

Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy

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I. INTRODUCTION

Justice John Paul Stevens once noted that “[i]t is the confidence in the men and women who administer justice that is the true backbone of the rule of law.”¹ This confidence gives legitimacy to courts at every level. But how is such confidence to be achieved and maintained? How do we instill trust and confidence in the judiciary in those members of the public with little knowledge of the court system or those who attain their knowledge from questionable sources? What kinds of information can be used to counterbalance the denigrating effect of judicial campaigns? This Article suggests that judicial performance evaluations, which meaningfully measure the traits that are essential to good judging, can serve to better inform the public of the role of the judiciary and to promote public trust and confidence in the courts.

The purpose of this Article is not to distill all of the complex factors that enter into measuring the public’s perception of state courts. Rather, its purpose is to consider how institutional legitimacy is likely affected by various cues and signals that the public receives about the judiciary. This Article also considers whether critically designed, appropriately administered, and widely disseminated judicial performance evaluations might supplement misleading cues. To that end, following an introductory section on institutional legitimacy, Section III discusses the effects of knowledge, goodwill, and judicial campaigns on the public’s perception of the judiciary. Section IV focuses on how the tactics used by judicial campaigns send cues that undermine the public’s trust in the judiciary. The last section discusses how more meaningful cues – particularly the results of valid judicial performance evaluation programs – can be used to inform the public and legitimize the judiciary.

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1. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

II. STATE COURTS: INSTITUTIONAL LEGITIMACY, IMPARTIALITY, AND INDEPENDENCE

The public's trust, confidence, and understanding of the courts all play an essential role in preserving their unique and independent character in our system of government. Like any institution, courts need public support and participation to maintain their institutional legitimacy.² Institutional legitimacy has two components: the willingness of the public to accept and defer to the institution's judgment and the willingness of the public to participate in the institution.³ To the extent state courts are viewed as legitimate government institutions, they remain viable dispute resolution systems, which command respect and deference and help to ensure stability and order. A loss of legitimacy leads to less peaceful dispute resolution and social and economic chaos.⁴ Thus, it is essential not only to evaluate the legitimacy of state judicial systems but also to foster it.

Most scholars who seek to measure the legitimacy of court systems focus on three aspects: confidence in the system's lawfulness, perception of the system's impartiality, and assessment of the system's propriety.⁵ When the public's opinion of these three aspects of legitimacy is low, the institution's

2. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865-66 (1992). The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Id.

3. See generally Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703 (1994).

4. *Id.* at 718 (discussing legitimacy as "authoritativeness").

5. Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1098 (2007).

vitality and viability suffer. Conversely, when public perception is high, public trust and confidence is high. Moreover, a confident and trusting public more readily accepts the necessity for an independent judiciary.⁶

While this Article does not undertake an exhaustive review of all factors that affect public perception of the courts, some of the research findings about public perception are highly relevant. Research indicates, for example, that the perception of, and thus respect for, the judiciary is influenced not only by the nature of the outcome of its work – that is, the public’s agreement or disagreement with court decisions – but also by the degree to which the system is perceived to be procedurally and substantively fair.⁷ Thus, institutions that are perceived to exercise their authority with both procedural and substantive fairness have a higher degree of legitimacy than those perceived to use unfair processes to reach unfair results. While substantive fairness may be intertwined with respect for or agreement with the outcome, procedural fairness is an important aspect of legitimacy even among those who disagree with the outcome.⁸ Thus, even when courts render decisions that are disfavored, they may retain legitimacy by being perceived as procedurally fair.⁹

The key to a perception of procedural fairness is impartiality. Thus, for example, when individuals evaluate an institution’s degree of procedural fairness, they are “especially influenced by evidence of even-handedness, factuality, and the lack of bias or favoritism (neutrality)’ – in short, by impartiali-

6. In a 2000 speech to the District of Columbia Circuit, Chief Justice William Rehnquist observed that the “degree to which [judicial] independence [is] preserved will depend again in some measure on the public’s respect for the judiciary.” Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 300 (2008) (quoting Chief Justice William Rehnquist, *Reflections on the History and Future of the Supreme Court of the United States* (June 2000) (transcript available at www.supremecourtus.gov/publicinfo/speeches/sp_06-16-00.html)).

7. See Tyler & Mitchell, *supra* note 3, at 734; see also James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 471 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 621-22 (1991). While most of the studies have focused on the United States Supreme Court, the general findings about the importance of procedural fairness have been applied to other institutions as well. See Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in *FRONTIERS OF JUDICIAL RESEARCH* (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

8. “People who believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their office” will continue to accept judicial decisions “if they respect the court as an institution that is generally impartial, just, and competent.” Murphy & Tanenhaus, *supra* note 7, at 275.

9. See Tyler & Rasinski, *supra* note 7, at 622, 628.

ty.”¹⁰ It follows, then, that impartiality is the lifeblood of judicial legitimacy.¹¹ Any aspect of the judicial system that detracts from a perception of impartiality should be avoided or eliminated in order to sustain and foster judicial legitimacy.¹²

Because of the essential role that the perception of impartiality plays in the legitimacy of the courts, what contributes to, and detracts from, the perception of impartiality becomes very significant. But neither people nor their perceptions are homogeneous. Individuals have different backgrounds that influence their perceptions about governmental institutions in general; accordingly, their perceptions of the courts are varied and distinct. People also have various degrees of knowledge about the court system. In addition, individuals have different amounts of goodwill, or “diffuse support,”¹³ for the court system. Their backgrounds, degree of knowledge, and level of goodwill affect their perception of judicial impartiality and, in turn, their respect for the judiciary.

10. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 60 (Feb. 2008) (quoting Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVE ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 416 (John T. Jost & Brenda Major eds., 2001)). Research data collected by the National Opinion Research Center at the University of Chicago, then analyzed by James Gibson and reanalyzed by Tom Tyler and Kenneth Rasinski, “suggest[s] that . . . (1) when people think that the Supreme Court makes decisions following fair procedures, they regard it as a more legitimate institution and (2) when the court is regarded as a more legitimate institution, people are more accepting of its decisions.” Tyler & Rasinski, *supra* note 7, at 627.

11. Tyler & Rasinski, *supra* note 7, at 628.

12. Some suggest that “[r]esources may be better spent maintaining perceptions of legitimacy than monitoring and sanctioning [non-compliant] behavior.” Tyler & Mitchell, *supra* note 3, at 781.

13. I use the term “goodwill” as synonymous with the more scientific term “diffuse support,” which has been described as “deep-seated beliefs regarding the uprightness of the institution.” Cann & Yates, *supra* note 6, at 303 (citing D. Easton, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1965)). Cann and Yates equate diffuse support with legitimacy and distinguish it from “‘specific support,’ which is contingent upon citizen satisfaction with immediate institutional policy outputs, in that it has greater stability, durability, and a more fundamental basis.” *Id.* at 304 (quoting V. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333 (2001)).

III. EFFECTS OF KNOWLEDGE AND GOODWILL ON PERCEPTIONS OF THE COURT SYSTEM

It is well established that the general public has an absence of knowledge about and lack of understanding of the justice system.¹⁴ In 1977, the National Center for State Courts conducted a survey aimed at measuring the public's opinion of state courts.¹⁵ The survey, and others following it, found that in addition to having a low level of confidence in state court systems, the public also had a low level of knowledge about state courts.¹⁶ These findings spawned a large number of court improvement projects aimed at promoting public trust and confidence in state courts.¹⁷

Twenty-two years later the American Bar Association (ABA) surveyed the nation¹⁸ to "[a]ssess the public's current understanding of the justice system; [i]dentify the public's current attitudes toward the justice system; [u]nderstand what drives those attitudes; and [i]dentify the key sources of information about and knowledge of the justice system."¹⁹ This survey, unlike its predecessor, revealed increased respect for the system²⁰ but reiterated

14. Yankelovich, Skelly & White, Inc., *Highlights of a National Survey of the General Public, Judges, and Community Leaders*, in *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 5, 21 (1980).

15. The survey of the public, judges, and opinion leaders has been characterized as the "most ambitious attempt to measure public opinion about the courts." NAT'L CTR. FOR STATE COURTS, *READING AND INTERPRETING PUBLIC OPINION ON THE STATE COURTS* (2002), available at http://www.ncsconline.org/projects_Initiatives/BPI/PublicTrust.htm.

16. Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 82 *JUDICATURE* 58, 59 (1998). Twenty-three percent (23%) of the respondents said that they were either "extremely" or "very" confident in state courts; 37% were "slightly" or "not at all" confident. *Id.*

17. See, e.g., Terry Nafisi, *One Hundred Years Since Pound: Has Court Reform Mattered?*, 27 *JUST. SYS. J.* 223 (2006).

18. One thousand respondents were surveyed. Those who completed the survey were 46% male, 54% female; 83% white, 8% African American, 3% Hispanic, 6% other; 31% high school or less education, 50% college, 19% post-graduate education; 87% registered voters, 13% not registered voters; 46% previously used lawyer, 54% not previously used lawyer; 35% less than \$35,000, 43% \$35,000 to \$75,000, 16% more than \$75,000; and 27% jury experience. ABA COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, *PERCEPTIONS OF THE U.S. JUSTICE SYSTEM* 3 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf> [hereinafter ABA PERCEPTIONS].

19. *Id.* at 1.

20. *Id.* at 7. Eighty percent (80%) strongly agree or agree that "in spite of its problems, the American justice system is still the best in the world"; 78% expressed confidence in the fairness of the jury system; and 69% believe that juries are the "most important part of our justice system." *Id.* at 6-7.

a lack of knowledge about its function and some of its basic tenets.²¹ Notably, respondents were asked to identify the function of the three branches of government using the responses “make laws,” “interpret laws,” “enforce laws,” or “don’t know.” More people responded incorrectly that the function of the judicial branch was to “make” or “enforce” the laws than responded correctly.²²

A. *Effect of Demographics and Knowledge on Perception*

1. Effect of Demographics on Perception

An individual’s socioeconomic background affects his or her level of confidence in the courts. Consistent with earlier findings, the ABA study and subsequent studies disclose that males in higher socioeconomic groups have greater confidence in the justice system.²³ All other groups – women, non-whites, and people with lower incomes – have less confidence in the court system.²⁴ These groups believe that the justice system is not impartial; it does not “treat all people equally.”²⁵ The disparity in treatment is believed to be diffuse between men and women, among racial and ethnic groups, and between rich and poor.²⁶

2. Effect of Knowledge on Perception

In addition to the survey’s findings that a substantial number of people in many different groups do not view the justice system as impartial, two other findings are significant to an assessment of how knowledge about the system influences perceptions of it. First, those with a greater understanding of and experience with the justice system are more confident in it.²⁷ Second,

21. The study refers to the level of knowledge as “uneven.” *Id.* at 6. For example, while an overwhelming majority knew that a criminal defendant found not guilty could be sued civilly, 37% believed that a criminal defendant was required to prove his or her innocence. *Id.* at 22.

22. *Id.* at 20.

23. *Id.* at 7. Individuals with post-graduate degrees and incomes in excess of \$75,000 annually have greater knowledge of and respect for the justice system. *Id.* at 7, 10.

24. *Id.* at 7. Respondents who are male, with higher incomes and higher education levels, display more confidence in the court system than other demographic groups. *Id.*

25. *Id.* at 12-13.

26. *Id.*

27. *Id.* at 7. The previous study reported that “[t]hose having knowledge and experience with the court voice the greatest dissatisfaction and criticism.” *Id.* This conclusion was contradicted by the 1999 findings; moreover, upon reanalysis of the data, the validity of the previous conclusion has been challenged. *Id.*; see also Kritzer & Voelker, *supra* note 16, at 65.

those with less knowledge are not only less confident in the system but are also more readily influenced by the least reliable information sources.²⁸

Just as knowledge level is uneven, depth of knowledge is also uneven. Those with the least amount of knowledge about the courts are less likely to distinguish the courts from other branches of government.²⁹ Since people do not instinctively appreciate that courts must be independent to discharge their duties, it follows that those with the least amount of knowledge will have the greatest difficulty embracing this distinction and, in turn, the judiciary's uniqueness as a governmental institution.³⁰

3. Sources of Knowledge

The 1999 ABA study also surveyed the sources of individuals' knowledge of the court system and the relative importance of each source.³¹ A majority of people listed education as their primary source of information.³² While most states include instruction about the judiciary as a part of their social studies curriculum, what is a part of the curriculum does not always translate into what is taught in the classroom, making it impossible to predict what exposure the average student has to the judiciary.³³ Nonetheless, statutes in many states require public and private schools to include instruction on American history, government, and federal and state constitutions;³⁴ some states also require instruction on federal and state "institutions."³⁵

State departments of education provide an overview of grade-level expectations in social studies.³⁶ These expectations are quite ambitious.³⁷ For

28. ABA PERCEPTIONS, *supra* note 18, at 11. These sources include movies, videos, television dramas, and court television programs. While identified by all respondents as the "least important information sources" for knowledge about the court system, these sources, along with other media sources, were "significantly more important to people with less knowledge than to people with more knowledge." *Id.*

29. *Id.* at 10. Individuals with the most knowledge of the justice system usually report the highest levels of confidence in the system. These individuals are typically "white, middle-aged, male, more educated, and [have] higher incomes." *Id.* They also have more experience with the justice system through lawyers and litigation. *Id.*

30. Gibson, *supra* note 10, at 61. Gibson also contends that the courts' uniqueness is a factor in their legitimacy. *Id.* ("Thus, courts profit greatly from the perception that they are not like ordinary political institutions.")

31. ABA PERCEPTIONS, *supra* note 18, at 94.

32. *Id.* at 11.

33. *Id.* at 99. Eighty-three percent (83%) of respondents had access to judicial system knowledge through social studies courses offered in grade school, while 82% had access through high school government and civics courses. *Id.*

34. *See, e.g.*, TENN. CODE ANN. §§ 49-6-1202, 1203.

35. MO. REV. STAT. § 170.011.1 (2000).

36. *See, e.g.*, TENN. DEP'T OF EDUC., A BLUEPRINT FOR LEARNING: SOCIAL STUDIES, <http://www.tn.gov/education/ci/blueprint/doc/cissblueall.pdf> (last visited Aug. 1, 2009); [hereinafter TENN. BLUEPRINT]; MO. DEP'T OF ELEMENTARY AND

example, teachers are often expected to cover a wide range of topics, such as civics, history, economics, and geography, all as a part of their social studies curriculum.³⁸ Because governance represents only one part of the overall social studies curriculum, and the role of the judiciary is but one subpart of governance, it is easy to understand why a study of the judiciary might be given short shrift.

In addition, state guidelines suggest that the limited coverage of the judicial function in schools may also be fairly superficial. For example, Missouri's guidelines require that elementary children gain "general knowledge of how and by whom authoritative decisions are made, enforced and interpreted."³⁹ While high school students are required to study "separation of powers" and "judicial review" as part of their understanding of a constitutional democracy, civic responsibilities with respect to the selection of the judiciary are not included in the guidelines.⁴⁰ As a further complication, the social studies curriculum is relegated to a position of inferiority in relation to mathematics and language arts under the standardized testing provisions of the No Child Left Behind Act (NCLB).⁴¹

SECONDARY EDUC., SOCIAL STUDIES GRADE-LEVEL EXPECTATIONS (Oct. 20, 2004), <http://dese.mo.gov/divimprove/curriculum/GLE/SSGLE10.20.04.pdf> [hereinafter MO. EXPECTATIONS].

37. See, e.g., TENN. BLUEPRINT, *supra* note 36; MO. EXPECTATIONS, *supra* note 36.

38. See, e.g., TENN. BLUEPRINT, *supra* note 36; MO. EXPECTATIONS, *supra* note 36. Both in the guidelines and in practice, history seems to receive the greatest emphasis. For example, the social studies curriculum page of the Knox County, Tennessee, Schools website focuses heavily on history and geography in the lower grades with no units overtly devoted to civics. Knox County Schools, Social Studies Files, Elementary Curriculum (June 2008), http://socialstudies.knoxschools.org/moules/locker/files/group_files.phtml?parent=1892067&gid=503630&sessionId=07f26025486eb300d75a3c9fa767d8e0. The high school curriculum does include a civics course. Knox County Schools, High School Course Descriptions, Social Studies Courses, Civics (Feb. 26, 2008), http://socialstudies.knoxschools.org/modules/groups/group_pages.phtml?gid=503630&nid=40753&sessionId=07f26025486eb300d75a3c9fa767d8e0. The online syllabus for that course includes an emphasis on informed participation in local elections and a description of the Tennessee court system. Knox County Schools, Social Studies Files, High School Curriculum (Dec. 2008), http://socialstudies.knoxschools.org/modules/groups/group_pages.phtml?gid=503630&nid=40753&sessionId=07f26025486eb300d75a3c9fa767d8e0.

39. MO. EXPECTATIONS, *supra* note 36, at 6.

40. *Id.* at 38. Students in grades nine through twelve are required to study the "selection of political leaders," presumably referring to the election of the members of the executive and legislative branches. *Id.*

41. Position Statement, National Council for the Social Studies, Social Studies in the Era of No Child Left Behind (2007), *available at* <http://www.socialstudies.org/positions/nclbera>. Standardized testing first rose in popularity in the 1970s as a way to increase accountability in the schools. From the very beginning, "teachers and subject matter specialists" questioned the validity of standardized testing in social

Court systems and national organizations have undertaken public education and outreach programs to supplement the insufficient exposure to information about state courts that public schools seem to provide. Organizations such as the American Judicature Society and the American Bar Association have designed model curricula that address all aspects of the court system.⁴² Each topic is organized according to educational level, ranging from elementary students to adults.⁴³ Similarly, many state courts have created various judicial-outreach projects to promote a greater understanding of the courts.⁴⁴ Many also have user-friendly web pages that introduce the public to the courts, the judges, and the judicial process.⁴⁵

studies. Dan B. Fleming, *Social Studies Standardized Achievement Tests: Are They Worth It?*, 54 *PEABODY J. OF EDUC.* 292, 293 (1977). Partly in response to longstanding skepticism on the part of social studies teachers, NCLB was written so as not to test achievement in social studies. National Council for the Social Studies, *supra*. Standardized tests instead focus on mathematics and language arts. As states and communities have amended their educational requirements to coincide with NCLB, teaching and education in social studies have atrophied. See National Council for the Social Studies, *supra*. Despite the absence of social studies as a subject on NCLB's standardized test, Missouri and some other states continue to test social studies knowledge in the fourth, eighth, and eleventh grades. Notably, the level of proficiency in the younger students (40% for fourth and eighth graders) is twice that of the older students (less than 20% for the eleventh graders). Mo. Dep't of Elementary and Secondary Educ., Missouri MAP Statistics Page (Aug. 17, 2005), <http://dese.mo.gov/divimprove/assess/stateresults.html.pdf>.

42. See American Judicature Society Public Education Home Page, <http://www.ajs.org/pe/index.asp> [hereinafter AJS Public Education]; American Bar Association Division for Public Education Home Page, <http://www.abanet.org/publiced/schools/home.html> [hereinafter ABA Public Education].

43. AJS Public Education, *supra* note 42; ABA Public Education, *supra* note 42.

44. A notable example is Tennessee's SCALES program. SCALES is an acronym for "Supreme Court Advancing Legal Education for Students." Press Release, Tennessee Administrative Office of the Courts, 1,000 Area Students Participating in Supreme Court Program (Mar. 20, 2000), <http://www.tsc.state.tn.us/GENINFO/PRESSREL/2000/001pr.htm>. The supreme court selects oral arguments to hear at local high schools after teachers and lawyers have conducted classes concerning the cases. The students hear the oral arguments and then are invited to ask questions of counsel and the justices following the session. *Id.* Since its inception in 1995, almost 20,000 Tennessee students, as well as hundreds of teachers, lawyers, school officials, and citizens, have participated in SCALES. Tennessee Administrative Office of the Courts, The Supreme Court Hears Oral Arguments at Tennessee Boys State, <http://www.tsc.state.tn.us/> (last visited May 27, 2009). For a discussion of other court outreach projects and their successes, see Ruth V. McGregor, *State Courts and Judicial Outreach*, 21 *GEO. J. LEGAL ETHICS* 1283 (2008).

45. Arizona, Colorado, and Kansas are among the states with websites that are designed to help the public understand the courts' function and navigate its processes. For example, Arizona's website is useful for citizens and educators seeking information about many particular aspects of the judicial process. It contains a large section entitled "Public Information and Assistance" with various subheadings underneath.

In addition to education, a large percentage of those surveyed ranked “personal experience” as an important and valuable source of their knowledge about the court system.⁴⁶ This finding is instructive for court systems in particular because it indicates that those with positive court experiences are more likely to have confidence in the court system.⁴⁷ But the study also cautioned that people with more positive court experiences are less likely to “improve their perceptions,” while those with “negative experiences have a good chance of becoming even more negative.”⁴⁸ Thus, attempting to enhance confidence in the courts by increasing the number of individuals who have personal experiences with the courts is, at best, a risky proposition.⁴⁹

Although individuals from all demographic groups recognize that media in every form⁵⁰ is an unreliable source of information about the courts,⁵¹ the media, regardless of this reputation, significantly impacts people’s knowledge of the justice system. Moreover, those with the least amount of knowledge about the court system rank media information as much more important than do individuals with greater knowledge.⁵²

B. *Effect of Goodwill on Perception*

Generally, people with greater knowledge about the court system have a higher level of goodwill, or “diffuse support,” for it.⁵³ This means that they are more likely to have ingrained convictions as to the “uprightness and legitimacy” of the courts.⁵⁴ This support not only enables courts to retain their authority even in times of public discord but also serves as a baseline for

See Arizona Judicial Branch Home Page, <http://www.supreme.state.az.us/>. Colorado’s website features self-help forms and information as well as an education resource menu with brochures and facts about the Colorado court system. See Colorado State Judicial Branch Educational Resources Home Page, <http://www.courts.state.co.us/Courts/Education/Index.cfm>. See also Kansas Judicial Branch Educational Resources for Teachers Home Page, <http://www.kscourts.org/programs/educatoralservices/default.asp>.

46. ABA PERCEPTIONS, *supra* note 18, at 11.

47. *Id.* at 8.

48. *Id.*

49. *Id.*

50. The “media” that impacts public perception is not limited to news media but includes entertainment media as well. Syndicated courtroom programs also “disseminate[] messages that audiences receive and decode for meaning.” Kimberlianne Podlas, *Please Adjust Your Signal: How Television’s Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 23 (Fall 2001). See *infra* text accompanying notes 77-78.

51. ABA PERCEPTIONS, *supra* note 18, at 11. Across all demographic groups, the media was characterized as the “least important informational source.” *Id.*

52. *Id.*

53. See *supra* text accompanying note 13 (describing term “diffuse support”).

54. Cann & Yates, *supra* note 6, at 300.

those with greater knowledge. In the absence of information, they rely on their deep-seated support for the courts. In this way, goodwill provides a buffer against less desirable cues and signals for those with greater knowledge. Conversely, research suggests that those with less knowledge about the courts generally have less inherent goodwill toward them,⁵⁵ leaving them vulnerable to undesirable cues about the judiciary when other information is lacking.

C. Control of Demographics, Knowledge, Goodwill

Ideally, aspects of public knowledge that detract from judicial legitimacy should be avoided or eliminated. But little, if anything, can be done to affect demographic influences. Courts struggle to improve public knowledge by using public information officers,⁵⁶ implementing court education programs,⁵⁷ and creating judicial websites. Despite these efforts, increasing the level of public knowledge – and thus, the amount of diffuse support for the courts – is an enormous task. And while the enormity of the task should not dissuade those efforts, it is arguably more effective for states to focus on the factors influencing public perception that can be altered more easily.

D. Effect of Judicial Campaigns on Perception

One of the factors that a state can alter is its judicial selection process. The judicial selection process plays a key role in shaping the public's perception of the courts.⁵⁸ The method of judicial selection and the campaign environment it yields are among the most influential factors. Studies indicate that judicial elections, campaign fundraising, and negative campaign advertising result in diminished respect for the judiciary, with judicial elections and campaign fundraising having the greatest negative effects.⁵⁹ Partisan and nonpartisan judicial elections⁶⁰ contribute to the erosion of public trust and confi-

55. *Id.*

56. Walter Latham, *Web Logs: Improving Courts' Ability to Quickly Communicate with Constituents*, in NAT'L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS* 114 (2004), available at <http://www.ncsconline.org/WC/Publications/Trends/2004/IntCtsTrends2004.pdf>.

57. The ABA Division of Public Education and the National Law-Related Resources Center has dozens of lesson plans, articles, projects, and other resources aimed toward improving and simplifying public education about the courts. ABA Division of Public Education Resources Page, <http://www.abanet.org/publiced/resources/home.html>.

58. Cann & Yates, *supra* note 6, at 316.

59. *Id.*

60. The term "judicial election" will be used to refer to partisan or nonpartisan judicial elections in which two or more candidates vie against one another. This use

dence in the courts and undermine the judiciary's legitimacy as a political institution. First, the rough and tumble of judicial elections diminish respect for the judiciary and weaken the view that the judiciary is a unique governmental institution. Costly judicial campaigns and policy-oriented platforms blur the already tenuous notion that the judiciary is a distinctive branch of government. The public, familiar with the political bargaining inherent in other elections, wonders whether those who contribute to judicial campaigns will expect – and receive – a quid pro quo in their “beneficiary’s courts.”⁶¹

Since people with greater knowledge about the court system have a higher level of goodwill toward it, their confidence in the system is less affected by judicial campaigns. But partisan and nonpartisan judicial campaigns have a detrimental and pronounced effect on a substantial number of people – those with less knowledge of, and information about, the court system.⁶² For these individuals, the absence of knowledge is often coupled with a shortage of goodwill for the courts, facilitated by the lack of information.⁶³ Additionally, this portion of the population rarely embraces the courts as unique institutions.⁶⁴ The resulting vacuum is easily filled with images from the negative aspects of election activity.⁶⁵ If judges must campaign like those seeking legislative or executive office, they will be viewed as being the same as other politicians. The judiciary, comprised of judicial politicians, will not be seen as unique.⁶⁶

Although judicial elections have less dramatic effects on those with greater knowledge of and more diffuse support for the court system, other aspects of judicial elections do have a considerable negative impact on these individuals. Campaign fundraising has a “statistically and substantially significant”⁶⁷ effect, producing the greatest decline in institutional legitimacy across all demographic groups, including a reduction in diffuse support among those with high levels of knowledge about the courts.⁶⁸ “When contributions are given by parties having a direct stake in the decision of the office holder, fewer than one-half of the people believe that the policymaker

of the term distinguishes it from retention elections in which the electorate decides whether a judge should be retained in office.

61. Cann & Yates, *supra* note 6, at 316.

62. *Id.* at 314-15.

63. *See id.*

64. *Id.* at 300.

65. *Id.* at 314-15.

66. Gibson, *supra* note 10, at 61 (“[P]recisely the most worrisome consequence of the politicized style of judicial elections is that, to the extent that campaigning takes on the characteristics of ‘normal’ political elections, courts will be seen as *not* special and different, with the consequence that their legitimacy may be undermined.”).

67. *Id.* at 69.

68. Cann & Yates, *supra* note 6, at 315.

can be fair.”⁶⁹ Moreover, judges who accept campaign contributions from those who stand to gain from the judge’s election are regarded as akin to legislators. This results in a concomitant decrease in respect and trust for the judicial office. Because courts derive their legitimacy from their perceived impartiality, high-dollar judicial elections will ultimately undermine institutional legitimacy.

It is not only campaign fundraising, but also a fear of quid-pro-quo politics, that leads to the diminished legitimacy of the judiciary. The connection between contributions and decisions is difficult, if not impossible, to measure,⁷⁰ but even the perception that such impropriety exists reduces public support and confidence in the judiciary.⁷¹ A strong majority of Americans believe that campaign contributions influence judicial decision-making,⁷² and many judges agree that campaign contributions affect their decisions.⁷³ Thus, when judicial elections are used to select state court judges, campaign fundraising and quid-pro-quo politics combine to erode the public’s trust and confidence in the courts. As trust and confidence wane, the perception of impartiality declines, and courts are viewed as less legitimate.⁷⁴

69. Gibson, *supra* note 10, at 69. The United States Supreme Court has addressed this situation recently in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009), in which the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required recusal of a judge in light of the serious risk of actual bias “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Id.* at 2263-64.

70. Gibson, *supra* note 10, at 62.

71. Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. OF POL. 261 (2002); Damon M. Cann, *Justice For Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 281 (2007).

72. JUSTICE AT STAKE CAMPAIGN, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS (March 2004), available at <http://faircourts.org/files/ZogbyPollFactSheet.pdf>.

73. In Texas, nearly half of the judges, 79% of the lawyers, and 69% of the court personnel responding believed that campaign contributions influenced judicial decision-making. TEXAS OFFICE OF COURT ADMINISTRATION & THE STATE BAR OF TEXAS, THE COURTS AND THE LEGAL PROFESSION IN TEXAS – THE INSIDER’S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS, available at <http://www.courts.state.tx.us/pubs/publictrust/execsum.htm>.

74. Cann & Yates, *supra* note 6, at 313 (“Citizens’ concerns over costly, intense, partisan judicial election campaigns are eroding society’s goodwill toward their state courts.”).

IV. JUDICIAL CAMPAIGNS AND VOTER CUES

Costly campaigns and quid-pro-quo politics were not always the mainstream in judicial elections. Before the 2002 decision in *Republican Party of Minnesota v. White*,⁷⁵ most judicial campaigns were not political events but were decorous events in which candidates talked about their educational background, professional experiences, and military and community service. In *White*, the Supreme Court of the United States struck down a provision of Minnesota's Code of Judicial Conduct that prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues."⁷⁶ Finding that the provision violated the First Amendment right to free speech,⁷⁷ the majority recognized a judicial candidate's right to express personal and political opinions to the public.⁷⁸ The *White* dissenters warned that the decision would have a negative impact on the perception of the courts because the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."⁷⁹ Justice Ginsburg, for example, cautioned that the "unseemly quid pro quo – a judicial candidate's promises on issues in return for the electorate's votes at the polls – inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest."⁸⁰

Before *White*, it was not only judicial ethics requirements but also longstanding custom and tradition that produced banal state judicial campaigns. Although many judges climbed to the bench as a result of prior political activities and connections, many happily relinquished the demands of political life upon becoming a judge. These judges routinely declined to voice their personal opinions on legal and political issues,⁸¹ even when asked to do so during a campaign.⁸² Many welcomed ethics provisions that restricted their political activity.⁸³ The limitations on political speech were a

75. 536 U.S. 765 (2002).

76. *Id.* at 768.

77. *Id.* at 788.

78. *Id.* at 775-88 (discussing the various definitions of impartiality).

79. *Id.* at 802 (Stevens, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 407 (1989)).

80. *Id.* at 819 (Ginsburg, J., dissenting).

81. David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, 39 CT. REV. 16, 18 (Spring 2002). In a 2001 survey, nearly two-thirds of the judges surveyed said that judicial ethics rules contained "the right amount and type" of campaign restrictions. *Id.*

82. *Id.* Ninety-seven percent (97%) of judges surveyed "strongly supported" the proposition that "[j]udicial candidates should never make promises during elections about how they will rule in cases that may come before them." *Id.*

83. *Id.* Nearly two-thirds of judges surveyed considered judicial canons that restricted campaign speech to contain "the right amount and type" of restriction. *Id.*

safe and appreciated haven. By acclimating to these limitations on political speech and activity, judges carved out a unique image. A judge was not simply a politician wearing a black robe but a special kind of public servant,⁸⁴ one who was uniquely isolated from backroom politics and deal-making.⁸⁵

When seeking office, even in contested elections, judges usually talked about their law school education, their military or community service, and their practical legal experience. In some jurisdictions, where candidates ran on partisan ballots, the party identification provided a quasi-platform for the candidate, but, in most campaigns, platforms were the exception, not the rule. When platforms did exist, they most often focused on matters concerning judicial administration or court improvement, not on hot-button political and social issues. Most candidates marketed their candidacy by one-on-one contact, direct mail, or newspaper advertisements.

After the *White* decision, judges have engaged in a new style of judicial campaigning involving political platforms – issue-based campaigns, largely delivered to the public via television advertising. Television advertising, an anomaly as late as 2000, is now defined as the “norm,” even in primary elections.⁸⁶ As the number of advertisements has increased substantially, the civility of the advertisements has decreased significantly. Rather than outlining professional accomplishments or legal experience, a majority of the ads are negative, attacking the opposition or positions attributed to the opposition.⁸⁷ Negative advertising seems to command a viewer’s attention. Moreo-

84. *Id.* at 19. Eighty-two percent (82%) of the public surveyed in 2001 found the following statement to be either “very convincing” or “somewhat convincing”:

Judges should be treated differently from other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests. We must take concrete steps to ensure that judges can make unpopular decisions based only on the facts and the law.

Id.

85. *Id.* Eighty-one percent (81%) of the public surveyed in 2001 found that the statement “[c]ourts are unique institutions of government that should be free of political and public pressure” was “more convincing” or “much more convincing” than the statement “[c]ourts are just like other institutions of government and should not be free from political and public pressure.” *Id.*

86. JUSTICE AT STAKE CAMPAIGN, 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 6 (2006), available at <https://www.policyarchive.org/bitstream/handle/10207/8749/9The%20New%20Politics%20of%20Judicial%20Elections%20-%202006.pdf?sequence=1>. In 2000, television advertising was used in judicial elections in less than one-quarter of the states; in 2002, the number had doubled; and in 2006, television advertising was used in all but one state judicial race. *Id.* at 2.

87. JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING

ver, it places judicial campaigns on an even keel with those run by other politicians and obscures any distinction between candidates for judicial office and other politicians. Like campaign fundraising and the fear of quid-pro-quo campaigns, negative advertising undermines the uniqueness of the judiciary and threatens its legitimacy.⁸⁸

The advertisements, mostly funded by special interest groups, reflect (or attack) a candidate's positions on tort reform, crime control, same-sex marriage, religion in public schools, abortion, and other controversial social issues.⁸⁹ Initially, following *White*, the advertisements were crafted to "send signals – that is, offer voters clues as to how future cases might be decided if a particular candidate is elected."⁹⁰ Rather than touting qualifications for office, the advertisements peddled positions on issues likely to attract special interest influence.⁹¹ In the election cycle following *White*, advertising signals gave way to explicit pronouncements on controversial issues.⁹² The number of advertisements promoting a candidate's qualifications fell to 30%, while a majority came painfully close to stating promises.⁹³ For instance, judges often announced that they were "law and order"; were "tough on crime"; or supported "traditional" values, "including the belief that 'the words "under God" belong in our Pledge of Allegiance.'"⁹⁴ And although some studies indicate that policy-based campaigns do not have a per se negative impact on the courts, it has been shown that the money and incentives that contested campaigns generate do. Moreover, policy-based campaigning creates cues and signals that those with little knowledge of the court system use to plug a vacuum of information, promoting an image of the judiciary in lockstep with the other political branches.⁹⁵

Thus, it is clear that most aspects of judicial campaigns undermine the public's trust and confidence and diminish the institutional legitimacy of the judiciary. For the large number of individuals who have scant knowledge of the judiciary, the tawdry images of judicial fundraising and deal-making fill a

POINT" – AND HOW TO KEEP COURTS FAIR AND IMPARTIAL 9 (2004), available at <https://www.policyarchive.org/bitstream/handle/10207/5927/200506271.pdf?sequence=1>; THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, *supra* note 86, at 8.

88. Gibson, *supra* note 10, at 62.

89. JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002, at 11, available at <https://www.policyarchive.org/bitstream/handle/10207/6251/200405061.pdf?sequence=1>.

90. *Id.*

91. *Id.*

92. THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, *supra* note 87, at 9-10.

93. *Id.*

94. *Id.* at 9.

95. Gibson, *supra* note 10, at 60. Gibson acknowledges that some analysts have found policy debates between judicial candidates to have "useful consequences, such as allowing citizens to base their voting decisions on more rational criteria" rather than on "dicey attributes." *Id.*

void, supplying signals and cues that judges are just like other politicians; for those with a greater level of knowledge, judicial campaigns diminish goodwill and weaken positive attitudes about the judiciary. If we must accept *White's* proposition that judicial candidates are constitutionally authorized to diminish the judiciary's legitimacy through their campaign activities, we can nonetheless turn our attention to ways to minimize the damaging effect.

V. SUPPLEMENTING THE CUES AND SIGNALS WITH MORE MEANINGFUL INDICATORS

One way to minimize the damaging effect of judicial campaigns is to supplement the signals and cues that these campaigns send with other more relevant indicators.⁹⁶ In elections, for example, voters look for information about candidates; they are motivated to make an informed decision. When the only information available is provided by special interest advertisements that signal the judge's social and political views, the voter is likely to choose the candidate whose views mirror his or her own, regardless of the candidate's qualifications for office. This selection of a candidate based on political views firmly instills the image of the judge as a politician and, perhaps, entitles the voter to assume that the judge's rulings will mirror the platform.

Similarly, individuals gauge their confidence in institutions by using the available cues and signals, even those that are not actually edifying. While, as acknowledged, individuals receive some signals through campaign advertisements, they also receive many other cues about the judiciary from various media genres. "Television and newspapers [provide] skewed and incomplete information to the general public about court processes and judicial proceedings"⁹⁷ Reality television shows⁹⁸ and portrayals in film and literature may also affect, and detract from, a positive judicial image.⁹⁹

96. In advertising, a cue is a "signal of something or a reminder of something. It brings to mind something from past knowledge or previous experience that provides a framework of meaning that can be used to interpret the sign." Sandra E. Moriarty, *An Interpretative Study of Visual Cues in Advertising*, <http://spot.colorado.edu/~moriarty/viscueing.html>. Advertising "depends upon cues to elicit the associated meanings." *Id.* See also Alan Bush, *Enhancing Advertising Effectiveness Through the Use of Culturally Meaningful Symbols*, *BUS. PERSPECTIVES* (Mar. 22, 1993), available at www.allbusiness.com/marketing/advertising/392925-1.html.

97. Lynn Mather, *Courts in American Popular Culture*, in *THE JUDICIAL BRANCH* 233, 243 (Kermit L. Hall & Kevin T. McGuire eds., 2005). Television and print news are criticized for overemphasizing criminal cases, "emphasizing violent crimes and large financial verdicts, focus[ing] on the filing of charges and on verdicts but without the processes in between, and . . . ignor[ing] the out-of-court negotiations and settlements that characterize most cases." *Id.*

98. Professor Kimberlianne Podlas, who has studied the effect of entertainment television on the perception of the judiciary, uses the term "syndi-court" to refer to television's syndicated courtrooms. Podlas, *supra* note 50. She concludes that "[i]n contemporary society, syndi-court is our primary icon of law. It is more pervasive

Rather than permitting the public to derive its perceptions solely from these miscues about the judiciary, states must provide other more accurate information to inform the public's perception of state courts. This information may be provided by the public school system, as it strives to educate youth about the role of courts in society, as well as by the court system itself, as it employs various initiatives including court education and outreach programs and user-friendly, interactive websites to help the public understand the system. But public education and court outreach programs have thus far proven unlikely substitutes for the dramatic cues sent by bitter, expensive judicial campaigns. Those vivid images are not likely to be replaced by generic information concerning a court and its processes. What may better help to displace those images, however, are critically designed, appropriately administered, and widely disseminated judicial performance evaluations.

A. *Judicial Performance Evaluations*¹⁰⁰

Judicial performance evaluations – when critically designed, appropriately administered, and widely disseminated – can provide supplemental cues and signals to inform the public's attitude about the judiciary. Moreover, because the use and publication of judicial performance evaluations further differentiates judges from other governmental officials, their use will enhance the public perception of courts as unique institutions and enhance their institutional legitimacy.

than any other type of legal information.” Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L. J. 465, 469 (2005).

99. Podlas, *supra* note 50, at 3, 15. Podlas' study revealed that frequent viewers of television courtroom dramas perceive judges as “aggressive, i[m]patient, and opinionated” and expect that they “signal” jurors their opinions about the case. *Id.* at 15. More importantly, Podlas concluded that “[t]he pictures of syndicated television courts provide the public with information regarding the operations of courts that are then integrated into their beliefs . . . becom[ing] the barometer against which all other judicial action is evaluated, and may alter the public's expectations of the bench.” *Id.* at 21.

100. This Article uses the phrase “judicial performance evaluations” to refer to an evaluation of incumbent judges based on observations, interviews, public hearings, and responses to standardized, scaled surveys, provided by relevant individuals who have direct information based on interaction or observation within the evaluation period. It does not use the phrase to include less scientific evaluations, such as bar polls and media polls. For a discussion of the history of bar polls and why they are insufficient measures of judicial performance, see ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE iv (1985) [hereinafter GUIDELINES] (“polling is not the only means – and not the soundest means if taken alone – of evaluating the performance of judges”); Penny J. White, *Judging Judges: Securing Judicial Independence by use of Judicial Performance Evaluations*, 29 FORDHAM URB. L. J. 1053, 1064-66 (2002).

As early as 1975,¹⁰¹ states began to experiment with methods of evaluating judicial performance in order to provide judicial accountability. Alaska, New Jersey, and Colorado were the early pioneers.¹⁰² These states trusted that performance evaluations would help both the judges and the public. Providing the evaluation results to the judges would allow the judges to identify areas in which improvement was necessary, thereby enabling them to become more proficient; disseminating the results of the evaluations to the public would give the public a more meaningful basis for deciding whether to support judges' retention.¹⁰³ Notwithstanding this original dual purpose, by 1995, for a variety of reasons, many of the eight existing judicial performance evaluation (JPE) programs were used only to improve judicial skills.¹⁰⁴

While these few pioneer states were experimenting with JPE programs, the American Bar Association was drafting objective judicial evaluation guidelines.¹⁰⁵ In 1985, the ABA adopted the *Guidelines for Evaluation of Judicial Performance*, a document consisting of black letter principles and explanatory commentary.¹⁰⁶ Because the Guidelines suggested "criteria and methodology useful for judging" judicial performance,¹⁰⁷ they were the impetus for other states to consider and adopt some form of JPE program.

Nonetheless, the number of states that use JPE programs for both purposes – self-improvement and voter information – remains very small.¹⁰⁸ In 2008, for example, eight states disseminated JPE results to voters.¹⁰⁹ In each

101. Bar polls and other means of assessing voter preference predated judicial performance evaluations by more than a century. JAMES H. GUTERMAN & ERROL E. MEIDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 2 (1977) (dating bar polls to the 1800s).

102. See Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255, 261-70 (1981) (addressing methods of judicial performance in New Jersey and Colorado). See also David C. Brody, *Management Note: Judicial Performance Evaluations by State Governments: Informing the Public while Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 334 (2000) (addressing methods of judicial performance in Alaska).

103. See COL. REV. STAT. § 13-5.5-101 ("to provide persons voting on the retention of justices and judges with fair, responsible, and constructive information about judicial performance and to provide justices and judges with useful information concerning their own performances.").

104. See White, *supra* note 100, 1066-67. Some states lacked sufficient resources to disseminate JPE results, thus leading to their use for self-improvement only, while in other states there was judicial resistance to dissemination of the results.

105. ABA Special Comm. on Evaluation of Judicial Performance, Concept Paper (1979).

106. GUIDELINES, *supra* note 100.

107. *Id.* at iv.

108. David C. Brody, *The Use of Judicial Performance Evaluations to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 118 n.34 (2008).

109. *Id.* at 118.

of these states, judges were subject to retention elections, making the use of JPE results for purposes of providing voter information prominent only in states with retention elections.¹¹⁰ No states with contested partisan or nonpartisan elections have disseminated JPE results.¹¹¹

1. Methodology for Evaluating Judicial Performance

States use different methodology in their JPE programs, but all states administer the programs through evaluation bodies or commissions.¹¹² The composition of that commission and its placement within the governmental structure vary from state to state.¹¹³ It is essential that the evaluation body be separated from those whom it evaluates. While placement may be within the judiciary branch, the evaluation body must maintain independence from it.¹¹⁴ If placement is within one of the other two branches, care must be taken that the body does not become “infect[ed] . . . with partisan politics.”¹¹⁵

The evaluation body’s composition is as important as its autonomy. Again, the composition of evaluation bodies varies considerably from state to state.¹¹⁶ All evaluation bodies include lawyers, and most include judges.¹¹⁷ And while most evaluation bodies include lay members as well, the division between lay members and members of the legal profession often disproportionately favors the latter.¹¹⁸ However, both lawyers and lay members play an essential role in assuring the mission of the evaluation body. Lawyers provide knowledge about the role of the judge and the judicial process, while lay members add a needed safeguard against an incestuous process.

Even an excellent evaluation body cannot accomplish its mission if it does not identify appropriate evaluation criteria and a reliable and valid

110. The eight states were Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah. *Id.* at 118 n.34.

111. DAVID ROTTMAN ET AL., JUDICIAL PERFORMANCE EVALUATION tbl.10, *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=218>.

112. For a chart outlining each state’s commission structure and procedure, see JUDICIAL SELECTION AND SERVICE 53-55, *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=218>.

113. *Id.*

114. *See generally* INST. FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION 1-4 (2006), *available at* <http://www.du.edu/legalinstitute/form-blueprint-eval.html> [hereinafter TRANSPARENT COURTHOUSE].

115. *Id.* at 4.

116. For a chart outlining each state’s commission structure and procedure, see JUDICIAL SELECTION AND SERVICE, *supra* note 112.

117. For a chart outlining each state’s commission composition, see *id.*

118. *See id.*

means of measuring the criteria.¹¹⁹ Expert assistance should be used to establish the criteria, discussed below, and to determine how to collect, synthesize, analyze, and use the data. Best practices dictate that data should be collected anonymously from multiple respondents who have recently interacted with the judge, observed the judge, or reviewed the judge's work.¹²⁰ Potential sources of information include jurors, lawyers, court staff, litigants, frequent witnesses, and other judges. Information may be collected by surveys, questionnaires, interviews, and public hearings. Relevant information may also be included by conducting formal court observations¹²¹ and by gathering and reviewing public records, including court documents.¹²² To address concerns about "self-selection," various sources of information should be used in addition to respondent surveys.¹²³

2. Criteria for Evaluating Judicial Performance

The value of JPE programs is their potential to serve as meaningful substitutes for inappropriate cues about judges and state courts. The ABA *Guidelines for the Evaluation of Judicial Performance* divides performance criteria into five sections, delineated as "guidelines." The first three address

119. ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, ISSUES IN RESEARCH AND DEVELOPMENT AND DATA COLLECTION FOR JUDICIAL PERFORMANCE EVALUATION PROGRAMS 14 (Apr. 1986).

Reliability and validity are terms with specialized meanings as used by social scientists. Reliability refers to the accuracy or precision of a measuring instrument (i.e., the less the error, the greater the reliability). . . . Validity, as compared with reliability, pertains more to the nature and meaning of one's variables. Content validity involves examining each item or question to determine its relevance.

Id.

120. TRANSPARENT COURTHOUSE, *supra* note 114, at 7.

121. Alaska uses a court observation program as part of its trial judge evaluations. Trained individuals observe court proceedings and evaluate judicial demeanor and temperament as well as clarity of expression.

122. ABA, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE § 6-5-3 (2005), available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf [hereinafter BLACK LETTER GUIDELINES]. Public records from the court will indicate the court's timeliness in issuing decisions as well as efficiency in managing the court docket. In Colorado, for example, the Commission on Judicial Performance reviews caseload information statistics which indicate the number of open cases, the age of cases, the number of jury trials, and the number of bench trials during the evaluation period. COMM'N ON JUDICIAL PERFORMANCE, JUDICIAL PERFORMANCE FACT SHEET, <http://www.cojudicialperformance.com/documents/2009%20fact%20sheet2.pdf> [hereinafter COLO. COMM'N ON JUDICIAL PERFORMANCE] (last visited Aug. 1, 2009).

123. Brody, *supra* note 102, at 340.

the judge's adjudicative responsibilities; the fourth addresses the judge's demeanor; and the fifth addresses the judge's administrative capabilities.¹²⁴

The first guideline relates to a judge's legal ability. It includes the judge's legal reasoning ability, knowledge of substantive law and procedural and evidence rules, and knowledge of current legal developments.¹²⁵ The second guideline evaluates a judge's integrity and impartiality, including several elements: avoiding impropriety and the appearance of impropriety; treating all with dignity and respect; being free of favoritism or bias; giving fair, individual consideration to all parties before deciding an issue; basing decisions on the law and facts; hearing cases with an open mind; and making difficult and unpopular decisions.¹²⁶ The third guideline assesses the judge's written and oral communications skills.¹²⁷

The fourth guideline, aimed at assessing a judge's demeanor, focuses on the judge's "professionalism and temperament," including whether the judge acts in a "dignified manner"; treats people courteously; is patient and controlled; deals fairly and effectively with pro se litigants; provides leadership in professional activities; and promotes "public understanding of and confidence in the courts."¹²⁸

The fifth and final guideline evaluates the judge's administrative capabilities. It appraises the judge's punctuality and preparedness; courtroom control, including enforcement of rules, orders, and deadlines; promptness in rulings; docket management; use of alternative dispute resolution methods and innovations in technology; and assurance that "disabilities and linguistic and cultural differences do not limit access to the justice system."¹²⁹ Outside the courtroom, guideline five evaluates the judge's ability to foster a productive work environment and to use hiring policies that promote a diverse pool of qualified applicants for court employment.¹³⁰

Most states use the criteria established in the American Bar Association *Guidelines for the Evaluation of Judicial Performance* as a starting point for drafting their own criteria.¹³¹ If the five ABA guidelines are succinctly sum-

124. BLACK LETTER GUIDELINES, *supra* note 122, at 3-5.

125. *Id.* at § 5-1.

126. *Id.* at § 5-2.

127. *Id.* at § 5-3.

128. *Id.* at § 5-4.

129. *Id.* at §§ 5-5-5.1 – 5.7, 5-5.10.

130. *Id.* at §§ 5-5-5.8, 5-5-5.9. These two criteria are often not included in states' criteria.

131. For example, the Arizona judicial performance standards, outlined on the webpage for the Arizona Commission on Judicial Performance Review, state that judges should administer justice fairly, ethically, uniformly, promptly, and efficiently; be free from personal bias when making decisions and decide cases based on the proper application of the law; issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis; act with dignity, courtesy and patience; and effectively manage their courtrooms and the administrative responsibilities of their office.

marized as legal knowledge, integrity, written and oral communication skills, demeanor, and administrative capabilities, it can be said that all states conducting and disseminating JPE results for retention elections use the ABA criteria as a model. Although different terminology is used by the individual states, each state evaluates judges based on these criteria.

3. Relationship of Criteria to Qualities of Good Judges

If JPE programs are to serve as meaningful substitutes for inappropriate cues about judges, the performance guidelines must measure the qualities of good judging. The qualifications for the bench required by state statutes and constitutions are minimal. Most states require only that judges have attained a certain age and a law license and are residents and citizens. Thus, for example, in most states, a thirty-year old with a law license “qualifies” for the bench.¹³² But, presumably, the public wants more than minimally qualified judges; most likely, the public wants *good* judges. The performance criteria outlined in the ABA Guidelines, and adopted in similar form by the states that use JPE programs, mirror the qualities that have long been regarded as essential to good judging and are appropriate measures of judicial performance.

Informed historical opinion about the qualities of a good judge is in harmony with the criteria that states use in JPE programs to evaluate their judges. Socrates, for example, provided one of the earliest descriptions of the qualities of a good judge: “Four things belong to a Judge: to hear courteously; to answer wisely; to consider soberly and to decide impartially.”¹³³ Socrates’ standards for good judging are uniformly reflected in the guidelines used in states with JPE programs.¹³⁴

For example, Tennessee court employees are asked whether a judge “demonstrates courtesy, respect and collegiality in working with judges and

Arizona Commission on Judicial Performance Review, Judicial Performance Standards, available at <http://www.azjudges.info/about/standards.cfm>.

132. See, e.g., MO. CONST. art. V, § 21.

133. This quote is one of many attributed to Socrates, but it does not appear in any existing ancient text. *But see* FRANKLIN PIERCE ADAMS, FPA BOOK OF QUOTATIONS 466 (1952). Another early description of the qualities of judging appears in chapter 19, verse 15 of Leviticus: “Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor nor honor the person of the might: but in righteousness shalt thou judge thy neighbor.” The New Standard Bible interprets the verse as, “You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly.” *Leviticus* 19:15 (New Standard Bible).

134. Throughout this Section, I contrast some views of good judging with the criteria measured by some JPE programs. Each reference is used by way of example and does not suggest that other JPE programs do not include the same, or similar, criteria.

other court personnel,”¹³⁵ while Tennessee attorneys are asked whether the judge “exhibited courtesy to all persons present during the proceedings.”¹³⁶ Similarly, Colorado judges are evaluated on whether they are “courteous toward attorneys” and “court staff.”¹³⁷ Missouri asks judges “to hear courteously” by evaluations based on “treat[ing] people equally regardless of race, gender, ethnicity, economic status, or any other factor” and “[w]eigh[ing] all evidence fairly and impartially before rendering a decision.”¹³⁸ The Kansas Commission on Judicial Performance asks attorneys whether trial judges “give[] proceedings a sense of dignity,” “[t]reat[] everyone in the courtroom with respect,” are “attentive during the proceedings,” and “[a]ct[] with patience and self control.”¹³⁹ In addition to being asked some of these questions, Kansas nonlawyers are asked whether trial judges “[d]emonstrate[] a sense of compassion and human understanding for those who appear before the court.”¹⁴⁰ To evaluate appellate judges, Kansas attorneys are asked whether the judge “[a]llows parties to present their arguments and answer questions,” “[i]s courteous toward attorneys,” and “[p]resents an appropriate demeanor on the bench.”¹⁴¹ Though more expansive, all of these questions ascertain whether the judge meets Socrates’ standard of hearing courteously.

Similarly, state guidelines for JPE programs reflect Socrates’ second criterion – “to answer wisely.” New Mexico incorporates this criterion into its legal ability area, one of four performance areas used to evaluate judicial performance in that state.¹⁴² Assessment of the judge’s “[u]nderstanding of the substantive law and relevant rules of procedure and evidence,” “[a]wareness and attentiveness to the factual and legal issues before the court,” and proper application of law are all aspects of the legal ability assessment.¹⁴³ Utah evaluates whether judges issue “legally sound decisions” by asking questions about the judge’s application of the law to the facts, awareness of recent legal developments, demonstration of scholarly legal

135. TENN. JUDICIAL PERFORMANCE & EVALUATION PROGRAM, COURT EMPLOYEE QUESTIONNAIRE (on file with author).

136. *Id.*

137. TRANSPARENT COURTHOUSE, *supra* note 114, at 46.

138. THE MO. BAR, JUDICIAL PERFORMANCE REVIEW CRITERIA, <http://www.mo-bar.org/data/judges08/> (last visited Aug. 1, 2009).

139. KAN. COMM’N ON JUDICIAL PERFORMANCE, SURVEY OF ATTORNEYS ABOUT TRIAL JUDGES, <http://www.kansasjudicialperformance.org/documents/Survey-Attorneys-About-Trial-Judges.pdf> [hereinafter KAN. SURVEY OF ATTORNEYS].

140. KAN. COMM’N ON JUDICIAL PERFORMANCE, SURVEY OF NON-ATTORNEYS ABOUT TRIAL JUDGES, <http://www.kansasjudicialperformance.org/documents/Survey-Non-Attorneys-About-Trial-Judges.pdf> [hereinafter KAN. SURVEY OF NON-ATTORNEYS] (last visited Aug. 1, 2009).

141. KAN. SURVEY OF ATTORNEYS, *supra* note 139.

142. N.M. JUDICIAL PERFORMANCE EVALUATION COMMISSION, HOW WE EVALUATE JUDGES – OVERALL FACTORS, <http://www.nmjpec.org/factors> (last visited Aug. 1, 2009).

143. *Id.*

analysis, and knowledge of the law and rules of evidence and procedure.¹⁴⁴ Kansas grades judges on whether they “[p]rovide[] rulings that are clear, thorough and well reasoned.”¹⁴⁵ Missouri evaluates judges on their ability to “[g]ive[] reasons for rulings” and write clear opinions and orders.¹⁴⁶

Socrates’ third and fourth criteria – “consider soberly” and “decide impartially” – are also well represented in state JPE criteria. All states ask respondents to evaluate the judge’s demeanor, attentiveness, impartiality, and fairness. Colorado, for example, assesses whether a judge “[d]isplays fairness and impartiality toward all participants” and “[d]emonstrates appropriate demeanor on the bench.”¹⁴⁷ Missouri asks lawyers whether trial judges “[are] affected by partisan considerations,” “[d]isplay[] fairness and impartiality toward each side of the case,” and “[t]reat[] people equally regardless of race, gender, ethnicity, economic status, or any other factor.”¹⁴⁸ Missouri jurors are asked whether the judge “appear[ed] to be free from bias or prejudice” and acted “in a dignified manner.”¹⁴⁹ Utah asks both lawyers and jurors whether judges’ behavior is “free from bias” and also asks jurors whether judges “avoid ‘playing favorites.’”¹⁵⁰

More recent and applied views about the qualities of a good judge also parallel traditionally used JPE criteria. Justice Cardozo, in his famous treatise, *The Nature of the Judicial Process*, expressed that judges may not “innovate at pleasure” or “yield to spasmodic sentiment, [or] vague and unregulated benevolence,” but rather must “draw . . . inspiration from consecrated principles” and “exercise a discretion informed by tradition, methodized by analogy, disciplined by system”¹⁵¹ His successor, Justice Frankfurter, also considered adherence to precedent as a sign of good judging. In speaking specifically about Supreme Court Justices, Justice Frankfurter suggested that judges needed

humility . . . disinterestedness, allegiance to nothing except the search amid tangled words, amid tangled insights, loyalty and allegiance to nothing except to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgment that poor fallible creatures can arrive at in that

144. UTAH ST. COURTS, JUDGE SELECTION AND EVALUATION, <http://www.utcourts.gov/knowcts/judsel.htm> (last visited Aug. 1, 2009).

145. KAN. SURVEY OF ATTORNEYS, *supra* note 139.

146. THE MO. BAR, *supra* note 138.

147. COLO. COMM’N ON JUDICIAL PERFORMANCE, *supra* note 122.

148. THE MO. BAR, *supra* note 138.

149. *Id.*

150. UTAH ST. COURTS, *supra* note 144.

151. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

most difficult of all tasks, the adjudication between man and man, between man and the state, through reason called law.¹⁵²

Half a century later, Colorado surveys jurors as to a judge's humility,¹⁵³ and Utah asks jurors if judges "avoid arrogance."¹⁵⁴ Missouri and Kansas lawyers are asked whether appellate judges "[r]efrain[] from reaching issues that need not be decided."¹⁵⁵ Similarly, Utah respondents must evaluate whether the judge properly applies "judicial precedents and other appropriate sources of authority."¹⁵⁶

Modern judges tackling the topic of quantifying the traits of a good judge echo the sentiment of Socrates and Justices Cardozo and Frankfurter. Judge William H. Hastie, judge of the United States Court of Appeals for the Third Circuit,¹⁵⁷ for example, observes that judges must "administer a systematic process of adjudication which makes sense and preserves objectivity through the rigorous application of reason" and must "stand somewhat apart from the battles that inevitably rage in society."¹⁵⁸ Justice William Erickson of the Colorado Supreme Court¹⁵⁹ comments that a "good judge . . . [s]hould possess the strength to avoid political and public pressure in reaching a result or decision in any case."¹⁶⁰ And Justice Samuel J. Roberts, former justice of the Pennsylvania Supreme Court,¹⁶¹ asserts that a good judge "should come to the court by fair means, beholden to no one – not to the gov-

152. Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953).

153. TRANSPARENT COURTHOUSE, *supra* note 114, at 59.

154. UTAH ST. COURTS, *supra* note 144.

155. THE MO. BAR, *supra* note 138; *see* KAN. SURVEY OF ATTORNEYS, *supra* note 139 (www.kscourts.org/pdf/AttorneyAppellateJudgeQ.doc).

156. UTAH ST. COURTS, *supra* note 144.

157. Judge Hastie was a native of Knoxville, Tennessee, the first African-American federal district judge, and a judge on the Court of Appeals for the Third Circuit from 1949 to 1971. Linda T. Wynn, *William Henry Hastie (1904-1976)*, <http://www.tnstate.edu/library/digital/hastie.htm> (last visited Aug. 1, 2009).

158. William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947, 955-56 (1973). Judge Hastie served as a Senior Judge after retiring from full-time status on the United States Court of Appeals for the Third Circuit. Wynn, *supra* note 157.

159. Justice William H. Erickson served on the Colorado Supreme Court from 1971 until 1996. Colo. Supreme Court Library, Erickson, William H., <http://www.state.co.us/courts/sctlib/67.htm> (last visited Aug. 1, 2009).

160. Ruggero J. Aldisert, William H. Erickson, Robert A. Leflar & Samuel J. Roberts, *What Makes a Good Appellate Judge? Four Views*, JUDGES' J., Spring 1983, at 14, 17 (views of Justice William H. Erickson).

161. Justice Samuel J. Roberts served on the Pennsylvania Supreme Court from 1963 until 1984. Pennsylvania Supreme Court Justices Since 1681, http://www.dgs.state.pa.us/dgs/lib/dgs/pa_manual/section5/pa_supreme_court_justices_since_1681.pdf (last visited Aug. 1, 2009).

error, legislators, trial lawyers, or special interest groups”; a good judge “does not make decisions with one eye on the media, or on public opinion polls, or on chances for retention or reelection, or on opportunities after leaving the bench.”¹⁶²

Correspondingly, states with JPE programs include independence from political or public pressure as an important judicial trait that should be evaluated. Tennessee lawyers are asked whether judges “render[] opinion(s) without regard to popular sentiment” and “use[] structured, logical reasoning rather than striving to reach a particular conclusion”;¹⁶³ Kansas lawyers evaluate whether judges “[r]ender[] decisions without regard to possible public criticism”;¹⁶⁴ Missouri lawyers consider whether the judge “[i]s not affected by partisan considerations.”¹⁶⁵

Clearly, Socrates’ criteria for the qualities of a good judge correlate with many states’ JPE criteria for evaluating the judiciary. State criteria are comprised of identifiable and objective factors and represent legitimate considerations in determining the quality of a judge’s performance. Even those criteria that seem indeterminate can be separated into measurable components about which respondents can be asked. Integrity, for example, is an attribute that is uniformly believed to be essential for a judge. A judge with integrity is a fair and impartial judge, one who has the “ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, the popularity of the decision, and without concern for or fear of criticism.”¹⁶⁶ In evaluating whether a judge possesses integrity, respondents might be asked whether the judge engages in or allows *ex parte* communications; prejudices issues or cases; rules based on the law; or is affected by ethnic, racial, or gender bias.¹⁶⁷

Similarly, the criteria can be measured. Whether a judge writes clearly, applies the law, makes reasoned decisions, acts courteously, rules definitively, or behaves with dignity are all objective factors that can be evaluated by those who appear before or have interaction with the judge. More importantly, these criteria, used by states with JPE programs and referenced throughout history as indicative of good judging, are far more informative than campaign advertisements.

162. Aldisert et al., *supra* note 160, at 51 (views of Justice Samuel J. Roberts).

163. TENN. JUDICIAL PERFORMANCE & EVALUATION PROGRAM, COURT EMPLOYEE QUESTIONNAIRE (on file with author).

164. KAN. SURVEY OF ATTORNEYS, *supra* note 139.

165. THE MO. BAR, *supra* note 138.

166. UTAH ST. COURTS, *supra* note 144.

167. *See, e.g.*, KAN. SURVEY OF ATTORNEYS, *supra* note 139 (“[t]reats parties equally regardless of race, sex or economic status” and “[r]efrains from inappropriate *ex parte* communications”); THE MO. BAR, *supra* note 138 (“[t]reats people equally regardless of race, gender, ethnicity, economic status or any other factor” and “[b]ases decisions on evidence and arguments”).

4. Dissemination of JPE Results

One of the most important aspects of JPE programs is how and to whom evaluations are disseminated. If JPE results are to provide meaningful supplements to inappropriate cues about judges, they must be broadly distributed to the electorate. States disseminate JPE results in various ways.¹⁶⁸ Some states publish the results in newspapers, others post them on a webpage, and still others include the information in voter guides that are distributed to registered voters.¹⁶⁹ As a matter of best practices, states should publicize the evaluation process as well as the evaluation results. The process and the results should be outlined in the media, in user-friendly websites, and in brochures mailed to registered voters. The public should be informed as to how the evaluation system works and how they may participate in it. In advance of disseminated evaluations, a well-informed public would understand the process and appreciate its neutrality and legitimacy.

As the Institute for the Advancement of the Legal System has noted, “[a] commitment to public judicial performance evaluation involves a concomitant commitment to assuring that the results are widely known”¹⁷⁰ States should not hamper the effectiveness of their JPE programs by allowing economic concerns to limit distribution. The goal should be to distribute the evaluations to as many citizens as possible in as many formats as possible. In addition, an explanation of the court system and the evaluative process should accompany the results, as should any specific explanation necessitated by either the process or the results.¹⁷¹ In this way, the distribution provides an additional opportunity to educate the public about a unique aspect of state courts.

168. See *infra* note 171.

169. Arizona, Alaska, Colorado, and Utah provide JPE results to registered voters. KEVIN ESTERLING & KATHLEEN SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATION 21 (1998). Both Alaska and Arizona publish JPE results on the Internet. Alaska Judicial Council, <http://www.ajc.state.ak.us> (last visited Aug. 1, 2009); Ariz. 1998 Voter Information Guide, <http://www.supreme.state.az.us/jpr/Archives/voteinfo.pdf> (last visited Aug. 1, 2009). Tennessee publishes JPE results in the state’s major newspapers.

170. TRANSPARENT COURTHOUSE, *supra* note 114, at 10.

171. Interpretation of the evaluations may sometimes require background knowledge that must be provided by the evaluation body. For example, attorneys in Colorado rated an appellate judge “low” on a survey question asking whether the judge explained her decisions. The Colorado Commission on Judicial Performance commented that it “does not give this [rating] much weight” because the judge was the Chief Judge who “is responsible for writing most of the court’s summary decisions, which do not require extensive explanation.” Commission on Judicial Performance, Colorado Court of Appeals: Honorable Janice B. Davidson, <http://www.cojudicialperformance.com/retention.cfm?ret=106> (last visited Aug. 1, 2009).

B. Using JPE Results to Fill the Information Vacuum, Supplement Negative Images, and Enhance Institutional Legitimacy

Judicial races have been characterized as “low-information” contests¹⁷² leading to low voter turnout and voter roll-off problems.¹⁷³ Conversely, the information provided by JPE evaluations is not only helpful to those seeking relevant information about judicial candidates, but the information also stands in stark contrast to the information provided by judicial campaign activity. For example, a judge’s evaluation might tell the public that 87% of the lawyers who have appeared in the judge’s courtroom evaluate her “knowledge and application of the law” as excellent, while only 70% rate her “promptness of rulings and decisions” as satisfactory. The same judge might be evaluated by jurors as excellent on “avoid[ing] undue personal observations or criticisms of litigants and lawyers” but “deficient” in her ability to “treat people equally regardless of race, gender, or ethnicity.” Based on these and many other objective criteria, the public, and the voter, can evaluate the judge’s performance.¹⁷⁴ In contrast, campaign advertisements may depict “Lady Justice, lifting her blindfold to watch ‘\$750,000 from personal injury lawyers’ tilt the scales she held aloft” while a voice-over asks “[is] justice for sale?”¹⁷⁵ Other advertisements portray courtrooms where judges appear to be sleeping on the bench.¹⁷⁶ The public may receive robocalls from Phyllis Schlafly or John Ashcroft, urging them to vote as Schlafly or Ashcroft would.¹⁷⁷ The use of robocalls is a recent addition to judicial elections, and, because they are common in executive and legislative races, their use undermines the effort to distinguish judicial elections from other elections.

The kind of information imparted through special interest advertising is also in stark contrast to that produced by JPE programs. Special interest advertisements will inform the public which judges are “born again Christian[s]” and will allow them to read the judge’s “testimony,” while JPE results will relate the degree of the judge’s fairness, courtesy, and humility.

172. Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE 141* (Matthew J. Streb ed., 2007).

173. “Voter roll-off” refers to the phenomenon of voters casting votes only for the offices that appear at the beginning of the ballot.

174. While this Article discusses how judicial performance evaluations are used to evaluate incumbent judges, similar evaluation programs have been devised for those seeking judicial office for the first time.

175. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE*, *supra* note 172, at 73, 78.

176. The “sleeping judge” advertisement accused Michigan Chief Justice Cliff Taylor of sleeping during the argument of a case. The ad features a judge-actor who nods off on the bench and concludes that Justice Taylor “needs a wake-up call.” GavelGrab, *Attack Ad Targets ‘Sleeping Judge’* (Oct. 24, 2008), <http://www.gavelgrab.org>.

177. *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, *supra* note 86, at 9.

Special interest questionnaires will reveal “what actions” the judge has “personally taken on the issue of pro-life” and whether the judge will agree to “display the Ten Commandments” in the courtroom,¹⁷⁸ while JPE results will address whether the judge follows judicial precedent. Knowledge of the judicial candidate’s personal viewpoints on social issues tells the public little more than what the judge would do if elected as a legislator or governor and, perhaps, what the judge will do in betrayal of the duties of judicial office. Even if one accepts the view that a judge’s personal viewpoints are pertinent considerations in an election, performance evaluations still play a crucial role in focusing the public’s attention on apolitical, neutral measurements of judicial qualification as well.

In addition to providing what is arguably irrelevant information about a candidate’s personal viewpoints, campaign materials often distill complex legal issues into emotive, misleading oversimplifications. For example, advertisements often describe a judicial decision that led to a retrial or reversal in a criminal case as “letting” the criminal “walk free”¹⁷⁹ with no discussion of what led the court, or judge, to make the decision. Similarly, a judge’s decision in a sexual harassment case may be described as making it “legal for employers to harass women on account of their sex” and leaving “no woman . . . safe” if the judge remains on the bench,¹⁸⁰ with no reference to burdens of proof or issues of credibility. In this way, campaign advertisements promote the idea that judges should be politicians who decide cases based on public sentiment, not on the rule of law.

These strong contrasts between the information the public receives from the dissemination of JPE results and the information the public receives from campaign activity accentuate the critical role that JPE programs can play in informing the public, improving their knowledge, and enhancing public trust and confidence in state courts. Among individuals with little knowledge about state courts, JPE results can provide meaningful information relevant to the task of judging. This information not only will fill the vacuum of comprehension but also will serve as a counterbalance to the less meaningful information imparted by campaign activity. When the only available information is that supplied by policy-based campaigns, the public must assume that a judge’s political views are most salient to selection. But when that information is balanced with information provided by JPE programs, the public can

178. A copy of a questionnaire used by the Alabama Christian Coalition can be viewed at *Votelaw*, Edward Still’s Blog on Law & Politics, 10 Commandments – 10 Questions (Feb. 9, 2004), <http://www.votelaw.com/blog/archives/001250.html>.

179. One example of an advertisement of this kind can be viewed at Brennan Center for Justice, *New Politics of Judicial Elections 2006: Realplayer* (Nov. 7, 2006), http://www.brennancenter.org/content/resource/new_politics_of_judicial_elections_2006_realplayer/.

180. A transcript of this advertisement is included in N.C. Center for Voter Education, *N.C. Bucks Trend of Nasty Judicial Elections* (Nov. 11, 2007), http://www.ncjudges.org/media/news_releases/11_11_04.html.

more meaningfully consider a judge's qualifications for office and, in turn, more favorably view the work of the courts.

In individuals with greater knowledge about state courts, the information provided by JPE programs can foster increased confidence and support by increasing voter awareness and participation. By providing more relevant information than that provided in current "low-information"¹⁸¹ judicial races, the JPE results will likely increase voter turnout and participation.¹⁸² Moreover, voters will be better informed and prepared to select judges based on appropriate criteria.¹⁸³

Some argue that publicizing the results of these evaluations cannot have the same impact as a politicized judicial campaign.¹⁸⁴ While it is inherently difficult for publicized JPE results to command as much attention or excitement as a name-calling, mud-slinging campaign, the impact of the JPE programs may be intensified as states work to find more creative ways to advertise evaluations and as the public becomes more acquainted with the uniqueness of the judiciary and the relevance of performance evaluation criteria. As the public begins to appreciate JPE programs, their use will be capable of impacting elections in a way that could quell the influence of special interests. A decade-old study by the American Judicature Society found "relatively clear evidence that voters indeed use this kind of judicial performance information . . ."¹⁸⁵ Moreover, a recent study confirms that "[w]idespread use of JPE programs can . . . shift[] public focus away from political positions or particular case outcomes and toward the process of adjudication."¹⁸⁶ In this way, JPE programs provide much-needed knowledge for the uninformed. Importantly, these programs counterbalance the negative images created by

181. Baum & Klein, *supra* note 172, at 141.

182. "The more that voters know about the candidates for a judgeship, the less likely they are to skip over that contest in the election booth." *Id.* at 142.

183. *Id.* "When voters who are starved for information rely on what the ballot tells them, they are not basing their decisions on information about judges' work on the bench, whether the past performance of a judge in office or the prospective performance of a nonincumbent." *Id.*

184. Susan M. Olson, *Voter Mobilization in Judicial Retention Elections: Performance Evaluations and Organized Opposition*, 22 JUST. SYS. J. 263, 278-79 (2001) (arguing that campaigns often involve dramatic stories that cannot be replicated by dry statistics and commentary of JPE).

185. Kevin M. Esterling, *Judicial Accountability the Right Way*, 82 JUDICATURE 206, 210 (1999); *but see* Olson, *supra* note 184, at 277 (arguing that "judicial performance evaluations are unlikely on their own to lead voters to differentiate greatly among judges" and that opposition campaigns are more powerful than evaluations in affecting voter choice). For an in-depth discussion of this study from the symposium, see Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573 (2009).

186. Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 202 (2007).

campaign activity. Over time, these programs can reeducate the public about the unique role of judges and the legitimacy of the least understood branch.

JPE programs continue to be almost exclusively the tool of retention states. Yet many retention states do not use JPE programs to their full potential, using them instead as only a means of self-improvement for judges. Retention states with limited-use JPE programs are missing a prime opportunity to use JPE to educate the public about the proper role of judges and the role of courts in our society. They should endeavor to expand their programs and disseminate a description of the program and the results of each judge's evaluation in advance of each judicial election. In addition, states that have sought unsuccessfully to alter their method of judicial selection should consider a system that combines merit selection, retention election, *and* broad-based judicial evaluations. By combining a comprehensive, meaningful performance evaluation with a retention election, states can address some of the frequent criticisms of judicial retention systems and provide the public with a means of selecting good judges to sit on state court benches.

VI. CONCLUSION

If confidence in the judiciary truly is the “backbone of the rule of law,”¹⁸⁷ then judicial performance evaluations are invaluable. Judicial performance evaluations measure judicial performance based on objective criteria that are essential to good judging and provide more meaningful cues and signals than do political campaigns and news and entertainment media. Unlike judicial campaigns that emphasize competition and conflict, the results of critically designed, properly administered, and widely disseminated judicial performance evaluations serve to inform the public while promoting trust and confidence in the judicial branch, prerequisites to the branch's continued legitimacy as a respected and fair governmental institution.

187. *Bush v. Gore*, 531 U.S. at 128 (Stevens, J., dissenting).