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COMMENTARY: ARE WE REPRISING A FINALE OR AN OVERTURE?

BY GERALD F. UELMEN*

I found reading Professor Thompson's paper a bit like looking through a knothole. Everything is explained in terms of California events. While California is frequently the precursor of national trends, the conflict between judicial independence and judicial accountability transcends local boundaries. The events of 1986 were strongly influenced by trends that are literally sweeping our nation. When viewed from that broader perspective, the 1986 election can be seen as an overture, rather than a finale as orchestrated by Professor Thompson. Before I explain that conclusion, however, I have a few quibbles with Professor Thompson's libretto, as well as his casting of characters.

(1) Quibble Number One: Justice Matthew Tobriner should not be cast as the Machiavelli of judicial activism. After hanging around Gideon Kanner so long,¹ I was beginning to share the belief that Tobriner's "Can Young Lawyers Reform Society Through the Courts?"² was some sort of manifesto for the due process revolution. By 1972, though, the revolution was over, New Chief Justice Warren Burger announced that young people who want to change the world should pursue a profession other than the law.³ I went back and reread Tobriner's speech, presented as a rebuttal to Burger's suggestion. It reads like the commencement speeches we all suffer through each and every year. It is an exhortation to represent the unrepresented and end the hypocrisy of giving people rights while denying them the means to enforce these rights. The revolution he espoused was not a sudden recognition that indigent people have rights. It was the mobilization of lawyers to provide representation to assert those rights.

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1. See Kanner, *Judging the Supreme Court Judges*, L.A. LAW., May 1986, at 31-32.

2. Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CAL. ST. BAR J. 295 (1972).

3. N.Y. Times, July 4, 1971, pt. 1, at 20, col. 3 (interview with Chief Justice Warren Burger).

If one were looking to cast a California Machiavelli who orchestrated the revolution, Justice Mosk would be a much more likely candidate. He was the chief architect of independent state grounds in California.⁴ The principal difference between Justice Mosk and Justices Grodin and Reynoso in terms of electoral vulnerability was on the death penalty issue. Nearly every decision presented in Professor Thompson's "hit parade" of California judicial activism was one in which Justice Stanley Mosk concurred.

Obviously, Professor Thompson prefers to view the 1986 election as some sort of grand referendum on judicial activism in California, which is not the way it played. The election reflected frustration on one issue—the death penalty. Thirty second television spots urged voters to cast three votes for the death penalty: "No on Bird," "No on Grodin," "No on Reynoso." Exit polls confirmed that this is what the voters thought they were doing.

(2) Quibble Number Two: Casting Chief Justice Rose Bird as chief villain of the piece is also an oversimplification. While she has served as "Chief Bogeyperson" for the far right for ten years, and will undoubtedly continue to be utilized by it for that purpose, an academic commentary should strive for greater objectivity. Professor Thompson's unflattering portrait of Chief Justice Rose Bird includes what can only be characterized as some "cheap shots." I found the suggestion that she set out to erase the memory of her predecessor, Chief Justice Donald Wright, particularly unfair.⁵ To draw that inference solely from her unavailability to attend a memorial service is just another unfortunate example of the petty sort of sniping she endured for ten years.

(3) Quibble Number Three: Professor Thompson seems to find merit in the campaign claim that the Court was responsible for delaying the disposition of death penalty cases. I think the record of the Bird Court will ultimately look good.⁶ Our new Court, despite doing little else, managed to decide six death penalty cases its first year. Delays are

4. See Goldberg, *Stanley Mosk: A Federalist for the 1980s*, 12 HASTINGS CONST. L.Q. 395 (1985).

5. See Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2024 (1988). No memorial service for Chief Justice Donald Wright has been published in the official California Reports, nor is the official Reporter even aware that the Court ever even conducted one. *Sic transit gloria mundi*.

6. In 1985, the Supreme Court decided 23 death penalty judgments. This was the first time since reinstatement of the death penalty in 1978 that the backlog was reduced. See UELMEN, CALIFORNIA DEATH PENALTY LAWS AND THE CALIFORNIA SUPREME COURT: A TEN YEAR PERSPECTIVE, REPORT TO CALIF. SEN. COMM. ON JUDICIARY, 12-14, Table 2 (1986).

not attributable to the circulation of opinions in a box. Most of the delays occur in settling the record, this is before the Court even hears a death penalty appeal.⁷ The cynical way we play politics with the death penalty in California should embarrass us, and it has not stopped. Our Supreme Court is literally being buried by a backlog of more than 200 death penalty cases. The Court is being reduced to little more than a death penalty review court, with the number of new hearings in non-death penalty cases cut in half and the depublication rate doubling during the past year. At the same time, prosecutors are gathering signatures to qualify an initiative to expand our death penalty law.⁸

(4) Quibble Number Four: Professor Thompson never mentioned the events of 1982. In 1982, the Court's disposition of a challenge to a wide ranging criminal justice initiative became the centerpiece of a political attack on the Justices up for confirmation. Justices Allen Broussard, Otto Kaus, and Cruz Reynoso were narrowly confirmed.⁹ The suggestion that Rose Bird's demise means a return to business as usual should not produce sighs of relief if business as usual is exemplified by 1982.

History may already be preparing for a replay. The 1988 California ballot in November will, in all likelihood, include the most far ranging criminal justice initiative in our history. In addition to expanding our death penalty law, it literally repeals the Bill of Rights in our state constitution for criminal defendants, provides for hearsay at preliminary hearings, reciprocal discovery, judicial voir dire, and the dismissal and jailing of defense lawyers who have the temerity to seek a continuance. If this initiative is enacted, the question of its validity will find its way to the Court some time before November of 1990, when five justices will again be on the ballot.¹⁰ Rose Bird's absence may mean we will not have to suffer through 1986 again, but I'm not looking forward to returning to the "good old days" of 1982 either.

Enough of my quibbling, I will now begin my serious criticisms. Professor Thompson's bottom line seems to be the comfortable notion that our retention elections are a safety valve, which will be utilized only when Justices stray too far over the line. We can rely on the paragons of

7. Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243, 247 (1988).

8. Initiative Measure, "Crime Victims Justice Reform Act of 1988."

9. Justices Broussard, Kaus and Reynoso were confirmed by margins of 56.2%, 57% and 52.4% respectively. L. A. Daily J., Nov. 4, 1982, pt. 1, at 1, col. 1.

10. Chief Justice Lucas and Justices Arguelles, Eagleson, Kaufman, and Panelli will be up for retention in 1990.

the bar to ride to the rescue if the safety valve is abused and turned against a justice who the bar holds in great esteem.

I submit that this is a delusion which ignores the reality of what is happening in nearly every state across our nation.¹¹ Supreme Court elections are taking on all the trappings of other political contests. Fund-raising, campaign committees, slate mailers, thirty second TV spots—it's a world where money talks. As Jesse Unruh put it, money is the mother's milk of politics, and we live in a world where lots of the sucklings will be wearing black robes.

The issues being debated in these contests are *not* the issues we have been discussing at this conference. They are not the questions Michael Moore has on his list.¹² The questions are much more simple: Should a judge who votes to reverse the conviction of a heinous killer be kept on the bench?¹³

Professor Thompson's suggestion that independence is not as essential for state judges because we have Article III judges to protect minorities in federal court is disingenuous. The issues that state judges are most vulnerable on are issues that are, as a practical matter, immune from federal review. In death penalty cases, for example, there will frequently be errors. The appellate judge must struggle with whether it was "harmless." Federal judges will be loath to second-guess that judgment. While I share Professor Thompson's confidence that "good" judges will ignore the political consequences of unpopular decisions, these "good" judges will be the very ones most likely to be removed. The "bad" ones will survive. If history teaches us anything about "bad" judges, it is that invariably they're the judges who remain "good" politicians after donning their robes.¹⁴

Our system of retention elections does not insulate our Court from this world. The margin of safety for judges on retention ballots is rapidly declining to the point that one unpopular decision can make *any* justice vulnerable.¹⁵ Since a retention election system permits no limitation on the tactics or fund-raising of the opposition, and since the incumbent is

11. Schotland, *1986 - A Historic Year for Judicial Elections*, 70 JUDICATURE 246 (1987).

12. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984).

13. See, e.g., *John Dixon Doesn't Think 20 Stab Wounds are Enough*, Shreveport Times, Sept. 18, 1988, (full page advertisement).

14. See, e.g., Uelmen, *Recalling 1932: The Bench Preserved*, L. A. LAW., Feb. 1983, at 14.

15. Hall & Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 344 (1987).

expected to behave like a judge, I believe contested retention elections are the most unfair system of all judicial elections.

I have little confidence that retention elections can be abolished in California, but there are some steps which can be utilized to minimize their impact upon the judicial process. I have proposed restructuring the terms of office of our justices to give every justice a full twelve-year term, and subjecting them to confirmation elections as soon after their appointment as possible.¹⁶ This would minimize the use of retention elections as a "referendum" on the popularity of previously rendered decisions.

The California events of 1986 should not be dismissed as an aberration. Political forces have been unleashed that will return to haunt us. To shrug it all off as just another example of how "unfair" life is might be a satisfactory finale for an opera, but it's going to become increasingly difficult to find Gibsons or Traynors to sing for us if the role of Supreme Court Justice requires a recurring stint as a political campaign fundraiser.

16. Uelmen, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333 (1988).

