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The Search for Competent and Representative Judges, Continued

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The Search for Competent and Representative Judges, Continued

BY ROBERT P. DAVIDOW*

INTRODUCTION

In 1981 this author published a set of four proposals for judicial selection.¹ Three of these proposals had in common the following elements: selection of a large nominating commission, at least half of whom were to be elected by proportional representation,² with the remainder being elected by lawyers, judges,

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² Proportional representation is a device, used primarily in certain European elections, to ensure more accurate representation. Such a device is a response to the problem ... that minorities in any given electorate are likely to remain unrepresented in a system of strict majority rule. Although different types of proportional representation exist, the list system is the simplest. Under that system, individuals vote for one of several lists of candidates, each proposed by a particular party or faction. Each party or faction is then entitled to the selection of the percentage of the total number of candidates to be elected that corresponds to the percentage of votes cast for its list. ... Another type of proportional representation is the single transferable vote. This system does not require party organization; instead, each voter lists the candidates in order of preference with his or her second, third, and even lower choices often being used to permit candidates to achieve the minimum number of votes needed for selection. Greater flexibility is thereby achieved with this system than with the list system.

Judicial Selection, supra note 1, at 434-35 (footnotes omitted).
and academicians; selection by that nominating commission of a large number of nominees broadly reflecting the beliefs, attitudes, and values of the commissioners;\(^3\) and final selection by lot\(^4\) from among the nominees. These proposals were premised upon the belief that the twin goals of quality\(^5\) and representativeness\(^6\) in judicial selection are not served by methods such as partisan election, non-partisan election,\(^7\) gubernatorial

\(^3\) See id. at 440.

\(^4\) If the argument in favor of assuring representativeness with regard to beliefs, attitudes, and values is accepted, then it is not difficult to accept selection by lot, which in this context is merely a mechanism that achieves more accurate representation. If nominees are relatively numerous and appropriately representative on every occasion, the law of averages will assure representative selection over time.

Id. at 436-37 (footnote omitted).

\(^5\) Other things being equal, the most intelligent people should be in government. No inconsistency need exist between a theory of democracy—at least a theory of representative democracy, as contrasted with a theory of pure democracy, such as that illustrated by the Greek city-state or the New England town meeting—and a preference for the most intelligent representative. This author has personally observed judges who were apparently unable to comprehend the arguments of counsel. Many other lawyers and even non-lawyers seemingly have had the same experience. Neither the actuality nor appearance of justice is served by such incompetence.

Judicial Selection, supra note 1, at 419 (footnotes omitted).

\(^6\) Acceptance of quality as a legitimate goal of judicial selection leaves unanswered the question whether judges should be representative of the community in which they serve or accountable to that community. Here, a distinction should be drawn between “accountability” and “representativeness.” Some people have assumed that because judges make policy decisions in deciding cases—e.g., the abortion and reapportionment decisions of the Supreme Court—judges should be accountable, in apparently the same way that legislators are thought to be accountable. This legislative analogy should be rejected, however, because it assumes that the task of the judge is no different from that of the legislator. . . . [T]he jury analogy, suggesting that the second major goal of judicial selection is representativeness and not accountability, is more appropriate than the legislative analogy.

Id. at 419-20 (footnotes omitted).

\(^7\) Problems with popular elections of judges include the following: Even if the electorate could be given pertinent information concerning the competence and attitudes of judicial candidates, it is unlikely that a system of election could provide adequate representativeness. If, for example, impecunious lawyers could obtain public funds to support their election campaigns, wealthy candidates would still have a marked advantage in light of Buckley v. Valeo, since it is doubtful that candidates could be prevented constitutionally from spending their own money in a campaign.
and legislative election (appointment), and merit selection systems such as the Missouri Plan. The proposals were further

A more fundamental problem of representativeness is the potential for a dilution of minority voting strength. This problem arises because the traditional form of election in the United States requires a majority vote for victory. When voting is polarized along racial lines—a common phenomenon today—a Black minority constituting fifteen percent of the population, for example, could never hope to elect a Black candidate to judicial office.

Id. at 426-27 (footnotes omitted).

Problems with executive appointment include the following:

Since political considerations are likely to be the sole or dominant consideration in the appointment of judges... executive appointment is unlikely to ensure either quality or representativeness. Although a requirement of confirmation by a legislative or independent body may give some protection against the appointment of grossly incompetent judges, the history of senatorial confirmation, for example, is not reassuring. Even if such confirmation by an independent body provides a check on the appointment of incompetent judges, the screening function performed by the senate or a similar body provides no assurance of representativeness.

Id. at 428-29 (footnotes omitted).

The main problem with present merit selection plans is their failure to assure sufficient representativeness. Under the original version of the merit selection plan, which was adopted in Missouri, for example, three of the seven members of the judicial nominating commission are appointed by the governor—the chief politician in the state. Since the governor is usually elected by majority vote and is likely to be committed to the views of his or her constituency, virtually all of his or her appointments to the commission will reflect such a majoritarian basis. Even where bipartisanship is required, as in Colorado, only the two major parties are guaranteed representation on the commission. The various groups, however, that are particularly interested in, and are likely to be affected by, the work of the courts do not necessarily arrange themselves along traditional party lines. Sympathy or antipathy toward persons accused of crime, for example, is not necessarily a function of party affiliation. Thus, bipartisanship on the commission provides no assurance of representativeness. Furthermore, there is no guarantee that representativeness of the commission as a whole will be improved by the presence of members not appointed by the governor. Although Watson and Downing concluded that the commissioners, especially lawyer commissioners, in Missouri did represent the various interest groups fairly well, there is no structural guarantee that non-appointed commissioners will represent the community at large or groups especially interested in the courts.

Id. at 430-31 (footnotes omitted).

Originally, [the Missouri] plan called for the gubernatorial appointment of one of the three nominees submitted by a judicial nominating commission composed of three lawyers, elected by members of the State Bar Association; three lay persons, appointed by the governor; and the chief justice
of the Missouri Supreme Court. After a specified period in office, each judge had to run in a retention election in which voters could vote only for or against the judge and not for another candidate; if the judge failed to receive a majority of the vote, a new judicial selection process was commenced.

Id. at 413 (footnotes omitted).

It was reported in 1985 that some form of merit selection had been adopted at some level in thirty-four states, as well as the District of Columbia and Puerto Rico. D. VANDENBERG, JUDICIAL MERIT SELECTION: CURRENT STATUS (1985). Since then Connecticut has adopted a form of merit selection. CONN. GEN. STAT. ANN. § 51-44a (West Supp. 1988).

There are at least two respects in which the role of judge in the United States differs from that of the legislator. First, although legislators theoretically are bound to uphold the Constitution, as a practical matter, the courts have assumed the task of assuring compliance with the fundamental law. Thus, the role of the court is not to ascertain the will of the majority; instead, it often involves enforcing the provisions of the Bill of Rights and other constitutional limitations in the face of majoritarian opposition.

Although constitutional issues may arise more frequently in federal courts than in state courts, almost any mundane state court adjudication can involve federal constitutional issues. In particular, state criminal trials are subject to a myriad of federal constitutional limitations developed through recent decisions of the Supreme Court. Also, civil matters adjudicated in state courts—for example, a suit to enforce a restrictive covenant in a deed, a suit for the wrongful death of a mother brought by her illegitimate children, and garnishment proceedings—often raise federal constitutional issues.

In fact, almost any state cause of action is potentially subject to a due process or equal protection challenge. Thus, although many cases tried in state court do not raise constitutional issues, the potential for constitutional assault is sufficiently great to justify the assumption that such issues will arise regularly. Even if no other factors were involved, this need to enforce limits on majority rule would be sufficient to justify a system of judicial selection different from that used to select legislators. The value judgment implicit in this conclusion, should be made explicit: Our Constitution strikes a balance between majority rule and the protection of individual rights; the latter is as important as the former, and the courts are the preeminent guarantors of the latter.

Second, the role of judges in a complex society is inherently different from that of legislators. In general, the legislature adopts general principles to be applied prospectively, but the courts apply general principles, previously determined, to existing disputes. The significance of this distinction as to accountability is readily apparent. When legislators, acting prospectively, attempt to determine present popular attitudes or anticipate future ones to ensure their re-election, no threat is posed to the reasonable expectations of private persons. There can be no detrimental reliance, therefore, when
must be representative of the community in which they serve. This article first reviews the jury analogy.\textsuperscript{11} Next, the necessity for judges who represent the views of not only the majority is discussed\textsuperscript{12} and highlighted by recent events.\textsuperscript{13} This article concludes by discussing some practical difficulties with the implementation of the proposed nominating commissions.\textsuperscript{14}

I. THE JURY ANALOGY

A. The Functions of Judge and Jury

Judge and jury perform very similar, although not identical, functions. While the chief function of jurors is to make findings of historical fact, judges also perform this function when trying cases without jurors and when ruling on such matters as motions to suppress evidence in criminal cases.\textsuperscript{15} Both jurors and judges apply legal principles to historical facts. Judges, however, establish the legal principles to apply, whereas jurors presumably accept instructions from judges as to the applicable legal principles. While this distinction holds true in the main, it is not always valid.\textsuperscript{16} Jury instructions are sometimes so general that

the statute has completely prospective effect. If judges, however, decide cases in accordance with their best estimate of present or future popular attitudes, private parties' reasonable reliance on past precedents may not be protected.

\textit{Judicial Selection, supra} note 1, at 420-22 (footnotes omitted).

\textsuperscript{11} See infra notes 15-31 and accompanying text.

\textsuperscript{12} See infra notes 32-42 and accompanying text.

\textsuperscript{13} See infra notes 43-50 and accompanying text.

\textsuperscript{14} See infra notes 51-59 and accompanying text.

\textsuperscript{15} See, e.g., \textit{Nix v. Williams}, 467 U.S. 431 (1986) (determination of whether certain evidence, obtained unlawfully, should nevertheless be admitted because the prosecution had established, by a preponderance of the evidence, that the evidence inevitably would have been discovered even without the illegal conduct).

\textsuperscript{16} One study of selective service cases concludes in part as follows:

The analysis of verdicts in selective service cases suggests that jurors sometimes judge laws as well as defendants—convicting more frequently when the public approves of legal norms or purposes they are serving, and convicting less frequently when the government policy being supported through the criminal law is in dispute. It would seem that this jury legislating is normally a subconscious phenomenon, for most jurors no doubt honestly believe that they are faithfully adhering to their prescribed
jurors find themselves first establishing legal principles before applying them. For example, some versions of the jury instruction with regard to the issue of insanity have been described as, in effect, a direction to the jury to decide the issue of moral blameworthiness. At this level of abstraction, jurors must decide what moral blameworthiness means in a particular context, and then decide whether the defendant is morally blameworthy under that standard. Another example is the application of the traditional "reasonably prudent" person standard in tort actions. Again, the standard is so general that the jury in effect decides the legal principle to apply to the historical facts.

B. Jury Attributes that Judges Ought to Have

If in fact judges and jurors perform very similar functions, one may then ask which of the attributes of the jury are attributes that we should also find in judges? Two principal attributes are representativeness and nonmajoritarianism.

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role of applying legal standards logically and interpreting the evidence objectively, even as they evaluate the laws on the books.


In discussing the majority's decision to abandon the Durham test of criminal responsibility in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), Judge Bazelon commented: "Nothing in the Court's opinion today suggests a departure from our long-standing view that the second of these two functions—the evaluation of the defendant's impairment in light of community standards of blameworthiness—is the very essence of the jury's role." Id. at 1030 (Bazelon, J., concurring in part and dissenting in part).

The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act.

The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea: the "reasonable man of ordinary prudence."

The representative nature of the jury is the most obvious attribute. Jurors are typically selected at random to represent, as nearly as practicable, a cross-section of the community. They are representative of the community in part because we cannot think of anyone else better suited to resolve factual issues, in light of the way in which people perceive facts differently and are influenced by various beliefs, attitudes, and values. Application of the jury analogy to judges may require the use of

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20 The pertinent federal statutes provide in part:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.


Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title.

Id. at § 1863(a).


21 This is implicit in the Court's statement in Duncan v. Louisiana, 391 U.S. 145, 156 (1968), that "[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

The jury is, of course, designed to do other things, including preventing oppression by the government. Id. at 155 (citing Singer v. United States, 380 U.S. 24, 31 (1965)).

22 For discussion of the concept of selective perception, see, e.g., Hastorf & Cantril, They Saw a Game: A Case Study, 49 J. ABNORMAL & SOC. PSYCHOLOGY 129 (1954).

23 For a discussion of the distinction between and among the concepts of "beliefs," "attitudes," and "values," see M. Rokeach, BELIEFS, ATTITUDES, AND VALUES (1970).

For discussion of how one's attitude toward capital punishment might affect one's inclination to find a defendant guilty or not guilty in a criminal case, see authorities discussed in Lockhart v. McCree, 476 U.S. 162 (1986). Not every study has shown a relationship between attitude and a propensity to find a defendant guilty or not guilty in a criminal case. See, e.g., Sealy, Another Look at Social Psychological Aspects of Jury Bias, 5 L. & HUM. BEHAV. 187 (1981).
multi-judge panels at trials without juries and at hearings at which important factual determinations are made.\(^{24}\)

A second attribute of the jury is its nonmajoritarianism. When a jury must decide a case unanimously, the will of the majority is sometimes thwarted. Even one member of a twelve-person jury can thwart the will of the remaining eleven.\(^{25}\) Similarly, when judges decide cases they often must enforce certain principles against majority rule. The chief example of this is found in the enforcement of the Bill of Rights in the face of contrary majority view expressed through legislative action.

This nonmajoritarianism is historically easy to explain: When the Constitution was written in 1787, commonly accepted principles of natural law and natural rights greatly influenced the founders; the assumption was that these principles would be enforced regardless of current majority views.\(^{26}\) Even apart from the Bill of Rights, ratified in 1791,\(^{27}\) the original Constitution contains explicit limitations on the exercise of governmental power, both on the part of the federal government\(^ {28}\) and on the part of the governments of the several states.\(^{29}\)

\(^{24}\) Although it may be assumed that the use of multi-judge panels would add to the cost of the administration of justice, such an increase would be offset to some degree if suggestions to provide alternative dispute resolution were implemented. See generally, Rosenberg, Resolving Disputes Differently: Adieu to Adversary Justice?, 21 CREIGHTON L. REV. 801 (1988); Lambrose, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1985).

\(^{25}\) The Supreme Court has held that the sixth amendment requires unanimous jury verdicts in federal criminal cases. See Andres v. United States, 333 U.S. 740, 748-49 (1948). Further, the Supreme Court has not permitted, thus far, nonunanimous state juries where the proportion required for conviction was below 75%. The Supreme Court upheld a nonunanimous state jury verdict in Johnson v. Louisiana, 406 U.S. 356 (1972), where nine of the twelve jurors voted to convict; this 75% requirement is the same requirement found in article V of the Constitution, requiring ratification of proposed amendments by legislatures or conventions in 3/4 of the states. Thus, even with regard to nonunanimous juries, strict majority rule has not been permitted to operate.


\(^{27}\) A brief discussion of the argument that the ninth amendment was intended to embody the natural law/natural rights tradition is found, for example, in Davidow, George Mason on the Tension Between Majority Rule and Minority Rights, 10 GEORGE MASON U.L. REV. 1, 23-24 n.87 (1987).

\(^{28}\) U.S. CONST. art. I, § 9 (powers denied to Congress).

\(^{29}\) Id. at § 10 (powers denied to the states).
C. One Desirable Dissimilarity

Jurors are ordinarily representative of the community with regard to intellectual ability; no systematic effort is made to get the brightest and best educated people on the jury. Concomitantly, it is desirable for the brightest and best-trained judges whose beliefs, attitudes, and values are broadly representative of those of the community to be on the bench. This is consistent with the concept of representative, as contrasted with direct, democracy.

II. The Relative Importance of the Application of This New Method of Selection to Trial Courts and Appellate Courts

To the extent that appellate courts announce new principles of law, one might be tempted to say that it is more important to have representativeness at the appellate level, especially as an attribute of the United States Supreme Court. As a practical
matter, however, the application of principles to facts may be of greater significance, especially when one considers that decisions based at least in part on fact-finding are unlikely to be reviewed at the appellate level and even less likely to be overturned on review. This is true precisely because one of the chief functions of the trial court is to find the facts. Therefore, it may be more important to establish this method of providing for greater representativeness at the trial court level.

One cannot appreciate the significance of representativeness in fact-finding without acknowledging the extent to which people perceive and evaluate facts differently. The concept of selective perception is well recognized in psychology. People tend to perceive what they expect to perceive. These expectations are influenced by personality factors such as beliefs, attitudes, and values—themselves the product of both genetic and environmental factors. The drawing of inferences from established historical facts—that is, fact evaluation and application of legal possibility is perhaps implicit in the Court's affirmance, by an equally divided vote, of a decision involving a challenge to a state law placing certain restraints on the performing of abortions. Hartigan v. Zbaraz, 108 S. Ct. 479 (1987), reh'g denied, 108 S. Ct. 1064 (1988). Moreover, Justice Blackmun has expressly stated that the overturning of Roe is a distinct possibility. Washington Post, September 14, 1988, at A3, col. 4.

It is true that the United States Court of Military Review may review the facts: it may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. 10 U.S.C. § 866(c) (1982). The United States Court of Military Review is most unusual in this respect, however.

The United States Supreme Court often reviews the trial court's findings of fact in first amendment cases. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 285-92 (1964) (evidence constitutionally insufficient to show that defendant in libel case acted with knowledge of falsity or reckless disregard of truth); Bose Corp. v. Consumers Union, 466 U.S. 485, 498-511 (1984) (Appellate judges applying New York Times v. Sullivan must exercise independent judgment in examining the record and determine whether it shows actual malice with convincing clarity.). Much more rarely does the Supreme Court review the facts in other cases; it does occasionally do so, however. See, e.g., New York v. Quarles, 467 U.S. 649 (1984) (rejection of lower court finding that there was no danger to the public arising out of police ignorance of the location of a handgun left somewhere in a grocery store shortly after midnight).

See Hastorf & Cantril, supra note 22.

See generally M. Rokeach, supra note 23.
principles to historical facts—is similarly influenced by an individual’s beliefs, attitudes, and values.37

Suppose that a defendant is accused of having committed the crime of attempting to obstruct justice by threats directed toward police officers. Three individuals testify at trial.38 The principal arresting officer testifies that the defendant’s arrest was based on information, erroneously stored in a police computer, that indicated there was an outstanding arrest warrant for the defendant. The officer then testifies that the defendant, following his arrest, made a number of statements to the officer or within his hearing: “I am going to get you.” “I am going to sue you for false arrest.” “If I lose, I’ll get you some other way.” “I’ve got five friends to help me take care of him” [the principal arresting officer]. The second witness, an officer who assisted in the arrest, testifies that, in addition to stating that he would sue the police officer, the defendant, shortly after his arrest and before arriving at the police station, said, “I am going to get [the first arresting officer] if I have to kill him.” The second arresting officer also testifies that at the police station, when the first arresting officer was out of the room, the defendant said that he was going to kill “him.” The second arresting officer testifies that he thought that “him” was a reference to the first arresting officer. The defendant testifies that while he threatened to sue the arresting officer, he never threatened to kill anyone.

Which version of these facts would a juror accept? Would the juror be influenced by a general disposition to believe—or disbelieve—police officers? Suppose that the arresting officers are white; the defendant is black.39 Would the juror be affected by the race of the witnesses? Would he or she pay attention not only to the differences between the defendant’s testimony and that of the police officers, but also to the differences between the versions given by the two police officers? (Would it be significant, for example, that the first arresting officer does not

37 Id.
38 These facts are essentially those found in Polk v. Commonwealth, 358 S.E.2d 770 (Va. Ct. App. 1987).
refer to a death threat, whereas the second officer describes a death threat supposedly made in the presence of the first arresting officer?) Regardless of which version of the facts would be accepted by a juror, would that version constitute an attempt to obstruct justice in light of the fact that the two arresting officers are large and the defendant is of slight build and was in handcuffs during most of the time during which the threats supposedly were made? Attempt requires an intent to obstruct, and that intention must be inferred from all of the facts and circumstances. Would an intent to seek personal revenge at some indefinite future time constitute an "intent to obstruct justice"? What would be the significance of the defendant's understandable anger resulting from the fact that the apparent outstanding warrant for his arrest was the result of computer error?

III. The Significance of Recent Events

Two recent events of interest are the rejection of Rose Bird and two of her colleagues in the California retention election of November 1986, and the rejection by the United States Senate of President Reagan's nomination of Robert Bork to be an

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40 The discrepancy between the testimony of the two arresting officers is not mentioned in the opinion of the court of appeals in Polk; it is, however, found through an examination of the trial transcript. See Commonwealth v. Pike, Trial Record at 30, No. 52-1985, Circuit Court of Fauquier County, Commonwealth of Virginia, October 11, 1985.

Failure of the court of appeals in Polk to mention this discrepancy is probably explained by the fact that, following conviction, the reviewing court will normally construe the facts in a manner most favorable to the winning side—here, the prosecution. In so construing the facts, the court is free to pick and choose among those statements made at trial that are most favorable to the prosecution's side; thus, the court can, as it did in Polk, ignore the discrepancy and simply refer to the uncontradicted testimony of the second officer that a death threat was made at the police station in the absence of the first arresting officer. This circumstance merely highlights the importance of fact-finding at trial.

41 Telephone interview, supra note 39.

42 Polk, 358 S.E.2d at 773.

associate justice of the United States Supreme Court. Each of these occurrences illustrates a problem with representativeness.

The failure of Rose Bird and two of her colleagues to be retained on the California Supreme Court illustrates the principle that representativeness is at risk when popular election is possible, even after an initial selection of a member of the court. Judicial retention elections make it possible for a popular majority to remove those expressing minority viewpoints from the bench; the end result is a judiciary that represents a smaller portion of the spectrum of community beliefs, attitudes, and values.

In the case of Robert Bork, lack of representativeness is demonstrated at the initial selection stage. The problem with the selection of Bork was not that his views could be regarded as very extreme; under this author's proposals someone with views as extreme as those of Bork could still be selected for any particular court. The problem is that this was attempted in a context in which there was no guarantee of representativeness; President Reagan ostensibly represented a majority view at one particular point in time, but there is no guarantee that in the

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4 For an analysis of the defeat of Judge Bork, see, e.g., Ackerman, Transformative Appointments, 101 Harv. L. Rev. 1164 (1988).

41 In the case of Rose Bird, her minority viewpoint was apparent opposition to capital punishment as such, as reflected in her judicial opinions. "Essentially, Bird's opponents charged her with being soft on criminal matters, especially the death penalty..." Wold & Culver, supra note 43, at 350.

42 Consider that while Rose Bird was being rejected by the voters in California because of her apparent opposition to the death penalty, Justices Brennan and Marshall of the United States Supreme Court were continuing a consistent course of action since 1976: They dissented from the denial of petitions for writs of certiorari in death penalty cases, asserting that the death penalty is in all circumstances cruel and unusual punishment in violation of the eighth and fourteenth amendments. See, e.g., Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976) (Brennan, J., and Marshall, J., dissenting); King v. Illinois, 107 S. Ct. 249, 249 (1986) (Brennen, J., and Marshall, J., dissenting); Davis v. Georgia, 479 U.S. 871, 872 (1986) (Brennan, J., and Marshall, J., dissenting).

43 There is little doubt that the views Bork expressed were extreme: In effect he claimed that the first amendment protects only speech that is "explicitly political." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971). Presumably this expression was intended to exclude all art and literature. His subsequent apparent change of heart was accepted by the Senate Judicial Committee during his confirmation hearings in 1987 with a measure of skepticism. See S. Exec. Rep. No. 7, 100th Cong., 1st Sess. 56-57 (1987).
federal system of selection of judges there will be sufficient representativeness at one time or over time.

Even if one assumes that representativeness can be achieved at any one time—a questionable assumption in view of the tendency of presidents to appoint persons who share their beliefs, attitudes, and values—\(^48\)—one must note that members of the Supreme Court, along with lower federal judges, hold their offices in effect for life; \(^49\) they serve longer than the term of the president who actually selects them. This latter problem explains in part why appellate court judges should be limited to a single fifteen-year term. \(^50\)

**IV. PRACTICAL DIFFICULTIES ASSOCIATED WITH THE WORK OF THE PROPOSED NOMINATING COMMISSIONS**

Although this article provides a theoretical justification for a broadly representative nominating commission that would select a large number of judicial nominees from whom a final selection would be made by lot, \(^51\) the question remains whether such a system would work in practice. In particular, the question arises whether twelve commissioners, for example, could or would cooperate sufficiently in the unanimous selection of twelve nominees when each of the commissioners had, in effect, a veto power over the nominations by the other members of the commission. Unanimous selection of nominees would be necessary

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\(^48\) From 1933 to 1962, for example, the percentage of appointments from those of the President's own party ranged from a low of 75% in the case of Truman to a high of 100% in the case of Kennedy. J. Grossman, Lawyers and Judges 28 (1965). This partisan system of appointments has continued into the present. See, e.g., Gotschall, Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution, 70 Judicature 48 (1986); Note, All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals, 87 Colum. L. Rev. 766 (1987).

\(^49\) "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

\(^50\) Beyond Merit Selection, supra note 1, at 877-82. Consider also the proposal to limit a Supreme Court justice to an 18-year, non-renewable term. Oliver, Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court, 47 Ohio St. L.J. 799, 801 (1986).

\(^51\) See Judicial Selection, supra note 1, at 434-36.
to ensure that those commissioners representing minority viewpoints would be able to insist upon the inclusion, within the list of nominees, of nominees espousing their views. 52

There is reason to believe that commissioners might very well proceed, as this article originally suggested, by saying to one another, "If you want me to refrain from vetoing those whom you prefer, you had better not veto my choice." 53 Further, the commissioners to whom such a remark had been made might respond, "If you do not want us to veto your choice, you had better make sure that your choice is well-qualified." 54 Here the concept of role morality, as recognized by sociologists, is important. 55

Persons assigned a particular role come to internalize the values attached to that role. This is evident in the case of jurors who are expected to apply the judge's instructions. The juror's generalized duty to obey the law is made more concrete in the specific instructions received from the judge. Studies suggest that jurors are successful in doing this to a considerable degree; 56 moreover, in jurisdictions where unanimity is required, juries

52 Id. at 441.
53 Id.
54 Id.
55 Role morality represents this impersonal element in morality. In a role one is a person of a certain kind put in a certain kind of relationship, and thus detached from purely personal idiosyncrasy. We shall be concerned later with whether a person can also achieve detachment from his roles; that is another story. Here we are concerned with the character of role morality. As a directive for behaviour in certain kinds of relationships, it is structured by rules; if not by explicit and sanctioned rules, at least by implicit understandings, and maxims, or rules of thumb, as to how such a person would behave in this kind of relationship.


Other factors besides that of role morality determine behavior in any particular situation. For discussion of the relative influence of role, personality, and social situation, see McCall, Discretionary Justice: Influences of Social Role, Personality, and Social Situation in Personality, Roles, and Social Behavior 285 (N. Ickes & E. Knowles eds. 1982).

56 See, e.g., the discussion of the Hinckley trial in V. Hans & N. Vidmar, Judging the Jury 179-98 (1986). Apparently the jury was able to understand and apply the judge's instructions regarding insanity. The same authors also conclude, after a review of the extant empirical studies, that "[t]he jury has not been shown, as a general matter, to be incompetent." Id. at 129.
ultimately fail to reach agreement in only about five percent of the cases.57

A critic may say that five percent, although a small percentage in the abstract, would represent a fairly large number of actual instances in which commissioners would be unable to perform their assigned task of unanimously choosing twelve nominees. The work of commissioners is not, however, a zero-sum game;58 that is, the fact that one commissioner "wins" (that is to say, has his or her choice included among the twelve nominees), does not mean that one or more of the other commissioners must "lose." They still can have their preferences included among the group of twelve. This contrasts with the situation in which a jury often has only two choices: "guilty" or "not guilty."59

This author cannot prove that such a system would work since this system has never been tried before. The same would be true, however, of any proposal to create mechanisms involving human interaction. Thus, if the burden is to prove feasibility, it cannot be met. On the other hand, one can just as easily argue that the burden should be on the opponents of this proposal to prove its lack of feasibility.

CONCLUSION

Because judges are more like jurors than legislators, they ought to be as broadly representative of the community with respect to their beliefs, attitudes, and values as are jurors. Moreover, they need to be as free from pressure to yield to current majority sentiment as are jurors. This conclusion supports a

57 In their study of 3576 trials, Kalven and Zeisel reported that the rate of hung juries was 5.5%. H. Kalven & H. Zeisel, The American Jury 57 (1966).


59 A jury can sometimes compromise by finding a defendant guilty of a lesser included offense. For example, a defendant charged with murder might be found not guilty of murder, but guilty of manslaughter. In such a situation the choices would be broader than simply "guilty" or "not guilty." Nevertheless, in such a situation jurors contending for a verdict of "guilty" of murder and those contending for acquittal would not get their first choice—a situation different from that existing with respect to the work of commissioners, who would be able to insist on the nomination of someone sharing their beliefs, attitudes, and values. See Judicial Selection, supra note 1, at 441.
proposal to choose judges by lot from among a large group of nominees selected by commissioners whose beliefs, attitudes, and values are broadly representative of those of the entire community. Such a commission could ensure that nominees possess the requisite competence. Moreover, with role morality and the absence of a zero-sum game, it is likely that commissioners would cooperate with one another in carrying out their responsibilities, even when required to act unanimously.