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The State of Wyoming prides itself on the quality of its judiciary. The process of selection and retention of judges is supposedly based upon the merit of those judges. Yet research has cast some doubt as to the validity of the judicial retention election as a means of accurately evaluating merit, indicating that voters have little information about judicial competence. The authors of this article conducted a study of Wyoming's 1978 judicial retention elections. They present their findings concerning the amounts, sources and effects of information possessed by Wyoming voters in those elections, and offer suggestions for improvement of the judicial retention election system.

JUDICIAL MERIT RETENTION IN WYOMING: AN ANALYSIS AND SOME SUGGESTIONS FOR REFORM

by

Kenyon N. Griffin and Michael J. Horan***

The selection and retention of judges under the Missouri Plan has been one of the more significant developments in the judicial process during the past quarter-century.¹ The plan itself or variations of it have been adopted for all or some of the judges in at least 20 states as a substitute for the election of judges. The attractiveness of the Missouri Plan stems in part from what have been the perceived flaws in the direct popular election of judges. A major problem has been voter apathy in both partisan and non-partisan judicial elections. Studies have shown that most voters are poorly informed about candidates for judicial office and

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1. See generally JUDICIAL SELECTION AND TENURE: SELECTED READINGS (G. Winters ed. 1967); JUDICIAL SELECTION AND TENURE (S. Escovitz, et al. comps. 1975).

frequently cannot recall the names of persons for whom they voted—if they even bothered to choose between judicial candidates at all.

In partisan elections, it has been shown that the dominant source of information for voters regarding judicial candidates is the party endorsement; this informational source is followed by conversations with friends, the media, and bar association recommendations.² Non-partisan election of judicial candidates, in contrast to partisan elections, removes the formal political party influence, but not without dubious consequences. Without party endorsements, the result is increased voter non-participation and the strengthening of the role of incumbency in electoral outcomes.³ In either case, the direct popular election of judges has been a selection procedure permeated with apathy, ignorance, and the impact of essentially irrelevant factors such as partisanship or money.⁴

The first ingredient of the Missouri Plan, “merit selection,” confronts these problems by eliminating the initial choice of judges by the voters and substituting instead a procedure wherein it is felt expertise and wisdom will be the dominant considerations. This procedure utilizes a judicial nominating panel of lawyers and non-lawyers to recruit and nominate several individuals who are qualified to fill a judicial vacancy. This fundamentally elitist procedure of “merit selection” is balanced by providing for final selection by the popularly elected chief executive of the state and, subsequently, requiring voter approval after the newly appointed judge has served a probationary period on the bench.

2. Klots, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUD. Soc'y 134 (1955). See McKnight, Schaefer, & Johnson, *Choosing Judges: Do the Voters Know What They're Doing*, 62 JUDICATURE 95 (1978); Brocksmith, *Oklahoma Poll Shows Court Voters in the Dark*, 50 JUDICATURE 134 (1966).
3. Winters & Allard, *Judicial Selection and Tenure in the United States, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 158-59 (H. Jones ed.) (1965). See also Jacob, *Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801, 806-808.
4. For a somewhat different estimate of the apathy problem in judicial elections, see S. NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* (1 American Politics Series 04-001, Sage Pubs. 1973); Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865 (1979).

The second ingredient of the Missouri Plan, "merit retention," provides the voters an opportunity to evaluate a judge's record and qualifications and cast their ballots to retain the judicial officer or to remove him or her from the bench. In principle, the public's opportunity to participate in merit retention election of judges is the ultimate check on judicial accountability. Judges, not unlike members of the legislative and executive branches of the government, face the voters and the voters determine whether judicial conduct and performance reflects the public interest.

Critics of this aspect of the Missouri Plan have argued that merit retention elections are empty pretenses at maintaining popular accountability of judges. They argue that, given the generally low visibility of judicial personnel and issues, the absence of traditional party guidelines, and the lack of personality clashes during election campaigns, the voters have no way of making an informed decision about the performance of a judge on the bench.⁵ Inevitably, if one follows these arguments, merit retention elections of judges are nothing more than plebiscites guaranteeing the incumbent a top-heavy majority vote.

The linkage between the voters' knowledge of judges' records and qualifications and their voting decisions in merit retention elections is critical if popular accountability of the courts is to be meaningful. The purpose of this article is to examine this linkage, based upon analyses of the results of the 1978 judicial retention elections in this state as well as a survey of Wyoming voters conducted the same year, and to discuss the implications and potential policy alternatives of these findings within the context of public accountability of judicial officials.

WYOMING'S 1978 JUDICIAL RETENTION ELECTIONS

Wyoming adopted the Missouri Plan for the appointment and retention of state district court judges and su-

5. See Barnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098 (1966); Wormuth & Rich, *Politics, the Bar, and the Selection of Judges*, 3 UTAH L. REV. 459 (1953).

preme court justices in 1972.⁶ Appointments to the bench are made by the governor from a list of three qualified persons nominated by the Wyoming Judicial Nominating Commission. Each judge or justice is then required to stand for retention during the November general election after the first year of service, and subsequently every six years for judges and eight years for justices. The election is non-partisan and non-competitive; the ballot question is: "Shall Judge be retained in office?" Unless one chooses to abstain, the only response the voter may give is "yes" or "no."

Wyoming is divided into nine judicial districts served by 15 state district court judges (see map). Seven districts are multi-county units comprised of two, three or four counties. In three of these districts, one judge serves the entire area, while in four districts two judges serve. In both types of districts, each judge has a "home" county and travels to one or more counties within his jurisdiction. The other two judicial districts in the state are single-county units. Natrona and Laramie counties—the most populous counties in Wyoming—comprise separate judicial districts and each has two resident judges.^{6a}

In 1978, five of the fifteen state district court judges were required to stand for retention. The names of these five judges were on the ballot in thirteen different counties; included were both single and multi-county judicial districts. The election results reveal, as shown in Table 1, that each judge received overwhelming support for retention from the voters. All five were retained, and an average of 79.5 percent of those voting on the retention question favored retaining their state district court judge. In no district did a judge receive less than 77 percent of the votes, though support by county ranged from a high of 89.8 percent for Judge George Sawyer in Goshen County to a low of 71.8 percent for Judge Paul Liamos in Campbell County.

6. WYO. CONST. art. 5, §4. The plan's provisions have also been extended by law to county court judges in the state. WYO. STAT. §5-5-111 (Supp. 1979).

6a. By legislative action, one additional district court judge has been allotted to the Sixth and to the Eighth Judicial Districts respectively, effective July 1, 1980. 1980 WYO. SESS. LAWS Ch. 20, §§1, 3.

**Wyoming Judicial Districts
and District Judgeships**

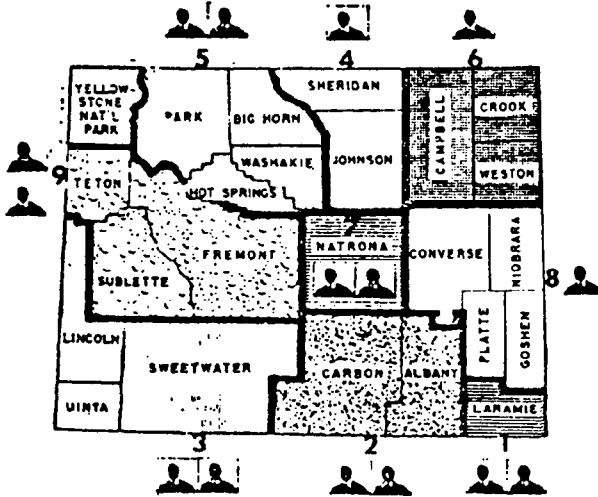


TABLE 1
1978 JUDICIAL RETENTION ELECTIONS IN WYOMING

JUDGE	COUNTY	RETENTION ELECTION TOTALS		GENERAL ELECTION TOTALS	
		% Yes	% No	% Abstention	Voting
Robert A. Hill	Albany	79.0	21.0	24.8	9,895
	Carbon*	83.0	17.0	25.3	6,000
	TOTALS	79.3	20.7	25.0	15,895
Paul T. Liamos, Jr.	Campbell	71.8	28.2	11.1	4,834
	Crook	87.3	12.7	12.5	1,973
	Weston*	80.0	20.0	12.7	2,518
	TOTALS	77.2	22.8	11.8	9,325
R. M. Forrister	Natrona*	78.7	21.3	11.3	19,821
	TOTALS	78.7	21.3	11.3	19,821
George P. Sawyer	Converse	75.2	24.8	26.9	3,184
	Goshen*	89.8	10.2	6.9	4,821
	Niobrara	85.3	14.7	27.7	1,382
	Platte	81.9	18.1	20.2	3,566
	TOTALS	84.1	15.9	17.1	12,853
Robert B. Ranck	Fremont	76.3	23.7	21.8	10,433
	Sublette	77.4	22.6	14.3	1,849
	Teton*	83.7	16.3	7.5	3,909
	TOTALS	78.4	21.6	17.5	16,191
WYOMING SUMMARY	All Races	79.5	20.5	16.8	74,185

*District Court Judge's "home" county.

Source: Data furnished by the Secretary of State's Elections Office.

Strong popular support for retaining the judges should not, however, obscure another important finding from the 1978 election results. Comparison of the number of persons voting in the general election and on the specific issue of judicial retention reveals that an average of 16.8 percent of the voters abstained on the retention question. The rate of abstentions ranged from a low of 6.9 percent in Goshen County, to a high of 27.7 percent in Niobrara County. Voter abstention rates were typically lower in a judge's home county than were the rates found statewide.

The results of Wyoming's judicial retention elections were similar to the results of merit retention elections of trial court judges across the nation.⁷ In 1978, 408 such retention elections were held, including the five in Wyoming. Two findings are especially noteworthy: First, only twelve of the judges (2.9 percent) were not retained in the thirteen states where trial court judges were up for retention. Second, an average of 73.4 percent of the voters in these states favored retaining their judge; the percentages ranged from a high of 80.0 percent in Kansas (and 79.5 percent in Wyoming) to a low of 64.1 percent in Alaska. These findings tend to support those critics of merit retention who argue that the plebiscitary nature of the process inevitably results in landslide victories for the incumbent judges.

Data for comparisons of voter abstention rates in those states which held retention elections in 1978 are not available. However, a recent study of judicial retention elections between 1948 and 1974 found an average abstention rate of 36 percent.⁸ Wyoming voters in 1978, in contrast to this quarter-century average, were much less likely to abstain on the judicial retention question. But even so, the abstention by an average of 16.8 percent of Wyoming's voters on judicial retention was significantly higher than in other races in the 1978 general election. Only 3.3 percent abstained

7. The 1978 judicial retention election results nationwide, for both trial and appellate judges, are summarized in Griffin & Horan, *Merit Retention Elections: What Influences the Voters?* 63 JUDICATURE 78, 81 (1979).

8. DUBOIS, *supra* note 4.

in the gubernatorial balloting, while eight to ten percent abstained in the other contests for state office.⁹

The Wyoming judicial retention results—including the 4 to 1 majority for retention and the 1 to 6 rate of abstentions—raise important questions about the information available on the record and qualifications of judicial personnel, and how such information relates to the voters' decisions. If the merit retention election is to serve as the primary mechanism for public accountability of judges, the voters must have sufficient information and knowledge about a judge to make a rational voting choice. In competitive elections, the election campaign plays an important role in providing information for the voters. Such information, particularly as it arises out of political debate, can be the basis for a more informed voting decision.

The 1978 judicial retention elections, in contrast to the statewide races and most local contests, produced no election campaigns conducted by, for, or against the five judges standing for retention. No funds were expended by any of the judges personally, nor were monies spent by political action groups, according to the Secretary of State's Elections Office. The Wyoming State Bar, concerned about the lack of information available to the voters in previous judicial retention elections, conducted a judicial evaluation poll in May of 1978. The bar poll results showed that an average of 80.7 percent of the lawyers who had practiced before the five judges in the previous year supported their retention; support ranged from a low of 75.3 percent for one judge to a near unanimous 98.9 percent for another.¹⁰

Publication of the bar poll failed to stimulate any significant discussion of the record and qualifications of individual judges up for retention. The state bar association released the lawyers' recommendations to the media,

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9. K. Griffin & M. Horan, *Informational Levels and Voting Behavior: Judicial Retention Elections in Wyoming* 10-13 (paper delivered at the annual meeting of the Western Social Science Association, Incline Village, Nevada, April 27, 1979).
 10. Based upon information released to the media by the Wyoming State Bar and published in Wyoming newspapers in October, 1978.

but did not otherwise engage in any campaign to influence voters in the upcoming elections. A survey of daily and weekly newspapers in each county within the five judicial districts found that the news release was published. However, interviews with the editors of these papers found that only one wrote an editorial regarding the retention of the judge in his district.

In summary, the 1978 judicial retention elections in Wyoming were not only non-competitive and non-partisan, but non-controversial as well. Interestingly, practicing lawyers who knew the judges gave them a 4 to 1 margin favoring retention, just as the voters did in November. A key question which emerges from these impressive figures, however, is this: Given the political context in Wyoming preceding the retention elections, did those voting have sufficient knowledge about their judge to make a rational and informed voting decision? This question goes to the heart of the Missouri Plan and public accountability of judges. It is to this issue which we now turn.

JUDICIAL RETENTION AND INFORMATIONAL LEVELS

The linkage between the voters' judicial retention decisions and their informational levels was a primary focus of the 1978 Wyoming Election Year Survey's post-election interview. No previous surveys, based on our review of the relevant literature, had studied voting behavior in non-competitive judicial retention elections. Starting with the conclusions of other studies which emphasized voter ignorance and apathy, we formulated a series of questions which sought to determine the voters' perceptions of their informational levels relative to the judicial conduct and performance of the five judges up for retention.

The post-election interview was part of a panel study of 1,020 Wyoming residents. The pre-election survey was conducted during the three weeks prior to the November general election; it consisted of a forty-minute personal interview with respondents who were selected using a

random clustered method.¹¹ The pre-election interview included questions on political attitudes and behavior, public policy issues, and demographic characteristics. The post-election interview, conducted by telephone, asked questions on voting choices for various statewide races as well as the judicial retention question. The findings discussed below are based on a sample of 336 voters who lived in the 13 counties where the judicial retention issue was on the ballot.

The first judicial retention question focused on the voter's decision to retain the state district court judge. Each was asked: "Do you recall how you voted on Judge _____? Did you vote to keep him in office, did you vote against him, or don't you recall how you voted?" The overwhelming majority of those interviewed—as in the case of the actual vote—voted for retention. However, a finding of equal interest is that one-fourth of the sample indicated either that they could not recall how they voted or volunteered that they abstained on the judicial retention issue. The sample included 65.6 percent who voted for retention and 10.0 percent who voted against retaining the judge in their district; however, 18.7 percent could not remember whether they voted for or against retention, while the remaining 5.7 percent said they abstained.

After asking how each respondent voted, we turned to a series of informational questions. First, we asked: "Overall, how much information did you have about the record and qualifications of Judge _____ to serve as a District Court Judge in your county?" Over half the voters—51.2 percent—reported that they had "no information at all," while 27.6 percent said they had "some" information and 21.2 percent reported that they had "a great deal" of information about the judges for whom they voted.

11. For a discussion of the sampling design and methodology of the survey, see K. Griffin, *Public Policy Issues: The 1978 Wyoming Election Year Survey* (University of Wyoming, Center for Government Research, 1979).

Second, we asked about the role of the Wyoming State Bar Poll as an information source in their decision to vote for or against retention. Before asking whether they had read or heard about the findings of the bar poll, the respondents were informed that all those lawyers who had practiced before the judge in their district had been asked whether or not the judge should be kept in office. In response to the question: "Did you read or hear about the findings of this poll?", only 12.8 percent reported that they were aware of the bar poll. A follow-up question found that only 5.1 percent of the sample reported that their retention decision had been influenced by the lawyers' recommendations.

Finally, we asked the respondents to indicate the sources of information which were important to them in deciding how to vote on the judicial retention issue. Personal contacts or observations of the judge was the single most frequently cited source of information; this was noted by 32.7 percent of the sample. The second-ranked source of information—conversations with friends or acquaintances—was cited by 22.0 percent, while 17.3 percent indicated that the media—newspapers, radio, television—were important sources of information in their decision.

In summary, two profiles of the Wyoming voter confronted with a judicial retention decision emerge from these findings. The first profile is characterized by the person who has no information on the judge, his record or qualifications for sitting on the bench. For this "uninformed" voter, we assume that the retention question has little or no importance for his or her political life. The second profile is characterized by the person who perceives that he or she has at least some minimal level of information about the judge and his qualifications and, presumably, the judicial retention issue has some salience. Among these "informed" voters, 48.6 percent reported that their knowledge was based on a single source of information, while 40.6 percent relied on two sources and only 10.8 percent utilized

three sources of information in making their decision on judicial retention.

INFORMATIONAL INFLUENCES ON VOTING

The preceding analysis suggests that, when confronted with a judicial retention decision, Wyoming voters can be characterized on two significant dimensions. First, when asked about their voting choices, they reported that they (1) made a decision and remembered whether the choice was "yes" or "no," or (2) decided not to decide and "abstained" or (3) remembered voting but could not recall whether they opted for or against retention. Second, when asked about information sources, the voters were rather evenly split between the "uninformed" who had no information on the record and qualifications of the candidate, and the "informed" voter who reportedly had received at least some minimal level of information.

Do informational levels influence the judicial retention decisions made by voters? As Table 2 shows, our survey of Wyoming voters supports the conclusion that judicial retention choices are made in large measure without regard to information sources. Focusing on those in the sample who clearly recalled voting either "yes" or "no" on retention, we found that information about the judge's record and qualifications for office, as well as whether the voters had heard of the bar poll, had personal contact with the judge, had talked with friends about the judge, or had media information, did not significantly influence the voters' choice. However, when the above three sources of information were summed into a judicial information index, we found that a slight difference emerged. Those reporting two or three sources of information were the least likely to vote for retention of their judge, while those with only one source were the most likely to vote for retention.

The conclusion that information is not related to voting "yes" or "no" on judicial retention is based on only a part of our sample, however; it does not include those who said

they “abstained” or could not remember how they voted, if indeed they did. When these individuals are included in the analysis, as also shown in Table 2, information levels were found to be significantly related to the voters’ *recollections* of their decision. What this analysis suggests is that the *uninformed* are the “abstainers” and the “forgetters,” while the *informed* are the voters.

Interestingly, only one source of information on the retention question differentiates the *uninformed* from the *informed*. For example, only 2.7 percent of those who reported having any information on the record and qualifications of the judge either abstained or could not remember how they voted, but 45.1 percent of those who said they had no information about the judge abstained or could not remember. Even having heard of the Wyoming State Bar Poll made a difference; only 1.6 percent of those who had heard about the lawyers’ recommendations either abstained or forgot, compared to 27.8 percent of those who had not heard of it.

The importance of the three sources of information about which the voters were asked is also linked to their *recollections*, though, as noted above, not their voting choice. Only 0.6 percent of those who had personal contacts with the judge abstained or could not remember how they voted on judicial retention, compared to 35.9 percent who did not have such contacts. Among those influenced by friends, 2.2 percent abstained or forgot, compared to 31.0 percent for those without such influences. Finally, of those who cited the media as an informational source which influenced their retention decision, only 1.2 percent abstained or could not recall, while 29.3 percent of the “no-media” group abstained or forgot.

To further examine the effects of information sources on judicial retention decisions, we combined the three sources—personal contacts, conversations with friends and the media—into an informational index again. The effects of increasing informational levels are clear. First, among

those with none of these informational sources, one-third could not recall how or even if they voted. Second, of the 150 voters in the sample with one or more sources of information, only one abstained and one forgot what his or her decision was.

In summary, two major findings emerged from the above analysis of Wyoming voters. First, the evidence is so convincing that we must conclude that information sources had little, if any, influence upon the voters' judicial retention decisions. The informational variables included in our 1978 survey do not explain why some voters, in fact, the overwhelming majority, voted "yes" on judicial retention, while others voted "no." Second, we found that voters who had information about judges standing for retention are more likely to recall how they voted on the judicial retention question. Furthermore, a single source of information raises the judicial retention issue out of the realm of ignorance and apathy. While voters may not be especially well-informed, the fact that those with even one source of information can remember voting either "yes" or "no" on retention has profound implications for the problem of voter apathy in merit retention elections.

DISCUSSION AND POLICY ALTERNATIVES

The public is rarely in a position to know in advance how good a judicial candidate is, but if his record as a judge is outstandingly poor, the voters can ascertain the facts, and in the merit retention elections they have a means of removing him.¹²

But How Do They Ascertain the Facts?

In one sense, the behavior of Wyoming voters in the 1978 judicial retention elections enables the proponents of merit retention to assert that it is functioning just as it was intended to function. Political partisanship, personalities and electioneering played no visible role in the voting; the Wyoming State Bar fulfilled its obligation to advise the

12. Winters & Allard, *supra* note 3, at 164.

TABLE 2
INFORMATIONAL SOURCES AND WYOMING VOTERS' JUDICIAL RETENTION DECISIONS
RECOLLECTION OF VOTING DECISION +

	Yes	No	N	Remembered that they Voted	Remembered that they Didn't Vote	Couldn't Recall how or if they Voted	N
INFORMATION ON JUDGE'S RECORD							
None	88.6%	11.4%	59	54.9%	9.7%	35.4%	172
Some	85.6	14.4	160	97.3	1.5	1.2	164
HEARD OF BAR POLL							
No	86.6	13.4	211	72.2	6.3	21.5	293
Yes	87.5	12.5	42	98.4	1.6	0.0	43
PERSONAL CONTACT WITH JUDGE							
No	88.6	11.4	144	64.1	8.4	27.5	226
Yes	84.3	15.7	109	99.4	0.0	0.6	110
TALKED WITH FRIENDS ABOUT JUDGE							
No	89.2	10.8	180	69.0	7.0	24.0	262
Yes	84.0	16.0	57	97.8	2.2	0.0	74
MEDIA INFORMATION ABOUT JUDGE							
No	87.5	12.5	196	70.7	6.9	22.4	278
Yes	84.0	16.0	57	98.8	0.0	1.2	58
JUDICIAL INFORMATION INDEX*							
No Sources	88.7	11.3	107	57.1	9.7	33.2	188
One Source	93.1	6.9	72	98.8	1.2	0.0	72
More Than One Source	77.9	22.1	77	98.7	0.0	1.3	78

*Based on a chi square test, this was the only statistically significant relationship found among the six information sources at the .05 level. +Each of these relationships were significant at the .001 level, based on the chi square test of independence.

electorate concerning its support or non-support of the judges running for retention; and finally, all five of the candidates were retained in office by popular majorities which were not only overwhelming, but also in rough proportion to the support the judges had garnered from the state bar poll.

On a deeper level, however, there is surely cause for disappointment and concern. Satisfaction with the outcomes of the 1978 judicial retention elections should not be permitted to obscure the troublesome features of the overall process by which these fortuitous results were obtained. While likely not unique to Wyoming, this process was permeated with voter lack of information about the candidates and by a sizeable proportion (about one out of six) of the electorate who failed to vote on the question of retention. In a low-populated state where politicians emphasize the informality of first names and voters typically know or have met elected officials, half the people voting admitted they knew nothing about the record and qualifications of the judge on whom they had been asked to pass judgment upon. Even more importantly, informational sources and levels seemed to make no difference in their decision to support or oppose the retention of their judge—a decision supposedly based upon “merit.” Of course, abstention and lack of information are not confined to popular election of candidates for the bench; they have been noted as matters of increasingly serious concern on all levels of the governmental spectrum, legislative and executive, as well as federal, state and local. Yet, it seems likely that those very conditions which are perceived as the *virtues* of merit retention of judges—the exclusion of political parties (the feature of nonpartisanship) and the absence of the clash of personalities (the noncompetitive feature)—also exacerbate the problems of voter knowledge and participation. Without the stimuli of party labels and candidate competition, and in an atmosphere where fear of politicizing the courts places severe informal restraints on the public

debate of judicial "issues,"¹³ many voters see merit retention elections as devoid of any real significance.¹⁴ Although merit retention under these conditions, both in Wyoming¹⁵ and elsewhere has long operated to the decided advantage of incumbent judges, another consequence has been to lend strong credence to those who charge that the process is nothing but window-dressing, a facade for maintaining popular accountability of judicial officers by means of a plebiscite whose favorable outcome is assured in advance.¹⁶ While this means that good judges are more or less routinely kept in office, so are the mediocre and even poor ones. Indeed, the pro-incumbent tendencies of merit retention are so formidable that in some jurisdictions opposition by the bar and the press has failed to prevent judges from rolling up heavy majorities for retention in office.¹⁷

Reactions in the legal community to the disappointing aspects of merit retention plans in operation have followed divergent paths. Probably the most frequently traveled one has been in the direction of strengthening the perceived weak points in the merit retention process, including better bar poll procedures and stimulating public awareness of the personnel and activities of the judicial branch of government. On the other hand, disillusionment with merit retention has led more pessimistic observers to call for the abandonment of the plan and a shifting toward more adequate institutional safeguards for dealing with individuals who transgress the bounds of judicial propriety.

In which direction should Wyoming move? While any response will undoubtedly be colored by one's philosophical position and value-orientation in matters connected with the judiciary, it would seem reasonable to be guided not only by a prudent awareness of what is at any one time

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13. Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128.
 14. See Dubois, *supra* note 4; Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 LAW & SOC'Y REV. 757 (1979).
 15. Out of the total of 22 merit retention elections held in Wyoming since 1972, only one judge has been turned out of office by the voters.
 16. Wormuth & Rich, *supra* note 5.
 17. See Griffin & Horan *supra* note 7, at 82-83, and the sources cited therein.

practicably attainable, but also by a consideration for fundamental principles of the political community in which we live. In this light, it would also seem reasonable that in a democratic society we determine whether a form of popular election of important public officials which is not working as expected can first be *reformed*, before we consider dismantling it altogether. Efforts should be made to cure the patient before pronouncing him dead. If the political doctrine of popular accountability, which, after all, is the principal justification for requiring *any* public official to run on an election ballot in *any* way, really does mean that the people should have some *direct* voice in who shall staff their courts, then attempts should be launched to correct the defects of merit retention; and only if these prove unworkable or otherwise practicably insoluble, should more radical measures be considered. The forms of *corrective* action for the deficiencies of merit retention in Wyoming may at first glance seem novel, but fortunately they are not without precedent in other states. As with so many other community problems, the greatest opportunities, as well as responsibilities, fall on the shoulders of the bar and the press.

Possible Bar Poll Reforms

Up to now, studies have demonstrated that the standard practice of polling members of the bar about a candidate running for retention, and then simply furnishing a raw tabulation of the overall results to the newspapers for publication and the presumed edification of the voters, is inadequate as a means of "informing" the public about the qualifications and record of a judge. This procedure, which has been followed in large measure by the Wyoming State Bar for judicial retention elections since 1976,¹⁸ clearly did not reach a very large proportion of the electorate in 1978, and evidently had limited effect upon those it did

18. While the 1978 state bar poll in Wyoming happily went beyond the straw-poll variety in order to gauge respondent attitudes concerning specific criteria applicable to a judge's performance, the practice of the bar has been to release to the public only the summary data from responses to the ultimate question concerning whether the subject of the evaluation should or should not be retained in office.

reach.¹⁹ While the concept of providing the lay public with a considered evaluation of a judge's professional qualifications by those of his colleagues who come into contact with him in their work offers, in theory, a valuable informational guideline for enabling the voters to make a more intelligent decision on whether to retain officials with a comparatively low degree of visibility in the public eye,²⁰ the tool by which this evaluation is gathered must be carefully designed. If all of the lawyers in a retention candidate's jurisdiction are to be surveyed, stringent controls must be employed to (1) assure that the resulting evaluation is based upon the responses of only those who have first-hand knowledge about a judge's performance in office, and (2) dispel the suspicion that a negative evaluation will somehow lay the respondent open to retaliation, by guaranteeing to the maximum feasible extent that all respondents will remain anonymous. The survey instrument, whether personal interview or mail questionnaire, should go beyond the simple "Do you think Judge X should be retained in office. Yes or No?" type of question so characteristic of straw polls, and seek to elicit the grounds for this ultimate answer, based upon specific criteria related to a judge's performance in office.²¹ An analysis of the resulting data, with percentage figures, should be submitted to the press after being shown to the candidate himself for inspection and comment. The press' cooperation in publishing a *full* summary of the results

19. See pp. 576-579 *supra*.

20. To be sure, influencing the electorate is only one of the purposes served by bar polls. Another, sometimes overlooked, use of these devices is to encourage self-improvement by judges by providing them with evaluative feedback from the bar even when a retention election is not imminent. The Wyoming State Bar in 1978 polled its members concerning all of the district and supreme court judges in the state with this end in mind. Unfortunately, the limited amount of data from the poll that was released to the public pertained only to the five judges running for retention that year. As a leading study of bar polls in the United States has indicated, however: "To maximize the influence of a judicial performance poll, full public disclosure is required. Even if self-improvement by the judiciary is the major goal, public awareness of the poll results should provide a stronger impetus for change." D. MADDI, JUDICIAL PERFORMANCE POLLS 22 (Research Contributions of the American Bar Foundation No. 1, 1977). See also C. PHILIP, HOW BAR ASSOCIATIONS EVALUATE SITTING JUDGES 14-20 (1976). But see Douglas, *Could Jurors Reach a Verdict on Judges, Too?* 62 JUDICATURE 57 (1978). Bar poll data on all judges could prove valuable background information for the work of the Wyoming Judicial Supervisory Commission as well. See generally pp. 589-591 *infra*.

21. PHILIP, *supra* note 20; MADDI *supra* note 20, at 1.

should be enlisted, in order to avoid distortions or misunderstandings in the minds of the public.²²

The role of the organized bar in judicial retention elections need not conclude at this point. Bar assistance to approved candidates, in the form of explicit endorsements in the media, and, in some circumstances, even financial assistance (e.g., for publicity purposes), should be seriously considered.²³

There is also no reason why others besides lawyers who have had the opportunity to observe a judge in action could not comment intelligibly about his demeanor on the bench. Alaska has found it worthwhile to poll all of the jurors who have served in a retention candidate's courtroom during his term, as well as law enforcement officers in the state. The results are disseminated to the public prior to the retention balloting.²⁴ Designed with care to assure the reliability of the results, such surveys can provide different informational perspectives to the electorate than the traditional bar poll, which is sometimes regarded by segments of the general public as smacking of elitism. Further input could be obtained through trained monitoring of court proceedings by concerned civic groups, such as the court watching project undertaken by the Illinois League of Women Voters in 1975.²⁵ Programs of this kind were established by private organizations in a number of states during the 1970's and, while sometimes accused of axe-grinding, have helped to contribute information about judges

22. For an account of a recent bar poll and newspaper effort to convey reliable and meaningful information to the electorate prior to voting on retention of judges, see the articles in the *Denver Post* on Oct. 1, 1978 (pp. 2, 50); Oct. 8, 1978 (p. 2); Oct. 29, 1978 (pp. 58-60).

23. See generally Meidinger, *Bar Polls: What They Measure, What They Miss*, 60 *JUDICATURE* 469, 473 (1977); Hyde, *The Missouri Plan for Selection and Retention of Judges*, 9 *F.R.D.* 457, 462 (1950).

24. Rubenstein, *Alaska's Judicial Evaluation Program: A Poll the Voters Rejected*, 60 *JUDICATURE* 478 (1977). By law, the Alaska Judicial Council (the judicial nominating agency under Alaska's plan of merit selection of judges) is required to evaluate judges running for retention and disseminate this evaluation to the public prior to the election. If it wishes, the Council may even recommend to the public whether it should vote yes or no on any particular candidate. *ALASKA STAT.* §22.10.150 (1976).

25. See *New York Times*, Feb. 24, 1977, at 18.

to the voting public.²⁶

The Role of the Press and Other Mass Media

The press has a vital role in this process of informing the public, of course. In addition to serving as a vehicle for the transmission of the views of the bar and other interested groups, it has the duty as well as the right to provide voters with evaluations of its own concerning judges whose names appear on the retention ballot. The complexities of legal procedure and the "cult of the robe" ought not to be permitted to immunize the occupants of the judicial branch of government from the scrutiny given other public officials. A somewhat cynical (but possibly true) observation has it that in order for a judge to be removed from office in a retention vote, he would have to commit a crime or a flagrant moral offense.²⁷ But is grave scandal the only touchstone of unfitness to hold judicial office which the electorate may take cognizance of? Surely not. Certainly other kinds of misbehavior or personal deficiencies, such as chronic neglect of duty, laziness, intemperance, and arbitrariness by judges are also deserving of censure; and these ought to be apparent to news reporters, not just lawyers—assuming, of course, the news media recognize an obligation to cover the courts and keep the public informed about their judges.

To be sure, the court-reporting capabilities of any news organization are limited by the constraints of time, staff resources, the nature of the medium, and the technical complexity of the subject itself. What coverage the *New York Times* and the *Washington Post* give to the law in their pages is not a practical yardstick for the coverage by the *Casper Star-Tribune* or the average small-town daily

26. Stecich, *Keeping an Eye on the Courts: A Survey of Court Observer Programs*, 58 JUDICATURE 468, 472 (1975); Nejeleski, *Judging in a Democracy: The Tension of Popular Participation*, 61 JUDICATURE 166 (1977). See also Winsor & Dunn, *Keeping an Eye on the Courts in Massachusetts*, 57 JUDICATURE 111 (1973); Weinstein & Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156 (1977).

27. See Jenkins, *Retention Elections: Who Wins When No One Loses?* 61 JUDICATURE 79 (1977).

in Wyoming. However, while wire service (United Press International) and local newspaper reporting about the activities of the judicial branch of state government has made noticeable improvements in the past decade, most news stories still consist of either lists of court appearances and dispositions, or event-centered items (such as controversial criminal trials or important decisions of the Wyoming Supreme Court). The latter of these especially characterizes court news broadcast by radio and television stations within the state. On the other hand, in-depth analyses of the decision-making tendencies of particular tribunals or judges are relatively uncommon, as are items localizing national or state legal news stories.²⁸ Perhaps most fundamental of all here is the need to educate the public concerning the contemporary significance of the courts in the making of public policy. In a society accustomed to thinking of the courts as refereeing essentially private disputes according to pre-established norms of law, it is important to recognize the judicial function in helping to create those norms.²⁹ Newspapers analyses and television documentaries frequently bear witness to the role of the United States Supreme Court in this regard, but sadly neglect the less glamorous state and local courts. This, despite the increasing tendency for interest groups denied succor in the federal courts to achieve recognition of their claims by recourse to state tribunals and provisions of state constitutions.³⁰ The Wyoming Supreme Court's decision last January ordering approximate equalization of funding for school districts in the state illustrates this trend,³¹ and is

28. See generally Drechsel, *How Minnesota Newspapers Cover the Trial Courts*, 62 JUDICATURE 195 (1978). See also Burch, *An Editor Looks at Judicial Selection*, 44 J. AM. JUD. SOC'Y 142 (1960); Grey, *Covering the Courts: Problems of Specialization*, 26 NIEMAN REP. 17 (1972).

29. Indeed, one study of the Wisconsin electorate found that the mass media, through the vehicles of television courtroom dramas and news stories about the courts, had little impact on people's perception of the courts. Attention to the courts was for most people neither a way of becoming more informed about them nor a means of selectively reinforcing previously-held views about them; it was, rather, an anticipated source of *entertainment*. Jacob, *supra* note 3, at 816-18.

30. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

31. *Compare Washakie County School District No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980) with *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

but one of several cases³² which suggest that the judiciary in Wyoming is taking a more active role in policy-making than it has in the past. If public policy ultimately rests upon informed popular consent, it should not be regarded as a threat to the integrity of the judiciary for the news media to undertake to explain how and why appellate courts make policy, what its content in a particular area appears to be, and where particular judges stand on it. Likewise, on the trial level, judicial behavior in such matters as sentencing practices and the efficient disposition of cases are of general concern to the public, and might well play an important part in the electorate's decision whether to retain a judge.³³ Journalists who possess some background in legal subjects by no means require a law degree to write intelligently about these activities of appellate and trial courts; but unless much more is done to stimulate public interest and concern for such matters, it can safely be predicted that voter concern for who staffs their courts will remain at disappointingly low levels.

The Alternative: Abolition of Merit Retention and Reliance Upon Judicial Disciplinary Provisions

Disillusionment with voting behavior in merit retention elections has led some observers to so doubt their effectiveness as a means of eliminating unfit judges, as to suggest that they should be discarded altogether in favor of some more reliable means to this end. Thus, while the initial selection provisions of the Missouri Plan (*i.e.* merit selection) would continue with executive appointment of judges from names submitted by mixed panels of lawyers and knowledgeable laymen, proposals have been made to strengthen the likelihood of obtaining well-qualified judges by

32. See, *e.g.*, *Oroz v. Board of County Commissioners*, 575 P. 2d 1155 (1978); *Witzenburger v. State ex rel. Wyoming Community Development Authority*, 575 P. 2d 1100 (1978).

33. Such information—though perhaps in a more generalized form—is, of course, well known to the attorneys who practice in a particular court. In the absence of a computerized data collection system, however, public awareness of this kind of information may have to depend upon a news reporter inquiring enough to extract it from a mass of accumulated data in a clerk of court's files. For an account of the controversy stirred up by a recent proposal in California to require the computerized collection of data relating to judicial disposition of criminal cases in the courts of that state, see Berg & Flynn, *Independence v. Accountability: California's Tug of War*, 59 JUDICATURE 379 (1976).

broadening the basis of representation on the nominating panels,³⁴ requiring the executive's choice to receive legislative confirmation,³⁵ or otherwise improving the initial recruitment process for filling vacancies on the bench.³⁶ Merit retention would thus be shored up or perhaps even dropped altogether in favor of tenure "during good behavior."³⁷ The structural details of such proposals vary, but nearly all share the common feature of reliance upon effective procedures for disciplining or removing judges specifically found unfit to serve. Pioneered by California in 1960, 48 states during the past two decades have supplemented their traditional methods of removing judges (typically the impeachment process) by creating special judicial conduct commissions possessing legal authority to deal with allegations of judicial unfitness.³⁸ In Wyoming, this agency is the Judicial Supervisory Commission, created by constitutional amendment in 1972.³⁹ Made up of two district court judges, two members of the Wyoming State Bar, and three laymen, this body receives complaints submitted to it concerning judicial misbehavior. If investigation and hearing show good cause, the Judicial Supervisory Commission can recommend to the state supreme court that it retire, censure, or remove a judge from office because of (1) seriously incapacitating disability, (2) willful misconduct in office, (3) willful and persistent failure to perform one's duties, (4) habitual intemperance, or (5) conduct prejudicial to the administration of justice that brings the judicial office into disrepute.⁴⁰ Sanctions for these indications of unfitness can be imposed only by the supreme court itself.⁴¹

34. Dunn, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1976).

35. *Id.*; Spaeth, *Reflections on a Judicial Campaign*, 60 JUDICATURE 10 (1976).

36. *See, e.g.*, Rubenstein, *supra* note 24.

37. Dunn, *supra* note 34; Spaeth, *supra* note 35; Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4 (1962).

38. *See* I. TESITOR, JUDICIAL CONDUCT ORGANIZATIONS (1978). The entire November, 1979, issue of JUDICATURE is devoted to a discussion of various aspects of these commissions.

39. WYO. CONST. art. 5, §6.

40. WYO. CONST. art. 5, §6(e).

41. Removal is mandatory if a judge is convicted of a felony or a crime involving moral turpitude, and the conviction becomes final. WYO. CONST. art. 5, §6(d).

While a detailed study of the Wyoming Judicial Supervisory Commission is obviously beyond the scope of this article, it may be observed here that the commission presently operates under budgetary and legal restraints which severely inhibit its presumed function of holding judges accountable to the public for their misconduct. Like similar agencies in many other states, it has no permanent investigative staff of its own, depending instead upon commission members or ad hoc "examiners" to initially review complaints, conduct preliminary investigations, and present evidence at formal hearings.⁴² Proceedings before the commission are governed by strict rules of secrecy until the point at which it files a disciplinary recommendation with the supreme court;⁴³ dismissal of a complaint as "trivial," or an adjudication favorable to the judge is thus never made part of the public record. This, to be sure, serves to protect the reputation of the judge involved in the complaint, but it is hardly reassuring to a public increasingly skeptical of all governmental officials in this post-Watergate era. The Judicial Supervisory Commission files no annual public reports by which its activities can be evaluated, nor does it conduct any significant educational program by which the public could be made aware of its existence as well as what avenues of recourse the commission offers to those having a legitimate grievance against a judge.⁴⁴ Finally, the grounds for which the commission may recommend disciplinary measures do not extend to judges who are merely incompetent, even though knowledge of the law and the judicial functions thereunder are among the minimal qualifications for judicial fitness.⁴⁵ These perceived weaknesses in the potential

42. See generally Devroy, *A Reporter's Notes on the Boston Conference*, 63 JUDICATURE 249 (1979). The Wyoming Judicial Supervisory Commission's budget for the fiscal biennium ending June 30, 1980 was \$5,958. 1978 WYO. SESS. LAWS Ch. 12, §86.

43. A breach of the secrecy rule is punishable as contempt of court. WYO. JUD. SUPERV. COMM'N R. 7 (a).

44. See generally Martineau, *The Educational Role of Judicial Conduct Organizations*, 63 JUDICATURE 227 (1979).

45. Nor, it should be pointed out, do the grounds for disciplinary action by any judicial conduct organization in the United States extend to judges merely because their decisions—in the absence of fraud, corrupt motive, or bad faith—are *unpopular*. Whether the *electorate* ought to refrain from punishing judges by failing to retain them on account of their decisions, is a question which goes to the heart of the meaning of "popular accountability," and obviously raises the problem of how it is to be balanced with the competing value of judicial *independence*.

effectiveness of the Judicial Supervisory Commission are again not unique to Wyoming, but they do make highly debatable whether the disciplinary commission concept—at least in its present form—can serve as a fully satisfactory substitute for the removal potentialities of the merit retention election.

Thus, while the spread of judicial conduct organizations has helped to provide the impetus for a tempering in reform enthusiasm for the merit retention idea,⁴⁶ no jurisdiction has yet actually gone so far as to eliminate the step from its process of choosing and retaining judges. For the time being, merit retention and the judicial disciplinary commission concept seem to be regarded as complementary approaches to the same intractable problem: How to deal with judges whose conduct must be called into account by the community, while at the same time preserving the essential independence of the judicial branch of government. Failure to significantly improve the informational weaknesses associated with merit retention can only lead to further doubts about its usefulness; on the other hand, those who advocate reliance upon the disciplinary commission concept have yet to demonstrate that its secrecy from public view, limited grounds for sanctions, and other debilitating characteristics, will nevertheless enable it to function compatibly with the maintenance of public confidence in a fair, upright, and competent judiciary.

46. The American Bar Association reaffirmed its endorsement of merit selection and retention of judges in 1974, but added, as an alternative to merit retention, appointment of judges during good behavior, or until reaching the age of compulsory retirement. See *ABA Strongly Reaffirms Merit Plan Endorsement*, 57 JUDICATURE 370 (1974). See also Ellis, *Court Reform in New York State: An Overview for 1975*, 3 HOFSTRA L. REV. 663, 674-75, 679 (1975).