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## Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts

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LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS. By *John B. Oakley* and *Robert S. Thompson*. Berkeley, Cal.: University of California Press. 1980. Pp. xiii, 183. \$17.50

Although “[l]aw clerks have been part of the American judicial process for nearly a century” and have “assumed ever-increasing re-

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sponsibilities,"<sup>1</sup> their role has, until recently, been largely unexplored in the legal literature. As details of that role have become known over the past decade,<sup>2</sup> it has been both trenchantly criticized and profoundly praised.<sup>3</sup> Large gaps remain, however, in our knowledge of the internal workings of judges' chambers and of the relationships between judges and clerks. There have been, for example, "virtually no" studies examining "how judges themselves perceive the impact of judicial staff upon their decisions" (p. ix).

In *Law Clerks and the Judicial Process*, John Oakley and Robert Thompson take a necessary first step toward filling those gaps. The primary obstacle to research, they note, has been "the tradition of confidentiality in the relationship between judges and law clerks" (p. ix). Despite this tradition, Oakley and Thompson were able to interview sixty-three judges from the Supreme Court of California, the United States Court of Appeals for the Ninth Circuit, the federal district courts in California, and the California courts of appeals. Their study examines how judges use their staffs, and suggests possible improvements. They proceed in three steps. First, they trace "the history of the use of law clerks in American courts" and attempt to construct an "idealized model of the judge-law clerk relationship" (p. x). They then use the data gleaned from their interviews to describe how judges currently use and abuse their staffs. Finally, they compare current practices with their idealized model and offer several strategies that will enable courts to move closer to the ideal.

Oakley and Thompson's ideal law clerk is cast very much in the traditional mold. Law clerks historically have been recent law school graduates. Acting as the messengers of academia, they stimulated their judges with the new ideas of legal scholars and moved quickly into careers of their own. This traditional model, the authors believe, is typified by Samuel Williston, who clerked for Justice Horace Gray, the first American judge to use law clerks.<sup>4</sup> Williston was expected to recommend a disposition for all newly filed cases. The limits of his role, however, were sharply drawn. He "served as a sounding board and editor, contributing ideas but not documents to Gray's work as a judge" (p. 14).

Two distinguishing characteristics mark the ideal clerkship. "First, the judge must retain responsibility for decision-making. Second, the clerk must carry the adversary process into the chambers, forcing the judge to justify each step of the decision-making

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1. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 785-86 (1981).

2. See sources cited at p. 5 n.17; Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 251-52 (1981).

3. Compare Vining, *supra* note 2, with Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981).

4. S. WILLISTON, *LIFE AND LAW* 92 (1940).

process" (p. 37). This ideal is attainable, Oakley and Thompson argue, only if clerks are recent graduates serving for limited terms. These clerks will feel free to disagree with their judges, and the judges, for their part, will naturally resist the influence of their young and transient clerks. The result is a "dialectic between the brashness of youth and the restraint of age, between theories of the classroom and the pragmatism of bench and bar" (p. 33).

Unfortunately, Oakley and Thompson's interviews reveal that we seem to be moving away from this ideal. The tremendous recent increase in judicial caseloads has begun to force changes in how law clerks are used. Appellate courts, for example, are increasingly relying on "central staffs" of court-employed lawyers, responsible to the entire court and not to a particular judge. These staffs "identify matters of a routine nature and . . . process them in some expediting fashion, generally to the point of recommended dispositions suitable for pro forma adoption by the court" (p. 22). California's appellate courts, moreover, have begun to retain individual judges' law clerks for indefinite periods. These practices, Oakley and Thompson argue, are leading to an undesirable bureaucratization of justice.

Despite the authors' warnings, however, we appear to be moving into, and so must deal with, "the age of the career clerk" (p. 137). The interviews revealed that judges were aware of the vices of career clerkships, but nonetheless created such positions to improve efficiency. Because the pressures for efficiency are unlikely to subside, Oakley and Thompson offer several suggestions for mitigating the adverse effects of career clerkships. The practical value of these proposals, unfortunately, is not immediately evident. They suggest, for example, that judges' budgets be expanded to provide for at least one short-term clerk. But they surely must recognize that fiscal constraints on state governments are partly responsible for the problems that they identify. The authors also fail to demonstrate that the use of short-term clerks will produce greater benefits than other potential reforms in the judicial system that must compete for scarce resources. Oakley and Thompson also suggest that judges attempt to minimize "the qualitative differences between long-term and short-term law clerks . . . by recruiting long-term clerks from a court's short-term alumni" (pp. 137-38). But most short-term clerks consider their clerkship to be an educational experience and pursue other, more lucrative careers. A third suggestion is that judges not insulate themselves from their short-term clerks. Although the existence of bureaucratized staffs may make this proposal difficult to implement, the authors' own interviews reveal that judges are aware of the problems with career clerks; the admonition, therefore, tells them little that they do not already know.

*Law Clerks* addresses an interesting subject, but comes up short

in several respects. The attitudes of law clerks, for example, are ignored throughout the book, although they are surely relevant to any reform proposals. One wonders, moreover, what insights are lost in the authors' "composite profiles" of judges in the various courts that they considered. And, as will often be true in exploratory studies, their sample sizes are quite small: They interviewed only six of the nation's 132 federal appellate judges, and fourteen of its 516 federal district court judges.<sup>5</sup> Finally, the book is simply too long for what it says; for most readers, the abridged version of the book, which appeared in the *California Law Review*,<sup>6</sup> will do just as well.<sup>7</sup>

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5. See McCree, *supra* note 1, at 777 n.1.

6. Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979).

7. *Law Clerks and the Judicial Process* was also reviewed in KIRKUS REVIEWS, Oct. 1, 1980, at 1340.

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