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On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model

ANNETTE E. CLARK*

In this article, Professor Clark joins the debate over whether the federal judiciary should utilize the medical matching model to reform the judicial clerk selection process. She analyzes the medical experience with the residency match in order to detail the ways in which proponents of a judicial clerk match have overstated the benefits, underestimated the costs, and overlooked the differing and potentially conflicting interests of judges and clerkship applicants in the selection process. Professor Clark concludes that reform of the judicial clerk selection process should be guided by a realistic appraisal of the costs and benefits of a matching system.

A vigorous debate has taken place recently in the legal literature over whether the federal judiciary should reform the clerk selection process and, more specifically, whether the federal judiciary should adopt a system modeled after the medical residency matching system. Through the use of a computer-generated algorithm, this proposed matching system would simultaneously pair all federal judicial clerkship positions with clerkship applicants on the basis of confidential rank-order lists submitted by judges and law student applicants. In 1990, Judge Patricia Wald began the most recent round of the debate, advocating the medical model in an essay on selecting law clerks.¹ Judge Alex Kozinski responded in a confessional mode, admitting that he is one of the “bad apples” in the judicial clerk selection process but asserting that reform is unnecessary.² Judge Louis Oberdorfer and one of his former law clerks then took up the banner of the medical model, arguing that the model makes sense from a judicial perspective.³ Most recently, Trenton Norris strongly advocated the medical model, presenting the perspective of an unsuccessful judicial clerkship

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

2. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991). In labeling himself a “bad apple,” Judge Kozinski is referring to his active and aggressive participation in the competition for the most highly qualified judicial clerkship applicants. *See id.* at 1715 n.21.

3. Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097 (1992).

applicant.⁴

Each of these commentators has provided a useful glimpse into the realities of the current judicial clerk selection process. But two vital elements are missing from the discussion thus far. First, the debate lacks an analysis of the medical residency match system that goes beyond the theoretical and into the practical workings of the program.⁵ It is both unwise and undesirable to discuss a model purely in a theoretical sense when one has a working model at hand. Second, proponents of adopting the medical match model for judicial clerk selection have not adequately considered the ways in which postgraduate medical education and training differ from the role of a judicial clerkship in postgraduate legal training. Even if the medical matching system is a model of simplicity and efficiency, it does not necessarily follow that this system will function equally well in the judicial setting. Significant differences between the judicial clerkship and the medical residency may caution against a wholesale adoption of the medical matching model.

This article endeavors to further inform the current debate through an exploration of the history and workings of the medical residency match and a comparative analysis of postgraduate medical training and the judicial clerkship.⁶ Part I delineates the problems that plague the present judicial clerk selection process. Part II explores the history, theory, and

4. 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).

5. See, e.g., Kozinski, *supra* note 2, at 1721-24 (critiquing the medical match model); Norris, *supra* note 4, at 791-98 (proposing the medical match model for use in the judicial clerk selection process); Oberdorfer & Levy, *supra* note 3, at 1098 (describing the medical match model); Wald, *supra* note 1, at 160-63 (describing the basic algorithm of the medical match model). It is striking that in the four articles to date, three of which specifically advocate the adoption of the medical residency matching model, only two articles from the medical literature are cited. See Kozinski, *supra* note 2, at 1721 n.29; Norris, *supra* note 4, at 791 nn.165-66; Oberdorfer & Levy, *supra* note 3, at 1101 n.15.

Given that the medical profession has used a formalized matching system since 1952, there is no dearth of information on how well that system has functioned. See *infra* Part III.

6. As a participant in the 1985 National Resident Matching Program (NRMP), I submitted numerous applications and interviewed with a number of internal medicine residency programs during my fourth year of medical school. After submitting my rank-order list of programs, I subsequently withdrew from the match in accordance with the NRMP guidelines for applicant withdrawal. Although I did not experience personally the exultation of matching with the program I had ranked first or the profound disappointment of matching with a program much lower on my list, I did join my friends and classmates as they opened their match letters on the designated day in March 1985. In what can only be described as a barbaric proceeding, the medical school I attended gathered all the fourth-year medical students together for simultaneous distribution and opening of the match letters. Within the course of a few minutes I observed some individuals laughing and shouting with joy, while others nearby were crying in disappointment or standing numb in disbelief. It is a day I will never forget.

I did not apply for a judicial clerkship, but I had the honor of serving as a judicial extern while in law school for The Honorable Eugene A. Wright, Senior Judge, United States Court of Appeals for the Ninth Circuit.

rules of the National Resident Matching Program in order to lay the groundwork for an in-depth analysis of the judicial match proposal. Part III tests claims about the medical matching system made by proponents of a judicial clerkship match against the realities of the medical match as presented in the medical literature. This Part concludes that the advocates of the judicial clerkship match have underestimated the costs and overestimated the benefits of a matching system. Finally, Part IV explores whether a stronger case can be made for a medical residency match than a judicial clerkship match, based on the differences in medical and legal postgraduate training.

I. THE CURRENT STATE OF JUDICIAL AFFAIRS

The judicial clerk selection process is initiated by interested law students who apply for positions with one or more federal judges.⁷ As they begin this application process, law students soon learn that "not all clerkships are created equal."⁸ While individuals might disagree over the relative ranking of circuits or judges, no one doubts the existence of an implicit hierarchy within the federal judiciary. Applicants learn, through formal and informal channels, to value circuit court clerkships over district court ones, clerkships within particular circuits over clerkships in others,⁹ and clerkships with certain judges over clerkships with other judges.¹⁰ Applicants use this information on the relative prestige of various judicial clerkships, along with their own personal preferences, to decide with whom they would like to clerk.

Not all clerkship applicants are created equal either. In evaluating applicants, judges utilize a number of criteria, including law school affiliation, grades, rank in class, law review and editorial board membership, and formal and informal recommendations from faculty.¹¹ Judges use this information to select the most promising applicants to interview and then make offers to those law students they wish to hire. Individuals who receive judicial clerkship offers accept or decline them, and judges who have positions yet to fill make additional offers. This "rolling admissions" process¹² continues until all positions are filled.

At first glance, the judicial clerk selection process does not seem to be

7. Approximately 1,000 federal district and circuit court judges hire just over 2,000 law clerks every year. Kozinski, *supra* note 2, at 1713 & n.12; Norris, *supra* note 4, at 765 nn.1-2.

8. See Kozinski, *supra* note 2, at 1719.

9. See *id.* (citing the D.C. Circuit as one that attracts a disproportionate share of the best applicants).

10. See *id.* (suggesting that geographic location and seniority are two factors that make some judges more attractive to applicants); Wald, *supra* note 1, at 154 (stating that a judge's reputation as a "feeder" of clerks to the United States Supreme Court attracts top applicants).

11. See Kozinski, *supra* note 2, at 1710-11; Norris, *supra* note 4, at 774-76.

12. See Norris, *supra* note 4, at 779 n.89.

particularly complicated or different from other market processes for "matching" employers with potential employees. How does the system work in reality? According to its critics, the selection process for judicial clerks does not at all resemble the calm, efficient process described above. Instead, the process is an "undignified,"¹³ "demeaning,"¹⁴ "anarchic open market"¹⁵ that resembles an "unfrenzied mating ritual."¹⁶ In her essay, Judge Wald describes the process as follows:

In an open market, where there is no prior agreement on when the selection process may begin or end, the preemptive striker sets the time frame for those judges who want to compete. Over three decades, the selection time has crept forward from late in a student's third year to midway in his second year. Early-bird judges skim off those applicants with the brightest credentials. This clearly bothers not only other judges but the top clerk candidates themselves who have their own preference about whom they wish to clerk for. So upon receiving an early offer from a less-favored judge, the candidate may call his first choice, apprise her of the offer, and solicit a counteroffer. And the race is on . . . Judges, in turn, sometimes are unseemly in their pursuit. They make "short-fuse" offers that lapse if the clerk does not respond within a specified time. Without any agreed upon guidelines among judges, the process over the years has peaked earlier and earlier and become ever more frenzied.¹⁷

While critics of the present selection system focus on unethical behavior by judges and the costs of the process to judges and applicants,¹⁸ their criticism by no means ends there. The commentators also assert that the present system fails to provide judges and applicants with adequate information about each other,¹⁹ fails to maximize the preferences of the participants,²⁰ deprives student applicants of bargaining power,²¹ disrupts the law school educational process,²² undermines public confidence in the judicial system,²³ reflects the individual goals of judges rather than the interests of

13. Wald, *supra* note 1, at 156.

14. *Id.*

15. *Id.* at 163.

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

17. Wald, *supra* note 1, at 156.

18. See generally Norris, *supra* note 4; Oberdorfer & Levy, *supra* note 3; Wald, *supra* note 1.

19. Oberdorfer & Levy, *supra* note 3, at 1099-1100; cf. Norris, *supra* note 4, at 785 (suggesting that judges can easily obtain detailed information on applicants but that applicants are at a serious disadvantage in trying to obtain information on judges).

20. Norris, *supra* note 4, at 783; Oberdorfer & Levy, *supra* note 3, at 1103.

21. Norris, *supra* note 4, at 780.

22. Oberdorfer & Levy, *supra* note 3, at 1102; Wald, *supra* note 1, at 156.

23. Oberdorfer & Levy, *supra* note 3, at 1097.

the public,²⁴ "punishes late-bloomers,"²⁵ allows judges to choose clerks based on discriminatory factors,²⁶ perpetuates an "old-boy network,"²⁷ and is generally riddled with externalities.²⁸

What is the panacea for this discontent? Judges Wald and Oberdorfer and Mr. Norris assert that the solution is a judicial clerkship match, modeled after the National Resident Matching Program.

II. THE NATIONAL RESIDENT MATCHING PROGRAM

A. AN OVERVIEW

Before advocating or opposing reform, participants in the debate should first understand the theory behind the National Resident Matching Program (NRMP).²⁹ The medical residency match occurs during the applicant's fourth (senior) year of medical school and is the primary point of entry into graduate medical education. The system is best described as a centralized market or clearinghouse that allocates applicants to programs based on the rank-ordered preferences of the participants.³⁰ Each applicant submits a list of programs to which he has applied, ranked in order of preference, beginning with rank number one for the most preferred program.³¹ Similarly, each residency program with available positions submits a list of applicants who have applied to the program, also ranked in order of decreasing preference.³² The match participants enter these rank-order lists directly into personal computers, using software the NRMP provides.³³ The NRMP must receive the lists by a deadline set in February of each year.³⁴ The actual matching of applicants to programs is conducted the following day by computer and requires only a few minutes to complete.³⁵ Medical schools then receive the match results on a designated

24. Norris, *supra* note 4, at 775.

25. *Id.* at 785. By this, Norris means that the system advantages those "who had good grades in their first year, those who are lucky enough to have written a solid legal research paper, and particularly those who have had their papers edited and published." *Id.*

26. *Id.* at 773-75.

27. *Id.* at 774.

28. *Id.* at 783-85.

29. For our purposes, it is even more important to understand the practical workings of the medical residency match. See *infra* Part III for this analysis.

30. See NATIONAL RESIDENT MATCHING PROGRAM, HANDBOOK FOR STUDENTS: 1994 MATCH (1993) [hereinafter NRMP HANDBOOK]; Oberdorfer & Levy, *supra* note 3, at 1103-04; Alvin E. Roth, *New Physicians: A Natural Experiment in Market Organization*, 250 SCIENCE 1524, 1524-25 (1990).

31. NRMP HANDBOOK, *supra* note 30, at 6. For a sample Worksheet for Rank Order List of Programs, see *id.* at app.2. Applicants are advised to refrain from listing any unacceptable programs on their rank-order lists. *Id.* at 6.

32. *Id.* at 1.

33. *Id.* at 7.

34. *Id.* at back cover.

35. *Id.* at app.1.

date in mid-March. The general announcement of match results occurs the following day at 12:00 noon Eastern Standard Time.³⁶

B. A BRIEF HISTORY OF THE MEDICAL RESIDENCY MATCH

Residency programs have long operated within an implicit hierarchy much like the judicial clerkship hierarchy.³⁷ Medical students learn, through formal and informal channels, which programs within their chosen specialty are the most desirable. Numerous factors serve to differentiate the more highly sought-after residency programs from the less desirable ones, including a program's reputation within the academic and medical community, the prestige of any affiliated academic institutions and hospitals, the national prominence of a program's faculty, geographic location, program size, on-call schedule, research opportunities, and the structure of the training program itself.³⁸

The structure and purposes of the medical residency match are best understood in a historical context. It was instituted at a point in time when there were almost twice as many internship³⁹ positions as there were graduates of U.S. medical schools to fill them.⁴⁰ This surplus of positions and the resulting competition among residency programs for students proved increasingly problematic. Directors of programs at prestigious institutions received an excess of applications and therefore could initially afford to make offers late in the students' senior year of medical school without compromising student acceptance rates.⁴¹ Conversely, directors of less prestigious residency programs received fewer applications and thus sought to fill their positions as early as possible, to the point of pressuring students in their third or even second year of medical school to commit to

36. *Id.* at 11.

37. *See supra* text accompanying notes 8-10.

38. *See, e.g.*, Wilton H. Bunch et al., *The Candidate's View of the Orthopaedic Residency Selection Process*, 68 J. BONE JOINT SURGERY 1292, 1295 tbl.II (1986) (listing factors reported by respondents as important in choosing an orthopedic residency program).

39. The first year of graduate medical training was historically referred to as an "internship," with subsequent years of training referred to as a "residency." Dennis K. Wentz & Charles V. Ford, *A Brief History of the Internship*, 252 JAMA 3390, 3390 (1984). In 1970, the American Medical Association House of Delegates voted to incorporate the accreditation of the first year of graduate medical education (the "internship") into the process for reviewing residency programs. *Id.* at 3393. The intent was to integrate the first year of graduate medical education into residency training in order to create a more unified program. *Id.* However, this attempt at integration has not been completely successful. As a result, the first year of graduate medical education is now variously referred to as an internship, the first year of residency, and postgraduate year one (PGY-1). *See id.* at 3390; Anne E. Crowley, *Residency Positions: Are There Enough?*, 252 JAMA 3386, 3386 (1984). For purposes of clarity, I will use the term "residency" to include the first year of graduate medical training.

40. John S. Graettinger & Elliott Peranson, *The Matching Program*, 304 NEW ENG. J. MED. 1163, 1163 (1981).

41. *Id.*

residency programs.⁴² This had a destabilizing effect on even the prestigious programs' hiring practices because, by waiting, these programs risked losing qualified candidates to earlier offers from other residency programs.⁴³ Less competitive programs experienced difficulties as well in that they risked filling positions early, only to turn away more qualified candidates who applied later.⁴⁴ Applicants were also forced to make difficult choices. Medical students with excellent credentials who held out for better offers risked waiting too long, while less qualified students who accepted earlier offers risked having to turn down subsequent, more desirable offers.⁴⁵

The first attempt to reform the medical residency market occurred in 1945 through the use of a "gentleman's agreement,"⁴⁶ whereby the residency program directors agreed to abide by a uniform appointment date.⁴⁷ From 1945 to 1949, problems in resident selection persisted in that students were asked to make increasingly rapid decisions to accept or decline offers.⁴⁸ In 1949, the Association of American Medical Colleges adopted a more comprehensive "Cooperative Plan for the Appointment of Interns."⁴⁹ Under this plan, residency programs sent offers by telegram that were delivered to applicants at 3:00 p.m. Eastern Standard Time on a specified date in February 1951.⁵⁰ Applicants who accepted offers were then required to withdraw their other applications by sending telegrams to those programs.⁵¹ The plan did not work as efficiently as anticipated. Applicants who did not receive initial offers from their first choices delayed responding to the offers they did receive⁵² and, in some cases, even withdrew acceptances upon receiving more desirable offers.⁵³ Programs also delayed making additional offers while they waited to hear from their

42. See John S. Graettinger, *The Residency Matching Program*, 104 ARCHIVES OTOLARYNGOLOGY 615, 615 (1978) (describing the fierce competition among residency programs in the 1940s).

43. Graettinger & Peranson, *supra* note 40, at 1163.

44. *Id.*

45. *Id.*

46. I am tempted to modify the sexist label for the agreement, but given the history of the medical profession little doubt exists that the term "gentleman's agreement" accurately reflects the medical field's gender make-up in the 1940s. For two fascinating historical accounts of women's struggle to gain entry into and acceptance within the medical profession, see THOMAS NEVILLE BONNER, *TO THE ENDS OF THE EARTH: WOMEN'S SEARCH FOR EDUCATION IN MEDICINE* (1992) and REGINA MARKELL MORANTZ-SANCHEZ, *SYMPATHY AND SCIENCE: WOMEN PHYSICIANS IN AMERICAN MEDICINE* (1985).

47. Graettinger, *supra* note 42, at 615.

48. Roth, *supra* note 30, at 1524. By 1949, a grace period of 12 hours in which to accept offers had been rejected as too long. *Id.*

49. Graettinger & Peranson, *supra* note 40, at 1163.

50. *Id.*

51. *Id.*

52. Graettinger, *supra* note 42, at 616.

53. Graettinger & Peranson, *supra* note 40, at 1163.

first choices.⁵⁴

As a result of the unsatisfactory experience with the Cooperative Plan, the National Interassociation Committee on Internships assembled in 1950 to develop a mechanical matching program.⁵⁵ By the 1951-1952 academic year, the Committee adopted a matching plan⁵⁶ and successfully implemented it.⁵⁷ The success of the 1952 match led to the establishment of the National Intern Matching Program (NIMP). This program expanded to become the National Intern and Resident Matching Program (NIRMP) in 1968, and became the National Resident Matching Program (NRMP) in 1978. The NRMP is the program that exists today.⁵⁸

C. THE ALGORITHM

As this brief review of the history of the NRMP reveals, the match was developed to address several problems in resident selection. First, the match was designed to allow students to make their decisions as late as possible in their final year of medical school and to give programs sufficient time to plan and fill positions.⁵⁹ Second, by requiring that all appointments be made at the same time, the match was intended to increase efficiency, eliminate the confusion and uncertainty of the unregulated process, and reduce the unfair pressure placed on students to make early commitments or to rescind acceptances.⁶⁰ Finally, the match was designed to benefit applicants and programs by allocating applicants to programs on the basis of participant preferences.⁶¹ These goals were and continue today to be achieved through the use of an "admissions algorithm."⁶²

54. *Id.*

55. *Id.*

56. See F.J. Mullin & John M. Stalnaker, *The Matching Plan for Internship Appointment*, 26 J. MED. EDUC. 341, 341 (1951).

57. See F.J. Mullin & John M. Stalnaker, *The Matching Plan for Internship Placement*, 27 J. MED. EDUC. 193, 193 (1952).

58. Graettinger & Peranson, *supra* note 40, at 1163. Between 1968 and 1978, the primary care specialties such as internal medicine, pediatrics, family medicine, and obstetrics and gynecology integrated the internship year into the residency. Allen S. Lichter, *The Residency Match in Radiation Oncology*, 22 INT'L J. RADIATION ONCOLOGY BIOLOGY PHYSICS 1147, 1148 (1992). In 1978, recognizing that residencies were being offered to senior medical students in almost all specialties, the NIRMP changed its name to the NRMP. *Id.* For a discussion of the expansion of the original NIMP to include specialty residency matching, see *infra* Part III A.

59. Graettinger, *supra* note 42, at 616.

60. Mullin & Stalnaker, *supra* note 56, at 341; see also NRMP HANDBOOK, *supra* note 30, at 1 (stating that the purpose of the match is to provide a uniform time during which both applicants and programs can make choices without pressure).

61. Mullin & Stalnaker, *supra* note 56, at 341.

62. See Graettinger & Peranson, *supra* note 40, at 1163. The match was labeled an "admissions algorithm" because it incorporated all the steps of the traditional admissions process as they would have occurred except that it added uniformity in the timing of the steps. *Id.*

Except for some relatively minor changes,⁶³ the matching algorithm used today is the same as that used in 1952 in the first medical match.⁶⁴ Participants do not extend and accept offers in the traditional rolling admissions process; instead, both applicants and programs submit confidential rank-order lists.⁶⁵ Applicants rank residency programs in order of preference and are advised to rank only those programs in which they would be willing to enroll if matched.⁶⁶ Programs do the same with applicants.⁶⁷ Then, through the computerized algorithm, residency programs offer positions "down" their rank-order lists until they fill their positions or have no more applicants, and applicants accept positions "up" their rank-order lists until they are matched to the programs highest on their preference lists.⁶⁸ In sum, the computer program matches each applicant to the training program ranked highest on the applicant's rank-order list that also offered the applicant a position.⁶⁹

Several aspects of this algorithm are worth noting. First, the algorithm replicates the traditional selection process in which programs first made offers to applicants they preferred and then continued to make offers in order of decreasing preference until all positions were filled.⁷⁰ Second, it

63. The primary change has been the addition of a "couple's match," whereby two individuals who wish to be in the same program, institution, or geographical region can submit a rank-order list of paired programs. See NRMP HANDBOOK, *supra* note 30, at 8. The couple will match to the most preferred pair of programs on their rank-order list where each partner has been offered a position. *Id.*; see also Graettinger & Peranson, *supra* note 40, at 1164 (describing the two-stage process for running a couple's match).

The NRMP has also added procedures for those individuals who wish to match to a shared residency position. See NRMP HANDBOOK, *supra* note 30, at 9. Shared residency positions are the graduate medical training equivalent of job sharing.

64. Graettinger & Peranson, *supra* note 40, at 1164. The NRMP match was done mechanically for many years but was fully computerized in 1974. *Id.*

65. NRMP HANDBOOK, *supra* note 30, at 1.

66. *Id.* at 6.

67. *Id.* at 1.

68. *Id.* at app.1. The algorithm works in such a way that each program first extends an offer to each of its first choice applicants within the program's quota (i.e., the number of positions it has to fill). Graettinger & Peranson, *supra* note 40, at 1164. All applicants are tentatively matched with offers from their highest ranked program, and their names are removed from the rank-order lists of programs that the applicants ranked lower on their lists. *Id.* The roster of positions for each program is then examined to determine how many positions remain open. *Id.* Because some of the applicants to whom programs extended initial offers will have been matched to more preferred programs, additional offers will be extended from the programs' rank-order lists. *Id.* Applicants are removed from a program's roster of filled positions if an offer from a program ranked more highly by an applicant becomes available. NRMP HANDBOOK, *supra* note 30, at app.1. These newly opened positions are then tentatively filled by applicants who have ranked the program and have not yet matched with a more preferred program. *Id.* The programs' rank-order lists are searched repeatedly until the match is completed. *Id.*

69. NRMP HANDBOOK, *supra* note 30, at app.1.

70. *Id.* at 1. Some commentators have argued that the algorithm favors programs over students whenever preferences conflict. See, e.g., Kevin J. Williams et al., *An Analysis of the Residency Match*, 304 NEW ENG. J. MED. 1165, 1165 (1981). They propose that the algorithm

allows participants on both sides of the match to rank according to actual preferences.⁷¹ Participants incur no risks by placing prestigious or very competitive programs high on their rank-order lists because doing so does not reduce their chances of obtaining positions with less desirable but more likely programs.⁷² Third, the algorithm produces "stable" matches⁷³ in which participant preferences are maximized.⁷⁴ Finally, by providing a process in which offers and acceptances are made simultaneously, the algorithm eliminates the time lag and uncertainty inherent in a rolling admissions process.⁷⁵

D. RULES AND POLICIES OF THE MATCH

In order to achieve its goals, the NRMP has adopted a set of rules and policies. Programs and applicants must agree to be bound by these policies before they can participate in the medical residency match.⁷⁶ The most important NRMP rule is the following:

There is *one cardinal rule* that both programs and applicants must observe: *neither must ask the other to make a commitment before the Match*. It is perfectly acceptable for programs to express a high level of interest in

be restructured to move "down" the applicants' lists and "up" the programs' lists, thereby putting applicants in the positions of offerors and programs in the positions of offerees. *Id.* at 1165-66. This mirror-image algorithm would change the results of the match in a small subset of cases. *Id.* Other commentators have rejected this proposal on the grounds that the present algorithm allows the NRMP to replicate the results that would be achieved with the traditional admissions process (i.e., without the match). See John S. Graettinger & Elliott Peranson, *National Resident Matching Program [Letter]*, 305 *NEW ENG. J. MED.* 526, 526 (1981). They argue that the NRMP was always intended to be a passive facilitator of the admissions process and not an active intervenor that would change the results. *Id.*

71. Graettinger & Peranson, *supra* note 40, at 1164.

72. NRMP HANDBOOK, *supra* note 30, at 6. Under the matching algorithm, no applicant can be bypassed by another applicant who is ranked lower on a particular program's rank-order list; conversely, programs will receive acceptances from the applicants ranked highest on their lists as long as the applicants do not receive offers from programs they prefer. Graettinger & Peranson, *supra* note 40, at 1164. Thus, applicants can rank residency programs purely on the basis of desirability without having to worry about their odds for acceptance at each program. Williams et al., *supra* note 70, at 1166.

73. A match is "unstable" if a student is matched with an unacceptable program, a program is matched with an unacceptable student, or a student and program who are not matched with one another would both prefer to be matched together. Roth, *supra* note 30, at 1525. An unstable match gives the participants an incentive to seek a different match. *Id.* A match that does not have the above characteristics is labeled "stable." *Id.* The theory of "stable" pairs or matches was first developed in 1962. See A. Gale & L.S. Shapley, *College Admissions and the Stability of Marriage*, 69 *AM. MATHEMATICAL MONTHLY* 9 (1962).

74. See Graettinger & Peranson, *supra* note 40, at 1164.

75. See Mullin & Stalaker, *supra* note 56, at 341-42.

76. NRMP HANDBOOK, *supra* note 30, at 3. Medical students are required to sign an NRMP Agreement form and pay a \$25 fee. *Id.* Teaching hospitals that enter their residency programs in the NRMP must agree to fill all first-year residency positions through the NRMP (i.e., hospitals cannot fill some positions through the match and others outside the match). *Id.* at 12. For a complete statement of NRMP policies, see *id.* at 12-15.

applicants to recruit them into their program. It is perfectly acceptable for applicants to say that they would prefer to enter one program over others. However, neither programs nor applicants should consider such expressions to be commitments. *Candor and honesty should be observed by both programs and applicants.*⁷⁷

Further, the NRMP Handbook states that “[b]oth applicants and programs may try to influence decisions in their favor, but any verbal or written contracts prior to the submission of Rank Order Lists should not be expected or made.”⁷⁸ Under the NRMP rules, the listing of a program or applicant on the submitted rank-order list is a commitment to offer or to accept an appointment if a match results,⁷⁹ and a match constitutes a firm commitment by both parties.⁸⁰ Either party’s failure to honor this commitment is a breach of the NRMP agreement, and the NRMP is authorized to inform “those who need to know that the breach occurred.”⁸¹ Controversies arising out of the match or claims of breach of the NRMP agreement must be settled by arbitration, unless the parties mutually agree otherwise.⁸²

III. THE PROPOSED JUDICIAL CLERKSHIP MATCH—AN ANALYSIS

This background on the history, purposes, and mechanics of the medical residency match facilitates a more refined and informed analysis of the proposal to institute such a match in the selection of judicial clerks. Advocates of a judicial clerkship match point first to the similarity between the conditions that existed in 1951-1952 when the medical residency match was implemented and the conditions that now exist for the selection of judicial clerks.⁸³ At first glance, Judge Wald’s description of the race to select clerks⁸⁴ is strikingly similar to the pre-1952 scramble to appoint first-year residents.⁸⁵ But there is one significant difference. The competitive environment that caused such problems in resident selection was the direct result of the surplus of residency positions in relation to the number of applicants.⁸⁶ The competitive environment and resulting problems with

77. *Id.* at 1.

78. *Id.* at 12.

79. *Id.* at 14.

80. *Id.* at 12.

81. *Id.* at 14.

82. *Id.* at 15. Arbitration is to be conducted through the American Arbitration Association; any arbitration award is final and will support entry of a judgment in a court having jurisdiction, as long as the arbitrator acted in good faith. *Id.*

83. See Norris, *supra* note 4, at 791.

84. See *supra* text accompanying notes 13-17.

85. See *supra* Part II B.

86. See *supra* text accompanying notes 39-45. Since 1980, the numbers of applicants and first-year residency positions have become more equal, so that now there is only a slight excess of residency positions over applicants. Wentz & Ford, *supra* note 39, at 3391.

judicial clerk selection, however, cannot be attributed to a surplus of clerkship positions over applicants. There is simply no shortage of qualified judicial clerkship applicants—in fact the opposite is true.⁸⁷ Judge Wald notes that it is not unusual for a judge in the circuit courts of appeal to receive between 300 and 400 applications for three clerk positions.⁸⁸

Yet the market, at least as described by Judge Wald, behaves as if the demand for judicial clerks exceeds the supply.⁸⁹ Why? The answer lies in the perceived quality of the applicants. Judge Wald explains that while most of the 300 to 400 applications any particular judge receives are from “top-drawer” candidates,⁹⁰ only a few dozen of those candidates merit “superstar” status.⁹¹ Thus, for the subset of federal court judges for whom only a superstar clerk will do, a perceived shortage of “qualified” applicants exists. It is the resulting competition among these federal court judges to snag one or more of the rare, highly prized law clerks that currently drives the judicial selection process and generates the calls for reform.⁹²

One would ordinarily expect the market to respond to a perceived shortage of supply by increasing the number of highly qualified clerks. The ability of the legal education market to respond in this manner is obviously limited. Unless prestigious law schools increase their class sizes and law review memberships significantly—an unlikely scenario in this age of law school belt-tightening and downsizing—so that there are more applicants with outstanding credentials, the supply of superstars will not increase significantly. And even if the legal education system were able to produce more of these highly qualified individuals, one is left with the sense that federal court judges would simply invent additional defining characteristics to separate the few superstars from the remaining stars.⁹³ Thus, the

87. See Norris, *supra* note 4, at 783 n.109 (noting that while there are few “name-brand students,” the pool of applicants is deep); Wald, *supra* note 1, at 155 (stating that “[i]n their less harried moments, lower court judges realize that there is plenty of talent out there”).

88. See Wald, *supra* note 1, at 152.

89. See text accompanying notes 13-17.

90. Wald, *supra* note 1, at 152.

91. *Id.* at 154-55. According to Judge Kozinski, judges are looking for clerkship applicants “who are not merely competent, but brilliant; not merely articulate, but lightning fast and prolific; not merely thoughtful, but persuasive and tactful; not merely dedicated, but driven; not merely cooperative, but single-mindedly committed to [the judge].” Kozinski, *supra* note 2, at 1708.

92. Kozinski, *supra* note 2, at 1708; Wald, *supra* note 1, at 155. Judges value and actively seek out highly credentialed clerks for a number of different reasons. As the workload for federal judges has increased, the importance of having superior clerks has correspondingly increased. *Id.* at 153-54. A judge’s reputation among her judicial colleagues is also enhanced by the quality and credentials of her law clerks. See *id.* at 154; Norris, *supra* note 4, at 775.

93. That this would likely occur is borne out by the current judicial clerk selection process, in which judges make distinctions between even highly qualified applicants from prestigious law schools. Those judges seeking the best and the brightest are not content with mere law review membership but rather prefer to hire editors-in-chief or other law review officers. See

question remains whether a judicial clerkship match can cure the ills of the unreformed market.

A. IMPLEMENTATION OF A JUDICIAL CLERKSHIP MATCH

The first and perhaps most important question is whether a judicial clerkship match can be successfully implemented given the evident lack of consensus on the need for reform.⁹⁴ Much can be learned on this question from the experience of the medical residency match. The debate in the legal literature until now has at least implied that the medical match sprang into existence full-blown and has functioned without problems ever since.⁹⁵ In fact, the residency matching program that exists today is the product of much trial and error and many failed attempts.

The National Intern Matching Program (NIMP) that had its formal beginnings in 1953 was more limited than the present National Resident Matching Program (NRMP). The NIMP was intended only to allocate medical school graduates to one-year internships.⁹⁶ The success of this original matching program for interns was attributed to three factors: (1) the internship year was a standardized and clearly defined experience; (2) the rate of student participation in the match was greater than ninety-five percent; and (3) almost all the hospitals offering internship programs participated.⁹⁷

The allocation of applicants to programs became more complex as graduate medical education underwent significant changes. From the turn of the century until the 1940s, the internship was the final year of clinical training for most physicians.⁹⁸ However, in the 1940s and particularly following World War II, residency training became an important form of education for physicians who desired additional hospital expertise beyond the one-year internship.⁹⁹ Because the NIMP did not provide for matching

Kozinski, *supra* note 2, at 1710 (stating that election to a significant law review board position is proof of a student's commitment and perseverance); Norris, *supra* note 4, at 778 (asserting that law review officers are more likely to obtain the best clerkships). Further, according to Norris, a hierarchy exists among the various law journals published by a given institution. See Norris, *supra* note 4, at 778. He asserts that judges value board and even rank-and-file members of the school's main journal more highly than editors-in-chief and board members of a school's lesser-known journals. *Id.*

94. See Kozinski, *supra* note 2, at 1707 (asserting that there is nothing wrong with the current law clerk selection process).

95. See Norris, *supra* note 4, at 791 (stating that the matching program has been used for 40 years to match medical residents to hospital residency positions); Wald, *supra* note 1, at 160 (same).

96. Mullin & Stalnaker, *supra* note 56, at 341.

97. See Frederick D. Malkinson, *A National Resident Matching Program for Dermatology*, 117 ARCHIVES DERMATOLOGY 457, 458 (1981); see also Graettinger & Peranson, *supra* note 40, at 1163 (stating that over 98% of hospitals and 97% of students participated in the 1951-1952 match).

98. Graettinger, *supra* note 42, at 615.

99. Wentz & Ford, *supra* note 39, at 3391. The number of residencies doubled between

into the various specialty and subspecialty residency programs, physicians who chose to further their graduate training were required to participate in selection processes that varied from residency program to residency program and from specialty to specialty.¹⁰⁰ Residency applicants were soon confronted by many of the same problems that had confronted internship applicants prior to the implementation of the internship match.¹⁰¹ Not surprisingly, participants began to call for reform—specifically, for the development of residency match programs.¹⁰²

Subsequent attempts to develop matching programs for various medical specialties were markedly less successful than the NIMP. For example, in 1966 the National Psychiatric Resident Matching Plan was established and administered through the NIMP.¹⁰³ Unfortunately, less than half the psychiatry residency programs agreed to participate.¹⁰⁴ The nonparticipating programs aggressively recruited applicants and succeeded in convincing a number of applicants to accept positions prior to and outside the residency match.¹⁰⁵ The psychiatry matching program was abandoned after two years.¹⁰⁶

In 1968, a residency matching program for pediatrics was established.¹⁰⁷ It too failed.¹⁰⁸ In 1969 a matching program for orthopedic surgery was attempted.¹⁰⁹ Again, many programs refused to commit themselves to the match. These nonparticipating programs granted appointments to applicants who had initially agreed to participate in the match but who were willing in the end to trade their chances in the match for the security of a certain, early appointment.¹¹⁰ The orthopedics match was subsequently

1941 and 1947. *Id.*

100. Graettinger, *supra* note 42, at 616-18.

101. *See id.*; *see also* Carl H. Slater & Rowland P. Vernon, *Resident-Matching Programs*, 207 JAMA 920, 921 (1969) (describing the competitive environment that resulted in increasingly early commitments by applicants and residency program directors).

102. *See* Slater & Vernon, *supra* note 101, at 920-21 (calling for additional residency matching programs).

103. *See* Jose Barchilon & Ward Darley, *National Psychiatric Residency Matching Program*, 41 J. MED. EDUC. 884 (1966).

104. Malkinson, *supra* note 97, at 458. The psychiatry match was preceded in 1959 by a "gentleman's agreement" for a uniform appointment date for psychiatric residencies, *see id.*, that was very similar to the deadlines for clerkship offers that have been tried in the judicial clerk selection process. *See* Norris, *supra* note 4, at 785-88; Wald, *supra* note 1, at 156-60. The psychiatry programs' "gentleman's agreement" was as unsuccessful as the judiciary's, with "too many agreements—and too few gentlemen!" Malkinson, *supra* note 97, at 458.

105. Malkinson, *supra* note 97, at 458.

106. *Id.*

107. *Id.*

108. *Id.*

109. Sherman S. Coleman & Ward Darley, *Matching Plan for Orthopaedic Surgery*, 75 CLINICAL ORTHOPAEDICS & RELATED RES. 117, 122 (1971).

110. Coleman & Darley, *supra* note 109, at 122-24; *see also* Malkinson, *supra* note 97, at 458 (explaining that the orthopedics match was started in a year in which most of the orthopedics residency positions had already been filled by previous commitments between

abandoned in 1970, largely because of the problems caused by nonparticipating programs.¹¹¹ In the late 1960s, a short-lived residency matching program in radiology also failed because of nonparticipation and covert noncompliance.¹¹²

Thus by 1970, four plans for residency matching adopted by four different specialties had failed, and a fifth program in dermatology lacked adequate support for adoption.¹¹³ In response to these failed attempts, the National Intern and Resident Matching Program (NIRMP) in 1970 established a recommended minimum participation figure of eighty percent of first-year residency positions for any specialty attempting to organize a residency matching program.¹¹⁴ Today, every medical specialty that offers positions to graduating medical students participates in the NRMP or some other centralized matching system.¹¹⁵ But this level of success occurred only after leaders within each specialty took to heart the NIRMP's recommendation and worked hard to develop a consensus in support of the match before implementing it.¹¹⁶

program directors and applicants); John Tucker et al., *Resolved: All Otolaryngology Programs Should Participate in the Residency Matching Program*, 104 ARCHIVES OTOLARYNGOLOGY 627, 628-29 (1978) (describing the demise of the orthopedics match).

111. See Coleman & Darley, *supra* note 109, at 124 (stating that the demise of the orthopedics match "highlighted the need for almost universal participation in order for the plan to succeed").

112. Ferris M. Hall, *Resident Matching Program in Radiology*, 137 AM. J. ROENTGENOLOGY 631, 631 (1981). Another contributing factor to the radiology matching program's demise related to its timing. The radiology residency match took place during the applicants' internship year. But many radiology programs had begun integrating internship with residency training, thus necessitating the selection of residents during medical school rather than during the internship year. *Id.*

113. Malkinson, *supra* note 97, at 458.

114. *Id.* In 1966, the report of the Citizens' Commission on Graduate Medical Education (the Millis Report) was released. Wentz & Ford, *supra* note 39, at 3393. The report was a response to concerns about the discontinuity in graduate medical education that resulted from the separation of internship and residency training. *Id.* The Millis Report recommended that the concept of the internship as an independent and freestanding entity be abandoned and that the first year of graduate medical training be integrated into residency training. *Id.* The Millis Report was influential in bringing about a major restructuring of graduate medical training, in which independent internships were replaced by residencies that included the first year of postgraduate training. *Id.* Reflecting the transition to a coordinated program of graduate medical education, the NIMP became the National Intern and Resident Matching Program in 1968 and then the National Resident Matching Program in 1978. See Graettinger & Peranson, *supra* note 40, at 1163; *supra* notes 55-58 and accompanying text.

Today, virtually all residency matching is done through this system or one like it. See Lichter, *supra* note 58, at 1149 tbl.1 (detailing various medical specialties, the organizations that conduct the matches, the number of programs in each specialty, and the percentage of programs in each specialty participating in a centralized match).

115. See Lichter, *supra* note 58, at 1149 & tbl.1.

116. See, e.g., Allen S. Lichter, *Response to Dr. Bastin [Letter]*, 24 INT'L J. RADIATION ONCOLOGY BIOLOGY PHYSICS 991, 991 (1992) (reporting that the Society of Chairmen of Academic Radiation Oncology Programs had voted overwhelmingly to institute a centralized match); Malkinson, *supra* note 97, at 457 (describing the long period of intensive study and

The lesson to be learned from the failed early attempts at specialty residency matching is that a matching system is bound to disintegrate unless virtually all programs with positions to offer participate.¹¹⁷ In the judicial clerkship context, if even a few judges from prestigious circuits held out, the system would likely unravel, just as it did in the early specialty residency matches. The scenario would look something like this: Judges who refused to participate in a clerkship match would continue the practice of extending early offers to desirable applicants. These applicants would then be faced with the difficult choice of accepting early offers or waiting and participating in the match, with the risk of matching at less desirable clerkship positions or not matching at all. The nonparticipating judges would benefit from this uncertainty by obtaining applicant commitments at the expense of judges who had agreed to participate in the matching system. The response by participating judges would then be either to break the rules and compete with nonparticipating judges by making early offers or to comply once but then refuse to participate in the matching process again. Either way, the system would fail.¹¹⁸

Further support for this prediction can be found by examining the results of prior attempts at reform of the judicial clerk selection process.¹¹⁹ Judge Wald points to earlier unsuccessful efforts to institute a fixed date for selecting clerks and argues that a matching system is needed.¹²⁰ But these failed attempts at establishing a fixed selection date are precise predictors of the fate of a judicial clerkship match unless widespread consensus is reached *before* the match is implemented. Otherwise, the very same things that caused the fixed selection date plan to destabilize and unravel—predeadline offers and acceptances and nonparticipating judges and circuits¹²¹—will defeat even the best planned match.

While acknowledging the problems that would result from nonparticipation and violation of the rules, Judge Wald still argues that “the match

debate prior to the approval of the matching plan in dermatology); Tucker et al., *supra* note 110, at 627-35 (transcript of a debate by the Society of University Otolaryngologists over whether the otolaryngology specialty should participate in a matching program).

As a result of these efforts, the percentage of programs participating in the match in most specialties is greater than 90%. See Lichter, *supra* note 58, at 1149 tbl.1.

117. An initial high participation rate by programs is the key to high participation by applicants. Frederick D. Malkinson, *A National Residency Matching Program for Dermatology*, 99 ARCHIVES DERMATOLOGY 350, 351 (1969). If virtually all programs participate, applicants have no opportunity to accept positions outside the match and are thus forced to participate in the match if they want to enter a residency program.

118. See Lichter, *supra* note 58, at 1149 (“If sufficient numbers of applicants are removed from the match process due to this unfair competition [from nonparticipating programs], the specialty match inevitably collapses.”).

119. For descriptions of prior reform efforts, see Norris, *supra* note 4, at 785-88, and Wald, *supra* note 1, at 155-60.

120. See Wald, *supra* note 1, at 155-63 (discussing a 1990 judicial effort to hold judges to a resolution that clerkship offers would not be made before May 1).

121. See *id.* at 157-60.

system deserves at least a fair trial as a last hedge against the anarchic open market."¹²² Her position seems paradoxical given her concern that the judiciary's image has been tarnished by the present undignified system.¹²³ Surely a match that is undone by nonparticipation and rampant violations of established rules would be an even greater blow to the judiciary's image. Based on the early experience of the medical residency matches, the federal judiciary simply cannot afford to institute a match on a trial basis without widespread consensus (which even the match's strongest proponents concede is unlikely)¹²⁴ or mandatory participation.¹²⁵

B. EFFICIENCY AND THE MATCH

Assuming for the moment that a match could be successfully implemented and sustained from year to year, questions still remain as to whether it would solve the many problems plaguing the present judicial clerk selection system.¹²⁶ Those who advocate a judicial clerkship match do so on several bases, but one of the recurring themes is that a matching system would bring much needed efficiency to the selection process.¹²⁷ This argument is worthy of more in-depth analysis than it has received in the debate to this point.

One of the strengths of the medical matching model is that it leads to pareto-optimal outcomes.¹²⁸ This is simply another way of saying that the algorithm maximizes the preferences of participants in such a way that "no judge and student who are not matched together would prefer to be matched together."¹²⁹ The resulting matches are stable¹³⁰ and theoretically will not be upset by any secondary market.¹³¹

122. *Id.* at 163.

123. *See id.* at 152.

124. *See* Norris, *supra* note 4, at 790 n.161 (stating that "[o]verwhelming support from judges is . . . unlikely"); Wald, *supra* note 1, at 163 (stating that "[i]t would not be surprising to encounter many 'wait-and-sees' the first time around, particularly among judges"); *see also* Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 *YALE L.J.* 207, 223 (1994) (noting that in a 1989 survey, only one-third of federal judges voted in favor of a matching system for selecting clerks).

125. Norris spends a good deal of time discussing the power of Congress to require the lower federal judiciary to institute a matching system for the selection of clerks. *See* Norris, *supra* note 4, at 788-91. He also argues that Congress should take such action. *Id.* at 791. Norris acknowledges, however, that Congress is unlikely to intervene, *id.* at 790, making his argument one of little practical import.

126. *See* discussion *supra* Part I.

127. *See, e.g.,* Norris, *supra* note 4, at 792-95; Oberdorfer & Levy, *supra* note 3, at 1103 n.25 (stating that "a matching system would dramatically lower the transaction costs confronted by both judges and students in the current system").

128. *See* Norris, *supra* note 4, at 793.

129. *Id.* at 793.

130. *See supra* note 73.

131. Norris, *supra* note 4, at 793. The secondary market in this context operates after the match to fill any remaining open positions with applicants who failed to match.

This efficiency argument is fine as far as it goes. But because pareto optimality is only a measure of outcome, it gives no information about the efficiency of the *process* used to reach the efficient outcome. As an illustration of this point, imagine a judicial clerkship match with a slight twist. Instead of allowing judges to choose whom they wish to interview from among many applicants, assume that judges are required to interview every individual who applies for a position with them. If the match is ultimately conducted using the admissions algorithm, the resulting match will still be pareto-optimal. But the process used to reach the pareto-optimal result in this example is highly inefficient—judges must expend scarce resources interviewing individuals whom they have no interest in hiring and whom they will not even include on their rank-order lists. Thus it is not enough to point to the pareto-optimal outcome of the match without accounting for the process-related transaction costs inevitably introduced by such a system.

1. Match-Related Transaction Costs

For example, the introduction of a matching system would lead to an increase in the number of interviews per clerk position to be filled.¹³² Presently, a judge could, in theory, interview some small number of individuals, make offers to the top applicants, and be done with the process within the course of a few weeks.¹³³ But under a matching system, a judge simply does not have that option. Because every clerkship position would remain open until the match date, a judge could never be certain that she had interviewed enough individuals to fill the open positions. In order to avoid having a position go unfilled in the match,¹³⁴ she would likely err on the side of interviewing additional applicants.¹³⁵

132. See Kozinski, *supra* note 2, at 1721 n.31 (asserting that a matching program would dramatically increase the number of interviews conducted); Norris, *supra* note 4, at 794 (stating that judges fearful of not getting their top matches will find it necessary to interview more applicants); cf. Lichter, *supra* note 58, at 1153 (explaining why a centralized residency match involves more effort on the part of programs in comparison to a rolling admissions process).

133. Norris suggests that few judges presently interview more than 10 applicants for their two or three positions. Norris, *supra* note 4, at 780.

134. As Judge Wald notes, a judge's reputation among her colleagues is determined in part by the quality of clerks she attracts. Wald, *supra* note 1, at 154. Failing to fill all positions in the match would undoubtedly do damage to a judge's reputation. Cf. Michael K. Magill, *Resident Recruiting*, 24 FAM. MED. 487, 500 (1992) (stating that failure to fill medical residency positions through the match can adversely affect a program's reputation). Further, if a position were to go unfilled through the match, a judge would be forced to resort to the secondary market of potential clerks who also failed to match; surely this is an undesirable outcome from the judge's perspective. See *id.* at 500 (describing the problems inherent in selecting residents from a pool of unmatched applicants).

135. The medical literature documents that interviewing and rank ordering too few choices involves a high risk of being unmatched, from both the programs' and applicants' perspectives. See Yufei Yuan & Amiram Gafni, *Investigating the Fairness of the National*

This increase in transaction costs has not gone unnoticed in the medical literature. One observer and proponent of the recently begun Radiation Oncology Matching Program acknowledges that a centralized match involves more effort than does the rolling admissions process.¹³⁶ Other residency programs have long noted the high program costs of recruiting first-year residents through the NRMP. For example, as far back as 1978, the University of Virginia Medical Center performed a study to measure the direct and indirect costs of obtaining each first-year resident.¹³⁷ The authors of the study were sufficiently concerned about the high cost of recruiting residents within the matching system that they recommended limiting the number of programs with which an applicant could interview.¹³⁸

The federal judiciary has had a similarly unsatisfactory experience with a system that resulted in more interviews per position. In 1990, when the judiciary attempted to introduce a fixed selection date for appointing clerks, judges overwhelmingly complained that they were forced to spend valuable judicial time interviewing more applicants than they wanted because they could not be sure that their first choices would accept on May 1.¹³⁹ It is not at all clear that judges would find this drain on judicial resources any more satisfactory merely because it occurred within the context of a match.

It is important to recognize that a matching system does not increase these sorts of transaction costs for the judiciary alone; applicants are affected as well. If judges conduct more interviews, then applicants as a group will spend more time and money being interviewed.¹⁴⁰ Certainly the result would be greater disruption of the academic year and the applicants'

Resident Matching Program, 65 ACAD. MED. 247, 252 (1990). Norris asserts that as judges became more familiar with the system, they would "develop a feel for the number of interviews necessary to obtain the best group of clerks." Norris, *supra* note 4, at 794; see also Oberdorfer & Levy, *supra* note 3, at 1102 n.22 (arguing that the increase in numbers of interviews with a match would be both temporary and slight). Although this might lead to some decrease in the number of interviews over time, it is still likely that the average number of interviews per clerk position under a matching system would be greater than the present number.

136. Lichter, *supra* note 58, at 1153.

137. Richard W. Kesler et al., *The High Cost of Recruiting Residents*, 73 S. MED. J. 1521, 1521 (1980). The authors of the study calculated that the university expended \$1,469 for each resident obtained through the matching system. *Id.* at 1522. This number was calculated by totaling the costs of materials, salaries, and benefits for recruitment-related secretarial services, and faculty and house staff time spent administering the selection process and interviewing candidates. *Id.*

138. *Id.* at 1523. Of course, today the expense of recruiting each first-year resident would be significantly higher than \$1,469.

139. See Wald, *supra* note 1, at 159.

140. Judge Oberdorfer and Mr. Levy dispute this, claiming that the match would actually allow "judges to see more students and students to see more judges, all at greater convenience and lesser expense." See Oberdorfer & Levy, *supra* note 3, at 1102. For a critique of their position, see *infra* text accompanying notes 176-92.

legal education.¹⁴¹ One might initially think that such a trade-off is reasonable from an applicant's perspective: additional interviews, while costly, should lead to greater chances of obtaining a clerkship. But because applicants are differently situated with respect to these costs and benefits, this conclusion may not be valid for many individuals.

Consider first the highly sought-after individuals whom judges such as Wald, Kozinski, and Oberdorfer are so eager to employ. In the current system, these applicants as a group are most likely to be the recipients of the early "short-fuse" offers, which the students must accept or reject immediately.¹⁴² These offers, when combined with the unwritten but oft-repeated "rule" that applicants should never reject an offer from a federal judge,¹⁴³ give rise to complaints that judges are unfairly pressuring and coercing law students.¹⁴⁴ For this group of applicants, then, the chance to gather more information, participate in additional interviews, and rank order judges might well be worth any additional expenditures of time, money, and emotional energy.¹⁴⁵ The benefits outweigh the costs for these individuals only because the match opens up options that were always there but were difficult to realize in a rolling admissions process. The most highly qualified applicants will obtain clerkship positions with or without a match. The difference is simply that, by maximizing participant preferences, a matching system may produce different and more desirable judge-clerk pairings than would have occurred otherwise.

Of course, this group of highly qualified applicants comprises a very small percentage of the total applicant pool. How would a match affect the vast majority of applicants? Trenton Norris is perhaps a good example of a qualified applicant¹⁴⁶ who did not obtain a judicial clerkship.¹⁴⁷ It is clear from Norris's article that he is convinced that his failure to obtain a clerkship position was largely due to an inefficient and unfair selection process. In fact, it is possible that Norris's chances would not have been any better—and might even have been worse—had he entered a judicial clerkship match.

141. *But see* Oberdorfer & Levy, *supra* note 3, at 1102 (stating that a matching system would allow students to minimize the amount of class time missed).

142. *See* Norris, *supra* note 4, at 781 & n.98; Wald, *supra* note 1, at 156. These offers are variously referred to as "short-fuse," "exploding," and "vanishing" offers. In each case, the offer is open for a very short period of time and may be revoked if the applicant does not immediately respond. *See* Kozinski, *supra* note 2, at 1716 (describing a typical scenario with this type of offer).

143. *See* Norris, *supra* note 4, at 781.

144. *See, e.g., id.* at 784; Oberdorfer & Levy, *supra* note 3, at 1098; Wald, *supra* note 1, at 156.

145. *But see infra* notes 166-70 and accompanying text (discussing the costs to applicants of later selection).

146. Norris was a Harvard law student and a law review member at the time he sought a judicial clerkship. *See* Norris, *supra* note 4, at 779 n.88.

147. *See id.* at 765 n.†.

Although a match would lead to more interviews per open position,¹⁴⁸ the increase in the overall numbers of interviews would not be evenly distributed across the applicant pool. Judge Wald, for example, does not advocate the match because she wishes to open up the interviewing process to benefit all applicants. Rather, she champions a match, at least in part, because she wants the opportunity to interview and hire the superstars that are currently taken out of the competition by early offers.¹⁴⁹ It is likely then that Judge Wald and other judges would conduct more interviews, but it is not clear that Trenton Norris or others similarly situated would benefit. Simply put, the “rich would get richer.”¹⁵⁰ Further, in the present system applicants may actually benefit from the acceptance of early offers, which removes the most highly qualified applicants from the market and opens up the remaining interview slots to others. Under a matching system, those interview slots will go to the superstars, leaving the remaining applicants worse off: any benefits they currently receive from having the most sought-after applicants removed from the competition early would disappear.

Even if all applicants were to receive more interview requests, there is no assurance that the outcome of the process, when measured by the identity of who secures clerkship positions and who does not, would be any different. Many of the problems with clerk selection cited by Mr. Norris—the “old-boy network,”¹⁵¹ the selection of clerks based on discriminatory factors,¹⁵² the “unfair influence” exerted by a judge’s current clerks,¹⁵³ and the preference for law review members and editors¹⁵⁴—would not change if a match were implemented. This is because the matching model is not intended to,¹⁵⁵ nor would it, change judges’ beliefs and attitudes concerning the qualities of a good clerk.¹⁵⁶ One might hope that exposing judges to more applicants would lead them to focus less on “paper” qualifications and more on the intangible qualities of the individuals they interview. But in the one instance in which this might have occurred—the 1990 attempt to

148. See *supra* notes 132-35 and accompanying text.

149. See Wald, *supra* note 1, at 154-55.

150. See Scott P. Stringer et al., *Otolaryngology Residency Selection Process: Medical Student Perspective*, 118 ARCHIVES OTOLARYNGOLOGY—HEAD NECK SURGERY 365, 366 (1992) (noting that those applicants who participate in an unreasonably high number of interviews take interview slots from potentially qualified applicants).

151. Norris, *supra* note 4, at 774.

152. *Id.* at 773-75.

153. *Id.* at 782. Given that Norris argues that more information about judges should be available to students, it is not clear why he regards the input by present clerks into the selection process as “unfair.”

154. *Id.* at 778-79.

155. See Mullin & Stalnaker, *supra* note 56, at 342 (stating that under the medical matching system, “complete freedom of applying any criteria for selection is fully preserved for both the hospitals and the students”).

156. *But cf.* Norris, *supra* note 4, at 798 (claiming that the matching system would “dilute the influence of connections to the proverbial old-boy network”).

institute a fixed selection date¹⁵⁷—judges did not praise the system for opening their eyes to the depth and diversity of the applicant pool. Rather, they complained about having to interview more candidates than they had previously.¹⁵⁸

Traditionally, the interview has been the entry into the judicial clerkship system—the proverbial foot in the door. With the invitation to interview comes hope and a greater emotional investment in the outcome. But because a match would result in more applicants being interviewed without a corresponding increase in the number of clerkship positions, individuals would have their expectations raised for naught. For many applicants, then, the benefits of additional interviews might be illusory, while the costs of those interviews—measured in terms of time, money, and emotional investment—would be very real.

A related cost of the medical matching model that has gone virtually unmentioned in the debate is the psychological cost of entering and participating in a matching system.¹⁵⁹ In addition to the usual stress of applying to and interviewing for positions, which is present in any case, the match adds a layer of formality to the process. In registering for the match, paying the fees, receiving the personal match codes, completing and sending in the rank-order lists, and waiting anxiously for match day, applicants make a significant psychological commitment to the process: a commitment that is greater than that involved in simply applying for clerkships and hoping for the best. For example, an applicant presently does not have to make decisions unless and until offers are received. With a match, however, applicants are required to make potentially binding prospective decisions about offers that may never materialize. This process of planning, prospective decisionmaking, and anticipation of the match date cannot help but raise applicants' expectations.

Of course, heightened applicant expectations are a potential problem with any matching model, including the medical resident match. But with the NRMP, those expectations are realistic because almost everyone who enters is successfully matched with a residency program.¹⁶⁰ In contrast, with a judicial clerkship match, the majority of applicants would likely fail

157. See *supra* notes 119-21 and accompanying text.

158. See Wald, *supra* note 1, at 159.

159. In the conclusion of his article, Norris mentions that "the proposed system may actually increase disappointment levels," but he does not explore this problem in any depth. See Norris, *supra* note 4, at 799.

160. See, e.g., Michelle Keyes-Welch et al., *Results of the National Resident Matching Program for 1992*, 67 ACAD. MED. 416, 416 (1992) (total of 12,957 U.S. seniors in medical school were matched into first-year residency positions, for a match rate of 92.4%); Robert H. Waldman & Richard R. Randlett, *Results of the National Resident Matching Program for 1993*, 68 ACAD. MED. 502, 502 (1993) (total of 13,020 U.S. seniors in medical school were matched into first-year residency positions, for a match rate of 92.4%).

This is not to say that there are not disappointed participants in the medical residency

to match into *any* clerkship position, let alone one that is high on their rank-order lists.¹⁶¹ And while failing to obtain a judicial clerkship would cause disappointment under any system, an applicant who opens a match letter to discover that he did not match at all suffers a form of rejection that is different in kind and degree from that experienced under the present system.¹⁶² The disappointment that is part of the rolling admissions process is arguably less acute because the process is more individualized and reasonably private, successes or failures do not all occur simultaneously, and individuals are able to adjust gradually their expectations downward as interviews or offers are slow to materialize. In contrast, in the context of a judicial clerkship match, the feelings of rejection would be more severe both because of raised expectations and because rejection would come in writing at a defined, universal moment in time when some individuals' expectations would be fulfilled and others' expectations would be dashed. It seems ironic that those who are so interested in protecting applicants in this process fail to consider the psychological costs involved in a matching system where the number of applicants far exceeds the number of positions.¹⁶³

One further cost of implementing a matching system is related to the timing of the selection process. Proponents of the match repeatedly proclaim the benefits of having the selection of clerks take place at a defined moment in a student's third year of law school, rather than early in the second year.¹⁶⁴ The later selection would give judges more information on which to base decisions and allow applicants more time to decide whether

match. Individuals who do not match or who match only with a second-choice specialty or a program low on their rank-order lists understandably experience disappointment.

161. It is unclear just how many law students apply each year for the approximately 2,000 federal court clerkships, but by all indications applicants greatly outnumber available positions. Because every student could apply for multiple positions, the number of applications likely exceeds the number of applicants. No one appears to doubt, however, that a significant surplus of qualified applicants exists in the market. For example, Norris refers to the pool of candidates as "deep," Norris, *supra* note 4, at 783 n.109, while Judge Wald notes that it is not unusual for circuit court judges to receive between 300 and 400 clerkship applications for three positions. Wald, *supra* note 1, at 152.

162. This problem is exacerbated because medical schools insist on turning the match announcement into a major production in which students are aware of their colleagues' successes and disappointments. See *supra* note 6.

163. The proponents of a clerkship match justify it by positing that most positions would be filled by applicants whom the judge ranked sixth or better; note that this is a justification from the *judiciary's* perspective. See Oberdorfer & Levy, *supra* note 3, at 1106-07 & n.47 (predicting that if each judge had three positions, between 82% and 94% of them would be filled by applicants whom the judge ranked sixth or higher). Interestingly, Oberdorfer and Levy do not predict the percentage of applicants who would match with judges the *applicants* ranked sixth or higher. Of course, this percentage would be nowhere near the 82%-94% range, particularly if those individuals who failed to match at all were included in the calculation.

164. See, e.g., Norris, *supra* note 4, at 794 (suggesting that the match could be held in the fall of students' third year); Oberdorfer & Levy, *supra* note 3, at 1099 (noting that judges

they want to clerk and with whom.¹⁶⁵ While the logic of these assertions cannot be denied, there are costs associated with later selection.

The principal problem with later selection is that it makes planning for the future more difficult.¹⁶⁶ In the medical residency context, this has caused applicants considerable anxiety and uncertainty. They have bound themselves through the match to a program, but they have little idea where they will be working and residing until a few months before they must move.¹⁶⁷ The lateness of the medical resident match has also prompted complaints that applicants' partners or spouses have been forced to compromise their own vocational or educational opportunities by awaiting the match day in March.¹⁶⁸

An additional problem would arise in the judicial clerkship context. Under the current system, law students learn during their second year whether they will be clerking for a judge upon graduation and can decide accordingly whether to participate in the law firm associate recruitment process. With a later selection date under a matching system, clerkship applicants might be forced to hedge their bets by going through the law firm interviewing process while waiting for the match results.¹⁶⁹ Further, those clerkship applicants who received offers from law firms prior to the match date presumably could not accept them because, by sending in their rank-order lists, they would have made binding commitments to clerk if matched. For at least some individuals, then, an early commitment from an acceptable judge may be preferable to the prolonged uncertainty and delay inherent in a later commitment made through a match.¹⁷⁰

2. Match-Related "Benefits"

The foregoing discussion illustrates just some of the ways in which

make offers without seeing third-semester grades or reports on summer employment); Wald, *supra* note 1, at 156, 160-61 (decrying the preemptive strikes by "early bird" judges and proposing the match as a solution).

165. Judges would have the benefit of two years' worth of grades, recommendations from summer employers, and recommendations from faculty who have known the applicants beyond their first year. Oberdorfer & Levy, *supra* note 3, at 1100. Students would know more about themselves and whether they are suited to be judicial clerks. *Id.*

166. See William E. Golden, *Match March*, 243 JAMA 1047, 1048 (1980).

167. *Id.*

168. See Miles K. Crowder, *Match March [Letter]*, 244 JAMA 1192, 1193 (1980); see also Miles K. Crowder & Howard B. Roback, *Psychiatric Residency Training Directors' Attitudes Toward the National Resident Matching Program*, 56 J. MED. EDUC. 194, 195 (1981) (noting that "March announcement makes it virtually impossible for applicant's spouse to coordinate a job or education endeavor").

169. See *infra* text accompanying notes 308-11 (explaining that a judicial clerkship match would not encompass all of the career options available to a graduating law student). Even those students not applying for judicial clerkships would be affected because the potential clerks would fill many of the valuable law firm interview slots.

170. Cf. Crowder, *supra* note 168, at 1193 (stating that many residency applicants favor an early commitment from a desired program).

proponents of the matching model have underestimated transaction costs. But proponents have also overestimated the benefits of the match. In making sweeping statements about the benefits to the judiciary of instituting a matching system, proponents fail to acknowledge that these benefits would not be uniformly distributed among federal appellate and district court judges. First, a benefits differential would exist among those judges who regularly participate in the competition for the most highly qualified applicants.¹⁷¹ Judge Wald and those judges similarly situated would gain access to applicants who would ordinarily be removed from the selection process very early, while Judge Kozinski and other judges who have benefited in the past from their willingness to make early offers would lose this advantage in a matching system—thus the debate between Judge Wald, who stands to benefit, and Judge Kozinski, who stands to lose from the institution of a judicial clerkship match.¹⁷² It follows that a judicial clerkship match, rather than providing equal benefits to all, would enhance the position of some federal judges *at the expense of other federal judges*.

Second, those judges who have been unable or who have chosen not to compete for the superstar applicants in the past are not likely to accrue significant benefits if a match is instituted.¹⁷³ The majority of district court judges and many of the appellate judges in the less prestigious circuits probably fill their clerkship positions with regional applicants.¹⁷⁴ A match will likely delay the selection process for these judges, without improving their chances of attracting or acquiring the most highly sought-after applicants. In short, the federal judiciary is made up of judges who are differently situated based on variables such as the prestige of the circuit, district, or judge; the geographical location; and the seniority of the judge.¹⁷⁵ In this context, it is nonsensical to discuss the effects of a match as if the judiciary were a monolithic entity. Yet that is precisely the position taken by match proponents.

171. Based on their articles, Judges Wald, Kozinski, and Oberdorfer would all fall within this category.

172. See generally Kozinski, *supra* note 2; Wald, *supra* note 1.

173. Judge Wald might respond that all judges would experience the benefits of a more favorable public perception of the judiciary—an advantage she implies would accompany a match system. See Wald, *supra* note 1, at 152, 163.

174. Judge Kozinski suggests that the federal clerkship market is national in scope. See Kozinski, *supra* note 2, at 1713. But one wonders whether his perspective is colored by the fact that the market for *his* clerkship positions is national in scope. The same can be said of Judges Wald and Oberdorfer, both of whom are highly respected judges with prestigious clerkship positions to offer in the marketplace. See *id.* at 1719 (stating that the D.C. Circuit “tend[s] to draw a disproportionate share of the nation’s top applicants”).

Applicants who wish to clerk may limit their applications by region for a number of reasons. Some are place-bound, others wish to clerk but not at the cost of leaving a particular geographic region, and others may believe that their chances of obtaining a position are highest in a region where their law school and its graduates are known and respected.

175. See *id.* (stating that not all clerkships are created equal).

On the applicant side of the equation, match proponents tend to justify any increase in judicial costs by arguing that the increase is outweighed by the benefits to students.¹⁷⁶ For example, Norris suggests that students would experience significant savings because they could trust that all positions would remain open until match day.¹⁷⁷ Students would thus enjoy "greater freedom to plan their interview schedules to take advantage of advance purchase air fares and combine multiple interviews and destinations into a single, cheaper trip."¹⁷⁸ Judge Oberdorfer and Mr. Levy also claim that the institution of a matching system would create a standardized interviewing period of three or four weeks, with the result that several cross-country trips could be reduced to a single one.¹⁷⁹ Norris asserts that this common interview period would increase the flow of information to students, who presently "have to work quite hard to find useful information."¹⁸⁰ If such benefits necessarily follow upon implementation of a matching system, then a review of the medical literature should support these assertions.

Although a review of the medical literature does reveal overall support for the residency match,¹⁸¹ it also reveals some significant dissatisfaction with particular aspects of the NRMP. The most common applicant complaints relate to the time, expense, and inconvenience involved in the prematch application and interviewing process.¹⁸² In one survey, over sixty percent of the medical students who responded indicated that travel

176. See Norris, *supra* note 4, at 794-95; see also Oberdorfer & Levy, *supra* note 3, at 1102 n.22 (asserting that the benefits to students of a matching system outweigh the costs to judges of interviewing more applicants).

177. See Norris, *supra* note 4, at 794.

178. *Id.*

179. See Oberdorfer & Levy, *supra* note 3, at 1102 & n.21. They seem to base this conclusion on the notion that judges and students would have nothing to gain by interviewing early or late within "the uniform interviewing period." *Id.*

180. Norris, *supra* note 4, at 785.

181. See, e.g., James E. Bennett, *Match March [Letter]*, 244 JAMA 1192, 1192 (1980) (arguing that even with all its imperfections, the NRMP is the fairest and most efficient method for appointing first-year residents); Crowley, *supra* note 39, at 3389 (asserting that the match remains the best available mechanism for bringing programs and candidates together); Ronald J. Faust et al., *Status of the Match in Anesthesiology: 1988*, 68 ANESTHESIA & ANALGESIA 226, 227 (1989) (noting that a survey of applicants to the Mayo Clinic's anesthesia program revealed widespread support for the NRMP); E. Wayne Martz, *Residency Matching [Letter]*, 58 J. MED. EDUC. 498, 499 (1983) (asserting that "[t]he NRMP is clearly the best and fairest way for everyone"); Yuan & Gafni, *supra* note 135, at 252-53 (concluding that, on the whole, the 1986 residency match operated fairly toward applicants).

182. For example, the Department of Otolaryngology at the University of Florida conducted a survey in 1992 of applicants who had applied to its program over the previous three-year period. See Stringer et al., *supra* note 150, at 365. The most frequent suggestion made by applicants was that programs should coordinate interview dates on a regional basis and be more flexible in arranging interviews. *Id.* at 366 (citing also a 1990 survey of match participants in which difficulties in arranging interviews and travel costs were among the most commonly cited criticisms).

distances and the costs involved in visiting residency programs were burdensome.¹⁸³ Similarly, in a questionnaire sent to orthopedic residency applicants, the individuals who had declined one or more interviews reported the following as their primary reasons for declining: travel costs, lack of scheduling flexibility on the part of programs, and travel time.¹⁸⁴ The authors of this study concluded that "the [matching] process is run for the convenience of the programs, with little attention being paid to the problems (temporal and financial) that are faced by the applicants."¹⁸⁵

A former participant in the match, Dr. Golden, describes the selection process as a "lengthy project requiring planning, social ingenuity, and, frequently, a fair amount of money."¹⁸⁶ In fact, his narrative of his futile attempts to coordinate his residency interview travel schedule under the medical match system is an almost perfect description of the present ills of the judicial interviewing process—ills that Norris and others claim the match will cure.¹⁸⁷ Dr. Golden comments on the pervasive lack of sensitivity on the part of the residency programs to applicant inconvenience and expense;¹⁸⁸ he concludes by stating that the residency selection system could only "appeal[] to those with money and the desire to be abused."¹⁸⁹

Another student participant described the medical residency match as a process that "occupies a considerable amount of the student's time, costs a

183. Mary P. Taggart et al., *Medical Student's Access to Information and Resources for the Residency Selection Process*, 63 J. MED. EDUC. 38, 41 (1988). Notwithstanding the time and expense involved, almost one-third of the medical students reported visiting more than 10 programs. *Id.* at 41-42.

184. See Bunch et al., *supra* note 38, at 1294-95. The authors note that the respondents were very concerned about the high level of interviewing activity, in addition to the associated expenditures of applicants' time and money. *Id.* at 1295.

185. *Id.* at 1296.

186. Golden, *supra* note 166, at 1047. When he wrote his commentary, Dr. Golden was a Morris Fishbein Fellow with the American Medical Association. *Id.* He based his comments on his contacts with students from across the country, who indicated to him that these problems with the match were extensive. Golden, *Match March [Letter]*, 244 JAMA 1192, 1193 (1980); see also Martz, *supra* note 181, at 499 (noting that the matching process "is expensive in time and money for students and programs alike").

187. Golden describes his own experience as follows:

For example, I applied to a few Chicago programs and knew that I had commitments in Chicago in early December. In an attempt to coordinate my travels for reasons of time and expense, I made telephone calls to two programs in October to advise them of my schedule. Both informed me that my application had yet to be reviewed. More than six weeks later, neither program would tell me if I could have an interview. After I arrived in Chicago, one program finally scheduled me five hours before my departing flight, and the other offered a session for the end of the month. Fortunately, a midwest snowstorm created cancellations, and I was spared the situation of deciding if I should spend the airfare to return later.

Golden, *supra* note 166, at 1048.

188. *Id.*

189. *Id.*

significant amount of money, and produces an extensive amount of emotional anguish for those involved."¹⁹⁰ His description of the experience is again strikingly similar to Mr. Norris's description of the present judicial clerk selection process:¹⁹¹

Each program, of course, wishes to fill these [residency positions] with the best, brightest, and most hardworking physicians available. On the other hand, we have the residency applicants who at the end of the third year of medical school begin their long journeys, crossing the country in search of a residency program The goal of this complicated procedure is to theoretically enable the applicants to match with the best training program that suits their needs. Whereas the training programs go through the same repetitive process selecting residents every year, the poor harried medical student is faced with a unique set of far-reaching decisions It is this stressful atmosphere, in which programs are competing among themselves for the best residents, and students are grappling for the top programs, which creates a miserable situation that I think is counterproductive to all parties concerned.¹⁹²

If the match does not eliminate the burdens of the application and interviewing process, does the match perhaps facilitate the flow of information between employers and applicants? Judge Oberdorfer and Mr. Levy argue that judges would take advantage of the later selection to obtain more information about applicants.¹⁹³ Norris assumes that the current applicant difficulties in acquiring useful information about judges and judicial clerkships would disappear under a matching system.¹⁹⁴ The medical literature does not support these propositions either.

Residency programs, for example, do not always take advantage of the access to additional applicant information made possible by the timing of the match. Despite the relatively late match date (spring of the fourth year of medical school), many residency programs have continued to set early deadlines for receipt of transcripts and letters of recommendation, so that the students' senior year performance cannot be included in the evaluations.¹⁹⁵ As a result, programs make their ranking decisions for the match based on incomplete information.¹⁹⁶

190. Lawrence Koplin, *The Matching Program From a First-Year Resident's Viewpoint*, 104 ARCHIVES OTOLARYNGOLOGY 622, 622 (1978).

191. See Norris, *supra* note 4, at 776-82.

192. Koplin, *supra* note 190, at 622.

193. See Oberdorfer & Levy, *supra* note 3, at 1099-1100.

194. See Norris, *supra* note 4, at 795.

195. See August G. Swanson, *The 'Preresidency Syndrome': An Incipient Epidemic of Educational Disruption*, 60 J. MED. EDUC. 201, 201 (1985). Because the third and fourth years of medical school are primarily clinical in nature, evaluations from these latter years measure the students' clinical, as opposed to basic science, skills. For a fuller description of medical school education, see *infra* text accompanying notes 293-95.

196. *Id.*; see also Hiram C. Polk, *An Additional Comment on Revisions in Surgical Matching*

Nor do applicants to medical residency programs appear to have satisfactory access to information on the various programs. In a survey of applicants to orthopedic residency programs, students were asked about the adequacy of the informational resources available to assist them in deciding where to submit applications.¹⁹⁷ Less than two-thirds of the respondents thought that the resources were sufficient.¹⁹⁸ Another recent nationwide survey of fourth-year medical students also analyzed their attitudes regarding the availability of information and resources pertaining to the selection process.¹⁹⁹ This survey was conducted in response to frequent student complaints that they encountered significant difficulties in obtaining accurate information about available residency programs.²⁰⁰ Specifically, the students complained that individual faculty members knew too little about residency programs other than their own; faculty advisors often did not know enough about the students as individuals to be helpful; and students had insufficient opportunities to visit various residency programs before making selections.²⁰¹

Applicants are not the only individuals who raise concerns about the fairness and efficiency of the residency selection process. One recent medical study documented the degree of discontent among directors of residency programs.²⁰² The directors expressed concern that the senior year of medical school is distorted by the selection process and that

Programs, 152 AM. J. SURGERY 560, 561 (1986) (advocating a requirement that deans' letters of recommendation not be provided until November 1 of a student's senior year, thereby providing more academic information to programs and giving students more time to explore specialty choices).

197. See Bunch et al., *supra* note 38, at 1294.

198. *Id.* According to the respondents, the two most important sources of information were residents at the students' medical school and the *Directory of Residency Training Programs*. *Id.*

199. See Taggart et al., *supra* note 183, at 38.

200. *Id.* at 39.

201. *Id.* One of the more interesting of the survey authors' conclusions was that medical professionals frequently direct their attention and efforts toward students in higher status and achievement categories, leading to an inequality among medical students in their access to information. *Id.* at 41-42.

202. See Norma E. Wagoner & J. Robert Suriano, *Recommendations for Changing the Residency Selection Process Based on a Survey of Program Directors*, 67 ACAD. MED. 459, 460 (1992). In July 1990, the authors conducted a nationwide survey of program directors participating in the NRMP. *Id.* Of 680 randomly selected directors, 469 (68.9%) responded. *Id.* The goal was to solicit the directors' responses to specified elements of the current residency selection process and to possible revisions, using a five-point scale ranging from strong agreement to strong disagreement. *Id.* The questionnaire solicited responses to the following areas of the selection process: 1) content of deans' letters; 2) transmission of deans' letters at a suitable time for decisionmaking by program directors; 3) predictive value of scores on the Medical College Admission Test (MCAT); 4) guidelines to improve the quality of the selection interview; 5) development of a system to schedule interviews; 6) adoption of an improved Universal Application; 7) reevaluation of the role of audition electives; and 8) development of a system for the unmatched student. *Id.* at 459-60.

students are pressured into making decisions too early in their careers.²⁰³ They also noted that the lack of coordination within the residency selection process created lost educational time for students.²⁰⁴ A director of the Association of American Medical Colleges contends that the medical residency match has created a "preresidency syndrome," in which excessively preoccupied medical students spend significant portions of their third year of medical school researching, applying to, and interviewing with the various residency programs, with a consequent disruption of the medical education process.²⁰⁵ In addition, a survey of the directors of approved psychiatric residency programs in the United States revealed that seventy-five percent of the respondents found the NRMP system to be unsatisfactory.²⁰⁶ Although the presence of nonparticipating programs was clearly the cause of part of this dissatisfaction, forty-five percent of directors expressed doubt about the effectiveness of the matching plan even with hypothetical full program participation.²⁰⁷ Their dissatisfaction stemmed from the lateness of the match, general doubts about the need for a match in psychiatry, and the impersonal, computerized nature of the plan.²⁰⁸

In sum, participants in the medical match complain of the expense, inconvenience, lack of information, general inefficiency, and time-consuming nature of the selection process. These are the very same evils that Judges Wald and Oberdorfer and Mr. Norris claim a judicial clerkship match will eliminate. Why doesn't institution of a matching system automatically solve such problems? One answer is that, despite assertions to the contrary,²⁰⁹ there is nothing intrinsic to the medical matching model that makes the application or interview process less expensive or more efficient. The model does not provide a standardized application form,²¹⁰ a set

203. *Id.* at 461.

204. *Id.* Although they would like to be more accommodating to students' schedules, many program directors indicated that their ability to be flexible was limited by the large number of interviews and the limited time span in which to conduct them. *Id.* at 462. Respondents expressed considerable support for the development of a centralized residency application service. *Id.* at 463. They generally resisted, however, a suggestion that interviewing be limited to a six-week time period. *Id.* at 464. After evaluating the survey responses, the authors of the study ultimately recommended that a task force be constituted to consider a number of revisions to the selection process, including the development of a computerized application service that would also allow for the scheduling of interviews. *Id.*

205. See Swanson, *supra* note 195, at 201; see also Golden, *supra* note 166, at 1047 (stating that students must develop a strategy for obtaining residency positions far in advance of the starting date).

206. See Crowder & Roback, *supra* note 168, at 194.

207. *Id.* at 195.

208. *Id.*

209. See *supra* notes 176-80 and accompanying text.

210. "The NRMP is not an application service." NRMP HANDBOOK, *supra* note 30, at 5. Students interested in particular residency programs must request applications directly from those programs. *Id.* The program directors will then review the applicants' credentials and, if interested, invite them for interviews. *Id.*

A Universal Application has been developed, but residency program directors are not

interviewing period,²¹¹ a mechanism to increase the flow of information to students, or a system to help applicants coordinate interviews and travel plans. In fact, the medical matching model was specifically designed to leave unchanged all but the processes of offer and acceptance.²¹²

It therefore is likely that, even if a judicial clerkship match were instituted, students would still be subject to the vagaries of judges' schedules. There is no reason, *a priori*, to assume that judges as a group would all choose to interview in the same three to four week period. Because, in theory, the match gives judges a longer period in which to conduct interviews, logic would suggest the possibility of even more variability in interviewing schedules from judge to judge than presently exists.

As an example, consider a student applicant who has arranged an interview with Judge A in a particular location and wishes to arrange an interview with Judge B on the same visit. Under the present system, Judge B has an incentive to accommodate the student if Judge B wishes to ensure that the student does not accept an offer from Judge A before Judge B has had the opportunity to interview the student.²¹³ The same is not true under the medical matching model. Because no offers can be made or accepted prior to the match date, Judge B risks little in declining the student's request for a convenient interview date.²¹⁴ If Judge B subsequently invites the student for an interview at a time convenient to the judge, the student will likely expend the extra time and money for a return visit because the student does not yet know whether any other judges will extend offers to her.

In conclusion, as to many of the efficiency claims made by proponents of the judicial clerkship match—reduced applicant expense, greater applicant opportunities, increased access to information, more time to make decisions—the medical residency match experience reveals that the predictions seriously underestimate the transaction costs and overestimate the

required to use it as a part of their application process. See Wagoner & Suriano, *supra* note 202, at 460. Use of the Universal Application has been highly variable across programs. *Id.* In a recent survey of applicants to an otolaryngology program, a number of respondents suggested that, in the interest of efficiency, a standard application and uniform deadline for receipt of applications should be instituted. See Stringer et al., *supra* note 150, at 366; see also Bunch et al., *supra* note 38, at 1294 (noting that in a survey of applicants to orthopedic residency programs, many respondents desired a standardized application process).

211. The match does, of course, provide a de facto end to the interviewing period because interviews will not occur after the last date for submitting program and applicant rank-order lists.

212. See Graettinger & Peranson, *supra* note 40, at 1163 (stating that the matching program replicated all steps of a traditional admissions process except the timing).

213. Obviously, for those who wish to compete for the most highly valued applicants, there is a push to interview early.

214. However, because a matching system allows highly sought-after applicants to be more selective, see *supra* text accompanying notes 142-45, judges who wished to ensure a high ranking would still have an incentive to accommodate such applicants' scheduling requests.

benefits of the medical matching model. Of course, such miscalculations are key in a context in which reform is urged on the basis of these very claims of improved efficiency.

C. COLLEGIALITY AND THE MATCH

A further basis for moving to the medical matching model focuses less on notions of efficiency and more on notions of judicial collegiality and fairness. Judge Wald, for example, criticizes the current selection system for being undignified, demeaning, and noncollegial.²¹⁵ According to Judge Wald, the present system rewards those judges who are willing to act early and undercut their colleagues on the bench by making "short-fuse" offers to the most desirable applicants.²¹⁶ Advocates of reform argue that a judicial clerkship match would remove those kinds of pressures and thus eliminate undesirable behavior on the part of judges. Norris claims that "[t]he matching system would result in a more dignified and collegial clerk recruitment process because it would provide few incentives or opportunities for manipulation of the process."²¹⁷ The assumption appears to be that a match would promote ethical behavior or at least discourage unethical behavior. Again, it is useful to look to the medical residency match to determine if reform would lead to the predicted results.

The medical literature is replete with anecdotal accounts of NRMP rules and policies violations, particularly residency program directors' attempts to obtain prematch commitments from applicants.²¹⁸ The pressures on the program directors go beyond those related to obtaining the most

215. See Wald, *supra* note 1, at 156.

216. *Id.*

217. Norris, *supra* note 4, at 795.

218. See, e.g., Clay Cockerell & Steven L. Dixon, *Are the Matching Programs for Training in Dermatology and Pathology Operating Fairly and Without Bias?*, 5 AM. J. DERMATOPATHOLOGY 193, 193 (1984) (condemning the practices of offering positions during interviews and earmarking positions for preselected candidates); John T. Cuttino & James H. Scatliff, *A Uniform Acceptance Date for Resident Recruitment*, 21 INVESTIGATIVE RADIOLOGY 170, 170 (1986) (stating that out of seven senior medical students who applied to radiology programs, one was offered a position outside the match and another was told "[w]e'll rank you #1 if you rank us #1"); John S. Graettinger, *Graduate Medical Education Viewed from the National Intern and Resident Matching Program*, 51 J. MED. EDUC. 703, 713 (1976) (noting that allegations of cheating and sham matching had occurred with increasing frequency in past few years); Terri A. Herman, *Playing Fair in the NRMP [Letter]*, 302 NEW ENG. J. MED. 1425, 1425 (1980) (alleging misleading interview tactics and lack of integrity on the part of the chairman of the Department of Medicine); Lichter, *supra* note 58, at 1149 ("Cries that other programs are cheating, candidates aren't telling the truth, and that the match process is being subverted are still heard . . ."); Martz, *supra* note 181, at 498 (recognizing that agreements between program directors and favored applicants may exist); Mullin & Stalnaker, *supra* note 56, at 198 (describing instances when program representatives informed students they would not be considered by their residency programs unless the students promised to rate their programs first on their rank-order lists); Wentz & Ford, *supra* note 39, at 3393 (stating that many programs and applicants attempt to maneuver outside the constraints of the match).

highly qualified candidates. Directors must also contend with the fact that failure to fill all open positions can adversely affect a program's reputation among students and the broader medical community, diminish the worth of the residency program in the eyes of its parent institution, and cause significant morale problems within the program.²¹⁹ The urgency to fill positions has led to an escalation of competition among programs for applicants, to the point that one commentator has termed it a "full-fledged war."²²⁰ The resultant concerns over cheating and abuse of the system span the decades during which the residency match has been in place.

For example, one commentator and participant in the match described the following scenarios:

Students interested in some specialties, notably psychiatry and obstetrics and gynecology, must negotiate with directors who, contrary to the rules of the NRMP, exert strong pressures for commitments to their programs While handshakes or written agreements are frequent, there are many stories of students who received such commitments but who found themselves bereft of a program on Match Day in March. Pressure tactics can become even stronger. One applicant was informed that in December she would receive a telephone call from a particular program director who would inquire where his program would rank on her list. She was told that her response would predicate her position on his list The prevalence of these tactics is well known. Indeed, an official of the NRMP has advised students to lie when in doubt. "After all," he noted, "the programs started this first."²²¹

One psychiatry program director stated that "particularly in psychiatry, the prohibition against early contracts is honored more in the breach than in the observance."²²² According to Dr. Myers, programs seeking early commitments sometimes require written acceptance but more often require a verbal agreement between the desired applicant and the program director to rank each other first.²²³ When he conducted an informal personal poll of several nationally respected department chairpersons, Dr. Myers found that only one of the directors strictly followed the NRMP requirements for confidential ranking without pressure or early commitments.²²⁴ Other com-

219. Magill, *supra* note 134, at 500.

220. David C. Garretson, *The Recruiting War*, 24 *FAM. MED.* 487, 487 (1992).

221. Golden, *supra* note 166, at 1047. Dr. Golden implies that the program directors were able to get away with these flagrant violations of the NRMP rules because students were faced with an increasingly competitive environment. This environment was caused by an expanded medical school enrollment in the 1970s at the same time that the number of first-year residency programs remained relatively stable. *See id.*

222. J. Martin Myers, *Gentlemen's Agreements and the National Residency Matching Program*, 39 *J. CLINICAL PSYCHIATRY* 689, 689 (1978).

223. *Id.*

224. *Id.*

mentators have alleged that the majority of applicants to psychiatric residency programs have entered into agreements with programs prior to submission of the NRMP rank-order lists.²²⁵

One applicant who interviewed for pathology positions with five different programs received calls from directors of three of those programs prior to submission of the rank-order lists:

In a typical call, the applicant may be told that he or she is an impressive candidate and will match with their program *if* he plans to rank their program highest. The applicant is then told that if he or she is more interested in another program, his or her rank will be made much lower in order to preserve higher rankings for other highly qualified applicants who are more interested in their training programs. The applicant is then asked how he plans to rank their program.²²⁶

According to Dr. Dixon, these kinds of calls are not uncommon.²²⁷

The incidence of such violations appears to be particularly high in internal medicine, a primary care area that has suffered for years from an excess of residency positions over interested medical school graduates.²²⁸

One report indicated that in order to compete in this market, several internal medicine program directors had written letters to desirable candidates urging them to negotiate outside the boundaries of the match.²²⁹

Pediatrics is another primary care area in which programs have encountered difficulty filling all of their positions through the NRMP.²³⁰ In a recent survey, pediatrics program directors were asked what future changes they anticipated in residency recruiting. Several respondents predicted that competition would increase and that "increased cheating and erosion of the matching process" would occur as a consequence.²³¹

Although most reports in the medical literature concern alleged violations of the NRMP rules by program directors, complaints have also been directed at the conduct of some applicants. For example, the chairperson of a residency selection committee for an anesthesiology residency pro-

225. See Crowder & Roback, *supra* note 168, at 194.

226. Cockerell & Dixon, *supra* note 218, at 195. Such manipulation forces the applicant who wishes to maintain a high ranking to lie, give an evasive answer, or inform the director that divulging rankings is a violation of NRMP protocol. *Id.*

227. *Id.*

228. Neil J. Farber et al., *Intern Candidates Who Withdraw from Contracts: Incidence and Internal Medicine Program Directors' Attitudes*, 8 J. GEN. INTERNAL MED. 19, 19 (1993).

229. *Id.* (citing R. Arky, *Message from the President*, 6 CAREERS INTERNAL MED. 4 (1990)); see also Lawrence G. Smith, *Competitiveness, Peer Pressure, and Career Choice [Letter]*, 329 NEW ENG. J. MED. 1281, 1282 (1993) (attributing the "numerous violations" of the NRMP in part to the mismatch in market forces).

230. Janice P. Piatt & Paul S. Bergeson, *National Trends in Pediatric Recruitment*, 146 AM. J. DISEASES CHILDREN 979, 979 (1992). Only 65% of pediatric residency positions were filled with graduates from medical schools in the United States in 1991. *Id.* at 979-80.

231. *Id.* at 981-82.

gram complained of manipulative and dishonest behavior by some residency applicants.²³² Dr. Boudreaux described applicants who made statements through letters or phone calls indicating their intent to rank his program first on their rank-order lists, but who then proceeded to rank other programs first.²³³ He posits that such behavior is the result of the intensely competitive nature of the match in combination with residency programs that foster dishonesty and set bad examples through their approaches to the selection process.²³⁴ Complaints have also been directed against candidates who match with programs and then renege on the match agreement, accepting positions elsewhere.²³⁵ For example, the competitive market for internal medicine residents has resulted in some candidates refusing to honor their NRMP match obligations or contractual commitments.²³⁶

These anecdotal reports strongly suggest that violations of NRMP rules and policies do occur, perhaps in significant numbers. Several attempts have been made to move beyond anecdotal evidence and to document the degree to which the rules are being ignored or intentionally violated. For example, in 1990, the Association of American Medical Colleges administered a nationwide questionnaire asking graduates whether one or more programs had pressured them to make commitments before the announcement of the match.²³⁷ Of the approximately eleven thousand students who responded, 10.4 percent said that programs had done so.²³⁸

In another survey, applicants to orthopedic residency programs received a questionnaire after they had submitted rank-order lists but before match results were announced.²³⁹ When asked whether they felt confident at that

232. Arthur M. Boudreaux, *Integrity in the National Resident Matching Program [Letter]*, 268 JAMA 3315, 3315 (1992).

233. *Id.*

234. *Id.*

235. Donald L. Butler, *Residency Matching Program Ethics [Letter]*, 182 RADIOLOGY 898, 898 (1992). Dr. Butler relates that one candidate who reviewed the NRMP rules with an attorney was told that "there is nothing here that you cannot get out of." *Id.*

236. Farber et al., *supra* note 228, at 19. In response to the actions of both directors and withdrawing candidates, the Association of Program Directors in Internal Medicine has begun working on a policy concerning ethical issues in recruitment. *Id.* at 21. The possibility of imposing sanctions against applicants who withdraw has also been raised. *Id.*

237. Lichter, *supra* note 58, at 1149.

238. *Id.* The percentages ranged from 4.8% in otolaryngology and neurosurgery to 27.9% in pathology. *Id.* at 1150; *see also id.* at 1149 tbl.2 (detailing percentages of applicants by specialty who were asked to commit to programs before the match). Because each program interviews numerous students, the percentage of programs violating the NRMP rules is likely lower than the 10.4% figure. *Id.* at 1149-50. In fact, using these figures, the authors of the article concluded that "overall adherence to the match process appears to be quite high in most specialties." *Id.* at 1150.

239. *See* Bunch et al., *supra* note 38, at 1295. The authors noted that, of the unsolicited responses they received on the questionnaires, comments about the match appeared most frequently; the respondents expressed particular frustration with deals made outside the match. *Id.*

time that they would secure an orthopedics residency, thirty-five percent of the students responded affirmatively.²⁴⁰ Of that thirty-five percent, fifty-two percent indicated they had signed a written contract contrary to the rules of the matching program, twelve percent reported a verbal agreement between themselves and the program director, and thirty-one percent reported that the program chair had made an implied promise of a residency position.²⁴¹ Not surprisingly, the survey authors raised concerns about the conduct of the residency program directors who participated in such agreements.²⁴²

The Mayo Clinic, responding to concerns regarding compliance with NRMP rules in the relatively new anesthesiology match, conducted a survey of all medical school seniors who completed applications to the Mayo Clinic residency program in anesthesia in 1987.²⁴³ A total of twenty-two percent of respondents indicated that one or more programs had pressured them to violate NRMP rules by signing a contract prior to the match date.²⁴⁴ Over thirty-two percent of respondents reported experiencing pressure to make verbal commitments before the match date.²⁴⁵

One family practice program recently conducted a survey of its top applicants at the conclusion of the residency match.²⁴⁶ The family practice program discovered that a number of applicants had received feedback from other programs regarding the applicants' rank status with those programs and that this feedback apparently influenced the rank order the medical students submitted to the NRMP.²⁴⁷ This finding prompted the program to conduct an expanded survey exploring the issue of improper program feedback to students prior to submission of the rank-order listings.²⁴⁸ The answers to questionnaires revealed that sixty-six percent of all

240. *Id.*

241. *Id.*

242. *Id.*

243. Faust et al., *supra* note 181, at 226. Of 87 individuals who were mailed questionnaires, 58 responded (a 66.7% response rate). *Id.* at 226-27. The average applicant interviewed at 9.4 programs; the 58 respondents reported a total of 537 interviews. *Id.* at 226.

244. *Id.*

245. *Id.* at 226-27. Interestingly, the survey authors conclude, based on these numbers, that "[t]he study demonstrated a low frequency of NRMP infractions, in contrast to the claims of some program directors." *Id.* at 228. The authors base their conclusion on the percentage of interviews in which an infraction was reported rather than on the percentage of applicants who reported infractions. A total of 2.8% of applicant interviews were followed by pressure to sign a contract, while 6.9% of applicant interviews were followed by pressure to make a verbal commitment. *Id.* at 227-28.

246. Steven J. Glinka et al., *Fairness in the Match*, 18 *FAM. MED.* 168, 168 (1986). The survey was conducted by the Family Practice Program, Ventura County Medical Center, UCLA School of Medicine, Ventura, California. *Id.* The survey's purpose was to improve the program's interview and selection process. *Id.*

247. *Id.*

248. *Id.* The follow-up survey was conducted in 1986 before students received match results but after they had submitted their rank-order lists. *Id.* Of the 160 questionnaires distributed, 90 responses were received (a 55% response rate). *Id.*

respondents, and seventy-three percent of respondents who applied exclusively to family practice programs, received direct or indirect feedback on their rank status prior to the date for submission of rank-order lists.²⁴⁹ Of those respondents who received such feedback, thirty percent acknowledged that it did influence their ranking of programs.²⁵⁰

The tendency of some programs to "bad-mouth" competing programs has been another concern in the competition to recruit family practice residents.²⁵¹ In 1990, the Association of Family Practice Residency Directors (AFPRD) began a discussion of the ethical issues facing residents and faculty.²⁵² A survey of all member program directors revealed that, of the possible ethical issues facing a residency program, the greatest concern was ethics in the recruitment of residents to family medicine programs.²⁵³ Specific areas of concern included sign-on bonuses, negative comments about other residency programs, recruitment of residents from existing family practice programs, and the signing of contracts with students outside the match.²⁵⁴ As a result of the survey and subsequent discussions, in June 1992 the AFPRD drafted and adopted *Guidelines on the Ethical Recruitment of Family Practice Residents*.²⁵⁵ The guidelines commit Association members, among other things, to several principles: 1) to give an honest and accurate representation of their respective programs; 2) to do no harm to other programs by engaging in negative discussions of those programs directly or by insinuation or innuendo; and 3) to interview and recruit in compliance with current legal and civil rights standards and within the rules of the NRMP.²⁵⁶

Although none of these anecdotes, reports, or surveys definitively establish the extent of rules violations that occur within the medical match, they do establish that mere institution of a match system does not automatically result in ethical behavior on the part of those who use the system to fill positions. It is evident that programs pressure student applicants to varying degrees into making verbal or written commitments to residency programs before the match date. Dr. Golden concludes his commentary by stating that the matching system would be more tolerable if applicants were treated fairly and with respect and that "[t]he greatest need for improve-

249. *Id.*

250. *Id.*

251. Garretson, *supra* note 220, at 487.

252. Mary Willard, *Guidelines on Ethical Recruitment of Residents*, 24 FAM. MED. 502, 502 (1992).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 502-03. The guidelines are hortatory only, with the intent to heighten awareness of the problems and begin a discussion of possible solutions. *Id.* at 502. One commentator has suggested that the next step for the AFPRD is to consider whether the guidelines should contain an enforcement mechanism. Magill, *supra* note 134, at 501.

ment is in the behavior and attitudes of program directors"²⁵⁷

Legal commentators who have endorsed the adoption of the matching system assume that it will solve the problems caused by the competitive nature of the judicial clerk selection process. But implementation of a match will not rid judges of their competitive natures or their desire to hire the best applicants any more than it has rid residency program directors of these same traits. At best, it might rechannel that drive into a form different from the current "exploding" or "short-fuse" offers. Based on the medical experience, one may expect such behavior to be translated into judicial pressure on applicants to violate the rules and spirit of the match by making early commitments. Such behavior would surely not pass unnoticed by the applicants, the other judges who learn of such behavior, legal commentators, and the media. Furthermore, given the relative clarity of the rules, such manipulation of the system would reflect even more poorly on the judiciary than does the present "free-for-all."²⁵⁸

Furthermore, the matching system could actually escalate the competition among judges for the best clerks. One consequence of computerized matching is that it facilitates the collection of centralized data. Once data is collected and analyzed centrally, strong arguments would exist for the publication of such data. Applicants could certainly take the position that information on the relative desirability of various clerkship positions should be made available to them.²⁵⁹ Although it is unlikely that the system would go so far as to publish individual judges' results—that is, how far down an individual judge had to go on her rank-order list to fill her clerkship positions—the system might publish cumulative data by circuits or districts.²⁶⁰ Judges in the more prestigious circuits or districts would probably benefit from the dissemination of such information. But the increased competition that could result from the use of such comparative data would not lead to more collegial or civil behavior within the judiciary.²⁶¹

257. Golden, *supra* note 166, at 1048.

258. See Lichter, *supra* note 58, at 1153 (noting that in a decentralized selection process no cheating exists because "one cannot break the rules if there are no rules to break").

259. Such information could take the form of numbers of applications received, fill rate (percentage of positions successfully filled through the match), or how far down on the rank-order list a judge went to fill all positions.

Information on the relative desirability of circuits and judges is not presently available in any systematic form. Students use informal channels such as former and current clerks, classmates, professors, and employers to glean information on judges. See Norris, *supra* note 4, at 776. The publication of centralized data would be preferable to this rather haphazard and inefficient "system" in two ways: the information would be readily available to all, and it would be accurate (at least as an overall measure of applicant preferences).

260. Such publication would be analogous to the current breakdown of data by specialties in the medical matching system. See, e.g., Keyes-Welch et al., *supra* note 160, at 416-17 (providing results of the NRMP for 1992, broken down by specialty); Waldman & Randlett, *supra* note 160, at 502-04 (providing results of the NRMP for 1993, broken down by specialty).

261. Certainly those specialties, such as internal medicine, pediatrics, and family medi-

Obviously, the medical residency match has continued to function quite well despite the occurrence of both blatant and more subtle violations of the NRMP rules.²⁶² Perhaps it is no more likely that a judicial clerkship match would be undone by cheating or abuse of the system. But it is surely important to recognize that the matching system does not change the incentives, nor is it free from abuse by those who hold the power and might choose to manipulate the system.

IV. COMPARISON OF MEDICAL RESIDENCY TRAINING AND THE JUDICIAL CLERKSHIP

Each of the previously cited articles by Judges Wald, Kozinski, and Oberdorfer, and Mr. Norris proceeded from the same central premise: a judicial clerkship match would be justified if its benefits outweighed its costs.²⁶³ Up until now, I have assumed the validity of this central premise and have analyzed the medical literature to test whether the claimed costs and benefits would actually materialize. But, it is possible to analyze the central premise itself and ask whether one can make a stronger case for a medical residency match than for a judicial clerkship match.

A. COSTS AND BENEFITS REVISITED

Although Judge Wald and Trenton Norris both conclude that a judicial clerkship match should be implemented, their underlying rationales are quite different. Judge Wald wishes to reform the clerk selection process primarily to benefit the judiciary. She sees the match as the answer to the problems that result from judges treating *other judges* unfairly.²⁶⁴ Norris, on the other hand, looks to the match primarily to benefit applicants. He sees the match as the answer to the problems that result from judges

... cine, that historically have failed to fill all positions through the match have had to deal with the negative fallout from the publication of such data. See, e.g., Garretson, *supra* note 220, at 487 (discussing the effects of failure to fill all family medicine residency positions through the match); John S. Graettinger, *Internal Medicine in the National Resident Matching Program 1978-1989*, 110 ANNALS INTERNAL MED. 682, 682 (1989) (analyzing the downturn in applications for internal medicine residencies); Piatt & Bergeson, *supra* note 230, at 979-82 (analyzing the pediatric residency programs' response to increased recruiting difficulties).

262. See Lichter, *supra* note 58, at 1153 (stating that "to avoid a centralized [residency] match because of fears of rampant cheating does not seem to have a foundation in fact").

263. Although the advocates of a judicial clerkship match start with the same premise, each takes a slightly different angle. Judge Wald concentrates on the benefits to the judiciary. See Wald, *supra* note 1, at 152-53. Norris focuses primarily on the benefits to applicants. See Norris, *supra* note 4, at 782-86. Judge Oberdorfer and Mr. Levy argue that efficiency would increase for all participants. See Oberdorfer & Levy, *supra* note 3, at 1101-02. Judge Kozinski starts with the same premise but disputes Judge Wald's conclusions as to the benefits of the match. See Kozinski, *supra* note 2, at 721-30.

264. See Wald, *supra* note 1, at 152 *passim*. This is not to say that Judge Wald is indifferent to applicant concerns. Her principal concern, however, is the judiciary.

treating *applicants* unfairly.²⁶⁵

This underlying difference in rationales becomes important in a context in which reform of the judicial clerk selection process differentially affects the judiciary and student applicants, producing conflicting interests between the two groups. If, based on evidence from the medical literature, Judge Wald or other members of the judiciary were to conclude that the judicial costs of a match were higher than previously understood,²⁶⁶ their position on the wisdom of such reform might change. In contrast, Norris and others similarly situated would likely be willing to accept higher judicial costs as long as the system benefited applicants.

Perhaps this difference in perspective can be illustrated using the process by which law review articles are selected for publication. When a professor has written an article, she generally will submit it to a number of different law reviews for consideration.²⁶⁷ Each law review editor, looking to fill a particular spot in an issue, sifts through stacks of submissions and decides which ones merit further review by student members.²⁶⁸ After several layers of review, the members of the law review board decide to whom they should make an initial offer of publication.²⁶⁹ A member of the law review then extends an offer to the author of the article, with a promise to leave the offer open for some period of time, perhaps two weeks.²⁷⁰ The author can then call other more desirable law reviews in an attempt to solicit a better offer.²⁷¹ When the two weeks are up, the author can accept the offer, request additional time, or decline the offer in order to accept a better one or in hopes that a better offer will be forthcoming in the near future.

Surely the outcome of this process is as important to law professors as is the outcome of the clerkship application process to law students.²⁷² And just as surely a matching system could be instituted whereby authors would submit articles to law reviews, and authors and law reviews would then be

265. See Norris, *supra* note 4, at 791-98.

266. Part III of this article contends that the costs to the judiciary of the matching system have been understated while the benefits have been overstated.

267. This practice is equivalent to a student submitting clerkship applications to various judges with open clerkship slots.

268. This practice is equivalent to a judge deciding which of the many applications merit further attention and selecting applicants to interview.

269. This decision is equivalent to a judge deciding to whom the first offer will be extended.

270. This period of time is analogous to the period of time during which an offer will remain open to a clerkship applicant. One of the primary problems with the present clerk selection system is that applicants are given almost no time in which to make their decisions. See Kozinski, *supra* note 2, at 1716-17 (describing the typical offer and acceptance scenario).

271. This practice is equivalent to a clerkship candidate placing calls to judges she prefers in an attempt to obtain a better offer. See Wald, *supra* note 1, at 156 (describing this process).

272. Many a tenure decision has been made on the basis of article placement.

required to turn in their respective rank-order lists by a given date. A computerized matching system could then match authors with law reviews, thus ensuring authors of the best possible placement.

Certainly law professors would have an interest in such a system because it would maximize their preferences for article placement.²⁷³ Both authors and law reviews would arguably benefit from the "full and free exchange of information and uninhibited choice of competing products or services."²⁷⁴ It would perhaps be more efficient for law reviews to select all of their articles for the entire year at one time. Yet one does not hear the same call for reform of the law review article selection process. Why? One possible answer is that the authors' preferences are not sufficiently valued to justify the institution of a matching system when balanced against the flexibility afforded law reviews by a "rolling" selection process.²⁷⁵ In addition, the law reviews' ability to revoke offers that are not accepted within a relatively short period of time is a very effective tool in persuading authors to accept offers for publication.²⁷⁶ The law reviews might well conclude that the costs *to them*, measured in terms of reduced flexibility and bargaining power, would outweigh any benefits *to them* from a matching system. In any case, the benefits to law professors would simply not be a part of the law reviews' cost-benefit calculations.

One would therefore expect that judges, who are analogous to the law reviews in this example, would give little weight to the fact that the matching algorithm maximizes *applicant* preferences. Yet Judge Wald supports the move to a match that is based on an algorithm designed to maximize participant preferences, including those of applicants. A closer analysis of her position, however, reveals that maximization of applicant preferences is not Judge Wald's primary goal. She appears to advocate the matching system because it will redistribute the applicants in a manner that will improve her chances of obtaining the best clerks.²⁷⁷ From Judge Wald's perspective, the maximizing of applicant preferences is essentially a byproduct of a system intended to provide more equal judicial access to the highly credentialed judicial clerkship applicants. In sharp contrast, Mr.

273. But a matching system would not be without costs to law professors, who would be required to submit all articles for a given year at one time.

274. See Oberdorfer & Levy, *supra* note 3, at 1103.

275. This flexibility permits law review editors to put together issues with the desired mix of authors, subject matter, and article type. Cf. Kozinski, *supra* note 2, at 1722 (discussing how judges sometimes choose clerks based on geographical, racial, and gender considerations).

276. Of course, the author can hold out for a better offer, but in doing so, she risks revocation of the pending offer. The end result may be that she receives no additional offers or settles for an offer from a less desirable journal.

277. I do not intend to suggest here that Judge Wald seeks to advance solely her own position. Rather, she seeks to advance the position of those judges who are similarly situated, in that they desire to compete but do not want to be forced to make their selections so early in the process.

Norris views the maximizing of applicant preferences as the primary justification for the match.²⁷⁸

Implicit in Norris's position is the notion that applicants have a "right" to a system that maximizes their chances of obtaining the positions they value most highly. Yet Norris never explains why applicants for clerkship positions, who are merely seeking employment, are entitled to a system that is designed to maximize their preferences. He seems to suggest that the matching system is justified as long as any efficiencies that are lost on the judicial side of the ledger are balanced by gains on the applicant side.²⁷⁹ But his position makes sense only if one assumes that the efficiencies on the judicial and applicant sides are interchangeable. This is, of course, a highly questionable proposition in the employment context. Judges, as employers, and clerkship applicants, as potential employees, each have an interest in maximizing their own preferences and efficiencies. As a result, one would expect that judges generally would be unwilling to bear additional costs in exchange for benefits to applicants. When the interests of employers and potential employees begin to diverge in this manner, it is necessary to have some theory for balancing the costs to one group with the benefits to the other. More specifically, if institution of a judicial clerkship match would result in additional transaction costs for the judiciary, how should this be balanced with the match's maximization of applicant preferences? It is in this context that an examination of the differences between the judicial clerkship and the medical residency is fruitful.

B. THE MEDICAL RESIDENCY AND THE JUDICIAL CLERKSHIP REVISITED

One of the most obvious differences relates to the number of medical residency applicants and positions, as compared with judicial clerkships. While approximately 2000 federal clerkship positions are filled each year,²⁸⁰ the medical system must contend with matching more than 15,000 fourth-year medical students to more than 18,000 positions in more than 4500 different programs.²⁸¹ The sheer size of the medical residency selection process would magnify any problems inherent in a decentralized system. In addition, because the number of residency positions either exceeds or

278. See Norris, *supra* note 4, at 792-93.

279. See *id.* at 795 (stating that "the match system will maximize preferences for both judges and students, decrease costs for students, and improve the flow of information for both groups, at the tolerable risk of requiring judges to hold more interviews until they acquire some experience with the system").

280. This number excludes clerkships with judges on specialized federal courts such as the Claims Court or the Tax Court. See Kozinski, *supra* note 2, at 1713 n.12.

281. Taggart et al., *supra* note 183, at 38; see also Keyes-Welch et al., *supra* note 160, at 417 (presenting tables showing the breakdown of total applicants and positions in the 1992 NRMP); Waldman & Randlett, *supra* note 160, at 503 (presenting tables showing the breakdown of total applicants and positions in the 1993 NRMP).

closely approximates the number of applicants, a decentralized process may not lead to pairings between available applicants and open positions. In contrast, the number of applicants for clerkships exceeds the number of positions by a wide margin. The excess of applicants virtually guarantees that judges will fill all positions even without a centralized process.

The differences between the medical residency and the judicial clerkship, however, go much deeper than mere size. The medical residency and the judicial clerkship occupy very different positions in the respective pathways for entry into the medical and legal professions. A graduate of an accredited medical school, in addition to passing the National Boards, must also complete at least one year of approved residency training as a prerequisite to licensure in all states.²⁸² Residency training is thus an integral part of the medical educational process.²⁸³ In fact, the *raison d'être* for residency programs has always been to provide education and training grounds for physicians.²⁸⁴ If a physician wishes to practice medicine, she has little choice but to seek a residency position through the match.²⁸⁵ The relationship between residency programs and residents is thus quite different from the ordinary employer-employee relationship.

Furthermore, the choice of a medical specialty is a fundamental career decision. There are several graduate medical education pathways, each of which leads the physician toward certification in a particular specialty or subspecialty. The career costs to a fourth-year medical student of choosing the wrong pathway are immense. For example, if an individual chooses an internal medicine pathway but later decides he wants to become a surgeon, he must essentially begin again and endure another five or six years of

282. See AMERICAN MEDICAL ASSOCIATION, U.S. MEDICAL LICENSURE STATISTICS 12 (1993); see also *id.* at 29 tbl.14 (detailing the number of years of graduate medical education required for licensure in each state).

283. That residency training is part of the educational and training process for physicians is reflected in the use of the term graduate medical education (GME) and in the nature of the accrediting process for residency programs, which is overseen by the Accreditation Council for Graduate Medical Education (ACGME). See generally Carlos J.M. Martini & Gary Grenholm, *Institutional Responsibility in Graduate Medical Education and Highlights of Historical Data*, 270 JAMA 1053 (1993). No corresponding nomenclature or educational accrediting body for judicial clerkships exists because the judicial clerkship's primary purpose is not the education or training of lawyers.

284. Of course, even though residencies were developed primarily for the training of physicians, many medical institutions are now financially dependent upon the relatively "cheap labor" provided by residents in training in the same way that the federal judiciary is dependent upon clerks to assist judges with the increasing volume of trial and appellate work.

285. All of the medical specialties that recruit senior medical students into their programs currently use a centralized matching system, although the percentage of participating programs varies among specialties. See Lichter, *supra* note 58, at 1149 & tbl.1. More than 90% of all residency matches in the United States are handled through the NRMP. Lichter, *supra* note 116, at 991. A few of the smaller specialties such as ophthalmology and otolaryngology use a centralized match other than the NRMP. See Lichter, *supra* note 58, at 1149 tbl.1.

residency training, this time in general surgery.²⁸⁶ Given the loss of time, money, and energy involved in switching specialties, it is preferable that fourth-year medical students make the appropriate choices the first time, particularly because applicants generally commit several years of their lives to residency programs and specialty training.

In contrast, an individual who graduates from an accredited law school and passes a state bar examination is entitled to enter into the practice of law in that state without further postgraduate training. The judicial clerkship is but one of many avenues, albeit a prestigious one,²⁸⁷ open to law school graduates. The work that clerks do is for the judiciary's benefit;²⁸⁸ any training or career assistance that clerks receive as a consequence of the experience is secondary.²⁸⁹ A judicial clerkship is a job to which law clerks commit only one or possibly two years of their lives. As a result, the structure of the relationship between judges and law clerks is a much more typical employer-employee relationship. Further, although a prestigious clerkship may facilitate entry into some desirable career tracks,²⁹⁰ it is not a necessary prerequisite to any particular type of law practice. Thus the judicial clerkship, when compared with the medical residency, is more akin to a privilege than a right.

There are other relevant differences between the medical residency and the judicial clerkship. One of the claimed advantages of the medical match is the late timing of the selection process.²⁹¹ But, as was noted previously, this delay in offers and acceptances is not without costs.²⁹² The late selection can be justified, in the medical context, by the particular design of the four-year medical school program. Of that four years, the first two are generally devoted to nonclinical education, with emphasis in the basic

286. The choice between medical and surgical residency training is so important because they occupy different branches on the medical training tree. Because there is little overlap between the training for the two specialties, a switch from one to the other generally requires that the individual begin training all over again at the level of first-year resident (intern). In contrast, if an individual first chooses internal medicine and later decides that she wants to become a dermatologist, she must only do additional specialty training in dermatology. Because dermatology is an offshoot of internal medicine, she does not need to begin residency training anew.

287. See Norris, *supra* note 4, at 767-68 (describing the benefits to applicants of clerking).

288. See Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1144 (1973) (describing the clerk's role as one of assisting the judge); Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1180 (1973) (stating that "[t]he role of the law clerk is to aid the experienced judge in his ultimate task, decision-making").

289. See Baier, *supra* note 288, at 1161-63 (describing the value to the clerk of the clerkship experience); Wright, *supra* note 288, at 1194-96 (describing the benefits to clerks).

290. See Norris, *supra* note 4, at 767 (stating that "[c]lerks can . . . look forward to a broader array of career opportunities").

291. See *supra* note 164.

292. See *supra* text accompanying notes 166-69.

medical sciences.²⁹³ In contrast, the final two years are almost entirely clinical in nature.²⁹⁴ The third-year medical student “practices” medicine by rotating through various specialties such as medicine, surgery, pediatrics, psychiatry, and obstetrics and gynecology.²⁹⁵ The fourth-year medical student continues her clinical training by rotating through other specialties and subspecialties such as endocrinology, cardiac surgery, rehabilitative medicine, dermatology, and anesthesiology.

As medical students advance through training, they are faced with a crucial choice—that of medical specialty. As they grapple with this decision, students confront a bewildering array of career possibilities.²⁹⁶ Because the first two years of medical education are primarily nonclinical, the students’ first significant exposure to clinical medicine comes in the third year.²⁹⁷ It is not uncommon for medical students to be uncertain about which specialty to pursue well into the fourth year of medical school.²⁹⁸ In addition, many students, by necessity, use their senior year electives to market themselves to various hospitals around the country where they hope to do their residency training.²⁹⁹

The late timing of the medical match is therefore related to—and a direct result of—the curricular structure of medical school education. Before the match was instituted, individuals interested in very competitive specialties or programs were being asked to commit to programs early in their medical school training. One student was encouraged to apply to dermatology residency programs while still in his first year of medical school.³⁰⁰ It is difficult to imagine a first-year medical student being able to

293. The first year is devoted primarily to classroom and laboratory work covering basic medical science courses such as biochemistry, anatomy, physiology, histology, pathology, and embryology. The second year is devoted to “systems” courses, in which students study, for example, the cardiorespiratory, genitourinary, gastrointestinal, and musculoskeletal systems.

294. See generally Harry S. Jonas et al., *Educational Programs in US Medical Schools*, 270 JAMA 1061 (1993).

295. Medical students at this stage are responsible for patient care but are subject to a great deal of oversight by residents and attending physicians.

296. For a sense of the complexity of the choices confronting graduating medical students, see generally Beverley Davies Rowley et al., *Graduate Medical Education in the United States*, 264 JAMA 822 (1990).

297. See Jonas et al., *supra* note 294, at 1065 (noting that clinical experiences are concentrated in the third and fourth years of the medical school curriculum).

298. According to data from the American Association of Medical Colleges, only 66% of students decide on specialties by the beginning of their fourth year of medical school. Lichter, *supra* note 58, at 1150.

299. See Swanson, *supra* note 195, at 201. Many residency programs inform applicants that they will not be considered for residency positions unless they take an elective in a program at that institution. *Id.* Thus, an individual interested in entering the Internal Medicine program at Stanford University would be well advised to do a clinical rotation at that institution before the match. An early match would prevent students from performing rotations at other institutions prior to the rank-ordering process.

300. Cockerell & Dixon, *supra* note 218, at 193.

select intelligently a field of specialization such as dermatology prior to being exposed to surgery, internal medicine, pediatrics, or even dermatology.³⁰¹ Competition was so fierce in some of the specialties that third-year medical students were being pushed to commit to a career pathway before they had even done any clinical rotations.³⁰²

In this context, a late match makes perfect sense. With a late match, medical students have the opportunity to explore the various specialties before they are asked to choose one. And medical residency programs are given access to evaluations of the applicants' performance in third- and fourth-year clinical rotations. Programs understandably seek access to these evaluations before ranking applicants because the clinical rotations measure somewhat different skills and aptitudes than do the didactic courses in the basic medical sciences.³⁰³

In comparison, legal education is quite different. The second and third years are substantially the same as the first year in terms of substance, and there is no fundamental shift from nonclinical to clinical training. Judge Oberdorfer and Mr. Levy are certainly correct when they state that "[b]y February of the second year, not every student knows whether clerking is for him or her."³⁰⁴ The crucial difference between legal and medical education is that there is nothing in the subsequent law school experience that will necessarily inform the student as to whether she should clerk. And, the judges' need for additional academic information is surely lessened by the similarities between the nature of the academic work and skills required in the second and third years of law school.³⁰⁵ Finally, if one assumes that most law students would choose a federal judicial clerkship over other types of postgraduate legal employment,³⁰⁶ then it is efficient to have judicial clerk selection take place earlier rather than later, so that those who do not obtain clerkships are free prior to graduation to pursue other employment opportunities. Consequently, the arguments for later

301. *Id.*

302. Golden, *supra* note 166, at 1047.

303. The skills required in nonclinical and clinical training are quite different. Nonclinical training emphasizes reading and memorization, whereas clinical training emphasizes application of knowledge and performance of medical procedures.

304. Oberdorfer & Levy, *supra* note 3, at 1100.

305. See Kozinski, *supra* note 2, at 1710 (asserting that judges can make reasoned judgments based on less than a complete academic record). Norris is correct when he asserts that the present selection system disadvantages the "late bloomers." See Norris, *supra* note 4, at 785. But this may be an acceptable cost in a system in which there are more qualified applicants than positions. It is difficult to take seriously Norris's view that it is unfair for a system to advantage "those who had good grades their first year [and] those who are lucky enough to have written a solid legal research paper." See *id.*

306. This assumption seems to underlie the articles by Judges Wald and Oberdorfer, Norris, and even Judge Kozinski, in that none of them discuss the other employment options potentially available to clerkship applicants.

selection of judicial clerks are less persuasive than those on the medical side.

Another relevant difference between the medical residency and the judicial clerkship relates to the choices available to students participating in a match. As mentioned previously, physicians who want to practice medicine are ordinarily required to participate in some residency training.³⁰⁷ In a sense, postgraduate medical training is a closed system.³⁰⁸ Thus, when medical residency applicants submit their rank-order lists, the matching process considers the entire universe of realistic options available to the applicants. As a result, the match can truly maximize applicant preferences.

The same cannot be said for a judicial clerkship match. Because a judicial clerkship is not part of the required legal training,³⁰⁹ a match would not begin to encompass all of the possible career options available to a graduating law student. Imagine for a moment that a law student would like to rank her career options in the following order: (1) judicial clerkship with a federal appellate judge; (2) corporate law practice with a particularly desirable firm; (3) judicial clerkship with a state supreme court justice; (4) public interest law practice; and (5) judicial clerkship with a federal district judge.³¹⁰ If a judicial clerkship match is instituted in the federal system, the only options available to the student through the match would be the federal appellate and district court clerkships. The match does not provide the applicant the opportunity to include in her rank-order list other employment opportunities such as a clerkship outside the federal system or employment with a law firm, prosecutor, or public defender's office. As a result, the match will only maximize applicant preferences within the narrow context of the federal judicial clerkship system. It cannot maximize applicant preferences within the broader context of postgraduate employment opportunities.³¹¹ This is a significant limitation to a judicial clerkship match—and one that is not present in the medical residency match. Yet commentators in the debate thus far have

307. *See supra* note 282 and accompanying text.

308. For purposes of this analysis, I am assuming that the graduating medical student wishes to practice medicine. Obviously, if the student does not wish to do so, the array of postgraduate training or employment opportunities differs from that available through the residency match.

309. *See supra* text accompanying note 287.

310. Even this ranking is highly simplified because it does not take into account that an applicant's rank order of various options would also depend on the particular judge in each court system or the particular law firm that may make the applicant an offer.

311. The same can rightly be said of the rolling admissions process presently used in clerk selection. Frequently, a clerkship applicant is forced to accept or reject an offer without knowing whether more preferred employment opportunities in law practice or with a state court judge may subsequently become available. My point is simply that, unlike the medical residency match, a judicial clerkship match cannot completely remedy this "problem."

failed to note this difference.³¹²

V. CONCLUSION

Until now, commentators have asserted either that everyone wins with a judicial clerkship matching system³¹³ or that everyone loses.³¹⁴ Judges Wald and Oberdorfer and Mr. Norris are correct in asserting that the match model has some advantages over the present clerk selection system. Regulation of the market to eliminate increasingly early offers and to maximize the preferences of participants would benefit at least some of the individuals involved in the process. But, if we accept the premise that a match should be instituted *if* the benefits outweigh the costs, then predictions as to those costs and benefits must be as accurate as possible. Such predictions are best tested by casting light on what until now has been a rather shadowy and ill-defined reference point—the medical residency match. In addition, it is useful to explore whether the differences between the medical residency and the judicial clerkship may support something less than wholesale adoption of the medical matching model.

What such an exploration reveals is that the realities of the medical matching model are quite a bit more complex than has been appreciated—at least in the legal literature. If the medical residency match is any indication, a judicial clerkship matching system would not affect judges and applicants equally, nor would all judges or all applicants be similarly situated as to its costs and benefits. Surely it is important to recognize that there would likely be winners and losers if a match were implemented.

In addition, any assessment of the need for reform is a balancing process that requires the assignment of relative weights to the interests of the various participants. There is a fundamental difference between a view emphasizing that judges should not take advantage of applicants through the use of “short-fuse” offers and one emphasizing that students are entitled to have their preferences maximized. How one assesses the relative importance of the various interests may very much depend on whether the judicial clerkship is viewed as an ordinary employment opportunity or as an educational experience that should be designed to maximize the interests of novice lawyers.

In the end, one can make a strong argument that medical residents have a stronger claim to a postgraduate selection system that maximizes their preferences than do judicial clerkship applicants. This does not lead neces-

312. One wonders whether this oversight occurs because the commentators cannot conceive of anyone actually choosing something other than a federal judicial clerkship if given the option.

313. Judge Wald, Judge Oberdorfer, and Mr. Levy and Mr. Norris present a united front in advocating the match from both the judicial and applicant perspectives.

314. Judge Kozinski rejects the matching system from both the judicial and applicant perspectives.

sarily to the conclusion that institution of a judicial clerkship match would be inappropriate or disastrous. Rather, the argument highlights the need to look beyond pure theory; we must assess the real workings of a match and approach any reform of the judicial clerk selection system with realistic expectations.³¹⁵ The match will not solve all of the problems of the present system. Nor is it perfect in its present form. The medical literature suggests ways that a judicial clerkship match could be structured to improve on the current medical model.³¹⁶ If a match is attempted, we should at least learn from the medical mistakes rather than replicate them.

315. The authors of a recent article assert that the only viable judicial clerkship reform is a benchmark starting date for clerkship interviews of March 1. *See* Becker et al., *supra* note 124, at 222. The "March 1 Solution" was adopted by the Judicial Conference of the United States in September 1993; it calls upon judges to refrain from conducting clerkship interviews until March 1 of the year preceding the year in which the clerkship is to begin. *See id.* at 207. Judges Becker and Calabresi and Justice Breyer contend that the benchmark starting date for law clerk interviews, which was implemented for the first time in 1994, resulted in a more efficient and less disruptive selection process for students, law school faculty and administrators, and judges. *See id.* at 218-19.

Even this modest reform was not without problems, however. The Eighth Circuit refused to recognize the March 1 benchmark, and some judges in the Ninth Circuit conducted interviews prior to March 1. *Id.* at 215-16. And despite the reform, students were still subjected to "short-fuse" or "exploding" offers from judges. *Id.* at 222.

316. Obvious examples would be to institute a uniform application date, a centralized application service and central repository for information on the various clerkships, an earlier match date, and an improved system for policing violations of the match rules.

