gested, might be better served by looking at the organisational structure:

"The major problem is that power is used and abused in ways that are hidden from sight or regarded as sacrosanct and beyond scrutiny."

As the editors of this work concede:

"no programs have been proposed nor policy resolved; nevertheless (the) mission to challenge and suggest rather than prescribe should prove useful in the future direction of corporate regulation."

[Corrigible Corporations & Unruly Law; Trinity University Press]

**Chief Justice Rose Bird**

*Failure is an inability to come to terms with who you are and what life is about*

Chief Justice Rose Bird, address to NSW Women Lawyers Association, April 1986

**Election of Judges.** Rose Elizabeth Bird, the Chief Justice of the Californian Supreme Court, has had a remarkable career, not just because of her personal achievements, but also because of the campaign against her since her nomination as Chief Justice. The controversy surrounding Chief Justice Bird raises some fundamental issues about the system of nomination and subsequent election of judges which prevails in some states of the United States.

In February 1977 Chief Justice Bird became the first woman appointed to the Californian Supreme Court. She was nominated by the then governor, Edmund G ('Jerry') Brown Jr to succeed Donald Wright as Chief Justice. Chief Justice Bird was then Secretary of California’s Department of Agriculture and Services, and had been the first woman to hold such a Cabinet-level position in the history of California. Her earlier career in law had been as a criminal lawyer. In 1966, Chief Justice Bird had become the first woman public defender in Santa Clara County in California.

More than half of the United States provide for some form of election of judges. Nearly all States have fixed term appointments for judges. Under amendments to the California Constitution made in 1934, judges are nominated by the governor and then undergo a confirmation election at subsequent State elections for the office of governor. Prior to the introduction of this system in 1934, Californian judges had to contest elections against other contenders for judicial office.

**Manipulation?** In the 1978 gubernatorial election, Chief Justice Bird very narrowly won confirmation of her nomination two years earlier. She thus became the first justice who nearly lost a confirmation election in California, where no appellate court judge had ever come close to defeat since the confirmation election system was started. Perhaps this was partly due to the publication, on election day, of a front page story in the Los Angeles Times asserting that the court had manipulated the timing of the release of an unpopular decision (*People v Tanner*) against the then ‘use a gun, go to prison’ law in order to assist Chief Justice Bird’s election. That allegation was subsequently investigated by the Californian Commission on Judicial Performance. The Commission was satisfied that there was no improper delay but its conclusions were marred by a successful challenge to its right to conduct open hearings and report in full.

**Soft on Crime?** Since then, controversy surrounding Californian Supreme Court decisions has consistently centred upon the Chief Justice despite the fact that she is one of a bench of seven. Many critics of decisions of the Californian Supreme Court have continued to focus upon Chief Justice Bird, contending that she is ‘soft on crime’. Her lack of previous judicial experience prior to her nomination was criticised, although at least eighteen United States Supreme Court justices, including Chief Justice Earl Warren, had had no previous judicial experience. Nonetheless Chief Justice Bird persisted with
her administrative reforms of the court system including the appointment of special panels to solicit public comment on problems such as court congestion, encouraging the Courts of Appeal to make their internal procedures public, assigning municipal and superior court judges to fill temporary vacancies on the Supreme Court, and giving less experienced and younger judges opportunities to sit at the appellate level. She prohibited court employees from accepting gratuities from lobbyists and also appointed women and members of minority groups to the Judicial Council, which is composed primarily of judges and acts as a kind of board of directors, determining policies for the state court system as a whole. These and other actions taken by Chief Justice Bird made her unpopular.

no on Bird. Prior to the 1978 election, a ‘No on Bird’ campaign was organised to attempt to prevent her confirmation as Chief Justice. This was the first time an organised attempt had been made to unseat an appellate court judge. The campaign against Chief Justice Bird raises many issues concerning the overlap between the three arms of government and the election of judges. Because of the position of judges in an arm of government intended to uphold the rule of law in an impartial and non-partisan manner, such elections may appear strange and anomalous to Australians. Judges standing for election in California had not, prior to 1978, needed to campaign. However the attack on Chief Justice Bird caused her to comment in two speeches she made before the 1978 election. She discussed the difficulty facing courts which are required to resolve fundamental social tensions that the political branches of government, the legislature and the executive, sometimes evade. She asked, ‘do we truly want a judiciary that decides issues not as an impartial arbiter but as a sycophant seeking to satisfy the wishes of a powerful few, a strident minority, or a momentary majority?’ And in a subsequent speech she stated that,

...judges are being perceived as easy targets and are being portrayed in a manner calculated to create prejudice in the public mind and then play on it. This technique has met with increasing success as the distinctions between the judiciary and the executive and the legislative branches have blurred with the thrusting of more and more political issues on the courts. Those who attack for momentary political advantage have not hesitated to seize upon this opportunity. (P Stoltz, Judging Judges: the Investigation of Rose Bird and the California Supreme Court, Free Press 1981, 59.)

The campaign was organised by Senator HL Richardson who announced that he would mount a one million dollar effort against Chief Justice Bird. He used direct mail and television advertisements, one of which showed a young woman pursued by a masked man into an elevator, the door closing and then the same woman, bloody and sobbing on the floor with her clothes badly disheveled. The announcer’s voice told the viewers: ‘Next May that rapist could be on the streets again because Rose Bird and the Supreme Court reversed an appellate court decision and said they did not think the victim had experienced ‘great bodily injury’. (id, 49.)

Commenting on this campaign in one of her speeches, Chief Justice Bird stated,

There is a small group of extremists in this state whose zeal for politicising the bench to ensure ideological domination has emboldened them to believe that the Chief Justiceship can be bought by the expenditure of $1 million in a media-blitz campaign. (id, 58)

Confirmation elections in California occur every eight to twelve years. Chief Justice Bird faces another confirmation election in November of this year. Four million dollars have already been spent by those campaigning against her. In a recent ABC radio interview (‘Tuesday Dispatch’ 26 April 1986) Chief Justice Bird commented upon the need for judicial restraint during campaigns since judges may not comment upon the cases heard before them. She said the process was ‘as if you were placed in a ring with an opponent who had gloves and you had both arms
The judicial handicap is increased by the ease with which court decisions can be distorted and sensationalised in an emotional context. The Chief Justice sees the solution as being the need to communicate what the role of the court is so as to avoid the politicisation of the judiciary and the phenomenon of 'politicians in black robes' beholden to special interests and powerful groups.

**to handle power with grace.** Her approach to the goal of publicising the ideal of the rule of law has been to open up the courts by publishing all court rules and to attempt to allow the judiciary to see itself as an organic whole. The diffusion of the natural tension between trial and appellate court judges has, she believes, been achieved by bringing up judges from the system below to sit on the Supreme Court, so that each level of the judiciary appreciates the problems of the other levels. Although this was regarded as abhorrent at first, the Californian judiciary now accept the practice. She is firmly committed to the notion that, in a diverse and pluralistic society, the judiciary should reflect that diversity so as to break down the belief that there is only one crucial viewpoint which must be adhered to by everyone appointed to the judiciary. She stated, 'it's very important to handle power with grace and the way in which to do that is to fundamentally understand that your view is a perception rather than the truth.' In her view, this is particularly difficult in an uncertain age when people seek certainty from somewhere and often look to the criminal law to provide it. The situation is worsened, she believes, when politicians exploit that need by using emotional rhetoric which makes it difficult to reach rational solutions, particularly in the context of the cult of personality in American political dialogue.

**an independent judiciary.** Nonetheless, Chief Justice Bird takes the view that there is a role for democracy in the appointment of the system of judges since the system of confirmation elections allows popular debate and genuine dialogue concerning the role of the court. However this creates a tension between the ideal of judicial independence and the notion of judicial accountability. In her view, at least, the message can be put across that a democracy needs an independent judiciary which will make unpopular decisions in a diverse culture so as to protect the rights of everyone, even the unpopular.

**an ordinary citizen.** Chief Justice Bird resists attempts to invade her personal life. However she believes that it is important for a public official to be 'as close to an ordinary citizen as possible', to use her words. She does most of her own typing and drives her own car, rather than using a chauffeur-driven limousine. She has written a number of articles on cancer, having herself undergone a modified radical mastectomy in 1976 and two subsequent operations for cancer. She described the experience as 'a kind of liberation' even though she said in 1979 'under the statistics, I will be lucky if I am alive in five years'.

**what winning is about.** In a recent address to the New South Wales Women Lawyer's Association (April 30, 1986), Chief Justice Bird discussed the risk that professional pressures and stresses may distort one's development as a human being. She spoke of restructuring the concept of what success and winning are about in order to achieve wisdom and live ethically. She described life as a learning and risk-taking process, but, in her view, if one learns something in the process of risk-taking then one can

re-structure the concept of what winning is about

... [and] risks are just a natural part of life ... [F]ailure is an inability to come to terms with who you are and what life is about.

**criminal law developments**

Yet malice never was his aim;
He lashed the vice, but spared the name;
No individual could resent
Where thousands equally were meant.
Jonathan Swift, *On the Death of Dr Swift C.* 1700

**increase in criminal appeals.** In his address to the Commonwealth Magistrates' Associa-