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Abstract
Judge Thomas J. Spargo serves as a fascinating poster-child in the debate on what's wrong (or right) with judicial elections. Judge Spargo, campaigning for re-election as Justice of the Berne Town Court in upstate New York, was accused of "failing to observe the high standards of conduct" expected as a judge because he handed out doughnuts to voters. Judge Spargo's case and others illustrate that popular debates about the merits of judicial elections versus judicial selection commissions have probably been mis-focused on two "second-order questions rather than concentrating on "first-order" concerns in judicial selection. This article discusses these questions and concerns and takes a look at judicial elections versus the judicial selection commissions.

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VIRTUOUS JUDGES AND ELECTORAL POLITICS: A CONTRADICTION?

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Judge Thomas J. Spargo serves as a fascinating poster-child in the debate on what's wrong (or right) with judicial elections. Judge Spargo, campaigning for re-election as Justice of the Berne Town Court in upstate New York, was accused of "failing to observe the high standards of conduct" expected of a judge, as well as:

> fail[ing] to avoid impropriety and the appearance of impropriety, fail[ing] to respect and comply with the law. . . . fail[ing] to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . to maintain the dignity appropriate to judicial office and to act in a manner consistent with the integrity and independence of the judiciary.[1]

The grave offenses for which these charges were leveled were some of Judge Spargo's judicial campaign activities:[2] to-wit, with malice aforethought, to "induce votes on his behalf," he handed out coupons for free donuts and coffee, and five dollars in gasoline (to the first five comers) at a local convenience store. Moreover, introducing himself as a candidate for Town Justice, on other occasions he bought a round of drinks for everyone at a local bar, and "handed out 50 half-gallons of cider and donuts to town residents at the town dump."[3] Local schoolteachers, highway maintenance, school bus garage and town barn employees, and patrons of a local store were also recipients of his largesse, receiving

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[1] Spargo v. New York State Commission on Judicial Conduct, 244 F. Supp. 2d 72, 79 (N.D.N.Y. 2003).

[2] To be sure, his election offenses were not Judge Spargo's only violations. He was also charged with failures to disclose conflicts of interest in criminal cases brought by the Albany County District Attorney's office, when he had represented the District Attorney in his own re-election campaign for a fee, partly still owing. *Id.* at 80. He was also accused of participating in a "loud and obstructive demonstration" against the 2000 presidential election recount in Miami-Dade County, as an observer for the Bush campaign and the Republican Party. *Id.* at 80.

[3] *Id.* at 79.

free pizzas to encourage their votes.[4]

Given that these activities would likely raise barely an ethics eyebrow if a Donor of Donuts had been stumping for George W. Bush or John Kerry, we may ask why the instinctive reaction to Judge Spargo's antics is disgust and embarrassment, especially by lawyers. Is it that Judge Spargo laid bare the ugly possibility that votes can be "bought" for a $5 gas coupon or free cider and donuts? Is it that Judge Spargo asked for voters to punch his name on the ballot for the wrong reasons? Or, as the charges suggest, is it that Judge Spargo was not acting "judicially"—that he offended the community's sense that judges inhabit (or at least should appear to inhabit) a world above the ordinary rough-and-tumble of political life?

As Judge Spargo's case illustrates, popular debates about the merits of judicial elections versus judicial selection commissions have probably been mis-focused on two "second-order" questions rather than concentrating on "first-order" concerns in judicial selection. One of these "second-order" questions is whether merit selection defeats the "right" of the voters to select judges.[5] Second, both pundits and professors wax forth on the question of who is better at selecting judges—the general public, or lawyers and trained laypeople on merit commissions.[6]

These questions, however, somewhat miss the point. Although surely in a democracy, voters do retain the ultimate "right" to make choices about who will govern them, wise rights-holders do not always exercise their rights directly. While I surely have the right to fix my own plumbing and educate my own children at home (so long as I meet state regulations), it is not always the smartest idea for me to do these things myself. Rather, in exercising my own practical wisdom, or phronesis, I may find it necessary to delegate these tasks to those with the best training, knowledge base, and

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[4] *Id.* More traditional campaign violations included his service as keynote speaker at a Conservative Party fundraising dinner while he was a town justice and candidate for the New York Supreme Court, and a $5,000 payment to a consultant who had nominated him for the Supreme Court. The payment was considered a campaign violation because the debt was incurred on the date of the nomination and the nominator, Jane McNally, had apparently agreed to work for him for free. The court notes that an additional $5,000 was paid to another consultant who was chair of the county Independence Party, delegate to its nominating convention, and a supporter of Spargo's nomination as an Independence Party candidate as well. *Id.* at 80–81.

[5] *See, e.g.*, Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J. L. & POL. 691, 708 (2003) (noting that supporters of judicial elections focus on accountability to voters over judicial independence).

[6] *Id.* at 706–10.

good practical judgment on such matters, given the nature of the decision. And, lest this sound like a stealth brief for unconditional merit selection, it is also true that we cannot determine whether voters should "hire out" their responsibilities to merit commissions or do it themselves until we answer the question, for what purpose are these judgments about judicial qualifications being made?

The tradition of virtue ethics that has regained popularity in the legal academy reminds us that we cannot identify the virtues we seek in our public officials without reference to a telos, a community good that is important to us, toward which those offices ultimately work. If we cannot be clear about that good—cannot explain what we mean by achieving "justice for all"—then we cannot be clear about the social role that judges should play in achieving that good. And if we cannot be clear about the social role of jurist, we cannot identify those virtues required of the individual who inhabits that social role. For Aristotle's understanding of the telos or ultimate good of a single human life—say, a judge's life—is not some hoped-for system of justice in the sweet by-and-by, but a "certain kind of life" that the judge lives each day; or—to put it in Christian virtue ethics language—"a quest or a journey in which a variety of forms of evil are encountered and overcome" on a daily basis.[7]

Academics, legislators, and merit selection members who have tried to explicitly identify judicial virtues, skills and habits, understand the need to be specific about the virtues required of a judge, even though they are a bit hazier about the "justice" for which judges are employing their virtues. To their credit, their understanding of judicial expectations embraces the virtue ethics understanding: they see that "virtue" in a judge is not limited to so-called "moral" qualities such as honesty and courage, but that it also embraces those "excellences" that make a person fitted to his role, including superior performance of his job. Thus, they understand that judicial virtue requires not only certain elements of personal moral character but also the high-quality education and experience necessary to undertake the work. Understanding the concept of the virtues as Aristotle might, as a set of excellences both of moral character and of skills and talents that enable a judge to do his job, they have tried to enumerate those qualities most needed in our judges.[8]

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[7] ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 175 (2d ed. 1984).

[8] *See, e.g.*, MINN. STAT. ANN. § 480B.01(8) (requiring the Minnesota Commission on Judicial selection to meet certain qualifications including such moral qualifications as

Yet, what any list of judicial virtues often lacks is a healthy respect for human limitation. This is, of course, a flaw that merit selection committees share with voters who expect their elected officials (along with other professionals who work for them, such as doctors and lawyers) to exhibit every excellence and virtue known to man. Any exercise of *practical* wisdom that identifies who will be a fitting judge must also identify those qualities or virtues that individuals do *not* need in order to be good judges. They must sort out those qualities that may be appropriate to, or even necessary in, many other officeholders, but that are either inimical to good judging or at least unusual to find in a good judge. While it may be tempting to want judges, like all other political appointees, to have every single virtue described in the human catalogue of perfections, holding judicial candidates to such a high standard is to hold them to no standard at all, because there is no chance for any candidate to achieve it.

How does this practical insight assist in the debate about whether judges should be elected or appointed? Just to give one brief example, one of the most critical habits of character that good judges need is introspection. Judges, like many lawyers, are often lone decision-makers—whether they are hearing difficult and unpopular issues such as death penalty or abortion bypass cases or simply bread-and-butter matters such as how long a small-time juvenile drug dealer should go to jail. They have to be good at sorting through the pros and cons of such issues all by themselves, without consulting with or seeking approval of others in their community about their decisions. Given this need, it is perhaps not surprising that a large number of lawyers—and, we can presume, judges—are introverts by nature,[9] used to working out problems in their own heads rather than negotiating their solutions in a group, a reality quite opposed to the popular perception that lawyers are thorough-going extraverts.

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integrity and diligence, as well as "maturity, health . . . judicial temperament . . . legal knowledge, ability and experience, and community service"); Lawrence Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1738 (1988) (identifying the three necessary judicial virtues as "a faculty for theoretical understanding of the law, a concern for the integrity of the law, and a practical ability to choose wisely in particular circumstances")

[9] *See* Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the Untied States*, 29 CAP. U. L. REV. 979, 1015 (2002) (noting that 56.4% of respondents in a lawyer satisfaction study preferred introversion, while in the original Meyers study of introversion and extraversion in the American population, 64.9% of the high school student sample she studied were extraverts.)

However, this virtue of introspection, if I am correct, fails to be a virtue in a traditional political campaign. Politicians, in large part, are good—one might even say virtuous—politicians precisely when they go out, listen to others' concerns, work through their position on the issues with others (from voters to legislative bodies to staff members) and, finally, make law as others—the people—expect of them, rather than what those politicians might personally decide if they were "in charge." Indeed, that is precisely what we need from politicians, in order to preserve the reality, and not simply the illusion, that political decisions are made democratically, based on a collective perception of what is the common good. Extraverts, we might say, make especially good democrats.

That this difference between the virtues of judges and the virtues of other public offices is relevant to judicial selection should now be apparent. Giving him the benefit of the doubt, though the readers of this Law Review will perhaps know him personally and give me reason to doubt my intellectual generosity, Judge Spargo was perhaps not so foolish as to believe he could "buy votes" with his donuts and cider. Maybe he was simply trying to make his voters happy, to find out what was important to them and to respond to the needs he saw expressed. (Donuts and cider on a cold day when you're waiting in line at the dump sound like a pretty good idea to me.) He was perhaps modeling what he perceived to be good—or at least successful—political behavior.

If a person with the judicial virtue of introspection is required also to be adept at a politician's non-judicial virtues, then we will have many more Judge Spargos—because they are the persons who have the skill of finding out what pleases voters and responding to their needs, which is necessary to successfully win a campaign. Or, we might consider the political virtue of being able to inspire the electorate, including those who have the means to contribute to campaigns. Lawyers who have the larger-than-life ability to describe to voters, with passion, what kind of nation we should aspire to be, and to paint in broad outlines what we need to do to achieve those aspirations don't always have the virtue of methodical and careful follow-through. That virtue, however, might be an essential quality needed in judges, especially those at the trial court level with tremendous caseloads and small staffs.

If the abilities to seek voters' approval for one's work and to inspire those who contribute to campaigns are demanded of judges, we will have many fewer introspective and methodical judges

occupying office. These potentially fine judges will be wise enough to know what it takes to be elected and understand that their strengths are not a good fit for that task. Or, they will shy away from running for office because they do not feel comfortable in the electoral roles they are expected to undertake, given who they are.

That is not to say that voter involvement in the selection process is inessential or counterproductive. Indeed, for example, voters will often have insights about how lawyers or judges treat the ordinary people with whom they interact that lawyers may miss—does a lawyer-candidate, for example, condescend to a farmer, or does a judge treat uneducated female litigants poorly?

Rather than posing the choice as either a traditional election or a blueblood merit system, we may want to consider a selection system that makes it possible for the electorate to have its democratic cake and eat it too. As just one example, a judicial selection system could assign to lawyer/professional-dominated judicial selection commissions the task of researching candidates' backgrounds and presenting a recommended electoral slate of qualified—in an Aristotelian sense, virtuous—judicial candidates. The voters, who would then have a wealth of data on candidates currently not available to them through traditional media sources, could select from this slate the candidate whom they deemed to be the strongest. Or, of course, exercising their ultimate right, the voters could ignore the extensive research and valuable advice of those to whom they delegated the responsibility to exercise phronesis, and bear the consequences.

The bench and bar would do well to focus the kind of thought and creativity they bring to a novel products liability case or the meaning of the Constitution to the very vital task of understanding what makes judges "judicial" and developing innovative ways for voters and lawyers to exercise their insights jointly to identify those candidates who can best fit the social role we require them to inhabit.

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