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## "On the Make": Campaign Funding and the Corrupting of the American Judiciary

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# “ON THE MAKE”: CAMPAIGN FUNDING AND THE CORRUPTING OF THE AMERICAN JUDICIARY

*David Barnhizer*<sup>+</sup>

## INTRODUCTION

Rather than symbolizing Justice as a blindfolded goddess carefully weighing the evidence in legal disputes to ensure fair and unbiased outcomes, it has become more accurate to visualize her with blindfold askew, sneaking glances to see who places the most money or other tribute onto her scale to tilt the balance in their favor. If blindfolded Justice is the abstract symbol of independent and equitable decision-making, the judge is the concrete manifestation of the process through which we attempt to attain justice and fairness. Achieving justice through the judicial mechanism requires independent and principled arbiters free of corrupting influence.<sup>1</sup>

Judicial integrity is at the heart of the Rule of Law. Justice Anthony Kennedy reminds us that a judge has a special role in the American democracy. Kennedy argues that:

we live in a constitutional democracy, not a democracy where the voice of the people each week, each year, has complete effect. We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles . . . . There's a rule of law, [and it has] three parts.

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<sup>+</sup> Professor of Law, Cleveland State University. I would like to express my appreciation for insightful comments offered at various stages by Sue Barnhizer, Paul Carrington, Cathrine Castaldi, Anthony D'Amato, Michael Davis, Sheldon Gelman, David Goshien, Candice Hoke, Judge Richard Markus, Ronald Rus, David Snyder, Lloyd Snyder, and James Wilson. I particularly want to thank Robert Drinan, who encouraged me to further develop some earlier thoughts on this subject. This, of course does not signify endorsement of the analysis and conclusions contained in this essay by any of the above individuals.

1. It is often useful to see ourselves through other eyes. See, e.g., Mark Cammack, *Jury Trials Worth a Try in RI Courts*, JAKARTA POST, Mar. 15, 2000, available at 2000 WL 4786836 (displaying the insights offered in the context of judicial integrity in Indonesia). President Abdurrahman Wahid has recently stressed the vital importance of restoring public confidence in the administration of justice in Indonesia. . . . Every legal system faces the challenge of ensuring the integrity of its judiciary. Judges everywhere are subject to pressures and temptations to depart from the requirements of the law and decide the cases before them based on fear or favor. *Id.*

[The first part is] the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That's neutrality.<sup>2</sup>

The thesis offered here is that the cost of judicial campaigns has reached a level where both candidates and sitting judges are shaping their behavior to attract financial and other support.<sup>3</sup> This not only results in distortion of judicial selection by repelling meritorious potential candidates who are unwilling to compromise their principles, but in the capture of judges by special interests willing to finance judicial campaigns.<sup>4</sup> Some argue that the great increase in contributions to

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2. *Frontline: Justice for Sale?* (PBS television broadcast, Nov. 23, 1999) (Bill Moyers' interview of Justice Anthony Kennedy) [hereinafter *Frontline: Justice for Sale?*]. For more discussion, visit <<http://www.pbs.org/wgbh/pages/frontline/shows/justice>>. The site contains a rich variety of resources, including inside views from two Supreme Court Justices, a state judge, a lobbyist and a political consultant; plus reports and polls. An interactive map showing how each state selects judges and links to state information and resources are also presented. The site includes a discussion of why the Founding Fathers wanted appointment by merit while Jacksonian Democrats called for elections of judges. An important part of the site includes an examination of reform efforts in Texas and other states and why voters do not always support merit selection of judges. Included is the ABA's position where merit selection is preferred. The site also contains an excerpt from the program, including Bill Moyers' interview with Justices Breyer and Kennedy, as well as two campaign ads for judges.

3. See William Glaberson, *State Judges Are Acting More Like Politicians As Challenges Grow*, J. REC. (Oklahoma City), June 23, 2000, available at 2000 WL 14296340 [hereinafter Glaberson, *Challenges Grow*]. Glaberson reports that:

In Ohio this year, more than \$5 million and possibly as much as \$12 million may be spent in a battle for a single seat on the state Supreme Court. The campaign, one of the most bitterly contested in the country, could shift the ideological balance of the court. Twenty years ago, a campaign for the same court cost \$100,000.

Races for state supreme courts in Michigan, Illinois, Alabama, Idaho and other states are also drawing national attention. Already this year, supreme court campaigns have included claims of race baiting, dirty politics, catering to rich trial lawyers and abdication to business interests.

*Id.*

4. See Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater?*, 44 WAYNE L. REV. 367, 370 (1998); see also Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 112-13 (1998); Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71 (1997); Gerald F. Richman, *The Case for Merit Selection and Retention of Trial Judges*, 72 FLA. B.J. 71 (1998); Paul D. Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215, 243 (1997-1998), (describing the Alabama practice of prohibiting judges to solicit campaign funds directly); Traciell v. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21, 21 (1996); see also generally Nicole C. Allbritain, Comment, *One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and*

judicial candidates simply means that contributors are giving to candidates they feel certain will support their positions.<sup>5</sup> To some extent this is certainly true. But even in those situations the legality of the action does not mean it is socially desirable or without harmful consequences.

Justice is a moral construct rather than a technical legalistic device. When judges come to see their behavior as limited only by the technical boundaries of legalistic rules, they have already lost the essential judicial spirit that helps to sustain the legitimacy of the Rule of Law. Special interests' contributions to judicial candidates and sitting judges can unquestionably be done in ways consistent with the letter of the law. But even though technically legal, that action can still destroy the vital and fragile integrity of the judiciary. This is the dilemma we face.

The situation has reached the point where supreme court justices from fifteen states called a "summit meeting" due to their concern "about the million-dollar war chests, attack advertising and even outright distortion of an opponent's record that seem to have become more widespread in judicial races this year and threaten public confidence in the courts."<sup>6</sup> Texas chief justice Thomas R. Phillips, whose state supreme court has been at the center of controversy for more than a decade over allegations of judicial candidates being bought by special interests, admits: "Within the last few years, this has become a national problem and one that has to be looked at nationally, not just in whatever state is having an election at the moment."<sup>7</sup>

But the solutions that are most needed are unlikely to be achieved by judges because they are rarely honest with themselves about the depth of the problem and the degree to which they are co-conspirators in its creation. The primary strategies being touted for consideration at Justice Phillips' "summit" suggest a concentration on improving information for voters and even holding judicial elections at different times than general elections. While improved voter information systems

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*Expenditures*, 64 U. CIN. L. REV. 1323 (1996) (analyzing the dilemma of selection based on partisanship and that based on merit); Malcolm A. Heinicke, Note, *The ABA Should Not Delay on Pay-To-Play: Regulating the Political Contributions of Lawyers to Government Officials Who Award Legal Contracts*, 49 STAN. L. REV. 1523 (1997), (describing the regulation of contributors in the area of municipal finance).

5. See Interview with the Honorable Richard Markus (May 2000) (on file with author) [hereinafter *Markus Notes*]; see also generally Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity To Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

6. William Glaberson, *State Chief Justices To Meet on Abuses in Judicial Races*, N.Y. TIMES, Sept. 8, 2000, at A14 [hereinafter Glaberson, *State Chief Justices*].

7. *Id.*

are desirable and needed, they are only a very small part of a solution, particularly as long as judicial candidates are barred from speaking freely in their campaigns. Similarly, there is a significant risk in scheduling special judicial elections since voters are already uninformed and largely apathetic about judicial candidates. The special election strategy could result in startlingly small voter turnout which would further reduce the judiciary's legitimacy.

One consequence of the rising cost of judicial elections and the amassing of large pools of campaign funds by special interests is that many judicial candidates are consciously and unconsciously selling their votes on issues. Judges need to attract the contributions both for their own campaigns and to keep the funds and other forms of political support away from potential competitors. Judges do this by crafting messages that signal to the contributors that the candidates are willing to provide what the donors want in exchange for their money.<sup>8</sup> This does not mean large numbers of judges are taking illegal bribes of a criminal nature.<sup>9</sup> The situation would be relatively simple if criminal bribery were the main problem.

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8. See Phillip Rawls, *Big Spender Calls for Limits on Judicial Campaign Contributions*, AP NEWSWIREs, Nov. 12, 1999 (on file with the *Catholic University Law Review*).

In Alabama, for example, "Jere Beasley, a Montgomery attorney and former lieutenant governor, said he would like to see the Legislature place limits on the amount of money that can be contributed to judicial candidates and on the amounts that can be spent by or on behalf of the candidates. In recent years, races for the Alabama Supreme Court have turned into multimillion-dollar spending sprees fueled by business groups and plaintiff lawyers. Beasley predicted that without limits, the same thing will happen next year—when five of the nine seats on the Supreme Court are up for grabs—because business interests will try to elect justices who will support their agenda. "They are trying to elect a Supreme Court that will put the stamp on binding arbitration," he said at a news conference."

*Id.*

9. The problem of judicial corruption is ancient. Anthony Kuhn, *Judicial Bribery in China Goes Way Back*, SEATTLE TIMES, Oct. 22, 1999, at C6. Consider this Kafkaesque report of "buying a human head" from China:

At first glance, it was an unremarkable news item. Nine convicts had been executed here in the capital of Henan province. . . . But one thing *see med* wrong: The paper listed only eight names. A day later, a notice posted outside a municipal courthouse confirmed what many locals had feared. The ninth man, executed in secret, was Cao Haixin, the democratically elected chief of a village within the Zhengzhou municipality. The notice said that Cao had shot a man in 1995 over an "ordinary dispute." But supporters say Cao was the victim of a most heinous form of judicial corruption known in China as "buying a human head." Bribing judicial and law-enforcement officials to eliminate one's opponents has a long history in China. Many such cases are studied by law students, such as the case of Tao Ercang, an 18th-century scholar who bribed a local judge to try his lover's husband on false charges. The judge had the husband beaten to death while interrogating him in court.

*Id.*

The process that is corrupting the American judiciary is far more pervasive, destructive, and subtle than ordinary criminal bribery intended to obtain a particular outcome in a specific case.<sup>10</sup> Judge Abner Mikva recently provided an example of how special interests can somewhat more subtly influence judicial decisions:

Between 1992 and 1998 . . . more than 230 federal judges took one or more trips each to resort locations for legal seminars paid for by corporations and foundations that have an interest in federal litigation on environmental topics. In the seminars devoted to so-called environmental education, judges listened to speakers whose overwhelming message was that regulation should be limited—that the free market should be relied upon to protect the environment, for example, or that the “takings” clause of the Constitution should be interpreted to prohibit rules against development in environmentally sensitive places.<sup>11</sup>

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10. Of course criminal bribery is serious and continues to happen. In the past decade or so we have had evidence of criminal bribery in Chicago’s Operation Greylord, in Miami, San Diego, and Youngstown, Ohio, to name a few places. See e.g., Alex Roth, *Judges Gain Little on Appeal: 2 Ex-jurists, Disbarred Attorney Are Resentenced*, SAN DIEGO UNION-TRIB., June 13, 2000, at A1 (reporting criminal bribery in San Diego); *Corruption Inquiry Ends After 10 Years*, FLA. TODAY, June 4, 2000, at 8 (reporting the sentence of Judge Alfonso Sepe after his admission of taking a \$125,000 bribe in a criminal drug trial); Mark Gillispie, *3 More Officials Face Charges: Corruption of Judiciary Probe Continues*, THE PLAIN DEALER, (Cleveland) Oct. 26, 1999, at 3B (“Two more judges and a former assistant county prosecutor were implicated in a growing federal investigation into judicial corruption in Mahoning County yesterday.”). Robert Becker, *Convicted Judge Seeks \$113,222: Shields Contends State Owes Pension Payout*, CHI. TRIB., Apr. 26, 2000, at 1. The Tribune story reports that:

Shields, once considered the front-runner to become chief judge of the Circuit Court, was a casualty of Operation Gambat, a federal probe of corruption in the old 1st Ward. The case against Shields involved Robert Cooley, a former corrupt lawyer who wore a hidden recorder while working undercover for the government, and Pasquale “Pat” De Leo, a politically connected lawyer who was Cooley’s “bag man.” Unlike many judges convicted in Operation Greylord, an earlier federal undercover probe of judicial corruption, Shields enjoyed a stellar reputation. Even Cooley, who says he bribed at least 29 Cook County judges during almost two decades as a corrupt lawyer, testified that he didn’t think Shields could be bribed.

*Id.*

11. Honorable Abner Mikva, *The Wooing of Our Judges*, N.Y. TIMES, Aug. 28, 2000, (visited Mar. 14, 2000) <[http://www.mediatransparency.org/stories/wooing\\_judges.htm](http://www.mediatransparency.org/stories/wooing_judges.htm)> [hereinafter Mikva, *The Wooing of Our Judges*]. In his long and distinguished career Judge Mikva has served as a member of Congress, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, and as legal counsel to President Clinton.

## I. A FORMULA FOR JUDICIAL CORRUPTION: MONOPOLY POWER, DISCRETION, LACK OF ACCOUNTABILITY, AND MONEY

The corruption of the judiciary includes deliberate judicial wrongdoing in exchange for financial contributions. But it also involves more subtle judicial behavior shaped to fit contributors' agendas. The belief that judges are directly or indirectly trading rulings for contributions has significant potential for developing among citizens a widespread perception of corrupt judicial fundraising and related favor-selling. Even if judicial corruption through decisions that favor special interests is not empirically demonstrable, the public's perception will be that judicial decision-making favors special interests to which the judge is obligated through financial or other campaign support.<sup>12</sup> The implications are quite serious. Without a widely held public perception of judicial fairness the members of political societies distrust their political institutions and lack the will to cooperate with others. If this distrust continues too long and becomes too intense and pervasive the social glue is not strong enough to prevent a weakening or even disintegration of the political system.<sup>13</sup>

Power both enables and corrupts, and discretionary power is even more difficult to manage without harmful effect. Few of us know how to handle it well. Discretionary power over the lives of others is at the core of a judge's job. The test is in how we deal with power and what it does to us. A key aspect of this analysis of how power affects us involves the degree of our accountability for decisions, the likelihood of abuses being detected, the maintenance of "plausible deniability" regarding any direct link between a judge's decisions and receipt of supporters' campaign contributions, and the very slight potential for sanctions if improper judicial behavior is exposed. Most of what judges do is discretionary, and many of the judiciary's professional failures are generated by a lack of accountability for their actions and omissions.

Robert Klitgaard used political and bureaucratic corruption as a theme

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12. See J. David Rowe, *Limited Term Merit Appointments: A Proposal to Reform Judicial Selection*, 2 TEX. WESLEYAN L. REV. 335, 344-47 (1995); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 9-10 (1995) (noting the unavoidable public perception of a quid pro quo in judicial decision making); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 204, 208-09 (1996).

13. In *The Leviathan*, Thomas Hobbes described six factors that lead to the weakening, and even the dissolution, of a political community. Hobbes' factors are: The belief that every private man is judge of good and evil actions; the belief that whatever a man does against his conscience, is sin; the belief that faith and sanctity, are not to be attained by study and reason, but by supernatural inspiration or infusion; the belief that he who has the sovereign power is subject to the civil laws, the belief that every private man has an absolute propriety in his goods: such as excluded the right of the sovereign, and the belief that the sovereign power may be divided. See THOMAS HOBBS, *THE LEVIATHAN* 185 (C.B. MacPherson ed., 1968).



in a recent essay.<sup>14</sup> Klitgaard's analysis is directly applicable to judicial corruption. He explains:

[C]orruption may be represented as . . . a formula:  $C = M + D - A$ . Corruption equals monopoly plus discretion minus accountability. Whether the activity is public, private, or nonprofit . . . one will tend to find corruption when an organization or person has monopoly power over a good or service, has the discretion to decide who will receive it and how much that person will get, and is not accountable.<sup>15</sup>

In thinking of how this analysis applies to judicial corruption, visualize Klitgaard's formula as follows: Corruption operates according to the formula:  $C = M + D - A$ . Restating the formula for judicial corruption results in: "Judicial Corruption" equals "judicial monopoly over the interpretation of ambiguous doctrines" plus "judicial discretion" minus "judicial accountability for being wrong." Klitgaard warns that:

[O]ne will tend to find corruption when an organization [insert the judiciary] or person [the specific judge] has monopoly power over a good or service [judging], has the discretion to decide who will receive it [discretionary aspects of selecting cases for appellate review] . . . and is not accountable. . . . [C]orruption is a crime of calculation, not passion. . . . [T]here are both saints who resist all temptations and honest officials who resist most. But when bribes are large, the chances of being caught small, and the penalties if caught meager, many officials will succumb.<sup>16</sup>

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14. See generally, Robert Klitgaard, *International Cooperation Against Corruption*, in WORLD DEV. REP. (1997) [hereinafter Klitgaard, *Corruption*]; see also ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988). Klitgaard observes that:

The reminder that corruption exists everywhere—in the private as well as the public sector, in rich countries and poor—is salutary, because it helps us avoid unhelpful stereotypes. . . . Corruption is a term with many meanings. . . . Viewed most broadly, corruption is the misuse of office for unofficial ends. The catalogue of corrupt acts includes—but is not limited to—bribery, extortion, influence peddling, nepotism, fraud . . . and embezzlement. Although people tend to think of corruption as a sin of government, it also exists in the private sector. Indeed, the private sector is involved in most government corruption.

Klitgaard, *Corruption*, *supra*.

15. Klitgaard, *Corruption*, *supra* note 14. Klitgaard also states that, "Different varieties of corruption are not equally harmful. Corruption that undercuts the rules of the game—for example, the justice system . . . devastates economic and political development." *Id.*

16. Klitgaard explains that:

Combating corruption . . . begins with designing better systems. Monopolies must be reduced or carefully regulated. Official discretion must be clarified. Transparency must be enhanced. The probability of being caught, as well as the penalties for corruption (for both givers and takers), must increase . . . . Laws

When we apply Klitgaard's formula to the American judiciary it becomes obvious that the rules allow "legal bribery" of judges through campaign contributions. The ABA's *Model Rule of Professional Conduct 3.5, "Impartiality and Decorum of the Tribunal"*, mandates that: "A lawyer shall not: (a) seek to influence a judge . . . by means prohibited by law."<sup>17</sup> The irony is obvious in the language itself, which on its face permits lawyers to seek to influence a judge by means *allowed* by law. The common denominator is entirely instrumental. Obviously, campaign contributions, in many instances, intend to influence the judge even if money and other support is given only to curry favor with the judge if there is ever a need for judicial goodwill and forbearance. An example of the potential influence, in a state with allowable per-lawyer campaign contributions of \$1,000, is that lawyers in larger law firms can sit down and decide which judges or judicial candidates are most useful to their interests. They can mobilize their per-lawyer contributions within the legal cap and combine contributions to ensure the election of judges who treat them well and give them what they want. It is not only large firms which engage in such behavior. Lawyers in smaller firms with similar interests, such as the make-up of the American Trial Lawyers Association (ATLA), can create institutions that collect and concentrate contributions to achieve their ends. The result is the ability to significantly influence judicial elections and decision-making.

The legal profession generally—and judges specifically—are governed by ethical mandates requiring them to avoid even the appearance of impropriety.<sup>18</sup> But a recent and troubling example offered by the Chief Justice of the United States Supreme Court reveals how loose and discretionary such "rules" are in their application. The *New York Times* criticized the Chief Justice for deciding not to disqualify himself from

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and controls prove insufficient when systems do not exist in which to implement them. Moral awakenings do occur, but seldom by the design of our public leaders. If we cannot engineer incorruptible officials and citizens, we can nonetheless foster competition, change incentives, and enhance accountability—in short, fix the systems that breed corruption.

*Id.*

17. Model Rules of Professional Conduct 3.5 (2001) (entitled "Impartiality and Decorum of the Tribunal").

18. For an intriguing protest of the behavior of judges and the legal system see Richard Wayne, *Secret Canons of Judicial Conduct* (visited Oct. 10, 2000) <<http://www.caught.net/nwsltr/candef.htm>>.

The criteria used in deciding if a judge is bad is NOT how they handle a high profile case or people of influence, but how they handle the poor, prosecutorial misconduct and the unrepresented. Regardless of how bad a Judge is, they will undoubtedly make SOME correct decisions. We consider a Judge bad if they do not FAITHFULLY and CONSISTENTLY adhere to their oath of office and aggressively pursue justice for ALL.

*Bad Judges and What To Do About Them* (visited Oct. 10, 2000), <<http://www.caught.net/prose/badjudge.htm>>.

participating in the Court's deliberations in the recent Microsoft decision. Justice Rehnquist's son, James Rehnquist, is part of a team of lawyers defending Microsoft against rival companies in a private antitrust case. The *Times* concluded that: "Mr. Rehnquist's openness about the situation is praiseworthy. For a judge to reveal the thinking behind a recusal decision is all too rare. But disclosure alone cannot cure the underlying problem here, which is preserving public confidence in disinterested decision-making by the nation's highest court."<sup>19</sup>

If the role-modeling provided by the Chief Justice of the nation's highest court suggests that he is unable to appreciate the danger of subjectivity and the appearance of impropriety inherent in such a situation, or is sufficiently arrogant that he feels accountable to no one who is of consequence to him, it is fair to be concerned about how lesser judges will perceive their obligation to avoid the appearance of impropriety in their relationships and campaign finance dealings.

The system of campaign contributions has legalized a corrupt process in which lawyers do make payments to judges before whom they practice and the payments are legitimated by labeling them as campaign contributions. But, judges are required to avoid even the appearance of impropriety. Canon 2 of the *ABA Model Code of Judicial Conduct* requires that "*A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All the Judge's Activities.*"<sup>20</sup> Although the *Model Code of Judicial Conduct* goes to great lengths to limit certain kinds of behavior, it misses the main point that the culture of judicial campaign financing and fundraising creates both the reality of impropriety and its appearance as an inherent and unavoidable fact. Canon 1 of the *MODEL CODE*, for example, imposes the requirement that "A Judge Shall Uphold the Integrity and Independence of the

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19. *Mr. Rehnquist's Dilemma*, N.Y. TIMES, Oct. 2, 2000, at A26. The *Times*' analysis suggests the dangers of such judicial subjectivity, arguing: "Mr. Rehnquist said he does not believe that 'a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents in another case, a party that is also a party to litigation pending in this Court.'" *Id.* But Justice Rehnquist conveniently misstates the standard by which his actions will be judged. Many, and perhaps even most, citizens are not "well-informed" about the judiciary. Their perception is going to be that of the typical voter or citizen upon whose faith democracy depends and their conclusion is likely to be that Justice Rehnquist ignored a fundamental conflict of interest. But Justice Rehnquist is also more than a little cavalier in concluding that well-informed citizens would understand and accept his actions as legitimate. The Microsoft litigation is not just "another case." *Id.* "The overlap here goes well beyond the client's identity. The case his son is handling involves the same client, Microsoft, in an antitrust matter involving some of the very same issues the government is litigating." *Id.*

20. See *MODEL CODE OF JUDICIAL CONDUCT* Canon 2 (1999).

Judiciary.”<sup>21</sup> Yet, the admonition is coming too late given the systemic corruption created by judicial fundraising. We have created a system that allows payments that would otherwise be bribes and legalized the “bribes” as campaign contributions.

## II. THE VITAL ROLE OF JUDICIAL NEUTRALITY AND INDEPENDENCE

Alexander Hamilton warned that: “power over a man’s subsistence amounts to a power over his will.”<sup>22</sup> Judicial independence declines in direct proportion to a judge’s dependence on others for financial support and other assistance needed to gain and retain the judicial office. Nor are judges ignorant about the sources of their financial support. In response to a question whether judges remained “insulated” from the fundraising process, one lobbyist for the industry group Pennsylvanians for Effective Government observed:

Thin insulation, yes. The judge is not supposed to accept a check, not supposed to make the phone call, and, to my knowledge, they do not. Obviously, their campaign staffs are doing that. Do the judges know who the big donors are, or, the candidates know who the big donors are? Of course, everybody does. It's common knowledge as to who the big donors are and where the sources of funds are. Do they know after the fact who made the contributions? Of course they do. When PEG has made contributions it's been acknowledged by the judicial candidate in a thank-you . . . .<sup>23</sup>

A citizenry's perception of fairness and independence in judicial decisions is obviously a fundamental element of the Rule of Law. Aristotle warned that a sense of fairness, and of justice being served, were essential elements of any decent society.<sup>24</sup> Mark Kozlowski remarks that: “as Justice Felix Frankfurter put it, ‘[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.’”<sup>25</sup> He concludes that:

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21. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1999).

22. THE WORLD TREASURY OF RELIGIOUS QUOTATIONS 748 (Ralph L. Woods ed., 1966) (citing Alexander Hamilton).

23. *Frontline: Justice for Sale?*, *supra* note 2.

24. Aristotle argues that:

[J]ustice is often thought to be the greatest of virtues . . . . And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also . . . . For this same reason justice, alone of the virtues, is thought to be ‘another’s good’, because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.

ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 1, in GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., 1984) (footnote omitted).

25. Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES, Aug. 9, 1999

“the appearance of judicial disinterestedness is not secured by adherence merely to the letter of campaign finance laws. The Supreme Court has long held that litigants are constitutionally entitled to proceed before ‘a neutral and detached judge.’”<sup>26</sup>

Respect for the law and the fairness of judicial institutions is essential to any legitimate political system. Plutarch once said in relation to the decline of the Roman Republic: “The abuse of buying and selling votes crept in and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts. And then to the army, and finally the Republic was subjected to the rule of emperors.”<sup>27</sup> Robert Klitgaard warns that:

Corruption is a term with many meanings. . . . Viewed most broadly, corruption is the misuse of office for unofficial ends. The catalogue of corrupt acts includes—but is not limited to—bribery, extortion, influence peddling, nepotism, fraud, and embezzlement. Although people tend to think of corruption as a sin of government, it also exists in the private sector. Indeed, the private sector is involved in most government corruption.<sup>28</sup>

Obviously, the argument offered here is that influence peddling and private sector strategies aimed at usurping the independence and neutrality of judicial decision-making have resulted in a culture of systemic judicial corruption.

The threat created by this systemic corruption is of great moment. Judges are the last defense of the Rule of Law’s integrity. When judicial decisions are seen as politicized rather than independent, or as done in the service of a special interest group or to advance judges’ self-interest rather than in a neutral and independent spirit, the sense of fairness and justice that is the binding force of the Rule of Law becomes exhausted and the system is weakened.<sup>29</sup> Disobedience and avoidance of legal obligations can be expected to rise in direct proportion to declining respect for law. As respect for the fairness of law diminishes, greater governmental force must be used to ensure obedience.

Both the public’s perception of judicial integrity and the reality of judicial integrity are being threatened by judicial fundraising and by judges’ dependence upon powerful special interests.<sup>30</sup> Justice Stephen

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(citing *Public Utilities Comm’n of the District of Columbia v. Pollak*, 343 U.S. 451 (1952)).

26. *Id.* (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)).

27. *Frontline: Justice for Sale?*, *supra* note 2.

28. Klitgaard, *Corruption*, *supra* note 14.

29. See Mikva, *The Wooing of Our Judges*, *supra* note 11.

30. See Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial*

Breyer warns that:

Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions . . . . The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty.<sup>31</sup>

Perhaps the worst example of a judiciary whose citizens have every right to consider it tainted is found in Texas. A report from a citizen's group, Texans for Public Justice, found that seven justices of the Texas Supreme Court had raised a total of \$9,166,450 in contributions for their most recent elections.<sup>32</sup> The amounts raised were not the most troubling issue. The report noted that:

Sources closely linked to litigants with cases before the same court contributed \$3.7 million, or 40 percent of the grand total . . . . Of the 530 opinions the Supreme Court issued during the period studied, 60 percent (322 cases) are tainted by the fact that at least one of the seven justices took money from sources with an interest in the case.<sup>33</sup>

An example of how this systemic corruption works among the federal judiciary was recently offered by Judge Mikva in his criticism of federal judges who allow themselves to be wined and dined at luxury resorts by business interests sponsoring "seminars" that presented only one side of an issue. Mikva observes:

If an actual party to a case took the judge to a resort, all expenses paid, shortly before the case was heard, the judge and the host would be perceived to be acting improperly even if all they discussed was their grandchildren. The conduct is no less reprehensible when an interest group substitutes for the party

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*Campaign Finance*, 72 S. CAL. L. REV. 505, 516-17 (1999); William V. Dorsaneo, III, *Opening Comment to the March 1999 Roy R. Ray Lecture Judicial Independence and Democratic Accountability in Highest State Courts*, 53 SMU L. REV. 255, 258 n.7 (2000); Justice Hugh Maddox, *Taking Politics Out of Judicial Elections*, 23 AM. J. TRIAL ADVOC. 329, 331-33 (1999); James Podgers, *Taking a Second Look at Giving*, A.B.A. J., Apr. 1999, at 87; Alexander Wohl, *Justice for Rent*, AM. PROSPECT, May 22, 2000, at 3437 (2000), available in 2000 WL 4739281.

31. *Frontline: Justice for Sale?*, *supra* note 2.

32. Texas Supreme Court Fundraising Closely Tied to Court's Case Load: 40% of Justices' Contributions Tied to Sources Litigating Supreme Court Cases, Feb. 23, 1998.

33. *Id.* Cheryl Gray and Daniel Kaufmann describe the danger of such pervasive systemic corruption. See Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, in 1997 WORLD DEVELOPMENT REPORT (World Bank 1997) ("Where there is systemic corruption, the institutions, rules, and norms of behavior have already been adapted to a corrupt modus operandi, with bureaucrats and other agents often following the predatory examples of, or even taking instructions from, their principals in the political arena.").

to the case.<sup>34</sup>

This corruption by well-financed surrogates that are set up in ways intended to allow legal cutouts and “plausible deniability” of wrongful intent is a pervasive force in our political arena. Mikva adds:

I know one federal judge who has been on a dozen trips sponsored by the three most prominent special interest seminar groups. I remember at least two occasions where judges on judicial panels where I also served took positions that they had heard advocated at seminars sponsored by groups with particular interest in the litigation.<sup>35</sup>

Justice Kennedy makes the connection between the respect for law and perception of judicial integrity in the following way:

A commitment to the constitution is not something that's genetic, it's not inherited, it's not automatic. It has to be taught. And each generation must learn about the constitution and the values of constitutional institutions within the context of their own time, within the environment of their own time. And if we are in an era in which there is a loss of confidence in the judicial system--and, even worse, a misunderstanding of the judicial system--then we must take steps to correct it.<sup>36</sup>

He goes on to conclude that:

I do sense that there is a growing misunderstanding, a growing lack of comprehension, of the necessity of independent judges . . . There must be a rededication to the constitution in every generation. And every generation faces a different challenge. We weren't talking about this 30 years ago, because we didn't have money in elections. Money in elections presents us with a tremendous challenge, a tremendous problem and we are remiss if we don't at once address it and correct it.<sup>37</sup>

One reason judicial integrity is so important is that judges occupy the central mediating and defining roles in relation to our most hotly contested and fundamental issues. The doctrines judges manipulate are among the most basic tools for allocating social benefits and duties. Legal scholars have paid far too little attention to the systemic functions of legal doctrines.<sup>38</sup> Doctrines are not simply words but are powerful formulae that have moral and political implications as well as great

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34. Mikva, *The Wooing of Our Judges*, *supra* note 11.

35. *Id.*

36. *Frontline: Justice for Sale?*, *supra* note 2.

37. *Id.*

38. See David Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 PITT. L. REV. 127, 133 (1988).

economic impact. All doctrines have functions and are chosen to achieve ends. Because they are goal-oriented judicial doctrines are obviously not truly neutral. Judicial doctrines are combinations of principles, positions, and policies advocated by the judiciary acting as a critical part of government.

Judges, operating within the rules of choice articulated for a powerful institution with critical functions, have made important choices about values. These choices are advanced in the form of doctrine. Doctrine is a conclusion about appropriate values, a formula for allocating benefits and duties, or a hypothesis about something of importance that supports and is supported by a particular institution or set of institutions. Through their formulations of legal doctrines judges provide rules for distributing power. Lawrence Friedman captures this in his warning: “law and . . . courts stand at the very core of crucial decisions in the United States . . . [including] such sticky issues as obscenity, abortion, sexual deviancy, personal morality, and drug laws . . . .”<sup>39</sup> He adds: “In complex societies custom is too flabby to do all the work—to run the machinery of order. Law carries a powerful stick: the threat of force.”<sup>40</sup>

Alexander Wohl reminds us that:

Chief Justice John Marshall once wrote that “the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary.” Marshall understood that judicial independence—whether guaranteed through life tenure in the case of qualified federal judges, or through the meritorious and fair selection of judges within the state systems—is the core of an effective judiciary and a foundation of our democracy.<sup>41</sup>

Wohl concludes that: “Until states begin to address these issues comprehensively, it will likely be politics as usual—a distressing indictment of our state judiciaries, and a continuing dilemma for those lawyers and citizens who want justice but don't want to have to buy it.”<sup>42</sup>

Judicial integrity is a vital element of a legitimate society because, as John Locke observed, as part of their social contract humans surrender their inherent rights of self-judgment and private dispute resolution to the processes of the political community in order to transcend an insecure and uncertain state of nature based on individual power. Locke concluded: “all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules . . . and the same to all parties . . . .”<sup>43</sup> This agreement to allow the system

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39. LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 275 (1984).

40. *Id.* at 257.

41. *See* Wohl, *supra* note 29, available in 2000 WL 4739281.

42. *Id.*; *see also* Mikva, *The Wooing of Our Judges*, *supra* note 11.

43. *See* JOHN LOCKE, *OF CIVIL GOVERNMENT SECOND TREATISE* 69 (1955); *see*



to resolve disputes continues so long as the community provides a credible, fair and authoritative means of dispute resolution. When the agreement does break down, the results can be tragic.<sup>44</sup>

Judges are therefore the umpires of the community's conflicts and their fair and equitable treatment of disputants is required for the process to be legitimate. Justice Kennedy observes that "[o]ur system presumes that there are certain principles that are more important than the temper of the times. And [to protect those principles] you must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort. That's the meaning of neutrality."<sup>45</sup> Absent that essential neutrality and independence the community's claim to be the exclusive means for dispute resolution is seen by many as illegitimate and people who consider themselves wronged begin to take private action.<sup>46</sup> This further undermines the political community.

Both actual judicial integrity and citizens' perception of the fairness of the judicial office are being diminished by the politicization of the judiciary.<sup>47</sup> Judge Mikva comments on the perception of judicial integrity

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also A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* (1993).

44. See, e.g., Juanita Darling, *Unsolved Murder Weakens Faith in Guatemalan Justice System*, L.A. TIMES, May 30, 1999, at A3. Juanita Darling describes the situation in Guatemala where the poor, faced with judicial corruption to the extent they receive no fair hearing of their grievances, "increasingly attack one another. The U.N. investigation of Guatemalan lynchings released in March revealed that 'some lynching victims were completely innocent of the crimes that caused the general anger. In the overwhelming majority of cases, people accused of minor crimes have been tortured and killed.'" *Id.*

45. *Frontline: Justice for Sale?*, *supra* note 2.

46. THOMAS HOBBS, *THE LEVIATHAN* pt. I, ch. 13 (C.B. MacPherson ed., 1968); see also, Mikva, *The Wooing of Our Judges*, *supra* note 11. Mikva opines:

Of course it may be a coincidence that none of the seminars financed by private interests take place in Chicago in January or in Atlanta in July. It may be a coincidence that the judges who attend usually come down on the same side of important policy questions as those who financed the meetings. It may even be a coincidence that environmentalists are seldom invited to speak. But surely any citizen who reads about judges attending fancy meetings under questionable sponsorship will have well-founded doubts about their objectivity.

*Id.*

47. William Glaberson reports that:

In interviews in more than a dozen states, judges, lawyers, legislators, political professionals and experts on the judiciary said the image of impartiality in the courts is a casualty of the new judicial politics. Even while campaign contributions were growing in the 1980s and 1990s, some of them said, judges seemed able to remain somewhat aloof from the battle. In place of those old inhibitions, judges are now finding themselves full participants in the same kind of ideological warfare that has affected other branches of government.

Glaberson, *Challenges Grow*, *supra* note 3.

by saying:

That is why so much is built into our judicial system—from the black robe and “all rise” custom to lifetime tenure for federal judges—to help foster the notion of judicial integrity. It all becomes meaningless, however, when private interests are allowed to wine and dine judges at fancy resorts under the pretext of “educating” them.<sup>48</sup>

The decline of the judiciary is being caused by several factors, but the most dominant are judicial fundraising and the tacit buying of judicial votes by contributors to judges’ campaigns.<sup>49</sup> In response to a question regarding the effects of campaign contributions on judges’ neutrality and independence, Justice Breyer answered:

[T]he campaign process itself does not easily adapt to judicial selection. Democracy is raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within. So, the whole problem of judicial campaigns is . . . difficult for us to confront. Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we’re concerned that there will be either the perception or the reality that judicial independence is undermined.<sup>50</sup>

While the situation has been deteriorating for more than a decade it is becoming steadily worse due to the rising cost of judicial campaigns and the heightened realization by special interests that the judiciary is one of our most critical levers of power.<sup>51</sup> Supreme court judges from fifteen

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48. Mikva, *The Wooing of Our Judges*, *supra* note 11.

49. See Wohl, *supra* note 29.

A recent study of Wisconsin State Supreme Court elections of the past 10 years found that candidates depend overwhelmingly on large individual contributions from a tiny number of well-off and nonminority contributors, most of whom are lawyers and lobbyists from a small number of large law firms . . .

Equally troubling, the breakdown of contributors is increasingly identifiable in terms of party alignment and single-issue advocacy. Many judicial candidates are identified with and endorsed by political parties. And even in those jurisdictions where judicial races are supposedly nonpartisan, judges are frequently grouped on ballots with candidates who are identified by party affiliation, thus making associations and decisions easy for voters, who are usually uninformed about judicial candidates.

*Id.*

50. *Frontline: Justice for Sale?*, *supra* note 2.

51. See Glaberson, *Challenges Grow*, *supra* note 3.

The politicking is becoming increasingly explicit. As the battle over changes in liability laws has moved into the courts in the last few years, both business groups and their trial lawyer adversaries have been increasingly open in describing the battle to win judgeships in bald political terms.

In a newsletter last fall, for example, the Michigan Manufacturers Association told its members about the importance of this year’s state Supreme Court

states have gone so far as to call a “summit” to consider what to do about what they admit is a critical situation.<sup>52</sup> Although there is enough blame to spread, business interests particularly have contributed to the judiciary’s decline. A lobbyist for Pennsylvanians for Effective Government (PEG) relates how the strategy unfolded:

The business community woke up in the late 1980s and realized that there are three legs to the government stool—the executive branch, the judicial branch, and the legislative branch. We were playing quite well for over a decade in two of those three and decided that the judicial branch are the arbitrators of the final interpretation of all rules and regulations that are passed by the legislature. Consequently, in '89 to the present, *PEG* periodically got involved in statewide appellate court races, most of those being supreme court races . . . .<sup>53</sup>

The pattern described by the PEG lobbyist has been repeated throughout the nation. William Glaberson reports on how this has progressed in the context of “tort reform” through “a variety of exaggerated claims by lawyers representing powerful interests aiming at legislative efforts to restrict their own liability through state legislative and judicial action.”<sup>54</sup> He reports one law professor describing the “tort reform” strategy as: “one of the most carefully developed and exquisitely executed political campaigns ever,” and includes statistics relating to the award of punitive damages—a main argument of the corporate defenders in their quest for legislative “reforms.”<sup>55</sup> Glaberson asks:

Huge punitive damage awards, for example, have become everyday events, right? Actually, a study of courts in the nation's 75 largest counties conducted by the National Center for State Courts found that only 364 of 762,000 cases ended in punitive damages, or 0.047 percent. OK, but isn't it true that more and more liability claims are filed every year? Actually, a study of 16 states by the same center showed that the number of liability suits has declined by nine percent since

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election. The newsletter flatly outlined the group's political goal.

In the last election, it boasted, contributions from the manufacturers' political action committee “swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda.”

*Id.*

52. See Glaberson, *State Chief Justices*, *supra* note 6.

53. *Frontline: Justice for Sale?*, *supra* note 2.

54. William Glaberson, *When the Verdict is Just a Fantasy*, N.Y. TIMES ABSTRACTS, June 6, 1999, at 1 [hereinafter Glaberson, *Just a Fantasy*].

55. *Id.*

1986.<sup>56</sup>

The judiciary is being corrupted by such special-interest strategies and the campaign fundraising process.<sup>57</sup> Wohl describes the dangers:

Today, big money is distorting even the sometimes questionable goals judicial elections were initially intended to serve. The issue is not simply whether state and local judges will be elected or whether campaigns for these seats will cost money. The question is whether abuses of the system of elections and campaign finance have upset the critical balance between the competing values of judicial independence and public accountability. Instead of offering an opportunity for the majority to bring judges to account, "justice" is increasingly being slanted toward the wishes of a minority of the wealthiest citizens whose role in funding elections is disproportionately large.<sup>58</sup>

The cost of judicial elections continues to soar and contributors are even more sophisticated in achieving their goals. The price of initial electoral success and subsequent retention of the judicial position has reached levels where new aspirants and incumbents alike are required to raise so much money that they are increasingly vulnerable to being bought by the financial "votes" of their contributors.<sup>59</sup>

Concern over the loss of judicial integrity is not hypothetical. When I started background work on this article, I asked a lawyer whether he had ever contributed to judicial campaigns. His answer was revealing and troubling. He told me he had done so only once and the experience showed him just how dangerous it was. This lawyer, who practices in Southern California, said that a local prosecutor's office decided to run several of their assistant district attorneys against judges whose rulings they did not like. Some of the lawyers in the area decided to create a committee to raise funds for the endangered judges and he contributed

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56. *Id.*

57. *See id.* ("Across the country, there are significant consequences to judges taking on the persona of politicians . . . . In many states, until the 1980s, the appointment or election of judges was arranged through quiet agreements among politicians and bar associations").

58. Wohl, *supra* note 29.

59. Sheila Kaplan, *Justice For Sale*, COMMON CAUSE MAG., May-June 1987, at 29; *see also generally* Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525 (1992); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1 (1992); Michelle L. Bullard, Comment, *Collier v. Griffith: Determining Whether Tennessee State Court Judges Should Recuse Themselves from Cases Which Involve Attorneys in Leadership Positions in Their Campaigns for Re-election*, 23 MEM. ST. U. L. REV. 741 (1993); Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991).

funds and his name to the committee. He related how in the midst of the heated election campaign, he was beginning a trial before a judge whose judicial friends and colleagues the lawyers' committee was supporting. At the beginning of the trial, the judge's bailiff entered the courtroom with a paper in his hand and then passed it to the judge. The judge looked down at the paper, looked up at the opposing lawyer (who was not on the lawyers' committee) without saying a word or changing expression and then looked back down at the paper. A few seconds later he looked up at my lawyer friend and smiled at him. From that point and throughout the trial the contributing lawyer "could do no wrong" and received an unbroken string of favorable rulings.<sup>60</sup> While happy to win, the experience disturbed him to the point that he has not contributed to judicial campaigns since that time.<sup>61</sup>

An example from a lawyer in Ohio further clarifies the situation. The lawyer faced a dilemma that should be familiar to many attorneys. Alexander Wohl reports that:

During a recent campaign for a seat on a local Ohio Domestic Relations Court, a lawyer from a small firm ran up against a political, ethical, and financial dilemma. His predicament began innocently enough when he was solicited for a campaign contribution by supporters of the Democratic incumbent. The lawyer, a longtime Democrat, willingly put his signature on a \$250 check to the judge's campaign. - Soon, however, he was contacted by the campaign of the judge's Republican opponent. Would the lawyer be willing to contribute to their candidate's campaign as well? The lawyer, who almost never gave to Republican candidates, nonetheless wrote out a matching check. His rationale was simple: His legal practice involved frequent appearances in family court, and he simply could not afford to risk offending whichever judge was eventually elected.<sup>62</sup>

This example helps illustrate that the rationalizations we use to deny the corrupting effects of campaign financing are either disingenuous or convenient self-deceptions. The truths of the situation are simple. Money shapes behavior. A lawyer who practiced law in Texas for 38 years sums up the situation: "With our partisan elections today, given a hard but close case, which even a biased judge couldn't be criticized for

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60. Interview with Ronald Rus, Partner, Rus, Miliband and Smith, in Irvine, Cal. (May 16, 2000); *see also* Wohl, *supra* note 29.

61. For a suggestion of the dangers of too much judicial discretion see generally Monroe H. Freedman, *The Ethical Danger of "Civility" and "Professionalism,"* 6 CRIM. JUST. 17 (1998).

62. *See* Wohl, *supra* note 29.

holding either way, the judge is going to decide for the party who gave him the \$10,000 donation for his campaign chest.”<sup>63</sup> Power shapes behavior. Judges need increasingly large amounts of money to both acquire power in the first instance and then to retain that power. Too much of judicial behavior is being molded by the combination of money and the desire for power. Much less obvious is what can be done to prevent both the actual corruption of the judiciary and the appearance of corruption that undermines citizens’ faith in the integrity of the law.<sup>64</sup>

### III. THE VARIED TECHNIQUES OF INFLUENCE AND JUDICIAL CORRUPTION

It will not be possible to return the judiciary to some illusory Eden of judicial innocence. While it would be naïve to think that judges have ever been free of the influence of special interests, it is nonetheless fair to conclude that the influence has increased by several orders of magnitude in its degree and sophistication. In our increasingly transparent “information society” it has also become so demonstrably obvious that citizens’ perception of judicial integrity has undergone a dangerous transformation that potentially threatens the legitimacy of the political community. Since judges emerge from our chaotic and competitive society their values are shaped by the culture in which they were reared and trained. It is unrealistic to expect judges to be entirely immune to the values of the culture from which they spring. Nor would we want them to be.

Although this essay is concerned primarily with the impact of campaign financing on judicial integrity and the public’s perception of judicial integrity, judicial corruption is not simply an issue of campaign contributions. This awareness becomes vital when we attempt to develop reform strategies because special interests faced with limits on financial

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63. Wendell S. Loomis, Viewpoints, *Judicial Corruption is Rampant*, HOUS. CHRON., Apr. 12, 1999, available in 1999 WL 3983729.

64. It was recently reported in Illinois that:

A political donation to Illinois Supreme Court candidate Morton Zwick while the donor had a case before Zwick is again raising questions about how judicial campaigns are financed in Illinois. Illinois Appellate Court Judge Zwick’s political campaign committee took in more than \$16,000 in contributions from Power, Rogers & Smith, the law firm that had the case before Zwick, the Chicago Sun-Times reported . . . . Zwick ruled in the donor’s favor. The gifts were legal and do not appear to violate ethical rules governing judges and lawyers. There is no evidence that the judge or the ruling were compromised. It is also not clear if Zwick knew about the donations. A Zwick spokesman said the judge did not feel it was appropriate to comment.

*Campaign Donor Had Case Before Supreme Court Candidate Zwick*, June 26, 2000., Associated Press, at \_\_\_\_\_. One committed to preserving the integrity of the judicial system might wish that Judge Zwick’s sense of “appropriate” behavior would have kicked in before taking the \$16,000 contribution.

contributions will shift to other methods of influencing the judiciary. There are many ways to bribe and influence judges. Some of them are outlined below. The list, along with the detailing of factors that represent the incentives and disincentives to which judges are subject, shows how complex and multifaceted the problem is.

The corruption of the judiciary is made possible to a large degree through the legalization of behavior that, without the legal authorization, would be considered improper or immoral. The legalization of activities that a fair-minded person would intuitively consider to be corrupting or at least suspect has “whitewashed” or laundered behavior of a highly questionable character. If a special interest group went to a state supreme court judge and said, “if you vote on this issue the way we want, we will give you \$100,000,” it would be a criminal act. If that same organization went to that judge and said: “We are not telling you how to vote but we are very concerned about this doctrine or statute and would like the rule to be more in our favor,” and the judge says in response, “I share your pain and appreciate your concern,” and the special interest group then sends the \$100,000 to the judge’s campaign committee, the otherwise criminal bribe has magically transmuted to a completely legal campaign contribution. But independent of clever legalisms the judicial behavior is arguably corrupt in fact. It may no longer be an illegal bribe but it remains an immoral bribe. The public has no difficulty understanding that fact. Exposure of the contribution will create a public impression of judicial impropriety.

But even this simple example does not tell the full story about the many forms of influence: peddling and corruption. Some of the most common ways to influence judicial behavior and decision-making are described below. These are followed by systemic factors that create such a weak system of accountability that judges can virtually “get away with murder.” Reform cannot occur without an understanding of the following factors:

- direct cash bribes of a criminal nature
- physical threats and intimidation
- blackmail
- “wink and nod” influenced bribery with tacit overt agreement
- the conjunction of judicial philosophy and judgment with a particular perception of the issues being judged that has been influenced by the judge’s need for money
- actual conjunction of judicial philosophy and judgment with a particular perception of the issues being judged

- direct cash campaign contributions
- promises to contribute cash in the future
- beneficial employment and investment deals for judges to kick in after leaving the bench
- business transactions in which the judge is given a very favorable equity position or other opportunity by someone not obviously linked with the person seeking the judicial favor
- promises to support the judge in future campaigns or to help organize a campaign for higher judicial office
- promises to recruit other campaign contributors
- campaign endorsements
- promises to provide services for campaigns and/or fundraising
- political party support for the judge's candidacy
- political party non-opposition to the judge
- political party threat of opposition to the judge
- loans of cash, products or services provided on advantageous terms
- gifts or highly favorable terms on car loans, mortgages, etc.
- expense paid junkets for the judge, the judge's family or friends
- favors for friends, relatives or former partners and associates of the judge.

Judges behave in accord with the incentives and disincentives to which they are subject. As the analysis based on Robert Klitgaard's formula of corruption reflects when applied to the judicial context, many of the factors that create a culture of judicial corruption relate to judges not being subject to any real oversight, not being adequately monitored, and having an enormous range of unsupervised discretion. In fact, detection, accountability and enforcement are central to any efforts to find solutions to judicial corruption. The following factors influence judicial behavior:

- the potential for financial gain over the long term
- the potential for financial gain over the short term
- the potential for financial loss
- preservation of the individual judge's reputation
- preservation of an individual judge's status
- negative media exposure
- positive media exposure
- the incentives and disincentives of the judicial culture



- the power of the system being served to help or harm the individual judge based on conformity or deviation from expected behaviors
- the power of the system being judged or dealt with to help or harm the individual judge
- the probability of the judge's questionable behavior being discovered
- the probability of the judge's behavior being reported even if discovered
- the probability of an sufficiently powerful external authority reviewing and investigating accusations or claims against the judge
- the probability of a relevant authority deciding to vigorously pursue accusations or claims against the judge
- the probability of an authority uncovering damning evidence or a "smoking gun" against the judge
- the probability of a relevant authority deciding to sanction the judge
- the probability of the sanctions being severe enough to inhibit or deter corrupt judicial conduct
- the probability of the judge being sued for corrupt or otherwise questionable professional behavior
- the probability of civil recovery against the judge
- the probability of criminal charges being brought against the judge.

#### IV. WHY IS THE PERCEPTION OF JUDICIAL INTEGRITY SO IMPORTANT?

Any civics text tells us there are three branches of our form of government—the legislative, the executive, and the judicial. Two branches, the legislative and executive, have fallen into such disrepute that they lack any perceived vestiges of integrity.<sup>65</sup> The third branch, the judicial, is barely hanging on to the remnants of its perceived integrity. Allowing judges to accept campaign funds from private sources is rapidly

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65. See WILLIAM STRAUSS & NEIL HOWE, *THE FOURTH TURNING: AN AMERICAN PROPHECY* 203 (1997). Indeed, our society gives credit for the debunking of the hero as if we cannot stand the comparison. Daniel Boorstin argues that "the growth of the social sciences has given us additional reasons to be sophisticated about the hero and to doubt his essential greatness." DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 50 (1987) [hereinafter BOORSTIN, *THE IMAGE*]. He continues, "[w]e see greatness as an illusion; or, if it does exist, we suspect we know its secret. We look with knowing disillusionment on our admiration for historical figures who used to embody greatness." *Id.* at 51. It is difficult to be concerned with deep principle in a society that holds integrity in contempt.

destroying any remaining integrity of the judicial branch.

It is important to understand why the public's perception of judges' fairness and integrity is more critical to the Rule of Law than is public perception of the same characteristics in legislators and political executives. Judges apply the law in its closest contact with citizens, and we intuitively know that judges' work is supposed to involve justice rather than politics. If a legislator is seen as biased, we accept it as part of the function of an elected representative. While we may desire legislators to be statesmen, we really do not think that it is a legislator's role to be just, as legislators advocate special interests. In any event, legislators' decisions tend to cancel each other out in the mix of voting, which we know is a compromise.

While public distrust for legislative and executive political institutions has soared, black-robed judges offer the symbol of dispassionate and fair justice. Justice Kennedy distinguished between the perception of "fairness" in legislative elections and the grave danger of applying the same dynamics to judicial elections. He suggests that:

[W]hen you carry over the political dynamic to the election, fair takes on a different meaning. In the political context fair means somebody that will vote for the unions or for the business. It can't mean that in the judicial context or we're in real trouble . . . . To begin with, we have to ask, Is it fair for the electorate to try to shape the philosophy at all, without campaign contributions? Is this a proper function? I am concerned about that. I do not think that we should select judges based on a particular philosophy as opposed to temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is general consensus . . . .<sup>66</sup>

Judges give the law its humanity and life through their decisions, which we implicitly and perhaps naïvely believe are guided by a sense of justice and what Aristotle called practical wisdom—i.e., a "true and reasoned state of capacity to act with regard to the things that are good or bad for man."<sup>67</sup> Judges are responsible for saving the soul of the Rule of Law through its just and equitable application to specific disputes.

Our "practically wise" judges are best understood as the priests of the Rule of Law. A judge may be fallible and err. But if a judge is unfair—particularly for purposes of self-interest—the heart of the system and its underlying foundation are threatened. We continue to have an inchoate belief in some kind of natural law in which justice is served in the specific dispute through the exercise of judicial wisdom.<sup>68</sup> When this belief is

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66. *Frontline: Justice for Sale?*, *supra* note 2.

67. ARISTOTLE, *supra* note 23, at bk. VI, ch. 5.

68. If, as Hobbes warns, the belief that God sets a pattern of divine laws to guide our behavior and regulate political community creates a difficulty for society, the "death of

betrayed by judicial self-interest, our faith in the sanctity and inherent justice of the law is weakened. At some point the law and its manifestation through judicial decisions is seen as simply another mechanism of social control, as flawed and contemptible as any other. When this occurs, we are thrown back into the Hobbesian state of nature in which the only rational action is to protect our own interests by capturing or at least neutralizing the political processes, including the judiciary. Even if we cannot fully control the process, we are successful if we can create a political gridlock in which the judicial institution cannot be used against us.

Several issues relate to the different forms of influence and the interest groups whose perception of judicial impropriety will affect their view of the legitimacy of the system and of the limits of allowable behavior. Those interests most affected by the perception of what will appear to be corruptly influenced behavior include those of lawyers, financial and other interest groups, the general public, litigants, and judges. Each represents a distinct set of interests and will be affected in distinct but important ways.

We must be concerned with the consequences of declining respect for the judiciary's integrity in relation to the perception of each interest group. If the public's perception of judicial integrity plummets, so will its respect for law. If judges' perception of the integrity of the judiciary declines, this creates a self-fulfilling prophecy where the effect could be acceptance among judges of an even lower standard of moral expectation as to acceptable judicial behavior. The result may be the further dishonoring of the judicial ideal. This perception of corruption among judges may keep better candidates out of the judicial field because they will not be willing to become part of such a dirty and corrupting process.

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God" trumpeted by the Enlightenment creates an equivalent dilemma. A fully secular conception of society in which laws are based solely on the power of humans to make choices of law without some strong source of external or divine authority, such as natural law or divine inspiration, has resulted in a system in which humans lack deep principles of a kind sufficient to guide their judgments. Daniel Boorstin concludes that:

The discovery, or even the belief that man could make his own laws, was burdensome . . . . [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.

DANIEL J. BOORSTIN, *THE DECLINE OF RADICALISM* 74 (1969). For discussions on natural law, see David Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988) and David Barnhizer, *Natural Law as Practical Methodology: A Finnish Analysis of City of Richmond v. J.A. Croson Co.*, 38 CLEV. ST. L. REV. 15 (1990).

Lawyers are a key part of preserving the integrity of the Rule of Law.<sup>69</sup> To the extent they see the judiciary becoming increasingly corrupt and self-serving, lawyers are more likely to follow that path toward corruption. As special interests with either financial or what they consider to be unquestionable moral goals in mind, they are like hungry predators who sense raw meat. The looser the rules that allow them to bribe judges and judicial candidates, the more they can be expected to descend on the judicial system. The financial stakes are either too high or the moral “rightness” of their position so powerful that the special interests feel justified in what they do. In any event, if they do not bribe judges, they know their opponents will. This creates the “Darwinian jungle” about which Auerbach warned.<sup>70</sup> The competitive and reactive behavior of such special interests will not change voluntarily, but can only be affected by altering the rules under which they operate.

Judicial integrity and independence are taken for granted until they are lost. The absence of an independent judiciary creates a social vacuum that leads to violence and destroys faith in democratic institutions. Respect for law and judges is essential for any democratic political system.<sup>71</sup> Lack of respect for the integrity of law and the judiciary weakens or destroys the ability of an existing democracy to function and prevents nascent democracies from coalescing into just political systems.

In the aftermath of the 1998 murder of Cardinal Gerardi in Guatemala, the judiciary is still trying to work through the corruption. An assassin crushed Cardinal Gerardi’s skull shortly after he released a scathing report on human rights abuses that occurred during Guatemala’s 35-year civil war. There has been no progress in the murder investigation, leading Rigoberta Menchu, a 1992 Nobel Peace Prize winner, to ask, “[h]ow are we going to guarantee justice? . . . If victims do not have the hope of justice, it will be impossible to reach true reconciliation.”<sup>72</sup> As the *Los Angeles Times* recently reported, the Gerardi case is apparently not an isolated incident; “[p]rosecutions of massacres, narcotics trafficking and ‘social cleansing’ murders of street children have [declined] miserably.”<sup>73</sup> The report goes on to warn that

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69. See generally David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y. 371 (2000) (commenting on the decline in values of the American lawyer).

70. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 141 (1983) (arguing that Americans’ dependence on the law assures conflict between competing individuals vying for wealth).

71. In the United States, many examples of declining respect for judicial integrity exist in the context of the abortion debate. Bombings of clinics, murders of “abortion doctors,” and other tragic acts of violence have been claimed as moral acts.

72. Darling, *supra* note 44, at A3.

73. *Id.*

decreasing faith in justice and the courts has prompted citizen-led law and order groups to demand harsher criminal penalties and has led to an increase in lynchings by angry mobs.<sup>74</sup>

Compare this situation with what has happened in Peru under the questionable leadership of its president, Alberto Fujimori. One report reveals a takeover of the judiciary by Fujimori to stop dissent, relating:

Today two-thirds of Peru's judges have only temporary status, meaning that they hold their positions at the pleasure of the Government and cannot act independently. In addition, the National Magistrates' Council, an autonomous body established in the Constitution to appoint and dismiss judges and prosecutors, has been largely gutted.<sup>75</sup>

The United States has been held together by its faith in the Rule of Law but the expanding corruption of the American judiciary is rapidly undermining that faith. Without an independent judicial branch there can be no real democracy. But judicial independence imposes the responsibility to exercise judgment and wise restraint while understanding the practical limits of the judicial task. Similarly, while the example from Peru deals with the capture of the judiciary by another branch of government, judicial independence can also be surrendered to private interests as well as to other political actors. That approach has characterized the decline of the American judiciary, where powerful private interests have bought the attention and the votes of judges.<sup>76</sup> The increasing privatization of governmental power and its entirely predictable capture by concentrated clusters of private actors who are answerable to virtually no one is threatening the foundations of strong democratic systems, such as the United States, and inhibiting other nations' ability to develop truly democratic methods of governance.

Justice Blackmun recognized the burden that the responsibility to sustain the Rule of Law in the face of conflicting values and political power imposes on the judiciary. He began *Roe v. Wade*<sup>77</sup> with Justice Holmes' dissenting observation in *Lochner v. New York*:<sup>78</sup> "[The

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74. *See id.*

75. Baruch Ivcher, *Peru's Endangered Dissidents*, N.Y. TIMES, Feb. 4, 1999, at opinion-editorial; *see also* Clifford Krauss, *Peru Extending Its Disavowal of Rights Court*, N.Y. TIMES, Aug. 5, 1999 ("The [human rights] court is also scheduled to hear a case brought by three judges whom Mr. Fujimori removed from office last year after they ruled that the Constitution prohibited him from running for a third consecutive term.").

76. *See* Mikva, *supra* note 11. Judge Mikva reports about more than 230 federal judges taking fully-paid "educational seminars" at luxury resorts. *Id.*

77. 410 U.S. 113 (1973).

78. 198 U.S. 45 (1905).

Constitution] is made for people of fundamentally differing views . . . .”<sup>79</sup> Even in the face of these fundamentally differing views judges are nonetheless required to use their practical wisdom to make independent choices about how to resolve irresolvable conflicts in ways that maintain the integrity of the political system. Roscoe Pound tells us that “[c]onflict and competition and overlapping of men’s desires and demands and claims, in the formulation and assertion of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure.”<sup>80</sup>

The abortion debate, however, demonstrates the intractable reality of some parts of the judicial task. It will not go away, nor given the fundamental nature of the competing values, should it. The enduring nature of the debate over such issues as abortion and the impact of the conflict on the judiciary were made apparent in a recent judicial primary election in Illinois in which abortion played an important role. William Glaberson reports that “[i]n one of the Illinois primaries this spring, a Republican Supreme Court justice, S. Louis Rathje, was unseated by a challenger who paid for campaign fliers that were distributed by anti-abortion groups. They described the challenger, Robert R. Thomas, as ‘the only endorsed pro-life candidate.’”<sup>81</sup> Judge Rathje warned that the tactic used by Thomas showed that politics were now a full part of judicial elections. Rathje claimed the problem is that:

People who have cases in court . . . will have to get used to appearing in front of judges who have already stated their views. ‘Would you feel more or less comfortable’ . . . ‘with a judge who has already told you how he is going to rule?’ Judge Thomas said that the pro-life declaration was simply a statement of his personal views. ‘It has nothing to do with my even-handed participation in cases’ . . . .<sup>82</sup>

Even if one were inclined to feel as confident of his judicial impartiality as Judge Thomas, the danger of this situation is that Thomas used his personal views to acquire votes from individuals who desire and expect that his personal moral code will inform and direct his judicial decision-making. Thomas’ claim that his personal values would not interfere with his judicial decision-making is more than a bit disingenuous; otherwise, why would Thomas have taken the time to inform voters of his personal views? If his personal beliefs do trump his judicial responsibility, then Thomas has arguably failed in his judicial

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79. *Roe*, 410 U.S. at 117.

80. ROSCOE POUND, *NEW PATHS OF THE LAW* 3 (1950).

81. Glaberson, *Challenges Grow*, *supra* note 3.

82. *Id.*

task. If Thomas does not apply his personal moral code regarding abortion to his judicial decision-making, then voters who were led to expect the connection are likely to resent what they consider a betrayal of their legitimate expectations created by Thomas' campaign fliers. Regardless of Judge Thomas' actual behavior, voters from all camps will see the electoral process as inappropriately and competitively politicized. Pro-choice voters can be expected to take Thomas' endorsement strategy as something they must combat to protect their own interests.

There are increasing concerns regarding the extent to which ideologies and special interests have captured judges. Former Illinois Supreme Court Justice Rathje, quoted above, asks whether Judge Thomas' view on abortion undermines his judicial integrity by substituting his personal values for responsible judicial discretion. This is precisely what conservative scholar Walter Berns complained about, albeit from the opposite perspective, in criticizing the effects of *Roe v. Wade*:

[W]hat were we taught by *Roe v. Wade*? That the Constitution is on the side of the big battalions, or, at least, the most strident battalions. That an up-to-date judiciary is contemptible because it is nothing but a political body but, unlike a political body . . . it pretends not to be. And we were also taught the necessity to form battalions of our own, which . . . is being done on a massive scale.<sup>83</sup>

Protesting what he describes as an ideological capturing of the judiciary by liberal political interests, Berns demonstrates why the loss of an independent and diverse judiciary is such a threat in a complex and disputatious democracy grounded on dispassionate justice and independent judicial thinking. If the judiciary does become controlled by a single ideology in a diverse and complex political system, it fails in its basic responsibility of fairness. An independent judiciary cannot be sustained if it is captured by one political belief, by another part of government, or by economic interests, be it capital, labor, or the dole.

The judge's task in attempting to balance the many competing interests has become increasingly difficult and volatile. The irony is that this different culture demands a judiciary that is *more* independent and wise as opposed to one increasingly corrupted by special interests.<sup>84</sup> Yet,

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83. Walter Berns, *Judicial Rhetoric*, in RHETORIC AND AMERICAN STATEMANSHIP 53, 55 (Glen E. Thurow & Jeffrey D. Wallin eds., 1984).

84. Important questions to be asked are: [w]ho becomes a judge? How are they likely to behave, and what is the probability that they will have true wisdom? Consider the implications of Plato's observation that:

[H]e [the lawyer] has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous . . .

rather than causing the judges to become more “judicial,” the tension and volatility have caused many judges to seek “niche constituencies” to which they can market themselves in ways that increase the probability that they will obtain financial and other electoral support.<sup>85</sup> Such niche constituencies and special interests are everywhere. This is a byproduct of changes in American society over the past decade. In our culture everything is for sale and only fools behave in a principled fashion.

This pervasive cultural value that dominates the marketplace brand of political economy makes judges fair game as tools to be used to achieve desired ends. It also increases the likelihood that judges will share this corrupting perspective.<sup>86</sup> Certainly this is borne out by Abner Mikva’s revelation of the close connection between the “wooing” of judges by powerful economic interests and the judges’ decisions on issues before them. He reports:

Judges who attended the [all expense paid business-sponsored seminars at luxury resorts] wrote 10 of the most important rulings of the 1990’s curbing federal environmental protections, including one that struck down habitat protection provisions of the Endangered Species Act and another that invalidated regulations on soot and smog. In six of these cases, according to the report, the judge attended one of the seminars while the case was pending before the court. And, . . . many judges failed to disclose required information about these seminars on their financial disclosure forms.<sup>87</sup>

## V. CAPTURING THE JUDICIAL SERVANT

Why would a judge betray his or her duty to justice in exchange for acquiring and holding onto the power provided by the judicial position?

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from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom.

MARTIN MAYER, *THE LAWYERS* 4 (1967) (quoting Plato).

85. See Glaberson, *Challenges Grow*, *supra* note 3 (“Millions of dollars in campaign contributions are flowing into races for top state judgeships this year, while candidates are testing the limits of rules that forbid them from signaling how they might vote on cases, according to judicial candidates, political consultants and lawyers across the country”).

86. Abner Mikva reveals the clear connection between powerful economic interests that “woo” judges and the judges’ decisions on issues before them:

Judges who attended the seminars wrote ten of the most important rulings of the 1990’s curbing federal environmental protections, including one that struck down habitat protection provisions of the Endangered Species Act and another that invalidated regulations on soot and smog. In six of these cases, according to the report, the judge attended one of the seminars while the case was pending before the court. And, . . . many judges failed to disclose required information about these seminars on their financial disclosure forms.

Mikva, *The Wooing of Our Judges*, *supra* note 11.

87. *Id.*



Presumably, those who seek judicial office do so to acquire a degree of power. Some seek power in order to do good. Some seek power for the status and meaning it bestows. Others seek power for itself. Regardless of the purpose, power changes everyone who achieves it. The judicial role accords a degree of personal identity. The individual seeks membership in a group or institution and becomes a component in the group with a particular role. Martin Mayer quotes G.K. Chesterton in words that offer some insight into the effect of power: "The horrible thing about all legal officials, even the best, [including] . . . all judges . . . is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."<sup>88</sup>

Too many judges have "got used to" power, deference, security, and do not want to surrender it for some lesser role. Judges have "got used to" the nuances of fundraising and working with contributors in ways that give them what they want. Too many judges have "got used to" the unjust processing of criminal defendants, the abuses of prosecutors, the misrepresentations of police, and the expectations of their political parties. This "getting used to" occurs because it is a great deal easier than fighting the system, requires far less insight and expenditure of energy, and allows a sense of security and comfort and the continuation of the status and privileges that the political system offers the judge. The judiciary can be a gilded and comfortable refuge.

Members of the judiciary are particularly subject to the more subtle forms of corruption given the fact that their positions accord them respect and deference. Judgeships are positions of power, status, and meaning. Judges are insulated from the reality of their own fallibility and inadequacy because they are surrounded by sycophants. Lawyers and employees are all dependent on judicial good will, and parties are subject to judges' whims and exercise of power. Few people with whom a judge interacts are willing to comment on the naked judge's "lack of clothes." In such a context it is difficult for judges to retain their perspective, but easy for them to assume they are in control of the

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88. THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 137 (1987). Shaffer continues:

People in institutions have a way of acting, an official tendency to turn other people into commodities, and to excuse themselves with grand, official phrases such as health, justice, equality, due process, privacy, democracy, and the rule of law. But behind the phrases are hidden patterns of behavior that show, when brought into the light, that people in institutions usually do not have values strong enough for community life.

*Id.* at 109.

process.

Insulated in their cocoons of deference, judges are more likely than others to engage in denial and self-deception. Judicial use of language of independence and integrity often masks the effects of influence and dependence on contributors. While independence is trumpeted as an ideal, it carries a personal responsibility and accountability that humans instinctively avoid.<sup>89</sup> Martin Buber has described our human condition as one in which the drifting and powerless individual is no longer able to understand or master the world in which he or she must function, and in which we were engaged in a “flight from responsible personal existence.”<sup>90</sup> Buber has warned of the deep fear and emptiness such a belief in one’s own impotence creates and of the profound danger of separating individual power from principle, a condition resulting inevitably in abuse to a degree which he termed as evil. Buber’s warning is particularly applicable to judges.

Judicial independence declines in direct proportion to a judge’s dependence on others for financial support and other assistance needed to gain and retain the judicial office. Judges’ need for campaign funds, as well as the need to preempt contributions to potential competitors, gives their contributors great power. Alexander Hamilton’s warning about those who have the power over another person’s subsistence have a “power over his will” has several implications for the judiciary.<sup>91</sup> A judge’s need for money and other support influences decisions that the judge makes concerning a particular special interest. The problem also extends to the effect on the judicial duties which the judge fails to perform or which he or she gives short-shrift because to do otherwise would offend a powerful constituency.

One of the worst consequences of money’s corrupting influence on judicial behavior is found in judges’ failure to regulate the unprofessional behavior of lawyers coming before them. Judges have a duty to ensure that lawyers are performing competently and professionally. Judges are, for example, responsible for ensuring that lawyers fulfill their duties as zealous advocates. There is also no question that the judge has a duty to

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89. See PETER BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* 93 (1963).

90. MARTIN BUBER, *THE KNOWLEDGE OF MAN* 108 (Maurice Friedman ed., Maurice Friedman & Ronald Gregor Smith trans., 1956).

For the typical man of today the flight from responsible personal existence has singularly polarized. Since he is not willing to answer for the genuineness of his existence, he flees either into the general collective which takes from him his responsibility or into the attitude of a self who has to account to no one but himself and finds the great general indulgence in the security of being identical with the Self of being.

*Id.*

91. RELIGIOUS QUOTATIONS, *supra* note 21, at 748 (citing Alexander Hamilton).

ensure the integrity of the dispute resolution process and manage it in ways that are fair to all parties. It is equally clear that far too many lawyers fail to meet their professional obligations, and in doing so, provide a relatively low quality of service to their clients. The irony is that even while public criticisms of lawyers have reached a disturbingly high level, lawyers' campaign contributions to judges have expanded dramatically.

Judges' dependence on the financial support of lawyers who practice before them has profound consequences for further diminishing the already low quality of legal services. For state court trial judges, lawyers' contributions are the primary source of campaign funds. How can these judges effectively discipline and criticize lawyers if they are dependent on the lawyers for campaign contributions? Judges are not going to discipline lawyers who are capable of causing them serious political trouble within their political party or who can deny the judges campaign financing and political support. This suggests that lawyers should be barred from contributing to individual judges' campaigns and that judicial campaigns should be publicly funded.

While lawyers' campaign contributions to trial-level judges create a culture in which judges accept less than professional behavior, contributions from other sources have become an increasing problem at higher judicial positions. Powerful interests understand fully that they can gain a greater share of power through law and the capturing of judges.<sup>92</sup> This trend is a relatively recent phenomenon particularly prevalent in state supreme courts, as these courts create policy for much of the legal system through the definition of relevant legal doctrines. State supreme courts ultimately decide issues such as tort liability,

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92. See Sheila Kaplan, *Justice For Sale*, COMMON CAUSE MAG., May-June 1987, at 29; *Judges Forum Looks at Inroads on Independence of the Judiciary*, CIV. JUST. DIG., Fall 1998, at 1, 1-8; William Glaberson, *Just a Fantasy*, *supra* note 54, at 1 (reporting a variety of exaggerated claims representing powerful interests aimed at legislative efforts to restrict their own liability through state legislative and judicial action). Glaberson reports that one law professor described the strategy as: "one of the most carefully developed and exquisitely executed political campaigns ever." *Id.* It includes statistics relating to the award of punitive damages—a main argument of the corporate defenders in their quest for legislative "reforms." *Id.* Glaberson asks:

Huge punitive damage awards, for example, have become everyday events, right? Actually, a study of courts in the nation's 75 largest counties conducted by the National Center for State Courts found that only 364 of 762,000 cases ended in punitive damages, or 0.047 percent. OK, but isn't it true that more and more liability claims are filed every year? Actually, a study of 16 states by the same center showed that the number of liability suits has declined by 9 percent since 1986.

*Id.*

including the applicability of punitive damages and similar liability doctrines of great concern to doctors, hospitals, insurance companies, tobacco companies, and other manufacturers of products having the potential for causing injury and death.<sup>93</sup> These rich and powerful organizations spend enormous sums of money attempting to capture the soul of the judiciary through campaign contributions.

It is easier to understand this capture and corruption of the judiciary when we accept that judges are not blindfolded demigods of independent justice, but that they are simply all-too-human politicians. As Arthur Schlesinger warned, while “[t]he intellectual . . . seeks truth; the politician [seeks] power.”<sup>94</sup> Combine the reality of politically motivated judges with Lord Acton’s insight that “[p]ower tends to corrupt and absolute power corrupts absolutely,” and we have an equation particularly applicable to members of the judiciary.<sup>95</sup> Judicial candidates seek power for many reasons; however, despite the candidate’s initial aim, power ultimately corrupts. Acton’s warning is central to this idea because judges possess unaccountable and discretionary power, and they have enormous discretion in manipulating open-textured and ambiguous concepts and doctrines. This power to define ambiguity is something entrusted to a theoretically meritorious and blindfolded judiciary. Yet, when this special judicial power is placed in the service of campaign contributors and other special interests, the result is a political judge who uses such power in the interest of supporters and contributors rather than in the service of justice.<sup>96</sup>

A judge’s or judicial candidate’s desire to gain and retain judicial power is therefore at the heart of judicial corruption. Judges can better ensure their tenure on the bench by adopting contributors’ values, allegiances, and agendas. But even here we tend to be masters of self-delusion who deceive ourselves into thinking that the contributors’ preferences and ways of thinking and valuing are our own. Abraham Maslow expands on this point by describing how we rationalize what we do in order to protect our egos and avoid a state of awareness that would cause us to act through a crisis of conscience or to face our own hypocrisy or cowardice.<sup>97</sup> As Maslow explained, “[w]e protect ourselves

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93. See, e.g., Ashbel S. Green, *Court Says Damages Cap Violates Constitution*, PORTLAND OREGONIAN, July 16, 1999, at A1 (noting that a recent Oregon decision which overturned the State’s cap on punitive damages ended 15 years of business and medical groups efforts to cap jury awards).

94. Arthur Schlesinger Jr., *Intellectual’s Role: Truth to Power?* WALL ST. J., Oct. 12, 1983, at 28.

95. THE OXFORD DICTIONARY OF QUOTATIONS I (Elizabeth Knowles ed., 1999) (reciting part of a letter from British Historian Lord Acton to Bishop Mandell Creighton, dated April 3, 1887).

96. See generally BUBER, *supra* note 91.

97. See Abraham Maslow, TOWARD A PSYCHOLOGY OF BEING 60 (1968).

and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths.”<sup>98</sup>

One unpleasant truth that applies to the judiciary is that few of us are independent and courageous individuals committed to justice at all costs. Rather, “most of the time we . . . desire just that which society expects of us. We *want* to obey the rules. We *want* the parts that society has assigned to us.”<sup>99</sup> This is what judges do in becoming a part of the political machinery. But this subordination of self to powerful interests is not limited to judges; it marks our entire culture. Jacques Ellul captured this with his insight that in a society dominated by large institutions, “[t]he intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit. . . . They will be the servants, the most conformist imaginable, of the instruments of technique.”<sup>100</sup> The deference of judges (and also many scholars) to institutional power and special interests demonstrates the tragic accuracy of Ellul's prescient analysis.

The ideal of the courageous and principled soul standing alone against overwhelming pressure is a myth. In the judicial context, it is unrealistic to expect a lone individual to act heroically in the midst of a corrupt system when the system's many privileges are so enticing and the individual has paid his dues to a political party before ascending to the bench. Anyone is subject to being morally corroded by the conditions and privileges of the judicial office. The probability of moral corrosion is heightened by a combination of powerful forces. No strong external mechanisms exist to inhibit judges' unprincipled behavior and to encourage and reward principled conduct. The likelihood of bar discipline is slight, as state supreme courts will act only if faced with the most egregious judicial behavior. Investigations into bribery and criminal misconduct by state court judges rarely occur. Federal enforcement officials almost exclusively end up conducting investigations into serious judicial misconduct because the local investigation and enforcement systems are hopelessly interconnected and political. In a system lacking external regulation and oversight, corruption will occur

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98. *Id.* (“We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful”).

99. PETER BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE 93 (1963).

100. JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY 349 (John Wilkinson trans., 1964). This was also J.H. Hexter's point when he described the “Doppelganger” to which all intellectuals were subject, which was the enormous and seductive attraction to political power. J.H. HEXTER, MORE'S UTOPIA: THE BIOGRAPHY OF AN IDEA 124-25 (1952).

unless a judge has a powerful personal code, one that is reinforced by the overall judicial culture. Although most judges would prefer to think that they possess such individual and cultural codes of honor, the relatively low quality of much of the present judiciary combined with the corrupting power of campaign financing and other sources of influence render such hopes largely empty.

Although exceptions undoubtedly exist, judicial corruption is generally not related to levels of judicial compensation. Judges receive a respectable amount of compensation on both state and federal levels. Although judicial salaries do not make judges wealthy, it is the demands of the reelection process that stretches judges' need for funds far beyond the personal means of most candidates. This has turned a problem into a crisis as the cost of judicial campaigns has risen dramatically. Judges are responsible for raising their own campaign funds, and the weight of campaign finance has become an increasingly heavy and diverting burden. Judges quickly learn the key signals that attract particular special interests and craft decisions that transmit the desired message. This can end up in a sort of informal "financial primary" aimed at gaining the dollar votes of powerful interests. The need to obtain campaign financing makes judges nothing more than politicians—perhaps even political hacks—who repay their financial backers through the coin of judicial decisions.<sup>101</sup>

Moral corrosion of judges occurs through a combination of factors. As indicated previously, one factor is judicial power itself. Additional factors include the reliance upon incompetent lawyers for goodwill and campaign contributions. Other demands come from the political party to whom the judge owes an allegiance, as the party can field a competitor if the judge fails to listen to reason. As if these factors were not enough, the solicitation and acceptance of campaign contributions adds greatly to the problem. The combination of judges not being visible, not being monitored, having enormous discretion, operating in an environment characterized by extremely weak systems of oversight and accountability, and with little probability of being challenged, is a powerful recipe for judicial corruption.<sup>102</sup> That some people resist the pressures and

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101. See Susan E. Liontas, note, *Judicial Elections Have No Winners*, 20 STETSON L. REV. 309 (1990); see generally, Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821 (1994); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990).

102. See, e.g., *Jail 4 Judges Initiative* (visited Oct. 15, 2000) <<http://www.jail4judges.org>> (advocating a judicial accountability initiative in California). This website contains a Judicial Accountability Initiative Law (J.A.I.L.) that seeks to amend the California Constitution to increase judicial accountability. It includes various indictments of the judiciary's behavior, including judicial corruption. In their executive summary, the organizers offer that:

J.A.I.L. is a proposed amendment to the California Constitution as a check against judicial misconduct and abuse of power. The initiative creates three

inducements better and longer than others does not mean they remain unaffected or that they do not surrender to the subtle seductions.

#### VI. JUDGES AS CO-CONSPIRATORS IN THEIR OWN CORRUPTING

Judges' sin is not only self-deception and being the helpless victims of an evil campaign finance system. This lets judges off much too easily. Judges and judicial candidates are not simply innocent victims of the evils of campaign finance and political parties beholden to the special interests. Many judges are eager co-conspirators. Most sitting judges are perhaps best described as paragons of judicial Darwinism: successful candidates who have learned how to manipulate the system and compete more effectively than their challengers. They are the winning competitors in a tainted race for the bench, which calls their integrity into question.

Both new judicial candidates and sitting judges learn how to send signals to potential financial supporters, as well as to voters, on particular issues. For example, judges can issue strongly worded rulings on volatile issues without a real basis in law because the ruling will show potential contributors that the judge is likely to decide such issues in their favor. Judges may also seek publicity in order to send signals to voters indicating that the judge possesses a particular value system. A judicial candidate can cleverly time a voter flier and endorsement on a critical theme that appeals to a special interest or an "anonymous" person can send out hundreds of thousands of postcards shortly before an election.

Cuyahoga County (Ohio) Common Pleas Judge Patricia Cleary sent a strong signal to anti-abortion voters by refusing to give bail to a female defendant charged with a minor offense. The woman indicated a desire to obtain an abortion if released and Judge Cleary took the opportunity to announce that she was pleased her refusal to grant bail would prevent the abortion.<sup>103</sup> Judge Cleary admitted that she had an extremely weak

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statewide Special Grand Juries in California for the sole purpose of investigating complaints against judges. The Special Grand Juries will have the power to sanction judges by levying fines and forfeitures against them; and for third-time offenses, removal from the bench. The Special Grand Juries will also have the power to indict judges and subject them to criminal proceedings before special trial juries who may sentence as well as convict the offending judge. When J.A.I.L. Becomes Law, Corrupt Judges Will: Be subjected to civil suit; Be removed from the bench!; Be prosecuted criminally!; Serve time in prison!

*Id.*

103. See Reproductive Health and Rights Center, *Prisoner Sues for Lack of Access to Abortion* (visited March 17, 2001) <<http://www.choice.org/4.prison.1.html>>.

Yuriko Kawaguchi, who was imprisoned for forgery in Ohio, wanted a judge to

basis for her ruling and acknowledged that she was denying bail at least in part because of her strong feelings against abortion. The result was that Judge Cleary received an enormous amount of free publicity for her action and a degree of name recognition that will increase the probability that voters will recognize her name on the ballot even if they do not remember what she did. She will also attract anti-abortion voters who will remember her stance.

Similar voter signaling can be found in capital punishment sentencing and other “tough on crime” strategies.<sup>104</sup> For a week or two before any Ohio judicial election, voters are flooded with television ads featuring judicial candidates. The candidates are often in black robes standing next to uniformed police chiefs, or banging gavels forcefully to demonstrate their toughness, or even slamming jail doors shut as a signal to voters that they will put criminals away for long sentences. These are embarrassing and cynical appeals to the sources of money and to voters’ baser instincts.<sup>105</sup> Voters normally do not know much about the candidates before the ads, and still lack any valid knowledge afterward. However, the judicial candidates need money for the advertising and public relations activities and this makes them dependent upon contributors. Contributors can exercise so much control that they ultimately corrupt the judges who take their money. Nor is the influence a one-time event. Because judges want to retain on the bench, they must consider sustaining their relationships with contributors. For this they depend upon their contributors’ continuing good will.

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release her from jail so she could end her pregnancy. Now she will carry her child to term because she was imprisoned too long to get an abortion. Kawaguchi is now suing the judge who kept her in jail. Kawaguchi, 21, accused Cuyahoga County Common Pleas Judge Patricia Cleary of sentencing her to prison for forgery to prevent her from having an abortion.

*Id.*

104. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 784-92 (1995); see also Cammack, *supra* note 1 (suggesting that another factor threatening the independence of judges is the on-going and familiar relationship judges develop with prosecutors).

105. See, e.g., Gerald Uelmen, *Disqualification of Judges for Campaign Support or Opposition*, 3 GEO. J. LEGAL ETHICS 419, 419-22 (1990); John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 339-43 (1988); Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 460-63 (1988); Mark Andrew Grannis, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 396-400 (1987); Gregory Gelfand, *Pun’s Oil Sues Toxicco: A Comedy of Errors in (At Least) Four Acts*, 11 DEL. J. CORP. L. 345, 359-60 (1986).



## VII. WHY IS THERE SUCH GREAT POTENTIAL FOR CORRUPT INFLUENCE IN JUDICIAL DECISION-MAKING?

While the adversary system has many positive attributes, it is not, has never been, and is unlikely to ever be a search for the truth. It is primarily a system to resolve disputes. Right and wrong are not irrelevant but are subordinated to the political system's greater need to have an authoritative dispute resolution system. The Rule of Law, therefore, does not necessarily seek to create substantively just, fair, and truth-based resolutions of conflicts. Representations to the contrary are fictions created to increase the community's acceptance of the legitimacy and authority of the decisions. In such a system a certain degree of hypocrisy and self-deception are essential elements. Too much truth about the legal system would expose the unfairness and hypocrisy needed to conduct business as usual.<sup>106</sup>

An example of the hypocrisy is easily offered. In many instances the legal system operates in injustice. The inevitable gap between the real and the ideal becomes a chasm when the judicial system deals with the poor, marginalized, and helpless.<sup>107</sup> It is at this juncture that a truly civilized system based on justice and the Rule of Law is best tested. Jesus was reported to have said, "that which you do to the least of us you do to me."<sup>108</sup> Thus, we are all judged by how we treat those who are less

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106. See GEORGE GILDER, *WEALTH AND POVERTY* ch. 8 (1981) (referring to hypocrisy as "the insincere expression of unfulfilled ideals").

107. See, e.g., John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 466, 466 (1999); Bright & Keenan, *supra* note 67, at 795-800; Leonard A. Bennett, Comment, *The Impossibility of Impartiality: Interest in Judicial Reflection as a Denial of Due Process for a Criminal Defendant*, 4 GEO. MASON U. CIV. RTS. L.J. 275, 291-92 (1994).

108. Cf. Bob Herbert, *Defending the Status Quo*, N.Y. TIMES, June 17, 1999, at opinion-editorial page. Herbert discusses proposed "reforms" in Texas and reports that:

It is not uncommon for indigent defendants, some of whom are innocent, to languish in jail for months before a lawyer is appointed to represent them. Many Texas counties have no procedure for the appointment of counsel before an indictment is returned.

A court-appointed lawyer in Brownsville who met his client for the first time while a jury was being selected failed to present evidence during the trial that the man was incarcerated at the time he was supposed to have raped a child. The man was convicted, sentenced to life in prison and served five years before a Federal judge ordered him released.

A severely mentally ill man accused of punching his grandfather in the arm spent *four years* in jail awaiting trial in Hidalgo County.

A man convicted of murder spent 10 harrowing years on death row before a volunteer attorney investigated his alibi and won his release . . . .

But for some folks in Texas the idea of providing even minimal constitutional protections for poor defendants is going a step too far. And one of those folks appears to be that beacon of compassionate conservatism—you've heard of

powerful and less advantaged than ourselves, not simply by how we defer to the powerful or behave in regard to people we like or from whom we can obtain some favor. Although one might hope the judiciary would be a shining beacon of justice, Stephen Gillers accurately captured the dichotomy between theoretical justice and justice in action. He argues that "in theory, the Constitution guarantees indigent defendants effective counsel. In reality, Supreme Court rulings have allowed judges to treat lawyers as effective even when they conduct no investigation, fail to cross-examine crucial witnesses, sleep during testimony or come to court drunk."<sup>109</sup>

Why is there such a difference between the ideal and the real? In large measure it is because the law is a political system that allocates social goods, rights, and obligations rather than a system of justice.<sup>110</sup> The adversary system is a political one whose rules of operation are selected by those interests that have been successful in dominating the political system. The legal system is not a self-contained theoretical construct of ideal justice; rather, it reflects, diffuses, and balances competing claims for political and economic power. Like any political system, ours is organized according to how powerful interests define what they desire.<sup>111</sup> Judges are among the most critical tools for protecting political and economic power. Control of the institutions through which judicial power is exercised and social goods are allocated is best achieved through pretending that the system and its decision-makers and institutions are operating according to fundamental principles such as fairness and justice.<sup>112</sup>

In a society with so many competing demands, those already in possession of power will dominate the levers by which power is shared and exercised. While it is easy to argue that such a condition is unfair,

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him—George W. Bush.

*Id.*

109. Stephen Gillers, *The Double Standard: Inequality in Criminal Justice May Be a Good Thing for the Favored Classes*, N.Y. TIMES, Mar. 21, 1999, at A13; see also generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999). Such behavior occurs easily because institutional behavior has a powerful tendency to dehumanize us, and this almost invariably happens to the judiciary.

110. This is obviously not an original observation. For further analysis see generally John Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193 (1990); David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65 (1990).

111. See LAO TZU, TAO TE CHING 62 (Richard Wilhelm & H.G. Ostwald trans., 1985) ("It is the [way] of heaven to reduce what has too much and to complete what does not have enough. Man's [way] is not so. He reduces what does not have enough, in order to offer it to what has too much.").

112. Cf. Marcia Coyle, *Death Defense Is a Sham: Claim Is Fla. Provides Lawyers But Makes It So They Can't Save Inmates*, NAT'L L.J., Dec. 21, 1998, at A1 (detailing the difficulties in Florida of providing adequate representation to indigent death row inmates).

the vital point is that it is inevitable. There is no way to avoid the continual struggle for power and dominance in complex human political systems. The judiciary is among the most critical paths to power. Jerold Auerbach describes what has occurred:

The dependence of Americans upon law, and their apprehension about it, are reciprocal. The exercise of freedom, channeled into the acquisitive pursuit of wealth, requires the vigorous assertion of individual rights, which law protects. It also assures incessant conflict between competing individuals, who are virtually unrestrained by any purpose beyond self-aggrandizement.<sup>113</sup>

He goes on to conclude that the competitive American society: "is filled with the excitement of the hunt, but . . . the hunters simultaneously are hunted. As Americans pursue their quarry, they need protection (provided by law) for themselves, and weapons (also provided by law) against their adversaries."<sup>114</sup>

It is not surprising that the most dominant interests create legal rules that allocate rights, duties, and the conditions governing access to resources in ways that preserve the disparity between those with power and those without. It would be far more surprising if the interests did not act in this way. Those with better weapons and stronger combat personnel tend to fare better in military conflicts, which is analogous to the adversary system that favors those with better lawyers, more supplies, the ability to shape the rules of engagement, and the resources to withstand sieges against their interests or to lay a sustained assault on an opponent.<sup>115</sup> Judges have long been creatures of the system; as long as their behavior was invisible or cloaked in the illusions of justice, the fiction possessed strength.

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113. JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* 141 (1983).

114. *Id.*

115. See, e.g., Mike Robinson, *Chicago Teenager Jailed for Months Even Though He Had a Perfect Alibi*, *THE PLAIN DEALER* (Cleveland), May 22, 1999, at 8A. Robinson reports:

A teenager who was in class when a teacher was shot and killed more than a mile away sat in jail for two years because his airtight alibi went unchecked for months . . .

[His public defender attorney] said he spent months trying to discredit that confession [the client said police hit him during an 18 hour interrogation session] and prove the alibi with telephone and school records.

But justice moved slowly. [The public defender] is one of 25 trial attorneys in the homicide unit and is defending 25 cases, including a dozen in which prosecutors are seeking the death penalty. He shares one investigator with five other attorneys who have similar caseloads.

*Id.*

As long as the culture served by the judge was relatively homogenous, at least in comparison with our current culture, judicial decisions appeared to serve the system overall. However, now there are so many powerful and ruthless competing interests that the system has been altered and its many defects bared. The exposed system is not holding up well to the intense scrutiny that characterizes the Information Age.

New competitors have bought judges for social and economic power, many of whom are struggling against each other. Judges now make decisions that depend upon money and judicial self interest, bias, political considerations, the expectations and needs of the institutions the judges serve, and numerous other factors unrelated to any strict understanding of truth or justice. Of course, judges have to some extent always done so. The problem is that now such judicial behavior is observed and reported.

It would be arrogant and self-serving for judges to protest that it is outrageous for anyone to question their integrity or think that they would allow contributions to influence their decisions. Judges are subject to the same influences as other persons. In fact, judges who consider themselves incorruptible may be more likely to be seduced by influence peddlers because they think themselves immune. Few people voluntarily seek to subject their activities to a more stringent scrutiny than the system requires. Judges are quite content to tell themselves that they are capable of behaving at the highest professional level. Indeed, judges find themselves able to escape the pressures of being held accountable. Judges share the prevailing values of the society from which they emerge, and America, at the end of the 20th century, is a culture in a drifting state of moral decline.

There are very few hard incentives for judges to be "judicial" in the ideal sense. The system rewards judges for conformity far more than for their "being just." It is not only an issue of the possible detection of corrupt behavior; judges have a key affirmative role in making the real system work as a functioning political system. Judges are the "conductors" of the dispute resolution system, and they have a schedule to keep, tickets to punch, interests to favor, and budgets to maintain.

Lower court judges process millions of eviction claims without imposing real burdens of proof upon landlords. In traffic offenses, police officers are given the benefit of the doubt and there is an almost impossible burden on the person charged to rebut the officer's testimony. Judges expedite the resolution of millions of felony cases each year and tens of millions of more minor offenses. Most judges are nothing more than cogs in an ever-grinding wheel that mass-produces the resolution of disputes. Judges are system administrators charged with meeting processing and production quotas, just as are other processors and manufacturers. Thoughtful reflection is not valued highly

in a system required to move large amounts of people through to decision in a short span of time.

Given the lack of accountability and absence of serious disciplinary mechanisms or review of judicial actions, and because judicial decisions are discretionary and inherently unscientific, lawsuits offer numerous options for judicial interpretation favoring special interests. Such a system allows the easy manipulation of its doctrinal rules, as every case of consequence contains mixtures of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, doctrinal principle, and more. Incommensurable and incompressible elements are essential to common law cases within which judges balance and resolve fundamental values. They do so with enormous discretion and where the burden is on others to prove that the judges' decisions are so wrong that they are able to convince a reviewing court to rule that the judge abused his discretion. Judicial decisions allow judges great latitude, and even when this latitude is not abused, judicial language reflects propositions about non-cumulative or "soft" knowledge.<sup>116</sup> The terms judges use expose the softness of law's substance. Concepts such as equal protection, due process, good faith, mens rea, knowingly, equity, malice, proximate cause, foreseeability, discretion, reasonable belief, and cruel and unusual punishment are highly elastic concepts whose malleability benefits the system by allowing flexible and adaptive responses to changing conditions but also threatens the system's integrity because the ambiguity permits significant interpretive latitude.

On the other hand, when the political community is split on a moral issue, it is generally the best for judges to avoid answering the questions. Some questions are simply too difficult. For example, in *Roe v. Wade*,<sup>117</sup> Justice Blackmun wisely avoided dealing with the point at which human life begins, observing that "we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any

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116. The common law operates on multiple levels. It shifts between these levels at will and works through the application of political language to discretionary situations. This was explored as a distinct system of "soft" knowledge. See Barnhizer, *supra* note 26, at 127, 137-38; See also EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949). Levi remarks:

The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. . . . Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.

*Id.*

117. 410 U.S. 113 (1973).

consensus, the judiciary . . . is not in a position to speculate as to the answer."<sup>118</sup> It was wise for Justice Blackmun to recognize the limits of judicial decision-making.

Consider the illusory possibility of a meeting of the minds on disputes relating to such concerns as weapons, drug use, pornography, obscenity, hate crimes, free speech, censorship, property ownership, and privacy. These conflicts are not simply points of reasoned contention among fully rational interest groups, but are fundamental, volatile, and even violent points of intersection of the most deeply-held value systems. In order for one interest group to attain its goals at the expense of another, it must obtain favorable legislation and interpretations of legal doctrine by judges.

#### VIII. IGNORANT VOTERS AND THE LACK OF USEFUL INFORMATION REGARDING JUDICIAL CANDIDATES

Solving the problems created by contributions to judicial candidates by lawyers and other interest groups is difficult as there are conflicting public policy goals at work. The first goal is the desire to have an independent judiciary whose members do not owe favors or have any special interest obligations. Even this is only part of the equation and it may not even be the most important part. Judges must not be perceived to have special interest obligations—particularly obligations owed to people with whom they deal in their judicial capacity. The issue of judicial integrity rests as much on avoiding the appearance of impropriety as it does on the reality of judges trading favors with contributors or by criminal bribery.

The second goal is the desire to choose judges who have the professional capacity to perform well, whatever that means. This attempts to infuse the choice of who is to be a judge with a qualitative assessment of merit that includes some substantial degree of practical wisdom, intellectual and emotional maturity, and humanity.<sup>119</sup> It relates not only to the quality of the person, but to the individual's ability to make decisions while subordinating personal values and preferences to make wise and balanced decisions according to legal rules and doctrines.

The existing state and local systems of choosing judges threaten both the goal of judicial independence and that of judicial merit by forcing (or allowing) judges to raise campaign funds. However, the systems also do this by making it unlawful and unethical for judicial candidates to discuss

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118. *Id.* at 159.

119. For a critical discussion of merit-based selections see Harold Ticktin, *Merit Selection Can't Guarantee Better Judges*, THE PLAIN DEALER (Cleveland), Apr. 15, 1999, at 10B ("Under the merit system, an old maxim holds that 'a judge is a lawyer who knows the governor.' With election, even a lawyer appointed by the governor, usually to fill a vacancy, must stand the test of a vote in November.").

their positions on serious issues of concern to voters. This latter restriction, along with requiring the judicial ballot to be non-partisan, is designed in theory to prevent the politicization of the judicial office. The theory is that if judges reveal their values during campaigns they would be seen as politicians supporting the positions of litigants in ways consistent with the judges' espoused values. The fear is that this would threaten the perception of judicial fairness that is at the heart of the judicial role.

If the ideal of judicial selection were in fact being achieved there would be every reason to prevent candidates from proclaiming their personal philosophies and values. While this article has criticized Judge Thomas' tactic in Illinois as going outside the rules, the truth is that preventing judges and judicial candidates from indicating their positions on certain issues has made the judiciary *more* vulnerable to contributors rather than less. It has made candidates more dependent upon the support of local political parties because of the candidates' need to obtain financing and name recognition. This muzzling of judicial candidates creates elections in which "[j]udicial races are like stealth candidates. They are barely above the radar."<sup>120</sup> Because voters are ignorant as to the qualifications and philosophies of the candidates for judicial positions they may cast votes on inappropriate criteria or recognize their complete lack of relevant knowledge and refuse to vote for judges at all.<sup>121</sup>

With an elected judiciary chosen according to the repressive rules, the public has minimal information about the individuals running for judicial positions. Due to a lack of useful information, a large part of the public either declines to vote for judicial candidates or votes on the basis of "ballot clues" obtained in the voting booth.<sup>122</sup> While voters are

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120. Wohl, *supra* note 29 (quoting Charles Price, political science professor at California State University, Chico).

121. Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 300-01 (1992).

122. See, e.g., Jim Edgar, *Voting for Judges Intelligently*, CHI. TRIB., Feb. 23, 2000, at 14. According to former Illinois Governor Jim Edgar:

The judiciary can affect people's lives for good or for bad. Its power is not just exercised in handing down prison terms. It also can dictate the outcome of other matters—such as the Baby Richard case in which the majority of the Illinois Supreme Court insisted on removing a young child from the only family he had known. Yet, despite the power the judiciary can wield, voters have abdicated their responsibility to select good judges. The results have been far from acceptable. Fifteen judges in Cook County were convicted or pleaded guilty in the Operation Greylord scandal. One of our elected Supreme Court justices was proclaimed one of the worst judges in America by a national magazine. The Supreme Court itself from time to time has been embarrassed by

prevented from obtaining real knowledge about the judicial candidates, the contributors, other special interests, and political parties are entirely aware of the judicial candidates' values and philosophical positions in ways denied to voters. Although the goal of keeping the judiciary above the common political fray by not allowing full debate appears noble, it is both profoundly anti-democratic and, at this point, completely counterproductive. The time has come to unmuzzle judicial candidates and unleash the dogs of political war and democratic competition for the judicial office. The special interests and incumbent judges are the only beneficiaries of continuing the current system.

Because voters are abysmally ignorant of any valid information regarding judicial candidates, the successful candidate must create "name brand recognition" among voters. Candidates accomplish this either by very expensive mass advertising or by the absurdity of the candidate having a popular and easily recognizable surname. An exit poll conducted by the Cleveland Bar Association demonstrates the extent of voter ignorance in regard to judicial candidates. The polltakers asked people to name three judicial candidates for whom they had just voted. Although the respondents voted no more than a few minutes earlier, only five percent could name three judicial candidates listed on the ballot. A post-exit poll of voters conducted one week after a general election asked voters to name one candidate for whom they had voted as Chief Justice of the Ohio Supreme Court.<sup>123</sup> Only eight percent could name even one of the two candidates listed on the ballot.<sup>124</sup> The impact of voter ignorance is measurable in other ways. One finding demonstrated that in virtually every election the drop-off of voters marking the top of their ballots for general candidates and not marking the bottom portion for judicial candidates is at or above fifty percent.<sup>125</sup>

Think back to our ideal of the judge as a wise servant of blindfolded and unbiased justice. If this were the goal, then what selection criteria and process would be most useful to ensure the election of ideal candidates? Ideally, voters would cast ballots for judicial candidates based on a rational and factual evaluation, identifying a candidates' intellectual ability, demonstrated integrity, judicial philosophy, experience, and ability to make wise and balanced judgments. In reality, virtually all facts necessary to make such evaluations are kept from

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charges of cronyism and bias in favor of its friends.

*Id.*

123. Release, Ohio Courts Institute, Nov. 27, 1978, *Summary of the Findings of the Study Conducted by Drs. Ronald J. Busch and Thomas A. Flinn of Cleveland State University Within a Week of the November 8, 1978 General Election for the Ohio Courts Institute.*

124. *See id.*

125. *See Markus Notes, supra* note 5.



voters. Voters typically do not even know the judicial candidates, much less their accomplishments, their principles, or nearly any other factor related to the candidates' capability and merit.

The near complete lack of information means that judicial elections are very low visibility contests. As a result, factors that most people would identify as meaningless, or of very limited value, dominate judicial elections.<sup>126</sup> These seemingly unimportant factors or "ballot clues" upon which voters rely include: (1) a politically familiar surname; (2) "perceived" gender; (3) "perceived" race; and (4) "perceived" ethnicity.<sup>127</sup> It is so important for candidates to take advantage of one or more of the perceived characteristics that some candidates adopt campaign references to try to gain a more favorable perception. For example, in politics, a male with the first name of Sanford might become "Sandy" because it seems more likeable, familiar, and sufficiently gender neutral that some voters might think they were voting for a woman.<sup>128</sup>

The ability to rely on one or more of the "ballot clues" has significant economic and political implications. Judicial candidates' campaign expenses are inversely proportionate to possessing one or more of the favorable characteristics or "ballot clues." Judicial candidates who do not benefit from the above factors must rely upon expensive mass advertising. Unless the candidate has personal resources and the willingness to expend them, the candidate must raise money from contributors.<sup>129</sup>

Ordinarily, lawyers constitute the overwhelming majority of contributors to local judicial candidates because the general public has very little interest in judicial candidates.<sup>130</sup> Although lawyers'

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126. See Edgar, *supra* note 123, at 14. Edgar argues:

It may not be fair to say that most Illinois voters know little, if anything, about the candidates for these judicial positions, but certainly it is accurate to say that many voters are in the dark when they vote—if they do vote—for judges. Many voters simply ignore the judicial portion of the ballot. There are usually far fewer votes cast in judicial races than in other contests. Voting intelligently for judges is not an easy task. Judicial canons and ethics prohibit judges and judicial candidates from commenting on specific issues or cases that may come before them. But judicial candidates often use those appropriate restrictions as an excuse for not sharing their views on broader issues affecting the judiciary and its role in society.

*Id.*

127. Markus Notes, *supra* note 5.

128. *Id.*

129. See, e.g., Wohl, *supra* note 29 ("The study also found that personal wealth is among the most important factors in a candidate's success since the fastest-growing category of contributions is from candidates to their own campaigns").

130. See Markus Notes, *supra* note 5.

contributions are not always bad, the need for such contributions puts pressure on lawyers to contribute to the campaign chests of judges before whom they practice. It is important to consider the potential cost of contributing to the opponent of a sitting judge and the potential for abuse this creates when the challenger loses and the winning judge obtains the challenger's list of contributors after election reports are filed. Disclosure of contributions significantly chills the willingness of lawyers to contribute to a challenger, thereby strengthening a corrupt incumbents' hold on the position. As discussed earlier, judges will be unwilling to insist on professional standards of behavior by lawyers on whom they depend for political support or campaign financing.

While local judicial candidates tend to obtain virtually all of their funding from lawyers, races for state supreme courts bring in other sources because the decisions of higher level courts, such as the Ohio Supreme Court, have greater policy effects throughout the system. Local court behavior is important to those directly subject to that court's jurisdiction; however, the policy implications of an individual trial judge's decisions are small compared to that of the appellate courts. Higher level judicial candidates receive financial contributions from businesses, physicians, labor unions, educational sources, health care providers, insurance companies, and other powerful interest groups. This expanded contributor list has led to an assertion that higher level judges serving on state supreme courts are tailoring their decisions to satisfy their most important contributors.<sup>131</sup>

Richard Markus, a judge who has served on both a state appellate court and a general trial court, doubts judicial favoritism. He believes that contributors support people whose decisions they like. Markus argues that contributors work to elect candidates who possess preferred political and judicial philosophies. If the preferred candidate is elected and makes decisions that further the contributors' agendas, they will of course be happy to contribute more money to keep such candidate on the bench.<sup>132</sup>

Even if we assume Judge Markus' analysis is correct, it does not answer the serious question concerning the appearance of judicial impropriety and the sense that special interest money is buying judges. Regardless of how honest a particular judge might be, the contributions from interested sources will cause members of the public to condemn the

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131. See Brauer, *supra* note 4, at 368, 376, 392; Carrington, *supra* note 4; William V. Dorsaneo, III, *Opening Comment to the March 1999 Roy R. Ray Lecture, Judicial Independence and Democratic Accountability in Highest State Courts*, 53 SMU L. REV. 255, 258 n.7 (2000); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 184 (1991); Traciell V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21, 22 (1996).

132. See Markus Notes, *supra* note 5.

close linkage between powerful financial contributors and the decisions of higher level judges that advance those contributors' agendas. The system's integrity is still threatened by the financial connection and the appearance of impropriety it undeniably creates. However, this is only part of the answer. It is disingenuous for judges to claim that contributors do not influence their judgment. Money's corrupting influence pervades all levels of the judicial hierarchy and shapes judicial behavior. Judges aspiring to sit on a higher court understand this game, and the more ambitious of those can be expected to send signals to potential contributors to demonstrate that the candidate shares the contributors' views and will serve their interests. This signaling of a candidate's willingness to advance contributors' interests undermines the judiciary's independence and the quality of judicial decision-making.

#### IX. ARE THERE ANY PRACTICAL SOLUTIONS TO JUDICIAL CORRUPTION?

It is not enough to lament. Now that the problems are exposed, is there anything that can be done to mitigate their harmful effects? Is the ideal of the wise and independent judge an illusion or something we can recapture? The judicial ideal must be articulated clearly and powerfully because it is a fundamental part of the moral principles needed to keep our society intact. An ideal is never fully attained. The ideal of the wise and independent judge is not illusory simply because communities expect wisdom and integrity from their judges greater than what they are capable of providing. However, we are moving toward making the judicial ideal an illusion and if this goes much further, the core of the Rule of Law will be imperiled.

Daniel Boorstin echoes the importance of such intangible ideals: "Ideals are like stars . . . you will not succeed in touching them with your hands. But like the seafaring man on the desert of waters, you choose them as your guides, and following them will reach your destiny."<sup>133</sup> Boorstin goes on to ask: "Have we been doomed to make our dreams into illusions? . . . An illusion . . . is an image we have mistaken for reality. We cannot reach for it, aspire to it, or be exhilarated by it; for we live in it. It is prosaic because we cannot see it is not fact."<sup>134</sup>

In regard to workable solutions, it is important to remember that judges are part of the system and not reformers, no matter what they

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133. BOORSTIN, *THE IMAGE*, *supra* note 65, at 182 (contrasting *celebrity*, which can be made into an ongoing and marketable commodity, with *heroism*, which tends to be done and then rendered historical).

134. *Id.* at 239.

profess. We must fully understand the system and the ways in which it influences judicial behavior. Nearly all judges depend on the support of political parties and have carefully worked their way through the party system to obtain support. They depend on the party for initial and continuing support. Judicial candidates depend on lawyers and their political party for financial contributions, endorsements, contributions of goods and services, and even aid in obtaining future employment upon leaving the bench.

There are also constraints on the steps states can take that concern their judiciary's independence and integrity. The Supreme Court of Ohio sought to impose a limit on campaign expenditures in Ohio's judicial elections.<sup>135</sup> The federal district court for the Northern District of Ohio and the U.S. Court of Appeals for the Sixth Circuit declared this cap unconstitutional.<sup>136</sup> The Sixth Circuit relied on the Supreme Court's 1976 *Buckley v. Valeo*<sup>137</sup> decision, which held that limits on campaign expenditures violated the First Amendment's ban against freedom of expression, and upheld the district court's ruling.<sup>138</sup> The Supreme Court refused to review the Sixth Circuit's decision. *Buckley* dealt with campaign expenditure limits in legislative races. *Suster* offered the opportunity to establish a different standard for judicial campaigns, but the federal courts chose to find no compelling difference between judicial and legislative races of a kind sufficient to allow limits on campaign expenditures.

The logical flaw in cases such as *Buckley* and *Suster* is that judicial candidates' First Amendment rights are already restricted during campaigns. The restrictions on candidates' rights to speak as freely as other political candidates can only be justified, if at all, by a compelling interest generated by the unique needs and conditions of the judicial office. Either there is something different about the judicial office that is sufficiently compelling to justify speech restraints not imposed on others, or the elective judicial office is no different from other elective positions. If there is a special and compelling state interest in relation to judicial campaigns sufficient to overcome candidates' First Amendment rights and erect a barrier to voters' legitimate access to full information about judicial candidates, then there are justifications for other limitations on judicial campaign financing and behavior. Of course, this does not give state legislatures and supreme courts *carte blanche* in creating rules, but does justify more restrictive rules than in other elections.

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135. See Allbritain, *supra* note 4, at 1324.

136. See *Suster v. Marshall*, 149 F.3d 523, 525 (6th Cir. 1998). Although the Sixth Circuit ruled against Ohio's limits on judicial campaign expenditures, the decision is a rich source of arguments that expose the competing issues and concerns. See generally *id.*

137. 424 U.S. 1 (1976) (per curiam).

138. See *Suster*, 149 F.3d at 525.

Compare this position with the views of Justices Breyer and Kennedy cited earlier in which Justice Kennedy, for example, distinguished the judiciary from the legislative election process by stating:

[T]he campaign process itself does not easily adapt to judicial selection. Democracy is raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within. So, the whole problem of judicial campaigns is . . . difficult for us to confront. Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we're concerned that there will be either the perception or the reality that judicial independence is undermined.<sup>139</sup>

Although the lower courts could have more inventively tested the applicability of *Buckley* to judicial races, it appears clear that as of now restricting a candidate's campaign expenditures is not a viable option. However, limiting individual contributions may well be a permissible and important means of reform.

Even given the *Buckley* limitations, several actions can be taken to stop or at least reduce the corruption of the judiciary.<sup>140</sup> Corruption must be prevented from occurring in the first instance; it must not be dealt with after the fact.<sup>141</sup> The Ohio Supreme Court's failed attempt to place

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139. *Frontline: Justice for Sale?*, *supra* note 2.

140. See Cammack, *supra* note 1. Cammack argues that:

Legal systems use various methods to seek to guarantee the independence of judges. Selection procedures designed to ensure that only honest and qualified men and women are chosen to serve as judges, adequate salaries for judges that reduce the temptation or need to resort to illicit payments, professional training, systems of bureaucratic oversight and appellate review and a culture of professionalism are all important means for guaranteeing integrity in the administration of the law. Another technique that is widely used to check corruption, particularly in the administration of criminal law, is to permit lay people to share in the responsibility of judging.

*Id.*

141. A recent report in the National Law Journal demonstrates the lengths to which powerful interests will go to achieve their goals through money. See Elizabeth Amon, *Exxon Bankrolls Critics of Punitives*, NAT'L L.J., May 17, 1999, at A1. Although the report involves Exxon's "buying" of law professors, it applies equally to judges and campaign contributions. The point is simple: money influences judgment. According to the article, Exxon funded articles by several of the most prominent law professors in the country, including Chicago's Cass Sunstein, and then used the results to support its position on appeal in opposing the award of punitive damages against it for the oil spill in Alaska. See *id.* Sunstein and other law faculty took the position, at best naïve, that their position would nonetheless be somehow virtuously uninfluenced by the bargain they made with Exxon. See *id.* The arrogance of this position on behalf of supposedly sophisticated law faculty exposes the kind of disingenuous value system of American intellectuals that is captured by the power and wealth of clients of such magnitude. *Cf.*

limits on campaign expenditures still left open numerous pathways, resulting in reducing special interests' ability to buy judges.<sup>142</sup> Such pathways include banning private contributions or at least removing the incentives for contributions to individual judges. This strategy relies more on regulatory and investigative actions as opposed to placing the judiciary under a microscope. Prevention is a far better strategy due to the small, close-knit nature of judicial communities and their instinct to protect and cover up violations. There may be an occasional "sacrificial judge" sanctioned to set an example, but even here the reasons may be that the judge is unpopular with colleagues or offers a particularly easy target.

Effective strategies for dealing with judicial corruption must involve a combination of approaches. No single approach will be adequate and strategies need to be continually adjusted as the special interests will adapt their strategies to deal with reforms. In other words, the stakes are too high for the game to be stopped. Reform strategies will be a continuing struggle rather than a single action. As suggested earlier, many of the judges are willing participants in this game, as are the political parties and patronage systems that depend on winning judicial contests and having their own people placed in the judicial office.

Therefore, if we are serious about reducing the ability of special interests that inappropriately use judges to serve their own agendas, we must visualize the effort as a continuing campaign. Seeking the most effective combination of strategies in that continuing campaign demands

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HEXTER, *supra* note 61, at 109 (describing in MORE'S UTOPIA the self-deception and rationalizations in which individuals engage when deciding to work for the "King."). Although we think our agendas will be advanced, it is always the case that we become captured and used to further the King's ends. *See id.*

142. The American jury is one of the most fundamental checks on judicial corruption at the trial court level. Ironically, the function of the jury may have been stated best in an article recommending its adoption in Indonesia as a check against judicial corruption. *See* Cammack, *supra* note 1.

Rendering judicial decision making more visible to the public by including members of the public in the process can inhibit judges from making decisions based on improper grounds. The right to trial by jury guaranteed in the U.S. Constitution is specifically directed toward the problem of judicial corruption. In the leading decision on the right to a jury trial in a criminal case, the U.S. Supreme Court stated that those who wrote the U.S. Constitution recognized the necessity of protecting against the use of false criminal charges to eliminate enemies, and against judges too responsive to the voice of higher authority. "The framers of the constitution," the court wrote, "strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." The Anglo-American jury represents one method for providing popular participation in the enforcement of the law.

*Id.* (footnotes omitted).

a realistic approach. Politics have always played a role in judicial selection and in the judicial decision-making process, and there is nothing improper about this. It would be absurd and destructive if judges were unaware of the community's social and political needs and stresses, and it would be disastrous if the judge did not attempt to incorporate appropriate values, concerns, and goals into decisions. When we criticize the politicization of the judiciary, we cannot say that political considerations should not be an element of wise judicial decision-making. This refers to political considerations regarded judiciously and independently for the community's good, rather than judicial advocacy of special interest groups' agendas due to judges' self-interest.

#### A. *Twelve Strategies for Reform*

There are strategies that offer some hope for reforming the judiciary. The irony is that few of the strategies reflect anything new. The problem is not one of knowing what to do. It is an issue of political will, accountability and integrity. Public funding of judicial candidates would relieve some of the pressures that lead to corrupt judicial behavior. So would the requirement that private contributions be limited in size and source or deposited into a generic trust for all judicial candidates. A ban against lawyers and other special interests pooling contributions to create larger impact on specific judicial races offers another potentially helpful strategy. An automatic requirement of recusal or disqualification of a judge from sitting on a matter where the judge has received a substantial financial contribution from an organization that supports a particular party or issue adds another method for preserving the integrity of the system.

Some argue that merit selection will resolve the problems they see as created by campaign financing. But others are concerned that merit selection would deprive the democratic electorate of choice. In any event it is likely that merit selection would simply shift the strategies and political focus of those seeking to capture the judiciary in ways that are more cosmetic than substantive. Merit selection does not guarantee the judge will not be corrupted through one of the numerous other devices by which judges can be influenced.<sup>143</sup>

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143. For analysis see Merit Selection Factbook; David K. Frank, "An Indictment of Ohio's Judicial Selection System: The Case for the Merit Plan," 1978 The Ohio State Bar Association. Not everyone agrees on the desirability of merit selection, and proposals have had a difficult time making headway in many states. One critic argues that "[u]nder the merit system, an old maxim holds that 'a judge is a lawyer who knows the governor.' With election, even a lawyer appointed by the governor, usually to fill a vacancy, must

But generally speaking, and most telling, is that we have chosen not to pursue prophylactic measures against judicial corruption. Even when we have attempted measures to remove judicial self-interest we have sometimes failed.<sup>144</sup>

Reform strategies come down to a limited set of factors. These relate to financing, fundraising, reporting requirements, recusal and disqualification rules, unmuzzling of judicial candidates in areas of judicial philosophy and the ability to critique an opponent's record, term limits, the possibility of removal and serious discipline of sitting judges, and the potential for citizen suits against judges in carefully tailored situations. Some of those approaches are reflected in recent changes in the Canons of Judicial Ethics passed by the ABA's House of Delegates in 1999 and in the proposals contained in California's Proposition 208.

In 1999 the American Bar Association amended its Model Code of Judicial Conduct to impose contribution limits and disclosure standards on elected judges. The provisions also require judges to disqualify themselves from hearing cases in which parties or their lawyers have contributed to the judge's campaign in amounts exceeding the specified limits. The ABA has a clear preference for merit selection of judges rather than judicial selection through contested elections. For states that continue to select judges through contested elections, the ABA urges reforms in campaign financing that include:

- Prohibiting a judge from appointing a lawyer to perform services for the court if the judge knows or learns by a timely motion that the lawyer contributed more than a specified threshold amount to the judge's election campaign. The prohibition does not apply if "the appointment would be substantially uncompensated, the lawyer's name came up in rotation from a list of qualified lawyers

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stand the test of a vote in November." Harold Ticktin, Editorial, *Merit Selection Can't Guarantee Better Judges*, THE PLAIN DEALER (Cleveland), Apr. 15, 1999, at 10B.

144. See, e.g., Joe Stephens, *Judges Ruled on Firms in Their Portfolios*, WASH. POST, Sept. 13, 1999, at A4.

A number of federal appellate judges have ruled on cases involving companies in which they own stock, despite a federal law designed to prevent judges from taking part in any case in which they have a financial interest.

An examination of financial disclosure reports and federal court records shows that in 1997 eight appeals court judges took part in at least 18 cases in which they, their spouses or trusts they helped manage held stock in one of the parties. The stock ownership ranged from a few thousand dollars to as much as \$250,000.

In interviews, the judges acknowledged that they should not have participated in the cases but stressed that their stock interests did not affect their rulings. The judges, who include some of the nation's best-known jurists, attributed their participation in the cases to innocent mistakes or memory lapses about their financial portfolios.

*Id.*



compiled without regard to their contribution history, or no other lawyer was willing, competent and able to accept the appointment.”

- Where a judge learns by motion that a party or the party’s lawyer has made political contributions within a particular time period that exceed established limits mandatory disqualification is required.
- Judicial candidates are required to instruct their campaign committees not to accept donations exceeding specified limits.
- Judicial campaign committees are required to file disclosure statements revealing the name, address, occupation and employer of each person contributing more than the established amount.
- States are urged to designate a depository for filing of disclosure statements in ways that allow convenient and timely public access to the information. The preferred manner is by easily accessible electronic means.
- In determining contribution limits aggregate contributions are defined as including not only cash but in-kind contributions that are made either directly to a candidate’s committee or treasurer or made indirectly to support a candidate or oppose a candidate’s opponent.

Another set of reforms is contained in California’s *Proposition 208*. That attempt to reform California’s judicial campaigns includes such strategies as: campaign contribution and spending limits covering single contributions, collective or “bundled” contributions, as well as limits on loans a candidate can make to his own campaign. *Proposition 208* included reporting requirements, prohibitions against soliciting or receiving contributions that are from lobbyists directly or are arranged by lobbyists even if they come from other sources. Also included are voluntary campaign spending limits with higher contribution limits allowed for candidates who agree to accept total expenditure limits, and restrictions on when contributions may be accepted. *Proposition 208* would have increased penalties for violation of the campaign laws and allowed for enforcement through government agencies, as well as citizen suits by residents in the relevant area when judges and campaign

committees violated the laws. Disclosure of major donors was also required.

The ABA's *Model Code of Judicial Conduct* and *Proposition 208* demonstrate both the concern over undue influence on the judiciary and that there are options available to improve the situation. The test, however, lies in our ability to identify key strategic factors and remove the incentives for contributors to give and for judges to take. That list of actions includes the following:

*1. Strategies Relating to Financing Judicial Elections*

*a. Strategy # 1: Public Funding of Judicial Campaigns*

- One strategy with significant promise is to provide adequate public funding of all judicial candidates while barring private contributions. The funding could be full or partial, with the formulas worked out for possible matching contributions. California's *Proposition 208*, for example, involved the combination of a public match with voluntary campaign expenditure totals by candidates willing to make the commitment. Although obviously more expensive in public dollars, public funding would help eliminate special-interest contributions to judicial candidates who meet reasonable entry-level criteria. This offers hope for relieving some of the corruption. It would at least mitigate the pressures caused by the need to raise substantial sums of money for the judge's campaign. But even public funding would not remove the harm caused by other forms of corruption. Even if the competition for financial contributions were muted by the availability of public funds special interests would respond by expanding their efforts in other areas through which they can influence the judiciary. At the federal level, for example, federal judges are appointed and need not campaign for reelection. But as Judge Abner Mikva reported, there are far too many cases of questionable behavior by federal judges who were willing to be seduced by powerful business interests by accepting fully paid luxury seminars that presented one-sided views on issues of importance to the corporations. The issue is obviously not only that of campaign financing. Power and luxury affect us all including the federal judiciary.
- A publicly funded program to allow candidates to communicate with the voters should be established. The contribution level would vary with the type of judicial race and the geographic area and population density of voters who must be reached. A state or locality may be able to increase public debate and reduce the frequency by which candidates are required to raise additional funds. The political

speech that is at the core of First Amendment protection is protected because there are no limits on total campaign expenditures. Candidates can still compete for voter attention through campaign advertising as *Buckley v. Valeo* sought to ensure.<sup>145</sup>

- Public funding is not a complete remedy, as financing through campaign contributions is only one source of judicial influence and corruption. Regardless of the amount of money available there is still a need to obtain name recognition with voters. Even if a reasonably significant amount of public money were available, those with a favorable political name would have an advantage over a candidate who may be much better qualified but lacks the prominent or appealing surname with high “ballot cue” impact. Equal allocation of funds is likely to create an advantage for incumbents who have some greater name recognition than most challengers. Public funding would therefore be of some use in limiting judicial corruption; however, it needs to be part of a larger set of reform strategies.

*b. Strategy # 2: Contribution Limits*

- If private contributions are allowed, the amount an individual or organization can contribute should be restricted to ensure that a specific contributor’s influence is restricted. The logic is that if an individual owes everyone something, then that individual owes nothing to specific interests.<sup>146</sup>
- Lawyers’ political contributions to specific judges should be strictly regulated either by banning such contributions altogether or by requiring them to be deposited into a generic pot from which all qualified candidates running for judicial office can draw.
- Campaign finance and contribution limits should be imposed on law firms to prevent larger firms from having an exaggerated impact on

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145. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

146. See generally John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000); *Opinion and Order Implementing Recommendations of the Supreme Court Judicial Campaign Finance Study Committee*, 62 TEX. B.J. 946 (1999); Tracy A. Bateman & Michael R. Flaherty, Annotation: *Disciplinary Action Against Attorney for Making Gift or Loan to Judge*, 29 A.L.R.5TH 505 (1995); KIM J. ASKEW & ADELE HEDGES, TEXAS PRACTICE GUIDE CIVIL PRETRIAL CONTENTS ch. 15 (1999); Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294 (1994).

judicial elections.

- Campaign finance limits should also be applied to other institutions such as trade associations, corporations, and political action committees that support specific candidates. Like law firms, trade associations of lawyers and other interests can pool resources and exert a disproportionate effect on selection of judicial candidates and the election of judges.<sup>147</sup>
- Contribution limits should vary according to the size of the geographic area in which the judge or judicial candidate is running. The contribution limit for a Texas Supreme Court justice, for example, is a maximum of \$5,000 from an individual and \$30,000 from a law firm.<sup>148</sup>

*c. Strategy # 3: Identity of Contributors and Other Potential Conflicts of Interest*

- There should be full disclosure of all contributions and contributors, including financial contributions and in kind services.
- All judicial candidates and sitting judges should be required to provide complete annual reports on all sources of income and investment to ensure that information is available so that citizens can evaluate any personal interest the judge might have in a particular case. This requirement relates not only to matters of identity and conflicts of interest, but to provision of other voter information.
- A requirement of identifying supporters should be imposed on judges who benefit from major campaign expenditures, such as billboards, postcards, mailings, and television advertising and endorsements made independently by interest groups on the judge's behalf.<sup>149</sup> This requirement would have remedied the Wisconsin situation in which an "anonymous" donor distributed almost half a million postcards shortly before a judicial election.

*d. Strategy # 4: Pooling of Contributions to Judges*

- Contributions to all judicial candidates should be deposited into

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147. See Renae Merle, *Panelists Agree Judicial Election System Should Be Changed*, AP NEWSWIREs, Sept. 1, 1999 (on file with the *Catholic University Law Review*); Clay Robinson, *New Chapter in Judicial Campaign Financing*, HOUS. CHRON., Feb. 28, 1999, at 2.

148. See Robinson, *supra* note 148, at 2.

149. See *id.*

general trusts. This will reduce the total money available because potential contributors would decide they are less likely to benefit from a generic contribution. Unless this strategy is linked with public funding, it will only work to reduce the total of available funds to candidates and make judges vulnerable to other forms of influence.

- As recently proposed in Texas, winning candidates should be prohibited from soliciting “late train” contributions after an election. Campaign contributions are also inappropriate for unopposed candidates and near-certain winners. Raising funds in this situation is an abuse of the judicial office, relying on enhanced judicial leverage and the “bandwagon effect” to draw more money from hopeful contributors. Limits should also be imposed on judges’ ability to hoard political donations between elections.<sup>150</sup>
- Judges and judicial candidates should be prohibited from donating campaign funds to political parties or political committees that endorse candidates.<sup>151</sup>
- There should be stringent limits on the ability of judicial candidates to build campaign “war chests” between elections and a prohibition against sharing campaign funds with other political organizations.<sup>152</sup> A dramatic expansion in public funding for judicial candidates would justify this approach.

*e. Strategy # 5: Recusal and Disqualification in Relation to Acceptance of Campaign Contributions*

Judges should be required to recuse themselves in cases where they have received a significant campaign contribution of money, goods, or services.

- A judge or judicial candidate should be disqualified if he or she accepts a campaign contribution from a party or lawyer in excess of legal contribution limits.
- Judges should also recuse themselves from sitting on a matter due to

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150. *See id.*

151. *See id.*

152. *Id.*

conflict of interest if the judge receives a substantial financial contribution from an organization that supports a particular party or issue.

- The recusal and disqualification rules should contain safeguards to prevent strategic contributions from individuals who would make a contribution to a judge or judicial candidate they did not like in order to allow someone to make a motion in a critical case to disqualify the judge from a decision.

## 2. *Strategies Relating to Voter Knowledge about Judicial Candidates*

### *a. Strategy # 6: Campaigns Based on Judicial Philosophy*

- The current system muzzles judicial candidates and results in voter apathy and ignorance in judicial selection. Many judges are making end runs around the limitations by receiving endorsements from visible interest groups who will notify similarly oriented voters that the candidate will support their interests. Thus, judges' values, opinions, and political affiliations are not an important part of what voters should know in order to make informed decisions. Although there may be some limits on the issues judges should address, such as commenting on how an ongoing case should be decided, we need to unmuzzle judicial candidates. Allowing candidates to address their judicial philosophy will produce a more honest debate than the absurd sound bites that tend to occur in current judicial campaigning.
- One promising reform strategy is allowing candidates to campaign on their judicial philosophies and perhaps even their personal philosophies. While there are admitted problems, the current system has become absurd to the extent that game playing and hypocrisy cause more damage than the muzzling rules benefit the system. Judges are already campaigning in ways that use gimmicks to end run or even flout the campaign rules. Judge Thomas' fliers in Illinois, the anonymous postcards in Wisconsin, and Judge Cleary's pursuit of press coverage in Ohio all demonstrate the current campaigning. Thus, there is no real integrity to the rules and the muzzling of judicial candidates is counterproductive. The muzzling prevents voters from having essential information about judicial qualifications and philosophies and makes candidates more vulnerable to the campaign financing processes because they cannot sell themselves to voters based on their positions.
- The muzzling of judicial candidates forces them to raise more money

from contributors who want the judge to represent their special interests and who are fully aware of the judge's positions.

- Since it will almost certainly be impossible to take “big money” out of judicial campaigns, one adjustment may offer some balance. One approach could be for Congress to legislate an exemption to the lobbying rules applicable to 501c3 tax exempt organizations that allows public interest organizations to support and oppose judicial candidates. Although many such organizations lack large pools of funds they have the ability to mobilize their members around issues about which they care. This is consistent with the idea that the problem with judicial elections is not necessarily that of money but the need to have a great deal of money to try to put one's name before the public. Allowing public interest organizations to make political statements in the context of judicial campaigns without losing their tax exempt status would help balance what is now an uneven playing field in which big money is increasingly in control.
- Judicial candidates should campaign on the merits of their positions so that voters can make sound democratic decisions about those they are electing. The current system of denying judicial candidates the opportunity to tell voters their positions on key issues ensures that voters will be poorly informed about the candidates' qualifications. This not only denies voters critical information but also results in lessened interest in the candidates because there is no information enabling voters to distinguish one from the other.
- Candidates should at least be allowed to discuss with voters how they would approach the issues in their judicial capacity. How the candidate's values would impact their decisions should be considered. People are typically unable to think of judges as independent evaluators of rules and requirements, which other people have created. Most people do not understand that although a good judge is concerned with justice, he or she is also required not to confuse personal values and preferences with justice in reaching a balanced decision. If a judicial candidate is unable to accept this special judicial responsibility, then he or she should not be appointed or elected to the bench.
- The opposition to fully competitive judicial campaigns was forcefully articulated in Florida in opposition to a proposal to allow judicial

candidates to speak freely. One critic argued that, “judges should keep their political opinions to themselves. Those who don’t get bounced off cases, wasting the time and resources of the voters who pay their salaries.”<sup>153</sup>

*b. Strategy # 7: Detailed, Timely, and Accessible Voter Information Systems*

- Former Illinois governor Jim Edgar recently described an information system, writing that:

I would recommend that voters take advantage of several sources. For example, [there is] an informative Web site . . . at IllinoisJudges2000.com. Operated by the Illinois Civil Justice League, this site is a comprehensive source of information on all judicial elections in Illinois. It is also interactive, so voters can ask questions of the judges and judicial candidates.<sup>154</sup>

- Missouri has an initiative that includes the distribution of brochures about voting for judges. It includes a judicial speakers’ bureau, a survey of lawyers to evaluate the judiciary, and an enlistment of the media to write about the judiciary. The state of Washington offers voter guides in Sunday newspapers describing judicial primary elections.<sup>155</sup>
- Judges’ campaign finance reports should be filed electronically to permit easy access by voters. There should also be a pre-election finance report required so that voters and opponents can react to situations in which it is arguable that too close of a connection exists between a judicial candidate and a special interest.

*3. Strategies Relating to the Quality and Ability of Judges: Merit Selection, Retention Reviews, Term Limits and Effective Discipline*

*a. Strategy # 8: Merit Selection*

- The alternative to popular election of judges is to adopt a system of merit selection. There are some selection systems that mix merit selection with popular voting at the end of a judicial term in which voters are asked whether a particular judge should be retained. To

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153. Martin Dyckman, *Two Cheers for Bicameralism*, ST. PETERSBURG TIMES, Feb. 14, 1999, at 3D.

154. Edgar, *supra* note 123, at 14.

155. See Wohl, *supra* note 29. These efforts have met with some degree of success. This suggests that voter education offers some hope for state judicial systems attempting to ensure judicial integrity, independence, and accountability. See *id.*



the extent that the judiciary has not been able to capture voters' interest, too much is lost by playing the democracy card. Many would argue that ordinary voters' ability to participate meaningfully in the selection of judges is a type of merit selection in itself and that we should improve that process rather than move to an appointed judiciary.

- The problem of substituting merit selection processes for elections is not limited to loss of voter choice. The mechanisms through which we assess merit of candidates can themselves be captured by special interests. Legislators who make appointments may possess a singular conception of a judge that does not necessarily guarantee judicial quality or that subordinates individual merit to some other valid social goal. This has been clearly demonstrated as a problem on the federal level with an appointed judiciary not subject to voters and not required to raise campaign funds.

*b. Strategy # 9: Retention Reviews*

- A Minnesota proposal for judicial term limits contains a retention review process that would be conducted by a legislative committee with public participation.<sup>156</sup> The idea of an diverse and independent review system that involves citizens in the greatest role is appealing. Presently, state supreme courts generally have the ultimate authority for review, suspension, or removal of a sitting judge for misconduct. In a system of merit selection it seems reasonable to create some forum for the evaluation of judges. Of course the standards for review are difficult and open to significant thinking, but mid-term reviews may be desirable.

*c. Strategy # 10: Term Limits*

- One way to limit the potential for corruption is to impose term limits on judges. Limiting of a judge to a single consecutive term may prevent the creation of financial and other relationships that create the corruption.<sup>157</sup> Term limits at least spread the corruption more

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156. See Thomas Neuville, *A Better Way To Achieve Independent and Accountable Judiciary*, STAR-TRIB. (Minneapolis-St. Paul), June 22, 2000, at 26A.

157. See Cammack, *supra* note 1.

Finally, the susceptibility of judges to corruption is partly a result of the fact that they are more easily targeted for corruption because they occupy a permanent role in the legal system. It is more difficult to exercise systematic control over the decision-making process if the group of decision makers is constantly changing.

widely. A proposal made in Minnesota would restrict judges to serve for a limited term of eight years. The Minnesota proposal includes provisions for legislative appointments and review. The judges can be confirmed for additional terms if they have performed competently. However, the problem is that the judicial reappointment is dependent on the judge satisfying the state legislature “with appropriate deference to the other branches of government.”<sup>158</sup> This *deference* is in itself a problem.

- Limitations to one term would create problems with talented candidates being unwilling to give up six or eight years of their career when there was little hope of continuing as a judge. Similarly, although offered as a solution to reduce or eliminate judges' dependence on campaign funding from private contributors the term limit strategy might make judges more susceptible to other forms of corruption such as making favorable rulings for law firms who will hire the judge after the term expires.

*d. Strategy # 11: Real Disciplinary Processes for Judges*

- Judges are like feudal barons. Their discretion is enormous and it is highly unlikely that other judges are willing to sanction them for even egregious misbehavior. The judiciary is a closed club that dislikes embarrassing the brotherhood of judges. The result is that intemperate behavior, drunkenness on the bench, ineptness, consistent reversals and much more is swept under the rug.
- Judges who knowingly violate campaign contributions laws should be subject to disciplinary proceedings with the possibility of automatic suspension or removal in serious or recurring cases.
- If judges are unwilling to discipline judges for serious failures, then bar associations and ordinary lawyers are certainly not going to make the challenges. This reluctance results in an insular system that fails to discipline judges adequately in ways that would create more judicial behavior, produces a “chilling effect” on lawyers who are aware of judicial misconduct, and results in the lack of a public record by which voters might be made aware of particular judges' shortcomings.
- In such a system, the only potentially workable mechanism is an independent review system outside the control of the existing

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*Id.*

158. Neuville, *supra* note 157, at 26A.

disciplinary processes and of state supreme courts. This review system should include judges and lawyers, but should not be numerically dominated by legal interests. It should be large and diverse enough to incorporate the special interests that will inevitably find their way into the system and prevent anyone from capturing a majority of the votes.

*e. Strategy # 12: Rethinking Judicial Immunity from Civil Actions*

- Judges are virtually immune from being sued for the consequences of their actions, and this immunity is generally a very good idea. However, the time may have come to reconsider judges' absolute immunity from civil damage actions for the consequences resulting from wrong and abusive decisions. There is a great hesitance in even making this suggestion because there are very good reasons for judicial immunity. In instances of a clear and egregious abuse or a pattern of abuse with which the organized bar and state supreme courts have been unwilling to investigate and sanction after notice, then allowing civil actions against judges may be advisable. The preliminary standards and the burdens of proof must be set high so that this remedy operates only in the most serious situations.
- As included in *Proposition 208*, citizen suits might be a desirable remedy for actions against judges who violate campaign financing and conflict of interest laws. While the remedy seems drastic from the perspective of lawyers and judges, no other part of government or the legal profession is likely to have the political courage required to take on judges who break the laws. Citizen suits in many areas recognize the important role of citizen actions in areas that are otherwise beneath the notice of governmental authorities, or that involve improper governmental action. If the judicial institution is to be protected against itself this remedy might be worth serious consideration.

## X. CONCLUSION

We have various illusions about judges. We want judges to be wise, but we do not know the meaning of wisdom. We want judges to possess judicial temperament, but how is this defined and how is it recognized? As a law school professor, I was taught that our mission was to teach students to "think like lawyers" but it has proved difficult to pin down the meaning of this complex idea. In the judicial context there must be an equivalent methodology and philosophy enabling jurists to "think like

judges.” The difficulty in achieving this quality of thought and decision comes from the fact that it represents a combination of factors such as intellect, judgment, wisdom, compassion, insight and emotional and mental maturity. The ability to achieve this state of mind and judgmental capacity seems increasingly rare to the extent we honor those few judges that at least seem to approach the ideal.

In any event, the real difficulty is whether any system of selection offers an increased chance to choose people to serve as judges who are fully qualified for the position. As most trial lawyers will admit, a realistic goal of the jury selection process is that we may well have to be satisfied if we are able to avoid the worst jurors and hope for a degree of neutrality among the remaining members of the jury. In the same way, we probably can only achieve a situation where the worst candidates for judicial office are either barred in the first instance or at least removed after they clearly demonstrate their incompetence or venality. If we create means to remove the worst judges we must accept our share of judges who are mixtures of brilliance, arrogance, compassion, wisdom, fairness, and balance.

While volumes could be written on the characteristics of an ideal judge, we need to keep in mind that the judiciary is an element of a political system. Thus, judges have a basic political role to serve and complaints about the judiciary being a political entity are misguided. The question is not whether judges should be political in at least some sense of the term. Obviously they should. The question addresses the meaning and extent of the particular kind of political behavior in which the judge should engage while still being “judicial.” This problem is much more difficult and poses the most basic question of what it means to be judicial.

There is no perfect solution to the complex problem of judicial corruption. As outlined above, there are many ways to influence judicial behavior. The special interests that desire to obtain favorable rulings from judges will adapt quickly to capture the judge within the framework of any set of rules. The ability to achieve a relatively honest and fair judiciary is therefore a moving target rather than a stationary formula. Given the critical role judges play in determining legal rules that are of great significance to a host of special interests, the judiciary will always be the focus of political activity. The problem is exacerbated because many judicial candidates come to the bench in possession of a personal agenda and function as advocates rather than impartial judges. One can hope that the candidate's personal agenda is placed into an appropriate judicial context as the judge gains experience and comes to better understand the responsibilities of the judicial role.

But personal and judicial philosophies at least reflect a core of principle. Taken to the extreme philosophical and ideological rigidity

can become a sort of blindness and close-mindedness that undermines the judiciary. Corrupt or improperly influenced judicial behavior is of consequence at the appellate level when too many judges are captured by specific special interests or a single philosophy dominates the judicial discourse. Such deficiencies can be muted in the appellate context through the necessity of achieving collective decisions by a majority of a judicial panel whose members represent a range of political philosophies. When a court has been "stacked" with judges who share highly similar philosophies, however, the court loses its balance and risks becoming seen as illegitimate in a political community of diverse and conflicting interests.

The problem of judicial abuse also becomes important at the trial level where judges with great discretion act individually. Although there is virtually no oversight available at the appellate level other than the need to negotiate a decision with other judges on a panel, the jury plays an important role in muting the effects of corrupt and biased judges at the trial level. Mark Cammack usefully reminds us that:

The jury, as it developed in England and then spread to the U.S. and other common law countries, consists of 12 ordinary citizens who are called to serve as jurors for a short time—typically one or two weeks—and then return to their lives as businesspeople, teachers, factory workers or farmers. The distinctive feature of the jury trial as it is practiced in the common law world is the fact that the jury is given full responsibility for the decision of the case. The judge who presides over the trial instructs the jury on the legal rules that are applicable to their decision. But then the jury decides the guilt or innocence of the accused, outside the presence of the judge and without judicial intervention.<sup>159</sup>

There can be no question that the single most important source of judicial corruption is created by the need for campaign funding. While favors will always be traded and interest group allegiances served, the systematic legalized bribery allowed by campaign financing rules has created a culture of corruption in which real corruption and the increasingly widespread appearance of judicial corruption and impropriety dominate. This is such a threat to the perceived legitimacy of the one part of our government that has managed to retain some shred of public respect that it must be stopped. If implemented, the mixture of strategies described here offer some hope. But in the end nothing will be effective if left up to judges by themselves because judges lack the political will, introspective orientation of the kind required for self-awareness, and acceptance of accountability required for reform.

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159. See Cammack, *supra* note 1.

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