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Court Review

Volume 55, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

TABLE OF CONTENTS

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Indiana Superior Court

Judge Julie Kunce Field
Colorado State District Court

Judge David Prince
Colorado State District Court

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ARTICLES

- 10** The Facts Behind the Media Coverage, the Sentence that Launched
a Recall

Jeffrey J. Hunt

- 16** Send Them a Message?: The Threat to a Fair and Impartial State-Court
Judiciary

Barbara J. Pariente & Melanie Kalmanson

- 30** The Least Accountable Branch?

James L. Gibson & Michael J. Nelson

- 36** Judicial Recall and Retention in the #MeToo Era

Jordan M. Singer

ESSAYS

- 44** The Fiction of Atticus Finch Meets the Reality of James Prince

David Prince

DEPARTMENTS

- 2** Editor's Note

- 3** President's Column

- 4** Thoughts from Canada

- 43** Crossword

- 48** The Resource Page

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 55, Issue 1

2019

EDITOR'S NOTE

When I started brainstorming for this issue, I was troubled by the extensive national media coverage of a recall election for a trial judge in California, Judge Aaron Persky. I was frustrated that the large volume of coverage had so few facts regarding Judge Persky or the already infamous sentencing decision that underlay the recall effort. While judicial accountability is critical to the credibility of our courts, I was also alarmed by the lack of any coherent communal standards for evaluating whether to recall a judge in our national dialogue. The plan for this issue resulted. We had no idea that the Kavanaugh hearings and the national attention to the Larry Nassar sentencing would only further spotlight community evaluation of judicial officers. How should we judge the judges, and how do we balance the need for impartiality with the need for accountability?

First, we hear from an accomplished lawyer and gifted former journalist, Jeff Hunt. His article gives us the facts we wanted to hear behind the Persky recall. Not surprisingly, the situation raised more challenges, regardless of your perspective, than the media coverage suggested.

In our second article, Justice Barbara Pariente and Melanie Kalmanson give us frontline accounts of efforts to “send a message” to judges. They discuss the dangers of a judiciary too beholden to popular will and make a case for that apparently passé notion of judicial independence. They also explain objective standards for evaluation of judges.

In our third article, we turn to the other side of the spectrum. Prof. James Gibson and Michael Nelson discuss the critical importance of accountability to the credibility of the judiciary and the risk of being known as *The Least Accountable Branch*. The authors question the premise that judges should be insulated from the views of the community. They discuss the scope of judicial discretion and question how a judiciary can be accountable if the subjective exercise of that discretion is effectively deemed unreviewable.

Our fourth article from Prof. Jordan Singer provides a broader perspective on the relative roles of accountability and independence for the judiciary. Prof. Singer reviews some history of our attempts in judicial selection systems to balance these sometimes competing elements. In his list of sample retention challenges, you could add one in my state of Colorado last year. A highly regarded trial judge made a ruling that a powerful civil attorney disliked and the attorney funded an advertising campaign against him that our nonpartisan, merit-based system was not equipped to handle. He was retained so, like other examples cited by Prof. Jordan, you may see that as an example of the strength of the current system or a cautionary tale of troubles to come.

Finally, I provide an essay reminding us of a time when the judiciary really was no more than a reflection of the popular prejudices of the day and how some of those influences are still with us. While tied to our topic, my essay is intended more to follow the advice of our psychology experts from issue 54:2 to be mindful of the purpose and value in our work.—David Prince



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 8 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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The cover photo is the Bent County Courthouse in Las Animas, Colorado. The courthouse opened in 1889 and is currently the oldest functioning courthouse in Colorado. Additionally, the courthouse is on the National Registrar of Historic Places. Cover photo by Mary Watkins.

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President's Column

Robert J. Torres, Jr.

Dear colleagues and *Court Review* readers!

The State of State Courts is an annual national survey conducted on behalf of the National Center for State Courts, and I thought it would be interesting to share the poll results and analysis as we focus on critical issues facing our respective judiciaries. In addition to NCSC's regular tracking measures, this year's research also examined three areas identified by NCSC's advisory group as critical issues facing state courts across the country: cash bail reform, self-represented litigants, and online dispute resolution.

Overall views toward state courts have held steady, and in a few cases improved, despite a year of "widespread political attacks on judges, campaign accusations of special interest influence on the court system, and increasingly partisan battles over judicial elections and nominations." Since tracking began in 2012, voter confidence and trust in the state courts reached a new high, with governors and state legislatures ratings falling well below the courts.

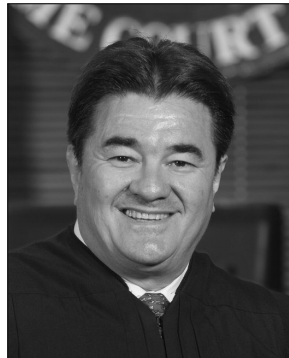
Nevertheless, there are still concerns of bias, inefficiency, and a two-tiered justice system weighted against "regular" people. Mistrust of the courts runs high with African-American voters, who are least likely to agree the courts are *unbiased in their case decision* (37% agree, 59% disagree) and are *taking the needs of people into account* (41% agree, 56% disagree). There is a large gap between white and African-American voters on the system being *fair and impartial* (white: 66% describes, AA: 36% describes) and *providing equal justice for all* (white: 56% describes, AA: 29% describes). Voters, particularly non-white voters, believe more can be done by judges to understand the needs of those in their courtrooms. Concerning the critical issues identified by the advisory group, a majority recognizes that cash bail produces a two-tiered justice system, and the public strongly believes that judges should base pretrial release decisions on factors other than ability to pay. A broad majority also say courts are not doing enough for self-represented litigants, but there is trepidation in navigating the court system without an attorney. Online dispute resolution has some attractiveness as a cost-effective way to resolve smaller cases. Not surprisingly, younger voters with a higher educational attainment or incomes are more likely to opt for an online resource over the courthouse.

The combative and partisan confirmation hearings for Justice Brett Kavanaugh appear to have affected the public's confidence in the United States Supreme Court along party lines according to the NCSC survey. The Kavanaugh hearings and other recent events (#MeToo) also highlighted concerns about inappropriate conduct within the judicial branch that was the

focus of another report, the 2018 Year-End Report on the Federal Judiciary from Chief Justice John Roberts. The Chief Justice referenced that "inappropriate workplace conduct is not pervasive within the Judiciary, but it also is not limited to a few isolated instances involving law clerks" and that "misconduct, when it does occur, is more likely to take the form of incivility or disrespect than overt sexual harassment" and frequently goes unreported. Although the Judiciary does have key foundations in place for managing inappropriate behavior, more can be done to encourage all employees to report misconduct to improve the workplace environment. Chief Justice Roberts endorsed the Working Group's recommendations to revise the Judiciary's codes of conduct to define more clearly how to promote appropriate behavior, strengthen and streamline internal procedures surrounding misconduct, and expand training programs to raise awareness of and prevent inappropriate behavior throughout the judicial branch.

Chief Justice Roberts also recognized the efforts of judiciary employees responding to natural disasters, including this year's "floods in Florida and North Carolina, Super Typhoon Yutu in the Northern Mariana Islands, the Alaska earthquake that damaged the Anchorage courthouse, and the new wildfires in Northern California." I serve as pro tempore Justice in the Northern Mariana Islands (NMI), and Super Typhoon Yutu hit close to home. Super Typhoon Yutu was the strongest storm on record to ever hit U.S. soil and tied for the most powerful storm on earth in 2018, according to the National Oceanic and Atmospheric Administration. Despite their own personal adversities, the judiciary employees of the CNMI stepped up to the plate to ensure continuity of operations. Recovery efforts are ongoing with courts spread over various temporary locations throughout the islands while the House of Justice (Guma' Hustisia) undergoes repairs.

In closing, we all recognize that AJA is the Voice of the Judiciary®, providing leadership and speaking for judges nationally on critical issues, such as judicial independence. The rare public rebuke of President Trump by Chief Justice Roberts when the President criticized a judge for having improper political motivations, and referred to him as an "Obama judge," appropriately summarizes our mission. "We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Chief Justice Roberts said in a statement given to the Associated Press. "What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for." I'm thankful for all of you.



Journalistic Sources and the Searching of Media Outlets in Canada

Wayne K. Gorman

The searching of media outlets by the police in Canada is, as elsewhere, a controversial topic. For instance, a recent decision of the Supreme Court of Canada (*R. v. Vice Media Canada Inc.*, 2018 SCC 53), which compelled a reporter to produce material to the police concerning an alleged crime, was described by one Canadian media outlet as a decision that will have a “damaging effect on investigative reporting across the country and weaken Canadian democracy” (see Global News, <https://globalnews.ca>).

In this column, I intend to review the Supreme Court of Canada’s decision in *Vice Media* and recent legislation enacted by Parliament, which now governs the authority of the police to search media outlets for evidence. As will be seen, the concern about democracy being weakened in Canada because of the Supreme Court’s decision is somewhat overstated.

R. V. VICE MEDIA CANADA INC.

In *Vice Media*, the police applied on an *ex parte* basis and obtained a production order requiring Vice Media (a large Canadian media organization) to produce the screen captures of messages exchanged with a source, which the police alleged could afford evidence of terrorism offences.¹

Vice Media brought an application in the Superior Court of Ontario seeking to have the production order quashed. The reviewing judge dismissed the application, holding that it was open to the authorizing judge to conclude that the media’s interest was outweighed by the public interest in obtaining reliable evidence of very serious terrorism offences. An appeal by Vice Media to the Ontario Court of Appeal was dismissed. Vice Media appealed the Supreme Court of Canada.

THE SUPREME COURT OF CANADA

A majority of the Supreme Court held that the production order was properly issued. The Supreme Court noted that the “provision authorizing the type of production order issued in this case, s. 487.014(1), grants peace officers and public officers the ability to bring an “*ex parte* application’ for a production order.” The Supreme Court rejected the proposition that media outlets must be given notice of such applications (at paragraph 61), but held that this is “subject to the authorizing judge’s overriding discretion to require notice where he or she deems appropriate” (at paragraph 65). The Supreme Court also held that the police must “show some evidentiary basis for why there

is ‘urgency or other circumstances,’” in order to obtain a production order on an *ex parte* basis (at paragraph 69).

THE TEST FOR ISSUING

The Supreme Court held that when a judge is asked to issue a production order in relation to the media, the authorizing judge “should apply a four-part analysis” (at paragraph 82):

(1) **Notice.** First, the authorizing judge must consider whether to exercise his or her discretion to require notice to the media. While the statutory *status quo* is an *ex parte* proceeding (see *Criminal Code*, s. 487.014(1)), the authorizing judge has discretion to require notice where he or she deems appropriate (see *National Post*, at para. 83; *CBC (ONCA)*, at para. 50). Proceeding *ex parte* may be appropriate in “cases of urgency or other circumstances” (*National Post*, at para. 83). However, where, for example, the authorizing judge considers that he or she may not have all the information necessary to properly engage in the analysis described below, this may be an appropriate circumstance in which to require notice.

(2) **Statutory Preconditions.** Second, all statutory preconditions must be met (*Lessard* factor 1).

(3) **Balancing.** Third, the authorizing judge must balance the state’s interest in the investigation and prosecution of crimes and the media’s right to privacy in gathering and disseminating the news (*Lessard* factor 3). In performing this balancing exercise, which can be accomplished only if the affidavit supporting the application contains sufficient detail (*Lessard* factor 4), the authorizing judge should consider all of the circumstances (*Lessard* factor 2). These circumstances may include (but are not limited to):

- (a) the likelihood and extent of any potential chilling effects;
- (b) the scope of the materials sought and whether the order sought is narrowly tailored;

Footnotes

1. Section 487.014 of the *Criminal Code of Canada* authorizes a Canadian judge to issue an order requiring a person or corporation to produce a document in their possession to the police if the

judge is satisfied the document “will afford evidence respecting the commission of [an] offence.”

(c) the likely probative value of the materials;

(d) whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources (*Lessard* factor 5);

(e) the effect of prior partial publication, now assessed on a case-by-case basis (*Lessard* factor 6); and

(f) more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party (*Lessard* factor 3).

At the end of the day, the decision as to whether to grant the order sought is discretionary (*Lessard* factor 2), and the relative importance of the various factors guiding that discretion will vary from case to case (see *New Brunswick*, at p. 478).

(4) **Conditions.** Fourth, if the authorizing judge decides to exercise his or her discretion to issue the order, he or she should consider imposing conditions on the order to ensure that the media will not be unduly impeded in the publishing and dissemination of the news (*Lessard* factor 7). The authorizing judge may also see fit to order that the materials be sealed for a period pending review.

REVIEW

The Supreme Court held that when a media outlet seeks to challenge a production order issued on an *ex parte* basis, the reviewing judge may only set aside the order “if the media can establish that — in light of the record before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the order.” However, “if the media points to information not before the authorizing judge that, in the reviewing judge’s opinion, could reasonably have affected the authorizing judge’s decision to issue the order, then the media will be entitled to a *de novo* review” (at paragraph 4).

2. In *R. v. Canadian Broadcasting Corporation*, 2018 ONSC 5856 it was noted that “[d]espite its name, the *Act* addresses more than the protection of journalistic sources. It also gives a measure of protection to the right of journalists to privacy in their gathering or dissemination of information” (at paragraph 1). Justice Drambot summarized the essence of the new legislation in the following manner (at paragraphs 2 and 3):

The *JSPA* accomplishes the first of these objectives by amending the *Canada Evidence Act*, R.S.C. 1985, c.C-5 to protect the confidentiality of journalistic sources. It allows journalists to refuse to disclose information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by

CONCLUSION

The Supreme Court concluded that in this case the production order was properly issued (at paragraph 5):

...the state’s interest in investigating and prosecuting the alleged crimes outweighs the appellants’ right to privacy in gathering and disseminating the news. Importantly, disclosure of the materials sought would not reveal a confidential source; no “off the record” or “not for attribution” communications would be disclosed; there is no alternative source through which the materials sought may be obtained; the source used the media to publicize his activities with a terrorist organization and broadcast its extremist views as a sort of spokesperson on its behalf; and the state’s interest in investigating and prosecuting the alleged crimes — which include serious terrorism offences — weighs heavily in the balance. Accordingly, I would dismiss the appeal.

The Supreme Court noted that its decision did “not engage the new *Journalistic Sources Protection Act*, S.C. 2017, c. 22” (at paragraph 6). The *Journalistic Sources Protection Act* was enacted on October 18, 2017.²

THE JOURNALISTIC SOURCES PROTECTION ACT

The *Journalistic Sources Protection Act* amended the *Criminal Code of Canada*, R.S.C. 1985, by adding section 488.01. This new provision allows the police to apply for a search warrant in relation to a “journalist’s communications or an object, document or data relating to or in the possession of a journalist” (see section 488.01(2)). Interestingly, it requires that the application be made to a Superior Court Judge. This is interesting because almost all criminal cases in Canada are heard in the Provincial Court and almost all search warrant applications must be made to the Provincial Court Judges.³

WHO IS A JOURNALIST?

The *Journalistic Sources Protection Act* also amended the *Canada Evidence Act*, R.S.C. 1985, by defining what constitutes

any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

The *JSPA* further advances the first objective and accomplishes the second objective by adding restrictions to the provisions of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46 (“the *Criminal Code*” or “the *Code*”) that authorize search warrants, orders to intercept private communications and production orders when they relate to journalists.

3. The amendments to the *Criminal Code* also set out the procedure to be followed when information is claimed to be “privileged” (see section 488.1 of the *Criminal Code of Canada*).

At the end of the day, the decision as to whether to grant the order sought is discretionary.

What if the journalistic source search warrant is executed and evidence is seized?

a “journalist.” The definition now contained in section 39.1 of the *Canada Evidence Act* defines what constitutes a journalist in very broad terms:

Journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of

information for dissemination by the media, or anyone who assists such a person.

The *Canada Evidence Act* also defines “journalistic sources” in broad terms:

Journalistic source means a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source.

SEARCH WARRANTS-SECTION 488.01(2) OF THE CRIMINAL CODE OF CANADA

Section 488.01(2) of the *Criminal Code* indicates that if the police know that an application for a search warrant “relates to a journalist’s communications or an object, document or data relating to or in the possession of a journalist, they shall make an application to a judge of a superior court of criminal jurisdiction or to a judge as defined in section 552.”⁴

The *Criminal Code of Canada* indicates (see section 488.01(3)) that a judge may only issue a search warrant that “relates to a journalist’s communications or an object, document or data relating to or in the possession of a journalist” if:

- the information cannot otherwise be reasonably obtained; and
- the public interest in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in gathering and disseminating information.

The new amendments also allow for the judge to whom the search warrant application has been made to order that “a special advocate present observations in the interests of freedom of the press concerning the conditions set out in subsection (3)” (see section 488.01(4)).

In addition, the new provision deals with those situations in which the police become aware that a search has uncovered information that “relates to a journalist’s communications or an object, document or data relating to or in the possession of a journalist” (see section 488.01(9)). In such cases, the police must now “as soon as possible, make an *ex parte* application to

a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and, until the judge disposes of the application”:

- (a) refrain from examining or reproducing, in whole or in part, any document obtained pursuant to the warrant, authorization or order; and
- (b) place any document obtained pursuant to the warrant, authorization or order in a sealed packet and keep it in a place to which the public has no access.

The judge to whom such an application is made can “confirm the warrant, vary the warrant...to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities”; or “revoke the warrant, authorization or order if the judge is of the opinion that the applicant knew or ought reasonably to have known that the application for the warrant, authorization or order related to a journalist’s communications or an object, document or data relating to or in the possession of a journalist” (see section 488.01(9)).

What if the journalistic source search warrant is executed and evidence is seized?

EXECUTION OF THE JOURNALISTIC SEARCH WARRANT

In such a situation the new *Criminal Code* provisions requires that the information seized be “sealed by the court that issued the warrant” (see section 488.02(1)) and that the police refrain from examining the information unless they have given “the journalist and relevant media outlet notice of [their] intention to examine or reproduce the document” (see section 488.02(2)). Upon receiving such a notice, The journalist or relevant media outlet may, within ten days of receiving the notice, “apply to a judge of the court that issued the warrant, authorization or order to issue an order that the document is not to be disclosed to an officer on the grounds that the document identifies or is likely to identify a journalistic source” (see section 488.02(3)).

If such an application is made, a judge may, pursuant to section 488.02(5) of the *Criminal Code*, order that the information seized be disclosed to the police if “satisfied” that “there is no other way by which the information can reasonably be obtained; and the public interest in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in gathering and disseminating information.” If the judge concludes that the information should not be disclosed to the police, the judge must order that it be returned to the journalist or the media outlet (see section 488.02(7)).

What if the Crown seeks to introduce the information seized at a trial?

OBJECTION TO THE INTRODUCTION OF EVIDENCE

The *Journalistic Sources Protection Act* amended the *Canada Evidence Act* by adding section 39.1 (“Journalistic Sources”). Section 39.1(2) of the *Canada Evidence Act* indicates that “a

4. Section 552 of the *Criminal Code of Canada* defines what constitutes a superior court judge in the various provinces. In some

they are referred to as Supreme Court Judges. In others, as judges of the Queen’s Bench.

journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source.” In addition, judges may raise the issue “on their own initiative” (see section 39.1(4)).

As a result of these amendments to the *Canada Evidence Act*, a journalist has been given standing at a criminal trial to object to the introduction of evidence. This is extraordinary because Canadian criminal law does not generally allow for third-party participation in criminal prosecutions.

Section 39.1(6) of the *Canada Evidence Act* indicates that before “determining the question, the court...must give the parties...a reasonable opportunity to present observations.” The *Canada Evidence Act* does not define what the word “observations” means.

THE TEST

Section 39.1(7) of the *Canada Evidence Act* sets out a specific test to be applied in determining when such information may be ordered to be disclosed:

The court may authorize disclosure of the information if

- the information cannot otherwise be produced; and
- the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

This requires a consideration of (see section 39.1(7)):

- the importance of the information or to central issue in the trial;
- freedom of the press, and
- the impact of disclosure on the journalistic source and the journalist.

APPEALS

Finally, the amendments to the *Canada Evidence Act* allows for an appeal of any decision made concerning information seized in relation to a journalist or a journalistic source (see sections 39.1(10) and (11)).

Such an appeal must be filed within ten under days of the decision being appealed (the normal appeal period in Canada is thirty days). The amendments appear to allow for third-party and interlocutory appeals and, interestingly, indicate that such an appeal must be “heard and determined without delay and in a summary way” (see section 39.1(12)). Canadian appeal courts have generally discouraged interlocutory appeals in criminal matters. It will be interesting to see what Canadian Courts of Appeal make of this provision.

JUDICIAL CONSIDERATION

The new legislation has not very received much judicial consideration. However, there are two decisions that can be referred to.

In *Côté c. R.*, 2018 QCCQ 547, the accused were charged

with a number of offences involving breach of trust and fraud. Some of the information discovered during a police investigation came into the possession of journalists. They published the information.

The accused issued subpoenas to a number of journalists to discover how they came into possession of the information and to support an application for a stay of proceedings. The journalists sought to have the subpoenas struck so as to protect their sources.

The application judge, Perreault, J.C.Q., suggested that the *Journalistic Sources Protection Act*, has changed the test adopted by the Supreme Court of Canada (the *Wigmore* test) for the disclosure of such information (see *R. v. National Post*, 2010 SCC 16) in the following manner (at paragraphs 189 to 193):

First, s. 39.1(9) has reversed the burden that previously fell on the journalist.

The first two elements of the *Wigmore* test have been incorporated into the definition of “journalistic source”.

The third element of the *Wigmore* test, requiring that the relationship be sedulously fostered, has been abandoned.

The fourth element of the *Wigmore* test has been modified significantly. The public interest in getting at the truth gives way to the public interest in the administration of justice. The person seeking disclosure will have to show that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

Parliament has also set out a non-exhaustive list of three factors that the court, person, or body carrying out this balancing exercise must consider:

- the importance of the information or document to a central issue in the proceeding,
- freedom of the press, and
- the impact of disclosure on the journalistic source and the journalist.

The application judge concluded that the subpoenas should not be struck (at paragraphs 227 and 228):

In this case, the information and documents concerned several aspects in addition to those of interest to the applicants. Significant information was being provided to the public that could help them better understand issues of general public interest, such as political

The journalists sought to have the subpoenas struck so as to protect their sources.

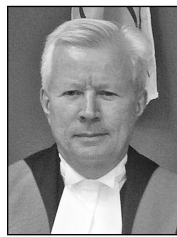
financing and the efforts made to stop the leaks at UPAC concerning the versions provided during parliamentary committees. The news was published by journalists, but the information revealed did not identify the State employees at the source of the leak, with the result that this information is still not in the public domain.

The Court therefore finds that the applicants have not discharged their burden of establishing that the public interest in the administration of justice outweighs the public interest in preserving the journalistic sources of Marie-Maude Denis and Louis Lacroix.

In *R. v. Canadian Broadcasting Corporation*, a section 488.01 search warrant was issued allowing the police to seize from the Canadian Broadcasting Corporation a video- and audio-recorded interview of a complainant in a sexual assault investigation. In issuing the warrant the application judge considered whether the public interest in the investigation and prosecution of the criminal offence outweighed the journalist's right to privacy in gathering and disseminating information. He concluded that in "light of the significant public interest in the investigation and prosecution of sexual offences in general and this one in particular, and the minimal interference that the production order sought will have on journalistic privacy, I readily conclude that the former outweighs the latter" (at paragraph 37).

CONCLUSION

Because of the very recent nature of the *Journalistic Sources Protection Act*, it is difficult to reach any conclusions as to its effect on the Canadian criminal justice system. Because of its broad nature and extraordinary third-party application, its effect may be astounding. At the very least, it sets out a process for the difficult weighing of the search for truth versus the importance of a free press.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge's Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

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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.

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Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

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The Facts Behind the Media Coverage, the Sentence that Launched a Recall

Jeffrey J. Hunt

In March of 2016, a jury convicted Brock Allen Turner of assault with intent to commit rape, sexual penetration of an intoxicated person, and sexual penetration of an unconscious person.¹ The story of Turner's prosecution attracted national attention even before he was sentenced. Turner, then a 19-year-old Stanford University athlete, sexually assaulted 22-year-old Jane Doe 1 while she was unconscious behind a dumpster near a fraternity house on campus.

The media attention escalated to viral status when Turner received the sentencing decision from Judge Aaron Persky, who at the time had been a judge on the Santa Clara County Superior Court for over a decade. The media headlines almost wrote themselves: on the three felony counts, Turner faced up to fourteen years in state prison; but Judge Persky rejected the prosecutor's sentencing recommendation of six years in prison and instead granted Turner probation and sentenced him to a total of six months in county jail.² Under a California law that allows inmates to earn one day off their sentence for each day of good behavior,³ Mr. Turner served a total of only three months, and was released in early September 2016.

But Turner's sentencing was just the beginning of the story for Judge Persky. The Turner sentencing became the subject of fierce public debate. A number of those who felt the sentence was a miscarriage of justice galvanized into a movement seeking to recall Judge Persky from judicial office.⁴ Among the leading recall proponents was Michelle Dauber, a Stanford University law professor who had written a letter to the judge regarding Turner's sentence.⁵ Dauber would eventually become the driving force behind the campaign to recall Judge Persky.

In response, opponents of the proposed recall united in a counter-campaign, arguing that recalling Judge Persky would

be a threat to the independence of the judiciary and would lead to numerous negative consequences, including harsher sentences, particularly for racial minorities.

In June of 2018, the voters of Santa Clara County voted to recall Judge Persky. This article first provides a brief factual and procedural background of the Turner case and then summarizes the positions articulated for and against the recall vote.

OVERVIEW OF THE FACTS OF THE TURNER CASE

Shortly after midnight on January 18, 2015, two Stanford graduate students who were biking to a fraternity house noticed two people on the ground between a basketball court and a wooden shed. The person on top began thrusting in a sexual manner. One of the graduate students noticed that the person on the bottom wasn't moving. Both men got off their bikes and approached the pair, calling out to ask if everything was okay. The man who was thrusting, later identified as Turner, looked at the approaching men, stood up, and backed away. Jane Doe 1 remained on the ground, her dress hiked up around her waist. Turner attempted to flee, but one of the cyclists chased him down and pinned him to the ground until police arrived.

The Santa Clara County District Attorney charged Turner with assault with intent to rape (Pen. Code § 220, subd. (a)(1); count 1); sexual penetration of an intoxicated person (§ 289, subd. (e); count 2); and sexual penetration of an unconscious person (§ 289, subd. (d); count 3). Trial commenced March 14, 2016. After about six and one-half days of testimony, the jury began deliberating. The next day, the jury returned its verdict, convicting Turner of all three counts.

Because of his conviction for assault with the intent to rape, Turner was presumptively ineligible for probation; a down-

Footnotes

1. The factual and procedural background information for this article is taken from the California Court of Appeals' unpublished opinion, *People v. Turner*, No. H043709, 2018 WL 3751731 (Cal. Ct. App. Aug. 8, 2018), available at <http://www.courts.ca.gov/opinions/nonpub/H043709.PDF>.
2. For Turner's conviction for assault with intent to commit rape, the statutory sentencing options were two, four, or six years in state prison. Turner also faced a term of three, six, or eight years in prison for his convictions for Penetration of an Intoxicated Person/Penetration of an Unconscious Person, with the potential for the terms to run consecutively. The district attorney recommended the mid-range sentence on the first count, a four-year sentence, to run concurrently with a six-year sentence—also in the mid-range—for the other count.
3. See Cal. Penal Code Section 4019(b)-(c).
4. In California, "Superior Court judges serve six-year terms and are elected by county voters on a non-partisan ballot. Vacancies that

occur between elections are filled through appointment by the Governor. An appointee serves until the next general election when he or she must stand for election in order to retain the seat." See Santa Clara Superior Court, *Fact Sheet—Judicial Elections* (November, 2006), available at <http://www.sccourt.org/documents/JudElections.pdf>. At the time of the Turner sentencing, Judge Persky was running unopposed and was a few days away from reelection.

5. In her letter to Judge Persky before the Turner sentencing, Dauber stated that she had been "a professor at Stanford Law School for the past 15 years," and that she had "been deeply involved in efforts to improve Stanford's prevention and response to sexual assault on campus." She also noted that she was the faculty co-chair of the Board of Judicial Affairs from 2011 through 2013, where she "helped lead a process to reform Stanford's sexual assault policies." Additionally, Dauber noted in the letter that "[t]he victim in [the Turner] case has been a close friend of [her] daughter since middle school," and Dauber "kn[e]w her well."

ward departure from the statutory minimum state prison sentence could only be granted if the court makes a finding that the defendant's case is an "unusual case where the interests of justice would best be served" by granting probation.⁶ The Probation Department recommended that the court exercise its discretion to grant this downward departure and conclude that Turner's crimes were "substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence."⁷

The People disagreed with the Probation Department's recommendation. In its sentencing memorandum, the Santa Clara District Attorney noted that the maximum prison sentence for the convictions would be fourteen years and recommended that the judge impose a sentence of six years. The People argued that Turner should not receive probation because his crimes were "more serious than other similar cases demanding a considerable punishment that is commensurate to the global effects of [his] actions."⁸ The People included with their sentencing memorandum a copy of a letter from Professor Dauber discussing the impact of Turner's crimes on the Stanford community. Dauber argued that Turner's case should not be seen as less serious than other sexual assaults.⁹ She also urged that probation not be granted on the basis that Turner was a "youthful" offender, arguing that Turner was the same age as many of the perpetrators of sexual assaults on campus.

At the sentencing hearing, Judge Persky prefaced his remarks about the Turner sentence with an express recognition that the decision was a difficult one¹⁰:

And as I'm sure everyone in the court can appreciate and as was stated several times today, it is a difficult decision. And I just want to, before I give my tentative decision, read something from [Jane Doe 1's] statement, which I think is appropriate — actually, two things from her statement. She gave a very eloquent statement today on the record, which was a briefer version of what was submitted to the Court. Let me just say for the record that I have reviewed everything, including the sentencing memorandum, the probation report, the attachments to the probation report, and the respective sentencing memoranda. And so [Jane Doe 1] wrote in her written statement, [as read] "Ruin a life, one life, yours. You for-

got about mine. Let me rephrase for you. 'I want to show people that one night of drinking can ruin two lives'— you and me.['] You are the cause; I am the effect. You have dragged me through this hell with you, dipped me back into that night again and again. You knocked down both our towers. I collapsed at the same time you did. Your damage was concrete: Stripped of titles, degrees, enrollment. My damage was internal, unseen. I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today." And then later on in her written statement, she writes, [as read] "If you think I was spared, came out unscathed, that today I ride off into the sunset while you suffer the greatest blow, you are mistaken. Nobody wins. We have all been devastated. We have all been trying to find some meaning in all of this suffering." And here — I think this is relevant to the — to the sentencing decision — she writes, [as read] "You should have never done this to me. Secondly, you should never have made me fight so long to tell you you should never have done this to me. But here we are. The damage is done. No one can undo it.

"And now we both have a choice. We can let this destroy us. I can remain angry and hurt, and you can be in denial. Or we can face it head on: I accept the pain; you accept the punishment; and we move on."

Judge Persky then announced his tentative decision was to agree with the Probation Department's recommendation that Turner's case presented unusual circumstances and to grant probation instead of a state prison sentence. Analyzing the factors under California Rule of Court 4.413, Judge Persky concluded that the presumption against probation was overcome because Turner was "youthful" and had "no significant record of prior criminal offenses."¹¹ The judge identified and discussed each of the 17 factors outlined in California Rules of Court, rule 4.414.¹²

Judge Persky then announced his tentative decision was to agree with the Probation Department's recommendation

• • • •

6. Cal. Penal Code Section 1203.065(b).

7. See Cal. Rule of Ct. 4.413(c)(1)(A). A copy of the Probation Department report is available at <http://documents.latimes.com/people-v-brock-allen-turner-89/>.

8. A copy of the People's Sentencing Memorandum is available at <http://documents.latimes.com/people-v-brock-allen-turner-59/>.

9. A copy of Professor Dauber's letter to Judge Persky is available at <http://documents.latimes.com/people-v-brock-allen-turner-79/>.

10. A transcript of Judge Persky's sentencing decision is available at <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>.

11. See Cal. Rules of Court 4.413(c)(2)(C), available at http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_413.

12. See Cal. Rules of Court 4.414(a), (b), available at

http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_414. The 17 factors are:

(a) Facts relating to the crime

Facts relating to the crime include:

- (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;
- (2) Whether the defendant was armed with or used a weapon;
- (3) The vulnerability of the victim;
- (4) Whether the defendant inflicted physical or emotional injury;
- (5) The degree of monetary loss to the victim;
- (6) Whether the defendant was an active or a passive participant;
- (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely

Outcry over the perceived leniency of the sentence swept the nation.

The judge found the following crime-related criteria to be relevant to his decision:

- the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime
- the vulnerability of the victim
- whether the defendant inflicted physical or emotional injury
- whether the defendant was an active participant in the crime
- whether the defendant demonstrated criminal sophistication.

The judge found the following defendant-related criteria to be relevant to his decision:

- the defendant's prior criminal record
- the defendant's willingness and ability to comply with the terms of probation
- the likely effect of imprisonment on the defendant
- the adverse collateral consequences on the defendant from the felony conviction
- whether the defendant is remorseful
- whether or not the defendant was likely be a danger to others

The Probation Department's report contained two assessment tools that had been used to analyze Turner's dangerousness. Turner had received a score of 3 on the Static-99R, which is an actuarial measure of sexual offense recidivism. This had the effect of placing him in the "Low-Moderate range of risk

relative to other adult male sex offenders."¹³ Turner was also assessed under the Corrections Assessment Intervention System (CAIS), "a standardized, validated assessment and case management system developed by the National Council on Crime and Delinquency [which] assesses a defendant's criminogenic needs and risk to re-offend."¹⁴ Based on the CAIS assessment, Turner would benefit from family therapy, would need to learn new coping skills, and would need to be treated for drug and alcohol abuse.

After announcing his tentative ruling, the judge heard from the prosecutor, defense counsel, and the Probation Department. In the end, Judge Persky granted probation and sentenced Turner to six months in the county jail. The judge did require Turner to register as a sex offender for life and that Turner submit to random drug and alcohol testing.¹⁵

RESPONSE TO THE TURNER SENTENCING

While the Turner case had already made national news even before Turner was convicted, the Turner sentence galvanized public attention. Outcry over the perceived leniency of the sentence swept the nation.¹⁶

Professor Dauber, who as noted above had submitted a letter to Judge Persky strenuously urging that Turner not be granted probation, led the charge of what would become a campaign to recall Judge Persky from the bench: the "Recall Aaron Persky" campaign.¹⁷ Proponents of the recall argued that Judge Persky's sentencing of Turner demonstrated that he was biased and unfit to sit on the bench. They argued that Judge Persky "appeared to favor athletes and other relatively privileged individuals accused of sex crimes or violence against women."¹⁸ Recall pro-

to recur;

- (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and
 - (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.
- (b) Facts relating to the defendant
- Facts relating to the defendant include:
- (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;
 - (2) Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole;
 - (3) Willingness to comply with the terms of probation;
 - (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;
 - (5) The likely effect of imprisonment on the defendant and his or her dependents;
 - (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;
 - (7) Whether the defendant is remorseful; and
 - (8) The likelihood that if not imprisoned the defendant will be a danger to others.

13. See Probation Department Report, available at

<http://documents.latimes.com/people-v-brock-allen-turner-89/>.

14. See *id.*

15. Turner appealed his convictions to the California Court of Appeals, which affirmed on August 8, 2018. *People v. Turner*, No. H043709, 2018 WL 3751731 (Cal. Ct. App. Aug. 8, 2018), available at <http://www.courts.ca.gov/opinions/nonpub/H043709.PDF>.

16. The Turner sentence was met with a fairly rapid legislative response. Approximately five months after Judge Persky handed down the Turner sentence, California governor Jerry Brown signed a bill that toughens penalties for attacks on unconscious victims. In particular, Assembly Bill 2888 (2016) removes a judge's discretion to grant probation in cases where the victim of a sexual assault is unconscious. See Sarah Larimer, *In the Aftermath of Brock Turner Case, California's Governor Signs Sex Crime Bill*, WASH. POST (Sep. 30, 2016), available at https://www.washingtonpost.com/news/grade-point/wp/2016/09/30/in-aftermath-of-brock-turner-case-californias-governor-signs-sex-crime-bill/?noredirect=on&utm_term=.f728a5799003.

17. The Recall Aaron Persky website is no longer available, but archived versions can be accessed at <https://web.archive.org/web/20180101224233/http://recallaaronpersky.com/>.

18. *Judge Persky's Other Cases*, available at https://web.archive.org/web/20180119094645/http://www.recallaaronpersky.com:80/judge_persky_s_other_cases. The recall proponents referred to the cases of Ikaika Gunderson, Keenan Smith, Robert Chain, and the "De Anza Gang Rape" case. According to the recall proponents, these cases presided over by Judge Persky show that he "has a long-standing pattern of bias in favor of privileged defendants."

ponents did not argue that Judge Persky had violated the law or committed any legal error in the sentencing.

The following “Mission Statement” summarizes the position of the recall proponents:

We are outraged at Judge Persky’s actions, and we don’t just want talk, we want to take him out of office. That is why the Committee to Recall Judge Persky is the only effort in existence that has put together a comprehensive plan and team that can actually take Persky out of office, so that he can no longer shield sex offenders from justice.

Additionally, the Recall Aaron Persky website listed the following under a heading titled, “Why the recall?”

Aaron Persky gave too lenient a sentence to Brock Turner, a former Stanford Swimmer convicted of sexual assault. Turner was only sentenced to six months for his heinous crime, and Persky cited the impact prison would have on Turner’s life in his decision. Persky is unfit to sit on the bench, and as long as he is a judge, predators in Santa Clara County will know they have an ally on the bench.

In response, numerous groups came out publicly against the recall.¹⁹ In particular, one group, called Voices Against Recall, was led by LaDoris Cordell, a former superior court judge in Santa Clara county.²⁰ According to the Voices Against Recall, other opponents of the recall included the Santa Clara

County Bar Association²¹; a group of more than 90 law professors in California²²; district attorneys in Santa Clara County, including Jeffrey Rosen, whose office prosecuted Turner²³; the Santa Clara Public Defender; several retired federal district court judges and California Supreme Court justices; and over 200 current and retired California Superior Court judges. The Voices Against Recall group argued that recalling a judge should be a monumental, and rare, occurrence. The opponents of the recall emphasized the value of an independent judiciary, arguing that a judge who must first assess the political popularity of a decision before rendering it, out of concern for job security, is not fulfilling the proper function of the judiciary. Recall opponents also asserted that the true burden of the recall of Judge Persky would be felt by criminal defendants, particularly those of racial minorities, with judges imposing harsher sentences on defendants out of concern for the political popularity of the decision.

Opponents of the recall also pointed out that the California Commission on Judicial Performance, an “independent state agency responsible for investigating complaints of judicial misconduct,”²⁴ released its findings in December 2016 that after thoroughly evaluating the charges against Judge Persky for judicial misconduct, the CJP concluded that there had been no

“We are outraged at Judge Persky’s actions, and we don’t just want talk, we want to take him out of office.”

19. Judge Persky himself also brought a lawsuit challenging the recall election in court. *See Persky v. Bushey*, 21 Cal. App. 5th 810, 815, 230 Cal. Rptr. 3d 658, 661 (Ct. App. 2018), *review denied* (May 1, 2018). Persky argued that the recall election was procedurally defective in a number of respects. *See id.* The recall proponents, including Dauber, intervened as real parties in interest and defended the procedural propriety of the recall election. The court ultimately ruled against Persky and allowed the recall election to proceed, and the California Court of Appeals affirmed. *See id.* Dauber also sought and was awarded attorney’s fees in connection with the lawsuit, under a California statute that provides that a prevailing party may recover attorney’s fees from an opponent when seeking to enforce “an important right affecting the public interest.” Elena Kadvan, *Persky Ordered to Pay Recall Campaign Attorney’s Fees*, PALO ALTO ONLINE (Oct. 25, 2018), available at: <https://www.paloaltoonline.com/news/2018/10/25/persky-ordered-to-pay-recall-campaign-attorneys-fees>.

20. The Voices Against Recall website has since been taken down, but archived versions can be accessed at <https://web.archive.org/web/20180423164925/http://www.voicesagainstrecall.org/>

21. Santa Clara County Bar Association, *SCCBA Statement on Judicial Independence*, SCCBA (June 14, 2016), available at: <https://sccba.site-ym.com/blogpost/1133925/249782/SCCBA-Statement-on-Judicial-Independence>.

22. *Law Professors’ Statement for Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky*, available at <https://www.mercurynews.com/wp-content/uploads/2017/08/90-law-professors-statement-for-the>

[independence-of-the-judiciary-and-against-the-petition-for-recall-of-santa-clara-superior-court-judge-aaron-persky-1-docx.pdf](https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NR-A2016/DA-on-Turner-Sentence.aspx). The law professors stated that “[t]he mechanism of recall was designed for and must be limited to cases where judges are corrupt or incompetent or exhibit bias that leads to systematic injustice in their courtrooms. None of these criteria applies to Judge Persky.”

23. County of Santa Clara, Office of the District Attorney, *DA Makes Statement on Brock Turner Sentencing* (June 6, 2016), available at <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NR-A2016/DA-on-Turner-Sentence.aspx> (“While I strongly disagree with the sentence that Judge Persky issued in the Brock Turner case I do not believe he should be removed from his judgeship. I am so pleased that the victim’s powerful and true statements about the devastation of campus sexual assault are being heard across our nation. She has given voice to thousands of sexual assault survivors.”).

24. State of California, Commission on Judicial Performance, *Home* (last updated November 28, 2018), available at: <https://cjp.ca.gov/>

The commission’s authority is limited to investigating allegations of judicial misconduct and, if warranted, imposing discipline. Judicial misconduct usually involves conduct in conflict with the standards set forth in the Code of Judicial Ethics. The commission cannot change a decision made by any judicial officer; this is a function of the state’s appellate courts. After investigation, and in some cases a public hearing, the commission may impose sanctions ranging from confidential discipline to removal from office.

misconduct.²⁵ Proponents of the recall, however, challenged the Commission's conclusion in a written "Response to the Commission on Judicial Performance" that criticized the accuracy of the Commission's report.²⁶

In the end, the voters of Santa Clara County voted to recall Judge Persky in June of 2018, with approximately 60% voting yes and 40% voting no.²⁷



Jeffrey J. Hunt is a shareholder at Parr Brown Gee & Loveless in Salt Lake City, Utah. His practice focuses on commercial litigation, including First Amendment, media, and intellectual property matters. Before becoming a lawyer, Mr. Hunt worked as a newspaper reporter in Iowa and Utah. The author gratefully acknowledges the assistance of Jeremy Brodis, an associate at Parr Brown, in preparing this article.

25. *Commission on Judicial Performance Closes Investigation of Judge Aaron Persky*, available at https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf. The Commission on Judicial Performance explained its conclusion as follows:

First, the [Turner] sentence was within the parameters set by law and was therefore within the judge's discretion. Second, the judge performed a multi-factor balancing assessment prescribed by law that took into account both the victim and the defendant. Third, the judge's sentence was consistent with the recommendation in the probation report, the purpose of which is to fairly and completely evaluate various factors and provide the judge with a recom-

mended sentence. Fourth, comparison to other cases handled by Judge Persky that were publicly identified does not support a finding of bias.

26. *Response to the Commission on Judicial Performance*, available at https://web.archive.org/web/20180101080614/http://www.recallaa ronpersky.com:80/response_to_the_commission_on_judicial_per formance; see also Elena Kadvany, *Analysis of Judge Persky's "Pattern" Cases*, PALO ALTO ONLINE (Last updated May 15, 2018), available at: <https://paloaltoonline.com/news/2018/05/11/analysis-of-judge-perskys-pattern-cases>.
27. Santa Clara County Registrar of Voters, *Official Final Results* (last updated July 9, 2018), available at http://results.enr.clarity elections.com/CA/Santa_Clara/75369/Web02.203317/#/c/C_2.



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Send Them a Message?:

The Threat to a Fair and Impartial State-Court Judiciary

Barbara J. Pariente & Melanie Kalmanson

What message do voters send by removing a judge from office based on disagreement with a lawful judicial decision? That question is at the heart of this issue of the American Judges Association's *Court Review*, which focuses on the issue in light of the 2018 recall of California Judge Aaron Persky based on public outrage at the lawful, but extremely lenient, sentence he gave to a Stanford University student-athlete in a highly publicized sexual assault case. The message to other judges: *Impose harsher sentences?* Or perhaps a more specific message: *Take sexual assault cases seriously?* Viewed broadly, is this an example of the voters demanding accountability in sentencing, or of voters sending a more insidious message—*Rule in a way that is not in step with the prevailing public opinion and risk your position as a judge?* Despite the valid concerns caused by the Stanford case, it is this latter message that, in my view, presents the greatest threat to judicial independence.

In 2010, those who opposed same-sex marriage in Iowa sent precisely this dangerous message. An aptly named TV ad, “Send Them a Message,” urged Iowa voters to “vote NO” on the retention of three respected Iowa Supreme Court justices, characterizing them as “activist judges” who “ignor[e] the will of voters,” “legislat[e] from the bench,” and “usurp the will of voters.”¹ The ad was part of a larger, politically motivated campaign to oust the three justices who were on the ballot for merit retention. To be clear, the outrage was not based on the justices’ ethics, professionalism, jurisprudence, or judicial integrity. Rather, the effort to remove these justices focused on one particular, unanimous decision striking down, as uncon-

stitutional, Iowa’s ban on same-sex marriage. The message: *Do not ignore the will of the voters.*

But this message is the antithesis of the role of the judiciary in our democracy. Judges should decide cases based on the facts and the law, not the will of the voters. Our branch is not intended to be political. Our judges are expected to be fair and impartial—not swayed by popular opinion, or pressures from special interests or the other two branches of government. Perhaps Justice Sandra Day O’Connor put it best: “The Founders realized that there has to be someplace where being right is more important than being popular or powerful, and where fairness trumps strength. And in our country that place is supposed to be the courtroom.”²

Yet, in 2012, inspired by the success of that 2010 campaign in Iowa, special interest groups³ targeted my colleagues, Justices Peggy Quince and R. Fred Lewis, and me when we were on Florida’s ballot for merit retention in 2012. As I have detailed in several articles,⁴ our opponents used some of the same political messages employed in Iowa—especially that catch-all, ill-defined term: “activist judges.” They used selected opinions from our Court that, although jurisprudentially sound, could be reduced to potentially controversial sound bites. Their true goal: oust us to give the governor his chance to select three new justices who presumably would be more in line with his judicial philosophy.⁵ The attacks required my colleagues and me to travel the state to speak to Florida voters and editorial boards, attempting to explain that the campaign against us was not based on our integrity, professionalism, or competence.

Footnotes

1. TV Ad: *Send Them a Message*, IA. STATE DAILY (Sept. 16, 2010), http://www.iowastatedaily.com/tv-ad-send-them-a-message/youtube_2da17cf2-c151-11df-8a59-001cc4c03286.html.
2. Barbara Pariente & F. James Robinson, *Preserving a Fair and Impartial Judiciary: The Cornerstone of Our Democracy*, 90 FLA. BAR J. 18 (May 2016), <https://www.floridabar.org/news/tfb-journal/?durl=%2Fdivcom%2Fjn%2Fjnjournal01.nsf%2F8c9f13012b96736985256aa900624829%2Fca10e4628afb589b85257fa10051404e>.
3. Throughout this article, we discuss the effect of “special interest groups” on the judiciary. Obviously, groups advocating for a particular view are important to the function of our government and are not inherently negative. For example, “special interest groups” appropriately participate in the judicial process by filing amicus briefs in appropriate cases relevant to their missions. In this context, the article uses the term to address groups that work to advance specific interests and may use their resources in a way that compromises the goal of a fair and impartial judiciary. See L. Jay Jackson, *Legislators and Special Interests Are Making Sure We Get the State Court Judges They Want* (July 1, 2013).

This article also addresses improper “political influence” on the judiciary. While political parties may not be directly involved, this term is used broadly to address the effect of one-sided, or politi-

cal, messages or influence that have no place in the judiciary, which was designed to be free from politics.

Finally, this article addresses the threat that arises when state legislatures react to judicial decisions in ways that may undermine judicial independence.

4. See generally Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529 (2016) [hereinafter *A New Era for Judicial Retention Elections*]; Barbara Pariente, *What’s Politics Have to Do With It?: Reinvigorating Our Defense of State Courts*, AM. BAR ASS’N J. (Aug. 23, 2018) [hereinafter *What’s Politics Have to Do With It?*]; Barbara J. Pariente & F. James Robinson, *Preserving a Fair and Impartial Judiciary—the Cornerstone of Our Democracy*, VOIR DIRE (Spring 2015) [hereinafter *Preserving a Fair and Impartial Judiciary*].
5. See, e.g., Lizette Alvarez, *G.O.P. Aims to Remake Florida Supreme Court*, N.Y. TIMES (Oct. 2, 2012), <https://www.nytimes.com/2012/10/03/us/republican-party-aims-to-remake-florida-supreme-court.html>; Jane Musgrave, *Florida Supreme Court Retention Race Unusually Stressful, Costly This Election*, PALM BEACH POST (Oct. 12, 2012), <https://www.palmbeachpost.com/news/state-regional-govt-politics/florida-supreme-court-retention-race-unusually-stressful-costly-this-election/vpfPqHdF5LXfDyDmuf9uKP/>.

So, how do we strike the appropriate balance between judicial accountability and maintaining a fair and impartial judiciary? This article attempts to answer that question by explaining why state courts are more vulnerable to attack than federal courts, defining proper characteristics for voters to consider in reviewing judges on the ballot for election or merit retention, and suggesting ways to ensure that judges and justices are less vulnerable to be removed or influenced by vocal public opinions or by special interests. Recent history has shown that, despite the good intentions of adopting a less political method of appointing and retaining judges and justices through a merit-based system, more needs to be done to further insulate state court judges from improper removal, or even influence, based on disagreement with specific judicial decisions.

WHY STATE COURTS ARE MORE VULNERABLE TO ATTACK THAN FEDERAL

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives in the other two branches of government.⁶ Legislative and executive officials are expected to consider public opinion, special interests who lobby, their political party agendas, or even their own personal opinions about issues. But judges are expected to act to protect the rights guaranteed in the Constitution and to enforce the rule of law so that all who come before court are treated equally and without “fear or favor.” Justices on the U.S. Supreme Court have warned of the corrosive effect of treating judges like politicians. For example, as Justice Ruth Bader Ginsburg put it: “[N]othing less than democracy itself is at stake if partisan groups are allowed to throw . . . justices off [their states'] high court[s].”⁷ The reason for the threat is clear: even if ultimately unsuccessful, attacks against the judiciary present the real danger that the judge will fear removal if the public disagrees with a decision.⁸

To guard against this threat, our Founders provided the fundamental tenet in our Constitution that federal judges be appointed to “lifetime tenure with removal only for high crimes and misdemeanors.”⁹ This system effectively prevents the specter of removal for issuing an unpopular opinion with which the public, politicians, or special interests disagree.¹⁰ The federal system of lifetime appointment also creates a clear distinction between the judiciary and the other two political branches of government.

For example, although U.S. Supreme Court Chief Justice Earl Warren was under attack for the Court's then-unpopular 1954 unanimous opinion in *Brown v. Board of Education*,¹¹ which he authored, he was not in danger of removal. Despite billboards in the South that read “Impeach Earl Warren,”¹² which appeared immediately after the Court issued its decision in *Brown*, Chief Justice Warren's judicial position was never in jeopardy. Because of the constitutional protection designed wisely by our Founders, the public's disagreement with the opinion could never constitute grounds to remove Chief Justice Warren or any other member of that Court. This enabled the Justices to decide the case based on the Constitution, not based on which side enjoyed greater public support.

Of course, even the federal model of lifetime appointment does not immunize federal judges from personal attacks. Throughout history, but intensifying more recently, various groups, such as the media, lobbyists, and politicians—including, even at times, the President of the United States—have attacked federal judges for decisions with which they disagree and, on occasion, have specifically attacked not just the decision but the decision maker. As the President of the American Bar Association (ABA) recently explained:

Disagreeing with a court's decision is everyone's right, but when government officials question a court's motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court's standing and hinder the courts from performing their constitutional duties.¹³

After U.S. President Donald Trump referred to a federal judge as “an Obama Judge,” criticizing an adverse ruling and the judge himself, U.S. Supreme Court Chief Justice John Roberts publicly “defended the independence and integrity of the federal judiciary,” stating:

We do not have Obama judges or Trump judges, Bush

So, how do we strike the appropriate balance between judicial accountability and maintaining a fair and impartial judiciary?

6. Republican Party of Minn. v. White, 536 U.S. 765, 805-06 (2002) (Ginsburg, J., dissenting) (joined by Justices Stevens, Souter, and Breyer).
7. Musgrave, *supra* note 5.
8. See Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. JUST. 1 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf; Margaret H. Lemos, *The State of the Judiciary*, 101 JUDICATURE 52, 54 (Autumn 2017), <https://judicialstudies.duke.edu/wp-content/uploads/2017/08/Judicature-Fall2017-roundtable.pdf> (suggesting that it is important to consider the effect on individual judges); see also *id.* at 55 (discussing Judge Baer's reaction to “a firestorm of criticism in the press and from political actors”).

9. *What's Politics Have to Do With It?*, *supra* note 4; see U.S. Const. art. III.
10. See *White*, 536 U.S. at 804; Lemos, *supra* note 8, at 54.
11. *Brown v. Bd. of Educ. of Topeka*, Shawnee Cty., Kan., 347 U.S. 483 (1954).
12. See, e.g., *Earl Warren*, HISTORY, <https://www.history.com/topics/us-politics/earl-warren> (last visited Dec. 4, 2018); *Earl Warren*, U.S. HISTORY, <https://www.u-s-history.com/pages/h3834.html> (last visited Dec. 4, 2018).
13. See *Statement of Bob Carlson*, ABA President Re: Being Thankful for Judicial Independence, AM. BAR ASS'N (Nov. 27, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson—aba-president-re—being-thankful-for-j/>.

Since 2010, special interest groups have increasingly interfered in retention elections.

judges or Clinton judges[.] . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.¹⁴

Unlike the federal system, virtually all state judiciaries—whether selected by contested elections, gubernatorial appointment, legislative selection, or commission-based gubernatorial appointment—do not enjoy the protections enshrined in our federal constitution.¹⁵ Instead, jurisdictions across the country use various processes because the method of judicial selection, as well as terms of service, are controlled by each state's own constitution.¹⁶ Sometimes, different jurisdictions within the same state even use different processes.¹⁷

Many states adopted merit-based systems for judicial selection and retention in an effort to insulate state-court judges as much as possible from the politics seen in elections in the other two branches.¹⁸ Under the merit-based system, judges are appointed by the state's governor after review by a commission based on their qualifications, which “typically include a candidate's legal ability, integrity and impartiality, professionalism and temperament, and any other necessary skills for the level or jurisdiction of the court to which the candidate is applying.”¹⁹ Then, periodically throughout their term depending on the state's constitution, the judge appears on the ballot.²⁰ Voters vote yes or no as to whether the judge should retain his or her seat and “does not face a challenger.”²¹

Unfortunately, history has shown that even merit-based systems are not immune from attack. Since 2010, special interest groups have increasingly interfered in retention elections, a topic on which voters are often under-educated,²² by mischar-

acterizing judges and their decisions. “[S]pecial interest groups seek to remove good judges whose only offense is having ruled according to the law, rather than the special interest groups' agenda.”²³ In fact, the most recent report from the Brennan Center for Justice explains that merit-based systems have become more political in recent years, to the point that any intended decrease in political influence by adopting the merit-based system may be lost.²⁴ Some argue that merit-based systems are *more* political than elections.²⁵ Even more concerning, some of these efforts by special interest groups to oust well-qualified jurists, as in Iowa, have been successful.

Some, myself included, attribute the rise of these politically motivated attacks against the judiciary on the U.S. Supreme Court's January 2010 decision in *Citizens United v. Federal Election Commission*.²⁶ As Wallace Jefferson, former Chief Justice of the Texas Supreme Court, and I explained in 2015, *Citizens United* and other decisions “led to unrestricted spending from outside groups” on elections in all three branches of government.²⁷

Accountability for the conduct of judges, like all public officials, is, of course, critical to a well-functioning democracy. However, a threat arises when the “accountability” is based on one-sided attacks or mere disagreement with an isolated decision.²⁸ And, “accountability” in the form of voters at the ballot box choosing to remove the judge poses a great danger to judicial independence. Ironically, Professor Margaret Lemos, professor and Senior Associate Dean for Faculty and Research at Duke Law, explains that, at least in the abstract, the public actually *disfavors* politicization of the courts:

Studies of state court systems . . . suggest that the more political the judicial-selection system, the lower the public's sense of the legitimacy of the courts. Public confidence in the courts tends to be lower in states with partisan judicial elections than in other kinds of selection systems. When the public hears about judges accepting campaign contributions or being subjected to

14. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. Times (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

15. Lemos, *supra* note 8, at 54; Malia Reddick & Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, INST. ADVANCEMENT AM. LEGAL SYS. 1 (Aug. 2014), <https://jpo.wrlc.org>; see *Methods of Judicial Selection*, NAT'L CTR. ST. COURTS, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Aug. 24, 2018). Only Rhode Island has adopted the federal model of lifetime appointment. A few other states have adopted systems in which judges are appointed for one long term. *Methods of Judicial Selection*.

16. *Methods of Judicial Selection*, *supra* note 15.

17. See *id.* (explaining that districts in Kansas are split on the selection of district judges; seventeen districts use gubernatorial appointment from nominating commission while fourteen districts use partisan election).

18. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1543-44.

19. *Id.* at 1543.

20. *Id.*

21. *Id.*

22. See *New Resources for Evaluating Judicial Candidates*, Informed Voters: Fair Judges (Aug. 16, 2018), <https://ivp.nawj.org/2018/08/16/new-resources-for-evaluating-judicial-candidates/> (“Many voters do not know what to look for in selecting judges or why they are on the ballot.”).

23. Wallace Jefferson & Barbara J. Pariente, *The “Citizens United” Anniversary Is a Regrettable Date for State Courts*, VOIR DIRE 14 (Spring 2015).

24. ALICIA BANNON, *CHOOSING STATE JUDGES: A PLAN FOR REFORM* 10 (2018); see Jefferson & Pariente, *supra* note 23, at 14.

25. See Reddick & Kourlis, *supra* note 15, at 9; Edward A. Purcell, Jr., *The Ideal of Judicial Independence: Complications and Challenges*, 47 TULSA L. REV. 141, 154 (2011). Other common criticism of merit selection includes “that it puts elites in control of selecting judges,” and “nominating commissions operate in secret with no public accountability.” Reddick & Kourlis, *supra* note 15, at 8.

26. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

27. Wallace & Pariente, *supra* note 23, at 14.

28. See, e.g., Lemos, *supra* note 8, at 55 (explaining why public accountability, at some level, is important).

or using attack ads, public support for and confidence in the courts diminishes.²⁹

While principled criticism of judicial decisions is part of a functioning democracy, the threat of removal is antithetical to the Framers' core principle of an independent and non-political judicial branch of government.³⁰ Jurists should not perceive a potential threat to their position if they rule in a way that is unpopular, or out of step with public opinion, special interests, or the other political branches.

Ultimately, the question is whether there is ever an appropriate reason for voters to remove a judge because of disagreement with a judicial decision. My response is a resounding "no." Removal on these grounds presents the real risk of making judges accountable to the voters, those in power, and those whose interests are threatened by judicial decisions. Such "accountability" undermines judicial legitimacy, threatens judicial independence, and upends the essential role of the judiciary—to protect each person's (whether individual or corporate) constitutional rights, which may, at times, prove counter to the majority view, special interests, or the other two branches of government.

So, what are the proper considerations to ensure a balance between accountability and judicial independence? The next section explains these five proper considerations for evaluating judges or judicial candidates: (1) integrity, (2) professional competence, (3) judicial temperament, (4) experience, and (5) service.

ENSURING ACCOUNTABILITY: PROPER CONSIDERATIONS

Despite the attention of several prestigious groups of

lawyers—including the American Bar Association (ABA),³¹ the American Judicature Society,³² and the American College of Trial Lawyers³³—the threat of improper influence on our state judiciary remains a serious problem that threatens the essence of a fair and impartial judiciary.³⁴ Because attacks against the judiciary continue, it is important to determine the proper factors that should be considered in electing, retaining, or even impeaching or recalling judges—whether by voters, the executive, or the legislature. Strong arguments supporting judicial accountability exist, especially when the breaches arise from actual judicial misconduct.³⁵

But judicial accountability should not come at the expense of judicial independence or fairness. In fact, there are already several forms of accountability in place that appropriately strike this balance. First, there is an important check on judicial behavior in that all judges are required to follow their state's Code of Judicial Conduct.³⁶ With respect to misconduct, that accountability is properly monitored by strong judicial qualifications commissions.

Accountability also derives from the basic requirement that trial judges adhere to precedent and follow the rules of evidence, and their decisions are subject to review by a higher court. As the Supreme Court of Washington has explained:

Judicial independence does not equate to unbridled discretion to bully and threaten, to disregard the require-

Jurists should not perceive a potential threat to their position if they rule in a way that is unpopular.

29. *Id.* (footnotes omitted); see also Jeffrey M. Jones, Frank Newport & Lydia Saad, *How Americans Perceive Government in 2017*, GALLUP (Nov. 1, 2017), <https://news.gallup.com/opinion/polling-matters/221171/americans-perceive-government-2017.aspx> ("Americans have a relatively higher level of trust in the judicial branch than either the executive or legislative branch.").

30. See *Republican Party of Minn. v. White*, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting); Justice Free from Special Interests, Informed Voters: Fair Judges, <https://ivp.nawj.org/app/uploads/2016/06/Politics-and-special-interests.pdf> ("Unlike our representatives in the legislature, we depend on our judges to stand apart from politics and partisan ideas.").

31. See *Statement of Bob Carlson, ABA President Re: Being Thankful for Judicial Independence*, AM. BAR ASS'N (Nov. 27, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re-being-thankful-for-j/> (The ABA "is committed to an independent, impartial judiciary that is free from political influence.").

32. The Mission of the American Judicature Society is "to secure and promote an independent and qualified judiciary and a fair system of justice." AM. JUDICATURE SOC'Y, <http://americanjudicaturesociety.org/> (last visited Nov. 29, 2018).

33. Am. College of Trial Lawyers, *Judicial Independence: A Cornerstone of Democracy Which Must Be Defended* (Sept. 2006).

34. *Lee v. State Bd. of Pension Trustees*, 739 A.2d 336, 341 (De. 1999); *A New Era for Judicial Retention Elections*, *supra* note 4, at 1537-38; see Randall T. Shepard, *Judicial Independence and the Problem of Elections: "We Have Met the Enemy and He Is Us,"* 20

Q.L.R. 753, 753 (2001); see, e.g., *North Carolina GOP Leader Raises Possibility of Impeaching Justices*, BRENNAN CTR. JUST.: FAIR CTS. E-LERT (Aug. 24, 2018); see also Greytak, et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-14*, BRENNAN CTR. JUST. 3 (2015), https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Election_2013_2014.pdf.

35. For example, as the recent impeachment of four West Virginia Supreme Court justices for improper use of state funds reminds us, judges are accountable to the public in their positions as governmental actors. *West Virginia House Votes to Impeach Four West Virginia Supreme Court Justices; Senate Schedules Trial*, BRENNAN CTR. JUST.: FAIR CTS. E-LERT (Aug. 24, 2018). Yet, some have posited that the alleged improper use of funds was a smokescreen for a political agenda by the other branches. See Meagan Flynn, *West Virginia Botches Impeachment of Chief Justice. Faces Constitutional Crisis. Stay Tuned.*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/15/west-virginia-botches-impeachment-of-chief-justice-faces-constitutional-crisis-stay-tuned/?utm_term=.a2e7c64c75a2.

36. See generally, e.g., Code of Judicial Conduct for the State of Florida, Fla. Supreme Ct., <http://www.floridasupremecourt.org/decisions/ethics/canon7.shtml> (last updated June 18, 2015); Code of Judicial Conduct, N.J. Courts (Sept. 1, 2016), <https://njcourts.gov/attorneys/assets/rules/cjc.pdf>; Oregon Code of Judicial Conduct, Or. Cts. (2013), <https://www.courts.oregon.gov/rules/Other%20Rules/CodeJudicialConduct.pdf>.

What if a judge uses a racial slur while performing his or her official duties, or in public?

ments of the law, or to ignore the constitutional rights of defendants. . . . Judicial independence requires a judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government. It does not refer to independence from judicial disciplinary bodies (or from higher courts). Decision making is constrained by the evidence, by appropriate procedural rules, records and legal principles.³⁷

In an attempt to advance the goal of a fair and impartial judiciary, the National Association of Women Judges (NAWJ) launched its Informed Voters Project (IVP), “a non-partisan voter education initiative developed to increase public awareness about the judicial system, to inform voters that politics and special interest attacks have no place in the courts, and to give voters the tools they need to ensure judges are appointed and elected on the basis of their character and ability.”³⁸ IVP offers the following five factors as proper considerations in evaluating judicial candidates for selection and retention—(1) integrity, (2) professional competence, (3) judicial temperament, (4) experience, and (5) service—which frame the discussion below.³⁹ Similarly, former U.S. Supreme Court’s Justice Sandra Day O’Connor’s *The O’Connor Judicial Selection Plan*, sets forth the following “values desired in individual judges”: fairness and impartiality, competence, judicial philosophy, productivity and efficiency, clarity, demeanor and temperament, community, and separation of politics from adjudication.⁴⁰

1. INTEGRITY

First, IVP explains that judges should be of the highest

integrity: “[a] judge should be honest, impartial, and committed to the rule of law.”⁴¹ Likewise, Canon 1 of the ABA’s Model Code of Judicial Conduct states that judges “shall uphold and promote the independence, integrity, and impartiality of the judiciary.”⁴² Given that each state’s code of judicial conduct and the federal and state constitutions are the lynchpins to judicial service,⁴³ violating these obligations would properly subject a judge or justice to consequence, including removal.⁴⁴

As the Brennan Center explains, “A judge’s job is to apply the law fairly and to protect our rights, even when doing so is unpopular or angers the wealthy and powerful.”⁴⁵ Therefore, as discussed above, “the reality of competing in costly, highly politicized elections is at odds with this role.”⁴⁶ Justice Ginsburg, joined by Justice Breyer, addressed this in 2015 in her concurring in part opinion in *Williams-Yulee v. Florida Bar*:

“Favoritism,” i.e., partiality, if inevitable in the political arena, is disqualifying in the judiciary’s domain. . . . Unlike politicians, judges are not “expected to be responsive to [the] concerns” of constituents. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. [1434,] 1441 [(2014)] (plurality opinion). Instead, “it is the business of judges to be indifferent to popularity.” *Chisom v. Roemer*, 501 U.S. 380, 401, n. 29, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (internal quotation marks omitted).⁴⁷

Of course, situations in which a judge should be removed may not be so clear cut. As others have recognized, these “characteristics . . . are . . . difficult to measure.”⁴⁸ What if a judge’s decisions reflect impermissible bias based on race, ethnicity, gender, sexual orientation, or other forms of bias?⁴⁹ What if a judge uses a racial slur while performing his or her official duties, or in public? For example, in 2018, Florida trial judge was under review for “using the word ‘moolie’ to describe a black defendant . . . while speaking with the defendant’s lawyer in chambers about scheduling.”⁵⁰ After

37. In re Hammermaster, 985 P.2d 924, 936 (Wash. 1999).

38. *About the Informed Voters Project*, Informed Voters Project: Fair Judges, <https://ivp.nawj.org/about/> (last visited Aug. 24, 2018).

39. Evaluation Tips, Informed Voters Project: Fair Judges 1, <https://ivp.nawj.org/app/uploads/2016/06/How-should-I-judge.pdf> (last visited Aug. 24, 2018); see *A New Era for Judicial Retention Elections*, *supra* note 4, at 1534; Reddick & Kourlis, *supra* note 15, at 12. These factors are similar to those suggested by the Defense Research Institute and used by, for example, New Mexico’s Judicial Performance Evaluation Commission. Defense Res. Inst., *Without Fear or Favor: A Report by DRI’s Judicial Task Force* 35 (2007), [http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-\(2007\)-\(1\).pdf?sfvrsn=6](http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-(2007)-(1).pdf?sfvrsn=6) [hereinafter DRI]; *Overall Factors*, Jud. Performance Evaluation Comm’n, <https://www.nmjpec.org/en/how-we-evaluate/overall-factors> (last visited Sept. 4, 2018).

40. The O’Connor Judicial Selection Plan, Inst. Advancement Am. Legal Sys. 2-3 (June 2014), <http://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=retention-election>.

41. Evaluation Tips, *supra* note 39.

42. *Model Code of Judicial Conduct*, Am. Bar Ass’n (2010), https://www.americanbar.org/groups/professional_responsibility/

[publications/model_code_of_judicial_conduct/](https://www.americanbar.org/publications/model_code_of_judicial_conduct/).

43. See, e.g., *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976); *State v. Hess*, 785 N.W.2d 568, 584 (Wis. 2010).

44. See DRI, *supra* note 39, at 34 (“The system should select judges who will be accountable to the laws and the constitutions of the United States and the applicable state.”).

45. Bannon, *supra* note 24, at 1.

46. *Id.*

47. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J., concurring in part).

48. Reddick & Kourlis, *supra* note 15, at 12.

49. See Berry, *supra* note 8, at 1.

50. Chris Perez, *Judge Uses Racial Slur to Describe Defendant, Blames New York Upbringing*, N.Y. POST (May 21, 2018), <https://nypost.com/2018/05/21/judge-uses-racial-slur-to-describe-defendant-blames-new-york-upbringing/>. “The slur is a shortened version of ‘mulignan’—a Sicilian slur used to describe black people or somebody with a dark complexion, according to the commission’s report on the case.” David Ovalle, *Miami Judge Who Used an Obscure Racial Slur Resigns from the Bench*, MIAMI HERALD (July 13, 2018), <https://www.miamiherald.com/news/local/article214845940.html>.

attempting to justify the use of this word,⁵¹ “Millan agreed to undergo racial sensitivity training,” but Florida’s Judicial Qualifications Committee (JQC) recommended that Millan be suspended from the bench for thirty days without pay, fined \$5,000, and subject to a public reprimand.⁵² The Florida JQC wrote: “The use of racially derogatory and demeaning language to describe litigants, criminal defendants or members of the public, even behind closed doors or during off-the-record conversations, erodes public confidence in a fair and impartial judiciary.”⁵³ After the Supreme Court of Florida unanimously rejected the JQC’s proposed sanctions and sent the case back for a full hearing, Millan resigned from the bench.⁵⁴

In a similar vein, Florida trial judge Mark Hulsey III was charged by the Florida JQC for making racist and sexist comments in court and “misus[ing] his judicial assistant and staff attorneys.”⁵⁵ “[F]acing potential impeachment by the Florida Legislature and” discipline by the JQC, Hulsey resigned.⁵⁶ As the cases of Millan and Hulsey show, the proper response to improper judicial actions by overt acts of bias does not seem to be removal by the voters but, rather, a more vigorous use of the JQC or appropriate disciplinary body. The message this time: *Explicit prejudice will not be tolerated in the courts.*

2. PROFESSIONAL COMPETENCE

Second, as to “professional competence,” IVP explains that “[a] judge should have a keen intellect, extensive legal knowledge and strong writing skills.”⁵⁷ Professional competence matters in both judicial selection—for determining whether a candidate is qualified for the role based on the state’s specific qualifications—and judicial retention. Fortunately, judicial competence has rarely been challenged in judicial retention elections.

3. JUDICIAL TEMPERAMENT

Third, as to “judicial temperament,” IVP explains that “[a] judge must be neutral, decisive, respectful and composed.”⁵⁸ Similarly, *The O’Connor Judicial Selection Plan* explains that judges must be “patient and even-keeled” as well as “collegial and humble,” meanwhile “command[ing] respect from the community and from those who enter the courthouse,” which the judge should “work to make . . . a comfortable place.”⁵⁹ Canon 2 of the ABA’s Model Code of Judicial Conduct pro-

vides: “A judge shall perform the duties of judicial office impartially, competently, and diligently.”⁶⁰

An example of accountability on this front comes from Arizona, where voters in 2014, recalled a judge for the first time since 1978.⁶¹ Judge Benjamin Norris of Maricopa County Superior Court was presiding over a custody case when the following ensued:

Fortunately, judicial competence has rarely been challenged in judicial retention elections.

The mother’s attorney was trying to convince Norris that the father should not have unlimited access to his two daughters, but Norris had quashed the subpoena of the Child Protective Services caseworkers who were supposed to testify.

Then, when the mother’s attorney asked if Norris had watched a video of an earlier hearing in which a judge had imposed a protective order against the father, Norris flew into a rage.

“I work 12-hour days,” he said. “And if you start making me watch two hours of video for every hour hearing, I don’t have 36 hours in a day.”

“Why are you yelling at me?” the lawyer asked.

“Because I’m upset by this.”⁶²

The hearing continued. “Nothing was accomplished.”⁶³ Norris’s “lack of civility,” which other judges had also noticed, “resulted in a bad review of his performance as a judge” by the Arizona Commission on Judicial Performance Review.⁶⁴ In response to the Commission’s review, the Maricopa County electorate rejected Norris’s retention,⁶⁵ sending this message: *Judges will be required to maintain a certain level of civility and patience in performing their judicial duties.* “[M]any in the legal community” considered Norris’s loss “a validation for the judicial-retention ballot.”⁶⁶

In contrast to the message voters send when they merely disagree with a judicial decision, the message sent to Judge Norris was properly based on his actions in performing his role

51. Perez, *supra* note 50.

52. *Id.*; accord eds., *Racial Bias in the Courtroom Undercuts Justice*, MIAMI HERALD (July 15, 2018), <https://www.miamiherald.com/opinion/editorials/article214917125.html>.

53. Perez, *supra* note 50.

54. Order, Inquiry Concerning a Judge, No.17-570, No. SC18-775 (Fla. June 8, 2018); Ovalle, *supra* note 50.

55. Larry Hannan, *Jacksonville Judge Accused of Racist and Sexist Comments Resigns*, Jacksonville.com (Jan. 23, 2017).

56. *Id.*

57. Evaluation Tips, *supra* note 39; see *In re Barnes*, 510 N.E.2d 392, 398 (Ct. App. Ohio 1986); *Methods of Judicial Selection*, *supra* note 15.

58. Evaluation Tips, *supra* note 39.

59. O’Connor Judicial Selection Plan, *supra* note 40, at 3.

60. *Model Code of Judicial Conduct*, *supra* note 42.

61. Michael Kiefer, *Merit Proponents: Voting Out Judge Out Shoes System Works*, AZCentral (Nov. 7, 2014), <https://www.azcentral.com/story/news/arizona/politics/2014/11/07/merit-proponents-voting-judge-shows-system-works/18654583/>.

62. *Id.*

63. *Id.*

64. *Id.* After conducting surveys, asking for self-evaluations, and holding interviews with judges, “the commissioners tallied up the data as to Norris’ qualifications to remain on the bench” and “rated him at the bottom.” *Id.* The commission voted 23-3 that Judge Norris “did not meet adequate standards.” *Id.*

65. *Id.*

66. *Id.*

Judicial temperament may also be compromised when judges are forced to participate in contested elections.

as a judge.⁶⁷ Judges acting in the manner that Judge Norris acted threatens judicial legitimacy; whereas, the exact opposite is true of removing judges based on their reasoned decisions.

Judicial temperament may also be compromised when judges are forced to participate in contested elections. Just this year, the Florida Supreme Court removed a state trial judge for 2016 campaign violations.⁶⁸ While running against criminal defense

attorney Gregg Lerman, Dana Marie Santino's campaign created "a Facebook page that blasted opponent Lerman's defense of 'Palm Beach County's worst criminals' and listed a few of his higher-profile cases. The page showed a photo of Lerman surrounded by the words 'child pornography,' 'murder,' 'rape' and more, in boldface and all capital letters."⁶⁹ In its opinion removing Santino from the bench, the Florida Supreme Court wrote that "Santino's conduct does not evidence a present fitness to hold judicial office."⁷⁰ Again, the message seems proper and reflects the principles espoused in nationwide judicial codes of conduct: *Judges will be required to maintain a certain level of character and dignity in all actions.*

4. EXPERIENCE

Fourth, as to "experience,"⁷¹ IVP explains that "[a] judge should have a strong record of professional excellence in the law."⁷² The rationale underlying this factor often seems instinctual: a judge should be an experienced advocate rather than a brand-new attorney who has not gained sufficient experience to perform judicial duties. *The O'Connor Judicial Selection Plan* suggests that this competence requirement demands judges have the best academic and intellectual skills, stating that judges must "have excellent analytical ability," "demonstrate excellent substantive legal knowledge, or a willingness to learn

at the earliest opportunity," and "undertake the research necessary to gain command of the facts and issues presented."⁷³

Of course, this factor is likely more important when considering a candidate for selection rather than retention because judges up for retention already have experience on the bench, so their ability to build on prior experiences to perform the judicial role is obvious. However, even after selection, a judge must be willing and able to continue expanding his or her knowledge by learning and researching, as *The O'Connor Judicial Selection Plan* explains.

5. SERVICE

Finally, as to "service,"⁷⁴ IVP explains that "[a] judge should be committed to public service and the administration of justice."⁷⁵ A judge should be diligent and hardworking. The judge's motivation in fulfilling his or her duties should not be for private gain, which would cause impropriety and improper bias. Canon 3 of the ABA's Model Code of Judicial Conduct seems to contemplate this, providing: "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."⁷⁶

Having explained these proper considerations for judicial selection and retention, or holding judges accountable, we turn next to review other messages voters have sent to judges, which were *not* based on these objective, neutral factors. Understanding these attacks and what motivated them is essential to understanding how to move forward; to make progress, we must learn from the past.

IMPROPER CONSIDERATIONS USED TO ATTACK THE JUDICIARY SINCE 2010

Politically motivated attacks on state-court judges existed before 2010,⁷⁷ but 2010 was a turning point.⁷⁸ As mentioned above, voters and, more specifically, special interest groups in Iowa used a well-funded campaign to remove three highly qualified Iowa Supreme Court justices on the ballot for merit retention.⁷⁹ The impetus was the court's unanimous opinion holding

67. Another example of a judge's proper removal for improper conduct that affected the judge's official role was seen recently with the suspension of Michigan County Judge Theresa Brennan. See Orlander Brand-Williams, *State Panel: Stop Paying Livingston County Judge Brennan*, DETROIT NEWS (Jan. 16, 2019), <https://www.detroitnews.com/story/news/2019/01/16/state-panel-stop-paying-livingston-county-judge-brennan/2593509002/>.

68. Marc Freeman, *High Court Removes Palm Beach County Judge Over Campaign Misconduct*, S. FLA. SUNSENTINEL (July 2, 2018), <https://www.sun-sentinel.com/local/palm-beach/fl-pn-judge-santino-supreme-court-ruling-20180702-story.html>.

69. *Id.*

70. *Inquiry Concerning a Judge No. 16-534 RE: Dana Marie Santino*, 43 FLA. L. WEEKLY S477, 2018 WL 5095128, *10 (Fla. Oct. 19, 2018).

71. "Experience" is defined as the "[a]ctive participation in events or activities, leading to the accumulation of knowledge or skill." *Experience*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=experience> (last visited Aug. 30, 2018).

72. Evaluation Tips, *supra* note 39.

73. O'Connor Judicial Selection Plan, *supra* note 40, at 2.

74. "Service" is defined as "[e]mployment in duties or work for

another, as for a government." *service*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=service> (last visited Aug. 30, 2018).

75. Evaluation Tips, *supra* note 39.

76. *Model Code of Judicial Conduct*, *supra* note 42.

77. See, e.g., Colman McCarthy, *Injustice Claims a Tennessee Justice*, WASH. POST (Nov. 26, 1996), https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?noredirect=on&utm_term=.fca53f190689 (explaining the removal of Justice Penny White in Tennessee in 1996); Georgiana Vines, *Where Are They Now: Election Loss Led to Success in Academia for Former TN Justice Penny White*, KNOXVILLE NEWS SENTINEL (Sep. 6, 2014), <http://archive.knoxnews.com/entertainment/life/where-are-they-now-election-loss-led-to-success-in-academia-for-former-tn-justice-penny-white-ep-596-354313321.html> (same).

78. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1529; see A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

79. See Bannon, *supra* note 24, at 10; see also *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009);

unconstitutional a state statute banning same-sex marriage. While those who mounted the campaign against these “activist” justices—who were simply performing their judicial duty of interpreting their state constitution—celebrated the justices’ removal as “a popular rebuke of judicial overreach,”⁸⁰ removing the justices had “no effect on” the substance of the decision that caused the attack.⁸¹ Yet, those who led the campaign commented that “the results should be a warning to judges elsewhere.”⁸² The message: *Unpopular decisions that ignore the will of the people jeopardize your position on the bench.*

Just two years after the successful Iowa campaign, special interest groups struck again. As mentioned above, opposition groups—including Americans for Prosperity and the Tea Party through Restore Justice, and ultimately the Republican Party of Florida⁸³—targeted my colleagues and me when we were up for merit retention in the 2012 election,⁸⁴ urging voters to vote “no” on our retention. Initially, they focused on a decision from our Court striking a state constitutional ballot initiative that was marginally about the health care mandate in the recently passed and very controversial Affordable Care Act.⁸⁵ But our opponents soon turned to a 2004 decision in a capital-sentencing case, which they used to support their argument to voters that we used our “own views to usurp the law and separation of powers.”⁸⁶ Focusing on these decisions, our opponents launched ads labeling us as activists, legislating from the bench, and failing to respect victims of crime⁸⁷—the same buzz words that were used against the Iowa justices in the “Send Them a Message” ad.⁸⁸

As a result of these attacks, we each decided that we should form a “Committee of Responsible Persons,” as authorized by the Florida Code of Judicial Conduct,⁸⁹ to fundraise and engage

in an educational campaign about the purpose of merit retention. Contrary to the ads, we maintained that our decisions were and would continue to be based solely on the law.⁹⁰ In fact, “a study commissioned by the Federalist Society found nothing to support a charge of judicial activism.”⁹¹ Unlike in Iowa, our opponents were ultimately unsuccessful and, fortunately, we were each retained and able to continue in our positions through our mandatory retirements.⁹² The message still resonated, though: *Despite the merit-retention system, your seat is not safe from political attack.*⁹³

My concern, as seen in my own 2012 merit-retention election, is that, by waging campaigns to remove a well-qualified jurist, judges are forced to campaign against an undefined opponent—an even more difficult task than campaigning against a defined opponent in an ordinary election. I am not alone in this regard. As detailed in the law review article authored by attorney Jim Robinson and me, political attacks on state court judiciaries have continued—including in 2014 in Kansas and Tennessee, and then again in Kansas in 2016⁹⁴—all fueled by groups attempting to change the composition on the court under attack.

Most recently, California voters expressed their discontent with the judiciary in 2018 by recalling Judge Aaron Persky—the first recall in the state in over eighty years.⁹⁵ Voters attacked Persky after he sentenced a Stanford athlete, Brock Turner, “to just six months in jail for sexually assaulting an unconscious woman.”⁹⁶ Although Turner faced up to fourteen

**The message:
Unpopular
decisions that
ignore the will
of the people
jeopardize
your position
on the bench.**

80. Sulzberger, *supra* note 78.

81. *Id.* Of course, we now know that the Iowa justices’ decision was legally correct—as the U.S. Supreme Court held in 2016 in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

82. Sulzberger, *supra* note 78.

83. Alvarez, *supra* note 5; Musgrave, *supra* note 5. This was the first time “a political party ever [took] a position” regarding the retention of state court judges. See Robert Barnes, *Republicans Target Three Florida Supreme Court Justices*, WASH. POST (Oct. 30, 2012), https://www.washingtonpost.com/politics/decision2012/republicans-target-three-florida-supreme-court-justices/2012/10/30/edbeb5de-1d22-11e2-ba31-3083ca97c314_story.html?noredirect=on&utm_term=.cd266c5be2f1.

84. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1549.

85. See generally *Fla. Dep’t of State v. Mangat*, 43 So. 3d 642 (Fla. 2010).

86. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1549–50 (quoting *Preserving a Fair and Impartial Judiciary*, *supra* note 2, at 10); see Barnes, *supra* note 83.

87. See Musgrave, *supra* note 5.

88. TV Ad: *Send Them a Message*, *supra* note 1.

89. See Canon 7C(1), Code of Judicial Conduct for the State of Florida, *supra* note 36; see also *A New Era for Judicial Retention Elections*, *supra* note 4, at 1560 & n.203.

90. Musgrave, *supra* note 5.

91. Barnes, *supra* n. 83.

92. Yet, we would see these buzzwords again just before our constitutionally required retirement in January 2019. See, e.g., Gary

Rohrer, *Florida Supreme Court: Next Governor Gets to Replace Retiring Justices*, ORLANDO SENTINEL (Oct. 15, 2018), <https://www.orlandosentinel.com/news/politics/political-pulse/os-ne-scott-appoint-justices-20181015-story.html>; David Smiley, *Florida Supreme Court Ruling Raises Stakes of Governor’s Election*, MIAMI HERALD (Oct. 15, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article220070010.html>.

93. See *TV Spending Surges Past \$1.4 Million in Tennessee Judicial Race*, BRENNAN CTR. JUST. (Aug. 7, 2014), <https://www.brennancenter.org/press-release/tv-spending-surges-past-14-million-tennessee-judicial-race> (reporting “a national trend of increasing expenditures on judicial elections,” especially in states that “worked to insulate courts from political pressure by establishing merit selection systems”).

94. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1556–57; Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL.com (Apr. 30, 2014), <https://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/>.

95. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

96. *Id.*; accord Augie Martin, Holly Yan & Dan Merica, *Voters Oust Judge Who Gave Brock Turner 6 Months for Sex Assault*, CNN (June 6, 2018), <https://www.cnn.com/2018/06/06/us/judge-aaron-persky-recall-results-brock-turner/index.html>.

The recall of Judge Persky was still based upon public disapproval of a judicial decision that was valid under the law.

years in prison under state law, Judge Persky sentenced him “to only six months,” citing his “age, the fact that both he and the victim were drunk and that prison time could have a ‘severe’ impact on [his] life as the reasoning behind the lenient six-month sentence.”⁹⁷ Persky explained that Turner also “lost his swimming scholarship to Stanford and had to register as a sex offender

in Ohio, his home state.”⁹⁸

Regarding his decision, Judge Persky stated: “As a judge, my role is to consider both sides. . . . It’s not always popular, but it’s the law, and I took an oath to follow it without regard to public opinion or my opinions as a former prosecutor.”⁹⁹ “Judge Persky was cleared of any official misconduct,” and the appellate court upheld Turner’s conviction.¹⁰⁰ But, “talk of a recall campaign began almost as soon as he handed down his sentence. . . . In a statement filed with the county registrar in response to” campaign efforts against him, led by the victim’s mother, “Judge Persky said he had a legal and professional responsibility to consider alternatives to imprisonment for first-time offenders.”¹⁰¹

The Stanford case caused public outrage for several reasons. First, the public considered Turner’s sentence, although permissible under the law, unreasonably short. More importantly, many thought that the defendant’s race contributed to the leniency in sentencing—that he was given a more lenient sentence because he is white rather than black. While this concern about racial disparities in the justice system is certainly valid, recalling Persky may have actually undermined the quest for a more equitable and merciful justice system. As Professor John Pfaff, an academic who studies criminal justice, explained: “The recall will make judges more punitive, thwart progress toward scaling back mass incarceration and—though Turner and Persky are both white—hurt minorities disproportionately.”¹⁰²

Unlike the attacks in Iowa, Florida, and Tennessee, the attack against Persky was not driven by special interests seeking to change the composition of the court. Rather, the attack against Persky was a result of voters’ outrage caused by one of Persky’s sentencing decisions, made in his judicial capacity, with which voters strongly disagreed because they viewed the

decision as insensitive to and minimizing the serious crime of sexual assault. However, the message was similar and harmful to a fair and impartial judiciary nonetheless. The recall of Judge Persky was still based upon public disapproval of a judicial decision that was valid under the law.

Some may argue that the message sent in the case of Judge Persky was proper based on the circumstances. But, if the message was proper under those circumstances, what is its logical end point? For state court trial judges who are required to run in judicial elections, should the judge be able to present a “tough on crime” platform?¹⁰³ In fact, many judges may already feel this pressure. Notably, the Brennan Center reported in 2017 that multiple studies found that judges subjected to upcoming contested elections or even retention elections are “more punitive toward defendants in criminal cases.”¹⁰⁴

Kansas offers a useful illustration. Opposition to the 2014 and 2016 merit-retention campaigns of well-qualified Kansas Supreme Court justices rallied around outrage by the families of the victims in a decision granting two death row defendants new sentencing proceedings. While the campaign was started by the victims’ families, interest groups and the Governor became involved and ultimately used the decision to create attack ads accusing the Supreme Court of Kansas of siding with murderers. As Jim Robinson and I have discussed elsewhere, special interest groups and politicians seized on this case in an attempt to change the composition of the Kansas Supreme Court, which they considered to be “too liberal.”¹⁰⁵

Similarly, the 2014 campaign against Justice Robin Hudson of the North Carolina Supreme Court, a well-qualified jurist, launched ads labeling her as “not tough on child molesters” and, even worse, “not fair.”¹⁰⁶ But the real motivation came from pro-business interests seeking her replacement.¹⁰⁷ Fortunately, not only were the attack ads unsuccessful in replacing Justice Hudson, but both the local and national press became aware of the motivations behind the campaign and explained it widely.¹⁰⁸ The attacks against Justice Hudson show not only the harmful messages special interests impose on voters but also, and more importantly, the importance of educating the media and public on this topic so they can properly identify and report on these attacks.

As all of these instances show, the merit-based system for selecting and retaining judges leaves good judges and justices vulnerable to attack by special interest groups. Some of these

97. Christal Hayes & John Bacon, *Judge Aaron Persky, Who Gave Brock Turner Lenient Sentence in Rape Case, Recalled from Office*, USA TODAY (June 6, 2018), <https://www.usatoday.com/story/news/2018/06/06/judge-aaron-persky-who-gave-brock-turners-lenient-sentence-sanford-rape-case-recalled/674551002/>.

98. Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html>.

99. Astor, *supra* note 95.

100. Hauser, *supra* note 98.

101. *Id.*; see Hayes & Bacon, *supra* note 97.

102. John Pfaff, *California Ousts an Elected Judge. Everybody Loses*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/13/california-ousts-a-judge-everybody-loses/?utm_term=.cd4158856239.

everybody-loses/?utm_term=.cd4158856239.

103. See Greytak, et al., *supra* note 34, at 3.

104. Berry, *supra* note 8, at 2.

105. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1553.

106. Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL.com (Apr. 30, 2014), <https://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/>; see Jefferson & Pariente, *supra* note 23, at 14.

107. See Binker, *supra* note 106.

108. E.g., *id.*; Tom Bullock, *Controversial “Justice for All NC” PAC Returns for Late Push on Judges*, WFAE 90.7 (Oct. 30, 2014), <http://www.wfae.org/post/controversial-justice-all-nc-pac-returns-late-push-judges#stream/0>.

attacks have even been successful in sending messages to judges that have no place in the judicial branch, the one branch of government designed to be free from improper influence.¹⁰⁹ As the Defense Research Institute has stated: “The unique position of the judiciary stems in part from the long-standing commitment to the American people to the rule of law and to constitutional government.”¹¹⁰

POTENTIAL WAYS TO IMPROVE THE MERIT-BASED SYSTEM

So, what can we do to ensure that American voters, and the public at large, understand and evaluate judges based on proper characteristics—as outlined above—rather than the improper motivations that have led to former attacks? As Alicia Bannon, Deputy Director for Program Management of the Brennan Center, observed, “there is far more agreement on the problems associated with judicial elections than on potential reforms.”¹¹¹ While others may disagree, it seems clear that, while certain aspects of the system may certainly be improved, a merit-based system is the preferred method for judicial selection and retention. Thus, I start with the premise, which may be controversial among some in the judiciary and legal profession, that election of state court judges and justices—whether partisan or nonpartisan—always creates the real risk of politicizing the judiciary and subjecting the judiciary to special interest influence.

Both the Brennan Center and *The O'Connor Judicial Selection Plan*, as well as other organizations,¹¹² have invested many resources in determining best practices and creating proposals for reforming the merit-selection and -retention systems. Having reviewed the literature and personally experienced these unwelcome attacks, I agree that, at the least, we should (1) review how judicial nominating commissions (JNCs) are composed and instructed, (2) maintain a vigorous judicial qualifications committee (JQC) process to ensure accountability, (3) consider a system of judicial evaluations, such as the one in Arizona, provided it can be truly non-partisan, and last but not least (4) concurrently provide an effective forum to continue to educate the

public, the media, and voters on judges up for retention election. In the end, I am in favor of a true merit-based system for all levels of judges with a properly constituted and nonpartisan JNC as well as a vigorous JQC to monitor complaints about judicial conduct. I also believe we should consider one lengthy term for judges, without retention, as the Brennan Center has proposed.¹¹³

So, what can we do to ensure the American voters, and the public at large, understand and evaluate judges based on proper characteristics . . . ?

I. REVIEWING THE COMPOSITION AND INSTRUCTION OF JNCs

First, political influence must be removed (or at least minimized) from every step of the judicial selection and retention process, beginning with the JNC. Each state's JNC and JQC is specifically tasked with ensuring that judges and justices are properly vetted before selection and that they comply with the appropriate code of judicial conduct while in office. As former Chief Justice of the Arizona Supreme Court, Ruth V. McGregor, explained, the JNC “is the key to the judicial merit selection process.”¹¹⁴ Likewise, the independence of JNCs is critical. Thus, I agree with the Brennan Center and *The O'Connor Judicial Selection Plan* that we should rethink how JNCs are composed and instructed.¹¹⁵

For example, in states like Florida, the Governor appoints each member of the JNC, resulting in the likelihood of a more partisan commission that, in turn, selects the list of the candidates from which the Governor appoints judges or justices.¹¹⁶ In Vermont, by contrast, the eleven-member JNC is appointed as follows: three members appointed by the Bar; two members appointed by the Governor; three members appointed by the Senate; and three members appointed by the House.¹¹⁷ Vermont's system seems to diversify the interests at stake better

109. See O'Connor Judicial Selection Plan, *supra* note 40, at 3-4.

110. DRI, *supra* note 39, at 24.

111. Alicia Bannon, *Rethinking Judicial Selection*, AM. BAR ASS'N (June 14, 2017), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/.

112. See, e.g., DRI, *supra* note 39.

113. See Bannon, *supra* note 24.

114. O'Connor Judicial Selection Plan, *supra* note 40, at 5; *accord* In re Advisory Op. to Governor, 276 So. 2d 25, 30 (Fla. 1973) (“The purpose of the judicial nominating commission is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office.”).

115. Bannon, *supra* note 24, at 2 (recommending bipartisan nominating commissions that are “appointed by diverse stakeholders,” “include non-lawyers, and have clear criteria for vetting candidates.” (emphasis added)); O'Connor Judicial Selection Plan, *supra* note 40, at 5 (recommending that nominating commissions be “constitutionally based” and “representative of the community to be served by the judge”).

116. § 43.291, Fla. Stat. (2018); see also *Judicial Nominating Commis-*

sion, Mass.Gov, <https://www.mass.gov/orgs/judicial-nominating-commission> (last visited Nov. 27, 2018). Before 2001, Florida's JNC was composed of three members appointed by the Florida Bar, three members appointed by the Governor, and three members selected and appointed by a majority vote of the other six members. § 43.291, Fla. Stat. (2000). However, in 2001, the Florida Legislature changed the statute to the system Florida uses today, under which Florida's Governor appoints five of the nine JNC members. For the other four members, the Florida Bar submits names to the Governor to accept or reject—essentially giving the Governor ultimate control over all nine seats on the JNC. § 43.291, Fla. Stat. (2001); ch. 2001-282, Laws of Fla. In 2018, when there were three upcoming vacancies on the Supreme Court of Florida, political influence on the JNC was at the forefront of discussion. See, e.g., Lloyd Dunkelberger, *Ron DeSantis Gets List of Conservative Nominees for Florida Supreme Court Vacancies*, ORLANDO WEEKLY (Nov. 28, 2018), <https://www.orlandoweekly.com/Blogs/archives/2018/11/28/ron-desantis-gets-list-of-conservative-nominees-for-florida-supreme-court-vacancies>.

117. *Judicial Nominating Information*, Vt. Judiciary, <https://www.vermontjudiciary.org/attorneys/judicial-nominating-information>.

JQCs are critical in ensuring that judges are held accountable for violating judicial codes of conduct.

than systems like Florida's, which, in turn, decreases the risk of politicizing the judiciary.

There are many options. Systems like Kentucky's and Indiana's even involve voters, although the process is more partisan in Kentucky. There, the JNC is composed of "the chief justice of Kentucky (who also serves as chair), two attorneys elected by

all attorneys in the vacancy's jurisdiction and four non-attorney Kentucky citizens who are appointed by the governor. The four citizens must equally represent the two major political parties."¹¹⁸

Similarly, Indiana's seven-member JNC consists of three attorneys, three non-lawyers, "and the Chief Justice of Indiana or a Justice of the Supreme Court whom the Chief Justice may designate."¹¹⁹ One attorney and one non-attorney are chosen to represent "each of three geographic districts of the Court of Appeals."¹²⁰ The attorney members "serve three-year staggered terms, after being elected by the attorneys in their respective districts."¹²¹ The Governor appoints the non-attorney members, one from each of the Districts, to serve three-year terms."¹²²

Indiana's JNC-selection process seems to more effectively reduce political influence, which is critical, by ensuring that each geographical area is represented, including a combination of attorneys and non-attorneys, as well as the Chief Justice, and involving the public. As *The O'Connor Judicial Selection Plan* explains, reducing political influence at this stage will help reduce any political influence that could arise in the next stage—gubernatorial appointment—as Governors are naturally political actors who are elected by voters to lead the state's executive branch.

2. MAINTAINING VIGOROUS JQCS

Second, we must ensure that each state's JQC remains independent and impartial. JQCs are critical in ensuring that judges are held accountable for violating judicial codes of conduct. As the cases of Judges Millan, Mulsey, and Santino illustrate, the JQCs are an effective way to ensure accountability under the judicial codes of conduct. In Florida, for example, the JQC has caused the removal or resignation of six judges since 2017—four judges resigned, voluntarily dismissing JQC

actions,¹²³ and two judges were removed by the Supreme Court of Florida after a JQC action.¹²⁴

3. JUDICIAL EVALUATIONS

Third, we should consider implementing a system of judicial evaluation, such as the system used by Arizona and proposed by *The O'Connor Judicial Selection Plan*. In Arizona, each judge is evaluated twice during his or her term—"once at midterm and once at the end of the term just before the general election. The review is a two-part process."¹²⁵ As part of the data collection and reporting stage, the Judicial Performance Review (JPR) Commission distributes and collects surveys by "people who have contact with the judges during a prescribed time period," "holds public hearings," and "accepts written comments from the public at any time."¹²⁶ Then, as part of the self-evaluation and improvement stage, the "[j]udges complete self-evaluations to rate their own performance," using categories identical to those used in the surveys.¹²⁷

After compiling the data, the JPR Commission determines whether the judge "Meets" or "Does Not Meet" the judicial performance standards, which include whether the judge:

- administer[s] justice fairly, ethically, uniformly, promptly and efficiently;
- [is] free from personal bias when making decisions and decide[s] cases based on the proper application of law;
- issue[s] prompt rulings that can be understood and make[s] decisions that demonstrate competent legal analysis;
- act[s] with dignity, courtesy and patience; and
- effectively manage[s] their courtrooms and the administrative responsibilities of their office.¹²⁸

Ultimately, the JPR Commission's findings are made available to the public.¹²⁹

Similarly, *The O'Connor Judicial Selection Plan* proposes a judicial performance evaluation system that would "publically [sic] disseminate regular evaluations of the performance of individual judges, based on criteria generally understood to be characteristics of a good judge."¹³⁰ *The O'Connor Judicial Selection Plan* defines those criteria as follows:

- Command of relevant substantive law and procedural rules
- Impartiality and freedom from bias
- Clarity of oral and written communications
- Judicial temperament that demonstrates appropriate respect

118. *Judicial Nominating Commission*, Ky. Ct. Justice (2018), <https://courts.ky.gov/commissionscommittees/JNC/Pages/default.aspx>.

119. *Judicial Nominating Commission Fact Sheet*, In. Judicial Branch, <https://www.in.gov/judiciary/jud-qual/2920.htm> (last visited Nov. 27, 2018).

120. *Id.*

121. *Id.*

122. *Id.*

123. Inquiry Concerning a Judge RE: John Patrick Contini, No. SC18-1189 (Fla.); Inquiry Concerning a Judge RE: Stephen Thomas Millan, No. SC18-775 (Fla.); Inquiry Concerning a Judge RE: Claudia Robinson, No. SC17-2093 (Fla.); Inquiry Concerning a

Judge RE: Mark Hulsey, III, No. SC16-1278.

124. Inquiry Concerning a Judge No. 16-534 RE: Dana Marie Santino, 43 FLA. L. WEEKLY S477 (Fla. Oct. 19, 2018); Inquiry Concerning a Judge No. 16-377 RE: Scott C. Dupont, 252 So. 3d 1130 (Fla. 2018).

125. See *JPR Process*, AZ Cts., <https://www.azcourts.gov/jpr/About-JPR/JPR-Process> (last visited Dec. 5, 2018).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *O'Connor Judicial Selection Plan*, *supra* note 40, at 7.

- for everyone in the courtroom
- Administrative skills, including competent docket management
- Appropriate public outreach¹³¹

Implementing plans similar to these would ensure a non-partisan, objective review of judicial performance, which would, in turn, provide feedback to judges and, more importantly, educate voters on the proper criteria by which judges should be reviewed for retention.

4. PUBLIC EDUCATION

Finally, it is important to create forums for voter education on judges who appear on the ballot for merit retention. As the IVP's purpose indicates and the example from North Carolina illustrates, voter education is critical. The ABA and IVP have started this process. In 2005, the ABA appointed a Commission on Civic Education and the Separation of Powers.¹³² Also, the ABA's Standing Committee on the American Judicial System states in its mission statement that it "supports efforts to increase public understanding about the role of the judiciary and the importance of fair courts within American democracy."¹³³ More specifically, the Subcommittee on State Courts "supports efforts to increase public understanding of judicial selection and retention methods and to increase informed citizen participation in states where judges are subject to election of any kind."¹³⁴

IVP provides educational materials—slide presentations, handouts, etc.—on their website that can be used for making presentations to the public, organizing presentations at law schools and universities, coordinating outreach efforts, and presenting at bar association events.¹³⁵ Other organizations have also recognized the importance of education in the mission to reduce improper influence on judicial selection and retention.¹³⁶ Ultimately, regardless of legislative change, voter education is critical in ensuring that judges are evaluated "about procedural fairness, demeanor, and knowledge—not about particular outcomes in individual cases."¹³⁷

CONCLUSION

In creating the judiciary as a separate and co-equal branch of government, our Founders understood the importance of a

fair and impartial judiciary—one that does not bend to the will of the majority, the other two branches of government, or special interests. In the end, state court judges, without a system comparable to federal judges' lifetime appointments (or at least a defined lengthy term) will always be vulnerable to removal, or fear of removal, for rendering "unpopular" decisions, or those disapproved by public opinion, special interests, or the other political branches.¹³⁸ Yet state courts review 95% of all cases in the United States.¹³⁹

In creating the judiciary as a separate and co-equal branch of government, our Founders understood the importance of a fair and impartial judiciary

So how do we as members of the legal profession and judiciary balance accountability with judicial independence? It is not through campaigns to remove judges who render decisions with which members of the public, political parties, or special interests disagree. The primary vehicle for judicial accountability—ensuring compliance with codes of judicial conduct and imposing consequences for misconduct—should be each state's judicial qualifications commission. In addition, an independent evaluation commission such as the one constituted in Arizona, if truly nonpartisan, could be charged with periodically evaluating each judge on the basis of objective, appropriate criteria, such as those explained in this article: integrity, professional competence, judicial temperament, experience, and service.

Further, increasing voter education on judicial elections and retention, ensuring that judicial nominating commissions for merit-selection states are appointed to ensure balance and focus on the merit of the applicants, implementing nonpartisan, objective evaluations, considering the elimination of merit-retention elections in favor of one lengthy term, and ensuring the viability of state judicial qualifications commissions are all proper areas of focus. In the end, a process where highly qualified attorneys and judges are selected through a nonpartisan and independent commission, even while the Governor ultimately selects from that list, is the best way to

131. *Id.*

132. DRI, *supra* note 39, at 33.

133. *Standing Committee on the American Judicial System*, Am. Bar Ass'n, https://www.americanbar.org/groups/committees/american_judicial_system/ (last visited Nov. 27, 2018).

134. *Id.*

135. See *News and Events*, Informed Voters: Fair Judges, <https://ivp.nawj.org/news-archive/> (last visited Nov. 27, 2018); *Resources*, Informed Voters: Fair Judges, <https://ivp.nawj.org/press-roompsa/#psa> (last visited Nov. 27, 2018).

136. See, e.g., President's Special Task Force to Study Enhancement of Diversity in the Judiciary and on the JNCs, Fla. Bar (2017), <https://www.floridabar.org/wp-content/uploads/2017/04/report-of-the-florida-bar-presidents-special-task-force-to-study-enhancement-of-diversity-in-the-judiciary-and-on-the-jncs.pdf>

(making ten recommendations, two of which focused on education); see also *Judicial Independent Resource Guide*, Nat'l Ctr. State Cts., <https://www.ncsc.org/Topics/Judicial-Officers/Judicial-Independence/Resource-Guide.aspx> (last updated Mar. 6, 2018).

137. O'Connor Judicial Selection Plan, *supra* note 40, at 7.

138. Of course, "unpopular" is relative because, as we know, public opinion is fluid and changes from year to year and, at times, from month to month or day by day. See, e.g., *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (explaining how public opinion on same-sex marriage has changed over time).

139. Greytak et al., *supra* note 34, at 1-2; Fair Courts, BRENNAN CTR. JUST., <https://www.brennancenter.org/issues/fair-courts> (last visited Nov. 16, 2018).

ensure that the public gets what it deserves: a highly qualified and fair and impartial judiciary.

I continue to urge that lawyers and judges become actively involved in defending our judiciary. I also urge the media, through a free and independent press, to become educated about these issues so they can effectively inform the public of the proper considerations when judges are up for retention, as well as the actual special interests behind the attacks on well-qualified judges.¹⁴⁰ At the same time, it is important to maintain ongoing civic education initiatives in schools, colleges, and for the general public. While I remain concerned about whether all of these groups, individually or collectively, can stem the tide—especially from those who would reduce messages to either a 30-second sound bite or, worse, a 280-character Tweet—we have no choice but to put forth our best concerted efforts. Nothing less than “justice” and the fundamental tenets of our Democracy are at stake.¹⁴¹



Justice Barbara J. Pariente graduated from George Washington Law School in 1973 with highest honors. After clerking for a federal district court judge, she began a career in private practice in civil litigation where she earned an AV rating from Martindale-Hubbell. Through Florida's constitutional system of merit selection, she became an appellate judge in 1993 and then, again through merit selection, was appointed in 1998 to the Supreme Court of Florida, where she served through her recent mandatory retirement in January 2019. She served as Florida's Chief Justice from 2004-2006. Throughout her judicial career, she has promoted the importance of upholding and advancing a fair and impartial judiciary and has served as co-chair of the National Association of Women Judges Informed Voters/Fair Judges Project: <http://www.nawj.ivp.org>. As a result of these efforts, Justice Pariente was recently awarded the Justice Sandra Day O'Connor Award for Judicial Independence by the American College of Trial Lawyers. Justice Barbara J. Pariente, FLA. SUPREME CT., <http://www.floridasupremecourt.org/justices/pariente.shtml> (last visited Nov. 30, 2018).



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140. See DRI, *supra* note 39, at 36 (urging their members to “[b]ecome involved”).

141. See generally, STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).



AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

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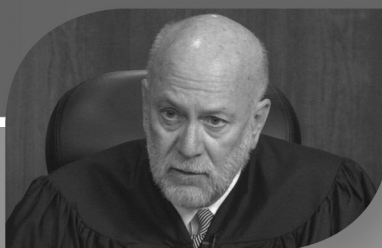
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The Least Accountable Branch?

James L. Gibson & Michael J. Nelson

Under what conditions should judges be held accountable to their constituents for the decisions they make? In framing our question as we have we are immediately tipping our hand on two crucial issues: (1) we assume that judges have constituents, which is, of course, technically true of more than 90% of American judges, and (2) we imply that under at least some conditions, accountability is not only appropriate but required by most theories of liberal democracy.¹ Our arguments run as follows:

- In many areas of law, including sentencing, judges are given by statute an enormous amount of discretion.
- When law authorizes discretion, law no longer indicates what specific decision should be made. Any decision that falls within the range of discretion authorized by law must be judged to be compatible with the rule-of-law.
- Judges may base their discretionary decisions on many factors, including expertise, their own ideological predilections, their own self-interest, the interests of the workgroup of which they are a member, and the preferences and interests of their constituents, to name just a few salient factors.
- The factors upon which judges base their decisions may conflict with one another. For instance, when it comes to sentencing, the interests of the courtroom workgroup may clash with the interests and preferences of the judge's constituents.
- References to constituents' preferences and interests as "whims" or in other ways irrational are practically never accompanied by evidence pertaining to the nature of those preferences and interests. It is improper to assume away a role in decision making for judges' constituents by such prejudicial and entirely non-evidence-based assertions.
- Under a number of conditions, it is appropriate for judges to base their discretionary decisions on the interests and preferences of their constituents. Doing so poses no conflict with hallowed principles such as the rule-of-law.

THE MEANING OF JUDICIAL ACCOUNTABILITY

What do we mean when we ask whether judges should be "accountable" to the public? Judicial accountability encom-

passes judicial responsibility for the conduct of judges as a whole, for their behavior on and off the bench, and for the content of their rulings.² Few would argue, for example, that judges should *not* be held accountable for mismanagement of institutional resources or for violating canons of judicial ethics. At least as institutional and behavioral notions of accountability are concerned, that judges should be held responsible for their actions seems beyond dispute.

But those are not the only types of accountability. The conversation around judicial accountability tends to focus on *decisional accountability*: the notion that it is good to hold judges responsible for specific decisions or sets of decisions that they make. As it concerns Judge Persky's situation in California, many of Persky's constituents who were unhappy with the sentence Persky gave to Turner exercised decisional judicial accountability when they voted against him at the ballot box. So too did Persky's supporters who found Turner's sentence to be appropriate.³ Critics of judicial elections oftentimes rebuke voter decision making and judicial campaigning on notions of judicial accountability. Many political scientists take a different view, arguing that such campaigns can provide valuable information to voters who are inclined to hold judges accountable for the decisions they make.⁴

Judicial accountability is often juxtaposed against judicial independence.⁵ Our notion of judicial independence is simple: judicial independence provides judges with the discretion to decide cases the way they believe a case should be decided. Judges who are not independent must decide cases in ways that they believe are incorrect for either personal or political reasons. In some countries, for example, judges risk death or replacement if they rule against the government;⁶ under these circumstances, judges lack judicial independence.

While it is sometimes fashionable to say that judges who are independent are "accountable to the law," that need not be the case.⁷ Independence simply means that judges are able to make decisions without fear of reprisal. In doing so, judges may decide on the basis of many factors, including the law, expertise, their own ideological predilections, their own self-interest (including ambitions), the interests of the workgroup of which

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Footnotes

1. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009); MELINDA GANN HALL, ATTACKING JUDGES (2014); HERBERT M. KRITZER, JUSTICES ON THE BALLOT (2015).
2. Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006).
3. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who*

Gave a 6-Month Sentence for Sexual Assault, NEW YORK TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>

4. BONNEAU & HALL, *supra* n. 1.
5. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012)
6. Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 921 (2002).
7. Alyse Face, *Judges Should Be Accountable to the Law, Not Public Opinion*, BRENNAN CENTER FOR JUSTICE (Sept. 17, 2014) <https://www.brennancenter.org/blog/judges-should-be-accountable-law-not-public-opinion>.

they are a member, and the preferences and interests of their constituents, to name just a few salient factors. Judicial independence may contribute to rule-of-law outcomes, but does not necessarily do so (e.g., judges who base their decisions solely on their own ideologies).⁸

Moreover, the relationship between judicial elections and judicial independence has changed over time. While many now argue that judicial elections *reduce* judicial independence, that has not always been the case. For example, judicial elections were originally adopted in the mid-1800s as a means of increasing judicial independence, based upon fears that judges were too accountable to the state legislators and party leaders who recommended and appointed them.⁹ Likewise, Bolivians adopted judicial elections in 2009 for their national high courts based upon a promise that judicial elections would increase judicial independence and reduce corruption.¹⁰

Of course, these two concepts have been the subject of voluminous debates among legal scholars, and our description here only scratches the surface of the tension between judicial independence and judicial accountability.¹¹ The key points of this discussion for our argument are simply that judicial independence increases opportunities for judges to rely upon whatever factors they would like—be those legal or otherwise—to make decisions. And, while decisional accountability is often criticized, the basic notion of judicial accountability for other types of judicial behaviors is relatively straightforward: just because someone is a judge does not mean they should not be held responsible for their conduct.

THE AVAILABILITY OF JUDICIAL DISCRETION

Judges' decisions are sometimes said to be incompatible with the rule of law. But we contend that any decision authorized by statute or precedent or rules of equity is one that is compatible with the rule of law. Those who criticize judges' decisions as inconsistent with the rule of law are often doing nothing more than declaring that they disagree with the decision. In reality, judicial decision making is difficult to judge because judges are gifted with unbelievable amounts of discretion.¹² This is not particularly surprising; almost every judicial decision, of almost every type, involves a choice between alternative outcomes. And, anyone with even a cursory knowledge of the opinions of high courts knows that judges often disagree about which of those alternative outcomes is correct. As much as Supreme Court nominees like to hail their affinity for calling "balls and strikes," the craft of judging is discretionary and difficult, and we observe many good-faith disagreements among competent and qualified judges about how a case

should be resolved.¹³

What explains these disagreements? In some cases, law is very clear and constrains the legitimate outcomes a judge can reach. If a road has a speed limit of 25 miles per hour and a driver is clocked by a police officer (who is using a correctly calibrated tool) as operating her or his motor vehicle at 40 miles per hour, a judge has relatively little discretion in how the defendant's speeding ticket should be resolved. In the absence of facts to the contrary, the defendant has committed the crime of speeding. The law is clear in that case.

Most cases are not that easy. Typically, the law is indeterminate, providing judges with legitimate discretion that supports a range of possible outcomes. This is true with regard to choices on concepts ranging from "commonality" to "reasonableness." As Judge Cardozo put it in his famous lecture on *The Nature of the Judicial Process*:

The decision-making freedom that judges have is an involuntary freedom. It is the consequence of legalism's inability in many cases to decide the outcome... That inability... create[s] an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by "the law."¹⁴

In other words, the law is not clear in many cases, leaving even the most careful judges a window of discretion. Consider, for example, constitutional provisions like "reasonable" searches and seizure, "cruel" punishment, or an "adequate" education. These clauses are ripe with vagueness; in these circumstances, judges' interpretations of the law give them discretion based on the meaning of the provision or statute they must interpret.

Trial judges, in particular, have an extreme amount of discretion in their day-to-day work. These judges make discretionary decisions about what evidence to admit, which witnesses to believe, which jurors to seat, and which requests of the lawyers to grant. All of these decisions typically involve judgment calls based on credibility, a concept that is extraordinarily subjective. In short, even when carrying out their day-to-day jobs, judges exercise a great deal of discretion.

[J]udicial decision making is difficult to judge because judges are gifted with unbelievable amounts of discretion

8. James L. Gibson & Michael J. Nelson, *Judicial Elections: Judges and their New-Style Constituencies*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 48 (Lee Epstein & Stefanie A. Lindquist, eds., 2017).

9. Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

10. Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 31 ELEC. STUD. 628, 628–29 (2012); Amanda Driscoll & Michael J. Nelson, *The Political Origins of Judicial Elections: Evidence from the United States and Bolivia*, 96 JUDICATURE 151 (2013); Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the*

Democratization of Justice: Lessons from the Bolivian Judicial Elections, 3 J. L. & CTS. 115 (2015).

11. For a more complete overview of the debate, see TARR *supra* n. 5.

12. Of course, the amount of discretion granted to judges in deciding what sentence to impose pales in comparison to the unfettered statutory discretion given to prosecutors when it comes to the decision to charge or not charge for a criminal offense.

13. Brett M. Kavanaugh, *The Judge As Umpire*, SAINT POPE JOHN XXIII LECTURE SERIES (2015) https://scholarship.law.edu/johnxxiii_lectures/2.

14. Quoted in Richard Posner, *HOW JUDGES THINK* (2008) at 9.

[J]udicial discretion is, practically speaking, virtually unbounded

In still other cases, the law *expressly provides judges with discretion*. This is obviously true when judges sentence a defendant, authorizing them to give, for example, a fine and/or a period of probation or a lengthy prison sentence. And many of those statutes are accompanied by *specific grants of discretion* in terms of the sever-

ity of a sentence.¹⁵ While specific aggregating or mitigating factors might be authorized by statute, determining whether or not those factors have been satisfied is often another grant of discretion. Again, this seems uncontroversial: that judges are so rarely found to have abused their discretion speaks to the conclusion that judicial discretion is, practically speaking, virtually unbounded.

THE FACTORS THAT INFLUENCE JUDICIAL DISCRETION

If judicial discretion is, as we have argued, an inevitable part of the judicial process, then what factors should guide that discretion? To begin, there are some features that clearly should *not* influence judicial behavior because they undermine the rule of law. The easiest example is a bribe. Even if a decision may be authorized by law (e.g., the defendant is statutorily authorized to receive probation), the process leading to the decision (the bribe) may render the decision illegitimate as a violation of the rule of law. And we of course recognize that, while bribery is not much of an issue in contemporary U.S. judicial politics, it is not so unbelievable outside the geographic confines of this country. Here, campaign contributions are an issue, and some believe that basing one's decision on campaign contributions is illegitimate and a violation of the rule of law.¹⁶ This then means that how a decision is made (procedurally proper) is important beyond the specific outcome embraced by judges.

Still, that extralegal factors may legitimately influence judicial decision making is not as strange as it may first appear. Consider the use of legislative intent to interpret a statute. Many judges and legal scholars believe that judges should defer to the interpretation of a text as it was originally drafted; by that view, judges' discretion should be curtailed by neither the law (strictly speaking) nor their own personal views but rather by outsourcing interpretation of a statute or constitutional provision to its original authors (or, in some instances, to a presidential signing statement).

Or consider interpersonal dynamics among judges. Judges on collegial courts decide cases in groups, and it is only natural

that the unique personal information they bring to the bench might change how their colleagues exercise their discretion in some cases.¹⁷ Justice Ginsburg made this point well when discussing the Supreme Court's deliberations in a case involving the strip search of a 13-year-old girl by her teachers: "They have never been a 13-year-old girl.... It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." After she explained to her colleagues "the trauma such a search would have on a developing adolescent," Ginsburg was able to persuade her colleagues to rule that the school's search was unconstitutional.¹⁸ In this way, judges' exercise of discretion might sometimes be affected by the personal views and experiences of their colleagues.

DISCRETION AND THE ROLE OF PUBLIC OPINION

Naïve understandings of judicial independence sometimes suggest that judicial independence is nothing more than deciding cases independent of public opinion. As we have argued above, this is not true. Indeed, sometimes the statutes *directly ask justices to consider public opinion*. Consider *Roper v. Simmons* (2005): "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."¹⁹ Or, to take another example, the *Miller* test for obscenity asks judges to consider: (1) whether "the average person, applying contemporary community standards" would find that the work, "taken as a whole," appeals to "prurient interests," (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, "taken as a whole," lacks serious literary, artistic, political, or scientific value.²⁰ These are all cases in which judges are specifically asked to consider what their constituents might believe about a case.

Even when public opinion is not expressly implicated in the law, there are many scenarios in which judges might quite reasonably take into account the preferences of their constituents in making their decisions. For instance:

- When the public turned against the war in Vietnam, sentences for draft evasion could quite reasonably be changed from prison time to probation under the theory that dwindling support for the war no longer justified incarcerating those who opposed the war.
- To combat the gun epidemic in Chicago, judges could quite reasonably announce that they intend to double the average sentence for gun-related crimes, based on the belief

15. James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision-Making*, 14 LAW & SOC'Y REV. 343 (1980); Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J. LAW & CTS. 117 (2014).

16. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 70 (2008); James L. Gibson, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGIT-*

IMACY 136 (2012).

17. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effect of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

18. Robert Barnes, *Supreme Court Rules Strip Search Violated 13-Year-Old Girl's Rights*, WASH. POST (June 26, 2009), Available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/25/AR2009062501690.html>.

19. 543 U.S. 551, 560-1 (2005).

20. 413 U.S. 15, 24 (1973).

that responding to the fear of gun violence is reasonable and that increasing penalties are likely to deter gun-toting behavior.

- As a means of “sending a message,” a judge could quite reasonably sentence Martha Stewart to prison time for insider trading on the stock market, this time under the theory that majoritarian institutions decided to ban certain trading behavior, and without meaningful enforcement and serious penalties, the purposes of the law would be defeated.
- When citizens vote to legalize some forms of marijuana, judges could quite reasonably change their sentencing behavior to give less serious sentences to those convicted of marijuana crimes because, as a *mala prohibita* crime, the definition of what constitutes a crime is to some degree arbitrary, with whatever people think is criminal being treated as criminal.
- Judges who ride a circuit—especially one made up of both rural and urban counties—could quite reasonably adjust their sentences to take into account the degree to which a crime constitutes a moral affront to the instant community.
- Judges pressed to address the widespread culture of sexual assault could quite reasonably issue sentences that assuage the legitimate concerns among their constituents that potential perpetrators need strong deterrents to get them to change their behavior.

LIMITS ON THE ROLE OF PUBLIC OPINION

We do not necessarily argue that sentences in instant cases should consider the preferences of the judge’s constituents. But sentences in the aggregate constitute public policy. For judges to say that they are changing the “going rate” for particular crimes because their constituents are worried about the crime does not strike us as being in the least inappropriate. Or certainly it is no more inappropriate than listening to the voices of those who say that current penalties are unfair and too severe.

Sentencing is a different type of judicial decision, one associated with an enormous degree of authorized discretion. We do not argue that judges should ignore mandatory sentences if their constituents oppose them.²¹ But we see no valid arguments supporting the view that judges who listen to the general sentencing preferences of their constituents are acting improperly. Certainly, no one could rightly judge sentences informed by the value priorities of the judge’s constituents a violation of the rule of law.

It is pure fantasy to suggest that, out of a range of 0 to 30 years, there is a “correct” decision, and that the judge is uniquely in a position to know what that “correct” decision is.

Instead, we know from decades of research on criminal courts that the interests of the “courtroom workgroup” play an outsized role in the decisions of that workgroup. Is it appropriate to sentence on the basis of a workgroup’s “going rates” for individual crimes? What about taking into consideration the degree of overcrowding in the prisons? Or perhaps enhancing a sentence because the defendant pled innocent and therefore required the time, effort, and expense of a jury trial? Or to issue lesser sentences to the clients of an attorney who makes campaign contributions to the judge to get assignments to represent indigent defendant? Much discussion of sentencing seems to suggest that there is a “correct” sentencing decision—or at least one that is best justified by the need of the convicted for “rehabilitation.” But American prisons generally fail in their rehabilitative function, and sentencing decisions are often more likely to represent the needs of the workgroup than the needs of the convicted.

Research on the sentencing decisions of Kansas judges offers a useful case study of the conflict between the needs of the criminal court workgroup and the preferences of the judges’ constituents.

It is pure fantasy to suggest that, out of a range of 0 to 30 years, there is a “correct” decision

THE SENTENCING BEHAVIOR OF KANSAS JUDGES

Much has been made of the findings that judges change their behavior over the course of the electoral cycle—scholars are particularly concerned about the research findings of Huber and Gordon, Gordon and Huber, and Berdejó and Yuchtman.²² The assumption is that decisions made in proximity to an election are improper (the word “pander” is often used) and that decisions made outside the electoral period (however defined) are proper. To be clear, “proper” and “improper” are normative judgments, not empirical findings. All the data themselves show is that the behavior differs at different points-in-time. For instance, “when election is imminent, judges in competitive districts are 7.1%. . . more likely to sentence a convict to time in prison and, conditional on incarceration, assign sentences 6.3 months longer than their counterparts in retention districts.”²³ In general, some scholars are much concerned about serious bias against criminal defendants in states that elect their judges. We, however, are less concerned.

For simplicity, let us assume two periods of decision making—a period under external scrutiny (the election period) and a period not under external scrutiny (the non-election

21. Consider, for example, U.S. District Court judge Jack B. Weinstein, who tossed aside a conviction for child pornography because the defendant posed “no risk to society.” A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N. Y. TIMES A1 (May 21, 2010).

22. Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office*, 48 AM J. POL. SCI. 247 (2004); Sanford C. Gordon and Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI.

107 (2007); Carlos Berdejó and Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV OF ECON. AND STATISTICS 741 (2013).

23. Gordon and Huber, *supra* n. 22 at 129-131. It is important to note that Gordon and Huber exclude so-called victimless crimes such as drug possession from their analysis. It is at possible that constituents want more *lenient* sentences for this sort of criminal conviction and that their preferences are satisfied by the courts.

Crimes typically are associated with a “going rate” [of sentence level].

period). What we mean by “external” is that in the period not under scrutiny, the courtroom workgroup (the prosecutor, the defense attorney, and the judge) is able to implement its preferences without constraint. Assume for a moment that prosecutors are

motivated by producing as high a “conviction rate” as possible, defense attorneys (and defendants) primarily want no jail time, and judges shoot for a record of not ever being overturned on appeal. All of these motivations fuel the plea-bargaining process.

Now, few have ever argued that the sentences handed out under plea bargaining are rationally designed. Crimes typically are associated with a “going rate,” around which increments and decrements are sought. An important goal of the process is conflict minimization and maintenance of the relationships among the repeat players—the courtroom workgroup. Under these circumstances, the average sentence for a second conviction on burglary might be on the order of four years, a very far cry indeed from the maximum sentence for the crime provided by the state legislature (a parameter that so many decry as an unreasonable, even if largely irrelevant, decision by a majoritarian institution).

Our point is simple. Assume Huber and Gordon are correct about temporal variability in sentencing. Could it not be that the sentences issued under periods without scrutiny are sentences that primarily serve the benefits of the courtroom workgroup, and that those sentences are “too low” (whatever that means)? When under scrutiny, the actors in the workgroup are compelled to consider societal interests more strongly, and therefore cannot “give away the store” just to secure a guilty plea from a defendant. To treat sentences in the non-electoral period as somehow more rational (e.g., tailored to fit the rehabilitation needs of the defendant) does not at all fit with the reality of plea bargaining in American criminal courts. If the workgroup is simply negotiating self-serving sentences in the non-election period, then the scrutiny that comes during the electoral period may actually be desirable from the point-of-view of the public good.

Let us assume that the constituents generally want a sentence of +6 months, or, more precisely, +6.3 months. We take this figure from the finding of Gordon and Huber that judges in competitive districts in Kansas “assign sentences 6.3 months longer than their counterparts in retention districts.”²⁴ Clearly, many observers view this additional 6.3 months as undesirable. But the only criterion they apparently use to make this judgment is that of defendant preferences. We completely

agree that it is reasonable to assume that convicted criminals would prefer to spend X months in jail rather than X + 6.3 months in jail.

So, convicted criminal defendants want less jail time and constituents want more.²⁵ Without some ancillary theoretical apparatus, it is not at all clear to us why the preferences of the defendants should be treated as superior to the preferences of the constituents.

We should readily admit that we do not necessarily agree with the view that guilty criminal defendants are somehow entitled to lenient sentences. We would not, for example, necessarily object to a convicted burglar getting 5.6 years of incarceration rather than 5.0 years. We would not agree with a sentence outside the range of available penalties proscribed by statute (of course). More generally, we would most likely agree with sentencing decisions that are transparent and subject to scrutiny. But simply to say that +6.3 months is somehow wrong, and because it is wrong, the method of selecting judges is wrong, strikes us as entirely too simplistic.

What if the people of Kansas realized how expensive it is to incarcerate convicts and therefore shifted to a preference of -6.3 months for the average sentence? Would it be appropriate for the sentencing judges to respond to these changed preferences? If so, then the culprit critics identify is not necessarily judges responding to the preferences of their constituents (because they are elected, not appointed), but rather that the constituents currently hold “bad” preferences. If that is true, then perhaps the palliative is to change the constituents, not the methods of selecting judges.

“PANDERING?”

Scholars who write about the role of public opinion in court decisions often use the word “pander” when referring to incorporating constituent preferences into the factors guiding the exercise of judicial discretion. According to the *Oxford English Dictionary*, the verb “pander” refers “to act as a pander; to minister to the immoral urges or distasteful desires of another;” or, “in weakened use: to indulge the tastes, whims, or weaknesses of another.”²⁶ Critics use this term, we suspect, under the assumption that the preferences of the constituents are ill-informed, or just simply irrational. We strongly suspect that many who read the Huber and Gordon findings are disgusted that the American people unreasonably seem to prefer more punitive rather than less punitive sentences. This is just one more charge in what is often a comprehensive indictment of the American people for being know-nothing dolts when it comes to law and politics.

Many have argued that judges ought not to “pander” to the “whims” of their constituents. Of course, framing the question

24. Gordon & Huber, *supra* n. 22 at 131.

25. To assume that the American people always want more punitive criminal sentences may not be correct. In the last decade or so, a rather dramatic change in American public opinion toward the death penalty has occurred, with support for the penalty declining by about 20 percentage points (see, for state-by-state documentation of this trend, Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions* 108 AM. POL.

SCI. REV. 23 (2014)). With the rising costs of incarceration—coupled with the rising public awareness of that cost—it is not difficult to imagine that public opinion could soon shift from preferring longer to shorter sentences.

26. OXFORD ENGLISH DICTIONARY, *Pander*, <http://www.oed.com/view/Entry/136753?rskey=9Nhiue&result=2&isAdvanced=false#eid> (Last visited Dec. 7, 2018).

in this fashion prejudices the conclusion. It assumes that constituents do not have meaningful policy preferences and that to respond to these meaningless preferences is to gratify or indulge an immoral or distasteful desire, need, or habit or a person with such a desire. We do not in this essay speak in favor of pandering.

Constituents differ—and differ legitimately—on what they view the function of sentencing to be (just as scholars and policy makers differ). Some may favor general deterrence, while others seek special deterrence. Some may favor retributive justice; others seek restorative justice. Some may view the role and preferences of the victim to be determinative; others may think that victims ought to be excluded from the sentencing process.

Constituents also have many legal policy preferences that are a far cry from being whims. Attitudes toward abortion, for instance, are often grounded in considered moral ideologies, and are also often informed by science and medicine.²⁷ The belief that harsher sentences will deter crime may or may not be entirely supported by scientific evidence, but because it is not does not mean that it is a whim that can be ignored (just as, out of faith, many scientists believe that life as we know it must exist somewhere in the universe). Relatedly, the position that the only way to stop sexual assaults in this country is by stepped-up prosecutions and lengthy and harsh penalties may be derived after considerable thought and deliberation. Similarly, the judgment that employment-at-will is an antiquated and unfair legal doctrine can be a considered view that is well grounded in other beliefs. Even the political preference that Americans should withdraw all troops from Afghanistan should hardly be treated, on its face, as a whim to which presidents and legislators ought not to pander. Ordinary people hold views on legal issues that may not be embedded in a well-articulated and logical ideological frameworks, but that does not mean that their preferences on issues such as issuing sentences of life imprisonment without parole or seizing private property for private development are whimsical, ill-informed, or unreasonable.

Finally, those who make the “whim” and “pandering” arguments typically (if not always) produce not a scintilla of proof in support of their views. How does one determine whether public opinion is a “whim” that ought to be ignored or a considered judgment? Critics typically use phrases like “pandering” to refer to representatives who represent views the critics disliked; for views with which they agree, phrases like “representative democracy” or even “the wisdom of the crowd” are more likely to be used.

CONCLUDING THOUGHTS

No one, of course, argues that judges ought to do nothing but look to the preferences of their constituents when making

sentencing or other policy decisions, just as (we hope) no one argues for complete judicial independence—or that the life terms of the highly unaccountable U.S. Supreme Court justices should be expanded to other judicial officers. No one argues that the majority ought to get its way in all policy decisions, judicial or otherwise; and we are not sanguine about the difficulty of specifying when the majority has the right to get its way and when minority rights must trump majority preferences. Clearly, there must be constraints on the degree of accountability and constraints on the degree of independence.

But we do argue that a large number of policy decisions made by judges ought not to ignore the preferences of the judges’ constituents. The enforceability of mandatory arbitration terms in contracts that nearly all do not read and do not understand is not an issue, for example, on which the preferences of the American people ought to be ignored. And, we contend, there is absolutely nothing wrong in a democracy that decides its judges should be elected and in which the constituents of the judges vote on the basis of whether they agree with the policy decisions of the judicial candidates. For judges to hide behind judicial independence, unsupported claims to the superiority of judicial judgments over the preferences of the constituents, and disain for the rationality of public opinion is unwarranted.



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27. Indeed, by some accounts, the science that undergirded *Roe v. Wade* (e.g., regarding viability) is no longer accepted, so the factual basis of *Roe* may well have been very seriously undermined. See Chelsea Conaboy, *The Abortion Debate Doesn't Change, But the*

Science of Abortion Does, BOSTON GLOBE (Aug. 31, 2018) <https://www.bostonglobe.com/ideas/2018/08/31/the-abortion-debate-doesn-change-but-science-abortion-does/smHRPvw5XDk-TXzMUrADawK/story.html>.

Judicial Recall and Retention in the #MeToo Era

Jordan M. Singer

The voter recall of California judge Aaron Persky in June 2018 was a watershed cultural moment. For the first time in more than forty years, a sitting judge had been removed from the bench, by the local citizenry, in a special election. The recall—instigated in reaction to Judge Persky’s lenient sentence for a defendant convicted of three counts of sexual assault—was hailed as a major political victory for the #MeToo movement, and a sign of an emerging consensus that soft treatment of sex offenders within the justice system is no longer acceptable.

Any questions about the sustainability of the moment were answered five months later, when Alaska voters removed another experienced trial judge, Michael Corey, on similar grounds. Like Judge Persky, Judge Corey drew national attention after granting a light sentence to a sexual offender. As was true with Judge Persky, the sentence stirred widespread dismay and local protest. And as they had with Judge Persky, political activists rapidly organized to remove Judge Corey from the bench, arguing that his actions constituted a dereliction of judicial duty. The campaigns in California and Alaska employed similar messaging and similar methods of outreach. And both campaigns saw the judge’s removal as merely the first step of a larger political movement to change existing law and social attitudes about sexual assault.

Given their outward resemblance, it is tempting to view the ousters of Judge Persky and Judge Corey as the shared—even inevitable—product of a particular cultural and political era. But in one important respect, the two events were fundamentally different. Judge Persky faced a recall election, a process that is both rare and difficult to implement, and which is specifically designed as an outlet for voters to protest particular judicial decisions. By contrast, Judge Corey faced a retention election, an occurrence that is both automatic and routine, and which is designed to allow voters to assess the judge’s overall performance without regard to specific decisions. Recall elections and retention elections have different purposes, different histories, and, typically, different outcomes. That a recall effort and a retention bid could produce such similar campaigns, with such similar results, is therefore noteworthy.

The crossover nature of the anti-Corey campaign also merits close attention. Recall campaigns are premised on popular accountability, and are intended in part to channel voter outrage over particular judicial decisions or comments. Retention elections, by contrast, embrace a vision of professional accountability, a broader view that focuses on a judge’s skill,

competence, and demeanor. Until 2018, the tone and tactics of recall elections had never worked in a retention setting. But the campaign against Judge Corey bucked this trend, successfully turning a retention election into a referendum on a single judicial decision. It is a worrisome development.

JUDICIAL SELECTION AND THE PURSUIT OF INSTITUTIONAL LEGITIMACY

This article examines the contrasting visions of judicial accountability in recall and retention elections, with particular application to the anti-Corey campaign. Judicial accountability is a core component of judicial legitimacy, which itself is a reflection of the public’s faith in the courts’ institutional competence. Judicial legitimacy flows from the belief that judges will interpret and apply the law in a generally trustworthy manner consistent with their constitutional obligations.¹ Legitimacy is the lifeblood of the courts: without it, they cannot obtain public support for their rulings,² or even the material resources they need to operate.³

The methods by which judges are selected or removed occupy a central role in establishing the courts’ legitimacy. This is true because—unlike private organizations that can hire the candidates most suited to their needs and goals—courts lack the power to choose their own members. It is therefore imperative upon those who do select judges to provide the courts with jurists who are capable and willing to rule fairly, honestly, and thoughtfully. Judges must be sufficiently independent that their decisions are not unduly influenced by political or social pressure, and sufficiently accountable that their decisions are grounded in established legal principles and practices. The history of judicial selection in the United States reflects an ongoing conversation about how best to accomplish that balance.

From the earliest days of the Republic, it was understood that protecting the legitimacy of the courts meant adequately distancing judges from the patronage of individual political actors. Accordingly, eight of the thirteen original states vested judicial appointment power in the state legislature, and the remaining five required an independent council to advise on or approve the governor’s judicial choices.⁴ Save a couple of local experiments, legislative or council-based gubernatorial appointment remained the dominant form of state judicial selection for the next seventy-five years.

In the 1840s, however, a series of financial panics triggered by overspending state governments seriously eroded citizen

Footnotes

1. See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828 (2005).
2. See Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RSCH. 297, 303 (2008).

3. See Jordan M. Singer, *The Federal Courts’ Rulemaking Buffer*, 60 WM. & MARY L. REV. ____ (forthcoming 2019), available at <https://ssrn.com/abstract=3174886>.
4. See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 & n.1 (1980).

trust in their legislatures.⁵ The episode raised questions not only about the institutional competence of state representatives, but also of the judges they appointed. Reformers argued that if judges who owed their office to legislators were not independent enough to prevent legislative malfeasance, a different method of selecting judges was needed. The agreed-upon solution was direct elections, reflecting the belief that judges who were directly chosen by the people could protect against corruption or incompetence in the other branches. New York adopted direct elections in 1846, and many other states quickly followed suit. By 1861, the majority of states (twenty-four in all) had changed their constitutions to provide for selection of judges by popular vote.⁶

Direct elections resolved public concerns about undue judicial fealty to legislatures, but over time elections themselves came under fire. For one thing, candidates running for judicial office had to align themselves with a political party, which seemed at odds with the impartial administration of justice. Of even greater concern, judges in many cities eventually became enmeshed in machine politics.⁷ Democratic party boss Tom Pendergast, for example, notoriously controlled all judicial bids in Kansas City for decades, rewarding judges who ruled in his favor and seeking a swift end to the careers of those who dared to rule against him.⁸

Such blatant exercises of political control inspired another modification—nonpartisan elections—which permitted judicial candidates to appear on the ballot without a party designation. This selection method removed some of the overtly political tones from contested judicial elections, but still left open the question of whether a judge so accountable to a single group of voters (or party bosses) could truly be seen as impartial.⁹ As the twentieth century dawned, the public commitment to the courts' institutional legitimacy endured, but the optimal method of balancing judicial accountability and judicial independence remained elusive.

RETENTION ELECTIONS AND THE SHIFT TO PROFESSIONAL ACCOUNTABILITY

In 1914, Northwestern University law professor Albert Kales proposed a new type of selection method known as merit selection. The proposal eliminated contested elections altogether and replaced them with a system that allocated the responsibility of judicial selection among a number of different actors.¹⁰ Specifically, it called for a nonpartisan nominating commission to present a slate of qualified judicial candidates to the governor, who would then appoint one of the nominees to an open seat. Each appointed judge would subsequently face periodic retention elections, in which the judge would run

unopposed, the only question facing voters being whether the judge should be retained on the bench. The proposal was quickly embraced by the American Judicature Society, and later by the American Bar Association.

Merit selection was designed in part to improve public perceptions of the courts' institutional competence, by embracing professional accountability and expertise as core principles of the judicial role. This was no accident. In the early twentieth century, lawyers themselves were undergoing a professional revolution, highlighted by the emergence of graduate legal instruction and an organized bar, and the same technocratic ideals were being carried over to the judiciary.¹¹ Merit selection accordingly utilized a similarly technocratic mechanism for choosing judges. It relied on a commission of knowledgeable experts, assuring (at least in theory) that only the most qualified and capable judges would be selected. It sought to hold newly appointed judges accountable for their efficiency and workmanship, rather than specific case outcomes. And if an unqualified or nakedly partisan judge somehow slipped through the initial selection process, retention elections guaranteed that voters could remove the offending judge on their own.

Retention elections were arguably the foremost innovation of the Kales proposal, designed to avoid the characteristics of contested judicial elections—fundraising, advertising, public policy pronouncements, interest group meetings, and currying favor with party bosses—that most clearly undermined the courts' institutional legitimacy. Running unopposed and solely on his or her own record, a judge could sidestep these political landmines. But retention elections presented another problem: most voters did not know enough about their judges to make meaningful decisions about whether they should be retained. As a consequence, some voters chose not to cast retention ballots at all, while others relied on low-quality proxy information about the judge—such as the judge's surname or perceived gender or ethnicity—to inform their decisions.¹²

One solution to this knowledge gap was to provide voters with information regarding each judge's professional skills and demeanor, either informally through polls of local bar associations or formally through state-run judicial performance evaluation (JPE) programs. The first JPE program began in Alaska in 1975, and similar programs had spread to nineteen states by the mid-2000s. In its most robust form, JPE evaluates individual

[B]latant exercises of political control [over judges] inspired another modification—nonpartisan elections.

5. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 84-86 (2012).

6. *Id.* at 276-77.

7. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5-6 (1994).

8. See Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 722 (2009).

9. See Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF*

JUDICIAL ELECTIONS 10 (Matthew Streb ed., 2007).

10. See Goldschmidt, *supra* note 7, at 8.

11. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 93 (1998).

12. See Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 727-28 (2007) (identifying common voter proxies).

[I]n 1911, then-President Taft vetoed . . . admit[ing] Arizona to the Union, specifically because the proposed state constitution provided for judicial recall.

judges on five criteria directly related to the process of adjudication, using a variety of informational sources.¹³ The outcomes of particular cases are never considered as part of the evaluation. Independent, nonpartisan commissions then decide whether each evaluated judge meets a set of predetermined performance standards, and transmit that information to voters through voter guides, websites, and (increasingly) social media. By focusing on the qualities that make a judge a good professional, JPE programs aim to improve both judicial accountability (by presenting

meaningful information to voters about a sitting judge's performance) and judicial independence (by educating voters about the content-neutral qualities they should expect in a judge). Indeed, the capacity of JPE programs to emphasize and contextualize judicial professionalism has led to their adoption not just in merit-selection states, but also in states with appointment systems and contested judicial elections.

Today, a mosaic of judicial selection methods is in use across the country, encompassing gubernatorial and legislative appointment, partisan and nonpartisan elections, and merit selection, in addition to local variants. Regardless of their preferred methods, however, states continue to emphasize the importance of their courts' institutional legitimacy, and most states have embraced judicial professionalism as a key contributor to that goal.

RECALL ELECTIONS AS A FORM OF POPULAR ACCOUNTABILITY

Retention elections came out of a longstanding national dialogue about the best way to *construct* a legitimate judiciary. Not so for recall elections, which from their inception were seen as a narrower housecleaning measure. The impetus for recall was a political battle between judges and social reformers during the first two decades of the twentieth century. During that period, the Supreme Court invalidated several notable pieces of economic and social legislation, drawing the wrath of populists and Progressives. Theodore Roosevelt and William Jennings Bryan, among others, characterized the judges responsible for these decisions as unaccountable actors who bent the law to suit their own economic and social philosophies, and argued

that such decisions would undermine the broader legitimacy of the judiciary. These concerns nourished an ultra-reform movement at both the state and federal level, which sought to give the public much greater control over judges and their decisions.

A key plank in the ultra-reform platform was the recall election, a tool that would allow voters to remove judges who were perceived as not properly discharging their responsibilities. As one proponent explained, recall elections were a way to surgically excise unaccountable judges from an otherwise trustworthy judicial branch.¹⁴ In 1903, California became the first state to allow the popular recall of judges, and several other states quickly followed suit.¹⁵ At the state and federal level, Progressives also suggested allowing voters to recall (that is, override) specific judicial decisions.¹⁶

Because judicial recall is such a blunt and potent tool for public management of the judiciary, states adopting the procedure intentionally made it difficult to implement. In California, for example, merely placing a recall of a superior court judge on the ballot requires proponents to prepare, file, and publish a notice of intention; prepare and receive approval of the recall petition; collect valid signatures equal to at least 20 percent of the last vote for the office; and file the petition before a designated statutory deadline.¹⁷ The vast majority of recall efforts stumble over these early hurdles and die out well before Election Day.¹⁸

Even with these procedural protections in place to prevent abuse, judicial recall was not universally supported. Indeed, prominent conservatives of the Progressive Era—among them William Howard Taft and Roscoe Pound—were horrified by the idea. They argued instead that *any* sort of election involving judges “enmeshed the judiciary in politics, undermined respect for the courts, and discouraged the selection of highly qualified jurists.”¹⁹ Recall elections also clashed with the developing notions of judicial professionalism, which Taft held dear and which he routinely touted during and after his presidency. In a moment of high drama in 1911, then-President Taft vetoed a joint congressional resolution that would have admitted Arizona to the Union, specifically because the proposed state constitution provided for judicial recall.²⁰ Still, recall remained in the public discourse, and many states—seeing no philosophical inconsistency between recall and retention—eventually adopted both practices.

THE DIVERGENT PATHS OF RECALL AND RETENTION ELECTIONS

Recall and retention elections differ not only in their goals, but also in the way they have been used over time. Recall elections represent a rare and particularly combustible form of

13. See Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 1, 10 (2008).

14. See, e.g., Senator Robert L. Owen, *The Recall of Judges*, 21 YALE L.J. 655, 656 (1911).

15. See G. Alan Tarr, *Do Retention Elections Work?*, 74 Mo. L. REV. 605, 607 (2009).

16. See Barry Friedman, “*Things Forgotten*” in the Debate over Judicial Independence, 14 GA. ST. U.L. REV. 736, 747-48 (1997).

17. See California Elections Code §§ 11006 *et seq.*

18. Before the Persky recall, there were 164 attempts to recall state officials in California. Only ten of these attempts actually made it to the ballot, and five were successful. See California Secretary of State, Recall History in California (1913 to present), available at <https://www.sos.ca.gov/elections/recalls/recall-history-california-1913-present>.

19. Tarr, *supra* note 15, at 607.

20. See W.F. Dodd, *The Recall and the Political Responsibility of Judges*, 10 MICH. L. REV. 79, 82-83 (1911).

judicial accountability. Before the Persky vote last June, there had not been a successful recall of a state judge since 1977, when Wisconsin judge Archie Simonson was removed from the bench in reaction to his controversial statements about the community's "sexually permissive environment" during the sentencing of a teenage boy convicted of rape.²¹ In both the Persky and Simonson episodes, popular outrage over a specific incident fueled the recall movement.

None of this has been characteristic of retention elections, which occur on a set schedule in merit selection states, and which emphasize professional, as opposed to popular, accountability for judges. With the inclusion of JPE programs in many states, retention elections are increasingly framed as an exercise in citizen-initiated professional review. Voters are asked to consider the judge's demonstrated administrative ability, communication skills, legal knowledge, impartiality, and courtroom demeanor—all aspects of professionalism and all divorced from assessment of particular decisions or case outcomes. As a result, most retention elections have evolved into relatively quiet and apolitical affairs. To be sure, there have been periodic efforts to not retain judges in reaction to specific case outcomes, mostly originating from the right side of the political spectrum. But perhaps because citizens in merit-selection states have been conditioned to expect their judges to be impartial, professional, and fair, these single-issue campaigns are rarely successful. Indeed, even when judges decide controversial issues shortly before an election, voters typically choose to retain them on the basis of their overall professionalism and body of work.²²

Campaigns against the retention of specific judges have found success on rare occasions, but never by making the election a referendum on a particular case outcome. Instead, these campaigns have asserted more broadly that the targeted judges lacked professionalism and institutional humility. In 1986, for example, three California supreme court justices lost their bids for retention after an extensive campaign aimed at their decisions to overturn death sentences in several criminal cases.²³ Although the motivation for the campaign was a substantive disagreement over the acceptability of capital punishment, the message to the voters—at least in part—was something more fundamental: the targeted judges had overstepped their institutional role, substituted their judgment for that of the people, and compromised the legitimacy of the judiciary itself.²⁴ In three other instances in which state supreme court justices were not retained—in Nebraska and Tennessee in 1996,²⁵ and in Iowa in 2010²⁶—the anti-retention campaigns employed the

same strategy, framing the targeted judges' decisions not as a mere policy preference, but rather as an egregious example of professional dereliction and institutional overreach.²⁷

The success of these particular anti-retention campaigns illustrates how deeply engrained impartiality and humility are in citizen expectations of the judge's professional role. The campaign organizers recognized that voters expected their judges to respect the legislative process, the separation of powers, and the rule of law more generally. Accordingly, these anti-retention campaigns deliberately focused on the limited role of the courts in the larger structure of American government, allowing them to further suggest that the targeted judges had made policy choices that were properly left to the legislature or to the people themselves.²⁸

It bears emphasis that even this theme of institutional overreach rarely produces the desired results for anti-retention forces. Most judges who face retention cannot be easily caricatured as overstepping their bounds or acting outside of their responsibilities. Most professionally sound judges are retained. And the handful of judges who lack professional demeanor or competence are usually not returned on those grounds alone.

Judicial retention elections across the country in 2018 were largely consistent with these historical trends. Most judges seeking to continue their service were comfortably retained; those who were not retained typically had received poor performance evaluations. But 2018 also witnessed the emergence of a new kind of anti-retention campaign, built on the model of Persky recall, which was seen most clearly in the efforts to remove Judge Michael Corey from his seat on the Alaska Superior Court.

THE UNCONVENTIONAL CAMPAIGN AGAINST JUDGE COREY

Judge Corey was first appointed to the bench in 2014, and faced a retention election at the end of his four-year term. In August 2018, Corey received a strong performance evaluation from the Alaska Judicial Council, which unanimously recommended that voters retain him.²⁹ But with only weeks before

[In retention elections, v]oters are asked to consider the judge's demonstrated . . . ability . . . divorced from assessment of particular decisions.

21. Anita Clark, *Judge to Press Simonson Case*, St. J., Jun. 18, 1977.

22. See, e.g., Kourlis & Singer, *supra* note 13, at 21.

23. See John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86 (1986) (noting that "[b]y May 1986, the [state supreme court] had overturned death sentences in all but three of the 56 cases it had decided").

24. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2038-39 (1987).

25. See Traci V. Reid, *The Politicization of Retention Elections: Lessons*

from the Defeat of Justices Lanphier and White, 83 JUDICATURE 68, 70 (1999).

26. See Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1471-1474 (2012).

27. The framing of these allegations for political purposes, of course, does not equate to their veracity.

28. See Jordan M. Singer, *Meaningful Information, Meaningful Retention*, 60 BUFF. L. REV. 1, 5-6 (2012).

29. See Alaska Judicial Council, Summary of Performance Evaluation for Judge Michael D. Corey, Third District Superior Court, available at <http://www.ajc.state.ak.us/sites/default/files/imported/selection/11-2018/Judges/corey.pdf>.

[T]he approach taken by No More Free Passes differed significantly from the handful of previous, successful anti-retention efforts.

the election, a seemingly quiet retention bid would become much more explosive.

In mid-September, Judge Corey was asked to approve a plea agreement in a criminal case involving stomach-churning facts. The defendant was alleged to have offered a ride to the victim, which she accepted. He drove her to a dead-end street, where he asked her to get out of the car, tackled her, and strangled

her until she lost consciousness. He then ejaculated onto her body and waited until she regained consciousness before driving away. The defendant was initially charged with first-degree kidnapping, two counts of assault, and misdemeanor harassment for contacting the victim with a bodily fluid. However, prosecutors dropped the kidnapping charge after concluding that they would not be able to meet their burden of proof at trial. The defendant subsequently pled guilty to the greater assault charge, which, given his otherwise clean criminal history, carried a sentence of zero to two years in jail. The state and the defendant eventually reached a plea deal calling for a two-year sentence with one year suspended, and three years probation. The defendant also would receive credit for time served while wearing an ankle monitor. Significantly, this meant that he would face no additional jail time.

At the plea hearing, Judge Corey probed the prosecution about the adequacy of the proposed plea deal.³⁰ Of particular concern was that the crime was plainly sexual in nature, yet the defendant had not been charged with sexual assault and was not even required to register as a sex offender. The prosecutor explained that the defendant's actions, while appalling, did not qualify as a sex crime under Alaska law. The prosecutor also noted that the state had insisted on probation as a way to require the defendant to undergo sex-offender treatment.³¹

Judge Corey described the case as “breathtaking,”³² and commented that the proposed sentence “at first blush would really quite frankly strike me as way too light.”³³ Nevertheless, he felt constrained by several aspects of Alaska law in determining whether to accept the agreement. Among other things, he could not consider the charges that had been dropped by the prosecution, nor could he propose a sentence aggravator on his own.³⁴ After a 30-minute hearing, Judge Corey accepted the plea agreement, based heavily on the defendant's prospects for rehabilitation, as well as the judge's stated belief that the attorneys in the case knew “far better and more about the case

than I do presently. They know more about what can be proven and what can't.”³⁵

The decision to accept the plea deal made national news almost immediately, and quickly gave rise to a local movement calling itself No More Free Passes. The movement was animated by two central concerns: the perceived unjustness of the sentence, and the failure of Judge Corey to discuss the victim during the plea hearing. No More Free Passes accordingly identified two corresponding goals: to change the existing law, and to remove the judge who had approved the plea.

From the start, the approach taken by No More Free Passes differed significantly from the handful of previous successful anti-retention efforts with respect to source, platform, tone, and underlying assumptions about the proper role of the judiciary. Indeed, its tone and tactics most closely mirrored the Persky recall campaign months before. Three characteristics of the campaigns were particularly notable.

First, the push to remove the judge was organized and fortified primarily by those on the left side of the political spectrum, drawing their energy from the #MeToo movement and the contemporaneous and controversial confirmation hearings for Supreme Court nominee Brett Kavanaugh.³⁶ This was new. Historically, aggressive anti-retention campaigns have been initiated by conservative groups opposed to judicial decisions concerning capital punishment, abortion, same-sex marriage, and the state's taxing power. This development suggests that retention elections may now become an instrument for mobilization by partisans on both sides of the political spectrum.

Second, social media played a key role in spreading the anti-retention message. No More Free Passes created a Facebook page just three days after Judge Corey approved the plea deal, and immediately began advocating for the judge's ouster. By November, the page had approximately 4,000 followers, and No More Free Passes was updating the page at least daily, eliciting thousands of viewer reactions in the process. No More Free Passes also created a GoFundMe page to solicit donations, and an Instagram page to spread its message. One of the group's founders, Elizabeth Williams, also promoted the cause on her personal Instagram page with hashtags like #nomore-freepasses and #nooncorey. And while No More Free Passes did not take to Twitter directly, the campaign benefited from dozens of sympathetic tweets by other users in the weeks leading up to the election. To be sure, the anti-Corey campaign also used traditional media effectively, granting interviews and writing op-eds for local newspapers and broadcasters. But social media played a central role in getting the message out.

Finally, the anti-Corey campaign broke most significantly from previous anti-retention efforts in the way it presented the

30. See Daniella Rivera, *No Jail Time for Man Who Pleaded Guilty in Strangling Assault* (Sep. 19, 2018), available at <https://www.ktva.com/story/39123509/anchorage-man-pleads-guilty-in-choking-sexual-assault-case>.

31. See State of Alaska Department of Law, Press Release, Justin Schneider Sentenced in Accordance with Current Law (Sep. 21, 2018).

32. See Rivera, *supra* note 30.

33. See Michelle Theriault Boots, “One Free Pass”: *The Story Behind the*

No-Jail Plea Deal that Drew Outrage from Alaskans, ANCHORAGE DAILY NEWS, Oct. 8, 2018.

34. See *id.*

35. *Id.*

36. See Daniella Rivera, *Alaskans Rally Against Judge's Retention After Schneider Plea Deal* (Oct. 6, 2018), available at <https://www.ktva.com/story/39244261/alaskans-rally-against-judges-retention-after-schneider-plea-deal>.

role of the judge. Previously, anti-retention campaigns had sought to convince voters that the targeted judges had acted unprofessionally by venturing beyond the limits of their authority. The fundamental message of the anti-Corey campaign, however, was that the judge had not done *enough* with his authority in the face of a potentially unjust outcome. In an op-ed published the week before the election, the founders of No More Free Passes wrote, “Judges hold one of the most powerful positions in modern society because we *expect them* to exercise judicial discretion.”³⁷ This message represented a complete reversal from the themes of earlier anti-retention campaigns, which accused targeted judges of insufficient humility in exercising their judicial roles.

The anti-Corey campaign was also able to neutralize the issue of professional competence which typically influences retention voting. Just weeks before accepting the plea deal, Judge Corey had been unanimously recommended for retention by the Alaska Judicial Council on the basis of his strong performance evaluation. A good performance review helps to place isolated controversial decisions in context, and historically voters have been unwilling to remove a good judge based on a single case. Despite public reminders about his performance evaluation and op-eds from members of the bar urging voters to place the single decision in broader context, this time voters were unmoved. It represented the first time in Alaska’s history that a judge was not retained after receiving a positive evaluation and recommendation.

In light of the unusual tenor and tactics of the campaign, there is good reason to view Judge Corey’s non-retention as an anomaly. Indeed, every other attempt to target judges for specific decisions (as opposed to poor job performance) during the 2018 election cycle was unsuccessful. Consistent with the history of retention elections, these anti-retention campaigns only spoke to a limited portion of the voting population, and (where available) judicial performance evaluations seemed to serve as a bulwark against knee-jerk decisions to remove judges. The fact that the anti-Corey campaign bucked these trends is therefore noteworthy. Moreover, the particular facts of the case underlying Judge Corey’s decision were broadly similar to the facts underlying Judge Persky’s decision, the campaign strategies closely mirrored those of the anti-Persky campaign, and the proponents of the Persky recall offered enthusiastic public support to the anti-Corey campaign. Given these facts, the non-retention of Judge Corey is probably best understood as part of a larger popular backlash situated in a specific cultural moment.³⁸

At the same time, there is reason to see the anti-Corey campaign as something more than an isolated event, and to believe that the messaging and mobilization tactics borrowed from judicial recalls will become more prominent in future retention elections. Another anti-retention campaign from the fall of 2018—this time to unseat California Supreme Court Justice Carol Corrigan—illustrates the concern. Justice Corrigan was appointed to the court in 2005 and retained in 2006, entitling her to a subsequent twelve-year term. During that time, Justice Corrigan authored hundreds of opinions on a wide variety of issues, and was generally well-regarded as a jurist. As the 2018 election neared, prominent newspapers endorsed her retention. But activists launched a powerful campaign to remove her, based entirely on an opinion she had written ten years earlier.

In May 2008, Justice Corrigan dissented in part from California’s landmark opinion legalizing same-sex marriage. In the dissent, she explained that she personally supported same-sex marriage rights, but believed that the issue was one for the voters, not the courts, to decide.³⁹ After the state’s voters reenacted the state’s ban on same-sex marriage through Proposition 8 in November 2008, she (along with five other justices) upheld the election result.

Proposition 8 was eventually struck down in federal court,⁴⁰ but Justice Corrigan’s dissent in the original same-sex marriage case was not forgotten. Like the campaign against Judge Corey, the campaign against Justice Corrigan eschewed charges of unprofessionalism or institutional overreach, focusing instead on the single substantive message that the justice had “voted twice against marriage equality.” An anonymously authored Facebook page titled “Vote NO on Carol Corrigan—CA Supreme Court Justice Against Equality” posted at least eighteen sharable photos and videos urging Californians to vote against retention. On Twitter, the anti-Corrigan campaign was bolstered by tweets from prominent celebrities as well as ordinary citizens.⁴¹ Many social media posts had both a multiplier and a boomerang effect, originating in California before being picked up by friends and sympathizers around the country

[E]very other attempt to target judges for specific decisions (as opposed to poor job performance) during the 2018 election cycle was unsuccessful.

37. Elizabeth Williams & Isaac Williams, *No More Free Passes: Don’t Retain Judge Corey*, ANCHORAGE DAILY NEWS, Oct. 26, 2018 (emphasis added).

38. The emergent awareness of sexual harassment and sexual assault in North American culture in 2018 has led to heightened scrutiny of judicial sentencing practices for sex crimes in a number of courts. See, e.g., *Protestors Want Judge Fired After “Disgraceful” Sentence Given to Sexual Assault Perpetrator* (Nov. 10, 2018), available at <https://bc.ctvnews.ca/protesters-want-judge-fired-after-disgraceful-sentence-given-to-sexual-assault-perpetrator-1.4172091>; *Thousands Sign Petition Calling for Judge in Shocking Oklahoma Child Rape Case to be Removed* (Feb. 5, 2018), available at

<https://kfor.com/2018/02/05/thousands-sign-petition-calling-for-judge-in-shocking-oklahoma-child-rape-case-to-be-removed/>.

39. See *In re Marriage Cases*, 183 P.3d 384, 468 (Cal. 2008) (Opinion of Corrigan, J.).

40. See *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (2010).

41. Olympic diver Greg Louganis, and actors Kal Penn and Willie Garson, among others, used their personal Twitter accounts to advocate against the retention of Justice Corrigan. Louganis’s anti-retention tweet generated attention from the mainstream media. See Rick Hurd, *Diving Legend Greg Louganis Wants California Justice’s Confirmation Bid to Belly Flop*, SAN JOSE MERCURY NEWS, Oct. 11, 2018.

(and the world), who in turn urged their associates back in the justice's home state to cast a vote against her. As with Judge Corey, an essentially local election took on national (and international) dimensions.

In the end, the campaign against Justice Corrigan was unsuccessful, and she was retained for another term. But the ten-year gestation period of the anti-Corrigan campaign suggests that in at least some circumstances, anti-retention activists are willing to take the long view. In addition, the shared tactics of the anti-Corey, anti-Corrigan, and anti-Persky campaigns suggests that in at least some instances, the passions and substantive messages that more typically animate judicial recall elections can bleed into regularly scheduled retention elections.

For supporters of a professional and depoliticized judiciary, the introduction into retention elections of tactics and themes normally reserved for recall elections is a deeply disconcerting development. Recall elections are a powerful form of popular accountability, meant to be used only in the most egregious circumstances, and are by design difficult to initiate. Retention elections, by contrast, are designed with a different purpose in mind, and do not feature these important procedural safeguards. Judges appear automatically on the retention ballot, allowing a last-minute campaign against them to arise with no warning. As the anti-Corey campaign demonstrates, a passionate electorate can transform a standard retention bid into a *de facto* recall election in a matter of weeks.

Recall and retention can coexist, as long as each mechanism stays true to its intended purpose. But retention elections should not transform into regularly-scheduled recall elections by default. Using regular checks of professional accountability as an opportunity to impose outcome-based accountability would threaten the decisional independence of individual judges, and dramatically undermine the judiciary's overall legitimacy and institutional competence.

"MOVING FORWARD"

The day after Judge Corey lost his retention bid, the leader of No More Free Passes posted the following message on the group's Facebook page: "Moving forward, we will no longer be discussing Mr. Corey. I believe his family and friends when they tell me he is a great man, husband, and father. He deserves privacy and peace during this time. We wish him nothing but the best in his future." That sentiment may be cold comfort for the judge. It should be a wake-up call for all who continue to desire a judiciary that is professional, fair, and independent.

One must proceed cautiously in attempting to draw broad conclusions from limited data points. But the events of 2018 do suggest the ongoing need to focus voters on the importance of a professional and institutionally legitimate judiciary. This means emphasizing that judges must be accountable to their professional and institutional obligations, as well as the limits on judicial discretion that those obligations impose. More specifically, citizens should be reminded that judges are not at liberty simply to change or ignore laws with which they disagree. Rather, consistent with their authority and professional

responsibilities, they must do their best to apply valid laws to the cases before them.

This is not to suggest that voters will—or even should—take a neutral view on the outcomes of specific cases. The decisions that animated the campaigns against Judge Persky, Judge Corey, and Justice Corrigan were quite fairly the subject of public debate and private anguish. But those campaigns also arose out of a mistaken belief that judges have the unfettered authority simply to do "the right thing," as opposed to laboring within their constitutional and institutional limitations. Members of the public should understand that the quality of the judiciary must be determined not by reference to a specific case, but rather by asking whether judges reach their decisions in a fair, accurate, and trustworthy manner.

Emphasizing judicial professionalism has a long and successful track record of helping to depoliticize judicial selection, but the message must be updated for the 2020s and beyond. In the twentieth century, judicial professionalism was equated with expertise, and the special training and skill that the legal profession required. The message worked because of the traditionally high regard given to experts in a given field. But the current era has seen an increase in public skepticism over expertise, with many Americans regarding "experts" as nothing more than an undifferentiated mass of wealthy elites.⁴² Consequently, it may no longer be enough to say that a judge should be retained because of her training, experience, and knowledge; it is also necessary to stress the judiciary's commitment to more modern notions of professionalism, such as transparency and continuous improvement. Courts themselves can take a role in this messaging, by routinely sharing the concrete steps they are taking to meet the needs of their users and the general public.

Courts can also be proactive about reaching out to other organizations to help spread the message of judicial professionalism. The organized bar has long been a loyal advocate for the judiciary, based on its intimate knowledge of the courts and respect for the rule of law. It is a logical place to start. But lawyers today are facing the same anti-elite backlash as judges. Courts may also need to develop connections with less traditional allies—including perhaps state legislators or community organizations—to reiterate the importance of judicial professionalism and institutional legitimacy. An ounce of prevention today will be worth it, lest the substantive moral certainty of recall elections become the prevailing lens through which all future judicial decisions are assessed.



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42. See Tom Nichols, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 218-19 (2017).

BAR CALLS by Judge Victor Fleming

Across

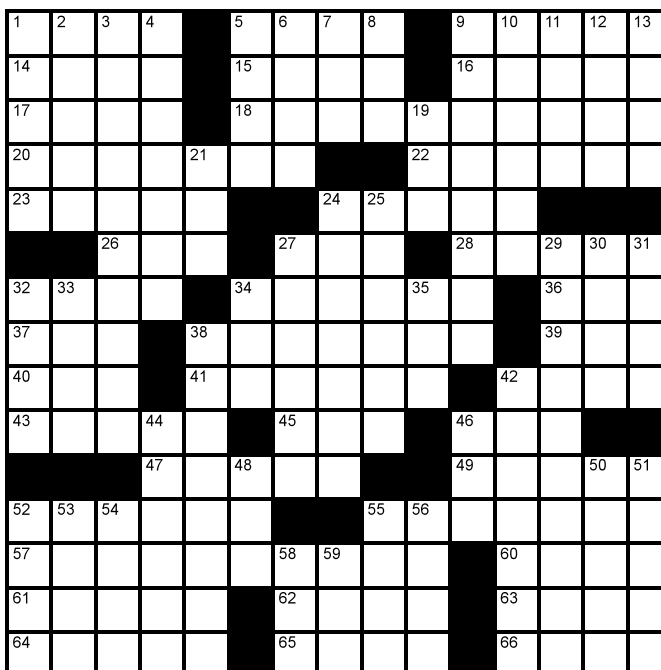
- 1 No great shakes
 5 ___ court advantage
 9 Biblical father of twins
 14 URL starter
 15 Poet Khayyám
 16 Electric car company
 17 To be, to Paris
 18 Stipulation at the bar?
 20 Uses as a prop
 22 ___-skelter
 23 ___ Bandito (old ad toon)
 24 Board leader?
 26 Captured
 27 Obi___ Kenobi
 28 Letter-shaped hardware
 32 It's a pain!
 34 "Make love, ___!"
 36 "Jazz Masters" org.
 37 Auction section
 38 Speculation at the bar, after "one"?
 39 Dynamite letters
 40 Aussie runner
 41 Mysterious Queen?
 42 Inverse ohms
 43 Egyptian Christians
 45 "___ it on me"
 46 Dundee turndown
 47 ___ chloride
 49 Scott of "Men in Trees"
 52 Plaster work
 55 Uranium 238, e.g.
 57 Stipulation at the bar?

60 O.T. book

- 61 Diarist Nin
 62 Vicinity
 63 "Saturday Night Live" bit
 64 Little laugh
 65 Lustful look
 66 "¿33-Down ___ usted?"

Down

- 1 Bookcase part
 2 Fur source
 3 Stipulation at the bar?
 4 Like sandals
 5 Itinerant traveler
 6 Foreboding phenomenon
 7 West of "My Little Chickadee"
 8 Miscalculate
 9 Mickey Spillane novel
 10 Aquanaut's base
 11 Helper (abbr.)
 12 On the calm side
 13 Singer Vikki
 19 Existential life force
 21 Toper
 24 Breakfast fare
 25 Not careful
 27 Like a mammoth
 29 Stipulation at the bar?
 30 "Jaywalking" celeb
 31 Body decorations, slangily
 32 Guinness of "Star Wars"
 33 "¿___ 66-Across usted?"
 34 ___ pros (dismiss without prejudice, casually)



- 35 In ___ event
 38 Precedent establisher
 42 "The ___ Falcon"
 44 Electronics whiz
 46 Classical start?
 48 Like Szechuan food
 50 Footnote abbr.
 51 Triangular Greek letter
 52 Sultan of ___ (Babe Ruth)
 53 Pitchfork's piercer

- 54 Home of the Jazz
 55 "Makes sense!"
 56 Movie rating symbol
 58 ___-Mart
 59 Fury

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 47.

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The Fiction of Atticus Finch Meets the Reality of James Prince

David Prince

For nearly all of us, *To Kill a Mockingbird* served as one of the major milestones on our paths to heeding the call to serve the rule of law. For me, Harper Lee's iconic novel shaped my journey from a slightly different perspective. Legal professionals routinely praise the inspirational bravery and integrity of the central character, lawyer Atticus Finch. But two other pieces of the story were more formative for me.

When prompted, most can remember that tension-filled scene in which unarmed Atticus Finch tried to face down a mob intent on lynching his client, Tom Robinson, an African-American accused of raping a white woman in racist America. Atticus doesn't make much progress until his daughter, Scout, and two other children show up. Scout greets members of the mob by name, takes away their anonymity within the mob, and shames them with her innocence. The mob mentality is broken not by force, authority, or persuasion as in the classic Hollywood western but by individual humanity. Everybody lives to witness Atticus's brilliant and spirited defense of Mr. Robinson in court.

I find that far too many people forget the second piece of the story that so impacted me. Despite Atticus's utterly convincing defense, Mr. Robinson was found guilty in a clear miscarriage of justice. Given the time, Tom Robinson was, in all likelihood, executed a short time later. And so I was always left to wonder, what was the point of it all? It seemed to me that the community just made a lynching look like a legitimate legal proceeding.

Part of the reason I had a jaded view of the novel was that it was an all too familiar story when I first read it. The journey taken by Atticus and Tom Robinson struck a little too close to home for me. I had grown up visiting extended family in rural Mississippi and hearing the stories of their lives around dinner tables and on front porches. Slowly over time, I learned that my grandfather had found himself in a situation similar to that of Atticus Finch. But grandfather Prince's experience was a little different.

It was really just a scrap of a story at first. In different houses, I heard different pieces of it from different perspectives, sometimes not even realizing they were talking about the same event. I only heard my grandfather Prince talk about his role once, literally on his death bed. I spent the next twenty years asking questions, reading, and researching in archives. Through a mix of family legend and recorded fact, here is what I've learned.

In a land famous for its heat, that summer had been a record breaker and among the driest on record. Union County, Mississippi was mostly subsistence farms then, many of them sharecroppers. With failure of the crops looming due to the dry heat, people were on edge.

Friday morning Amanda Gaines found her 21-year-old daughter, Bessie, crawling out of the pea patch near their

home. Bessie was bruised and bloodied. Through the swollen pulp that had been her face, she was able to tell her mother that she'd been attacked down by the well. She'd also been raped. She'd been beaten so badly you have to wonder if she'd been left for dead.

They sent for a neighbor that had a car, still relatively rare in these parts. They took Bessie to the nearest town, New Albany. New Albany was also the county seat. They took her straight to Dr. Maes's hospital.

Sheriff Johnny Roberts got the story as best he could from the Gaines family. He assembled a posse and headed to that well. They had tracking hounds that soon found a scent and they were off in pursuit.

That was wooded bottom land, rich in hard woods. Soon enough, the hounds led the posse across the path of a crew of hired men that were felling trees for an itinerant saw mill. There were four men in that crew and suspicion quickly fell on one of them, L.Q. Ivy.

History does not tell us why suspicion fell on L.Q. Maybe he was the youngest. He was just a couple of weeks shy of his 18th birthday. He had been born and raised within a mile or two of that very spot. Maybe he had some attitude or maybe somebody had a grudge against him. Given the time and place, they could have chosen any one of the crew or all of them. They were all African-American, the year was 1925, Bessie was white, and this was an era of frequent mob rule.

In that time, lynchings were all too common in nearly every state in the union. But this had happened in Mississippi, a state in a brutal era that stood head and shoulders above the rest in lynchings with 500 or more documented victims.

But this was also Union County, and Union County seemed to be different from its neighbors. Nearby counties numbered their lynchings by the dozen, but Union County had never had a lynching. Sheriff Roberts and his deputies aimed to keep it that way. At 25 years old, my grandfather was a newly minted deputy for Sheriff Roberts, only a few weeks on the job.

Despite the lack of lynchings in Union County, Sheriff Roberts knew the dangers. Right from the beginning and unlike the sheriff in *To Kill a Mockingbird*, he started a series of strategies to see his prisoner live for a courtroom trial. He took his first precaution as soon as he arrested L.Q. He did not take him to the medieval looking stone jail behind the Union County courthouse. Instead, he secretly took L.Q. out of town to the community of Aberdeen where he could hide him.

This happened in the fall. The farmers had their crops "laid by," which meant they had time on their hands while they waited and sweated for the harvest. News of Bessie's violation and L.Q.'s arrest spread fast on otherwise idle tongues.

Bessie Gaines was said to be clinging to life in the hospital. Dr. Maes's hospital stood just a few blocks from courthouse square. The square had a classic American layout with wide

grass lawns almost all the way around the turn-of-the-century building that housed all government offices and the courtroom for the circuit-riding judge. A crowd gathered that Friday night on the courthouse lawn. They say it reached over 4,000 people even though the town was home to well under 2,000 souls. The crowd was in an ugly mood and already could justly be called a mob.

The community's official leadership were huddled in the courthouse trying to decide how to diffuse the situation. Unlike with Atticus Finch, the local officials hadn't left town and also wanted to avoid a lynching. But, also unlike Atticus's mob, this one wasn't just a handful of people but was thousands.

The officials made much the same decision as Atticus did and tried to reason with the mob. But Sheriff Roberts also had his deputies circulating in the crowd disarming people. The deputies are said to have gathered wheelbarrow loads of weapons.

Judge Pegram came out of the courthouse first to talk to the crowd. He promised the crowd swift justice. The crowd shouted back that they could be swifter.

Mayor Tate tried next. He told the crowd to let the authorities handle it and to go home. They booed him down.

Then came New Albany's favorite son, U.S. Senator Hubert Stephens. Beloved Sen. Stephens told the "good people" to go back to their farms and their families. They shouted back that he should go home himself. They told Sen. Stephens that if they wanted his advice, they'd ask for it.

The talkers had not made much headway but they had bought time for those disarming deputies. This was in an era before amplification, and the talkers were accomplished campaign shouters that could make themselves heard by outdoor crowds of thousands like this. So it took many by surprise when Sheriff Roberts stood before them and appeared to say something. He had the kind of booming command voice that a sheriff should have, but nobody seemed to be able to quite hear him. But he had caught their interest. A silence settled over the crowd as they strained to hear what Sheriff Roberts had to say.

Unlike the flowery language of the politicians who had already spoken, Sheriff Roberts was simple and plainspoken. He did not try to persuade them, he just gave them hard facts. Once he had their attention, the command returned to his voice. He told them, "He ain't here. He's in jail down the river. Nothing for you to do now, so go on home. He ain't here."

The crowd grumbled and stomped but, with their quarry out of reach, they slowly began to break up.

To *Kill a Mockingbird* would have us believe that this was the end of the ugly side of the mob, but real life is not so clean.

Some in the crowd did not give up so easily. Billy Preston¹ and several of his boys paid a late-night visit to Judge Pegram's home. They said the same as the doctor, that Bessie was touch and go and may not live. They argued that justice could only be served for everyone if Bessie were given a chance to say one way or another if L.Q. Ivy had done it. Whether it was the force of the argument or the force of half a dozen mob leaders in his living room at midnight, Judge Pegram issued a writ ordering Sheriff Roberts to produce L.Q. Ivy at the hospital for identification by Monday.

Sheriff Roberts saw the trap being set as clearly as you do. So he moved to his next stratagem. Instead of waiting for Monday when the mob would be waiting, he snuck L.Q. into town on Sunday morning when nearly everyone was at church. L.Q. was brought to Bessie's hospital room with Judge Pegram and her father as the only witnesses.

Through swollen eyelids and lips, Bessie whispered, "I'm not sure but he looks like the man."

They'd been delayed that morning and by the time they were coming out of the hospital, the churches were letting out and a crowd was already gathering. With time running out, Sheriff Roberts and his group all paused again in a hallway for a conference before trying to leave the hospital.

Billy Preston and his boys blocked the Sheriff and his charge on the hospital lawn. The small crowd was swelling with every moment that passed. Somehow, word had already raced ahead that L.Q. had been identified. Preston and one of his boys demanded L.Q. be handed over. Judge Pegram tried to shout him down but without much success.

Sheriff Roberts looked around, they were already surrounded by a couple of hundred people that were closing in quickly. He heaved a heavy sigh and pulled Preston close to him, saying where few could hear him, "Not here, not now. Not with the judge and the girl's father here for the federals to blame. I'm taking him to the jail. If you and enough of your boys were to overpower us, well nobody could say we hadn't done all we could." A big smile spread across Preston's face. He'd always known Sheriff Roberts was a practical man.

Just as Preston stepped aside to let the sheriff pass, Bessie's father started shouting to the crowd. He was standing back behind them on the hospital steps. When he shouted, they all turned back toward him, knowing he was about to justify their plan and urge justice for his daughter. As the crowd turned, Sheriff Roberts and his crew moved quickly and unobserved to their car.

A crowd gathered that Friday night on the courthouse lawn.

Author's Note:

This essay shares a combination of family lore and historical facts. Where family storytelling is at odds with accuracy, I have chosen the version I was told in countless homes growing up. This essay should not be confused with an attempt to set down a dispositive history. For the best recitation of the true facts, see the reporting done by journalist Lareeca Rucker at <https://bit.ly/2wPOFG> and drawn partially from the contemporary account of Memphis reporter J.L. Roulhac.

Footnotes

1. Billy Preston is a fictional name and represents a composite of several people.

Sitting as a people's court, the crowd pronounced sentence and proceeded to the execution.

What Mr. Gaines said surprised the crowd. He told them that Bessie was not sure about the man. He asked them not to take any hasty action. They did not much care for that message.

Meanwhile, Sheriff Roberts, L.Q. Ivy, the Aberdeen Sheriff, and a couple of deputies drove off down the street. Billy Preston glanced over his shoulder at the retreating sound of the car just in

time to see them reach the end of the street and turn the wrong way, they turned away from the jail and toward the river.

Preston shouted, "WE BEEN HAD BOYS, AFTER THEM."

People scrambled to cars and set off in pursuit. But Sheriff Roberts had a head start and he intended to make the most of it. Sheriff Roberts raced across town toward the bridge over the Tallahatchie River. It was the only way to cross that river for 30 miles in either direction. As he reached the bridge, he slowed and dropped off two deputies with orders to delay their pursuers as long as they could.

Sheriff Roberts sped off with L.Q. toward Holly Springs, a majority African-American community to the north and birthplace of legendary anti-lynching crusader Ida B. Wells.

The deputies threw together a makeshift road block at the bridge ahead of the mob. When those good citizens arrived, guns were drawn and threats were made but the two deputies were soon overwhelmed by sheer numbers. They never fired a shot. Depending on my mood, some days I think they never had a chance and sometimes I think that if they had just shot one person it might have ended that mob. But we will never know what might have happened, only what did happen.

The deputies had succeeded in stalling the mob and giving Sheriff Roberts a little more time—but it wasn't enough. Telephones were pretty unusual in that area then, but there was one close to the bridge. Someone saw what was happening and called ahead to the next town, Myrtle. A few minutes later, three cars left Myrtle, drove south a ways, and then set up to block the road.

With the road blocked ahead and the mob closing in from behind, Sheriff Roberts was out of tricks. The outcome looks to have been inevitable at that point.

Once the mob took L.Q., they brought him back to that temporary saw mill where L.Q.'s nightmare had begun. They stripped him, put him in chains, and then tortured him with a blow torch as well as a set of lemon squeezers. By and by, the 17 year old was persuaded to recite a confession before a crowd of several hundred. Sitting as a people's court, the crowd pronounced sentence and proceeded to the execution.

People think of lynching as a hanging, but by the early 20th century, the mobs were much more sadistic. They found a Model T axle and drove it into the ground as a giant stake. They chained L.Q. to that stake, surrounding him with crate

wood doused with kerosene. Three men stepped forward from the crowd and lit the pyre.

I suspect that the people reading this essay have to rely entirely on imagination to hear the screams and experience the smells of a person literally on fire. But my grandfather did not need his imagination for these things. He was there. He had been one of those deputies with Sheriff Roberts. He caught up to the mob when the pyre was in full blaze. He would talk of how that smell and those screams were still with him half a century later.

While he could still speak, L.Q. is said to have cried out, "have mercy, I didn't do it."

My grandfather was barely literate, never held a book other than a Bible. He had failed as a sharecropper. His working life had been standing at the town square waiting for someone who needed a day laborer. The family still says the best job he ever had was working for a regular paycheck from the city cleaning the streets of horse manure in the early 20s, the job that got him hired as a deputy. One can imagine how the job of deputy must have looked to a man like that. Less than two weeks on the job, papaw turned in his badge the day after the lynching and spent the rest of his life at that town square waiting for work as a day laborer.

Most of this story, I have gotten from other sources. Papaw would tell me little more than the scene at the sawmill and how those smells and sounds still haunted him. He was a huge, powerfully built man. He had a strong voice and, normally, was such an optimistic person that he was always on the verge of breaking into laughter. But when he told me about L.Q. Ivy, he was flat and deflated. He would always say "there wasn't anything anybody could do to stop it..." as his voice trailed off.

I have always struggled with what to make of this story and my grandfather's role in it. As much as I loved and admired my grandfather, at times I despised him for what I saw as his cowardice. I knew him to be a man lacking in racial prejudice and a man of boundless physical courage. I questioned why he didn't do something more like shoot a member of that mob. It was always easy for me to forget that the "mob" was made of real people, people that were my grandfather's friends and neighbors just like Harper Lee's mob members. If you reversed perspectives on the humanity of the participants, would Scout or Atticus really have shot Mr. Cunningham? In these moods, I most resented the simplicity of *To Kill a Mockingbird's* version of the mob mentality. At other times, I recognized the likely pointlessness of any additional actions I thought papaw could have taken. If you know the history of the time, the best possible outcome of any action by him would have been replacement of the mob lynching with a state-sanctioned hanging that would have been every bit as much an injustice but would have had the trappings of courtroom legality, just like the result Atticus Finch ultimately delivered in *To Kill a Mockingbird*. Because, at the end of the day, the majority of people did not believe in the rule of law at that time.² They believed in their tribe and promoting their tribe over any other. In a mood

2. The real-life mob members had so little of the fictional shame shown by the characters in *To Kill a Mockingbird* that they proudly posed for a group photograph with their victim. You can see that

photograph in the archives of the Library of Congress at <https://bit.ly/2Cy0wPN> and at <https://bit.ly/2TmMs15>. The only kernel of truth I can find in that fictional shame is that the story

recognizing this reality, I usually resented the people praising Atticus Finch and forgetting who Tom Robbins was or the net result on his fate.

Given the time and his capabilities, maybe it was enough for grandfather Prince to fight the mob as he did and, when he failed, then to make what was a big sacrifice for him and his family when he turned in that badge and refused to “be a part of it.” Plenty of people today and through history have not been willing to do even that much. Maybe, like Atticus Finch and Scout, he did what he thought he could and felt the pain of its inadequacy in the end. About all I truly know firsthand is how that one day in his youth still haunted him at his end.

The lesson I learned from grappling with how to feel about my grandfather's role in his world was that my time would be better spent deciding what role I will play in my world. The lesson for me from both L.Q. Ivy and Tom Robbins is that if you wait until the lynch mob assembles (whether in the street or in the trappings of a courtroom) and hope for one hero to step forward and save the day, you have waited too long. The rule of law is not gained by one brave person standing against a community; the community itself must be the authority that values the rule of law enough to impose it. That community support for the rule of law is built laboriously through people who, day in and day out, live its principles and persuade others of its worth. More often than not, it can feel like the labor of Sisyphus eternally pushing his rock. But, bit by bit, pebble by pebble, isolated decision by isolated decision, that community support for the rule of law can be coaxed to grow.

Today, the judiciary and community support for the value of the rule of law are under challenge like never before in my life time. In the half dozen discussions of judges I have seen in high-profile national media during the last year, I have heard much praise for the judge's support of this tribe or that tribe but the voices for fair and impartial administration of justice seem to be little more than a whisper.

Happily, the rule of law is much stronger today than in the lynching era. But some of the instinct that fueled that era

remains, that herd mentality to rush to a judgment and mete out the herd's vision of punishment immediately. Today, that instinct is more likely to manifest itself as a Twitter barrage, cable news screed of outrage, cyber attack, boycott, shut down of a target, online petition, or firing—all on the bases of overheated rhetoric and rumor, done immediately, without bothering to gather or weigh actual facts. Whether the herd member today condemns the accused or the accuser in the latest media sensation based on an investigation that never occurred and non-existent objective standards of decision making, the long-term victim is the rule of law.

We of today's bench have taken on the mantle of stewards for one of the greatest inheritances we could hope for, a community that valued the rule of law impartially applied. A big part of our job is to preserve and strengthen that value, a charge all the more important because it is under challenge from all directions today. Sometimes we will pursue this charge in our actions on the bench, sometimes in our words in the community, and sometimes in our private behaviors. And, let's face it, some days we will step wrongfooted. Never forget that the work you do today will echo down the years no matter how small the individual act may seem to you at the moment—make sure you do your best to design your legacy to strengthen the rule of law. To all of you that labor professionally each and every day to maintain the high standards of the rule of law and promote by your work public appreciation for the rule of law, thank you for me and thank you for the generations to come.



David Prince is a trial judge in Colorado, an editor of Court Review, and a faculty member for the National Judicial College. He is also a contributor to a community storytelling program known as The Story Project. Your comments on this story are welcome at david.prince@judicial.state.co.us

of L.Q. Ivy has always been told in white homes since the day after it happened with L.Q. Ivy being innocent. However, they also have always told the story villainizing Bessie Gaines who was, as an unwed mother, another of the social untouchables of the day. While the storytellers accept that Bessie was the victim of some-

body's brutal attack that day, they usually accuse one of her rumored many boyfriends and suggest she likely deserved it for her sinfulness.

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April 23-25

\$184 single/double Wed. and Thurs.

\$284 single/double Fri. and Sat.

For more information, go to <http://amjudges.org/conferences>

Answers to Crossword

from page 43





The Resource Page



NEW PUBLICATIONS

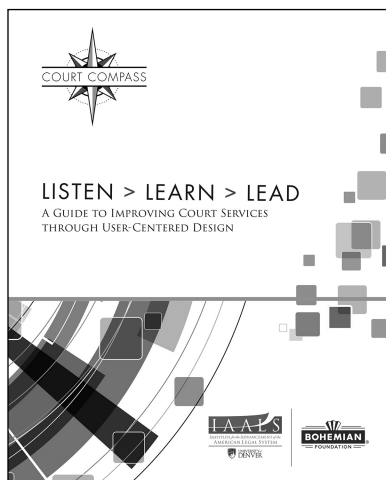
The State of State Courts 2018
National Center for State Courts,
<https://bit.ly/2V54eYJ>



The State of State Courts, produced by the National Center for State Courts and discussed by Pres. Torres in his column for this issue, can be found at <https://bit.ly/2V54eYJ>. NCSC includes a handy six-page summary of the results, as well as presentation slides for those of you educating the community. As always, the annual survey contains some intriguing information and excellent materials.

Listen > Learn > Lead: A Guide to Improving Court Services Through User-Centered Design

Institute for the Advancement of the American Legal System,
<https://bit.ly/2FD10F0>



In reviewing our courthouse systems or building new systems for a new program, we are frequently told to obtain stakeholder input. But, how many of us really know how to go about gathering and reviewing such feedback in a practical yet comprehensive way?

IAALS has an ongoing program called Court Compass that explores ways to make court systems for divorce more user-friendly and accessible. In pursuing this mission, Court Compass had developed a system for obtaining feedback from stakeholders in the systems ranging from self-represented litigants to inside and outside system professionals. They call it the Design Spring Process. They believe they have developed an excellent system for gathering useful stakeholder feedback that would apply to a wide variety of projects. The good news for us is that they have decided to share in this handy guide.

Judea Pearl and Dana MacKenzie, *The Book of Why, the New Science of Cause and Effect*

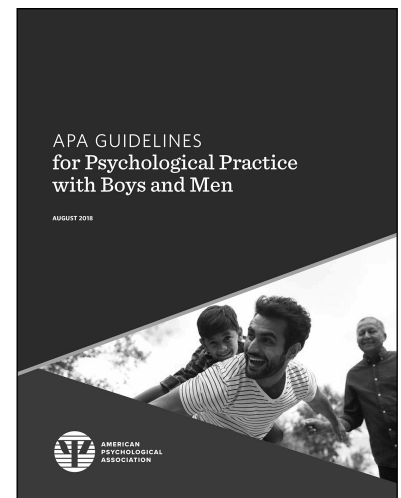
Basic Books, 2018. 432 pp. (\$32)

Judges, like researchers, routinely evaluate causation, always searching for the dividing line between correlation and causation. We do so daily in the most simplistic case ranging to the staggeringly complex. In *The Book of Why*, Prof. Pearl brings insight and analytical integrity to approaching a question of causation. While the book is written with the researcher in mind and can bog down in some dense language now and then, it is overall an enjoyable and illuminating read for anyone in the decision-making business. Prof. Pearl explains a multi-runged, ladder-of-causation framework. Possibly of most importance to us, Prof. Pearl helps explain what data can and cannot actually tell us. While the insights in this book will help you in your gatekeeper role for scientific evidence, it will also help you bring a new rigor and validity to your own causation analyses.

APA Guidelines for Psychological Practice with Boys and Men: August 2018

American Psychological Association,
<https://bit.ly/2D0EQww>

Judges are frequently required to provide some guidance, oversight, or evaluation of a litigant's psychological treatment or of treatment programs. Most of us have been poorly equipped to play this role. One option for expanding my understanding of the practice side of treatment programs has been reading the bevy of thoughtful media pieces discussing the APA's recent release of guidelines for treatment of boys and men. On first blush, this sounds disturbing to our "fair and impartial" mindsets to segregate out males for special treatment. However, the latest set of treatment guidelines follow earlier guidelines released relating to



females and LGBTQ. The guidelines and some of the discussion of those guidelines are enlightening regarding the particular challenges associated with treating these groups. Reviewing the discussion and the guidelines may just help you evaluate that next treatment methodology argument you hear in your courtroom. One accessible write-up of the issues can be found in *The Atlantic* at <https://bit.ly/2QBv3jZ>.