; for instance, a seller who would

⁸⁴ Becker, Breyer & Calabresi, *supra* note 8, at 219.

prefer a higher price than the other members of the cartel can be given a larger sales quota. But there is no obvious way for a judge who is disserved by a given start date to be compensated for the losses he or she would incur from compliance with that date.

It is clear that some judges lose from specified start dates. Obviously, those judges who wish to gain a strategic advantage over other judges by jumping the gun are disadvantaged. This is related to our observation in Part I.B that the unregulated market is unlikely to be Pareto inefficient: at least a few judges are likely to be made worse off if the bargaining gain they enjoy from jumping the gun in an unregulated market is eliminated.

But other judges would want to defect as well; this is a consequence of the congestion caused by a start-date arrangement (hence the defection problem is linked to the congestion problem discussed above). Our description of the clinical psychology market in Part III.B.3 precisely illustrates the problem. The congestion on the start date produces pressure on parties to try to arrange deals in advance in order to avoid the problems that come up on the official start date. The problem may be particularly acute when, as in the 1989-1990 law clerk market, there ends up being no minimum time that offers must be kept open. (As Judge Wald describes in the passage quoted above, the one hour minimum period collapsed, at least in some Circuits, as events got underway on the specified start date.) Here the market is likely to be over very quickly (as revealed by the description from Judge Wald quoted just above, where much of the bidding in the D.C. Circuit was over in 15 minutes), and thus a judge has reason to think that any candidate not reached very quickly will probably be committed to someone else. Then the judge has reason to be reluctant to make an offer to a candidate who is likely to want to hold it for a long time (and as the earlier quotation makes clear, a long time can be measured in minutes). Thus, in deciding to whom to make an offer, the judge has some reason to favor candidates who have indicated a willingness to accept offers quickly. So, in turn, candidates have an incentive to let judges know that they will accept their offers, since this makes it more likely that an offer will be received. Indeed, in the 1989-1990 law clerk market, “[s]avvy clerk applicants . . . played their own hands. They (or sometimes their sponsoring professors) called chambers in advance to announce that that particular judge was the first choice.”⁸⁵

Yet another reason that defection is hard to control with a stage 2 approach in the law clerk market is that defection will often be difficult to detect (and hence will be relatively easy to get away with). Often it is not public knowledge when a clerk is hired. Recall our earlier anecdote (in Table 15) about a judge asking an interviewee to sneak in the service entrance on a

⁸⁵ Wald, *supra* note 2, at 158.

Saturday. Without some way of verifying when hires were made or contacts occurred, it is difficult to police defections from a start-date arrangement (even if enforcement were feasible once defection had been detected).

The problem with start dates is not only that they will be undercut by defectors—although this is a problem. The problem is that these defectors make the judiciary look bad, a concern that many judges have voiced and that was discussed above. A system, such as this one, that depends on honorable behavior also tends to penalize the honorable and put honor in bad repute. As one judge said on our survey with regard to “cartel” solutions: “All you do is create an incentive to cheat—on the part of students and judges alike.”⁸⁶

This sort of concern was precisely what motivated the Judicial Conference’s September 1998 abandonment of the March 1 benchmark start date for interviews. Judges who did not honor the start date were thought by the Judicial Conference to be engaging in a public act of lawlessness (even though there was no official “law” to be broken).⁸⁷ For similar reasons the NCAA and the Japanese Ministry of Labor gave up trying to regulate their respective markets; they felt that their decision making bodies were cast in a poor light by having made rules that many were not following.⁸⁸

Palliatives. Could some degree of compliance be achieved if each year, at the close of the market, all clerk candidates were surveyed, and a summary of the year’s events were circulated, indicating when first contacts were reported, whether and when there were agreements in violation of any start dates, and so forth? The great difficulty here would be that the report would of course have to preserve student anonymity, and probably also omit judge names (no student is going to report that Judge X, for whom the student will be clerking, winked and nodded well in advance of the start date), and without student or judge names it seems doubtful that the report would be very useful.

Another possible palliative would involve limiting the information available to judges prior to the start date. Making it more difficult for judges to gather information will impede their ability to move early, and so (for example) the strategy of asking law schools to embargo letters of recommendation until February 1, a strategy adopted by the Judicial Conference in 1993 in connection with its establishment of a March 1 start date,⁸⁹ was a sensible way to try to reinforce the (failed) attempt to establish a later appointment date. The fact that just such a strategy was partially successful in the American medical market in the 1940s (as described in Part

⁸⁶ 1999 Judge Survey #84d.

⁸⁷ Although there is no official record of this sentiment, one of us (Posner) attended the meeting in question and can testify to the content of the discussion.

⁸⁸ Roth & Xing, *supra* note 3, at 1012 & n.24, 1016.

⁸⁹ See Becker, Breyer & Calabresi, *supra* note 8, at 214.

III.B.1 above) gave grounds for at least cautious optimism, especially since in the medical market this strategy was effective at moving the date of appointment back very substantially.

But the law clerk market, or at least the most competitive segment of this market, is substantially smaller than the medical market.⁹⁰ In light of the size of the law clerk market, the success or failure of any reform that depends in part on an embargo on letters of recommendation may succeed or fail based on how nearly universal compliance is achieved. Even a relatively small set of “leaks,” if they systematically concern the most competitive part of the market, has the potential to defeat the intent of the embargo. And it is very difficult to prevent *all* leaks. It is particularly difficult to control informal contacts by telephone, and these appear to be common in the law clerk market.⁹¹ Of course when other professors are offering phone recommendations prior to the specified date, refusal by a given professor may harm his or her own students. So the temptation to talk to a judge who has already started gathering information about other candidates may be considerable.

In addition, as already noted, even if defections are perfectly controlled, the start-date approach does not work well in giving parties a chance to consider a wide range of possible transactions; the problem of congestion will remain. And there are no palliatives for *that* problem. As noted above, the start-date approach in the market for medical residency positions was abandoned even though there did not appear to be significant problems with defection; the reason was that the problems with congestion were thought to be intolerable.

C. Centralized matching systems.

Many of the markets discussed in Part III, as well as numerous others listed on Table 20, have progressed from stage 1 to stage 2 to stage 3, with the final move coming after the (inevitable in all markets with which we are familiar) failure of a stage 2 solution. A stage 3 solution involves a centralized matching system, which allows participants’ preferences to be considered in an orderly way and permits one to set the timing of the market at a desired point (say, the third year of law school for the market for federal judicial law clerks), as is currently the case in the market for medical residencies.

⁹⁰ Judge Wald notes, “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.” Wald, *supra* note 2, at 154-55.

⁹¹ See Becker, Breyer & Calabresi, *supra* note 8, at 219 n.36 (quoting a letter from a law school dean to the effect that in 1994 professors at other law schools communicated with judges by phone before the authorized date).

1. The “monkey see, monkey do” approach: Adopt the medical system as is.

One possibility is to adopt the medical system as is. Several commentators have urged something like this approach for the law clerk market.⁹² Here is a recent succinct description of the medical match:

Each year . . . graduating physicians and other applicants interview at residency programs throughout the country, and then compose and submit Rank Order Lists (ROLs) to the NRMP [National Resident Matching Program], each indicating an applicant’s preference ordering among the positions for which she has interviewed. Similarly, the residency programs submit ROLs of the applicants they have interviewed, along with the number of positions they wish to fill. The NRMP processes these ROLs and capacities to produce a matching of applicants to residency programs.⁹³

A few points bear emphasis here. First, the matching occurs *after* personal interviews have been conducted. Neither residency programs nor candidates are expected to make choices sight unseen for what are relationships in which personality certainly may matter.

Second, the medical match reflects purely the preferences of the participants for pairing with one another. It does not reflect some broader aspect of social planning or engineering by a central authority. The match is simply a way of facilitating the parties’ expression and achievement of their preferences, an opportunity that is lacking in an unregulated market with timing problems.

Third, the process is completely confidential. Neither side ever learns how the other side ranked it. This seems critical in the clerkship context, as no student would want the judge for whom he or she will be clerking to know that the student ranked that judge far down on the list.

Fourth, the matching system is set up to accommodate the preferences of married couples who wish to be in the same geographic region.⁹⁴ It is also set up to accommodate other specialized preferences of applicants and residency programs.⁹⁵

⁹² See Norris, *supra* note 59; Oberdorfer & Levy, *supra* note 32; Wald, *supra* note 2.

⁹³ Roth & Peranson, *supra* note 9, at 749.

⁹⁴ See *id.* at 758-59.

⁹⁵ See *id.*

Fifth, under the matching system participants can never gain from submitting rankings that depart from their true preferences. In other words, there is no possibility of gaining from ranking parties on the other side in a strategic manner based on impressions of how those parties will be ranking the initial party.⁹⁶

Might the medical match approach work in the law clerk market?

Prognosis. Not promising. The medical match does away with one of the central problems identified above for a stage 2 solution—the fact that congestion may occur on the start date. But the problem of implied agreements between participants as a way of getting around the strictures of the imposed agreement remains. Since judges and candidates are permitted to meet for interviews before the match date, “offers” and “acceptances” can be communicated well in advance of the centralized match. Just as in the situation of the market for Canadian articling positions (see Part III.B.5 above), there is nothing here to stop a judge from saying to a candidate: “I’ll rank you first in the match if you rank me first.” Or consider a judge who is more subtle, saying to a candidate:

You are my first choice. If I knew that I was your first choice, I would just decide now to rank you first in the match. Of course, if I am not your first choice, I need to consider other candidates, and we won’t have any mutual commitment. But if you tell me that I am your first choice, then I will know that you will rank me first on your form, and I’ll relax now and not worry about other candidates.

The subtext is:

Of course, I’m not asking you to make a commitment of the kind that we’re not supposed to make. That would be unethical on my part. I just want to understand your preferences—that is part of what I try to accomplish at an interview. Of course, only an unethical cad would mislead me about his or her preferences, so I know that I can rely on what you tell me.

No system will work unless it makes this kind of conversation untenable.

How is this sort of problem avoided in the medical match? Certainly it is not entirely avoided; estimates suggest that 10% to 15% of students are urged to make informal commitments to residency programs prior to the match date.⁹⁷ However, there has not been enough “winking” and “nodding” to bring

⁹⁶ See *id.* at 770-71.

⁹⁷ See Clark, *supra* note 59, at 1783 (reporting 1990 survey results according to which 10.4% of students nationwide were pressured to make

down the system or even weaken it in any significant way. The critical difference from the law clerk market seems to be that informal promises are far more likely to be binding when made to federal judges than when made to residency programs. Studies of the medical match suggest that students feel residency programs often lie to them,⁹⁸ and this may make students more willing to violate a supposed informal understanding (since they feel residency programs do this all the time). A key feature in the law clerk market may be the relatively small number of judges in the relevant sector of the market. This is an interesting feature of the law clerk context, since ordinarily smaller markets make coordination easier. Here the small size of the market seems to make informal agreements easier to enforce, and it is these informal but binding agreements that present potential problems. Thus, just as the ability to make informal agreements caused problems with the stage 2 solutions in the markets for college bowls, clinical psychology positions, and Japanese university graduates, this ability makes wholesale adoption of the medical model in the law clerk setting—as several prior commentators have advocated—highly problematic.

Palliatives. Adopt a modified medical match. (See below.)

2. A modified medical match.

a. Solving the problem of informal agreements.

Since informal agreements intended to circumvent a centralized match seem so likely to be problematic in the law clerk market, a successful centralized process would have to have a way of preventing them. One step the Canadian articling market discussed above takes in response to this problem is to require students to affirm on the form on which they submit their ranking lists that they “have not accepted an articling position or made a commitment to article in the [upcoming] articling year.”⁹⁹ We propose a

informal commitments prior to the centralized match); Richard D. Pearson & Allison H. Innes, *Ensuring Compliance with NRMP Policy*, 74 ACAD. MED. 747, 747 (1999) (reporting that 15% of 1996 and 1997 graduates of the University of Virginia School of Medicine were asked for signals concerning what rank order list they intended to submit to the centralized match).

⁹⁸ For instance, a recent study found that 33% of student surveyed felt that residency programs had lied to them during the process, and 58% were skeptical of the sincerity of programs’ statements that they would be ranked highly by the programs. See Kimberly D. Anderson, Donald M. Jacobs & Amy V. Blue, *Is Match Ethics an Oxymoron?* 177 AMER. J. SURGERY 237, 238, 239 (1999).

⁹⁹ See Law Society of Upper Canada, *Articling Handbook for Principals and Students*.

similar approach for the law clerk market: each judge and each student who participates in the centralized match should be required to certify, as a condition of participation, that no prior understanding or agreement with a student or a judge had been reached. The idea is to make destabilizing early agreements nonbinding.

One way in which this certification requirement would make such agreements nonbinding is that parties on the receiving end of impermissible overtures seeking informal understandings would presumably feel less bound to adhere to such understandings, given their explicitly forbidden status as reflected in the certification requirement. A second, and critical, reason the certification requirement might work is that if participants are explicitly required to certify that no informal understanding was reached prior to the match, then a judge who attempted to engineer such an understanding would not be in a strong position to retaliate against any student (at least in an overt manner) who ended up not ranking the judge highly. That is, it is hard to imagine a judge complaining to colleagues, law professors, Supreme Court Justices, or anyone else who might be in a position to influence a particular applicant's future that the applicant did not stick to an informal understanding that the judge and candidate were explicitly required to certify they did not make. And since students have far less power to retaliate against judges, there seems little reason to worry about the problem from that end.¹⁰⁰

b. The scope of the centralized process.

A critical question in the context of a matching process for the market for federal judicial law clerks is the scope of the match. The medical model is that all (or virtually all) employers are included. But this model would not make sense in the law clerk market, at least as a starting point. The comprehensive model very quickly runs up against the fact that a not-insubstantial number of judges would probably be highly resistant to the idea of a centralized match. In a 1989 survey of judges, only one-third expressed support for a centralized match¹⁰¹—although a very important caveat here is that in the decade since 1989 the market has experienced many more debacles

¹⁰⁰ Of course, each of the reasons just given also suggests that a similar sort of certification might be helpful in the context of a stage 2 solution, where an offer start date is specified. But, as noted above, defections are only one of the problems with a stage 2 solution. The other major problem, which in fact is greatly exacerbated when defections do not occur, is congestion on the start date. This congestion, like the problem of informal agreements, prevents parties from considering a range of options before making their decisions and, in the medical context, led to the adoption of a stage 3 mechanism apparently without any problem with defections.

¹⁰¹ See Breyer, Becker & Calabresi, *supra* note 8, at 229.

and several additional failures of attempts to impose stage 2 solutions, meaning that the openness to a stage 3 approach might be greater.

A match of comprehensive scope also overlooks what seems to us to be a very important feature of the law clerk market. This feature, which emerges strongly from our judge surveys, is that there are two groups of judges: those who are engendering the problems in the market, and the rest of the judges, who perceive no problem obtaining qualified clerks and are not eager to be part of any “solution” to what they do not consider to be their problem. The first group of judges seems to think it is difficult to obtain the clerks the judges desire, while the second does not view this as a problem. Judges Wald and Kozinski are in the former camp,¹⁰² and the judge author of the present article (Posner) agrees with that point of view. Our judge surveys provide many examples of judges in the other camp, as reflected in the comments in Table 22.

¹⁰² See Kozinski, *supra* note 1, at 1708; Wald, *supra* note 2, at 153-55.

Table 22: Judges' Perceptions of a Bifurcated Market

Survey	Comment
1999 Survey #101c	I have never understood the serious competition between judges for clerks. For nearly a quarter of a century, I had fine clerks, turning down dozens of applicants who would have been equally fine. Of course, I was employing clerks—not judges!
1999 Survey #9	There are far more well qualified applicants than there are positions available in the federal system.
1999 Survey #83	There are far more good candidates than clerkships. The notion that we judges have to compete with one another is misplaced. It's a buyer's market.
1999 Survey #2	Although I do not interview, as a rule, until the winter or spring of the year in which the law clerks start work, I have never had any problems obtaining satisfactory law clerks.
1999 Survey #4	There are plenty of able people out there.
1999 Survey #8a	[T]here are plenty of good candidates
1999 Survey #8b	I do not participate in the unseemly "rush" of second-year law students (they have only one full year of grades when they apply) for judicial clerkships. I interview in May and June of the year preceding the Court year for which they are hired and find many qualified candidates.
1999 Survey #10	There are always excellent candidates available even late in the year.
1999 Survey #27	Even though hiring after only 3 semesters of law school is quite early, my expertise of almost 10 years indicates that regardless of the national strictures, I have a plethora of excellent applicants to choose from <i>after</i> the super-stars have been cherry-picked -- I am just not bothered by the "sooners", largely because I'm not that interested in [unreadable]-hunting for #1 grad and top 5 schools.
1999 Survey #30a	I do not find the system flawed. Hiring competent clerks has not been a problem
1999 Survey #34	There are far more qualified applicants than available positions.
1999 Survey #57	There are plenty of good law grads to go around.
1999 Survey #68	There are a lot of smart people out there.

Table 22: Judges' Perceptions of a Bifurcated Market (continued)

Survey	Comment
1999 Survey #89	In the past two years I have not hired until spring of the year they begin clerking. While the field is much smaller, I am content that I have harvested clerks roughly equivalent to those hired from the primary competitive field. I have not had to lower my demanding standards.
1999 Survey #95	There are plenty of well-qualified law school candidates out there.... This "competition" business is nonsense. The judges so obsessed with getting the very best must be awfully insecure about their own abilities and intellect!!
2000 Survey #99	[C]ompetition or not, I have always been able to secure fine clerks.
2000 Survey #25	I have found many qualified candidates after the somewhat hysterical selection process undertaken by many appellate judges in the early spring.
2000 Survey #47	There are many more well-qualified candidates than clerkships
2000 Survey #102	There are plenty of outstanding applicants. I have always been "behind the curve" in hiring but have always been able to secure wonderful people to fill these positions!
2000 Survey #91	I am disgusted by the "rat race" to hire prestigious law clerks. I refuse to take part in it, and by doing so I have discovered many highly qualified people—passed over by others—who have been excellent law clerks.
2000 Survey #69	There are lots of great fish in the sea. Without trying very hard, I have gotten consistently excellent clerks, from many different law schools.
2000 Survey #63	It's a pain, mainly because there are a small number of grotesquely aggressive judges out there who seem to think that if they don't get x or y to clerk for them they'll somehow suffer [irreparable] injury! They need to chill out!
2000 Survey #72	This is a "big, fancy law school" problem. If my colleagues weren't such snobs about where their clerks come from, we'd be a lot better off.
1999 Survey #82	The judges who advertised themselves to the law schools as running farm clubs for the Supreme Court seem to be energizing most of the competitive problems.
2000 Survey #83	This is a big school, fat-headed judge problem. Go away and leave us alone. I'm serious.

Sources: 1999 and 2000 Judge Surveys.

There are two possible explanations for the perceived limits on the pool of top candidates in the view of the first group of judges. One possibility is that the number of judges who perceive the need to hire “top” candidates is large relative to the pool of such candidates. But perhaps a more important explanation relates to the issue of Supreme Court clerkships. Many judges want to attract applicants who will go on to clerk at the Supreme Court, not only because of the intrinsic value of these clerks due to their high ability, but also because such applicants have instrumental value to the hiring judge in that they make the judge more attractive to future candidates.¹⁰³ The role of Supreme Court clerkships can explain why there is always a shortage of “best” clerks, since there is a fixed number of Supreme Court clerkships. It can also explain why many judges (those not competing to be Supreme Court feeders) seem to think that clerk quality is not a big issue at all.

Picking up on the role of the Supreme Court, our proposed model for a centralized match is that participation be required *for the limited set of federal appellate clerkships that may feed into Supreme Court clerkships*, with enforcement by the Supreme Court in a manner discussed more fully below.¹⁰⁴ Thus, a judge who chooses not to participate in the centralized match cannot feed any of his or her clerks to the Supreme Court. The judge would decide whether to participate, and thus whether to be eligible to feed clerks to the Court. A student would regain eligibility for a Supreme Court clerkship by clerking for a judge who hired through the centralized match following a clerkship with a judge who did not hire through this procedure.

Our proposed approach has several advantages relative to a centralized match of comprehensive scope. First, it would not require participation from, and cause inconvenience to, the judges who do not perceive themselves to be the cause of any problem and do not feel the need for any solution. This is a significant plus of the proposal. One of the clearest lessons from the experience in various medical markets is that the degree of participation of employers covered by the centralized process is critical to the success of the process.¹⁰⁵ A high degree of participation seems much more likely with the targeted approach than with a general approach embracing all

¹⁰³ See Wald, *supra* note 2, at 154.

¹⁰⁴ One judge suggested what seems to be a similar two-tier system but as a means of enforcing a start date for offers, not a centralized match. The judge wrote, “[I]f all the Supreme Court Justices, or even a majority of them, announced that none of the group making the announcement would hire any law clerk who had been hired the year before in contravention of the rule set by the Judicial Conference, this would go a long way towards obtaining enforcement of the rule.” 1999 Judge Survey #8c. Our reasons for rejecting a start-date approach are discussed in Part IV.B above.

¹⁰⁵ See Clark, *supra* note 59, at 1761-65.

federal appellate judges. On the other hand, it must be recognized that there may be some cost to requiring judges who want to hire outside the centralized match to self-identify as nonfeeders. But our hunch (although at this point it cannot be more than that) is that only a minority of federal appellate judges would opt out of the centralized matching process and that these judges—the sources of the comments quoted in Table 22—do not have significant interest in being regarded as Supreme Court feeders anyway.

A second advantage of our targeted approach is that the great majority of judges who currently engender the “competitive problems” would almost certainly *not* want to opt out of the Supreme Court feeding pool. Thus, the precise judges whose participation is most needed would be most likely to participate in the match.

Enforcement of our proposed approach would be in the hands of the Supreme Court. Would the Court go along? Our survey of the Justices showed essentially unanimous agreement on two points: first, the current state of the market for federal judicial law clerks is a mess, and something should be done about it; and second, there are far more well-qualified applicants for Supreme Court clerkships than slots available at the Court. Thus, Supreme Court Justices are concerned about the status quo, and they would be unlikely to find it a significant burden to limit themselves to clerks hired through the match for initial clerkships, particularly given the judges who are likely to participate in the match (as discussed just above). Fundamentally, given the number of excellent applicants, there is little risk that a Justice would gain much from defecting and hiring a stellar person who did not participate in the match, since it would be easy for the Justice to hire a very good person who did participate in the match. This is not to say that the Justices would not perceive the regime to be a restriction on their freedom; they surely would. It is simply to say that the restriction would be limited in comparison to the significant potential benefit that they themselves—many of them former appellate judges—seem interested in achieving for the lower federal court system.

The most obvious difficulty with our proposed noncomprehensive model is that some appellate judges who do not participate in the match may try to hire fairly strong candidates before the match; these candidates might be led to accept such offers if they are uncertain (as of course they often would be) about their chances of getting a clerkship with one of the “Supreme Court feeder” appellate judges participating in the match. This would in fact be much like the problem that comes up in the present market; students accept offers from less preferred judges because they do not know whether offers from more preferred judges will materialize (see Table 10 above). This is precisely the problem a centralized match is designed to solve. So if hiring did occur before the centralized match, a more comprehensive approach might be desirable. But

the tailored approach, which recognizes the two-tier market that many judges feel currently exists, seems to us a good place to start.

A final question concerns clerkships that are not at the federal appellate level but might conceivably feed into Supreme Court clerkships. Realistically, this is not a concern. Although we do not have comprehensive data, in 1996-1997, when one of the present authors (Jolls) clerked at the Court, all of the law clerks hailed from federal appellate clerkships.

c. Attributes of a centralized process.

A number of arguments have been advanced in the existing legal literature in support of a centralized matching process for the market for federal judicial law clerks, and a number of objections to these arguments have been offered.¹⁰⁶ Although the existing debate has focused on a comprehensive match rather than on the sort of match we propose here, many of the arguments and objections are similar. Since they have been well rehearsed, we discuss them fairly briefly.

i. Ability to consider a range of options.

Most fundamentally, a centralized clearinghouse vastly expands the parties' ability to consider a wide range of options before making their decisions. This is the main advantage of a centralized matching system.

Some have objected to the idea of a matching system on the ground that judges might have to conduct more interviews under such a system.¹⁰⁷ This might well be true, particularly in the early years until judges learned how many interviews they needed to conduct in order to be sure they would fill their slots. At the same time, in light of the number of interview cancellations under the present system (see Part II.C.3.a above), it might well be that too *few* interviews are being conducted at present. Moreover, with improvements in technology it may be that interviews can be conducted via videoconference. Already the Second Circuit is hearing a fair number of cases from upstate New York and Vermont by videoconference.

In any event, the cost of having to conduct additional interviews seems to be a cost that many judges are willing to bear in exchange for a more orderly and sensible process. Our judge survey in both 1999 and 2000 posed this question: "In general, would you favor a regime (assumed to be

¹⁰⁶ The literature here includes Clark, *supra* note 59; Kozinski, *supra* note 1; Norris, *supra* note 59; Oberdorfer & Levy, *supra* note 32; and Wald, *supra* note 2.

¹⁰⁷ See Clark, *supra* note 59, at 1776-70, Kozinski, *supra* note 1, at 1721 & n.31.

fully enforceable) under which hiring occurred much later, say in the fall of the third year, and in an orderly fashion; under which interviews could be scheduled at a judge's convenience, without the pressure of "beating" other judges; but under which more interviews had to be conducted?" 75% of judges said "yes" in 1999; 71% said yes in 2000. So many—although not all—judges seem willing to bear the burden of more interviews in exchange for the benefits that a match might bring. It also seems likely that the judges most willing to bear the burden of more interviews are the ones most dissatisfied and frustrated with the present system and, thus, most likely to opt for participation in the targeted centralized match we propose.

ii. Reduced geographic bias.

A matching process would also significantly reduce the geographic bias that may arise under a stage 2 solution to the unraveling problem.¹⁰⁸ Because the process would no longer be compressed into a very short time frame (as under a stage 2 approach and, indeed, also in today's unregulated market), judges not near major cities, where students can visit many judges in a short timeframe, would not be as disadvantaged. Also, since interviews could occur at any time, candidates might be able to visit judges when they are in the area for other reasons. But the latter point should not be overstated: judges might well want to interview all of their candidates within a relatively compressed time frame, so as to be able to make comparisons, and candidates might not want to interview far earlier than other applicants for fear that they would be forgotten by the time the judge got around to making decisions on rankings for the centralized match. Thus it might be an overestimate to suggest, as some advocates of matching systems have, that students could interview at any time convenient to them, including while flying out to interview for jobs at law firms.¹⁰⁹ Still, at a minimum, interviews could be scheduled well in advance in a calm and nonchaotic manner.

Note that the same factors that suggest a reduced geographic bias also suggest reduced travel costs, since travel could be arranged well in advance. Thus, although more interviews might, all else equal, mean higher travel costs for students,¹¹⁰ all else is not equal; instead of buying non-advance-purchase tickets in order to come on short notice, students could buy discounted tickets, which are often only a fraction of the cost of full-fare tickets. If discounted tickets are generally one-fifth (say) of the cost of full-

¹⁰⁸ See generally Carl Tobias, *Stuck Inside The Heartland with Those Coastline Clerking Blues Again*, 1995 WISC. L. REV. 919.

¹⁰⁹ Norris, *supra* note 59, at 794, offers such an argument.

¹¹⁰ As Judge Kozinski argues. See Kozinski, *supra* note 1, at 1721 n.31.

fare tickets (which seems a reasonable estimate), then students could do five times as many trips without increasing their travel costs.

iii. Balance and diversity of clerks.

The biggest objection that skeptics about a centralized match have voiced is that it interferes with judges' ability to ensure diversity and balance across clerks.¹¹¹ The idea is that the attractiveness of one clerk will depend on who his or her co-clerks will be.

This is an important point, but there are three responses to it. First, the argument may overstate the degree of control judges have in the *current* market. When a candidate is snatched away by another judge who has made an exploding offer, as Part II.C.1.a showed occurs frequently at present, the first judge is limited in his or her ability to achieve an optimally diverse and balanced mix of clerks.

Second, the fact that, as noted above, a number of judges make offers to a pool of candidates and fill their positions with the first offerees to accept suggests that at least some judges do not regard the composition of their clerk team as critical.¹¹²

Third, and most important, the algorithm used in some matching systems provides ways to deal with issues of diversity and balance. For instance, the clinical psychology match allows conditions such as "not all positions should be filled with candidates from the same school." Similar conditions apply in some of the British medical markets, where Edinburgh urological surgeons are able to request what they regard as an appropriate gender balance among the students with whom they are matched.¹¹³ In general, there is no theoretical difficulty in implementing restrictions of this sort, in which some candidates are viewed as substitutes for other candidates (for instance, candidates from the same school). Thus, it would be easy to allow judges to say (for example) "not all positions should be filled with candidates of the same sex."

¹¹¹ See Breyer, Becker & Calabresi, *supra* note 8, at 221-22; Kozinski, *supra* note 1, at 1722.

¹¹² See *supra* notes 34-35 and accompanying text (describing this strategy).

¹¹³ See Alvin E. Roth, *A Natural Experiment in the Organization of Entry-Level Labor Markets: Regional Markets for New Physicians and Surgeons in the United Kingdom*, 81 AMER. ECON. REV. 415, 428 n.26 (1991).

iv. Impersonal nature of the match.

Another criticism that has been offered of a centralized match is that it would undermine the “highly personal relationship between judge and clerk.”¹¹⁴ Judge Kozinski writes:

The selection process—for all its expense and pain and disappointment and hardship—is the crucible wherein the foundation of that relationship [between judge and clerk] is forged. The time a 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.¹¹⁵

The difficulty with this argument is that all of these things would continue to happen under a matching system (interviews, talking with recommenders, clerk preparation for the interview, etc.). The only thing that would be absent is what Judge Kozinski describes later as the “electrifying” moment when a student says, “Yes, judge, I accept” in person (or on the phone).¹¹⁶ Judge Kozinski asks, “How will the bond between judge and clerk be affected when offer and acceptance are so impersonal? How will the emotional content of the relationship be diminished by the inherently protracted delay between interview and computer communication?”¹¹⁷ Whatever the answers to these questions (and we doubt that the mode of offer and acceptance has much significance in the overall nature of the judge-clerk relationship), we would be surprised if, for most participants in the law clerk market, this issue outweighed all of the other serious problems and inefficiencies of a stage 1 or stage 2 market. The survey evidence described in Part II above certainly suggests that neither judges nor students generally regard the current process as an auspicious beginning to the judge-clerk relationship.

v. Changes of mind.

Another issue raised by critics of a centralized match is that some candidates or judges might find their match unacceptable in reality “even though it might have seemed acceptable as a remote contingency far down a list of happier possibilities.”¹¹⁸ This is a concern, for saying yes to a specific

¹¹⁴ Kozinski, *supra* note 1, at 1723.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1723-24.

¹¹⁸ *Id.* at 1724.

offer out there (or making an offer to a specific candidate) seems different from listing a particular judge or candidate on a form that will be processed sometime down the road. But this risk must be weighed against the fact that candidates change their mind in the current market as well, due we think largely to the early time at which decisions must be made. For example, a few years ago a Harvard Law School student accepted an offer with a prominent D.C. Circuit judge two years ahead of the time at which the clerkship was to begin and then, a year or so later, informed the judge that he would not be doing the clerkship after all. With the market occurring at a later date and in a more orderly fashion, changes of mind on grounds of changed circumstances or changed preferences would be far less likely.

vi. Bargaining power.

One of the design questions that must be settled in constructing a match is which side of the market “makes offers” and which side “accepts or rejects” offers. (Of course these terms do not have their ordinary meanings in a centralized matching process, but the concept is similar to who makes and receives offers in a decentralized market.) In most matches we know of, this issue has been settled by appeal to the practice in the decentralized market; thus, in a match for the law clerk market, judges would retain the initiative. Interestingly, the recent redesign of the medical match reverses this: the match is now conducted so that medical students have the initiative, and (within the internal operation of the match algorithm) residency programs are treated as if they accept or reject the offers (or applications) of the students.¹¹⁹ But it turns out that the two approaches yield largely similar results as a practical matter in any event.¹²⁰

d. Transition and administrative issues.

The medical match occurs in March of the last year of medical school. Ultimately a similar sort of time frame may be desirable for the market for federal judicial law clerks. But initially it might be best to have the law clerk market occur earlier than the winter or spring of the third year. The reason is that it might ease the transition. “Both the models and the experience of the many markets that have attempted to halt unraveling suggest that a cautious plan of attack” would be to introduce a central match “initially at an early time, when a substantial percentage of transactions are already taking place, and then to move the time at which the mechanism operates later only after it has attracted a high rate of participation.”¹²¹

¹¹⁹ See Roth & Peranson, *supra* note 9, at 755-79.

¹²⁰ See *id.* at 759-60.

¹²¹ Roth & Xing, *supra* note 3, at 1038.

Having the process go early would mean that initially only the benefits from a more orderly process, and not the benefits from later hiring, would be achieved. But even the former benefits seem likely to be significant, particularly from the perspective of what seems to be the judges' primary concern, the way in which the process casts the judiciary in a negative light.

The modified match we have proposed here could be administered by an outside firm skilled in running matches such as the medical residency matching program and the clinical psychology matching program. Alternatively, the match could be administered by the Administrative Office of the United States Courts or some other judicially-related entity, presumably with some technical help from an outside organization.

e. Trouble signs in a modified match.

i. Movement from a stage 3 to a stage 4 market.

A lesson from the other markets discussed in Part III above is that even a stage 3 mechanism that is working well can on occasion be threatened by unraveling problems. One source of such problems is summer-associate-type positions that effectively amount to “prematching” in advance of the centralized match. This is stage 4 in the typology described in Part III.A.

The possibility of such “prematching” is unlikely, however, to bring down a centralized match, assuming it gets up and running successfully. If “prematching” were to become very significant—as in the case discussed in Part III.B.5 above in which 80% of participants in a match submitted only one alternative, making it clear that everything had been settled in advance—then the centralized clearinghouse might have to be abandoned, but this has not occurred in other markets with centralized matches that produce stable outcomes. The situation of 80% prematching occurred in a match that used a nonstable matching algorithm.¹²²

ii. Informal agreements in contravention of the certification requirement.

A separate trouble sign in a modified match in the market for federal judicial law clerks would be the reliance of parties on informal prematch understandings (unrelated to summer-associate-type positions) notwithstanding the certification requirement described in Part IV.C.2.a above. A possible response, if such a problem were to develop, would be the use of a small degree to randomization in the match to destabilize the informal understandings. The somewhat speculative randomization proposal we offer here is meant to suggest one way of dealing with the problem of informal

¹²² See *id.* at 1000.

understandings in contravention of the centralized match. We realize that most judges are not accustomed to thinking in explicitly statistical terms, so this proposal may cause a certain culture shock.

Suppose that an anonymous hotline were set up to monitor compliance with the prohibition on informal understandings reflected in the certification requirement. If this hotline showed that some threshold of noncompliance had been reached (say 1% of candidates, or 1% of the total number of positions), then it could be announced that 5% (for example) of applicants would have their first and second choices randomized in the centralized match. That is, for 5% of applicants, there would be a 50% chance of having their second choice judge ranked as their first choice and vice versa. (If no second choice judge was listed, the student would have a 50% chance of not being matched at all.) This would give these applicants a smaller than 50% chance (with the precise number depending on the preferences of both their first and second choice judges) of consequently being matched to their second choice judge even if their first choice judge wanted them. This would provide *all* students (not just the 5%) with the ability to avoid any understanding that they would put Judge A first when they preferred Judge B, since no one would know which students' choices had been randomized; a candidate could simply say to Judge A (who thought an understanding with the candidate had been reached) that "randomization must have kicked in." It would be important not to set the threshold number of reports required for randomization too high, since receiving the sort of informal overture described above from a judge might well produce sufficient excitement on the part of a clerkship candidate eager to put the process behind him or her that the candidate would not call even an anonymous hotline.

Hopefully the threat of randomization—and the statement that this would make about judges' behavior—would be enough to deter a sufficiently large number of judges from reaching informal understandings that the randomization would not ever have to kick in. But the knowledge that in any given year randomization *could* always kick in would help to deter such informal understandings in the first place, since there would be some question as to how reliable they were. Even in years in which randomization would actually occur, it would, we think, probably produce fewer negative effects than the current system (although it should be acknowledged that the negative effects would be of a different character). Obviously the prospect of intentionally failing to put together pairs who want to be with one another is troubling and could certainly produce perceptions of unfairness; but so too is, and does, the current free-for-all.

V. Conclusion

The hiring process for federal judicial law clerks has engendered intense dissatisfaction among both judges and students. Hiring occurs earlier and earlier—now often early in the student’s second year of law school—and in a rushed, chaotic process that resembles a game of musical chairs, in which frequently neither judges nor students make their most desired matches. Efforts to reform the process have been attempted over the years, with a complete lack of success.

Our study has differed from the earlier literature on this baffling and frustrating issue in three major respects. First, we have placed the issue within the context of economic theory that identifies the incentives and constraints, and the private and social costs and benefits, that lead to the “unraveling” of certain markets. Second, we have situated the clerkship hiring market within the range of markets that have exhibited similar problems and experienced a wide variety of attempted and achieved solutions. And third, we have conducted a far deeper and wider-ranging empirical survey of judicial and applicant attitudes and behaviors than any previous students of this subject.

It would be nice to be able to report that on the basis of this unprecedented research effort we have come up with a clear solution to the problem. But we have not. The problem is stubborn, intractable; this is plain as a matter of theory and as a matter of experience in this and other markets. The solutions that have been tried and sometimes succeeded in the other markets are unlikely to work as well in the clerkship hiring market because of subtle differences.

A mature appreciation of the recalcitrance of the world to reformers’ efforts requires recognition that many social and economic problems cannot be solved and can only be lived with. Nevertheless, not being given to fatalism, we have suggested a partial solution, which would require Court of Appeals judges who want to be “feeder” judges, that is, who want their clerks to go on to clerk for Justices of the United States Supreme Court, to enroll in a computerized matching system that would, for those judges and the students applying to them for clerkships, very largely eliminate the congestion, information, and resulting mismatching problems of the present system. More generally, we believe strongly that the Supreme Court could play an important and productive role in helping to organize and improve the market for federal judicial law clerks. We commend our suggested solution to the attention of the relevant decision makers. But we hope that apart from its merits and any criticisms that may be lodged against it, our study will be seen to have permanent value in framing and illuminating a most interesting, if difficult, market problem.

Data Appendix—The Market for Federal Judicial Law Clerks

Table A1: Response Rates by Seniority Status and Circuit, 1999 and 2000 Judge Surveys

Group of federal appellate judges	Number of judges surveyed		Number of judges responding		Percent of surveyed judges responding	
	1999	2000	1999	2000	1999	2000
All judges	238	238	155	129	65%	54%
Active judges	161	159	103	84	64%	53%
Senior judges	77	79	51	45	66%	57%
Senior status not listed	N/A	N/A	1	0	N/A	N/A
1st Circuit	11	10	8	7	73%	70%
2nd Circuit	20	21	9	10	45%	48%
3rd Circuit	18	19	13	13	72%	68%
4th Circuit	16	13	10	6	63%	46%
5th Circuit	20	19	9	10	45%	53%
6th Circuit	23	22	16	11	70%	50%
7th Circuit	13	15	10	9	77%	60%
8th Circuit	17	18	11	15	65%	83%
9th Circuit	40	43	27	17	68%	40%
10th Circuit	16	15	11	8	69%	53%
11th Circuit	18	17	11	8	61%	47%
D.C. Circuit	11	11	7	6	64%	55%
Federal Circuit	15	15	11	9	73%	60%
No circuit listed	N/A	N/A	2	0	N/A	N/A

Sources: Almanac of the Federal Judiciary (1999) (1999 data on active and senior judges); Judicial Yellow Book, Spring 2000 (2000 data on active and senior judges); 1999 and 2000 Judge Surveys (survey response rates).

Table A2: The Importance of Membership in the School's Main Law Review to Judges' Hiring Decisions

Ranking of the importance of membership in the school's main law review ^a	Number of judges	Cumulative percentage
1	6	5
2	23	25
3	11	34
4	14	47
5	8	53
6	8	60
7	7	66
8 or below ^b	7	72
a factor, but not ranked	7	78
not a factor	25	100
Total number of judges responding: 116		

Source: 2000 Judge Survey.

^a Ties in rankings were resolved by assuming that law review membership received the higher ranking, so if anything the data reported here *overstate* the importance of law review membership.

^b Some judges wrote in additional selection criteria, so it was possible for one of our eight listed criteria to receive a ranking below 8.

**Table A3: Representation of Students from Top Law Schools
in Federal Appellate Clerkships**

Institution	<i>U.S. News & World Report</i> Ranking	Number of Law Clerks	Size of Class
Top four:			
Yale	1	45	192
Stanford	2	16	182
Harvard	3	56	552
Chicago	6	26	188
Total		143	1114
Next six:			
NYU	4	21	443
Columbia	5	22	389
Michigan	7	13	356
Berkeley	8	13	282
Virginia	9	17	363
Cornell	10	7	182
Total		93	2015
Next ten:			
Duke ^a	10 ^a	10	214
Northwestern	12	10	217
Penn	13	4	252
Georgetown	14	20	587
Texas	15	4	470
UCLA	16	10	319
USC	17	1	203
Vanderbilt	18	4	187
Minnesota	19	2	235
Washington and Lee	20	3	122
Total		68	2796

Sources: <http://www.usnews.com/edu/beyond/gradrank/law/gdlawt1.htm> (visited 8/17/00) (*U.S. News* rankings and number of J.D. students (divided by three to get class size)); *Judicial Yellow Book*, Spring 2000 (law clerk data).

^a Tied with Cornell.

Table A4: Response Rates of Students By School and By Applicant Status, 1999 Second-Year Survey

Group	Number of students responding	Number of respondents who applied for federal clerkships in 1998-1999
All seven schools	337	143
Top four schools:		
Yale	51	33
Stanford	72	24
Harvard	114	40
Chicago	30	13
Total	267	110
Other schools surveyed:		
Columbia		
Michigan	26	13
Vanderbilt	13	5
	31	15
Total	70	33

Source: 1999 Second-Year Student Survey.

**Table A5: Hiring of Third-Year and Post-Graduate Candidates,
1999-2000**

Percent of judges whose hiring of third-year students for 2001-2002 clerkships was Higher than Lower than About the same as their level of hiring of third-year students in previous years	9% 14% 77%
Percent of judges whose hiring of post-graduates for 2001-2002 clerkships was Higher than Lower than About the same as their level of hiring of post-graduates in previous years	10% 13% 77%
Number of third-year students hired for 2001-2002 clerkships as of the date of the judge survey As a percent of total hires completed at the time of the judge survey ^a	35 12%
Number of post-graduates hired for 2001-2002 clerkships as of the date of the judge survey As a percent of total hiring completed at the time of the judge survey ^a	38 13%

Source: 2000 Judge Survey.

^a299 total completed hires were reported by judges responding to the survey.

Table A6: Judges' Reasons for Making Offers Before Completing Scheduled Interviews, 1998-1999 and 1999-2000

Survey	Judge's reason for making offers before completing scheduled interviews
1999 Survey #105	Avoid loss to other judge(s).
1999 Survey #73	Because candidates were already accepting offers elsewhere.
1999 Survey #18	Because I had to compete with other offering judges.
1999 Survey #91	Because I really liked her and everything moved so fast this year - plus, so many were dropping out before they interviewed with me. In any event, she took a position with the judge she interviewed with after me - see below.
1999 Survey #106a	Because I told each interviewee that I would be prepared to consider making an offer should they be pressed by another judge and required to accept within a specified period of time.
1999 Survey #36	Because I was pretty certain the candidate would receive an offer instanter!
1999 Survey #112b	Because if I see a candidate I like I give them an offer.
1999 Survey #90	Because of the issue in the previous question [referring to cancellations of interviews by applicants].
1999 Survey #8	Because other judges were hiring candidates away.
1999 Survey #38	Because other judges were making offers to students that I was interviewing.
1999 Survey #42	Competition.
1999 Survey #33	Did not want to lose outstanding applicants.
1999 Survey #22	Excellent candidate I didn't want to lose.
1999 Survey #45	Excellent candidate who had other options.
1999 Survey #31	Hired one exceptionally qualified candidate on the spot (figured she'd be gone if I waited).
1999 Survey #112	I found a good candidate and didn't want to lose him/her.
1999 Survey #53b	I had to act fast as this candidate was sure to receive other offers in the days ahead.
1999 Survey #17	I learned from experience that if I waited to complete all interviews before making offers quite a few applicants would withdraw.
1999 Survey #25	I thought I would lose good prospects if I didn't.
1999 Survey #8d	If I liked a candidate, I made an offer at the interview. The reason I did not want to wait until all interviews were over was to minimize the risk of losing candidates who would want to clerk for me.
1999 Survey #67	Impression that many offers with short deadlines were being made.

Table A6: Judges' Reasons for Making Offers Before Completing Scheduled Interviews, 1998-1999 and 1999-2000 (continued)

Survey	Judge's reason for making offers before completing scheduled interviews
1999 Survey #30	My staff consists of 4 clerks and 1 secretary. I had to recruit a whole staff (including a new secretary) in early 1999. One of my most promising applicants notified me she had been hired by one of my colleagues in November or December 1998. Under these circumstances, I felt that I had to accelerate my recruitment as much as possible.
1999 Survey #104	Otherwise they would be gone, based on prior years.
1999 Survey #3d	Outstanding applicants who would be taken by another judge if I did not act.
1999 Survey #82	Perceived competition from other judges.
1999 Survey #24	Pressured by a student to match an offer.
1999 Survey #187	Satisfaction with candidate, desire not to lose candidate to another offer.
1999 Survey #18c	So as to be able to compete.
1999 Survey #21	So other judges would not hire someone I really thought highly of.
1999 Survey #53	The best candidates disappear fast.
1999 Survey #97	To keep from losing a good clerk to some other judge.
1999 Survey #99	To prevent that applicant from being hired by someone else before I completed interviews.
2000 Survey #69	A bird in the hand
2000 Survey #41	Afraid they would be hired by someone else.
2000 Survey #75	Applicant already had an offer.
2000 Survey #73	As I learned recruiting for a law firm, it is an effective and necessary procedure.
2000 Survey #45	Because applicants had other offers already.
2000 Survey #119	Because if I see a good applicant, I want to make an offer before the person has been hired.
2000 Survey #46	Because the candidate was so good, I knew from experience that she would receive and probably accept another offer if I waited any longer.
2000 Survey #33a	Competition and pressure to finish.
2000 Survey #28	Good candidate-would have accepted another offer.
2000 Survey #80	I did this for the first time ever, because almost none of the interviewees wanted to take my 2-year position, and this excellent candidate did; plus the candidate said that the school had instructed the students that they "had" to take the first offer given, and the candidate was headed immediately for additional interviews.

Table A6: Judges' Reasons for Making Offers Before Completing Scheduled Interviews, 1998-1999 and 1999-2000 (continued)

Survey	Judge's reason for making offers before completing scheduled interviews
2000 Survey #76	I started late (later than other judges) and good candidates were being hired by other judges.
2000 Survey #37	If I think a candidate would be an excellent choice I like to wrap up my efforts and leave it to the candidate. Also, the longer the process drags on, the more likely that someone else will make him/her an offer resulting in nothing to show for our efforts.
2000 Survey #114	Obtain clerk who was offered another clerkship.
2000 Survey #5	Outstanding applicant who would be hired by another judge if I did not act.
2000 Survey #43	Rolling admission to keep from losing clearly acceptable clerk applicant.
2000 Survey #74a	To avoid losing the really good applicants.
2000 Survey #100	To hire a good candidate before someone else did.
2000 Survey #18	To meet competition. However, at all times I had at least two offers open.

Source: 1999 and 2000 Judge Surveys.

**Table A7: Student Comments About the Decision Not to Apply-
Concerns About the Nature of the Process and Early Hiring, 1999**

Survey	Comment
1999 Survey #199	[The market] certainly seems like a hellish experience and that definitely contributed to my decision not to apply.
1999 Survey #210	[My decision not to apply] was at least in part because of disgust with the process.
1999 Survey #202	I think the current system is absurd and I have yet to hear a sufficient rationale for it. Frankly, I chose not to apply not because I am uninterested, but because of the process.
1999 Survey #211	The reason I chose not to [apply] was . . . I was exhausted from fall interviews and was not ready to begin the process again. [Also,] I had spoken with many people about it and their tremendous frustration with the process discouraged me.
1999 Survey #196	Terrible market. The reason I did not apply was [that] I was burnt out from 2L law firm interviewing and because it forced me to decide to[o] early where I wanted to be two years from now. And the process is a hodgepodge lottery.
1999 Survey #16	The biggest concern that I had was that I had to be getting my application packets together so that they could do out in Dec.-Jan. That meant that the more judges I would apply to, the less time I would have to study for finals etc.
1999 Survey #201	[The process] was especially not attractive so soon after the 2L summer job search.
1999 Survey #14	[The] scheduling [of the market] (time of year when students must apply) is tremendously inconvenient. [This is part of the reason that] I, while theoretically very interested, chose not to apply. I hope too many others weren't similarly dissuaded.

Source: 1999 Second-Year Student Survey.

Table A8: Timing of the Market by Circuit, 1998-1999 and 1999-2000

	Number of judges from Circuit		Number of judges as a percent of total responses from Circuit	
	1998-1999	1999-2000	1998-1999	1999-2000
Started interviewing and making offers by Jan. 31				
1st Circuit	2	4	40%	80%
2nd Circuit	4	7	44%	70%
3rd Circuit	4	6	33%	38%
4th Circuit	3	2	33%	100%
5th Circuit	0	6	0%	63%
6th Circuit	6	6	40%	63%
7th Circuit	0	6	0%	71%
8th Circuit	3	10	30%	60%
9th Circuit	6	14	26%	80%
10th Circuit	2	7	22%	88%
11th Circuit	2	3	29%	50%
D.C. Circuit	2	6	29%	100%
Federal Circuit	3	2	30%	11%
Total	37	79	28%	71%
Done with interviews and offers by Jan. 31				
1st Circuit	2	4	40%	80%
2nd Circuit	2	7	22%	70%
3rd Circuit	3	5	25%	38%
4th Circuit	1	2	11%	100%
5th Circuit	0	5	0%	63%
6th Circuit	5	5	33%	63%
7th Circuit	0	5	0%	71%
8th Circuit	3	9	30%	60%
9th Circuit	3	12	13%	80%
10th Circuit	0	7	0%	88%
11th Circuit	1	3	14%	50%
D.C. Circuit	0	6	0%	100%
Federal Circuit	2	1	20%	11%
Total	22	71	17%	63%

Source: 1999 and 2000 Judge Surveys.

Table A9-1: Student Perceptions Regarding the Timing of the 1999-2000 Market for Federal Judicial Law Clerks—General Comments

Survey	Comment
Survey #25	I ended up having to miss the entire last week of classes to fly out to five or six interviews on the west coast, arriving back the day before my first exam for which I was entirely unable to study. ... Although I'm happy (and lucky) to have ended up with what looks like an exciting job opportunity, I'm sure I'd perform better at it had I been able to catch the Establishment clause in Con law.
Survey #34	To have a shot at appellate court clerkships you have to apply in the middle of Harvard's interviewing season. It's ridiculous that the process is so front-loaded with lots of clerkships awarded in October and November. 2Ls in the fall have little by the way of writing samples and only one year's grades.
Survey #165	Judges need to be sensitive to the fact that travelling in December imposes enormous costs. My fall grades reflect the fact that I did not have adequate time to pull together the course material.
Survey #263	[T]he timing meant that some of us were interviewing during finals . . . , obviously a particularly bad time to be travelling and preparing well for an interview.
Survey #28	Trying to apply for clerkships, do call back interviews [with law firms], 2nd year Ames [moot court competition] and normal classwork was absolute hell."
Survey #32	I couldn't postpone my interviews to study [for exams]. I believe that I experienced adverse effects on my performance as a result.

Source: 2000 Second-Year Student Survey.

Table A9-2: Student Perceptions Regarding the Timing of the 1999-2000 Market for Federal Judicial Law Clerks—Statements About Difficult Things in the Hiring Process

Survey	“One of the most difficult things in the [clerkship hiring] process was”...
Survey #17	Trying to schedule all of my interviews right before finals.
Survey #19	Having to deal with the clerkship application process so soon after the fall summer job interviewing season.
Survey #55	Scheduling during exam period.
Survey #58	Sending out clerkship applications, deciding on summer work and studying for finals at the same time.
Survey #60	Juggling clerkship applications, summer job interviews and finals.
Survey #165	Scheduling and attending interviews during exam week.
Survey #166	Scheduling interviews on week before finals.
Survey #169	Trying to balance applications, interviews for summer associateships, . . . and studying.
Survey #196	Dealing with clerkship and summer law firm process simultaneously.
Survey #199	Ramping up . . . for application in the beginning of the 2nd year (while interviewing with firms).
Survey #206	Having to interview during finals reading period.

Source: 2000 Second-Year Student Survey.

Table A10: The Role of References from Classmates

Survey	Comment
1999 Survey #154 ^a	In an e-mail headed ‘The Dish,’ one Washington, D.C. clerk leaked me the names of my classmates who had made the judge’s shortlist. In exchange for the gossip, he asked me to rank my peers. It didn’t matter that I hadn’t worked directly with them and knew nothing of their writing skills. It didn’t matter that after a year and a half of law school, I had limited experience to know what makes a good clerk.
1999 Survey #119	On the D.C. Circuit, peer references were being used to extend interviews and offers. I think [it’s] offensive that someone could get a desired clerkship because she had a good friend who made calls on her behalf.
1999 Survey #164	[A third-year student who would be clerking for a particular D.C. Circuit judge the following year] may have put the good word in. Judges called 3L’s in law review.
1999 Survey #122	Third year law students play an enormous role. The clerks sort through the resumes and then call their buddies in the class below and ask who to interview. This was especially important when no one had any grades in to speak of because the process began so soon.
1999 Survey #43	A 3L friend from undergrad. at Harvard who will be clerking for [a particular judge] . . . established contact with clerks in particular chambers.
2000 Survey #3	[A] 3L (future clerk) . . . recommended me to his future judge.

Source: 1999 and 2000 Second-Year Student Surveys.

^a This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

Table A11: The Importance of Recommendations from Familiar Professors to Judges' Hiring Decisions

Ranking of the importance of recommendation from a familiar professor ^a	Number of judges	Cumulative percentage
1	26	22
2	23	42
3	21	60
4	10	69
5	5	73
6	4	77
7	1	78
8 or below ^b	0	78
a factor, but not ranked	11	87
not a factor	15	100
Total number of judges responding: 116		

Source: 2000 Judge Survey.

^a Ties in rankings were resolved by assuming that recommendations from a familiar professor received the higher ranking, so if anything the data reported here *overstate* the importance of such recommendations.

^b Some judges wrote in additional selection criteria, so it was possible for one of our eight listed criteria to receive a ranking below 8.

Table A12: The Role of Faculty Clerkship Brokers

Survey	Comment
1999 Student Survey #134	One of my professors gave me a glowing review when the judge called him, and 15 minutes later I got the offer.
1999 Student Survey #116	[Professor X] definitely got me several interviews by calling on my behalf. [Professor Y] got me at least the [interview with a particular prominent Eastern seaboard judge] ([that judge] told me), and probably [another judge].
1999 Student Survey #1	[Dean X] got me the . . . interview [with a prominent Ninth Circuit judge].
1999 Student Survey #119	One professor basically got me an interview with [a prominent D.C. Circuit judge].
1999 Student Survey #9	One recommender took a very active role in the process. I can tell because he clerked for a particular judge who offered an interview, lobbied the judge on my behalf, and served as a messenger to let me know where the judge's hiring was going. He also called to discuss how I felt about different judges/circuits.
1999 Student Survey #114	One of my professors really wanted me to clerk for a particular judge. But that judge never called me. When I accepted a state clerkship, this professor was upset and called the judge who she wanted me to clerk for, only to find that the reason this judge hadn't called me was that she hadn't started interviewing yet. . . . This judge now thinks that I will reapply next year, and my guess is that she will at least interview me.
2000 Student Survey #37	My recommender got me many interviews I wouldn't have gotten on my own because he was friends with many judges.
2000 Student Survey #167	My professor nominated the judge I interviewed with.
2000 Student Survey #235	I told a professor whom I'm close to that I would very much like to interview with my 1st choice judge. At that point, the judge had not called me back after I told the chambers that I'd be in his city the following week. My professor made a call on my behalf. Immediately after the call, the judge called to tell me he'd be incredibly excited to see me. After the judge's call, my professor called me to make sure the judge called. I received my offer at the interview. Months later, when my judge sent a letter to all his 2001-2002 clerks describing the other clerks, he pretty much wrote in my description that he trusted "his friend" (my professor).

Table A12: The Role of Faculty Clerkship Brokers (continued)

Survey	Comment
2000 Student Survey #266	One of my professors called the judge I will be clerking for and played an integral role in my getting the interview and clerkship.
2000 Student Survey #252	[The] dean of [the student's] law school, good friends with [a particular] judge, called him on my behalf.
2000 Student Survey #209	[V]arious [faculty from the student's school] played enormous roles getting me interviews with the three judges I applied to.
2000 Student Survey #165	[O]ne of my recommenders carried considerable weight with several judges. I was told several times that her name and recommendation secured my interview.
2000 Student Survey #8	A professor called to get me an interview despite the fact that all interviews had been filled.
1999 Judge Survey #52	[I] delegate[] [hiring] to [the] Clerkship Committee at a Law School.
1999 Judge Survey #61	I always take (or almost always) one law clerk from Harvard, recommended by my classmate, [Professor Z].
1999 Judge Survey #52	[I have] arrangement w[ith] [a] law school: I hire people we mutually agree on: The interview is a formality ([and] sometimes I hire w[ithout] interviews).
2000 Judge Survey #70	[A]t least one of my clerks is, in effect, picked by a certain law professor.

Sources: 1999 and 2000 Second-Year Student Surveys; 1999 and 2000 Judge Surveys.

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