

# Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights

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## I. Introduction

The Bill of Rights in the United States Constitution grants many rights to criminal defendants. State courts have the same duty as the federal courts to protect the federal constitutional rights of criminal defendants.<sup>1</sup> Because most of criminal law is the responsibility of the states and because the federal courts do not have the capacity to oversee all state criminal trials, the state courts' ability to protect these rights becomes more compelling.<sup>2</sup>

This duty to protect can be difficult to perform when state judges may be voted out of office. The difficulty arises because the public reacts strongly toward criminal defendants. The public is typically hostile toward them. As Judge Aldisert said in *United States v. Janotti*:

The rights conferred upon our society by judges of the Third Article [of the United States Constitution] emanated from cases in which the defendants were unpopular and generally regarded as transgressors — Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending. . . . [F]ederal judges were unwilling to relegate the formulation of these protections to the "coquetry of public opinion. . . ."<sup>3</sup>

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1. "[I]t was said to be a recognized portion of the duty of this court — and, we will add, of all other courts, National and State — 'to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations.'" *Ex parte Royall*, 117 U.S. 241, 252 (1886).

2. See Wayne LaFare & Jerold Israel, *Criminal Procedure* § 1.2(a) (1984).

3. 673 F.2d 578, 616 (3d Cir. 1982) (Aldisert, J., dissenting) (footnote omitted).

Elected state judges are not as insulated from the "coquetry of public opinion" as are federal judges, who have life tenure. If the public perceives a state judge as "soft on crime" or as one who "coddles criminals," or if the judge makes a favorable ruling for an unpopular defendant in a highly publicized case, the public can have retribution against the judge at the polls.<sup>4</sup> Federal judges do not have these problems because they are not elected nor may their salaries be reduced.<sup>5</sup>

Since federal courts have only a limited capacity to hear matters of state criminal law,<sup>6</sup> state courts' ability to protect federal constitutional rights cannot be impaired. Yet as Justice Brennan said, "It cannot be denied that state court judges are often more immediately 'subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.'" <sup>7</sup> The American Bar Association Commission of Professionalism agreed. It stated that "judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years."<sup>8</sup> Thus, state judges must have the independence of federal judges if federal constitutional rights are to be fully enjoyed.

The purpose of this article is to show that elections can hamper a judge's ability to be an impartial, unbiased adjudicator. Since an impartial judge is a fundamental requirement of due process, these elections should be eliminated. Section II surveys criminal defendants' rights, shows the public hostility toward the exercise of those rights, and demonstrates the role that state courts must play to protect those rights as well as show public hostility toward those rights. Section III provides examples of judges who have faced public pressure because of their role in criminal trials or appeals. Section IV examines the current methods of judicial selection and retention and shows what oversight the federal courts have played. Section V discusses the policies behind judicial elections and shows how the electoral process is not suited for the ju-

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"As Justice Frankfurter noted, it is precisely because appeals based on criminal process guarantees are so often made by 'dubious characters' that infringement of those guarantees calls for 'alert and strenuous resistance'; . . . criminal process guarantees are 'normally invoked by those accused of crime, and criminals have few friends.'" LaFave & Israel, *supra* note 2. See also *Justice Under Reagan*, U.S. News & World Rep., Oct. 14, 1985, at 58 (poll shows 87% of Americans believe courts should be more harsh on crime).

4. See *infra* p. 125-30.

5. U.S. Const. art III, § 1.

6. See *supra* note 2.

7. William Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L.Rev. 535, 551 (1986).

8. Report of Commission on Professionalism, 112 F.R.D. 243, 293 (1986).

diciary. The Code of Judicial Conduct will be emphasized. Section VI surveys the various government actors who can eliminate elections and the possible solutions.

## II. Defendants' Rights and the Role of Trial and Appellate Judges in Safeguarding Those Rights

### A. *The Rights and the Judge's Role*

The fourth through the eighth amendments of the Bill of Rights grant many protections to citizens accused of crime. These protections include the fifth amendment right to exclude involuntary or illegally obtained confessions,<sup>9</sup> the fourth amendment right to exclude illegally obtained evidence,<sup>10</sup> the sixth amendment rights to have the prosecutor provide to the defense any exculpatory evidence<sup>11</sup> and to confront adverse witnesses,<sup>12</sup> and the eighth amendment right not to be inflicted with cruel or unusual punishment.<sup>13</sup>

The duty to protect these rights falls first on the trial judge. She has the duty to grant defense motions to suppress unconstitutional confessions or illegally seized evidence, to change venue when an impartial jury cannot be drawn from the community, and to compel the prosecution to turn over exculpatory evidence. The judge, however, has some discretion in determining whether a violation of these rights has occurred. When a defendant has been found guilty, the judge imposes the sentence in most cases.

Aside from protecting the rights enumerated in the Bill of Rights, the judge must conduct the trial so as not to infringe on the defendant's right to "fundamental fairness" under the due process clause of the fourteenth amendment.<sup>14</sup> Due process does not require a perfect trial, only a fair one.<sup>15</sup> There is a range in which a judge can conduct the trial in an unfair manner, so long as the unfairness does not rise to a substantial level which an appellate court cannot ignore. Examples of judicial conduct held not to be a violation of federal due process include a judge's comment about his belief of the defendant's guilt and about the defendant's prior

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9. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

11. See *Brady v. Maryland*, 373 U.S. 83 (1963).

12. See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965).

13. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910) (overly severe sentence).

14. See generally 28 U.S.C. § 2254(d)(7) (1982). See, e.g., *California v. Trombetta*, 467 U.S. 479, 485 (1984).

15. 16C C.J.S. *Constitutional Law* § 1068 (1985).

conviction of the same crime,<sup>16</sup> and a judge telling the defendant in the presence of the jury that he should consider himself to be in police custody.<sup>17</sup>

On appeal in state court, the trial judge's rulings on constitutional, as well as other issues, are accorded a presumption of correctness.<sup>18</sup> Even if a ruling is held to be incorrect, it could nevertheless be considered harmless error.<sup>19</sup> Under the harmless error doctrine, a right could be violated without allowing the victim a remedy. This doctrine has been criticized for lessening the protection of constitutional rights.<sup>20</sup>

In the area of sentencing, a convicted defendant cannot challenge a sentence on appeal which is within the statutory limits, unless she can show its severity was based on a constitutionally improper basis.<sup>21</sup> As a result, a sentencing judge can impose a harsher than necessary sentence to impress the public. That sentence will stand on appeal unless an improper factor such as race or sex is involved. The defendant has the burden of establishing that factor.

Federal court review of these constitutional issues is extremely limited. All issues may be heard on certiorari to the Supreme Court. Review is rare, however, and the Court does not grant certiorari merely to correct errors in the state courts. The Supreme Court, by necessity, must only grant certiorari to decide compelling and important questions of law.<sup>22</sup>

On habeas corpus, review is still limited. The Supreme Court in *Stone v. Powell*<sup>23</sup> held that fourth amendment issues cannot be heard by a federal court as long as the defendant has had a full and fair opportunity to litigate the issue in state court. A full and fair opportunity does not mean that the state trial court's decision is correct, only that the defendant had the issue heard.<sup>24</sup> Whether *Stone* will extend to other rights that do not answer the question

16. *Walker v. Bishop*, 295 F.Supp. 767 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1378 (8th Cir. 1969).

17. *Payne v. Smith*, 667 F.2d 541 (6th Cir. 1981), *cert. denied*, 456 U.S. 932 (1982).

18. 24A C.J.S. *Criminal Law* § 1849 (1962 & Supp. 1988).

19. *Chapman v. California*, 386 U.S. 18 (1967).

20. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421 (1980).

21. "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence. . . ." *Solem v. Helm*, 463 U.S. 277, 290 n.16. (1983). *See, e.g., United States v. McCord*, 466 F.2d 17 (2d Cir. 1972) (preferential sentencing on ground of religion).

22. Sup. Ct. R. 17.1.

23. 428 S.Ct. 465 (1976).

24. *LaFave & Israel, supra* note 2, § 27.3(d).

of guilt or innocence has not been determined.<sup>25</sup>

As for other constitutional issues, the federal courts will only consider them if the defense raised the issue at trial. If the issue was not raised at trial, the defendant must show cause and prejudice to excuse the default.<sup>26</sup> Cause means there must be a good excuse for not raising the issue. Prejudice means that had the issue been raised, the result of the trial would have been different.<sup>27</sup> This is a very difficult standard to meet. Even a failure to anticipate a subsequent change in the law will not excuse a default.<sup>28</sup>

There is little or no federal appellate review of sentences.<sup>29</sup> A federal court will inquire if a sentence is imposed on an impermissible basis such as race, sex or political belief. It will also determine if the sentence is disproportionate by using a three-prong test measuring "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."<sup>30</sup> These are very high standards to meet and leave the trial judge with wide discretion.

Pressure from the electorate could make a trial judge, in exercising discretion, push the trial to the limits of the harmless error doctrine in order to obtain convictions. Then the trial judge could sentence more harshly than necessary in order to impress the public. Electoral pressure could then make an appellate judge hide behind the harmless error doctrine, when she should vacate a conviction.

### B. Public Reaction to Defendant's Rights

The enforcement of defendants' constitutional rights has not been well accepted by the public. One example is the *Miranda v. Arizona*<sup>31</sup> decision to provide notice upon arrest that the suspect has the right to remain silent, that statements can be used against her at trial, and that she has the right to the assistance of an attorney. Public reaction, as reflected by their elected representatives, was hostile. Senator Sam Ervin said, "Enough has been done for those who murder and rape and rob! It is time to do something for those who do not wish to be murdered or raped or robbed."<sup>32</sup> Sen-

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25. LaFave & Israel, *supra* note 2, § 27.3(c).

26. LaFave & Israel, *supra* note 2, § 27.4(d) & (e).

27. *Id.*

28. See *Smith v. Murray*, 477 U.S. 527 (1986).

29. LaFave & Israel, *supra* note 2, § 25.2(f).

30. *Solem v. Helm*, 463 U.S. 277, 292 (1983).

31. 384 U.S. 436 (1966).

32. See generally Liva Baker, *Miranda: Crime, Law, and Politics* 201 (1983).

ator John McClellan said, "The Supreme Court has set a low tone in law enforcement, and we are reaping the whirlwind today! Look at that chart [indicating the rising crime rate]! Look at it and weep for your country. . . ."33 Reactions to such rulings as *Mapp v. Ohio*,<sup>34</sup> allowing illegally seized evidence to be excluded at trial, and *Escobedo v. Illinois*,<sup>35</sup> allowing the defendant to have an attorney present during questioning, were also publicly decried.<sup>36</sup>

These and decisions made by the Supreme Court under Chief Justice Earl Warren were seen as favorable to defendants. Presidential candidates tried to exploit the public perception that guilty people were being set free. Richard Nixon said,

From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities.

The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community.<sup>37</sup>

Though the Warren Era ended in 1969, the rhetoric against the Supreme Court and defendants' rights has not. President Ronald Reagan and Attorney General Edwin Meese sought to narrow those rights.<sup>38</sup> They have also been outspoken on the need to be tough on criminals. For instance, in response to a question whether suspects should be given *Miranda* warnings, Meese said, "Suspects who are innocent of a crime should. But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."<sup>39</sup>

Whatever a legislator or executive may say or do, she cannot

33. George Cole, *Politics and the Administration of Justice* 21 (1973).

34. 367 U.S. 643 (1961).

35. 378 U.S. 478 (1964).

36. See, e.g., Baker, *supra* note 32, at 33-35.

37. *Id.* at 211. For the speeches and public reaction of losing candidate George Wallace, see *id.* at 243-44.

In a campaign speech in Deshler, Ohio, Richard Nixon said: "I was in Philadelphia the other day. I found that a cab driver who had been cruelly murdered and robbed, and the man who murdered and robbed him had confessed the crime, was set free because of a Supreme Court decision. An old woman, who had been brutally robbed and then murdered — the man who confessed the crime was set free because of a Supreme Court decision. . . . And an old man who had been robbed and clubbed to death — and the man who confessed the crime was set free in Las Vegas because of a Supreme Court decision. My friends, when that's happening in thousands of cases all over America, I say this. Some of our courts have gone too far in their decisions weakening the peace forces as against the criminal forces in the United States of America. . ." *Id.* at 248.

38. *Justice Under Reagan*, U.S. News & World Rep., Oct. 14, 1985, at 58.

39. *Reagan Seeks Judges With "Traditional Approach"*, U.S. News & World Rep., Oct. 14, 1985, at 67.

directly affect whether an individual defendant has a fair trial, where all of her rights are protected. A trial judge can directly affect it by presiding over the trial and making rulings that directly affect what happens to the individual defendant. That is why the trial judge must be insulated from public pressure.

### III. Public Pressure on Judges

#### A. Examples

Public pressure on judges may not always be overt. An example is the case of the Alday defendants. On May 14, 1973, Wayne Coleman, George Dungee, and Carl Isaacs, escaped convicts from a Maryland prison, and Isaacs' brother Billy, travelled down the east coast to the small town of Donalsonville, Georgia. There, they stopped to rob the mobile home of Jerry Alday and his family. No one was home at the time the four broke in, but soon thereafter the family members began to arrive. As they arrived, each was callously shot to death, with Mary Alday also being raped.<sup>40</sup> Six members of the family were brutally murdered.

The murder of the popular family outraged the town.<sup>41</sup> The sheriff publicly said, "If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish. . . . And I don't think that would satisfy me."<sup>42</sup> This sentiment increased when Billy Isaacs testified about Carl's mood after committing one of the murders. Billy said, "He came out laughing. . . . Carl told us 'that bastard begged me for mercy.'"<sup>43</sup> At each of the defendant's trials, their attorneys moved for a change of venue to protect their client's sixth amendment right to a trial by an impartial jury. The judge ruled against the defendants in all three cases. At Coleman's trial, seven of the jurors were at least acquainted with one of the victims, and all twelve were aware of the convictions of Carl Isaacs and George Dungee, who were tried before Coleman.

Each of the defendants was convicted of first degree murder and sentenced to death. On automatic appeal to the Georgia Supreme Court (as required by the law in capital cases), the justices held that the trial judge did not abuse his discretion in refusing to grant a change of venue.<sup>44</sup> When the defendants brought an

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40. See *Coleman v. Kemp*, 778 F.2d 1487, 1488 (11th Cir. 1985).

41. *Id.* at 1488-1537.

42. *Id.* at 1501.

43. *Id.* at 1498.

44. *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976), cert. denied sub nom. *Coleman v. Georgia*, 431 U.S. 909 (1977); *Isaacs v. State*, 237 Ga. 105, 226 S.E.2d 922,

action on state habeas corpus, the judge held that the change of venue issue had already been dealt with adequately on appeal.<sup>45</sup> On federal habeas corpus, the Eleventh Circuit Court of Appeals held that the trial judge did abuse his discretion. The court vacated the convictions and ordered new trials for each of the three defendants.<sup>46</sup>

A firestorm of protest ensued. Over 100,000 people signed a petition to impeach the federal judges.<sup>47</sup> The Governor of Georgia, Joe Frank Harris, reacted to the decision with "shock and disappointment."<sup>48</sup>

The state judges, who presided over the cases, had to have been aware of the public's desire for conviction regardless of whether the defendant's rights were violated. The sensational nature of the case and the publicity it generated made a hostile public attitude toward the defendants foreseeable. Yet the judges' responsibility to protect the defendant's rights was equal to that of the federal judges.

A more clear case for a change of venue is difficult to imagine.<sup>49</sup> The trial judge nevertheless knew that if he moved the case away from the vengeful community, or if the state appeals judges had granted a new trial, they would have lost their offices in the next election. As a former Georgia Superior Court Judge stated:

[The] cases were tried in a Georgia court and reviewed by the Supreme Court of Georgia. Why would these judges rule one way on the change of venue issue and the federal court another?

Politics. The trial judge and the Supreme Court justices all are part of an electoral system that holds them directly accountable to the voters. In the tense situation that existed fol-

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*cert. denied sub nom.* Isaacs v. Georgia, 429 U.S. 986 (1976); *Dungee v. State*, 237 Ga. 218, 227 S.E.2d 746, *cert. denied sub nom.* Isaacs v. Georgia, 429 U.S. 986 (1976).

45. *Dungee v. Hopper*, 241 Ga. 236, 244 S.E.2d 849, *cert. denied sub nom.* Peek v. Georgia, 439 U.S. 882 (1978).

46. *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied sub nom.* Kemp v. Coleman, 476 U.S. 1164 (1986); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

47. Atlanta Constitution, Dec. 12, 1985, at A38, col. 2. The impeachment drive failed. After reviewing the petitions, the House Subcommittee on Courts, Civil Liberties, and Administration of Justice stated, "[F]ederal judges should not and cannot be impeached for judicial decision making — even if the decision is an erroneous one." *Id.* Oct. 17, 1986, at A26, col. 1.

48. *Id.* Dec. 12, 1985, at A38, col. 2. Commenting on the twelve years that the appeals process took, Governor Harris said, "That's too long, regardless of whose rights have been violated." *Id.* at col. 4.

49. The purpose of a change of venue is to not try a defendant in a community where he or she would be prejudiced or seriously inconvenienced. See generally LaFave & Israel, *supra* note 2, § 16.1(d). The constitution can require a change of venue when pretrial publicity is too great. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

lowing the Alday murders, it is not surprising that the trial judge decided not to move the trial.

It is less understandable but certainly plausible that the Supreme Court did not want to risk the political fallout from a ruling reversing the convictions. These judges are for the most part decent and learned, but they might have endangered their careers by making such a controversial ruling.<sup>50</sup>

A state judge must be able to make difficult, controversial rulings if he is to perform his function. The ability to make these rulings should apply to all cases a judge hears. A few instances have been gathered of judges who were voted out of office, not because of any particular cases, but for being perceived as pro-defendant generally. This has occurred at both trial and appellate levels.

Trial level elections, because they are local, do not generate widespread publicity. This has not immunized some judges from electoral defeat, however. For example, one study gathered a few instances of judges and magistrates who were defeated.<sup>51</sup> In 1974, Idaho magistrate Glenn Anderson was voted out of office after a local newspaper implied that the voters should elect a magistrate who would "back our police force and make it mean something to juveniles to be caught breaking the law besides having a finger wagged at them[.]"<sup>52</sup> Illinois Circuit Judge Charles Iben lost an election after being criticized in the local newspaper as "being soft on criminals."<sup>53</sup> Indiana County Judge Andrew Giorgi lost because his handling of trials amounted to "fast crime and slow justice."<sup>54</sup> Three Iowa judges were also not retained: David Halbach for being "too lenient with juveniles"; Roger Halleck for failing "to live up to his original promises to get tough with lawbreakers"; and Anthony Scolaro for giving "more deferred sentences for drunk driving convictions than any other judge. . . ."<sup>55</sup> Pennsylvania Judge Thomas Wood, who believed in alternatives to prison sentences, was voted off of the bench for being too lenient with criminals.<sup>56</sup>

At the appellate level, particularly during elections for a state's highest court, the publicity is potentially more widespread. The most noteworthy example of an appellate election, where a judge's criminal case rulings were a major issue, was the 1986 Cali-

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50. Alex Crumbley, *Alday Outrage Should Prompt Changes*, Atlanta Constitution, Dec. 22, 1985, at D1, col. 2; D6, col. 2.

51. Susan Carbon & Larry Berkson, *Judicial Retention Elections in the United States* 28-29 (1980).

52. *Id.* at 28.

53. *Id.* at 29.

54. *Id.*

55. *Id.*

56. *Id.* at 29-30.

ifornia Supreme Court election. Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso of the California Supreme Court were ousted. Though they did not face as emotional a case as the Alday murders, they were perceived and attacked as being "soft on crime," mainly because of their death penalty reversals.<sup>57</sup>

Bird, in particular, was the focus of a right wing campaign in which an estimated \$10,000,000 was spent to defeat her.<sup>58</sup> Campaign materials erroneously suggested that defendants, whose death sentences she helped to reverse, were now on the streets.<sup>59</sup> One television commercial showed a mother by a portrait of her twelve-year-old daughter, who had been kidnapped, murdered, and mutilated. The mother complained that because of Bird, her daughter's killer was still alive.<sup>60</sup> Bird lost by a margin of sixty-six percent to thirty-four percent as a result of this negative publicity.<sup>61</sup> Grodin and Reynoso, also accused of being soft on crime,<sup>62</sup> lost by margins of fifty-seven percent to forty-three percent and sixty percent to forty percent, respectively.<sup>63</sup> This was the first time in California history that a supreme court justice had been defeated.<sup>64</sup>

Before 1986, appellate judges had generally not been challenged and had enjoyed job security because of public indifference to judicial elections.<sup>65</sup> The disinterest of voters could be traced to the boring campaigns that have typically been waged. Since judicial ethics prevent a candidate from commenting on how he will decide cases or to even take public stands on political issues, there is little left to excite the public.<sup>66</sup> Few voters cast votes in judicial elections, and of those that do vote, most do not know the names of the candidates.<sup>67</sup> While California voters rejected the three justices, none of the eighty-eight Los Angeles County Superior Court Judges were defeated.<sup>68</sup> So long as a judge does not attract atten-

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57. See generally, Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52.

58. *Id.* at 54.

59. *Id.* at 52.

60. *Id.*

61. L. A. Times, Nov. 5, 1986, at 1, col. 2.

62. See Reidinger, *supra* note 57.

63. *Supra* note 61.

64. Bird was also the target of conservatives in her 1980 retention election. There, the opposition was disorganized and started its campaign late. Bird retained her position on the bench with 51.7% of the vote. See Preble Stoltz, *Judging Judges* (1981).

65. Philip DuBois, *From Ballot to Bench* 33 (1980).

66. *Id.* at 32. See also *id.* at 64-66.

67. *Id.* at 33.

68. Rebecca Kuzins, *Looking Beyond the Retention Elections*, California Lawyer, Oct. 1986, at 31, 50.

tion, he will likely be retained.

Public indifference may be waning.<sup>69</sup> In the 1986 elections, judicial candidates were challenged at least in part because of crime issues. North Carolina Supreme Court candidate James T. Exum Jr. was attacked for being "soft on capital punishment."<sup>70</sup> Oklahoma Court of Criminal Appeals Judge Edgar Parks faced the same situation.<sup>71</sup> A Republican group in California, perhaps because of the momentum they gained in the Bird campaign, began to raise funds to target appeals court justices.<sup>72</sup>

State court decisions have not generated as much publicity as those of the United States Supreme Court. But the publicity in California's supreme court election may begin a hazardous trend. The public has seen how it can exert influence over the selection of judges, and consequently the trend of judicial decision-making. Therefore, state court elections may never again be characterized by indifference and lack of knowledge about the candidates.

Some commentators feel the California election was an extraordinary event that will not be repeated often. Bill Roberts, a political consultant who ran the gubernatorial campaigns of Ronald Reagan and George Deukmejian, said, "It's not likely to happen again[.] It's a one-time thing. Rose Bird was arrogant, and there was a strong feeling that criminals were getting off too easily."<sup>73</sup> Stanford law professor Barbara Babcock agreed. She said, "[Bird] was hated from the time of her appointment because she was appointed to revolutionize things. And she was a woman. The situation that led to her defeat won't easily be replicated."<sup>74</sup> Neither of those comments account for the defeat of Justices Grodin and Reynoso, however.

Others feel that the ousting of the three will influence judicial decision-making. A *Los Angeles Times* poll showed that, although only thirty-four percent of state judges favored retaining Bird, fifty-three percent felt that judges would now have to worry about the political consequences of their decisions. Only forty-one percent admitted that they themselves would not be influenced.<sup>75</sup> Attorney and political science professor Robert Gerstein observed, "Since the 1920s and 1930s there's been a realist school that says

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69. For other judicial elections that year, some where crime was a major issue and some where it was not, see generally *id.* and Reidinger, *supra* note 57.

70. See Reidinger, *supra* note 57, at 58.

71. Kuzins, *supra* note 68, at 31.

72. *Id.*

73. Reidinger, *supra* note 57, at 54.

74. *Id.*

75. Recent Development, 9 Harv. J. L. & Pub. Pol'y 751, 754 (1986).

there's no magic in judging. . . . You look at judges as political actors. There's less awe of judges now. There's less of a sense that they are separate from the political system."<sup>76</sup> Former California Supreme Court Justice Otto Kaus said, "[the election] has to give special interest groups a new feeling of power." He further stated, "I'm afraid the era of retaining judges on the basis of their character, without tallying up their votes, is a thing of the past. There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."<sup>77</sup>

The implications for criminal defendants are beginning to manifest themselves. The California Attorney General, perhaps hoping to take full advantage of the new political makeup of the court, asked the California Supreme Court in *People v. Anderson*<sup>78</sup> to overturn *all* of the Bird Court's precedents on the death penalty.<sup>79</sup> The court refused to overturn every ruling, but did overrule the two California Supreme Court precedents on intent.<sup>80</sup> Those cases held that a person must have formed the intent to murder before that person can be given the death penalty. In dissent, Justice Broussard chastised the court for addressing the issue of intent, when the case was decided on other grounds, and for the tenuousness of the court's reasoning for overruling. Despite the court's reversal of Anderson's conviction and grant of a new trial,<sup>81</sup> the issues raised in Justice Broussard's opinion, and the fact that it now will be easier to execute criminals, make it clear that the court was swayed by political considerations.<sup>82</sup>

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76. Kuzins, *supra* note 68, at 31.

77. Reidinger, *supra* note 57, at 58.

78. 43 Cal.3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

79. *Id.* at 1153, 742 P.2d at 1335, 240 Cal. Rptr. at 614.

80. *Carlos v. Superior Court*, 35 Cal.3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983); *People v. Turner*, 37 Cal.3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984).

81. Although the defendant won this particular appeal, the overall effect on criminal defendants is worse than if the defendant had lost. As Justice Broussard noted, because the defendant was granted a new trial, the defendant "will have little incentive to seek review of this decision in the United States Supreme Court. But having overruled *Carlos* in a case where it did not matter, the majority will be able to cite this case to affirm a death penalty upon a defendant who did not intend to kill." 43 Cal.3d at 1165 n.21, 742 P.2d at 1344 n. 21, 240 Cal.Rptr. at 623 n. 21 (Broussard, J., dissenting).

82. Without specifying what the phrase "political winds" referred to, Justice Broussard wrote, "Periodically, when the political winds gust in a new direction, it becomes necessary to remind all concerned of the virtues of a steady course. As lawyers and judges, we sometimes deliver our reminder in Latin: *stare decisis*." 43 Cal.3d 1152, 742 P.2d at 1335, 240 Cal. Rptr. at 614 (Broussard, J., dissenting).

#### IV. Judicial Selection and Federal Court Involvement

##### *A. Methods of selection by state*

States establish their court systems and judicial selection and retention processes according to state constitutional law. Few states follow the federal example granting judges Article III guarantees of tenure and salary level protection. Only Massachusetts,<sup>83</sup> New Hampshire,<sup>84</sup> and Rhode Island<sup>85</sup> offer judges, from courts of general jurisdiction to the highest appellate court, life tenure after initial appointment.

Appellate court judges from eight states — Connecticut,<sup>86</sup> Delaware,<sup>87</sup> Hawaii,<sup>88</sup> Maine,<sup>89</sup> New Jersey,<sup>90</sup> New York,<sup>91</sup> South Carolina,<sup>92</sup> Vermont,<sup>93</sup> and Virginia<sup>94</sup> — never face an election. They initially are selected by appointment or nomination and are retained by an executive or legislative body after a certain period of time. The same is true for judges in courts of general jurisdiction in those states, except in New York, where they must run for election and reelection.

Two basic methods are used to select judges: (1) nomination or appointment by the legislature or the executive and (2) partisan election. The same methods are used for reappointment after a certain number of years, except for the many states that use non-partisan elections called retention elections. In a retention election, the judge runs without opposition. Voters either choose to retain or to remove the judge. If a judge is voted out of office, a new judge fills the vacancy according to the state's method of selecting judges. The newly appointed judge then faces a retention election at a prescribed time. The number of states employing each type of method are listed as follows:

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83. Mass. Const. pt. 2, cl. 2, § 1, art. IX.; pt. 2, cl. 3, art. I.

84. N.H. Const. pt. 2, art. 73.

85. R.I. Const. art. 10, § 4.

86. Conn. Const. art. 5, § 2; Conn. Gen. Stat. § 2-40 (1969).

87. Del. Const. art. IV, § 3, § 30; Del. Code Ann. tit. 10, §§ 906, 1303, 1702 (1974).

88. Haw. Const. art. VI, § 3.

89. Me. Const. art. 5, pt. 1, § 8.

90. N.J. Const. art. 6, § 6, para. 3.

91. N.Y. Const. art. 6, § 2; N.Y. Jud. §§ 71, 68 (McKinney 1983).

92. S.C. Const. art. V, § 14; S.C. Code Ann. §§ 14-8-60, 14-3-40 (Law. Co-op. 1977 & Supp. 1987).

93. Vt. Const. ch. II, § 34; Vt. Stat. Ann. tit. 4, §§ 71, 604, 4 (1981).

94. Va. Const. art. VI, § 7.

## HIGHEST APPELLATE COURT

## Initial Selection

appointment	22 states
election	25 states

## For Retention in Office

appointment	9 states
partisan election	9 states
retention election	29 states

## INTERMEDIATE APPELLATE COURT (IF ANY)

## Initial selection

appointment	14 states
election	17 states

## For Retention in Office

appointment	3 states
partisan election	6 states
retention election	22 states <sup>95</sup>

*B. History*

Judicial elections began as an outgrowth of Jacksonian democracy.<sup>96</sup> Until that time, judges usually were appointed by the governor subject to approval by the legislature, or they were elected by the legislature.<sup>97</sup> Many became dissatisfied with those methods because they saw judgeships as political spoils,<sup>98</sup> and because they believed the elite judiciary was primarily concerned with protecting the property interests of the wealthy.<sup>99</sup>

Most states adopted systems where judges were selected in contested partisan elections.<sup>100</sup> Judicial candidates were nominated by political parties in races resembling elections for legislative seats and governorships. Under this system, many of the best persons were unwilling to run for judicial office because they did not want to undergo the ordeal of campaigning.<sup>101</sup> A Justice of the Texas Supreme Court said:

[T]he abler lawyers still will not exchange a sure or promising career in private fields, with its greater financial rewards, for an appointment which is merely a head start for the next election and thus entails all the political preoccupations and risks of elective office, including risk of defeat and having

95. See Larry Berkson, Scott Beller & Michelle Grimaldi, *Judicial Selection in the United States* (1980).

96. *Id.* at 3.

97. *Id.*

98. DuBois, *supra* note 65, at 3-4.

99. See *supra* note 51, at 3.

100. *Supra* note 51, at 1.

101. See DuBois, *supra* note 65, at 4. See also Report on Commission on Professionalism, 112 F.R.D. 243, 293 (1986).

to start life all over again when some opponent with a catchier name or baby-kissing technique happens to want the office or is financed to run for it by some disgruntled lawyer or litigant.<sup>102</sup>

A disgruntled anti-crime group could be added to that list today.

In 1937, the American Bar Association proposed the Merit Selection Plan for selecting judges.<sup>103</sup> The plan called for the governor or another senior elected official to appoint judges when vacancies arose. The nominee would come from a list of candidates nominated by a commission, composed of high judicial officers and members of the general public. The appointment would be confirmed by a state senate or other legislative body, if the state desired. After a specified number of years, the judge would undergo reappointment or a retention election. The purpose of a retention election is to make judicial elections non-political by removing opposition candidates. Yet this was the kind of election the California justices had to undergo.

### C. Federal Oversight

Because state court systems are determined by state constitutional and statutory law, neither the president nor congress has any power to oversee state court systems. Neither do the federal courts. The United States Supreme Court said, "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions. . . ." <sup>104</sup> As for the manner in which judges are selected, the Court said, "Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, . . . whether in the judicial courts or otherwise."<sup>105</sup> The responsibility rests entirely with the states.

State courts are forums for vindicating federal constitutional rights. To the extent that those systems or methods of judicial selection affect those rights, particularly due process rights, the federal courts can interfere with state systems.<sup>106</sup> In *Tumey v.*

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102. W. St. John Garwood, *Judicial Selection and Tenure — the Model Article Provisions*, 47 J. of the Am. Judicature Soc'y 21, 24 (1963).

103. *Supra* note 95, at 6.

104. *Missouri v. Lewis*, 101 U.S. 22, 30 (1879).

105. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892).

106. "[Federal-state comity] principles simply are not... a broad, discretionary device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials." *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 299 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

*Ohio*<sup>107</sup> the Supreme Court invalidated a city ordinance allowing the mayor to sit as a judge in cases where the defendant could not be imprisoned. Under the ordinance, the mayor, as judge, convicted and fined a defendant charged with unlawful possession of an intoxicating beverage.<sup>108</sup> Because the mayor was paid a percentage of the fines he levied, he could not be an impartial adjudicator. The Court held that, while states may create their own judicial systems, such systems must meet the requirements of due process.<sup>109</sup> It established a test in which "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."<sup>110</sup> Not even legitimate state interests will overcome that requirement.<sup>111</sup>

The Court went further in *In re Murchison*.<sup>112</sup> It held that even where a judge is *in fact* impartial, that judge must still satisfy the *appearance* of impartiality. In *Murchison*, the Court invalidated a Michigan procedure that let judges sit as one-person grand juries in questioning witnesses suspected of perjury. The judge suspected the witness of perjury. In chambers, he questioned the witness and convicted him on the spot. The Supreme Court said, "[O]ur system of law has always endeavored to prevent even the probability of unfairness."<sup>113</sup> This is to ensure that the parties before the court respect the decisions of the judge and the manner in which she conducts the trial.

The Fifth Circuit Court of Appeals clarified the *Tumey* test in *Brown v. Vance*.<sup>114</sup> There, the Mississippi system for compensating justices of the peace by the number of cases the justice disposed of was invalidated. The effect was that the police deliberately wrote traffic tickets in districts where the defendant would appear before a justice with a high conviction rate. Thus, the justices with high conviction rates received most of the cases and made the most money. Evidence indicated that several justices were impartial despite the incentive to convict. The court

107. 273 U.S. 510 (1927).

108. *Id.* at 515.

109. *Id.* at 523.

110. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

111. *Id.* at 535 (discussing legislative interests of providing the system of courts, determining the jurisdiction of its courts, the method of disposing fines, or stimulating prosecution of crime with rewards).

112. 349 U.S. 133 (1955).

113. *Id.* at 136.

114. 637 F.2d 272 (5th Cir. 1981).

held that to be irrelevant. It stated that the *Tumey* test is used to measure whether the system has the potential for partiality, not whether the judge herself is impartial.

The Supreme Court mentioned judicial elections when it first considered the use of television in a criminal trial. In *Estes v. Texas*,<sup>115</sup> the Court said:

Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, . . . The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand — the fair trial of the accused.<sup>116</sup>

Although the Court found no specific instances of prejudice toward the defendant, it nevertheless invalidated the use of television because, as the concurrence noted, “the prejudices of television may be so subtle that it escapes the ordinary methods of proof.”<sup>117</sup> *Estes* was concerned more about the influence of television on the witnesses and the jury than on the judge. The issue of an election’s effect on a judge was not adequately developed. Nevertheless, the Court showed concern for “subtle pressures” that could adversely affect a trial. An election’s influence also would be subtle.<sup>118</sup>

Though judicial elections were not a main issue, they became a subissue in *Stone v. Powell*.<sup>119</sup> The main concern of the opinion was the state courts’ capability for protecting defendants’ fourth

115. 381 U.S. 532, 548 (1965). The Court addressed the issue of non-tenured judges in *Palmore v. United States*, 411 U.S. 389 (1973). The defendant claimed that because he lived in the District of Columbia he was constitutionally entitled to an Article III judge. He did not claim that the judge was biased and the issue of elections could not be reached because District of Columbia judges were appointed to 15 year terms. The Supreme Court held that The District of Columbia courts were established pursuant to Congress’ Article I power to govern the District, not Article III. Therefore, Congress did not have to give those judges Article III protections.

116. *Estes v. Texas*, 381 U.S. 532, 548 (1965). Chief Justice Warren expressed concern over a speech by the trial judge, which stated in part, “I took an oath to uphold [the state] Constitution; not the Federal Constitution. . . .” The Chief Justice wrote:

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience. I find it difficult to believe that this trial judge, with over 20 years’ experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States: [to hold the United States Constitution supreme].

*Id.* at 566 (Warren, C.J., concurring).

117. *Id.* at 578 (Harlan, J., concurring).

118. When the Court later narrowed *Estes* in *Chandler v. Florida*, 449 U.S. 560 (1981), it did not address the issue of television’s influence on the judge.

119. 428 U.S. 465 (1976).

amendment rights. The Court determined that state courts could adequately vindicate a defendant's fourth amendment rights, so that such claims would not be heard by federal courts on habeas corpus.

The respondent claimed that state judges could not protect fourth amendment rights as well as federal judges. The respondent did not mention elections, but claimed that the proximity of state judges to local law enforcement, such as the police and the district attorney's office, caused state judges to be less sensitive toward a defendant's constitutional rights.<sup>120</sup> The *amicus* brief of the American Civil Liberties Union (A.C.L.U.) agreed. It cited seventeen recent cases where a defendant's Fourth Amendment claims had to be vindicated in federal court after adverse rulings in state courts.<sup>121</sup> The proximity argument appears weak, particularly when one considers that state judges are institutionally no closer to local police or district attorneys than federal judges are to the F.B.I. or the Justice Department. Nevertheless, a five to four majority stated:

Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.<sup>122</sup>

This passage does not address or offer an explanation for the cases cited in the A.C.L.U. brief. The dissent noted that "[s]tate judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences. . . ."<sup>123</sup> Perhaps if the question of judicial elections was directly put in front of the Court, the Court would mandate change or at least expand the opportunities for state prisoners to bring their constitutional claims in federal court.

Due process means that a judge will fairly and impartially consider any claims that a defendant makes under the federal Bill of Rights. Any part of a state judicial system that infringes upon a judge's ability to be impartial must be invalidated. As Justice Brennan stated, "The mere invocation of the 'slogan state's rights' does not authorize the judiciary to 'administer a watered-down,

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120. Brief for Respondent at 87, *Stone v. Powell*, 428 U.S. 465 (1976) (No. 74-1055).

121. Brief of American Civil Liberties Union, *Amicus Curiae* at 18-27, *Stone v. Powell*, 428 U.S. 465 (1976) (Nos. 74-1055 & 74-1222).

122. *Stone*, 428 U.S. at 494.

123. *Id.* at 524 (Brennan, J., dissenting).

subjective version of the individual guarantees of the Bill of Rights when state cases come before [the Court].'<sup>124</sup> Since federal courts protect the federal due process right, they would have to invalidate judicial elections if shown that elections infringed on that right.

## V. The Suitability of Elections for Judicial Office

### A. *The arguments for and against judicial elections*

Many reasons are advanced for electing judges. Three of the most basic reasons are: (1) elections make judges accountable for their actions; (2) since judges affect public policy, the public should have a voice regarding who holds office; and (3) judges are inevitably political, whether elected or not, so elections make a judge accountable to the people, not to the official who appoints judges.<sup>125</sup>

Under the accountability argument, an incompetent judge could be removed from office, instead of serving for as long as he pleases. Also, judges are immune from civil liability for their decisions, so an election is the only way to check their power. This argument does not consider the need for a judge to be free to take unpopular, but constitutionally mandated, action. A state's interest in accountability cannot outweigh an individual's freedoms guaranteed by the Bill of Rights.<sup>126</sup>

Regardless of the necessity for protecting rights, elections do not fulfill the goal of accountability. The A.B.A. Commission said, "Interestingly, it has long been observed that popular elections of judges rarely offer accountability to the public."<sup>127</sup> The federal system has never been shown to have more incompetent or irresponsible judges than the state courts. The states can ensure they have quality judges by having the governor, or whoever appoints judges, take the responsibility seriously by making a thorough investigation into a nominee's qualifications and character. The A.B.A. Commission stated that, even where judges are initially appointed, "more must be done to obtain the best qualified judges and to depoliticize the entire process."<sup>128</sup> The report did not specify the steps to be taken, however.

Though judges' rulings do create policy, the public should not

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124. Brennan, *supra* note 7, at 541 (brackets in original).

125. DuBois, *supra* note 65, at 6-28.

126. *Cf.* *Tumey v. Ohio*, 273 U.S. 510 (1927) (state interests insufficient to overcome defendant's due process requirement of an impartial adjudicator).

127. Report of Commission on Professionalism, 112 F.R.D. 243, 293 (1986).

128. *Id.* at 294.

be able to pressure a judge into ignoring the constitutional rights of an individual. Judges' primary responsibility is to decide the case before them. The Fifth Circuit Court of Appeals stated:

[T]he reality and the appearance of 'political justice' are incompatible with the assumptions of a system of government of laws not men. Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest party, or person is entitled to the greatest respect.<sup>129</sup>

Whatever policies result from a judge's decisions can be overturned or modified by the legislature.

Proponents of elections also claim that judges are political whether they are elected or appointed.<sup>130</sup> Arguably, if elected, they follow the will of the people and, if appointed, they follow the will of whoever appoints them. Although judges can never be insulated completely from the political process, they are less likely to be political if they do not have to run for reelection. If a judge is appointed to carry out his appointer's political agenda, or if a judge is elected to carry out a political party's agenda, with tenure protection, he may ignore those political expectations without fear of electoral retribution.

There are many reasons for not holding elections. The primary reason is that judges need to be impartial and unbiased. If they feel their job depends upon ruling one way or another, they cannot perform their function and the defendants before them will not respect their decisions. Another reason is the public apathy toward judicial elections. The public knows little about the candidates or the issues. Supporters of elections, on the issue of voter apathy, point out that voters likewise know little or nothing about their state legislative representatives.<sup>131</sup> Ignorant voters are no justification for having elections. Whenever voters are apathetic about an election, the potential exists for a pressure group to tar-

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129. *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977), cert. denied 435 U.S. 1013 (1978). Louisiana Appeals Court Judge Morial challenged Louisiana law requiring him to resign his judgeship in order to run for mayor of New Orleans. Morial claimed the law violated his right to free speech under the first amendment. When he claimed that the state interest in a non-political judiciary was disavowed by having judicial elections, the Court claimed under equal protection analysis that a state did not have to exercise "the full extent of its power to prevent some evil." *Id.* at 302-03 n.6. Judge Fay, dissenting, felt that the law revealed that the state was not sincere in its interest of having a non political judiciary because of the judicial elections. *Id.* at 308-10.

130. See DuBois, *supra* note 65, at 20-28.

131. *Id.* at 62-63.

get someone and exert a disproportionate influence to defeat a candidate.

Moreover, some feel that an election and its campaign de-means a judge and causes loss of public respect. In response, those who support elections point to the strict guidelines for judicial candidates and attorneys not to comment on political issues or issues before the court and to confine their comments to the qualifications of the candidates.<sup>132</sup> Nevertheless elections place attorneys in a difficult position. They have a duty to speak out about the judge's qualifications, or lack thereof, but must avoid any misleading statements which might lessen public confidence in the judiciary.<sup>133</sup> Though they have this duty to speak, attorneys face sanctions for making false or misleading statements, even if made in good faith.<sup>134</sup> If the judge and attorney comply and do not speak about issues, then the public has little basis on which to cast a ballot.

Additional reasons for eliminating elections are evident from the examples of elections in this article. Although the Alday defendants were able to find justice in the federal courts, those courts, with their crowded dockets, are unable and unwilling to review every state criminal case.<sup>135</sup> There must be some mechanism for insulating judges from the public hysteria that a sensational case can generate. Even if a judge never hears a particular case that generates a huge public outcry, he would still have to worry that some group, such as Rose Bird's opponents, was keeping score on each ruling. A judge's rulings or imposition of a sentence in an individual case can be very complex. Requiring a judge to explain the results of many cases during an election campaign would be impractical.<sup>136</sup> Therefore, the inquiry would become superficial.

A judge could have a difficult time explaining legal reasoning to the general public while the judge's opponents wage an emotional campaign against him. When the mother of a young daughter, who was brutally murdered and mutilated, complains in a television commercial about a judge vacating the killer's death sentence, the judge has little recourse.<sup>137</sup> A judge can explain that a defendant's right was violated, which warrants a new trial, but the

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132. See generally Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 Ohio St. L. J. 201 (1986).

133. *Id.* at 203.

134. *Id.* at 209, 211.

135. *Supra* note 2. Though they eventually received justice, twelve years passed from the time the three defendants were convicted and sentenced in January, 1974, to the time their new trials were ordered in December, 1985.

136. See *supra* p. 123-24.

137. See *id.*

public, unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim. When many politicians assert that rights given to defendants are rights taken away from victims, the public naturally feels little sympathy for the defendant.<sup>138</sup> Professor Shiffrin said, "Appellate judges are vulnerable because the electorate is not reading their opinions. They are sitting ducks. They cannot publicly discuss their opinions. If someone makes an attack on them, they can't respond."<sup>139</sup>

The main reason for eliminating elections remains the need for judges to be openminded and to have the ability to take tough action. As Professors Brest and Leff explained during the California campaign:

Citizens are free to vote for or against political candidates for any reason. After all, we choose them to represent our views. But justices are different from politicians on the ballot. They are *not* our representatives. On the contrary, their duty is to uphold the Constitution and laws even when that is politically unpopular.<sup>140</sup>

The judicial office, whether trial or appellate, is not suited for elections.

### B. *The Code of Judicial Conduct*

The American Bar Association Code of Judicial Conduct,<sup>141</sup> particularly Canon 7, illustrates the inappropriateness of elections. Canon 7 circumscribes a judge's ability to participate in political parties,<sup>142</sup> to support candidates for other elective offices,<sup>143</sup> and to raise campaign funds.<sup>144</sup> A judge simply cannot put together an organization or solicit funds as candidates for other offices may. He cannot seek endorsements or other support.<sup>145</sup> Canon 5(G) prohibits a judge from "accept[ing an] appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."<sup>146</sup> Because a judge is limited to speaking only about

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138. See *supra* note 3 and accompanying text.

139. Kuzins, *supra* note 68, at 50.

140. Paul Brest & Elizabeth Leff, *When Judging Justices: Arguments to the Jury*, L.A. Times, Nov. 2, 1986 at § V, at 3, col. 1.

141. Model Code of Judicial Conduct (1984).

142. *Id.* Canon 7(A)(1)(a).

143. *Id.* Canon 7(A)(1)(b).

144. *Id.* Canon 7(A)(2).

145. *Id.* Canon 7(B)(2).

146. *Id.* Canon 5(G).

experience and qualifications, he cannot offer a policy on which the electorate can vote.

Canon 7 restricts a judge's ability to address issues. It says a judge "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact."<sup>147</sup> In the context of defendants' rights, a judge will not be able to state that he will be "tough on crime" or that he will "put criminals behind bars" or make any other similar statements. A judge who merely says that he will have a "strict sentencing philosophy" violates the Canon.<sup>148</sup> Some judges have found this Canon hard to follow. When speaking about capital punishment, a judicial candidate in Pennsylvania said, "I think I'd pull the switch myself." Another said that he would bring to the bench the "perspective of law enforcement from. . . the prosecutorial side. . ."<sup>149</sup> If a justification for judicial elections is for the public to control judicial policy making, the public needs information which judges cannot provide without violating Canon 7.

The Canon changes those requirements whenever a judge draws active opposition. If opposed, he "may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2)."<sup>150</sup> Implicit in this assumption is that once a candidate is challenged by the opposition on his record, the candidate can then comment on his past rulings or give clues as to how he will rule in the future. A judge could not satisfy the appearance of impartiality if he makes statements that imply a campaign promise, especially when the judge will face another election sometime in the future where the public may hold him to those statements.

Canon 7 foresees elections where judges run solely on their qualifications and not on their politics.<sup>151</sup> To inject political issues is to invite the appearance of partiality or a political agenda. The Canon is powerless to stop this scenario once a pressure group attacks a candidate's record. The only way to avoid this is to not have judicial elections.

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147. *Id.* Canon 7(B)(1)(c).

148. See A.B.A. Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980).

149. See Bruce Kauffman, *Judicial Selection in Pennsylvania*, 27 Vill. L. Rev. 1163, 1168-69 (1981-82). *Contra* Morial v. Judiciary Comm'n of Louisiana, 565 F.2d 295, 305, n. 11 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

150. *Supra* note 141, Canon 7(B)(3).

151. See A.B.A. Comm. on Ethics and Professional Responsibility, Informal Op. 1487 (1982).

Although Canon 7 is the only Canon to speak directly to electoral conduct, other Canons are also applicable. Canon 2 states that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>152</sup> Emotional campaigns, where a candidate is forced to take positions on legal and political issues, do not serve this goal. The Canon also states that a judge should not "convey or permit others to convey the impression that they are in a special position to influence him."<sup>153</sup> The Georgia judges, who presided over the Alday trials and appeals, could hardly convey the impression that the enraged community was not in "a special position to influence", knowing that the community would have its say at the next election.

This issue is addressed more specifically in Canon 3, which states that "[a judge] should be unswayed by partisan interests, public clamor, or fear of criticism."<sup>154</sup> When judicial elections drew little voter interest, it was easy for judges to comply with this canon. Now that judicial elections draw more attention,<sup>155</sup> compliance will be more difficult. The electoral pressure can be subliminal.<sup>156</sup> As with television cameras in the courtroom, the influence can be "so subtle that it escapes ordinary methods of proof."<sup>157</sup> This influence does not further the goal of the Model Code, expressed in Canon 1, which states, "An independent and honorable judiciary is indispensable to justice in our society."<sup>158</sup>

## VI. The Elimination of State Judicial Elections

### A. *The parties to enact reform*

The impetus for election reform should come from state legislatures or state executives. Since no interest group advocates defendants' rights, and since the public is generally hostile toward them,<sup>159</sup> neither legislators nor executives will take any action the public perceives as being favorable to defendants. If this reform was part of a more general reform aimed at enhancing judicial impartiality for all matters, criminal and civil, it may have a chance to be enacted.

The debate over methods of selecting judges has spanned the

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152. *Supra* note 141, Canon 2(A).

153. *Id.* Canon 2(B).

154. *Id.* Canon 3(A)(1).

155. See Reidinger, *supra* note 57 and Kuzins, *supra* note 68.

156. See *supra* note 120 and accompanying text.

157. *Estes v. Texas*, 381 U.S. 532, 578 (1965) (Harlan, J., concurring).

158. *Supra* note 141, Canon 1.

159. See *supra* note 3 and accompanying text.

history of the country<sup>160</sup> and continues to the present.<sup>161</sup> Professor Allen finds that "the salient fact remains that in the United States no persons or agencies possess political or administrative responsibility for the decency and efficiency of criminal justice as a whole. We have not been ingenious in devising institutions that subject criminal justice functions to scrutiny and test."<sup>162</sup> Legislatures and executives have shirked the responsibility to oversee criminal procedure.

Because an impartial judge is a fundamental requirement of federal due process, federal courts may have to take action. As Professors LaFave and Israel state, "[C]ommentators who favor legislative solutions to many of the issues resolved by the Court acknowledge that the Court has frequently been forced into action by the persistent failure of the legislative branch to treat those issues. The choice, it is argued, has been between the Court assuming responsibility for the decency of the criminal justice process and no one assuming that responsibility."<sup>163</sup>

It would not be beyond a federal court's ability if that court were forced to command changes in the way a state selects and retains judges. Justice Jackson said that criminal procedure is a "specialized responsibility within the competence of the judiciary on which they do not bend before political branches of Government, as they should on matters of policy which comprise substantive law."<sup>164</sup> Justice Harlan agreed when he said, "[procedural guarantees] are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence."<sup>165</sup> This is because courts deal with the procedures by which legislative policies and constitutional rights are vindicated.

A defendant could raise the claim by moving at trial that the judge recuse herself for bias. If a judge had made anti-defendant statements during a campaign or if the judge has been targeted by a pressure group, the defendant would have a good factual basis on which to make her claim. Even if the judge were to recuse herself, the replacement judge would also have been an elected judge, so relief could not be granted by the state trial court. State appellate

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160. See *supra* note 51, at 1-10.

161. See Kauffman, *supra* note 149.

162. Frances Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L.F. 518, 524-25 (1975) (quoted in LaFave & Israel, *supra* note 2, § 2.7(b), n. 18).

163. LaFave & Israel, *supra* note 2, § 2.7(b).

164. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

165. *In re Gault*, 387 U.S. 1, 70 (1967) (Harlan, J., dissenting).

judges, who also face elections, would not be able to grant relief either. Since selection of judges is a matter for state legislatures, the judges would be powerless to grant relief.

The claim could be brought to the Supreme Court on direct appeal or to the federal district court on habeas corpus. Similarly situated prisoners could band together in a class action suit on habeas corpus, because habeas corpus is a civil proceeding.<sup>166</sup> On habeas corpus, a prisoner can assert that she is illegally detained because of violations of due process under the U.S. Constitution.<sup>167</sup>

Though the right to an impartial judge is not enumerated in the first eight amendments of the Bill of Rights, it is an element of the due process clause of the fourteenth amendment, which applies to the states.<sup>168</sup> In due process analysis, the nature of the deprivation determines the amount of process that is due.<sup>169</sup> If an impartial adjudicator is needed when a defendant is subject to a fine,<sup>170</sup> then the need for judicial impartiality becomes more compelling when a defendant is subject to a prison sentence or a death sentence.

The federal court would still be reluctant, because of federal-state comity, to tell the states how to run their court systems.<sup>171</sup> Nevertheless, the federal courts have interfered in state and local political and government affairs in a number of instances. These include abolishing poll taxes,<sup>172</sup> outlawing gerrymandering of political districts,<sup>173</sup> easing the malapportionment of state legislatures according to the "one man-one vote" rule,<sup>174</sup> drawing school district boundaries requiring the busing of school children,<sup>175</sup> and ordering changes in state prison systems.<sup>176</sup>

The federal courts have ordered changes in state court systems. A federal court ordered Ohio not to allow a mayor to sit as a judge when a fine which is to be imposed is used to supplement his salary,<sup>177</sup> or even if the fine is to be added to the city treasury.<sup>178</sup> A federal court ordered a state not to pay its justices of the peace

166. LaFave & Israel, *supra* note 2, § 27.1(a).

167. *Id.* § 27.3(b); 28 U.S.C. § 2255 (1982).

168. *Tumey v. Ohio*, 273 U.S. 510 (1927).

169. *See generally* 16C C.J.S. *Constitutional Law* § 967 (1985).

170. *Tumey*, 273 U.S. at 510.

171. *But see supra* note 127 and accompanying text.

172. *Harper v. State Bd. of Elections*, 383 U.S. 663 (1966).

173. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

174. *Baker v. Carr*, 369 U.S. 186 (1962).

175. *See, e.g., Swann v. Charlotte-Mecklenburg County Bd. of Educ.*, 402 U.S. 1 (1971).

176. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978).

177. *Tumey v. Ohio*, 273 U.S. 510 (1927).

178. *Ward v. City of Monroeville*, 409 U.S. 57 (1972).

according to how many convictions the justices secured.<sup>179</sup> A federal court would not necessarily have to dictate a solution. It could invalidate elections and leave it to the states to work out alternative solutions.

### B. Solutions

Tenure protection may not necessarily have to be life tenure. Tenure protection could mean reappointment by a legislative or executive body. Legislators and executives deal with many other issues that arouse public interest such as education, taxes, and the environment. Of the issues that judges deal with, crime is the predominant one which arouses the public. Because of this, the public is less likely to vote a legislator or executive out of office on the single issue of judicial appointments. If the public disapproves of a legislator's vote for reappointment of a particular judge, they may approve of other reappointments. If the public disapproves of a legislator's votes for reappointment overall, they still may approve of his or her record on other issues and not vote the legislator out of office.

A possible solution could be to require tenure protection for the trial level judges only.<sup>180</sup> As an alternative, there might be a provision to grant tenure protection for appellate judges only. Trial level tenure would be preferable, if a choice is to be made, because the harmless error doctrine would not be used to excuse constitutional violations. Also, it would be preferable for judicial economy since, when judges rule correctly, there is less need for an appeal. So long as one layer has protection, then there will be one point where tough decisions could be made.

Another solution could be to limit tenure protection to criminal courts because of the peculiar nature of criminal trials. Elections could be retained for a state's civil courts. This could be justified on due process grounds because of the compelling interest a defendant has in her freedom and even in her life itself. The issues of imprisonment or death do not arise in civil trials. This solution, however, may appear to give defendants a special favor.

Life tenure for all judges would be the best solution. It provides the most insulation for the judge because she would not be influenced by any public body. It also eliminates the problems inherent in judicial campaigns and elections.

Whichever solution is chosen by the state or imposed by the

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179. *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1982).

180. See *Ward*, 409 U.S. at 61-62 ("[defendant] is entitled to a neutral and detached judge in the first instance").

federal court, it must insulate judges from public pressure. It will only be adequate if state judges will not have any "temptation" which will make them "forget the burden of proof required to convict" or make them not "hold the balance nice, clear, and true between the State and the accused."<sup>181</sup>

## VII. Conclusion

Though judicial elections had been characterized by voter indifference and lack of issues, the potential remained for a trial or appellate judge to be voted out of office, not because of the judge's ability, but because the judge is seen by the public as being too favorable to defendants. Despite the indifference, some judges were voted out of office. A judge's standing with the public was still a subtle influence in his performance, particularly in highly publicized cases.

Judicial elections, particularly at the appellate level, are now drawing much public attention. They are being decided on hotly contested political issues and are drawing large sums in campaign contributions. The defeat of the three California judges has shown the nation's voters what they can do when they need an outlet for their rage against crime.

That election may have been an aberration in the routine of uncontested elections. Considering the amount of money spent for that election, as well as other state elections that year, one must expect that hotly contested elections, where crime is likely to be a major issue, will be the trend in the future.

Regardless how elections will be in the future, the judicial office is not suited for public ballot. None of the reasons suggested for having judges face election have been realized. Judges, more than legislators or executives, have a duty to protect minority rights. This duty is difficult to perform when a judge is subject to majoritarian pressure.

Furthermore, a primary requirement of due process is that the judge be unbiased and impartial. Judges cannot heed outside pressure or carry out a political agenda and expect the parties before them to respect their decisions and rulings. Since an impartial adjudicator is a matter of federal due process, election reform may have to be stimulated by federal court action. However reform is initiated and whatever reform is enacted, state judges should have the necessary independence in order to fully protect the rights of criminal defendants.

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181. *Turney*, 273 U.S. at 532.