Education for Judicial Aspirants

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The word “professionalism,” which has become commonplace in debates about the condition and future of the legal profession, may conjure different connotations to different people. 1/ 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 lawyers but to the judiciary as well seems entirely appropriate, particularly given the increasing frequency and severity of attacks on judges 2/ and on judicial conduct. These include perennial critiques of judicial sentences 3/

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2/ A.B. Princeton University, J.D. Georgetown University. Visiting Professor, Northeastern University School of Law. This article is an outgrowth from, and expansion of, a white paper presented by the author at a 2007 symposium held in Columbus, Ohio and co-sponsored by the ABA Standing Committee on Judicial Independence, the Ohio State Bar Association, and the Ohio State University Moritz College of Law. The author would like to express his appreciation to Roy Schotland, Doreen Dodson, William Weisenberg, and Konstantina Vagenas for their insights and encouragement.

3/ “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, 120 (2002).

2/ The reference here is not to physical attacks, though these too have been escalating. See, e.g., Amanda Paulsson & Patrik Jonsson, Judge Case Hits A Nerve in Courts, CHRISTIAN SCI. MONITOR, Mar. 4, 2005, available at http://www.cbsnewst.com/stories/2005/03/04/national/main678008.shtml; 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, CHICAGO TRIB., June 13, 2006, § 1, at 6.

3/ Relatively recent examples are Bill O’Reilly’s critiques of Vermont judges Edward Cashman and David Howard. See Bill O’Reilly, Talking Points: No Justice in
and orders granting motions to suppress\textsuperscript{4} 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 gubernatorial views,\textsuperscript{5} castigation of judicial consideration of foreign sources of law when interpreting the Constitution or federal statutes,\textsuperscript{6} commonplace attacks on U.S. Supreme Court decisions generally, from both sides of the political spectrum, as (with apologies to Tennyson) cannons to the left of them and cannons to the right of them volley and thunder,\textsuperscript{7} generic legislative dyspepsia over instances of “judicial activism,”\textsuperscript{8} legislative threats of jurisdiction


\textsuperscript{5} See Juan Gonzalez, \textit{Pols Rule Courtrooms: Acting Judges Owe Their Job to Pataki, Rudy}, N.Y. DAILY NEWS, Jan. 18, 2000, at 8; Transcript of Governor’s Comments on Judges, SACRAMENTO BEE, Feb. 29, 2000, at 8.

\textsuperscript{6} See, e.g., H.R. Res. 568, 108\textsuperscript{th} Cong., 2d Sess. (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)).

\textsuperscript{7} Compare Vincent T. Bugliosi, \textit{None Dare Call It Treason}, NATION, Feb. 5, 2001, at 11 with Joan Biskupic, \textit{Bork, Uncorked; The Judge Holds the Supreme Court in Contempt}, WASH. POST, Mar. 16, 1997, at C01.

stripping, and, from the lunatic fringe, “J.A.I.L. 4 Judges.” While one would like to believe that purely political motives 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 criminal misconduct) and keep state judicial conduct commissions in business.

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.

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


licensing standards, and enforceable ethics codes. 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 profession.

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;
- 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;

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• 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.\(^\text{16}\)

“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.\(^\text{17}\) 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

\(^{16}\) 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).

“find[ing] persons . . . qualified by learning, experience and temperament, to decide the cases that come before them impartially and in accordance with the law.”18/

The vast majority of people serving in the judiciary have no special credentials for the judicial role other than a law school education, bar passage, and some amount of experience in the practice of law. 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”),19/ a Study Group on Pre-Judicial Education – which will be called in this essay “Introductory Judicial Education” or “IJE”20/ – was empaneled in 200121/ and


19/ 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 (in cooperation with the ABA Judicial Division) the Least Understood Branch project.

20/ 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
in 2003 issued a brief but interesting report. The idea of IJE is that some sort of formal preparation, while neither (or at least not necessarily) an absolute 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 the majority of other lawyers.

As part of this effort, it was necessary for the Study Group 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 this education might take, how the availability of this education might affect the pool of potential judges, how this education might assist those responsible for the selection of judges, and the potential impact of this education on the overall functioning of our system of justice.

As the Study Group observed:

category of sentiment that is, as noted above (see notes 2-10, supra), already far too prevalent in our society. One could offer a different label, such as “warmup judicial education” or “WJE,” but that seems a bit flippant and in any event does not present a good sound byte!

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.

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

See, e.g., AM. BAR ASS’N, STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE STUDY GROUP ON PRE-JUDICIAL EDUCATION (Feb. 12, 2005) [hereinafter “STUDY GROUP REPORT”].
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.

. . . . We also identify potential negative effects of [IJE], including its possible negative impacts on the pool of potential judges, which might vary depending on the format. 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.\(^{23}\)

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.”\(^{24}\) 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,”\(^{25}\) developing data on “the typical background of those who become state court judges,”\(^{26}\) and experimenting with pilot programs.\(^{27}\)

\(^{23}\) Id. at 4-5.

\(^{24}\) Id. at 30.

\(^{25}\) 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.

\(^{26}\) Id. at 30-31. “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.

\(^{27}\) Id. at 31. “Given the novelty of [IJE], it will be critical to begin by taking small steps. We believe 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
The concept of Introductory Judicial Education is not only unobjectionable but may well deserve some 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.\textsuperscript{28} 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? Before one can intelligently decide whether or not to support such a suggestion, one really needs to know more about what the proponents have in mind.

The topic thus rather naturally subdivides itself into two fundamental questions:

\begin{itemize}
  \item Is there a sufficiently strong case to be made for IJE?
  \item If so, what would be envisioned as the substantive curriculum?
\end{itemize}

In considering these questions, we have the luxury – and the challenge – of writing on a nearly clean slate. Canvassing the law review literature\textsuperscript{29} reveals very little of substance on the subject of judicial education\textsuperscript{30} generally and even less on IJE.

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].” \textit{Id.}

\textsuperscript{28} \textit{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. \textit{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.

\textsuperscript{29} That canvassing was done as of the Ides of March 2007 (that irrepressible classical education again!).

\textsuperscript{30} \textit{i.e.}, continuing education for those who have \textit{already} ascended to the bench.
Indeed, the latter boasts only two offerings, one by a former Director of the A.B.A.’s Judicial Division\textsuperscript{31} and the other by a judge of the Louisiana Court of Appeal, Third Circuit.\textsuperscript{32} Beyond these, to date there has been only the Study Group Report,\textsuperscript{33} and nothing else of consequence.

Before turning to the merits of IJE, a few more introductory words are in order. The impetus for considering this topic can be traced back to a lingering unease with judicial selection and the ongoing (though now somewhat stagnant) debate over merit selection. Those concerns date back at least to the era of the drafting of the federal constitution\textsuperscript{34} and began to ferment in the Jacksonian era,\textsuperscript{35} 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.\textsuperscript{36} What is undisputed is that the mid-19\textsuperscript{th}


\textsuperscript{32} 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.

\textsuperscript{33} Study Group Report, supra note 22.

\textsuperscript{34} “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).


\textsuperscript{36} The choice of elections was not (as myth holds) “an 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
century witnessed a move toward elective judiciaries in many states, followed in the 20th century by the realization that the taint of politics is just as strong in elective regimes as – and perhaps even stronger than – in appointive regimes. That realization has come home to roost in recent years with the advent of significant and highly controversial donations to candidates for judicial office and public perceptions of the implications for judicial independence.

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.”


38/ The most recent of these involves a $3 million contribution to a West Virginia high court judge, made by the Chairman and CEO of the contributing corporation after it had lost a $50 million fraud verdict and while it was preparing to file an appeal to the same high court. 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.J. Massey Coal Co., ___ S.E.2d ___, 2008 WL 918444 (W. Va., April 3, 2008). The former 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. See generally 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. A petition for certiorari will be filed in the U.S. Supreme Court, id., and the facts are stark, but the chances for obtaining the writ are uncertain. In cases of judges refusing to recuse themselves because of large campaign contributions, the Supreme Court has 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),
Viewed in this context, IJE is perhaps another “take” on merit selection\(^{40}\): 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 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.\(^{41}\)

**The Case for IJE**

Some form of IJE is present in certain civil law systems. Much could be, and has been, written on this subject, but a detailed examination is beyond the scope of this article. Some summary observations about a few such systems will suffice, but one fundamental characteristic is worth noting at the outset: These civil law systems proceed

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\(^{40}\) For some background on merit selection, see Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990).

\(^{41}\) Cf. LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 128-130 (3d ed. 1994) (observing that merit selection does not eliminate political considerations from the process).
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, than those prevailing in the Anglo-American common law tradition.

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. 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,\textsuperscript{42} at both the federal and state levels.\textsuperscript{43} The \textit{Deutsches Richtersgesetz} or German Judges’ Law prescribes the requirements for the study of law and establishes a regimen of state testing for aspiring jurists.\textsuperscript{44} 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


\textsuperscript{43} 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 (\textit{Gerichtsverfassungsgesetz}), has consistently prescribed the principle of the \textit{Einheitsjuristen} (“standardized jurists,” \textit{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.” Stefan Korioth, \textit{Legal Education in Germany Today}, \textit{24 Wis. Int’l L.J.} 85, 88 (2006).

\textsuperscript{44} \textit{Deutsches Richtergesetz} (“DRiG”), 1972 BGB1 I 713, as amended, § 5 I.
focus on “the analysis of complex, practical cases.” Thus, a quintessentially judicial outlook predominates. Thereafter, upon passing the second state examination, the student becomes a Volljurist (“full jurist”) and is eligible to apply for a judgeship. This approach to legal education, according to Dietrich Rueschmeyer, fosters “a syndrome fostering civil service orientations and loyalty toward ‘the State.’”

Originally designed for a small elite, this two-stage system with its mandatory training requirements now produces in excess of 100,000 law students, nearly 60-70 percent of whom will not become judges or public prosecutors because the German government is limiting the number of civil servants. The explosion of those embarking on judicial and legal careers has resulted in a glut of judges and Rechtsanwälte

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45/ Clark, supra note 42, at 1804.

46/ The same, however, can be said of the education received by the vast majority of law students in the United States.

47/ However, this same curriculum produces prosecutors, government lawyers, and a broad array of in-house corporate lawyers. Clark, supra note 42, at 1805.


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

51/ Law (or, more specifically, the economic and social value system embodied in the American legal mainstream of the late 20th 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.
(practicing attorneys) and an increase in competition severe enough to affect negatively the quality of legal advice and services being rendered.\footnote{52/} 

The French system is somewhat different, embodying as it does 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 (\textit{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).\footnote{53/}

Confining ourselves for present purposes to the corps of “professional” judges (\textit{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 \textit{École Nationale de Magistrature} (National College of Judges) and embark upon a civil service career.\footnote{54/}

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; they have contrasted this 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

\footnote{52/} Korioth, \textit{supra} note 43, at 89.


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.\footnote{55}

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. From
Montesquieu’s point of view, the judiciary should be “\textit{invisible et nulle}.”\footnote{56} This
formalistic approach, still evident in the organization and philosophy of the French
judiciary today,\footnote{57} undoubtedly derives in no small part from French fear of judicial
despotism and the revolutionary reaction against the \textit{parlements} of the \textit{ancien régime}.\footnote{58}

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

\footnote{55}{\textit{See e.g., John P. Dawson, The Oracles of the Law} (1968); \textit{John H. Merryman, The Civil Law Tradition} (1969).}

\footnote{56}{\textit{Charles de Secondat, Baron de Montesquieu, The Spirit of Laws} 116 (Thomas Nugent trans. 6th ed. 1792).}

\footnote{57}{\textit{See, e.g., Réné David, French Law: Its Structure, Sources & Methodology} 27 (M. Kindred trans. 1972).}

encroachment by the federal government.\textsuperscript{50} As Alexander Hamilton cogently observed, "The 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."\textsuperscript{60}

Traditionally, Japanese society viewed litigation -- and by extension lawyers and judges -- with distaste and not with respect. Indeed, until very recently,\textsuperscript{61} legal education in Japan was limited to undergraduate courses of study\textsuperscript{62} and was, in all events, fairly stodgy, typically featuring large, assembly line\textsuperscript{63} 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.\textsuperscript{64}


\textsuperscript{60} THE FEDERALIST No. 78, at 434 (A. Hamilton) (Clinton Rossiter & Charles R. Kessler, eds. 1999).

\textsuperscript{61} See text accompanying notes 72-75, infra.


\textsuperscript{63} 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.”).

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.\textsuperscript{65} Admission to practice faces a bottleneck 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.\textsuperscript{66} Funded by the government and controlled by the Saiko saibansho (the Japanese Supreme Court) and the private bar,\textsuperscript{67} the LRTI each year admits only 1,000 of the approximately 30,000 law graduates taking the bar examination.\textsuperscript{68}

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.\textsuperscript{69} The majority of them are career judges\textsuperscript{70} and are perceived negatively by the business


\textsuperscript{66} Id. at 299.


\textsuperscript{69} Miyazawa, supra note 65, at 493.

\textsuperscript{70} 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/Uploaded Files/Faculty/Haley/TheJapaneseJudiciary_SSRN.pdf (noting that approximately three-
community because they lack business education or work experience, and therefore are
deemed incapable of understanding contemporary business and professional practices.\footnote{71/}
For these reasons, the business community, acting through a group known as the \textit{Nippon Keidanren} (Japanese Federation of Economic Organizations),\footnote{72/} has proposed many far-reaching legal reforms in Japan,\footnote{73/} including specifically a series of judicial reforms aimed at making access to the courts easier and less expensive and 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.”\footnote{74/} 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. Although


\footnote{72/} This organization, the successor by merger to the \textit{Keidanren} (Federation of Economic Organizations) and the \textit{Nikkeiren} (Federation of Employers’ Associations), boasts a membership (as of June 2006) comprising 1,351 companies, 130 industrial associations, and 47 regional economic organizations. See Nippon Keidanren, \textit{available at} \url{http://www.keidanren.or.jp/english/profile/pro001.html}.

\footnote{73/} \textsc{The 21\textsuperscript{st} Century Public Policy Institute, Toward a Revitalization of the Civil Justice System} (Dec. 22, 1998), \textit{available at} \url{http://www.21ppi.org/english/policy/19981222/recommendation.pdf}. The sponsoring organization is a think tank funded by the \textit{Keidanren}. See \textsc{The 21\textsuperscript{st} Century Public Policy Institute}, \textit{available at} \url{http://www.21ppi.org/index_e/html}.

the reform process has already begun, with the opening in 2004 of 68 new graduate
schools of law,\textsuperscript{25} it is far too early to be able to assess the results.

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. 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. In the
case of the judiciary, however, bureaucratization impairs the ability of judges to hear all
grievances, identify and pay attention to all of the interests involved, and render timely,

\textsuperscript{25} See, e.g., Eriko Arita, Sixty-Six Institutions Win Approval to Open U.S.-Style Law
Schools, THE JAPAN TIMES, Nov. 22, 2003, 2003 WL 8610293 at *1. The number of
schools was subsequently increased from 66 to 68. Ichiko Fuyuno, Japan Grooms New
reasoned decisions based on existing laws and precedents. That impairment threatens to corrode the judicial process itself, which lies at the font of the legitimacy of the judicial branch.

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 A.B.A. Commission on the 21st Century Judiciary, which suggests that the role of the trial judge has fundamentally changed. 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.”
- “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.”

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77/ 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. 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”).

78/ 21ST CENTURY JUDICATURE REPORT, supra note 76, at 47.
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.”\textsuperscript{79}

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.\textsuperscript{80} 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.\textsuperscript{81}

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\textsuperscript{82} 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 1970’s and

\begin{itemize}
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at 48.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} 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.
\end{itemize}
1980’s, U.S. district judges try fewer civil cases than they did 30-40 years ago\textsuperscript{83/} – 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\textsuperscript{84/} 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,\textsuperscript{85/} and not without harsh criticism from academia.

\textsuperscript{83/} 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 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).


\textsuperscript{85/} Movement toward a culture of devoting increased 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 (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 Judges Role, 61 Judicature 400 (1978). See also D. Marie Provine, Settlement
(particularly from Professor Owen Fiss),\textsuperscript{86} but considerably more research and data are needed with respect to the myriad functions performed by state trial courts.\textsuperscript{87} Indeed, there has been some, but very little, evidence of diminution in the work of state trial courts\textsuperscript{88} 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 does not denote any fundamental alteration in the trial judge’s role and is not, in fact, limited to trial judges but covers appellate judges as well. It is more likely simply a consequence of

\begin{quote}
STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center 1986) (criticizing academics and praising “[s]ettlement-oriented judges” who have a “fundamental commitment to enhancing settlement opportunities in federal courts”).
\end{quote}

\textsuperscript{86} E.g., Owen M. Fiss, \textit{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”); Owen M. Fiss, \textit{The Bureaucratization of the Judiciary}, 92 YALE L.J. 1442, 1443 (1983) (contending “bureaucratization” of the judiciary “tends to corrode the individualistic processes that are the source of judicial legitimacy”). See also David S. Clerk, \textit{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”).

\textsuperscript{87} There have been some studies, now largely dated, of declining trial rates in certain counties (predominantly rural) in Illinois, see Stephen Daniels, \textit{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, \textit{THE APPEAL OF CIVIL LAW} (1990), and California, see Lawrence M. Friedman & Robert V. Percival, \textit{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.

\textsuperscript{88} Indeed, 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% and 29%, respectively, and a similar increase between 1984 and 2000 of 30% and 46%, respectively, together with an increase during the latter period of 66% in juvenile filings and 79% in domestic relations filings. See 21\textsuperscript{ST} CENTURY JUDICIARY REPORT, \textit{supra} note 76, at 39-40 (citing NCSC statistics).
the disparity in pay between the judiciary and the practicing bar,\textsuperscript{89/} and of other repercussions of inadequate legislative funding of the judiciary (both federal \textsuperscript{90/} and state\textsuperscript{91/}).

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 \textit{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. To make a truly convincing case, however, requires recognition of something even closer to home, something 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.

\textsuperscript{89/} As of this writing, the annual salaries for first-year associates at top-tier Boston firms is an astounding $165,000.

\textsuperscript{90/} The 21\textsuperscript{st} Century Judiciary Report recognizes this. \textit{Id.} 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 20 years now, but no one in Congress pays heed. \textit{See, e.g.}, John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary (Jan. 1, 2007). 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. \textit{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. \textit{Id.} at 6.

A variety of surveys have 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 among 52% of those surveyed; further disaggregating those data, the percentage of African-Americans rating the court system as “poor” amounted to 47% (as compared with a 17% “poor” rating among all those surveyed). 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% among non-Hispanic whites, 29% among Hispanics, and 18% among African-Americans; indeed, nearly 70% of African-Americans believed that courts treated black people worse than whites and Hispanics, a proposition with which 40% of whites and Hispanics agreed. That same year, a joint A.B.A. Journal - National Bar Association Magazine survey of lawyers reported that 52% of African-American attorneys strongly believed that racial prejudice exists in the courts and 55% of white attorneys believed that “some” racial prejudice

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92/ Among those surveyed, 35% rated the courts only “fair,” and 17% 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.

93/ Id.


95/ Id.
exists there.\textsuperscript{96/} Finally, a 2001 survey conducted by the Justice at Stake Campaign yielded similar results: 85% of African-Americans believed that there is different justice for the rich than for the poor, 55% of them believed that judges are not fair and impartial (as compared with 62% of whites surveyed who believed that judges are fair and impartial), and only 43% of African-Americans surveyed (as compared with 67% of whites) believed that judges are committed to the public interest.\textsuperscript{97/} 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.\textsuperscript{98/} Second, there must always be full and fair opportunities for litigants to present their cases. Third, we must have neutral decision-making by fair,


\textsuperscript{98/} 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, \textit{e.g.}, Raymond Hernandez, \textit{Pataki Choice for Judgeship is Assailed: Court Conduct at Issue in Senate Panel Hearing}, 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 “Statements that Judge Irizzary was gratuitously rude and abrasive and demeaned lawyers, that she 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 \url{http://www.cobar.org/static/judges/nov2000/10CNTYaanderson.htm} (judge evaluated 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.”).
honest, and impartial judges.\textsuperscript{99}\ In short, the public demands fairness and impartiality, both actual and perceived, and both substantive and procedural.

Survey results show that the public, and particularly certain identifiable segments thereof, perceive the judiciary as failing to live up to these reasonable expectations. 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.

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 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

\textsuperscript{99} See Rottman, \textit{supra} note 92, at 7-8.
matter of the curriculum.\textsuperscript{100} 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\textsuperscript{101} 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.”\textsuperscript{102} 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. 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 year. For example, courses offered in the summer of 2000 included “Courts and...

\textsuperscript{100} Amy, supra note 32, at 138-39.

\textsuperscript{101} 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, available at http://www.nyu.edu/institutes/judicial/programs/index.html. 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.

\textsuperscript{102} Amy, supra note 32, at 131.
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.”103/ 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 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,104/ almost nobody would deny that if students learn anything during their three


This website has since been dismantled, because the reputedly excellent LL.M. program in Judicial Process has sadly 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.

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, 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 of topics: more education in health law issues, more education in environmental law and land use, more education in end of life decision-making (recall the Terry Schiavo imbroglio), more education in business, more

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105/ See text accompanying notes 29-32, *supra*.


education about aberrant behavior, mental illness, substance abuse, and anger management, more education in genetics, more education in science generally, more education in statistics, more education in intellectual property, more 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, these states include North Carolina, California, Maryland) have followed through on this suggestion, some on 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 Please 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).


education about technology, more education in ADR, more education about pro
bono initiatives, more education in art and aesthetics, more education in negotiation
and settlement, more education about child abuse, more education about gender
bias, more education about addiction, more education in capital cases,
education in international law, 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 16th 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 inquiry. By now those days are long gone, if in fact they ever existed. There are simply too many books, too

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125/ 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...”

many fields of inquiry, and too much information for any single human being to assimilate.\textsuperscript{126/}

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.\textsuperscript{127/}

Instead, 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 their judicial ambitions. Indeed, some examples of appropriate areas training could 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;\textsuperscript{128/}

\textsuperscript{126/} Indeed, we need not 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.

\textsuperscript{127/} BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178 (1921).

\textsuperscript{128/} 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,\textsuperscript{129} attorneys,\textsuperscript{130} litigants,\textsuperscript{131} witnesses,\textsuperscript{132} and others\textsuperscript{133};

- jury selection and selection of a foreperson\textsuperscript{134};

\textsuperscript{129} Cf. 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); 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).


\textsuperscript{131} Cf. 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). Abuse of defendants, unfortunately, has a long pedigree in this country, as evidenced by the prejudicial and intemperate (indeed, contemptuous) treatment by Justice Samuel Chase 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).

\textsuperscript{132} Cf. In re Gorenstein, 434 N.W.2d 603, 603 (Wis. 1989) (disciplining a judge for criticizing “victim-witness. . . for crying during cross-examination”).

\textsuperscript{133} Id. at 604 (noting that same judge also 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).
effcient, but appropriate,\textsuperscript{135} use of law clerks and staff attorneys;\textsuperscript{136}
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,\textsuperscript{137} ethnicity,\textsuperscript{138} religion,\textsuperscript{139} gender,\textsuperscript{140} nationality,\textsuperscript{141}
\begin{footnotesize}
\textsuperscript{134} Cf. Johnson v. Maryland, 915 F.2d 892, 894 (4th Cir. 1990) (in racially charged murder trial, judge failed to disclose to counsel in camera conversation with juror who complained that the white foreperson was saying “The blacks [on the jury] are sticking together and other remarks suggesting racial prejudice).


\textsuperscript{136} Cf. 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).

\textsuperscript{137} Cf. 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; 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”).
\end{footnotesize}
alienage,\textsuperscript{142} socio-economic status,\textsuperscript{143} prosecution or defense in criminal cases,\textsuperscript{144} and various organizations\textsuperscript{145};


\textsuperscript{141/} Cf. 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 \url{http://www.cjp.ca.gov/PubReprovals/Haugner_PubR_041194.doc}; Mary Wisniewski, \textit{Watching the Watchdogs Watch: The JIB and Courts Commission}, \textit{Chi. L.w.}, Mar. 1999, at 63 (reporting disparaging remarks by judges against Danes and Yugoslavians); Feiden, \textit{supra} note 140, at 4 (reporting on judge’s Anglophobic tirade against defendant of British ancestry).


\textsuperscript{143/} Cf. 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); In re Gorenstein, 434 N.W.2d 603, 603 (Wis. 1989) (noting that judge berated women with minor children for abusing the welfare system); Alisa Lapolt, \textit{Reprimand, Training Urged for Racine Judge Over Unwed Mother Remarks}, \textit{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.”).
identifying and dealing with personality conflicts (e.g., with other judges, or among lawyers, jurors); basic techniques of docket management;

\[144/\] Cf. In re Duckman, 92 N.Y.2d 141, 146, 699 N.E.2d 872, 874, 677 N.Y.S.2d 248, 251 (1998) (holding that judge improperly dismissed charges against criminal defendants and verbally humiliated prosecutors); Feiden, supra note 139, 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 45 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).

\[145/\] Cf. Steele, supra note 138, 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).

\[146/\] Cf. 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://cjtp.ca.gov/CNCensureRTF/VelasquezCNCN_04-16-97.rtf.

\[147/\] 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.”).
● 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, family obligations, professional relationships, romantic attachments, and affiliations with or memberships in religious, professional, civic, and community organizations;

\[148/\] Cf. 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).


\[150/\] Cf. 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.


\[152/\] Cf. In re Chrzanowski, 636 N.W.2d 758, 761 (Mich. 2001) (involving judge who appointed her paramour to represent indigent criminal defendants at state expense without disclosing relationship to opposing counsel).

\[153/\] 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).
• some of the fine points of judicial ethics;\footnote{154}{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 talking with reporters about the case); In re Buckson, 610 A.2d 203, 205 (Del. Jud. 1992) (censuring and removing from office judge who, without resigning his position, publicly announced he was seeking his party’s nomination for governor); 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.}
• balancing judicial independence and judicial restraint;
• financial planning: how to “afford” to be a judge;\footnote{155}{See notes 90 - 91, supra.}
• public perceptions and the importance of judicial decorum;\footnote{156}{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 images 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, defended some of the adult content as “funny,” but conceded that some of it was “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.}
• dealing with threats to personal safety and security and that of court personnel and loved ones;\footnote{157}{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}
• determining when recusal is advisable, even where it is not mandatory; \(^{158/}\)
• balancing First Amendment rights against the needs of judicial discretion in election campaigning; \(^{159/}\) 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.

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In this way, they can serve Justice Brandeis’ oft-quoted “states as laboratories” function,¹⁶⁰/ 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.

CONCLUSION

Though by no means free from 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 and credentialing for lawyers who aspire to, or are 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 and fostering the ideals of fair and impartial courts that have long been the hallmark of our legal system.

¹⁶⁰/ 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”).