

2015

Judging as Judgment: Tying Judicial Education to Adjudication Theory

Robert G. Bone

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Judges Commons](#)

Recommended Citation

Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. Disp. Resol. (2015)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2015/iss1/8>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Judging as Judgment: Tying Judicial Education to Adjudication Theory

ROBERT G. BONE*

INTRODUCTION

The thesis of this Article, simply stated, is that judicial education makes sense only against the backdrop of general ideas and beliefs about law, courts, and adjudication. These ideas and beliefs motivate a focus on educating judges and help guide more specific pedagogical choices. I explore this broad thesis from both a historical and a normative perspective.¹ Historically, I argue that interest in judicial education caught fire in the 1960s in large part because of prevailing beliefs about law and the proper function of courts. Normatively, I argue that the connection between judicial education and normative views of courts and adjudication continues to be important today, although in a different way. Judicial education has a vital role to play in engaging and testing different views of civil adjudication and its proper function. In particular, in-person, face-to-face instruction is valuable as a way for judges to reflect critically on principles that underlie American adjudication and to work out a shared conception of the institution that fits the core elements of litigation practice.

Prior to the 1950s, judges received little in the way of formal training. They might have attended the occasional judicial conference or perhaps a seminar on a specific topic of interest, but mainly they were expected to learn on their own.² It was not until the 1960s that enthusiasm for formal education caught hold.³ Today, there are many different programs for state and federal judges, both at the trial and the appellate level. While many of these offerings focus on specific areas of substantive and procedural law, some cover more general aspects of the judicial process, such as case management, judicial decision-making, and opinion writing.⁴

The original choice to make formal education regularly available to judges is highly significant. Those who pushed for it in the late 1950s and 1960s were strongly influenced by prevailing beliefs about courts, adjudication, and effective judging. Today, the selection of topics for instruction also reflects beliefs about judging and adjudication. For example, courses in pre-trial management and settlement rest on an assumption, itself contested, that judges should be involved in

* G. Rollie White Professor of Law, University of Texas School of Law. I wish to thank the participants in the Judicial Education Symposium at the University of Missouri School of Law for helpful comments. I am also grateful to Ashley Crosswell and Sara Martin for their valuable research assistance.

1. I approach this topic with some trepidation. My work in civil procedure includes forays into adjudication theory, but judicial education itself is a new area for me. Also, as a law professor, I do not face the same practical constraints and pressures judges and practicing lawyers do. My hope is that a relatively detached perspective has something valuable to offer.

2. See Delmar Karlen, *Judicial Education*, 52 A.B.A. J. 1049, 1049 (1966).

3. See *infra* Part I.A.

4. See *infra* Part II.

managing cases and facilitating settlements, and this assumption in turn presumes certain beliefs about the nature and function of civil adjudication.⁵

Indeed, I shall argue that judicial education makes its most valuable contribution when it provides an opportunity for judges to reflect critically on their own beliefs. Hence the title of this article: Judging involves judgment, and judgment must be guided and constrained by the institutional context in which it is exercised. This means that to exercise judgment responsibly, a judge must first work out a general conception of the institution of civil adjudication in which she acts. Judicial education has an important role to play in this process. An in-person, face-to-face instructional format is, I believe, a particularly effective way for judges to engage one another in formulating and debating general principles that fit and justify core features of litigation practice and civil adjudication. The overall aim should be to work out, to the extent feasible, a shared understanding of the institution that can guide the adjudication of cases and the design of procedural rules.

The body of this Article is divided into three parts. Part I describes the rise of judicial education in the 1960s and explains why it caught on then and not earlier. Part II briefly surveys the general types of judicial education programs and courses being offered today. Part III builds on the discussion in Parts I and II to argue that in-person, face-to-face judicial education has an important role to play in bringing judges together to engage in a group process of critical reflection.

I. A HISTORY OF JUDICIAL EDUCATION IN THE U.S.

Although there were a few scattered courses for judges before the mid-1950s, no systematic programs existed. Traffic and juvenile court judges received some limited instruction, and the United States Judicial Conference Committee on Pre-Trial Procedure offered federal district judges training in the use of pre-trial procedure.⁶ But for the most part, formal courses for judges simply did not exist. In fact, few jurists took the idea of judicial education at all seriously. As a notable figure in the later judicial education movement remarked in 1966, “[a]s recently as fifteen years ago, the thought of judges going back to school would have seemed ludicrous to most members of the legal profession.”⁷

This situation changed markedly—and rapidly—in the late 1950s and 1960s. The following discussion first describes what happened and then offers an explanation for why it happened when it did.

5. So too, programs that feature economic analysis assume judges should apply economics when deciding cases. *See, e.g.*, RICHARD A. POSNER, REFLECTIONS ON JUDGING 105-30 (2013) [hereinafter R. POSNER, REFLECTIONS] (recommending courses for judges in economics and statistics).

6. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 944-45 & n. 63 (2000).

7. Karlen, *supra* note 2, at 1049; *see also* Francis C. Cady & Glenn E. Coe, *Education of Judicial Personnel: Coals to Newcastle*, 7 CONN. L. REV. 423, 424 (1975) (“Prior to 1956, it would have been considered an affront to the judiciary to suggest that judges should continue their education after their elevation to the bench. It had simply been assumed that, by donning a judicial robe, a mere mortal was immediately transformed into the image of Jove on Olympus.”); Resnik, *supra* note 6, at 944 (quoting an ABA Report to say that before the 1950s “the use of the word ‘education’ in connection with the judiciary brought raised eyebrows”) (quoting ANNUAL MEETING OF THE ABA, REPORT OF THE JOINT COMMITTEE FOR THE EFFECTIVE ADMINISTRATION OF JUSTICE 625 (1963)).

A. The Emergence of Judicial Education

In 1956, the Institute of Judicial Administration at New York University School of Law held a summer seminar for appellate judges, the first in a series that continues to this day.⁸ The success of this pioneering effort helped convince the profession that classes for judges could work well if designed properly. In 1963, reflecting back on seven years of the NYU program, Warren Burger, then a federal judge sitting on the D.C. Court of Appeals, noted the importance of the program and its influence on other judicial education efforts.⁹

However, it was not until 1961 that the judicial education movement caught fire. In that year, the American Bar Association, the American Judicature Society, and eight other organizations committed to court reform joined in a coalition, Project Effective Justice, which, in turn, created the Joint Committee for the Effective Administration of Justice (“Joint Committee”) with United States Supreme Court Justice Tom C. Clark as its chair.¹⁰ Many lawyers and judges at the time celebrated the formation of Project Effective Justice and its Joint Committee as a major step in the campaign for court reform. Indeed, in announcing the Joint Committee, the *Journal of the American Judicature Society* predicted it would “develop into the greatest concerted drive for the improvement of justice in the history of the nation.”¹¹

What is striking for our purposes is that the Joint Committee, from its inception, focused on judicial education as a way to effect court reform.¹² Between 1961 and 1963, the Committee organized some fifty seminars for state trial judges throughout the country.¹³ These seminars were so popular that they “reached virtually every judge sitting in a state court of general jurisdiction.”¹⁴

The success of these initial efforts laid the groundwork for an expanded program. When the Joint Committee’s funding ran out in 1964, Clark, along with others in Project Effective Justice, located a new funding source and established the National College of State Trial Judges (“National College”) to take over the Joint Committee’s educational work. The National College held its first summer

8. Karlen, *supra* note 2, at 1050 (reporting that the first seminar attracted twenty judges from state supreme courts and federal appellate courts). Dean Arthur Vanderbilt founded the Institute for Judicial Administration at NYU in 1952 with the aim of coordinating work and publishing studies on judicial administration. Dean Vanderbilt went on to become Chief Justice of the New Jersey Supreme Court. See Resnik, *supra* note 6, at 944 n.65. The NYU seminar is still offered today. See, e.g., New Appellate Judges Seminar, NYU LAW, <http://www.law.nyu.edu/centers/judicial/2014AJS> (last visited May 30, 2015).

9. Warren E. Burger, *School for Judges*, 33 F.R.D. 139 (1963).

10. *Society Joins in New Nation-Wide Campaign for Effective Administration of Justice*, 45 J. AM. JUD. SOC. 46 (1961) [hereinafter *Nation-Wide Campaign*].

11. *Id.* at 46 (noting that the “project was conceived as a device for mobilizing all of the resources of the country in the field of judicial reform”).

12. See Karlen, *supra* note 2, at 1051; Maurice Rosenberg, *Judging Goes to College*, 52 A.B.A. J. 342, 342 (1966).

13. See Rosenberg, *supra* note 12, at 343 (describing the Joint Committee’s efforts); Tom C. Clark, *Message from the Chairman: An Idea Becomes a National Program*, 46 J. AM. JUD. SOC. 8, 8-9 (1962) (reporting that the Joint Committee has furnished eight seminars involving “some 750 judges in 17 states, one territory and one exclusively metropolitan area” and plans more programs which “before Christmas 1962 . . . will have reached an additional 16 states and one metropolitan area.”).

14. INSTITUTE OF JUDICIAL ADMINISTRATION, *JUDICIAL EDUCATION IN THE UNITED STATES: A SURVEY 90* (1965) [hereinafter *JUDICIAL EDUCATION SURVEY*].

session in July 1964, at the University of Colorado School of Law.¹⁵ This initial session was an intense four-week course of instruction with classes conducted “on the problem-discussion method” and covering topics related to trial procedure and court administration.¹⁶ The National College offered similar courses in subsequent years and under a slightly different name (“The National Judicial College”) continues to do so today.¹⁷

The National College provided courses for state trial judges, and the NYU seminars catered to state and federal appellate judges. But there was little in the way of systematic instruction for federal district judges at the time. The United States Judicial Conference and its committees organized a few seminars on assorted topics, such as pre-trial procedure in protracted cases, federal probation and sentencing, and bankruptcy.¹⁸ In most respects, however, the educational offerings were very limited.¹⁹

This situation changed dramatically with the creation of the Federal Judicial Center (FJC) in 1967. The FJC was established as an independent agency committed to research, education, and the administration of justice in the federal judiciary.²⁰ During its first several years of operation, the FJC concentrated on providing seminars for newly appointed district judges and other district court personnel.²¹ In 1973, it added seminars for experienced district court judges and

15. Karlen, *supra* note 2, at 1051; Rosenberg, *supra* note 12, at 342. The National College of State Trial Judges began at the University of Colorado and then transferred to the University of Nevada in Reno after receiving long term funding from the Fleischman Foundation of Nevada. Rosenberg, *supra* note 12, at 342-43. It later became the National Judicial College, which is still connected with the University of Nevada in Reno and continues to stage a variety of courses and educational programs for state judges. See THE NAT'L JUDICIAL COLL., www.judges.org (last accessed May 30, 2015).

16. Rosenberg, *supra* note 12, at 343-44; *The National College of State Trial Judges*, 48 J. AM. JUD. SOC. 95 (1964) [hereinafter *National College*] (reporting on the first session held in July 1964 and noting “[t]he courses were presented through a series of problems with discussion of specific solutions”). Professor Maurice Rosenberg, a Columbia Law School professor who taught in the summer sessions, reported in 1966 that the July sessions for the first two years (1964 and 1965) were attended by about 100 judges selected from about 300 applicants and that the typical student “had been named to his court less than two years earlier” for the 1964 session and less than a year earlier for the 1965 session. Rosenberg, *supra* note 12, at 343-44; see also *National College*, *supra*, at 96. The topics included evidence, civil pre-trial conference, criminal procedure, domestic relations jurisdiction, sentencing and probation, judicial process and judicial ethics, judge-jury relations, jury instructions, judicial discretion, court organization and management, and relations among the courts, the bar, and the public. *National College*, *supra*, at 95-96.

17. *A Report on the National College*, 6 TRIAL JUDGES' J. 1, 1 (1967) (“By the end of the summer sessions in 1969, more than 1400 judges or over one-third of the total number [of general jurisdiction trial judges] will have attended one of the four-week sessions of the College.”).

18. See JUDICIAL EDUCATION SURVEY, *supra* note 14, at 64-70 (describing educational efforts at annual circuit meetings); Karlen, *supra* note 2, at 1050 (the Judicial Conference organized programs for federal trial judges focused on trials of protracted cases); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 36 (Summer 1988) (as of 1966, the Judicial Conference and its committees were “sponsoring fourteen programs of continuing education”).

19. See William M. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1132 (1995).

20. 28 U.S.C. §§ 620-629 (2014); Schwarzer, *supra* note 19, at 1132-34. The original enabling statute provided that the FJC would function “to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government, including, but not limited to, judges, referees, clerks of court, probation officers, and United States commissioners.” 28 U.S.C. § 620(b)(3).

21. See, e.g., SECOND ANNUAL REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE OF THE UNITED STATES: JULY 1, 1968-MARCH 1, 1969, at 4-5 [hereinafter SECOND

federal appellate judges.²² These programs expanded in subsequent years, and today the FJC oversees an extensive set of educational offerings for federal judges at all levels.²³

The success of the Joint Committee, National College, and Federal Judicial Center, along with NYU's Institute of Judicial Administration, ignited a much wider enthusiasm for judicial education. The National Academy of Judicial Education was formed in 1969 to provide training and education for judges sitting on state courts of limited jurisdiction, and the National Center for State Courts was established in 1971 to provide services to state courts similar to those the FJC offered federal courts.²⁴ In addition, individual states established their own programs. For example, a new center in California held an orientation program in 1976, and Michigan started offering judicial education in 1977.²⁵ By 1986, all fifty states were involved in providing some form of education for judges.²⁶

The rapidity with which judicial education took hold in the 1960s is quite remarkable. In roughly a decade, the state of judicial education in the United States was transformed from a few sporadic offerings and a regular summer seminar at NYU into a vibrant and expanding field with a multitude of institutionalized programs. The following section offers an explanation for why these developments occurred when they did, an explanation that features prevailing ideas and beliefs about law and adjudication.

B. Why the 1960s?

Many factors converged to make the 1960s a propitious time for mobilizing interest in judicial education. First, concerns about court congestion and delay highlighted problems with judicial administration, which in turn sparked interest in education as a way to encourage reform. Second, Associate Justice Tom Clark

ANNUAL REPORT] (reporting that in 1968, its first year of operation, the FJC assisted the Judicial Conference's Committee on Trial Practice and Techniques with three seminars for newly appointed federal district judges); ANNUAL REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE OF THE UNITED STATES: 1971, at 25-26 (reporting that the FJC held two multi-day seminars for newly appointed district court judges as well as a number of seminars for district court clerks, magistrate judges, and other personnel) available at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage?openform&url=/library/fjc_catalog.nsf/bycollectionfrm?openform&category=Federal+Judicial+Center+Annual+Reports.

22. See ANNUAL REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE OF THE UNITED STATES: 1973, at 21, available at [http://www.fjc.gov/public/pdf.nsf/lookup/annrep73.pdf/\\$file/annrep73.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/annrep73.pdf/$file/annrep73.pdf).

23. See ANNUAL REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE OF THE UNITED STATES: 2013, at 5, available at [http://www.fjc.gov/public/pdf.nsf/lookup/annrep13.pdf/\\$file/annrep13.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/annrep13.pdf/$file/annrep13.pdf).

24. See Cady & Coe, *supra* note 7, at 441-52 (describing the various national organizations involved in judicial education).

25. LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING 13 (1996). Two authors reported in 1975 that "[t]he great majority of states are conducting some form of continuing judicial education," although they also noted that "there are few state orientation programs for new judges." Cady & Coe, *supra* note 7, at 431, 438.

26. L. ARMYTAGE, *supra* note 25, at 13. In 1977, "all but five states provide[d] training programs for their judiciary," and "mandatory requirements exist[ed] in 23 states." Larry Berkson & Lenore Haggard, *The Education and Training of Judges in the United States*, in MANAGING THE STATE COURTS 142, 147 (1977). As judicial education became more prevalent on the state level, those involved eventually formed their own national association, the State Judicial Educators Association. Cady & Coe, *supra* note 7, at 452.

became involved in the judicial education movement during the 1960s and his energy and leadership built enthusiasm and mobilized broad-based support. Third, and most important for this Article, the intellectual climate of the 1950s and 1960s provided a favorable mix of ideas and beliefs that made sense of judicial education as a way to achieve effective court reform.

1. Congestion and Delay

Concerns about case backlog and court congestion intensified during the 1960s.²⁷ One report cited a 55% increase in the number of civil cases filed in federal district courts between 1960 and 1969, and a 19% increase in the number of criminal cases.²⁸ State courts, too, suffered from congestion and delay, especially in metropolitan areas. Commentators at the time identified several causes: increasing population, a sharp rise in automobile accident litigation,²⁹ new and expanded statutory and common law causes of action, more intensive regulation, a growing docket of civil rights cases (it was the 1960s after all), and a major increase in *habeas corpus* petitions and draft- and immigration-related criminal cases.³⁰ In fact, the situation was so serious that some proclaimed a “crisis in the courts.”³¹

Congress responded to this crisis on the federal level by adding more district court judgeships: 63 new judges were added in 1961, 35 in 1966, and 61 in 1970.³² But adding new judgeships also created new sources of delay and cost.³³ Local districts, for example, had to accommodate the influx of additional judges and adjust to a larger court.³⁴ Moreover, with reduced congestion and delay, cases

27. See, e.g., Earl Warren, *Administrative Problems of the Federal Judiciary*, 23 BUS. LAW. 7, 8-10 (1967) (describing problems in state and federal courts). For a discussion of these problems at the federal court level, see Beverly Blair Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L. REV. 253, 258-59 (1971); Tom C. Clark, *Judicial Reform: A Symposium – Introduction*, 23 FLA. L. REV. 217 (1971). For a discussion of the problems at the state court level, see Alfred T. Sulmonetti, *Let's Put Our Judicial House in Order*, 6 TRIAL JUDGES' J. 1, 24 (1967) (“legal periodicals reveal numerous articles on the subject ‘Crisis in the Courts’”); Joseph R. Weisberger, *Court Administration: A Challenging Dilemma*, 6 TRIAL JUDGES' J. 26 (1967) (officials and citizens “deplore the ever-increasing backlog and congestion in the litigation process” of state trial courts).

28. Cook, *supra* note 27, at 258.

29. Charles S. Desmond, *The Courts, The Public, and The Law Explosion: A Critique*, 54 GEO. L.J. 777, 791 (1966) (“everyone knows that the delay problem in the [state] civil trial courts is related almost entirely to highway accident cases”).

30. See, e.g., SECOND ANNUAL REPORT, *supra* note 21, at 16 (about a third of the federal district court docket involves Section 2254 *habeas* applications by prisoners); Cook *supra* note 27, at 258-59 (listing some of the causes for federal courts); Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 567 (1967) (noting the seriousness of the congestion and delay problem for federal and state courts); Weisberger, *supra* note 27, at 26 (noting the huge burden imposed on state trial courts by automobile cases caused by “the burgeoning of motor vehicle traffic, coupled with higher speeds and complicated traffic patterns”). Additionally, federal courts had to deal with more complex and burdensome forms of litigation made possible by the liberal joinder provisions of the Federal Rules of Civil Procedure. See Resnik, *supra* note 6, at 944-45.

31. See Sulmonetti, *supra* note 27, at 24.

32. Cook, *supra* note 27, at 260.

33. *Id.* at 259 (“creating new judgeships in an effort to relieve the courts of external pressure temporarily adds to their burden”).

34. *Id.* at 263 (remarking on the need for coordination, and noting there were only 29 single-judge districts in 1949, and only four after 1970).

at the margin became more valuable and thus worth filing, which increased the volume of litigation and diluted some of the congestion-reducing benefits of a larger judiciary.³⁵ As a result, many commentators at the time felt that adding judges could not, by itself, solve congestion and delay problems.³⁶ In their view, it was also necessary to reform the courts by enhancing the efficiency of judicial administration.³⁷ Proposed reforms included such things as improved information management systems, better budgeting, a more professional administrative staff, and better case management techniques, opinion drafting, and so on.³⁸

Education played an important role in this reform strategy. It was through judicial education that sitting judges could be persuaded to use, and new judges trained in the use of, more efficient administrative and management methods.³⁹ In sum, widespread perception of serious congestion and delay problems sparked interest in judicial administration, which in turn highlighted the value of judicial education.

However, this cannot be the entire explanation for the rise of judicial education. Complaints about serious congestion and delay were hardly new to the 1960s. Jurists raised these concerns in the first few decades of the twentieth century, and all the way back into the nineteenth century as well. Roscoe Pound, for example, cited serious court congestion and delay in his famous 1906 address to the American Bar Association,⁴⁰ which helped to catalyze the procedural reform movement of the 1920s and 1930s.⁴¹ Yet in none of these earlier periods was judicial education considered an important part of the solution.

More generally, congestion and delay are inevitable features of any court system: unresolved cases always wait in the wings, adjudication always takes time, and litigation always generates costs. These features become problems only relative to some normative baseline of what a properly functioning court system

35. *Id.* at 259.

36. *See, e.g.,* Clark, *supra* note 27, at 221 (“While some jurisdictions do need more judges, experience teaches that the omnibus creation of new judgeships has not been the answer.”); Maurice Rosenberg, *Frank Talk on Improving the Administration of Justice*, 47 TEX. L. REV. 1029, 1033-34 (1969).

37. Judicial administration included such things as the “structure, organization, and personnel of the courts, and . . . their operations in terms of administration and management,” as well as “reform in procedural law.” Robert C. Finley, *Judicial Administration: What is This Thing called Legal Reform?*, 65 COLUM. L. REV. 569, 571 (1965).

38. *See, e.g.,* ERNEST C. FRIESEN, JR., EDWARD C. GALLAS & NESTA M. GALLAS, *MANAGING THE COURTS* (1971); Clark, *supra* note 27, at 221 (“What is needed is a more efficient judge and staff operation plus a modernization of facilities and equipment.”).

39. *See* Finley, *supra* note 37, at 572-73, 575 (arguing that judicial education is an important part of court reform, for it teaches judges current ideas about legal reform and provides opportunities for them to “seek solutions to common problems by sharing common experiences and wider dissemination of ideas”).

40. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). Indeed, some reformers in the 1960s and 1970s pointed to Pound’s speech as an early call for modernized judicial administration, a call that went largely unheeded. *See, e.g.,* E. C. FRIESEN ET AL., *supra* note 38, at 4-5 (“The focus of attention for most of the six decades since Pound’s speech has not been on court mismanagement.”).

41. *See, e.g.,* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78-79 (1989) [hereinafter Bone, *Mapping*]. Notably, the automobile played an important role in the 1920s and 1930s, just as it did in the 1960s. The invention of the automobile created new risks that produced a flood of tort cases burdening state courts. *See* Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, at 393, 402-06 (1992).

should be doing. It is the baseline that makes the queue seem too long, litigation too protracted, and cases too costly.⁴² Thus, the important question has to do with defining this baseline, and the answer necessarily depends on a theory of adjudication. In other words, congestion and delay become serious problems only because critics have some reason to believe that courts can and should do better, and those beliefs depend on a conception of what courts *should* be doing, that is, on a theory of adjudication, expressly or implicitly held.

2. Leadership: The Role of Justice Tom Clark

Another factor contributing to the rise of judicial education in the 1960s involved the leadership of Justice Tom Clark.⁴³ Clark, an Associate Justice of the United States Supreme Court from 1949 to 1967, threw himself into the project of court reform and judicial education with extraordinary zeal.⁴⁴ As chair of the ABA Section of Judicial Administration in 1958, he played a critical role in establishing the National Conference of State Trial Judges, which later helped to create state judicial education programs.⁴⁵ Most importantly, he chaired the Joint Committee for Effective Administration of Justice during the crucial period (1961-1964) that catalyzed the judicial education movement.⁴⁶ He was also a leading figure in establishing the National College of Trial Judges and chaired its Board of Directors.⁴⁷ And he served as the first director of the Federal Judicial Center.⁴⁸

Clark's combination of energy, enthusiasm, and commitment, together with his reputation as a Supreme Court Justice, no doubt helped secure the critical funding and cooperation essential for building momentum in favor of judicial education.⁴⁹ Still, Clark's leadership cannot alone account for the rise of judicial education in the 1960s. Clark succeeded because others also believed in its importance. He doubtless inspired many to become involved, but it is hard to imagine he would have invested the time and effort he did if he were not confident that his efforts would be rewarded. The question remains: What was it about the 1960s that supported this level of confidence and commitment?

42. See Bone, *Mapping*, *supra* note 41, at 4-5.

43. See John P. Frank, *Justice Tom Clark and Judicial Administration*, 46 TEX. L. REV. 5, 7 (1967) (referring to Clark as the "No. 1 executive in adult education in the United States"); Frank R. Kenison, *The Continuing Contribution of Robert A. Leflar to the Judicial Education of Appellate Judges*, 25 ARK. L. REV. 95, 98 (1971) (noting that Tom Clark's "monumental contribution to judicial education at all levels cannot go unmentioned").

44. He had a lengthy record of involvement in matters of judicial administration. See Frank, *supra* note 43, at 8.

45. *Id.* at 14-15, 22-23.

46. *Id.* at 17-20. See *supra* notes 10-14 and accompanying text. Justice Tom Clark was also responsible for organizing Projective Effective Justice in 1961, the umbrella group coordinating the different organizations working on judicial administration.

47. Frank, *supra* note 43, at 7, 23-26 (referring to this accomplishment as "one of the most important tasks Clark had ever undertaken"); Kenison, *supra* note 43, at 98.

48. See Rosenberg, *supra* note 36, at 1032 ("Federal judges and their supporting personnel will soon have an opportunity to take part in a training program designed by the new Federal Judicial Center under the directorship of Justice Tom C. Clark, the guiding light of the State Trial Judges College.").

49. See Frank, *supra* note 43, at 35-46.

3. *The Intellectual Climate*

I believe that a large part of the reason why the 1960s was such a propitious time for judicial education has to do with prevailing ideas about law, courts, and adjudication. Two aspects are particularly salient: the popularity of process jurisprudence, and the rise of management science after World War Two. Process jurisprudence focused attention on institutional design, and the teachings of management science instilled confidence that judicial institutions could be made more efficient. These beliefs together pushed judicial administration to the forefront and focused attention on education as the way to mobilize broad-based support for reform.

The following discussion describes how process jurisprudence and management science combined to shape the reform agenda of the 1960s. Before proceeding, a word of caution is in order. Reformers rarely discussed their normative views with care and this makes it difficult to support strong causal claims. As a result, my argument is based mostly on correlation. I claim that process jurisprudence was a key element of legal thought during the relevant period, that the ideas behind management science and operations research were in the air and likely known to many jurists, and that the mix of the two nicely fits the reform agenda and the enthusiasm for judicial education at the time.

a. Process Jurisprudence

Process jurisprudence had a major impact on the law during the 1950s and 1960s.⁵⁰ It emerged partly in response to the legal realist movement of the 1920s and 1930s and partly as a reaction to World War Two.⁵¹ Its major figures included Henry Hart, Albert Sacks, and the legal philosopher Lon Fuller.⁵² Hart and Sacks wrote the canonical text, *The Legal Process: Problems in the Making and Application of Law*, which was taught to several generations of law students from the mid-1950s through much of the 1960s.⁵³

This is not the place to delve into the details of process jurisprudence. Briefly, it is known for its focus on procedure and institutional design and its commit-

50. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lii, cii-civ (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter Eskridge & Frickey, *Introduction*]. Some refer to process jurisprudence as “legal process” or the “legal process school.” *Id.* at lii.

51. For accounts of process jurisprudence and its relationship to legal realism and the World War Two experience with totalitarianism, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 253-58 (1992); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282-85 (1973) (tracing reactions to totalitarianism back to the late 1930s).

52. See M. J. HORWITZ, *supra* note 51, at 254; Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U.L. REV. 1273, 1276 (1995).

53. M. J. HORWITZ, *supra* note 51, at 254. The Legal Process materials, although not formally published at the time, were widely circulated. They were finally published in 1994. See Eskridge & Frickey, *Introduction*, *supra* note 50, at vii-ix.

ment to reasoned elaboration in the law.⁵⁴ It is the focus on institutional design that fits the preoccupation with judicial administration and court reform during the 1960s. In particular, process jurists were deeply concerned about institutional competence and focused on assigning substantive decisions to the institutions best suited to handle them.⁵⁵ As for civil adjudication, Lon Fuller argued that adjudication evolved gradually to resolve disputes involving claims of right and as a result had developed structural features, such as adversarialism and a commitment to principled decision making and reasoned argument, which suited it well to perform its rights-deciding function.⁵⁶

Process jurisprudence differed in significant ways from the legal realism of the 1920s and 1930s. The legal realists were concerned at least as much with substantive law reform as with legal process.⁵⁷ By contrast, process jurists focused mostly on process and institutional design. This shift in emphasis reflects a change in beliefs about law and society.⁵⁸ Process jurists worried more than their realist predecessors about value conflict in a pluralist society and the problems it created for substantive law.⁵⁹ Moreover, they conceived of regulation in a more

54. See White, *supra* note 51. Professors Eskridge and Frickey, the editors of the published Hart and Sacks Legal Process materials, describe distinctive elements of the “legal process vision” in the following way:

The strengths of the legal process vision were its insistence that law is accountable to reason and not just fiat, its claim that institutional architecture and procedure are both critical to law’s operation and can be analyzed systematically, and its consideration of legal doctrine in light of law’s purposes and the polity’s underlying principles. Its main weaknesses were its polarized categorizations (e.g., substance/procedure), its undue optimism about the competence and public-spiritedness of state institutions, and its failure to recognize the ideological and non-neutral nature of its own positions.

Eskridge & Frickey, *Introduction, supra* note 50, at civ; see also *id.* at xcii-xcvi.

55. See M. J. HORWITZ, *supra* note 51, at 254 (noting that for Process jurists, “the task was to harness and channel that legal discretion through institutional arrangements” and that they focused on “institutional competence”); Eskridge & Frickey, *Introduction, supra* note 50, at xciii (noting that Hart and Sacks were concerned with allocating the roles of private and public institutions in the ordering of society “according to their relative ‘competence’ to handle the matter”).

56. See, e.g., Bone, *supra* note 52, at 1301-10 (arguing that Lon Fuller’s theory of natural ordering principles for institutions fits with his theory of adjudication based on reasoned argument in an adversarial setting). By contrast, Fuller believed that complex polycentric problems involving difficult tradeoffs were best left to agencies or to the market. *Id.* at 1314-20.

57. For a sampling of the vast literature on sociological jurisprudence and legal realism, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 68-111 (1977); LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986); M. J. HORWITZ, *supra* note 51, at 169-246; ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); and G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

58. There is always a risk in dividing intellectual history into sharply defined periods. Many of the ideas that informed process jurisprudence had been around for some time before process jurisprudence seized on them. Eskridge & Frickey, *Introduction, supra* note 50, at lxcvii-lxxxv. Still, the Legal Process School of the 1950s placed its own gloss on these ideas and organized them in a distinctive way that had a major impact on lawyers, judges, and academics during the period.

59. See, e.g., Frank R. Kenison, *Some Preliminary Observations on the State Appellate Judge Today*, 61 COLUM. L. REV. 792, 793 (1961) (stressing complexity and value conflict when describing the challenge facing state appellate judges in the twentieth century: “competing factors and conflicting values are more diverse and change becomes more constant”). The legal realists assumed social practice embodied a working balance among conflicting values, and as a result, they relied heavily on custom and convention as a source of law. See generally Bone, *Mapping, supra* note 41, at 97 n.332 (describing the belief in an immanent social order). For example, if sellers in a particular industry followed informal norms that seemed to work well in practice, this in itself was a good reason to in-

complex and dynamic way. Legal realists tended to assume that law regulated society directly by commanding results and sanctioning noncompliance. Process jurists instead believed that law and society interacted dynamically, each influencing the other in a continual process of mutual adjustment. For process jurists, legal rules created feedback effects that altered the practice being regulated, and the altered practice might then require changes in the legal rules regulating it.⁶⁰

Roughly speaking, institutional design in process jurisprudence was the key to managing value conflict and addressing regulatory complexity.⁶¹ The fact that a decision issued from a well-designed institution was thought by itself to vest the decision with legitimacy apart from the substantive values it implemented. Moreover, well-designed institutions were thought capable of managing regulatory complexity and producing good decisions and rules in the long run.⁶² However, effective institutions were not designed from scratch; they evolved gradually in response to social need and, over time, acquired core features that equipped them to do their work well. It followed then that anyone interested in institutional reform had to study existing institutions and respect the way those institutions actually worked in practice. In other words, process jurists were institutional pragmatists: they believed that existing institutions held clues to how those same institutions could be improved.⁶³

Process jurisprudence no longer has the force it once did. Today, people disagree sharply about questions of process design and those disagreements often reflect disputes over substantive values. But during the 1960s, the ideas and beliefs associated with process jurisprudence made sense of focusing on judicial administration and procedure. The commitment to the primacy of process and institutional design helps explain why lawyers and judges were willing to invest so much time and effort in improving the courts.⁶⁴ For process jurists, courts were key institutions in society committed to the application of principled reasoning, and their proper functioning was essential to the efficacy and legitimacy of the decisions and common law rules they produced.

corporate those norms into the law. One of the most notable examples can be found in Karl Llewellyn's drafting of the original Sales Act. See Zipporah Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

60. As a result, a rule seemingly optimal when first adopted can turn out badly later when the practice being regulated changes in response to it. See Bone, *supra* note 52, at 1286-88, 1292-97.

61. *Id.*; see Eskridge & Frickey, *Introduction*, *supra* note 50, at xci-xcii.

62. Eskridge & Frickey, *Introduction*, *supra* note 50, at xciv-xcvi.

63. Lon Fuller derived adjudication's function and its core features—party participation through reasoned argument in an adversarial setting—by considering the way adjudication actually worked in practice. See Bone, *supra* note 52, at 1301-10.

64. It might seem obvious that jurists worried about court congestion and delay would focus on judicial administration. But it was not so obvious at the time. Some critics advocated other approaches and some questioned whether reforming judicial administration could do the job. For example, there was some discussion about transferring automobile accident litigation, the chief cause of state court congestion, to an administrative process, or even adopting no-fault insurance. The Columbia University Project for Effective Justice conducted empirical studies to test the efficacy of some of the proposed reforms, and one author writing in 1965 described the results as revealing that “even modest gains were difficult to achieve in the field of judicial administration.” Finley, *supra* note 37, at 575-76. In fact, Charles Alan Wright, a distinguished proceduralist, expressed grave doubt that reforms to judicial administration could ever succeed on their own to remedy congestion problems without a significant reduction in the volume of case filings. Wright, *supra* note 30, at 568. See also Desmond, *supra* note 29, at 77-78 (noting the persistence of serious delay in the courts despite the “remarkable improvements in court administration”).

Judicial education made sense as a key component of this reform program. Through judicial education classes, judges could be taught the importance of administration and court reform. They could also be inspired to try new ideas and methods and to experiment on their own.⁶⁵ Moreover, the popular problem-and-discussion format was thought to be a good way to learn what worked well in practice, since it encouraged judges to reveal ideas and techniques that they already used to good effect in their own courtrooms.⁶⁶

In theory at least, judicial education might have played a role in earlier reform campaigns, but the goals pursued by those campaigns did not clearly single out judicial education as part of the solution. The legal realists, for example, focused on removing technical barriers that interfered with judges doing what they would otherwise do well. They pushed for substantive reforms that freed judges to decide cases on functional grounds,⁶⁷ and they implemented procedural reforms that empowered judges to exercise discretion unencumbered by common law technicality.⁶⁸ There is no obvious reason why realists committed to these goals should think that judicial education had any particular role to play; their vision assumed that judges would do a fine job as long as they were allowed to judge free of artificial fetters.⁶⁹

65. See Finley, *supra* note 37, at 572-75. The content of many courses offered in the 1960s reflect favorite legal process themes, such as statutory interpretation, the function of concurrences and dissents, the nature of appellate review, the function of precedent and *stare decisis*, the nature of the judicial process, and the relationship between federal and state courts. See, e.g., Burger, *supra* note 9, at 144-46 (noting that the first five years of the NYU Appellate Judges seminar focused on classes addressing opinion writing, the nature and function of the judicial process, and the relationship between state and federal courts); Kenison, *supra* note 43, at 101-02 (listing topics of recurrent interest to judges participating in the NYU seminar); Robert A. Leflar, *The Quality of Judges*, 35 IND. L.J. 289, 302-03 (1960) (listing some of these topics).

66. The problem-and-discussion format was very popular at the time. See, e.g., JUDICIAL EDUCATION SURVEY, *supra* note 14, at 49-51 (describing the NYU Appellate Judges seminar); Karlen, *supra* note 2, at 1050-51 (noting that in the NYU program, “everyone sits around one large table and discussion is free and uninhibited,” and describing the programs put on by the Joint Committee for the Effective Administration of Justice as discussion-based); Rosenberg, *supra* note 12, at 344-45 (describing the problem-and-discussion format used by the National College of State Trial Judges). Moreover, the problem-and-discussion approach was explicitly justified as a way to encourage sharing of ideas. See, e.g., DELMAR KARLEN, JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE 48 (1970) (through judicial education “experienced judges are given an opportunity . . . to share ideas and insights”); THIRD ANNUAL REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (1970) [hereinafter THIRD ANNUAL REPORT] (noting the usefulness of the “continuing seminar program” as a device to “uncover the techniques and procedures which are presently available and in use by some courts and by some judges” in order to “measure and evaluate them, and recommend them for adoption by other courts and judges”); Burger, *supra* note 9, at 147 (stressing the interchange of ideas); Kenison, *supra* note 43, at 98-99 (Karl Llewellyn “spotted a deficiency in judicial education prior to 1960” and complained about the failure of appellate judges “to get together into any pooling of their craft wisdom”); Rosenberg, *supra* note 12, at 343 (the active “stimulation of insights and perspectives” is one of the main objectives of the judicial education programs put on by the National College).

67. See M. J. HORWITZ, *supra* note 51, at 198-206.

68. See Bone, *Mapping*, *supra* note 41, at 98-103.

69. I am not suggesting that judicial education had nothing at all to offer the legal realists. Rather, my point is that the nature of the realist agenda did not point strongly to judicial education as part of the solution, at least not as strongly as it did for reformers in the 1960s.

b. Management Science

Management science is the study of the principles and methods for making optimal management decisions within budgetary, personnel, and other constraints. While those in the field trace its early history back to the late nineteenth century, it was not until the 1950s that management science established itself as a major area of inquiry.⁷⁰ Enthusiasm for the discipline—and for the related fields of operations research and systems analysis—grew rapidly after the Second World War, fueled in part by the military success of operations research during the War.⁷¹ Those who promoted management science in the 1950s and 1960s conceived of the field as more than a collection of tools for solving complex organizational problems. They thought of it as a scientific discipline committed to discovering general principles of sound management.⁷² Moreover, interest in the field was not just theoretical. The principles of management science were applied in business and industry.⁷³ Some corporations even created their own internal “operations research groups” to apply those principles to concrete business problems.⁷⁴

Although there are few explicit references to “management science,” “operations research,” or “systems analysis” in the legal literature of the 1960s, there is evidence that at least some of those involved with judicial administration were influenced by the ideas. Moreover, given the prevalence of talk about efficiency and analogies to business, it is very likely that many more were caught up in the general enthusiasm for management reform. In 1962, for example, a law professor writing about teaching jurisprudence in regular courses identified “Operations Research and Management Science” as the jurisprudential core of a course in procedure and judicial administration.⁷⁵ In 1967, Joseph Tydings, a Senator from Maryland, gave a speech, “Modernizing Our Courts,” in which he championed management science as the key to improving judicial administration:

70. The origins of management science can be traced back to the late nineteenth and early twentieth centuries when Frederick Winslow Taylor, Lillian Gilbreth, and others applied quantitative methods to business problems. See DANIEL WREN, *THE EVOLUTION OF MANAGEMENT THOUGHT* 104-55 (3rd ed. 1987); Sunil Chopra et al., *Five Decades of Operations Management and the Prospects Ahead*, 50 *MGMT. SCIENCE* 8, 8 (2004). The field really took off after the Second World War with the creation of the Institute of Management Sciences in 1953. See Wallace J. Hopp, *Fifty Years of Management Science*, 50 *MGMT. SCIENCE* 1, 1 (2004). One of the reasons for the enthusiasm in the 1950s had to do with the success of a closely-related field, operations research, in solving complex military problems during World War Two. *Id.* (stating that these events were “the Big Bang”).

71. See D. WREN, *supra* note 70, at 308-10, 348-69.

72. At the first national meeting of the Institute of Management Sciences in 1955, the editor of *Management Science*, the premier journal in the field, declared his conviction that “a science of management will stand as a legitimate and recognized field of scientific endeavor” and “no other field of endeavor is as important to man as the field which searches for truths about the ways in which men work and live together.” Hopp, *supra* note 70, at 2 (quoting C.W. Churchman, *Management Science, the Journal*, 1 *MGMT. SCI.* 187, 187-88 (1955)); see also *id.* (quoting one of the founders of the Institute as saying that it was grounded in a vision of management science “modeled more on the lines of ‘science-type’ activities such as discovering and formulating ‘laws of behavior’ (quoting W.W. Cooper, *The Founding of TIMS*, 2002 *INTERFACES* 1, available at, www.interfaces.pubs.informs.org)).

73. In fact, a new journal, *Management Technology*, was created in 1960 as a vehicle for publishing articles about practical applications. Moreover, when the journal *Management Science* took over *Management Technology* in 1965, the issues alternated between pure science and practical application. Hopp, *supra* note 70, at 4.

74. See Chopra et al., *supra* note 70, at 9.

75. Thomas A. Cowan, *Notes on the Teaching of Jurisprudence*, 15 *J. LEG. ED.* 1, 2 (1962).

In aid of . . . sound judicial administration . . . we in this century have the opportunity to utilize the skills and techniques developed by management experts. Commerce and industry have drawn liberally upon these sources to achieve the more efficient use of their resources. It is time for the courts to make use of the advances in management science as well. With proper guidance from lawyers and judges, there is every reason to expect that management consultants can streamline court administration without impinging in the least upon the traditional judicial decision-making processes.⁷⁶

I am not suggesting jurists drew directly on management science principles and methods, although some evidently did. My claim is that enthusiasm for management science influenced the reform movement by way of inspiration and analogy. In particular, it inspired confidence that the court system could be organized in an efficient way, and it guided the formulation of reform proposals by supporting analogies to developments in business and other management sectors.⁷⁷ Indeed, it was quite common for jurists during the 1960s to point to business efficiency as an ideal for judicial efficiency.⁷⁸

Here too, judicial education fit into the picture as a way to teach specific management techniques and to prime judges to look for more efficient methods in practice.⁷⁹ Through judicial education courses, judges were supposed to learn the value of efficient court organization and the importance of actively managing litigation rather than deferring to lawyers and parties.⁸⁰

II. A BRIEF OVERVIEW OF CONTEMPORARY JUDICIAL EDUCATION PROGRAMS

The history recounted in Part I offers lessons for judicial education today. As we have seen, judicial education emerged in the 1960s as part of a court reform movement, and it was influenced by ideas and beliefs that prevailed at the time. These particular beliefs no longer have the force they once did. Process jurisprudence came under attack in the 1970s, and the idea that management science includes objective truths about institutional design seems misguided today. However, the notion that judicial education must be tied to beliefs about adjudication still holds true. Before deciding what judges should be learning, one must first under-

76. Joseph P. Tydings, *Modernizing Our Courts*, 4 GA. ST. BAR J. 84, 88 (1967); see also E. C. FRIESEN ET AL., *supra* note 38, at 10-14, 19-22 (urging an interdisciplinary approach and the application of modern management science and systems analysis to court administration); Maurice Rosenberg, *Devising Procedures That are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 798-99 (1971) (noting that visitors from Japan interested in American efforts to improve judicial administration inquired about “the adaptability of management science principles to the courts”).

77. See, e.g., E. C. FRIESEN ET AL., *supra* note 38, at 10-14.

78. See, e.g., THIRD ANNUAL REPORT, *supra* note 66, at 1 (quoting Chief Justice Burger as criticizing the courts for not applying “the techniques of modern business”); Tydings, *supra* note 76, at 88.

79. See THIRD ANNUAL REPORT, *supra* note 66, at 1 (“we know that the absolute prerequisite for efficient management of the work of any court is control by the court”); Burger, *supra* note 9, at 144-45 (appellate court machinery “will no more run itself than could a law firm of comparable size without executive committees, personnel committees, managing partners . . .”).

80. See Clark, *supra* note 27, at 218, 220 (emphasizing that trial judge control over litigation is essential). See generally Resnik, *supra* note 6, at 944-49 (describing the emphasis on case management in judicial education courses for trial judges).

stand what judges should be doing, and that requires a theory of courts, adjudication, and good judging. Part III examines this point more closely and makes the case for face-to-face, in-person teaching as a way to engage judges in reflecting critically on these jurisprudential issues. Before proceeding, however, it will be useful to have a general sense of the types of courses taught to judges these days. This Part II lays that foundation.⁸¹

The offerings are vast. There are programs for federal judges and programs for state judges; programs for administrative law judges and programs for tribal court judges. There are programs for trial judges and for appellate judges, and for sitting judges as well as new judges. These programs vary from state to state and across different types of courts within a state. The following brief overview organizes the courses into four broad categories useful for the analysis in Part III: (1) those that teach specific areas of substantive or procedural law, (2) those that teach process and management skills, (3) those that address broader jurisprudential and theoretical topics, and (4) those that teach non-legal technical knowledge and skills. A caveat is in order at the outset. I made no effort to obtain course syllabi or course materials, so the following discussion relies on course titles to identify content.

A. *Specific Substantive and Procedural Law Areas*

Many judicial education courses cover specific areas of substantive or procedural law. For example, the 2014 catalog of the National Judicial College includes courses entitled “Selected Criminal Evidence Issues,” “General Jurisdiction,” “Fourth Amendment,” “Advanced Evidence,” and the like.⁸² The Federal Judicial Center offers a two-stage orientation program for newly appointed federal judges, which covers evidence rules, civil rights litigation, employment discrimination, and other substantive topics.⁸³ And the Federal Judicial Center’s continuing education program for sitting federal judges includes specialized workshops in intellectual property and employment law, as well as periodic workshops that focus on new legal developments.⁸⁴

Even the NYU New Appellate Judges Seminar for 2014 lists what appear to be two substantive courses alongside what is mostly a skills-and-theory-oriented curriculum.⁸⁵ Finally, an extensive report on judicial education written by Professors Catherine White and Maureen Conner and published by the Judicial Education Reference, Information, and Technical Transfer Project (the “White-Conner

81. For a comprehensive survey of judicial education programs as of 2005, see Catherine M. White & Maureen E. Conner, *Issues and Trends in Judicial Branch Education 2005*, JUD. EDUC. REFERENCE INFO. & TECHNICAL TRANSFER PROJECT (2005) [hereinafter White & Conner, ISSUES AND TRENDS].

82. 2014 Courses (Alphabetical Listing), THE NAT’L JUDICIAL COLL., <http://www.judges.org/courses/courses-2014-alpha.html> [hereinafter 2014 NJC Courses].

83. THE FEDERAL JUDICIAL CENTER: EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/About_FJC_English_2010_July.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/About_FJC_English_2010_July.pdf/$file/About_FJC_English_2010_July.pdf) [hereinafter FJC EDUCATION AND RESEARCH].

84. *Id.*

85. The two substantive courses are “Current Problems in Criminal Law” and “Issues in Judicial Ethics and Judicial Independence.” See New Appellate Judges Seminar: July 13-18, 2014, available at http://www.law.nyu.edu/sites/default/files/upload_documents/2014%20AJS%20Agenda.pdf [hereinafter 2014 NYU Seminar].

Report”) lists many courses offered between 1990 and 2004 that appear to focus on substantive and procedural law topics.⁸⁶

B. Process and Management Skills

The second category, which includes courses in process and management skills, is well represented among current educational offerings. For example, the National Judicial College offers courses in mediation (“Civil Mediation”) and trial management (“Conducting the Trial”) as well as courses entitled “Advanced Skills for Appellate Judges,” “Dispute Resolution Skills,” and “Management Skills for Presiding Judges.”⁸⁷ The Federal Judicial Center also offers skills-based workshops and seminars, including training in settlement and the use of ADR.⁸⁸

In addition, the NYU Appellate Judges Seminar includes several sessions entitled “Opinion Writing” as well as a session on “Statutory Interpretation.”⁸⁹ And the White-Conner Report, summarizing educational offerings nationwide, lists broad subject matter categories that are obviously skills-oriented, such as “Communication Skills: Verbal, Nonverbal, and Written” and “Court Administration, Management, and Leadership.”⁹⁰

C. Jurisprudence and Theory

The third category focuses on the jurisprudential or theoretical dimensions of judging. I could not find many courses of this sort. Based on titles, it appears that four of the forty-nine courses offered by The National Judicial College in 2014 belong to this category: “Decision Making,” “Judicial Philosophy and American Law,” “Logic and Opinion Writing” (which appears to cover more than just writing skills), and “Today’s Justice: The Historic Bases.”⁹¹ The Federal Judicial Center offers classes on the judicial process and federalism.⁹² The NYU Appellate Judges Seminar includes a course entitled “The Decisional Process” and another entitled “Processes of Decision-Making,” both of which may have a substantial theory component.⁹³ And the White-Conner Report includes a few broad subject matter classifications and topic areas that seem relevant.⁹⁴

86. See White & Conner, ISSUES AND TRENDS, *supra* note 81, at 157-73.

87. See 2014 NJC Courses, *supra* note 82.

88. See FJC EDUCATION AND RESEARCH, *supra* note 83.

89. See 2014 NYU Seminar, *supra* note 85.

90. See White & Conner, ISSUES AND TRENDS, *supra* note 81, at 158-60, 173 (chart showing that 26% of courses offered between 1990 and 2004 fit into these two broad categories).

91. 2014 NJC Courses, *supra* note 82.

92. See FJC EDUCATION AND RESEARCH, *supra* note 83.

93. See 2014 NYU Seminar, *supra* note 85.

94. For example, the subject matter category “Judicial Life and the Judicial Role and Responsibilities” includes topics such as “Judicial Decision Making” and “Judicial Discretion” and the category “The Role of the Court in Society” includes a number of seemingly relevant topics. See White & Conner, ISSUES AND TRENDS, *supra* note 81, at 166-67, 169-70, 173 (chart showing that 5% of courses offered between 1990 and 2004 fit into these categories).

D. Non-Legal Technical Knowledge

The fourth category includes courses centered on teaching various types of non-legal knowledge and skills, including economics, statistics, and specific technology areas (relevant, for example, to patent cases). I was able to find only a few offerings of this sort.⁹⁵ The Law and Economics Center at George Mason Law School organizes seminars for judges covering topics in economics, finance, and statistics.⁹⁶ Additionally, the Federal Judicial Center once worked on software to teach statistics to judges, but eventually abandoned the effort.⁹⁷

III. A NEW LOOK AT JUDICIAL EDUCATION

There is something rather puzzling about the curricular choices summarized in Part II. While lots of courses involve in-person, face-to-face instruction, the subject matter of many of them seems poorly suited to this teaching method.⁹⁸ The information taught is valuable, to be sure, but in-person, face-to-face instruction is not the best way to teach it.

To illustrate, consider the first category: courses teaching topics in substantive and procedural law.⁹⁹ It is difficult to imagine how a few hours of instruction concentrated into a few days could possibly provide sufficient information about complicated areas of substantive and procedural law—or facilitate sufficient retention—to be all that helpful to busy judges over the long run. A much better way to deliver this information is through web-based programming. With access to web courses, judges can learn what they need to know at their own pace and when they need to know it.¹⁰⁰

The same is true for the fourth category, non-legal technical subject matter. This type of information is not easily taught in short courses. Even if a judge grasps the main points of economics or statistics at the time she takes a course, she is very likely to forget what she has learned soon after the course ends. These subjects are much better suited to web-based instruction. With access to a web module, the judge can study the material when she has the time and review it as needed.

The second category—process and management skills—requires a closer analysis. In the 1960s, it made sense to teach national courses addressing topics in court management because people believed that the court system needed a major

95. Nor could Judge Richard Posner, who remarked on their scarcity in a recent book. R. POSNER, REFLECTIONS, *supra* note 5, at 331-50.

96. Mason Judicial Education Program, GEORGE MASON UNIV. SCH. OF LAW: LAW & ECONOMICS CTR., <http://www.masonlec.org/programs/mason-judicial-education-program> (last visited Sept. 3, 2015).

97. See R. POSNER, REFLECTIONS, *supra* note 5, at 337.

98. To be sure, any opportunity to get together with colleagues can be valuable, but collegial interaction takes place in lots of different settings. Judicial education ought to be evaluated for its *educational* value.

99. Judges must learn this material, of course. For instance, practicing lawyers and legal academics tend to be specialists before they become judges and they need to become familiar with a range of legal fields fairly rapidly, especially if they sit on courts of general jurisdiction. Moreover, sitting judges must learn new areas of the law as their cases require it.

100. I am not an expert in adult learning theory, so these observations are based primarily on my experience as a teacher and a student.

overhaul and that there were ideal management principles to guide the effort. Today, court (as opposed to case) management, while still important, is probably a somewhat less pressing concern, and people are more skeptical about the existence of ideal management principles. Moreover, much of court management today is governed by local rules and practices, and this sort of information is better conveyed at the local level.

This leaves process skills, such as opinion writing, and topics in case (as opposed to court) management, such as discovery supervision, settlement promotion, and the like. A stronger argument can be made for the in-person teaching of these subjects. But there is still a problem. The problem is that people disagree about what should be taught. For example, those who believe that court decisions should adhere strictly to formal law are likely to stress formalistic approaches in courses on judicial decision-making, whereas those who believe that moral principles or social policy should play an important role will favor a more functionally oriented curriculum.¹⁰¹ So too, those who champion settlement are likely to feature judicial settlement promotion in case management courses, whereas those who prefer trial will feature trial preparation more centrally.¹⁰²

Most importantly, these disagreements reflect deeper divisions over the proper function of adjudication. This means it is not possible to design a useful curriculum without first deciding what judges *should* be doing—and that requires a theory of civil adjudication. One cannot just teach everything and leave it to judges to choose among the various options; as I discuss below, what counts as proper adjudication is not simply a matter of personal preference. In short, one must first know what judges should do before one can decide what they should be taught to do.

This is where in-person, face-to-face instruction can make a valuable contribution. Guided group discussion through in-person instruction makes possible a collective process of critical reflection aimed at building a normatively attractive conception of adjudication and judging. Jurisprudence and legal theory—the subjects in our third category—have an obvious role to play in this process, not merely as interesting intellectual diversions but as essential building blocks. Thus, the reason for engaging broad jurisprudential and theoretical questions about civil adjudication is to answer the very practical question of what judges should be doing in the litigation process, and this, in turn, informs the answer to the equally practical question of what process and case management skills judges should be taught.

This is an ambitious undertaking, to be sure, and I shall have more to say about it in Section B below. But it bears repeating that some effort of this kind is necessary if judges are to understand what they should be doing and how they can

101. Justice Scalia is a well-known proponent of a more formalist approach. And Judge Posner is a good example of a judge committed to a more functional approach. See, e.g., R. POSNER, REFLECTIONS, *supra* note 5, at 105-30; see also RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter R. DWORKIN, LAW'S EMPIRE] (describing and defending a theory of law and legal decision that requires attention to moral principles).

102. Judicial enthusiasm for settlement promotion has been well documented. See, e.g., Resnik, *supra* note 6, at 949. It has also been criticized. See, e.g., Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 761-64 (2010). In fact, there might be a trend in the opposite direction today, with more judges placing somewhat greater weight on the value of trial. See *Delaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 150 n.4 (D. Mass. 2006) (noting an incipient backlash).

do it well. A judge can try to reach this understanding on her own, but, as I explain in Section B below, working it out with others in a group setting is likely to be more effective.

Section A briefly describes several different adjudication theories with different implications for how judges should handle cases and make decisions. With this background in place, Section B then discusses the special value of judicial education classes conducted through in-person, face-to-face instruction.

A. *Theories of Civil Adjudication*

By a theory of civil adjudication, I mean a general and internally coherent framework of values, concepts, and principles that explains the function of adjudication within the broader structure of legal and political institutions and ties that function to more concrete procedural elements. The following discussion examines three different theories: (1) a pragmatic theory advocated most recently by Judge Richard Posner, (2) an efficiency-based theory, and (3) a rights-based theory. These are not the only possibilities, but they are the most common, and they have different implications for what judges should be taught.

1. *Pragmatic Adjudication*

Pragmatism has had a major influence on civil adjudication in the United States, at least since the opening decades of the twentieth century. For example, many legal realists in the 1930s were influenced by philosophical pragmatism, and the original Federal Rules of Civil Procedure reflect pragmatic beliefs.¹⁰³ Roughly speaking, a pragmatist believes that a good rule is one that works well in practice and, conversely, that the way a rule works in practice indicates whether it is good.¹⁰⁴ Recently, Judge Richard Posner has championed his own brand of pragmatism and applied it to judging.¹⁰⁵ It is Posner's theory that I focus on here.

Posner describes the core of his pragmatism as "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, and slogans."¹⁰⁶ According to Posner, the pragmatic judge eschews "abstract moral and political theory" in favor of insights grounded in empirical fact.¹⁰⁷ She also rejects formalist assumptions about the determinacy and sufficiency of existing law, instead embracing the realist view that cases should be decided with all relevant considerations in mind, including empirical effects.¹⁰⁸ A Posnerian pragmatist is not wedded to existing law but follows it when the benefits of doing so are large

103. See Bone, *Mapping*, *supra* note 41, at 80-98.

104. This is an admittedly rough description of pragmatism, but it captures the core idea—that abstract concepts and norms have meaning only in terms of their practical, empirically-verifiable effects. Charles Peirce was one of the most important and influential figures in American philosophical pragmatism. See, e.g., Charles A. Peirce, *How to Make Our Ideas Clear*, in PRAGMATISM: THE CLASSIC WRITINGS 79, 88 (H. Thayer ed., 1982); *The Fixation of Belief*, in *id.* at 73-75, 77.

105. See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) [hereinafter R. POSNER, PRAGMATISM].

106. *Id.* at 3.

107. *Id.* at 60. Posner's pragmatism rejects dogmatic adherence to utilitarianism or any other philosophy. It accepts any theory that is useful for figuring out what to do as a practical matter. *Id.* at 65, 76-77.

108. R. POSNER, REFLECTIONS, *supra* note 5, at 105-30.

enough.¹⁰⁹ In short, a judge following Posner's version of pragmatism seeks a reasonable decision all-things-considered.¹¹⁰

Posner insists that his pragmatism aligns with no particular normative theory. Even so, his examples tend to have a utilitarian bent, which is hardly surprising given Judge Posner's background. For example, a Posnerian judge is likely to support class certification when large-scale case aggregation yields substantial social benefits in resolving common questions or achieving deterrence.¹¹¹

In a recent book, Judge Posner discusses some of the implications of his pragmatic approach for judicial education.¹¹² He is highly critical of the current focus on legal doctrine and recommends teaching judges the tools they need to handle increasingly complex cases, such as how to deal with statistical-type analyses and the relevance of various aspects of decision theory to adjudication.¹¹³ Notably, very few, if any, of the subjects Posner includes in his preferred curriculum lend themselves to short-term, in-person classes.¹¹⁴

2. Normatively-Directed Adjudication Theories

The problem with Posner's pragmatic theory as an account of American adjudication is that it lacks normative direction. Posner's theory focuses mainly on

109. These benefits include such things as predictability, continuity, impartiality, and decisional efficiency. R. POSNER, PRAGMATISM, *supra* note 105, at 61-64.

110. *Id.* at 64-65, 73. At the same time, it is important to note that pragmatic judging involves much more than subjective intuition. The difference between pragmatism and intuitionism is often misunderstood, and in the law this misunderstanding has been compounded by confusion over the nature of legal realism. See, e.g., Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in JUDGES ON JUDGING 115, 115 (4th ed. 2013) (describing Realists as intuitionists); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORN. L. REV. 1, 2 (2007) (positing two "contrasting models" of judging and describing the legal realist model as one in which judges "follow an intuitive process to reach conclusions which they only later rationalize with deliberative reasoning"). In intuitive adjudication, the judge reviews the evidence and the legal arguments and then waits for a "hunch" or feeling about how to decide the case or issue. She then justifies her intuitive decision *ex post* by finding law to support it. See, e.g., Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L. Q. 274 (1928). By contrast, Posner's pragmatism recognizes that law constrains decisions and assumes that judges determine what is reasonable at least in part by applying objective analytical methods. See R. POSNER, PRAGMATISM, *supra* note 105, at 60-64.

111. As an example, see Judge Posner's opinion in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012) and his opinion in the same case after the Supreme Court vacated and remanded, *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013).

112. R. POSNER, REFLECTIONS, *supra* note 5, at 329-50.

113. *Id.* at 346 ("[w]hat is needed in continuing legal education in short is a change in emphasis from legal doctrine, formal legal procedure, and discrete areas of social science . . . to meeting the challenge that complexity poses to reliable decision making by federal judges at all levels"). In the category of technical knowledge, he mentions "how to manage encounters with statistical analysis in litigation, including appeals" and "the culture rather than the details of scientific inquiry and proof." *Id.* at 346. As for judicial decisionmaking, he mentions instruction in "Bayes's Theorem and other methods of rational decisionmaking," and "the cognitive abilities and psychological characteristics of judges, jurors, and witnesses." *Id.*

114. I believe it is notable that Posner's examples of instructional methods do not mention in-person judicial education. For example, he proposes that law schools require students to take some technically-oriented courses that will be helpful whether they end up as judges or practicing lawyers. *Id.* at 347-48. He also imagines a role for MOOCs (Massive Open Online Courses) in teaching technical subjects. *Id.* at 348-50. And he calls on the Federal Judicial Center to continuously review the academic literature and provide summaries of relevant technical works. *Id.* at 334.

method and has little to say about normative ends.¹¹⁵ The judge's obligation, according to Posner, is simply to make a "reasonable" decision based on all relevant considerations. Perhaps Posner, like some pragmatists, assumes that judges will converge on a common understanding and common conclusions over time. But it is not at all obvious why they would. Without normative direction, it is hard to see how people who disagree about what is reasonable might be persuaded to change their views. After all, even formalists of the sort Posner condemns can argue that their formalism constrains judicial power and, as such, is a proper response to separation-of-powers demands in a liberal democracy. They might be wrong about this—and I believe they are—but it is hard to see why they should give up their position as "unreasonable," at least without some further specification of what reasonableness entails.¹¹⁶

There are theories of civil adjudication that do make normative choices. The two main candidates, efficiency-based theory and rights-based theory, differ in how they view the purpose of civil adjudication. The following sketches each in turn.

a. Efficiency-Based Theory

An efficiency-based theory views the purpose of adjudication in terms of maximizing social welfare in the aggregate.¹¹⁷ Welfare is sometimes maximized by strictly following substantive rules and sometimes by engaging in more fact-specific cost-benefit balancing.¹¹⁸ The choice of approach depends on the social costs and benefits. On the procedure side, the efficiency-minded judge is supposed to choose procedures that minimize expected social costs, including the costs of process and the costs of outcome error.¹¹⁹

This brief description is highly simplified, but it captures the core features.¹²⁰ An efficiency-based theory focuses on ex ante incentives, considers marginal effects on social costs and benefits, and gives short shrift to individual rights as independent constraints on welfare maximization.¹²¹ These features have strong implications for what courts should do and how judges should handle litigation. For example, an efficiency-based approach is likely to support broader use of

115. See R. POSNER, PRAGMATISM, *supra* note 105, at 55 (agreeing that pragmatism has "no moral compass"); Michael Sullivan & Daniel J. Solove, *Radical Pragmatism*, in THE CAMBRIDGE COMPANION TO PRAGMATISM 324 (Alan Malachowski ed., 2013).

116. Indeed, Posner is remarkably inattentive to the difficult question of democratic constraints on the judicial role and the way fidelity to existing law serves legitimacy values. See Jeremy Waldron, *Unfettered Judge Posner*, THE NEW YORK REVIEW OF BOOKS (March 20, 2014) (reviewing R. POSNER, REFLECTIONS, *supra* note 5).

117. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2010).

118. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

119. See ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 114-16 (2003).

120. One way the description is simplified is that it assumes deterrence is only a function of reducing the risk of outcome error. A more complicated analysis would also count other ways that litigation affects deterrence, including directly through high process costs. See, e.g., Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1194-95, 1235 (2013).

121. This is a very rough statement of a more complicated point. For example, an efficiency-based theory can support deciding cases strictly according to the legal rights of the parties if social welfare would be maximized by doing so. The proviso is still crucial though; the overall goal remains welfare maximization and not rights enforcement.

class actions than current law permits, stricter limits on discovery, and broader nonparty preclusion.¹²² A judge following an efficiency-based theory will tend to favor settlement and ADR and even be willing to get involved in actively promoting settlement, at least in those cases where trial is likely to be very costly.¹²³

An efficiency-based theory supports roughly the same recommendations for judicial education as Posner's pragmatic theory. The judge must know how to deal with statistical evidence and complex scientific and technological information. One possible difference has to do with the intensity of instruction in economic theory. An efficiency-minded judge would have to have a fairly extensive knowledge of normative economics to know what efficiency demands. Posner's pragmatic judge, however, is not supposed to rely on abstract theory and likely would not need to be as well informed to make a reasonable, all-things-considered judgment.

b. Rights-Based Theory

The third theory of civil adjudication is a rights-based theory. It differs from the other two in how it conceives the primary purpose of adjudication. According to rights-based theory, the purpose of adjudication is to enforce the legal rights of the parties. It follows that judicial education in a rights-based system should teach judges how to determine those legal rights.

Professor Ronald Dworkin is perhaps the most famous proponent of a rights-based theory of adjudication.¹²⁴ A "right" in Dworkin's theory gives the rightholder grounds for resisting decisions that aim to achieve collective goals or maximize aggregate welfare. This conception of a right is familiar from constitutional law. The First Amendment, for example, gives individuals a right to freedom of speech that constrains state action justified on social welfare grounds. Dworkin applies a similar idea to all legal rights. In short, legal rights act as trumps that constrain aggregate welfare maximization.

Legal interpretation is central to Dworkin's theory because it is through interpretation that judges determine what rights parties have. Interpretation for Dworkin involves dimensions of fit and justification. A sound interpretation is one that fits existing law *and* embodies a normatively attractive justification for that law. For example, a judge faced with a common law decision must construct a coherent set of principles that fits the relevant common law precedent and justifies that precedent on morally attractive grounds, taking account of the broader legal context in which the case arises.¹²⁵ These principles then define the legal rights that parties possess. Similarly, a judge faced with applying a statute must

122. See, e.g., Robert G. Bone, *Discovery*, in *PROCEDURAL LAW AND ECONOMICS* 67 (C.W. Sanchirico ed., 2012); *Preclusion*, in *id.* at 188; *Class Actions*, in *id.* at 350. Roughly speaking, a class action is justified when the social benefits in terms of better outcomes, stronger compliance incentives, and reduced litigation costs exceed the social costs of managing a complicated procedural structure. So too, an efficiency-based approach can justify stricter discovery limits to control for strategic abuse. And broader nonparty preclusion makes sense when repeated litigation is not likely to produce significantly more accurate results.

123. An efficiency-based theory considers both costs and benefits.

124. See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 101; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter, R. DWORKIN, *TRS*].

125. See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 101, at 228-75, 309-12 (illustrating how integrity works with a common law example and responding to the utilitarian account of common law duties).

interpret the statute in a way that fits the legislative record and also justifies the result as the product of a legislature operating as it should in a democratic system.¹²⁶

Dworkin's theory is complex, and this is not the place to delve into it in detail. But even this brief summary highlights major differences between a rights-based theory and its pragmatic and efficiency-based counterparts. Central to Dworkin's theory is the notion that every person has a right to treatment as an equal, which entitles her to equal concern and respect.¹²⁷ This right has several implications. For one thing, it means that *stare decisis* is not just a matter of weighing social costs and benefits, as it is in a pragmatic theory. Judges have a *moral* obligation to respect precedent, an obligation based on treating litigants as equals.¹²⁸ Moreover, it is not enough that a judicial decision improve aggregate social welfare; it must honor the right of each person to equal concern and respect as well as the specific institutional rights that flow from this background right. On the procedure side, the right to treatment as an equal imposes equality-based constraints on the distribution of outcome error, constraints that must be satisfied before cost-minimization can be pursued.¹²⁹ For example, Dworkin's rights-based theory might well reject stricter pleading rules that systematically and seriously skew the error risk even if those same rules reduced expected social costs in the aggregate.¹³⁰

As far as I know, Dworkin never discussed the implications of his theory for judicial education, but some conclusions are fairly obvious. Since factual accuracy is at least as important in Dworkin's theory as it is in pragmatic and efficiency-based theories, the same arguments can be made for courses teaching judges how to handle complicated technological facts and empirical evidence.¹³¹ But there is one area in which Dworkin's theory is likely to generate different course recommendations. Judges must be familiar with at least some aspects of moral and political theory to be able to identify morally attractive principles that fit existing law and thereby determine parties' rights. Hence it would be important to teach aspects of moral and political theory as well.¹³²

126. *Id.* at 313-17, 337-50. In Dworkin's view, it is a mistake to treat a statute as if it were the command of a personified legislature or a public choice bargain between legislators and interest groups. Instead, a statute should be interpreted as the product of a legislature committed to honoring democratic principles within practical constraints.

127. See R. DWORKIN, TRS, *supra* note 124. In his later work, Dworkin recasts this central norm in terms of a principle of integrity. See R. DWORKIN, LAW'S EMPIRE, *supra* note 101, at 176-224.

128. The obligation to follow precedent is also tied to integrity. See R. DWORKIN, LAW'S EMPIRE, *supra* note 101, at 225-27.

129. See Ronald Dworkin, *Principle, Policy, Procedure*, in A MATTER OF PRINCIPLE 72 (1985); Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010).

130. In other words, if limiting procedures increases the risk of error, the increased risk must be justly distributed in order to satisfy the requirements of a rights-based theory.

131. In a sense, it is even more important. Since it is not enough to cite high social costs alone as a justification for limiting substantive rights enforcement, there is a strong imperative to find the facts correctly even when an efficiency-based theory would cut corners to save costs.

132. By contrast, Posner's pragmatism eschews moral and political theory, and it is difficult to see what relevance moral theory could possibly have for an efficiency-based theory.

B. A New Justification for Judicial Education

To recap, there are several different theories of adjudication, which have somewhat different implications for the content of judicial education programs. All three theories examined in Section A support courses teaching judges how to deal with statistical evidence, scientific evidence, and technical subject matter. However, Dworkin's rights-based theory would also seem to support instruction in moral and political theory, and an efficiency-based theory would seem to require more intensive instruction in normative economics. The striking fact, however, is that none of these subjects are well suited to short courses involving in-person, face-to-face instructional formats.¹³³

The conclusion is different for case management techniques and process skills. These topics might well be suited to in-person instruction, especially since that format allows for simulations and personal feedback. The problem with teaching this material is not so much choosing the optimal format as it is figuring out what should be taught. People disagree about what judges should do in managing litigation and deciding cases and this means they are bound to disagree as well about what judges should be taught. Those favoring an efficiency-based theory, for example, are more likely than those favoring a rights-based theory to support teaching active involvement with discovery management and settlement promotion.¹³⁴

An important insight follows from this analysis. The 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.

Any such theory will almost certainly differ from the three pure theories discussed above. American civil litigation is simply too complex and varied to fit a single theory. Our procedural system, for example, values rights as well as efficiency and cares about individual participation for dignitary as well as outcome-quality reasons.¹³⁵ Thus, it is reasonable to suppose that any normative account will be a hybrid theory, not perfectly consistent internally but coherent enough to ground a principled practice.

133. As discussed above, instruction in how to deal with statistics, scientific evidence, and technical subject matter is better delivered through web modules. *See supra* notes 98-100 and accompanying text. Moreover, it is not easy to see how an adequate introduction to moral and political theory can be provided in a one or two week course.

134. Proponents of a rights-based theory should be more cautious about the effect of case management techniques on outcome error, regardless of litigation cost savings. More precisely, a rights-based case-management course is likely to stress greater sensitivity to the effect of discovery limits on access to information necessary for rights vindication and greater attention to the risk that active settlement promotion might skew outcomes in individual cases.

135. *See, e.g.,* Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485 (2003) [hereinafter Bone, *Agreeing to Fair Process*].

Constructing such a theory necessarily involves interpreting existing rules and practices as parts of an integrated whole. The overall goal must be to find a reasonably coherent set of principles that fit settled aspects of litigation practice and also justify that practice as the best it can be given what it is. The approach I have in mind is similar to Ronald Dworkin's interpretive approach and has much in common with John Rawls's idea of reflective equilibrium.¹³⁶ Roughly speaking, one moves back and forth between relatively settled aspects of litigation practice and more general principles that justify that practice, adjusting practice and principle until the two fit together in a reflective equilibrium. The goal is not to construct an ideal theory in the abstract or simply to collect existing rules and principles intact. The goal is to critically prune and adjust theory and practice until the result satisfactorily accounts for core features of adjudication in a way that makes the institution a normatively attractive part of our overall system of democratic institutions.¹³⁷

This process of critical reflection is difficult to do on one's own. This is where in-person, face-to-face instruction comes into play. In-person classes offer an opportunity for guided reflection in a group setting, where ideas can be challenged, modified and then challenged again. One can imagine an instructor or one of the judge-participants proposing a principle that fits certain aspects of litigation practice, and other judges testing the principle on other aspects, refining it, and debating the refinements—with everyone gaining a better understanding of the normative stakes through discussion and debate.¹³⁸ It might be possible to replicate this process through written exchanges, but I very much doubt it. In-person, face-to-face discussion allows for immediate feedback closely tailored to the ideas being expressed and also facilitates back-and-forth exchanges capable of honing imprecise ideas and focusing on their implications.¹³⁹ Once again, the aim is to try to reach agreement on a normative account that fits and justifies the core features of existing adjudication.

This is a tall order, to be sure. But it is not an impossible task. Recall that participants are not debating their own personal preferences about how an ideal system should be designed. Instead they are debating competing accounts of an *existing* institution, which provides an external point of reference. Moreover, the imperative to fit and justify that institution should constrain and channel discussion. Also, the participants have a strong professional stake in achieving a successful result that they can use to guide their own decisions. As judges, they occupy similar institutional roles and face a common set of professional challenges.

136. See generally JOHN RAWLS, *A THEORY OF JUSTICE* 17-19 (rev. ed. 1999) (describing the process of seeking a reflective equilibrium); R. DWORKIN, *LAW'S EMPIRE*, *supra* note 101, at 225-27 (describing a process of legal reasoning grounded in an effort to form "the best constructive interpretation of the community's legal practice").

137. For a similar account, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 940-43 (1999) [hereinafter Bone, *Process of Making Process*].

138. It is not impossible for a judge to do this by herself, but she would have to be a Dworkinian Hercules to do it well. See R. DWORKIN, *TRS*, *supra* note 124, at 105.

139. There is a close analogy between this process and the proper use of socratic instruction in a law school classroom. Over the more than thirty years I have been teaching law, I have found that the chief value of the socratic back-and-forth is that it gives students a chance to realize both the potential and the limits of their own ideas and to learn from the contributions and mistakes of others. I am not sure how this process could be effectively replicated through written materials or web-based instruction.

Thus, they share a common basis for discussion as well as a common purpose. Finally, it is not necessary to develop the best theory; there is value in figuring out a workable set of principles that do an adequate job of fitting and justifying and that can be improved with further deliberation.

This is just a brief sketch and I will not go into more detail here.¹⁴⁰ I have described this process of reflective equilibrium in some of my other writing and applied it to concrete legal issues.¹⁴¹ Obviously, it would be ideal if discussion produced a consensus set of principles. But consensus is not easy to achieve. Any principled account of adjudication necessarily implicates values, and although existing practice constrains value choice, it does not uniquely determine it. However, even a partially successful effort can reap substantial benefits, especially when other judges can build on it in future discussions. Moreover, engaging in the process itself can be valuable whether or not it yields anything substantive. Doing so encourages each judge to engage in the same kind of deliberation when deciding a case or managing litigation.¹⁴² This then is the best use of in-person judicial education: to provide judges with an opportunity to reflect critically on their role in the institution of adjudication with an eye to developing a conception of that institution capable of guiding future decisions and rule choices.

CONCLUSION

The central thesis of this Article is that judicial education must be tied to general ideas and beliefs about law, courts, and adjudication. I have made both a positive and a normative case for this thesis. On the positive side, I showed how judicial education emerged in the 1960s in large part because of prevailing ideas and beliefs about process jurisprudence and management science. On the normative side, I argued that in-person, face-to-face judicial education makes most sense as a way for judges to reflect critically on their own ideas and beliefs about courts and adjudication.

The insight of the 1960s, that judicial education is essential to sound adjudication, continues to hold true today. Judges must base their procedural decisions and choice of procedural rules on a justifiable and normatively attractive view of civil adjudication. This is particularly difficult in a world rife with conflicting values and divergent views. Judicial education serves an important function in this world by providing a controlled setting where judges can reflect critically on the nature of adjudication and the judicial role. Only by encouraging this type of reflection can we hope to achieve a system of civil adjudication that is principled as well as efficacious.

140. It is important that the teacher be skilled in facilitating discussions of this sort and diligent about keeping the participants focused on the goal. When discussion stalls, the teacher should be prepared to offer procedural examples or hypotheticals to stimulate further discussion.

141. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 614-24 (2011) (day in court); Bone, *Process of Making Process*, *supra* note 137, at 943-47 (small claim class action); Bone, *Agreeing to Fair Process*, *supra* note 135, at 547-50 (2003) (subclassing).

142. As to the latter, see Bone, *Process of Making Process*, *supra* note 137, at 940-47. I understand that those involved with judicial education today are interested in the psychology of judicial decision making, but that is different than the normative dimension I explore here.