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# Education for Judicial Aspirants

Keith R. Fisher

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## EDUCATION FOR JUDICIAL ASPIRANTS\*

*Keith R. Fisher\*\**

I.	Introduction .....	163
II.	Judging as a Separate Profession.....	164
III.	The Case for IJE .....	175
	A. Comparing the Common Law and Civil Law Approaches .....	175
	B. Fundamental Change in the Role of the Trial Judge ..	182
	C. Declining Public Confidence in the Judiciary .....	185
IV.	Towards an IJE Curriculum.....	189
V.	Conclusion.....	201

### I. INTRODUCTION

State judiciaries are responsible for the resolution and disposition of the vast majority of civil and criminal cases in the United States.<sup>1</sup> Yet

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\* Copyright © 2008, 2009 by Keith R. Fisher. All Rights Reserved. This article is a synthesis of the author’s work to date on the subject of Introductory Judiciary Education. Small portions of this article were drafted by the author for inclusion in the Report and Recommendations of the Ohio Bar Association and the ABA Standing Committee on Judicial Independence on Introductory Judicial Education to the ABA House of Delegates and an Amicus Brief filed by the ABA (of which the author was also the principal draftsman) in the U.S. Supreme Court *Caperton v. A.T. Massey Coal Co.* A substantial portion of this article is derived from a white paper written by the author for a Symposium on Pre-Judicial Education hosted by the Ohio State University Moritz College of Law and co-sponsored by the Ohio State Bar and the Standing Committee on Judicial Independence.

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1. According to the National Center for State Courts in Williamsburg, Virginia, 98 percent of all judicial proceedings in the United States occur in state courts. See National Center for State Courts, Court Administration: Caseflow Management, <http://www.ncsconline.org/WC/CourTopics/overview.asp?topic=CasMan> (last visited Oct. 17, 2009). Justice Breyer has reportedly put the

public confidence in the court system has greatly diminished and continues to wane, and criticism of the quality of individual judges and the judiciary as a whole is ubiquitous.<sup>2</sup> Judges themselves have evidenced their dissatisfaction by voluntarily doffing their robes and leaving the bench in ever-increasing numbers.<sup>3</sup>

The crisis in our judicial system has many causes, but one recurring theme has been that most judges are ill-prepared for the challenges, personal and professional, of a judicial career, and many of them turn out to be ill-suited for the job. On February 16, 2009, the House of Delegates of the American Bar Association (ABA) voted overwhelmingly to approve a resolution and recommendation urging state high courts and state, local, and territorial bar associations to establish voluntary programs of Introductory Judicial Education.<sup>4</sup> Such programs would enable individuals interested in serving on the judiciary to obtain, well in advance of any selection or election process in which they might become involved, a better appreciation of the role of the judiciary and the myriad of challenges judges face both on and off the bench. Armed with that education, a judicial aspirant would be not only better prepared to serve as a judge but also in a far better position to make an informed decision about whether to pursue a judicial career in the first place.

This article will consider the concept of Introductory Judicial Education, its underlying rationale and purpose, and the possible curricular content of such a program.

## II. JUDGING AS A SEPARATE PROFESSION

The word “professionalism,” now widely used in discourse about the condition and future of the legal profession, may conjure different

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figure at 95 percent. See Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash “in the Courtroom”*, N.Y. TIMES, Apr. 15, 2008, at A22.

2. See *infra* notes 157-189.

3. See *infra* note 105.

4. The Recommendation and Resolution, No. 113, was sponsored by the ABA Standing Committee on Judicial Independence and co-sponsored or supported by the ABA Judicial Division, the Lawyers Conference, the National Conference of Administrative Law Judges, the National Conference of State Trial Judges, the Appellate Judges Conference, the Ohio State Bar Association, the Mississippi Bar, the ABA Standing Committee on Client Protection, the ABA Center on Ethnic and Racial Diversity, the ABA Section of Dispute Resolution, the National Conference of Federal Trial Judges, the San Diego County Bar Association, the National Judicial College, and the American Judicature Society.

connotations to different people.<sup>5</sup> Putting such nuances aside, the word does denote a certain quality of conduct that is expected by members of the profession and lay people alike. Applying the concept of professionalism not just to the bar but to the judiciary as well seems entirely appropriate, particularly given the increasing frequency and severity of attacks on judges<sup>6</sup> and on judicial conduct. These include perennial critiques of judicial sentences<sup>7</sup> and orders granting motions to suppress<sup>8</sup> in criminal cases, petulant (if not choleric) insistence by former governors George Pataki of New York and Gray Davis of California that decisions by their judicial appointees should reflect

5. “Indeed, it seems clear that the word professionalism means different things to different people, and it is often used in different ways by the same people, sometimes at the same time and in the same context.” Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 121 (2001).

6. The reference here is not to physical attacks, though these too have escalated. See Jerry Markon, *Besieged by Threats, Judges Seek Security [as] Intimidation of Court Personnel Has Surged Recently*, CHI. TRIB., May 25, 2009, at 16 (“[t]he threats against federal court personnel have more than doubled in the past six years, from 592 to 1,278”). See, e.g., Amanda Paulson & Patrik Jonsson, *How Judges Cope with Everyday Threats on the Job*, CHRISTIAN SCI. MONITOR, Mar. 4, 2005; Rick Lyman, *Focus on Safety for Judges Outside the Courtroom*, N.Y. TIMES, Mar. 11, 2005, at A18; Shaila Dewan, *Terror in Atlanta: The Overview; Suspect Kills 3, Including Judge, at Atlanta Court*, N.Y. TIMES, Mar. 12, 2005, at A1; *Sniper Shoots Judge in Reno Courthouse*, CHI. TRIB., June 13, 2006, § 1, at 6. More recently, a radio commentator was charged with threatening the lives of three federal judges and was committed for trial on those charges notwithstanding his claim to First Amendment protection for “rhetorical hyperbole.” See Lynne Marek, *Trial Over Death Threats Against Federal Judges Could Test Free Speech Rules Online*, NAT’L L. REV., Nov. 24, 2009.

7. Relatively recent examples are Bill O’Reilly’s critiques of Oklahoma judge Thomas Bartheld (also criticized by Geraldo Rivera) for imposing a one-year sentence on convicted child molester for rape and sodomy of a five-year old girl, see Kandra Wells, *O’Reilly, Rivera, Take Bartheld, Miller to Task on National TV*, MCALESTER NEWS CAPITAL, June 6, 2009, [http://www.mcalesternews.com/local/local\\_story\\_157175737.html](http://www.mcalesternews.com/local/local_story_157175737.html), and of Vermont judges Edward Cashman and David Howard. See Bill O’Reilly, *Talking Points: No Justice in Vermont* (Jan. 16, 2007), available at <http://www.foxnews.com/story/0,2933,243904,00.html>.

8. A prime example is the notorious 1996 Presidential campaign issue (and intimidating threats of impeachment) arising from such an order by Judge Harold Baer in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), vacated, 921 F. Supp. 211 (S.D.N.Y. 1996). See generally Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1; Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1; Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1; R. Eugene Pincham, Commentary, *A New Tyranny Against Judiciary*, CHI. TRIB., May 23, 1996, at 30. During this imbroglio, Judge Baer did receive support from his judicial colleagues within the Second Circuit, who wrote a letter decrying politicians’ public castigation of judges for their opinions and the concomitant threat to the independence of Article III judges. See *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., Mar. 29, 1996, at 4.

gubernatorial views,<sup>9</sup> castigation of judicial consideration of foreign sources of law when interpreting the Constitution or federal statutes,<sup>10</sup> generalized attacks on U.S. Supreme Court decisions from both sides of the political spectrum as (with apologies to Tennyson<sup>11</sup>) cannon to the right and left of them volley and thunder,<sup>12</sup> generic legislative dyspepsia over instances of “judicial activism,”<sup>13</sup> legislative threats of jurisdiction stripping,<sup>14</sup> and, from the lunatic fringe, “J.A.I.L. 4 Judges.”<sup>15</sup> While one would like to believe that purely political motives<sup>16</sup> or fundamental differences in deeply-held philosophical or religious beliefs account for most such fusillades, it cannot be gainsaid that a great many complaints are, in fact, meritorious (with some potentially rising to the level of

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9. See Juan Gonzalez, *Pols Rule Courtrooms: Acting Judges Owe Their Job to Pataki, Rudy*, N.Y. DAILY NEWS, Jan. 18, 2000, at 8; *Davis' Remarks Leave Judges' Heads Shaking*, SACRAMENTO BEE, Mar. 2, 2000.

10. See, e.g., H.R. Res. 568, 108th Cong. (2004) (disapproving Supreme Court's use of this technique in cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Atkins v. Virginia*, 536 U.S. 304 (2002)).

11. See ALFRED, LORD TENNYSON, *The Charge of the Light Brigade* (1854), in TENNYSON: SELECTED POETRY 96 (W.E. Williams, ed. 1985).

12. Compare Vincent T. Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11 (criticizing the Supreme Court majority in *Bush v. Gore*, 531 U.S. 98 (2000)) with Joan Biskupic, *Bork, Uncorked: The Judge Holds the Supreme Court in Contempt*, WASH. POST, Mar. 16, 1997, at C01 (highlighting Judge Bork's criticisms of the Supreme Court).

13. See, e.g., *Judicial Activism: Defining the Problem and Its Impact, Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights, U.S. Senate Comm. on the Judiciary*, 105th Cong. (June 11, 1997); Warren Richey, *Judicial Aftershocks from the Schiavo Case*, CHRISTIAN SCI. MONITOR, Apr. 4, 2005, available at <http://www.csmonitor.com/2005/0404/p02s01-usju.html?s=hns>; *Judicious Temperament: Retired Supreme Court Justice Sandra Day O'Connor Speaks Up Against Political Attacks on Courts*, HOUSTON CHRON., Mar. 16, 2006, at B18.

14. See, e.g., AMERICAN BAR ASSOCIATION, REPORT OF THE COMMITTEE ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 57 (1997); Ralph Jimenez, *Judges, Lawyers Decry the Virulence of Attacks on High Courts*, BOSTON GLOBE, N.H. WKLY., Oct. 4, 1998, at 1.

15. See Claire Cooper, *Bid to Punish Judges Has Eye on State*, SACRAMENTO BEE, Nov. 17, 2005, at A3.

16. See, e.g., Ralph Z. Hallow, *Republicans Out to Impeach 'Activist' Jurists*, WASH. TIMES, Mar. 12, 1997, at A1; The Constitution Task Force, Report of the Citizens for Independent Courts Task Force on the Distinction Between Intimidation & Legitimate Criticism of Judges, *Defending Justice: Courts, Criticism and Intimidation*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 121, 146-47 (2000), available at [http://www.constitutionproject.org/pdf/uncertain\\_justice.pdf](http://www.constitutionproject.org/pdf/uncertain_justice.pdf).

criminal misconduct<sup>17</sup>) and keep state judicial conduct commissions in business.<sup>18</sup>

Invoking professionalism with respect to the judiciary raises the question whether “judging” can be regarded as a separate profession from “lawyering.” Taking an essentially instrumentalist approach to defining what constitutes a profession, courts have identified certain salient characteristics, including, at a minimum, formal training, licensing standards, and enforceable ethics codes.<sup>19</sup> As the New York Court of Appeals has observed:

A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.<sup>20</sup>

For their part, social scientists have also endeavored to identify the principal characteristics that distinguish professions from other occupations. These include:

- a substantial body of knowledge, essential to performing the tasks of the occupation and requiring mastery of abstract concepts and complex principles unfamiliar to the population at large;
- self-regulation by means of established and enforceable standards for ethical behavior of practitioners;

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17. See, e.g., Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231 (1997). Cf. Abraham Abramovsky & Jonathan I. Edelman, *Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?*, 33 FORDHAM URB. L.J. 727 (2006).

18. See *infra* notes 150-180 and accompanying text. See also Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-56 (2004).

Civil suits against judges are more problematic because of judicial immunity. Recently, two Luzerne County, Pennsylvania judges were accused of taking kickbacks in return for sending juveniles to privately owned detention facilities. A federal court ruled that one of the judges was immune from damages for the vast majority of his conduct, as it occurred inside a courtroom, while the other judge, whose actions were more administrative in nature, such as signing a placement agreement with the detention center, did not enjoy immunity. See Ashby Jones, *New Lawsuits Try to Pierce Shield of Judicial Immunity*, WALL ST. J., Nov. 12, 2009.

19. E.g., *Hosp. Comp. Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351, 1361 (D.N.J. 1992).

20. *In re Estate of Freeman (Lincoln Rochester Trust Co. v. Freeman)*, 311 N.E.2d 480 (N.Y. 1974).

- self-regulation of the conditions and content of the work performed, providing a high level of individual autonomy;
- a culture emphasizing a strong and enduring level of dedication to the work;
- identification with the occupation by practitioners and a sharing of common interests and values;
- a motivational ideal of service to clients and the public: While a business chiefly seeks financial profit, a profession is mainly concerned with the ideal of service.<sup>21</sup>

“Judging,” it should be noted, encompasses all of these *except* formal training and learning beyond and different from what is required for admission to the practice of law, i.e., prior education or credentialing that is peculiar to the task of being a judge.

The foregoing array of formal characteristics—particularly the educational requirements, licensing requirements, and ethical code—engenders a degree of trust and dependency that creates the fiduciary obligations said to be owed by professionals to their clients and, to a degree, the public as well.<sup>22</sup> In the case of judges, that duty translates into obligations of fidelity to the law, integrity, fairness, impartiality, and adherence to a quasi-Aristotelian notion that like cases will be treated alike. Whether judicial selection is made by election or appointment, “there is an implied covenant with the people that the judges selected will be persons who have demonstrated by well-defined and well-recognized qualifications their fitness for judicial office”—a covenant that includes “find[ing] persons . . . qualified by learning, experience and temperament, to decide the cases that come before them impartially and in accordance with the law.”<sup>23</sup>

The vast majority of people serving in the judiciary have no special credentials for the judicial role that set them apart from lawyers in general. Thus, other than a law school education, bar passage, and some amount of experience in the practice of law (typically, though not

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21. See RONALD M. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 19-33 (2d ed. 1988). Omitted from this enumeration, because it is not germane to the topic of this essay, is a darker, corollary characteristic of a profession—that of being a cartel, able to monopolize the provision of a particular type of service. See RICHARD L. ABEL, *AMERICAN LAWYERS* 17-30 (1986).

22. See Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY. L. REV. 563, 573-80 (1995).

23. James J. Alfini and Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 701 (2002).

always, as litigators), there is no special training given to those who aspire to judicial office prior to their ascendancy to the bench.<sup>24</sup>

In recent years, suggestions have been made for a special curriculum for individuals aspiring to judicial office. Under the aegis of the American Bar Association's Standing Committee on Judicial Independence ("SCJI" or the "Committee"),<sup>25</sup> a Study Group on Pre-Judicial Education—which is now called "Introductory Judicial Education" or "IJE"<sup>26</sup>—was empanelled in 2001<sup>27</sup> and in 2005 issued a brief but interesting report.<sup>28</sup> The idea of IJE is that some sort of formal

24. A variety of programs are offered for those who are already judges. Some prominent examples are (1) the courses developed and offered by the National Judicial College in Reno, Nev. (principally targeted at state trial and family court judges), *see generally* The National Judicial College, <http://www.judges.org> (last visited Nov. 15, 2009), and (2) those offered in an orientation program for new federal judges offered by the Federal Judicial Center (principally covering civil and criminal trial practice, case management, judicial ethics, opinion writing, and (for district judges and magistrate judges) the criminal sentencing process, as well as discrete areas of substantive law that arise frequently in federal practice), *see* THE FEDERAL JUDICIAL CENTER, EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS, at 2, *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/FJCEdRes.pdf/\\$file/FJCEdRes.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FJCEdRes.pdf/$file/FJCEdRes.pdf).

25. The Standing Committee on Judicial Independence has taken a leadership role in promoting public trust and confidence in the judiciary as well as in the justice system more generally, including such recent efforts as the DVD video program. *Protecting Our Rights, Protecting Our Courts*, the pro-judicial independence pamphlets *Countering the Critics, Countering the Critics II*, and *Rapid Response to Unjust and Unfair Criticism of Judges*, and the Least Understood Branch project.

26. Born, no doubt, of a classical education, but influenced further by a culture in which sound bytes are everything, the author's initial reaction to the term "Pre-Judicial Education" was decidedly unfavorable. One is simply asking too much of that little hyphen, and it can't bear the load! For whether or not one ends up, as a substantive matter, being a proponent of some sort of special education for aspiring judges, the term "Pre-Judicial" smacks too much of "prejudicial"; indeed, that is the Latin etymology of words such as "prejudicial" and "prejudice," and from a psychological perspective there is a strong possibility that the host of negative contemporary connotations attached to those words, not only in legal discourse specifically but also in modern English usage generally, would subconsciously damn the concept before it even gets a fair hearing. That, after all, is the essence of what it means to be "prejudicial"—with or without the hyphen.

The alternative, "ante-judicial," is no better, not merely because it sounds a bit precious, rather like "ante bellum"—redolent as that is with mental visions of plantations and privileged persons sipping mint juleps on honeysuckle-scented verandas—but also because it suffers from the potential of homonymous confusion with "anti-judicial," a category of sentiment that is, as noted above (*see supra* notes 6-16), already far too prevalent in our society.

Accordingly, though begging the reader's indulgence for this footnote, the author intends to use the phrase "Introductory Judicial Education" or its acronym "IJE" to describe any and all possible variations on a curriculum or training program for individuals who aspire to judicial office, whether trial-level or appellate, and whether federal, state, or administrative.

27. The Study Group comprised trial and appellate judges, lawyers, judicial and adult educators, bar association executives, and legal academics.

28. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION (2005) [hereinafter *Study Group Report*].



preparation, while neither a prerequisite for judicial office nor a guarantee of selection, will result in a cadre of potential jurists who have exhibited the interest and the commitment to acquire an extra educational credential that potentially could make them better qualified for the judiciary than other lawyers.

As part of this effort, the Study Group necessarily had to address the issue whether the effectiveness and perception of legitimacy of judicial selection might be enhanced through the establishment of a program of Introductory Judicial Education. This involved consideration of the form such education might take, how its availability might affect the pool of potential judges and assist those responsible for judicial selection, and the potential long-range impact of such education on the overall functioning of our system of justice.

As the Study Group observed:

What we envision is not the displacement of existing selection mechanisms, but rather their enhancement by making available to potential judges educational programs designed to produce judicial candidates who are better prepared for the role and who can make a more informed decision regarding whether a judicial career is appropriate for them. Education of this sort would prove useful to those responsible for judicial selection—whether an electorate or an appointive authority—by providing a significant piece of information regarding the interest level and aptitude of the candidates. The candidates themselves would benefit from attaining a better appreciation of the judicial role. Changes in the nature of law practice and the judicial role over the past several decades have rendered the gap between the two activities increasingly large. Lawyers are less able to appreciate all of what being a judge entails, and the skills learned in practice are less directly applicable to a judicial role that now includes a substantial managerial component. Because of this, we believe that [IJE] programs would also appeal to practitioners who do not intend to become judges, but who could benefit from knowing more about judicial roles and responsibilities. . . .

While we do not believe that [IJE] stands as a cure for all the problems of judicial selection, we believe that it can alleviate many of them. For example, candidates who have undergone [IJE] will be less likely to engage in unethical or otherwise inappropriate campaign conduct. More generally, as already suggested, they are likely to be better candidates both because their education will make them better judges and because their decision to seek a judgeship will be more informed. In addition, just as education has traditionally served as a gateway to opportunity in American society, so can [IJE] open judicial careers to

those who might otherwise been [sic] excluded from pursuing them based on, for instance, a lack of political involvement. In sum, [IJE] presents the possibility of creating a larger pool of better-prepared potential judges.<sup>29</sup>

The Study Group also identified some possible negative externalities:

. . . To the extent that [IJE] involves significant costs, career interruption, or geographic relocation, some otherwise suitable candidates are likely to be discouraged from pursuing judgeships. In addition, there is some reason for concern regarding whether these effects would fall more heavily on women and those in public service or other less remunerative practice areas. These effects are, of course, speculative, but nonetheless deserve ongoing attention as the concept of [IJE] moves forward.<sup>30</sup>

After examining a variety of resources and programs, the Study Group concluded that “[IJE] presents a viable and valuable avenue for improving both appointive and elective systems of judicial selection.”<sup>31</sup> Acknowledging that the concept was “largely uncharted territory,” the Study Group suggested certain additional preliminary steps that might be (but have not, to date, been) taken. These include compiling “data regarding the specific sorts of information that would be most valuable to those considering a judicial career,”<sup>32</sup> developing data on “the typical background of those who become state court judges,”<sup>33</sup> and experimenting with pilot programs.<sup>34</sup> As a concept, Introductory

29. *Id.* at 4-5.

30. *Id.* at 5.

31. *Id.* at 29.

32. *Id.*

Both new and experienced judges should be systematically surveyed regarding what they wish they had known at the outset of their judicial careers. The practicing bar might likewise be surveyed concerning the perceived strengths and deficiencies of both new and experienced judges. In addition, because making the programs useful to practitioners as well as aspiring judges will be critical to their success, attention must be paid to the bar’s views of what its members would find most useful and interesting.

*Id.*

33. *Id.* at 29.

Such data would provide an additional window into the experiential gaps of the judiciary, and thereby suggest areas of curricular emphasis that might not be apparent from other studies. In addition, the data might reveal that there are categories of lawyers who are relatively under-represented in the judiciary, and perhaps suggest ways in which education might be shaped to make them more likely to consider becoming a judge.

*Id.*

34. *Id.* at 29-30.

Given the novelty of [IJE], it will be critical to begin by taking small steps. We believe

Judicial Education is largely unobjectionable and may well merit enthusiastic support from the organized bar, which has an interest in maximizing the chances that the most highly qualified individuals will ascend to the bench.<sup>35</sup> The devil is in the details, however. What, for example, would be the intended scope of such a program? Would it be a relatively short, seminar-like program, lasting a week or less? Would it be a formal, degree program requiring a year of full-time study in residence, much like a typical LL.M. curriculum? What sorts of subjects would comprise an IJE curriculum?

The topic thus rather naturally subdivides itself into two fundamental questions. Is there a sufficiently strong case to be made for IJE? If so, what might be envisioned as the substantive curriculum?

In considering these questions, we have the luxury—and the challenge—of writing on a nearly clean slate. Canvassing the law review literature reveals very little of substance on the subject of judicial education<sup>36</sup> generally and even less on IJE. Indeed, the latter boasts only two offerings, one by a former Director of the A.B.A.'s Judicial Division<sup>37</sup> and the other by a judge of the Louisiana Court of Appeal, Third Circuit.<sup>38</sup> Beyond these, the only publication to date has been the Study Group Report.<sup>39</sup>

Before turning to the merits of IJE, a few more introductory observations are in order. The impetus for considering this topic can be traced back to a lingering unease with judicial selection and the ongoing (though by now somewhat stagnant) debate over merit selection.<sup>40</sup>

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that an appropriate jurisdiction should be identified for the implementation of a pilot program, the initial design of which should be such as to permit flexibility to adapt in light of early results. More generally, we believe that broad experimentation will be necessary to determine what is workable and useful, and that such experimentation should be fostered and encouraged. From there, work can begin to develop generalized standards, and perhaps the formation of an institute devoted solely to [IJE].

*Id.*

35. *Id.* at 6. Problems with judicial selection appeared to the Study Group to be “most acute” at the state level, so its inquiry was limited to the IJE for aspirants to state judiciaries. *Id.* Even conceding the correctness of the protasis, it seems sensible to assume that if IJE is worthwhile, it will be equally useful to aspirants for both state and federal judicial office.

36. I.e., continuing education for those who have *already* ascended to the bench.

37. Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851 (2002).

38. Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 52 *J. LEGAL EDUC.* 130 (2002). This article is an adaptation of Judge Amy’s thesis for the degree of LL.M. in Judicial Process at the University of Virginia School of Law.

39. Study Group Report, *supra* note 28.

40. With 39 of the 50 states relying on some form of election to select judicial officers, that phenomenon, which dates back to the eighteenth century (*see infra* note 41) and took wing with 19th century populist concerns about cronyism in judicial appointments, is not likely to vanish in the foreseeable future. Nonetheless, the media occasionally takes the opportunity to editorialize

Those concerns date back at least to the era of the drafting of the federal Constitution<sup>41</sup> and began to ferment in the Jacksonian era,<sup>42</sup> possibly as a result of populist dissatisfaction with the appointment of judges perceived to be political cronies of the party in power, though this is disputed.<sup>43</sup> What is undisputed is that the mid-nineteenth century witnessed a move toward elective judiciaries in many states,<sup>44</sup> followed in the twentieth century by the realization that the taint of politics is just

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(even in what are supposed to be news stories) in favor of merit selection. *See, e.g.*, Editorial, *Justice for Sale?*, WASH. POST, Mar. 3, 2009, at A12 (“[S]tates should consider abolishing judicial elections in favor of an appointment system that distances jurists from politics and fundraising.”); Samuels, *supra* note 1 (noting “inappropriate judicial involvement in partisan politics,” the “dawn of a grubby new era of multimillion-dollar campaigns for important state judgeships,” and referring with approval to “state reformers stepping up their call for . . . a switch to a nonelective merit selection system.”). Even justices of the U.S. Supreme Court cannot resist commenting on the judicial election phenomenon. *See* Republican Party of Minn. v. White, 536 U.S. 765, 787 (2002) (noting ABA’s historical preference of merit selection over judicial elections); *id.* at 782 (“[I]f, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process.”); *id.* at 788-92 (O’Connor, J., concurring) (expressing serious reservations about judicial elections generally and noting concerns about campaign contributions undermining public confidence in the judiciary).

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal judiciary. In resolving this case, however, we should refrain from criticism of the State’s choice to use open elections to select those persons most likely to achieve judicial excellence.

*Id.* at 795 (Kennedy, J., concurring).

41. “Judicial elections began in 1789 in Georgia localities, then in 1793 in Vermont localities, and in 1812 Georgia adopted it for state judges.” Roy A. Schotland, *To The Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1399 (2003) (citations omitted).

42. *See, e.g.*, Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 342-49 (1996) (alluding to such historical developments in the context of tracing the evolution of judicial selection for New York’s high court).

43. The choice of elections was not (as myth holds):

[A]n unthinking ‘emotional response’ rooted in . . . Jacksonian Democracy” which somehow “assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control.” On the contrary, the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary “free from the corrosive effects of politics and able to restrain legislative power.

Schotland, *supra* note 41, at 1400 (citing Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 HISTORIAN 337 (1983)). *See also* Caleb Nelson, *A Re-Evaluation of Scholarly Explanation for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); David B. Frohnmayer, *Who’s to Judge?*, 58 OR. ST. B. BULL. No. 2, 9, 10 (1997).

44. *See* JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 97 (1950); Schotland, *supra* note 41, at 1399-1400.

as strong in elective regimes as in appointive regimes (and perhaps even stronger). That realization has come home to roost in recent years with the advent of significant and highly controversial donations to candidates for judicial office<sup>45</sup> and public perceptions of the implications for judicial independence.<sup>46</sup>

Viewed in this context, IJE is perhaps another “take” on merit selection.<sup>47</sup> An effort to maximize the chances that judicial selection—by *any* process—will result in a judiciary composed of competent individuals who are not only philosophically attuned to the imperatives of fairness and impartiality (both in appearance and in fact) but capable of performing at a higher level of competence and efficiency as a result

45. The most recent of these involves campaign support in excess of \$3 million to a West Virginia high court judge from the Chairman and CEO of a corporation after it had lost a \$50 million fraud verdict and while it was preparing to file an appeal to the same high court. *Justice for Sale?*, WASH. POST, Mar. 3, 2009, at A12. After winning a particularly contentious election, the judge in question, Brent D. Benjamin, refused to recuse himself, and with him as Acting Chief Justice, the court overturned the verdict by a one-vote margin (3-2). *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, (W. Va 2008), *rev'd*, 129 S. Ct. 2252 (2009). The former West Virginia Chief Justice, Elliott E. Maynard, had finally recused himself from the case after photographs surfaced of him being wined and dined on the French Riviera and Monaco by the same CEO; these revelations led to Maynard’s being defeated in the Democratic primary and losing his seat on the court. Ian Urbina, *West Virginia’s Top Judge Loses His Reelection Bid*, N.Y. TIMES, May 15, 2008, at A25; Paul J. Nyden, *Mining Appeal Moving Along Olson to Argue Harman Case Before Supreme Court*, CHARLESTON GAZETTE & DAILY MAIL (WV), May 16, 2008, at 1A. On November 14, 2008, the U.S. Supreme Court granted certiorari. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 593 (2008). The granting of the writ had been unexpected, because in cases where judges had refused to recuse themselves in the face of large campaign contributions, the Supreme Court had previously denied certiorari three times. See *Avery v. State Farm Mutual Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Consol. Rail Corp. v. Wightman*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

On June 8, 2009, a closely divided Court, while specifying that its holding was limited to the extreme facts of the case, held 5-4 that when one with a personal stake in a particular case has had a “disproportionate influence” in placing the judge on the case by the magnitude of campaign support when the case was pending or imminent, the due process clause of the Fourteenth Amendment forbids the judge from hearing the case, regardless of whether the judge is or is not actually biased. *Caperton*, 129 S. Ct. 2252, 2264-65 (2009). (In the interests of full disclosure, the author was the principal draftsman of the American Bar Association’s amicus briefs, one at the certiorari stage and one at the merits stage, filed in the *Caperton* case).

46. See, e.g., David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1 (2003); Aman McLeod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499 (2005); Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597 (2005).

47. For some background on merit selection, see Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990).

of having received specialized training in the college of judicial arts and sciences. IJE is not, however, a panacea for the ills of judicial selection, nor can it be: As with the choice of judicial selection by election or by appointment, judicial selection with or without IJE can never be entirely insulated from partisan politics.<sup>48</sup>

### III. THE CASE FOR IJE

#### *A. Comparing the Common Law and Civil Law Approaches*

Some form of IJE is present in certain civil law systems. Much could be, and has been, written on this subject. While a detailed examination is beyond the scope of this article, some summary observations about a few such systems are offered here. One fundamental characteristic is worth noting at the outset: These civil law systems proceed from a set of premises radically different vis-a-vis the role of the judiciary, and how its members fit into the legal system overall, from those prevailing in the Anglo-American common law tradition.

##### 1. Germany

The German system features a path embodying education for career judges. As is common among European systems, legal education begins at what in the United States would be the undergraduate level.<sup>49</sup> Legal education in Germany differs radically from the U.S. model both in the uniformity of the curriculum at German universities and in the degree of governmental regulation,<sup>50</sup> at both the federal and state levels.<sup>51</sup>

The *Deutsches Richtersgesetz*, or German Judges' Law, prescribes the requirements for the study of law and establishes a regimen of state

48. Cf. LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 128-30 (3d ed. 1994) (observing that merit selection does not eliminate political considerations from the process).

49. Stefan Koriath, *Legal Education in Germany Today*, 24 *WIS. INT'L L.J.* 85, 90 (2006).

50. Subjects of regulation include, *inter alia*, periods of study, vacations, mandatory and elective courses, state examinations, and grading. See David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 *S. CAL. L. REV.* 1795, 1802 (1988) (citing M. BRAUN, *JURISTENAUSBILDUNG IN DEUTSCHLAND* 67-113 (1980)).

51. Since the founding of the German Reich in 1871, primary responsibility for oversight of legal education has rested with the states. Nevertheless federal involvement, starting with the 1877 Court Constitution Act (*Gerichtsverfassungsgesetz*), has consistently prescribed the principle of the *Einheitsjuristen* ("standardized jurists," i.e., the same qualification for all legal professions), a bifurcated qualification approach requiring passing two state examinations, and the notion of "the judge as a model for all jurists." Koriath, *supra* note 49, at 88.

testing for aspiring jurists.<sup>52</sup> After passing the first examination, the student must complete a series of training rotations, each lasting from three to nine months in criminal court, civil court, a prosecutor's office, an administrative agency, and a practicing lawyer's office (plus one elective), while simultaneously taking courses that are taught by judges and civil servants and that focus on "the analysis of complex, practical cases."<sup>53</sup> Thus, a quintessentially judicial outlook predominates.<sup>54</sup> Thereafter, upon passing the second state examination, the student becomes a *Volljurist* ("full jurist") and is eligible to apply for a judgeship.<sup>55</sup> This approach to legal education, according to Dietrich Rueschmeyer, develops "a syndrome fostering civil service orientations and loyalty toward the State."<sup>56</sup>

Originally designed for a small elite, this two-stage system with its mandatory training requirements now produces in excess of 100,000 law students,<sup>57</sup> about 60 to 70 percent of whom will not become judges or public prosecutors because the German government limits the number of civil servants.<sup>58</sup> The explosion of those embarking on judicial and legal careers<sup>59</sup> has resulted in a glut of judges and *Rechtsanwälte* (practicing attorneys) and an increase in competition severe enough to affect, negatively, the quality of legal advice and services being rendered.<sup>60</sup>

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52. DEUTSCHES RICHTERGESETZ ("DRiG"), 1972 BGBI.1 713, as amended, § 5 I; Koriath, *supra* note 49, at 89 n.17 (2006) ("[t]oday's Federal Judge Act (Deutsches Richtergesetz) stipulates in Section 5 that 'those who finish the study of legal sciences with the First State Examination and the subsequent preparatory service with the Second State Examination obtain the qualification for the office of a judge.'").

53. Clark, *supra* note 50, at 1804.

54. The same can be said of the education on the Langdellian model purveyed to the vast majority of law students in the United States. See Black's Law Dictionary 228 (8th ed. 2004) ("casebook method").

55. However, this same curriculum produces prosecutors, government lawyers, and a broad array of in-house corporate lawyers. Clark, *supra* note 50, at 1804.

56. *Id.* (quoting DIETRICH RUESCHMEYER, LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES 4 (1973)) (quotation omitted).

57. Koriath, *supra* note 51, at 89 (citing STUDIERENDE AN HOCHSCHULEN WINTERSEMESTER 2003/2004 FACHSERIE 11 REIHE 4.1- 2004 DSES STATISTISCHEN BUNDESAMTES, available at <http://www-ec.destatis.de/csp/shop/sfg/bpm.html.cms.cBroker.cls?cmspath=struktur,vollanzeige.csp&ID=1014818>).

58. *Id.* (citing STATISTIK JURASTUDENTEN, PRÜFUNGEN, RECHTSANWÄLTE DER BUNDESRECHTSANWALTSKAMMER, available at [http://www.brak.de/seiten/08\\_02.php](http://www.brak.de/seiten/08_02.php)).

59. Law (or, more specifically, the economic and social value system embodied in the American legal mainstream of the late twentieth century) has long been one of the New World's most successful exports, but now it seems that portions, at least, of the Old World are also uncritically importing our surfeit of lawyers per capita.

60. Koriath, *supra* note 51, at 89.

## 2. France

The French system is somewhat different, embodying not only a corps of “professional” judges but also a variety of tribunals employing non-professional judges, many of whom have not received any formal legal training (e.g., the civil servants who are judges of the administrative courts, the business people appointed to the commercial courts, and the miscellaneous lay people who serve on labor courts).<sup>61</sup> Confining ourselves for present purposes to the corps of “professional” judges (*magistrats*), these are career judicial officers, drawn from law graduates, who by age 28 have matriculated, based on their performance on a highly competitive examination, into the *École Nationale de Magistrature* (National College of Judges) and have embarked upon a civil service career.<sup>62</sup>

Comparative law studies have observed the rather formalist nature of French judicial discourse, which seeks to minimize judicial power, emphasize the establishment of clear, predictable rules, and maximize the power of the legislature; these studies have contrasted those features with the American approach, in which judicial discourse is more pragmatic (or realist), takes as its point of departure a recognition of the foibles of the legislature—particularly its inability to foresee the multifarious legal and factual scenarios that will challenge, if not confound, the interpretation of statutory law—and thus empowers judges to preserve the slow, accretive, common-law case-by-case lawmaking role based on frequently policy-laden applications of logic and precedent.<sup>63</sup>

This fundamental difference is perhaps a reflection of the divergences in Enlightenment thought on the judicial role as between Montesquieu and the Federalists. Montesquieu saw the power of the state divided between the executive (the King) and the legislature but not the judiciary, which he saw as merely effecting the will of the legislature by application of statutory provisions to particular disputes.<sup>64</sup> From Montesquieu’s point of view, the judiciary should be “*invisible et*

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61. See John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1760-61 (1988).

62. *Id.* at 1759. See also Adam Liptak, *Rendering Justice, With One Eye on Re-Election*, N.Y. TIMES, May 25, 2008, at A1.

63. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* (1968); JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* (1968).

64. MELVYN RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 246 (1977).



*nulle*.”<sup>65</sup> This formalistic approach, still evident in the organization and philosophy of the French judiciary today,<sup>66</sup> undoubtedly derives in no small part from French fear of judicial despotism and the revolutionary reaction against the *parlements* of the *ancien régime*.<sup>67</sup> By contrast, the Federalists, while viewing the judiciary as weaker than the two political branches, anticipated an active, central, and essential role for judicial review as protecting not only the fundamental rights of the people (those guaranteed in the Bill of Rights) from encroachment by the states, but the rights of the states and the people from encroachment by the federal government.<sup>68</sup> As Alexander Hamilton cogently observed, “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . , courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>69</sup>

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65. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 72-96 (Anne M. Cohler et al. eds., 1989).

66. See, e.g., RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES & METHODOLOGY* 27 (M. Kindred trans. 1972).

67. See Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Pénales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 *BROOK. J. INT’L L.* 67, 94 (2006); Amalia Kessler, *Book Review: Revisiting the Question of French and American Difference*, 18 *YALE J.L. & HUMAN.* 327, 328 (2006) (reviewing MICHEL DE S.- O.- L’E SASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004)).

68. Courts are “the bulwarks of a limited Constitution against legislative encroachments.” *THE FEDERALIST* NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kessler, eds. 1999). See generally Keith R. Fisher, *Towards A Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 *HARV. J.L. & PUB. POL’Y* 981, 1017-23 (2006).

69. *THE FEDERALIST* NO. 78, at 434 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kessler, eds. 1999).

In the last eight essays of *The Federalist* (78-85), written for the conclusion of the second bound volume, Hamilton dedicated the first six to the judiciary, which he thought the most important guardian of minority rights but also the weakest of the three branches of government: “It commands neither the press nor the sword. It has scarcely any patronage.” He was especially intent that the federal judiciary check any legislative abuses. In number 79, Hamilton introduced an essential concept, never made explicit in the Constitution: that the Supreme Court should be able to review and overturn legislation as unconstitutional. At Philadelphia, delegates had concentrated on the question of state versus federal courts, not whether courts could invalidate legislation. Here, Hamilton bluntly affirmed that “no legislative act . . . contrary to the constitution can be valid,” laying the intellectual groundwork for the doctrine of judicial review later promulgated by Supreme Court justice John Marshall. . . .

Hamilton revered great judges and in [THE FEDERALIST NO. 79] pondered how the most highly qualified people could be recruited and retained by the courts. He argued for adequate salaries and against both age limits and the power to remove judges, except by impeachment.

RON CHERNOW, *ALEXANDER HAMILTON* 259 (2004) (citations omitted).

### 3. Japan

Traditionally, Japanese society viewed litigation—and by extension lawyers and judges—with distaste and not with respect.<sup>70</sup> Indeed, until very recently,<sup>71</sup> legal education in Japan was limited to undergraduate courses of study<sup>72</sup> and was, in all events, fairly stodgy, typically featuring large, assembly line<sup>73</sup> lecture courses teaching, in the abstract, substantive rules of Japanese law and theories of interpretation of Japanese legal codes without any actual case analysis or, for that matter, classroom participation by students.<sup>74</sup> Those actually aspiring to a career as lawyer, prosecutor, or judge, while they might take these undergraduate law courses, found them inadequate for passing the bar and had to enroll, in addition, in various “cram schools,” which entailed years of additional study.<sup>75</sup>

Admission to practice faces a bottleneck caused by the requirement of admission to the *Shiho Kenshu Sho*, or Legal Research and Training Institute (LRTI), a two-year training program consisting of rotations between stints in civil and criminal courts and offices of practicing attorneys in the private bar.<sup>76</sup> Funded by the government and controlled by the *Saiko saibansho* (the Japanese Supreme Court) and the private bar,<sup>77</sup> the LRTI each year admits only 1,000 of the approximately 30,000 law graduates taking the bar examination.<sup>78</sup>

70. See Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Toward Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 798 (2001).

71. See *infra* text accompanying notes 82-86.

72. See, e.g., Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, 2 ASIAN-PAC. L. & POL'Y J. 16, 32 (2001).

73. See Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419, 432 (2002) (“Most students quickly discover that law faculties offer only a series of mass-produced, impersonal lectures with enrollments that exceed 500 students. Students cannot pass the National Bar Examination by attending these lectures. So students who want to become lawyers go to preparatory cram schools and do not bother attending university classes.”).

74. See, e.g., Kohei Nakabô, *Judicial Reform and the State of Japan's Attorney System: A Discussion of Attorney Reform Issues and the Future of the Judiciary*, 10 PAC. RIM L. & POL'Y J. 623, 638 (2001) (Yohei Suda trans.) (2001); James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 309 (2004).

75. See Setsuo Miyazawa, *Education and Training of Lawyers in Japan—A Critical Analysis*, 43 S. TEX. L. REV. 491, 493 (2002); Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL EDUC. 1 (1989), reprinted in JAPANESE LEGAL SYSTEM 298 (Meryll Dean, 2d ed. 2002).

76. *Id.* at 299.

77. See Eric A. Feldman, *Mirroring Minds: Recruitment and Promotion in Japan's Law Faculties*, 41 AM. J. COMP. L. 465, 467 (1993).

78. See Gerald Paul McAlinn, *Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance*, 2 ASIAN PAC. L. & POL'Y J. 15, 17-18 (2001).

Typically, Japanese judges will have followed this undergraduate law degree-*cum*-cram school route and join the judiciary fresh from their training at the LRTI.<sup>79</sup> The majority are career judges<sup>80</sup> who are perceived negatively by the business community because they lack business education or work experience and therefore are deemed incapable of understanding contemporary business and professional practices.<sup>81</sup> For these reasons, the business community, acting through a group known as the *Nippon Keidanren* (Japanese Federation of Economic Organizations),<sup>82</sup> has proposed many far-reaching legal reforms in Japan,<sup>83</sup> including specifically, a series of judicial reforms aimed at making access to the courts easier and less expensive. The goal of these reforms is to create “a civil justice system better able to state the contours of the legal versus the illegal, to lessen growing risk exposure, and to promote business planning.”<sup>84</sup> Among these reforms are (i) that graduate professional schools for the study of law be established, (ii) that judges be appointed from among practicing attorneys who are familiar with the contours of business disputes, and (iii) that future judges undertake training in non-legal fields, primarily the sciences, in order better to understand intellectual property cases.<sup>85</sup> Although the reform process has already begun, with the opening in

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79. See George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do*, 13 U. MIAMI INT'L & COMP. L. REV. 475, 477 (2006) (citing Miyazawa, *supra* note 75, at 493).

80. JOHN O. HALEY, THE JAPANESE JUDICIARY: MAINTAINING INTEGRITY, AUTONOMY AND THE PUBLIC TRUST 5 (Faculty Working Papers Series, Paper No. 05-10-01) (Oct. 5, 2005), available at [http://law.wustl.edu/UploadedFiles/Faculty/Haley/TheJapaneseJudiciary\\_SSRN.pdf](http://law.wustl.edu/UploadedFiles/Faculty/Haley/TheJapaneseJudiciary_SSRN.pdf) (noting that approximately three-quarters of the judges appointed from the 1970 LRTI graduating class were still on the bench in 1996).

81. See Goodman, *supra* note 70, at 806.

82. This organization, the successor by merger to the *Keidanren* (Federation of Economic Organizations) and the *Nikkeiren* (Federation of Employers' Associations), boasts a membership (as of May 28, 2009) comprising 1,295 companies, 129 industrial associations, and 47 regional economic organizations. See Nippon Keidanren, About Nippon Keidanren, <http://www.keidanren.or.jp/english/profile/pro001.html> (last visited Nov. 4, 2009).

83. THE 21ST CENTURY PUBLIC POLICY INSTITUTE, TOWARD A REVITALIZATION OF THE CIVIL JUSTICE SYSTEM (Dec. 22, 1998). The sponsoring organization is a think tank funded by the *Keidanren*. The 21st Century Public Policy Institute, <http://www.21ppi.org/english/index.html> (last visited Nov. 4, 2009).

84. Luke Nottage, *Japan's Impending Reform of the Administration of Justice: Far from Final*, 48 ASIAWATCH NEWSL. (CCH), Aug. 2001, available at <http://www.law.usyd.edu.au/~luken/asiawatch48.htm>.

85. *Id.*

2004 of 68 new graduate schools of law,<sup>86</sup> it is far too early to be able to assess the results.

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From this necessarily abbreviated tour of three foreign legal systems with targeted education as a prerequisite for judicial office, one finds they have little to offer that would recommend adoption of IJE in the United States. To the extent that a specialized program of study is designed to create a cadre of judges—a specialized judicial class, if you will—it is anathema to our legal system. Add to that the youth and inexperience of those eligible for career judicial positions, and one finds foreign law programs to be poor role models for adoption of IJE in the United States.

The vitality of the American common law system is its flexibility and adaptability to changes in society, technology, and broad legal trends. To be sure, a fair degree of bureaucratization of the judiciary has already occurred during the latter half of the twentieth century in response to a variety of historical and cultural phenomena, including the emergence of the administrative state, huge escalation in crime, and an explosion of civil litigation that has largely overwhelmed judicial efforts at docket control.<sup>87</sup> Further bureaucratization would be distinctly unhealthy. In our republican form of government, bureaucratization of the executive and legislative branches, which derive their power and legitimacy directly from the will of the people, has shown a tendency to insulate those officials in a manner that has impaired their responsiveness to societal problems.<sup>88</sup> In the case of the judiciary, bureaucratization impairs the ability of judges to hear all grievances, identify and pay attention to all of the interests involved, and render timely, reasoned decisions based on existing laws and precedents. That impairment threatens to corrode the judicial process itself, which lies at the heart of the legitimacy of the judicial branch.

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86. See, e.g., Eriko Arita, *Sixty-Six Institutions Win Approval to Open U.S.-Style Law Schools*, THE JAPAN TIMES, Nov. 22, 2003, available at 2003 WL 8610293 at \*1. The number of schools was subsequently increased from 66 to 68. Ichiko Fuyuno, *Japan Grooms New Lawyers*, WALL ST. J., Apr. 13, 2004, at A18.

87. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1442 (1983) [hereinafter Fiss, *Bureaucratization*]. See generally *Normative Controversies Underlying Contemporary Debates About Civil Justice Reform: A Way of Talking About Bureaucracy and the Future of the Federal Courts*, 76 DENV. U. L. REV. 217, 220-21 (1998) (summarizing legal scholarship on the bureaucratization of the judiciary).

88. See Fiss, *Bureaucratization*, *supra* note 87, at 1443.

### B. Fundamental Change in the Role of the Trial Judge

If the experience of foreign legal systems provides no principled basis for IJE, we must look for one elsewhere. One possibility is contained in the Report of the ABA Commission on the 21st Century Judiciary, which suggests that the role of the trial judge has fundamentally changed.<sup>89</sup> If that is so, then some sort of IJE might well be advisable in order to adapt judges to their new functions. In support of the claim of fundamental change in the role of trial judges, the Report cites the following:

- “The term ‘trial judge’ is increasingly becoming a contradiction in terms as fewer cases go to trial in state or federal courts.”<sup>90</sup>
- “The time, expense, and unpredictability of trials have made negotiated or judge-brokered settlements and alternative dispute resolution mechanisms increasingly attractive, . . . [resulting in] a ‘brain drain’ for jurists who leave the bench to become mediators or arbitrators.”<sup>91</sup>
- As a corollary to the above, the role of the judge has changed “from someone who dispassionately tries cases to someone who rolls up her sleeves and helps the parties to resolve their dispute by means short of trial.”<sup>92</sup>
- Finally, there has been a move toward “problem-solving courts” to cope with various intractable societal problems, such as drug addiction and substance abuse, mental illness, domestic violence, prostitution, and shoplifting.<sup>93</sup> Typical characteristics of such “problem-solving” approaches are increased judicial monitoring of offenders whose sentences have not involved incarceration, more aggressive use of off-site scientists and social-service providers, and community outreach.<sup>94</sup>

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89. AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 47-50 (2003) [hereinafter “21ST CENTURY JUDICIARY REPORT”], available at [http://www.abanet.org/barserv/library/n/judiciary\\_and\\_the\\_courts/4543.pdf](http://www.abanet.org/barserv/library/n/judiciary_and_the_courts/4543.pdf).

90. *Id.* (citing Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., October 2002, at 24). See also Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405-07 (2002) (expressing “concerns over trial numbers” and noting a “decline in trials” and an “attending decline in participation of lay citizens . . . in our justice system”); Leonard Post, *Federal Tort Trials Continue a Downward Spiral*, 27 NAT’L L.J., Aug. 22, 2005, at P7 (quoting Professor Stephen Burbank as observing that “federal judges now give more attention to case management and non-trial adjudication than they give to trials,” and “it is quite clear that ‘trial’ judges ought to spend more time on that activity from which the name is taken”).

91. 21ST CENTURY JUDICIARY REPORT, *supra* note 89, at 47.

92. *Id.*

93. *Id.* at 48.

94. *Id.*

To begin with, many of these assertions are made largely on the basis of anecdotal evidence, which makes evaluation of their validity difficult. The substance of these assertions is important, however, so solid empirical research would be valuable and is badly needed. Even assuming the accuracy of these assertions, however, does not lead ineluctably to the far-reaching conclusion that the role of trial judges<sup>95</sup> has fundamentally changed. Although research to support this point would be helpful, intuitively it seems unlikely—even if, as a result of concerns over overburdened dockets in the 1970s and 1980s, U.S. district judges try fewer civil cases than they did thirty or forty years ago<sup>96</sup>—that trial judges today try fewer cases than their forebears of a century ago. Any number of factors may have contributed to a change in profile of federal court dockets and led to trial of fewer civil cases as a result of combining the mandate of the Speedy Trial Act<sup>97</sup> with the proliferation of criminal matters, and the average number of cases tried per judge may be lower solely as a percentage of the overall docket.

These phenomena, it should be noted, have been documented primarily with regard to the *federal* system,<sup>98</sup> and not without harsh

95. It bears mention that no claim has been advanced that the role of appellate judges has changed. Unless IJE were to be confined to those aspiring only to the trial bench, the curriculum would have to accommodate all levels of the judiciary.

96. See AMERICAN COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL”: THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM, at 4-5 (2004) (observing that “[t]he number of civil trials in federal court over the 40 years from 1962-2002 has fallen, both as a percentage of filings and in absolute numbers. . . . These numbers are particularly startling in light of the enormous increase in litigation over the same 40 year period”). See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005). But cf. Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 571-87 (2004) (cautioning against exaggerating our ability reliably to draw causal inferences from currently available data); John Lande, “*The Vanishing Trial*” Report: *An Alternative View of the Data*, DISP. RESOL. MAG., Summer 2004, at 19, 19-21 (disputing the accuracy of the common perception that decrease in trial rates is attributable to an increase in ADR and arguing that more research is necessary to determine if there is a causal connection).

97. 18 U.S.C. § 3161 (2008).

98. Movement toward a culture of devoting increased federal judicial resources to promoting settlements and alternative dispute resolution originated with former Chief Justice Warren Burger. See, e.g., *Chief Justice Highlights Needs and Achievements in Year-End Report*, THIRD BRANCH, Feb. 1984, at 1, 10 (referring to an earlier report of the Federal Judicial Center calling for increased use of arbitration); Martin J. Newhouse, *Some Reflections on ADR and the Changing Role of the Courts*, BOSTON BAR J., Mar.-Apr. 1995, at 15, 17 (noting that “former Chief Justice Burger has consistently been a vocal advocate of ADR”). Promotional efforts in this direction increased during the tenure of Judge William Schwarzer as Director of the Federal Judicial Center. See, e.g., William W. Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400 (1978). See

criticism from academia (particularly from Professor Owen Fiss),<sup>99</sup> but considerably more research and data are needed with respect to the myriad of functions performed by *state* trial courts.<sup>100</sup> Indeed, there has been some, but very little, evidence of diminution in the work of state trial courts,<sup>101</sup> and the trial of contested cases remains the key function of judges today as in yesteryear.

The “brain drain” phenomenon identified by the 21st Century Report<sup>102</sup> does not denote any fundamental alteration in the trial judge’s role and is not,<sup>103</sup> in fact, limited to trial judges but encompasses appellate judges as well. It is more likely simply a consequence of the disparity in pay between the judiciary and the practicing bar,<sup>104</sup> and of other repercussions of inadequate legislative funding of the judiciary (both federal<sup>105</sup> and state<sup>106</sup>).

*also* D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 93 (Fed. Judicial Ctr. ed., 1986) (criticizing academics and praising “[s]ettlement-oriented judges” who have a “fundamental commitment to enhancing settlement opportunities in federal courts”).

99. *E.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (asserting movement away from litigation-centered legal education to alternative dispute resolution “rest[s] on questionable premises”). *See* Fiss, *Bureaucratization*, *supra* note 87, at 1443 (contending “bureaucratization” of the judiciary “tends to corrode the individualistic processes that are the source of judicial legitimacy”). *See also* David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 150-52 (1981) (arguing that to the extent “that the trend toward administration alters the traditional mode of adjudication, it may threaten the effectiveness of the courts”).

100. There have been some studies, now largely dated, of declining trial rates in certain counties (predominantly rural) in Illinois, *see* Stephen Daniels, *Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties*, 19 LAW & SOC’Y REV. 381 (1985), Missouri, *see generally* WAYNE MCINTOSH, *THE APPEAL OF CIVIL LAW* (1990), and California, *see* Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC’Y REV. 267 (1975). These studies are, as Sherlock Holmes would say, “suggestive,” but considerably more detailed and up-to-date research is needed.

101. The dubiety of any significant diminution in tried cases is underscored by statistical evidence reported by the National Center for the State Courts (NCSC), showing an increase in civil and criminal filings between 1977 and 1981 of 23 percent and 29 percent, respectively, and a similar increase between 1984 and 2000 of 30 percent and 46 percent, respectively, together with an increase during the latter period of 66 percent in juvenile filings and 79 percent in domestic relations filings. *See* 21ST CENTURY JUDICIARY REPORT, *supra* note 89, at 39-40 (citing NCSC statistics).

102. 21ST CENTURY JUDICIARY REPORT, *supra* note 89, at 36. *See also infra* note 105.

103. *See id.* at 47 (discussing the changes in the trial judge’s role).

104. In 2008, the annual salary for a first-year associate at a top-tier Boston firm was an astounding \$165,000. *See generally*, NALP Directory of Legal Employers, <http://www.nalpdirectory.com/> (last visited Nov. 4, 2009).

105. The 21st Century Judiciary Report recognizes this. 21ST CENTURY JUDICIARY REPORT, *supra* note 89, at 35-36, 47. On the disparity in pay, both Chief Justice Roberts and his predecessor, Chief Justice Rehnquist, have been sounding the tocsin for twenty years now, but no one in Congress has paid heed. *See, e.g.*, John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary 3 (Jan. 1, 2007), *available at* <http://www.supremecourtus.gov/publicinfo/year->

On the other hand, the “rolling up one’s sleeves” and “problem-solving courts” phenomena—certainly probative (if any proof were needed!) of the lengths to which overworked, underpaid judges will go to manage their crowded (if not gridlocked) dockets and minimize, to the extent they are able, the number of cases that will take up scarce in-court adjudication time—does suggest some changes in trial court function. Whether these rise to the level of *fundamental* change must await further research.

Thus, unlike the experience of foreign judicial education programs, it is possible that recent alterations in the role of trial judges support the notion of IJE. As yet, however, there is no plerophory. To make a truly convincing case requires recognition of something even closer to home, something that is at once apodictic and vital to the very legitimacy of the judiciary. That something is the people’s perception of the fairness and impartiality of the courts.

### *C. Declining Public Confidence in the Judiciary*

A variety of articles<sup>107</sup> and surveys<sup>108</sup> have from time to time revealed significant variations in these public perceptions among racial and ethnic groups. A 1992 survey of California residents and attorneys yielded an aggregate negative rating of the California court system

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end/2006year-endreport.pdf. Relative remuneration of federal judges has continued to deteriorate. The Administrative Office of the U.S. Courts has estimated that the real pay of federal judges has declined since 1969 by almost 24 percent, while the real pay of the average American worker during that time has increased by almost 18 percent. *Id.* at 3. Thirty-eight federal judges left the federal bench (left, not retired) in the past six years alone, 17 of them in the past two years. *Id.* at 6. The Chief Justice’s Annual Reports continue to sound the alarm, though seemingly to little avail. See John G. Roberts, Jr., 2008 Year-End Report of the Federal Judiciary 8 (Jan. 1, 2009) (decriing congressional failure to enact federal judicial pay raises or even a cost-of-living increase such as is given to every federal employee, including members of Congress themselves), available at <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf>.

106. See THE CONSTITUTION PROJECT, THE COST OF JUSTICE: BUDGETARY THREATS TO AMERICA’S COURTS (2006), available at [http://www.constitutionproject.org/pdf/The\\_Cost\\_of\\_Justice\\_Budgetary\\_Threats\\_to\\_America’s\\_Courts.pdf](http://www.constitutionproject.org/pdf/The_Cost_of_Justice_Budgetary_Threats_to_America’s_Courts.pdf).

107. See, e.g., R. William Ide, III, *Eradicating Bias in the Justice System*, A.B.A. J., Mar. 1994, at 8 (noting minorities’ lack of faith in the judiciary); H.T. Smith, *Toward A More Diverse Judiciary*, A.B.A. J., July 1995, at 8 (urging increased attention to diversity on the bench); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 119-28 (1997) (arguing that the impartial judge mandate of the Fourteenth Amendment requires racial diversity on the bench); Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1117 (2003) (questioning how the public can repose confidence and trust in the judiciary if the communities it is supposed to protect are excluded from its ranks).

108. See *infra* notes 111-114 and accompanying text.



among 52 percent of those surveyed;<sup>109</sup> further disaggregating those data, the percentage of African-Americans rating the court system as “poor” amounted to 47 percent (as compared with a 17 percent “poor” rating among all those surveyed).<sup>110</sup> A 1999 NCSC-sponsored survey showed the following breakdown among those responding “strongly agree” to the proposition that “[j]udges are generally honest and fair in deciding cases”: 34 percent among non-Hispanic whites, 29 percent among Hispanics, and 18 percent among African-Americans;<sup>111</sup> indeed, nearly 70 percent of African-Americans believed that courts treated black people worse than whites and Hispanics, a proposition with which 40 percent of whites and Hispanics agreed.<sup>112</sup> That same year, a joint *A.B.A. Journal–National Bar Association Magazine* survey of lawyers reported that more than half of African-American attorneys strongly believed that racial prejudice exists in the courts and more than half of white attorneys believed that “some” racial prejudice exists there.<sup>113</sup> Finally, a 2001 survey conducted by the Justice at Stake Campaign yielded similar results: 85 percent of African-Americans believed that there is different justice for the rich than for the poor, 55 percent of them believed that judges are not fair and impartial (as compared with 62 percent of whites surveyed who believed that judges are fair and impartial), and only 43 percent of African-Americans surveyed (as compared with 67 percent of whites) believed that judges are committed to the public interest.<sup>114</sup>

The Supreme Court has recognized in a variety of contexts that the judiciary’s legitimacy and efficacy derives largely from the public’s confidence in its fairness and fidelity to the law.<sup>115</sup> In recent years, large

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109. Among those surveyed, 35 percent rated the courts only “fair,” and 17 percent rated them “poor.” See David B. Rottman, *What Californians Think About Their Courts: Highlights from a New Survey of the Public and Attorneys*, CAL. COURTS REV., Fall 2005, 6, 6.

In fairness, it should be noted that a more recent survey in California shows marked improvement in public perception of the courts there. As compared with 52 percent negative opinions overall in 1992, 67 percent of those surveyed in 2005 gave a positive response (“excellent,” “very good,” or “good”), and the percentage of African-Americans expressing the most negative evaluation (“poor”) declined from 47 percent in 1992 to 18 percent in 2005. *Id.* at 7.

110. *Id.*

111. See generally NATIONAL CENTER FOR THE STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY* (1999).

112. *Id.*

113. See Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 43.

114. Justice at Stake Campaign, *National Survey of American Voters* (2002), available at <http://faircourts.org/files/JASNationalSurveyResults.pdf>.

115. See, e.g., *Alden v. Maine*, 527 U.S. 706, 752 (1999) (a state court’s “legitimacy derives from fidelity to law”); *United States v. Mistretta*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”); *Valley*

campaign expenditures have become a virtual prerequisite for election to state judicial office. To meet this demand, judicial candidates increasingly depend on large contributors.<sup>116</sup> These elections are no longer “low key affairs, conducted with civility and dignity,”<sup>117</sup> but involve highly reported, politicized campaigns marked by million-dollar budgets and heated competition. This massive influx of money may pose a threat of judicial impropriety, both actual and apparent.

A substantial majority of the public—often 80 percent or higher—believes that campaign contributions influence judicial decisions, according to a variety of surveys conducted at both the national<sup>118</sup> and the state<sup>119</sup> level. Tellingly, many state court judges feel the same way:

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Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) (“public confidence [is] essential” to the judicial branch) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). See also *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. at 2266-67 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

116. This phenomenon is not limited to state high court elections. Candidate fundraising is also on the rise in elections for trial and intermediate appellate judgeships. For example, two candidates running for an Illinois intermediate appellate court judgeship in 2006 quadrupled the previous state record by raising a combined \$3.3 million. See LAUREN JONES, JAMES SAMPLE & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 24 (Justice at Stake Campaign ed., 2006), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf>. Fundraising records will continue to be broken as more interest groups do the same mental calculus candidly acknowledged by an Ohio AFL-CIO official: “[W]e figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.” J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. ST. B. J. 19, 20 (2002).

117. Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002) (quoting Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995)).

118. Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Court: Judicial Survey Results* (2007), available at [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf) (finding that 69 percent of the public “thinks that raising money for elections affects a judge’s rulings to a moderate or great extent.”); Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007), available at <http://www.ced.org/images/content/events/judicial/zogby07.pdf> (finding that 79 percent of business executives believe “campaign contributions have an impact on judges’ decisions, and more than 80 percent of African-Americans express this view, including 51 percent believing that judicial election contributions carry a “great deal” of influence).

119. **Texas:** Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider’s Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) (finding that 83 percent of Texans believe money has an impact on judicial decisions); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001), available at <http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm> (finding Texas Supreme Court 750 percent more likely to grant discretionary petitions for review

A 2002 national survey of elected state judges showed that 22 percent of them believe campaign contributions have at least *some* influence on judge's decisions, and another 4 percent believe such contributions have a *great deal* of influence.<sup>120</sup>

One can distill, from several elements identified by researchers to be of key importance to such popular perceptions, some basic themes vital to the ongoing legitimacy of the judiciary. First, judges must treat those who come before them with dignity and respect.<sup>121</sup> Second, there

filed by contributors of at least \$100,000 than by non-contributors, and 1,000 percent more likely to grant them for contributors of \$250,000 or more).

**Pennsylvania:** Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) (finding that voters "overwhelmingly agree that the amount of money in elections and campaigns has caused them to lose a great deal of faith in the political system"), available at <http://www.courts.state.pa.us/NR/rdonlyres/46DA48F0-A7B1-436C-BF9C-66DF7BF6E3CF/0/sclee.pdf>. See also Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 (noting that nine out of ten Pennsylvanians regard judicial fund raising as evidence that justice is for sale).

**Ohio:** T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEV. PLAIN DEALER, Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90 percent of respondents believed campaign contributions influenced judicial decisions). See also Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (finding that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs," and "voted in favor of contributors 70 percent of the time.")

**Louisiana:** Vernon Valentine Palmer, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (showing striking statistical bias toward contributors by state supreme court justices over fourteen-year period). Note, however, that the methodology of this study has subsequently been called into question. See Robert Newman, Janet Speyrer & Dek Terrell, *A Critique of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function"* (2008), available at [http://www.lasc.org/press\\_room/press\\_releases/2008/Critique\\_of\\_Tulane\\_Law\\_Review.pdf](http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf); E. Phelps Gay & Kevin R. Tully, *Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function* (2008), available at [http://www.lasc.org/press\\_room/press\\_releases/2008/Rebuttal\\_Revised.pdf](http://www.lasc.org/press_room/press_releases/2008/Rebuttal_Revised.pdf). This contretemps was evidently of sufficient magnitude as to engender a letter of apology from the Dean of the Tulane Law School to the Justices of the Louisiana Supreme Court. See Letter from Lawrence Ponoroff to Hon. Pascal F. Calogero, Jr. *et al.* (Sept. 10, 2008), available at [http://www.lasc.org/press\\_room/press\\_releases/2008/AR-TU\\_APOLOGY\\_LETTER.pdf](http://www.lasc.org/press_room/press_releases/2008/AR-TU_APOLOGY_LETTER.pdf).

120. Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire* (2001-2002) 5, available at [www.gqrr.com/articles/1617/1411\\_JAS\\_judges.pdf](http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf).

121. State bar associations and judicial conduct commissions often collect detailed information about bad judicial behavior, though most of the time this information is never made public. There have been, however, some notable exceptions. See, e.g., Raymond Hernandez, *Pataki Choice for Judgeship is Assailed*, N.Y. TIMES, Oct. 2, 2003, at B1 (regarding nomination of state court judge Dora Irizzary to the federal district bench, bar association comments included "[s]tatements that Judge Irizzary was gratuitously rude and abrasive and demeaned lawyers, that she

must always be full and fair opportunities for litigants to present their cases. Third, we must have neutral decision-making by fair, honest, and impartial judges,<sup>122</sup> who have the sense to recuse themselves in situations, such as cases involving litigants who are substantial campaign contributors, where the appearance of impartiality has been tarnished.<sup>123</sup> Fourth, minority perceptions would be enhanced not only by demonstrable impartiality of individual jurists but also a kind of structural impartiality achieved by a greater percentage of minority faces<sup>124</sup> in judicial robes. In short, the public demands fairness and impartiality, both actual and perceived, and both substantive and procedural. As Justice Frankfurter cogently observed in another context, “justice must satisfy the appearance of justice.”<sup>125</sup>

Survey results show that the public, and particularly certain identifiable segments thereof, perceive the judiciary as failing to live up to these reasonable expectations.<sup>126</sup> Given these perceptions—and these disparities—there is certainly a case to be made for educating judges to conduct the business of the courts in a manner that not only lives up in fact to the ideals that lend legitimacy to the judiciary and judicial decisions, but also dispels any significant public perceptions (or misperceptions, as the case may be) of biased or unequal justice.

#### IV. TOWARDS AN IJE CURRICULUM

In crafting a potential curriculum for IJE, one is faced with two preliminary issues. First, the program cannot realistically differentiate between courses appropriate for the trial bench versus those for the

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flew off the handle in a rage for no apparent reason and screamed at attorneys, that she was impatient and did not fully listen to attorneys’ legal arguments, and did not have a good grasp of the legal issues presented to her.”); Recommendations for Judicial Retention, Colorado State Bar, 2000 Evaluation of Judge Adele K. Anderson, *available at* <http://www.cobar.org/static/judges/nov2000/10CNTYaanderson.htm> (evaluating a judge as “discourteous and condescending to those appearing in her courtroom as well as to staff members” and engaging in “demeaning and harsh treatment of individuals appearing in her court without legal counsel.”).

122. See David B. Rottman, *What Californians Think About Their Courts: Highlights from a New Survey of the Public and Attorneys*, CAL. COURTS REV., Fall 2005, at 7-8.

123. Cf. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

124. Justices O’Connor and White, in their tributes to Justice Marshall, recounted how his different perspective enriched the deliberation process. See generally Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215 (1992). See also Chen, *supra* note 107, at 1111-13 (providing statistics on the percentage of minorities among the federal judiciary (including bankruptcy judges and magistrate judges) and the California judiciary).

125. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

126. See *supra* note 119.

appellate bench. Obviously, no one who has availed himself of IJE can possibly know whether he will ever ascend to the bench, and for those who are ultimately selected based on an appointive (as opposed to electoral) process, whether the appointment will be at the trial or appellate level. Second, the curriculum should not duplicate the kinds of courses that are currently offered—and that it makes sense to offer—to individuals who have *already* been selected for judicial office.

In his article, Judge Amy suggests an LL.M. degree program as the model for IJE. He justifiably extols the intellectual advantages of an academic setting and argues that completion of the requirements for an academic degree signal expertise in the subject matter of the curriculum.<sup>127</sup> No doubt his enthusiasm for this model springs from his enormously positive experience at the University of Virginia's Master of Laws in the Judicial Process program. Such a formal—indeed, luxurious—academic blueprint does not, however, seem necessary for the more modest goals of a *voluntary* IJE program aimed at practicing lawyers who aspire to, but may never achieve, judicial office. This can readily be seen from the design of the U.Va. LL.M. program itself, which was directed at those who are already sitting judges<sup>128</sup> and even more particularly at appellate judges, and which had, according to Judge Amy, “a three-year format, with two resident summer sessions and a thesis requirement.”<sup>129</sup> Such a commitment of time and labor, and the concomitant exposure to a variety of legal subjects, is entirely appropriate to justify the award of an advanced legal degree but unrealistic for an IJE program.

Furthermore, Judge Amy's point about expertise, while eminently sensible in the abstract, seems to overshoot the mark when it comes to the considerably more humble goals of IJE.<sup>130</sup> Preliminarily, it should be noted that even the excellent U.Va. LL.M. Program did not guarantee any particular expertise, because the curriculum varied from year to

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127. Amy, *supra* note 38, at 138-39.

128. This is also true for the Dwight D. Opperman Institute of Judicial Administration at the New York University School of Law, which trains not only sitting U.S. judges but also foreign judges, and sponsors appellate judges' seminars, workshops on special topics in the law, the Brennan lecture series honoring the state judiciary, and a biennial research conference. See NYU School of Law – Institute of Judicial Administration: Programs, <http://www.law.nyu.edu/centers/judicial/programs/index.htm> (last visited Nov. 16, 2009). Likewise, the National Judicial College at the University of Nevada-Reno is oriented toward the training of sitting judges, both from the United States and abroad. See The National Judicial College - The NJC Experience, *available at* <http://www.judges.org/about.html>.

129. Amy, *supra* note 38, at 131.

130. *Id.* at 137.

year. For example, courses offered in the summer of 2000 included “Courts and Social Science,” “Environmental Risks and Scientific Evidence,” “European Union Law,” “International Law in American Courts,” “American Constitutional History: From *Brown* to the Present,” and “Modern Civil Legal Systems;” offered in the summer of 1999 were “American Constitutional History: 1781 to 1861,” “American Constitutional History: Reconstruction to *Brown*,” “Contemporary Legal Thought,” “Law and Economics,” and “Legislation.”<sup>131</sup> If the case for IJE is largely, if not wholly, predicated on sensitizing judicial aspirants to the importance of core values of the judiciary, then no particular substantive expertise, no courses in European Union law, U.S. constitutional history, and civil law systems, and no lengthy residential academic program, with or without thesis, are necessary.

Indeed, much of the formal learning about the craft of adjudication—an essential component, to be sure, of being an effective judge—is already imparted in the legal academy. While there has long been some dissatisfaction, on the part of the organized bar and others, with the apparent disjunction between what students learn in law school and what they are capable (or, more to the point, incapable) of doing when they enter law practice,<sup>132</sup> almost nobody would deny that if students learn anything during their three years of law school, it is how to read judicial opinions, analyze them, critique them, synthesize them, and deconstruct them. In short, recent American law graduates are far more able to perform certain substantive judicial functions than they are to draft, interpret, or negotiate contracts and other legal documents.

The aforementioned canvassing of the literature,<sup>133</sup> while not unearthing more than a couple of articles pertinent to IJE, did find numerous instances of off-the-cuff suggestions (mostly unelaborated) for *existing* judges receiving additional education across a broad spectrum

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131. See Judges Program, Curriculum and Faculty, [http://www.law.virginia.edu/html/prospectives/judges/judges\\_curriculum.htm](http://www.law.virginia.edu/html/prospectives/judges/judges_curriculum.htm) (last visited Mar. 26, 2007). The appellate orientation is self-evident. This website has since been dismantled, because the reputedly excellent LL.M. program in Judicial Process sadly has been discontinued as a result of the drying up of sources of funding. Telephone conversation between the author and Ms. Joyce Holt at the University of Virginia School of Law LL.M. Program (May 21, 2008).

132. See generally AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991).

133. See *supra* text accompanying notes 36-39.

of topics: more education in health law issues,<sup>134</sup> more education in environmental law and land use,<sup>135</sup> more education in end-of-life decision-making (recall the Terry Schiavo imbroglio<sup>136</sup>), more education in business,<sup>137</sup> more education about aberrant behavior, mental illness, substance abuse, and anger management,<sup>138</sup> more education in genetics,<sup>139</sup> more education in science generally,<sup>140</sup> more education in statistics,<sup>141</sup> more education in intellectual property,<sup>142</sup> more education

134. See, e.g., Cynthia Honssinger, Robert Ianni & Jeff Millsteen, *The Emerging Role of State Attorneys General in Public Health Emergencies*, 33 J.L. MED. & ETHICS 115, 117 (2005); Gene W. Matthews, Georges Benjamin, S. Peter Mills, Wendy Parmet & James J. Misrahi, *Legal Preparedness for Bioterrorism*, 30 J.L. MED. & ETHICS 52, 55 (2002).

135. See, e.g., Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 22 (2007) (describing efforts of the Foundation for Research on Enviro-Economic Development).

136. See, e.g., Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1015, 1026 (2006).

137. See, e.g., Stan Bernstein, Susan H. Seabury & Jack F. Williams, *The Empowerment of Bankruptcy Courts in Addressing Financial Expert Testimony*, 80 AM. BANKR. L.J. 377, 394 (2006); Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 912 (1995). Cf. John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 232-33 (2001) (noting judicial education program for state court judges at the University of Kansas, funded by the Fred C. and Mary R. Koch Foundations, emphasizing a law and economics approach to legal analysis).

To address this problem, the ABA has recommended, after a study on the subject by an ad hoc committee, that specialized business courts should be created in every state. See Report of the ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947 (1997). Only a few states (not counting Delaware, of course, whose courts have an in-depth and highly sophisticated business law jurisprudence) have followed through on this suggestion, some on a statewide basis (these states include North Carolina, California, and Maryland) and some on only a limited basis (a special commercial calendar in the Cook County Court in Illinois, a Special Business Court in Milwaukee, Wisconsin, the Court of Common Pleas in Philadelphia County, Pennsylvania), and the Business Litigation Section of the Superior Court in Suffolk, Essex, Middlesex, and Norfolk counties in Massachusetts (i.e., in and around Boston).

138. See, e.g., Arline S. Rotman, *Commentary on "Empirical and Ethical Problems with Custody Recommendations: A Call for New Family Court Priorities"*, 43 FAM. CT. REV. 242, 245 (2005).

139. See, e.g., Joanne Seltzer, Note, *The Cassandra Complex: An Employer's Dilemma in the Genetic Workplace*, 27 HOFSTRA L. REV. 411, 470 (1998).

140. See, e.g., Dorothy E. Schmidt, *A Dark and Stormy Night: The Mystery of the Missing Science in Fingerprint Identification*, 75 DEF. COUNS. J. 47, 76 (2008); Michelle Mello & Kathryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 700 n.251 (2008) (citing RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH (Wendy Wagner & Rena Steinzor, eds. 2006) (describing program at Brooklyn Law School to educate judges on empirical methodology)).

141. See, e.g., Michael J. Saks, *Teaching Statistics to Judges*, 42 JURIMETRICS J. 351 (2002).

142. See, e.g., John Shepard Wiley, Jr., *Taming Patent: Six Steps for Surviving Scary Patent Cases*, 50 UCLA L. REV. 1413, 1421 & n.22 (2003) (citing A. HOWARD MATZ, WHO CAN UNDERSTAND THIS STUFF? HOW AMERICAN COURTS ATTEMPT TO EDUCATE JUDGES AND JURIES ABOUT SCIENCE AND TECHNOLOGY 14 (2001) (prepared for the International Conference on the Rights of Intellectual Property in Cyberspace)).

about technology,<sup>143</sup> more education in ADR,<sup>144</sup> more education about pro bono initiatives,<sup>145</sup> more education in art and aesthetics,<sup>146</sup> more education in negotiation and settlement,<sup>147</sup> more education about child abuse,<sup>148</sup> more education about gender bias,<sup>149</sup> more education about addiction,<sup>150</sup> more education in capital cases,<sup>151</sup> more education in international law,<sup>152</sup> etc. While these suggestions were directed toward post-judicial education, they provide a glimpse of the multifarious agendas for judicial reform that exist and, at the same time, make us take a step back and realize that judges cannot be all things to all people. Perhaps, in the sixteenth century, it might have been possible for an intellectually gifted individual (e.g., Sir Francis Bacon) to have acquired virtually encyclopedic knowledge of all published areas of human

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143. See, e.g., Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671, 719-25 (2007); Erich Taylor, *A New Wave of Police Interrogation? "Brain Fingerprinting," The Constitutional Privilege Against Self-Incrimination, and Hearsay Jurisprudence*, 2006 U. ILL. J.L. TECH. & POL'Y 287, 303 n.149 (citing Caryn Tamber, *Brave Neuro World*, THE DAILY RECORD (Baltimore), Dec. 20, 2005).

144. See, e.g., Sam Ledbetter & Chris Thomason, *Circuit Court Appointment Commission*, 40 ARK. LAW. 16, 21 (Winter 2005); Brian L. Josias, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1180 (2004).

145. See, e.g., Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 51 n.299 (2004).

146. See, e.g., Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 409 (1994).

147. See e.g., Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, 43 NO.1 JUDGES' J. 19 (Winter 2004).

148. See, e.g., Myrna S. Rader, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007).

149. See, e.g., Angie Perone, Note, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115, 116 (2006); Kimberly A. Lonsway, Leslie V. Freeman, Lilia M. Cortina, Vicki J. Magley & Louise F. Fitzgerald, *Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System*, 27 LAW & SOC. INQUIRY 205, 228 (2002); Hope Viner Samborn, *Gender Bias in the Courts: Working Toward Change*, A.B.A. PERSP., Winter/Spring 2002, at 4, 6, available at <http://www.abanet.org/women/PSPGenderBias2.pdf>.

150. See, e.g., Lauren Shapiro, *An HIV Advocate's View of Family Court: Lessons from a Broken System*, 5 DUKE J. GENDER L. & POL'Y 133, 144 (1998); Barrie L. Becker, Note, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235, 257 & n.175 (1991).

151. See, e.g., Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 52 (2007).

152. See, e.g., Janet Kovin Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29, 33-35 (2007); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 38 n.243 (2007).



inquiry. By now those days are long gone, if in fact they ever existed.<sup>153</sup> There are simply too many books, too many fields of inquiry, and too much information for any single human being to assimilate.<sup>154</sup>

At the same time, we must recognize, as Cardozo did, the evolutionary nature of the judicial process:

The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.<sup>155</sup>

A model IJE curriculum should focus on primary skills that will be essential for aspirants to judicial office. Many of these skills will prove useful to people, especially busy lawyers, in their daily lives, even if they never realize (or decide to abandon) their judicial ambitions. Indeed, some examples of appropriate areas for training can be gleaned by negative inference from reports of disciplinary proceedings against judges, while others may be identified merely by common sense. Thus a curriculum could include short courses in:

- developing listening skills;
- interpreting body language;<sup>156</sup>

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153. Compare the following passage about the training of 19th Century Dutch foreign service officers:

A *contrôleur* was one of the more junior grades in the Dutch colonial service, presiding over a subdivision of a residency known as an *afdeling*, or department; but junior or no, a candidate had to spend four years at the College of Delft and pass with honors a rigorous examination that included the Javanese and Malay languages (both very similar, to be sure); French, German, and English language and literature; Islamic law, algebra, geometry, trigonometry, geology (no doubt helpful to the present task), drawing, land surveying and leveling, as well as a host of other disciplines including, for some less explicable reason, the subtle mysteries of “Italian book keeping... .”

SIMON WINCHESTER, *KRAKATOA – THE DAY THE WORLD EXPLODED: AUGUST 27, 1883* 155 n\* (2003).

154. We need not, however, be preoccupied with the spectre of judges lacking sufficient education or technical training across the broad spectrum of subjects our courts encounter. In appropriate circumstances, judges can always appoint special masters who can bring to bear the requisite expertise far more efficiently.

155. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 178 (1921).

156. This would be particularly useful for trial judges, as an aid to assessing the credibility of witnesses.

- judicial demeanor, and the proper treatment of court staff,<sup>157</sup> attorneys,<sup>158</sup> litigants,<sup>159</sup> witnesses,<sup>160</sup> and others;<sup>161</sup>

157. *Cf. Fletcher v. Comm'n on Judicial Performance*, 968 P.2d 958, 963-64 (Cal. 1998) (concluding that judge improperly used court staff, law clerk, and public defender for reelection campaign purposes); *id.* at 964 (approving finding that judge engaged in prejudicial misconduct by holding court clerk in contempt for refusing to discuss employment matter without union representative present); *In re McClain*, 662 N.E.2d 935, 937 (Ind. 1996) (finding that judge sent vulgar letters to secretary employed at courthouse and enclosed a used condom); *In re Deming*, 736 P.2d 639, 654 (Wash. 1987) (noting allegations by court personnel of sexual harassment by judge); *Miss. High Court Orders Judge Reprimanded*, BATON ROUGE ADVOC., Oct. 12, 2001, at 2B (reporting on judge accused of verbally abusing court clerks and other county employees); Cheryl Reid, *Tollefson, Stolz Say They Offer Clear Choice*, TACOMA NEWS TRIB., Oct. 12, 2000, at B1 (reporting on judge who chased court employees down hallway in a rage). Perhaps the most high-profile example is that of former U.S. District Judge Samuel B. Kent, who sexually assaulted both his case manager and his secretary and who, after lying about those incidents to an investigative committee of judges, was prosecuted for obstruction of justice and sentenced, after a guilty plea, to 33 months imprisonment. James C. McKinley, Jr., *Judge Sentenced to Prison for Lying About Harassment*, N.Y. TIMES, May 12, 2009, at A15. Judge Kent was subsequently impeached by the House of Representatives, *see Ashley Southall, House Approves Impeachment Articles Against Judge*, N.Y. TIMES, June 20, 2009, at A12, but he resigned from the bench rather than face trial in the U.S. Senate, *see Bloomberg News, Texas: Impeached Federal Judge Will Step Down*, N.Y. TIMES, June 26, 2009, at A12. For more details on the Kent scandal, *see, e.g., John Council, Congress Tries to Knock "King" Samuel B. Kent Off His Throne*, TEX. LAW., June 8, 2009, at 6.

158. *Cf. Fletcher*, 968 P.2d at 963 (finding that judge made inappropriate and sexist remarks about counsel); *In re Elliston*, 789 S.W.2d 469, 480 (Mo. 1990) (noting testimony of sixteen attorneys on their personal experiences with abusive judge); *Deming*, 736 P.2d 639, 655-56 (Wash. 1987) (removing from office judge who commented on the breasts of one female prosecutor and told another "I would really like to jump your bones"); *In re Raab* (N.Y. Comm'n on Jud. Conduct, Feb. 3, 2003) (finding persistent pattern of abuse by judge of attorneys), available at <http://www.sejc.state.ny.us/Determinations/R/raab.htm>; Ralph Ranalli, *Lopez Resigns, Denies Misdeeds; Says Accepting Findings Goes Against Principles*, BOSTON GLOBE, May 20, 2003, at A1 (reporting on notorious case where judge was persistently rude, discourteous, sarcastic, and condescending toward prosecutors); Robert Becker, *State Ousts Judge, Cites Harassment*, CHI. TRIB., Dec. 4, 2001, at 1 (reporting removal from office of judge who sexually harassed four female prosecutors).

159. Abuse of defendants unfortunately has a long pedigree in this country, as evidenced by the prejudicial and intemperate (indeed, contemptuous) treatment by Justice William Paterson of Congressman Matthew Lyon, lawyer Thomas Cooper, journalist Joseph Callender, and others in presiding over prosecutions under the Sedition Act of 1798. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 48-64 (2004). *Cf. Fletcher*, 968 P.2d at 963 (judge improperly entered judgment against nonparty, without affording notice or an opportunity to be heard, because judge subjectively thought he "ought to pay"); *id.* at 971-74, 975-76 (detailing numerous ex parte contacts with criminal defendants); Miller, *supra* note 18, at 444 n.118 (citing Robynn Tysver, *Omaha Judge Reprimanded for Mistreating Defendants*, OMAHA WORLD-HERALD, Sept. 30, 2000, at 13 (reporting that judge routinely yelled at and berated defendants appearing before him)).

160. *Cf. id.* at 444 n.119 (citing *In re Gorenstein*, 434 N.W.2d 603, 603 (Wis. 1989) (disciplining a judge for criticizing "victim-witness . . . for crying during cross-examination")); *Fletcher*, 968 P.2d at 974-75 (detailing judge's numerous ex parte contacts with witnesses).

161. *Cf. Deming*, 736 P.2d at 653-654 (noting factual findings with respect to judge's affair with probation department employee, attempt to use his office to secure a promotion for that

- jury selection and selection of a foreperson,<sup>162</sup>
- efficient, but appropriate,<sup>163</sup> use of law clerks and staff attorneys;<sup>164</sup>
- sensitivity training to help identify and cope with stereotyping and latent bias and prejudice, e.g., those based (albeit with some overlap in many instances) on race,<sup>165</sup> ethnicity,<sup>166</sup> religion,<sup>167</sup> gender,<sup>168</sup> nationality,<sup>169</sup> alienage,<sup>170</sup> socio-economic status,<sup>171</sup>

employee, and sexual advances he made to an intern); Miller, *supra* note 18, at 444 n.120 & 122 (citing *Gorenstein*, 434 N.W.2d at 604 (noting that judge criticized state mental health hospital and its staff and stated that “he had never found a doctor or any staff person associated with it to be qualified”); *In re Schwartz*, 755 So.2d 110, 111 (Fla. 2000) (publicly reprimanding judge who made sarcastic remarks about law professor and denigrated textbook the professor had written)).

162. *Cf.* *Johnson v. Maryland*, 915 F.2d 892, 894 (4th Cir. 1990) (showing a judge, in racially charged murder trial, who failed to disclose to counsel in camera conversation with juror who complained that the white foreperson was saying “[t]he blacks [on the jury] are sticking together.” and other remarks suggesting racial prejudice). The author was counsel to the petitioner in this case.

163. *Cf.* *Miss. Judicial Performance Comm’n v. Hopkins*, 590 So. 2d 857, 858 (Miss. 1991) (noting that a judge allowed court clerks to dismiss parking tickets); *In re Going* (N.Y. Comm’n on Jud. Conduct, Dec. 29, 2000) (noting judge’s abusive behavior toward law clerk after termination of romantic relationship between them), available at [http://www.scjc.state.ny.us/Determinations/G/going\(2\).htm](http://www.scjc.state.ny.us/Determinations/G/going(2).htm); *In re Ward*, No. 79 CC-1 (Ill. Jud. Inquiry Bd., July 10, 1980) (describing allegation that judge permitted a court clerk to conduct court calls and enter orders), *complaint summary available at* <http://www.state.il.us/jib/summary.htm>; Ann W. O’Neill, *Appeals Court Criticizes L.A. Judge for ‘Egregious’ Misconduct*, L.A. TIMES, May 25, 2000, at B3 (reporting public criticism of trial judge for allowing law clerk to preside over pretrial conference).

164. *Cf.* *Miller*, *supra* note 158, at 441 n.85 (citing *In re Hunter*, 823 So. 2d 325, 336 (La. 2002) (stating that a judge failed to fulfill her duty to supervise her staff); *In re Van Susteren*, 348 N.W.2d 579, 579 (Wis. 1984) (taking into account judge’s failure to supervise court personnel for prompt and efficient disposition of official business as a factor in a suspension recommendation)).

165. *Cf.* *Miller*, *supra* note 18, at 446 n.145 (citing, *inter alia*, *In re Goodfarb*, 880 P.2d 620, 621 (Ariz. 1994) (finding that judge in chambers used the phrase “fucking niggers”); *In re Flier* (Cal. Comm’n on Jud. Performance, May 30, 1995) (finding racial insensitivity in judge’s reference to in-custody adult African American as a “good boy”), available at [http://cjp.ca.gov/PubAdmRTF/FlierPA\\_05-30-95.rtf](http://cjp.ca.gov/PubAdmRTF/FlierPA_05-30-95.rtf); Maurice Possley & Ken Armstrong, *Clamor Grows Over Associate Judge*, CHI. TRIB., Nov. 11, 1999, § 2, at 1 (reporting that judicial candidate failed to disclose that he had committed racial discrimination in jury selection in a murder case when serving as a public prosecutor); John Caher, *Commuter Tax Fight Next on Court Agenda: Internet Porn, Russian Bank Cases Also to Be Heard*, N.Y. L.J., Feb. 4, 2000, at 1 (reporting judge’s obscene and racially offensive remarks, including reference to a 67-year-old murder victim as “just some old nigger bitch”); Mickey Ciokajlo, *Judge Accused of Misconduct; State Agency Cites Behavior, Remarks in Court*, CHI. TRIB., May 16, 2002, at 1 (reporting that judge referred to African American as “boy”).

166. *Cf.* *Miller*, *supra* note 18, at 446 n.146 (citing Karen Dorn Steele, *Passing Notes: Judge, Clerk Make Ethnic Slurs; Investigation Prompts Reprimand*, IRE J., Mar. 1, 2002, at 32 (reporting judge’s reference to Hispanic Americans as “greasers”).

167. *Cf.* *Miller*, *supra* note 18, at 446 n.147 (citing Fredric U. Dicker, *Panel Slams Judge’s “Bizarre” Religious Remarks*, N.Y. POST, Oct. 4, 2003, at 2 (reporting judge’s slurs directed at Jewish lawyer and Catholic schools)).

168. *Cf.* *Miller*, *supra* note 18, at 446 n.143-44, 447 n.165 (citing, *inter alia*, *In re Cieslik*, No. 87 CC-2 (Ill. Jud. Inquiry Bd., July 30, 1987) (reprimanding judge for making “intemperate, rude and sexist remarks to women attorneys during official proceedings”), *complaint summary available*

prosecution or defense in criminal cases,<sup>172</sup> and attitudes towards various organizations,<sup>173</sup>

- identifying and dealing with personality conflicts (e.g., with other judges,<sup>174</sup> parties,<sup>175</sup> or among lawyers, jurors,<sup>176</sup> etc.);

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at <http://www.state.il.us/jib/summary.htm>; Douglas Feiden, *Trial and Error in Queens Courts*, N.Y. DAILY NEWS, July 7, 2003, at 4 (reporting that judge dispensed toothbrushes to “deadbeat dads” before packing them off to jail); Michele McPhee, *Cases vs. Diamond Dismissed*, N.Y. DAILY NEWS, Apr. 3, 2003, at 35 (reporting complaints of misconduct filed against judge allegedly so hostile to men in divorce cases that husbands who had appeared before her formed support group); Joe Fitzgerald, *Apology Now Would be Too Little, Too Late*, BOSTON HERALD, Apr. 30, 2003, at 5 (reporting bias in favor of transgendered individuals by judge who described kidnapping and attempted rape of 11-year-old boy by transgendered person as “a low-level offense”).

169. Cf. Miller, *supra* note 18, at 446 nn.150-51 & 153 (citing *In re Haugner* (Cal. Comm’n on Jud. Performance, Apr. 11, 1994) (finding that a judge made comments that were insensitive to persons of Japanese ancestry and reflected possible racial or ethnic bias), available at [http://www.cjp.ca.gov/PubReprovals/Haugner\\_PubR\\_041194.doc](http://www.cjp.ca.gov/PubReprovals/Haugner_PubR_041194.doc)); Mary Wisniewski, *Watching the Watchdogs Watch: The JIB and Courts Commission*, CHI. L., Mar. 1999, at 63 (reporting disparaging remarks by judges against Danes and Yugoslavians); Feiden, *supra* note 167, at 4 (reporting on judge’s Anglophobic tirade against defendant of British ancestry).

170. Cf. Miller, *supra* note 18, at 446 n.154 (citing H.G. Reza & Christine Hanley, *Migrant Gets a New Trial; Judge Scolded*, L.A. TIMES, June 5, 2003, at B1 (reporting that judge displayed such overt bias against undocumented aliens that appeals panel found manifest miscarriage of justice)).

171. Cf. *Gorenstein*, 434 N.W.2d 603, 603 (Wis. 1989) (noting that judge berated women with minor children for abusing the welfare system); Miller, *supra* note 18, at 446 n.155, 447 n.158 (citing *In re Michelson*, 591 N.W.2d 843, 844 (Wis. 1999) (noting panel’s finding that judge’s comments demonstrated bias based on socioeconomic status); Alisa Lapolt, *Reprimand, Training Urged for Racine Judge Over Unwed Mother Remarks*, MILWAUKEE J. SENTINEL, Nov. 2, 1998, at 3 (reporting judge remarking, “I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.”)).

172. Cf. Miller, *supra* note 18, at 441 n.90, 445 nn.141-42 (citing, *inter alia*, *In re Duckman*, 677 N.Y.S.2d 248, 251 (1998) (holding that judge improperly dismissed charges against criminal defendants and verbally humiliated prosecutors); Feiden, *supra* note 167, at 4 (reporting that judge told prosecutor who collapsed with chest pains not to “take it so personally”); Ralph Ranalli & Joanna Weiss, *Friends Say Lopez Will Quit Bench*, BOSTON GLOBE, May 15, 2003, at A1 (reporting that judge displayed bias against prosecutors); John Caher, *Agency’s Authority to Act Under “Spargo” Clarified: Prosecutions for Behavior on the Bench May Proceed*, N.Y. L.J., Apr. 22, 2003, at 1 (reporting that judge had been accused of “denying assigned counsel, setting unreasonably high bail, coercing guilty pleas, [and] entering convictions against defendants who were not before him”); Janan Hanna, *Outspoken Judge Will Take Class to Curb Anger*, CHI. TRIB., May 9, 2002, at 1 (reporting that judge interrupted defense lawyer’s closing arguments forty-five times and suggested that the defense witnesses were thieves and drug addicts); David Rosenzweig, *Judge Removed From Case Over Remark*, L.A. TIMES, Mar. 14, 2001, at B1 (reporting that judge questioned the credibility of criminal defendants who testified in their own defense)).

173. Cf. Miller, *supra* note 18, at 446 n.149, 447 n.162 (citing Steele, *supra* note 165, at 32 (reporting prejudicial remark against labor unions); Stephen Hunt, *Remarks by a Judge Upset Attorney*, ACLU, SALT LAKE TRIB., Oct. 16, 2002, at C1 (reporting prejudicial remarks against ACLU); William Kleinknecht, *Appeals Court Finds Bias Against Automaker—Cites Judge’s “Antagonism” in Case of Accident that Left Teen Paraplegic*, STAR-LEDGER (Newark), June 4, 2003, at 41 (reporting prejudice against automobile manufacturers)).

- basic techniques of docket management,<sup>177</sup>
- basic techniques of managing people, especially those with large personalities (including, but not limited to, lawyers) in the courtroom and in chambers;
- balancing the needs of judicial office with pre-existing friendships,<sup>178</sup> family obligations,<sup>179</sup> professional relationships,<sup>180</sup> romantic attachments,<sup>181</sup> and affiliations with or memberships in religious,<sup>182</sup> professional, civic, and community organizations;

174. *Cf.* Miller, *supra* note 18, at 444 n.126 (citing, *inter alia*, *In re Crawford*, 629 N.W.2d 1, 3-4 (Wis. 2001) (suspending judge who threatened to publicize purported evidence of misconduct by chief judge); *In re Jones*, 581 N.W.2d 876, 883 (Neb. 1998) (removing from office judge who engaged in a pattern of serious misconduct, including saying “fuck you” to a fellow judge and calling her a “bitch”); *In re Velasquez*, No. 139 (Cal. Comm’n on Jud. Performance, Apr. 16, 1997) (censuring judge who made public statements disparaging fellow judges), *available at* [http://cjp.ca.gov/CNCensureRTF/VelasquezCNCN\\_04-16-97.rtf](http://cjp.ca.gov/CNCensureRTF/VelasquezCNCN_04-16-97.rtf)).

175. *Cf.* John Caher, *Utterly Inexcusable Acts Prompt Censure of N.Y. Judge*, LEG. INTELLIGENCER, Oct. 5, 2006, at 4 (reporting that N.Y. Comm’n on Judicial Conduct declined to suspend Albany city judge who on one occasion “descended from the bench, dropped his robes to the floor and seemingly challenged a defendant to a fist fight in court” and on another “suggested police officers ‘thump the shit out of’ another allegedly disrespectful individual”).

176. *Cf.* *Rushen v. Spain*, 464 U.S. 114, 119 n.2 (1983) (acknowledging, in case where juror had two unrecorded, ex parte contacts with trial judge that she was acquainted with murder victim of police informant witness, “that the trial judge promptly should have notified counsel for all parties after the juror approached him.”); *Johnson*, 915 F.2d at 897 (noting “it would have been preferable for [the trial judge] to have had Johnson and his counsel present during the conversation with [the] juror . . . or at least to have recorded the conversation and disclosed its substance to Johnson and his counsel.”).

177. *Cf.* Miller, *supra* note 18, at 453 n.234 (citing, *inter alia*, *In re Waddick*, 605 N.W.2d 861, 862-63, 868 (Wis. 2000) (suspending judge for falsely claiming that his docket was up-to-date when he was behind on numerous cases); *In re Johnson*, 692 So. 2d 168, 170, 172 (Fla. 1997) (removing from office judge who repeatedly backdated DUI convictions in order to disguise how long she was taking to dispose of cases)).

178. *Cf.* Richard Marosi, *State Agency Admonishes Former Judge*, L.A. TIMES, Oct. 4, 2000, at B4 (reporting public rebuke of judge who improperly released or reduced bail on six criminal defendants who were clients of judge’s old friend or the friend’s daughter).

179. *Cf.* Miller, *supra* note 18, at 433 n.15, 438 n.64 (citing, *inter alia*, Wren Propp, *Court Suspends Mora Magistrate*, ALBUQUERQUE J., Apr. 10, 2003, at 6 (reporting suspension of judge who dismissed traffic citations on behalf of family and friends); *In re Schwartz*, No. 01 CC-3 (Ill. Jud. Inquiry Bd., Nov. 30, 2001) (discussing case of judge who allegedly pressured the Southern Illinois University School of Law to admit his stepson and, when the application was denied, retaliated by banning students from the school’s clinic from representing clients in his court), *complaint summary available at* <http://www.state.il.us/jib/summary.htm>).

180. *Cf.* Miller, *supra* note 18, at 450 n.200 (citing, *inter alia*, *In re Durr*, No. 72 CC-1 (Ill. Jud. Inquiry Bd., Aug. 1, 1973) (suspending judge for failing to disclose to litigants that opposing counsel was judge’s business partner), *complaint summary available at* <http://www.state.il.us/jib/summary.htm>).

181. *Cf.* *Deming*, 736 P.2d at 653-54 (detailing judge’s attempt to use his office improperly to secure career advancement for paramour); Miller, *supra* note 18, at 436 n.47 (citing *In re Chrzanowski*, 636 N.W.2d 758, 761 (Mich. 2001) (involving judge who appointed her paramour to

- some of the fine points of judicial ethics;<sup>183</sup>
- balancing judicial independence and judicial restraint;
- financial planning: how to “afford” to be a judge;<sup>184</sup>
- public perceptions and the importance of judicial decorum;<sup>185</sup>
- dealing with threats to personal safety and security and that of court personnel and loved ones;<sup>186</sup>

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represent indigent criminal defendants at state expense without disclosing relationship to opposing counsel)).

182. *Cf.* *Fletcher v. Comm’n on Judicial Performance*, 968 P.2d 958, 971 (Cal. 1998) (involving judge who encouraged defendant in family law matter to attend a religious men’s fellowship meeting at judge’s own house, during which the defendant’s personal problems became a focal point for discussion).

183. *Cf.* *United States v. Microsoft Corp.*, 253 F.3d 34, 107-17 (D.C. Cir. 2001) (rebuking U.S. district judge who had presided over Microsoft antitrust trial for “deliberate, repeated, egregious, and flagrant” talking with reporters about the case); *In re Buckson*, 610 A.2d 203, 205-06 (Del. Jud. 1992) (censuring and removing from office for “persistent” and “wilful” misconduct judge who, without resigning his position, publicly announced he was seeking his party’s nomination for governor); Miller, *supra* note 18, at 450 n.200, 452 n.215, (citing, *inter alia*, *In re Forde*, No. 96-311 (Ark. Jud. Discipline and Disability Comm’n, Sept. 22, 1998) (finding violation of the Code of Judicial Conduct where judge failed to disclose that he leased office space to an attorney who appeared before him), available at <http://www.state.ar.us/jddc/pdf/sanctions/Ford96.311.pdf>; *In re Chirlin* (Cal. Comm’n on Jud. Performance, Aug. 28, 1995) (involving trial judge who, after presiding over breach of contract action between actress and movie studio in which the studio prevailed, but while the matter was on appeal, attended premiere of film and post-premiere reception as studio’s guest), available at [http://cjp.ca.gov/PubAdmRTF/ChirlinPA\\_08-28-95.rtf](http://cjp.ca.gov/PubAdmRTF/ChirlinPA_08-28-95.rtf)).

184. *See supra* notes 104-106.

185. *Cf.* Scott Glover, *Judge Grants a Stay After Conceding He Maintained His Own Website with Sexually Explicit Images*, L.A. TIMES, June 12, 2008, at 1 (reporting that Chief Judge Alex Kozinski of the Ninth Circuit, who was presiding as a trial judge in an obscenity case, acknowledged posting sexual content on his personal website, including “a photo of naked women on all fours painted to look like cows and a video of a half-dressed man cavorting with a sexually aroused farm animal. He defended some of the adult content as ‘funny’ but conceded that other postings were inappropriate.”). To his credit, Kozinski recused himself from the obscenity trial amidst uproar over the pornographic material on his website. Scott Glover, *U.S. Judge in Obscenity Trial Steps Down*, L.A. TIMES, June 14, 2008, at 1. *See also In re Hamilton*, PA. L. WKLY., June 25, 2007, at D8 (reporting decision that magisterial district judge was subject to discipline for provoking a fistfight with a police officer at a local golf club party and then telling the officer’s wife to “pick your piece of shit husband off the floor;” court held “reasonable expectations of the public would include the expectation that a judicial officer would not act lawlessly in provoking a fistfight . . . and then commit assault and battery on a member of the local community”).

186. *Cf. Appellate Court Upholds Matt Hale Conviction*, CHI. TRIB., May 31, 2006, at C3 (reporting affirmance of conviction of white supremacist on charges of soliciting murder of federal Judge Joan Lefkow). Judge Lefkow herself was not assassinated, but her mother and husband were, and this led to installation of home security systems by the U.S. Marshal’s Service for most federal judges in Chicago. *See* Jeff Coen, *Judges Get Home Security, Lefkow Slayings Spur Expansion of Measures to Safeguard Jurists*, CHI. TRIB., June 25, 2006, at C1. Subsequently, however, the efforts of the U.S. Marshal’s service have come under harsh attack. *See* U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE UNITED STATES MARSHAL’S SERVICE JUDICIAL SECURITY PROCESS (Sept. 2007), available at <http://www.usdoj.gov/oig/reports/USMS/e0710/>

- determining when recusal is advisable, even where it is not mandatory;<sup>187</sup>
- balancing First Amendment rights against the needs of judicial discretion in election campaigning,<sup>188</sup> public speaking, relations with news media, and responding to public criticism of decisions.

The foregoing does not purport to be an exhaustive list; it is merely a set of suggestions for discussion and debate on the structuring of a pilot IJE program. Such a program need not be a year-long, formal academic curriculum leading to the awarding of an advanced degree but can be accomplished in a flexible format, with a maximum anticipated duration of one or two weeks, which could be covered in a single session (e.g., a summer session) or seriatim in a number of one- to two-day (or perhaps even weekend) seminars. Individual state bar associations are well-positioned to sponsor IJE for their membership, and to experiment with the structure and content of such programs. In this way, they can

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final.pdf (criticizing lax efforts of U.S. Marshal's service to improve investigation of threats against federal judges and protection of those threatened).

187. This is a subject that has traditionally contained many gray areas. *See, e.g.*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55 (2000); Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 UNIV. OF MICH. J. L. REFORM 1017, 1118 n.395 (2004). Note that Canon 3(E) of the 1990 version (which remains the version still in force in the several states) of the A.B.A.'s Model Code of Judicial Conduct, MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990), has been substantively revised in the version approved by the A.B.A. House of Delegates on February 12, 2007. *See* MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007). SCJI is currently working on a Judicial Disqualification Project, which, when completed, will have surveyed the most significant standards in use across the country and will propose recommendations to the ABA House of Delegates for endorsement.

The Supreme Court's granting of certiorari in *Caperton v. A.T. Massey Coal Co.*, No. 08-22, *cert. granted*, 129 S. Ct. 593 (2008), has resulted in a surge of public interest in the special problem of recusal relating to judicial election Campaign contributions. A recent poll, conducted by Harris International February 12-15, 2009 on behalf of the Justice at Stake Campaign, found that 81 percent of those surveyed (slightly in excess of 1000 individuals) believe judges should not decide whether they themselves should hear a case, and that when a judge's impartiality is challenged, another judge should weigh the facts. Some 68 percent would doubt a judge's impartiality if one party to a case had contributed \$50,000 to the judge's election campaign, and that number rose to 73% if the campaign contribution level were at \$1 million. *See* 2/22/09: Poll: Huge Majority Wants Firewall Between Judges, Election Backers, *available at* <http://www.justiceatstake.org/node/125>.

188. "When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence." *N.Y. State Bd. of Elections v. López-Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring). *Cf. Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that First Amendment prohibits the states from gagging candidates for judicial office on issues of public debate); *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 88-90 (N.D.N.Y. 2003) (invalidating state judicial conduct regulations prohibiting judicial candidates from engaging in political activity).

serve Justice Brandeis' oft-quoted "states as laboratories" function,<sup>189</sup> with the ultimate goal of populating the judiciary of the future with men and women who will potentially be more sensitive to the demands and responsibilities of serving as a judge, more attuned to the central importance of public perceptions of the judiciary as a barometer of the legitimacy of judicial review, and more consciously committed to fulfilling the ideals of the fair and impartial administration of justice for all.

## V. CONCLUSION

Though by no means free from all doubt and worthy of careful scrutiny under the magnifying glass of healthy skepticism, there seems to be a persuasive case that can be made for voluntary, additional education for lawyers aspiring to, or considering the possibility of someday seeking, judicial office. The goal of such education would be to advance the cause of professionalism by improving the overall quality of the pool of people seeking election or appointment to the bench. Individual state bar associations will be able to take leading roles in fashioning the optimal format and curriculum of such a program for their individual jurisdictions and fostering the ideals of fair and impartial courts that have long been the hallmark of our legal system.

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189. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting with approval states serving as laboratories for trying "novel social and economic experiments without risk to the rest of the country").



