

Essay

On Clerkship Selection: A Reply To The Bad Apple*

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Federal judges are sworn to dispense “equal justice to the poor and to the rich.” They are supposed to go about this awesome task deliberately, and with a dignity that will inspire and maintain firm public confidence in the decisions that they make and the way that they make them. The present method used by federal judges to select their law clerks unnecessarily jeopardizes that confidence.¹

* This Essay responds to Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991).

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The authors thank Elliott Peranson, President of National Matching Services, Inc., Toronto, Canada, and Professor Alvin E. Roth of the University of Pittsburgh for their valuable suggestions. The views expressed here are, of course, those of the authors alone.

1. Judge Kozinski questions whether judges’ behavior during the clerkship selection process in any way affects the ability of the federal judiciary as an institution to perform its constitutional function. See Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1716 n.24 (1991). Unlike the other two branches of our federal government, which derive their authority directly from the people, the institutional authority of the judicial branch ultimately depends upon its ability to inspire and retain the confidence of the public. To retain that confidence requires more than the constitutionally defined “good Behaviour” that entitles federal judges to serve for life. U.S. CONST. art. III, § 1. To maintain public confidence in the institution, the judicial branch should constantly strive to appear, and to be, dignified, businesslike, and rational.

Public comment on the clerkship selection process suggests that too few judges are now meeting this standard as they compete in the clerkship selection process. As one widely quoted commentator put it:

The once-decorous process by which Federal judges select their law clerks has degenerated into a free-for-all in which some of the nation’s most eminent judges scramble for the top law school students.

For most of each year, federal judges decide the hundreds of large and small issues that come before them in a careful, orderly, and dignified way. Every February, however, there is an uncharacteristic lapse, as many judges and students engage in what has been responsibly described as a "frenzied mating ritual."² Rather than waiting for more information or interviewing a number of other well-qualified prospects, many judges extend offers in unseemly haste out of concern that their colleagues on the bench will make off with their prime prospects. Students almost uniformly jump at the first offer they receive for fear of being left without any clerkship at all.

In her recent article on clerkship selection,³ Judge Patricia Wald lamented this frenzy and its unflattering reflection on the otherwise respected federal judiciary.⁴ To reform the selection process, Judge Wald suggested that the judiciary consider adopting a nationwide "matching" system similar to that used by hospitals to select medical school graduates for residency programs.⁵ Stated simply, that process starts much as the clerkship selection process starts, with medical students seeking positions at certain hospitals and hospitals selecting which applicants to interview. After a set period of time during which all interviewing occurs at the mutual convenience of hospitals and applicants, each hospital and each applicant submits to a designated coordinator a rank order list of choices. Hospitals list in order of preference the several applicants they wish to employ. Applicants list, also in order of preference, the hospitals where they seek residence. The designated coordinator then "matches" each hospital with the applicants it ranked highest, as long as those applicants did not receive offers through the matching system from hospitals ranked higher on their lists. The resulting selections are announced to hospitals and applicants at a uniform time.

Judge Alex Kozinski has poked fun at what he describes as the "Let's Imitate Medical Placement" (LIMP) plan.⁶ His recent essay concludes with a

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The judges agree that the process is one in which the law of the jungle reigns and badmouthing, spying and even poaching among judges is rife. "When it comes to hiring law clerks, there is no collegiality," one judge lamented. "Perfectly honorable people will [stop] at nothing."

David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash*, N.Y. TIMES, Mar. 17, 1989, at B4.

Particularly egregious is the disillusioning first impression of the federal judiciary that law students—the future leaders of our profession—confront when applying for clerkships. As one recent Stanford law student stated: "[The clerkship selection process] was positively surreal, the most ludicrous thing I've ever been through. . . . Here are these brilliant, respected people—they're Federal judges for God's sake—and they're behaving like 6-year-olds." *Id.*

2. Margolick, *supra* note 1, at B4.

3. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990).

4. *Id.* at 152.

5. *See id.* at 160-63. Similar matching systems are now used in a variety of professions, including systems that match law school graduates to entry-level positions at law firms in Toronto and Vancouver. *See id.* at 160 n.8.

6. Kozinski, *supra* note 1, at 1721.

challenge to the proponents of a matching system for law clerk selection to "explain *why* an overhaul of the current system is necessary and *how* the proposed overhaul would improve the situation."⁷ This Essay accepts that challenge.

I. THE ADVANTAGE OF INFORMATION

First of all, the introduction of a matching system for law clerk selection is not necessary. It is only highly desirable. A matching system would dramatically improve the most noticeable and significant problem with the current system: lack of information.

Judge Kozinski and Judge Wald agree on the importance of the judge-clerk relationship, calling it "the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair."⁸ Yet before the parties agree to enter into this mutually dependent relationship, they know practically nothing about each other.

Wary of losing a potential "superstar,"⁹ federal judges are compelled by the current system, or lack of one, to form this critical relationship without the kind of information routinely required and obtained by every other employer in our profession. The federal government subjects attorney applicants to searching inquiries by the Federal Bureau of Investigation. Law schools screen faculty prospects with exquisite care and intense faculty debate. Law firms hire associates based on their records of accomplishment after two full years of law school. They prefer to make job offers after personally observing students' work for an entire summer. Partnership decisions are made only after seven or more years of working together. Yet, by February 18, 1992, many federal judges, and certainly all judges in the D.C. Circuit, had finished hiring clerks for the 1993-94 Term. Judges made offers to students without seeing third semester grades or reports of summer employment. Some judges even extended offers as early as December 1991.¹⁰

Judge Kozinski agrees that there is a great deal of information that would be useful to a judge in selecting clerks,¹¹ yet he tacitly accepts the status quo and forgoes this information for the myopic reason that a judge who waits for this information risks being preempted by another judge's offer. In spite of his

7. *Id.* at 1730.

8. *Id.* at 1708 (quoting Wald, *supra* note 3, at 153).

9. *Id.*

10. As in the previous year, judges in the 1992 clerkship selection season have not attempted to establish any time constraints for the selection of law clerks for the 1993-94 Term. Previous efforts to delay the making of offers have failed repeatedly. In 1990, for example, even with a May 1 offer embargo date, offers were made as early as January 30. See Questionnaire Results Regarding 1990 Law Clerk Hiring By Judges on the Federal Courts of Appeals 1 [hereinafter Questionnaire Results] (on file with the Office of the Assistant Director for Judges Programs, Administrative Office of the United States Courts, Washington, D.C.).

11. See Kozinski, *supra* note 1, at 1710.

vivid description of how important good clerks are, Judge Kozinski is apparently willing to make a "reasoned judgment" about hiring clerks based on nothing more than "prox[ies]" and "indicati[ons]."¹² When a decision is of fundamental importance, judges generally require as much information as possible and base decisions on something beyond mere probable cause. If for no other reason, a matching system would improve the clerkship selection process because it would enable both students and judges to base their decisions more on information and less on guesswork.

Because a matching system would eliminate any incentive to interview or extend offers early, the clerkship selection process could be held at a uniform time in the fall of students' third year of law school. Judges would have the benefit of grades for two years rather than one, and recommendations from professors who have spent more time with the student and from attorneys with whom the student worked during his or her second summer.¹³ Judges could also evaluate law review or other written work in a more fully developed form than is generally available in February of the student's second year. Perhaps most importantly, after a summer of supervised work, a law student in the autumn of the third year would be more nearly the maturing adult that a judge seeks as a law clerk. That maturity is more easily observed in the third year than it is predicted in the second.

In the fall of their third year, students would also have more information—not necessarily about judges, but about themselves. Students should not want to clerk merely for prestige and access to future career opportunities, or because clerking is what people who have done well in law school are "supposed" to do. Students should, more importantly, think of a clerkship as an opportunity for public service, as well as a valuable and fulfilling personal and professional experience. By February of the second year, not every student knows whether clerking is for him or her. Some think it is, when it may not be; others think it is not, when it may be.¹⁴ A summer job, an experience in a clinical program, or a position as a research assistant during the second year can change a student's attitudes about clerking. Adopting a matching system would allow clerks to be selected in the fall of the third year, when judges can select from a better defined group of applicants based on far more information.¹⁵

12. *Id.*

13. *Cf. id.* at 1726 ("[A]s to those candidates in whom I am genuinely interested, no number of letters is too many.").

14. Judge Kozinski, for example, only decided that he wanted to clerk "late in [his] third year of law school." *Id.* at 1728 n.40.

15. One could argue that all of this information would likewise be available to judges and students were an embargo placed on the extension of offers until a set date in the fall of the third year. Experience has shown, however, that such embargoes have not been universally respected. *See, e.g., id.* at 1719 (noting that "widespread cheating and confusion" accompanied the most recent effort to implement an embargo date). Judges are simply subject to too much pressure to violate an embargo agreement for that system to remain stable, thus creating precisely the type of unmanageable chaos that led the medical profession to

II. AN IMPROVEMENT, NOT AN OVERHAUL

Judge Kozinski's protestations notwithstanding, the introduction of a matching system would not be an "overhaul" of the law clerk selection process.¹⁶ Nothing about the process would change except that, after all the information is at hand and all interviews are complete, matching would replace the present means of communicating offers and acceptances. Judges would continue to sort through applications, decide which students to interview, check references, analyze writing samples, and conduct interviews exactly as they do now.

Judge Kozinski's concern that "[t]he match that is sought through the clerkship process is infinitely more delicate and complex than that involved in medical residency programs"¹⁷ is irrelevant. The question is not whether the judge-clerk relationship is more or less "personal" or "intangible" than the hospital-resident relationship. Rather, the appropriate question is whether adopting a matching system would in any way diminish the current ability of judges and students to assess these intangibles. It would not. Under a matching system, judges—using precisely the same methods that they use now—would actually get a better opportunity to assess applicants' qualifications and to observe their personal characteristics than the current system permits.

The only things that would be diminished under a matching system are the frenzy and uncertainty inherent in the current system. Neither judges nor students would be left—as they are now—wondering whether they might have been better off waiting to see if someone preferable would turn up or whether by waiting they would have lost a fleeting opportunity. Both judges and students would be able to explore, thoroughly and patiently, all of their options. Under a matching system, interviews would no longer need to be rushed to

adopt its matching system in 1952. See Alvin E. Roth, *New Physicians: A Natural Experiment in Market Organization*, 250 *SCIENCE* 1524, 1524 (1990). Because a matching system would be governed solely by the preferences expressed privately on participants' rank order lists, any prematch arrangements would be unenforceable. "Cheating" would yield no benefits, and the rules of the match would apply equally to all participants. See NATIONAL RESIDENT MATCHING PROGRAM, HANDBOOK FOR STUDENTS, at app. 1 (1990) [hereinafter NRMP HANDBOOK].

Furthermore, even those judges who honored previous embargoes found that system to be unpleasant and inefficient. It produced a mad telephone scramble as soon as the embargo expired and imposed the same limits as the current anarchy on judges' and students' knowledge of the full range of their options. Under both the current system and an embargo system the "mating" occurs so quickly that many judges find that they cannot afford to give a student much time to accept or reject an offer, lest all of the judge's other desired candidates disappear. The student, therefore, faces almost irresistible pressure to accept or reject the offer before he or she is aware of all of the judges who might wish to extend an offer—disadvantaging both the student and all of those other judges. A matching system would eliminate this "telephone race" and assure that judges and students have the fullest possible range of options available to them before they forge a judge-clerk relationship.

16. See Kozinski, *supra* note 1, at 1730.

17. *Id.* at 1723.

enable judges to make their decisions quickly.¹⁸ Rather, interviews could be conducted with both judges and students at ease about spending as much time as necessary to get acquainted. Judges like Judge Kozinski who spend weeks, sometimes months, revising and refining opinions¹⁹ would not need to settle for a “greased lightning” clerkship selection process in which crucial personnel decisions are made in a matter of days, sometimes hours.

By creating a standardized interviewing period of perhaps three or four weeks, a matching system would also dramatically alleviate two problems with the current anarchy that Judge Kozinski deems “unavoidable”: the expense to law students of traveling to numerous interviews across the country and the disruption of law school classes.²⁰ Because there would be nothing to gain or lose, for either judges or students, by interviewing early or late within the uniform interviewing period, judges could more easily schedule interviews at their convenience and students could coordinate travel plans to minimize expenses and the amount of class time missed.²¹ This would enable judges to see more students and students to see more judges, all at greater convenience and lesser expense.²² In turn, this would diminish the natural edge that east coast judges have in hiring students from east coast law schools and west coast judges have in hiring from west coast law schools.²³

18. The need to extend offers quickly or risk losing prime candidates is very real. In a recent survey of judges on the federal courts of appeals, 80% of those who responded found that during the 1990 clerkship selection process at least one applicant in whom they were interested had already accepted another clerkship. See Questionnaire Results, *supra* note 10, at 1. Students face similar pressure to act quickly. Most of the judges who expressed a preference stated that students should have to respond to clerkship offers within 24 hours. Almost one out of six stated that students should have to respond on the spot. See *id.* at 4.

19. Kozinski, *supra* note 1, at 1711 n.9.

20. *Id.* at 1712, 1713-14.

21. When one considers that what may now be several cross-country trips could be reduced to a single journey, and that greater opportunity for advance planning would allow students to take advantage of discount air fares, the cost savings could be very significant.

22. Judge Kozinski is concerned that adoption of a matching system would “dramatically multiply the number of interviews that would have to be conducted.” Kozinski, *supra* note 1, at 1721 n.31. This need not be the case. Because judges would have an opportunity to consider *all* of their applicants before deciding whom to interview, no judge would have to schedule interviews with less qualified applicants merely because those students were among the best of the “early applicants.” Furthermore, federal judicial clerkships are highly prized, and experience with other matching programs strongly suggests that well over 80% of all clerkships will be filled by applicants whose judge ranked them sixth or higher. See *infra* notes 46-47 and accompanying text. Even if the number of interviews were to increase slightly in the first few years of a matching program as judges overcompensate for the uncertainty of a new system, that temporary increase would not approach the levels (25-30 interviews per judge) of Judge Kozinski’s apocalyptic predictions. See Kozinski, *supra* note 1, at 1722. And given the benefits of the matching system, the costs of interviewing a few more applicants than usual for a couple of years—if that is even necessary—seems a very small price to pay.

23. See Kozinski, *supra* note 1, at 1719. The matching system could also accommodate couples by accepting rank order lists of paired position preferences. See NRMP HANDBOOK, *supra* note 15, at 6, 10. This could alleviate the strain currently felt by many couples for whom proximity to one another is a substantial, but difficult to control, factor in the clerkship selection process.

III. REPLACE HIGH-PRESSURE MARKETING WITH A RATIONAL MARKET

In spite of these obvious advantages, Judge Kozinski objects to a matching system. He lauds the current anarchy as "an entirely rational and efficient device for allocating scarce resources within a free market," and attacks the matching proposal as the brainchild of "bureaucrat[s]" and "central planner[s]."²⁴ This suggestion is an ideological canard. In the first place, the current anarchy is neither rational nor efficient. A truly rational and efficient free market requires full and free exchange of information and uninhibited choice of competing products or services.²⁵ As demonstrated above, the "free market" that Judge Kozinski cheers is fraught with imperfections that prevent participants from receiving full information and from maximizing their preferences.

Moreover, a matching system for the selection of law clerks emphatically would not substitute central planning for the existing market. Matching would simply improve the existing market by installing a completely passive, but efficient, central market. The matching system would be neither a bureaucracy nor a computer randomly assigning clerks to judges.²⁶ Rather, it would be a centralized market that allocates resources based solely on the expressed preferences of the market participants. It would be no more a centrally planned bureaucracy than is the New York Stock Exchange.²⁷

In order to assure full information and reduce transaction costs, the New York Stock Exchange provides a central location at which stock transactions can occur pursuant to a uniform set of rules. A specialist on the floor of the exchange brings together offerors and offerees and matches them based on their

24. Kozinski, *supra* note 1, at 1721.

25. A rational and efficient free market also requires low transaction costs. As described in Part II, *supra*, a matching system would dramatically lower the transaction costs confronted by both judges and students in the current system.

26. For those judges reluctant to embrace a "machine-driven process," Kozinski, *supra* note 1, at 1723, the match can be done entirely by hand. See Roth, *supra* note 15, at 1526. The matching algorithm is fairly simple; computers just speed up the process.

27. Professor Alvin E. Roth of the University of Pittsburgh has studied centralized matching systems established for medical residencies and other purposes both here and abroad. *E.g.*, 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). In a recent article, Professor Roth noted that

the centralized markets studied here do not involve central planning as it is most usually understood, because these markets have been designed to be sensitive to the preferences expressed by the participants, rather than to achieve the independent objectives of a planner. What is centralized is not the objective, but the market mechanism itself. This kind of centralization is something that occurs more often than is generally recognized: for example, the stock market contains institutions like the New York Stock Exchange, governed by explicit rules about how and when trades may be transacted.

Roth, *supra* note 15, at 1527. Professor Roth's study of matching programs in the United States and Britain established that every matching system he studied that has used a stable algorithm, such as the algorithm used by the National Resident Matching Program, has "controlled the unraveling of appointment dates and survived to the present." *Id.* at 1526.

independently expressed preferences. This is a rational and efficient free market, just like the one a matching system would create.²⁸ The anarchy preferred by Judge Kozinski is less like the markets of Wall Street than it is like the bazaars of Baghdad, with hawkers importuning passersby to shop at their stalls before the customers have an opportunity to walk to the stalls at the end of the street.²⁹

IV. MISPLACED OBJECTIONS

Judge Kozinski raises a number of other objections to a matching system, all of which are misplaced. For example, he is concerned that a matching system would "decreas[e] the means by which less-favored clerkships can compete for desirable applicants."³⁰ Judge Kozinski reports that he sometimes plays poker or chess with applicants, treats them to bagels and lox, or simply wines and dines them as a means of becoming acquainted with, and hopefully captivating, particularly desirable candidates.³¹ Nothing about a matching system would inhibit Judge Kozinski, or a judge with a "less-favored" clerkship, from using these or other means to show interest in a particular candidate and to stimulate that candidate's interest in the clerkship.

Indeed, a matching system might actually improve the abilities of many "less-favored" clerkships to compete for desirable applicants. In 1990, eighty percent of the judges on the federal courts of appeals called applicants to arrange interviews only to find that one or more had already accepted another clerkship.³² A "less-favored" clerkship cannot compete if it never has a chance. A matching system would assure that a judge could interview more applicants in whom he or she is interested because there would be no mechanism by which other judges could snap up prime candidates prior to the

28. Because it essentially brings offerors and offerees from all over the country together instantaneously, the matching system may actually be more rational, efficient, and orderly than the New York Stock Exchange. In this respect, the matching system may resemble the highly acclaimed market created by the National Association of Security Dealers Automated Quotations (NASDAQ) system even more than it resembles the New York Stock Exchange. *See generally* David A. Dobofsky & John C. Groth, *Exchange Listing and Stock Liquidity*, 7 J. FIN. RES. 291 (1984) (explaining the benefits of over-the-counter markets such as NASDAQ).

29. The Harvard Business School, hardly a haven for bureaucrats and central planners, strictly forbids any recruiting organization from making a job offer to a student that includes "any incentive" for the student to accept the offer before the end of a predefined interviewing period. PLACEMENT OFFICE, HARVARD BUSINESS SCHOOL, HARVARD BUSINESS SCHOOL RECRUITER'S GUIDE & EMPLOYMENT STATISTICS FOR THE CLASS OF 1990, at 4 (1990). The school does not view this "regulation" as an affront to the free market system, but rather as an essential part of its effort "to create a fair and efficient mechanism for students and recruiting organizations to learn about one another." *Id.*

30. Kozinski, *supra* note 1, at 1719.

31. *See id.* at 1715 n.21; *see also* Margolick, *supra* note 1.

32. *See* Questionnaire Results, *supra* note 10, at 1. This information is based on a process in which many judges putatively agreed to a May 1 offer embargo date. In 1991 and 1992, when there was no such date, the percentage was likely even higher.

match.³³ Moreover, the ability of students to coordinate their travel plans would make it easier for students to apply to and interview with judges across the country. All judges, therefore, whether “less-favored” or not, would be able to interview, and hence compete for, a larger, more geographically diverse group of applicants.

Judge Kozinski makes the point that the matching system would “eliminate a very important bargaining tool for judges competing for the most gifted clerkship candidates—the ability to make offers early and entice applicants into ending the anxiety and uncertainty by accepting early.”³⁴ But “ending the anxiety” should not be the reason for accepting a clerkship. This sounds more like making “an offer you can’t refuse” than like the beginning of “the most intense and mutually dependent [relationship] outside of marriage, parenthood, or a love affair.”³⁵ Clerkship decisions, by both parties, should be based on “[m]utual trust and respect,”³⁶ not a fear of being left out in the cold. Using this fear as a “tool” in a “competi[tion]”³⁷ for the most gifted clerkship candidates is a disturbing intrusion on what could be a truly free market process.

Judge Kozinski argues that “receiving an early offer broadens a student’s choices; it cannot diminish them.”³⁸ It is unclear how this is so. Receiving an early offer only broadens a student’s choices relative to not receiving that offer at all. Because early offers are usually accompanied by pressure, if not ultimatums, to accept the offers quickly,³⁹ students are forced to make clerkship decisions before they have full information about the range of available opportunities. Under the current system, early offers, and the pressure that accompanies them, actually limit students’ choices. What would broaden choice, for both judges and students, is a system enabling both to evaluate as many options as possible and then to make clerkship decisions with full information. A matching system would accomplish this.

Judge Kozinski’s essay also attempts to convert a curse into a blessing. He admits that the current anarchy “may be conducive to undignified behavior [and] may reward lack of collegiality,” but he likes these traits in a clerkship

33. A judge and an applicant could, of course, agree that they would place each other first on their rank order lists. Such an agreement, however, would be unenforceable, and each would run the risk that the other would change his mind at the last minute. Because judges and students are best off if they place their “true” first choices at the top of their lists, *see* Roth, *supra* note 27, at 1003, all participants in the match should find it in their best interests to interview with a range of judges or applicants before committing to a final set of preferences. A judge or a student who gives a commitment too early forgoes valuable information about other possible matches. A judge or a student who accepts an early commitment at face value does so at great risk. *See* NRMP HANDBOOK, *supra* note 15, app. 1.

34. Kozinski, *supra* note 1, at 1719.

35. *Id.* at 1723 (quoting Wald, *supra* note 3, at 153).

36. *Id.* at 1709.

37. *Id.* at 1719.

38. *Id.* at 1720.

39. *See supra* note 18.

selection process.⁴⁰ He reasons that “[t]he way people respond to the pressure of the current selection process is very revealing; it is valuable information that can help the other actors reach a decision.”⁴¹ Put another way, it lets students tell the cads from the saints.⁴² But the ability to make these distinctions is useless if market imperfections restrict a student’s ability to act based on these revelations. Given the current anarchy, for most students a cad in the hand is worth two saints in the bush. A system that reveals information yet makes it virtually impossible to act on that information is nothing but an exercise in futility.⁴³

Judge Kozinski’s essay also raises the problem of “the clerkship mix, that is, each judge’s desire to have a balanced workforce who get along with each other.”⁴⁴ From the student’s perspective, suffice it here to say that the applicant has never had any say in that aspect of the process. From the judge’s perspective, several points bear mentioning. First, no judge need include on a rank order list the name of any applicant who would not be completely compatible and satisfactory.

Second, the matching system would allow judges to assemble a balanced team of clerks with far less difficulty than Judge Kozinski imagines. His scenario of judges seriously considering twenty-five to thirty applicants and then sorting through thousands of possible combinations of clerks one at a time⁴⁵ is simply fanciful. An overwhelming majority of judges on the federal courts of appeals would continue to fill all three of their clerkship positions from among their top six choices. According to a survey of circuit judges, in 1990 over 80% filled all of their clerkship positions by extending five or fewer offers.⁴⁶ Federal court clerkships have always been extremely desirable jobs. Nothing about the matching system would change that. Experience with other matching systems also indicates that, if each judge has three positions, between

40. Kozinski, *supra* note 1, at 1713, 1716-18.

41. *Id.* at 1718.

42. *See id.* at 1713. Judge Kozinski opposes a matching system because it would “put[] the cads on an equal footing with the saints.” *Id.* That certainly seems better than the current arrangement, which gives the advantage to the cads!

43. Judge Kozinski might respond that, even if the current anarchy limits a particular student’s ability to reject an offer from a judge he or she considers to be a “cad,” in the long run this information will affect that judge’s reputation and, eventually, the quality of the clerkship applications that judge receives. *See id.* at 1718. This long-run market mechanism, however, already works with respect to the information of real consequence to applicants: the way a judge operates 365 days a year. This mechanism is certainly one of the reasons why Judge Kozinski attracts such fine applicants every year. Knowing how a judge operates in the current clerkship selection process provides applicants with little, if any, relevant information about what it would be like to work for the judge, while the costs, to judges and students alike, of this anarchic, “Through the Looking Glass” process are high indeed.

44. *Id.* at 1722.

45. *Id.*

46. Questionnaire Results, *supra* note 10, at 2.

82% and 94% of the positions would be filled by applicants whom the judge ranked sixth or better.⁴⁷

Third, the matching system can be extremely flexible. In addition to processing single rank order lists of preferences, the matching system would accommodate judges who prefer to think of their staffing needs in terms of three separate positions—perhaps one clerk with a strong academic background, another with some real-world experience, and a third who is the best available overall candidate—with separate lists for each position.⁴⁸

Alternatively, the matching system could process complicated sets of constraints and super-preferences that might modify a judge's "primary" list of preferences. For example, imagine that Judge Langdell generally prefers to hire one clerk from school *A*, one clerk from school *B*, and one clerk from any of five other schools. In one particular year, however, Judge Langdell finds that three of the applicants from school *B* are far superior to any of the applicants from other schools, with the exception of three outstanding students from school *A* whom Judge Langdell prefers most of all. As long as Judge Langdell identifies the six "super-preferred" applicants and the law schools of all of the applicants, the matching system could process the following set of instructions:

1. If I can get two of my top three from school *A*, I will take both of them and one from school *B*, and I will do without a clerk from one of the other schools for a year.
2. If I cannot get two of my top three from school *A*, I would like to get two of my top three from school *B*, plus one student from school *A*.
3. If I can get neither of those combinations, I would like one from school *A*, one from school *B*, and one from one of the other five schools.

This ability to specify rules along with simple rank orderings would give judges generous flexibility in the selection process. Thus, a matching system would be as likely to achieve whatever balance a judge desired as he or she could hope to accomplish in the frantic week or two in February during which judges and students must now find each other and commit to their relationships.

In the end, Judge Kozinski identifies only one true advantage that the current anarchy will always have over a matching system: the judge and the

47. These statistics were provided by National Matching Services, Inc. and are based on its experiences with the Toronto and Vancouver law firm matching programs and the United States dental matching program. *See* Communication from Elliott Peranson, President, National Matching Services, Inc., to Michael N. Levy, Associate, Skadden, Arps, Slate, Meagher & Flom (Apr. 3, 1991) (on file with authors).

48. Telephone Interview with Elliott Peranson, President, National Matching Services, Inc. (Apr. 1, 1991). According to Mr. Peranson, several employers participating in the legal and dental matching programs identify their preferences by treating each position separately. These employers can also leave instructions to "fill in" any list for one position with applicants listed for other positions in the event that none of the applicants on the first list match with the employer.

student personally witnessing that “electrifying” moment of acceptance.⁴⁹ The elapse of a few days between the filing of rank order lists and the announcement of the match, however, should not be particularly traumatic for any judge who is mature and secure enough not to require instant gratification. So far as law students are concerned, they have been steeled for such a delay by their earlier experiences as successful applicants for college and law school, where the final, wonderful joy of admission was undiminished, and indeed possibly enhanced, by the passage of time.

V. CONCLUSION

The current anarchic process by which federal judges select their law clerks is inefficient, expensive, disruptive, and demeaning. It limits the information available to both judges and students, and forces them to make critically important decisions before they can explore the full range of opportunities available to them. A matching system similar to the process used to fill medical residency positions would solve these problems without diminishing in any way the intensely personal nature of the judge-clerk relationship. It would permit judges to select law clerks in a more orderly and businesslike manner—thereby furthering judges’ legitimate self-interests while also keeping faith with the interests of the public and of the vast majority of judges in maintaining the reputation of the federal judiciary as an orderly and dignified institution.

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