JUDICIAL SELECTION IN MICHIGAN: A FRESH APPROACH

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I. INTRODUCTION

Having published two articles on judicial selection many years ago,[1] I thought I had said about all I wanted to say about that subject. In light of recent events, especially the publication of the Report of the Michigan Judicial Selection Task Force[2] and the publication of Jed Handelsman Shugerman's new history of judicial selection in the United States,[3] I think it appropriate, even necessary, to revisit the issue.

In my previous articles, one of which constituted part of my dissertation for Columbia University School of Law,[4] I stated that judicial selection should entail a search for the most qualified persons whose beliefs, attitudes, and values[5] are representative of those of the citizenry. I assumed that selecting the most qualified persons was an

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1. Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409 (1980-1981) [hereinafter *Judicial Selection*]; Robert P. Davidow, *The Search for Competent and Representative Judges, Continued*, 77 KY. L. J. 723 (1989) [hereinafter *The Search for Competent and Representative Judges*].

2. MICH. JUDICIAL SELECTION TASK FORCE, REPORT AND RECOMMENDATIONS (2012).

3. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS (2012).

4. *Judicial Selection*, *supra* note 1. The other two dissertation articles are Robert P. Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX TECH. L. REV. 851 (1981) [hereinafter *Beyond Merit Selection*]; and Robert P. Davidow, *Law Student Attitudes Towards Judicial Careers*, 50 U. CIN. L. REV. 247 (1981).

5. *See generally* MILTON ROKEACH, BELIEFS, ATTITUDES, AND VALUES: A THEORY OF ORGANIZATION AND CHANGE (1968).

obvious goal, although I acknowledged that not everyone agreed.[6] The search for a representative judiciary made sense to me because the role of the judge is very similar to that of the jury, which is supposed to represent a cross-section of the community, although, admittedly, it does so only imperfectly. Sufficient representation seemed achievable only through a selection process that approximated that used in selecting a jury. My focus was thus on achieving substantial diversity and competence on the bench. Given that both Shugerman and many members of the Task Force have implicitly or explicitly favored a form of merit selection, in which the governor must choose from among several candidates put forth by a nominating commission,[7] I believe that the most salient issue in the context of judicial selection in Michigan today is the role, if any, of the governor in some form of merit selection scheme.

II. THE ROLE OF THE GOVERNOR

Often, merit selection is criticized because, contrary to the claims of some of its supporters, it fails to take politics out of the selection process.[8] I believe this is a valid criticism. The governor is, after all, a state's chief politician. A governor cannot close his eyes to the reality that the choice of some members of the nominating commission are likely to affect the support that the governor can expect from influential (and wealthy) members of the public. To an even greater extent, the governor's selection of a judge is likely to affect the willingness of potential contributors to give to the governor's reelection campaign. Moreover, the governor may well want to fill a judicial vacancy with a candidate whose beliefs, attitudes, and values most closely resemble those of the governor.[9]

Instead of thinking of reasons why the governor should not be involved in the selection process, one might turn the questions around and ask: Why *should* the governor be involved in the process? Proponents of merit selection have seemingly accepted without question the active involvement of the governor. But what is gained by including the governor in the selection process? If one of the goals of judicial

6. *Judicial Selection*, *supra* note 1, at 418 (quoting the late Senator Hruska: "[t]here are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they?").

7. *See* SHUGERMAN, *supra* note 3, at 253-66; MICH. JUDICIAL SELECTION TASK FORCE, *supra* note 2, at 11.

8. SHUGERMAN, *supra* note 3, at 232-33 (quoting an opponent of merit selection who complained that it was "simply a substitution of one form of politics for another").

9. *Id.* at 206.

selection is to minimize politics,[10] then the answer to this question must be nothing.

Given the inappropriateness of gubernatorial involvement in the selection process, we can turn to the goals of judicial selection that I set forth in my 1980s articles.

III. REPRESENTATIVENESS

Jeffrey Toobin has said that the Supreme Court "is a product of democracy and represents, with sometimes chilling precision, the best and worst of the people."[11] What the Court does not represent, however, are the beliefs, attitudes, and values of the citizenry or of the legal profession.

The goal of representation is based on the analogy to a jury.[12] We do not expect jurors to be without a point of view, but we do hope and expect that they will represent, admittedly imperfectly,[13] the various points of view of persons in the community. We seek representative jurors at least in part because we cannot think of any better way to decide cases.[13] The same principle should apply to judges because of the similarity in the functions performed by judges and juries. The work of the trial courts aptly illustrates the jury analogy. Among countless cases that could serve as examples, I focus here on one that I was personally involved in when I was working for the Cook County (Chicago) Public Defender's Office in 2001: *People v. Hill*,[14] an unreported case.

In *Hill* the plain-clothes arresting officer testified that he observed the defendant as he apparently exchanged "an unknown item from [a] plastic bag" for an unknown amount of U.S. currency on five or six occasions while the officer was about twenty yards from the defendant.[15] The officer then approached the defendant and, when he was within three feet of the defendant, pulled out his badge and identified himself as a police officer.[16] The defendant, according to the officer, immediately

10. *See generally* ROKEACH, *supra* note 5.

11. JEFFERY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 340 (2007).

12. *See generally Judicial Selection*, *supra* note 1, at 423-24.

13. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.1300, 600.1304 (West 2011) (providing for selection from among those with drivers licenses and those on the "personal identification cardholder list," thus excluding, e.g., the homeless and some elderly persons).

14. *Id.* § 423.

15. Email from Robert P. Davidow, Professor of Law (retired) (Nov 2, 2012) (on file with author).

16. *Id.*

17. *Id.*

dropped a plastic bag to the ground.[17] The officer picked up the bag and found that it contained white powder the officer suspected was heroin.[18] The officer then arrested the defendant. The defendant did not testify.[19] The judge, sitting without a jury, convicted the defendant of possession of a controlled substance with intent to deliver.[20]

This would be an entirely unremarkable case were it not for the history of "dropsy" testimony, of which the officer's testimony in this case is an example. The late Judge Irving Younger, when sitting as a trial judge in the New York City Criminal Court, recounted this history in *People v. McMurty*.[21] According to Younger, before 1961 (when the U.S. Supreme Court made the exclusionary rule applicable to the states in *Mapp v. Ohio*),[22] police officers in New York would testify that they stopped someone for little or no reason, searched him, found drugs, and arrested him.[23] No effort was made to establish any level of suspicion because it did not make any difference; the evidence was admitted.[24] After *Mapp* the police continued for a few months to testify truthfully, and the evidence was suppressed. Then someone had the bright idea that if the defendant dropped the evidence on the ground, this was an abandonment, meaning that the defendant no longer had any expectation of privacy in the dropped item, and so the Fourth Amendment offered no further protection to the defendant.[25] Said Younger: "Spend a few hours in the New York Criminal Courts nowadays, and you will hear case after case in which a policeman testifies that the defendant dropped the narcotics on the ground, whereupon the policeman arrested him."[26] Younger stated, among other things, that in such cases such testimony "should be scrutinized with especial caution" and that "[s]hould the policeman's testimony seem inherently unreal, it will forthwith be rejected."[27]

Notice the judge's role in *Hill*. The judge had to decide whether the officer was telling the truth. On the face of it, the officer's testimony stood uncontradicted and therefore the judge might have found, and apparently did find, that an easy case for conviction.[28] But the judge

18. *Id.*
19. *Id.*
20. *Id.*
21. 314 N.Y.S.2d 194 (Crim. Ct. 1970).
22. 367 U.S. 643 (1961).
23. *McMurty*, 314 N.Y.S.2d at 196.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 197.
28. *Hill*, 835 N.E.2d 466.

might have heeded Judge Younger's admonition and examined the testimony with "especial caution." Had the judge done so, he might have concluded that the testimony was unworthy of belief because it seems especially unlikely that a defendant would drop incriminating evidence to the ground within three feet of an officer. It is rather a stretch to say that a defendant like Hill could reasonably think he could dissociate himself from evidence by dropping it, as the officer testified.[29]

If this case had been tried before a jury, it would have had to decide whether the officer was testifying truthfully. Thus, the roles of judge and potential jury in *Hill* are very similar. The process of fact-finding is essentially the same. Like the judge, the jurors would bring to the question their own beliefs, attitudes, and values—their predispositions, if you will. Are they inclined to believe the officer simply because he is a police officer? Possibly because of antagonistic previous contacts with the police, are they inclined to disbelieve the officer? Are they affected by the race of the officer or the defendant? What is their general attitude toward the principle that the prosecution must prove guilt beyond a reasonable doubt?

The similarity in functions of judge and jury was, in essence, recognized by the U.S. Supreme Court in *Duncan v. Louisiana*,[30] in which the Court held that the Sixth Amendment right to jury trial was guaranteed to defendants in state criminal trials: "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."[31] Thus, the Court recognized a difference in perspective, but not in function.

Although American jurisdictions generally require the appellate courts to defer to the trial decision-maker's findings of fact,[32] appellate

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29. Like Judge Younger, the Warren Court expressed skepticism about dropsy testimony: "It is, of course, highly unlikely that Sibron, facing the officer at such close quarters, would have tried to remove the heroin from his pocket and throw it to the ground in the hope that he could escape responsibility for it." Sibron v. New York, 392 U.S. 40, 46 n.3 (1968).

30. 391 U.S. 145 (1968).

31. *Id.* at 156.

32. An exception is the military:

> [T]he Court of Criminal Appeals may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C.A. § 866(c) (West 2011).

courts do have a limited fact-finding function.[33] In a criminal case they may be asked, for example, to decide whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[34]

A theoretically important difference between the roles of judge and jury is that the trial judge and the appellate judges are supposed to determine the law of the case.[35] In a superficial way this is true. Many laws, however, are written at a high level of abstraction; applying them to the facts of a specific case may involve, in substance, law-making. For instance, in a Virginia case[36] a defendant was charged with attempt to obstruct justice under a statute that defined the offense to include, among other things, the use of threats in an attempt (in this context, with intent) to intimidate or impede law-enforcement personnel in the performance of their duties.[37] During the bench trial, the judge had to decide whether the statute applied to the defendant's threat to kill two burly police officers, made while the slender defendant was handcuffed.[38] The defendant was clearly angry about having been falsely arrested on the basis of any erroneous computer record.[39] A fact-finder might have decided that the statute did not cover the facts of the case, for instance, because a threat accompanied by a desire to seek revenge did not constitute an intent to intimidate or impede, especially when the defendant was incapable of carrying out the threat. In my view, there was no obviously right

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33. *See generally* 24 C.J.S. *Criminal Law* § 2376 (2012).

34. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (holding there is a due process minimum standard for conviction). In addition, it is possible to find the U.S. Supreme Court engaging in de novo review of the facts. In Scott v. Harris, 550 U.S. 372 (2007), the Court viewed a videotape of a high-speed chase in which a police car rammed the back of a car, causing the driver to lose control of his vehicle and crash, rendering the driver a quadriplegic. Disagreeing with two lower federal courts, the Supreme Court concluded that the driver was not cautious and controlled; rather, "what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380. In his dissent, Justice Stevens stated that "eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are." *Id.* at 389 (Stevens, J., dissenting).

35. *See, e.g.*, Sparf v. United States, 156 U.S. 51 (1895).

36. Polk v. Commonwealth, 358 S.E.2d 770 (Va. Ct. App. 1987). The facts recited in the text are essentially those found in Polk, as supplemented by a telephone interview with Stephen C. Gregory, defense attorney in Polk (March 23, 1989). The case is discussed in *The Search for Competent Judges*, *supra* note 1, at 733.

37. *Polk*, 358 S.E.2d at 772.

38. *Id.*

39. *Id.*

decision. In any event, the decisions by the trial judge and by the appellate court, respectively, to convict and to affirm the conviction, were a determination of the law of the case—a determination that a jury would also have had to make had it been entrusted with the decision whether to find the defendant guilty or not guilty.

IV. QUALITY[40]

Clearly judges should be sufficiently intelligent and trained to understand the arguments of counsel. That is not enough, however. Judges should be willing to listen to both sides before rendering a decision. Presumably, one would hope to avoid appearing before a judge such as the one, for example, before whom I appeared in a post-conviction proceeding in Cook County (Chicago) who announced that he was ready to rule without bothering to read the petition for post-conviction relief.

Admittedly the application of law to particular facts is often a matter about which reasonable minds may differ, as illustrated above. When reasonable minds cannot differ, however, one should reasonably expect the judge to apply the law. I recall one of my Florida cases in which the sole testimony concerning the validity of a search came from a police officer who said that he had *no reason* to believe that the defendant, who had been riding in the front passenger seat of a car stopped for a traffic offense, was armed and dangerous. The judge refused to suppress the evidence found in the defendant's pocket despite the *Terry*[41] requirement that a frisk following a stop based on reasonable suspicion be supported by an articulable suspicion that the defendant is armed and dangerous.

Thus, for me, quality involves judicial temperament as well as proper training and basic intelligence, a sentiment shared, I believe, by other lawyers whose experiences have been similar to my own.

V. PROPOSALS FOR JUDICIAL SELECTION

I am thus persuaded that the roles of judge and jury are very similar. What follows from this conclusion? For me the answer is that we ought to adopt that method of judicial selection that most closely approximates the method by which we choose jurors.

We do not elect jurors. We do not allow a member of the executive branch to select them. We seek a representative cross-section of the community. We do this through a process that, albeit imperfectly, aims at

40. *See generally Judicial Selection*, *supra* note 1, at 417-19.

41. Terry v. Ohio, 392 U.S. 1, 21 (1968).

random selection—selection by lot. We do this largely because we can think of no better way of selecting jurors, given differences in beliefs, attitudes, and values among citizens generally. We do not expect jurors to take a public opinion poll or solicit funds from the public before they render a verdict. We expect jurors to bring those differing beliefs, attitudes, and values with them into the jury room. Similarly, we do not expect judges to take a poll before finding facts and applying legal rules to those facts.

In addition, we expect judges, among other things, to enforce constitutional constraints on majority rule. Our constitutional system of government has, from its earliest days, been characterized by a balance between majority rule and minority rights,[42] and judges have been the preeminent guarantor of the latter.[43] Because the courts are especially the protectors of minority rights, I do not agree that in the design of a judicial selection system "the question is not how to maximize [both judicial independence and accountability], but how to strike a balance between them."[44] I do not view accountability as a desirable attribute of a judicial selection system.[45] Accordingly, I oppose both popular election of judges and retention elections, the latter being elections in which voters are asked merely whether a particular judge should be retained.[46] Of course judges are not totally free to do anything they please. They may not commit criminal acts, such as soliciting or receiving bribes, or misbehave in other substantial ways.[47]

In my dissertation I suggested in the first of four proposals that judges be selected by lot from among a large number of nominees

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42. *See* U.S. CONST. art. I, §§ 9-10, amends. I-X.

43. *See generally* THE FEDERALIST PAPERS NO. 78 (Alexander Hamilton); *Judicial Selection*, *supra* note 1, at 421.

44. Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 132 (2007).

45. SHUGERMAN, *supra* note 3, at 105, 111-12 (noting the move toward the election of judges in the 19th century was often based, not on a desire to produce accountability, but rather on a perhaps naive belief that elected judges would be more independent of legislatures than appointed judges would be).

46. *See Beyond Merit Selection*, *supra* note 4, at 878-80 (standing for the proposition that state court appellate judges should be limited to a single 15-year term, with full pension at the end of the term (the latter to fully ensure judicial independence), while facilitating some judicial turnover).

47. For example, in Michigan, "[o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judges for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his/her duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice." MICH. CONST. art. 6, § 30(2).

proposed by a broadly representative nominating commission.[48] Specifically, I suggested that the commission consist of

> [T]wo lawyers, elected by the State Bar Association; six persons popularly elected by proportional representation, of whom one must be a lawyer and five must be nonlawyers; two judges, elected by all judges of courts of record in the state; one full-time member of a faculty of a law school in the state accredited by the American Bar Association, elected by all full-time members of the law school faculties of accredited law schools in the state; and one full-time member of a nonlawyer faculty of an accredited university within the state, elected by all nonlawyer full-time professors in accredited universities in the state.[49]

The requirement of proportional representation in the selection of the popularly elected members of the commission was intended to ensure the broadest possible representation. Proportional representation, of course, would allow relatively small groups to elect members of the commission,[50] thus avoiding the situation that prevails in most American legislatures in which one must, as a practical matter, be a member of one of the two major political parties in order to run successfully for public office. Election of members of the public through proportional representation would arguably give the public a greater role in the selection process than it has in current schemes for merit selection.

The inclusion of academics will strike some as strange. I know that in one medium-size city in which I once lived and taught, some members of the community spoke with pride of having a research university in their midst, but paid little attention to the opinions of faculty members. Having been an academic for many years, however, I suppose I have a bias in favor of treating seriously the views of those who have devoted their professional careers to the study of the judiciary and related matters. Moreover, there is an advantage in having persons on the commission who have not only a pertinent expertise, but also "livelihoods [that] cannot be adversely affected by their refusal to place a high priority on maintaining the good will of judges and [lawyers]."[51] Moreover, in at

48. *Judicial Selection*, *supra* note 1, at 436-39.
49. *Id.* at 440.
50. *Id.* at 435.
51. *Id.* at 441.

least two merit-selection states a law school faculty member is a member of the nominating commission.[52]

To those who might complain that, overall, this plan favors the elites, I would say the following: First, if we assume for the sake of argument that all lawyers, judges, and academics can be regarded as elites, they would number seven out of twelve, with lawyers constituting half of the commissioners (of course, the number of elites, and lawyers in particular, could be reduced); second, elites cannot be all that bad, as it was they who wrote the Constitution in 1787.

Under this proposal, each commissioner would choose one nominee, with the others having a veto power to assure quality. It is true, of course, that the granting of a veto power to each commissioner would permit any one member to disrupt through non-cooperation. The example of juries, which have been found to reach a unanimous decision in the overwhelming majority of cases,[53] suggests that this would not be an insurmountable problem. My expectation was that each commissioner would say to his or her colleagues, "I will refrain from vetoing your choice if you allow me to select a qualified nominee who shares my beliefs, attitudes, and values."[54]

Selection by lot may also seem strange, even radical, to some.[55] It should be noted, however, that selection of judicial officers by lot is not an entirely novel concept. In fifth and fourth century B.C.E. Athens, most governmental officials, including judicial officers (called dikasts), were selected by lot from among all citizens,[56] although women and slaves were excluded. This selection was not considered inconsistent with democracy; indeed, it was considered a basis ingredient of

52. The dean of the West Virginia College of Law serves as an *ex officio* member of the Judicial Vacancy Advisory Commission. W. VA. CODE ANN. § 3-10-3A (West 2011). The dean of the University of New Mexico School of Law is the chair of the Appellate Judges Nominating Commission. N.M. CONST. art. VI, § 35.

53. *Judicial Selection*, *supra* note 1, at 442 n. 157 (quoting HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 56 (1966).

54. *Id.* at 441.

55. William Bunting, Note, *Election-By-Lot as a Judicial Selection Mechanism*, 2 N.Y.U.J.L. & LIBERTY 166, 184 (2006) This student's Note proposes selection of trial judges by lot from among all lawyers in a jurisdiction on the theory that serving as a judge should be regarded as a civic duty. This proposal presupposes that virtually all lawyers will be subject to what amounts to a draft, with the selected lawyers having to serve for a period of ten weeks as trial (but not appellate) judges. Lawyers are to be excluded for bias or prejudice. No mechanism, however, is provided for excluding those who might be regarded as unsuitable because of a lack of ability or judicial temperament. Thus, apart from potential logistical problems, this proposal is, from my point of view, unsatisfactory because there is no institutional guarantee of quality, which I regard as an essential attribute of judges.

56. *Judicial Selection*, *supra* note 1, at 438-39.

democracy.[57] Moreover, the founders at the Constitutional Convention in 1787 considered the experience in ancient Greece to be relevant.[58] I see no reason to treat that experience as irrelevant when we discuss how best to choose judges. (The exclusions found in the Athenian model would not, of course, be found in any modern system of judicial selection).

To those who might object to my previous proposals as impractical, I answer that the idea of selection by lot was initially suggested to me, not by some ivory-tower academic, but by a very practical practicing attorney from Royal Oak, Michigan.[59] I do acknowledge that there is no way I can fully respond to those who might raise this issue; after all, no jurisdiction has implemented one of my proposals. If the burden is on me to prove the feasibility of selection by lot, I cannot meet that burden. But, for the same reason, those who might object cannot prove its infeasibility.

VI. PROBLEMS WITH OTHER METHODS OF JUDICIAL SELECTION

One of the best critiques of the election of judges is found in Senior U.S. Supreme Court Justice Sandra Day O'Connor's concurring opinion in *Republican Party of Minnesota v. White*,[60] noting a judge's awareness that an unpopular decision in a publicized case could hurt that judge's reelection prospects, and recognizing, in essence, that such awareness might influence that judge's decision. I would add that judicial elections offer no institutional assurance of either quality or representativeness. Also, they discourage otherwise worthy candidates from running because of the cost of campaigns. Moreover, raising large sums of money during campaigns raises the specter of corruption.[61]

My proposals (four variations on a single theme)[62] resemble in some respects schemes for merit selection. Merit selection nominating commissions, like my commission, can exclude those thought to be unfit, whether because of lack of ability, experience, or judicial temperament. As mentioned above, however, traditional merit selection schemes are deficient in that they involve the governor in final selection and often empower the governor to appoint some members of the commission.

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57. *Id.* at 439.

58. *See, e.g.*, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 206 (Ohio University Press 1985) (remarks of James Madison, June 28, 1787).

59. The late James Renfrew.

60. 536 U.S. 765, 788-92 (2002) (O'Connor, J., concurring).

61. *See, e.g.*, Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 884 (2009) (perhaps the most egregious example of recent memory).

62. The common element is final selection by lot. *Judicial Selection*, *supra* note 1, at 440-49.

Also, with merit selection the several nominees are likely to reflect the somewhat unrepresentative composition of the commission. Even with commissions substantially larger than the seven under the original Missouri Plan, for example seventeen in Tennessee[63] and sixteen in Arizona,[64] there is no assurance of diversity, despite exhortations to provide for diversity, as in Arizona.[65] In any event, the governor is free to choose the one nominee whose values most closely resemble those of the governor, who may have been elected by a bare majority of the voters, or even by a plurality in elections in which a third party candidate may have run. The lack of diversity is not merely theoretical. Arizona, like other merit selection states, has not achieved much in the way of diversity as measured by race and gender.[66] Of course, even attainment of diversity in these categories does not ensure the selection of persons with wide-ranging life experiences (and different perspectives) that may not correlate with race and gender.[67]

VII. CONCLUSION

I have previously proposed four similar methods of judicial selection, the first of which would involve final selection by lot from among perhaps twelve candidates selected by a broadly representative nomination commission that would include members of the public popularly elected through proportional representation.[68] At a minimum, I hope for a fuller discussion of what I regard as the basic goals of judicial selection, together with an acknowledgment of the deficiency of selection schemes that involve the governor, whether in interim appointments or in merit selection plans.

Certainly there are quality judges in Michigan, but their assuming the bench was accomplished in spite of elections, not because of them.

I am not absolutely wedded to the specifics of my proposals. What I am wedded to is the jury analogy (resulting in a more diverse judiciary),

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63. TENN CODE ANN. § 17-4-102 (West 2011).

64. ARIZ. CONST. art. VI, § 36.

65. *Id.* § 36(a), (c).

66. Arizona has achieved gender equality only on its Supreme Court; it has not achieved racial equality on any of its courts. CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, *Improving Judicial Diversity* 1, 48-9 (2012). Similar lack of diversity was found in the other 9 state supreme courts that were the subject of the study. *Id.* at 49.

67. Lack of correlation between race and perspective is well illustrated by a comparison of the beliefs, attitudes and values of Justice Clarence Thomas with those of the late Justice Thurgood Marshall.

68. *Judicial Selection, supra* note 1, at 435.

the search for the most competent judges, and the exclusion of the governor from the selection process. A judicial selection system embodying these principles would, I believe, do much to improve the actuality and appearance of justice in Michigan.