

# Court Review

Volume 43, Issue 2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 43, Issue 2

2006

## EDITOR'S NOTE

**M**y inaugural issue of *Court Review* contains articles examining judicial selection, retention, and independence. Public scrutiny of the courts is especially complicated. On the one hand, democratic theory supports a role for the citizenry in judging judges: Governmental transparency, accountability, and public input into governmental policymaking are important principles for strong, democratic public institutions. On the other hand, it seems counterproductive to have the third branch undergo the same kinds of inspections that officials elected to the executive and legislative branches of government undergo. Judges are supposed to operate independently and impartially, not looking over their shoulder when they rule on motions, render decisions, accept/reject cases for appellate review, and so on. Some argue the election of judges undermines public trust and confidence in courts. According to this line of analysis, it is no surprise that opinion polls reveal there is greater trust and confidence in members of the judiciary than those they elect to legislatures or state/federal executive positions. Interestingly, there is little empirical evidence examining the impact of judicial elections on public trust and confidence. The research that has been conducted reveals the issue is nuanced, not cut and dried. For example, a review of the literature concluded it is not the case that politics are absent when nominating commissions are involved, there is little evidence that accountability values are fulfilled by retention elections, and merit-selected judges do not appear to differ from elected judges (though there is some evidence that merit systems result in fewer minorities on the bench than election systems). Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002) (available at <http://www.ajs.org/js/LitReview.pdf>). An experimental survey found that whereas business campaign contributions and use of attack ads undermine the public's perceptions of government (both the judiciary and the legislature) it was also the case that judicial candidates' policy debates do not adversely impact trust and confidence in the courts. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, \_\_\_ AM. POL. SCI. REV. \_\_\_ (2008, forthcoming) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996302)). The articles in this issue on judicial selection, retention, and independence provide timely and insightful perspectives to the debates about the best ways to select and retain judges, who should be allowed to serve as a judge in our system, and potential encroachments on the independence of judges. In addition, we introduce a new feature for *Court Review*, "Social Science Research for (and in) the Courts," that will appear periodically in the journal. In this issue, Professor Brian Bornstein focuses on the correspondences between judges' and juries' decisions. Finally, effective this issue, *Court Review* will use continuous pagination. — Alan Tomkins



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 79. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to one of *Court Review's* editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com); or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: [atomkins@nebraska.edu](mailto:atomkins@nebraska.edu). Comments and suggestions for the publication, not intended for publication, also are welcome.

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# President's Column

Steve Leben

By the time you read this, Eileen Olds will have been busy working as the American Judges Association's president for some time. That means two things for me. First, I'll no longer be on the treadmill-like travel schedule that accompanies that office. Second, I'll be back at work as the editor of *Court Review*, getting its publication schedule back on track.

But before relinquishing this space, allow me a few moments to talk about the AJA and its work over the past year.

Like most professional associations, our potential is hindered a bit by the one-year term of our leaders. My wife heads up the medical staff at a large hospital in Kansas City; they revised their leadership structure in the past two years so that the president of their staff could serve more than a year, thus better enabling long-term thinking and long-term projects. In the one-year term, a person starts to get the hang of the job and its possibilities right about the time it's over.

For AJA, though, I'm not sure there's a better way, and most professional organizations—from the smallest to even very large ones like the American Bar Association—work this way. In this system, the AJA can best move forward when we continually build from year to year on the progress made in previous years.

My service as AJA president was made so much easier because of the excellent leadership we had for several years before me. Terry Elliott worked hard to make sure that we addressed matters of substance. Mike McAdam organized a stunning national conference that included production of a one-hour PBS program on judicial independence. Gayle Nachtigal insisted that we focus on providing a true voice for judges in general. Mike Cicconetti worked to maintain the AJA as a go-to leader for judges. And a great many others, including former presidents, members of our Board of Governors and committees, and our friends at the National Center for State Courts, have helped to build the platform from which we are able to do matters of importance to judges.

From this platform, together we have done a lot in the past year:

- AJA issued its first “white paper,” urging actions that will improve both actual and perceived procedural fairness in the courts. The paper was presented at our national conference in Vancouver, and further action on the recommendations contained in the paper should be expected.
- AJA obtained trademark protection for its role as the Voice of the Judiciary.<sup>®</sup> We had begun using this mark under Gayle Nachtigal's leadership, both as a testament to our actions and as an aspirational goal for our future. When another organization copied the mark, we registered it. We sought throughout the year to live up to that role.



- AJA issued a statement of support for a much-needed pay raise for New York state judges. These judges have not received a pay raise in 9 years—and have only received two raises in the past 20 years. Our statement received some coverage in New York, where we have nearly 150 members. But whether it received coverage or not, it was important for an organization that calls itself the Voice of the Judiciary to speak on a matter of this importance.
- AJA joined an amicus brief defending from constitutional attack the North Carolina law providing public financing for judicial elections. The brief was in *Duke v. Leake*, scheduled for oral argument in the United States Court of Appeals for the Fourth Circuit in December 2007; the brief emphasized the need for a judiciary that the public could respect as impartial.
- AJA's annual meeting was highlighted by a joint appearance by Justice Ruth Bader Ginsburg of the United States Supreme Court and Justice William Ian Corneil Binnie of the Supreme Court of Canada.
- AJA adopted a formal resolution supporting appropriate increases to mandatory judicial-retirement ages.
- AJA joined several other organizations in actively opposing the 2006 ballot proposal in Colorado under which appellate judges would have faced term limits, a proposal that was defeated at the polls 57% to 43% in November 2006.
- As AJA president, I took the opportunity to place newspaper op-ed pieces on appropriate subjects. An op-ed piece in the *National Law Journal* advocated real reforms to improve the judiciary, rather than the sort of ballot measures proposed in Colorado and South Dakota in 2006; the suggested reforms included appropriate and transparent judicial-performance evaluations, and the use of social-science research to improve court functions. An op-ed in the *Providence Journal* pointed out how judges decide cases on their merits, not on political grounds. I also participated in a debate before the American College of Trial Lawyers against the proponents of the South Dakota Jail-4-Judges initiative regarding appropriate reform of the court system.

From this base, the AJA will continue to move forward under the guidance of Eileen Olds and her leadership team in the coming year. I want to thank all of you who have helped the AJA and me during the past year. I also hope that you will come to our next educational conference—September 7 to 12, 2008—at the Westin Maui in Hawaii. Trust me when I say: You couldn't have a more beautiful and relaxing conference site. See you there.

# Judges vs. Juries

Brian H. Bornstein

This article introduces a new feature for Court Review, “Social Science Research for (and in) the Courts,” the purpose of which is to summarize recent research on social science topics that judges might encounter. Social science research has a long-standing, and sometimes tense, relationship with the law.<sup>1</sup> Nonetheless, there are signs that the courts’ receptivity to social science research is growing. The fields of psychology and the law and economics and the law have expanded considerably in the last 20 or so years. Because judges are increasingly likely to encounter social science issues, the goal of these columns is to provide “state-of-the-art” research summaries in a non-technical manner.

In contrast to the standard scholarly publication, the columns will not be heavily footnoted, but they will list a handful of relevant sources for further reading. As Court Review is the official journal of the American Judges Association, this inaugural column focuses on an issue that arises frequently in debates about court reform and that is central to discussions of judicial performance—the nature and extent of differences in judge and jury decision making.<sup>2</sup>

## JUDGES VS. JURIES

Critics of the jury often assume, explicitly or implicitly, that judges would in some sense “do better”—that is, reach verdicts that are more in line with the evidence, be less susceptible to extralegal influences, and so on.<sup>3</sup> There have been relatively few systematic studies of judicial decision making, perhaps because of difficulties in recruiting judges as research participants and the complexity of what judges do. Nonetheless, a number of social scientists have applied fundamental decision making models to judicial reasoning, encompassing judges at both the trial and appellate levels.<sup>4</sup> Whether judges’ decisions differ from juries’ decisions is, of course, an empirical question. Most attempts to answer this question fall into one of three general categories: archival studies of trial verdicts; surveys of judges’ opinions regarding jury trials over which they presided (often referred to as studies of judge-jury agreement); and experimental vignette studies in which judges serve as research participants.

## ARCHIVAL STUDIES

Archival studies compile data from a large number of

decided cases to assess the relationship between trial outcome and various factors, such as characteristics of the judge or whether the decision maker was a judge or a jury. Gregory Sisk and colleagues took advantage of a fascinating opportunity to analyze decisions made by 188 judges concerning essentially the same legal question, namely, the flurry of cases that posed constitutional challenges to the Sentencing Reform Act of 1984.<sup>5</sup> They found that judges’ decisions—and even more so their reasoning—varied depending on several social background variables, such as prior employment (e.g., prior experience as a criminal defense lawyer).

More germane to the question of whether judges’ decisions differ from jury verdicts, several studies have compared outcomes in jury versus bench trials. In one of the earliest, and still one of the best, exemplars of this approach, Clermont and Eisenberg analyzed a large number of state court trials. They found that plaintiffs were more likely to win, and recovered more in damages, when their cases were decided by a judge than when they were tried before a jury.<sup>6</sup> This observation suggests that jurors find civil defendants more sympathetic than do judges. Such a tendency is at odds with the claims made by

## Footnotes

1. See generally, JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* (6th ed., 2005).
2. The Column Coordinator, Brian Bornstein, welcomes comments from readers and suggestions for topics to be covered in future columns. They can be directed to bbornstein2@unl.edu or via phone at (402) 472-3743.
3. See, e.g., Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004); CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002).
4. For overviews of this approach, see, e.g., Edith Greene & Lawrence Wrightsman, *Decision Making by Juries and Judges: International Perspectives*, in *HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS* (D. Carson & R. Bull eds., 2d ed., 2003) (covering both

- trial and appellate court judges); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (trial); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (appellate); Jennifer K. Robbenolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?* 32 FLA. ST. U. L. REV. 469 (2005); LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* (2006) (appellate). Specific exemplars are discussed *infra*.
5. Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).
6. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

many tort-reform advocates that jurors are excessively pro-plaintiff and anti-defendant.

A number of more recent studies have focused on judge versus jury behavior in awarding punitive damages. For example, Hersch and Viscusi found that juries are more likely than judges to make extremely large, “blockbuster” awards and juries’ punitive awards are less strongly related to compensatory damages.<sup>7</sup> Eisenberg and colleagues, on the other hand, using similar data sets (but different statistical assumptions) found that judges and juries award punitive damages at about the same rate, and the ratio of punitive to compensatory damages is approximately the same for the two groups.<sup>8</sup> Punitive damage awards by juries were, however, more variable, and the groups’ respective tendency to award punitive damages varied depending on case type (i.e., financial vs. bodily injury). Thus, although archival analyses of punitive damages are somewhat inconsistent, it is clear that one cannot simply conclude that one group of decision makers is somehow outperforming the other.

With regard to criminal trials, there is some evidence that juries treat defendants more harshly. King and Noble<sup>9</sup> found that in two states (Virginia and Arkansas) that authorize jury sentencing in non-capital cases, juries meted out more severe sentences for most offenses. The authors argue that this difference reflects demographic and attitudinal differences between judges and jurors less than it shows the influence of procedural factors, such as greater restrictions on the sentencing options available to juries.

### JUDGE-JURY AGREEMENT

The classic study of judge-jury agreement was conducted by Harry Kalven and Hans Zeisel, who asked judges in thousands of cases to report both how the jury decided the case and how they would have decided if it had been a bench trial.<sup>10</sup> In civil cases, they found an agreement rate of 75-80% as to liability.<sup>11</sup> With regard to damages, judges would have awarded more in 39% of cases and less in 52% of cases, resulting in an overall tendency for judges to favor smaller awards. In criminal cases, they likewise found an agreement rate of approximately 75%. Again, however, the disagreements were somewhat asymmetrical: In the majority of cases where judges reported favoring a different verdict from that reached by juries, juries were more lenient (i.e., acquitting when judges would have convicted). In explaining the reasons for these disagreements, judges mentioned a variety of defendant characteristics capable of producing sympathy: age (i.e., youth or old age), gender, attractiveness, remorse, family responsibilities, and occupation (e.g.,

veterans, police officers, or clergy). Defendants who were rated as sympathetic engendered a higher disagreement rate than non-sympathetic defendants.

Kalven and Zeisel’s findings have stood up well under the test of time. Sentell found that a large majority (86%) of Georgia superior-court judges reported their agreement rate with jury verdicts in negligence cases as “about the same” as Kalven and Zeisel’s,<sup>12</sup> and a recent study by Eisenberg and colleagues of judge-jury agreement in criminal trials obtained a virtually identical agreement rate of 75%.<sup>13</sup> Although the latter study found the same sort of asymmetry as the earlier Kalven and Zeisel study (i.e., judges more likely to convict in cases where there was disagreement), the pattern was more nuanced, in that judges were actually more likely than juries to acquit when judges viewed the evidence favoring conviction as weak, but they were more likely to convict when they viewed the evidence as medium or strong.

Overall, then, these studies suggest considerable agreement between judges and juries; yet in the minority of cases where they do differ, judges could be characterized as somewhat “tougher”: They would award less in civil cases, and they *may be* (depending on the strength of the evidence) more likely to convict in criminal cases.

### EXPERIMENTAL VIGNETTE STUDIES

A number of experimental studies have presented judges with mock trials and asked them to evaluate the cases and render hypothetical verdicts. This approach, which has much in common with the jury-simulation literature, sacrifices the complexity and realism of an actual trial to obtain greater experimental control. The nature of the method affords a comparison between judges and laypeople (mock jurors), either directly, as part of the same study, or indirectly, where similar studies of laypeople have been performed.

The most comprehensive such study, conducted by Chris Guthrie and colleagues, assessed whether judges were susceptible to five different “cognitive illusions” to which laypeople (including jurors) are generally susceptible: anchoring (making estimates based on normatively irrelevant starting points, such as an *ad damnum*); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving events to have been more probable after one knows the event has occurred, also referred to as the “knew-it-all-along” effect); the representativeness heuristic (undervaluing relevant background statistical information, or base rates); and egocentric biases (overestimating one’s own abilities).<sup>14</sup> They found that judges were just as susceptible as laypeople to three of the five

7. Hersch & Viscusi, *supra* note 3.

8. Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006).

9. Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005).

10. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966).

11. The exact percentage varies depending on how one treats hung juries.

12. R. Perry Sentell, *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991).

13. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005).

14. Guthrie et al., *supra* note 4.

illusions; they were less susceptible to the other two (framing and representativeness), though they were still not completely immune to their effects.

Other studies have obtained generally comparable results. Judges, like most people, are not very successful at ignoring information they have been told to disregard,<sup>15</sup> and they actually *make* decisions based on factors other than those that they *believe* influence their decisions.<sup>16</sup> Conflicting with the results of King and Noble's archival analysis, at least one experimental study has found that judges tend to be somewhat harsher than mock jurors (to the extent that they differ at all) in criminal sentencing.<sup>17</sup> With respect to civil cases, vignette studies have demonstrated that trial-court judges and jury-eligible citizens behave quite similarly: They rely on more or less the same factors, and award roughly comparable amounts, in both non-economic and punitive damages.<sup>18</sup> Consistent with the archival studies, mock juror awards do tend to be more variable.

## CONCLUSIONS

These methodologies differ in a number of important respects. For example, studies of judge-jury agreement and vignette studies compare jury verdicts with judges' opinions for the *same* cases, whereas archival studies compare verdicts in cases tried by juries to verdicts in similar, yet still completely *different*, cases tried by judges. Thus, it is possible that the cases tried before juries and judges are in some respects fundamentally different. For example, lawyers and litigants might base the decision of whether to have a bench or a jury trial on subtle case characteristics, or they might choose to present different kinds of evidence depending on who the fact-finder is. Moreover, each method suffers from its own particular limitations: Archival studies can suffer from incomplete verdict reporting, experimental studies lack consequences for the participants and fail to embody the complexity of real trials, and judges offering post hoc opinions on a jury trial they oversaw might display retrospective memory bias or feel pressure to validate the jury's verdict.

On the other hand, the advantage of these multiple methodologies is that they potentially offer *convergent validity*, meaning that if different methods all point to the same general finding, then it is unlikely that the finding is limited to the particular circumstances of any single approach. With respect to the question of whether judges and juries differ, the research suggests that although there are some differences, the overall pattern of decision making is quite comparable for the two groups. On the whole, judges' decision making adheres to the same psychological principles as jurors' decision making; they

are much more similar than they are different, including their susceptibility to errors in reasoning. Moreover, any discrepancies might reflect countervailing tendencies. For example, most evidence suggests that judges are more likely to convict, but there is also some indication that they award less severe sentences than juries. Thus, there might be reasons for preferring a jury or a bench trial for certain types of cases (e.g., depending on the strength of the evidence, the nature of the injury, etc.), but an expectation that one or the other will reach a "fairer," "better," or "more favorable" verdict does not appear to be among them.

## RECOMMENDED READING

Edith Greene & Lawrence Wrightsman, *Decision Making by Juries and Judges: International Perspectives*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS § 3.5 (D. Carson & R. Bull eds., 2d ed., 2003).

Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?* 32 FLA. ST. U. L. REV. 469 (2005).



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15. Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

16. Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERS. & SOC. PSYCH. 805 (1975).

17. Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial*

*Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73 (1989).

18. Roselle L. Wissler et al., *Decision-Making about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999) (non-economic damages); Jennifer K. Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315 (2002) (punitive damages). There is some indication that, when judges and juries do differ in civil cases, jurors award greater damages. Wissler et al., *supra*; see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001).

# Thoughts About Enriching Judicial Independence by Improving the Retention Vote Phase of Appointive Selection Systems<sup>1</sup>

Hon. John F. Irwin and Daniel L. Real

*“At the core of public trust [in the judiciary] is the belief that judges are impartial.”<sup>2</sup>*

In August 1979, *Time* magazine featured an article titled, “Judging the Judges.”<sup>3</sup> In that article, nearly 30 years ago, was a discussion about a number of problems facing the judiciary as well as a discussion about potential reforms to address the problems. One of the problems discussed at some length was public perception that the judiciary lacked sufficient impartiality. While recognizing the emergence of judicial discipline systems to address partiality problems of sitting judges, the article also noted “a convincing argument for getting better judges to begin with.”<sup>4</sup> The article also recognized that, at that time, “half the states [had] turned to so-called merit selection for at least some judges” utilizing some type of a selection committee or nominating commission, a “selector” who chooses from candidates forwarded by the committee, and a “retention ballot” process of retention elections.<sup>5</sup>

As the *Time* article noted, one problem with voters going to the polls and having a say in choosing the people who resolve their disputes and enforce the law is that “most voters do not know much about the candidates for whom they are voting.”<sup>6</sup> As discussed below in this article, the same could be said about voters going to the polls and having a say in deciding whether

sitting judges should remain on the bench. Further complicating the process and the difficulties of ensuring both independence and competence is that “[d]efinitions of a good judge read like recommendations for sainthood: compassionate yet firm, at once patient and decisive, all wise and upstanding.”<sup>7</sup> The difficulty in finding the best possible process for locating and retaining judges who can live up to such lofty standards makes examining judicial selection and retention an especially meaningful undertaking.

In 2005, almost three decades after these very issues were being raised and discussed in *Time*, we examined them as part of a symposium on Judicial Independence at Fordham Law School in Manhattan, New York.<sup>8</sup> The present article is derived from an article, written for the symposium (and published in *Fordham Urban Law Journal*), that contains specific information about the merit selection system that exists in Nebraska.<sup>9</sup> The present article notes a number of examples of what appear to be steps in the right direction toward improving judicial selection processes as a whole and judicial retention processes as a part.

## I. POTENTIAL PROBLEMS WITH RETENTION VOTES IN APPOINTIVE SYSTEMS

Many states currently use a basic nonpartisan elective retention system.<sup>10</sup> Sitting judges stand for periodic retention votes,

### Footnotes

1. This article derives from a previous article originally published in the *Fordham Urban Law Journal* as Judge John F. Irwin and Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Judicial Retention Vote Phase of an Appointive Selection System*, 34 *FORDHAM URB. L. J.* 453 (2007).
2. *Judging the Judges*, *TIME*, Aug. 20, 1979, <http://www.time.com/time/magazine/article/0,9171,947362-1,00.html>.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* In this respect, the article quoted Daniel Webster: “There is no character on earth more elevated and pure than that of a learned and upright judge. He exerts an influence like the dews of heaven falling without observation.”
8. Symposium, *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 *FORDHAM URBAN L.J.* 1 (2007). See also [http://www.abanet.org/judind/pdf/fordham\\_symposium.pdf](http://www.abanet.org/judind/pdf/fordham_symposium.pdf). Videos of the various panels presented at that symposium can be viewed at: <http://video.google.com/videoplay?docid=5656379188749882220>; <http://video.google.com/videoplay?docid=7203689873046760924>; <http://video.google.com/videoplay?docid=-5802659044171916074>; and <http://video.google.com/videoplay?docid=4296908524674977612>.
9. John F. Irwin & Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Judicial Retention Vote Phase of an Appointive Selection System*, 34 *FORDHAM URB. L.J.* 453 (2007).
10. See the American Judicature Society’s webpage detailing judicial selection and retention procedures in the various states at [http://www.ajs.org/selection/sel\\_stateselect.asp](http://www.ajs.org/selection/sel_stateselect.asp).

and their names appear on general election ballots, although the retention election is not a partisan political event. The current system in states employing elective retention systems, however, does suffer from some basic deficiencies that prevent the system from fully ensuring the purposes of judicial quality and public participation. The deficiencies overlap greatly and can generally be divided into problems associated with non-participation by the public and problems associated with ineffective participation by the public.

First, elective retention systems suffer from the problem of non-participation by the public. “Voter roll-off,” or the phenomenon of a voter casting votes for higher profile issues on the ballot, such as executive and legislative offices, but not casting votes on matters of judicial retention, is widely recognized.<sup>11</sup> Studies reveal that judicial retention elections are “generally characterized by low voter turnout” and that “judicial retention elections attract the smallest turnout of all the types of judicial elections.”<sup>12</sup> Voter roll-off appears to be increasing; it averaged approximately 36% between 1976 and 1984, 32.4% between 1986 and 1996, and 29.5% in 1998.<sup>13</sup> Both the absolute numbers and the pattern of fewer citizens voting are signs of the decreasing effectiveness of the elective retention system.

Inasmuch as an effective judicial retention system should strive to achieve a good balance of promoting judicial quality and impartiality on the one hand and promoting public participation and accountability on the other hand, non-participation by the voting public can seriously undermine the desired balance. For example, if a significant portion of the voting public chooses not to participate in a judicial retention election, then sitting judges arguably have less imperative to act impartially and to strive for high standards of competence and temperance because a significant portion of the voting public will be choosing not to exercise any public accountability of the judges’ performance. If a judicial district comprises 1,000 voters, but only 700 cast votes on a particular judge’s retention, then the judge might actually need approval from only 351 voters, or slightly more than one-third of the voting public; effectively needing approval from only one-third, rather than one-half, of the voting public certainly undermines the balance of judicial impartiality/quality and public participation/accountability.

Second, elective retention systems also suffer from the problem of ineffective participation by the public. Even among the voting public that participates in judicial retention elections, some percentage of voters traditionally will vote “yes” or “no” on judges, either for no discernible reason, or for the “wrong” reason. For example, some voters will simply vote “no” on retention for any judge, either because of a generalized distrust of public officials, as a reaction to crime rates, or because of a

negative experience with the judicial system, rather than discerning specific judges who should not be retained. Similarly, some voters will simply vote “yes” on retention for any judge without considering whether each individual judge should or should not be retained. Discussion at the Fordham Symposium suggested that as many as 25 to 30% of participating voters always vote “no” on retention, regardless of judicial performance evaluation recommendations.<sup>14</sup>

Ineffective voter participation also disrupts the desired balance of judicial impartiality/quality and public participation/accountability, and arguably does so in an even more damaging manner than non-participation. Take, for example, the hypothetical scenario above where only 700 of the 1,000 voters in a particular district choose to participate in the judicial retention election. Not only is the determination of whether a particular judge should remain on the bench being left to a smaller voting public, but the determination is potentially severely skewed by the portion of those 700 voters who participate with either no discernible reason for casting a particular vote or with improper motivating forces driving a particular vote.

## II. POSSIBLE UNDERLYING REASONS FOR THE PROBLEMS

Both non-participation and ineffective participation result in similar disruptions to the desired balance of judicial impartiality and competence on one hand and public participation and accountability on the other hand. However, simply recognizing the goals of an effective judicial retention system and recognizing that the current system has problems that undermine those goals is not enough. It is also necessary to consider the possible underlying reasons for non-participation and ineffective participation by the voting public, so that suggestions can be made to address the underlying causes and, it is hoped, address the ultimate problems and make the elective retention system more effective.

Several of the major underlying reasons for the voting public’s non-participation or ineffective participation in judicial retention elections fall under the broad umbrella of “education.” These “education” related issues include the public’s

**Even among the voting public that participates in judicial retention elections, some percentage of voters traditionally will vote “yes” or “no” on judges, either for no discernible reason, or for the “wrong” reason.**

11. See William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Election Have Told Us*, 70 JUDICATURE 340, 342 (1987) [hereinafter Hall & Aspin, *Twenty Years*.]; William K. Hall & Larry T. Aspin, *The Rolloff Effect in Judicial Retention Elections*, 24 Soc. Sci. J. 415, 415 (1987).

12. Hall & Aspin, *Twenty Years*, *supra* note 11, at 342.

13. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79 (1999).

14. See also Thomas F. Whelan, *Symposium on the Best Appointive System for the Selection of State Court Judges*, 22 SUFFOLK LAWYER 24 (2006).

**[M]edia . . . generally provide very little coverage about particular judges standing for retention, and then usually provide only negative coverage about a particular judge who has been targeted for non-retention.**

general lack of understanding about the judicial branch in general and about retention elections in particular, the lack of available resources to inform the public about judicial independence and performance, and the efficacy of the resources that are available. Each of these issues contributes both to voter non-participation and ineffective participation.

Although American public education includes

significant instruction in government, including the three branches of government, the actual workings of the judicial system are not a prominent part of most curricula.<sup>15</sup> With respect to national government, students are taught: (a) details about the electoral college, including presidential succession and other details about the executive branch; and (b) details about how legislation is crafted, debated, and passed; (c) and details about the composition and election of senators and representatives. Students are taught comparatively very little about the Supreme Court justice nomination process, Congress's advise-and-consent powers, or the process through which the Supreme Court chooses, hears, or decides cases. With respect to state government, students are similarly taught details about the selection and workings of the executive and legislative branches of government, but very little about the judicial branch, other than its existence as a third branch. Beyond the general lack of education about the judicial branch, the voting public is generally entirely uneducated about what a judicial retention election is or what its purposes and goals should be.

It is reasonable to assume the lack of education about the judiciary and retention elections results in ignorance about the public's role in ensuring judicial independence, judicial impartiality, and judicial quality, and a related reluctance for voters to seek out the kind of information that would allow meaningful participation in a retention election. Even those voters who are informed and do desire such information, however, will encounter another obstacle: The lack of available

resources to inform the voter.<sup>16</sup> Currently there are very few resources available to inform voters about judicial independence, judicial retention, or specific judicial performance. For example, in Nebraska the State Bar Association's website contains links to pertinent resources; however, the information available about judicial performance is nonetheless limited.<sup>17</sup> Moreover, there is no evidence that a significant portion of Nebraska's voting public is even aware of the website or the resources contained therein. Other sources outside the bar association and its website, such as print, television, and radio media, generally provide very little information about most judicial retention elections. While traditional print, television, and radio media devote significant time to coverage of executive and legislative elections, they generally provide very little coverage about particular judges standing for retention, and then usually provide only negative coverage about a particular judge who has been targeted for non-retention. As such, rather than providing their audiences with meaningful information about the judicial branch of government, retention elections, and the information that voters need to make informed decisions about particular judges, these media tend to largely overlook judicial retention elections.

Finally, even those voters who are able to overcome the general lack of education about the judiciary, take a personal interest in learning about the judiciary and understanding retention elections, and make an effort to seek out available information from sources such as traditional media or the bar association will face the additional difficulty that the few available resources are generally inadequate to truly foster a meaningful decision. To return to the Nebraska example, the state bar association circulates judicial performance surveys for completion by attorneys. The surveys, however, ask only a handful of questions about each particular judge (ranging from less than ten questions for appellate court judges and less than fifteen questions for trial court judges), are typically extremely general in nature (such as asking for a rating from "excellent" to "very poor" on "Legal Analysis," "Judicial Temperament and Demeanor," or "Trial Management"), and provide very little opportunity for any meaningful explanation of an attorney's answers.<sup>18</sup>

In addition to the education-oriented issues that contribute to retention elections being less effective than possible, retention elections also suffer from being particularly susceptible to influence by political agendas. Partly because of voter drop-off and the underlying education-oriented problems already discussed, retention elections can be vulnerable to special interest

15. This statement, as well as the general observations that follow in this paragraph, are largely matters of the authors' personal observation bolstered by personal discussions with educators and citizens in the authors' local community. The general observations, however, are illustrated and confirmed by observing sources such as Social Studies Help, <http://www.socialstudieshelp.com>, a site that provides assistance for, inter alia, high-school advance-placement government students. A review of that site reveals that, although there is information provided on a variety of theoretical and practical topics, there is no information about the process of judicial selection or retention. See the Social Studies Help Center, <http://www.socialstudieshelp.com>.

16. See, e.g., David B. Rottman & Roy A. Schotland, *What Makes*

*Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1371-72 (2001) ("Starting as long as forty-five years ago, exit polls and other polls have shown a startling lack of voter awareness of even the names of [judicial] candidates."); Hall & Aspin, *Twenty Years*, *supra* note 11, at 342 ("Some voters do not vote in judicial retention elections because they lack enough information to cast an informed vote.").

17. See Nebraska State Bar Association's website, <http://www.nebar.com>.

18. See Nebraska State Bar Association, Public Information: Judicial Evaluation, [http://www.nebar.com/publicinfo/judicial\\_eval.htm](http://www.nebar.com/publicinfo/judicial_eval.htm) (containing links to past judicial evaluation questionnaires and results).

groups furthering political agendas that may or may not even relate to anything a judge has actually done.

One example of this phenomenon was the non-retention of Nebraska Supreme Court Justice David Lanphier in 1996. In the political campaign by a special group to foil the retention of Justice Lanphier, he was not accused of judicial malfeasance or incompetence; rather, the focus was on selected decisions rendered by the Nebraska Supreme Court that frustrated the public.<sup>19</sup> While on the Nebraska Supreme Court, Justice Lanphier participated in a number of decisions involving term limits and Nebraska's second-degree murder statute.<sup>20</sup> In response to a unanimous decision of the Nebraska Supreme Court holding unconstitutional a term-limits amendment passed through Nebraska's initiative process, advocates of term limits seized on public sentiment concerning a number of Nebraska Supreme Court decisions overturning second-degree murder convictions to mount a public campaign to have Justice Lanphier voted out of office.<sup>21</sup> Only two months before to the 1996 election in which Justice Lanphier stood for retention, founders of an organization called "Citizens for Responsible Judges" cited Lanphier's "disregard for the safety of [Nebraska] communities" and Lanphier's "willingness to set convicted murderers free on minor technicalities" while waging a very public and political campaign against him.<sup>22</sup> Justice Lanphier was ultimately not retained in office, with only approximately 38 percent of the voting public voting in favor of retention.<sup>23</sup>

### III. THOUGHTS ABOUT IMPROVING THE RETENTION VOTE SYSTEM

Identifying the apparent problems with existing elective retention systems and understanding the possible underlying reasons for those problems is the first step toward proposing meaningful reform. The next step is to address those concerns in a way that helps achieve the best possible system of retention, ensure optimum independence and optimum quality members of the judiciary, and recognize the inherent resistance to change that could complicate reform efforts. Additionally, meaningful reform should seek to provide both short-term improvements and long-term systemic change.

As a preliminary matter, it bears noting that elective retention can be effective. A 1991 study of over 900 judges from 10 states who stood for retention in elections concluded that elective retention systems actually influence the behavior of judges, both with respect to the rendering of competent decisions and temperament on the bench.<sup>24</sup> Surveyed judges indicated that, in their opinions, the best ways to win retention elections is to perform competently, to be fair and impartial, to

manage cases well, and to be knowledgeable.<sup>25</sup> The survey indicated that the vast majority of judges self-report that their behavior and performance on the bench are influenced by the accountability of having to stand for retention elections.<sup>26</sup>

There are reasons to believe the public will actually react differently to different judges rather than treat judges as interchangeable. Differences in the vote results among judges appearing on the same ballot is evidence that voters do discern among different judges (at least somewhat and albeit perhaps for unclear or improper reasons). For example, in the same 1996 retention election in which Justice Lanphier was not retained (as discussed above) by a vote of approximately 60% against retention and 40% in favor of retention, other judges appearing immediately after Justice Lanphier on the ballot were retained by votes of 70% or more in favor of retention.<sup>27</sup>

One approach to reforming judicial retention elections in states like Nebraska is to implement steps toward systemic change. These steps should include reforming education about the judicial branch at the "academic" level, increasing the amount of public information available about the judicial branch, and improving the quality of information available about the judicial branch. These steps can provide some short-term improvement in the meaningfulness and effectiveness of judicial retention elections, and can also provide long-term systemic change.

First, changes need to be made to improve "education" about the judicial branch. Although "education" is often a popular buzzword for reform efforts, to affect meaningful improvement in judicial retention elections, education must encompass far more than just voter guides and other adult education tools. Rather, changes need to be made at the academic level to promote more significant education about the judicial branch. School curricula need to include education about the workings of the judicial branch, the mechanisms of judicial selection and retention, and the importance of an independent and highly competent judiciary. It is vital that students begin learning about the judicial branch as a coequal branch of government, and about the role of the public in ensuring an independent judiciary. Employing school curric-

**A 1991 study of over 900 judges from 10 states who stood for retention in elections concluded that elective retention systems actually influence the behavior of judges . . . .**

19. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999).

20. *Id.* at 70.

21. *Id.* at 70-71.

22. *Id.* at 70.

23. *Id.* at 72.

24. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 (1994).

25. *Id.*

26. *Id.*

27. Judge Irwin's election results in the 1996 retention election serves as an example. Judge Irwin represents the same judicial district on the Nebraska Court of Appeals as Justice Lanphier did on the Nebraska Supreme Court. Judge Irwin's name appeared on the ballot immediately below Justice Lanphier's name, and Judge Irwin received a "yes" vote of more than 70%, almost exactly the opposite of Justice Lanphier's vote.

**[I]n addition to educational reform aimed at creating more interested and informed voters in the future, reform should also strive to make available more public information for today's voters.**

ula in this manner will change attitudes about the judiciary's role in government, and will begin to foster an attitude and an interest in the public at a younger age that will translate into future voters who are more meaningfully involved in utilizing and optimizing judicial retention elections. Although the fruits of academic curricula reform may not be apparent for some years to come, longer-range plan-

ning should be a part of any meaningful reform effort.

There is some empirical precedent for the suggestion that educational efforts related to the law can generate significant youth interest in a relatively short period of time. For example, mock trial programs, which teach young people about the process of how a typical trial might proceed, are now hugely popular and common in schools of all sizes across the country.<sup>28</sup> But the mock trial program has only recently become widespread. In just the past few years, this program, which started as a somewhat isolated and grassroots program, has grown in popularity and serves as an example of how quickly educational reform about the judiciary might take hold.<sup>29</sup>

Second, in addition to educational reform aimed at creating more interested and informed voters in the future, reform should also strive to make available more public information for today's voters. As noted above, the public information currently available on the subject of judicial retention is primarily limited to bar surveys, the results of which are not widely distributed or sought, and are given only limited coverage in print media.<sup>30</sup> More is needed than bar-survey results and/or "Judicial Retention Information Kits," available to voters on a bar association website,<sup>31</sup> as it is unlikely a significant portion of the voting public is aware of the availability of or capable of accessing these resources. Further, it is apparent that these limited resources are simply not enough to provide sufficient information to both foster interest and involvement and to make involvement meaningful.

As such, reform efforts aimed at providing more information to current voters should be broad reaching and varied. For example, there should be established a series of public forums to be held in venues all across the state on the subjects

of judicial impartiality, judicial selection, and judicial retention. Such forums could help to make the current voting public more aware of the system of judicial selection, the system of retention elections, and the purposes and goals of such a retention system, as well as the importance of the public's meaningful participation. In addition to public forums, traditional media should be encouraged to provide more consistent coverage about these topics, rather than providing coverage only of the most controversial judicial decisions or the most public campaigns seeking the ouster of sitting judges.

Further, public service groups that currently participate in voter education, groups such as the League of Women Voters,<sup>32</sup> should also be encouraged to make the judiciary and judicial retention elections a part of their voter education efforts. Public interest groups, which hold meetings or invite guest speakers on topics of interest to the group, could provide a valuable outlet for more judicial branch and judicial retention education.

Third, in addition to starting the educational process concerning the judiciary and judicial retention earlier and increasing the availability of resources to educate current voters, it is vital that the reform process seek to improve the quality of information available to the voting public. One way to improve the quality of information available to the public is to reform the existing bar surveys about judicial performance into more thorough judicial performance evaluations, such as those already instituted in Alaska, Arizona, Colorado, and Utah.<sup>33</sup> Such systems are designed to "systematically collect and analyze information about judges' on-the-bench performance, and make recommendations about judges to voters prior to a retention election."<sup>34</sup> Contrary to the relatively simple and general bar surveys currently used in jurisdictions like Nebraska, the judicial performance evaluations in these states include commissions composed of attorneys, non-attorneys, and judges, who conduct surveys of court users (including attorneys, litigants, jurors, law-enforcement personnel, other judges, etc.) on such topics as integrity, legal competence, communication skills, temperance, punctuality, administrative skills, case-progression, rates of reversal on appeal, and continuing education.<sup>35</sup> The commissions then compile the survey results, analyze them, make recommendations about retention, and make the recommendations and review information available to the voting public.<sup>36</sup>

A meaningful judicial performance evaluation system can be effective in improving the quality of information available to the voting public, and also promotes public confidence in the information because the public is so heavily involved in the

28. For example, a Google search for "high school mock trial programs" yielded nearly two million results, which included links to the programs established in high schools all across the country. Google.com, High School Mock Trial Programs – Google Search, <http://www.google.com/search?hl=en&lr=&q=high+school+mock+trial+programs&btnq=search>.

29. See National High School Mock Trial Championship, <http://www.nationalmocktrial.org/history.cfm> (documenting the growth in participation in the national tournament from five states in 1984 to forty states and three foreign countries in 2006).

30. See *supra* discussion Part III.

31. See, e.g., *supra* note 17 and accompanying text.

32. See League of Women Voters, <http://www.lwv.org>.

33. See KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS xiii-xv (1998).

34. *Id.* at 4

35. *Id.*

36. *Id.*

compilation of the information, from serving as members on evaluation commissions, to being surveyed about interactions with judges, to receiving more meaningful and detailed information.<sup>37</sup> The American Judicature Society's review and evaluation of the judicial performance evaluation systems in Alaska, Arizona, Colorado, and Utah includes thorough and detailed considerations of many elements essential to effectively implementing such a system, including considerations about the rules and procedures to be followed by the evaluation commissions, the need for adequate funding, the need for detailed and measurable standards, the importance of confidentiality throughout the evaluation process, the need for effective means of disseminating results and recommendations, and the need for meaningful training programs.<sup>38</sup>

These three steps for reforming the current system of judicial retention elections, (1) educational reform at the academic level to develop more interested and informed voters in the future, (2) increasing public information about the judiciary and judicial retention elections available to the current voting public, and (3) improving the quality of information available, can all work together to bring about systemic change, both in the short term and in the long term, to address the problems with the current system of judicial retention elections. In the short term, steps can be taken to make current voters more aware of the current system of judicial selection and retention, through public forums, meaningful coverage in traditional media, and the efforts of existing voter education groups. By creating a more educated and interested voting public, both the problems of non-participation and ineffective participation can be alleviated. To be successful, however, it is also crucial to ensure that the information available to the increasingly interested and informed voting public is quality information, addressing as many aspects of judicial performance as possible in as much detail as possible. Further, in the long term, steps can be taken to create a voting public of tomorrow that will better understand the judiciary and its role in government and that will, it is hoped, take at least as much interest in the importance of judicial retention elections as in elections for the other two branches of government. Perhaps this more educated and informed voting public will even be more ready and open to the discussion of whether another retention system might be more effective than elective retention.

#### IV. STEPS IN THE RIGHT DIRECTION

Although, as the *Time* magazine article mentioned at the beginning of this article indicates, the subjects of judicial inde-

pendence, elections, and retention have been topics of discussion for the better part of at least 30 years, and although there have certainly been a handful of scholars who have devoted time and energy to the subject for some time now, there has recently been a real surge in the breadth and diversity of the discussion.<sup>39</sup>

This surge is reflected in a number of projects, conferences, and programs addressing these subjects and including such participants as members of the judiciary, members of academia, celebrities, and ordinary members of the public. To highlight the diversity of this growing discussion, consider the following as a mere sampling of the arenas in which this discussion is occurring:

In Tennessee, a Tennessee Supreme Court initiative called the SCALES (Supreme Court Advancing Legal Education for Students) Project was designed to educate students about the judicial branch.<sup>40</sup> This project provides students with intensive instruction about the workings of the judiciary by using real cases pending before the Tennessee Supreme Court. In-service sessions are conducted to provide students with advanced instruction about the court system and about the particular pending cases the students will observe, judges and lawyers visit classrooms to provide additional instruction, and students are then allowed to observe oral arguments in a pending case, followed by "debriefing" sessions with attorneys. The students later receive copies of the supreme court opinion issued in the case they observed. Through this project, students receive intensive instruction about the judiciary and its role, have the opportunity to see how a real case is argued before the appellate court, meet and discuss the case with the attorneys who argued the case, and have an opportunity to gain a better understanding of the judicial branch.

Another project with similar education goals is a national project called, "Representative Democracy in America: Voices of the People," a project funded by the U.S. Department of Education.<sup>41</sup> The Representative Democracy project is "designed to reinvigorate and educate Americans on the critical relationship between government and the people it serves."<sup>42</sup> The project seeks to accomplish its goals by introducing citizens, particularly young people, to the participants and processes of government. The project sponsored a

**[S]teps can be taken to make current voters more aware of the current system of judicial selection and retention . . . .**

37. *Id.* at 5.

38. *Id.* at 117-21.

39. Among the scholars who have spent considerable time and energy in this area are Norman Greene of Schoeman, Updike & Kaufman, LLP, (<http://www.schoeman.com/greene.htm>); Anthony Champagne of the University of Texas at Dallas (<http://www.utdallas.edu/dept/socsci/faculty/tchampagne.html>); Charles Geyh of Indiana Law School (<http://www.law.indiana.edu/directory/cgeyh.asp>); David Rottman of the National Center for State Courts ([http://www.ncsconline.org/d\\_research/staff.html#rottman](http://www.ncsconline.org/d_research/staff.html#rottman)); Luke Bierman of Justice at Stake (<http://www.justiceatstake.org/contentViewer.asp?breadcrumb=8,685,760>); Rachel Caufield of Drake University and the American Judicature Society (<http://www.drake.edu/artsci/PolSci/Faculty.html>); and Roy Schotland of Georgetown Law School. ([http://www.law.georgetown.edu/curriculum/tab\\_faculty.cfm?Status=Faculty&Detail=323](http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=323)).

40. See American Bar Ass'n, SCALES Primer: A How-to Guide, <http://www.abanet.org/ylde/library/memphis04pdf/scales.pdf>.

41. See Representative Democracy in America, <http://www.representativedemocracy.org/>.

42. *Id.*

**Actor Richard Dreyfuss garnered headlines last year by speaking out about the importance of a serious effort toward more thorough civics-related education.**

Congressional Conference on Civic Education in November 2006, which included state legislators, representatives of state executive branches, and other influential civic education leaders.<sup>43</sup> Through its website, the project provides various products and classroom materials for use by educators.<sup>44</sup> Although the project's focus does not yet appear

to include efforts directed at education about the judicial branch in particular, it is another example of a project aimed directly at more thorough civics-related education.

The push for more thorough civics-related education is not reserved to governmentally related projects, however. Actor Richard Dreyfuss garnered headlines last year by speaking out about the importance of a serious effort toward more thorough civics-related education. Dreyfuss appeared on Bill Maher's HBO show and spoke about the subject.<sup>45</sup> Additionally, ABC news highlighted Dreyfuss's plans to "launch a personal campaign to teach Americans the rights and duties of citizens."<sup>46</sup>

Bar leaders across the county have also taken up the task of becoming involved in the public discourse about judicial independence and the role of the judiciary in an effort to help educate the public about those subjects. For example, in 2006 the American Bar Association's Law Day topic was, "The Importance of a Fair and Impartial Judiciary."<sup>47</sup> Ohio State Bar Association President Jane Taylor delivered a speech on the topic to the Toledo Rotary in which she pointed to the ABA project called "The Least Understood Branch" as an example of an effort "at civic education, a return to basics, in order that our citizenry—from students to civic and community organizations—understand what is meant by the separation of powers and the role of the judiciary in a free and democratic society."<sup>48</sup> As various public discourse criticizing courts and threat-

ening judicial independence have emerged, other bar leaders have stepped forward to provide a more balanced explanation of judicial independence and the role of the judiciary.<sup>49</sup>

Elsewhere, conferences and symposia have been organized and conducted to bring together members of the judiciary, academia, legal community, and other interested members of the public in an effort for more public discourse and education. The 2006 symposium at Fordham Law School is one example that brought together current and former judges, legal educators, public policy scholars, and interested members of the public to critically appraise existing appointive selection and retention models and to propose reform in the hopes of improving existing systems.<sup>50</sup> Another example is a conference held at Georgetown Law School in Washington, D.C., in September 2006 called, "Fair and Independent Courts: A Conference on the State of the Judiciary."<sup>51</sup> The Georgetown conference featured such participants as retired Associate Justice of the United States Supreme Court Sandra Day O'Connor and leaders from the business and media communities, nonprofit sector, and government, and explored the role of the courts in our society, the importance of an impartial judiciary, and suggestions for improving the effectiveness of the judiciary and public discourse about the judiciary.

Finally, even local media outlets have started becoming involved in the discussion. As one example, in November 2006 an online newspaper in Nebraska included an article titled, "Too Many Critics Do Not Understand the Duty of Judges."<sup>52</sup> In the article, the author decried public feedback to stories involving the judiciary in which people "complain of judges who are 'out of touch' with the will of one interest group or another."<sup>53</sup> The article concluded with: "The independent judiciary is supposed to be independent. The former is obvious. Sadly, it is not obvious to everyone."<sup>54</sup> This article is yet another example of the upsurge in the amount of discourse on these topics.

The notion that we need an independent judiciary is practically timeless. The recognition that various methods of judicial selection and retention entail certain threats to judicial independence and are, for other reasons, not as effective as they

43. Representative Democracy in America, Congressional Conference on Civic Education, [http://www.representativedemocracy.org/detail.asp?repdemPLinks\\_ID=12](http://www.representativedemocracy.org/detail.asp?repdemPLinks_ID=12).

44. Representative Democracy in America, Products & Classroom Materials, [http://www.representativedemocracy.org/detail.asp?repdemPLinks\\_ID=3](http://www.representativedemocracy.org/detail.asp?repdemPLinks_ID=3).

45. See, e.g., <http://www.jwharrison.com/blog/2006/11/21/real-time-richard-dreyfuss%E2%80%99-civics-lesson-part-1/> and <http://www.jwharrison.com/blog/2006/11/21/real-time-richard-dreyfuss%E2%80%99-civics-lesson-part-2/>. The videos of Dreyfuss's appearance are available elsewhere on the internet, as well, and can be found by running a Google search.

46. ABC News, *Actor Wants to Bring Back Civics* (Dec. 3, 2006) (transcript available at <http://abcnews.go.com/ThisWeek/story?id=2696871&page=1>). In the article, ABC quoted Dreyfuss as saying, "If you think that running a government like ours is, arguably, more complicated than running a pharmaceutical company or an auto company—and it is—then we should train people to the run-

ning of the country."

47. See Jane Taylor, President, Ohio State Bar Ass'n, Law Day Speech at the Toledo Rotary Luncheon, *The Importance of a Fair and Impartial Judiciary* (May 1, 2006)(transcript available at <http://www.abanet.org/judind/toolkit/impartialcourts/lawday.pdf>).

48. *Id.*

49. See <http://www.abanet.org/judind/toolkit/impartialcourts/barleaders.pdf>.

50. See Symposium, *supra* note 8.

51. See Press Release, Georgetown University Law School, *Fair and Independent Courts: A Conference on the State of the Judiciary* (Sept. 18, 2006) (available at <http://www.law.georgetown.edu/news/releases/september.18.2006.html>).

52. Ed Howard, *Too Many Critics Do Not Understand the Duties of Judges* (Nov. 28, 2006), [http://nebraska.statepaper.com/vnews/display.v/ART/2006/11/28/456c59743fbff?in\\_archive=1](http://nebraska.statepaper.com/vnews/display.v/ART/2006/11/28/456c59743fbff?in_archive=1)

53. *Id.*

54. *Id.*

could be is also a long-standing principle. What is reassuring is that there is suddenly a plethora of examples of groups and individuals, from members of the judiciary to educators to public policy experts to celebrities to media to ordinary citizens, who are moving to make discussion of these topics and education about the judiciary a priority. These are all steps in the right direction.

## V. CONCLUSION

Judicial reformers seeking to develop the best possible system of selecting state court judges must be patient, but must also open their minds to the world of possibility and explore ideas for seeking both short-term and long-term systemic change that, in a commonsense fashion, will address the problems that inhibit the effectiveness of the current retention election system. To that end, improving public awareness about the existing system, its goals, and its current weaknesses, and implementing steps to address those weaknesses, will help to keep us moving toward the best possible system. Changing attitudes and interest in something like judicial retention elections is certainly never an easy task, but it is only through seeking to do just that that reformers of an elective retention system can hope to near its potential for effectiveness.



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# Judicial Reform in Texas: A Look Back After Two Decades

Anthony Champagne

One of the most frequently quoted comments on judicial reform is the late New Jersey Chief Justice Arthur T. Vanderbilt's remark, "Judicial reform is not for the short-winded."<sup>1</sup> Vanderbilt's remark illustrates a key point about judicial selection reform. Reforms do not occur simply because someone or some group in a state decides that change in the system of selection is desirable; rather, it is necessary for key interest groups in the judicial politics of a state to reach a sufficient political consensus that change can occur. A variety of factors may lead to such a consensus on the need for reform. In Oklahoma, for example, judicial reform came about as a result of a major scandal in the state's judiciary.<sup>2</sup> But in some states, consensus for change among key stakeholders is difficult.<sup>3</sup> Key interest groups can have competing objectives, making judicial reform impossible. At other times, political conditions—the political environment of a state—lessen the chances of reform.

This article will focus on Texas's judicial reform experiences for the past two decades. Texas has been a bellwether state in heralding a new era in judicial elections. It was the first state where widespread problems developed in judicial elections in the 1980s. There was judicial scandal, supreme court elections become a battleground for plaintiffs and business interests, there were huge sums spent in Supreme Court races, there was intense competition between the political parties for control of the state judiciary, and there were increasing demands from minorities for greater representation on the bench.<sup>4</sup>

In trial court elections, beginning in the early 1980s, first in Dallas County and later spreading to other counties, most notably Harris County where Houston is located, there was a pattern of partisan sweeps in judicial elections where large numbers of judges were defeated for reelection simply because they had a different party affiliation from the popular candidate at the top of the ticket. In Dallas County, Republicans swept the trial court elections to such a degree that many of the remaining Democratic judges changed their party affiliation to the Republican Party in a bid for political survival.<sup>5</sup>

At first Texas seemed an anomaly with its expensive, highly

partisan judicial elections. It did not take long, however, for other states to follow. The Texas judicial experience was actually a harbinger of things to come in other state judicial elections.

With the rise of this new level of competition in judicial elections, there was a major push to change the system of selection in Texas. However, just as in many other states where judicial elections have become highly competitive, the system of selection has not changed.<sup>6</sup> On the surface, Texas seemed to have all the components that one might think necessary for change: Intensely partisan and expensive judicial elections; a major judicial scandal; widespread negative publicity about the state's judiciary; and an active reform movement led by a well-known major figure. Still, the system did not change.

As in Texas, in states where judicial elections have become expensive and competitive, judicial reform efforts have developed. As a general matter, reform efforts in recent years have proven ineffective in changing the system of judicial selection. The Texas experience offers a lesson in the difficulties of judicial selection changes. What happened in Texas suggests the importance and the enormous difficulty in developing a political coalition among key interests in a state that can bring about change in the system of judicial selection. This article will explore what went wrong with the judicial reform movement in Texas. In the process, it will offer a blueprint of what can go wrong with a reform effort and explain why in Texas, and many other states, judicial reform efforts have failed. However, this article will also suggest that opportunities are now developing in Texas for a new reform effort—opportunities caused primarily by changing state demographics, which are quickly altering the state's political climate.

## I. A BRIEF BACKGROUND OF JUDICIAL ELECTIONS IN TEXAS

In Texas, like other states, judicial elections were once low-key, inexpensive, sleepy affairs. Judges were only rarely defeated and generally did not have opposition.<sup>7</sup> One description of this old era in judicial politics noted:

### Footnotes

1. Professor Roy Schotland of Georgetown University, for example, at a panel on *Judicial Elections and Campaign Finance Reform*, quoted Chief Justice Vanderbilt's remarks with the following preface: "[Y]ou have probably all heard [this quote] a thousand times...." Symposium, *Judicial Elections and Campaign Finance Reform* 33 U. Tol. L. Rev. 335, 340 (2002).
2. Phillip Simpson, *The Modernization and Reform of the Oklahoma Judiciary*, 3 OKLAHOMA POLITICS 1 (1994).
3. See, e.g., the case studies of judicial reform efforts found in ANTHONY CHAMPAGNE & JUDITH HAYDEL (EDS.), *JUDICIAL REFORM IN*

THE STATES (1993).

4. See generally, KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS* (2005).
5. A discussion of partisan sweeps in Dallas and Harris counties as well as a discussion of party switching by judges is found in Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 71-80 (1986).
6. CHEEK & CHAMPAGNE, *supra* note 4, at 117.
7. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URBAN L.J. 907, 910 (2002).

## Big-money judicial campaigns quickly led to problems in Texas.

At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements and the support of courthouse politicians.<sup>8</sup>

Things began to change in Texas judicial politics in the late 1970s. First, in 1976 an unknown lawyer ran for the Texas Supreme Court against a highly respected incumbent who had won the State Bar poll by a 90% margin. That unknown lawyer won even though a State Bar grievance committee had filed a disbarment suit against him alleging 53 violations—another 20 more allegations were later added. However, the lawyer had a famous Texas name, Yarbrough, which probably led voters to confuse him with another Yarbrough who had twice run a strong race for governor or with the long-time U.S. senator from Texas, Ralph Yarborough. Although Justice Yarbrough served only a few months before criminal charges and the threat of legislative removal led to his resignation,<sup>9</sup> the case provided a lesson: Name identification could elect nearly anyone to the bench in Texas. In 1978, a little known plaintiffs' lawyer named Robert Campbell successfully ran against an incumbent judge for the Texas Supreme Court. There was speculation that Campbell benefited from University of Texas running back Earl Campbell winning the Heisman Trophy the previous fall.<sup>10</sup>

A recognizable name could put someone on the bench in Texas. However, it was also possible to use advertising to create name identification.<sup>11</sup> That, of course, meant there was a need for campaign funds. Texas became a battleground between members of the civil bar, plaintiffs' attorneys and defense lawyers who realized that campaign funds could buy the name recognition for the judicial candidates who reflected their points of view.<sup>12</sup> And, once these opposing segments of the bar got into the battle for control of the Texas bench, they discovered they could not simply depart the battleground; else the opposing side would be victorious in the election.<sup>13</sup> Like warfare, once the fighting between the opposing sides of the bar started, it was nearly impossible for either to stop.

Another thing that was making it impossible to go back to the old style of judicial campaigns was that Texas was developing a viable two-party system. In 1978, Texas elected its first Republican governor since Reconstruction. With the election

of a Republican governor, appointments to vacant seats on major trial courts and the appellate courts were in his hands, and, with relatively few exceptions, he insisted that his judicial appointees

agree to run in subsequent elections as Republicans.<sup>14</sup> It was also the case that the election of a Republican governor heralded the emergence of a viable Republican Party in the state. The state quickly moved from a one-party Democratic state to a competitive two-party state before becoming largely a one-party Republican state.<sup>15</sup> That meant candidates for judicial offices had opposition, not just in their base, which had been the Democratic Party primary where opposition was often minimal and more easily controlled, but in the general election. Candidates for judicial office had to have money, often for media buys for television, which was not only an expensive form of campaigning, but a necessary one in a large, urban, and competitive state.

Where does really big money in judicial campaigns originate? It tends to come from economic interests that have a stake in judicial decisions.<sup>16</sup> As a result, candidates for judicial office tended to increasingly reflect one or the other of the opposing economic interests funding them.

Big-money judicial campaigns quickly led to problems in Texas. One was the claim that judges were biased in favor of their campaign contributors.<sup>17</sup> As a result, there was criticism about the new and very substantial role of money in judicial campaigns.<sup>18</sup> Another problem with big money in judicial campaigns was the risk of scandal caused by an unhealthy relationship between judges and their contributors.<sup>19</sup> One highly publicized example of that unhealthy relationship can be found in the case of *Manges v. Guerra*.<sup>20</sup> In *Manges*, a jury found Clinton Manges, acting as the manager of mineral leases on 70,000 acres of the Guerra family's land, violated his obligations to the Guerras. Manges was removed from his manager's position and the Guerras were awarded \$382,000 in actual damages and \$500,000 in exemplary damages.<sup>21</sup> Ultimately the case was taken to the Texas Supreme Court by Manges, who hired a well-known San Antonio plaintiff's lawyer to represent him.<sup>22</sup> The case was assigned to a justice who had received substantial campaign contributions from both Manges and his lawyer. Initially the justice proposed an opinion that supported Manges, but that opinion was rejected and so the justice tried again. Two justices eventually recused themselves—one

8. Paul Burka, *Heads, We Win, Tails, You Lose*, TEXAS MONTHLY, May 1987, at 138-139.

9. Champagne & Cheek, *supra* note 7 at 911.

10. *Id.* at n.25.

11. *Id.* at 911.

12. CHEEK & CHAMPAGNE, *supra* note 4, at 37-51.

13. Big money remained in Texas Supreme Court elections even after state elections moved into the Republican column. *Id.* at 50.

14. James Brian McCall, In the Shadow of John Connally: An Examination of Gubernatorial Power in Texas 66-68 (2006) (unpublished Ph.D. dissertation, University of Texas at Dallas) (on file with author).

15. *Id.*; see also Champagne, *supra* note 5, at 67-80.

16. Champagne, *supra* note 5, at 84-90.

17. See, e.g., Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74; Mary Flood, *Justice Still for Sale? Clock Is Ticking on the Answer*, WALL ST. J., June 24, 1998, at T1.

18. See, e.g., Pete Slover, *Group Alleges Supreme Court Favors Donors*, DALLAS MORNING NEWS, Apr. 25, 2001, at 23A.

19. CHEEK & CHAMPAGNE, *supra* note 4, at 172-176.

20. 673 S.W.2d 180 (Tex. 1984).

21. Champagne & Cheek, *supra* note 7, at 912.

22. *Id.*

**[T]here seemed all the components of a successful reform movement.**

With those recusals, the vote was 4-3 for Manges and for reversal of the lower court. The chief justice ruled that five votes were required for reversal. At that point, the justice who had recused himself due to the campaign contribution decided to vote in favor of reversal.<sup>23</sup> The attorney for the Guerras filed a motion for rehearing and asked that three justices, including the justice who had changed his vote from recusal to reversal, recuse themselves due to receiving significant campaign money from Manges and his attorney.<sup>24</sup> The justices did not recuse themselves.

The following year, a justice (one of the three whose recusal had been requested) told a different litigant (a litigant who also was a potential campaign contributor) that his case was a tough one and that if he did not win it, he would win the next.<sup>25</sup> The justice then discussed the court's deliberations and told the litigant that he would see what could be done back in Austin.<sup>26</sup> In 1985, at the request of the attorney in the Manges case, the justice attempted to transfer two cases from one court of appeals to another.<sup>27</sup> These matters, plus other misbehavior by the justice, led to his public reprimand by the State Commission on Judicial Conduct.<sup>28</sup> Another justice (also one of the three whose recusal had been requested) was swept into the scandal because two of his briefing attorneys had accepted a weekend trip to Las Vegas from a member of the same plaintiffs' firm that had represented Clinton Manges.<sup>29</sup> He had also solicited funds to prosecute a suit against a former briefing attorney who had testified before a House Committee in a manner unfavorable to the justice.<sup>30</sup> For these actions, the justice received a public admonishment by the State Commission on Judicial Conduct.<sup>31</sup>

At roughly the same time, the Texas Supreme Court refused to review an \$11 billion judgment against Texaco.<sup>32</sup> From 1984 until early 1987, more than \$355,000 was contributed to the then-justices on the Texas Supreme Court by lawyers representing Pennzoil and, although lawyers for Texaco also contributed, they gave far less.<sup>33</sup>

Not only was there scandal, but it was highly publicized

because he had been sued by Manges over a campaign statement he had made, and the other because he had received \$100,000 in campaign money from Manges and his lawyer.

scandal. On December 6, 1987, the national television program *60 Minutes* featured a story about the Texas Supreme Court that was titled, "Is Justice for Sale?"<sup>34</sup> The program explored the relationship between large campaign contributions and judicial decisions in Texas. It was a devastating portrayal of what can go wrong in the new politics of judicial selection.

Texas Supreme Court Chief Justice John Hill proposed merit selection of judges as an alternative to the current system of partisan election of judges.<sup>35</sup> He proposed himself as the leader of a movement for judicial reform.<sup>36</sup> Hill was a highly visible figure in Texas politics, far more than most state supreme court justices. He had been a successful lawyer in Texas, a former Texas Attorney General (a statewide elective office), and the Democratic candidate for governor of Texas in 1978. To get that nomination for governor, he had defeated the incumbent governor in the Democratic primary.<sup>37</sup>

Thus, there seemed all the components of a successful reform movement: There was a new politics of judicial elections in Texas where there were competitive, expensive races; these races involved major battles between competing economic interests, most clearly the business community and the plaintiffs' bar; there was highly publicized scandal with strong overtones of systemic corruption in a system that depended on money from lawyers and litigants who appeared before the courts; and there was a visible leader of a movement pushing for reform of the system by offering a well-established solution to the problem—merit selection of judges. Success seemed just around the corner.

## **II. TEXAS JUDICIAL SELECTION REFORM IN THE 1980S: POLITICS, INFLUENCE, AND THE PUBLIC'S PREDILECTIONS**

Texas's judicial reform movement was to die a slow death for a variety of reasons, mostly reflecting political conditions in the state and an inability to develop enough of a coalition of competing interests to change the system. Yet, the demise of the reform movement is instructive, not only for future reform efforts in Texas, but also for reform movements in other states.

The first notable problem with judicial reform in Texas was the problem of Chief Justice John Hill taking the leadership role in the movement. There was immense opposition to his reform efforts from within the court and unprecedented intra-court conflict emerged.<sup>38</sup> Fifteen months after Hill proposed

23. *Id.*

24. Motion for Recusal of Justice C.L. Ray, *Manges v. Guerra*, 673 S.W.2d 180 (Tex.1983) (No. C-771); Motion for Recusal of Justices Ted Z. Robertson and William W. Kilgarlin, *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1983) (No. C-771).

25. Champagne & Cheek, *supra* note 7, at 912.

26. *Id.*

27. *Id.* at 913.

28. State Commission on Judicial Conduct, *Findings, Conclusions and Public Reprimand Relating to Certain Activities of Justice C.L. Ray of the Supreme Court of Texas* (1987).

29. Champagne & Cheek, *supra* note 7, at n.34.

30. *Id.*

31. State Commission on Judicial Conduct, *Findings, Conclusions and Public Admonishment Relating to Certain Activities of Justice William Kilgarlin of the Supreme Court of Texas* (1987).

32. Champagne & Cheek, *supra* note 7, at 913.

33. *Id.* at n.35.

34. *60 Minutes: Is Justice for Sale?* (CBS television broadcast, Dec. 6, 1987).

35. Champagne & Cheek, *supra* note 7, at 913.

36. *Id.*

37. For a discussion of Chief Justice Hill and his earlier effort to become governor of Texas, see McCall, *supra* note 14, at 53, 58-60.

38. Champagne & Cheek, *supra* note 7, at 913.

**[M]ajor political opposition [was] developing to prevent merit selection in Texas.**

of judicial selection reform.<sup>40</sup> Judicial selection reform seemed to be in the air when Chief Justice Hill used the ceremony on January 4, 1988 that installed Phillips as his successor as a forum to argue for merit selection. The fires of opposition roared quickly in response: Justice Robert Campbell resigned January 6, 1988, explaining that, among other activities, he was going to actively campaign against merit selection.<sup>41</sup>

The turmoil on the Texas Supreme Court surrounding Hill's efforts turned out to be a small molehill compared to the major political opposition developing to prevent merit selection in Texas. Texas was evolving into a true two-party state after a century plus of almost complete Democratic Party dominance. The two parties found themselves in rare agreement on one issue: They were adamant in their support for partisan election of judges.<sup>42</sup>

It was not only the political parties, however, that were involved in the fight over judicial selection. Two key segments of the bar—the plaintiffs' bar and the defense bar—used the partisan election system to forward their objectives of controlling the bench. By 1980, the election of Texas Supreme Court justices (which has only civil jurisdiction; the Texas Court of Criminal Appeals is the highest court in the state for criminal matters) had become a battleground for plaintiffs' attorneys and defense lawyers, each trying to elect judicial candidates favorable to their perspective.<sup>43</sup>

Supreme court races were getting increasingly expensive.<sup>44</sup> Initially, competition between plaintiff-bar-backed and defense-bar-backed judicial candidates occurred in the Democratic primary because the Republican Party was so weak in the state. However, in 1988, several strong Republican candidates for the Texas Supreme Court moved campaign contributions to record levels.<sup>45</sup> Increasingly, the tendency was for defense interests to back Republican candidates and plaintiffs' lawyers to back Democratic candidates.<sup>46</sup> In 1994 there was an effort by a plaintiff-backed candidate to defeat a pro-defense Democratic justice in the Democratic primary. Total expenditures in that primary came to \$4,490,000 which made it one of the most expensive judicial races in history.<sup>47</sup> When the pro-defense Democratic justice won what was one of the most vicious judicial campaigns in Texas history, the Republican

candidate for the justice's seat withdrew, giving the pro-defense Democrat an easy electoral victory. It seemed clear the Republican was only in the race to compete against the Democratic nominee if the plaintiff-backed candidate won the primary.<sup>48</sup> Plaintiffs and business interests were fighting it out in partisan judicial elections and, at least at that time, were reluctant to change the battleground, though the plaintiffs' bar seemed to have more at stake in maintaining partisan elections than did business interests.

When Chief Justice John Hill was proposing merit selection in Texas in the late 1980s, the plaintiffs' bar was a powerful force in Texas Democratic politics. They were opposed to a change in the method of judicial selection.<sup>49</sup> Their campaign contributions had placed several pro-plaintiff justices on the Texas Supreme Court in the 1980s, and the result was that several key judicial decisions had been favorable to plaintiffs.<sup>50</sup> While the Republican Party was growing in the state, Democrats were still winning major judicial offices, and many of those Democrats had the backing of the plaintiffs' bar. The plaintiffs' bar could use its campaign contributions to back candidates sympathetic to plaintiffs. Although not all Democrats in Texas were pro-plaintiff, the plaintiffs' bar backed Democrats who were far more likely to be sympathetic to the plaintiffs' views than were Republicans.<sup>51</sup> With Texas electing in 1978 its first Republican governor since Reconstruction (Dallas oilman Bill Clements was the Republican who defeated John Hill for the governorship, by 18,000 votes), it seemed much more desirable for plaintiffs' lawyers to use the partisan election system to elect the type of judges they wanted than to use a merit selection system where the governor who would be appointing judges might well be a Republican or, given the history of Texas politics, a conservative Democrat.<sup>52</sup>

Additionally, the demographics of Texas were changing. Texas's Latino population was growing at a dramatic pace, and Texas's African-American population was increasingly concentrated in the state's urban centers, most notably Dallas and Houston. With Latino population growth and African-American population concentration came political power in Texas politics.<sup>53</sup> These two groups had an important voice in whether there would be change in the way Texas selected its judges. The problem for the judicial reformers was that neither Latino nor African-American interest groups wanted merit selection. Instead, they were interested in increasing the numbers of Latinos and African-Americans on the bench. As a method of achieving that objective, Latino and African-American interest groups wanted to continue to elect judges, but they wanted the districts to be smaller than currently

39. *Id.* at 913-914.

40. CHEEK & CHAMPAGNE, *supra* note 4, at 173.

41. Champagne & Cheek, *supra* note 7, at 914.

42. Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 502, 520 (1988).

43. CHEEK & CHAMPAGNE, *supra* note 4, at 37-54.

44. *Id.*

45. *Id.*

46. *Id.*

47. Champagne & Cheek, *supra* note 7, at 915.

48. *Id.* at 916.

49. Anthony Champagne, *Judicial Selection in Texas: Democracy's Deadlock*, in TEXAS POLITICS: A READER 96 (2d ed., Anthony Champagne & Edward J. Harpham eds., 1998).

50. *Id.*

51. *Id.*

52. *Id.*; see also McCall, *supra* note 14.

53. CHEEK & CHAMPAGNE, *supra* note 4, at 146-159.

existed. Given the numbers of trial judges in urban counties and given that all trial judges were elected countywide, the goal of these groups became the election of trial judges from districts considerably smaller than the county.<sup>54</sup> The problem for these interests was that to elect African-American judges, a different subdistrict had to be drawn compared to the subdistricts that had to be drawn to elect Latino judges. Nevertheless, although African-American interests and Latino interests would compete over which subdistrict boundaries were appropriate, neither group offered the politically necessary support for merit selection.

The other problem that Chief Justice Hill and the reform movement faced was the opposition of numerous incumbent judges. The incumbent judges had been elected by a partisan election system, and they were generally happy with that system—especially if their political party was dominant within their jurisdiction. A lot of opposition to reform came from judges who were secure in their positions, saw no need to change, and saw a change in the system of selection as a threat to their survival on the bench.<sup>55</sup>

Finally, another problem with the movement for merit selection in Texas was that voters like to vote for judges. True, the voters might not know the judicial candidates for whom they were voting, but they did not like the idea of giving up their decision-making powers to any blue-ribbon commission that presented names from which a governor must make a selection.<sup>56</sup> Indeed, then-Justice Franklin Spears, a vocal opponent of merit selection of judges, noted that a non-binding referendum issue appeared on the March 1988 Democratic primary ballot asking whether, “Texans shall maintain their right to select judges by a direct vote of the people rather than change to an appointment process created by the legislature.” Eighty-six percent of those voting on the issue cast their ballot in favor of elective judges.<sup>57</sup> A 1987 statewide poll found that 65% of those polled thought the elective judge system was “working all right as it is.”<sup>58</sup> Still another poll found that 60% of those polled favored the elective system over an appointive system.<sup>59</sup> Spears also cited a 1986 state bar poll where more lawyers disfavored a merit selection system than favored it for major trial courts: 50% to 43%. Additionally, more lawyers disfavored a merit selection system than favored it for appellate courts: 49% to 45%.<sup>60</sup> One can certainly quarrel with some of the language in the referendum and polling questions, but Spears seemed to have a point. Texans probably did favor voting for judges. Indeed, there is a long-standing practice in Texas for voting for a great number of officials. At the statewide level, for example, not only are nine Texas Supreme Court justices elected, but the nine Texas Court of Criminal Appeals judges are as well. Additionally, the three members of

the Railroad Commission of Texas are elected statewide, as is the governor, the Lt. governor, the comptroller, the commissioner of the General Land Office, and the commissioner of agriculture.<sup>61</sup>

**[T]he judicial reform effort simply could not gain traction . . . .**

### III. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE 1990S

In spite of former Chief Justice Hill’s best efforts, the judicial reform effort simply could not gain traction in the face of opposition from the political parties, the trial lawyers, African-American and Latino interest groups, incumbent judges, and a state political culture that favored election of large numbers of officials, including state judges. However, the politics of the state were changing dramatically, money was heavily involved in judicial elections, and the Clinton Department of Justice was suggesting that they would refuse to approve the creation of any more courts in Texas on the grounds that the current system discriminated against minorities. In 1994, judicial reform gained new life because the state’s Lt. governor, Bob Bullock, a Democrat and one of the most powerful and effective politicians in the state’s history, created a committee to explore the possibilities of developing a judicial reform proposal.<sup>62</sup>

The committee was designed to give key interests a voice in developing the proposal. Three Democratic state senators and three Republican state senators were appointed. One of the Democratic state senators was an African-American with close ties to civil-rights groups in Houston that advocated greater representation of African-Americans on the bench. One of the Democratic state senators was a Latino who had close ties to civil-rights groups in San Antonio that advocated greater representation of Latinos on the bench. Four other members of the committee were judges—one Republican and three Democrats. Three of the judges were Texas Supreme Court justices, and one was the presiding judge of the Court of Criminal Appeals. The Republican justice was Chief Justice Tom Phillips, the chief justice who replaced John Hill on the bench and who was himself a strong advocate of a retention system for selecting judges rather than the partisan election system. The president of the Texas Trial Lawyers Association, the major plaintiffs’ attorney organization in the state, regularly attended the meetings. Another participant was a public relations specialist who was a close friend of Lt. Governor Bullock and who represented business interests in political and legislative matters. No public or consumer representatives were on the committee, no lower-court judges, and no mem-

54. Champagne, *supra* note 49, at 97-98.

55. *Id.* at 98.

56. The loss of the right to vote for judges is, of course, a concern of voters nationwide. Former Texas Supreme Court Chief Justice Tom Phillips, writing about judicial elections, noted that a poll published in 2002 “shows clearly that voters cherish their franchise and in elected states they generally prefer to retain it by a two to one margin.” Thomas R. Phillips, *Electoral Accountability*

and *Judicial Independence*, 64 OHIO ST. L.J. 137, 140 (2003).

57. Spears, *supra* note 42, at 519.

58. *Id.*

59. *Id.* at 520.

60. *Id.*

61. *Statewide Elected Officials*, Texas Secretary of State, <http://www.sos.state.tx.us/elections/voter/elected.shtml>.

62. Champagne, *supra* note 49, at 99-100.

bers of the Texas House of Representatives. Notably, John Hill was not invited to attend the meetings. Bullock claimed that Hill had wanted to be on the committee, but because Hill had become such a political lightning rod, it was impossible for him to be asked to serve. At least one state senator, the chief justice, and the business representative were strong supporters of merit selection.<sup>63</sup>

It quickly became clear that there were no easy solutions to judicial selection issues in the state that could accommodate all the competing interests. Some sort of compromise had to be developed. Minorities were willing to support modifications of the appellate courts in exchange for greater representation of minorities on trial courts. While minorities believed it would be possible to draw smaller districts within counties that would increase minority representation on the bench, they knew that appellate court districts were so vast that small districts for appellate courts would still be so large that minorities would not benefit. Business interests saw an opportunity. They were willing to support greater minority representation on the trial court bench in exchange for an appointive system such as merit selection for the appellate courts. Plaintiffs' lawyers saw their influence on appellate courts weakening. It would not make much difference to their interests whether Republican governors appointed pro-business judges to the appellate bench or whether voters elected them. Smaller trial courts, however, opened up the possibility that at least some pro-plaintiff trial judges could continue to be elected.<sup>64</sup>

Creating a compromise was difficult, however, because minorities and plaintiffs' lawyers had long fought merit selection; they were fearful that such a system would not benefit their interests. Republicans and judges, on the other hand, were uncomfortable with the idea of small districts. Eventually, however, the committee agreed on a compromise where appellate judges would be appointed by the governor; trial judges in urban areas would be elected from county commissioners' precincts. After serving for a time, they would run countywide in retention elections. Later, they would have to be reelected from county commissioners' precincts. In order to depoliticize the judiciary, judges were to be elected in nonpartisan elections, which would protect judges from the party sweeps that had occurred in recent elections in urban counties where large numbers of trial court judges were swept out of office simply because their party affiliation was an unpopular one during a particular election.<sup>65</sup>

Although it was a complicated scheme, the compromise, on its face, seemed to have something for everyone. Business got an appointive appellate judiciary. Minorities and plaintiffs' lawyers got smaller trial court districts, which would allow for the election of more minorities and some plaintiff-oriented judges. Judges were protected from party sweeps.<sup>66</sup>

The problem, of course, was in the details of the compromise. Although African-Americans were very supportive of the

compromise, Latinos were not. At that time, Harris (where Houston is located) and Dallas counties were the two largest counties in Texas and elected a

**The problem, of course, was in the details . . . .**

total of 96 of the 386 district court judges in Texas. These counties were so large, and so many judges were elected in each metropolitan area, they were the most important in any plan that would increase minority representation on the bench. Since every county in Texas is divided into four county commissioners' precincts, under the compromise, one-fourth of Harris and Dallas County trial judges would be elected from each precinct. However, Harris and Dallas County both had three white county commissioners and one African-American county commissioner. Latinos did not believe such a compromise would promote the election of more Latino judges; instead, they thought districts much smaller than a county commissioner's precinct were needed to elect Latino judges.<sup>67</sup>

The political parties also opposed the compromise. Nonpartisan elections would protect the interests of incumbent judges from party sweeps, but nonpartisan elections weakened the political parties. Additionally, an appointive system reduced the number of elective judges and therefore reduced the importance of the political parties. Then-Governor George W. Bush would have benefited from the compromise because of his power to appoint appellate judges; however, he opposed the compromise as well, probably because he did not want to oppose the Republican Party.<sup>68</sup>

Lt. Governor Bullock backed his committee's recommendations, and the compromise was turned into legislation that passed the Texas Senate, probably because Bullock had such sway over the state senate that any legislation that he endorsed had a high probability of success in that body. However, things did not go so well in the Texas House. Democratic Speaker Pete Laney did not give priority to judicial selection reform. Additionally, the opposition of the parties and of Governor Bush emboldened critics of the compromise. Moreover, Latino house members tried to amend the compromise. Instead of electing district judges by county commissioners' precincts in urban areas, they proposed that the judges be elected from state representative districts. Of course, that proposal increased the chance that Latino judges would be elected in urban counties, but it also reduced the number of African-American judges who were likely to be elected. The modified proposal also proved unacceptable to business interests and to Republicans who could not approve of even smaller constituencies for judges than commissioners' precincts. In the face of the various opposition constituencies, the compromise plan failed.<sup>69</sup>

Although the compromise effort led by Lt. Governor Bullock failed, it was not a total failure. Significantly, Bullock's judicial reform bill did pass the state senate. It was the first

63. *Id.* at 100.

64. *Id.* at 100-102.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

**[T]he compromise effort . . . was not a total failure . . . .**

time a judicial selection reform proposal survived that far in the legislative process. Of course, in Texas a judicial selection reform proposal would still have a

long way to go, since it is likely that most changes in the judicial selection system would not only have to pass the legislature, but would have to be submitted to the voters in the form of a constitutional amendment.

Buoyed by the passage of the proposed bill in the Senate, in 1996-97 the Texas Supreme Court created task forces to develop proposals for improving the Texas judiciary. One of the task forces was assigned to examine the issue of judicial selection, but, even though the task force expressed concerns over the current system for selecting judges, the members were unable to agree upon an alternative judicial selection system.<sup>70</sup> Chief Justice Phillips tried to push the issue of judicial selection reform in his State of the Judiciary address where he criticized the partisanship of judicial elections, the role of money in judicial races, and the lack of minority representation on the bench.<sup>71</sup>

Prospects for reform, however, seemed slim as the 1997 legislative session began to draw to a conclusion. In the senate, there was a proposal that provided for appointment of appellate judges and the election of district judges in nonpartisan elections. Both appellate and trial judges would then run in retention elections, although trial judges would run in regular nonpartisan elections after two retention elections. In counties larger than one million, district judges would be elected from county commissioners' precincts. Another senate proposal provided for the appointment, election, and retention of appellate judges and eliminated straight party voting for appellate and district judges. Appellate judges would have to run in partisan elections following the expiration of their appointed terms and then would be subject to retention elections.<sup>72</sup>

Of these two proposals, the first bill was sponsored by an African-American Democrat from Houston. He did not have enough support from non-minority legislators to pass the bill. The second bill was proposed by a white Republican from West Texas. Minorities threatened to oppose that plan on the grounds that it did not increase the likelihood of minority representation on the bench.

After considerable posturing by the sponsors of the two bills, a compromise bill was designed where appellate judges would be appointed. District judges would also be appointed, but the districts would be county commissioners' precincts. The appointed judges would then run against opponents in the next primary elections, but all candidates would run in all primaries, which created a nonpartisan primary election. If a candidate did not receive 50% of the vote, there would be a runoff in the general election. The winner would serve for four years and would then run in a nonpartisan retention election.

Much like Lt. Governor Bullock's committee's compromise, however, this proposal did not resolve the concerns of Latinos, who continued to believe that smaller judicial districts were needed to elect Latino judges. Incumbent trial judges were also concerned about the plan since it would affect their districts and also dramatically change the process by which judges were elected.<sup>73</sup>

#### **IV. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE NEW MILLENNIUM**

In the 2003 legislative session, another major effort was made to change the system of judicial selection in Texas. The West Texas Republican senator who had pushed so hard for judicial selection reform in the 1996-97 session tried again with a bill that would have appellate and district judges appointed by the governor with the consent of the Texas Senate. After appointment, the judges would run for office in retention elections. One of the strongest supporters of the bill was Chief Justice Tom Phillips, a long-standing advocate of judicial selection reform. And, just as had occurred when Lt. Governor Bob Bullock took an interest in judicial selection reform, the bill cleared the senate, only to die in the house.<sup>74</sup>

The bill did have bipartisan support, however, including significant Republican support. A Republican group, "Make Texas Proud," was formed to support the bill, and membership in the organization included former Republican Governor Bill Clements, former Republican National Co-chairwoman Anne Armstrong, and three former state party chairs. Possibly this strengthened Republican support had something to do with Chief Justice Phillips's efforts to show that demographic changes in urban counties would shortly bring a Democratic resurgence to those areas. In contrast, this forecasted demographic change may have been what prompted important Democrats to oppose judicial selection reform. The Mexican American Legal Defense and Education Fund also opposed the reform. Most important, many Republican leaders, including the leadership of the state Republican Party, were opposed to changing the system of judicial selection in the state. Politics, of course, often relates to the here and now, not to future demographic changes. The Texas Republican Party mounted a mighty effort against the bill.<sup>75</sup>

In its effort to kill the judicial selection reform bill, the Texas Republican Party attacked one of their own, Chief Justice Tom Phillips, the first Republican chief justice of the Texas Supreme Court since Reconstruction and the first Republican Texas Supreme Court justice to win election to the state supreme court since Reconstruction. Texas Republican Party Chairwoman Susan Weddington claimed the bill was Chief Justice Phillips's idea and that he was the one "very out front on this."<sup>76</sup> The Texas Republican Party's website contained a petition that visitors could sign "to protect Texans' right to elect their judges!"<sup>77</sup> The state Republican Party sent out an e-mail to party members urging them to contact law-

70. *Id.* at 102.

71. *Id.*

72. *Id.*

73. *Id.* at 103.

74. CHEEK & CHAMPAGNE, *supra* note 4, at 103-105.

75. *Id.*

76. *Id.* at 104.

77. *Id.*

makers to oppose the bill.<sup>78</sup> Supporters in the house were lobbying colleagues, and Chief Justice Phillips, along with Associate Justices Craig Enoch and Harriet O'Neill, were seeking the support of house members. The bill was about to be voted out of the House Judicial Affairs Committee with majority support when staff members for the new Republican Speaker told the chairman of the committee to pull the bill from consideration. Although the Democratic Party also opposed the bill, it was the opposition of the state Republican Party that had the real impact.<sup>79</sup>

Not long thereafter, Chief Justice Tom Phillips retired from the bench, to be replaced by a chief justice, Wallace Jefferson, who is much less supportive of judicial selection reform than his predecessor.<sup>80</sup> Perhaps the most effective and respected advocate of selection reform in the state was no longer in a strong position to advocate change—and his harshest critics had been the leaders of the political party in which Chief Justice Phillips had been a pioneer. Judicial selection reform had again been defeated, this time with seemingly a fatal blow by the Texas Republican Party.

What a difference one election can make! In the November, 2006 elections, 42 Democrats opposed 42 Republicans in Dallas County judicial elections—the county that was at one time the core of the Republican Party in the state.<sup>81</sup> All 42 Democrats won, leaving only 17 Republican judges in Dallas County who either were unopposed or were not up for election in the cycle.<sup>82</sup> Immediately, speculation began as to whether the 17 Republicans would change their party affiliation in order to keep their positions, something a number of Democratic judges did in the early 1980s when the county moved from the Democratic to the Republican column.<sup>83</sup> There had been hints of a voting shift in Dallas County since at least 2002 when a Democrat won a position as a county trial judge. Then in 2004, three Democratic judicial candidates won elections as did a Democratic candidate for county sheriff. But 2006 was a Democratic sweep with all 42 Democratic judicial candidates elected, a Democratic district attorney elected, and a Democratic county judge (the equivalent of a county executive).<sup>84</sup> Some of the Democratic candidates won simply by riding the wave of Democratic voting and raised lit-

78. *Id.* at 104-105.

79. *Id.*

80. Chief Justice Wallace Jefferson, as part of his election bid in 2006, responded to a question posed by the League of Women Voters of Texas: "What method of selecting judges and justices best ensures an independent judiciary?" The caution in his response is notable:

We currently have an independent judiciary. Whether elections "ensure" and independent judiciary is a complex question. Because much of the public is unfamiliar with judicial candidates—particularly in large counties and at the State level—the judiciary is largely selected by partisan affiliation, which has the effect of sweeping qualified judges out of office when political winds shift. An appointment/retention system, emphasizing merit, may be a remedy. This is a matter the Legislature should explore.

League of Women Voters of Texas, *Voters Guide 2006 General*

tle money, had no campaign Web site, did not appear at campaign events, and did not respond to candidate questionnaires.<sup>85</sup> Interestingly, some of the Democratic judges who were elected had been defeated years ago in the Republican electoral sweeps of the 1980s when Republican judges rapidly gained control of the courthouse.<sup>86</sup>

The movement to the Democrats was part of a demographic shift in Dallas County that had long been predicted by some.<sup>87</sup> As the minority population in Dallas County increased, so did the percentage of voters who selected Democratic candidates until finally there was a shift in the power of the political parties. Demographic trends suggest that Harris County, where Houston is located, should not, according to these demographic projections, be very far behind.<sup>88</sup> Harris County is the most populous county in the state with the largest number of judges. Further into the future, the growth of the Latino population in the state can be expected to eventually shift statewide elections into the Democratic column.<sup>89</sup>

Even though the greatest opposition to judicial reform in Texas has been the Texas Republican Party and a center of opposition has been Dallas County Republicans—most notably Dallas County judges, there is talk in Republican circles that it is time to reconsider their opposition to change in partisan election of judges.<sup>90</sup> As Charles Sartain, the lawyer who represents the Dallas County Republican Party was quoted as saying, "[t]he Republicans in Harris and Dallas thought things were just fine the way they were. Since the election I am speaking to more Republicans who favor a different method and want to figure out how to sell it to the Legislature."<sup>91</sup>

At least for the time being, both the Texas Republican Party and the Texas Democratic Party remain opposed to merit selection. When a Republican state senator and a Republican state representative announced in the aftermath of the election that they would introduce merit selection legislation in the legislature, the state Republican Party stated that it was standing on principle and continued to support partisan elec-

## What a difference one election can make!

*Election Edition*, <http://www.lwvtexas.org/VG%20General%202006-9-25-06.pdf>

81. Miriam Rozen, Mark Donald, & Mary Alice Robbins, *Dems Take Big D*, TEXAS LAWYER, Nov. 13, 2006, at 1.

82. *Id.* at 17, 19.

83. *Id.* at 19.

84. Gromer Jeffers Jr., *Democratic Trend Forecast*, DALLAS MORNING NEWS, Nov. 9, 2006, at 1, 18A.

85. Michael Grabell, *Democrats Short on Courtroom Recognition*, DALLAS MORNING NEWS, Nov. 9, 2006, at 18A.

86. *Id.*

87. *Id.*; see also Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 26-30 (2001).

88. Champagne, *supra* note 87, at 30.

89. *Id.* at 28-30.

90. Rozen, Donald, & Robbins, *supra* note 81 at 20.

91. *Id.*

**[T]he judicial reform movement has taken on new life . . . .**

tion of judges. The state Democratic Party announced it continued to support the voters' right to choose judges.

On the other hand, the Texas Association of Defense Counsel announced that it had historically

supported the concept of retention elections for appellate judges, and the Texas Trial Lawyers Association announced that it was open to considering the idea.<sup>92</sup> No doubt it will take more time for key interest groups to calculate the costs and benefits of taking a new position on merit selection—the strength and breadth of the demographic shift in voting in Texas needs to be assessed, especially since some argument is also being made that this shift is largely due to unhappiness with President Bush.<sup>93</sup> Moreover, the voting shift has so far been limited to one large county in the state.

## V. CONCLUSION

There is little doubt that the judicial reform movement has taken on new life now that a base of the Republican Party has been swept out of office. John Hill, wrote in the *Texas Lawyer* that Texas should have merit selection because, “Partisanship is a cancer on the judiciary. Lawyers should take all possible steps to remove it. There is no Republican or Democratic justice.”<sup>94</sup>

It is looking like judicial elections are becoming competitive again in Texas. This advent of competitiveness in judicial elections in the state offers an opportunity for reformers and a challenge. If it is possible to change the system of selection while the parties are competitive in the state where no party has an advantage and both parties are at risk, it seems possible that change in the system of selection can occur as a way of reducing electoral uncertainty on the bench. However, if the demographic changes in the state lead to rapid political changes so that the Democratic Party sees a rapid emergence as the dominant party in Texas, it will be much harder to change the system of selection. If the Democrats are dominant in the state's judicial elections, they will likely become, as the Republican Party did before them, the major obstacle to judicial reform. The interests that support the Democratic Party, most notably plaintiffs' lawyers, African-Americans, and Latinos, will have an interest in insuring the continuation of partisan elected judges when those judges are Democrats.

Nevertheless, as John Hill has stated in reference to judicial

selection reform, “Maybe this is the time that lightning's going to strike.”<sup>95</sup> Hill may be right. There are moments when policy proposals are timed to fit with the political needs of a state. This may be the moment. It is a cusp of a great demographic change that promises to create increased political competitiveness and immense political turmoil. If this period of great competitiveness is a consistent and relatively lengthy period where no key interests see an immediate forthcoming political advantage, the opportunity exists to build a political coalition that can bring about a change in judicial selection systems. The problem with the last great opportunity for change—the late 1980s—when John Hill first proposed judicial selection reform was essentially threefold:

- (1) the changes in Texas judicial politics were unprecedented so there was no sense of how lasting or dramatic the changes might be;
- (2) there was inconsistency in the changes occurring in the state's judiciary—Republicans, for example, had a political advantage with Ronald Reagan at the top of the ticket in 1980 and 1984, but Democrats had an advantage with Democratic Senator Lloyd Bentsen at the top of the ticket in 1982; and
- (3) the changes in Texas judicial politics were quite rapid. The first Republican to win a Texas Supreme Court seat won in 1988 and by 1994, Democrats could no longer win a contested Texas Supreme Court race.

Thus, with the previous great opportunity to change Texas judicial selection, it was difficult to understand what was happening without the benefit of hindsight, and some elections (most notably 1982) obscured the pattern of what was occurring in Texas judicial politics. Then, when the changes did occur, and Texas moved to being largely a one-party Republican state, the changes occurred rapidly. Now Texans should know what can happen in state judicial politics. The dramatic changes in Texas in the 1980s and early 1990s began with major Republican victories in judicial elections in Dallas County and spread from there. There is a historical pattern for what is happening now that did not exist in the earlier era. If those changes remain clear—so there are no confusing signals about what is happening such as occurred in the 1982 election—and if those changes are slow enough for key interest groups to be unable to identify a political advantage in remaining with the existing system of selection, the changes Hill first spoke about in 1986 may well occur.

92. Mary Alice Robbins, *Legislators Propose Post-Election Judicial Merit-Selection Bills*, TEXAS LAWYER, November 20, 2006, at 4.

93. A *Dallas Morning News* editorial claimed, “Some Dallas County Republicans blamed the national party—and specifically President Bush's travails—for depressing their local turnout.” Editorial, *Inside the Blue Wave*, DALLAS MORNING NEWS, November 9, 2006, at 28A.

94. John L. Hill, Jr., *It's Time to Eliminate Partisan Election of Judges*, TEXAS LAWYER, Nov. 6, 2006, at 29. John Hill died of a heart ailment on July 9, 2007.

95. Robbins, *supra* note 92.

The Texas system offers valuable lessons for other states considering changing their system of judicial selection. This is not simply a case study of the failure and prospects for judicial reform in one state. The Texas case tells us that change in a system of selection really is not for the “short-winded.” It can be a difficult and time-consuming process of putting together a coalition of key interest groups that begin to see political advantages in alternatives to the present system of judicial selection and that see disadvantages in remaining with that system. The Texas reform movement shows the need for a lengthy and persistent political battle to build that political coalition. Most importantly, the Texas efforts at judicial reform show the importance of changes in the state political environment in creating changes in the state’s judicial politics.



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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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

## 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,<sup>4</sup> 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;<sup>5</sup> 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.<sup>6</sup> Also, contentious elections spoil the image of the judiciary through negative campaign advertisements about the candidates.<sup>7</sup>

**[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.<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup>

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.<sup>11</sup> 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, *Thoughts 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 likeli-

hood 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.<sup>12</sup> 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.<sup>13</sup> “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.”<sup>14</sup> 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.<sup>15</sup> “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.”<sup>16</sup>

### 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, includ-

ing 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,<sup>17</sup> 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.<sup>18</sup>

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<sup>19</sup>—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?”<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.

#### 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,<sup>23</sup> 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.<sup>24</sup>

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)

**[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 . . .**

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 Caulfield, *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.**

mandated and regular, both before a commissioner begins work and periodically thereafter.<sup>27</sup> Knowing how to recruit and select the best judicial candidates is a skill that may be learned by commissioners and is not innate.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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”),<sup>31</sup>

by the appointing authority.<sup>25</sup> 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.<sup>26</sup>

Another theme of the symposium was that training of commissioners should be

industriousness, professional skills, social awareness, collegiality, writing ability, decisiveness, speaking ability, administrative ability, and interpersonal skills.<sup>32</sup>

States may also wish to have experience requirements for both lawyer and non-lawyer members of the judicial nominating commission.<sup>33</sup> 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),<sup>34</sup> 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.<sup>35</sup> 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](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.<sup>36</sup> This is not merely a problem with retention elections, but also with initial elections.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup>

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 unprofes-

sional 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."<sup>43</sup>

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;<sup>44</sup> and the presence of apparently inconsistent or arbitrary results, with candidates with similar attributes being rated differently.<sup>45</sup> In addition, although some political par-

**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].**

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 tempera-

ment 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.<sup>46</sup> Furthermore, political party screening panels may not function under articulated and enforceable rules, much less transparently.<sup>47</sup>

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.<sup>48</sup> 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 opportu-

nity 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.<sup>49</sup>

Judges may also benefit from favorable judicial performance review when attacked in retention elections for their decision making.<sup>50</sup>

### 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.<sup>51</sup> Observations were made about the international experience where judges must pass through “academic and practical training.”<sup>52</sup> 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.”<sup>53</sup> To correct any deficiencies in judicial education,

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](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.<sup>54</sup>

### 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.<sup>55</sup> 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.<sup>56</sup> 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;<sup>57</sup> where the appointing authority has substantial control over the selection of nominating commissions, cronyism and political rewards may be perceived as determining judicial selection.<sup>58</sup>

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.<sup>59</sup> No state appointment plan relies exclusively (much less heavily) on organizations to select commissioners.<sup>60</sup> 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

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

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](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](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](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](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](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](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](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.

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deans, subject to the mayor's approval.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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;<sup>64</sup> until recently, the New York State Bar Association plan proposed retention elections, but it now has apparently abandoned them.<sup>65</sup>

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.<sup>66</sup>

#### **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.<sup>67</sup> 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.<sup>68</sup>

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](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](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.<sup>69</sup>

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.<sup>70</sup>

[L]awyers and officials said they could not publicly challenge the [town or village] justice because of his power here.<sup>71</sup>

What is being done about those [Town and Village] Courts?<sup>72</sup>

### 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;<sup>73</sup> 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."<sup>74</sup> 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.<sup>75</sup>

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"<sup>76</sup> and provide "accessible venues to resolve criminal and civil disputes pursuant to State law."<sup>77</sup>

[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](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  
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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.<sup>78</sup>

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.”<sup>79</sup> Non-lawyer judges reportedly serve in many states besides New York.<sup>80</sup>

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.”<sup>81</sup> 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.”<sup>82</sup> 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.”<sup>83</sup> 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.”<sup>84</sup> Another judge holds sway through fear: “[Town and Village Court] Judge Head rules Keeseville, and God help you if you oppose him....”<sup>85</sup> As the *Times* commented, “It is impossible to say just how many of those [Town and Village Court] justices are ill-informed or abusive.”<sup>86</sup>

The *Times* pointed out that New York “demands more schooling for licensed manicurists and hair stylists” than for these local judges.<sup>87</sup> 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.”<sup>88</sup> 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.”<sup>89</sup>

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](http://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 col-

lege 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](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.<sup>90</sup> 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.”<sup>91</sup>

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.<sup>92</sup>

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.”<sup>93</sup> The requirement of simplification alone hardly inspires confidence in the system, let alone in the capability of the judges.

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.<sup>94</sup> 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

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

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 E.*, 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](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](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<sup>95</sup> and administrative<sup>96</sup> 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.”<sup>97</sup> The “non-lawyer basic

training program” would increase “from one week to seven.”<sup>98</sup>

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.”<sup>99</sup> 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.<sup>100</sup>

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.’”<sup>101</sup> 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.”<sup>102</sup>

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](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.”<sup>103</sup> 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.”<sup>104</sup>

#### **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.”<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup> 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.”<sup>109</sup> 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.<sup>110</sup>

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.”<sup>111</sup> 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 bal-

ances, whose citizens enjoy civil rights, and where property rights are well protected see both higher levels of wealth and higher rates of wealth creation.<sup>112</sup>

[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.<sup>113</sup>

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

**“[J]udicial independence is not an end in itself, but an instrumental value designed to protect the rule of 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.”<sup>114</sup> There are systemic constraints to deter such conduct, including codes of judicial conduct (requiring patience, temperance, courtesy, competence, and fairness)<sup>115</sup> 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.<sup>116</sup>

In many cases, statutory or common law requires a particular result,<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup>

Judicial independence certainly means that judges are not coerced to decide cases.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

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*<sup>124</sup> in the South.<sup>125</sup> 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.”<sup>126</sup> 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?<sup>127</sup> 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?

Indeed, the repeated use of Southern federal judges as examples of judicial courage<sup>128</sup> 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.<sup>129</sup> Others may agree that laws facilitating abortion (or particular types of abortion) are unjust, some may not.<sup>130</sup> 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 reelected.<sup>131</sup> 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

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

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.”<sup>132</sup> 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”<sup>133</sup> or resignation. Indeed, a federal circuit court judge voluntarily resigned when he recognized that politics might be impinging on his decision making.<sup>134</sup> 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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Law School, titled *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*. In addition to his article, the Fordham Urban Law Journal published his model judicial selection by appointment plan, *The Judicial Independence Through Fair Appointments Act*, 34 *FORDHAM URB. L.J.* 13 (2007), and many articles by the symposium participants in a special volume entitled *SYMPOSIUM ON RETHINKING JUDICIAL SELECTION: A CRITICAL APPRAISAL OF APPOINTIVE SELECTION FOR STATE COURT JUDGES*, 34 *FORDHAM URB. L.J.*, Vol. 1 (2007). Mr. Greene’s other articles on judicial selection appear in the *Mercer Law Review*, the *Albany Law Review*, the *New York State Bar Association Government Law and Policy Journal*, and the *Idaho Law Review*. His other articles on the judiciary, which are published in connection with symposia he organized at the *Association of the Bar of the City of New York*, appear in the *Brooklyn Law Review*, the *Cardozo Law Review*, the *Fordham Urban Law Journal*, and the *New York University Law Review*. He acknowledges the support of the *Altria Group, Inc.* in connection with the preparation of this article.

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.

# The Legislatures, the Ballot Boxes, and the Courts

William E. Raftery

As a separation-of-powers matter, the nation's framers and their state counterparts placed some distance between the legislative and judiciary branches so that each might better serve the people. Of course, the separation between the two branches has not prevented legislation impacting the courts year in and year out, much of which could reasonably be described as changes that potentially infringe on the independence, fairness, and impartiality of the courts. (I term these "attacks on the courts.") Moreover, the issue has been compounded lately by a series of efforts in initiative and referendum states to achieve by the ballot box what could not be accomplished through the legislature. Three areas in particular, those dealing with impeachment, judicial accountability, and court stripping, appear to be parts of larger national trends that will in all probability be replicated (in whole or in part) in other states in the future. This article describes recent legislative and citizen attacks on the courts and argues that there needs to be judicial awareness of and responses to potential encroachments on judicial independence. While impeachment and judicial accountability/personal liability for judges have found minimal support and success, altering the jurisdiction of the courts is proving to be robust and successful.

## I. IMPEACHMENT AND REMOVAL

The first attack is via the legislative impeachment process. The nation's framers wisely subjected judges to removal *for cause* through impeachment. Historically, this has been a rarely used power. Importantly, judicial *opinions and decisions* have not resulted in impeachment, even when controversial court decisions raised the possibility in legislatures. Since 1785, there have been only 32 investigations, involving 36 state judges, in contemplation of impeachment. In only 10 cases did the legislature actually impeach, convict, and remove a judge: In none of these cases was the impeachment based on political or policy disagreements with the judge's decision.<sup>1</sup> Rather, the impeachments that referred to a judge's order or ruling were done so as a secondary matter; a bribe or other impropriety was the center of the legislative concern.<sup>2</sup>

In the past five years, however, legislatures have acted—or threatened to act—solely on a judge's decision.<sup>3</sup> In fact, rhetoric about the removal of judges based solely on their case decisions has become increasingly common. None of these instances in the state courts has resulted in an actual impeachment and removal, but it is startling that the threats have materialized at all. Six state actions are exemplary:

- In 2004, Colorado Judge John W. Coughlin was under impeachment threat for his order in a custody case. Portions of the order were reproduced in the bill of impeachment. The specific case citation appeared in the house resolution, which sought to impeach the judge for malfeasance.<sup>4</sup> It died in committee.
- In 2005, a bill was introduced in the Tennessee Senate that would have made any decision that "deviates from rule of law" or precedent presumptively an act of judicial misconduct unless the judge could "present clear and convincing evidence that, before ruling, the adjudicator competently and thoroughly researched the law on the question controlling [and] cite uncontradicted and controlling precedent...that the question was one of first impression."<sup>5</sup> This bill never made it out of committee.
- In 2006, resolutions seeking the impeachment of the entire New Jersey Supreme Court for their ruling on same-sex marriage were introduced and are currently pending before the assembly judiciary committee.<sup>6</sup>
- In 2006, New Hampshire's legislature considered the removal of a sitting judge for a decision made years prior. Superior Court Justice Kenneth R. McHugh had ruled a plaintiff's pleadings in a divorce case were frivolous.<sup>7</sup> The bill was unanimously rejected by a joint house-senate committee.
- In 2006, The Ohio House of Representatives considered removing Judge John Connor for his sentencing of a sex offender. The speaker of the house issued a press release saying the house was "reviewing the processes by which Judge Connor may be removed from the bench."<sup>8</sup> Those plans, however, were shelved a few days later.

## Footnotes

1. See generally John O. Haley, *The Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. COMP. L. 281 (2006). See also Connecticut General Assembly, Office of Legislative Research, *Impeachment of State Officials*. February 9, 2004, <http://www.cga.ct.gov/2004/rpt/2004-R-0184.htm>.
2. Haley, *supra* note 1.
3. See *infra* Section II.
4. H.R. 1007, 64th General Assembly, Second Regular Session. (Colo. 2004).
5. S.B. 3522, 104th General Assembly, Second Session (Tenn. 2006).
6. A.R. 217 (Justice Albin), 212th Legislature, Second Session. (N.J. 2007); A.R. 218 (Justice LaVecchia), 212th Legislature, Second

Session (N.J. 2007); A.R. 219 (Justice Rivera-Soto), 212th Legislature, Second Session (N.J. 2007); A.R. 220 (Justice Wallace), 212th Legislature, Second Session (N.J. 2007); A.R. 221 (Chief Justice Poritz), 212th Legislature, Second Session (N.J. 2007); A.R. 222 (Justice Zazzali), 212th Legislature, Second Session (N.J. 2007); A.R. 223 (Justice Long), 212th Legislature, Second Session (N.J. 2007).

New Jersey operates on a session cycle (in this instance, 2006/2007). All 2006 bills are still pending in 2007, without the need for reintroduction.

7. H.A. 1, 159th Session, Second Year. (N.H. 2006).
8. Editorial, *Judge Connor Must Go—Now!*, DAYTON DAILY NEWS, Mar. 19, 2006, at B6.

- In 2006, the Vermont House called upon District Judge Edward Cashman to resign for the relatively lenient sentence he handed down in a child molestation case.<sup>9</sup> When Judge Cashman later accepted the prosecution's motion for reconsideration and increased the sentence, the house's resolution was extensively amended to remove direct references to Judge Cashman or any calls for his resignation. The resolution also included a provision that the general assembly "recognizes the importance of an independent judiciary to the rule of law in our constitutional system of government." The joint resolution passed the house and was forwarded to the senate where it died.

## II. JUDICIAL ACCOUNTABILITY

Citizen-led initiatives and referenda account for a second set of attacks that go after judges not in their official capacity, as in impeachment, but personally. These are in the form of "judicial accountability" efforts, and they are frequently focused on forcing judges to pay out of their own pockets for civil judgments that would stem from claims raised by litigants who would have a cause of action against a judge for misconduct. An example is the ongoing effort being mounted by Coloradan Rick Stanley. Stanley and others from the "Liberty Initiatives Group" are proposing a ballot initiative for 2008, the "Colorado Judicial Accountability Act." The act would amend the Colorado Constitution and impose "personal liability" on judges, limit indemnification of judges for damages they would be liable for, and remove judges from office after three instances of misconduct.<sup>10</sup>

Before 2006, the phrase "judicial accountability" was ill-defined or simply not defined at all. A Lexis/Nexis search of "US Newspapers and Wires" found 34 uses of the phrase "judicial accountability" in 2001. By 2004, the number jumped to 90. It increased to 168 in 2006, based largely on events in South Dakota (described below).

9. J.H.R. 52, Adjourned Session of the 2005-2006 Biennium. (Vt. 2006)
10. See <http://home.earthlink.net/~19ranger57/initiative2.pdf>. Stanley, a former Libertarian candidate running for the 2002 Senate seat in Colorado, was convicted in 2004 for sending two judges a "notice of order" demanding that they reverse his conviction for a weapons violation or face arrest by Stanley's Mutual Defense Pact Militia followed by a trial for treason. The conviction was recently affirmed by the Colorado Court of Appeals. *People v. Stanley*, \_\_\_P3d\_\_\_, 2007 WL 1017674 (Colo.App. Apr. 5, 2007).
11. Full text of Constitutional Amendment E, An Amendment to Article VI of the South Dakota Constitution, Relating to Judicial Decisions, is the South Dakota Secretary of State's website, [http://www.sdsos.gov/electionsvoteregistration/upcomingelection\\_2006BQExplanations.shtm](http://www.sdsos.gov/electionsvoteregistration/upcomingelection_2006BQExplanations.shtm).
12. Judicial Accountability Initiative Law (JAIL) "a single-issue national grassroots organization designed to end the rampant and pervasive judicial corruption in the legal system of the United States." See <http://www.jail4judges.org/>. Stegmeier is a member of the organization, and the South Dakota initiative followed the JAIL4Judges standard approach for reform.
13. See, e.g., Bob Ellis, *Zogby Poll: South Dakota Amendment E (JAIL) Support at 67%*. DAKOTA VOICE, Sept. 21, 2006, [http://www.dakotavoice.com/200609/20060921\\_3.html](http://www.dakotavoice.com/200609/20060921_3.html).

Rick Stanley's attempts at "judicial accountability" may be exemplary; however, so far they have been mostly ineffectual. South Dakota's Bill Stegmeier's proposed Amendment E, the Judicial Accountability Initiative Law of 2006<sup>11</sup> (popularly known as the JAIL4Judges<sup>12</sup> Amendment), on the other hand, raised more concerns as there seemed to be at least a chance for enactment.<sup>13</sup> The amendment was designed to create a Special Grand Jury that could subject anyone "shielded by judicial immunity" to civil suit or criminal prosecution for "conspiracy." Although the initiative lost 89% to 11% in November 2006, the loss only emboldened the JAIL4Judges movement. Stegmeier wrote in the aftermath of the initiative's defeat:

And next time, thanks to the lessons we have learned, our new Judicial Accountability Amendment will be bulletproof. And for good measure, we will also put on the ballot an amendment to outlaw computerized vote counting. And just because they have peeved us off, how about an amendment to require judges to inform the jury it has the right to judge the law as well as the accused's guilt or innocence? I think so!<sup>14</sup>

Stegmeier is a board member of the Liberty Initiatives Group which, as previously noted, is pushing for a JAIL-like initiative in Colorado in 2008.<sup>15</sup> Florida's JAIL4Judges branch has worked with their national leadership to modify certain portions of what appeared on the ballot in South Dakota<sup>16</sup> and are making their attempt to get onto the 2008 ballot. Their first act was to register as a nonprofit corporation titled "The Florida Bar Association, Inc."<sup>17</sup> Next, they commenced an action

**Citizen-led initiatives and referenda account for a second set of attacks that go after judges . . . personally.**

14. David Kranz, *Teaching Long a Lesson? J.A.I.L. Amendment Proponents Blame Official for Its Failure*, ARGUS LEADER, Feb. 5, 2007, available from [http://www.tulanelink.com/jail/argusleader\\_07b.htm](http://www.tulanelink.com/jail/argusleader_07b.htm).
15. See Gene Chapman, *My Child is Born*, LIBERTY INITIATIVES GROUP, Dec. 9, 2006, <http://libertyinitiativesgroup.blogspot.com/2006/12/my-child-is-born.html>; and *Colorado Judicial Accountability Act Passed in LIG Meeting* (Jan. 16, 2007) <http://libertyinitiativesgroup.blogspot.com/2007/01/colorado-judicial-accountability-act.html>
16. A version of the new initiative has been released online. See e-mail reproduced as part of a group discussion post dated February 13, 2007 from national JAILer in Chief Ronald Branson and *Branson to Hurt: "We Need A Special Grand Jury"* [http://groups.google.com/group/Lawmen/browse\\_thread/thread/cc4a7608932bfa6b/e77e6880f8e488e5?hl=en#e77e6880f8e488e5](http://groups.google.com/group/Lawmen/browse_thread/thread/cc4a7608932bfa6b/e77e6880f8e488e5?hl=en#e77e6880f8e488e5).
17. Articles of Incorporation (Sept. 9, 2005). On file with the Florida Secretary of State [http://www.sunbiz.org/scripts/cordet.exe?action= DETFIL&inq\\_doc\\_number=N05000009115&inq\\_came\\_from=NAMFWD&cor\\_web\\_names\\_seq\\_number=0000&names\\_name\\_ind=N&names\\_cor\\_number=&names\\_name\\_seq=&names\\_name\\_ind=&names\\_comp\\_name=FLORIDABAR&names\\_filing\\_type=](http://www.sunbiz.org/scripts/cordet.exe?action= DETFIL&inq_doc_number=N05000009115&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=FLORIDABAR&names_filing_type=)

**[C]ourt-stripping efforts have sought to simply remove from the courts jurisdiction over a variety of cases.**

against “the Florida Bar” before that state’s supreme court demanding “the Florida Bar” give space in its publications to the JAILers as well as a motion to disqualify all sitting justices.<sup>18</sup> The supreme court rejected their petition and a motion for reconsideration is pending. In Nevada, the former head of that state’s JAIL4Judges chapter and current leader of the state’s third-largest political party has vowed to use that state’s existing law that permits grand juries to be convened by gathering of signatures to proceed against any and every judge he can. Moreover, he intends on pushing to push legislation or initiatives to lower the number of signatures required for such grand juries.<sup>19</sup>

JAIL4Judges is not the only group seeking to make judicial officers subject to personal civil suits and imprisonment for their decisions.

- In Arizona<sup>20</sup> and California,<sup>21</sup> JAIL4Judges-like initiatives have been submitted for signature gathering by others alleging judicial conspiracies against them.
- North Dakota’s proposed Family Law Reform Initiative<sup>22</sup> (FLRI) would subject all judges “who knowingly promote[] false or frivolous claims of domestic abuse” to automatic disbarment. In visitation/support cases, courts that “deliberately refuse” to enforce orders to the liking of one of the parties “shall enjoy no immunity from either prosecution or civil suit.”<sup>23</sup> In addition, the initiative would retroactively reopen all domestic cases involving divorce, families, or children decided in the last 10 years and require they be retried before juries. Backers of the original version of FLRI were able to gather only 4,000 of the over 12,000 signatures needed within the one-year deadline.<sup>24</sup> However, proponents have begun modifications to the initiative’s language and vow to gather signatures for the 2008 ballot.<sup>25</sup>

While the above efforts have been prompted by disgruntled litigants using citizen-legislation avenues, legislatures also have been examining whether to make judges liable for personal expenses based on their decisions.

- Connecticut’s legislature<sup>26</sup> copied portions of the JAIL4Judges ballot language concerning “judicial immunity” and went even further, creating an inspector general for the judiciary with the power to convene a grand jury at any time against any judge. The IG could personally “grant the writ of habeas corpus in the same manner as the Supreme and District courts” and could require judges “state an authority of law for which the judgment should be based, in particular order(s) for denial or dismissal if no written finding was available.”<sup>27</sup> The IG’s grand jury “shall be granted powers of jury nullification and have the right to take it upon themselves to judge the law as applied ethically and constitutionally by a judge as well as the facts in controversy surrounding a judge’s decision.”<sup>28</sup>
- In 2005, Indiana’s House considered a bill that would have changed the presumptions regarding joint legal and physical custody and other similar issues.<sup>29</sup> The proposed legislation would have impacted the judiciary significantly: Any judge who “fails to comply...commits official misconduct and: (1) is not entitled to judicial immunity; and (2) may not be represented at the state’s expense in an action against the judge for official misconduct.”<sup>30</sup>
- Also in 2005, West Virginia’s House considered a bill<sup>31</sup> providing that if a municipal trial court judge’s decision is overturned on appeal, the judge would be “personally liable to the defendant for one hundred dollars...and shall in all events be paid from the personal funds of that judge. The judge may not be reimbursed by the municipality...”<sup>32</sup>

### III. COURT STRIPPING

The third attack is against the judicial officer not as a person or as judge, but as a part of the judicial branch as a whole. To that end, court-stripping efforts have sought to simply remove from the courts jurisdiction over a variety of cases. Here, the attack on the judiciary is an institutional one; although individual judges or judicial decisions are sometimes referenced, these are often federal cases or cases from states other than the jurisdiction considering stripping the courts of jurisdiction. Court stripping may prove to be the most successful of the three arenas of judicial attacks.

Numerous federal efforts to remove jurisdiction from the

18. Press Release, Florida J.A.I.L. for Judges, *Florida J.A.I.L. for Judges Files Suit Against the Florida Bar to Enjoin Illegal Activity*, (Feb. 21, 2007) [http://www.jail4judges.org/PressReleases/PR\\_2007-02-21.htm](http://www.jail4judges.org/PressReleases/PR_2007-02-21.htm).  
19. Christopher Hansen, *An Interview and Answers to All Those Questions*, INDEPENDENT AMERICAN PARTY OF NEVADA (blog), Sept. 19, 2006, <http://www.independentamerican.org/blog.php?blog=208>.  
20. Arizona Secretary of State, C-02-2008, *Judicial Reform*, <http://www.azsos.gov/election/2008/General/Initiatives.htm> (copy of text obtained from the Arizona Secretary of State on file with author).  
21. See *Proposed Public Agency Accountability Ballot*, [http://ag.ca.gov/cms\\_pdfs/initiatives/2007-01-03\\_06-0036\\_A1S.pdf](http://ag.ca.gov/cms_pdfs/initiatives/2007-01-03_06-0036_A1S.pdf)  
22. See <http://www.flri.net/>.

23. See <http://www.nd.gov/sos/electvote/elections/docs/petition4-11-2006.pdf>.  
24. Kyle Johnson, *Family Initiatives*, GRAND FORKS HERALD, July 23, 2006, at 1.  
25. Dale Wetzel, *Time Runs Out for ND Family Law Ballot Measure*, ASSOCIATED PRESS, Apr. 11, 2007.  
26. H.B. 6289, 2005-2006 Meeting, 2006 Session (Ct. 2006).  
27. *Id.* at Section 3.  
28. *Id.* as Section 5.  
29. H.B 1512, 114th General Assembly, First Session (Ind. 2005).  
30. *Id.* at Sections 3 and 10.  
31. H.B. 3140, 79th Legislature, First Session. (W. Va. 2005).  
32. *Id.* at Section 8-34-5.

courts pertaining to matters such as the Pledge of Allegiance and the phrase “under God,”<sup>33</sup> public prayer,<sup>34</sup> and the display of the Ten Commandments<sup>35</sup> have been introduced in recent years. Similar attempts to remove or alter the jurisdiction of the state courts have also been considered, some echoing or copying outright their congressional counterparts. For example, Arizona proposed to remove jurisdiction over cases where a government employee issued an “acknowledgement of God as the sovereign source of law, liberty or government.”<sup>36</sup> Senator Karen Johnson, who introduced the legislation, told local media that “[W]e’re supposed to have religion in everything—the opportunity to have religion in everything. I want religion in government, I want my government to have a faith-based perspective.”<sup>37</sup> The bill was withdrawn.<sup>38</sup>

Kentucky’s effort went further, though it too was unsuccessful. A bill was introduced to enact a constitutional amendment that would have prohibited courts from construing any provision of the state constitution to prohibit the historic display of the Ten Commandments on public property, require an increase in taxation, order the expenditure of funds by government, and a litany of other restrictions on the courts.<sup>39</sup> The provision was approved by the senate state and local government committee before being rejected by the full senate in a 16-22 vote. But the matter is not dead. In 2007, Kentucky’s House picked up where the previous effort left off.<sup>40</sup> In addition, the proposed bill would limit the courts’ power in Establishment Clause cases to injunctive relief and award of costs. Courts would be expressly prohibited from awarding “actual damages or attorney’s fees.”<sup>41</sup>

The efforts to remove jurisdiction have been primarily focused on cases in which courts have ordered governments to provide additional funding to schools or for other purposes.

- Indiana proposed a prohibition on the courts from issuing any order “requiring the State or a political subdivision of the State to expend money for the operation of any court of the State.”<sup>42</sup> It was never voted on in committee.
- Legislation has been introduced in Kansas for the past three years that would prohibit courts from ordering funding or appropriations in general.<sup>43</sup> The 2005 version was approved

by full senate, but died without action in the house. The 2006 version was voted out of committee but ultimately rejected by the house. The 2007 version was limited only to school-funding issues.

- The Oklahoma legislature introduced a bill that would have prohibited courts from ordering any action resulting in an increase in taxes, fees, or other sources of revenue.<sup>44</sup> The bill passed the house 78-12 but died without any action in the senate.

**Arizona proposed to remove jurisdiction over cases where a government employee issued an “acknowledgement of God as the sovereign source of law, liberty or government.”**

This past year, much of the focus has been on Missouri, which like Kansas has had a multiyear effort to limit the courts’ authority. A bill was introduced in the house in 2006 that would prohibit the courts from ordering the state or local government to levy or increase a tax.<sup>45</sup> The legislation would also prohibit the courts from ordering how to spend, allocate, or budget fiscal resources in all cases except to compel reasonable funding of judicial operations. It was voted out of committee but died on the house floor. The 2007 legislation would have forbidden courts “to instruct or order the state or any county, city, or political subdivision thereof, or an official of the state or of any county, city, or political subdivision thereof, to levy or increase taxes” and to issue decisions “on how to spend, allocate, or budget fiscal resources in a manner inconsistent with duly enacted and effective legislation.”<sup>46</sup> The proponents pointed to other states, especially Kansas, for the need to remove the court’s jurisdiction over these matters thereby “Stopping Judges for [sic] Raising Taxes.”<sup>47</sup> The Kansas Supreme Court had previously struck down on constitutional grounds that state’s school-financing program as failing to pro-

33. *Pledge Protection Act of 2003*, H.R. 2028, 108th Congress, First Session (As Approved by House); *Pledge Protection Act of 2004*, H.R. 2028, 108th Congress, Second Session (As Approved by House); *Pledge Protection Act of 2005*, H.R. 2389, 109th Congress, First Session (As Approved by House); *Pledge Protection Act of 2007*, H.R. 699, 110th Congress, First Session (As Introduced in House).

34. *Public Prayer Protection Act of 2005* H.R. 4364, 109th Congress, First Session (As Introduced in House); *Public Prayer Protection Act of 2007* H.R. 2014, 110th Congress, First Session (As Introduced in House)

35. *Safeguarding Our Religious Liberties Act*, H.R. 4576, 109th Congress, First Session (As Introduced in House).

36. S.C.R. 1026, 48th Legislature, First Session (Ariz. 2007).

37. Howard Fischer, *Senator Wants God Out of Courts*, ARIZONA STAR, Jan. 31, 2007, at B5.

38. S.C.R. 1026, 48th Legislature, First Session (Ariz. 2007).

39. S.B. 236, 2005-2006 Legislature, 2006 Regular Session (KY 2005).

40. H.B. 19, 2007-2008 Legislature, 2007 Session (KY 2006).

41. *Id.* at Section 2.

42. S.J.R. 12, 115th General Assembly, First Session (Ind. 2007).

43. S.C.R. 1603A, 2005 Special Session (KS 2005); H.C.R. 5032, 2006 Regular Session (KS 2006); .S.C.R 1601, 2006 Regular Session (KS 2006).

44. H.J.R 106, 2006 Regular Session, (Okla. 2006).

45. H.J.R. 31, 93rd General Assembly, Second Session (MO 2006).

46. H.J.R 1, 94th General Assembly, First Session (MO 2007).

47. Speaker of the Missouri house Rod Jetton elaborated on the need for the legislation, citing to the activities in other states, through his newsletter, CAPITOL REPORTS. See *Stopping Judges from Raising Taxes (Part I)*, Apr. 4, 2003 and *Stopping Judges for Raising Taxes (Part II)*, Apr. 13 ,2007, both <http://www.rodjetton.org/reports>.

**Citizen-led efforts are a reflection of political dissatisfaction with the government that is now targeting the judiciary.**

vide sufficient funds to meet the requirement.<sup>48</sup> Missouri was facing a similar lawsuit. However, even Kansas's proposed legislation did not go this far and dealt only with ordering appropriations.<sup>49</sup>

Missouri's HJR 1 made it through the house with the vocal support of that state's

governor. In an interesting piece of timing, the house voted on the bill the same day testimony concluded only a few blocks away in a court case involving school financing. A senate committee modified the language but it failed to receive approval by the full senate before the adjournment of the legislature.

#### **IV. WHY LEGISLATIVE ATTACKS ON THE COURTS ARE INCREASING AND SHOULD BE OF CONCERN**

Citizen-led efforts are a reflection of political dissatisfaction with the government that is now targeting the judiciary. They may be of concern, but they do not have the institutional backing that legislative efforts have. They are of concern, even though none of the three categories of attacks on the judiciary have gotten as far as passage by a full legislature to date. Why then are bills continuing to be introduced by legislators? There are several factors at play.

First, they serve as vehicles for state legislators to voice displeasure with specific decisions and judges. The impeachment efforts are clear indicators of this. However, there are more subtle ways in which legislatures have sought to accomplish the same goal—strategically based budget cuts or personnel decisions come to mind. But these recent efforts are public and loud. Knowing that their likelihood for success is minimal or nonexistent, legislators get a message across without actually having to push the matter too hard.

The efforts by legislatures voice displeasure with the state's judiciary in general or are tied into displeasure with the federal courts, with the state's court system serving as punching bag by proxy. Kentucky's and Missouri's court-stripping legislation proposals are cases in point. These are not in reaction to any particular decision rendered by their states' courts. Instead, these are responses to federal cases or decisions rendered in

other states. "Judges" are lumped together nationally, with local reactions the result.

Finally, some of these efforts are truly intended to hurt judges, personally or professionally, or the judiciary as a whole. We may be past the point during the 1960s when "Impeach Earl Warren" was on billboards but never made it into articles of impeachment on the House floor, but in 1997 then-House Majority Whip Tom Delay (R-Texas) threatened that on the federal judiciary level, "the articles of impeachment are being written right now..."<sup>50</sup> Yet despite the Republican Whip having his party as majority in both the U.S. House and Senate, the impeachment efforts never materialized.

In the state, however, there seems to be great persistence. We are starting to see efforts against state judges move from ideas to actual legislation and in so doing moved a step closer toward actual passage. Of the judges impeached or investigated for possible impeachment from 1991 to 2004, none were pursued based solely on their decisions. Colorado's 2004<sup>51</sup> effort marked a change on that score. Court stripping is moving beyond one-chamber bills and into the realm of legislative possibility. Will we see the introduction of more articles of impeachment or direct efforts against particular judges for specific decisions in the future? It appears very likely.

#### **V. WHAT CAN BE DONE**

What are the messages to take away from this when it comes to the legislature and judiciary? Let us return back to South Dakota. The state legislature unanimously passed a resolution in support of their state's judiciary and against the idea of subjecting judges to imprisonment for their decisions.<sup>52</sup> Both political parties put opposition to J.A.I.L. 4 Judges (Amendment E in South Dakota) into their state party platforms or passed resolutions to that effect. More than 200 city councils, county commissions and school boards passed resolutions against Amendment E. Why? In part, it was because the language of the amendment included councils, boards, and commissions, as they are protected by "judicial immunity" when rendering certain decisions. In part, it was because the proponents themselves admitted several times to wishing to attack not just judges, but also the "New World Order" and the Federal Reserve,<sup>53</sup> the Uniform Commercial Code,<sup>54</sup> the use of Social Security numbers as the Mark of the Beast in Revelations,<sup>55</sup> etc. But those local resolutions also came about as people began to

48. *Montoy v. Kansas*, 279 Kan. 817, 112 P.3d 923 (2005).

49. Both pieces of legislation used the same language: "The executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States. Any existing order directing the legislative branch to make an appropriation of money shall be unenforceable as of the date this provision is adopted."

50. Ralph Z. Hallow, *Republicans out to impeach 'activist' jurists*, THE WASHINGTON TIMES, Mar. 12, 1997, at 1.

51. See *supra* note 4 and accompanying text.

52. H.C.R. 1004, Eighty-First Session, (S.D. 2006).

53. Ron Branson, *Investing In America*, J.A.I.L. NEWS JOURNAL, June 8,

2005, [http://www.jail4judges.org/JNJ\\_Library/2005/2005-06-08.html](http://www.jail4judges.org/JNJ_Library/2005/2005-06-08.html).

54. "Yes, Loma, we \*/do/\* "hope that all of you have studied history and understand that we are being ruled under UCC corporate law" \*\_J.A.I.L.\_\* is the means by which the People will carry out their duty to alter or reform government today, The People will settle for nothing less than a Constitutional Republic, a republican form of government — \*\_NOT\*\_ A DEMOCRACY!" E-mail from Barbie Branson, Associate National JAILer in Chief. Reprinted as "What About The Corporation?", J.A.I.L. NEWS JOURNAL, Jan. 6, 2006, [http://jail4judges.org/JNJ\\_Library/2006/2006-01-07.html](http://jail4judges.org/JNJ_Library/2006/2006-01-07.html).

55. Ron Branson, *When the Courts Don't Work, Neither Do Governments Work*, J.A.I.L. NEWS JOURNAL, Feb. 19, 2004, [http://www.jail4judges.org/JNJ\\_Library/2004/2004-02-11A.html](http://www.jail4judges.org/JNJ_Library/2004/2004-02-11A.html).

realize that regardless of how they might feel about a particular decision in their case or even cases in other states with a national impact, there was something wrong with the idea of making a judge pay out of his or her own pocket or be thrown in prison for an unpopular decision.

The vast majority of bills previously mentioned died in committee with no action taken. There is at least *for the time being* a resistance to the notion of personally harming judges, or removing judges, or harming the judiciary for doing the job the people expect of them, namely, to adjudicate matters. At some basic level, it smacks of either a threat to our system of government or is too much a parallel to those people who actually personally harm others in a physical way, such as in those cases where judges and other court personnel have been killed.

Nevertheless, the recent electoral defeats cannot be seen as the end of these efforts. JAIL4Judges started in 1996 in a California garage, spread across the internet, and landed on the South Dakota ballot in 2006. Actual legislation to impeach judges for their decisions would have been unheard of five years ago, yet today numerous bills and resolutions have been introduced. Hobbled courts' ability to hear cases is closing in on reality. To those states fielding these issues, the need to recognize these efforts as part of an interwoven national trend is essential. To those in states that have not yet had to confront these issues, these efforts may be to serve as a warning. With

an internet- and blog-connected society and a series of pundits who have made careers by attacking judges in general and some individual judges in particular, we will not have to wait ten more years to see similar efforts arriving on the doorstep of other states either through the legislative process or through initiatives and referenda.



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*Examining the Work of State Courts and State Court Caseload Statistics. He serves on the editorial board of The Justice System Journal and was the editor of the National Association for Court Management's Court Security Guide. Bill received his M.P.A. degree from John Jay College of Criminal Justice with a specialization in court administration.*



# The Resource Page



## WEBSITES

### CONTINUITY OF COURT OPERATIONS: A PLANNING GUIDE

[http://ncsconline.org/D\\_Research/coop](http://ncsconline.org/D_Research/coop)

The National Center for State Courts has released a planning guide for continuity of operations for courts. A continuity-of-operations plan can help a court continue its essential functions when normal court operations are impaired because of a natural or man-made emergency. The planning guide includes information on planning for a pandemic.

The web-based planning guide includes hyperlinks that make it easy to navigate; worksheets and templates are provided to guide the planning process. These materials were developed with the assistance of a National Coalition for Emergency Management, representing 16 court and emergency-management

organizations, and the effort was supported by a grant from the Bureau of Justice Assistance. The planning guide walks users through the process of developing a continuity-of-operation plan with worksheets, a template for a plan, and many links to online resources that provide helpful background. Resources available through links include state continuity-of-operations plans in Arizona and Florida, the Louisiana District Judges Association's 2006 *Disaster Recovery Template* (something they know a lot about), and guidance documents on preparing for epidemics or pandemics from the state courts in California, Florida, and Pennsylvania.

The website will be expanded in the near future to include an online educational program about continuity-of-operations planning. For more information, contact researcher Pam Casey at the National Center for State Courts ([pcasey@ncsc.dni.us](mailto:pcasey@ncsc.dni.us)).



## PUBLICATIONS

### JUSTICE SYSTEM JOURNAL SPECIAL ISSUE ON JUDICIAL CONDUCT AND ETHICS

[http://www.ncsconline.org/D\\_Comm/Projects/JSJindex/JSJ\\_TOC/Vol28\\_3/vol28\\_3.html](http://www.ncsconline.org/D_Comm/Projects/JSJindex/JSJ_TOC/Vol28_3/vol28_3.html)

The *Justice System Journal* has published a special issue on judicial conduct and ethics. The issue contains 7 articles describing and criticizing the 2007 ABA Model Code of Judicial Conduct. This portion of the issue will be of special interest to judges as the supreme courts of each state review the new ABA Model Code and decide whether to adopt its provisions, either as proposed or with modifications.

The special issue (Volume 28, No. 3) also contains several articles on judicial-campaign speech under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The issue concludes with articles on judicial-ethics education, judicial-conduct commissions, recent litigation, and several notes of recent ethics cases. Current issues of the *Justice System Journal* may be ordered for \$13 from the National Center for State Courts' online bookstore: from the National Center's home page (<http://www.ncsconline.org>), click on "Bookstore."

### PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE

**National Institute on Drug Abuse, National Institutes of Health**

<http://www.nida.nih.gov/PDF/PODAT/PODAT.pdf>

The National Institute on Drug Abuse has a helpful, 56-page review of the 13 principles they have concluded are at the heart of any successful drug-addiction treatment plan. Although published a few years ago, its accessibility on the web and easy-to-use format make it still a helpful resource on research about addiction, treatment, and recovery.

## PUBLIC OPINION ON LAW ENFORCEMENT

"How much confidence do you have in police officers in your community to [see below]: a great deal, a fair amount, just some, or very little confidence?"

	ALL	WHITES	BLACKS	HISPANICS
<b>Do a good job of enforcing the law</b>				
A great deal	42%	47%	21%	34%
A fair amount	31%	31%	34%	28%
Just some	13%	11%	17%	18%
Very little	11%	9%	20%	15%
Unsure	3%	2%	8%	5%
<b>Not use excessive force on suspects</b>				
A great deal	37%	42%	11%	30%
A fair amount	29%	31%	27%	21%
Just some	12%	10%	20%	19%
Very little	14%	11%	28%	17%
Unsure	8%	6%	14%	13%
<b>Treat blacks and whites equally</b>				
A great deal	37%	42%	14%	26%
A fair amount	29%	32%	23%	19%
Just some	11%	8%	17%	21%
Very little	14%	10%	31%	21%
Unsure	9%	8%	15%	13%

Source: Pew Research Center/National Public Radio survey conducted by Princeton Survey Research Associates International, Sept. 5-Oct. 6, 2007, as reported in *The Polling Report* (Nov. 12, 2007). N=3,086 adults nationwide, including 1,536 non-Hispanic whites, 1,007 non-Hispanic blacks, and 388 Hispanics.