The Virtues of Alternatives

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William Simon has made a good case for the proposition that judicial clerkships are probably not as valuable an experience as contemporary law students evidently are led to believe. A great deal of what he writes rings true from my personal experience. I spent a year as law clerk to California's Chief Justice Roger Traynor, another year as law clerk for Chief Justice Earl Warren, and most of an additional year as a deputy prosecuting attorney in Ventura County, California. The Traynor clerkship was a mechanical and impersonal experience from which I learned mainly that the California Supreme Court was (and is) a poorly run institution. I did much more work and much more interesting work for Earl Warren, and of course I am glad to have had the experience of knowing the great man personally. Nonetheless, I learned more of value from prosecuting criminal cases in a state court than from the two judicial clerkships combined.

This conclusion should not be surprising. A person who has been in school most of his life, and who had done particularly well at academic work, has relatively little to gain from additional years of library research and opinion writing. What such a person most needs is immersion in practical and human problems, the last thing one gets at a rarefied appellate court. I also agree with Simon that clerkships tend to reinforce certain unpleasant aspects of our elite legal culture, particularly the obsession with hierarchical status. I fear this was particularly true in my own case. One of the best aspects of my subsequent experience in criminal jury trials was that my status as a former Supreme Court law clerk and law school professor was a kind of negative credential that I had to overcome to get local professionals to regard me as something other than a visiting dilettante. When I left the office, my boss paid me the compliment of assuring me that I had not revealed any evidence of possessing extraordinary mental capacity.

I would join Simon in encouraging law graduates to consider as an alternative to judicial clerkships some experience that provides a sharper break with academic methods and priorities. Many new graduates have found the experience of clerking valuable, but I agree with Simon that in some cases students seem to be pursuing clerkships "under the unreflective, compulsive influence of the culture." I am glad to see students take short-term jobs for a year or two before settling down to private or governmental practice, but clerking should not be the only alternative considered.

Simon's article is about the value of the clerkship experience from a point of view of the clerk. Appropriately, he does not attempt to assess the value of

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the present system of the judiciary or to society at large. The only apparent alternative to the short-term clerkship system is a career bureaucracy of judicial assistants. (This bureaucracy is in fact emerging alongside of the postgraduate clerkships.) I used to feel confident that it was a good thing for judges to be exposed to a new group of clerks every year or two, to keep the judges acquainted with currents of thinking in the law schools and to prevent the rigidity and isolation of a career bureaucracy. I haven't exactly changed my mind, but I am now more acutely aware of the disadvantages of encouraging judges to rely upon intelligent but intellectually immature young people who may be heavily influenced by faddish notions prevalent in the elite law schools. I don't know the best way to provide our judges with armies of assistants that the greatly expanded judicial role seems to require, but I am not enthusiastic about an activist judiciary whose primary counselors are individuals who are struggling to prolong their adolescence and have "a distaste for the concrete, the practical, the utilitarian, and the politically contingent." I fear that I have observed evidence of just that distaste in dozens of recent judicial opinions.