THE DANGER INHERENT IN THE PUBLIC PERCEPTION THAT JUSTICE IS FOR SALE

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TABLE OF CONTENTS

I. INTRODUCTION

Public perception is a tricky business. When it comes to the courts, the issue of public perception becomes even more complicated. The judiciary is often referred to as "the least understood branch of government,"[1] reflecting the belief in the public's limited understanding of how the courts operate and what they do. Generally, an individual's knowledge about the courts is quite limited unless and until—and often even after—one becomes involved in a case as a party, witness, or juror. That narrow experience may ultimately define one's perception of the courts.

Taken separately from these individual experiences is the more general public perception about the courts and the judiciary. This perception is shaped by the news, experiences shared by friends and colleagues and, in some states, regular judicial elections. And public

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1. *See, e.g.*, Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 87 JUDICATURE 30, 30 (2003) (describing the judiciary as the "least understood branch of government"); Clifton Barnes, *Least Understood Branch: ABA Project Aims to Inform Public About the Judicial System*, BAR LEADER, Nov.–Dec. 2006, at 14; Elizabeth A. Starrs, *Looking Back, Looking Forward—II*, COLO. LAW., June 2007, at 5–6 n.2 (referring to the judiciary as "The Least Understood Branch of Government").

perception may also be difficult to capture:

> Making sense of public perception is enormously complicated. Some people care about what courts do more than others. Some know more about what courts do than others. Some have more experience with courts (as jurors, witnesses, or litigants) than others. And because courts are not monolithic, it is possible that differences between court systems engender differences in public perception of judges and courts.[2]

However, a certain picture has emerged about how the public generally views the courts. For many years, the public had more favorable opinions of courts and judges than of executive and legislative officials.[3] However, this higher opinion was not uniform; instead, voters in states with elected judiciaries have lower opinions of the courts than those in other states.[4]

Judicial elections, often heralded as the way to keep judges accountable to the people[5] and to empower the public, have some very distressing and, perhaps, counterintuitive results. The elections actually undermine public confidence in the courts and foster the public perception that judges are not so much accountable to the public as they are to campaign contributors and political supporters.

In short, the public has internalized what recent scholarship

2. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 220 (2012).

3. *See, e.g.*, PRINCETON SURVEY RESEARCH ASSOCS. INT'L, NAT'L CTR. FOR STATE COURTS, SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUDICIAL ISSUES 17–19 (2009), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=118 (discussing the results of a 2009 survey, which revealed that seventy-four percent of respondents had "a lot" or "some" confidence in state courts, sixty-six percent had "a lot" or "some" confidence in the state legislature, and sixty-five percent had "a lot" or "some" confidence in the office of the governor).

4. *See, e.g.*, THE ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS 2 (2007), *available at* http://www.law.georgetown.edu/judiciary/documents/finalversionjudicialfindingsoct1707.pdf (concluding that "[l]iving in a state that holds partisan elections is negatively related to trusting the state courts to operate in the best interest of the American people").

5. *See, e.g.*, Leo Strupczewski, *Despite Flaws, Study Stokes Fire for Judicial Election Issue*, THE LEGAL INTELLIGENCER (Mar. 23, 2012), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202446505998.

> demonstrates—that judges are subject to legal and political influences—but the public nonetheless continues to express considerable confidence in the courts. . . . The public-perception landscape is, however, more complicated. Citizens may think that judges are influenced by extralegal considerations, but that does not mean citizens like it.[6]

There is growing public concern about how monetary contributions to judicial election campaigns affect later decision-making in the courtroom; this concern is best reflected and expressed in the public perception that "justice is for sale." This, in turn, has troubling implications for the ability of our courts to function in our constitutional structure.

This Article focuses on the existence of this public perception and why it matters. Part I explores the data demonstrating that there is indeed a public perception that justice is for sale. Part II attempts to locate the perception within the context of the actual functioning of the courts—does evidence exist to demonstrate that the perception has some roots in reality? Part III argues that even if the perception is erroneous or cannot be proven conclusively to be an accurate perception, its existence and persistence pose a serious threat to the legitimacy of our courts—one that must be addressed by judges, courts, bar leaders, and policymakers. Part IV discusses the "official" response by judges, courts, and lawyers and explains why it has not been effective in dispelling the perception that justice is for sale. This Article concludes with a proposal designed to eliminate the perception altogether.

II. THE DATA—THE PUBLIC BELIEVES THAT JUSTICE IS FOR SALE

Public opinion polls and surveys consistently demonstrate that the public believes campaign contributions to judicial candidates affect future decision-making in the courtroom. That perception has persisted and grown stronger as judicial elections have grown more expensive, partisan, and divisive.

A series of polls going back more than a decade reflect a steady—if not growing—belief among the public that campaign contributions directly affect judicial decision-making. The percentage of respondents expressing this belief increases or decreases based on the wording of the question—whether the survey is asking about "some" influence or a "major" influence—but consistently more than three quarters of those surveyed

6. Geyh, *supra* note 2, at 222 (footnote omitted).

express the belief that justice is, at least to some extent, for sale.

- A 1998 poll commissioned by the Pennsylvania Supreme Court's Special Commission to Limit Campaign Expenditures found that nearly ninety percent of Pennsylvanians believed campaign contributions affected judicial decision making at least some of the time.[7]
- A 2001 national poll found that seventy-six percent of Americans believed campaign contributions had at least some—more than just a little—influence on judicial decisions.[8]
- In a 2009 *USA Today*/Gallup poll, eighty-nine percent of respondents called "the influence of campaign contributions on judges' rulings . . . a problem."[9]
- A 2010 Public Opinion Strategies Poll found that seventy-six percent of Pennsylvanians believed that campaign contributions influence judicial decisions more than just a little.[10]
- A 2011 poll found that eighty-three percent of Americans believed that campaign contributions have a "great deal" or "some" influence on a judge's decisions.[11]

Depending on the wording of the question, then, between seventy-six and ninety percent of the public has expressed concern about the potentially poisonous influence of campaign contributions. The numbers have held steady for years, demonstrating that the public concern about the role of money in judicial elections has not been assuaged by judicial protestations that campaign contributions do not influence decisions.

7. *History of Judicial Selection in PA*, PENNSYLVANIANS FOR MOD. CTS., http://www.pmconline.org/node/29 (last visited Apr. 26, 2012) (citations omitted).

8. GREENBERG QUINLAN ROSNER RESEARCH INC. ET AL., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001) [hereinafter FREQUENCY QUESTIONNAIRE], *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

9. Joan Biskupic, *Supreme Court Case with Feel of a Best Seller*, USATODAY.COM (Feb. 16, 2009), http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

10. PA MERIT SELECTION STATEWIDE, PROJECT: #10384, PENNSYLVANIA STATEWIDE 6 (2010), *available at* http://www.judgesonmerit.org/wp-content/uploads/2010/06/2010-Merit-Selection-Poll1.pdf.

11. 20/20 INSIGHT LLC, REF. 2011-184, NATIONAL REGISTERED VOTERS FREQUENCY QUESTIONNAIRE Q6 (2011), *available at* http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf.

This is staggering. An overwhelming majority of the public participating in these polls has expressed a belief that campaign money affects outcomes in the courtroom. There is a pervasive perception that one branch of our government is operating in utter conflict with its mission; that is, the public does not believe that we have fair and impartial justice.[12]

> Rather than symbolizing Justice as a blindfolded goddess carefully weighing the evidence in legal disputes to ensure fair and unbiased outcomes, it has become more accurate to visualize her with blindfold askew, sneaking glances to see who place the most money or other tribute onto her scale to tilt the balance in their favor.[13]

How can this perception have been permitted to take hold and grow without a widespread campaign to prove it erroneous? Answering that requires exploring some other questions. First, why is there such a persistent belief that campaign contributions have a toxic effect on the judicial process? It seems that there must be more than voter cynicism to explain this. Is the perception grounded in some measurable facts?

Second, have our courts and judges taken positive action to combat or dispel the perception? If not, why not? Shouldn't this be a major concern for the judiciary and a target of concerted action?

Finally, is there anything that can be done, or will this perception about the role of campaign contributions continue to define our image of the courts?

III. DOES EVIDENCE SUPPORT THE PERCEPTION THAT JUSTICE IS FOR SALE?

To explain why the perception persists, it is imperative to explore whether the perception is a myth or whether it is grounded in fact. This, in

12. *See* Geyh, *supra* note 2, at 233 ("[R]oughly 80% of the public thinks that elected judges are influenced by the campaign contributions they receive, which, in turn, has adversely affected public perception of the courts' legitimacy." (footnotes omitted)); Vernon V. Palmer, The Recusal of American Judges in the Post-*Caperton* Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors 5 (Dec. 7, 2010) (unpublished manuscript), *available at* http://ssrn.com/absdtract=1721665 ("In public opinion polls across the United States, an overwhelming number—somewhere between seventy and ninety percent of the citizenry—already affirmatively believe that campaign contributions *do* affect judge's rulings.").

13. David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 361 (2001).

itself, may not be dispositive because it is very hard to dispel myths, even with facts and data. However, if solid data were available to dispel the myth of the influence of campaign contributions, one would expect that it would eventually have an impact. But what if the data is not dispositive, or worse, actually lends credence to the perception?

The primary criticism about the perception that justice is for sale is that it simply is not true—that judges are not influenced by campaign contributions or electoral concerns when they render decisions.[14] This claim, however, has not been effective in changing public opinion. First, as will be discussed below, the perception that justice is for sale is just as difficult to prove or disprove as the claim that justice is not for sale. Second, the messengers—lawyers, judges, and court officials—lack credibility in defending a campaign contribution system in which they are all complicit and seemingly all stand to benefit.

The difficulty of demonstrating a direct correlation between campaign contributions and case outcomes equally plagues those who try to prove or disprove that justice is for sale. Even if such correlations can be established, they are often attacked as not being probative on the question of causation. In other words, if there is a correlation, how can one prove that each judge or justice voted a particular way because of campaign contributions? Such causative proof is very difficult to obtain; it is simply not possible to identify with absolute certainty why any particular judge voted in any particular way in any given case or to prove that the judge voted in a particular way not because of the reasons cited in the opinion but for some other, inappropriate reason. As a result, studies that attempt to make such a correlation are often attacked or undermined.[15]

However, a recent article by Professor Keith Swisher in the *Georgetown Journal of Legal Ethics* surveyed the available data, focusing primarily on campaign contributions by attorneys, and concluded that even though the evidence of correlation is stronger than that of causation,

> common sense seems even stronger in its conclusion that contributions appear to influence the judges receiving those contributions; in other

14. *See, e.g.*, Strupczewski, *supra* note 5 ("Florida's merit selection system . . . followed by merit retention where voters weigh in at the polls, has apparently helped insulate the courts from special interests and politics.").

15. *See, e.g.*, Vernon V. Palmer, *The Recusal of American Judges in the Post-*Caperton *Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors* (Dec. 7, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1721665.

> words, "under a realistic appraisal of psychological tendencies and human weakness," judges rule more favorably for contributors than for non-contributors. In short, all else being equal, attorney-contributors fare better than attorney-cheapskates.[16]

The author explained that although "proving causality (in other words, proving whether judicial 'decisions follow dollars' or 'dollars follow decisions') is difficult, . . . studies provide significant preliminary insight—and several tentatively conclude that money can buy influence."[17]

Distilling Swisher's analysis reveals the following:

- Joanna Shepherd's study of every state supreme court decision from 1995 to 1998 "revealed a strong relationship between campaign contributions and judges' decisions" and tied judges' pro-business and pro-plaintiff votes to contributions from pro-business groups and insurance companies on one hand and to lawyers, specifically from the plaintiffs' bar, on the other.[18]
- Chris Bonneau and Damon M. Cann's study of the highest courts in Michigan, Nevada, and Texas found a "'quid pro quo relationship between contributors and votes in Michigan and Texas'" but not in Nevada.[19]
- Ron Rotunda's preliminary analysis of the highest courts in Illinois, Michigan, and Wisconsin found that contributing attorneys lost more cases than they won.[20]
- A ten-year study of the Wisconsin Supreme Court found that "while the slight majority of justices did not appear to change their voting behavior for money, three justices appeared to do just that."[21]
- A four-year study of arbitration cases handled by the Supreme Court of Alabama found a very close correlation between voting patterns and contributors.[22]

16. Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 228–29 (2011) (footnote omitted).
17. *Id.* at 233.
18. *Id.* at 233–34.
19. *Id.* at 234–35.
20. *Id.* at 235 (footnote omitted).
21. *Id.* at 236 (footnote omitted).
22. *Id.*

- "Correlations (and sometimes causality) have also been found for other types of cases and in other locales, including: (1) the Supreme Court of Georgia; (2) the Texas Supreme Court; and (3) tort cases in Alabama, Kentucky, and Ohio."[23]

Swisher concluded that although more research is needed, "many courts have been shown corruptible by money, to a degree unlikely to be the result of chance."[24]

In addition to the studies collected by Swisher, there are additional studies, some of which are summarized in the following synopses.

- A study of decisions rendered by the Supreme Court of Michigan between 1995 and 2001 that found "a justice is more likely to vote for a side in a case if that side's law firms have out-contributed the opposing side's law firms, but only when the contribution advantage enjoyed by one side over the other is relatively large."[25]
- A study of 1,914 civil cases decided by the high courts of Alabama, Louisiana, Michigan, Montana, Ohio, Pennsylvania, Texas, and Washington and contributions from business, unions, noncorporate lawyers, and education organizers indicated that "while contributions have a relatively large effect on individual justices, the effect of contributions on the votes of individual justices typically counteract each other at the court level."[26]
- A study of decisions by the Louisiana Supreme Court over a fourteen year period found that "[f]rom various angles of observation . . . judicial voting patterns sharply favored the contributors' interests."[27]
- A 2006 study of the Ohio Supreme Court conducted by the *New York Times* found that some justices "sided with contributors more than 70% of the time."[28]

23. *Id.* at 236–37 (footnotes omitted).

24. *Id.* at 237 (footnote omitted).

25. Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 400 (2008).

26. Matias Iaryczower & Matthew Shum, *Money in Judicial Politics: Individual Contributions and Collective Decisions* 4, 19 (forthcoming 2012) (unpublished manuscript), available at http://www.princeton.edu/~miaryc/judmoney.pdf.

27. Palmer, *supra* note 12.

28. Adam Liptak & Janet Roberts, *Tilting the Scales?: The Ohio Experience;*

The studies seeking to link campaign contributions to outcomes in court are intriguing, but in the Authors' view, there are other meaningful ways to examine the validity of the perception that justice is for sale without becoming entangled in the causation debate. It is not necessary to attempt to determine whether campaign contributions actually influence outcomes in the courtroom. Instead, it can be determined how often there is even an opportunity for such influence to occur; that is, does the question about the influence of campaign contributions raise a real problem or only a bogeyman?

To find out, Pennsylvanians for Modern Courts (PMC) requested that the American Judicature Society research cases in Pennsylvania to answer this simple question: how often are campaign contributors actually appearing before the judges they helped elect? In the Author's mind, a significant overlap between the list of campaign contributors and the list of lawyers, litigants, and parties in the courtroom would demonstrate that the specter of campaign contribution influence was rooted in the reality of who appears in court.

In 2010, the American Judicature Society studied the eighty-two civil cases decided by the Pennsylvania Supreme Court during the 2008 and 2009 sessions.[29] In sixty percent of those cases, "at least one of the litigants, attorneys, or law firms involved had contributed to the election campaign of at least one justice."[30] In nearly one-third of the cases, a single litigant, lawyer, or law firm "had contributed to at least four of the six justices who ran in contested elections."[31] The Authors believe the data likely understates the true overlap because it only counted contributions from lawyers and law firm political action committees (PACs), but it did not account for contributions to the justices from other PACs that might have been funded by lawyers, law firms, and litigants.

In requesting the AJS research, PMC was not seeking to focus only on decisions in those cases in which the winner was a contributor. Instead, the goal was to determine whether the facts support the public suspicion

Campaign Cash Mirrors a High Court's Ruling, N.Y. TIMES (Oct. 1, 2006), http://query.nytimes.com/gst/fullpage.html?res=9A06E7D81730F932A35753C1A9609C8B63&pagewanted=all.

29. AMERICAN JUDICATURE SOCIETY, CAMPAIGN CONTRIBUTORS AND THE PENNSYLVANIA SUPREME COURT 2 (2010), *available at* http://www.ajs.org/selection/jnc/docs/AJS-PAstudy3-18-10.pdf.

30. *Id.*

31. *Id.* During 2008 and 2009, six of the justices were elected and one was appointed to fill an interim vacancy. *Id.*

about judicial campaign contributions. The results demonstrated that judicial election states have set up a system in which those who fund judicial campaigns are appearing regularly before the very judges they helped elect.[32]

This fact, which is easily corroborated by reviewing case records, does not suffer from the same difficulties as the studies seeking to tie contributors to outcomes.[33] Instead, the power of the data lies in simply demonstrating that contributors appear frequently in court before the judges whose elections they supported.[34] This, in turn, demonstrates that the public concern about campaign contributions is tied to the reality of what happens in the courtroom.[35]

Extrapolating from the studies seeking to prove or disprove causation also demonstrates this underlying truth: the fact that all the studies can be conducted to produce statistically significant results demonstrates how often campaign contributors are in the courtroom. Whether contributors win or lose is not dispositive; the point is they are there with great frequency. The overlap between the list of campaign contributors and the parties and lawyers in the courtroom feeds the perception that justice is for sale.

Additional evidence that the public perception is rooted in reality may be found in a surprising source—the judiciary. Significantly, there is not a unified judicial voice decrying the public perception. Although many judges do dismiss this data as alarmist and unfounded, polling among judges has revealed that many judges share the public's concerns.[36]

32. *See, e.g.*, *id.* (noting "[c]ases involving campaign contributors were the rule rather than the exception").

33. *See, e.g.*, McLeod, *supra* note 25, at 395–98 (outlining variables considered in a study conducted to test the influence of campaign contributions on judicial decision-making). Outside very particular facts, it is essentially impossible to directly tie campaign contributions to judicial outcomes.

34. *See* Malia Reddick & James R. DeBuse, *Campaign Contributors and the Pennsylvania Supreme Court*, 93 JUDICATURE 164, 164–65 (2010) (detailing the percent of litigants appearing before a judge to whom they contributed campaign funds).

35. *See* FREQUENCY QUESTIONNAIRE, *supra* note 8 (finding seventy-six percent of survey respondents believed that campaign contributions have "[a] great deal of influence" or "[s]ome influence" on judges' decisions).

36. *See* GREENBERG QUINLAN ROSNER RESEARCH ET AL., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2001–2002), *available at* http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf (noting thirty-five percent of state supreme court justices responded that campaign contributions have had a "great deal" of influence or "some" influence on their

The 2001 poll cited above specifically polled state court judges.[37] Almost half of the 2,428 state court judges polled reported that they believed campaign contributions influenced decisions, even if just a little.[38] This is staggering, and because judges are in the unique position of knowing exactly why they decide cases as they do, this data offers another important link between the perception and the realities of the courtroom.

This data, combined with anecdotal reports by elected judges, demonstrates that the public perception is rooted in some reality. For example, Pennsylvania Chief Justice Ronald Castille, responding to the above-cited AJS study, acknowledged the troubling effect of campaign contributions on public perception: "The money does have an outward appearance of a lack of fairness in the system."[39] The comments of Ohio Supreme Court Justice Paul Pfeifer are telling: "'I never felt so much like a hooker down by the bus station . . . as I did in a judicial race . . . . Everyone interested in contributing has very specific interests. They mean to be buying a vote . . . .'"[40] Clearly, there is a problem when judges refer to the judicial campaign fundraising process in such debased terms.

Building on this analogy linking judicial campaign fundraising to prostitution, one observer wrote the following:

> Lawyers as johns, and judges as prostitutes? Across the United States, attorneys ("johns," as the analogy goes) are giving campaign money to judges ("prostitutes") and then asking those judges for legal favors in the form of rulings for themselves and their clients. . . . With the surge of money into judicial elections (e.g., *Citizens United v. FEC*), and the Supreme Court's renewed interest in protecting justice from the corrupting effects of campaign money (e.g., *Caperton v. A.T. Massey Coal Co.*), these conflicting currents and others will force the practice to grow both in its pervasiveness and in its propensity to debase our

decisions).

37. *See id.* at 1.

38. *See id.* at 1, 5 (showing nearly half of the judges polled answered that campaign contributions made have "[a] great deal of influence," "[s]ome influence," or "[j]ust a little influence" on decisions).

39. Pat Loeb, New Study Raises Concerns About Pennsylvania Supreme Court, KYW News Radio 1060 (Mar. 20, 2010), http://www.kyw1060.com/New-Study-About-PA--Supreme-Court/6618967.

40. Liptak & Roberts, *supra* note 28 (quoting Ohio Supreme Court Justice Paul E. Pfeifer).

commitment to actual justice and the appearance of justice.[41]

IV. DOES IT MATTER IF THE PERCEPTION IS WRONG?

That the justice is for sale perception cannot be entirely proved or disproved is not troubling to the Authors. Instead, the real problem is the existence and persistence of the perception. The fact that the public believes judges are influenced by campaign contributions[42] is itself damaging to our courts and judiciary.

The truth is perception is reality when it comes to the courts: "Where the courts are concerned, if it looks bad it is bad, so don't do it. In the legal system, fairness is paramount and the appearance of fairness is . . . whatever comes right under paramount."[43] We have a clear public perception problem when it comes to elected judges and the influence of campaign cash in the courtroom.[44] But we must treat this as more than a public perception problem—it is an issue that affects the position of our courts in our governmental structure.

The courts do not possess the power of the purse or the sword;[45] enforcement of judicial decisions depends on public adherence to the courts' decisions and orders. Public adherence to court decisions and orders depends on public confidence in and respect for the courts. Simply put, the power of the courts lies in the public's trust that court decisions are fair and impartial. If that fundamental belief is shaken, it threatens the ability of the courts to act with authority and makes the courts vulnerable to encroachment on their power by the other branches of government.

> It is not enough that judges decide cases free from bias, outside influence, political pressure, popular will, and personal bias—though certainly that is the primary ideal underpinning our judicial system. The public must *perceive* and *believe* that judges do so. When the

41. Swisher, *supra* note 16, at 225.

42. *See* FREQUENCY QUESTIONNAIRE, *supra* note 8 (reporting that just over three-fourths of Americans polled believe campaign contributions have "[a] great deal" or "[s]ome" influence over judges).

43. Ron Dzwonkowski, *When Cash, Courts, and Politics Mix*, DETROIT FREE PRESS (Feb. 22, 2009), http://www.mcfn.org/related.php?article=189 (alteration in original).

44. *See supra* Part II.

45. *See generally* U.S. CONST. arts. I–II (giving the legislative branch the power to control funding and the executive branch the power to enforce the laws and raise an army).

> public perceives that judges are independent and decide cases free from any outside influence, this belief actually bolsters and increases judicial legitimacy and, by extension, judicial independence. This is because public confidence that judicial decisions are fair and impartial increases the ability of the courts to make difficult, unpopular decisions—that is, to continue to exercise independence.
>
> The converse is also true. Even an erroneous public perception that judges are not acting independently, that the courts are subject to outside pressures and influences, can weaken the courts.[46]

As noted above, it is nearly impossible to prove that a campaign contribution influenced a judicial decision, but it is even more difficult to prove that there was no influence.[47] The judicial election system perpetuates the public perception about the influence of campaign money on elected judges.[48] As judicial elections become more expensive, the taint of money is felt more heavily.[49]

The United States Supreme Court appears to agree. In its 2009 decision in *Caperton v. A.T. Massey Coal Co.*,[50] the Court found that in some cases, the Due Process Clause may require recusal of a judge from a case involving someone who contributed to or expended significant amounts on the election of the judge.[51] The Court explained:

> Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required . . . recusal.[52]

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46. Shira J. Goodman et al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 863 (2010).

47. *See supra* Part II.

48. *See supra* Part II.

49. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009, at 1 (2010) ("Campaign fundraising more than doubled, from $83.3 million in 1990–1999 to $206.9 million in 2000–2009.").

50. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

51. *Id.* at 2256–57.

52. *Id.* at 2265.

In response to *Caperton*, it was observed that "[w]ithout explicitly saying so, the majority acknowledged that campaign contributions to judicial candidates can poison the whole system. And the dissenters seemed to agree with this proposition."[53] *Caperton* was an easy case; the Court clearly acknowledged that the confluence of factual circumstances was "extraordinary."[54] But many other cases with less egregious facts raise the same questions about bias and the perception of bias.[55] *Caperton* does not provide a prescription to solve that problem.

The problem is one that must be of concern to lawyers, bar associations, judges, and court administrators. The challenge now is not to correct a misperception but to address the implications of the public perception regarding the influence of campaign contributions on judicial decisions.

The public perception that justice is for sale threatens the values at the core of our justice system, especially the ideal that our courts are controlled by and faithful to the rule of law.

> [P]ublic faith in the rule of law is [central] to our political culture. . . . "The rule of law may be our deepest political myth. It is the foundation of our beliefs about our community as a single people with a unique history, as well as our view of our individual obligations to the state."[56]

This is why the belief that justice is for sale is so dangerous and worthy of a concerted effort not to simply dispel the perception but also to eradicate any possible factual basis for it. The perception undermines the fundamental values on which our justice system stands and the source of public trust in and adherence to court decisions.

> If blindfolded Justice is the abstract symbol of independent and equitable decision-making, the judge is the concrete manifestation of the process through which we attempt to attain justice and fairness.

53. Goodman et al., *supra* note 46, at 885.

54. *See Caperton*, 129 S. Ct. at 2265 ("Our decision today addresses an extraordinary situation where the Constitution requires recusal.").

55. *See, e.g.*, Palmer, *supra* note 12, at 3 ("[D]emonstrat[ing] that far smaller contributions also create a risk of actual bias, and that the relative size of a donation, in comparison to overall campaign funds and expenditures, is not a necessary component of the risk").

56. Geyh, *supra* note 2, at 226 (quoting PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA, xi (2002)).

> Achieving justice through the judicial mechanism requires independent and principled arbiters free of corrupting influence.[57]

Public trust in our courts is more than just good civics; it is necessary to the continued functioning of our governmental structure. In the name of "accountability," we have created a system that undermines that very trust:

> Without a widely held public perception of judicial fairness the members of political societies distrust their political institutions and lack the will to cooperate with others. If this distrust continues too long and becomes too intense and pervasive the social glue is not strong enough to prevent a weakening or even disintegration of the political system.[58]

This should be of enormous concern to judges, court administrators, lawyers, and all who care about separation of powers, fair and impartial justice, and public respect for governmental institutions. It is clearly of great concern to some important leaders among the judiciary. A *Front Line* interview by Bill Moyers focused on the problems of judicial elections and campaign contributions.[59] Part of the show featured interviews with Supreme Court Justices Anthony Kennedy and Stephen Breyer. The interchange about the problems caused by the perception that justice is for sale is instructive:

> [Bill Moyers:] Let me just give you some statistics from a poll conducted by the Texas state supreme court and the Texas bar association, which found that 83 percent of the public think judges are already unduly influenced by campaign contributions; 79 percent of the lawyers who appear before the judges think campaign contributions significantly influence courtroom decisions, and almost half of the justices on the court think the same thing. . . . [I]sn't the verdict in from the people that they cannot trust the judicial system there any more?
>
> [Justice Kennedy:] This is serious because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral. And when you have figures like that, the judicial system is in real trouble.

57. Barnhizer, *supra* note 13 (footnote omitted).

58. *Id.* at 366 (footnote omitted).

59. Bill Moyers, *Transcript: February 19, 2010*, BILL MOYERS JOURNAL, PBS (Feb. 19, 2010), http://www.pbs.org/moyers/journal/02192010/transcript1.html.

. . .

> [Justice Breyer:] [I]ndependence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty.[60]

V. WHY HASN'T THE PERCEPTION BEEN DISPELLED?

Too often the argument that judicial elections create the perception that justice is for sale is met with eye rolling and an "oh, that again" attitude. This is not sufficient to counteract the perception and may, in fact, be further fanning the flames of distrust in the courts.

The persistence of the perception that justice is for sale begs this question: Why hasn't there been a concerted effort to dispel the perception or prove it erroneous? Why aren't courts, judges, and lawyers engaged in a campaign to combat the perception and eliminate any factual basis for it? And if such campaigns have been pursued, why have they failed?

One possible explanation lies in what Charles Gardner Geyh calls the benefits of sticking to the "rule-of-law script."[61] Geyh questioned why judges, lawyers, and other court defenders persist in claiming that judges simply decide cases according to the law in the face of strong evidence that judges in fact allow other considerations to affect their decisions and that the public believes this to be so.[62] Geyh's analysis was focused primarily on the influence of political and ideological influences on judicial decision making and the public's perception about those influences, but it is instructive for our purposes as well.

> In short, while the public is well aware of extralegal influences on judicial decision making, it does not approve of them. That helps to explain the continuing appeal of rule-of-law rhetoric and the resonance of policy arguments aimed at discouraging ideological and other influences. For their part, judges are acutely aware of the relationship between public perception and the judiciary's institutional legitimacy, and to the extent the public wants judges whose commitment to the

60. *Id.*
61. Geyh, *supra* note 2, at 223.
62. *See id.* at 223–25.

> rule of law is unwavering, it behooves judges and the legal establishment to profess such a commitment.[63]

It seems, then, that denying that campaign contributions affect judicial decision making is the strategy perceived to be most aligned with perpetuating the ideal of the rule of law. But this strategy discounts the potency of the public perception and, in so doing, displays a lack of respect for and lack of understanding of the public.

Moreover, as the data demonstrates, the strategy has failed.[64] Claiming that campaign contributions do not affect judicial decision making and are not intended to do so has done nothing to mitigate the public perception that justice is for sale. Accordingly, this strategy also has failed to reverse the declining public confidence in our courts. As a result, our courts continue to be at risk, as is the valued ideal of a system based on the rule of law.

Finally, there is a problem with the spokespersons. Judges and lawyers decrying the impact of campaign contributions while seeking and providing those contributions are simply not credible on the issue. Moreover, "judges . . . are rarely honest with themselves about the depth of the problem and the degree to which they are co-conspirators in its creation."[65] Similarly, lawyers often claim their contributions are given only to support "good candidates" without an eye to future litigation, but their giving patterns belie this.[66]

In short, judges and lawyers denying that campaign contributions affect judicial decision making has not and will not dispel the perception that justice is for sale. Instead, as long as campaign contributors continue to appear with frequency before the judges they helped elect, the perception will persist.

VI. CONCLUSION

States that elect judges, especially in partisan elections, have erected a system that essentially requires judicial campaigns to seek funds from lawyers, law firms, business organizations, unions, political parties, and

63. *Id.* at 224–25 (footnotes omitted).

64. *See supra* Parts II–III.

65. Barnhizer, *supra* note 13, at 363.

66. *See, e.g.*, *id.* at 378–80 (describing situations in which donations to judicial elections were motivated by the desire to, or resulted in, influence on decision making); Strupczewski, *supra* note 5.

other special interests likely to appear frequently before the judges they help elect. This fact has created the widespread public perception that justice is for sale.[67]

As long as states continue to elect judges, the perception will persist. Potential solutions such as campaign finance disclosure rules, stricter recusal standards, or public financing have not been successful to date in solving the problems caused by money in elections and, in fact, simply intensify the perception that campaign contributions have a toxic influence on our courts. That is, attempts to erect rules and procedures to blunt the impact of campaign contributions on judicial decision making have the very effect of confirming that campaign contributions are as worrisome as the public believes.

The solution advocated by PMC is simple—get judges out of the fundraising business. PMC—and the Authors—have long advocated for merit selection for Pennsylvania's appellate courts, and while there are no perfect judicial selection systems and no systems that remove politics entirely from the process, merit selection does solve the money problem.

> [U]nder Merit Selection, Pennsylvanians would no longer have to worry when they appear before the appellate courts whether their opponent or the opposing counsel contributed to one of the presiding judges or justices. No longer would any money flow directly from a litigant or lawyer to assist a future appellate court judge in reaching the bench. This is how the system should work. No one should ever have to worry about whether a campaign contribution affected a judicial decision. It should not ever be a consideration. But in our current system, it is.[68]

We know for certain that at least seventy-six percent of the Pennsylvania population—and probably closer to ninety percent—is concerned about the influence of campaign contributions on judicial decision making.[69] This effect is mirrored in the national statistics.[70] That is unacceptable and should be unacceptable to all who care about fair and impartial courts. To date, no state has found a way to solve this problem

67. *See supra* Part II.

68. Goodman et al., *supra* note 46, at 889.

69. Press Release, Am. Judicature Soc'y et. al., Poll Shows Pennsylvanians Favor Judicial Merit Selection: Statewide Poll Also Reveals Citizens Have Negative Opinions About Judicial Elections (June 9, 2010) (on file with author).

70. *See supra* Part II.

while continuing to elect judges in expensive, partisan contests. The solution is clear—eliminate money from the system and there will no longer be a question of whether campaign contributions affect judicial decision making. No one will have to wonder whether justice is for sale.