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Appointive Selection of Judges, Limited-Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence

Norman L. Greene

The subject of the selection of state court judges has many aspects, including the choice of the selection system, the design of the selection system, the comparison of alternative modes of selection, and the effect of the system on judicial performance or decision making, including "judicial independence." This article addresses many of these aspects and takes as its starting point a unique symposium of articles published in a special issue of the *Fordham Urban Law Journal* in the Spring of 2007, preceded in time by a daylong symposium with the authors held at Fordham Law School on April 7, 2006.[1] The symposium investigated judicial selection systems by appointment and asked if a well-designed appointment system is the best way to select judges, what should that system look like? As the organizer of the symposium, as well as both a participant and an observer, I will synthesize many of its themes. To provide context to the discussion, the article will also elaborate on some of the problems associated with judicial elections, the principal alternative mode of judicial selection.

This article then goes beyond the Fordham symposium by considering some of the problems that may arise when individuals without qualifications become judges. The article focuses on the issue of non-lawyer judges who serve in various states in courts of limited yet important jurisdiction; and it uses as a case study the judges in New York State's Town and Village Courts. These courts were the subject of widespread negative press coverage in 2006 and are now the subject of administrative and legislative scrutiny and reform.

Finally, the article reflects on the complexities of independence in judicial decision making. The phrase "judicial independence" is often used, little understood, and frequently undefined. But it is related to the mechanisms used to select and retain judges: among other things, some selection systems by their very design may provide judges with an incentive to decide cases with an eye toward retaining their positions. Whatever else it means, judicial independence cannot mean freedom to make decisions solely based on a judge's self-interest in staying in his or her position. Some attention to this core principle of justice therefore needs to be paid when deciding on any system of judicial selection or retention.

I. THE FORDHAM SYMPOSIUM: DESIGNING AND APPRAISING THE BEST APPOINTIVE SYSTEMS

> [O]ne can rationally and correctly embrace democracy as a whole while realizing that not every public office in a democracy needs to be filled by popular election. The office of judge—at both the trial and appellate level (including the state's highest court)—is one of those offices. . . . There is no requirement of democratic theory that mandates that all public offices be filled by election.[2]

> Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system. . . .If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges. [3]

Footnotes

1. *See* Symposium, *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges,* 34 FORDHAM URB. L.J. (2007). Together the oral and written presentations will sometimes be referred to as the "symposium" or the "Fordham symposium," without discriminating between oral and written presentations of the participants. The symposium sponsors were the American Judicature Society, the Constitution Project, the League of Women Voters of New York State Education Foundation, the Louis Stein Center for Law and Ethics at Fordham University School of Law, and the Fund for Modern Courts, with grant support from Carnegie Corporation of New York and the Open Society Institute.
2. Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary,* 4 NEV. L.J. 35-36 (2003).
3. Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O'Connor, J. concurring). Since the date of the Supreme Court's decision, reformers in Minnesota have been considering the adoption of commission-based appointment of judges. *See* Citizens Commission for the Preservation of an Impartial Judiciary, *Final Report and Recommendations,* Mar. 26, 2007 (Minnesota commission proposal to appoint judges, with a judicial performance evaluation plan) (hereinafter Citizens Commission, *Final Report*), available at http://keepmnjusticeimpartial.org/FinalReportAndRecommendation.pdf.

A. The Nature of the Symposium

Titled *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, the Fordham symposium included articles and commentary from some 20 participants from 15 states. Several of the represented states appoint many or all of their judges (*e.g.,* Arizona, Colorado, Kansas, Nebraska, and Wyoming). While 15 states were represented in the symposium, virtually any state could have been represented in a discussion about judicial appointments. At least some judges are appointed in most if not all states; even if a state does not appoint judges as a general matter, judges at a minimum may be appointed to fill unexpired terms of retiring judges. The authors and panelists at the symposium reflected an array of expertise. There were professors of law and political science, judges and practicing lawyers, as well as experts in the area of judicial conduct and court reform.

B. The Background: The Ills of Judicial Elections

Although the symposium did not focus on the problems associated with judicial elections,[4] a brief discussion of some of these problems provides context for the symposium's primary focus. These problems include the need to raise campaign funds (often from attorneys who practice before the court) to finance expensive campaigns;[5] expanded judicial campaign speech; the lack of voter education about the candidates; the lack of voter participation in elections; and the prevalence of contentious judicial campaigns. According to a *New York Times* study of judicial elections in Ohio, expensive campaigns make it appear that justice is for sale to campaign contributors.[6] Also, contentious elections spoil the image of the judiciary through negative campaign advertisements about the candidates.[7]

[V]oter education on judicial performance is notoriously inadequate.

In addition, the lack of restriction on judicial campaign speech as a result of the Supreme Court's decision in *Republican Party of Minnesota v. White* and subsequent cases threatens a loss (or at least perception of loss) of judicial impartiality.[8] Under the rulings of these cases, judicial candidates may now announce their personal views on certain legal and political issues, and within limits, may solicit funds for their campaigns. Some have argued that the result of *White* will be a more informed electorate and more meaningful elections.[9] Others contend that the purpose of the lawsuits challenging restrictions on judicial speech has been "to loosen the constraints on judicial candidates so that a more ideologically pure group of candidates would be identified and elected."[10]

Judicial elections have often been criticized for failing to permit voters to exercise any meaningful choice, since, among other things, voter education on judicial performance is notoriously inadequate.[11] Judicial elections therefore have little to do with keeping poor candidates from getting on the bench

4. There was consideration about retention elections at the symposium, since retention elections form an important part of many existing appointment systems. *See* John F. Irwin & Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Retention Vote Phase of an Appointment Selection System*, 34 Fordham Urb. L.J 453 (2007) (hereinafter Irwin & Real, *Enriching*). *See also* John F. Irwin & Daniel L. Real, T*houghts About Enriching Judicial Independence by Improving the Retention Vote Phase of Appointive Selection Systems*, 43 Ct. Rev. 60 (2006).
5. *See, e.g.,* James Sample et al., The New Politics of Judicial Elections (2006), available at http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf.
6. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006 at A1 ("An examination of the Ohio Supreme Court by The New York Times found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."). According to the article, the key questions asked by the study were how often did the Ohio Supreme Court hear cases involving major contributors and how did justices vote in those cases. *Id. See also* Madhavi M. McCall & Michael A. McCall*, Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety,* 90 Judicature 214*,* 216 (March-April 2007) ("public opinion surveys indicate that many in the electorate believe justices alter their behavior to accommodate the preferences of campaign contributors."); Luke Bierman, *Help Wanted: Is There a Better Way to Select Judges*, 34 Fordham Urb. L.J 511, 519 (2007) ("Selecting judges through popular electoral processes presents the distinct likelihood that those judges will perform their duties with an eye toward the electorate's expectations…").
7. *See generally* Norman L. Greene, *Perspectives on Judicial Selection*, 56 Mercer L. Rev. 949, 950 n. 3 (2005) (hereinafter, Greene, *Perspectives*).
8. *White*, 536 U.S. 765 (2002). *See* Charles G. Geyh, *Rethinking Judicial Elections*, Bill of Particulars, Spring 2003, http://www.law.indiana.edu/publications/particulars/2003spring/cgeyh.shtml (statement by judicial aspirant during a judicial campaign is "uniquely important" since may "be treated as a condition of his selection"; "judges will obviously feel greater need to adhere" to such positions).
9. Raymond A. Sobocinski, *Adumbrations on Judicial Campaign Speech*, 43 Idaho L. Rev. 193 (2006). However, increasing knowledge of judicial performance so as to provide meaningful voter choice is not the subject of *White*. Norman L. Greene, *Reflections on the Appointment and Election of State Court Judges: A Response to* Adumbrations on Judicial Campaign Speech *and a Model for a Response to Similar Advocacy Articles*, 43 Idaho L. Rev. 601 (2007).
10. Robert H. Tembeckjian, *Perspective: Campaign Speech and the Administration of Justice*, N.Y.L.J., Nov. 29, 2006. The author of the article in this footnote is administrator and counsel to the New York State Commission on Judicial Conduct. He was also a panelist at the Fordham symposium.
11. Stempel, *supra* note 2, at 46 ("…there is likely to be little real information about the judicial philosophy, ideology, or past record of candidates for judge. Thus most voters participating in local judicial elections are largely shooting in the dark in casting their ballots.") (footnote omitted).

[D]etermining which type of appointive system to employ has been the subject of too little discussion. Symposium participants sought to identify the best practices for commission-based appointment systems.

and removing them once they are there.[12] Lacking substantive information, voters sometimes vote "blind" based on cues having nothing to do with judicial quality or perhaps upon the basis of the last political sign they observed; many do not vote at all. [13] "Without accurate and relevant knowledge about the specific judges at issue, voters are prone to base their decisions on factors such as ethnicity, gender, name recognition, party affiliation, or length of time on the bench. Even worse, without information to inform their choices, a significant number of voters apparently cast a vote without any rationale at all."[14] Furthermore, voters may be generally unable to assess a judge's technical skills, including the judge's mastery of rules of evidence and the judge's ability to master complex issues of substantive law.[15] "As a consequence, voters tend to vote based on cues unrelated to a judge's performance, such as ethnicity or party affiliation, where that information is available."[16]

C. The Issues at the Fordham Symposium

The Fordham symposium considered various existing state court systems for appointing judges, reviewed their strengths and weaknesses, and attempted to propose solutions, including suggesting new systems or designs. Determining whether to elect or appoint judges is an issue that has been the subject of extensive and not always useful debate,[17] but determining which type of appointive system to employ has been the subject of too little discussion. As noted previously, in this article I am highlighting some of the subjects of the symposium without attempting to summarize either the program itself or the published papers.[18]

The symposium focused primarily on commission-based appointive systems for selecting state court judges. In these systems, judicial nominating commissions propose a limited number of nominees for the appointing authority, typically a governor or other local appointing authority, to select as a judge. The most commonly recommended commissions consist of judicial nominating commissioners who are bipartisan and include both lawyers and non-lawyers. Matters considered at the symposium included selection and composition of the membership of judicial nominating commissions; the encouragement of diversity (defined broadly) in appointive systems, both for nominating commissioners and nominees; the extent of involvement of the appointing authority in the selection process; the openness of the judicial selection process; the development of codes of conduct and training for judicial nominating commissioners; and the method of retaining judges after expiration of their term, including the opportunity to evaluate their performance before the retention decision through some form of judicial performance review. Symposium participants sought to identify the best practices for commission-based appointment systems whether or not such practices are currently in use in any state—including consideration of foreign judicial systems[19]—to guide states that are considering

12. This article does not seek to compare the quality of elected versus appointed judges, and the author is well aware of the difficulty in measuring quality and applying the test of quality to each individual judge. The above comment solely observes that voters who lack any knowledge of the judge's performance cannot effectively keep the poorly performing judges off the bench. A good discussion of the subject of judicial quality appears at Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 803 *et seq.* (2004). Professor Zeidman was a Fordham symposium participant.
13. Stempel, *supra* note 2, at 46, 51. *See also,* Sarah Elizabeth Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico's Supermajority Requirement for Judicial Retention,* 86 B.U. L. REV. 173, 217 (2006) (noting that in retention elections, most voters abstain or "'vote blind" because they have to make a "decision on which they have no basis for judgment" (quoting Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 319 (1994)). To the same effect, see Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1046 (2007)("voters [in judicial elections] are likely to cast their ballots in ignorance; they often seem to support (or oppose) every incumbent, vote a straight ticket without any knowledge of the relationship between party and judicial philosophy (if there is one), or simply not vote at all").
14. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS, JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), at 15 (hereinafter, SHARED EXPECTATIONS) (footnotes omitted). A copy of the report is available through the institute's website at http://www.du.edu/legalinstitute/index.htm
15. Stempel, *supra* note 2, at 44.
16. SHARED EXPECTATIONS, *supra* note 14, at 3.
17. The Fordham symposium sought to differentiate itself from programs where advocacy dominates as opposed to studying judicial selection systems. For the problem of advocacy in the literature of state judicial selection, see F. Andrew Hanssen, *The Political Economy of Judicial Selection: Theory and Evidence*, 9 KAN. J.L. & PUB. POL'Y 413, 419 (2000) ("Most of what I have seen on judicial selection in the states…takes the form of advocating one method or another rather than simply trying to determine whether there are systematic differences, and if so, what they are and why.")
18. Thomas F. Whelan, *Symposium on the Best Appointive System for the Selection of State Court Judges*, THE SUFFOLK LAWYER, Apr. 2006 at 24, reprinted in THE JURIST, Fall 2006–Winter 2007, at 14, sought to summarize the presentations at the Fordham symposium in April 2006. Justice Whelan is a New York State Supreme Court justice who attended the Fordham symposium in April 2006. My article, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35 (2007), among other things, captured many of the themes of both the oral and written symposium presentations.
19. *See* Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J 363 (2007); Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?* 34 FORDHAM URB. L.J 387 (2007).

appointment systems. These include states that are planning to move from judicial elections to appointments or seeking to improve their current method of judicial appointments.

The symposium also sought to refine the judicial selection debate by defining what is meant by appointive systems—what they are and what they can be. "[A]lmost all of the good government groups . . . support an 'appointive' system. If we start with the assumption that an appointive system is the way to go, how do we develop a good appointive system? What are the mechanics?"[20] Where there is a lack of definition, the debate between supporters of electing judges and supporters of appointing judges can be abstract or unclear. Some who challenge appointive systems assume that the term refers only to the worst systems (*e.g.*, elitist; closed or secretive; and non-diverse), which no serious reformer would recommend.[21] They then infer from that assumption that no appointive system works well. These flawed appointive systems include those in which an executive appoints a judge without the intervention of a judicial nominating commission or legislative consent to limit or ratify, respectively, the executive's choice. Without such a commission or legislative approval process, a judgeship may be more readily used as a form of patronage, with judicial offices awarded as rewards to staffers and others close to the appointing authority.[22] The symposium focused on commission-based appointive systems only.

D. Designing the Best Appointive System

The Fordham symposium showed that no existing system is likely to contain all the best elements for a commission-based appointive system. Proposing an appointive system is therefore not a matter of looking around the country and asking which single appointive system is best, then accepting it. Rather, those seeking to adopt appointive systems should determine which elements work best and therefore how the best system should be designed. An appointive system may be considered through its separate parts, some good, some better; and a state may select the best parts of each such system or develop improved parts of its own.

[T]hose seeking to adopt appointive systems should determine which elements work best. . . . [T]he Fordham symposium considered . . . [for example,] how judicial nominating commissioners should be regulated and trained . . . .

1. REGULATION AND TRAINING OF JUDICIAL NOMINATING COMMISSIONERS

Although there is much interest and debate concerning who should select the judicial nominating commissioners in commission-based appointive systems,[23] the Fordham symposium also considered other important questions, including how judicial nominating commissioners should be regulated and trained; what should be the code of conduct governing judicial nominating commissioners; how violations of such a code should be detected; and how the code should be enforced.[24]

Among other things, a code of conduct should limit communications between the judicial nominating commissioners and the appointing authority so as to avoid the possibility or perception of control of the commission or commissioner(s)

20. John Caher, *Cardozo: Fix Party Conventions to Fight Voter Non-Participation*, N.Y. L.J., Mar. 27, 2006 (quoting my description of the purpose of the Fordham program). *See also* John Caher, *By Tapping Jones, Spitzer Reveals Hands-On Style of Picking Judges*, N.Y. L.J., Jan. 14, 2007 (quoting me as follows: "It is definitely not enough for one to proclaim he supports appointing judges or even that he supports appointing them through a commission, without providing a detailed system….There is not just one system.").
21. *See* Joyce Purnick, *Metro Matters; A Judiciary in Disrepair (and Denial)*, N.Y. TIMES, Dec. 1, 2005, at B1, quoting a New York State Supreme Court justice, Queens County, as defining an appointive system as one in which "elitist lawyers" select judges, as follows:

    > No committee can guarantee morality. . . . I refuse to concede to a white-shoe firm from a city bar. The public's right to elect its judges is supreme.

    The flaw in the justice's argument is that he defines the appointive system as one which no serious reformer would propose, namely, one in which elitist lawyers from "white-shoe" firms select judges. *See* Norman L. Greene, Letter to the Editor, *Judges in New York,* N.Y. TIMES, Dec. 7, 2005 at A32. In addition, an appointive system must take account of diversity. *See* Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485, 485 (2007) ("For an appointive system to be perceived as legitimate, it must ensure that diversity is considered in nominating candidates and in appointing judges.") (footnote omitted).
22. *See* John Caher, *Outgoing Governor Names Aides, Backers to Judgeships*, N.Y. L.J., Dec. 14, 2006 (hereinafter, Caher, *Outgoing Governor*) (outgoing New York Governor Pataki awards New York Court of Claims judgeships to his lieutenant governor, the governor's counsel and "several other politically connected lawyers"). Of course, patronage appointments may still occur if the legislature defers to the choices of the appointing authority or if the judicial nominating commission, mistaking its function and failing to act independently as required, does the same. The best appointment systems are commission based, with or without legislative involvement.
23. Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group's Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 FORDHAM URB. L.J. 425, 437 (2007) ("everyone—from elected officials to average people in focus groups—wants to know who will be appointing members of the nominating commission"), 439 ("'who picks the pickers' often becomes a labyrinth from which the reform effort cannot escape."); Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions,* 34 FORDHAM URB. L.J. 163, 181 (2007) (referring to the existence of "extensive literature that considers the composition of nominating commissions").
24. Norman L. Greene, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35, 51-70 (2007).

A judicial nominating commissioner may learn . . . how to seek information about the candidates . . . and how to evaluate the information once it has been obtained.

by the appointing authority.[25] Communications should also be limited between the commissioners and those who appointed them. The commissioners "represent the public in the judicial selection process; they are not agents or representatives" of those who selected them.[26]

Another theme of the symposium was that training of commissioners should be mandated and regular, both before a commissioner begins work and periodically thereafter.[27] Knowing how to recruit and select the best judicial candidates is a skill that may be learned by commissioners and is not innate.[28] A judicial nominating commissioner may learn (and ideally should be taught) how to seek information about the candidates for judgeships and understand how to evaluate the information once it has been obtained.[29]

The American Judicature Society has been in the forefront in the training of commissioners. For example, the American Judicature Society provides a *Handbook for Judicial Nominating Commissioners* and an accompanying educational program called the *Institute for Judicial Nominating Commissioners* to train commissioners.[30] The *Handbook* assists commissioners in determining whether candidates possess the desired qualities for judicial office, including impartiality, integrity, good judicial temperament (which implies "an absence of arrogance, impatience, pomposity, irascibility, arbitrariness or tyranny"),[31] industriousness, professional skills, social awareness, collegiality, writing ability, decisiveness, speaking ability, administrative ability, and interpersonal skills.[32]

States may also wish to have experience requirements for both lawyer and non-lawyer members of the judicial nominating commission.[33] In some less populated areas, the requirements may be reduced or made less stringent if necessary to avoid unduly limiting the pool of available commissioners.

2. ACCOUNTABILITY AND JUDICIAL PERFORMANCE REVIEW

a. Elections and Accountability

The Fordham symposium also focused on how to achieve accountability in a commission-based appointive system. Opponents of such systems sometimes contend that if the public is precluded from voting judges out of office, the public will be unable to hold the judges responsible for unacceptable performance. This argument would theoretically not apply to appointive systems with retention elections since the opportunity to hold a judge accountable by ballot would supposedly remain, although judges are rarely rejected in retention elections.

Because voter participation in judicial elections is low and voters often have no basis to determine which judges are performing well or poorly without judicial performance review (discussed below),[34] judicial elections are logically a poor method to achieve accountability, regardless whether they are retention elections or contested elections. It is self-evident that voters who do not participate or are uninformed cannot and do not hold judges accountable through elections.[35] Many judicial elections also have a single unopposed candidate, and sitting judges may not have opponents, leaving no issues to be

25. Greene, *Perspectives*, *supra* note 7, at 964; Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 Fordham Urb. L.J. 13, 22-23 (2007) (creating a firewall for certain communications between the appointing authority and judicial nominating commissioners) (hereinafter, Greene, *Judicial Appointments Act*).
26. Marla N. Greenstein, Handbook for Judicial Nominating Commissioners 12 (2d ed., rev'd by Kathleen M. Sampson, 2004). *See also* Greene, *Judicial Appointments Act*, *supra* note 25, at 23 (restrictions on communications between commissioners and those who appointed them).
27. *See* Greene, *Judicial Appointments Act*, *supra* note 25, at 24 (requiring training of commissioners).
28. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 Fordham Urb. L. J. 265, 285-6 (2007). "[N]ominating commissions should undertake professionalized search processes similar to those utilized by business organizations when hiring senior executives, or by academic institutions when hiring senior administrators and tenure-track faculty members. The use of search consultants could well be appropriate." *Id.* at 286.
29. Steven Zeidman, *Careful What You Wish for: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 Fordham Urb. L. J. 473, 477-8 (2007) (hereinafter, Zeidman, *Careful*). "[Y]our typical commission member is unlikely to be an expert, or even particularly skilled, in this information-gathering technique. Is she trained to design the questions (including the more spontaneous follow-up questions), solicit the answers, and then analyze the responses across candidates?" *Id.* at 477-8. "Supporters of appointive systems and nominating commissions must be honest—these information-gathering techniques require great training, skill, and time." *Id.* at 479.
30. Greenstein, *supra* note 26, at 2. *See also* Caufield, *supra,* note 23.
31. Greenstein, *supra* note 26, at 93 (citing Utah Application for Judicial Office, which is quoted in part in the parenthetical in the text). *See also* Richard A. Watson & Rondal G. Downing, The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan 295 (1969) (dividing judicial temperament into "'open-mindedness and the ability to listen patiently to both sides of the case'" and "'courtesy to lawyers and witnesses'").
32. Greenstein, *supra,* note 26, at 89.
33. *See* Jesse Sunenblick, *Pataki's Puppets*, Judicial Reports, Dec. 8, 2006, http://www.judicialreports.com/archives/2006/12/patakis_puppets.php, describing a paralegal selected as a judicial nominating commissioner for New York's Court of Appeals and speculating that her principal recommendation was that her husband is the Kings County Conservative Party leader. *Cf.* Greene, *Judicial Appointments Act, supra* note 25, at 24 (establishing experience requirements for commissioners).
34. Shared Expectations, *supra* note 14, at 3.
35. Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 Or. L. Rev. 459, 477 (1993). This section considers the common circumstance of contested elections and retention elections without judicial performance review. The use of judicial performance review with retention elections is considered *infra.*

[P]roponents of appointive selection may emphasize the potential for accountability in appointive systems through . . . judicial performance review.

discussed at all.[36] This is not merely a problem with retention elections, but also with initial elections.[37] Moreover, since in many cases judicial terms are much longer than those of most elected officials, the opportunity to hold a judge accountable through the ballot—even if possible—is infrequent. Court administrators and judicial conduct commissions may provide some accountability before a judge's term expires, subject to the limitations discussed below.

b. Judicial Performance Review in Appointive Systems

Supporters of appointive systems need not cede the issue of accountability to supporters of judicial elections. Rather, proponents of appointive selection may emphasize the potential for accountability in appointive systems through a sophisticated procedure known as judicial performance review. This procedure "looks at how a judge treats people in the courtroom, explains her decisions, manages her caseload, and adheres to existing law. It then measures each judge's performance in these areas both in absolute terms against established benchmarks, and relative to the performance of other judges."[38] In this procedure, an evaluation committee gathers detailed background on each judge, including "survey data, review of case management skills and written opinions, courtroom observation, and information gained from interviews with the judge," and disseminates the evaluation report publicly.[39] Using politically neutral criteria, judicial performance evaluation asks, "Is Judge X a good judge because she treated all parties fairly, reached a decision supported by existing law, and explained her decision clearly and thoroughly?" rather than is "Judge X a good judge because she reached a particular result in that case."[40]

For judicial performance review to have an effect on retention, the results of the review need to be disseminated to the voters charged with retaining the candidates or not or to the commissions evaluating them for reappointment. Information on judicial performance needs to be obtained from users of the court system who have had experience with the judge, such as lawyers, litigants, witnesses, judicial staff, and jurors.[41] An adequate review system requires an accessible record of users so that relevant data may be collected, organized and disseminated. Information may sometimes be best collected at the time of the contact between the user and the judge (or shortly thereafter) when information is freshest in the user's mind.[42]

36. Diane D. Blair & Jay Barth, Arkansas Politics and Government 237 (2d ed. 2005) (discussing Arkansas judicial elections and noting that sometimes there is no "vigorous contest for first election to the bench in which the qualifications, values, and views of all contestants [are] highly publicized [in the first place]; and an equally vigorous challenge when a judge [seeks] reelection, so his or her performance could be evaluated.").

    On November 7, 2006 in New York City, my polling place in the 74th Election District had five judicial elections. Every single candidate was unopposed. My voting machine presented a total of five candidates for five positions, and I was invited to vote for all five. There was no other choice, except not to vote. The ballot for judges read substantially as follows:

    1. *Justice of the Supreme Court (vote for any two)*
        Angela M. Mazzarelli on Republican and Democratic Lines
        Joan B. Lobis on Republican and Democratic Lines
    2. *Judge of the Civil Court – Countywide (vote for any one)*
        Jane Solomon
    3. *Judge of the Civil Court (vote for any two)*
        Eileen Rakower – on Democratic Line
        Michael Stallman – on Republican and Democratic Lines

    Only the above were judicial candidates. I had the identical experience on the election ballot for November 2004, except that there were nine candidates and I was invited to vote for any nine. Greene, *Perspectives*, *supra* note 7, at 960.

37. Blair & Barth, *supra* note 36, at 237. *See also* Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. Ark. Little Rock L.J. 281, 297 (1996). ("If elections were the result of the considered opinion of the electorate, the election of judges might be a greatly preferred technique. Experience and empirical research unfortunately inform us that this is not the case. The vast majority of voters in judicial elections are not adequately informed about the candidates. Consequently, voters typically make decisions based on very nonprofessional and meritless considerations. . .").
38. Shared Expectations, *supra* note 14, at 3.
39. Shared Expectations, *supra* note 14, at 5. *See generally* Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 Fordham Urb. L.J. 315 (2007).
40. Shared Expectations, *supra* note 14, at 2-3.
41. *See e.g.*, Irwin & Real, *Enriching, supra* note 4, at 470; Dubofsky, *supra* note 39, at 321-3 (collection of computerized information about filed cases, survey information of those who appeared before the judge, and other data). The references above to student evaluations of professors and businesses of employees do not mean that judges should be subject to the identical evaluation techniques as professors and employees. Differences in the roles of those persons, the type of information that must be gathered and evaluated, and the public interest involving the judiciary require separate ways to gather and analyze the information.
42. Colorado sends surveys as part of judicial performance review to randomly selected persons in various categories of court users. Dubofsky, *supra* note 39, at 322. Making it possible for such court users to send in relevant information in advance of such surveys may provide valuable supplemental information and lead to more complete results than random surveys could. There is no reason for such persons to await the receipt of a survey before providing relevant information on judicial performance. For Arizona's judicial performance review program, see Mark I. Harrison et al., *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 Fordham Urb. L. J.239, 245-247, 251-259 (2007) (detailing Arizona's judicial performance review program). *See also id.* at 253: "In conducting its evaluations, the JPR [judicial performance review] Commission [in Arizona] surveys virtually everyone who has interacted with the judge in his or her duties, including lawyers and judges' staff, and, where applicable, litigants, jurors, and witnesses."

The best mode of dissemination may depend on available resources and local needs and may include such forms as the internet, the press, and mail. Finally, public education will be needed to motivate the public to consider the evaluative information that has been gathered, understand its significance, and act upon it.

Reviews need not only be conducted near the end of the judge's term to provide voters or commissions screening or nominating judges with enough information needed to reach decisions on retention of the judge. Midterm reviews may also be conducted, and if desired, shared only with the judge. Without midterm reviews, a judge may receive only limited feedback and therefore may lack the normal evaluative information, which might lead her to change and improve.

Without a formal judicial performance review procedure, judicial accountability may rest on various ad hoc measures. For instance, a witness to such negative judicial performance (such as a lawyer, juror, or a judge) may file a complaint about it or a newspaper reporter may cover it. However, a complaint may never become public even if substantiated; and, in any event, it may not be pursued by public authorities in a public manner. The conduct may not bear on a judge's fitness to serve (an issue for the judicial conduct commission), but it may bear on whether the judge should be retained (an issue for voters in retention elections or commissions charged with renominating judges). Nor is the press the answer. Many examples of poor performance are not newsworthy and therefore may not be covered. Also, reliance on episodic information cannot provide the systematic collection of information that judicial performance review requires.

Furthermore, conventional wisdom is that some are reluctant to report unprofessional conduct of judges to the authorities. Among their possible concerns are that the report may not remain confidential and find some way back to the judge and that the judge who is the subject of the complaint may retaliate. To address these concerns, safe and confidential channels should be created for witnesses to report such information, and witnesses should be protected from retaliation.

Judges themselves may be reluctant to report unprofessional judicial conduct by their colleagues. Yet judges may have an institutional incentive to address problems with their peers for the benefit of the court system. The public is too likely to equate problems with individual judges anywhere with problems of all judges everywhere. "[P]eople tend to mix all courts together. If their experience with a judge is that judge is biased and ignorant, they're not going to assume other judges are better."[43]

Without a formal judicial performance review procedure, judicial accountability may rest on various ad hoc measures [and lack the] systematic collection of information [on] judicial performance [that is required].

Although private organizations such as bar associations or political parties sometimes evaluate judges, such evaluations may fall short compared to judicial performance reviews. For example, these private evaluations may commonly share some or all of the following deficiencies: the use of vague and unpublished criteria or untrained evaluators for making evaluations; the receipt of reluctant or guarded responses from sources of information who may be fearful of disclosure (even if information given is promised to be kept confidential); the absence of a systematic method for collecting information from those with experience before the judge (and thus having insufficient data); a lack of sufficient time or resources for the evaluators to obtain adequate information on the judge; a lack of public trust in the evaluation process because of a lack of transparency or public input in the process; the use of opaque recommendations and conclusions about a judge, such as blank statements of "qualified," which tell the public little about the judge and certainly nothing about the raters' reasons for providing the recommendations;[44] and the presence of apparently inconsistent or arbitrary results, with candidates with similar attributes being rated differently.[45] In addition, although some political par-

43. Remarks of Professor Pamela Karlan, Stanford Law School, Remarks at the Georgetown Law Center and American Law Institute Conference: *Fair and Independent Courts: A Conference on the State of the Judiciary*, Washington, D.C., Sept. 29, 2006, http://www.law.georgetown.edu/news/documents/CoJ092906-karlan.pdf (hereinafter, Karlan Remarks). To the same effect, *see* Mississippi Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209, 218 (Miss. 2006), available at http://www.mssc.state.ms.us/Images/Opinions/CO37615.pdf, at 16 (proceeding against Justice Court judge in Mississippi; noting that "Justice courts will ordinarily have a much greater volume of cases than our state trial courts or appellate courts. Our citizenry's overall perception of the entire judicial system in this state is quite often a result of contact with our justice courts, since the vast majority of our citizens will have little or no contact with our state trial or appellate courts, other than for jury service.").

44. In an exceptional situation, a nominee for a federal judgeship in the Eastern District of New York, now Judge Dora Irizarry, however, was subject to detailed, negative bar comment for temperament issues. Raymond Hernandez, *Pataki Choice for Judgeship Is Assailed*, N.Y. TIMES, Oct. 2, 2003, at B1; Michael Cooper, *Governor Defends His Embattled Choice for a Federal Judgeship*, N.Y. TIMES, Oct. 3, 2003 at B4; Norman L. Greene, Letter to the Editor, *Courtroom Courtesy*, N.Y. TIMES, Oct. 6, 2003 at A16 (letter to the editor on Irizarry matter). Nonetheless, with New York senatorial and gubernatorial support, the candidate was confirmed as a judge by the United States Senate. *See also* Editorial, *Pataki's Controversial Federal Judge*, N.Y. TIMES, Oct. 3, 2004, at A15. *Cf.* Zeidman, *Careful*, *supra* note 29 at 478 ("Quickly, I came to realize that the legal community has its own pinstripe version of the police department's oft-noted 'blue wall of silence.' It was extremely uncommon for anyone to have anything particularly critical to say. In short order I came to more fully appreciate the phrase 'damning with faint praise.'")

45. To the extent that commission ratings can sometimes be erratic, consider the description of a fictional judge of a music contest where it was common knowledge that the ratings are questionable but no one protests the "consensual hoax":

[J]udges, whose performance is a matter of great public concern, should be subject to improved evaluation techniques and in some states that is happening already.

ties have established screening panels to evaluate candidates, it is unclear whether the screening is fairly conducted or influenced by political party leaders.[46] Furthermore, political party screening panels may not function under articulated and enforceable rules, much less transparently.[47]

Without judicial performance review, the judiciary lacks the type of procedure applied in many business organizations, with "merit" raises and evaluations, or even in a classroom, with student evaluations of professors. This does not mean that business organizations always function fairly, that evaluations are consistently reasonable and appropriate, and that raises are fairly and scientifically (as opposed to whimsically or invidiously) distributed. Nor need it be argued, of course, that judges should be awarded merit increases (as opposed to having fixed salaries) or made employees at will (instead of having guaranteed or life terms). Rather, this article only observes that judges, whose performance is a matter of great public concern, should be subject to improved evaluation techniques and in some states that is happening already.[48] A recent report explained why the public and the judges themselves will benefit from judicial performance evaluation, as follows:

> [Judicial performance review] is, at heart, no different than the routine performance evaluations that many Americans encounter in their own jobs. It is an opportunity to assess periodically a worker's strengths and weaknesses, and make sure that the "employee" and the "employer" are focused on the same goals. Just as an employee who performs well on her evaluation can congratulate herself on a job well done, judges who receive strong evaluations can be confident that their approaches to the job are effective. Conversely, just as an employee who rates poorly in some areas understands the need to improve, judges who do not perform well in certain areas will recognize the need to do better. Just as workplace evaluations lead to more efficient and more confident employees, judicial evaluations can lead to more effective and productive courts.[49]

Judges may also benefit from favorable judicial performance review when attacked in retention elections for their decision making.[50]

3. PRE-JUDICIAL EDUCATION—SHALL THE LAW SCHOOLS DEVELOP A PROGRAM?

The subjects of judicial education and examinations were raised by the Fordham symposium. Possible suggestions included a judicial training program (or "judicial studies graduate school") or a test like a bar examination.[51] Observations were made about the international experience where judges must pass through "academic and practical training."[52] Although judges in the United States are not typically required to complete any courses before becoming judges today, judging is a skill that arguably may be enhanced through education before judicial service begins. Most of the available educational offerings today are "in-service and continuing professional education for judges already selected and serving."[53] To correct any deficiencies in judicial education,

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> There is not even a proper scoring form, just a ream of Tawside Council-headed notepaper on which I draw four columns then circulate it to the other judges, indicating that they do the same. We shall mark separately for technique, interpretation and musicality. . . . Add the marks together, divide by three, top average is the winner.
>
> I have done this sort of thing before and never with an easy conscience.…There is no fair way to rate a winsome ten-year-old against a pimply matriculant, and on different instruments to boot. Injustice is inbuilt, but the public demands a winner and we must deliver one. Everyone knows the system is rotten, but we perpetrate a consensual hoax in the hope of filching a few prime-time seconds to remind viewers that there are greater heights in life than politics, sport and popstardom.

NORMAN LEBRECHT, THE SONG OF NAMES 26 (2002).

46. *See* Editorial, *The City: Brooklyn's Lessons*, NY TIMES, June 10, 2007 ("[C]andidates in some counties will be screened by independent expert panels. That could help a bit. But while the panels will vet candidates the party leaders will still make the final choices.… Eventually the court or the legislature will conclude that it simply isn't right to pack the courts with cronies, even vetted ones.")
47. *See* Lopez Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (2007).
48. *See* Sam Skolnik, *Taking Cash Power Out of the Judiciary: Court Reformers Want Judges to Be Appointed, at Least at the Beginning*, LAS VEGAS SUN, Mar. 20, 2007, available at http://www.lasvegassun.com/sunbin/stories/sun/2007/mar/20/566610617.html (Nevada proposed constitutional amendment to appoint judges, with a judicial performance evaluation plan); Sam Skolnik, *Judges Win Again and Again: Bill's Revival Might Limit Voters' Say on Who Serves on the Bench*, LAS VEGAS SUN, June 7, 2007 (Nevada Senate passes appointive selection proposal; second passage required plus voter approval), available at http://politics.lasvegassun.com/2007/06/bills_revival_m.html; and Citizens Commission, *Final Report, supra* note 3, at 16 (Minnesota commission proposal to appoint judges, with a judicial performance evaluation plan). For an overview of judicial performance evaluation, *see* Rebecca Love Kourlis and Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability,* 90 JUDICATURE 200 (2007).
49. SHARED EXPECTATIONS, *supra* note 14, at 4.
50. Jean E. Dubofsky, *supra* note 39, at 339; SHARED EXPECTATIONS, *supra* note 14, at 76-78.
51. Zeidman, *Careful*, *supra* note 29, at 481-2.
52. *Id.* at 482.
53. Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial L.L.M. Degree*, 52 J. LEGAL EDUC. 130, 134 (2002). *See also* Zeidman, *Careful*, *supra* note 29, at 482.

legal educators may need to consider precisely how and which opportunities for judicial education may be provided. [54]

E. Unifying the Reform Movement on Appointive Systems

Various bar associations and other organizations have supported appointing judges. Obtaining consensus within the reform movement on how an appointive plan should be designed is a different matter. In New York, for instance, three bar associations, the New York City Bar Association, the New York County Lawyers Association, and the New York State Bar Association, have each proposed different plans for appointing judges, with varying degrees of detail.[55] A common area of contention involves how to select the judicial nominating commission. The American Judicature Society website, which describes a number of state plans, reflects a general practice that elected officials select the commissioners, with commissioners including both lawyers and non-lawyers. [56] However, in some instances, a limited number of commissioners may be selected not by elected officials but by other methods, including by law schools or bar associations.

Some plans permit a large number of selections to be made by the appointing authority, others permit fewer. The disadvantage of allowing a substantial number of selections by the appointing authority is that it may create the perception that the authority controls the process. This may in turn cause a decline in applications to the judicial nominating commission except by persons close to the appointing authority;[57] where the appointing authority has substantial control over the selection of nominating commissions, cronyism and political rewards may be perceived as determining judicial selection.[58]

Various . . . organizations have supported appointing judges. Obtaining consensus . . . on how an appointive plan should be designed is a different matter.

A New York City Bar Association task force report proposed a plan, which has various public officials selecting unspecified organizations and the organizations selecting all the commissioners.[59] No state appointment plan relies exclusively (much less heavily) on organizations to select commissioners.[60] For example, some states use bar associations for the selection of certain commissioners, and New York City currently provides for 2 out of 19 commissioners for nominating New York City judges to be selected by law-school

54. Amy, *supra* note 53 at 130-131 (suggesting that educators should consider making available degree programs or courses in the judicial process for prospective judges). Some undergraduate law schools or continuing legal education providers may be concerned whether there would be interest in such courses from those who are not yet judges and may never be judges. This obviously needs to be explored. One suggestion might be for law schools to cross-list the courses with a political science department if the law school is part of a university or to offer them every other year. The cross-listing might increase the numbers of students available by drawing from two separate schools.
55. *See* New York City Bar Ass'n, Recommendation on the Selection of Judges and the Improvement of the Judicial Selection System in New York State (2006), http://www.nycbar.org/pdf/report/Judicial_Selection_TaskForceReport_Dec2006.pdf (hereinafter, NYC Bar Report); Action Unit No. 4, N.Y. State Bar Ass'n, A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges (1993), http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Legislation/NYSBA_Model_Plan_for_selecting_judges.pdf (hereinafter, the NYSBA 1993 Plan), and N.Y. State Bar Ass'n, *Memorandum*, Jan. 23, 2007, http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Legislation/MeritSelection.pdf (hereinafter, NYSBA 2007 Plan); and *see* John Caher, *State Bar Offers Two Plans to Reform Judge Selections*, N.Y. L.J., Jan. 23, 2007; and New York County Lawyers Ass'n, *Judicial Selection in New York State: A Roadmap to Reform*, May 8, 2006, http://www.nycla.org/siteFiles/Publications/Publications248_0.pdf (hereinafter, NYCLA Report). The NYC Bar Report was republished in 62 Rec. 89 (2007). Citations to the NYC Bar Report in this article are to the report individually online, not to The Record. The NYC Bar Report as published in The Record is also available at http://www.nycbar.org/Publications/record/vol_62%20 _no_1.pdf
56. *See generally* Table 2 (Composition of Nominating Commission) of American Judicature Society, Judicial Merit Selection: Current Status (2003), http://www.ajs.org/js/JudicialMerit Charts.pdf (describing state by state how nominating commissions are selected). Other variations involve the election of a certain number of judicial nominating commissioners by bar association members, such as in the case of Missouri, members of the Missouri bar. *See* http://www.ajs.org/js/MO_methods.htm It is unclear why, if elections are a poor way to select judges, they are a reasonable way to select judicial nominating commissioners. Many factors, however, affect the proper functioning of judicial nominating commissions, including the rules and regulations governing their operations and the abilities of the commissioners. *See also* Zeidman, *Careful*, *supra* note 29, at 479 (asking "how we can select commissioners who, within the necessary framework of diversity, are best able to perform the commission's stated task. Who are the best qualified to evaluate who are the best qualified for the bench?")
57. Greene, *Perspectives, supra* note 7, at 962-3; Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 Alb. L. Rev. 597, 605 (2005).
58. *See* Caher, *Outgoing Governor, supra* note 22. The article dealt with appointments to the New York Court of Claims where there is no judicial nominating commission restricting the governor's power to select judges. The governor's selections included persons notably close to him politically. This is an example of what may occur if a governor selects without a commission and even where a commission exists but is subservient or obedient to a governor's wishes. The governor's control over the selection of commissioners, of course, need not require the commissioners to follow the governor's wishes once selected; however, the structure of the commission may lead to the impression that that is occurring.
59. NYC Bar Report, *supra* note 55.
60. *See generally* Table 2 (Composition of Nominating Commission) of American Judicature Society, *supra* note 56.

The Fordham . . . symposium issue [published a] model act for judicial selection by appointment . . . which borrows from some existing plans . . . and contains various innovations.

deans, subject to the mayor's approval.[61] A plan relying exclusively on organizations to select commissioners would, among other things, leave no one person accountable for the ultimate choices. An appointing authority would merely select an organization, and if the organization selected an unqualified person, the appointing authority could not be blamed and could shift criticism to the organization.

The roles of appointing authorities vary in judicial selection reform plans as well. The New York State Bar and the New York County Lawyers Association plans have local authorities appointing many judges with local jurisdiction.[62] In contrast, the New York City Bar plan has the governor appointing local judges outside New York City, with the mayor selecting local judges within New York City.[63] Moreover, the New York City Bar and New York County Lawyers Association plans provide for commission-based reappointment for appointing judges after the conclusion of their terms;[64] until recently, the New York State Bar Association plan proposed retention elections, but it now has apparently abandoned them.[65]

Advocates of appointive plans may need to consider not only which type of plan is likely to be accepted, but also which plan works well; and these may be two different things. For example, it may be easier in some circumstances to get the governor's support for a plan by allowing him to control the selection of all or most of the judicial nominating commissioners. But the cost of doing so may be a plan which is functionally indistinguishable from a plan in which a governor selects nominees unilaterally, and that is an invitation for political patronage.

One potential unifying factor among the reformers would be the presence of credible proposed legislation supporting appointive selection. Thus in May or June 2007 when New York State Governor Eliot Spitzer proposed Program Bill No. 34, which contained a constitutional amendment for a commission-based appointment plan, the New York State Bar Association promptly issued a press release supporting the plan and seeking its approval and wrote a letter to New York State legislators accordingly. [66]

F. A Model Judicial Selection by Appointment Act

The *Fordham Urban Law Journal* published in its symposium issue my model act for judicial selection by appointment.[67] This model act borrows from some existing plans of judicial selection by appointment and contains various innovations. Since it is a model act, it provides jurisdiction-dependent alternatives, which may be used without disturbing the integrity of the overall structure. For example, variations might include the number of judicial nominating commissions and commissioners, the extent to which commission proceedings are kept confidential, and the existence of legislative ratification of judicial appointments.[68]

The model act addresses many matters discussed at the symposium, including establishment of judicial nominating commissions to propose candidates for an appointing authority to select from; use of multiple nominating commissions to permit statewide and local authorities to select judges (*i.e.,* decentralizing the nominating and appointing functions); specification of criteria to be considered by judicial nominating commissions in proposing nominees; identification of the persons who should select judicial nominating commissioners; safeguards to prevent appointing authorities from controlling the commissions by limiting their communications with commissioners (essentially establishing a firewall), with sanctions for breach; required training of judicial nominating commissioners; a code of conduct and rules of procedure for judicial nominating commissioners; a mandate that diversity be considered by judicial nominating commissioners; oversight over the judicial nominating commissioners by a judi-

61. City of New York, Mayor's Advisory Committee on the Judiciary, Exec. Order No. 8, § 5(a), Mar. 4, 2002, http://www.nyc.gov/html/acj/downloads/pdf/exec_order_8.pdf. Although the law schools may nominate candidates for the commission, the Mayor has the right to approve or disapprove the nominated candidates or request additional candidates. *Id.* at §5(a).
62. NYCLA Report, *supra* note 55, at 9; NYSBA Report, *supra* note 55, at 5.
63. NYC Bar Report, *supra* note 55, at 19-20.
64. NYCLA Report, *supra* note 55, at 11; NYC Bar Report, *supra* note 55, at 19.
65. *See* NYSBA 1993 Plan, *supra* note 55, at 16 (providing for retention elections). The NYSBA 1993 Plan, however, was older than the NYCLA Report and NYC Bar Report, and it predated some politicized retention elections, such as that involving the 1996 rejection of former Tennessee Supreme Court Justice Penny White. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 313 *et seq.* (1997). The NYSBA 2007 Plan abandoned retention elections.
66. See Press Release, *New York State Bar Association Endorses Governor Spitzer's Merit Selection Plan,* June 20, 2007, available at http://www.readmedia.com/news/show/New_York_State_Bar_Association_Endorses_Governor_Spitzer_s_Merit_Selection_Plan/2072. The governor's plan has important principles in common with prior bar association commission-based appointive selection plans as well as other classic appointive selection plans and presents a promising opportunity for New York judicial selection reform. Analyzing the details of the governor's plan and suggesting refinements are beyond the scope of this article.
67. Greene, *Judicial Appointments Act*, *supra* note 25.
68. If legislative ratification is required, a provision is needed to deal with the situation in which the legislature rejects the nominee of the appointing authority. An issue is whether following a rejection, the appointing authority is limited to selecting from the remaining nominees or whether an additional nominee should be added. A better policy is for the judicial nominating commission to add a nominee after a rejection lest the legislature be in a position to keep rejecting nominees until the appointing authority is forced to select the one the legislature favors.

cial nominating review commission to ensure compliance with legislative mandates; judicial performance review for judges seeking retention or reappointment (an important element of any appointment plan); and reselection by a commission rather than by retention elections, following substantial public input.[69]

As did the symposium presentations and other articles, the model seeks to point the way to the development of a good appointive system, which is not only likely to be passed but also likely to serve the states' purposes in attracting and retaining qualified judges. In the next section, this article will consider a substandard judiciary consisting primarily of non-lawyer judges governing New York's Town and Village Courts.

II. NON-LAWYER JUDGES: THE CASE OF NEW YORK'S ELECTED TOWN AND VILLAGE COURTS

> Recent criticisms of the courts…have "highlighted some problems that have existed for some time.". . . The [New York S]tate's Commission on Judicial Conduct has said that…investigation of misconduct by the town and village justices consumes a large share of its resources.... [T]he president of the State Magistrates Association, the justices' organization, said he knew of no need to give court officials more power to oversee the justice courts.[70]

> [L]awyers and officials said they could not publicly challenge the [town or village] justice because of his power here.[71]
>
> What is being done about those [Town and Village] Courts?[72]

A. Introduction

The preceding section considered systems best suited to identify, select, and retain the judges who are most likely to perform well in their judicial roles. This section addresses courts in New York (as in other states) in which judges lack the basic credentials of a law degree and legal experience and yet still serve on the bench in some courts of limited jurisdiction. Among other things, it will set forth some of the serious problems reported about the judges and the courts, ongoing efforts to address them, and the outlook for such courts, including whether they should be permitted to continue with non-attorney judges and, if so, why.

[J]udges [in some courts] lack the basic credentials of a law degree and legal experience and yet still serve on the bench. . . .

B. The *New York Times* Series

The Town and Village Courts became a national story when "exposed" in a series of articles in the *New York Times* in the fall of 2006;[73] however, the word "exposed" is not intended to connote "discovered." Problems with these courts have long been known. "During the last 50 years in particular, observers have expressed dissatisfaction with the lay judge system, asserting that non-attorney judges inherently lack the requisite training to ensure due process and enforce other critical constitutional and statutory protections."[74] Non-lawyer judges obviously could not pass through a legitimate judicial nominating commission applying normal criteria for selection as a judge—especially graduation from an accredited law school. According to New York's 2006 report on these courts, 72% of the nearly 2000 Town and Village Court judges are non-lawyers.[75]

The Town and Village Courts are New York's "most numerous and diverse trial courts, [l]ocated in all 57 counties outside New York City"[76] and provide "accessible venues to resolve criminal and civil disputes pursuant to State law:"[77]

> [They] enjoy the same criminal jurisdiction as any other "local criminal court," including the Criminal

69. Greene, *Judicial Appointments Act*, *supra* note 25. In addition to the model provisions, other reforms are possible. For instance, a state may provide that vacancies on judicial nominating commissions must be advertised so that qualified persons will have an opportunity to apply. *See e.g.*, Maute, *supra* note 19, at 412 (describing British nominating commission as follows: "Commissioners must be selected through an open application process….). In addition, judicial nominating commissioners may be required to take an oath of office committing themselves to comply with the legislative or administrative scheme for the commission.
70. William Glaberson, *Senate to Review Oversight of Town Courts*, N.Y. TIMES, Dec. 12, 2006, at B2 (hereinafter, Glaberson, *Oversight*).
71. William Glaberson, *A Small-Town Judge's Personal Justice Stirs Concern and Attracts Scrutiny*, N.Y. TIMES, Dec. 14, 2006, at B8 (hereinafter, Glaberson, *Personal Justice*).
72. Paraphrase of comment by a United States Supreme Court justice to the author in September 2006 after the justice read a *New York Times* article on the Town and Village Courts. The name is withheld because the comment was "off-the-record."
73. William Glaberson, *Broken Bench: In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006 (hereinafter, Glaberson, *Tiny Courts*); William Glaberson, *Broken Bench: Small-Town Justice, with Trial and Error*, N.Y. TIMES, Sept. 26, 2006; and William Glaberson, *Broken Bench: How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006.
74. New York State Unified Court System, *Action Plan for the Justice Courts*, Nov. 2006, http://www.courts.state.ny.us/publications/pdfs/ActionPlan-JusticeCourts.pdf , at 14 (hereinafter, *Town and Village Report*).
75. *Town and Village Report*, *supra* note 74, at 10. The New York State Constitution authorizes non-lawyers to serve as judges. *Id.*
76. *Town and Village Report*, *supra* note 74, at 8. There are 1,277 of these courts in "925 towns and 352 villages ranging from sparsely populated rural municipalities to densely populated suburban localities with over 100,000 residents and many characteristics of mid-sized cities." *Id.* The courts are also the subject of task forces of the Fund for Modern Courts and New York City Bar Association and a study by the Special Commission on the Future of the New York State Courts. *See* http://www.moderncourts.org/Advocacy/town/index.html, http://www.abcny.org/PressRoom/PressRelease/2006_1027.htm and http://www.nycourtreform.org/notices.shtml.
77. *Town and Village Report*, *supra* note 74, at 8.

New York "demands more schooling for licensed manicurists and hair stylists" than for these local judges.

Court of the City of New York, the City Courts outside New York City and the District Courts of Nassau and western Suffolk Counties on Long Island. By investing in them such broad criminal jurisdiction, the Legislature empowered the [courts] to arraign all crimes (including the most serious felonies) allegedly committed in the locality, and to adjudicate misdemeanors, traffic infractions and other violations.[78]

Although the *New York Times* series is about "the lowest tier in New York's state system," the situation is not anomalous: it is "a tier that is replicated in many other states of the country."[79] Non-lawyer judges reportedly serve in many states besides New York.[80]

The *New York Times* articles on these judges were critical (if not scathing), one quoting a judge as follows: "'I just follow my own common sense….And the hell with the law.'"[81] As the *New York Times* found, there was a pattern of poor judicial performance typified by either ignorance of the law or a willingness to overlook it. "Many [town and village justices] do not know or seem to care what the law is. Justices are not screened for competence, temperament or even reading ability. The only requirement is that they be elected."[82] The *Times* article further indicated of the judges that "[M]any—truck drivers, sewer workers or laborers—have scant grasp of the most basic legal principles. Some never got through high school, and at least one went no further than grade school."[83] Among the many problems documented in the exposé included "justices [in Town and Village Courts who] have illegally jailed people, threatened their enemies, protected their friends and made grievous legal errors, with little supervision or penalty. The law often counts for little, because three-quarters of the justices are not lawyers."[84] Another judge holds sway through fear: "[Town and Village Court] Judge Head rules Keeseville, and God help you if you oppose him…."[85] As the *Times* commented, "It is impossible to say just how many of those [Town and Village Court] justices are ill-informed or abusive."[86]

The *Times* pointed out that New York "demands more schooling for licensed manicurists and hair stylists" than for these local judges.[87] New York's Chief Judge Judith Kaye spotlighted the problem of lack of training as well. Commenting in a 1983 dissent on the minimal training of the judges, then New York Court of Appeals Judge Judith Kaye noted, that "[d]espite the courses prescribed for nonlawyer Town and Village Justices, their training in the law, and especially their exposure to the complexities of a criminal jury trial, do not approach a law school education and experience at the Bar."[88] As Judge Kaye wrote, the use of non-lawyer judges endangers the rights of criminal defendants:

> Appellant, facing the possible deprivation of his liberty, had the right to trial before a law-trained Judge [citation omitted]. The right to effective assistance of counsel and the right to trial by jury, both so jealously guarded, lose force without a law-trained Judge to insure that motions are disposed of in accordance with the law, that evidentiary objections are properly ruled on, and that the jury is correctly instructed....Because of the technical knowledge required to insure that defendants facing imprisonment are afforded a full measure of the rights provided to them, use of non-law-trained Judges is a procedure that "involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[89]

78. *Town and Village Report*, *supra* note 74, at 8 (footnotes omitted). Their civil jurisdiction includes "civil actions where the amount in controversy does not exceed $3,000 exclusive of interest and costs, and may grant orders of protection and other relief in sensitive disputes that might be adjudicated in Family Court." *Id.* at 2. They also handle summary landlord-tenant proceedings. *Id.* at 9. In both civil and criminal cases, they "must be prepared to select fair juries, appoint interpreters, decide pre-trial motions, conduct trials, render evidentiary rulings, issue written opinions, prepare records of proceedings for appellate review and generally supervise the effective operation of their courts." *Id.* at 9.
79. Karlan Remarks, *supra* note 43.
80. Other states that appear to have non-lawyer judges in some courts, according to the American Judicature Society's website, www.ajs.org, include Colorado, Georgia, Louisiana, Mississippi, Nevada, New Mexico, and Texas. This is not intended to be an exclusive list of affected states, all of which may be compiled from the website.
81. Glaberson, *Tiny Courts*, *supra* note 73.
82. Glaberson, *Tiny Courts*, *supra* note 73.
83. Glaberson, *Tiny Courts*, *supra* note 73.
84. Glaberson, *Personal Justice*, *supra* note 71.
85. Glaberson, *Personal Justice*, *supra* note 71. The judge attended college without graduating and had no law degree; "the only training that New York has given its justices for decades is six days of initial schooling and an annual refresher course." *Id.*
86. Glaberson, *Tiny Courts*, *supra* note 73.
87. Glaberson, *Tiny Courts*, *supra* note 73. The judges have reportedly been required to receive less training than hair-removal-waxing technicians, nails specialists, and massage therapists. *See* Mark Alcott, President, New York State Bar Association, Testimony Before the New York State Assembly Committees on Judiciary and Codes: Reform of the New York State Justice Courts, Dec. 14, 2006, at 2-3 http://www.nysba.org/Content/NavigationMenu/About_NYSBA/Presidents_Page/JusticeCourtReformTestimony.pdf
88. People v. Charles F., 60 N.Y.2d 478, 470 N.Y.S.2d 342, 345 (1983) (Kaye, dissenting), *cert. denied sub nom.* Charles F. v. New York, 467 U.S. 1216 (1984).
89. People v. Charles F., 470 N.Y.S.2d at 344-5 (Kaye, dissenting, quoting from Estes v. Texas, 381 U.S. 532 (1965)) (citation omitted). The majority held that the defendant had no absolute due-process right under New York or federal law to trial before a judge who is a lawyer. This was the sole basis upon which the defendant had sought to appeal his conviction.

The same should apply to civil litigants whose rights and property also may be jeopardized by non-lawyer judges.[90] As Judge Kaye noted, "'a lay person, regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar.'"[91]

The foregoing is not intended to suggest that a law degree and experience at the bar guarantee that a person will be a good judge, and one must concede that some with such credentials are not good judges. One may likewise concede that some non-attorney judges may handle cases well. Society commonly relies on education and experience to indicate minimal competence in the field, however, and it is reasonable to require them. A medical degree does not ensure that one is a good doctor, but it is necessary for one to practice medicine, subject to other applicable professional licensing requirements.

But degree and experience aside, the evidence is growing and perhaps irrefutable that the non-attorney judges lack the knowledge to do their jobs. A New York City Bar Association Task Force on Town and Village Courts' report on the judges thus states in sweeping fashion:

> Interviews and responses to questionnaires distributed by the Task Force reflect the almost unanimous view that the training and education program until now is deficient and that the justices do not have adequate knowledge about most of the relevant laws, constitutional guarantees, and legal procedures, including substantive law, pretrial and trial procedures, ethics rules, administrative functions, fiscal responsibilities, rules of evidence and presumptions.[92]

This paragraph identifies so much that the justices may not know that one must wonder what, if any, important matters they *do* know. According to the task force, more training is in order. But the task force also cites a comment by New York's Judicial Institute to the effect that whatever training is given to the justices must be simplified: *i.e.,* "what is critical for the project is that those who make presentations be capable of teaching an audience of non-lawyers whose education ranges from high school graduates to those with graduate degrees."[93] The requirement of simplification alone hardly inspires confidence in the system, let alone in the capability of the judges.

[T]he evidence is growing and perhaps irrefutable that the non-attorney judges lack the knowledge to do their jobs.

This article is not in a position to evaluate the case studies set forth in the *New York Times* series. Nor does this article purport to determine whether the *New York Times* overemphasized the abuses in the system (for journalistic effect or otherwise) as compared to its successes (if any); used a proper or improper sampling of cases (*e.g.,* unduly considered new or old cases or overlooked certain cases); or, in general, used proper methodology in reaching its conclusions about the Town and Village Courts.[94] Nor may it compete with those who actually visited the Town and Village Courts, including undoubtedly some courts in poor areas with insufficient (or any) lawyers or resources and some in prosperous areas; taken testimony on the courts as is being done by the Special Commission on the Future of the New York State Courts; or undertaken any independent empirical research on how well any of the Town and Village Courts are working, let alone whether any are functioning well. Furthermore, it recognizes that studies are ongoing, and some final reports are yet to be written.

But even if the *New York Times* series is not conclusive evidence, many concur that these courts require serious inquiry

90. Although rights in civil and criminal litigation may be different in various respects (such as the right to counsel), the American civil legal system arguably should require a law-trained judge in civil cases as well.
91. *Charles F.*, 470 N.Y.S.2d at 345 (Kaye, dissenting).
92. The New York City Bar Association Task Force on Town and Village Courts, *Recommendations Relating to Training for Town and Village Justices and Court Clerks,* June 11, 2007, at 3 (hereinafter, *Training Recommendations*), available at http://www.nycbar.org/25_recommendations.htm.
93. *Training Recommendations*, *supra* note 92, at 7-8. The stated mission of the New York State Judicial Institute is to serve as a "center for education and research designed to enhance the quality of the courts and ensure that the New York State Judiciary sets the standard for judicial excellence around the country" (http://law.pace.edu/JI/index.html). The New York City Bar Association Task Force has issued several reports, which appear to be interim in nature. Besides *Training Recommendations*, the Task Force has issued New York City Bar Association Task Force on Town and Village Courts, *Memorandum on Justice Court Technology*, Mar. 6, 2007, and New York City Bar Association Task Force on Town and Village Courts, *Recommendations Relating to Assisting Town and Village Justices,* June 11, 2007 (hereinafter, *Assisting Justices*). The reports are expressly stated to be interim in nature since they "do not preclude further investigation by the Task Force and recommendations for structural or organizational changes in the Town and Village Courts." *Assisting Justices*, at 1. *Training Recommendations*, at 1, adds, to the same effect, that recommended "development of extensive training programs" are not viewed by the Task Force "as a substitute for changes in structure, jurisdiction, or funding source if such changes are shown to be needed after our study is complete….[N]o assumption will be made that these [training] recommendations are all that is required for the long run." All the New York City Bar Association Task Force reports mentioned in this article are available at http://www.nycbar.org/25_recommendations.htm, as is the final Task Force report, *Recommendations Relating to Structure and Organization* (Oct. 30, 2007).
94. The *New York Times* described its methodology as follows:

> …The *Times* reviewed public documents dating back decades and, unannounced, visited courts in every part of the state. It examined records of closed disciplinary hearings. It tracked down defendants, and interviewed prosecutors and defense lawyers, plaintiffs and bystanders. The examination found overwhelming evidence that decade after decade and up to this day, people have often been denied fundamental legal rights.

Glaberson, *Tiny Courts*, *supra* note 73.

[T]he concept of a non-attorney judge seems as self-contradictory today as the concept of a doctor without a medical degree.

and reform, if reform is even possible. It is no coincidence that private court reform task forces are examining the problem and filing reports; and it is not for nothing that New York has already instituted administrative reforms (their sufficiency aside) and is holding ongoing legislative and commission-sponsored hearings, as discussed in the next section. Finally, the concept of a non-attorney judge seems as self-contradictory today as the concept of a doctor without a medical degree.

C. The Government Response to Town and Village Courts

Since the *New York Times* series, the courts have been subject to legislative[95] and administrative[96] scrutiny. The New York State Office of Court Administration, whose concern over the Town and Village Courts antedated the *New York Times* series, announced limited "plans to increase training for the justices, to improve their supervision and to better monitor whether they are protecting basic legal principles like the constitutional right to a lawyer. . . . . The courts . . . are also to be required for the first time to keep a word-for-word record of their proceedings, like other courts in the state."[97] The "non-lawyer basic training program" would increase "from one week to seven."[98]

Hearings were scheduled before both houses of the New York State Legislature, with the first hearing held in December 2006. The first hearing exposed additional problems as a New York State District Attorney testified to "'jaw–dropping moments' of judicial incompetence. . . that cases simply vanished in the local courts for lack of attention, that some justices did not know how to conduct trials, and that some even committed crimes or violated ethical rules."[99] Other hearings are being held on the courts before the Special Commission on the Future of the New York State Courts, with testimony including, among other things, the need and feasibility of attorneys serving as judges in these courts.[100]

Even after the recent scrutiny, some reportedly have minimized the severity of the problem of using non-lawyer judges. Whether such sentiments will survive the current inquiries is unclear. Moreover, such reports do not address the question of whether such persons would voluntarily subject themselves to the Town and Village Courts, if they had a choice, or personally had a good experience there. For example, the president of an interested trade group for the Town and Village Court judges downplayed the significance of their lack of education. He testified at a hearing that judges who "are not lawyers 'know a lot of things lawyers don't know,' including 'two subjects relevant to small-town court cases,' namely, 'Trucks and game laws.'" [101] Despite recommending reforms, even the Town and Village Report on these courts likewise states that "most non-attorney justices perform their judicial roles admirably and well." [102]

95. William Glaberson, *State's Justice Courts to Face Scrutiny by Assembly Panel,* N.Y. TIMES, Oct. 14, 2006; Glaberson, *Oversight, supra* note 70, at B-2.
96. For administrative action being taken with respect to the Town and Village Courts, *see* Town and Village Report, *supra* note 74. The Town and Village Report was in progress before the *New York Times* series was published. *See also* Press Release, New York State Unified Court System, *First Steps in Action Plan to Improve Quality of Local Justice Courts, New Appointments and Administrative Changes Implemented to Enhance Justice Delivery in New York's Town and Village Courts* (Jan. 16, 2007), http://www.courts.state.ny.us/press/pr2007_4.shtml; William Glaberson, *Big Plan for Small Courts: Seeking Money to Fix Them*, N.Y. TIMES, Jan. 30, 2007. *See also* Joel Stashenko, *Panel Begins Review of State's Town and Village Courts,* N.Y.L.J., June 14, 2007 (hereinafter, Stashenko, *Panel Begins Review*) (describing the first of a schedule of hearings held by the Special Commission on the Future of the New York State Courts; among other testimony, a town justice described non-lawyer judge's deficient knowledge of the law and recommended establishing a district court system, which would be staffed by attorneys only to replace the current system).
97. William Glaberson, *Justice Courts in Small Towns to be Upgraded*, N.Y. TIMES, Nov. 22, 2006.
98. John Caher, *Debate on Town Judges Questions Need for Degree*, N.Y. L.J., Jan. 30, 2007 (hereinafter, Caher, *Debate*).
99. William Glaberson, *Assembly Hearing Looks at Reform of New York's Town Courts*, N.Y. TIMES, Dec. 15, 2006, at B-4 (hereinafter, Glaberson, *Assembly Hearing*).
100. *See* Stashenko, *Panel Begins Review*, *supra* note 96 (describing the first of a schedule of hearings before the New York Special Commission on the Future of the New York State Courts). The website for the Special Commission is http://www.nycourtreform.org/. The transcript of the hearing held by the Special Commission on June 13, 2007 is available at http://www.nycourtreform.org/AlbanyHearingTranscript61307.pdf.
101. William Glaberson, *Assembly Hearing*, *supra* note 99.
102. Town and Village Report, *supra* note 74, at 43. *See also* Caher, *Debate*, *supra* note 98, reporting a similar statement by New York State's then chief administrative judge "that the vast majority of non-lawyer justices serve ably and responsibly." One might wonder whether such a finding might logically justify a reduction in the education or experience requirements for other judgeships, at least in courts of limited jurisdiction, since non-lawyers are evidently doing so well. No one would seriously suggest such a reduction, however.

    Other unsubstantiated contentions in support of non-lawyer judges include the one made by the chair of a New York State Senate committee opposing a requirement of law degrees for the town and village justices, stating: "A lot of towns and villages think their justices are doing a fine job not being attorneys, and I agree…." William Glaberson, *"Deeply Concerned," Special Panel Will Extend Study to Small-Town Courts*, N.Y. TIMES, Feb. 24, 2007, at B1, B5. To begin with, no empirical evidence was presented to back up the assertion of what the towns and villages think, and no basis was provided for the senator's statement of agreement with their alleged thinking. One would suspect that a poll of the victims of Town and Village Court injustice would yield a different view, however. In contrast to the senator's statements, the chair of a New York State Assembly committee concluded after legislative hearings that justices should be required to have law degrees, although she acknowledged the existence of political opposition to such a requirement. *Id.*

"[T]he unique education that law school provides can empower judges to discern, apply and shape the law in ways that non-attorneys can find difficult, if not impossible."

According to the report, the judges "take very seriously their judicial roles, and their duties continually to improve their knowledge of the law, and over the years exceptions to these principles have been relatively few in number."[103] The report does not indicate what percentage of non-attorney judges fall into the category of performing well and how many are the exceptions. In any event, both statements appear to be undocumented and lack empirical support in the report.

Furthermore, the Town and Village Report's complimentary statements are self-contradictory, as the report itself recognizes the importance of legal education for judges to enable them to do their jobs. As the report notes, "there is nearly unanimous agreement that the unique education that law school provides can empower judges to discern, apply and shape the law in ways that non-attorneys can find difficult, if not impossible."[104]

D. An Anecdote Regarding Judicial Immunity

The abuses that the *New York Times* detailed have led some to question whether such non-lawyer judges even merit the civil or criminal immunity to which judges are normally entitled. This hypothetical issue was addressed through an anecdote related by Stanford Law School Professor Pamela S. Karlan at the Georgetown Law Center and American Law Institute program on *Fair and Independent Courts: A Conference on the State of the Judiciary* in September 2006. Professor Karlan noted that the *New York Times* series "talks about . . . the truly shocking abuses that occur there [in Town and Village Courts]. Individuals with ten hours of legal training and not even a high school diploma, let alone a law degree, are meting out justice for $900 a year, putting people in jail, setting bail, denying them protective orders, imposing staggering fines on them, and announcing they are the law."[105] According to Professor Karlan, this influenced the thinking of some law students in her class concerning whether the judges merit judicial immunity:

> I [Professor Karlan] was teaching a class on Section 1983 litigation, and I was doing absolute judicial immunity. And every year … I explain to the students the appellate process solves a lot of these problems. Mandamus deals with a lot of these problems. Threatening judges with financial ruin will obviously affect their decisions. And most years, I get agreement from the students immediately. But I didn't this year, because of the Glaberson [*New York Times*] series [on Town and Village Courts], and students who raised their hand and described what had happened to them as undergraduates caught speeding in New York.[106]

Professor Karlan's reference to the students who find themselves with a speeding charge presumably before non-attorney judges makes an important point. Where a system of justice goes awry in a Town and Village Court before a non-attorney justice, the victim of the injustice may find the failure much less forgivable than the public at large. Uninvolved parties may find it easier to defend town and village justices: *e.g.*, by saying that they are good judges, that remedying the situation would be too costly, or that attorneys are scarce, thus necessitating reliance on non-attorney judges. This may not be so easy for those directly affected by those courts.

The loss of immunity—and thus the threat of financial ruin—would essentially eliminate the courts.[107] It is doubtful whether anyone would wish to serve as a judge under those circumstances. However, the question remains whether New Yorkers may be better off without these courts.

E. The Outlook

To the extent that the courts sometimes fill a need and cannot be reformed, studies might be conducted to determine whether the work of these courts could be absorbed by other existing courts or whether perhaps new courts could be created to take over the job of Town and Village Courts. Other

103. Town and Village Report, *supra* note 74, at 43.
104. Town and Village Report, *supra* note 74, at 41. The statement in the text that the education that "law school provides can empower judges to discern, apply and shape the law" is a reasonable answer to those who might contend that not all attorneys (*e.g.*, attorneys who principally handle commercial transactions) have the experience to be judges, only those whose experience is in the courtroom. Despite differences in experience among attorneys (including the presence or absence of courtroom experience), the law-school education is common to all. Non-attorney town and village judges by definition do not have it.
105. Karlan Remarks, *supra* note 43. Media news stories on the conference are available at Georgetown Law and American Law Institute, A Conference on the State Judiciary: Conference in the News, http://www.law.georgetown.edu/judiciary/news.html (last visited Apr. 2, 2007).
106. Karlan Remarks, *supra* note 43. Professor Karlan appeared to be making a point about the Town and Village Courts rather than proposing a solution by eliminating judicial immunity for anyone. Indeed, in the earlier part of her presentation, she supported judicial immunity as a general proposition, noting that "it's not entirely clear what judicial independence means. To be sure, there are some things we agree—all of us—that judges should be free from….[T]hey shouldn't face personal liability." *Id.* She also supported judicial immunity from suit in Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 539-40 (1999) on the grounds that errors may be corrected on appeal and that "[w]e must allow judges to be free to make some mistakes in order to avoid chilling the forms of bold action we really support" (hereinafter Karlan, *Two Concepts*).
107. Although the criticism of Town and Village Courts seems to focus on non-lawyer judges rather than lawyer judges, Professor Karlan did not suggest in her brief anecdote whether some of her students were suggesting ending immunity for non-lawyer judges only or for all Town and Village Court judges.

areas of inquiry might include whether judges could travel to the relevant localities served by these courts, litigants could travel to where other judges are sitting, or litigants and judges could be linked through telecommunications to handle necessary legal work remotely. Other possible reforms might include stripping from the courts jurisdiction to hear more serious cases or providing litigants with the option to have their cases heard by other courts with attorney judges.

That the courts are reportedly popular with some or that a remedy is costly need not drive the inquiry.[108] Popularity and cost are dubious concerns where the rights of individuals are at risk. Even the so-called scarcity of lawyers for these courts is a questionable consideration, as then New York State Court of Appeals Judge Judith Kaye noted in a dissent in 1983: "The argument that it would be difficult throughout the State to find law-trained persons to serve as Judges cannot preclude what is constitutionally required."[109] One might similarly question whether barbers in isolated municipalities should be licensed to practice dentistry or witch doctors to practice medicine where true professionals are only available at a distance. Furthermore, the argument from scarcity of attorneys appears to be wrong factually in New York. Judge Kaye added that there are many lawyers in New York State who can handle the job, citing an earlier case.[110]

New York should not accept courts which dispense second-rate (or worse) justice. As the Town and Village Report states: "Because Justice Courts play such a pivotal role in New York's justice system, they must pursue the same, Statewide standard of justice that New Yorkers expect and deserve in every case and in every other court."[111] The key question to be answered then, interim reforms aside, is what will New York (and other states as well) do about those courts. This remains unresolved as of the writing of this article.

III. REFLECTIONS ON JUDICIAL INDEPENDENCE

> The importance of good institutions (independent judiciaries, for example) to economic growth and development is widely acknowledged. Nations whose governments operate under systems of checks and balances, whose citizens enjoy civil rights, and where property rights are well protected see both higher levels of wealth and higher rates of wealth creation.[112]
>
> [J]udicial independence has two distinct meanings: First, it refers to the capacity of a judge to decide cases according to the facts as she finds them and the law as she conceives it to be written, without inappropriate external interference ("decision-making independence"); Second, it refers to the capacity of the judiciary as a separate and independent branch of government to resist encroachment from the political branches, and thereby preserve its institutional integrity ("institutional independence"). In both cases, judicial independence is not an end in itself, but an instrumental value designed to protect the rule of law.[113]

"[J]udicial independence is not an end in itself, but an instrumental value designed to protect the rule of law."

The first part of this article covered the Fordham symposium, which addressed judicial selection reform for state court judges. The second part considered a particular example of a judicial system—namely, the Town and Village Courts in New York State—where judges are neither selected nor trained properly. The third part will touch on the concept of judicial independence. It will not attempt to define it any better than Professor Charles Geyh has in the introduction to this section. Rather, it will present some of the relevant issues to think about when using that phrase.

To say that judicial independence is desirable or undesirable is to say little unless there is agreement on what judicial independence means. Fixing its meaning requires attention to key questions, including independence from what and to do what. No one wants judges to be free to do whatever they like. A judge who functions free of the constraints of positive law

108. Town and Village Report, *supra* note 74, at 16. *See id.* at 12 *et seq.* detailing the history of the courts, including proposals to abolish the courts which have been rejected. The report notes that "New Yorkers consistently have rejected broad structural changes to their Justice Courts." *Id.* at 14.
109. People v. Charles F., 470 N.Y.S.2d at 346 (Kaye, dissenting).
110. People v. Charles F., 470 N.Y.S.2d at 346 (Kaye, dissenting). *See also* Caher, *Debate, supra* note 98, reporting another argument in favor of non-attorney judges based upon scarcity of attorneys ("'We are not all from Appalachia, and we are not all woodchucks, but there are areas where there are no attorneys….'"). However, the Rockland County District Attorney responded that any shortages might be addressed by using attorneys from surrounding areas as judges. *Id.*
111. Town and Village Report, *supra* note 74, at 2.
112. F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence*, 94 Am. Econ. Rev. 712, 726 (2004).
113. *See* Geyh, *supra* note 8.
114. Karlan, *Two Concepts, supra* note 106, at 557. In an update of *Two Concepts,* Professor Karlan discussed Alabama Supreme Court Justice Tom Parker's statement in an op-ed article in 2006 that states need not follow the United States Supreme Court decision in Roper v. Simmons, 543 U.S. 552 (2005) (executing defendant who commits otherwise capital crime before the defendant is 18 years of age violates the Eighth Amendment). According to Professor Karlan, Justice Parker's position is that of claiming "the right to rule independently of existing precedent." Karlan, *Judicial Independences*, *supra* note 13, 95 Geo. L.J. at 1052. In cases in which controlling precedent is unclear, Professor Karlan questioned whether "lower court judges should feel bound to decide the case before them in the way most likely to be affirmed by the higher court or whether they are free to push their own views as far as possible, aggressively distinguishing existing precedents and perhaps even challenging the higher court to revisit the issue." *Id.* at 1053.

Fixing [the] meaning [of judicial independence] requires attention to key questions, including independence from what and to do what.

"in pursuit of his personal vision of justice" reflects "judicial independence run wild."[114] There are systemic constraints to deter such conduct, including codes of judicial conduct (requiring patience, temperance, courtesy, competence, and fairness)[115] and precedent. Judges may also be inclined through their long pre-judicial experience and training to follow the law rather than their personal preferences and biases. [116]

In many cases, statutory or common law requires a particular result,[117] and there is little question what a judge should do. But some commentators have questioned what acting "according to law" in other contexts means, since they doubt whether there is an immutable source of law, which a good judge may find and apply.[118] Also, critical legal studies proponents have argued that rather than deciding according to law, judges make value choices, which are designed to preserve the "political domination of the elites whose values they share"; and some political scientists have commented on the importance of a judge's personal views and attitudes—rather than the law—in her decision making.[119]

Judicial independence certainly means that judges are not coerced to decide cases.[120] A good example of coercion is "telephone justice" as described by United States Supreme Court Justice Stephen Breyer. According to Justice Breyer, this is the practice that occurred when Soviet party bosses told judges how to decide cases, and the judges followed orders because their livelihood was at stake.[121] A related fictional account occurs in the movie *Miracle on 34th Street*, where a political boss threatened a judge with the loss of his job if he were to decide that Kris Kringle is not Santa Claus.[122] The fact that we do not have telephone justice—at least that we know about—in the United States should not lead to complacency. This is especially the case since there is a perception that judicial decisions where judges are elected may be affected by a desire not to alienate campaign contributors or voters. Thus, judicial independence is a condition free from license and coercion in decision making, but beyond those borders, there is a fair ground for discussion.

In attempting to illustrate judicial independence, commentators sometimes resort to historical accounts of cases in which judges acted "independently" to apply the law. For example, contrasted with the Soviet judges (who were not independent) are the "hero judges." These are the judges who have stood up to the popular will to make decisions with which many disagreed, although the law required the decisions. Judges who make such decisions, according to Chief Justice John G. Roberts, Jr. (quoting President Reagan), are patriotic, since it is the job of a judge to do the unpopular thing if necessary to enforce the rule of law:

> At a reception for judges in the White House, President Reagan said that the judiciary's . . . "commitment to the preservation of our rights often requires the lonely courage of a patriot." Those words have stuck with me since I heard them. And to the extent that attacks on judicial independence emanate from conservative quarters, I would commend to those quarters those words from the leading conservative voice of our

115. *See generally* Norman L. Greene, *Preface, Executioners, Jailers, Slave-Trappers and the Law: What Role Should Morality Play in Judging*, 19 CARDOZO L. REV. 863 (1997) (judges deciding against conscience); Norman L. Greene, *A Perspective on "Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*," 61 BROOK. L. REV. 1122 (1996); and Norman L. Greene, *A Perspective on Temper in the Court: A Forum on Judicial Civility*, 23 FORDHAM URB. L.J. 709 (1996) (judicial intemperance). *See also* Norman L. Greene, *Introduction, Politicians on Judges: Fair Criticism or Intimidation*, 72 N.Y.U. L. REV. 294 (1997) (judicial independence). The above are published symposia, which the author organized at the Association of the Bar of the City of New York, each of which is preceded by his preface or introduction.
116. CHARLES GARDINER GEYH, WHEN COURTS AND CONGRESS COLLIDE (2006), at 279-80. Indeed, since New York's non-attorney justices lack any such training, this observation militates in favor of less rather than more independence for such judges.
117. Karlan, *Two Concepts, supra* note 106, at 548 ("Precedent takes some potential outcomes completely off the table. When the law is clear, parties may not even litigate…"). *See also id. at* 544 ("When it comes to statutory cases, our general answer is that we want very little, if any, independence. Assuming that a statute is constitutional, the job of the courts is to vindicate the statutory scheme created by the legislature.").
118. GEYH, *supra* note 116, at 261 (citing to former Second Circuit Court of Appeals Judge Jerome Frank).
119. GEYH, *supra* note 116, at 262.
120. Karlan Remarks, *supra* note 43. As previously noted, Pamela Karlan has written extensively on judicial independence. Karlan, *Two Concepts, supra* note 106, and Karlan, *Judicial Independences*, *supra* note 14. Among other things, *Two Concepts* notes that "judicial independence has both negative and positive aspects. Judges must be both free *from* certain kinds of pressures or influences and free *to* envision and realize certain goals."). Karlan, *Two Concepts*, *supra* note 106, at 536. (emphasis in original).
121. Testimony of Justice Stephen Breyer, Before the House Committee on the Judiciary, Subcommittee on the Courts, the Internet and Intellectual Property, *Oversight Hearing* on *Judicial Compensation and Judicial Independence*, Apr. 19, 2007, at 8 http://www.uscourts.gov/testimony/JusticeBreyerPay041907.pdf ("I heard the judges [in a newly independent Russia] talking about something called 'telephone justice.' That, they said, occurred when the party boss would call to tell the judge how to decide a particular case. Why did we do it, they asked each other…. Because we needed the apartment for our families, the education for our children, the economic necessities that the Communist Party controlled.").
122. Norman L. Greene, *Introduction, Politicians on Judges: Fair Criticism or Intimidation*, 72 N.Y.U. L. REV. 294, 294-5 (1997).

> time, "the lonely courage of a patriot." President Reagan recognized that it was the job of judges to make unpopular decisions; unpopular with the populace at large, unpopular with particular social or professional elites. But he also recognized that the courage required of them was the courage of a patriot because in making those unpopular decisions, they were fulfilling the framers' vision of a society governed by the rule of law.[123]

President Reagan's phrase (as quoted by Chief Justice Roberts) "lonely courage of a patriot" to describe the hero judge recalls the "courageous federal judges" who struck down segregation in the face of community opposition in enforcing *Brown v. Board of Education*[124] in the South.[125] It is commonly accepted that *at times*, a judge is called upon to identify and strike down unjust laws or to uphold laws that would eliminate injustice, however unpopular the decision may be. "The strong claim in favor of judicial independence rests on the case in which there is a clear legal rule, but either the rule or one of the litigants is unpopular."[126] Of course, the use of the phrase "at times" leaves open certain questions, such as the following: at what times, which laws are unjust, why is the judge's decision unpopular, and is there is any legitimate basis for the unpopularity.

The image of the lonely courage of a patriot works only sometimes, depending on what the patriot-judge does or who the parties are. If a decision is unpopular with a reviled group, such as segregationists wishing to enforce Jim Crow laws, the situation is clear. But suppose the decision is unpopular with parents who support a child protective law stricken down by a court: are we so sure that the judge is acting patriotically or even admirably?[127] What about an unpopular decision that creates an injustice in a particular case, such as by adhering to a time limit that prevents submission of powerful proof of innocence in a criminal prosecution?

The image of the lonely courage of a patriot works only sometimes, depending on what the patriot-judge does or who the parties are.

Indeed, the repeated use of Southern federal judges as examples of judicial courage [128] suggests either the brilliance of the example or the paucity of situations in which a consensus on injustice is reached. Alternatively, it may be the prudent course to reach back to safe historical examples. However, beyond such examples, there is still controversy over which laws are unjust, and unpopular decisions may be legitimately unpopular. For example, today some may agree that harsh criminal laws (including the death penalty) are unjust; some may not. [129] Others may agree that laws facilitating abortion (or particular types of abortion) are unjust, some may not.[130] Of course, a consensus could probably be reached over a ruling which has the effect of freeing (or not freeing) an innocent person.

Some have suggested that greater independence might be achieved were judges to view themselves as one-term judges without a possibility of being reselected.[131] As one judge noted in a private conversation with me, he was unconcerned with the political consequences of his actions since "I did something else before becoming a judge, and if necessary, I can do something else afterwards." Therefore, he implied, he would likely make his decisions without regard to public outcry if he thought that the decisions were called for by the law and the

123. John G. Roberts, Jr., Chief Justice, United States Supreme Court, Remarks to Georgetown Law Center and American Law Institute, *Fair and Independent Courts: A Conference on the State of the Judiciary*, Washington, D.C., Sept. 28-29, 2006, http://www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf. *See also* U.S. Courts Newsroom, *Chief Justice Praises Judicial Independence*, Oct. 3, 2006, http://www.uscourts.gov/newsroom/judicialindependence.html Chief Justice Roberts's remarks were given on Sept. 28, 2006. The conference was not the first occasion in which the chief justice had used the phrase. *See, e.g.,* The ALI Reporter, *Chief Justice Roberts, Justice O'Connor, and ABA President Greco Stress the Importance of Judicial Independence; Pollock, Henderson, and Koh Also Speak at Annual Meeting* (Summer 2006), https://www. ali.org/ali/R2804-05-chiefjustice.htm (Chief Justice Roberts referred to the lonely courage of a patriot at the American Law Institute Annual Meeting on May 15, 2006).
124. Brown v. Board of Education, 347 U.S. 483 (1954).
125. Karlan, *Two Concepts, supra* note 106, at 558. According to Professor Karlan, the judges who enforced *Brown* did follow positive law, specifically the Fourteenth Amendment. *Id.*
126. Karlan, *Two Concepts, supra* note 106, at 541.
127. Karlan, *Two Concepts, supra* note 106, at 556 ("It is easy to say that the judges who enforced the Fugitive Slave Acts or who presided over the legal apparatus of the Third Reich made pacts with the devil. But what about the judges who refused to enforce child labor laws because they thought them dangerous intrusions on that most fundamental human liberty, freedom of contract?") Decisions that are unpopular may also be so because they are poorly written decisions, not because the judge is a hero.
128. Karlan, *Two Concepts, supra* note 106, at 558 ("Our current image takes as the exemplars of judicial independence the Supreme Court of *Brown v. Board of Education* and the courageous federal judges who enforced it in the South.").
129. Robert F. Worth, *Appeals Court Upholds Federal Law on Executions,* N.Y. Times, Dec. 11, 2002 (story reports that Second Circuit reversed ruling finding federal death-penalty law unconstitutional).
130. For discussions of unjust laws, see generally the following symposia preceded by my introductory articles, Norman L. Greene, *Preface, Executioners, Jailers, Slave-Trappers and the Law: What Role Should Morality Play in Judging?*, 19 Cardozo L. Rev. 963 (1997) (judges deciding against conscience); Norman L. Greene, *A Perspective on "Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France,"* 61 Brook. L. Rev. 1122 (1996) (judges and other lawyers complicit with fascism). *See also* with respect to abortion law, Karlan, *Two Concepts, supra* note 106, at 555-7.
131. *But* see, *e.g.,* Commission on the 21st Century Judiciary, American Bar Association, Justice in Jeopardy 1, 9 (2003); G. Alan Tarr, *Designing an Appointive System: The Key Issues,* 34 Fordham Urb. L. J. 291, 310-11 (2007).

facts. Establishing one-term judges, however, has drawbacks. This may dissuade persons from choosing to interrupt their practices to become judges and deprive the public of an advantage in having experienced judges.

Furthermore, "the success of our judicial system should not be made to depend on all judges being heroes," although "[h]eroic judges can and have made impartial rulings in the teeth of public clamor."[132] Even if some judges can withstand the clamor, others cannot. They still require some tools to address the situation, including recusal to "disqualify themselves in cases in which they cannot be fair and impartial due to political pressures"[133] or resignation. Indeed, a federal circuit court judge voluntarily resigned when he recognized that politics might be impinging on his decision making.[134] But despite the availability of these courses of action, there is no assurance that a judge will adopt this approach, rather than silently yield to the voice of the crowd. Indeed, if the judge has given in to the pressure, it may be difficult to determine whether the judge did so out of coercion or out of disagreement or agreement with the prevailing law.

IV. CONCLUSION

It matters how appointive systems are designed, and considering how best to do this was one of the objects of the Fordham symposium. Whether a state seeks to improve its existing appointive system or change its system from elections to appointments, a state will find the Fordham symposium an important resource on a previously understudied topic.

Related to the appointment of judges is the question of who should be allowed to be a judge. The troubling conduct reported of judges in New York's Town and Village Courts, which are heavily populated by non-lawyer judges as are similar courts in other states, raises the issue of the failure of judicial selection in its most basic aspects: namely, selecting judges for courts who are not qualified by way of legal training and experience. By permitting non-lawyer judges to function in these courts, New York gives the appearance (if not the fact) of endangering the rights of at least some of its citizens. It is difficult to understand why retaining a system of non-lawyer judges is a reasonable response to the needs of New Yorkers and citizens of other states who have the same type of court or whether better approaches may be designed.

Finally, there is the related issue of judicial independence. This is not an area dominated by absolutes. Indeed, if asked whether our judiciary should act independently, the most candid answer may have to be that it depends on the circumstances. This article considers some of the circumstances on which the answer must rest.

It is critical for our judges to be well-qualified and neutral. We therefore need to ensure that the best candidates for the judiciary are selected, retained, and allowed to make the important decisions asked of the courts. This article addresses some of the considerations required to assist us to reach these goals.

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132. Geyh, *supra* note 8.
133. Bright, *supra* note 65, at 330.
134. *Id.* at 312. Third Circuit Judge H. Lee Sarokin resigned in 1996 when he began to consider how an opinion he was preparing could be used politically. *Id.* The possibility of judges rendering politically popular decisions to preserve their positions was recently recognized in a brief to the United States Supreme Court by the Association of New York State Supreme Court Justices in the City and State of New York. *See* Petition for Writ of Certiorari at 13, New York State Bd. of Elections v. Torres, __ U.S. __ (2006) (No. 06-766), in which the petitioners noted that having to run in primary elections could affect their decision-making, stating, "Having served on the bench for 14-year terms, these trial court judges are suddenly faced with the daunting task of re-entering politics. To compete effectively in primaries they will be under pressure to…render politically popular decisions." The petition for a writ of certiorari was granted. *See supra* note 47.