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The Politics of Crime and the Threat to Judicial Independence

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JUSTICE IN JEOPARDY

REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY

July 2003

Alfred P. Carlton, Jr.

American Bar Association President, 2002-2003

THE RECOMMENDATIONS OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY WERE APPROVED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES IN AUGUST 2003. THE COMMENTARY CONTAINED HEREIN DOES NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE ABA. ONLY THE TEXT OF THE RECOMMENDATIONS HAS BEEN FORMALLY APPROVED BY THE ABA HOUSE OF DELEGATES AS OFFICIAL POLICY (SEE APPENDIX A).

THE REPORT, ALTHOUGH UNOFFICIAL, SERVES AS A USEFUL EXPLANATION OF THE RECOMMENDATIONS.

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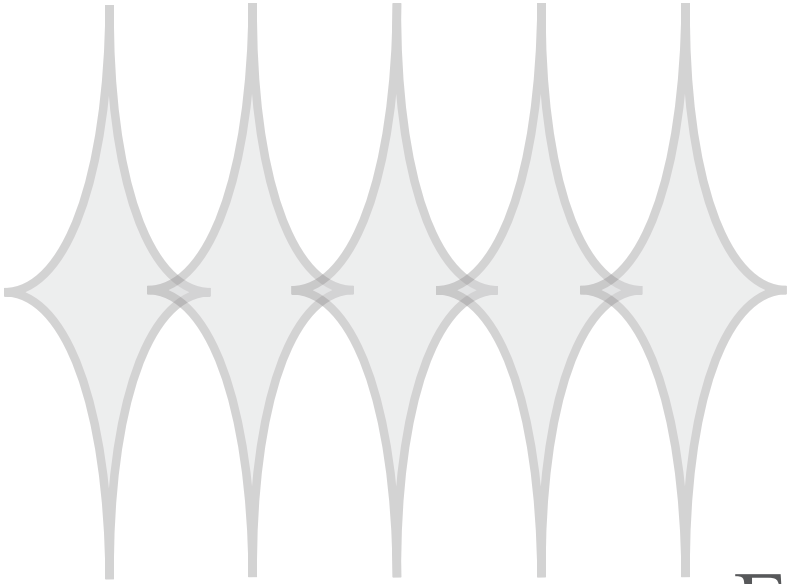
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APPENDIX F

THE POLITICS OF CRIME AND THE THREAT TO JUDICIAL INDEPENDENCE

Jeannine Bell*

The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J. dissenting)

The threat to judicial independence that Justice Stevens notes in his dissent in *Harris v. Alabama* has recently been eliminated. In 2002, the Supreme Court ruled 7–2 in *Ring v. Arizona*¹ that juries, not judges, must make the determination that a defendant will be sentenced to death. Before the Court’s decision in *Ring*, judges were ultimately responsible for sentencing in capital cases in nine states. In these states, elected judges faced pressure to demonstrate their support for the death penalty either by overruling a jury verdict or by imposing it with or without a jury’s advisory opinion. By taking the ultimate decision regarding whether a defendant will be sentenced to death out of the hands of the judge, *Ring* removed what Stevens identified as a significant threat to state court judges’ ability to make unfettered decisions.

Though this particular threat to the independence of state court judges has been eliminated, across the nation the politics of crime still matter for state court judges, the vast majority of whom are elected. Challenged by interest groups and opponents, state court judges face the prospect of election defeat because of rulings they have made in capital cases. Governors have also criticized judges for their rulings in capital cases. The death penalty case is not the only political stumbling block that judicial candidates have faced. Judicial candidates have often felt pressure to demonstrate to constituents that they are not soft on crime.

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¹ *Ring v. Arizona*, 536 U.S. 584 (2002).

This white paper addresses factors that judges and some scholars argue threaten the ability of state trial court and appellate judges to make independent decisions in criminal cases. Part I discusses the particular issues of concern to judges who must make decisions in the area of criminal law and the sway that the “politics of crime” holds for elected judges. Next, Parts II and III address two types of difficulties that judges face—those that stem mainly from the fact that the vast majority of judges must run for reelection, and those that constitute more direct attempts to limit judges’ power. The white paper concludes in Part IV with a brief discussion of some of the consequences of placing such limits on judicial power.

Part I. Why Criminal Law Is Different

All elected judges may be sanctioned by voters who dislike decisions they have made while on the bench. Increasing judicial accountability by increasing citizens’ power to remove judges from office is one justification for this form of judicial selection. As judicial elections have become more politicized, elected judges have had to raise money for their election campaigns. Judicial elections have become increasingly expensive, and judges must worry about raising money to run election campaigns. During the 2000 judicial elections, candidates for state supreme court raised \$45.6 million, double the figure raised just four years earlier.² The need to raise money presents judges with ethical dilemmas when potential or past donors appear before them.

A related issue concerns the need to seek votes. Judges may be concerned that controversial decisions made on the bench will alienate voters and donors, causing them to lose an election or to fail to raise enough funds to mount a successful campaign. Finally, judges may be tempted to take policy positions to distinguish themselves from their challengers during the campaign. While articulating policy positions is a valuable part of the political process for other elected officials, promises are problematic for judges. A judge might be tempted to live up to her campaign promises and ignore the applicable law for fear of not being re-elected. For these reasons, making promises or pledges are ethical violations under the American Bar Association’s Model Code of Judicial Conduct, which most states have adopted.³

For trial court judges who preside over criminal dockets and appellate judges who must hear appeals in criminal cases, the politics of crime and the public fear of crime add to other threats to judicial inde-

² Larry Bivens, *Coalition Wants to Reform State Judicial Campaigns*, GANNETT NEWS SERVICE, Feb. 22, 2002.

³ Penny White, *Judicial Independence: Judging Judges: Securing Judicial Independence by the Use of Judicial Performance Evaluations*, 29 FORDHAM URBAN L.J. 1053, 1061 (2002).

pendence. Though it has always been a concern in America, fear of crime increased and became a more salient issue in the late 1980s and early 1990s for the public and in American politics.⁴ Though some statistics suggested the number of actual crimes committed was decreasing, citizens' perception of the amount of crime increased. From 1989–1992, a greater number of Americans indicated in polls that they believed more crimes had occurred that year than the year before. From 1985–1992, the number of individuals claiming to be victims of crime more than doubled.⁵

In the 1980s and 1990s, politicians capitalized on fear of crime by demonstrating that they believed in taking a serious approach to ending crime—that they were tough on crime.⁶ One way politicians have chosen to demonstrate that they are tough on crime is by attacking judicial decisions. Judges who make decisions in criminal cases are especially vulnerable.⁷ Fear of crime makes decisions in criminal cases of greater interest to the public. Rulings in the defendant's favor in death penalty cases often serve as fodder for criticism from law-and-order politicians. Similarly, judges in criminal cases are required to make thousands of decisions regarding the suppression of evidence and bail.⁸ While it is impossible to predict who will commit a crime while released on bail, it is easy for politicians in hindsight to criticize a judge who granted bail to the defendant who re-offends while out on bail.⁹ Politicians have also chastised judges for their decisions to suppress evidence and other rulings unfavorable to the prosecution. The sections below describe and provide examples of the myriad ways in which judicial independence is threatened for judges who must make decisions in criminal cases.

Part II. Election-related Challenges to Judicial Power

A. The Public, Special Interest Groups and the Death Penalty

The public interest in crime makes judges most vulnerable to attack when they are running for election. One area of criminal justice to which the public pays close attention is the death penalty. Public support for the death penalty, though it has recently fallen, remains high. Two-thirds of Americans support the imposition of the death

⁴ Ann Lin, *The Troubled Success of Crime Policy*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT* 313 (1998).

⁵ *Id.*

⁶ *Id.*

⁷ Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U.L. REV. 308, 316 (May 1997).

⁸ *Id.* at 319.

⁹ *Id.*

penalty, at least in theory.¹⁰ Public support for the death penalty was even higher in the mid-1990s when polling data showed 80 percent of Americans supported the imposition of the death penalty and has remained higher in some states, such as Texas, than it has in the country as a whole.¹¹

The high level of public support for the death penalty has meant that judicial candidates' views on the death penalty are often very important. Judges' rulings in death penalty cases and judicial candidates' views on the death penalty have been a minefield for those facing elections. Judges face election or retention elections in all but six of the states that have the death penalty.¹² Candidates are aware of the likelihood of discussions of their views on the death penalty and may try to avoid discussing the issue on the campaign trail for a variety of reasons. For example, one candidate for a local judgeship in California skipped a television debate because he was concerned that his responses to questions about the death penalty and the "three-strikes" law might violate judicial ethics rules.¹³ Sometimes their views or rulings in death penalty cases prevent them from being appointed. According one news story, legal experts contend that in an attempt to show he is conservative, Governor Gray Davis of California has appointed judges who enthusiastically support the death penalty.¹⁴ Davis subjected potential justices to a lengthy questionnaire regarding their views in a variety of areas, including the death penalty.¹⁵

State court judges around the country have faced election defeat because of rulings made in capital cases. When an interest group, challenger, political actor, or governor publicize a judge's behavior in a death penalty case, generally the decision made or vote cast by the judge favors the defendant in some way. The most damaging of these attacks use brochures or ads that describe, in gory detail, the murder for which the defendant received the death penalty. Voters are urged to show their support for the death penalty or sympathy for the victims by not re-electing the judge. The legal basis for the judge's decision is never given.

The best publicized of these attacks was leveled at Tennessee Supreme Court Justice Penny White. In 1996, White was targeted by a pro-

¹⁰ Jennifer L. Harry, *Death Penalty Disquiet Stirs Nation*, 62 CORRECTIONS TODAY (Dec. 1, 2000).

¹¹ *Id.*

¹² Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L. REV. 760, 779 (1995).

¹³ Dawson, *Citing Ethics Worries, Skips Taping of TV Debate as Opponents Spar Over Experience*, METROPOLITAN NEWS COMPANY, Feb. 24, 2000.

¹⁴ Harriet Chiang, *Defense Attorneys Accuse Davis of Bias in Handing Out Judgeships*, S.F. CHRONICLE, Feb. 21, 2000 at A1.

¹⁵ *Id.*

death penalty group, the Tennessee Conservative Union (TCU), after she and four other justices on the court voted to overturn a convicted murderer's death sentence. White was the only justice sitting for retention that year. TCU and the Republican Party transformed White's retention election into a referendum on the death penalty by sending out flyers describing the murder in grisly detail and advising voters that the murderer had not received punishment he deserved—" [t]hanks to Penny White."¹⁶ The Republicans' brochure advised voters to vote for capital punishment by not voting for White.¹⁷ White, who had spent just nineteen months on the court, lost her bid for re-election.

White is not the only judge to lose an election because of a ruling made or a vote cast in a death penalty case. In 1992, Justice James Robertson of the Mississippi Supreme Court lost his seat after a challenger who ran a law-and-order campaign and was supported by the state prosecutors' association spotlighted an opinion the judge wrote.¹⁸ At issue was Justice Robertson's statement that the Constitution did not allow the death penalty for rape when the victim survived the attack, a view consistent with the Supreme Court's ruling in *Coker v. Georgia*.¹⁹ One ad used by Robertson's opponents advised, "[V]ote against Robertson because he's opposed to the death penalty and he wants to let them all go."²⁰

Though the prevalence of such referenda on the death penalty is not precisely clear, judges either faced more difficult elections or lost their seats because of the rulings on the death penalty in Texas and in North Carolina.²¹ Judicial independence in capital cases seems especially threatened in Texas. After a 1994 decision to reverse a conviction in a notorious capital case, Texas Republicans responded to a call to take over the Texas Court of Criminal Appeals, and the Republicans won in every judicial election that year.²² In a similar story—also from the Texas Court of Criminal Appeals—Judge Charles Baird was the lone dissenter in the appeal of famed death row inmate Karla Faye Tucker. He cites this as a reason for his defeat in the next

¹⁶ Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 168 (Jan.-Feb.1997).

¹⁷ *Id.*

¹⁸ *Id.* at 170.

¹⁹ *Id.*

²⁰ John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 466 (1999).

²¹ In elections in 1986 and 1990 in North Carolina, challengers castigated Chief Justice Exum for voting to reverse several death sentences. Anthony Champagne, *National Summit on Improving Judicial Selection: Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1394 (June 2001).

²² Bright, *supra* note 7, at 320.

election.²³ In recounting his experiences, Baird told of another Texas judge, an eight-year incumbent, who granted a motion to suppress a weapon in a capital case and was defeated in a primary election that occurred immediately after he handed down the decision.²⁴

B. Politicians and the Politics of the Death Penalty

Public support for the death penalty and the graphic nature of many of the crimes for which murderers receive the death penalty make calling attention to any of a judge's rulings in death penalty cases that can be construed as favorable to the defendant an especially effective way for politicians to dramatize their own firm commitment to law and order. State supreme court judges have drawn fire from other elected officials—governors, state legislators and, in a few cases, candidates for federal office. During their 1994 election campaigns, opponents of Senators Charles Robb, Edward Kennedy, and Diane Feinstein castigated each for voting to confirm former Chief Justice Rosemary Barkett of the Florida Supreme Court to a seat on the Eleventh Circuit. At issue were Barkett's votes to overturn death sentences in several cases while she was on the Florida high court.²⁵ For example, one television ad for Feinstein's opponent, Michael Huffington, charged, "Feinstein judges let killers live after victims died."²⁶

In addition to candidates for state and national office, state supreme court justices have drawn fire from governors for their rulings in death penalty cases. In 1986, three California supreme court justices were defeated in retention elections after Governor George Dukemejian withdrew his support for them because of their votes in death penalty cases. In Florida, perhaps in response to the justices' striking down his plan to speed up executions by limiting death penalty appeals in 2000, Governor Jeb Bush publicly accused the state supreme court of hurting crime victims by adding "unnecessary delay and legal gamesmanship" in their consideration of death penalty cases.²⁷

²³ Stephen Bright, et. al, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUMAN RTS. L. REV., 123, 153 (Fall 1999).

²⁴ *Id.*

²⁵ Though in his ads Huffington made the comparison between Justice Rosemary Barkett and former Justice Rose Bird, it is important to note that while she was on the Florida Supreme Court, Barkett reportedly voted to uphold more death sentences than she voted to reverse. By contrast, between 1977 and 1986, the California Supreme Court under Rose Bird reviewed seventy-one death penalty convictions and upheld only four death sentences. John Culver, *The Transformation of the California Supreme Court, 1977-1997*, 61 AL. L. REV. 1461 (1998).

²⁶ Bright, *supra* note 12, at 790.

²⁷ Jo Becker & Charles Lane, *Florida's Top Court Has Been GOP Target*, WASH. POST, Nov. 15, 2000.

In Tennessee, Republican Governor Dan Sundquist opposed the retention of White, a Democratic appointee, and promised that he would appoint only judges who support the death penalty. In a statement that dramatically illustrates gubernatorial control of the supreme court, Sundquist reportedly said immediately after White lost her seat, "Should a judge look over his shoulder about whether they're going to be thrown out of office? I hope so."²⁸

Voters clearly cede to governors the ability to appoint judges who the governors believe best able to adjudicate matters before the court. In addition, governors may believe that the voters elected them with the mandate to carry out particular policy positions and that the best way to do this is to select judges who are more likely to enforce the law from the governor's policy perspective. The actions described above also seem to suggest that these governors assume that the state supreme court is an extension of the governor's mansion. In other words, judges should make decisions in line with the governor's policy perspective, irrespective of the law or the facts in the case.

C. Accusations of Being Soft on Crime

State court trial and appellate judges' ability to make unfettered decisions is compromised when they must be concerned about challengers accusing them of being soft on crime. Such attacks are most troubling to judges when they focus, as they have recently, on the judge's actual decisions. In 1999 Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court faced a challenger who ran ads focusing on her dissent in a case in which she wrote that the Wisconsin's sexual predator law was not constitutional. The challenger's ads suggested that if Abrahamson were re-elected, sexual predators would be free to prey on children.²⁹ In California, Judge Patricia Gray of the Sonoma County Superior Court sent out brochures maintaining that her opponent, a former public defender, defended the actions of cop killers, violent criminals, and child molesters.³⁰ In another case, this time from Alabama, the Judicial Inquiry Commission charged Justice Harold See with using ads during his 2000 campaign that accused his opponent of being soft on drug defendants.³¹

²⁸ Bright, *supra* note 7, at 166.

²⁹ Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 985 (2001).

³⁰ Mike McKee, *Nasty Election Fight Spurs A Probe By CJP*, THE (S.F.) RECORDER, Dec. 29, 2000. Gray lost the retention election and the California Commission launched a formal inquiry into Gray's campaign practices.

³¹ Larry Bivens, *Coalition Wants to Reform State Judicial Campaigns*, GANNETT NEWS SERVICE, Feb. 22, 2002.

In addition to challengers, interest groups may also use media campaigns during elections to criticize judge for decisions they have made that the group believes to conflict with its views. Florida's Barkett serves as an excellent example. Though an analysis of Barkett's opinions showed that she voted with the majority of the court more than 90 percent of the time, a variety of groups opposed Barkett's retention in 1992 because she was supposedly soft on crime. Groups opposed to Barkett's retention included the National Rifle Association (NRA), which spent more than \$30,000 opposing her. The NRA criticized Barkett because she had not upheld enough death sentences, despite the fact that she had voted to uphold the death penalty in more than 200 cases since she was appointed to the court in 1985.

Not all of the interest groups who attempt to defeat judges because they are soft on crime are conservative. Gay rights groups, victims' groups, and activists who represent the black community have also opposed judges who the groups believed did not adequately punish criminals who committed crimes against women, gays and lesbians, and people of color. Protests frequently occur in reaction to what the community considers too lenient of a sentence for an offender who has committed a high-profile crime. For instance, Soon Ja Du, a Korean-American grocer shot and killed Latasha Harlins, an unarmed black teenager, in 1991. The shooting, which allegedly occurred because Du believed that Harlins had shoplifted a bottle of orange juice, was well publicized. After newly-appointed Judge Joyce Karlin of the Los Angeles Superior Court sentenced Soon Ja Du to probation, the black community in Los Angeles held numerous protests.³² Members of the African-American community filed formal charges with the California Judicial Commission and demanded Karlin's recall.³³ Karlin's sentence was upheld on appeal, and the effort to recall her failed. Karlin won reelection against three challengers the next year, but retired from the bench before completing her term.

In some cases, groups organize around a particular judge who has made a series of decisions that the groups consider unfavorable. Women's and gay rights groups came out against Judge David S. Young of Utah's Third District, accusing him of bias when gays and women were crime victims. In 1996, Young held onto his seat by a slim margin, but was unseated when he lost a retention election in 2002.³⁴

³² Rene Lynch, *Shooting sentence focuses attention on state's judiciary*, ORANGE COUNTY REGISTER, Dec. 2, 1991.

³³ *Id.*

³⁴ Elizabeth Neff, *Judge's Removal Causes Stir; Some support Young, his rulings; others laud retention vote system; Young Is First State Judge to Be Ousted*, THE SALT LAKE TRIBUNE, Nov. 7, 2002, at B1.

Judges who are perceived as not being tough on crime may also face opposition from prosecutors and law enforcement groups during their reelection or retention campaigns. For example, Citizens for a Responsible Judiciary, a group composed of police officers and state's attorneys organized to publicly oppose Barkett's retention in 1992.³⁵ In both Mississippi and Oklahoma, prosecutors have organized similar organizations to oppose judicial candidates they believe to be soft on crime.³⁶

Though the charge that a judge is soft on crime can and has been used to characterize decisions made by judges from a variety of political perspectives, the Republican Party has leveled this charge in a number of cases at judges who are Democrats. In addition to the takeover of the Texas Court of Criminal Appeals described above, the Republican Party has accused candidates who are Democrats of being pro-defendant or soft on crime in several different states. In a state where no sitting supreme court justice had been challenged in over 100 years, Justice Jean Hofer Toal, South Carolina's first female justice, ran for reelection by the legislature in 1995 and was attacked by the state Republican Party, which called her a liberal judge who was soft on crime.³⁷ In Michigan, the Republican Party ran television commercials in which the word "pedophile" was quickly shown adjacent to the name of one Democratic appeals court judges, along with an announcement indicating that he had voted to uphold a light sentence for a pedophile.³⁸

Part III: Direct Attempts to Limit Judicial Power

Many (though not all) of the limitations on judicial power described above are offshoots of the process of electing judges, rather than selecting them by appointment. Judges who face reelection are vulnerable to attacks by politicians, challengers, and interest groups. In other words, any threat to the judicial independence that exists can be viewed as one cost of the system of accountability most states have chosen. Some view this as a fitting price for allowing citizens to have an opportunity to be involved in electing their state's judges.

The independence of state court judges has been also challenged in ways which have little to do with elections. A judge's freedom to make decisions is compromised when judicial commissions or ethics

³⁵ Diane Rado, *Fiery debate rages ever hotter over chief justice's keeping job*, ST. PETERSBURG TIMES, Sept. 9, 1992.

³⁶ In 1986, the Oklahoma District Attorneys Association came out against a Court of Criminal Appeals judge because they believed he did not support the death penalty. Prosecutors in Mississippi have also organized to oppose candidates who are soft on crime. See Champagne, *supra* note 21, at 1399.

³⁷ Blume, *supra* note 20, at 471.

³⁸ Randall T. Shepard, *Judicial Independence and the Problem of Elections: 'We have met the enemy and he is us,'* 20 QUINNIPIAC L. REV. 753, 757 (2001).

boards sanction judges for having made unpopular decisions. While it is important that judges be disciplined for unethical behavior, their ability to make independent decisions is threatened when public outcry leads to charges filed against a judge, especially when the particular decision lies within the scope of the judge's discretion.

Perhaps the most widely reported case of a judge being sanctioned for an unpopular decision involved Judge Howard Broadman of the Tulare County (California) Superior Court. The California Commission on Judicial Performance charged Broadman with willful judicial misconduct in 1995 and 1996. At issue was Judge Broadman's widely publicized 1991 order that a defendant in a drug case agree to the implantation of the birth control device Norplant as a condition of probation. The defendant had previously lost custody of her five children. In another very controversial case, Broadman delayed sentencing of an HIV-positive rapist to investigate the possibility of prison officials' withholding medical treatment from the defendant.³⁹ Though some of the charges of improper sentencing against him were dismissed, Broadman, who was supported by the California Judges Association, argued that the charges against him interfered with his exercise of judicial independence.⁴⁰

Removing a judge from a particular jurisdiction because of an unpopular decision that he or she has made demonstrates a related threat to judicial decision-making. Significant public outcry over a particular judge's decision can lead for calls for the judge's removal or transfer to another jurisdiction. Such was the case in Los Angeles after Karlin sentenced Du, the Koren-American grocer, to probation. After the decision, Los Angeles District Attorney Ira Reiner attempted to prevent Karlin from hearing new criminal cases by filing for affidavits of removal on all of her pending cases. In a move that was heralded as striking a blow for judicial independence, the head judge of the court declined to transfer Karlin to a noncriminal court outside out of the area. This signaled a defeat for the Los Angeles District Attorney's office—which had succeeded in having judges prevented in at least two earlier occasions in 1985 and 1990 from hearing criminal cases after they made decisions with which the district attorney's office did not agree.⁴¹

Judicial independence is directly threatened by legislation or other actions that attempt to limit the scope or range of judicial decision making. A relatively little known example occurred in Texas in 1989

³⁹ *A Career Under Fire*, THE (S.F.) RECORDER, JAN. 5, 2000.

⁴⁰ Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROB. 59, 67 (Summer 1998).

⁴¹ Lynch, *supra* note 32.

when the Texas District County Attorneys Association—dissatisfied with what it believed were the liberal, pro-defendant decisions of the Texas Court of Criminal Appeals—put forth a legislative proposal to amend the Texas Constitution to restrict the court’s decisions. Prosecutors argued that the court, an intermediate court with supervisory authority over criminal appeals, was interpreting the Texas Constitution in a way that gave defendants more rights than the U.S. Constitution did. The proposed constitutional amendment, which ultimately died in House committee, would have prevented the court from independently construing provisions of the Texas Constitution having to do with defendants and thus removed judges’ interpretive independence.⁴²

Sentencing guidelines, three-strikes law, and mandatory minima are more commonly used legislative initiatives to limit judicial discretion. Judges, who are often opposed to sentencing guidelines, argue that guidelines requiring mandatory sentencing for particular crimes violate the separation of powers and impede their ability to render justice.⁴³ One Florida judge remarked that sentencing guidelines result “in the truly evil avoiding punishment and the technically guilty being senselessly incarcerated more often than should be tolerated in a free society.”⁴⁴

Three-strikes laws, which are in force in the majority of states, require judges to impose a long sentence on any defendant guilty of three felonies. Under California’s three-strikes laws, which were passed in 1994, defendants with two previous convictions for violent felonies had to receive a sentence of twenty-five years to life for their third felony.⁴⁵ This sentence is required irrespective of whether violence was used during the commission of the third felony. A second strike requires a doubling of the normal sentence. Judges complain that these types of laws comprise judicial independence by taking the power away from judges to decide whether the defendant should be shown mercy or if rehabilitation is possible and would serve the public interest more than meting out a long sentence. The California Supreme Court agreed and handed down a controversial decision in 1996, which indicated that three-strikes laws limit judicial discretion and in doing so violate the separation of powers.⁴⁶ In that decision, judges were given the power to dismiss felonies if there is a low likeli-

⁴² George E. Dix, *Judicial Independence in Defining Criminal Defendants’ Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1376-79 (1990).

⁴³ *Keep Politics Out of Justice*, FLA. SUN-SENTINEL, Nov. 4, 2001.

⁴⁴ *Id.*

⁴⁵ See Michael Vitiello, *Three Strikes and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. REV. 1643, 1647 (1997).

⁴⁶ *People v. Superior Court (Romero)*, 13 Cal. 4th at 529-30, 917 P.2d at 647, 53 Cal. Rptr. 2d at 808.

hood of the defendant committing further crimes.⁴⁷ The California Supreme Court further expanded judicial discretion the following year when it decided that judges had broad authority to reduce felony convictions in crimes that were “wobblers,” crimes such as petty theft that are nonviolent felonies.⁴⁸ In the event of wobblers, judges were given the authority to reduce the third conviction to a misdemeanor conviction, thereby avoiding the three-strikes law.

Part IV. Conclusion: Consequences of Politicization

All of the actions described above—criticism of judges’ decision by the public, interest groups, prosecutors, challengers, and governors; sanctions issued to judges; and legislative attempts to limit judges’ power to decide cases have changed the judicial landscape. The most obvious change is the politicization of campaigns has made judicial campaigns much more expensive, forcing judges to raise large sums of money to defend themselves against attacks.

Judges may also find it harder to keep their seats. Even if a judge is able to comment on a decision that is being scrutinized, he or she may have a hard time defending his or her actions. In the area of criminal law, judges who are responsible for sentencing make many decisions, often with incomplete information. If a defendant out on bail commits a crime, the judge may find it particularly difficult to defend his or her decision to grant bail. Judges who are accused of letting violent killers go free are frequently defeated at the polls because the crimes for which defendants are sentenced to death are often grisly and the procedural protections on which judges base their decision may seem inadequate to the public.

Judges and some scholars believe that the message the defeat sends to judges who remain constitutes an even more significant threat to judicial independence. They argue defeat of a judge who lost because he or she was targeted by a governor, interest group, or challenger for making an unpopular, yet legally defensible, decision suggests to all the remaining judges and judicial candidates that if one is to remain a judge, policy preferences must guide decision-making rather than the law.

Politicization of crime may have led some judges who are eager to keep their seats to inject politics into the race by dramatizing their

⁴⁷ Maura Dolan, *Court Widens Judges’ Leeway on Three Strikes*, L.A. TIMES, Jan. 17, 1997.

⁴⁸ *Id.*

records⁴⁹ or by accusing their opponents of opposing the death penalty.⁵⁰ Judge Mike McCormick of the Alabama Tenth Circuit Criminal Court ran advertisements during his re-election campaign bragging: “Some complain that he’s too tough on criminals, and he is.... We need him now more than ever.”⁵¹ In an attempt to appear tough on crime, candidates have also made promises regarding future conduct—a clear violation of judicial ethics rules. One candidate for the Texas Court of Criminal Appeals, Judge John Devine of the Harris County Civil District Court, announced his candidacy by declaring that he believed in “being short on words but long on sentences.”⁵² Another candidate for the same court promised during her campaign that if elected she would never vote to reverse in a capital murder case.⁵³

The politicization of the death penalty and other criminal justice issues may have had an impact on how judges make decisions. The independence on the judiciary is limited if judges are more likely to make particular decisions because they feel that their tenure would be threatened if they were to decide otherwise. Several types of evidence— anecdotal evidence showing that particular judges have fulfilled campaign promises never to reverse death sentences, studies of death penalty relief rates after politicization, and surveys of judicial attitudes— suggest that the politicization of criminal justice issues and attaching consequences to unpopular rulings affect judicial decision making.

Researchers have attempted to evaluate systematically the degree to which judges feel pressured to vote to uphold death sentences. Using data that compared appellate reversal rates before and after events in

⁴⁹ There is evidence from around the country that judges may advertise the number of cases in which they upheld the death penalty. For instance in his retention election campaign for the Nevada Supreme Court, Justice Cliff Young ran an advertisement in which he demonstrated how tough he was on crime by giving the number of cases in which he had voted to uphold the death penalty. Steven Bright, *Judicial Review and Judicial Independence: Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 847 (1998).

⁵⁰ In the race for the First District Court of Appeals in 1996, incumbent Judge Lee Hildebrandt ran misleading television advertisements accusing his opponent of opposing the death penalty. The opponent, who lost, filed a grievance. The offending judge was found to have violated the judicial code of conduct. *In re* Judicial Campaign Complaint Against Hildebrandt, 675 N.E.2d 889 (1997). In a similar case from Georgia, George M. Weaver distributed a brochure that accused his opponent in the race for the Georgia Supreme Court of calling the electric chair silly. Like Hildebrandt, Weaver was found to have violated the state code of judicial conduct. Shepard, *supra* note 38, at 762. Weaver appealed to the federal courts, and in October 2002, a three-judge panel of the United States Court of Appeals for the 11th Circuit found unconstitutional portions of Georgia’s judicial canons that restrict misrepresentations in judicial campaign speech and that prohibit judges from personally soliciting campaign contributions. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

⁵¹ Bright, *supra* note 7, at 320.

⁵² Julie Mason, *Judge Devine enters Court of Criminal Appeals race*, HOUSTON CHRONICLE, July 28, 1999.

⁵³ Bright et. al., *supra* note 23, at 133. One of her former colleagues maintains that in five years on the court, she had kept that promise and never voted to reverse a capital case.

which the death penalty was highly politicized, John Blume and Theodore Eisenberg found that in California, Tennessee, and South Carolina, politics did have an impact on outcomes in death penalty cases.⁵⁴ In California, the event was the removal of Chief Justice Rose Bird; in Tennessee, the event was the removal of White. In South Carolina, the focal event was the pro-death penalty campaign of the state's attorney general. In each of these three states, the authors found a statistically significant decrease in reversal rates following these highly politicized pro-death penalty events.⁵⁵ The authors cautioned that politicization might not affect reversal rates in all states, however. Data from Texas and Mississippi did not show decreases in relief rates following highly publicized pro-death penalty events.⁵⁶

A third measure of the impact of the politicization on appellate and trial courts is the way judges feel about making unpopular decisions. There is some evidence that judges—and not necessarily judges who make decisions in the area of criminal law—feel the affect of politicization of their jobs. For instance, one recent study of Florida judges by the League of Women Voters found that close to 95 percent of the judges surveyed indicated they are conscious of the consequences that will follow from an unpopular ruling; a quarter of the respondents said this happens frequently.⁵⁷ Though the judges denied that being aware of the consequences affects their ruling, the vast majority, some 83 percent, indicated that they believed that their colleagues were affected by the consequences. As a reason for their concerns, judges in the survey cited recent attacks on courts and the likelihood that they would not be re-elected.⁵⁸ Even if the survey is correct and the knowledge that some decisions may have negative consequences does not affect a judge's final decision, the survey revealed that at least some judges behave differently when they are worried how a decision will be received. Some judges insisted they often spend more time drafting an opinion or order they fear will be unpopular.⁵⁹

⁵⁴ John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 499 (1999).

⁵⁵ *Id.* at 500-501.

⁵⁶ *Id.*

⁵⁷ Amy K. Brown, *Judges Say Politics Are Interfering with Independence*, 28 FLA. BAR NEWS, Oct. 15, 2001 at 1.

⁵⁸ *Id.*

⁵⁹ *Id.*