"*THE APPEAL*" TO THE MASSES

PENNY J. WHITE*

INTRODUCTION

For more than a decade, dozens of legal scholars have written to decry the politicalization of state court judiciaries.[1] The decision in *Republican Party of Minnesota v. White*[2] only increased the concern and the opportunity, by creating an environment ripe for control by moneyed interests. But largely we have been talking to ourselves, sharing pages in law review symposia and meeting in law school classrooms to lament the threats to judicial independence and, occasionally, to propose reform.

After giving dozens of lectures and writing several articles on the topic of judicial independence, I, too, began to feel like a doomsday pre-

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* E.E. Overton Distinguished Professor of Law Director, Center for Advocacy and Dispute Resolution University of Tennessee College of Law. Professor White has served as a state intermediate appellate judge and a supreme court justice.

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1. *See* Shirley S. Abrahamson, Keynote Address, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 9-10 (2003); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 13 (2003); James J Brudney & Lawrence A. Baum, *Foreword to Symposium, Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1, 1 (2003); Stephen B. Burbank, *What Do We Mean by "Judicial Independence?*," 64 OHIO ST. L.J. 323, 324 (2003); Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, CT. REV., Summer 2004, at 4, 5; Kevin S. Burke, *The Tyranny of the 'Or' Is the Threat to Judicial Independence, Not Problem-Solving Courts*, CT. REV., Summer 2004, at 32, 32; Harry L. Carrico, *Call to Arms: The Need to Protect the Independence of the Judiciary*, 38 U. RICH. L. REV. 575, 576 (2004); Michael G. Collins, *Judicial Independence and the Scope of Article III—A View from the Federalist*, 38 U. RICH. L. REV. 675, 677-78 (2004); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49-50 (2003); Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, CT. REV., Summer 2004, at 26, 26; D. Dudley Oldham & Seth S. Andersen, Commentary, *Role of the Organized Bar in Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341, 342 (2003); Thomas R. Phillips, Keynote Address, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 138 (2003); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 603 (2004); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 579 (2004); Jeffrey Rosinek, *Some Thoughts on the Problems of Judicial Elections*, CT. REV., Summer 2004, at 20, 20; John Russonello, *Speak to Values: How to Promote the Courts and Blunt Attacks on Judiciary*, CT. REV., Summer 2004, at 10, 10; Roy Schotland, *Resource Materials on Judicial Independence*, CT. REV., Summer 2004, at 38, 38; Rodney A. Smolla, *Chief Justice Harry L. Carrico and the Ideal of Judicial Independence*, 38 U. RICH. L. REV. 571, 571 (2004); Kenneth W. Starr, *Legislative Restraint in the Confirmation Process*, 38 U. RICH. L. REV. 597, 598 (2004).

2. 536 U.S. 765, 777-78 (2002).

dictor, or at least like Henny Penny in the story of Chicken Little.[3] Often, I struggled when it was suggested that I should end an address on a high note, unsure whether I could, in good conscience, reach one. Because I felt that my message was stale and dispiriting, I was hesitant when *Denver University Law Review* editor Forrest Plesko asked me to contribute to this issue. Within a few weeks, as a matter of pure coincidence,[4] I listened to John Grisham's book *The Appeal*[5] during a lengthy road trip. I realized immediately that John Grisham may have done what none of us could do: through the medium of literature, he has told the story of what is happening in our state courts to a heretofore-unreached, but indispensable-to-any-solution, audience—the American public.

A detached reader's first reaction might be that *The Appeal* tells a pretty good story, but that it is *only* a story. This essay tests the reader's likely reaction by contrasting some[6] of the imaginary,[7] and perhaps outlandish, facts of Grisham's book with what is actually happening in state judicial elections. Its goal is to chronicle the present condition of state court judicial selection.

3. The story of Chicken Little, who first alerts Henny Penny that "the sky is falling" before the two set off a flurry of panic, dates to the Jataka Tales of Buddhist Indian folklore, but was made popular in modern times by the Australian author Joseph Jacobs in his book *Henny Penny*. My previous expressions of woe about the demise of judicial independence include the following: Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 7-8 (2004); Penny J. White, *If Justice is for all, who are its Constituents?*, 64 TENN. L. REV. 259, 260 (1997); Penny J. White, *"It's a Wonderful Life," or is it? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 1-2 (1996), *as reprinted in* 80 JUDICATURE 174, 174 (1997); Penny J. White, *Judging Judges: Securing Judicial Independence by use of Judicial Performance Evaluations*, 24 FORDHAM URB. L.J. 1053, 1056 (2002); Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, one who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615, 615-16 (2004); Penny J. White, *"The Good, the Bad, and the [Very, Very] Ugly" and (its Postscript), "A Fistful of Dollars:" Musings on* White, 38 U. RICH. L. REV. 626, 627 (2004); Penny J. White, The Aftermath of *Republican Party of Minnesota v. White*, 1 (July, 14, 2007) (unpublished article, on file with the Pound Foundation).

4. The choice of *The Appeal* was not completely accidental. Judge Mary Anne Majestic, Tempe, Arizona, prompted my taking the time to listen to the book, and I thank her for that.

5. JOHN GRISHAM, THE APPEAL (2008) [hereinafter THE APPEAL].

6. Because of time constraints and page limitations, I address only a very few of the assertions in Grisham's books, having to give short shrift or totally omit many, equally interesting others, such as employing wedge issues to get out the vote in otherwise low turnout judicial races; using decoy, colorful candidates to gain public attention; developing intelligence on the personal lives of incumbents; employing scare tactics and voting tariffs to deter certain voters; and involving federal office holders with established political allies.

7. The author assures the reader in his Author's Note that "[a]ny similarity to a real person is coincidental." GRISHAM, *supra* note 5, at 357.

I. GRISHAM, THE AUTHOR

"[O]utlandish";[8] "preposterous";[9] "hallucinatory";[10]" [s]pell-binding hyperbole";[11] "healthy dose of exaggeration and falsehood";[12] and "baloney of biased rhetoric."[13] These are but a few of the words and phrases that have been used to describe John Grisham's novels. The descriptions may well be good fits for many of Grisham's plots and characters. *The Firm's* story about Mitch McDeere—a 25-year old Harvard graduate, who stumbles into employment with a law firm that works round-the-clock for visible clients while laundering money in the back offices for the Mafia[14]—is a bit surreal. The same characterization applies to the Sullivan law firm in *A Time to Kill* as a law firm that "every lawyer detested."[15] Similarly, the depiction of Hemba and Hamilton—the "trusty lawyers" in *The Testament* who use "lobbyists for legal bribery to land fat government contracts and hide money in Swiss accounts"[16] and also use prosecutors who forsake the obligations of their office in order to align themselves for higher office[17]—is at least inordinately jaded. Moreover, Grisham's exaggerations do not end with the lawyers in his books. He writes about judges who, while incarcerated, blackmail gay men by threatening to expose their sexuality,[18] as well as judges who conspire with defense counsel to force plaintiffs to settle lawsuits.[19]

Grisham's critics claim that his writings are agitprop,[20] that he uniformly views the legal system with a "jaundiced eye"[21] always favoring the little guy,[22] and that the system he portrays is always corrupt and perverted, based on a "cynical premise."[23] Still, others see Grisham as

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8. David Germain, *Adaptation of Grisham Courtroom Thriller is "Outlandish Story,"* CANARSIE COURIER, Oct. 30, 2003, *available at* http://www.canarsiecourier.com/News/2003/1030/Arts_Entertainment/024.html.

9. *Id.*; Marilyn Stasio, *Crime*, N.Y. TIMES, Mar. 24, 1991, at BR37.

10. Review of THE FIRM, http://www.amazon.co.uk/Firm-John-Grisham/dp/0099830000 ("Hallucinatory [E]ntertainment . . . Terrifically [E]xciting. . . [G]rips and [P]ropels.") (last visited Oct. 31, 2008).

11. Review of THE APPEAL, http://www.amazon.com/gp/pdp/profile/A36LKTTFZJ3VI9 (last visited Nov. 10, 2008).

12. Interview by SlushPile.net with John Grisham, Author (Mar. 1, 2006), http://www.slushpile.net/index.php/2006/03/01/interview-john-grisham-author/.

13. Janet Maslin, Book Review, *If You Can't Win the Case, Buy the Election and Get Your Own Judge*, NY TIMES, Jan. 28, 2008.

14. *See* JOHN GRISHAM, THE FIRM (1991).

15. *See* JOHN GRISHAM, A TIME TO KILL 27 (1989).

16. *See* JOHN GRISHAM, THE TESTAMENT 265 (1999).

17. *See* JOHN GRISHAM, A TIME TO KILL 101 (1989); JOHN GRISHAM, THE CLIENT 120-21 (1993).

18. *See* JOHN GRISHAM, THE BRETHREN (2000).

19. *See* JOHN GRISHAM, THE RAINMAKER 195-97 (2000).

20. Timothy Rutten, Book Review, *Deft Social Realism and Iffy Grammar*, L.A. TIMES, Jan. 29, 2008 at E1.

21. John B. Owens, *Grisham's Legal Tales: A Moral Compass for the Young Lawyer*, 48 UCLA L. REV. 1431, 1434 (2001).

22. *Id.* at 1435-38.

23. Stasio, *supra* note 9.

"holding up a mirror to our age,"[24] painting a "sadly familiar picture,"[25] and being "deadly accurate."

II. BACKGROUND: *THE APPEAL*

Drawing on a familiar formula, *The Appeal* includes bad rich guys and good poor guys and gals, a Faustian challenge, and an ending that brings a glimmer of hope. But is *The Appeal* just another "depressingly fascinating"[26] Grisham tale? Or does it contain elements of reality, an exposé of the effect of real world politics on state judicial systems?[27]

The Appeal traces a fictitious toxic tort case, *Baker v. Krane Chemical*,[28] from jury verdict until the case's conclusion in the Mississippi Supreme Court.[29] A Mississippi jury finds that Krane contaminated the groundwater in Bowmore causing the cancerous death of Jeanette Baker's husband and son and awards Mrs. Baker $41 million dollars in compensatory and punitive damages.[30] This verdict sets off a chain reaction, bankrupting Mrs. Baker's lawyers (the good guy and gal husband-and-wife law firm of Wes and Mary Grace Payton),[31] making Krane's CEO (bad guy Carl Trudeau) an even wealthier man,[32] and landing an unknown, undistinguished lawyer (foil family-value conservative Ron Fisk) on the Mississippi Supreme Court[33] in the place of an incumbent

24. Chuck Leddy, *Grisham Provides a Shock to the System*, BOSTON GLOBE, Jan. 26, 2008, *available at* http://www.boston.com/ae/books/articles/2008/01/26/grisham_provides_a_shock_to_the_system/.

25. *Id.*

26. Peter Guttridge, *Evil Comes in Many Guises*, THE OBSERVER, Feb. 3, 2008, *available at* http://www.guardian.co.uk/books/2008/feb/03/stephenking.fiction.

27. *See* Carol Memmott, *Grisham's 'Appeal' Rules Harshly on Bought Elections*, USA TODAY, Jan. 30, 2008, *available at* http://www.usatoday.com/life/books/reviews/2008-01-28-grisham-appeal_N.htm.

28. THE APPEAL, *supra* note 5, Author's Note. Grisham describes the characters as "purely fictional"; the town, county, company, products, and chemicals as nonexistent; the justices, organizations, churches, corporations, and think tanks as not real; the campaign as a "figment of [his] imagination"; some of the laws as "butchered"; and the lawsuit as "borrowed from several actual cases" but adds that "there is a lot of truth in this story."

29. THE APPEAL, *supra* note 5.

30. *Id.* at 1-13.

31. *Id.* at 245-46. The members of the Payton firm hold hands and pray "as they had never prayed before" when they learn that the jury has reached a verdict. *Id.* at 5 ("Please, dear Lord . . . grant us a divine victory. And deliver us from humiliation, ruin, bankruptcy, and a host of other evils that a bad verdict will bring."). By contrast, Krane's lawyer awaited the verdict "reading a biography and watching the hours pass at $750 per" and "marched away without comment, without prayer." *Id.*

32. *Id.* at 352-55. In true Grisham style, a side story emerges in which Trudeau, while fighting the verdict with his government-relations consulting firm, manages to buy very low and sell very high. After acquiring almost all of Krane stock when the prices were deflated, by virtue of the news surrounding the verdict and other pending toxic tort lawsuits, Trudeau, through his lawyer mouthpieces, bolsters the stock price by rumors about settlement negotiations, and then instructs counsel to withdraw from negotiations. *Id*. at 272-89.

33. *Id.* at 105-109, 300-01.

justice (partial protagonist Sheila McCarthy, female, divorced, qualified, experienced, but naive and unsuspecting).[34]

From the very beginning, Grisham makes it clear that Krane and Trudeau are pure antagonists, bad to the core. Krane intentionally dumps toxic waste, contaminating Bowmore's ground water;[35] Trudeau uses bribes and well-placed connections to dupe the government. [36] For years, residents of Bowmore complain about suspect water, both to the factory and to the government, but are constantly reassured that it is safe.[37] When unusually high rates of cancer strike Bowmore, the Paytons—the story's absolute protagonists—are the only lawyers with the nerve to fight Krane and the stomach to acquire the debt necessary to do so,[38] thus making the large jury verdict even sweeter.

The verdict in favor of Baker enrages Trudeau, who vows to win on appeal,[39] and is aided in his effort by a friendly United States Senator who calls Trudeau to suggest that with the help of Barry Rinehart—"[a lawyer who is] extremely competent, smart, discreet, successful, and expensive," but not in the phone book,[40] and who is protagonist number two—the verdict can be "fix[ed]."[41] Rinehart, a nefarious "consultant of sorts," "specializes in elections"[42] and can assure Krane's victory on appeal if Trudeau will provide the cash to "restructure[] the Mississippi Supreme Court."[43] "For eight million [dollars]," Trudeau "can buy [him]self a supreme court justice."[44]

Trudeau would not "buy" a sitting justice outright. Instead, Rinehart would use his money to take a "not particularly friendly" incumbent justice "out of the picture."[45] Rinehart targets a moderate female justice, Sheila McCarthy, and selects as the unsuspecting protégé an inexperienced and unbaggaged[46] lawyer named Ron Fisk,[47] whose back-

34. *Id.* at 116-20, 188-190.
35. *Id.* at 10-12, 17-18, 20-24.
36. *Id.* at 139-40.
37. *Id.* at 20-24.
38. *Id.* at 8. A side plot in Grisham's story involves the plaintiff's firm teetering on financial disaster. In the end the antagonist controls the banks too, calling the loans, and forcing the firm into almost certain bankruptcy.
39. *Id.* at 31. Within minutes of the verdict, Trudeau is assured by his lawyers that "'[i]t'll be years before a dime changes hands, if, in fact, that ever happens,'" prompting Trudeau to swear "'it will never happen. Not one dime of our hard-earned profits will ever get into the hands of those trailer park peasants.'" *Id.* at 18. Hours later, Trudeau boasted to "number 228 on the *Forbes* list of the 400 richest Americans," "'[w]e'll never pay a dime.'" *Id.* at 31.
40. *Id.* at 68.
41. *Id.* at 68-69.
42. *Id.* at 68, 81-82.
43. *Id.* at 84.
44. *Id.* at 85.
45. *Id.* at 83.
46. *Id.* at 106. "The Fisks were squeaky-clean. There was nothing to dig up in the heat of a nasty campaign."
47. *Id.* at 105.

ground is conducive to the pro-business and socially conservative campaign that Rinehart calculates will win the election.[48] After meetings with politicians and special interest groups, Fisk, unknowingly at first,[49] becomes the face of the operation "to convert Sheila McCarthy from the sensible moderate she was into the raging liberal [the opposition] needed her to be."[50]

As plaintiffs' lawyers descend on Bowmore to ride the coattails of the *Baker* victory, and the Paytons struggle to avoid bankruptcy while litigating the appeal, Rinehart's company takes full advantage of the plodding appellate timeline and the emotional barometers of conservative special interest groups.[51] Rinehart wrangles and masks massive contributions from business and special interests using shadow groups to funnel illegal campaign funds.[52] Having coerced politicians and government officials with a mixture of duplicity and bribery to gain a financial and political advantage, Rinehart then employs wedge issues to both distract and ignite voters. He enlists a diversion candidate to stoke the death penalty debate, manufactures a gay marriage crisis in rural Mississippi, and overwhelms the public with a barrage of advertisements that distort McCarthy's moderate record.[53] What begins with Fisk's "soft ads"[54] quickly evolves into a "blitzkrieg campaign,"[55] accusing McCarthy of

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> Young white male, one marriage, three children, reasonably handsome, reasonably well dressed, conservative, devout Baptist, Ole Miss law school, no ethical glitches in the law career, not a hint of criminal trouble beyond a speeding ticket, no affiliation with any trial lawyer group, no controversial cases, no experience whatsoever on the bench.
>
> There was no reason anyone outside of Brookhaven would ever have heard the name of Ron Fisk, and that was exactly what made him their ideal candidate. They picked Fisk because he was just old enough to cross their low threshold of legal experience, but still young enough to have ambitions.

48. *Id.* at 107. "Judicial Vision," Rinehart's organizational façade has as its "sole purpose" the election of "quality people to the appellate courts." *Id.* Quality people are:

> . . . conservative, business oriented, temperate, highly moral, intelligent, and ambitious young judges who can literally . . . change the judicial landscape of this country. . . . [including] protect[ing] the rights of the unborn, restrict[ing] the cultural garbage that is consumed by . . . children, honor[ing] the sanctity of marriage, keep[ing] homosexuals out of [the] classrooms, fight[ing] off the gun-control advocates, seal[ing] our borders, and protect[ing] the true American way of life.

Id.

49. *See id.*

50. *Id.* at 190.

51. *See id.* at 208-09. For good measure, the group plants two gay men in Jackson, Mississippi, who try to marry, and then file a lawsuit when they are denied a license. Their appeal meanders alongside of the *Baker* appeal in the Mississippi courts. *Id.*

52. *Id.* at 213.

53. *Id.* at 222-24.

54. *Id.* at 190. The soft ads featured plays to patriotism and family heritage and featured family values such as hard work and the pursuit of the truth. *Id.* They included "friendly stuff . . . Rotary Club, Boy Scouts." *Id.* at 111.

55. *Id.* at 110. Rinehart's operative describes a blitzkrieg campaign as: "basically an ambush. Right now Judge McCarthy has no idea she has an opponent . . . . She has six thousand bucks in her campaign account . . . . [W]e'll wait until the last minute to announce your candidacy . . . . She will be overwhelmed from the first day." *Id.* at 110-11 (internal quotation marks omitted).

being "soft on crime[, s]oft on gays[, s]oft on guns[, a]gainst the death penalty."[56]

Taken largely by surprise, Justice McCarthy struggles to assemble her own campaign with few resources. She garners the support of the struggling plaintiffs' bar, which enables Rinehart to foster the stereotypical business versus trial lawyers debate over consumer protection and frivolous lawsuits. In the end, McCarthy loses and Fisk is elected[57] just in time to hear the *Baker* appeal and make good on his campaign platform of limiting liability and reversing punitive damages awards.[58] The dead and dying in Bowmore receive nothing, and Krane stock "roar[s] to life," as Trudeau "sip[s] Cristal champagne, smoke[s] Cuban cigars," and celebrates the realization of his vow that "[n]ot one dime . . . would ever be handed over to those ignorant people and their slimy lawyers."[59]

Through constant inference and occasional explicit expression, Grisham uses the setting, plot, and characters to push a frightening theme: state appellate judges and ultimately the courts on which they serve are manipulated and controlled by moneyed special interest groups.[60] From start to finish, Grisham asserts what some might consider fanciful facts to enhance the story: special interest groups and wealthy businesses target sitting judges for removal; they select inexperienced, pliable greenhorns to run for judicial office and spend millions of dollars from unrevealed sources getting them elected; they run rank campaigns demonizing incumbent judges and creating expectations of how the challenger will rule, to which the new judge succumbs once in office. Widespread voter apathy and poor citizen erudition simplify the take-over while complicating the targeted judge's ability to respond and react.

The truly disturbing nature of Grisham's plot as well as the vile nature of the characters leaves one to contemplate to what extent the story is simply artifice at work. Has Grisham spun another entertaining tale which is pure fiction, or has he used the story as a medium to warn against a frightening reality?

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56. *Id.* at 111.

57. *Id.* at 301.

58. *Id.* at 347. Grisham prolongs the inevitable, pausing for Fisk's son to suffer a catastrophic injury caused by a "defectively designed and unreasonably dangerous" aluminum baseball bat and exacerbated by a sloppy emergency room doctor. *Id.* at 328-29, 340-41. Fisk has to confront the Ron Fisk he has become, a man who "can't sue" (despite his doctor's indictment that the emergency room doctor committed "gross negligence") because to do so would "make a mockery" out of himself. *Id.* at 341. Despite his "true feelings," described as "changing," Fisk votes to reverse the *Baker* verdict rather than "betray those who had elected him." *Id.* at 347.

59. *Id.* at 350-51.

60. In his Author's Notes, Grisham describes the theme more benignly: "[a]s long as private money is allowed in judicial elections we will see competing interests fight for seats on the bench." *Id.* at 357, 358.

III. REALITY OR PURE FICTION: TESTING SOME ASSERTIONS IN *THE APPEAL*

A. *Targeting Sitting Justices for Removal: Reality or Pure Fiction?*

1. Targeting Sitting Justices

> Rinehart to Trudeau: "*We do campaigns. . . . When our clients need help, we target a supreme court justice who is not particularly friendly, and we take him, or her, out of the picture.*" [61]
>
> Senator to Fisk: "*This gal, McCarthy, . . . [has] never been on board. . . . She's too liberal, plus, between us boys, she just ain't cut out for the black robe.*"[62]
>
> Rinehart's Agent to Fisk: "*Sitting judges make tough decisions. . . . They leave trails, records that opponents can use against them.*"[63]

Test the assertion that appellate judges are targeted for removal on sitting Justice Carol Hunstein of Georgia, or former Justices Louis Butler of Wisconsin, Warren McGraw of West Virginia, or Chuck McRae of Mississippi. They likely will all agree that the assertion is not fictitious but a common reality. Justice Hunstein was a veteran judge of twenty-two years, [64] with fourteen years on the Georgia Supreme Court when she was targeted for removal by, among others, the American Justice Partnership.[65] She won the venomous contested race,[66] her first ever, in

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61. *Id.* at 82-83.

62. *Id.* at 133.

63. *Id.* at 109.

64. Judge Hunstein served as judge of the Dekalb County Superior Court from 1984 until she was appointed by Georgia Governor Zell Miller to the Georgia Supreme Court in 1992. She was challenged in 2006 by Michael Wiggins, an attorney for the Department of Homeland Security who "moved from Washington to Atlanta in May, just a month before qualifying." Bret Bell, *Hunstein: Can They Buy a Judgeship?* SAVANNAH NOW, Oct. 24, 2006, *available at* http://www.savannah-now.com/node/164280/print.

65. American Justice Partnership is a collaboration of organizations that join to accomplish state legal reform. *See* http://www.americanjusticepartnership.org/ (last visited Oct. 31, 2008):

> In Georgia, millions were spent on TV ads in one of the most negative judicial campaigns in American history. The Safety and Prosperity Coalition, an interest group that received the majority of its funding from the American Justice Partnership, an arm of the National Association of Manufacturers, reported raising over $1.8 million in an effort to defeat Justice Carol Hunstein.

Voter Rejection of Political Tampering Doesn't Quell Special Interests in '06 Judicial Elections, MONEY AND POLITICS, Nov. 8, 2006, *available at* http://www.joycefdn.org/Programs /MoneyPolitics/NewsDetails.aspx?NewsId=125.

66. Both candidates aired ads leveling personal attacks. An advertisement aired by the Safety and Prosperity Coalition said: "Carol Hunstein . . . voted to throw out evidence that convicted a cocaine trafficker . . . . [she] even ignored extensive case law and overruled a jury to free a savage rapist." Hunstein's campaign ad attacking her opponent claimed that "Mike Wiggins was sued by his own mother for taking her money. He sued his only sister. She said he threatened to kill her while she was eight months pregnant." MONEY AND POLITICS, *supra* note 65. The ad won a "Pollie," the Oscar for political ads. JIM GALLOWAY, *About those other Oscars: Hunstein ad gets a Pollie*, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 27, 2007, available at http://www.ajc.com

which she was challenged by a man whom she described as the opposition's thirty-fifth choice to run against her.[67]

Justice Louis B. Butler, Jr. was the first and only African-American justice on the Wisconsin Supreme Court.[68] Justice Butler had twelve years of judicial experience, sitting as a city judge, circuit judge, and supreme court justice,[69] when he was targeted by special interests and "phony issue ad groups"[70] as an activist, liberal judge who used loopholes to favor criminal defendants.[71] While those who financed the removal of Justice Butler were likely motivated by concerns over tort cases,[72] they used false accusations about rulings in criminal cases to ignite and provoke the voters.[73] One such television advertisement was described by the independent, bipartisan Wisconsin Judicial Campaign Integrity Committee[74] as "offensive" and "race-baiting"[75]—reminiscent of the Willie Horton ads used in the 1988 presidential campaign.[76]

/metro/content/shared-blogs/ajc/politicalinsider/entries/2007/02/27/about_those_other_oscars_hunst.html.

67. Bell, *supra* note 64.

68. The Wisconsin Supreme Court has seven justices, all of whom are elected to ten-year terms in state-wide nonpartisan elections. *See* Wisconsin Court System, http://www.wicourts.gov/about/judges/supreme/index.htm (last visited Oct. 31, 2008).

69. Justice Butler's biography, http://www.wicourts.gov/about/judges/supreme/retired/butler.htm (last visited Oct. 31, 2008).

70. The phony ad groups were uncovered by Fact Check.org and the Wisconsin Democracy Campaign. *See Judgment Day in Wisconsin*, FACT CHECK, Mar. 7, 2008, http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html; Viveca Novak, *Wisconsin Judgment Day, the Sequel*, FAST CHECK, Mar. 21, 2008, http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html); *Hijacking Justice 2008 Issue Ads in the 2008 Supreme Court Campaign*, Feb. 22, 2008, http://www.wisdc.org/hijackjustice08issueads.php; *Nasty Supreme Court Race Cost Record $6 Million*, July 22, 2008, http://www.wisdc.org/pr072208.php.

71. Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008; Dee Hall, *Supreme Court Debate is Bitter*, *available at* http://www.nytimes.com/2008/05/25/us/25exception.html.

The New York Times described the race as between a "small-town trial judge with thin credentials" and "a graduate of the University of Wisconsin law school who served for 12 years as a judge in Milwaukee courts." *Id.* at 72. The Wall Street Journal described the election as a "bar brawl" and Justice Butler as "one of the court's most liberal members." *Wisconsin Bar Brawl*, THE WALL STREET JOURNAL, Mar. 24, 2008, *available at* http://online.wsj.com/article/SB120631561392258183.html?mod=opinion_main_review_and_outlooks [hereinafter *Brawl*].

72. The Wisconsin Supreme Court, after Justice Butler's joinder, was described as having "dismantled the state's tort reform law, eliminating caps on noneconomic damages in medical malpractice rulings," and accepting "collective liability for manufacturers in cases involving lead paint." *Brawl*, *supra* note 71.

73. Novak, *supra* note 70.

74. For a general discussion of judicial campaign oversight committees, *see* William Fortune & Penny J. White, *Judicial Campaign Oversight Committees' Complaint Handling in 2006 Elections: Survey and Recommendations*, 91 JUDICATURE 232 (Mar./Apr. 2008). The Wisconsin Judicial Campaign Integrity Committee is a bipartisan seven-member task force created by the Wisconsin State Bar following the 2007 Supreme Court elections for the purpose of monitoring Supreme Court races. The committee educated voters, sought pledges from candidates, monitored campaign advertising and activities, and reviewed materials to ascertain compliance with the Code of Judicial Conduct. *See* Judicial Campaigns and Selections, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_oversight.cfm?state= (last visited Oct. 31, 2008).

2. Targeting Judges Who are Easy to Label

Groups are strategic in choosing which judges to target, often choosing judges who are easy to label, not based on their true judicial philosophies, but based on commonly held stereotypes about race and gender. Labeling a judge as an "activist,"[77] a "liberal" or as "soft on crime" is a favorite ploy utilized by those who wish to remove an incumbent. The branding manipulates the public to act out of fear or safety concerns in a way that wealthy corporations, whining about insurance rates or jury verdicts, do not.[78] For example, the campaign against Justice Butler in Wisconsin emphasized that he was a minority. Advertisements juxtaposed his picture against pictures of minority defendants.[79] Detractors[80] nicknamed him "Loophole Louis"[81] and criticized him for "putting criminals back on the street"[82] and jeopardizing cases based on "technicalities," notwithstanding his moderate voting record.

Similarly, the forces that opposed Justice Carol Hunstein in Georgia chose to target a female justice rather than any one of the three male incumbents who were also on the ballot,[83] even though her record "was more conservative than her other colleagues."[84] Aware that some might question the motivation for running against the sole woman on the ballot,

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75. Novak, *supra* note 70; Brennan Center for Justice, *Buying Time – 2008: Wisconsin Analysis*, May, 12, 2008, http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin;

76. The Willie Horton ad, used in the Bush-Dukakis campaign. http://www.youtube.com/watch?v=EC9j6Wfdq3o (last visited Oct. 31, 2008).

77. The recurring use of the label "activist judge" may have been the brainchild of Karl Rove's early judicial campaigns in Texas and Alabama. Whatever its origins, it has stuck and is the kiss of death to a judicial candidate.

> The term 'activist judges' motivates all sorts of people for very different reasons. If you're a religious conservative . . . it means judges who established abortion rights or who interpret Massachusetts's equal-protection clause as applying to gays. If you're a business conservative, it means those who allow exorbitant jury awards. And in [the south] especially, the term conjures up those who forced integration.

Joshua Green, *Karl Rove in a Corner*, THE ATLANTIC (2004).

78. The United States Chamber of Commerce targets judges by evaluating the rulings that the judges have made on the high court and "grading them for positive or negative impact on the state's economy. Then the chamber's Institute for Legal Reform, whose board members include chiefs of major corporate donors to the judge-ousting campaign, recommend which judges to target." Robert Lenzer & Matthew Miller, *Buying Justice*, FORBES 64 (July 21, 2003).

79. Liptak, *supra* note 71.

80. Some reports say that Justice Butler characterized the nickname as "affectionate."

81. Debra Cassens Weiss, *Wisconsin Justice Dubbed 'Loophole Louis' in TV Ads*, ABA JOURNAL 2008, *available at* http://www.abajournal.com/news/Wisconsin_justice_dubbed_loophole_louis_in_tv_ads/; television ad referring to Justice Butler as "Loophole Louis", www.youtube.com/watch?v=mM9CEGPZX2A.

82. A television advertisement claimed that "Louis Butler *worked to put criminals on the street.* Like Reuben Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child." Novak, *supra* note 70.

83. *See* SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS (2006): HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK, http://www.justiceatstake.org/files /NewPoliticsofJudicialElections2006.pdf.

84. Nina Totenberg, *Report: Spending on Judicial Elections 2006*, Oct. 4, 2008, www.npr.org/templates/story/story.php?storyId=10253213. In contentious criminal cases, Justice Hunstein had agreed with the prosecution 39% more often than the court in its entirety. *Id.*

a supporter suggested that the campaign needed a better answer than that the Justice "was a one-legged Jewish female from DeKalb County with a lot of money in the bank and Zell [Miller] as her campaign chair."[85] During Justice Hunstein's campaign, United States Attorney General John Ashcroft[86] recorded an automated telephone call endorsing Hunstein's opponent saying, "[h]e will protect us from terrorists and criminals," and disparaging her as a "liberal incumbent activist judge who will stop at nothing to win." [87]

It is not just the special interests groups who use branding to simplify—and often misstate—the records of judicial candidates. The candidates do so as well, even when they are fully cognizant of the misinformation. Often the candidates compete to drown out one another's law and order mantra. In 2004, both candidates for the Illinois Supreme Court were sitting judges, presumably aware of the complexities of judicial decision making. Yet both isolated frightening facts from selected cases and used them to label their opponent as soft on crime. According to Maag supporters, Judge Karmeier was "lenient" because he "gave probation to kidnappers who tortured and nearly beat a ninety-two-year-old grandmother to death." Karmeier supporters countered that Judge Maag overturned the conviction of a "man who sexually assaulted a six-year-old girl."[88]

3. Targeting Judges With a Judicial Paper Trail

To succeed, it is also important to target a sitting judge who has produced a body of work, a paper trail of judicial opinions that can be misrepresented, oversimplified, and criticized. Explanations of nuanced judicial opinions are no competition for simple "tough on crime" rhetoric in a "world of 'thirty-second ads and snappy sound bites.'"[89] While the Hortonesque ad used against Justice Butler actually referred to a case he had handled as a public defender,[90] not as a justice, his critics also used

85. Bell, *supra* note 64.

86. In *The Appeal*, Senator Rudd, affectionately known as "the King," tells Fisk, "I don't get involved in local races . . . . However, this race is too important . . . . I've made some powerful friends in this business, and they will be happy to support your campaign. Just takes a phone call from me . . . . My folks can put together a lot of money. Plus, I know the people in the trenches. The governor, the legislators, the mayors." THE APPEAL, *supra* note 5, at 131-32.

87. SAMPLE ET AL., *supra* note 83.

88. DEBORAH GOLDBERG, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS (2004): HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT" – AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 10 (Jesse Rutledge ed., 2005) *available at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf.

89. THE APPEAL, *supra* note 5, at 262.

90. The apparent source for the claim was the case of *State v. Mitchell*, a case that Butler handled when assigned as a public defender. Butler's client, Reuben Mitchell, was not released, although Butler won his appeal based on the introduction of evidence in violation of the rape-shield statute. State v. Mitchell, No. 86-0879-CR, 1987 WL 267164 at *2-3 (Wis. Ct. App. April 23, 1987). The state successfully appealed the case to the Wisconsin Supreme Court, who found that the error was harmless and reinstated the conviction. State v. Mitchell, 424 N.W.2d 698, 707 (Wis. 1998).

cases from his judicial "trail" to complete the liberal brand. These ads were also arguably inaccurate.[91]

Opponents also used a judicial trail to defeat Justice Warren McGraw, a former Chief Justice and member of West Virginia's highest court, the Supreme Court of Appeals. Brent Benjamin, whose campaign was largely funded by a special interest organization's two and half million dollar donation,[92] tagged McGraw as an "activist judge who molly-coddles criminals and endangers the welfare of children."[93] The organization complained that McGraw had joined a *per curiam* opinion which required a lower court to grant probation to a convicted sex offender in order to enable him to participate in a proposed rehabilitation plan.[94]

4. Masking the Real Bull's Eye: Targeting Judges Who are "Not Business Friendly"

As demonstrated by the political forces in Wisconsin, West Virginia, Washington, and Illinois (to name but a few), the visible platform of choice of law and order is generally used to mask the opponent's real agenda—tort reform. Occasionally, however, opponents will use both messages as was the case with Mississippi's Justice C.P. (Chuck) McRae. Justice McRae was targeted and removed from the Mississippi Supreme Court after eleven years of service by pro-business forces.[95]

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91. An ad sponsored by Wisconsin Manufacturers & Commerce claimed that Justice Butler focused on "needless technicalities" and "nearly allowed a murderer to go free." Wisconsin Judgment Day, the Sequel, *supra* note 70. The case so described was *State v. Jensen*, in which Justice Butler concurred in part and dissented in part. State v. Jensen 727 N.W.2d 518, 537 (Wis. 2007) (Butler, J., concurring in part, dissenting in part). The issue on which Justice Butler dissented was an issue left uncertain by recent United States Supreme Court decisions involving the Sixth Amendment right to confrontation. Ironically, the Supreme Court granted certiorari in a case raising the issue a few months after the *Jensen* decision and decided the matter in June 2008. *See* Giles v. California, 128 S.Ct. 2678, 2693 (2008).

92. The organization, known as "And For the Sake of the Kids," donated $2.5 million dollars to Justice Benjamin's campaign, which was provided by Don Blankenship, CEO of Massey Energy, and "one of West Virginia's most powerful businessmen." Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURG POST-GAZETTE, Sept. 21, 2008 at A1. Blankenship intermittently claimed that his generosity was either fueled by the desire to do the right thing, Carol Morello, *Political Ads Aired in D.C.Target W.Va. Audience*, WASH. POST, Nov. 1, 2004 at B01, or by economics. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 4, 2004 at § 1.

93. Morello, *supra* note 92, at B01.

94. *Id.*; *see also* State v. Arbaugh, 595 S.E.2d 289, 294 (W. Va. 2004) (per curiam). The defendant, Tony Arbaugh, described by the *per curiam* majority as having lived a "long and painful life" and having "endured a long history of sexual assault at the hands of two of his adult male family members," had been placed on probation. *Id.* at 290-91. After a circuit court found that he had violated the probation by the use of drugs and alcohol, Arbaugh was sentenced to prison. The Supreme Court of Appeals reversed and ordered the lower court to allow Arbaugh to participate in an award-winning private rehabilitation program, Youth Services Systems, organized in conjunction with the Catholic Church. *Id.* at 291- 93. "Considering Mr. Arbaugh's tender age and extreme victimization, we cannot, we will not, surrender any opportunity to salvage his life and to turn him into a productive member of society." *Id.* at 294.

95. Justice Jess Dickinson, who defeated Justice McRae, received $1.2 million from doctors and small business owners and another $1 million from Mississippians for Economic Progress, a

Justice McRae was a former president of the Mississippi Trial Lawyers Association, who prided himself as being the court's defender of the "have-nots against the haves."[96] Although the forces against him were primarily business groups interested in electing judges with a sympathetic ear to insurance, health care, and big business, they also utilized ads that preyed upon the public's fear of crime.[97] Pro-business interests likewise used dual messages in Wisconsin where Justice Butler and four of his supreme court colleagues were credited with making Wisconsin a "mecca for the trial bar"[98] and in West Virginia where Justice McGraw was seen as hurting the state's business climate: "[w]ithout a change in the Supreme Court, businesses w[ould] continue to avoid West Virginia."[99]

Similar tactics were used against Chief Justice Gerry Alexander in Washington. In a six-day period, a single group spent $357,000 on an advertisement featuring a mother whose young son was killed by a murderer released from prison as a result of a court ruling.[100] The group funding the advertisement was "Americans Tired of Lawsuit Abuse," based in Alexandria, Virginia, and organized to limit liability lawsuits. During the campaign, the group's spokesperson confirmed that it targeted the Chief Justice hoping to achieve tort reform but ran the advertisement for its likely effect despite its complete irrelevance to the group's agenda.[101]

Efforts to hide the agenda by manipulating or mixing the message have not always been the chosen course in judicial campaigns. When Karl Rove staged the first all-out judicial battle in Texas,[102] he created a

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local group funded by the United States Chamber of Commerce. Justice McRae received $700,000, mostly from trial lawyers. Lenzer & Miller, *supra* note 78, at 64.

96. *Id.*

97. In the closing weeks of the campaign against Justice McRae, the Law Enforcement Alliance of American, an associate of the National Rifle Association, ran ads suggesting that Justice McRae was lenient on child predators, having voted to reverse the conviction of a defendant convicted of molesting a three-year old. Justice McRae responded with equally acerbic ads, claiming that his opponent had been sued for striking a customer with a liquor bottle and for not paying his bills and that he wished to retain the Confederate flag. *Id.*

98. *Wisconsin Bar Brawl*, *supra* note 71.

99. Liptak, *supra* note 92, at § 1 (quote attributed to Don Blankenship, primary donor to the organization that bankrolled Justice Benjamin's successful campaign against Justice McGraw).

100. Richard Roesier, *Supreme Cash Flows*, SPOKESMAN REVIEW, Sept. 13, 2006 *available at* www.spokesmanreview.com/tools/story_breakingnews_pf.asp?ID=7365.

101. *Id.*

102. Although the battle was ostensibly for the seats on the court, Rove's real interest was in eliminating the power of Texas Democrats. As Sam Gwynne, Executive Editor of *Texas Monthly*, would explain years later:

> So it became this giant pitched battle, because it wasn't necessarily about the kind of verdicts and the ease with which someone might get a verdict for the plaintiff, but it was also about the back end, which was the financing of the entire Democratic Party. . . . It's a battle for the soul of Texas politics because it's a battle for the money,the lifeline money of Democrats, which is now drying up . . . .

Interview with Sam Gwynne, Executive Editor, Texas Monthly (Jan. 8, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/architect/interviews/gwynne.html [hereinafter Interview with Gwynne].

"formula . . . for winning judicial races [that] involved demonizing Democrats as pawns of the plaintiffs' bar and stoking populist resentment with tales of outrageous verdicts."[103] As one Texas lobbyist observed, reflecting on Rove's winning formula years later: "[h]e knew intuitively, . . . that you had to have, as Mark Twain says, 'a devil for the crusade.'. . . [Y]ou had to demonize somebody."[104] In Texas, the demons were members of the Texas Supreme Court whose stoking was done by the plaintiff's bar.

Because the Texas Supreme Court does not hear criminal cases, the platform challenging incumbent justices could not have as its centerpiece the emotional issues of law and order. But the state was perceived as one of the most plaintiff-friendly venues in the country,[105] with the court largely controlled by trial lawyers.[106] Business leaders believed that this reputation thwarted economic growth in the state.[107] The Texas Medical Association also resented the court for its record in medical liability cases, contending that it caused escalating malpractice rates.[108] Under Rove's leadership, the business and medical communities and the state Republican Party refined and redefined a "neglected issue—tort reform."[109]

Judicial races were traditionally "low salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout."[110] In addition, because judicial races are "down ballot" and often of little interest to the public, significant voter falloff occurs.[111]

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103. Green, *supra* note 77.

104. Interview with Kim Ross, Lobbyist, Texas Medical Association, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) [hereinafter Interview with Ross]. Ross continued that "in this case it was central casting. [The Supreme Court justices] were doing it to themselves . . . . And it just so happened, because that was that era when the trial lawyers were a very convenient device for us to use to begin to educate voters in terms of a philosophical shift." *Id.*

105. *See* Interview with Tom Phillips, Chief Justice (1988-2004), Texas Supreme Court, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) [hereinafter Interview with Phillips]. According to former Texas Chief Justice Tom Phillips, "Texas's very lax venue laws . . . allowed a disproportionate number of cases to be tried in areas of the state that had no real connection with the dispute, but were areas where juries were known to be liable to give a very large award if their sympathies could be properly invoked." *Id.*

106. *See* Interview with Gwynne, *supra* note 102; *see also* Interview with Phillips, *supra* note 106 (stating that the "widespread feeling in Texas . . . [was] that the trial lawyers were too powerful within the legislature").

107. *See* Interview with Gwynne, *supra* note 102.

108. *See* John Jack, *Corporate financed campaigns . . . Government by the rich, for the rich?*, (April 2000), *available at* www.afn.org/~iguana/archives/2000_04/20000402.html.

109. *See* Interview with Phillips, *supra* note 105.

110. George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1580 (Apr. 2008) (quoting Richard Briffault, *Judicial Campaign Codes after* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 196 (2004).

111. *See* Mathew Manweller, *Examining Decreasing Rates of Voter Falloff in California and Oregon*, 36 STATE AND LOCAL GOVERNMENT REVIEW 59 (Fall 2004), *available at* http://www.cviog.uga.edu/slgr/2004/1d.pdf (explaining that voter falloff is the "difference between

When Rove and company undertook the first comprehensive defeat of incumbent supreme court justices in Texas, voter fall-off in some judicial races ran as high as thirty percent.[112] Their task was to interest more of the public in the judicial selection process. They did so by branding the trial lawyers as dishonest co-conspirators, flagrantly "buying" justice in the State of Texas.[113] Framing the issue in this way connected the public with the coalition, a connection that would have been unlikely had the emphasis been on the financial complaints of wealthy doctors and business professionals.[114] The merger worked. The campaign—Clean Slate '88[115]—resulted in the election of five justices, viewed as more friendly to the coalition's interests.

From those early state-court races until today, the American Tort Reform Association (ATRA) has been a prime player in the state court reshaping project. The organization lists its goal as "bringing greater fairness, predictability, and efficiency to the civil justice system."[116] It monitors venues that it calls "judicial hell holes," based primarily on court decisions in cases involving asbestos exposure, medical malpractice, and automobile liability, and then issues annual reports.[117] Based upon its findings, it decides which judges to target for removal. As one business leader explained, "We don't pick our opponents lightly when we make selections of people to target for replacement on the bench.

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how many people go to the polls and how many people actually vote on a specific candidate or issue."). In other words, a number of voters go to the polls, but do not vote all the way down the ballot, meaning that they do not vote on judges' races. Hon. Charles K. Wiggins, *The Washington State Supreme Court Elections of 2006: Factors at Work and Lessons Learned*, 46 JUDGES' JOURNAL 5 (Winter 2007), *available at* http://www.abanet.org/jd/publications/jjournal/2007winter/winter07.pdf.

112. *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (Sept./Oct. 1999). These figures apply to retention races, but uncontested elections would have similar falloff.

113. *See* Interview with Bill Miller, Texas political consultant, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) (identifying the "breakthrough moment" as the airing of *60 Minutes'* "Justice for Sale" in 1987, which revealed that Texas Supreme Court justices took hundreds of thousands of dollars in campaign donations from lawyers appearing before them).

Ironically, a decade later, in a follow-up program entitled "Payola Justice," *60 Minutes* concluded that justices continued to take large amounts of money from those with cases before the court, but that the source of the donations had shifted to corporations and defense law firms, rather than plaintiff attorneys, prompting the *Austin American-Statesman* to editorialize that "[j]ustice is still for sale, but with new buyers." Editorial, *Justice is still for sale, but with new buyers*, AUSTIN AMERICAN-STATESMAN (Nov. 3, 1998), *available at* www.tpj.org/payola/editorial1.html.

114. *See* Interview with Ross, *supra* note 104.

115. *See* Jack, *supra* note 108. The political action committee for the Texas Medical Association, TEXPAC, used a video campaign to inform the public. TEXPAC distributed videos detailing stories of huge verdicts against doctors, prompting members of the medical profession to contribute to the campaign.

116. The website of the organization, which lists its mission, may be viewed at http://www.atra.org/about/ (last visited Nov. 1, 2008).

117. The "Judicial Hell Holes" reports may be viewed at www.atra.org/reports/hellholes/. Some lament that jurisdictions that were previously labeled tort "hell holes" are now consumer hell holes. *See Exxon decision may re-emerge in court contest*, HUNTSVILLE TIMES (June 29, 2008) (quoting Alabama state Democratic party chair Joe Turnham), *available at* http://www.al.com/news/huntsvilletimes/index.ssf?/base/news/1214731002124261.xml&coll=1.

The primary way to make a selection is tracking all decisions the [court has made] and determin[ing] how each of the judges ha[s] voted on the merits of those cases."[118] Thus, not only does targeting exist, but its proponents regard it as rather scientific.

B. Campaigns Funded by Millions of Dollars Provided by Unknown and Camouflaged Special Interest Groups: Reality or Pure Fiction?

1. Whose Money?

Trudeau to Rinehart: *"Who are your clients?"*[119]

Rinehart: *"I can't give you the names, but they're all on your side of the street. Big companies in energy, insurance, pharmaceuticals, chemicals, timber, all types of manufacturers, plus doctors, hospitals, nursing homes, banks. We raise tons of money and hire the people on the ground to run aggressive campaigns."*[120]

If the real message is sometimes masked in judicial elections, the real messenger is often completely hidden. Notwithstanding AMTRA's leadership role in "reshaping" state courts, it is rarely out front in those efforts. More usually, AMTRA and several other recognizable organizations filter their support through other groups, groups with warm, benevolent, and sometimes, intelligent-sounding or patriotic names[121] like West Virginia's "For the Sake of the Kids"; Wisconsin's "Citizens to Defend the Constitution" and the "Coalition for America's Families"; Georgia's Safety and Prosperity Coalition; Ohio's "Partnership for Ohio's Future"; and Washington's "It's Time for a Change."

The four most expensive supreme court races in history—three in Alabama and one in Illinois—and the recent $8 million race in Wisconsin, as well as many others, are notable not only for the amount spent but also for the source of their funds and the manner in which the funds were spent. While lawyers historically were the major contributors in judicial races, donating about ten percent more than business as late as 2000, by 2006 business interests donated twice as much as lawyers.[122] In addition, special interest groups spent millions more on information or issue advertising. These expenditures, which are not funneled through a candidate's campaign, are not reflected on the campaign disclosure state-

118. *See* Jack, *supra* note 108 (quoting Ginger Sawyer, Louisiana Association of Business and Industry).
119. THE APPEAL, *supra* note 5, at 83.
120. *Id.*
121. The front organization in THE APPEAL was "Lawsuit Victims for Truth." *Id.* at 222.
122. SAMPLE ET AL., *supra* note 83, at 18.

ment.[123] In 2005-06, for example, eighty-four percent of total expenditures in judicial races came from special interests groups.[124]

These interest groups, not candidates or political parties, supplied the funds for the greatest increase in expenditure among judicial candidates—television advertising. Most of the advertising reflects the organizational agenda on the issues of tort reform, crime control, and family values.[125] In the 2006 judicial campaigns, business groups funded more than ninety percent of all special interest television advertising.[126] In the state of Washington, business interests paid for *all* of the television advertising.[127] And, Louisiana has just become the "latest state to set a record for TV spending on a Supreme Court race."[128]

While the infusion of money and the dominance of television advertising in judicial elections is disturbing, the stealth tactics of the donors is alarming. The groups use innocuous names to camouflage their identities and mask their sources. They manipulate disclosure requirements by securing larger contributions at the end of the election cycle,[129] thereby avoiding reporting them until after the election. And they often escape reporting requirements altogether by not using "magic words" like "elect" or "defeat" in their advertisements.[130]

In the Georgia contest between Justice Carol Hunstein and candidate Michael Wiggins, outside interest groups spent more than $4 million.[131] The Safety and Prosperity Coalition in Georgia was the highest

123. *See generally* RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 3 (2005), http://www.followthemoney.org/press/Reports/200508251.pdf; PUBLIC CITIZEN CONGRESS WATCH, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 11 (2004), http://www.stealthpacs.org/documents/StealthPACs.pdf.

124. SAMPLE ET AL., *supra* note 83, at 18.

125. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 5, 13 (2000), http://*www.justiceatstake.org/files/JASMoneyReport.pdf*. In 2000, more than $10 million was spent on more than 22,000 television airings. *Id.* at 5.

126. SAMPLE ET AL., *supra* note 83, at 7.

127. *Id.* at 12. During the 2006 Washington Supreme Court race between Chief Justice Gerry Alexander and challenger John Groen, a record 1,081 advertisements ran, all of which were paid for by three special interests groups. The challenger's supporters spent four times as much on airtime as did Chief Justice Alexander, who won the race. *Id.* at 13.

128. Press Release, Brennan Center For Justice, Buying Time – LA Smashes Records, AL Ad Wars Go Negative (Oct. 9, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_la_smashes_records_al_ad_wars_go_negative/.

129. Most campaign reporting laws require that a final disclosure form be filed after the election, enabling groups to avoid being identified until after the election. In THE APPEAL, Rinehart "knew the trial lawyers would scrutinize the contributors in the hope that out-of-state money was pouring in from big business interests . . . . He was confident he would raise huge sums of money from out of state, but these donations would pour in at the chosen moment, late in the campaign when the state's benign reporting laws protected it from being an issue." THE APPEAL, *supra* note 5, at 213.

130. GOLDBERG ET AL., *supra* note 125, at 18 (providing "[M]any interest groups have invested huge sums in judicial elections [but] avoided disclosing their finances.").

131. SAMPLE ET AL., *supra* note 83, at 22.

spending special interest group in judicial elections in the country in 2006, contributing $1.3 million to the Wiggins campaign.[132] The Coalition funneled its money through an out-of-state group, headquartered in Michigan, and arranged for most of the money to arrive just weeks before the November election.[133] Justice Hunstein also raised an enormous amount of money, becoming the first judicial candidate in Georgia to surpass $1 million in fund-raising.[134]

In Wisconsin and Washington, groups headquartered in Virginia weighed in, making major contributions to challengers who sought to unseat incumbent justices. A Virginia-based business coalition known as the "Coalition for America's Families" reportedly spent more than $1 million to unseat Wisconsin Justice Louis Butler.[135] Another Virginia group, "Americans Tired of Lawsuit Abuse,"[136] combined with "Citizens to Uphold the Constitution"[137] and "It's Time for a Change"[138] to spend more than $2.5 million in 2006 Washington Supreme Court races.[139] Two other groups, "Constitutional Law PAC" and "FairPAC," forged ahead independent of the candidates in favor of or against targeted candidates.[140]

Perhaps the champion silent partner in the effort to restructure state courts is the United States Chamber of Commerce. Targeting judges in Texas, Michigan, Illinois, Ohio, Mississippi, Alabama, West Virginia, Georgia, Wisconsin, Washington, and other states, some say that the

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132. *Id.* at 11.

133. *Id.* at 22.

134. Justice Hunstein is reported to have raised $1.38 million despite Georgia's $5000 individual contribution limitation. *Id.* at 17.

135. Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court* Campaign, Feb. 22, 2008, http://wisdc.org/hijackjustice08issueads.php. The Coalition for America's Families lists its address as Middleton, Wisconsin, and its goal as "continuing the fight to lower the tax burden and increase the decision-making power of the American Family." Coalition for America's Families, http://www.coalition4families.com/About_Us.aspx (last visited Nov. 1, 2008). The issues it seeks to address are taxes, right to life, right to bear arms, and school choice. Coalition for America's Families, http://www.coalition4families.com/Home.aspx (last visited Nov. 1, 2008) (follow "Issues" hyperlink).

136. In 2006, the two largest donors to Americans Tired of Lawsuit Abuse were the American Tort Reform Association and the American Justice Partnership. Together they gave almost $890,000. *See* Ctr. for Responsive Politics, *Americans Tired of Lawsuit Abuse: Top Contributors, 2006 Cycle*, http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2006&ein=203371803 (last visited Nov. 1, 2008).

137. According to a Seattle newspaper, Citizens to Uphold the Constitution is supported by labor, environmental groups, trial lawyers and other organizations. Andrew Garber, *State Supreme Court Contests Spark "Fundraising Arms Race*," SEATTLE TIMES, Sept. 14, 2006, *available at* http://community.seattletimes.nwsource.com/archive/?date=20060914&slug=supreme14m.

138. According to the blog from the Spokesman Review, "It's Time for a Change" is a PAC backed by the Washington Building Industry. Posting of Rich to Eye on Olympia, http://www.spokesmanreview.com/blogs/olympia/archive.asp?postID=4008 (Sept. 13, 2006).

139. SAMPLE ET AL., *supra* note 83, at 21.

140. Ralph Thomas, *Interest Groups Targeting State Supreme Court Races*, SEATTLE TIMES, May 23, 2006, at B1, *available at* http://community.seattletimes.nwsource.com/archive/?date=20060523&slug=court23m.

Chamber operates under the strategy that it's cheaper to buy a state supreme court than an entire state legislature.[141] The Chamber and its supporters respond that they are merely righting a system that had become obscenely one-sided after years of trial-lawyer control.[142]

In less than three-quarters of a decade,[143] the Chamber of Commerce has infused hundreds of millions of dollars into state court races.[144] Even assuming that "turn about is fair play," the Chamber's furtiveness is problematic. The Chamber often masks contributions and avoids disclosure by characterizing its efforts as "informational" rather than as candidate support.[145] The Chamber also sabotages unsuspecting candidates by pumping thousands of out-of-state dollars into cover organizations, who then enlarge the campaign's coffers in the final days of the campaign, creating a blitzkrieg.[146] When, for example, the Chamber decided to target Justice Chuck McRae of Mississippi, they channeled a million dollars through various local groups;[147] in other cases, channeling also occurred, using ally political action committees. Moreover, it is commonplace for the Chamber to funnel donations through its tax-exempt unit, the Institute for Legal Reform,[148] thus giving most of the contributing corporations a hefty tax deduction.[149]

2. How Much Money?

Fisk: "*What makes you think I can beat her?*"[150]

Rinehart's Agent to Fisk: "*Because we have the money . . . . Unlimited. We partner with some powerful people.*"[151]

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141. *See* Jesse M. Reiter, *The Purchasing of our State Supreme Courts: How Goliath is Beating David in Courtrooms Across America*, July 19, 2007, http://www.buzzflash.com/articles/contributors/1172.

142. Lenzer & Miller, *supra* note 78, at 67.

143. The genesis of the "war on the judges" is said to have been a meeting between Chamber President Thomas Donohue and Home Depot founder Bernard Marcus in 2000. *Id.* at 70.

144. *Id.* at 65. The article refers to the Chamber's involvement as a "secret war" with its "prime objective: to vote out judges supported by trial lawyers, labor unions and the Democratic Party and install new judges sympathetic to insurance companies, multinational corporations and the Republican Party." *Id.* at 64-65.

145. Lenzer & Miller, *supra* note 78, at 67.

146. I borrow this term directly from Grisham, but he is not the only one to use it to describe judicial campaigns. *See* THE APPEAL, *supra* note 5, at 109; *see also* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 82 (Summer 1998).

147. Lenzer & Miller, *supra* note 78, at 64.

148. The Institute for Legal Reform is forthright about its mission, stating, "The U.S. Chamber Institute for Legal Reform (ILR) is a national campaign, representing the nation's business community, with the critical mission of making America's legal system simpler, fairer and faster for everyone." About ILR, www.instituteforlegalreform.com/about/index.cfm (last visited Nov. 1, 2008). The Institute further states that, "Founded by the U.S. Chamber of Commerce in 1998 to address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively by not only working to change the legal culture, but also to change the legislators and judges that create that culture." *Id.*

149. Lenzer & Miller, *supra* note 78, at 70.

150. THE APPEAL, *supra* note 5, at 108.

> Fisk: *"How much will this cost*?"[152]
>
> Rinehart's Agent to Fisk: *"Three million bucks."*[153]
>
> Fisk: *"And you can raise that much money?"*[154]
>
> Rinehart's Agent to Fisk: *"[We] already [have] the commitments. And if we need more, we'll get more."*[155]

Raising and spending money to get elected to the bench is nothing new. But a study of the three election cycles before 2000 showed that around one-third of the candidates for judicial office raised no funds at all.[156] Even among those who did raise money, the amounts raised and expended were relatively low in comparison to today's standards. What was of interest to observers about the year 2000—a year pegged as the "watershed year for big money, special interest pressure, and TV advertising in state supreme court campaigns"[157]—was the dramatic increase in the amount of money spent in supreme court races. The more than $45 million raised and expended by supreme court candidates represented a sixty-one percent increase over the amount raised in 1998 and a one hundred percent increase over amounts raised in 1994.[158] All combined, candidates for supreme court seats have raised over $157 million since 1999, with $46.8 million raised in the 2004-05 cycle and $34.4 million raised in the 2005-06 cycle.[159]

If 2000 was a watershed year for the expenditure of money in state supreme court elections, it was nonetheless the tip of the iceberg in comparison to the sums spent since then. Aggregate candidate fundraising records were broken in forty percent of the states with supreme court races in 2004.[160] It was also the year of the single most expensive judicial race in United States history, the $9.3 million contest in Illinois between Illinois Court of Appeals Judge Gordon Maag and Circuit Judge Lloyd Karmeier.[161] This figure almost doubled the previous record for a state judicial election.[162] Moreover, the election was not even state-wide,

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151. *Id.* at 109.
152. *Id.* at 111.
153. *Id.*
154. *Id.*
155. *Id.*
156. GOLDBERG ET AL, *supra* note 125, at 8 fig. 2.
157. *Id.* at 7.
158. *Id.* at 4.
159. SAMPLE ET AL, *supra* note 83, at 15 & n.10. The lesser amount in 2005-06 reflects the number of contested elections in that year, 27 as compared to 33 contested elections in 2004-05. *Id.*
160. GOLDBERG ET AL, *supra* note 88, at 13.
161. *Torts and Courts*, THE ECONOMIST, Apr. 12, 2008, at 36.
162. Brennan Center for Justice, Avery v. State Farm Automobile Ins. Co., (Feb. 3, 2006), http://www.brennancenter.org/content/resource/avery_v_state_farm_automobile_ins_co/.

involving instead thirty-seven southern Illinois counties.[163] Special interest spending for the race pitted pro-business and Republican organizations against trial lawyers, labor groups, and Democratic organizations.[164] In the end, Justice Karmeier raised slightly more than Judge Maag,[165] and won the election.[166]

The campaign to become Alabama's Chief Justice in 2006 was the second most expensive judicial race in U.S. history, with a total of $8.2 million raised between the primary and general campaigns.[167] As in Illinois, the judicial election battle was a war between business interests and the chamber of commerce and trial lawyers, characterized as "not exactly evenly matched opponents,"[168] with the business community being positioned to outspend the trial lawyers two to one.[169] In addition to attracting big business dollars, Alabama also attracts pure partisan dollars as one of the few states with partisan appellate elections.[170] This may help to explain Alabama's status as the home of three of the four most expensive judicial campaigns in history.[171]

The spending levels set by candidates in Illinois and Alabama were not surpassed, but they are within the sights of judicial candidates in many other states, including Wisconsin, West Virginia, Georgia, Wash-

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163. Geri L. Dreiling, *Supreme Fight*, ILL. TIMES, May 27, 2004, *available at* http://www.illinoistimes.com/gyrobase/Content?oid=oid%3A3205.

164. JAMES SAMPLE ET AL, BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 21 fig. 5 (2008).

165. The total reported contributions to Justice Karmeier's "Citizens for Karmeier" campaign were $4,802,869, while the total reported contributions to Judge Maag's "Maag for Justice" campaign were $4,580,588. The Maag contributions are detailed at Illinois Campaign for Political Reform, Maag, Gordon (2003-2004 Cycle), http://www.ilcampaign.org/sunshine/icpr/icpr_filer.aspx?cycle=2003-2004&id=8508 (last visited Nov. 1, 2008). The Karmeier contributions are detailed at Illinois Campaign for Political Reform, Karmeier, Lloyd (2003-2004 Cycle), http://www.ilcampaign.org/sunshine/icpr/icpr_filer.aspx?cycle=2003-2004&id=8502 (last visited Nov. 1, 2008).

166. When Fisk asks "[w]hat makes you think I can [win]?" the real response is "[b]ecause we have the money." THE APPEAL, *supra* note 5, at 108-09. While testing that assertion is beyond the scope of this Essay, a few observations should be made. "[T]he correlation between strong fundraising and electoral success persists. In 2003-2004, 35 out of 43 high court races were won by the top fundraisers, a success rate of 81 percent. This figure represents an increase from 80 percent in 2001-2002, and 71 percent in 1999-2000." GOLDBERG ET AL, *supra* note 88, at 16 & n.20. The percentage declined in 2006, with 17 of 25 top fund raisers winning the election. Some predict that this may indicate a "voter backlash against big-money, heavy-handed court campaigns," though acknowledging that it is too soon to tell if it is a trend or a "blip." SAMPLE ET AL, *supra* note 83, at 24 & n.17.

167. SAMPLE ET AL, *supra* note 83, at 5.

168. Scott Horton, *The Best Justice Money Can Buy*, HARPER'S, Dec. 13, 2007, *available at* http://harpers.org/archive/2007/12/hbc-90001908.

169. SAMPLE ET AL, *supra* note 83, at 18 fig. 11.

170. *Id.* at 6; *see also* THE AMERICAN JUDICATURE SOCIETY REPORT ON JUDICIAL SELECTION IN STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf (reporting that eight states have partisan elections for judges on the state's highest court: Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, West Virginia).

171. SAMPLE ET AL., *supra* note 83, at 15.

ington, Louisiana, and Ohio. In the 2008 campaign fueled by tort reform interests, two candidates for the Wisconsin Supreme Court jointly raised about $1 million, but spent $5 million,[172] most of which was provided by "outside special interest groups that secretly raised and spent most of that money on negative ads about the candidates."[173] In West Virginia in 2004, the challenger, and now Justice, Brent Benjamin raised and spent far in excess of Justice Warren McGraw. Justice Benjamin received $2.4 million from one donor and $745 thousand from another.[174] Georgia Supreme Court Justice Carol Hunstein began with a $125 thousand war chest, but managed to extend that amount to $1.38 million to defeat challenger Michael Wiggins, who received $1.75 million from one donor, the Safety and Prosperity Coalition.[175] The Washington numbers were lower: approximately $1 million in a 2004 supreme court race[176] and more than $4 million in 2006.[177]

As 2008 draws to a close, Louisiana is on target to have its most expensive supreme court election in a decade.[178] Candidates and special interest groups combined to spend more than $5.9 million through the third quarter of the year;[179] a significant upsurge in spending was occurring as the campaign headed into the final weeks.[180] Twenty-eight seats on fourteen supreme courts remain open, with elections in November 2008. Through November, candidates in those races had raised nearly $30 million dollars.[181]

All contested judicial elections require incumbent judges to spend time raising money and campaigning during election years. In some

172. Liptak, *supra* note 71, at A1.

173. Wisconsin Democracy Campaign, Nasty Supreme Court Race Cost Record $6 Million: Candidates Were Outspent $4 to $1 by Outside Special Interests (July 22, 2008), http://www.wisdc.org/pr072208.php. Among the contributors were Club for Growth Wisconsin; Coalition for America's Families, a Virginia-based coalition of businesses and non-profit groups; the Greater Wisconsin Committee, a Milwaukee-based group; and the Wisconsin Manufacturers & Commerce, the state's largest business organization. *Id.*

174. GOLDBERG ET AL, *supra* note 88, at 4 n.6. Don Blankenship, CEO of Massey Energy, donated the larger amount through an organization known as "For the Sake of the Kids" which filtered the money to the Benjamin campaign. The smaller amount was donated by an organization called "Doctors for Justice." *Id.*

175. SAMPLE ET AL, *supra* note 83, at 20.

176. Thomas, *supra* note 140, at B1.

177. Kate Riley, *Cleaning Up Judicial Elections*, THE SEATTLE TIMES, Nov. 14, 2006, at B6, *available at* http://seattletimes.nwsource.com/html/opinion/2003422757_riley14.html.

178. Brennan Ctr. for Justice, Louisiana, Alabama, Ohio Lead TV Spending Surge in State Supreme Court Races, www.brennancenter.org/content/resource/buying_time_la_al_oh_lead_spending_surge/ (last visited Nov. 1, 2008).

179. Brennan Center for Justice, Buying Time: Special Interests and Supreme Court Elections, www.brennancenter.org/content/resource/buying_time_special_interests_conspicuously_absent_from_supreme_court_elect/ (last visited Nov. 1, 2008).

180. Spending increased from $178,600 to $316,000 from the second to third week in September 2008. *Id.*

181. 2008 Supreme Court Elections: More Money, More Nastiness, Nov. 5, 2008, http://www.justiceatstake.org/contentViewer.asp?breadcrumb=5,55,1104 (last visited Nov. 11, 2008).

states, judges must run in both primary and general elections increasing the amount of time and money that the judge must expend. The need to campaign and to raise large amounts of money interferes with the judge's ability to perform the duties of office and affects a judge's and, consequently, a court's, productivity during election season. But campaign demands may also result in a war-chest phenomenon. In order to ward off potential contenders, judges may feel the need to raise funds continuously, thereby decreasing their productivity well beyond election year. For example, in 2006, two incumbent justices in Michigan raised a combined $1 million despite what was described as "token opposition."[182] An Illinois Supreme Court justice raised more than $1.7 million before she realized she would not have opposition.[183]

C. *Campaigns Funded for the Purpose of "Restructuring the Court" and Justices Fulfilling Commitments Once Elected: Reality or Pure Fiction?*

> Fisk to Rinehart's' Agent: "*I want to know why these people are willing to pony up three million bucks to support someone they've never heard of.*"[184]
>
> Rinehart's Agent: "*These are people who are demanding change, and they are willing to pay for it.*" [185]
>
> "*We will expect a commitment to limit liability in civil litigation.*"[186]
>
> "Justice Fisk wrestled with the case. . . . [H]e had great sympathy for the child, but would not allow his emotions to become a factor. On the other hand, he had been elected on a platform of limiting liability. . . . When a case involved a substantial verdict, the insurance companies could now relax."[187]

When a well-financed judge is elected on a well-defined platform, what do the financial backers expect? The answer to that loaded question depends on who is asked and under what circumstances. When the public is asked, nine out of ten respond that special interest groups are mobilizing courts to promote their own agendas, and eight out of ten judges agree.[188] But special interest groups who spend thousands each election cycle vow to be interested only in assuring a balanced and fair

182. SAMPLE ET AL, *supra* note 83, at 20.

183. Michael Higgins, *Burke to Return Most of War Chest to Donors Unopposed in Primary, Justice Will Empty Coffers*, CHI. TRIB., Jan. 21, 2008, at 1, *available at* http://archives.chicagotribune.com/2008/jan/21/news/chi-burke_21jan21.

184. THE APPEAL, *supra* note 5, at 152.

185. *Id.*

186. *Id.* at 112.

187. *Id.* at 313.

188. Alexander Wohl, *The Judge on the Stump*, AM. PROSPECT, Aug. 12, 2002, *available at* http://www.prospect.org/cs/articles?article=judge_on_the_stump.

state court system. For example, the Institute for Legal Reform, the political arm of the United States Chamber of Commerce, lists its mission as "making America's legal system simpler, fairer and faster for everyone."[189] To this end, it routinely invests millions of dollars to replace judges who are not (and who have not been objectively identified as) obscure, unfair, or inefficient.

Like a teacher when students meet expectations, the groups cannot conceal their exhilaration with (and approval of) the results. They loudly applaud every decision that advances the group's agenda, even when their pupils behave in ways that are inimical to model judicial behavior.[190] The American Tort Reform Association, for example, boasts on its webpage, "besides naming two new Judicial Hellholes this year, the biggest headline may be the fact that Madison County, Illinois is no longer a Hellhole [since] courts there have undertaken several positive reforms which justify moving the county this year to the report's 'Watch List.'"[191] A fair translation of ATRA's message is this: we received a high return on our investment; the judges we installed did just what we expected them to do, notwithstanding the questionable conduct of their initiates.[192] Thus, the short answer about the special interests' expectations is that they expect results. And if anecdotal evidence has any value, they appear to realize their expectations.

When a Wisconsin Supreme Court justice whose campaign had been bankrolled by Wisconsin's largest business organization authored the opinion in a case which the organization financed, the financiers praised the decision.[193] Though they characterized it as a "major victory

189. Institute for Legal Reform, www.instituteforlegalreform.org/about/index.cfm/ (last visited Nov. 1, 2008).

190. The Wisconsin State Judicial Commission filed an ethics complaint against Justice Michael Gableman who defeated Justice Louis Butler in the spring. The complaint alleges that Gableman knowingly leveled false charges against Butler in an advertisement that claimed that Butler had "worked to put criminals on the street." Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad was Deceiving*, MILWAUKEE J. SENTINEL, Oct. 8, 2008, *available at* http://www.jsonline.com/news/statepolitics/32440994.html. The ad concerned a case that Butler handled as a public defender, not a judge. Butler initially won on appeal, but the Wisconsin Supreme Court found that any error in the case was harmless. The defendant served his entire sentence. FactCheck.org, Wisconsin Judgment Day, the Sequel, http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html (last visited Nov. 1, 2008).

191. American Tort Reform Foundation, Report Names New Judicial Hellholes, http://www.atra.org/newsroom/releases.php?id=8202 (last visited Nov. 1, 2008). The report adds "The #1 Judicial Hellhole from 2002 to 2004 dropped to the #4 position in 2005, and then into 'purgatory' at #6 last year. Continued progress in restoring judicial fairness led by Chief Judge Ann Callis and Judge Daniel Stack, combined with substantial drops in the filing of class action, asbestos and large claims, has led ATRF to move Madison County onto the Watch List." AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES (2007), http://www.atra.org/reports/hellholes/report.pdf.

192. *See* "Citizens for Karmeier" *supra* note 165.

193. Wisconsin Manufacturers & Commerce, WMC Hails Supreme Court Ruling in Menasha Corp. Tax Case (July 11, 2008), http://www.wmc.org/display.cfm?ID=1854.

for all taxpayers," the taxpayer beneficiaries of the $350 million were Wisconsin businesses.[194]

Wisconsin Manufacturers & Commerce, the state's largest business lobby, spent more than $2 million to help Justice Anne Ziegler win an open seat on the Wisconsin Supreme Court. After winning, Justice Ziegler was poised to hear a case which could result in $350 million in tax refunds to Wisconsin businesses, a case that Wisconsin Manufacturers & Commerce had helped to finance.[195] Despite public outcry about the case, Justice Ziegler not only refused to recuse herself, but also authored the majority opinion in the 4-3 case which found in favor of the businesses.[196]

The refusal to recuse was but one in a long line of cases indicative of Justice Ziegler's troubling interpretation of the role of a judge. As a circuit judge, Ziegler ruled in two dozen cases involving a bank on which her husband was a paid member of the board of directors.[197] The state's ethics rule clearly prohibited judges from hearing cases involving businesses if the judge's spouse was a director of that business.[198] But Justice Ziegler sat on twenty-four such cases and ruled for the bank twenty-one times.[199]

While no one but Justice Ziegler could say with certainty whether her rulings were influenced by campaign contributions or family relations, her refusal to step aside in these cases, while quite satisfying to her contributors, gives the public a jaundiced view of the bench, which further confuses the already muddled understanding of the role of the courts. While the agenda-laden Wisconsin Manufacturers & Commerce "hailed" the decision, Wisconsin newspapers called for Justice Ziegler's resignation.[200] The calls for the Justice's resignation poignantly disclose

194. *Id.* The case concerned the purchase of $5 million custom software, an unlikely purchase for the average taxpayer. Wis. Dep't Revenue v. Menasha Corp., 745 N.W.2d 95, 103 (Wis. 2008).

195. Patrick Marley, *Ziegler Faces Conflict Questions*, MILWAUKEE JOURNAL SENTINEL, Mar. 5, 2007, at B1 *available at* www.jsonline.com/story/index.aspx?id=573250.

196. Wis. Dep't of Revenue v. Menasha Corp., 754 N.W.2d 95, 126 (Wis. 2008). Justice Louis Butler, who was defeated by another candidate promoted by Wisconsin Manufacturers & Commerce, joined the dissent in the case. *Id.* at 147 (Butler, J., dissenting). The issue of Butler's recusal was also raised because an attorney on his campaign finance committee represented Menasha Corporation and contributed to Butler's campaign. Editorial, *Step aside in this case*, MILWAUKEE JOURNAL SENTINEL, Nov. 28, 2007, at A12, *available at* www.jsonline.com/story/index.aspx?id=691180.

197. Marley, *supra* note 195, at B1. Although Justice Ziegler's opponent raised this conflict of interest during the Supreme Court campaign in 2007, Ziegler won the election. Soon afterwards, however, the Judicial Commission investigated the complaint, the first-ever investigation of a sitting justice, and recommended a public reprimand. Steven Walters & Patrick Marley, *Panel Recommends Ziegler Reprimand*, MILWAUKEE JOURNAL SENTINEL, Sept. 7, 2007, at A1, *available at* www.jsonline.com/story/index.aspx?id=658384.

198. Marley, *supra* note 195, at B1.

199. *Id. See* Editorial *supra* note 196.

200. Editorial, *Ziegler Should Quit the Bench*, THE CAPITAL TIMES, Nov. 30, 2007, at A8.

that the harm from her conduct extends far beyond the individual decision or the judge:

> To try to pretend that Ziegler is not doing severe damage to the reputation of the state's highest court, and more broadly to the rule of law, is at this point untenable to anyone who has sworn a solemn oath to "support the Constitution of the United States and the Constitution of the state of Wisconsin" and to "faithfully and impartially discharge the duties of office."[201]

The explosion of special interest money in judicial campaigns has amplified this disturbing trend of judges hearing cases that involve their campaign contributors. Wisconsin's Justice Ziegler, unfortunately, is but one example. It is likely more than coincidence that two other glaring examples involve sitting justices whose multimillion dollar campaigns were financed by special interests groups with clear judicial agendas.

The justices in the other two examples both refused to disqualify themselves in cases involving their most generous donors; their conduct led litigants to beseech the United States Supreme Court to intervene and address whether participation in a principal financial supporter's case violates due process of law.[202]

Illinois Supreme Court Justice Lloyd Karmeier prevailed in the most expensive, and by some accounts the most bitter,[203] supreme court race in history in 2004. Included in his $4.8 million in contributions was $1.35 million in donations from State Farm Mutual Automobile Insurance Company, its lawyers, its affiliates, and its affiliates' lawyers.[204] In 1999, plaintiffs had secured a monumental $1.05 billion verdict against State Farm.[205] State Farm appealed, but the judgment was affirmed by a unanimous Illinois Court of Appeals in 2001. In late 2002, the Illinois Supreme Court granted the plaintiffs' permission to appeal. The court held oral argument in May 2003, at a time when Justice Karmeier was not a member of the court. The case remained pending during and after the election. When it became apparent that newly-elected Justice Karmeier intended to participate in the decision, plaintiffs moved for his

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201. *Id.*

202. Petition for Writ of Certiorari at i, Caperton v. A.T. Massey Coal Co., Inc., No. 08-22 (July 2, 2008), 2008 WL 2676568 [hereinafter *Caperton Writ*]. Petition for Writ of Certiorari at i, Avery v. State Farm Mut. Auto Ins. Co., 547 U.S. 1003 (2006) (No. 05-842), 2005 WL 3662258 [hereinafter *Avery Writ*].

203. The election was described by the *St. Louis Post Dispatch* as an "ugly, dispiriting, destructive, misleading, money-drenched race." Editorial, *Buying Justice*, ST. LOUIS DISPATCH, Nov. 5, 2004, at B6.

204. *Avery Writ*, *supra* note 202, at 6.

205. The case against State Farm was a nation-wide class action involving two claims, one alleging breach of contract and one alleging consumer fraud. The contract claims were tried by a jury, while the judge tried the consumer fraud claims in a bifurcated seven-week trial. The jury awarded in excess of $450 million dollars in contract damages. Once punitive damages and damages for disgorgement and consumer fraud were included the verdict exceeded $1 billion. *Id.* at 4.

recusal noting that "perhaps through oversight" the justice had failed to disqualify himself.[206] State Farm opposed the motion.[207]

Twenty-seven months after oral argument, in August 2005,[208] the Illinois Supreme Court reversed the verdict against State Farm, with Justice Karmeier agreeing and casting the deciding vote on the breach of contract claim.[209] The extraordinary timeline of the case added to its rankness. The Illinois Supreme Court issued its decision in the *State Farm* case months beyond the acceptable, though voluntary,[210] time period for opinion preparation as established by the American Bar Association's Standards Relating to Appellate Courts.[211] Delay in any case adversely affects the litigants; it may also have a detrimental effect on the public's perception of the courts. But when the delay is inordinate—more than two years from argument to decision—and when it appears to be purposeful, its potential harm is multiplied. [212]

Yet neither the delay nor its potential harm reduced the cheers of the United States Chamber of Commerce. They celebrated the decision as a significant victory in favor of the business community and against class actions.[213] Others were not so elated, warning that the judge's poor judgment had dramatic widespread ramifications:

> [T]he juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will case doubt over every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.[214]

Plaintiffs in *State Farm* unsuccessfully urged the United States Supreme Court to determine whether Justice Karmeier's failure to recuse

206. *Id.* at 6.
207. *Id.* at 9.
208. SAMPLE ET AL, *supra* note 164, at 22 (discussing case timeline).
209. *Id.*
210. *See* National Center for State Courts, Case Processing Time Standards, www.ncsconline.org/cpts/cptsState.asp (last visited Nov. 1, 2008).
211. Standard 3.52 sets forth that 90% of all cases in a state court of last resort should be concluded within a year of oral argument. STANDARDS RELATING TO APPELLATE COURTS, § 3.52, (ABA Comm'n on Standards of Judicial Admin. 1994); STANDARDS RELATING TO APPELLATE DELAY REDUCTION, §§ 3.52-.55, (ABA Judicial Admin. Div. 1988).
212. Standard 2.4 of the *Appellate Court Performance Standards and Measures* requires that appellate courts resolve cases expeditiously. APPELLATE COURT PERFORMANCE STANDARDS AND MEASURES, Standard 2.4, (Nat'l Ctr. for State Cts. & App. Ct. Performance Standards Comm'n. 1999), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/appellate&CISOPTR=56.
213. Business Wire, *Chamber Hails Illinois Supreme Court Decision on State Farm*, Aug. 18, 2005, http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_18/ai_n14926963.
214. Editorial, *Illinois Judges: Buying Justice?*, ST. LOUIS POST DISPATCH, Dec. 20, 2005, at B8.

himself violated their due process right to a fair and impartial tribunal.[215] Had the Court weighed in, states might have avoided a similar incident, which is equally disturbing and has unfolded in West Virginia. Like Justices Ziegler and Karmeier, Justice Brent Benjamin was involved in a well-funded, rancorous campaign for the state supreme court. He successfully unseated an incumbent justice with the financial backing of Don Blankenship, the CEO of Massey Energy and one of West Virginia's business elite.[216] All totaled, Benjamin received $3 million in contributions from Blankenship and the PACs. This amount constituted over sixty percent of Benjamin's total campaign finances.[217]

Blankenship's company, Massey Energy, was embroiled in lengthy litigation with Hugh Caperton, the owner of a coal production company in West Virginia.[218] In 2002, a lower court in West Virginia ordered Massey Energy to pay $50 million for tortuous interference with Caperton's business as well as for fraudulent misrepresentation and concealment.[219] In 2004, as the case lay dormant, Brent Benjamin was elected to the West Virginia Supreme Court of Appeals.

In October 2006, Massey Energy sought review in the West Virginia Supreme Court of Appeals. Prior to Massey's filing, the plaintiff requested Justice Benjamin to recuse himself. Justice Benjamin declined. The court granted review and then reversed the $50 million verdict against Massey Energy.[220] Two justices dissented and characterized the majority decision as a "result-driven" effort.[221]

While the plaintiff's petition for rehearing was pending, photographs surfaced of Don Blankenship together with Chief Justice Elliot Maynard, a member of the court's majority, at a vacation spot on the French Rivera.[222] In the subsequent furor, the court agreed to rehear the appeal. While the Chief Justice denied impropriety, he recused himself

215. The issue presented in the petition for certiorari was whether a judge may "receive more than $1 million in direct and indirect campaign contributions from a party and its supporters, while the party's case is pending, [and] cast the deciding vote in that party's favor consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Avery Writ*, *supra* note 202, at i.

216. Blankenship donated $1.7 million to Justice Benjamin's campaign through the organization "For the Sake of the Kids." Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURG POST-GAZETTE, Sept. 21, 2008, at A1.

217. Liptak, *supra* note 92, at 11.

218. *Caperton Writ*, *supra* note 202, at 8.

219. *Id.* at 5.

220. Caperton v. A.T. Massey Coal Co., 2008 W. Va. LEXIS 22, 135 (W. Va. Apr. 3, 2008). The reversal was based on a forum selection clause in a contractual agreement to which neither Massey Energy nor Caperton were parties and despite the fact that the verdict rendered against Massey was on tort, not contract grounds. *Id.* at 42.

221. *Id.* at 137.

222. Ian Urbina, *West Virginia's Top Judge Loses His Re-election Bid*, N.Y. TIMES, May 15, 2008, at A25, *available at* www.nytimes.com/2008/05/15/us/15judge.html?_r=1&scp=1&sq=west%20virginia's%20top%20judge%20loses%20his%20re-election%20bid&st=cse&oref=slogin.

from further proceedings in the case as did Justice Larry Starcher, one of the two dissenting justices, who had been vocal in his opposition to Blankenship's financial entanglement with the court.[223]

Justice Starcher was candid about the effect of campaign contributions on the case's outcome. In a blunt opinion, he issued an invitation to Justice Benjamin to join him in recusing.

> I repeat—the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow . . . . At this point, I believe that my stepping aside in the instant case might be a step in treating that cancer—but only if others as well rise to the challenge. If they do not then I shudder to think of the cynicism and disgust that lawyers, judges and citizens of this wonderful State will feel about our judicial system.
>
> And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case.[224]

Justice Benjamin declined Justice Starcher's invitation as well as the suggestions of state-wide media.[225] Because he stood next in line to serve as Chief Justice under West Virginia's rotational plan, Benjamin also appointed the two replacement judges to sit in the place of the recused justices.[226] In April of 2008, four years after the original hearing, the court reheard the case and once again reversed by a 3-2 margin, with Justice Benjamin joining the majority.

The United States Supreme Court was again invited to determine whether due process requires the recusal of a judge who received large campaign contributions from a party or an attorney:[227] This time, the Court has accepted the invitation, granting the Petition for Certiorari on November 14, 2008.[228] The Petition stresses the importance of the issue:

> In light of the increasing prominent role of money in judicial elections and the public perception of impropriety that such campaign

223. *Id.*

224. Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, A.T. Massey Coal Co., Inc. v. Caperton, No. 33350 (Feb. 15, 2008) (*reprinted in* SAMPLE ET AL, *supra* note 164, at 19).

225. Editorial, *Bravo*, CHARLESTON GAZETTE, Feb. 16, 2008, at 4A, *available at* http://wvgazette.com/Opinion/Editorials/200802150735.

226. Boselovic, *supra* note 215, at A1.

227. *Caperton Writ*, *supra* note 202, at 8. The issue presented for review in the Petition is "whether Justice Benjamin's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment." *Id.*

228. Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22).

> contributions tend to generate, this Court should clarify the circumstances in which due process requires the recusal of a judge who benefited from the campaign expenditures of a party or an attorney.[229]

Perhaps, in addressing the issue, the Court will consider the weight of empirical evidence indicating that judicial voting records track campaign contributions. Studies conducted in Ohio show that Ohio justices vote with their contributors seventy-five percent of the time,[230] while similar studies in Louisiana show a contributor-decision ratio of sixty-five percent.[231] While it may be impossible to scientifically validate cause and effect, when asked, judges candidly admit that a causal relationship exists. More than a quarter of state court judges believe that campaign contributions have an influence on judges' decisions.[232] Some surprisingly state the simple truth: "everyone interested in contributing has very specific interests."[233] "It's pretty hard in big-money races not to take care of your friends."[234]

The public overwhelmingly agrees. Although most Americans continue to express a belief that "[i]n spite of its problems, the American justice system is still the 'best in the world,'"[235] only thirty percent expressed a high level of confidence in the overall justice system.[236] The public's lack of confidence is generated by the influence of money in judicial elections. Since the beginning of this decade, Americans have

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229. *Caperton Writ*, supra note 202, at 27.

230. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=print. Justice Terrence O'Donnell's concurrence with his contributors was reported as 91% of the time.

231. Adam Liptak, *Looking Anew at Campaign Case and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14, *available at* http://www.nytimes.com/2008/01/29/us/29bar.html?sq=Liptak&st=nyt&scp=2&adxnnlx=1201619026-XtMkjm/3pEJv8ra4bwZ6oA&pagewanted=print. Two of the Louisiana justices voted with their contributors 80% of the time. A recent Texas study claims that six of the current Texas Supreme Court justices took two-thirds of their campaign contributions from lawyers and litigants who appeared before them. Press Release, Texans for Public Justice, Uncovering Massive Campaign Conflicts, TPJ Calls for Halt to "Payola Justice" (Oct. 7, 2008), *available at* http://www.tpj.org/reports/courtroomcontributions/pressrelease.pdf. Others claim the study is the product of trial lawyer rhetoric. *See* Press Release, Texans for Lawsuit Reform, Texans for Public Funded by Trial Lawyers (Nov. 2, 2006), *available at* http://www.tortreform.com/node/369/print.

232. While 26% of state court judges say that campaign contributions have some influence on decisions, 72% believe they have at least "some influence." Memorandum from Greenberg Quinlan Rosner Research, Inc. & American Viewpoint to Justice at Stake Campaign 1 (Feb. 14, 2002), *available at* http://gqrr.com/articles/1617/1410_JAS_report.pdf.

233. Liptak & Roberts, *supra* note 230, at A1 (quoting Justice Paul Pfeifer as saying, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."). Justice Pfeifer previously served in the Ohio Senate and House of Representatives, running in five non-judicial elections. *See* www.sconet.state.oh.us/Justices/pfeifer/default.asp.

234. Liptak & Roberts, *supra* note 230, at A1 (quoting retired Chief Justice Richard Neeley, who also said, "It's very hard not to dance with the one who brung you.").

235. American Bar Association, Perceptions of the U.S. Justice System 58 (1998), *available at* www.abanet.org/media/perception/perceptions.pdf.

236. *Id.* at 50.

expressed increasing concern about the effect of campaign contributions on judicial decision-making.[237] More than three-fourths of voters believe that campaign contributions have an influence on judges' decisions.[238] To almost seventy percent of that number, that "influence" results in contributors receiving favorable treatment in the courts.[239]

CONCLUSION: TESTING SOLUTIONS

Scientific validation of the effect that campaign contributions and special interest agendas have on judicial decision making is unnecessary to conclude that state courts systems face real danger. The emerging setting is a court system seen as providing justice for some but rarely for all; the plot is an effort to hijack the courts. As the justice system is increasingly perceived as unfair, favoring the wealthy, controlled by special interests, and being influenced by contributions, it will cease to be a viable method of dispute resolution.

When the United States Supreme Court upheld the right of a candidate for judicial office to announce views on contested legal or political issues in *Republican Party of Minnesota v. White*,[240] the Court maintained there was a difference between announcements, which are constitutionally protected, and promises, pledges, and commitments, which arguably are not.[241] But that difference—unlike Grisham's assertions tested in this essay—is in reality pure fiction, much more the sophistry of Supreme Court analysis than reflective of human cognition. When a judicial campaign is focused on issues of limiting liability and tort reform, for example, the public does not separate the information into discrete categories of "announcements" and "commitments." Rather, the public accepts and processes the information as defining the candidate's platform and signifying the candidate's future judicial behavior.

In addition to perpetuating a misunderstood role of the courts, there are other byproducts of the new setting for state judicial elections. Campaigning and fundraising, even on a small scale, take time away from judicial duties, time when judges could be issuing opinions consistent with reasonable appellate deadlines. Even judges who are not on the ballot or who have little or no opposition feel mounting pressure to establish a war chest in order to deter potential challengers. Moreover, even

237. Memorandum from Greenberg Quinlan, *supra* note 230, at 1.

238. *Id.* The numbers are significantly higher in Texas with 83% of the public, 79% of lawyers, and 50% of the justices believing that campaign contributions "significantly influence decisions." John Jack, *Corporate financed campaigns . . . Government by the rich, for the rich?* (April 2000), *available at www.afn.org/~iguana/archives/2000_04/20000402.*

239. Memorandum from Greenberg Quinlan, *supra* note 232, at 1. Surveys in individual states have yielded similar results. *See generally* Liptak & Roberts, *supra* note 230; Liptak, *supra* note 231; Memorandum from Coleen Danos, National Center for State Courts, Judicial Elections and Judicial Independence Concerns: Stepping Up to the Plate (Nov. 10, 1998), *available at* http://www.ncsconline.org/WC/Publications/KIS_JudInd_S98-1305_Pub.pdf.

240. Republican Party of Minnesota v. White, 536 U.S. 765, 796 (2002).

241. *Id.* at 770.

judges who are not targeted will be tempted to check their opinions—or to temper them—in order to not disagree with the current bandwagon issues.

Once a new appellate judge is elected, the judge and the court must undergo a transition. Even experienced lawyers likely will be ill-equipped to manage the unique demands of appellate judging—not merely researching and writing, but *collaborating* on appellate opinions. Courts with frequent turnover are less productive not only because of the steep learning curve for a new judge,[242] but also because of the inevitable shift in group dynamics.[243] In addition, because appellate judging is a collaborative function, the absence of even one judge, who is meeting with fundraisers or on the stump, affects the overall productivity of the court.

Judges who have faced hard-fought election battles may become cynical and resentful; they may be forced to serve with judges who campaigned against them, reducing collegiality and creating artificial divides.[244] Finally, upheaval in a court's composition may result in instability in the law, which in turn affects the willingness to rely on precedent and overall confidence in government.

Because John Grisham writes for profit, his chosen setting for *The Appeal* did not publicly finance judicial elections; nor did it impose limitations or rigorous reporting requirements on campaign contributors. Justice Fisk was neither governed by a mandatory recusal provision nor subject to transparent and public disciplinary proceedings for sitting on a case in which he had made a campaign commitment. All of those possi-

242. A case in point is Alabama, the state with a frequent turn-over on its supreme court. Between 1998 and 2008, twenty different justices have served on Alabama's nine-member supreme court. The issue of productivity surfaced in a 2006 race for the position of chief justice. Incumbent Chief Justice Drayton Nabers accused Justice Tom Parker, who was vying for the position, of being unqualified to hold the position. In support of his claim, Nabers revealed that Parker had authored only one opinion in his first year on the bench. During the same time period, Chief Justice Parker had authored twenty-four opinions. Two other justices who had joined the court with Parker in 2004 had authored thirty-eight and twenty-eight opinions respectively during the same time period. Justice Parker blamed his lack of productivity on the fact that he had not served as a judge before, which classically begs the question. Dana Beyerle, *New Justice Parker Slower than Colleagues*, TUSCALOOSA NEWS, Apr. 24, 2006, *available at* http://www.tuscaloosanews.com/article/20060424/NEWS/604240329.

243. Justice Shirley Abrahamson, Chief of the Wisconsin Supreme Court since 1996 says that "[e]very time you get a new justice; it's a new court in terms of how you work together." Bill Lueders, *Under Fire*, MILWAUKEE MAGAZINE, Dec. 1, 2005, *available at* www.milwaukeemagazine.com/currentIssue/full_feature_story.asp?NewMessageID=13177. Even with consistent leadership, interpersonal squabbles can interfere with a court's productivity. The members of the Wisconsin Supreme Court were described in the late 1980s as "claw[ing] at each other . . . . They are more preoccupied with one another than the law." In 1999, four justices accused Chief Justice Abrahamson of abusing her authority and publicly supported a contender for her position. *Id.*

244. In Wisconsin, Chief Justice Abrahamson threatened to sue four other justices, referred to by the Wisconsin media as the "Gang of Four" when the four took steps to diminish the Chief Justice's constitutional powers. *Id.*

ble reforms, untested in Grisham's fiction, might make a difference in reality. Public finance, campaign finance, and disclosure reform would alter the financier's lethal weapon—money. Mandatory recusal provisions, stringent disciplinary standards, and transparent disciplinary proceedings would cower even the most blatant violator.

All or some of those reform efforts might make a difference, but the only certain solution is an appeal to the masses. Through public pressure and backlash, the public can send a message to judges who accept large contributions, campaign on issue-oriented platforms, use and endorse misleading and injudicious advertisements, and refuse recusal in obvious conflict of interest situations that such conduct by a judge will not be tolerated. In many ways, Grisham's books—much more real that fiction—could begin the much-needed process of appealing to the public to save the courts.