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"ON THE MAKE": CAMPAIGN FUNDING AND THE CORRUPTING OF THE AMERICAN JUDICIARY

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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 decisionmaking, 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.

Judicial integrity is 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.

"[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."

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. This not only results in distortion of judicial selection by repelling meritorious

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potential candidates who are unwilling to compromise their principles, but in the capture by special interests willing to finance judicial campaigns. Some argue that the great increase in contributions to judicial candidates simply means that contributors are giving to candidates they feel certain will support their positions. 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 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. 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."

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 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 is that many judicial candidates consciously and unconsciously sell their votes on issues. Judges need to attract the contributions both for their own campaigns and to keep the funds 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. This does not mean large numbers of judges are taking illegal bribes of a criminal nature. The situation would be relatively simple if criminal bribery were the main problem.

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. 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 'taking' clause of the Constitution should be interpreted to prohibit rules against development in environmentally sensitive places."

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. 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.

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.

The system of campaign contributions has legalized a corrupt process in which lawyers 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." Although the Model Code official 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 Judiciary." 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.

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." 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"

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. 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.'" He concludes that:

"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 "

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.

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.

Justice Stephen 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."

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. 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 (329 cases) are tainted by the fact that at least one of the seven justices took money from sources with an interest in the case."

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. Doctrines are not simply words but are powerful formulae that have moral and political implications as well as great 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" 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."

Both actual judicial integrity and citizens' perception of the fairness of the judicial office are being diminished by the politicization of the judiciary. Judge Mikva comments on the perception of judicial integrity 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."

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. 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, hurry-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."

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. Supreme court judges from fifteen states have gone so far as to call a "summit" to consider what to do about what they admit is a critical situation. 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 . . ."

The judiciary is being corrupted by special-interest strategies and the campaign fundraising process. 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."

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.

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 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. While happy to win, the experience disturbed him to the point that he has not contributed to judicial campaigns since that time.

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 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."

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 holding either way, **the judge is going to decide for the party who gave him the \$10,000 donation for his campaign chest.**" 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.

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 naive 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.

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? 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."

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 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. 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." 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. 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 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. 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, 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. 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." 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. 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.

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.

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 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.

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

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. Judge Cleary admitted that she had an extremely weak 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. 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. 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.

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.

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. 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." Thus, we are all judged by how we treat those who are less 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 fall to cross-examine crucial witnesses,

sleep during testimony or come to court drunk."

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. 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. 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.

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, 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 selfaggrandizement."

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."

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. 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.

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 noncumulative or "soft" knowledge. 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.

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. 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 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." 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.

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. While voters are 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. Only eight percent could name even one of the two candidates listed on the ballot. 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.

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 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. 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. 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.

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.

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

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.

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 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.

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." 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. "

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

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 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.

Twelve Strategies for Reform

There are strategies that offer 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. 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.

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.

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 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.

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.

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 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.

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.

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. 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 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.

Judges and judicial candidates should be prohibited from donating campaign funds to political parties or political committees that endorse candidates.

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. 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 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."

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.

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.

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 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. 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. Term limits at least spread the corruption more 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." This deference is in itself a problem.

Limitation 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 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.

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 business people, 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."

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.