

# Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions

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## ABSTRACT

The system of privately financed elections of judges in most states across the country has long been controversial, with both the scholarship and advocacy relating to this subject directed toward identifying the problems of public perception and potential for biased decisions and then focusing on solutions that range from merit selection to public campaign financing to recusal. The Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.* addresses the problem by finding a due process violation when a contribution or donation is likely to have a "significant and disproportionate influence" on the judge's election. At the same time, the Court's decision in *Citizens United v. FEC* opens the door to unfettered corporate support for (or opposition to) judicial candidates.

This essay examines from a social science perspective the potential for campaign contributions to undermine judicial impartiality as a result of unconscious operation of the principles of reciprocity and denial. The author concludes that these principles combine to create a probability that judges will be influenced by campaign support from lawyers and parties appearing before them, even if the amounts of money involved are not "significant and disproportionate." Thus, reliance on the judge's decision to recuse—under almost any standard—will likely be inadequate to combat that influence. In states that do not abandon judicial elections, the potential impact of the reciprocity principle might be mitigated by rules preventing assignment of a case to a judge who has received contributions from a party or counsel, by requiring judges to make public at the commencement of consideration of any case or appeal any donations or contributions by parties or counsel, and possibly by a statement that such contributions will not affect the judge's impartiality.

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#### INTRODUCTION

*It is easy to say that a judge who has a financial stake in the outcome is not impartial. But how about a judge who receives a campaign contribution from one side? A big campaign contribution? A whopping campaign contribution?*<sup>1</sup>

Society asks judges to be wise, learned, sober, fair, impartial, and, some would add, restrained or empathetic. Unfortunately, society all too often asks judges to be superhuman, too. When judges are elected and must raise campaign contributions from those who may appear as counsel or parties before them, two fundamental human traits – reciprocity and denial – make it impossible for those judges to recognize threats to their impartiality, and difficult to recuse themselves as frequently as they should. Reciprocity, the often unconscious impulse to return a favor, and denial, the inability to confront or even perceive inconvenient facts, produce serious and vexing problems for the judicial systems in the thirty-

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<sup>1</sup>Bauer v. Shepard, 620 F.3d 704, 717 (7th Cir. 2010) (Easterbrook, C.J.) (emphasis in original).

nine states that use some form of election to select and retain judges.<sup>2</sup> The question none of these states has answered: How can judges operate in a neutral fashion within a fair system of justice when those judges must depend upon lawyers and their clients to support and contribute to judicial campaigns?

This problem is both fundamental and growing. “The law makes a promise – neutrality. If the promise gets broken, the law as we know it ceases to exist,” Supreme Court Justice Anthony M. Kennedy stated more than a decade ago,<sup>3</sup> when campaign costs were considerably lower than they are today.<sup>4</sup> Twenty of the twenty-two states with contestable Supreme Court elections set new records for election costs in 2000-2009.<sup>5</sup> This spending has predictable consequences. “The more money that’s poured into judicial elections the more likely it is that courts will become places that react to special interest groups rather than to the concept of impartial justice,” said Indiana Supreme Court Chief Justice Randall Shepard.<sup>6</sup> This fear is well-grounded: the data suggest that “the judicial candidate with the most funds in a race general[ly] wins the election.”<sup>7</sup>

America’s Founding Fathers recognized the need to insulate judges from the prejudicial impact election campaigns would cause. Article II of the United States Constitution provides for the appointment of federal judges,<sup>8</sup> and Article III grants them life tenure. States, on the other hand,

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<sup>2</sup>James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CENTER FOR JUSTICE 10 (2008), available at [http://brennan.3cdn.net/1afc0474a5a53df4d0\\_7tm6brjhd.pdf](http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf).

<sup>3</sup>Associate Justice Anthony M. Kennedy, Address at to American Bar Association Symposium, *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice* (Dec. 4-5, 1998) Philadelphia, Pennsylvania.

<sup>4</sup>James Sample, Adam Skaggs, Jonathan Blitzer & Linda Casey, *The New Politics of Judicial Elections 2000-2009: Decade of Change*, JUSTICE AT STAKE CAMPAIGN 1 (2010), available at [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf). The money going into judicial elections nationwide continues to soar. According to Justice at Stake: “Through Monday, Nov. 1, 2010, slightly more than \$12 million was spent nationally on TV air time this year in state supreme court elections. Of that, nearly \$5.1 million — 42% of total spending for the year — was spent in the week leading up to the election, between Oct. 26 and Nov. 1.” Available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/2010\\_judicial\\_elections\\_increase\\_pressure\\_on\\_courts\\_reform\\_groups\\_say?show=news&newsID=9129](http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say?show=news&newsID=9129).

<sup>5</sup>*Id.*

<sup>6</sup>Scott Michels, *Judicial Elections Turn ‘Bitter, Nasty,’ and Pricey*, ABC NEWS, June 19, 2007, available at <http://abcnews.go.com/TheLaw/story?id=3292991&page=1>.

<sup>7</sup>James J. Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality* 22 (Hofstra U. Legal Stud. Reaserach, Working Paper No. 10-29, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1662630](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662630).

<sup>8</sup>U.S. CONST. art. II, § 2.

have gone back and forth between appointing and electing judges;<sup>9</sup> currently only eleven states have no judicial elections.<sup>10</sup>

Against that backdrop, I argue in this essay that judicial elections cause greater harm to our system than even the reformers have suspected. Not only do the huge sums of money and increasing partisan rancor make it difficult, if not impossible, for judges to maintain their independence, but the psychology of reciprocity and denial undermine reliance on recusal as a tool for ensuring impartiality. Reciprocity, an inherent trait of human nature, makes judges susceptible to being influenced unduly, and unconsciously, by campaign supporters, even those who give seemingly insignificant sums. At the same time, the natural tendency toward denial weakens judges' ability to perceive and confront those conflicts of interest.

While I have explored the relationship between reciprocity and congressional gifts, travel, and campaign contributions,<sup>11</sup> the idea that the magnetic pull of reciprocity might have some impact on judicial decisionmaking first occurred to me during a fascinating discussion on judicial elections, entitled "The Debate Over Judicial Elections and State

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<sup>9</sup>Appointment gave way to election during the Jacksonian era, riding in on the coattails of democratic populism. Judyth Pendell, *Introduction* to CENTER FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE, CONFERENCE SERIES NO. 6, JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE 1-2 (2001), available at [http://www.manhattan-institute.org/html/mics\\_6.htm](http://www.manhattan-institute.org/html/mics_6.htm). In 1937 the American Bar Association adopted a policy encouraging merit-based selection of judges, and in 1940 Missouri led the way in establishing such a system. A.B.A. Standing Committee on Judicial Independence, *Standards on State Judicial Selection*, 2000 COMM'N ON STATE JUDICIAL SELECTION STANDARDS REP. 32, available at <http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/reformat.authcheckdam.pdf>.

<sup>10</sup>See Sample, *supra* note 2.

<sup>11</sup>I first applied the reciprocity principle to lobbying the Congress in a speech, later published as an essay, where I called for Congress to reduce the effects of reciprocity on legislators' actions by reducing the opportunities for lobbyists to provide gifts, travel, and other favors to legislators. Thomas M. Susman, *Lobbying in the 21st Century—Reciprocity and the Need for Reform*, 58 ADMIN. L. REV. 737, 747-49 (2006). Congress took a large step in that direction with the Honest Leadership and Open Government Act of 2007, where it banned lobbyists from providing gifts, entertainment, and travel to members of Congress and their staffs. Pub. L. No. 110-81, 121 Stat. 735, 747 § 206. In a later essay I applied this principle to congressional campaigns, observing that "political campaigns will continue to provide a multifaceted outlet for lobbyist activities that will inevitably and even unconsciously trigger reciprocal action by the elected official" and arguing for removing (or at least severely reducing) opportunities for lobbyists to gain favor of elected officials through contributing to and otherwise participating in campaigns. Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STANFORD L. & POL'Y. REV. 10, 18-20 (2008).

Court Judicial Selection,” held at Georgetown Law School.<sup>12</sup> This essay has been germinating ever since.<sup>13</sup>

It is inescapable that the combination of reciprocity and denial will inflict damage to the courts if safeguards are not adopted and enforced. This essay explores a new dimension in assessing the problem. Various potential solutions have been advanced – including merit selection, executive appointments, more rigorous and refined disqualification procedures, both anonymous and public financing of elections, and diversion of cases from judges who have received contributions from counsel or parties. Each state will need to decide which of these approaches best (and constitutionally) serves the cause of promoting fairness and impartiality of elected state court judges. I favor the approach adopted in February 2011 by the New York courts (screening and reassignment of cases by court clerks), discussed in the concluding section, and suggest another approach that also does not require systemic changes of constitutional dimension in the states (full disclosure and disclaimer in each case in which a supporter or contributor is a party or counsel). For brevity, in this essay I will refer to both direct contributors and supporters through indirect donations as “supporters.” But first, the problem.

#### I. THE APPEARANCE OF IMPROPRIETY: THE PROBLEM PEOPLE SEE

The appearance of impropriety can be as damaging to the integrity of the justice system as quid pro quo exchanges between campaign supporters and judges. National surveys show that only five percent of Americans believe that contributions made to judicial campaigns do *not* influence judicial decisions in any way.<sup>14</sup> Furthermore, the exponential increase in the cost of campaigns for elected judges is contributing to these negative perceptions. Between 2000 and 2004, the total amount of money

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<sup>12</sup>Georgetown University Law Center, Conference on the Debate over Judicial Elections and State Court Judicial Selection (Oct. 17, 2007), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=422>.

<sup>13</sup>The idea of applying the reciprocity principle to gifts and travel to members of Congress was derived from the insightful work on reciprocity by Professor Robert Cialdini and set out in ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 149 (4th ed., 2001). Professor Cialdini has been an invaluable critic and inspiration during the final stages of development of this essay.

<sup>14</sup>Greenberg Quinlan Rosner Research & American Viewpoint, *Justice at Stake Frequency Questionnaire 4* (Oct. 30-Nov. 7, 2001), (surveying 1000 registered voters), available at [http://www.gqrr.com/articles/1617/1412\\_JAS\\_ntlsurvey.pdf](http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf), cited in James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 *JUDGES' J.* 17, 18 (2007). A February 2011 poll found that “94 percent of North Carolina voters believe campaign contributions have some sway on a judge’s decision, including 43 percent who say campaign donations can greatly affect a ruling.” [http://ncvoterred.com/research/2011/2\\_22\\_11\\_judicial\\_poll.php](http://ncvoterred.com/research/2011/2_22_11_judicial_poll.php).

candidates raised increased sixty-seven percent over the figure from 1994-98.<sup>15</sup> After raising \$2.6 million to win a seat on the Alabama Supreme Court, Chief Justice Sue Bell Cobb remarked on the damaging nature of the process, “People need to have complete faith in the courts, and raising large amounts of money doesn’t give people comfort that they have an independent judiciary.”<sup>16</sup> Even if judges are not explicitly ruling in favor of their supporters to repay them for their contributions or donations, the appearance of conflicting interests seems strong enough to lead the public to question the neutrality of the elected judges.

Chief Justice Cobb is not alone in her concerns; many judges perceive elections as corrosive to impartial courts. In one survey, seventy-two percent of state court appellate and trial judges said they believe that campaign contributions have at least a little influence on decisions made by elected judges.<sup>17</sup> But is this common perception an accurate reflection of reality? A number of empirical studies on the state supreme court level found a very strong correlation between campaign contributions and outcomes favorable to the contributing party.<sup>18</sup> The judges studied ruled in favor of their contributors sixty-five to ninety percent of the time.<sup>19</sup> However, correlation alone does not prove causation; some contributors might be predisposed to support judicial candidates whose judicial philosophies would make them more likely to rule in ways supporters would favor. Others might simply hedge their bets by giving to competing judicial candidates in a race.

But the data and the attitudes of contributors support the contention that contributions affect the outcomes.<sup>20</sup> Consider the comment by Justice Paul E. Pfeifer, an Ohio Supreme Court justice, reported by *The New York Times*, that “[e]veryone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not,

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<sup>15</sup>Sample, *supra* note 7, at 17.

<sup>16</sup>Michels, *supra* note 6.

<sup>17</sup>Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake State Judges Frequency Questionnaire 5 (Nov. 5, 2001-Jan. 2, 2002), [http://www.gqrr.com/articles/1617/1411\\_JAS\\_judges.pdf](http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf) (surveying 2428 judges), *cited in* James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 *JUDGES’ J.* 17 (2007).

<sup>18</sup>Sample, *supra* note 7, at 11-12.

<sup>19</sup>*Id.* See also Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of actual Bias in Decisions Involving Campaign Contributors*, 10 *GLOBAL JURIST* at \*4 (October 2010), available at <http://www.bepress.com/gj/vol10/iss3/art4> (concluding that “from various angles of observation the findings show that the judicial voting patterns sharply favored the contributors’ interests.”).

<sup>20</sup>*Id.*

it's hard to say.”<sup>21</sup> Even the Supreme Court takes for granted this link between contributors and “political outcomes” favorable to supporters:

It is in the nature of an elected representative to favor certain policies and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason . . . to make a contribution to [] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.<sup>22</sup>

## II. THE PSYCHOLOGICAL EFFECTS: THE PROBLEM PEOPLE DO NOT SEE

Judges, of course, are only human and are thus subject to a variety of influences that transcend the law and evidence before them.<sup>23</sup> We can readily perceive the likelihood of bias when a family member or close friend appears before a judge as a party, and rules have been crafted to address these problems. Less conscious may be the influence of physical attractiveness; research suggests that good-looking people are more likely to receive highly favorable treatment in the legal system,<sup>24</sup> yet we have not even begun to articulate guidance or cautionary measures to counter this kind of influence.

This essay does not deny that there are many psychological, often unconscious factors that influence judicial decisionmaking. I leave open for discussion the description of these problems and an exploration of possible solutions.<sup>25</sup> But the influence of private campaign contributions that enable (or disable) the election of judges in many states has recently received a great deal of attention in the courts, the academy, and the media. The focus, however, has principally been on how courts might interpret and administer disqualification standards to address the problem of

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<sup>21</sup>*Id.* at 12.

<sup>22</sup>*McConnell v. Federal Election Comm'n*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.), quoted with approval in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 910 (2010).

<sup>23</sup>The Framers of the U.S. Constitution authorized diversity jurisdiction for the federal courts to guard against “local bias” against nonresident litigants. See *Guarantee Trust Co. v. York*, 326 U.S. 99 (1945). The “home field advantage” is a well-known phenomenon in the sports world. Tobias J. Moskowitz & Jon Wertheim, “What’s Really Behind Home Field Advantage,” *Sports Illustrated* 66 (Jan. 17, 2011).

<sup>24</sup>ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 149 (4th ed. 2001).

<sup>25</sup>See generally EILEEN BRAMAN, *POLITICS & PERCEPTION* 5 (2009) (“Put simply, empirical evidence demonstrates that judges tend to vote for outcomes consistent with their policy preferences.”).

significant and disproportionate influence on judicial decision making. This essay proposes that, where support for a judge's campaign is the problem, leaving the recusal decision to the judge who has received that support is likely to be an inadequate solution.

*A. The Reciprocity Principle*

The essence of the reciprocity principle is that if we have directly benefited from another's favor, returning the favor is considered good form, perhaps even socially required. Psychologist Dennis Regan conducted experiments in the 1970s that identified the principle as a force in human interactions. He tested two specific hypotheses: (1) subjects are more likely to comply with a request made by someone who has done them a favor than with a request made by someone who has not, and (2) subjects are more likely to comply with a request made by someone they like than with a request made by someone they do not like. During these experiments, subjects believed they were participating in an art appreciation project. In some instances, the researcher's assistant (pretending to be another subject) unexpectedly bought the subject a soft drink during a break; in other cases, this did not occur. The assistant also varied his demeanor and, at the end of the experiment, asked the subjects to purchase raffle tickets.

Regan found that receiving a soft drink "more than doubled the proportion of the subjects buying more than a single ticket."<sup>26</sup> Surprisingly, the likeability of the assistant did not influence the subject's willingness to purchase the tickets when there was an existing obligation to the requester (When the obligation was not present, there was a positive correlation between liking the requester and compliance with his lottery ticket request—an unsurprising result given the literature on liking and influence).<sup>27</sup> Regan concluded that "the favor affects compliance not because it makes the recipient more attracted to the favor-doer – although the favor does indeed have this effect – but because the recipient feels obligated to reciprocate the favor."<sup>28</sup>

Discussing Regan's work, Professor Robert Cialdini, author of *Influence*, observed that "[f]or those who owed [the assistant] a favor, it made no difference whether they liked him or not; they felt a sense of

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<sup>26</sup>Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 627, 634 (1971).

<sup>27</sup>See text accompanying notes 48-50 *infra*.

<sup>28</sup>Regan, *supra* note 26, at 635.



obligation to repay him, and they did.”<sup>29</sup> Cialdini also discussed other aspects of the reciprocity rule: for example, “[a] person can trigger a feeling of indebtedness by doing us an uninvited favor,” and “[a] small initial favor can produce a sense of obligation to agree to a substantially larger return favor.”<sup>30</sup> In short, for all individuals the reciprocity principle is ingrained, subconscious, and universal.

In a study conducted a few years later, a professor carried out an experiment in which he mailed Christmas cards to complete strangers.<sup>31</sup> Most recipients responded by sending a card back to the original sender without explicitly questioning the sender’s identity. Though the greeting card experiment is a rather benign example, the implications it carries for judicial politics can be dangerous. An elected judge may not even be aware of the extent to which he or she is returning the favor or acting within the bounds of “acceptable” social norms under a premise of making an independent judicial decision.

Social scientists believe that the reciprocity principle developed as part of human social evolution. “A widely shared and strongly held feeling of future obligation made an enormous difference in human social evolution, because it meant that one person could give something (for example, food, energy, care)” knowing full well that the recipient of their goodwill would in turn repay them.<sup>32</sup> Sociologists consider this trait so engrained in human nature that it can be identified in every society, despite cultural differences. Professor Alvin Gouldner went so far as to conclude that the “norm of reciprocity is . . . no less universal and important an element of culture than the incest taboo,” that it is “found in all value systems,” and that it is “universally present in moral codes.”<sup>33</sup>

### *B. Denial*

When combined with the natural inclination to reciprocate favors, a natural inclination toward denial becomes a dangerous force in judicial elections, where judges’ recusal decisions are final. Sigmund Freud characterized denial as “a defense against external realities that threaten the

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<sup>29</sup>ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 23 (4th ed., 2001).

<sup>30</sup>*Id.* at 30, 33.

<sup>31</sup>*Id.* at 17.

<sup>32</sup>*Id.* at 18.

<sup>33</sup>Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOCIOLOGICAL REV. 161, 171 (1960). Gouldner cites one source after another on the universal – and indispensable – role of reciprocity in insuring social stability, starting with Cicero: “There is no duty more indispensable than that of returning a kindness.” *Id.* at 161.

ego.”<sup>34</sup> In politics, defenses against threats to one’s ego are all too common.

Stanley Milgram conducted the earliest psychological experiments to explore obedience and the willingness of individuals to do things they would strongly deny being capable of doing. Milgram’s obedience experiments in the 1960s explored the limits of an individual’s moral compass. An instructor asked participants to administer electric shocks to another individual. The participant did not know the shocks were fake. As the voltage increased, the supposed “recipient” of the shocks began to react verbally as if in greater and greater pain, but the majority of the participants continued administering shock treatments until the instructor announced the end of the experiment. Though these experiments are most often discussed in the context of torture and cruelty, they also “teach us that in a concrete situation with powerful social constraints, our moral sense can easily be trampled.”<sup>35</sup>

Other social scientists have conducted experiments to assess the natural ability of individuals to deny illicit behaviors of friends and family. There is a consensus in the field that individuals are more likely to overlook the transgressions of those close to them than those of individuals with whom they have no existing relationship. Psychologists in Vancouver experimented with a simulated game in which participants were responsible for a group of investments with a partner. The players had the option of cutting out their partner if she cheated in some way. The subjects were willing to overlook multiple violations by friends but would not put up with violations by anyone with whom they had no established relationship.<sup>36</sup> “The closer you look, the more clearly you see that denial is part of the uneasy bargain we strike to be social creatures,” said University of Miami psychologist Michael McCullough, author of *Beyond Revenge: The Evolution of the Forgiveness Instinct*.<sup>37</sup> One implication of this work is that judges may overlook actions of friends that outsiders would perceive as inappropriate.

The response to Milgram’s results further demonstrates the strong inclination to deny, despite clear evidence to the contrary. After describing the results of his electric shock experiment to audiences, he asked groups

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<sup>34</sup>Benedict Carey, *Denial Makes the World Go Round*, N.Y. TIMES, Nov. 20, 2007, at F1.

<sup>35</sup>Thomas Blass, *The Man Who Shocked the World*, PSYCHOLOGY TODAY (Mar. 1, 2002), <http://www.psychologytoday.com/print/23584>. The original experiments are fully described in Stanley Milgram, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

<sup>36</sup>Carey, *supra* note 34.

<sup>37</sup>*Id.*

to guess how many people would comply fully and whether they believed they could ever personally comply all the way to 450 volts. “People typically guessed that at most one . . . out of a thousand would comply – and no one believed that they themselves would.”<sup>38</sup> The facts clearly demonstrated otherwise: 63 percent of subjects were willing to administer the full voltage. When only 26 percent of judges polled admit that campaign contributions might have some affect on judicial decisions<sup>39</sup> —as opposed to 76 percent of the general public<sup>40</sup> —might the denial mechanisms of many of the jurists polled be at work?<sup>41</sup>

If a natural human defense mechanism involves denying transgressions without triggering a guilt response, the implications for the judicial elections system could be troubling. This denial is not insidious or sinister. Perhaps it is fair to characterize the problem as a judicial “blind spot.”<sup>42</sup> The plain fact is that influence is often unconscious, with the “stimulus perceived, but . . . not evaluated as influential.” “Individuals suffer from an introspection illusion when judging the cause of their own behavior.”<sup>43</sup> Since the recusal “decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter,”<sup>44</sup> then the inclination to deny

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<sup>38</sup>DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 240 (Cambridge U. Press 2007), citing ARTHUR G. MILLER, *THE OBEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE* 13, 21 (1986).

<sup>39</sup>Available at [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf).

<sup>40</sup>Available at [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf). This number dropped to 71% a few years later, perhaps reflecting growing public apathy or callousness. Bert Brandenburg, *Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions*, JUSTICE AT STAKE CAMPAIGN (Sep. 8, 2010), [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/9810\\_solid\\_bipartisan\\_majorities\\_believe\\_judges\\_influenced\\_by\\_campaign\\_contributions?show=news&newsID=8722](http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722).

<sup>41</sup>If subjects wildly underestimate their unwillingness to inflict excruciating pain on another person, should we be surprised that judges underestimate their ability to be influenced by campaign contributions? Likewise, subjects vastly underestimate the likelihood of compliance by others as well, resulting in part, according to Luban, “from the ‘false consensus effect,’ the well-confirmed tendency to exaggerate the extent to which others share our beliefs.” David Luban, *supra* note 38 at 241, n.9.

<sup>42</sup>See the discussion of studies that reveal that people “generally are poor at self-assessment” in Charles Gardner Geyh, *Why Judicial Disqualification Matters—Again* 39 (unpublished manuscript); see also EILEEN BRAMAN, *LAW, POLITICS & PERCEPTION* 14 (2009) (“the main thrust of much empirical research on decision making has been to demonstrate the substantial disconnect between what judges do (represented by case votes) and the objective criteria that judges say guides their decisional behavior”).

<sup>43</sup>Jessica M. Nolan, P. Wesley Schultz, Robert B. Cialdini, Noah J. Goldstein & Vidas Griskevicius, *Normative Social Influence is Underdetected*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 913, 914 (2008). The authors conclude that “asking people what they think would influence them may not provide good data on which to base solutions. In fact, our results suggest that people hold incorrect beliefs about what motivates them . . .” *Id.* at 921.

<sup>44</sup>Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 *U. KAN. L. REV.* 531, 536 (2005).

wrongdoing and the creeping influences of reciprocity go unchecked by current recusal methods.<sup>45</sup>

### *C. Overcoming the Presumption of Impartiality*

According to Blackstone, “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends on that presumption and idea.”<sup>46</sup> Through the subsequent centuries, however, this presumption has been eroded: Judges, legislatures, and the American Bar Association (ABA) have evolved various standards for testing whether a judge should be disqualified, culminating in the current appearance-of-partiality standard.<sup>47</sup> According to the American Bar Association’s Code of Judicial Conduct, which has been adopted by almost every state: “A judge shall avoid impropriety and the appearance of impropriety.”<sup>48</sup>

Why isn’t the admonition of the Code of Judicial Conduct, coupled with each judge’s oath to uphold the law, sufficient to gird elected judges to resist the siren call of reciprocity? Doesn’t a judge’s training and the entire pomp and circumstance of courtroom, robe, and elevated dais shield the judicial decisionmaker from unconscious favoritism? These are worthy objections; to note that the powerful pull of reciprocity has been shown to extend well beyond the laboratory is surely one compelling response.<sup>49</sup> Another answer may lie in the many studies that reveal other sources of unconscious bias in judicial proceedings.<sup>50</sup>

Two other factors tend to support the conclusion that reciprocity may trump the judiciary’s injunctive norm to avoid partiality. One is the reinforcing effect that “liking” would have regarding the donor of contributions to a judge’s campaign. Professor Cialdini begins his chapter

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<sup>45</sup>For a detailed exposition of cognitive dissonance and the psychological evidence on denial, see generally CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* (2007).

<sup>46</sup>3 WILLIAM BLACKSTONE, *COMMENTARIES*\* 361.

<sup>47</sup>The evolution of these standards, beginning with the common law presumption of impartiality, is explored in Charles Gardner Geyh, *Why Judicial Disqualification Matters—Again* 7 (unpublished manuscript).

<sup>48</sup>MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004); see *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009).

<sup>49</sup>Professor Cialdini considers the reciprocity principle “overpowering”; it is so strong that it simply overwhelms the influence of other factors that normally affect the decision to comply. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 22-23 (4th ed. 2000). Recent studies support the primal force of reciprocity: researchers have found that infants show a selective interest in helping those who have shown a willingness to give them a toy, even when the toy is not given. Kristen A. Dunfield & Valerie A. Kuhlmeier, *Intention-Mediated Selective Helping in Infancy*, *PSYCHOL. SCI.* (March 2010).

<sup>50</sup>ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 149 (4th ed. 2000).

on “Liking” with the sentence: “Few of us would be surprised to learn that, as a rule, we most prefer to say yes to the requests of people we know and like.”<sup>51</sup> Moreover, “several of the factors leading to liking . . . have been shown to work unconsciously to produce their effects on us, making it unlikely that we could muster a timely protection against them.”<sup>52</sup> It is not a stretch to assume that in many instances where a lawyer or party to a lawsuit has made a contribution to a judge’s election campaign, the judge may develop a liking for that person. We learned from the reciprocity studies that reciprocity trumps liking,<sup>53</sup> so the absence of liking—as where the judge simply has never met the donor—should not be seen as weakening the tendency toward reciprocity. But the presence of liking may certainly be seen as reinforcing that tendency.

The other factor that may blunt the force of the tradition of judicial impartiality is the focus in any given case on the lawyers and parties appearing before the judge. We can assume that reciprocity and the commitment to impartiality are competing and potentially incompatible norms when a judge is called upon to become a neutral arbiter in a dispute in which one party has been a campaign supporter. It is possible that the judicial canons and oath remain background noise—ever-present but no longer routinely articulated—while the presence in the courtroom of a supporter is front and center in the judge’s attention. At that point, “there is substantial evidence that shifting an individual’s attention to a specific source of information or motivation will change the individual’s responses in ways that are congruent with the features of the now more prominent source. . . . That is, norms motivate and direct action primarily when they are activated . . . .”<sup>54</sup>

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<sup>51</sup>*Id.* at 144.

<sup>52</sup>*Id.* at 174.

<sup>53</sup>*Supra* notes 28-29. In the infant reciprocity study, all of the adult participants were “nice people,” yet it was the “willingness to provide (even if unable to) that” set apart those preferred by the infants. Dunfield et al, *supra* note 49, at 4.n.39.

<sup>54</sup>Robert B. Cialdini, Carl A. Kallgren & Raymond R. Reno, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 201, 204 (1991). This focus theory explains “why the dominant norms of a society—that are presumably always in place—may only sometimes predict behavior: They should activate behavior only when *they* have been activated first. . . . [T]he conflicting norms may coexist within the same society but . . . the one that will produce congruent action is the one that is temporarily prominent in consciousness.” *Id.* at 205. Thus, “at a given time, an individual’s actions are likely to conform to the dictates of the type of norm that is currently focal, even when the other types of norms dictate contrary conduct.” *Id.* at 230. See Robert B. Cialdini, *The Focus Theory of Normative Conduct*, in *HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY* (PAUL A.M. VAN LANGE, ARIE W. KRUGLANSKI & E. TORY HIGGINS eds.), (forthcoming September 2011) (“[I]t is only when . . . [a] norm is salient that it is likely to direct behavior forcefully.”).

## III. ATTEMPTED SOLUTIONS: WHAT STATES HAVE DONE

*A. Limits on Campaign Contributions*

States with elected judges have widely varying laws with respect to campaign contribution limits.<sup>55</sup> For example, Illinois places no limits on the amount any individual or group (political party, political action committee, or corporation) may contribute to candidates for the state supreme court, while Kentucky bans corporate contributions and limits individuals, political action committees, and political parties to \$1,000 per election cycle.<sup>56</sup> The campaign finance laws are remarkably silent on the limits of a law firm's aggregate contribution; Texas is the only state to have passed legislation on this subject.<sup>57</sup> The 1995 Texas Judicial Campaign Fairness Act limits the aggregate amount contributable to a judicial candidate from any one firm to \$30,000.<sup>58</sup> This amount includes contributions by the firm itself, as well as any of its employees and their spouses.<sup>59</sup>

In 1995, the Ohio Supreme Court limited both contribution amounts and campaign expenditures for judicial elections. The spending limits were struck down as unconstitutional in *Suster v. Marshall*,<sup>60</sup> based on the Supreme Court's decision in *Buckley v. Valeo*,<sup>61</sup> in which campaign spending limits were struck down as unconstitutional while campaign contribution limits were held to be compatible with the First Amendment.

Reducing the amount of money involved in judicial elections, as noted above,<sup>62</sup> certainly would reduce the appearance that judicial independence

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<sup>55</sup>No effort is made in this section to assess or predict the impact or implications of the Supreme Court's fast-evolving jurisprudence on campaign contributions. See *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876 (2010).

<sup>56</sup>Thomas A. Gottschalk, *Judicial Recusal as a Campaign Finance Reform*, Sandra Day O'Connor Project on the State of the Judiciary, 2008 Conference: Our Courts and Corporate Citizenship.

<sup>57</sup>Roy Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127, 127 (2003).

<sup>58</sup>TEX. ELEC. CODE ANN. §§ 253.155, 253.157 (West 2003).

<sup>59</sup>*Id.*; Texas Ethics Commission, Campaign Finance Guide for Judicial Candidates and Officeholders (May 12, 2010), [http://www.ethics.state.tx.us/guides/JCOH\\_guide.htm#CONTR\\_LAW\\_FIRMS](http://www.ethics.state.tx.us/guides/JCOH_guide.htm#CONTR_LAW_FIRMS).

<sup>60</sup>121 F. Supp. 2d 1141 (N.D. Ohio 2000).

<sup>61</sup>424 U.S. 1 (1976).

<sup>62</sup>The money going into judicial elections nationwide continues to soar. According to Justice at Stake: "Through Monday, Nov. 1, 2010, slightly more than \$12 million was spent nationally on TV air time this year in state supreme court elections. Of that, nearly \$5.1 million — 42% of total spending for the year — was spent in the week leading up to the election, between Oct. 26 and Nov. 1." Press Release, Justice at Stake Campaign, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/2010\\_judicial\\_elections\\_increase\\_pressure\\_on\\_courts\\_reform\\_groups\\_say?show=news&newsID=9129](http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say?show=news&newsID=9129).

is being compromised. However, the reciprocity research suggests contribution limits are at best half-measures, since the human tendency to return a favor can be triggered by even a small gesture of goodwill. The raffle tickets purchased by Professor Regan's test subjects were more expensive than the soft drinks the test subjects received.

North Carolina's solution is the Public Campaign Fund, a voluntary system of public financing for judicial campaigns. Candidates for the state's supreme court and court of appeals are eligible to participate after they raise a certain amount of qualifying funds in \$10-\$500 donations from at least 350 registered North Carolina voters.<sup>63</sup> In exchange for stopping their fund-raising and abiding by spending limits, participants receive public financing, funded in part by a check-off on state income tax returns and in part by a privilege license fee paid by North Carolina lawyers. In 2004, twelve of the sixteen candidates for North Carolina's supreme court and court of appeals participated in the program, and four of the five winners were participants.<sup>64</sup> In 2006, eight of the twelve candidates participated, including five of the six winners.<sup>65</sup> A handful of other states have adopted public financing for judicial campaigns, with varying levels of success.

The substantial promise of public financing may be undermined by a recent court ruling striking down a key public financing concept as unconstitutional. That concept: if a non-participant exceeds the limits, a participant receives additional public financing to eliminate the disparity. The U.S. Court of Appeals for the Second Circuit struck down such a provision in Connecticut's public financing law, the Citizens' Election Program.<sup>66</sup> In June 2010, the Supreme Court temporarily barred Arizona from exercising a similar trigger provision of its public financing law; the issue was argued on the merits (along with a companion case) before the Court in March 2011.<sup>67</sup>

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<sup>63</sup>North Carolina Center for Voter Education, *Fact Sheet: The Public Campaign Fund*, [http://www.ncjudges.org/media/fact\\_sheet\\_pcf.html](http://www.ncjudges.org/media/fact_sheet_pcf.html).

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010).

<sup>67</sup>McComish v. Bennett, 130 S. Ct. 3408 (2010); *consolidated with* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 644 (2010) Nos. 10-238 and -239, argued March 28, 2011. The Justices were reported to have been "skeptical" about the constitutionality of Arizona's statute. See Robert Barnes, "Supreme Court skeptical about Arizona's campaign finance law," THE WASH. POST, March 28, 2011, *available at* [http://www.washingtonpost.com/politics/supreme-court-skeptical-about-arizonas-campaign-finance-law/2011/03/28/AF2xXIrB\\_story.html](http://www.washingtonpost.com/politics/supreme-court-skeptical-about-arizonas-campaign-finance-law/2011/03/28/AF2xXIrB_story.html).

*B. Recusal and Disqualification*

The Supreme Court recently dealt with recusal issues and the influence of campaign contributions in *Caperton v. A.T. Massey Coal Co.*<sup>68</sup> A West Virginia jury found Massey liable for running Hugh Caperton, a mining executive, out of business; the jury awarded \$50 million in damages. At this point, Don Blankenship, president and CEO of Massey, contributed \$3 million as an independent expenditure<sup>69</sup> to support the 2004 West Virginia Supreme Court of Appeals campaign of Brent Benjamin, the eventual victor. (Blankenship also made the statutory maximum direct contribution of \$1,000 to Benjamin's campaign.) The \$3 million exceeded the combined contributions of all other Benjamin supporters. Caperton then tried to disqualify Justice Benjamin on grounds Blankenship's campaign contributions to him created a conflict that violated the Due Process Clause and the West Virginia Code of Judicial Ethics. Justice Benjamin refused to step aside. The West Virginia Supreme Court of Appeals, of which Justice Benjamin was then a part, granted review and in 2007 overturned the jury's decision. Caperton asked for a rehearing and the recusal of three of the five justices, two of whom recused themselves. Justice Benjamin was the exception and, acting as chief justice, selected two judges to replace the justices who had recused themselves. On a 3-2 vote, the court upheld its determination to overturn the jury's decision, and Justice Benjamin voted with the majority and filed a concurring opinion.

The U.S. Supreme Court reversed. Writing for the 5-4 majority, Justice Kennedy stated that this was a circumstance "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."<sup>70</sup> But though Kennedy concluded that "there was a serious, objective risk of actual bias that required Justice Benjamin's recusal,"<sup>71</sup> he based that conclusion on the size and timing of Blankenship's campaign contributions rather than on a generalized reliance on the psychology of reciprocity. The *Caperton* holding thus seems very narrow, restricted to situations "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

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<sup>68</sup>129 S. Ct. 2252 (2009).

<sup>69</sup>An independent expenditure is a contribution made by a supporter not directly to the candidate, but to generate advocacy for or against a candidate.

<sup>70</sup>*Id.* at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>71</sup>*Id.* at 2265.



funds or directing the judge's election campaign when the case was pending or imminent.”<sup>72</sup>

*Caperton* does establish that the appearance of impropriety is a sufficient ground for recusal, a position endorsed in the ABA Model Code of Judicial Conduct and adopted by most states, including West Virginia. The standard directs that “a judge shall avoid impropriety and the appearance of impropriety,”<sup>73</sup> and the test for an appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”<sup>74</sup> Legal scholars, such as Mark Harrison, chair of the ABA Commission on Judicial Independence, hope that *Caperton* “will cause judges to be more careful about the size and source of campaign contributions and motivate them to consider recusal more seriously before a party moves for the judge’s disqualification.”<sup>75</sup> In the wake of *Caperton*, and the 2007 revisions to the ABA Model Code, many states have begun the process of reviewing and updating their judicial conduct codes.<sup>76</sup> The effectiveness and practical value of these codes remains to be tested.

In any event, the emphasis of the *Caperton* majority on contributions that have a “significant and disproportionate influence” misses the mark. Suppose a contribution only has a moderate influence? Could that be enough to impair impartiality and trigger recusal? Moreover, under the reciprocity principle, as described above, even a small favor can give rise to a disproportionately large return favor. Hence, in the real world of judicial elections, any campaign contribution may have a significant influence on a judge’s decisionmaking.<sup>77</sup> That is not to say that a \$10,000 contribution does not yield greater influence than a \$500 one—clearly it would. It is only to recognize that what might be considered trivial

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<sup>72</sup>*Id.* at 2263-64. The appellants’ argument, as Justice Kennedy described it, relied on the notion of reciprocity. “Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is . . . strong and inherent in human nature . . .” *Id.* at 2262.

<sup>73</sup>MODEL CODE OF JUD. CONDUCT Canon 2 (1990).

<sup>74</sup>MODEL CODE OF JUD. CONDUCT Canon 2 cmt. (1990).

<sup>75</sup>Joan C. Rogers, *Caperton Ruling May Spur States To Enhance Their Process for Judges’ Recusal*, 25 LAW. MANUAL ON PROF. CONDUCT 335 (2009).

<sup>76</sup>*Id.* at 339.

<sup>77</sup>In his monumental work on judicial disqualification, Richard Flamm observed that as of 1996 “the argument that attorney contributions to judicial election campaigns in and of themselves create a bias sufficient to warrant judicial disqualification had repeatedly—and virtually unanimously—been rejected . . .” RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 184-85 (Little, Brown & Co. 1996).

contributions can still trigger a return favor under the reciprocity principle.<sup>78</sup>

And there are further complications: one social science experiment involving testing attitudes of West Virginians concluded that “The failure to recuse from a case has just as great an impact on perceived impartiality in the condition of offered but rejected campaign support as it does in the accepted support scenario.”<sup>79</sup> When campaign contributions are offered, in the public’s perception, at least in this one study, the campaigning judge is damned whether the offer is accepted or rejected.

### *1. Applying Caperton: Avery v. State Farm*

*Caperton*’s limits as a counterweight to reciprocity and denial are best illustrated by a look back at the Illinois Supreme Court case of *Avery v. State Farm Mutual Automobile Insurance Co.*,<sup>80</sup> a case involving the appeal of a class action trial court verdict against State Farm that had yielded a \$1 billion trial court verdict against the insurer. The Illinois Supreme Court began hearing oral arguments in late 2003, but left the case pending through the summer of 2004.

In November of that year, while the case was still pending before the state supreme court, Illinois voters elected a new supreme court justice, and the litigants on both sides of the case did their best to ensure that the new justice would be one who would be sympathetic to their arguments. The candidates received \$9.3 million in campaign contributions, a national record.<sup>81</sup> The winning candidate, Circuit Judge Lloyd Karmeier, received contributions from State Farm employees and lawyers, along with \$2 million from the U.S. Chamber of Commerce.<sup>82</sup> He refused to recuse himself from the case and cast a deciding vote, overturning the verdict against State Farm. The U.S. Supreme Court denied certiorari, leaving state courts and legislators with the task of finding appropriate solutions to

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<sup>78</sup>The Conference of Chief Justices, in its amicus brief in *Caperton*, sets out seven criteria that “are relevant to a constitutional [due process] inquiry.” The first of these is “size of the expenditure.” Brief of the Conference of Chief Justices as *Amicus Curiae* In Support of Neither Party, *Caperton v. A.T. Massey Coal Co.*, No. 08-22, at 25 (Jan. 2009), available at [http://brennan.3cdn.net/d6274e472669a87b58\\_dqm6ii1z9.pdf](http://brennan.3cdn.net/d6274e472669a87b58_dqm6ii1z9.pdf).

<sup>79</sup>James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* 30 (CELS 2009 4th Annual Conference on Empirical Legal Studies Working Paper Series, July 2, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1428723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723).

<sup>80</sup>835 N.E.2d 801 (Ill. 2005).

<sup>81</sup>Sample, *supra* note 2, at 21. Karmeier’s opponent received substantial contributions from groups interested in the outcome of the litigation as well.

<sup>82</sup>*Id.*

the problem of curbing potential conflicts of interest arising from the private funding of judicial elections.

Would Justice Karmeier have cast the same vote without the significant campaign contributions that helped him get elected? We may want to assume that the answer is “yes.” But whether the vote would be different should not be the test;<sup>83</sup> at the very least, the appearance of impropriety seems high enough to threaten public confidence in Illinois courts. Yet it is not at all clear whether *Caperton* would mandate recusal by a justice in Karmeier’s position should a similar situation arise in the future. Unfortunately, while *Caperton* holds that there is a due process line that judges cannot cross, it does not tell us where to draw that line. Determining where and how to draw that line is an old and difficult problem.<sup>84</sup>

## 2. *Recusal’s Checkered History*

The story of recusal is a story of rules and standards; the rules have covered too few cases, and the standards have been difficult to apply. The story began with England’s common law, under which only a “direct pecuniary interest” could trigger a judge’s recusal.<sup>85</sup>

The federal recusal statute originated in 1792 and has been amended numerous times to expand its scope. In 1911, parties to the case were given the right to challenge a judge’s presence on the court.<sup>86</sup> In 1948, judges received more discretion in determining whether to recuse themselves.<sup>87</sup> Currently, the two principal statutes governing recusal are 28 U.S.C. § 144, which applies only to district judges and provides for recusal when a party to the case files a “timely and sufficient affidavit”

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<sup>83</sup>Nor is it relevant to assessing the impropriety of Justice Benjamin’s conduct that Massey Coal Co. prevailed on remand. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 357 (W. Va. 2010).

<sup>84</sup>Distinguishing between direct contributions to a candidate—permitted under Illinois law in *Avery*—and independent expenditures made by third-parties—made in *Caperton*, where West Virginia limits direct contributions to \$1000—is unhelpful. Plainly, the public reporting of expenditures inevitably informs judicial candidates of whose money is being spent to elect or defeat them. Additionally, the reciprocity-based analysis in this essay is unchanged even if one agrees with the hotly contested observation of the Supreme Court majority in *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876, 909 (2010), that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.” See also *Buckley v. Valeo*, 424 U.S. 1, 47-49 (1976) (striking down the federal ceiling on independent expenditures because it “fails to serve any substantial governmental interest in stemming corruption or the appearance of corruption”).

<sup>85</sup>Debra Lynn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223 (2002). See generally Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KANSAS L. REV. 531 (2005).

<sup>86</sup>Debra Lynn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1224 (2002).

<sup>87</sup>*Id.* at 1225.

alleging the judge has “a personal bias or prejudice,”<sup>88</sup> and 28 U.S.C. § 455, which provides for judges to recuse themselves in any case in which their “impartiality might reasonably be questioned.”<sup>89</sup> With either statute, the decision whether to recuse is up to the judge in question, who, the research on denial suggests, often will be unlikely to appreciate the presence or appearance of a conflict of interest. Bright line rules cover certain financial interests, such as requiring automatic recusal in cases where a judge holds even one share of stock in a company that is a party to the case, and family ties, such as a spouse or a child who is or represents a party to the case.<sup>90</sup> But coming up with anything approximating a set of bright line rules for deciding other types of recusal cases in the federal system has been beyond the powers of our top legal minds.

The states have adopted a variety of approaches to disqualification, many based on the American Bar Association’s Model Rules. The ABA amended its Model Code in 1999 to add a new Canon requiring a judge to disqualify himself or herself from a case where—

The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than [insert amount] for an individual or [insert amount] for an entity [is reasonable and appropriate for an individual or an entity].

However, only two states have adopted a version of the model rule and four additional state supreme courts have adopted rules that incorporate the decision in *Caperton*.<sup>91</sup> In some states the standards for disqualification of a judge are set by the state constitution<sup>92</sup> or statute<sup>93</sup>; in others, it is

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<sup>88</sup>28 U.S.C. § 144 (2006).

<sup>89</sup>28 U.S.C. § 455(a) (2006).

<sup>90</sup>28 U.S.C. § 455(b)-(c) (2006).

<sup>91</sup>The two states with specific rules are Arizona, Rule 2.11(A)(4) (judge must disqualify when a party, the party’s lawyer, or that lawyer’s firm has within the previous 4 years made aggregate contributions to the judge’s campaign in excess of amounts set under state law) and Utah, Rule 2.11(A)(4) (judge must disqualify when a party, the party’s lawyer, or that lawyer’s firm has within the previous 3 years made aggregate contributions to the judge’s campaign in excess of \$50). See discussion of states that have rejected or adopted disqualification rules intended to address *Caperton* in American Judicature Society Center for Judicial Ethics, “Judicial Disqualification Based on Commitments and Campaign Contributions,” available at [www.ajs.org/ethics/eth\\_disqualification.asp](http://www.ajs.org/ethics/eth_disqualification.asp) (updated Nov. 8, 2010).

<sup>92</sup>E.g., TEX. CONST., art. 5, §11.

<sup>93</sup>E.g., ALASKA STAT. § 22.20.020 (2010).

pursuant to a court rule,<sup>94</sup> and the substantive grounds for disqualification also tend to vary; in short, one size does not fit all, and the factors providing grounds for disqualification vary considerably from state to state. However, “either verbatim or in substance,” virtually every state now employs the impartiality standard provided in the ABA’s Model Code “either by statute, procedural rule and/or code provision.”<sup>95</sup> That standard provides: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>96</sup>

Even the standards that exist admit of varying interpretations. Rules defining the degree or kind of “interest in the outcome” necessary to disqualify a judge “cannot be defined with precision,”<sup>97</sup> wrote Justice Hugo Black, who was himself criticized for failing to recuse himself in *United States v. Darby*<sup>98</sup> and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*.<sup>99</sup> Half a century after Justice Black wrote that adequate bright line rules were unattainable, Justice Kennedy wrote that they were necessary: “The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.”<sup>100</sup> Kennedy’s *Caperton* opinion does not enunciate rules; it instead embraces a standard put forth in 1927—whether the potential conflict in question “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance, nice, clear, and true.”<sup>101</sup>

Even with the straight-forward admonition that a judge must be impartial and appear impartial, it should not be surprising that Professor Charles Geyh has found instances of judicial recusal on the grounds of campaign contributions to be rare.<sup>102</sup> Geyh postulates that judges may be reluctant to recuse themselves because, among other reasons, they simply believe they are not influenced by contributions. Hence, we are back to the denial principle, discussed earlier in this essay.

<sup>94</sup>*E.g.*, Del. Sup. Ct. R. 84.

<sup>95</sup>Brief of the Conference of Chief Justices as *Amicus Curiae* In Support of Neither Party, *Caperton v. A.T. Massey Coal Co.*, No. 08-22, at 17 (Jan. 2009), available at [http://brennan.3cdn.net/d6274e472669a87b58\\_dqm6ii1z9.pdf](http://brennan.3cdn.net/d6274e472669a87b58_dqm6ii1z9.pdf).

<sup>96</sup>Canon 2, Rule 2.11(A) of the ABA Model Code of Judicial Conduct (2007).

<sup>97</sup>*In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>98</sup>312 U.S. 100 (1941).

<sup>99</sup>325 U.S. 161 (1945); see Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 611-12 (1987).

<sup>100</sup>*Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009).

<sup>101</sup>*Id.* at 2265 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>102</sup>Charles Gardner Geyh, “Report of the Disqualification Project,” ABA Standing Comm. on Judicial Independence 39 (2008).

### 3. *New York's Novel, and Absolute, Approach*

In early February 2011 the New York Administrative Board of the Courts, which has broad rulemaking authority over judicial procedures, adopted a proposed rule governing assignments and disqualification involving contributors to judicial campaigns.<sup>103</sup> The rule would provide that no case shall ordinarily be assigned to a judge or justice when:

an attorney or party in a case has contributed \$2500 or more individually (or \$3500 or more collectively, by multiple plaintiffs or defendants, or by an attorney and his or her law firm) to the assigned judge or justice's campaign for elective office within two years prior to such assignment.

In unveiling the proposal, Chief Judge Jonathan Lippman observed that “changing times and technologies have made it extremely difficult, if not impossible, to reconcile the appearance of impartiality with the reality of judicial campaigns”; thus, “the appearance of impropriety arising from judges hearing cases involving recent contributors has become unavoidable—and unacceptable.”<sup>104</sup> The proposed rule was immediately hailed as “a move that will change the political culture of courts and transform judicial elections by removing an important incentive lawyers have for contributing” to judicial elections.<sup>105</sup> Whether the rule is adopted, much less proves transformative, is yet to be seen. But, if adopted, it is likely at least to remove the potential for unconscious bias by judges responding to the reciprocity principle.

### CONCLUSION AND RECOMMENDATIONS

Given the ingrained and subconscious nature of reciprocity and denial, it is difficult to see how any system can cope with conflict of interest

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<sup>103</sup>Proposed Part 151 of the Rules of the Chief Administrator of the Courts, *available at* [http://www.courts.state.ny.us/attorneys/pdfs/2011\\_02\\_14\\_14\\_04\\_54.pdf](http://www.courts.state.ny.us/attorneys/pdfs/2011_02_14_14_04_54.pdf).

<sup>104</sup>State of the Judiciary 2011, “Pursuing Justice,” *available at* <http://www.nylj.com/nylawyer/adgifs/decisions/021511lippman.pdf>.

<sup>105</sup>William Glaberson, “New York Takes Step on Money in Judicial Elections,” *New York Times*, Feb. 14, 2011, *available at* <http://www.nytimes.com/2011/02/14/nyregion/14judges.html>. The *Times* article reports that court officials will “use computer programs to compare the names of lawyers and other people involved in cases against public records of contributions to judicial candidates. If contributions of more than \$2,500 over two years are found, the case would be assigned to a different judge.”

through a recusal decision at the discretion of the judge whose impartiality is in question.<sup>106</sup> While proposals have been advanced to have a judge other than the one whose impartiality may be in question make the recusal determination, these too face significant obstacles.<sup>107</sup> If recusal rules are difficult to apply when a supporter is party to or counsel in a case before a judge who benefited from that party's or counsel's direct contribution to the judge's campaign, consider the difficulty of applying these rules when there has been consequential third-party advertising supporting or opposing the election of that judge. Moreover, inflexible recusal mandates applicable to judges before whom supporters appear may be unworkable even when applied by other judges – as when the supporters have given to many judges on that particular court – or may prove perverse – as when counsel or corporations specifically target judges who are likely to be unsympathetic to their causes.<sup>108</sup>

Some states have attempted to adopt a black-box system under which candidates for judicial office are not allowed (supposed) to know who made contributions to their campaigns.<sup>109</sup> This system would surely cure the reciprocity problem were it successful; the judge would not know the source of contributions and could thus not even unconsciously reciprocate in the courtroom. Because “candidates often know who spends money on

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<sup>106</sup>See also explorations of the “halo effect,” e.g., Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgment*, 35 J PERSONALITY & SOC. PSYCHOL. 250, 256 (1977) (“When considering the establishment of rules concerning . . . conflict of interest . . . it would therefore seem advisable to consider more than the possibility that some individuals in the system may be venal and corrupt. The protestations of even the most virtuous and disinterested participants that they are capable of independent judgments should be considered suspect.”)

<sup>107</sup>Even other judges, however, will be less skeptical of a fellow-judge's impartiality than the general public. Charles Gardner Geyh, “Judicial Disqualification: An Analysis of Federal Law” (Federal Judicial Center 2010), cited in Geyh, “Why Judicial Disqualification Matters—Again” 35 n.124 (unpublished manuscript). Plus, the concepts of liking and denial will also come into play when a judge in the next chamber is called upon to question the impartiality of her cohort, not to mention the influence of what some researchers have found as “a general judicial hostility toward recusal.” See generally JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* (1995).

<sup>108</sup>This problem could, of course, be cured by allowing the counsel on the opposing side of the donor to waive a recusal requirement.

<sup>109</sup>MINN. CODE OF JUDICIAL CONDUCT Canon 5B(2) (campaign committees “shall not disclose to the candidate the identity of” either contributors or those who were solicited and refused to contribute); COLO. CODE OF JUDICIAL CONDUCT Canon 7B(2)(e) (same); NY St. Bar Assn Comm. on Prof. Ethics Op 289, at 3 (April 27, 1973) (“the names of those who contribute . . . should be kept secret from the candidate” and where the names appear in a public record, “no candidate or judge should attempt to have any such list made available to him, nor should he seek in any other way to learn the identity of those who contributed . . .”).

their behalf,”<sup>110</sup> however, it can be expected that the public and litigants would be justifiably cynical about whether these walls are effective. A possible consequence of this system, even when the donors who make direct contributions are unknown, might be the unwanted growth in influence of independent expenditures over judicial elections. This may result in the general population (even the population of lawyers) ceding influence to corporations, unions, or ideological groups whose contributions are made specifically to secure election of judges who share their perspectives. This cannot be a desirable result.

It may well be that the only sure remedy is to remove the potential for reciprocity, denial, or appearances of impropriety so that recusal will be unnecessary. Solutions that have been widely discussed and debated,<sup>111</sup> and that have been adopted by many states, include political or merit-based appointment of judges<sup>112</sup> and public financing of judicial elections.<sup>113</sup> Even with these alternatives to election of judges, a majority of Americans perceive the courts at every level—state courts, and even federal courts—

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<sup>110</sup>James J. Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, LSRN Paper No. 10-29, at 9, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1662630](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662630). As Flamm puts it: “since every jurisdiction that authorizes judicial elections requires candidates for elective office to file reports disclosing all campaign contributions—and, for contributions over a certain amount, the names of contributors—the ethical provisions designed to screen judges from their contributors are, as a practical matter, unenforceable.” RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 190 (Little, Brown & Co. 1996).

<sup>111</sup>For a summary of proposals see Roy A. Schotland, *A Plea For Reality*, 74 MO. L. REV. 507, 524-26 (2009); James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CENTER FOR JUSTICE 25-35 (2008), available at [http://brennan.3cdn.net/1afc0474a5a53df4d0\\_7tm6brjhd.pdf](http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf).

<sup>112</sup>Of course, reciprocity may incline an appointed judge to feel beholden to the governor who appointed her, but the likelihood of the governor in an individual capacity appearing before that judge can be seen as relatively slim. The participation in the appointment process by a selection committee and in the confirmation process by a legislative body may reduce the judge’s sense of gratitude toward any single person. Additionally, the traditional “merit selection” plan ordinarily contemplates retention elections for sitting judges, but after the 2010 Iowa Supreme Court campaign and election, that system hardly proved to be free from the influence of money spent to oust three sitting judges who had angered social conservatives over a reproductive rights ruling.

<sup>113</sup>See generally the excellent Dialog on public financing of judicial elections in Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1250, 1254 (2008) (Afterword). The constitutional fate of public financing of elections is clearly in question. In the wake of *Citizens United*, there may be no practical way for a state to foreclose independent contributions, and perhaps even direct contributions, to a judge’s campaign. In *Davis v. FEC*, 128 S.Ct. 2759, 2772 (2008), the Supreme Court cited with apparent approval the Eighth Circuit’s decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), holding a public funding election scheme to be subject to strict scrutiny and unconstitutional. The Ninth Circuit more recently upheld a public financing regime in *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); the Supreme Court has granted certiorari. See note 67 *supra*.



to be influenced by politics;<sup>114</sup> the role of campaign contributions in reinforcing the public's perception of increasing politicization of state courts, however, while but one (significant) element of this larger problem, is one that should be eliminated.

It is not clear that voters will be willing to move away from a judicial election system even in the face of persuasive evidence that the public perceives elected judges to be influenced by contributions – and even in the face of some evidence assembled here that judicial impartiality may in fact be diminished when a lawyer or party appearing before that judge has been a campaign supporter.<sup>115</sup> Professor Cialdini proposes that the best defense against the overwhelming influence of the reciprocity rule is to recognize it so that we can diffuse its force.<sup>116</sup> And, of course, recognition and acknowledgement of the potential for influence can help blunt the effects of, if not serve an antidote to, denial. Since campaign contributions are already fully reported in most jurisdictions, ensuring greater transparency of donors to independent advocacy organizations would help close the loophole from the donor-disclosure side. But it should not stop there.

The New York solution, discussed above, takes recusal decisions entirely out of the hands of the affected judges. While the proposed rule cannot accommodate the potential impact of independent contributions, and while the contribution limit of \$2,500 within two years may not fully address the potential for an unconscious reciprocity bias,<sup>117</sup> the rule would go a long way toward addressing the potential effects of reciprocity and denial discussed in this essay.

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<sup>114</sup>KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* ch. 1 (2010). Bybee observes that “judges subject to noncompetitive retention elections actually find that they are not entirely removed from either political influence or public suspicion. The merit-based appointment process itself may involve substantial politicking and lobbying behind the scenes.” *Id.* at 9.

<sup>115</sup>See Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 508-11 (2009). Prof. Schotland points out the obvious—“The problem, of course, is that the voters in many states with judicial elections will not give up voting for judges,” *id.* at note 6—and quotes the authoritative resolution of the Conference of Chief Justices that formally resolved in 2007: “elections will stay in many and perhaps all of the states that have that system.” *Id.* at p.509 (quoting Conference of Chief Justices, Resolution of February 7, 2007, <http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html>).

<sup>116</sup>ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 46 (4th ed., 2001).

<sup>117</sup>Palmer, *supra* note 19, at 3 (Palmer's empirical study “demonstrates that far smaller contributions also create a risk of actual bias, and that the relative size of a donation, in comparison to overall campaign funds and expenditures, is not a necessary component of the risk.”). See also Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290(2) J. Am. Med. Ass'n 252 (2003) (reporting that physicians are influenced more by small gifts than by large ones).

Another approach may also be helpful. Whenever a judge is called upon to hear a case—at the trial or appellate level—in which a lawyer or party has been a supporter of that judge and the judge knows (or reasonably should have known) of that support, the judge should issue at the start of the proceeding (1) a statement that sets out the nature and size of the contribution or other financial support known to the judge<sup>118</sup> and the person making it and (2) an affirmation specifically and in writing that the judge has considered the applicable ethical proscriptions and concluded that the donation will not affect the judge’s impartiality in that proceeding. Such a disclosure “statement” will not only alert the parties to the contribution, but also it will focus the judge’s attention on the dangers of unconscious reciprocity-based bias.<sup>119</sup> The “affirmation” would serve at least to remind the judge of her commitment to impartiality.<sup>120</sup> This combination solution may not cure the disease, but it should help treat some of the potential manifestations.<sup>121</sup>

In the end, no system is perfect.<sup>122</sup> However, the implications of the principles of reciprocity and denial are clear: Privately financed judicial elections, despite the current system for judicial recusal, undermine public confidence in the independence and impartiality of our courts, and ultimately impair the impartiality of our judges as well.

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<sup>118</sup>It may well be that identifying contributors, and especially independent donors, is not all that easy. Questions will arise like how to identify a contribution by a salaried lawyer in the West Coast office of a firm with a case before a judge in Texas, or by an owner of shares in a publicly traded corporate party to a lawsuit. There are sure to be devils in the details.

<sup>119</sup>See Roy F. Baumeister, E.J. Masicampo & Kathleen D. Vohs, *Do Conscious Thoughts Cause Behavior?*, 62 ANN. REV. OF PSYCH. 332, 346-350 (in press for 2011), available at <http://www.csom.umn.edu/assets/165663.pdf> (“consciousness seems to reduce the power and influence of many . . . situational influences”).

<sup>120</sup>A separate problem might arise from this affirmation process that needs to be explored: the possibility that the affirmation might result in a “licensing effect” in some judges who may feel they do not have to protect their image as unbiased so scrupulously as before. See Baumeister et al., *supra* note 119 at 346 (“a conscious thought that depicts the self as free from undesirable prejudices increases people’s willingness to act in ways that could be regarded as prejudiced”). It is also possible that some judges would lean over backward to appear consistent with this public affirmation of absence of bias toward the supporter, thereby undercutting fairness in the opposite direction.

<sup>121</sup>I am not unaware of the potential unintended consequence of this kind of disclosure rule: it may well heighten public concern and even distrust of the elected judiciary by serving as a repeated reminder to the public that the judge issuing the statement has received support from a party or counsel. As a counterbalance, however, it may remind the public that the judge is fully aware of her ethical responsibilities.

<sup>122</sup>For one possible flaw in a system of judicial appointments, for example, see Mary L. Clark, *My Brethren’s (Gate) Keeper? Testimony by U.S. Judges at Others’ Supreme Court Confirmation Hearings: Its Implications for Judicial Independence and Judicial Ethics*, 40 ARIZ. ST. L.J. 1181 (2008). For a discussion of potential changes to the recusal system, see Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005).