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Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?

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Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well- Functioning Judiciary and Adequately Serve the Public Interest?

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I. INTRODUCTION

Judges are often said to enjoy a certain “mystique” that arises immediately upon their election or appointment to the bench.¹ To some extent, this phenomenon may be based on the belief that judges are, in Blackstone’s words, “the ‘depositories of the law; the living oracles.’”² However, this sense of awe may also be attributable to the shroud of secrecy that surrounds much of what judges do.³

Although society would doubtless benefit from an increased understanding of a number of types of judicial behaviors (for example, judicial deliberation and decision-making), there is one issue about which virtually nothing is known, namely the means by which a new judge learns the art of judging.⁴ Unlike judges in civil law countries, who undertake specialized coursework in judicial studies from the earliest stages of their careers,⁵ judges in the United States typically “[take] the oath, [step] onto the bench, and [proceed] to fill the judicial role as if born in the robe.”⁶ This tradition, which is rooted in medieval English practice, is based on the assumption that anyone who has become a senior litigator is sufficiently well-prepared to act as a judge.⁷

Although this approach may have been acceptable in the Middle Ages, much has changed since then. Not only has the legal community recognized that acting as a judge is not the same as acting as an advocate,⁸ but the duties of a judge have

¹ Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 145 (2009); see also Charles Fried, *A Meditation on Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1227 (2004) (“There is an aura about judges that we do not want them to dissipate . . .”).

² See Kadens, *supra* note 1, at 145 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

³ Lawyers and lay people are often fascinated by first-hand, “insider” reports of what goes on behind chambers doors. Thus, books authored by former clerks at the U.S. Supreme Court are often in high demand, since they are seen as a means of demystifying certain aspects of the judicial process. See EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (1998); TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006); TODD C. PEPPERS & ARTEMUS WARD, IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (2013); ARTEMUS WARD & DAVID L. WEIDEN, SORCERER’S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006).

⁴ See Kadens, *supra* note 1, at 143-46. Some commentators refer to the process of learning how to be a judge as “socialization” rather than education. See *id.* at 146 (including citations).

⁵ See *id.* at 145; Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004).

⁶ Kadens, *supra* note 1, at 143. Although some proposals have been made regarding the development of a form of pre-appointment training, that approach is still in its infancy and will in any case be voluntary in nature. See ABA, Standing Committee on Judicial Independence, Report to the House of Delegates, Recommendation No. 113, <http://www.americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/recommendations/113.authcheckdam.pdf> (last visited Aug. 7, 2015). Some observers suggest that U.S. law schools should undertake efforts to educate future judges about issues relating to adjudication. See Sande L. Buhai et al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, nn. 115-59 (2011).

⁷ See Kadens, *supra* note 1, at 144.

⁸ See Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 168-69 (2010); Kadens, *supra* note 1, at 143-44.

changed significantly since medieval times.⁹ Furthermore, the various methods of selecting judges in the United States (which includes judicial appointments, judicial elections and various combinations of the two procedures) are quite different than those used in sixteenth century England.¹⁰ In fact, there is no constitutional requirement that judges in the United States be qualified as lawyers, which allows a significant number of non-legally-trained individuals to sit as judges.¹¹

Concerns about judicial preparedness led to major reforms in the 1960s and 1970s, when the United States became the first common law country to adopt a system of judicial education.¹² Over the years, judicial education has become “big business” in the United States, and numerous public and private institutions now offer educational programming to both state and federal judges.¹³ However, requirements regarding judicial education vary considerably across the nation,¹⁴

⁹ See Fisher, *supra* note 8, at 182-85. For example, judicial caseloads have increased dramatically, particularly in the last few decades. See S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide For Novice, Experienced and Foreign Judges*, 2015 J. DISP. RESOL. 93, 95 [hereinafter Strong, *Writing*]. Judges are also having to take on additional duties, ranging from case management (leading to the rise of the “managerial” judge rather than the professional adjudicator) to alternative dispute resolution (as a result of the increased emphasis on settlement). See Fisher, *supra* note 8, at 170, 182; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

¹⁰ See Barbara F. Berenson, Book Review, *The People’s Court: Pursuing Judicial Independence in America* By Jed Handelsman Shugerman, 94 MASS. L. REV. 147, 147 (2013) (reviewing JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURT: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012)); Kadens, *supra* note 1, at 144-45.

¹¹ See *North v. Russell*, 427 U.S. 328, 339 (1976); Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 11 (2007) (noting “in the early years of the Republic many judges were not lawyers and, even today, many judges are not”); Paul Biederman, *An Education Revolution From the Field*, SCH. REFORMED (Dec. 5, 2012), <https://schoolreformed.wordpress.com/2012/12/05/post-13-an-education-revolution-from-the-field-continued/> (noting that “in our state, most magistrate, municipal and probate judges, as well as most tribal court judges, never went to law school; many never even completed college”).

¹² See LIVINGSTON ARMYTAGE, *EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING* 12-14 (1996); see also 28 U.S.C. §§ 620-29 (2015) (establishing the Federal Judicial Center in 1967); FED. JUDICIAL CTR., www.fjc.gov (last visited Aug. 7, 2015) [hereinafter FJC Website].

¹³ ARMYTAGE, *supra* note 12, at 14 (citation omitted). Perhaps the most well-respected judicial education center in the United States is the Federal Judicial Center (FJC), which focuses on research and education of the federal judiciary. See FJC Website, *supra* note 12. A number of states have their own judicial education programs, although many states also rely on the services of the National Judicial College, a Nevada-based non-profit originally created by the American Bar Association, to educate their judges. See NAT’L JUDICIAL COUNCIL, <http://www.judges.org/> (last visited Aug. 7, 2015); ARMYTAGE, *supra* note 12, at 13. For-profit judicial education institutions also exist, although some questions have been raised about the objectivity of privately funded programming. See CTR. FOR PUB. INTEGRITY, *Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars* (May 27, 2014) <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars> (noting that “[c]onservative foundations, multinational oil companies and a prescription drug maker were the most frequent sponsors of more than 100 expense-paid educational seminars attended by federal judges over a 4 ½ year period”); Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 941-44 (2002).

¹⁴ See NAT’L JUDICIAL EDUC. PROGRAM, *Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct 15* (Apr. 2004), http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/resources/Comm_Code_HechtSchafran_0504ddt.authcheckdam.pdf; ARMYTAGE, *supra* note 12, at 13, 29-40; Patricia H. Murrell & Philip D. Gould, *Educating for Therapeutic Judging: Strategies, Concepts, and Outcomes*, 78 REV. JUR. U. P. R. 129, 136 (2009).

with some courts—most notably those in the federal system—failing to require their judges to participate in any educational programming whatsoever.¹⁵

While the initiatives of the 1960s and 1970s represent a significant move forward, a number of problems still remain.¹⁶ One of the most pressing issues involves the degree of control exerted by the judiciary over the scope, content and methods of judicial education. Conventional wisdom suggests that the judiciary should “take primary responsibility for providing continuing judicial education,” a view that is based on claims of expertise (i.e., the belief that only judges can appreciate the particular pressures and demands of acting as a judge and thus are the only persons qualified to act as instructors) and the need to protect judicial independence.¹⁷ However, questions have been raised in a variety of contexts about the propriety of self-regulation, since self-interest may tempt individuals to act in a manner that is contrary to the public interest.¹⁸ Concerns about self-regulation may be particularly pressing in cases involving judicial education, given the role that the judiciary plays in a well-ordered society.¹⁹

It is possible to explain the current approach to judicial education in relatively benign terms. For example, the large degree of judicial control over judicial education may simply be the result of acculturation and tradition.²⁰ However, the

¹⁵ By tradition, most if not all incoming federal judges attend new judge orientation sessions offered by the Federal Judicial Center. However, participation is purely voluntary.

¹⁶ One of the most pressing issues concerns funding for judicial education. See ABA Commission on the 21st Century Judiciary, *Preserving the Judiciary's Institutional Legitimacy*, 37 BRIEF 54, 56-57 (2008), available at http://apps.americanbar.org/tips/faic/16_PreservingJudiciary.pdf. Without public funding, judges may resort to privately funded educational programs, which carry with them the risk of political influence and bias. See CTR. FOR PUB. INTEGRITY, *supra* note 13; Green, *supra* note 13, at 941-44.

¹⁷ ABA Commission on the 21st Century Judiciary, *supra* note 16, at 56; see also CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING AND EDUCATION IN OTHER JURISDICTIONS 32-33 (May 2006) (constituting a report prepared for the British Judicial Studies Board), available at http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf; J. Clifford Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 MICH. J. INT'L L. 849, 858-59 (2000) [hereinafter Wallace, *Asia*].

¹⁸ See Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons From Financial Regulation*, 2010 WIS. L. REV. 441, 442-43, 465 (discussing self-regulation and the recent financial crisis); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1016 (2003) (discussing self-regulation of the legal profession). Although proponents of “new governance theory” praise the departure from a “command and control” model of regulation toward self-regulation, they do not advocate an entirely deregulated approach. See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 3 (1992) (“Good policy analysis is not about choosing between the free market and government regulation . . . sound policy analysis is about understanding private regulation . . . and how it is interdependent with state regulation.”); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 882 (2003) (suggesting “the way past the current impasse is to return to [a] commitment to a legal decisionmaking process that is deeply informed about the institutions with which legal actors interact”); On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2100 (2008) (reviewing RICHARD H. THALER & CASS R. SUNSTEIN, *STUMBLE, PREDICT, NUDGE: HOW BEHAVIORAL ECONOMICS INFORMS LAW AND POLICY* (2008) and DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008)).

¹⁹ See Jonathan Lippman, *A Proactive Judicial Bench: Confronting the Crisis of the Unrepresentative*, 2011 CARDOZO L. REV. DE NOVO 1 (discussing the role of the judiciary in a well-functioning society).

²⁰ See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 792, 797 (1980) (noting overexposure to problematic practices dulls perception of impropriety); Wayne D. Brazil, *The Adversary Character of Civil*

situation can also be viewed from a much more troubling perspective, namely that of regulatory capture.²¹

Regulatory capture (also known as “agency capture”) arises when an “organized interest group[] successfully act[s] to vindicate [its] goals through government policy at the expense of the public interest.”²² Applying this principle to judicial education may seem somewhat strange, since the judiciary cannot be considered to be either an “agency” in the technical sense or a special interest group.²³ In fact, the judicial branch is often considered to be the primary means of combating regulatory capture.²⁴ However, concerns about capture appear to be appropriate here, based on (1) the high degree of control currently wielded by the judiciary on matters relating to judicial education; (2) resistance by judges to any independent external oversight on matters relating to judicial education; and (3) the potentially significant number of negative externalities generated by the current system.²⁵ As a result, the existing approach to judicial education can arguably be said to meet the classic definition of agency capture.²⁶

Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295, 1343 (1978) (noting that judges are also subject to the pressure of acculturation).

²¹ See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013).

²² *Id.* at 1340; see also Dorit Rubenstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 578 (2012).

²³ What constitutes an agency in U.S. law is a complicated issue, but the judiciary, as separate branch of government, would not be included in any of those definitions. See 5 U.S.C. § 551(1)(B) (2015) (defining “agency” for purposes of the Administrative Procedure Act and excluding “the courts of the United States”); see also Kimberly N. Brown, *Presidential Control of the Elite “Non-Agency,”* 88 N.C. L. REV. 71, 72-73 (2009) (defining various types of hybrid or independent agencies). However, there are two agencies—the FJC and the Administrative Office of the U.S. Courts (AOUSC)—that are affiliated with the U.S. federal judiciary. See 28 U.S.C. §§ 601-12 (2015) (establishing the AOUSC); 28 U.S.C. §§ 620-29 (2015) (establishing the FJC); Administrative Office of the United States Courts, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited Aug. 7, 2015); FJC Website, *supra* note 12.

²⁴ See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-63 (1985).

²⁵ See ARMYTAGE, *supra* note 12, at 150; THOMAS, *supra* note 17, at 32-33; Wallace, *Asia*, *supra* note 17, at 858-59; see also NAT’L JUDICIAL EDUC. PROGRAM, *supra* note 14, at 15. Here, negative externalities might include costs associated with judicial inefficiency related to poor case management skills or generated as a result of appeals resulting from poor judicial practices. See Lillian R. BeVier, *Law, Economics, and the Power of State*, 21 HARV. J.L. & PUB. POL’Y 5, 8 n.13 (1997) (defining a negative externality as arising “when some costs of an activity spill over to parties not directly involved in the activity” in question).

²⁶ Notably,

[t]he literature uses a variety of definitions to explain the results or features of capture. One definition suggests that in a situation of capture, regulated industry members “persuade regulators to alter rules or be lenient in enforcing those rules.” A somewhat different definition emphasizes the consequences, suggesting that captured regulatory agencies are “persistently serving the interests of regulated industries to the neglect or harm of more general, or ‘public,’ interests. . . . [T]he accusation implies excessive regulated industry influence on regulatory agencies.”

Reiss, *supra* note 22, at 578 (footnotes omitted). Regulatory capture can arise despite the best intent of the public officials involved. See Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 222 (2012) (noting “regulatory capture can occur despite the desire of public officials to protect the public” and discussing “how regulated entities are able to dominate the presentation of information to agencies, producing information asymmetries that make it more likely agencies will adopt industry-favored policies”).

Although some scholars have declined to characterize the concept of capture as either positive or negative,²⁷ regulatory capture is generally considered problematic from both a practical and theoretical perspective.²⁸ Capture of the judiciary could be particularly harmful, given the connection between a well-functioning judiciary and an effective system of justice.²⁹

This phenomenon suggests a pressing need for further scrutiny into matters relating to the education of judges in this country.³⁰ This Essay therefore considers of a number of fundamental issues relating to judicial education in the United States so as to consider, at least as a preliminary matter, whether regulatory capture exists. Given the scope of this Essay, some issues are necessarily excluded.³¹ Nevertheless, this Essay hopes to trigger a deeper debate about judicial education in this country.

The structure of the analysis is as follows. First, the Essay considers certain obstacles to research concerning judicial education as a means of determining why more scholars have not sounded an alarm regarding practices in this field (Section II). The Essay then addresses a number of issues relating to the current approach to judicial education to determine whether and to what extent judicial control over this issue can be considered problematic (Section III). That analysis leads logically into a discussion of various ways that the possibility of regulatory capture of judicial education could be diminished (Section IV). Finally, the Essay concludes by drawing together various strands of analysis (Section VI).

II. INVISIBLE BARRIERS TO SCHOLARLY SCRUTINY OF JUDICIAL EDUCATION

In many ways, the reform movement of the 1960s and 1970s marked the high point for scholarly interest in judicial education.³² Recent years have seen a significant shortage of critical commentary in this field,³³ which is somewhat prob-

²⁷ See Reiss, *supra* note 22, at 571-72.

²⁸ See David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 333-35 (2014).

²⁹ See Lippman, *supra* note 19, at 1.

³⁰ Notably, the diversity of judicial education centers in the United States does not offset the claim that judicial education has been subject to regulatory capture by the judiciary, if, as appears to be the case, control over the content and method of educational programming is controlled directly or indirectly by judges. See *infra* notes 94-102 and accompanying text (discussing individual and institutional influences).

³¹ For example, this discussion does not reflect a detailed discussion of the number and types of negative externalities that arise as a result from the current approach to judicial education, although certain types of empirical data suggests such negative externalities do exist. See *supra* note 25 (defining negative externalities); see also *infra* notes 67-75 and accompanying text (regarding public perception of the judiciary and improper judicial behavior).

³² See ARMYTAGE, *supra* note 12, at 12-13.

³³ See Kadens, *supra* note 1, at 144-45 (“[S]cholars . . . of the judiciary have paid limited attention to the question of how an appointee learns to be a judge.”); THOMAS, *supra* note 17, at 113 (noting “there have been few major developments in this field since the 1970s”). The academic literature on judicial education is relatively sparse and largely outdated. See Diane E. Cowdrey, *Educating Into the Future: Creating an Effective System of Judicial Education*, 51 S. TEX. L. REV. 885, 889 (2010) (suggesting very little discussion exists regarding both the primary purpose of judicial education and how that purpose is to be achieved); Virginia A. Hettinger et al., *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792, 792-93 (2003) (citing scholarship); Kadens, *supra* note 1, at 144-45 & nn. 2, 4 (providing citations regarding the socialization of judges and the existence of judicial education centers that are almost entirely from the 1970s and 1980s). There are a number of judicially-authored pieces, but those tend to be written from an anecdotal rather

lematic for the current discussion, given that questions regarding regulatory capture should be considered within a larger analytical context.³⁴

To some extent, the lack of scholarship in this field could signal a consensus that the problems of judicial education have been resolved. That issue will be considered in Section III in conjunction with issues relating to regulatory capture.³⁵ However, the dearth of critical commentary in this area of law could be the result of other factors. Indeed, closer analysis suggests that scholarly research into judicial education has been hindered by a number of “invisible barriers” that have little, if anything, to do with the quality and nature of judicial education in this country.

Analysis of these “invisible barriers” is important because these obstacles do more than impede independent evaluation of the way in which judges learn how to carry out their judicial functions. Instead, these phenomena describe why the judiciary is reluctant to cede control over judicial education and why regulatory capture may have occurred.

It is impossible to consider all potential barriers to legal education in the scope of the current Essay.³⁶ Instead, this section will focus on three issues that are particularly relevant to the current discussion: the lack of consensus as to the role and function of judges; a belief that other mechanisms, such as judicial selection procedures, are adequate to create a well-functioning and well-informed judiciary; and concerns about the extent to which judicial education infringes on judicial independence.

than scholarly perspective and are therefore not perhaps as objective as one might hope. See Chad M. Oldfather, Book Review, *Oral History and the Study of the Judiciary*, 78 GEO. WASH. U. L. REV. 846, 849 (2010); see also Lenore Alpert et al., *Becoming A Judge: The Transition From Advocate to Arbitrator*, 62 JUDICATURE 325 (Feb. 1979); Charles S. Claxton, *Characteristics of Effective Judicial Education Programs*, 76 JUDICATURE 11 (Jun.-Jul. 1992); Susanne DiPietro et al., *Judicial Qualifications and Judicial Performance: Is There a Relationship?*, 83 JUDICATURE 196 (Jan.-Feb. 2000); Henry J. Friendly, *Reflections On A Lawyer Newly Become Judge*, 71 YALE L. J. 218 (1961); Jessie B. Gunther, *Reflections on the Challenging Proliferation of Mental Health Issues in the District Court and the Need for Judicial Education*, 57 ME. L. REV. 541 (2005); Aaron Ment, *The Transition from Lawyer to Judge: Connecticut's Pre-Bench Orientation Program*, 73 JUDICATURE 281 (Feb.-Mar. 1990); Patricia H. Murrell et al., *Courts as Learning Organizations: Toward a Unifying Vision*, 93 JUDICATURE 14 (July-Aug. 2009); Paul Nejeleski, *Symposium Seeks New Approaches to Judicial Education*, 74 JUDICATURE 104 (Aug.-Sep. 1990); *On Becoming A Judge: Socialization to the Judicial Role*, 69 JUDICATURE 139 (Oct.-Nov. 1985); David Richert, *Federal-State Educational Programs*, 86 JUDICATURE 172 (Nov.-Dec. 2002); Franklin M. Zweig & Diane E. Cowdrey, *Educating Judges for Adjudication of New Life Technologies*, 83 JUDICATURE 157 (Nov.-Dec. 1999); Jack B. Weinstein, *The Contribution of Henry G. Manne Towards the Education of the American Judiciary*, 50 CASE W. RES. L. REV. 421 (1999).

³⁴ See Reiss, *supra* note 22, at 571-72. Limited analyses of judicial self-regulation exist, although they focus primarily on issues relating to removal and discipline of judges. See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443 (2013); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 233 (1993).

³⁵ See *infra* notes 65-102 and accompanying text.

³⁶ Other commentators have discussed these issues at more length. See THOMAS, *supra* note 17, at 110-14.

A. *Lack of Consensus Regarding the Role of Judges in U.S. Courts*

The first issue to consider involves the lack of consensus about what constitutes “good” or “appropriate” judging.³⁷ This debate, which includes both practical³⁸ and theoretical elements,³⁹ is both central and preliminary to the question of judicial education, since a judicial curriculum cannot be developed without agreement on the types of skills and attributes that should be taught.⁴⁰

Up until this point, the only subject that has won universal acceptance as an appropriate topic for judicial education involves courses concerning recent developments in substantive or procedural law.⁴¹ While no one doubts that judges must be competent in both content and procedure, this educational approach suggests that legal expertise is the sole hallmark of a good judge. In fact, judges do much more than simply apply the law in a mechanistic manner.⁴² Instead, judges must master a wide range of personal and professional skills if they are to do their jobs properly.⁴³

³⁷ See Lippman, *supra* note 19, at 4 (noting that the role of judiciary goes beyond mere adjudication). Even the American Bar Association (ABA) is unable to determine this issue with any degree of specificity, as demonstrated by its model code of judicial conduct, which includes only four canons, which are all quite general. See ABA Model Code of Judicial Conduct, ABA http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited Aug. 7, 2015). Some academic studies into the nature of judging do exist, although they, too, could be expanded upon. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1385-91 (2012); Lippman, *supra* note 19, at 1; Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 896 (2012); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1303-17 (2008); S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1062-63, 1076-81 (2014).

³⁸ For example, numerous questions arise with respect to evidentiary concerns, such as the adequacy of eyewitness testimony or the effect of implicit bias on adjudication. See Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 451-52 (2012); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 481-82 (2010); see also Andrea L. McArdle, *Using a Narrative Lens to Understand Empathy And How It Matters In Judging*, 9 LEGAL COMM. & RHETORIC: JALWD 173 (2012); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decision-Making*, 85 SO. CAL. L. REV. 313, 323 (2012).

³⁹ For example, one of the key controversies involves the question of whether judges should focus solely on the merits of the case in front of them or whether they should consider the development of the common law in a particular field. See Ethan J. Lieb et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 700 (2013); Strong, *Writing*, *supra* note 9, at 113.

⁴⁰ See ARMYTAGE, *supra* note 12, at 148; Cowdrey, *supra* note 33, at 890.

⁴¹ This issue goes to the competence of the judiciary, as noted in the ABA Model Code of Judicial Conduct. See ABA Model Code of Judicial Conduct, *supra* note 37, Canon 2. However, there is growing support for courses concerning certain types of “‘judge craft’ - the specific skills judges need to do their job, including skills training in areas such as opinion writing, sentencing, dealing with certain types of litigants and evidence.” THOMAS, *supra* note 17, at 13-17.

⁴² See ARMYTAGE, *supra* note 12, at 7-8; THOMAS, *supra* note 17, at 13-17.

⁴³ See THOMAS, *supra* note 17, at 13-17. Debate often arises as to whether certain characteristics—including those, such as integrity and independence, that are believed to be fundamental to good judging—are either inherent (and therefore not susceptible to educational efforts) or adequately addressed through the judicial selection process. See Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 844 (2011) (noting importance of judicial integrity, independence and impartiality); see also ABA Model Code of Judicial Conduct, *supra* note 37, Canon 1 (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”); *id.* at Canon 2 (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

If judicial education is intended to address judicial performance as a whole, then those persons involved in the development of a judicial curriculum must understand what it is that judges do.⁴⁴ However, the process is inadequately understood by both judges⁴⁵ and legal academics.⁴⁶ As a result, it is difficult or impossible to answer many of the core questions involving judicial education.

B. Excessive Reliance on Judicial Selection As a Predictor of Judicial Competence

Although there may not be much research concerning what it means to be a judge, there is a considerable amount of scholarship concerning the process of selecting judges.⁴⁷ Traditionally, the United States has placed a great deal of emphasis on judicial selection procedures as a means of identifying candidates who will have a successful career on the bench.⁴⁸ However, a number of concerns have been raised about whether and to what extent judicial selection procedures can actually be relied upon to produce good judges.⁴⁹ Some commentators have gone so far as to conclude that “no selection method can guarantee the continued fitness of the judiciary.”⁵⁰

However, society does not need to rely on the judicial selection process as the exclusive means of ensuring good judicial performance. Instead, judicial education can provide additional, and in many ways more direct, means of improving

⁴⁴ See THOMAS, *supra* note 17, at 14-15.

⁴⁵ For example, “even the most learned judges have acknowledged that they do not understand how judges make decisions.” Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001).

⁴⁶ Some preliminary work has been done on these subjects, although much of the existing analysis is from judges themselves. See RICHARD A. POSNER, *HOW JUDGES THINK* (2010); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006); Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons From Judge Cardozo*, 85 NOTRE DAME L. REV. 1629 (2010). While useful, more work is warranted, particularly from academics. See *supra* note 33 (noting that although the judicial perspective is useful, independent analysis of judicial functions is also important). The lack of academic involvement in these issues has been seen as problematic. See THOMAS, *supra* note 17, at 113 (“One critic has drawn a connection between the need for reform in the field of continuing education for judges . . . and the lack of academic interest in judicial studies He maintains that university research on the efficiency of the judicial system, on the sociological background of the judiciary, on recruitment, evaluation, promotion, and even on the acceptance of the courts by the public is almost non-existent, and there have been few major developments in this field since the 1970s.”).

⁴⁷ For example, commentators have noted the potentially detrimental role that politics can play in both judicial elections and judicial appointments. See Norman L. Greene, *Perspectives From the Rule of Law and International Economic Development: Are There Lessons For Reform of Judicial Selection in the United States?* 86 DENV. U. L. REV. 53, 112-14 (2008); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2184-85 (2006); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 586-87 (2005); Joanna M. Shepherd, *Are Appointed Judges Strategic Too?* 58 DUKE L. J. 1589, 1592 (2009).

⁴⁸ See Kadens, *supra* note 1, at 143-45.

⁴⁹ See Wayne Doane, Note, *The Membership of Judges in Gender Discriminatory Clubs*, 12 VT. L. REV. 459, 461 (1987); see also Fisher, *supra* note 8, at 164.

⁵⁰ Doane, *supra* note 49, at 461; see also Fisher, *supra* note 8, at 164 (concluding many judges “turn out to be ill-suited for the job,” despite having survived rigorous selection procedures).

performance on the bench.⁵¹ Unfortunately, the current fixation with judicial selection procedures has usurped the more logical debate about judicial education as a means of ensuring and promoting excellence in judging. So long as judicial selection is seen as a proxy for judicial competence, the discussion about judicial education will be shortchanged.

C. Concerns About Judicial Independence

The final issue to consider involves judicial independence. Traditionally, judges in the United States have opposed mandatory forms of judicial education on the grounds that such practices infringe upon judicial independence.⁵² Furthermore, concerns about judicial independence have also affected determinations about who is to develop educational programming for judges. Thus, Chief Justice William Rehnquist once went so far as to claim that “[j]udicial independence is enhanced when the third branch controls judicial education, research and planning.”⁵³

Given this background, it is perhaps understandable that some academics might hesitate before involving themselves in the debate over judicial education. Even so, commentators have long recognized that judicial independence can be carried too far and devolve into judicial hubris.⁵⁴ As a result, it is necessary to determine whether assertions about the need to protect judicial independence are legitimate or whether judicial independence is being used as a stand-in for other, perhaps less praiseworthy concerns.⁵⁵

One reason why some judges may resist anything other than purely voluntary forms of judicial education may be the belief that judicial education diminishes the prestige or “mystique” of the judiciary and thereby damages the legitimacy of the institution.⁵⁶ However, it is possible to view judicial education efforts not as evidence of a failing judiciary but instead as a means of ensuring a competent and

⁵¹ See THOMAS, *supra* note 17, at 13-17.

⁵² Mandatory judicial education can relate either to the need to undertake some form of judicial education (regardless of content) or specific types of judicial education (such as that relating to implicit bias, domestic violence, etc.). See ARMYTAGE, *supra* note 12, at 171.

⁵³ William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, 18 AM. J. TRIAL ADVOC. 499, 507 (1995). Some commentators have also suggested that judicial education not only does not infringe on judicial independence but can actually enhance it. See James B. Eaglin & Matthew Alex Ward, *Enhancing the Administration of Justice and Strengthening Judicial Independence Through Independent, Judicial-Based Research Centers*, 7 J. LEGAL TECH. RISK MGMT. 77, 108 (2014); see also RUSSELL WHEELER, *JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE* 42 (1988).

⁵⁴ See Andrew M. Hall, Book Review, *Lusky and the Long Dark Road*, 11 J. L. & POL. 213, 214 (1995); Maimon Schwarzschild, *Judicial Independence and Judicial Hubris*, in *THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES* 177, 178 (Shimon Shetreet & Christopher Forsyth eds., 2012); see also Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 588-90, 594 (2009); Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 768 (2004) (“Common themes in discussions of judges include their tendency to become arrogant . . .”).

⁵⁵ See *supra* notes 21-26 and accompanying text.

⁵⁶ See ARMYTAGE, *supra* note 12, at 29; Kadens, *supra* note 1, at 143.

well-informed bench.⁵⁷ Indeed, judicial education has been said to be an effective means of promoting public confidence in the judiciary.⁵⁸

Another reason why judges may resist mandatory forms of judicial education may be due to content-based concerns.⁵⁹ For example, some judges may believe that they do not need instruction on a particular issue or that the material in question is somehow inappropriate for a judge to consider.⁶⁰ However, social science research indicates that judges often are unaware of certain gaps in their knowledge.⁶¹ Concerns regarding “inappropriate” instruction also appear inapt because the primary function of a judge is to distinguish between relevant and irrelevant material. Indeed, some judges have accepted invitations to attend industry-sponsored judicial education programs at luxury resorts based on the claim that, as judges, they are fully capable of distinguishing between objective educational material and special interest group propaganda.⁶²

D. Effects of the Invisible Barriers to Research Concerning Judicial Education

Although the discussion in the preceding subsections is quite brief, the underlying sentiments run deep within the judiciary and thus should be taken quite seriously. However, it is in many ways easier to explain the rationales behind various obstacles to research concerning judicial education than it is to justify their continued effect on legal scholarship. In fact, allowing these invisible barriers to legal research to continue to bar critical commentary of judicial education would simply reinforce the “mystique” of the judiciary and allows judges to wield significant if not exclusive control over matters relating to their own professional educations.⁶³

Finding the current approach to judicial education problematic does not require a determination that the judiciary is acting in bad faith. Indeed, commentators have explicitly recognized that “regulatory capture can occur despite the desire of public officials to protect the public.”⁶⁴ Therefore, any analysis regarding

⁵⁷ See THOMAS, *supra* note 17, at 136.

⁵⁸ See ABA Commission on the 21st Century Judiciary, *supra* note 16, at 55 (“There is more at stake here than simply promoting judicial competence. The continuing legitimacy of our judicial institutions requires that a process be in place to reassure the public that the judges who interpret our laws, rule on our civil claims, resolve disputes affecting our families, and sentence our citizens are capable and highly qualified.”); see also *supra* notes 67-77 and accompanying text.

⁵⁹ See *supra* note 41 and accompanying text.

⁶⁰ To some extent, this objection may be ideologically based. For example, conservative judges may be more opposed to judicial education programs attempting to demonstrate the existence and effect of implicit bias, since conservatives “may be more inclined than liberals to justify and use their implicit biases for explicit judgment.” See Gregory S. Parks & Matthew W. Hughey, *Opposing Affirmative Action: The Social Psychology of Political Ideology and Racial Attitudes*, 57 HOW. L.J. 513, 537 (2014).

⁶¹ See *infra* notes 85-90. Social scientists have also determined that certain types of cultural outlooks actually affect perceptions of fact. See Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 109 (2010) (discussing the work of Yale Law School’s Cultural Cognition Project) [hereinafter Secunda, *Cultural Cognition*].

⁶² See Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARV. ENVTL. L. REV. 405, 469-80 (2001).

⁶³ Kadens, *supra* note 1, at 143.

⁶⁴ Shapiro, *supra* note 26, at 222.

regulatory capture must focus on objective rather than subjective elements. A number of those issues are considered in the following section.

III. JUDICIAL EDUCATION, JUDICIAL PERFORMANCE AND JUDICIAL CONTROL OF JUDICIAL EDUCATION

Previously it was suggested that the paucity of academic research concerning judicial education could be due to the fact that the reforms of the 1960s and 1970s effectively resolved all of the important issues in this field.⁶⁵ If true, then the question of regulatory capture could be considered moot, given that the definition of regulatory capture contemplates some sort of negative effect on the public.⁶⁶ However, as the following subsections suggest, judicial education in the United States does not appear to be problem-free.

A. Public Perception of Judicial Performance

The first issue to consider is whether the reforms of the 1960s and 1970s have fully and finally fixed any problems associated with judicial education in the United States. As it turns out, there is some evidence to support the conclusion that the judicial education system is operating at acceptable levels of efficiency and competence. For example, public perception polls often suggest that the judiciary is functioning relatively well, at least in comparison to other branches of government.⁶⁷ However, closer examination of the data indicates that public perception of judicial performance is not all that high when considered in absolute numbers.⁶⁸ Furthermore, confidence in the courts is lowest among those with direct experience with the judicial system.⁶⁹

This information has triggered a number of questions about the quality of judicial performance in this country.⁷⁰ While some criticisms of judges' behavior (such as that relating to "judicial activism") can be framed in political or ideological terms,⁷¹ a number of content-neutral concerns have also been raised.⁷² Misgiv-

⁶⁵ See *supra* notes 32-35 and accompanying text.

⁶⁶ See *supra* notes 21-26 and accompanying text.

⁶⁷ See Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007); The State of State Courts: A 2014 NCSC Public Opinion Survey, NAT'L CTR. FOR STATE COURTS (Dec. 4, 2014), <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx>.

⁶⁸ Although the judiciary tends to be rated more highly than other branches of government in public perception polls, the numbers—which often range from approximately 50 percent to 70 percent, depending on the question asked—are still relatively weak by any objective measure. See Jamieson & Hennessy, *supra* note 67, at 900; NAT'L CTR. FOR STATE COURTS, *supra* note 67; see also Fisher, *supra* note 8, at 186-89.

⁶⁹ See Jamieson & Hennessy, *supra* note 67, at 901-02; NAT'L CTR. FOR STATE COURTS, *supra* note 67, at 3.

⁷⁰ See David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 115 (2008); Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 FORDHAM URB. L.J. 315, 315 (2007); Fisher, *supra* note 8, at 186-89.

⁷¹ See Brody, *supra* note 70, at 116; see also Timothy M. Phelps, *Federal Judges Faces Possible Impeachment*, MSN (Mar. 16, 2015), <http://www.msn.com/en-us/news/politics/federal-judge-faces-possible-impeachment/ar-AA9NGO6> (discussing a Republican-appointed federal judge who was

ings have also been expressed about judicial behavior from the bench, including the apparent increase in reports of judicial incivility,⁷³ judicial insensitivity⁷⁴ and self-perceived judicial invincibility.⁷⁵

Some people dismiss these types of issues as uncharacteristic of the judiciary as a whole.⁷⁶ However, many if not all of these incidents could have been avoided if the individuals in question had received appropriate forms of judicial education before the episodes occurred.⁷⁷ Thus, it does not appear as if the current approach to judicial education is entirely successful.

B. Judicial Perception of Judicial Performance

Closer examination of the various types of problematic behaviors discussed above suggests that many can be traced back to the so-called “mystique” of the

denounced after putting a former Democratic government in manacles following a corruption conviction).

⁷² For example, concerns have been enunciated about written decisions and opinions that are less than respectful of the parties and/or other members of judiciary. See Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 842 (2009) (noting that some interpretive methods “incur [a] cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity ‘unreasonable’ and hence unworthy of consideration in the adjudicatory process”). Indeed, there is even a “sarcasm index” rating various judges. See Debra Cassens Weiss, *Scalia Tops Law Prof’s Sarcasm Index*, ABA L.J. (Jan. 20, 2015), http://www.abajournal.com/news/article/scalia_tops_law_prof_sarcasm_index (noting that “heavy use of sarcasm can demean the court, and . . . arguably demonstrates . . . lack of respect for the legal opinions of . . . colleagues” (citation omitted)).

⁷³ See Rene Stutzman, *Brevard Judge Who Got Into Courthouse Fistfight Faces Formal Charges*, ORLANDO SENTINEL (Aug. 14, 2014), <http://www.orlandosentinel.com/news/breaking-news/os-fighting-judge-brevard-20140814-story.html>.

⁷⁴ See Bill Chappell, *Montana Judge is Publicly Censured Over 30-Day Sentence For Rape*, NPR (July 22, 2014), <http://www.npr.org/blogs/thetwo-way/2014/07/22/334069164/montana-judge-is-publicly-censured-over-30-day-sentence-for-rape>; Lynn Hecht Schafraan, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063-65, 1067 (1995).

⁷⁵ See Valerie Richardson, *Scalia Defends Keeping God, Religion in Public Square*, WASH. TIMES (Oct. 1, 2014), <http://www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religion/?page=all> (quoting U.S. Supreme Court Justice Antonin Scalia as saying: “What can they do to me? I have life tenure.”).

⁷⁶ For example, the judge who engaged in the fistfight was said to have acted out of character and was sent to anger management training. See Dan Kedney, *Florida Judge Deals Out Justice With His Fists*, TIME (June 3, 2014), <http://time.com/2818369/florida-judge-courtroom-fight/>; see also *supra* note 73. Although some types of bad behavior (such as Justice Scalia’s heavy-handed use of sarcasm and other demeaning tactics) are supported by certain members of the lay and legal communities, commentators have suggested that actions not only injure the judiciary but appear to have harmed the judge in question. See Garrett Epps, *The Twilight of Antonin Scalia*, THE ATLANTIC (Aug. 21, 2014), <http://www.theatlantic.com/politics/archive/2014/08/the-twilight-of-antonin-scalia/378884/> (suggesting that Justice Scalia’s influence is waning); Kahan et al., *supra* note 72, at 842-43; Weiss, *supra* note 72.

⁷⁷ See Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 815 (1996); Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 375 (2012) [hereinafter Secunda, *Debiasing*]. Of course, judicial education will only resolve such issues if the judges in question are required to attend educational programming. Supreme Court justices, such as Justice Scalia, are not required to undergo any type of judicial education. Indeed, Justice Scalia has been known to teach judicial education courses, including those relating to judicial writing, despite criticism of his writing style. See Duke Law, Center for the Study of Judicial Studies, Faculty for Summer 2013, <http://law.duke.edu/judicialstudies/degree/faculty/> (listing Justice Scalia as teaching a course on judicial writing); see also Kahan et al., *supra* note 72, at 842-43; Weiss, *supra* note 72.

judge.”⁷⁸ While the aura surrounding judges may contribute to a necessary sense of respect for the judiciary,⁷⁹ such sentiments can be problematic if they generate overconfidence (sometimes described in the literature as “judicial hubris”) that results in questionable judicial practices.⁸⁰ Although judges are not the only ones prone to overconfidence, commentators have suggested that “one can make a persuasive argument that the natural human foibles such as . . . overconfidence . . . become exacerbated, rather than reduced, because of the isolation in which judges work and the pedestal upon which they are placed.”⁸¹ Judges may also be inclined to overestimate the importance of intellectual prowess over interpersonal and other types of skills necessary to the art of judging.⁸²

Concerns about overconfidence among judges are particularly relevant to the current discussion because judges in the United States are largely in control of their own educational agendas, both individually and institutionally.⁸³ Some judges (most notably those on the federal bench) do not ever need to undertake any form of judicial education.⁸⁴

A system that allows individuals to choose for themselves the content and timing of their professional education is somewhat questionable in light of research indicating that persons “who are overconfident . . . make poor [educational] choices compared to learners who are uncertain about their knowledge.”⁸⁵ The situation is further exacerbated by the fact that some supremely overconfident people—particularly those who are given a great deal of deference in their jobs—are highly unlikely to learn from experience.⁸⁶

⁷⁸ Kadens, *supra* note 1, at 143; *see also supra* notes 71-75 and accompanying text.

⁷⁹ *See* Fried, *supra* note 1, at 1227.

⁸⁰ *See* Jeffrey M. Stempel, *In Praise of Procedurally Centered Judicial Disqualification – And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 741, 744 (2011); *see also supra* note 54 and accompanying text.

⁸¹ Stempel, *supra* note 80, at 744.

⁸² *See supra* notes 42-43 and accompanying text. Some authorities suggest that “[s]mart people overestimate the importance of being a smart person.” Debra Cassens Weiss, *Lawyers in Failed Firms Overestimated the Importance of Being Smart*, *Law Dean Says*, ABA J. (Mar. 9, 2015), http://www.abajournal.com/news/article/lawyers_in_failed_firms_overestimate_the_importance_of_being_smart_law_dean (quoting Dean Frank Wu of Hastings Law School).

⁸³ Most states mandate some form of judicial education for sitting judges, although the requirements are set at the local level and can vary widely. *See* NAT’L JUDICIAL EDUC. PROGRAM, *supra* note 14, at 15; ARMYTAGE, *supra* note 12, at 13, 29-40; Murrell & Gould, *supra* note 14, at 136. As a result, judges in both state and federal court are usually allowed to choose their own curriculum. The concept of mandatory judicial education remains fraught, even though some people believe that judicial education should be considered part of a judge’s continuing ethical duty. *See* NAT’L JUDICIAL EDUC. PROGRAM, *supra* note 14, at 15 (“Judicial education is essential to judges’ ability to meet the obligations of Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.”); *see also id.* (noting some judges find mandatory judicial education “insulting”).

⁸⁴ Although incoming federal judges are not required to attend new judge orientations offered by the FJC, most do. However, there is no continuing judicial education requirement for federal judges and no systematic approach to developing certain skills.

⁸⁵ Jennifer M. Cooper, *Smarter Law Learning: Using Cognitive Science to Maximize Law Learning*, 44 CAP. U. L. REV. __ (forthcoming 2016).

⁸⁶ *See* Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 693 (2005). Empirical evidence also shows that those persons (such as judges) who are more socially dominant are more confident in their judgments, regardless of actual ability. *See* Stephen V. Burks et al., *Overconfidence and Social Signaling*, 2013 REV. ECON. STUD. 1, 4.

Overconfidence is not the only characteristic that affects decisions regarding educational programming. For example, empirical studies suggest that individuals do not seek training in subjects they believe they have already mastered.⁸⁷ Furthermore, some issues, such as those relating to implicit bias, are extremely difficult to reach through voluntary training programs because “these cognitive processes can operate implicitly, or at a level below conscious awareness, . . . [and thus] can bias judgment and behavior in ways that go unnoticed by the individual.”⁸⁸ As a result, those judges who do not believe that they are prone to implicit bias or who do not find such biases problematic may not choose to receive training in this particular subject matter area,⁸⁹ even though social scientists and judicial education experts all agree that “[e]veryone, judges . . . included, harbors attitudes and stereotypes that influence how he or she perceives and interacts with the social world.”⁹⁰

C. *Judicial Education and Judicial Performance*

Problems associated with overconfidence, implicit bias and similar issues can be addressed through educational measures.⁹¹ However, a voluntary, judge-led system of education does not seem to be well-suited to resolving these sorts of matters, since those persons who are most in need of instruction on particular issues are perhaps least likely to choose programming on those topics.⁹² Indeed, many judges find certain forms of judicial education “insulting” and “strenuously oppose” efforts to impose any educational requirements on the judiciary.⁹³

This phenomenon raises a second type of concern, namely the control that the judiciary exerts over the content of judicial education. At this point, most of the faculty on judicial education courses are judges themselves, even if the judges have no special expertise in education or in the subject matter under discussion.⁹⁴

⁸⁷ See Cooper, *supra* note 85. Furthermore, students who believe themselves to be under time pressure (as many sitting judges are) often choose not to focus on material that they believe will be difficult to learn. See *id.*

⁸⁸ *Helping Courts Address Implicit Bias: Resources for Education*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/ibeducation> (last visited Aug. 7, 2015); see also Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146-48, 1172-79 (2012). Similar problems occur with respect to domestic violence cases. See Schafran, *supra* note 74, at 1075.

⁸⁹ For example, conservative judges may be more opposed to judicial education programs attempting to demonstrate the existence and effect of implicit bias, since conservatives “may be more inclined than liberals to justify and use their implicit biases for explicit judgment.” See Parks & Hughey, *supra* note 60, at 537.

⁹⁰ NAT’L CTR. FOR STATE COURTS, *supra* note 88; see also Mahoney, *supra* note 77, at 815; Secunda, *Cultural Cognition*, *supra* note 61, at 109; Secunda, *Debiasing*, *supra* note 77, at 375.

⁹¹ See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 153 (2010); Mahoney, *supra* note 77, at 815; Secunda, *Debiasing*, *supra* note 77, at 375.

⁹² See Cooper, *supra* note 85.

⁹³ NAT’L JUDICIAL EDUC. PROGRAM, *supra* note 14, at 15 (“Mandatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it.”); see also ARMYTAGE, *supra* note 12, at 29-40, 169.

⁹⁴ See Wallace, *Asia*, *supra* note 17, at 856 (reflecting the judicial view that a variety of courses, including those regarding “avoiding bias . . . are more effectively taught by an experienced judge (even one without formal judicial education) than by an ‘expert’ or ‘professor’ who usually does not have practical experience and may be more inclined to ‘lecture’ than to ‘engage’ the learners”).

Although experts in judicial education recognize the benefits of including outside experts on faculty, the bias in favor of judges as faculty is overwhelming.⁹⁵

Those who act as faculty on judicial education programs obviously have a great deal of control over both the content and method of presenting the material.⁹⁶ However, individual judges can affect the educational curriculum in other ways as well. For example, judicial education in the United States is a highly susceptible subject to market pressures.⁹⁷ Because judges can pick and choose which courses they will attend, any program that is considered too difficult or too controversial will likely be poorly attended, which decreases the likelihood that the program will be offered again in the future.⁹⁸ Indeed, commentators have noted a significant lag in institutional adoption of programs that are seen as particularly challenging for judicial audiences.⁹⁹ Notably, market pressures affect both for-profit and not-for-profit institutions, since both types of organizations are accountable for their curricular choices.¹⁰⁰

Judicial influence over the educational curriculum is pervasive not only at the individual level, but also at the institutional level, as illustrated by the number of judges serving on the advisory boards of organizations specializing in judicial education.¹⁰¹ Although judicial input into programming is of course necessary, “the conservative nature of the judicial branch, its many stakeholders, and its resulting reluctance to change” can thwart efforts to improve or modify existing approaches to judicial education.¹⁰²

IV. POTENTIAL SOLUTIONS TO PROBLEMS OF REGULATORY CAPTURE

Although more work needs to be conducted before a definitive conclusion can be reached, the various problems that remain unaddressed by the current approach to judicial education, the high degree of control currently wielded by the judiciary over judicial education and the resistance by judges to any independent, external

⁹⁵ Compare Schafran, *supra* note 74, at 1072 n.52 (“Effective judicial education requires a combination of expert presentation by judicial and nonjudicial faculty and interactive exercises in which judges practice applying their new knowledge.”) with Wallace, *Asia*, *supra* note 17, at 856.

⁹⁶ Although judges are usually not responsible for developing the content of the courses they teach (that task is typically carried out by full-time staff members at the sponsoring organization), judicial faculty are free to interpret the materials provided to them in any way they like, and it is not uncommon for judges to ignore some suggested material in favor of other issues.

⁹⁷ See Jeffrey W. Stempel, *Refocusing Away From Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 363 n.116 (2010).

⁹⁸ See *supra* notes 85-87 and accompanying text (noting that learners tend to avoid difficult material, if given the chance).

⁹⁹ See Stempel, *supra* note 97, at 363 n.116.

¹⁰⁰ For-profit institutions have an obvious financial interest in maximizing class attendance. However, not-for-profit institutions may be under similar pressures to fill their courses, particularly if those organizations are subject to oversight from legislative or other bodies with control over the judicial education entity’s budget. See 28 U.S.C. § 628 (2015) (noting appropriations and accounting procedures for the FJC).

¹⁰¹ See 28 U.S.C. §621 (2015) (listing members of the supervisory board of the FJC); Faculty Council, NAT’L JUDICIAL COUNCIL, <http://www.judges.org/about/faculty-council.html> (last visited Aug. 7, 2015) (helping “ensure that quality teaching standards are maintained and that the curricula offered are relevant, challenging and invigorating to the College’s participants” and entirely made up of judges); see also 2014 FJC Annual Report, FED. JUDICIAL CTR., *supra* note 12, at 14 (listing members of various FJC Committees, some of which are entirely made of judges).

¹⁰² Elizabeth Dennis, *Leading Into the Future: Securing the Public Trust in Texas Courts*, 51 S. TEX. L. REV. 839, 840 (2010).

oversight of judicial education suggest that this particular field has been subject to regulatory capture.¹⁰³ The question, therefore, is what should be done now.

Scholars have identified “three different responses to the problem of regulatory capture: accountability, independence, and transparency.”¹⁰⁴ Applying those principles to judicial education suggests a need for (1) increased external input over programming choices (independence); (2) increased mechanisms to measure whether and to what extent judges are engaging in appropriate forms of judicial education (accountability); and/or (3) increased publicity about the nature, quality and success of judicial education (transparency). While these sorts of reforms obviously cannot be implemented overnight, there are a number of initiatives that can assist with the process.

A. Independence

The first potential solution to regulatory capture—independence—contemplates the need to establish a certain amount of distance between the regulatory entity and the regulated entity. This goal can be achieved in the field of judicial education by allowing academics, experts and independent stakeholders to have a stronger voice in matters relating to judicial education. Input should be sought not only regarding the content of judicial education but also the question of whether and to what extent mandatory programming is necessary. Notably, this process cannot be initiated by or include members of either the legislative or executive branch of government, since that would raise separation of powers concerns.¹⁰⁵

When considering how best to implement this procedure, reformers can look to other countries that have successfully integrated outside voices into discussions about judicial education. For example, Canada has adopted a “three pillar” approach to judicial education which considers input from judges, academics, and the community.¹⁰⁶

B. Accountability

The second potential solution to regulatory capture—accountability—would require members of the regulated entity (i.e., judges) to be held accountable for their actions so as to minimize potential wrongdoing and encourage voluntary compliance with any necessary standards of behavior. This issue has been already been discussed in the United States in the context of the debate about judicial

¹⁰³ See Reiss, *supra* note 22, at 571-72; see also *supra* notes 32-102 and accompanying text. For example, more research needs to be conducted regarding the negative externalities generated by the current system, although reports regarding problematic judicial behavior suggest such evidence can be found. See *supra* notes 71-75 and accompanying text.

¹⁰⁴ Roger Van Den Bergh, *Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy*, 16 INT'L REV. L. & ECON. 363, 378 (1996); see also Shapiro, *supra* note 26, at 249-55 (noting also that creating the political will for reform is important).

¹⁰⁵ See ELIZABETH B. BAZAN & MORTON ROSENBERG, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES (May 31, 2005), available at <https://fas.org/sgp/crs/misc/RL32935.pdf> (discussing scope and limits on congressional oversight of the federal judiciary).

¹⁰⁶ See THOMAS, *supra* note 17, at 50.

evaluation procedures that could identify areas where improvement in judicial practices is needed, either by individual judges or the judiciary as a whole.¹⁰⁷

Although judicial assessments are routinely conducted in civil law jurisdictions,¹⁰⁸ judges in the United States have traditionally resisted such measures based on concerns about judicial independence¹⁰⁹ and separation of powers.¹¹⁰ However, some commentators have claimed that judicial evaluations can increase the legitimacy of the judiciary by offsetting negative information generated during judicial election campaigns.¹¹¹

A full-fledged debate about the propriety of judicial evaluation programs is beyond the scope of the current Essay. However, some experts in judicial education have avoided these types of concerns by suggesting the use of needs assessments rather than judicial evaluations to determine what type of judicial programming would be useful to judges.¹¹²

C. Transparency

The third response to regulatory capture—transparency—would involve increased knowledge and scrutiny of both the content and the process of judicial education in this country. The burden for this particular process will likely fall to the academic community, although other members of civil society could also participate in the dissemination and analysis of information about judicial education procedures.

Although there is much yet to be done in this regard, there have been a number of recent efforts that could increase transparency regarding judicial educa-

¹⁰⁷ See STANDING COMMITTEE ON JUDICIAL ADMINISTRATIVE REPORT: REGARDING A JUDICIAL EVALUATION FORM, 3 HAW. B.J. 9 (1999); Eaglin & Ward, *supra* note 53, at 78-88; Shepherd, *supra* note 47, at 1592. However, measuring the quality of judicial decision-making is a difficult task, since many issues are subjective or are outside the judge's control. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 32 (2004); Frank B. Cross & Stephanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1388-99 (2009) (discussing "productivity, quality and independence" as relevant criteria and noting criticism of research methodologies); Chad M. Oldfather, *Against Accuracy (As A Measure of Judicial Performance)*, 48 NEW ENG. L. REV. 493, 494-95 (2014).

¹⁰⁸ See THOMAS, *supra* note 17, at 115.

¹⁰⁹ See Shepherd, *supra* note 47, at 1592; THOMAS, *supra* note 17, at 115. The concern is that material gained from judicial evaluations could be used for punitive purposes, particularly in jurisdictions where judges are subject to re-election. See Shepherd, *supra* note 47, at 1592. However, judicial evaluations can be used for more benign purposes. See Eaglin & Ward, *supra* note 53, at 78-88 (discussing judicial research centers).

¹¹⁰ See BAZAN & ROSENBERG, *supra* note 105, at 1-6.

¹¹¹ See Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 652-54 (2009).

¹¹² See ARMYTAGE, *supra* note 12, at 67-83 (discussing pros and cons of needs assessments as well as various methodologies); see also *Good Judicial Training Practices*, EUROPEAN JUDICIAL TRAINING NETWORK, <http://www.ejtn.eu/Resources/Good-judicial-training-practices/> (last visited Aug. 7, 2015) (containing various types of needs assessments). Still, assessing the needs of the judiciary can be a difficult task. See Shirley A. Dobbin et al., *Surveying Difficult Populations: Lessons Learned From A National Survey of State Trial Court Judges*, 22 JUST. SYS. J. 287, 287-304 (2001); see also Frank M. Coffin & Robert A. Katzmann, *Steps Towards Optimal Judicial Workways: Perspectives From the Federal Bench*, 59 N.Y. UNIV. ANN. SURVEY AM. L. 377, 391-92 (2003). Although it is useful to ask judges what issues they find most important, one cannot rely exclusively on self-assessment to determine educational needs and goals. See Dobbin et al., *supra* note 112, at 288.

tion.¹¹³ One of the more useful of these initiatives involves a recent symposium organized by the University of Missouri's Center for the Study of Dispute Resolution and entitled "Judicial Education and the Art of Judging: From Myth to Methodology." The symposium generated a number of articles relating to judicial education and provided numerous insights into how the current system can be improved. The contributions to this symposium fell into three basic categories and addressed a number of issues raised in this Essay.

First, a number of papers, including "Judging as Judgment: Tying Judicial Education to Adjudication Theory" by Professor Robert Bone and "Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role" by Professor Chad Oldfather, considered the often-overlooked question of what it means to be a judge.¹¹⁴ As noted previously, this issue is critical to questions relating to judicial education, since it is impossible to develop an appropriate curriculum without knowing what it is that judges do.¹¹⁵ Indeed, Professor Bone made a direct connection between these two concepts, stating

[t]he choice of curriculum depends on controversial assumptions about what constitutes good judging. This means that one must first formulate a reasonably coherent conception of good judging before one can design effective judicial education courses. It is not enough merely to teach a menu of different options from which judges can choose. Proper adjudication is not something individual judges decide as a matter of personal preference or conviction. A judge has a duty, by virtue of her role within the existing system of adjudication, to act in a manner consistent with the core principles and practices of that institution. As a result, she has an obligation to formulate a theory of adjudication that fits the institution in a normatively attractive way.¹¹⁶

Professor Oldfather also considered the connection between judicial education and the art of judging. He framed the challenge of educating judges as involving three different elements:

The first is that the law affords a great deal of discretion to judges. Sometimes this is by design, and sometimes it is a product of the inherent underdeterminacy of much law. The second is that in exercising this discretion judges are susceptible to an array of unconscious influences often regarded as illegitimate, and that if unchecked threaten to undermine the rule of law. The third is that the inarticulable nature of judicial decision-making means that good judging necessarily entails drawing on another

¹¹³ For example, the dissolution of the American Judicature Society in 2014 put the future of "Judicature," one of the preeminent publications in the area of judicial studies, at risk. However, Duke Law School has agreed to take over publication of the journal through Duke's Center for Judicial Studies. See *Duke Law Center for Judicial Studies to Assume Publication of Judicature*, DUKE L. NEWS (Nov. 20, 2014), <http://law.duke.edu/news/duke-law-center-judicial-studies-assume-publication-judicature/>.

¹¹⁴ See Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RESOL. 129 [hereinafter Bone, *Judging*]; Chad M. Oldfather, *Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role*, 2015 J. DISP. RESOL. 155 [hereinafter Oldfather, *Judicial Role*].

¹¹⁵ See *supra* notes 37-46 and accompanying text.

¹¹⁶ Bone, *Judging*, *supra* note 114, at 152.

sort of unconscious influence—in this case, one that we want to celebrate and cultivate. The challenge thus stems from the need to give play to some unconscious influences but not others, and it is complicated by the fact that the line between legitimate and illegitimate influences is both blurry and contestable.¹¹⁷

A second set of articles from the symposium focused on the goals and purposes of judicial education. Contributions in this category included “What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education” by the Honorable Duane Benton, “Judicial Bias: The Ongoing Challenge” by Professor Kathleen Mahoney, “International Arbitration, Judicial Education and Legal Elites” by Professor Catherine Rogers, “Toward a New Paradigm of Judicial Education” by the Honorable Mary Russell and “Writing Reasoned Decisions and Opinions: A Guide For Novice, Experienced and Foreign Judges” by Professor S.I. Strong.¹¹⁸ Although a few scholars have previously touched on questions relating to the judicial curriculum,¹¹⁹ the contributions from the symposium took a significant step forward in identifying topics of particular concern to judges.¹²⁰

The articles come at curricular issues from a wide range of perspectives. For example, two authors considered judicial education from an international and comparative standpoint. This approach is particularly intriguing because the United States is often considered an “exporter” of judicial education programming and innovations.¹²¹ However, there is much that can be learned from other jurisdictions, particularly the National Judicial Institute (NJI) of Canada¹²² and the European Judicial Training Network (EJTN),¹²³ which both provide excellent examples of how to develop a sophisticated curriculum for judges that includes both substance and skills.

The Canadian perspective was reflected in the article written by Professor Mahoney, who provided a number of insights into how Canada is handling matters relating to implicit bias concerning race, gender and class.¹²⁴ Professor Rog-

¹¹⁷ Oldfather, *Judicial Role*, *supra* note 114, at 156-57.

¹¹⁸ See Duane Benton & Jennifer A.L. Sheldon-Sherman, *What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education*, 2015 J. DISP. RESOL. 23; Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP. RESOL. 43; Catherine A. Rogers, *International Arbitration, Judicial Education and Legal Elites*, 2015 J. DISP. RESOL. 71; Mary R. Russell, *Toward a New Paradigm of Judicial Education*, 2015 J. DISP. RESOL. 79; Strong, *Writing*, *supra* note 9, at 93.

¹¹⁹ Existing scholarship is relatively sparse. See Rosemary Cairns Way & Daphne Gilbert, *Resisting the Hidden Curriculum: Teaching for Social Justice*, 2 CANADIAN LEGAL EDUC. ANN. REV. 1 (2008); Rosemary Cairns Way, *Reconceptualizing Professional Responsibility: Incorporating Equality*, 25 DALHOUSIE L.J. 27 (2002); Fisher, *supra* note 8, at 189-201 (discussing the concept, content and rationale of introductory judicial education); J. Clifford Wallace, *The Globalization of Judicial Education*, 28 YALE J. INT'L L. 355, 358-59 (2003) [hereinafter Wallace, *Globalization*].

¹²⁰ See *supra* notes 37-46 and accompanying text.

¹²¹ See *Rule of Law Initiative (ROLI)*, ABA, http://www.americanbar.org/advocacy/rule_of_law.html (last visited Aug. 7, 2015); USAID: JUDICIAL REFORM & GOV. ACCOUNTABILITY PROJECT, http://www.jrga.org/index.php?option=com_k2&view=item&layout=item&id=65&Itemid=28&lang=en (last visited Aug. 7, 2015); Strong, *Writing*, *supra* note 9, at 96; Wallace, *Globalization*, *supra* note 119, at 364.

¹²² See NAT'L JUDICIAL INST., <https://www.nji-inm.ca/index.cfm/judicial-education/the-nji-s-judicial-education-portfolio/> (last visited Aug. 7, 2015) (including a course calendar that discusses the “craft of judging,” including judge craft, court craft and professional craft).

¹²³ See *European Judicial Training Network Methodologies*, EJTN, <http://www.ejtn.eu/Methodologies--Resources/> (last visited Aug. 7, 2015).

¹²⁴ See *id.*

ers took more of an international approach and considered whether and to what extent judicial education about a particular international dispute resolution procedure (i.e., international arbitration) can improve judicial practices involving domestic disputes. Among other things, Professor Rogers noted that

[i]t is often assumed that the only form of judicial education needed for international arbitration is training on how to keep judicial “hands off” arbitration proceedings and outcomes. International arbitration reforms, however, integrate judges into various aspects of reforms, which in turn provide potential inspiration for improvements in local judiciaries.¹²⁵

The discussion about curriculum development then shifted from international to institutional concerns. Thus, Chief Justice Russell wrote about how state court judges can obtain innovative educational programming through creative statewide initiatives¹²⁶ while Judge Benton offered two different proposals—one relating to judicial evaluations and one relating to educational vouchers—intended to improve the current educational model.¹²⁷

The analysis also included an article involving judicial education at the individual level. As that submission recognized, many judges have extraordinarily busy dockets and “find it hard to make the time to attend in-person seminars, particularly given expanding workloads and decreasing budgets. For those people, a published guide . . . may be the best way to trigger new ways of thinking” about particular issues.¹²⁸ That article focused primarily on issues relating to judicial writing, since that subject is particularly amenable to written, as opposed to in-person, guidance.¹²⁹

The third and final topic covered by the symposium involved not content but methodology. Papers falling under this heading included “Educating Judges: Where To From Here?” by Dr. Livingston Armytage and “Judicial Education: Pedagogy for a Change” by Professor Brettel Dawson.¹³⁰ These contributions discussed best practices in judicial education, as informed by research into adult learning practices and the distinctive attributes of judges as learners.¹³¹ Educators who incorporate these proposals into their training programs can help increase judicial confidence in judicial education by moving past the “talking head” model of professional programming and creating the sort of practical coursework that judges want and need.¹³²

¹²⁵ Rogers, *supra* note 118, at 72.

¹²⁶ See Russell, *supra* note 118, at 86.

¹²⁷ See Benton, *supra* note 118, at 36.

¹²⁸ Strong, *Writing*, *supra* note 9, at 128.

¹²⁹ See *id.*

¹³⁰ See Livingston Armytage, *Educating Judges: Where To From Here?* 2015 J. DISP. RESOL. 167; T. Brettel Dawson, *Judicial Education: Pedagogy for a Change*, 2015 J. DISP. RESOL. 175.

¹³¹ See MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* 45-49 (1980) (distinguishing andragogy, the teaching of adults, from pedagogy, the teaching of children); Joni Larson, *The Intersection of Andragogy and Distance Education: Handing Over the Reins of Learning to Better Prepare Students for the Practice of Law*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 117, 123-24 (2007). These principles have been successfully applied in the context of judicial education. See ARMYTAGE, *supra* note 12, at 106-11, 127-30.

¹³² See Wallace, *Asia*, *supra* note 17, at 856.

V. CONCLUSION

As the preceding sections suggest, the field of judicial education is filled with controversies and challenges. Indeed, reports suggest that the judiciary is currently in a state of “crisis” because “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.”¹³³ This may be in part because the field of judicial education appears to have stagnated since the reforms of the 1960s and 1970s. While this phenomenon could be caused by a number of factors, regulatory capture of judicial education by the judiciary would appear to be at least one possibility.

Experts agree that a well-functioning judiciary is critical to the creation of an effective system of justice.¹³⁴ Given the problems currently facing U.S. courts, it appears to be time to rethink strategies and methodologies that were put in place over forty years ago, during the first judicial education reform movement.¹³⁵ Such efforts would not only help individual judges perform their duties better, but would go a long way toward improving public perception of and confidence in U.S. state and federal courts.

¹³³ Fisher, *supra* note 8, at 164.

¹³⁴ See Lippman, *supra* note 19, at 1.

¹³⁵ See *supra* note 12 and accompanying text.