

THE FAILURE OF JUDICIAL RECUSAL AND DISCLOSURE RULES: EVIDENCE FROM A FIELD EXPERIMENT[†]

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ABSTRACT—U.S. courts rely predominately on judicial self-recusal and in-court disclosure to address judicial conflicts of interest and maintain a critical perception of impartiality. But these approaches fail to account for the legal, institutional, and social dynamics that surround the relationship between judges, attorneys, and the adjudicative process. In reality, judges rarely use their discretion to disclose conflicts or recuse themselves, and attorneys do not ask them to do so. If we understand both the legal and extralegal incentives at play in these decisions, none of these outcomes should be surprising. The shortcomings of recusal and disclosure rules are particularly salient in the context of judicial campaign finance, where elected judges face the acute dilemma of being assigned to a case in which one of the parties or attorneys has made financial contributions to the judge’s election campaign.

To support these substantive claims, this Article features the results of a novel randomized field experiment—the first-ever blinded experiment conducted on judges in active cases. In the experiment, Wisconsin and Texas civil cases that feature donor attorneys are identified and a portion of the judges presiding over these cases are randomly assigned to receive a letter identifying the potential conflict and requesting recusal. Judicial and attorney behavior is then tracked over the life of the case to observe how often judges recuse, whether they disclose the conflict, how attorneys respond to those disclosures, and whether the intervention of a third party has any effect on these decisions. The experimental results provide much-needed empirical confirmation of growing skepticism surrounding judicial recusal and raise

[†] This Article was previously titled *Why Judges Don’t Recuse and Attorneys Don’t Ask Them To*. Portions of the experimental analysis presented in this Article were conducted as a collaborative effort. The results of these portions of the analysis are also presented in an article previously published in the *Journal of Politics*: Jonathan S. Krasno, Donald P. Green, Costas Panagopoulos, Dane Thorley & Michael Schwam-Baird, *Campaign Donations, Judicial Recusal, and Disclosure: A Field Experiment*, 83 J. POL. 1844 (2021). While the results in the previous publication were conducted in accordance with a preregistered design, many of the results presented in this Article—including additional outcomes, tests, variables, and measurements—deviated from that preregistered design. The experiment in this Article received Institutional Review Board approval, and it was partially funded by grants from the Open Society Foundations and the Democracy Fund, neither of which is responsible for the content of this Article.

serious doubts that the most popular solution to the recusal problem—increased judicial disclosure—will do much to help at all. Building on these findings, I explore procedural and institutional alternatives that better account for the realities of judicial conflicts of interest and the incentives of court actors.

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“If you fire a recusal motion at a judge, make sure you aim for the head.”

—Anonymous Texas Trial Judge[‡]

INTRODUCTION

Recusal is designed to be a simple and effective procedural remedy for judicial conflicts of interest—the judge looks out for personal or legal factors

[‡] In order to adhere to Institutional Review Board requirements and protect the identity of those interviewed as part of this study, the sources for this quote and all similar quotes in this Article are kept

that might prevent her from ruling impartially, and if she identifies any, she can remove herself and have the case assigned to a more neutral adjudicator. As a safeguard, the judge is expected to disclose potential conflicts so the parties and attorneys who might be disadvantaged can then seek recusal even if the judge does not do so on her own. These behavioral expectations undergird the judicial-recusal and judicial-disqualification regimes in almost all U.S. trial courts. But these assumptions are likely false. Working within a legal framework that merely allows for but does not explicitly require recusal under most circumstances, judges are unlikely to remove themselves. This is because judges are disincentivized to recuse—doing so requires a judge to recognize their bias, reassigning the case takes time, and the act of recusal itself is often perceived as a dereliction of judicial duties.

The shortcomings of the U.S. recusal regime were recently thrust into the national spotlight when a series of *Wall Street Journal* articles chronicled how, from 2010 to 2018, more than 130 federal trial judges had presided over and ruled in nearly 700 cases while they (or their family members) held stock in one or more of the companies that were parties in the cases.¹ Further investigation found that two-thirds of the rulings on contested motions made by judges in those cases were made in favor of the conflicted parties.² The public response was swift and fierce, and within months, Congress had passed bipartisan bills to address the growing apprehensions about the neutrality of the judicial system.³ But while current ire is focused on the recent recusal failures of the federal bench, nonrecusal has been a

anonymous. See also Jeff Nobles, *Judicial Recusal and Attorney Disqualification: An Ethic for Litigators & Other Aliens in a Strange Land* 5 (Texas Bar College of Legal Education: Advanced Civil Appellate Courses, October 7–8, 1999), http://www.texasbarcle.com/Materials/Events/1295/66861_01.pdf [<https://perma.cc/L77V-3KXK>] (“If you point the barrel of a recusal motion at a Texas judge, make sure it is loaded with a silver bullet.”).

¹ James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J., (Sept. 28, 2021, 9:07 AM) [hereinafter Grimaldi et al., *Federal Judges Broke the Law*], <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421> [<https://perma.cc/4CFL-ELAX>]; see also James V. Grimaldi, Joe Palazzolo & Coulter Jones, *A Post-Watergate Law Some Judges Overlook*, WALL ST. J., (Sept. 28, 2021, 9:03 AM), <https://www.wsj.com/articles/a-post-watergate-law-some-judges-overlook-11632834199> [<https://perma.cc/XLA5-RM93>] (exploring the rules that require recusal for stock ownership); Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Federal Judges or Their Brokers Traded Stocks of Litigants During Cases*, WALL ST. J., (Oct. 15, 2021, 9:59 AM), <https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192> [<https://perma.cc/VD5S-X5FM>] (identifying cases in which stocks were actively traded by presiding judges).

² Grimaldi et al., *Federal Judges Broke the Law*, *supra* note 1.

³ The bill, called the “Courthouse Ethics and Transparency Act,” was signed into law by President Biden in May 2022 and amends the Ethics in Government Act of 1978 by requiring judges to be more transparent about their stock holdings. Courthouse Ethics and Transparency Act of 2022, Pub. L. No. 117-125, 136 Stat. 1205 (codified at 5 U.S.C. app. 4 §§ 101, 103, 105, 107).

longstanding issue at all levels of the U.S. court system.⁴ Indeed, the potential for recusal-related problems is almost certainly greater with judges in state courts, where conflicts are more common, less known, and potentially more serious.⁵

As national and state legislatures grapple with how to address the failings of the current system, they are likely to rely on the extant legal literature, which is robust in reviewing the legal landscape of recusal but offers solutions that are almost entirely bereft of empirical support. Consequently, many of these solutions fail to account for the social, institutional, and behavioral incentives at play in judges' recusal decisions. In particular, legal scholars have long understood the problems inherent in judicial-recusal rules,⁶ and the leading research almost unanimously suggests that an increased focus on mandatory in-court disclosure of conflicts can serve as a simple and effective procedural backstop to the recusal process.⁷

⁴ See, e.g., Benjamin B. Johnson & John Newby Parton, *Judges Breaking the Law: An Empirical Study of Financially Interested Judges Deciding Cases*, 99 N.C. L. REV. 1, 4 & n.23 (2020) (identifying over 200 instances in which judges presided over cases while owning stock in one of the parties); Joe Stephens, *Ethics Lapses by Federal Judges Persist, Review Finds Violations Involve Stock Holdings and Free Trips*, WASH. POST (Apr. 18, 2006), <https://www.washingtonpost.com/archive/politics/2006/04/18/ethics-lapses-by-federal-judges-persist-review-finds-span-classbankheadviolations-involve-stock-holdings-and-free-tripsspan/8cf1b306-7dbd-4d20-a75c-868f1a546466/> [<https://perma.cc/W8V3-F2AB>] (finding similar recusal failures in the early 2000s).

⁵ See ALICIA BANNON, RETHINKING JUDICIAL SELECTION IN STATE COURTS 8–9 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf [<https://perma.cc/VUB8-WCMF>].

⁶ As Professor Charles Geyh, one of the leading scholars of judicial recusal, stated in response to the *Wall Street Journal* report, these recent recusal failures raise “a more systemic problem of judges chronically neglecting their duty to disqualify in such cases.” Michael Siconolfi, Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Dozens of Federal Judges Had Financial Conflicts: What You Need to Know*, WALL ST. J. (Apr. 27, 2022, 7:30 PM), <https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140> [<https://perma.cc/N4K2-GH4H>].

⁷ See, e.g., Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 583 (2005) (“The proposal discussed here takes this disclosure requirement significantly further by requiring the judge to provide directly to litigants in pending cases any information that might be considered to have an impact on the judge’s partiality.”); James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES’ J. 17, 22 (2007) (“One way to increase the odds that litigants will learn pertinent information would be to require judges to disclose, at the outset of the litigation, any facts that might reasonably be construed as bearing on the judges’ impartiality.”); Leslie W. Abramson, *Judicial Disclosure and Disqualification: The Need for More Guidance*, 28 JUST. SYS. J. 301, 303, 308 (2007) (stating that “[a]t a minimum, required reports about a judge’s financial investment or any other disqualifying circumstance should be readily available both to the support staff in the clerk’s office where the judge works and to the litigants and counsel” and that “broader disclosure provisions [are essential] so that litigants believe that the integrity of the judicial system and individual judges is self-evident”); Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges’ Decisions*, 26 J.L. & POL. 359, 384 (2011) (“Whenever a judge is called upon to hear a case—

The logic behind this approach is intuitive: by informing all the participants in a case of a potential conflict of interest, the burden of the recusal decision can be shifted, in part, to the individuals who are more incentivized to identify partiality and seek removal—namely, the parties and attorneys who are disadvantaged by the conflict. But disclosure only matters if it facilitates action; the belief that increased transparency will serve as a panacea fails to account for the fact that attorneys face their own set of extralegal incentives that discourage them from asking for recusal, even if they are aware of the conflict and believe recusal is warranted. These attorneys know that the ultimate decision to recuse is almost entirely up to the personal discretion of the judge, and attorneys do not want to risk the repercussions of impugning the judge's character given the likelihood that she will not recuse and possibly be even more negatively disposed toward their client. Many also face the near certainty that they will be back in front of the same judge again for future cases.

These behavioral considerations are particularly salient in the context of judicial campaign finance, where elected state court judges often face the acute dilemma of presiding over cases in which one of the parties or attorneys has made financial contributions to the judge's previous (or current) election—circumstances that naturally evoke concerns about quid pro quo relationships. Empirical work is increasingly demonstrating a strong, positive relationship between whether a court participant donated to a judge and how well that participant fares in the case.⁸ What is more, a majority of both the public and the legal community—including many of the judges themselves—believe campaign donations are unfairly influencing judicial decisions.⁹ If existing recusal and disclosure procedures are effective in

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 . . . a statement that sets out the nature and size of the contribution or other financial support known to the judge . . .”); Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 855 (2015) (“[I]n order to make these two reforms regarding who will be the sole or final arbiter in disqualification disputes worthwhile, all jurists and the parties must provide meaningful and timely disclosure of possible grounds for conflict or bias.”).

⁸ Of particular note are the studies that use clever empirical methods to credibly identify a causal relationship between campaign donations and judicial decision-making. *See infra* notes 51–58 and accompanying text. Additionally, a substantial number of scholars have conducted observational studies that show significant correlation between campaign donations and judicial decisions. *See infra* note 49.

⁹ *See, e.g.*, JUST. AT STAKE, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE (2001) [hereinafter JUST. AT STAKE, STATE COURTS FREQUENCY QUESTIONNAIRE], <https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey.pdf> [<https://perma.cc/H5FW-7DJ4>] (sharing a national poll showing that 76% of voters believed that campaign contributions had at least “some influence” on judicial decisions); JUST. AT STAKE, JUSTICE AT STAKE — STATE JUDGES

addressing conflicts of interest, judges should be recusing in many of the cases that feature campaign donors. Yet the nature of judicial elections and campaign finance is such that both the cost to judges of recusing—the goodwill of future donors—and the cost to attorneys of asking the judges to recuse—the goodwill of a current adjudicator—is even higher than usual.

In this Article, I rely on the latest scholarly research on judicial psychology and decision-making and a novel randomized field experiment to evaluate U.S. judicial-recusal rules and practices. In particular, I focus on how well they address potential conflicts in cases where an elected judge has received a campaign contribution from someone involved in the case. The experimental results show that judges are even less willing to voluntarily recuse than previously thought, and that the most commonly suggested remedy for nonrecusal—mandatory disclosure—appears to do little to mitigate the problem. These experimental findings run in stark contrast to the underlying assumptions of modern recusal rules, much of the academic literature on judicial recusal and impartiality, and the U.S. Supreme Court's most recent opinions on judicial bias.

This Article makes five key contributions. First, it outlines and consolidates the behavioral framework behind both the judge's decision to recuse and the attorney's decision to request recusal. Although the last decade has produced a litany of scholarship exploring the judge's decision to recuse, this literature has spent relatively little time on the attorney's decision to request recusal—particularly in the context of state trial courts. Understanding the behavioral incentives of all the participants in the courtroom is essential to developing effective legal policy and procedure, and I argue that modern recusal rules are unlikely to adequately address real or perceived judicial bias, even when supplemented by disclosure and transparency.

Second, this Article provides much-needed empirical evidence supporting the growing skepticism surrounding the current judicial-recusal regime in U.S. courts. While the *Caperton v. A.T. Massey Coal Co.* ruling produced a veritable explosion in legal scholarship exploring (and usually

FREQUENCY QUESTIONNAIRE (2002) [hereinafter JUST. AT STAKE, STATE JUDGES FREQUENCY QUESTIONNAIRE],

<https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%20%2C500%20Judges.pdf> [<https://perma.cc/H9TP-UBY4>] (sharing a judicial poll showing that 46% of state judges thought campaign contributions influenced judges' decisions and 60% believe that recusal should be mandatory in cases that feature parties that have financially supported a judge's campaign).

deriding) the current state of recusal law,¹⁰ almost none of this analysis provides any empirical support for its conclusions.¹¹ The data in this Article come from a randomized field experiment (also known as a randomized controlled trial, or RCT) that identifies civil cases in the Wisconsin and Harris County, Texas trial courts in which one of the attorneys donated to the judge's previous political campaign. Half of these judges are then randomly assigned to receive a letter from a Fordham University-based organization identifying the potential conflict and asking the judge to recuse. The results show that judges almost never recuse from these sorts of cases. They also provide no evidence that the judges are any more likely to recuse even when they receive outside pressure to do so.

Third, the design of the experiment also allows an exploration of the efficacy of judicial disclosure to nondonor parties as a supplement to current recusal procedures. Increased judicial disclosure of campaign contributions is among the most common remedies suggested in the literature on judicial conflicts of interest and recusal, by both those who support the current regime and those who criticize it. Those who are comfortable with the status quo assume that the current disclosure rules ensure that parties in a case are informed regarding potential sources of judicial bias. Those who criticize the current regime believe that if disclosure was mandatory, the potentially disadvantaged attorneys would be empowered to request recusal when appropriate. The results from this Article's field experiment show that, without the experimental intervention (i.e., under normal circumstances), on-the-record disclosure of campaign donations is virtually nonexistent—in the over 300 cases tracked during the study, not a single judge disclosed the donation. However, one-third of the Wisconsin judges who received the letter requesting recusal disclosed the contribution on the court record, allowing us to then measure the downstream impact of disclosure on both requests for recusal and recusal itself. Strikingly, these increased disclosure rates had no discernible effect on either the propensity for attorneys to move for recusal or for the judge to eventually recuse herself.

Fourth, building on the empirical results of the experiment, but being careful to account for its limitations, this Article explores potential

¹⁰ 556 U.S. 868 (2009). Kevin Morrow notes that, as of 2018, there are 682 law review articles that cite *Caperton*. Kevin Morrow, To Judge or Not to Judge? Judge Shopping, Recusal & Judicial Defendants 5 n.36 (unpublished manuscript) (on file with *Northwestern University Law Review*).

¹¹ Upon reflecting on the array of theoretical proposals in this area at the time *Caperton* was decided, Lee Epstein questioned "the wisdom of adopting any approach to recusal . . . in the absence of empirical evidence." Lee Epstein, *Shedding (Empirical) Light on Judicial Selection*, 74 MO. L. REV. 563, 564–65 (2009). In my review of the literature since then, I found only four studies that reported on actual recusal rates at all, and only two of them featured an empirical evaluation on judicial recusal as part of the primary analysis. See *infra* notes 175–181 and accompanying text for a discussion of these findings.

approaches to the problems caused by donors in the courtroom. It looks first at common procedural solutions, arguing that neither automatic (*per se*) recusal nor independent recusal review is likely to be tenable. Instead, the Article posits that the problem of money in the courtroom is best ameliorated by the combination of limited no-cause peremptory challenges paired with mandatory disclosure by the court system, as opposed to disclosure made by judges themselves. The Article concludes by briefly exploring broad institutional reform and argues that first-order solutions—such as the elimination of judicial elections or bans on judicial campaign fundraising—are nonstarters in the current political environment, although anonymized donations in judicial campaigns may be both feasible and effective.

Finally, the design and implementation of this Article’s field experiment pushes the boundaries of what can—and arguably *should*—be done to empirically evaluate law and policy. Randomized experiments have long been considered the gold standard for making causal claims in the medical and “hard” sciences and have more recently been adopted in nearly all social science disciplines to answer a vast array of questions and theories.¹² Field experiments are a subcategory of experiments that emphasize the importance of either conducting the study in real-world environments or replicating those environments as closely as possible.¹³ This approach consequently produces credible causal results that are methodologically sound and eminently well suited for testing actual law and policy.¹⁴

Despite these benefits, field experiments are exceedingly rare in legal scholarship.¹⁵ That places this Article’s field experiment in a distinctive category: not only is it the first field experiment to study judicial-recusal decisions, it is only the second field experiment to ever be conducted on

¹² See James N. Druckman, Donald P. Green, James H. Kuklinski & Arthur Lupia, *Experimentation in Political Science*, in CAMBRIDGE HANDBOOK OF EXPERIMENTAL POLITICAL SCIENCE 3, 9 (James N. Druckman, Donald P. Green, James H. Kuklinski & Arthur Lupia eds., 2011); Steven D. Levitt & John A. List, *Field Experiments in Economics: The Past, the Present, and the Future*, 53 EUR. ECON. REV. 1, 2 (2009).

¹³ See ALAN S. GERBER & DONALD P. GREEN, FIELD EXPERIMENTS: DESIGN, ANALYSIS, AND INTERPRETATION 9–13 (2012).

¹⁴ See Donald P. Green & Dane R. Thorley, *Field Experimentation and the Study of Law and Policy*, 10 ANN. REV. L. & SOC. SCI. 53, 55 (2014).

¹⁵ See *id.* at 56 fig.1 (finding only six field experiments in law reviews up through 2014); see also H. Fernandez Lynch, D.J. Greiner & I.G. Cohen, *Overcoming Obstacles to Experiments in Legal Practice*, 367 SCIENCE 1078, 1078 (2020) (expressing concern that legal practices are not tested through randomized controlled trials); D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 ANN. REV. L. & SOC. SCI. 295, 300–02 (2016) (finding that, compared to medicine and social sciences, the number of randomized control trials in the legal profession is “pathetic”).

actual judges in real cases and is the first to be done with the judges blinded to the study.¹⁶ This is important not just for the data it can provide in supporting this Article's arguments but also for the sake of advancing the subfield of empirical legal studies.

* * *

This Article proceeds as follows. Part I reviews judicial-recusal rules and procedures, discusses the threat that judicial campaign fundraising may have on judicial impartiality, and examines recusal specifically in the context of campaign finance. Part II details the incentive structure and behavioral framework behind the judge's decision to recuse, explores disclosure as a potential solution to nonrecusal, and details the incentive structures surrounding an attorney's decision to move for recusal and why disclosure will likely not affect that decision. Part III describes the setting and design of the randomized field experiment. Part IV presents and analyzes the resulting data. Last, Part V offers potential alternatives to the current system.

I. JUDICIAL CONFLICTS OF INTEREST, RECUSAL, AND CAMPAIGN FINANCE

This Part provides an abridged background on the judicial-recusal rules and procedures most commonly used in U.S. courts and discusses how judicial elections stand as an especially prominent and problematic source of judicial bias. While an in-depth exploration of these issues is not the focus of this Article, a basic introduction is necessary to lay the groundwork of the

¹⁶ See Krasno et al., *supra* note †, at 1844–45 for the initial publication that featured portions of the experiment presented in this Article. The 1961 Manhattan Bail Project is the only other previous study of this type that I am aware of. Liz Marie Marciniak, *Manhattan Bail Project*, in *ENCYCLOPEDIA OF COMMUNITY CORRECTIONS* 246, 246–47 (Shannon M. Barton-Bellessa ed., 2012). In that study, the judges were cooperative participants in a randomized experiment where the Vera Institute of Justice provided risk analyses for some criminal bail hearings.

Such studies, however, may become more common. A chapter in a forthcoming *Cambridge Handbook* features a wonderful example of a randomized field experiment in the court context, where the authors created Wikipedia pages for 154 Irish Supreme Court cases, published a randomly selected 77 pages, and measured whether judges are more likely to cite the cases featured in the published group than the unpublished group. The authors found compelling evidence that judges (or at least clerks) do reference Wikipedia and that such online content does find its way into formal opinions. Neil C. Thompson, Brian Flanagan, Edana Richardson, Brian McKenzie & Xueyun Luo, *Trial by Internet: A Randomized Field Experiment on Wikipedia's Influence on Judges' Legal Reasoning*, in *CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE* (Kevin Tobia ed., forthcoming) (manuscript at 19, 28), <https://ssrn.com/abstract=4174200> [<https://perma.cc/4BZ4-QFRB>]. There are, notably, a growing number of survey or "lab" experiments conducted on judges, but these inherently take place outside of the courtroom and deal with decisions on hypothetical case facts. See, e.g., Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges*, 45 *J. LEGAL STUD.* 255, 260–62 (2016) (describing a study in which judges decided fictional cases via iPad in a laboratory setting).

behavioral frameworks and field experiment presented in Parts II, III, and IV. Section I.A briefly reviews U.S. judicial-recusal law more broadly. Section I.B explores the unique problems campaign contributions have in relation to judicial impartiality and public perceptions of the judiciary, highlighting the relevant empirical studies in those areas. Section I.C outlines how states with judicial elections have (or have not) attempted to engineer their recusal regimes to address those potential conflicts stemming from judicial campaign finance.

A. *Recusal Law in the United States*

The U.S. legal system has devised numerous methods for a judge to avoid conflicts of interest before they reach the bench, such as screening procedures and preemptive elimination of the source of bias.¹⁷ But inevitably, potentially problematic cases will be assigned to judges, so there must be a systematic procedural and ethical approach for dealing with those conflicts. For nearly every judicial body in the United States, judicial recusal is the primary solution and “perhaps the States’ most reliable weapon for maintaining both the reality and the appearance of a ‘fair hearing in a fair tribunal’ for every litigant.”¹⁸ Professor Dmitry Bam, one of the leading scholars on recusal policy (and a skeptic regarding its efficacy in the area of campaign contributions), explains: “Recusal has tremendous allure because, in theory, it allows us to ensure judicial impartiality at the point of delivery.”¹⁹

Simply defined, judicial recusal is the process through which a judge relinquishes or is disqualified from a case because of a perceived or actual bias.²⁰ Under most circumstances, judges are responsible for recusing

¹⁷ One prominent example of preemptive elimination of bias is to prevent judicial candidates from directly soliciting campaign donations. The constitutionality and effectiveness of these restrictions was at issue in *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015).

¹⁸ Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 16, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22).

¹⁹ Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 651 (2015).

²⁰ In many jurisdictions, there is a technical distinction between recusal and disqualification, with the former being a decision that is up to the judge and the latter being a decision that is imposed upon the judge. *See, e.g.*, *Goolsby v. State*, 914 So. 2d 494, 496 n.1 (Fla. Dist. Ct. App. 2005) (defining recuse); *State v. Desmond*, No. 91009844DI, 2011 WL 91984, at *7 n.62 (Del. Super. Ct. 2011) (remarking on the distinction between recusal and disqualification). In practice, however, this distinction is not particularly clear. *See* MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 1 (AM. BAR ASS’N 2010) (“In many jurisdictions, the term ‘recusal’ is used interchangeably with the term ‘disqualification.’”); *see also* Mark T. Coberly, Note, *Caesar’s Wife Revisited—Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1201 n.5 (1977) (“[T]his distinction [between disqualification and recusal] is no longer generally recognized.”). This Article refers to both processes as recusal, which is a common approach in the recusal literature. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.2, at 4 (3d ed. 2017).

themselves *sua sponte*, although in many cases the judge's recusal evaluation is prompted by a motion for recusal filed by the litigants or an interested third party.²¹

In their current manifestations, federal and state judicial-recusal requirements in the United States stem from three distinct legal sources: constitutional rights of due process, statutory and procedural rules, and judicial ethics codes.

At the federal level, there is no explicit constitutional basis for judicial recusal, but the Supreme Court has found that the Due Process Clause requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."²² Although this somewhat-circular test does not provide a clear threshold at which the probability of bias becomes unconstitutional, the Court has provided examples of violations in some of its decisions, most prominently in *Caperton v. A.T. Massey Coal Co.*, which is reviewed in Section I.C. At the state level, there are several constitutions that do call for recusal under certain circumstances, but most states invoke recusal only through their own due process requirements.²³ Interpretations of these due process requirements vary depending on the state, but they are generally similar to the form and function of the federal Due Process Clause.²⁴

In practice, statutes control most recusal disputes. Federal recusal disputes are controlled by 28 U.S.C. § 455.²⁵ Section 455(b) specifies that judges must recuse when certain conditions exist, including: personal

²¹ This Article distinguishes between for-cause recusal and peremptory challenges, the latter of which are discussed in Part V as a potential (albeit partial) remedy for the shortcomings of the current system.

²² *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

²³ See generally FLAMM, *supra* note 20, §§ 3.1–.52, at 31–104 (providing a comprehensive overview of the recusal approaches of all fifty states). Maryland's constitution states that "[n]o Judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, by affinity or consanguinity, within such degrees as now are, or may hereafter be prescribed by Law, or where he shall have been of counsel in the case." MD. CONST. art. IV, § 7. Mississippi's constitution states that "[n]o judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties." MISS. CONST. art. 6, § 165. Similar language exists in the New Mexico constitution, N.M. CONST. art. VI, § 18, Tennessee constitution, TENN. CONST. art. VI, § 11, and Texas Constitution, TEX. CONST. art. V, § 11.

²⁴ See Melinda A. Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors*, 7 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 238, 287 (2017).

²⁵ *Id.* at 285. Professor Melinda Marbes, another top recusal scholar, explains that the other two federal statutory avenues for recusal, 28 U.S.C. § 47 and § 144, are applicable only to certain cases or have the difficult-to-attain standard of actual bias and are therefore not widely used. *Id.*

knowledge regarding the facts of the case, previous employment dealing with the case, financial interest in the case, or a familial relationship (to the third degree) with a participant in the case.²⁶ Section 455(a) outlines the broad provision of the rule, stipulating that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”²⁷ The appearance-of-bias standard in this “catchall” provision reflects the most common approach to regulating nonitemized sources of bias in U.S. recusal regimes.²⁸

Like the federal courts, most states have statutory recusal regulation. These statutes generally provide a list of per se (automatic) recusal rules, although the circumstances that require recusal vary from state to state.²⁹ States also vary on the standard used to make determinations regarding potential sources of bias that fall outside of the explicitly listed categories, with twenty-four states using appearance of partiality, five states requiring a showing of actual bias on the part of the judge, and the remaining states adopting a standard that incorporates both the appearance and actual bias approaches or falls somewhere in between.³⁰

Additionally, both federal and state judges are ostensibly governed by additional recusal rules outlined in the respective court rules and ethics codes, although it is generally unclear to what extent these sources have the force of law and subsequently allow for justiciable claims when not followed.³¹

B. The (Potential) Impacts of Judicial Campaign Finance

Of all the potential sources of conflicts facing trial judges, judicial campaign finance is likely the most controversial. In almost any other context, the transfer of money from any potential litigant or attorney to an active judge is seen as an explicit threat to judicial impartiality.³² In most

²⁶ 28 U.S.C. § 455(b).

²⁷ *Id.* § 455(a).

²⁸ See Marbes, *supra* note 24, at 287–88.

²⁹ See *id.* at 283.

³⁰ See *id.* at 287–88.

³¹ Although it has no force of law, the ABA Model Code of Judicial Conduct has long been the leading influence on these provisions. The Code of Conduct for U.S. judges is practically identical to the ABA Model Code, and forty-nine states have used the 1972 edition in creating their own codes. See Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1229–30 (2002).

³² To quote popular political comedian John Oliver, “Think about it. Giving money to judges wouldn’t be acceptable in a state-fair squash-growing competition.” LastWeekTonight, *Elected Judges*:

judicial elections, however, citizens, businesses, and even active lawyers are transferring thousands or even millions of dollars to judges through direct contributions and independent expenditures.³³

Over the last three decades, the cost of judicial election campaigns skyrocketed, in terms of both fundraising and spending.³⁴ In 1990, the average judge running in a contested race spent \$364,348 on her campaign (an amount that was already drastically higher than it was just a few election cycles earlier).³⁵ By 2004, the average judge spent \$1.5 million on a state supreme court race.³⁶ Judicial candidates in nonpartisan races saw a similar spike in spending during that period, moving from \$300,000 to \$600,000.³⁷ Data on lower courts are less widely available but generally show a similarly seismic shift in the scale of campaigns leading up to the turn of the millennium.³⁸ More recently, the cost of these elections has stabilized and

Last Week Tonight with John Oliver (HBO), YOUTUBE, at 8:24 (Feb. 23, 2015) (originally aired on Feb. 22, 2015 on HBO), <https://www.youtube.com/watch?v=poL7I-Uk3I8> [<https://perma.cc/7HGR-MW5L>]; see also MODEL CODE OF JUD. CONDUCT r. 3.13 cmt. 1 (AM. BAR ASS'N 2020) (“Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge’s decision in a case.”).

³³ As it currently stands, judicial elections occur in the vast majority of states, although the form of election and the level of courts for which it is employed varies. Out of fifty states, thirty-nine employ judicial elections to initially select their judges at some level, with thirty-three using elections to select trial court judges, twenty-three using them to select intermediate judges (noting that ten states do not have intermediate courts), and twenty-five using them to select high-court judges. Fourteen states do not hold popular elections for the initial selection of judges but do hold some form of retention elections. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), <https://brennancenter.org/judicial-selection-map> [<https://perma.cc/F2WR-SPGW>].

³⁴ Professor Chris Bonneau documents that just from 1990 to 2000, the percent of judicial elections for state supreme court seats that were contested rose from 68% to 95% and from 44% to 75% for partisan and nonpartisan elections, respectively. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27 tbl.6 (2004); Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL’Y Q. 107, 107–09 (2005).

³⁵ Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 59, 63 (Matthew J. Streb ed., 2007).

³⁶ *Id.* at 63 fig.4.1.

³⁷ *Id.*

³⁸ See, e.g., Phillip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC’Y REV. 395, 400 (1984) (reporting that the cost of elections in the California superior courts—the trial courts—doubled from 1972 to 1978); CAL. COMM’N ON CAMPAIGN FIN., *THE PRICE OF JUSTICE: A LOS ANGELES AREA CASE STUDY IN JUDICIAL CAMPAIGN FINANCING* 8 (1995) (reporting that “[m]edian superior court campaign spending has more than doubled every year for the past 16 years, increasing 22-fold from just over \$3,000 in 1976 to over \$70,000 in 1992”).

even dipped in some states,³⁹ but the days in which judicial elections were “low-key affairs”⁴⁰ are clearly over.

To complicate matters, studies also show that a significant percentage of donations to judicial campaigns—in some cases a majority of them—come from potential participants in that judge’s courtroom.⁴¹ The most recent reports (covering the 2015–2016 election cycles) by the Brennan Center calculate that 31.7% of the over \$40 million raised by judicial candidates comes from lawyers and lobbyists, while an additional 24.1% comes from business interests.⁴²

The natural question that emerges from these recent trends in judicial campaign financing is whether this money is potentially influencing judges’ legal decisions.⁴³ Many believe the connection between contributions and judicial decision-making is obvious, particularly when a contributor is a participant or has a stake in the outcome of a case;⁴⁴ a judge not feeling

³⁹ See Chris W. Bonneau, *Fundraising and Spending in State Supreme Court Elections*, in JUDICIAL ELECTIONS IN THE 21ST CENTURY 79, 81 tbl.5.1 (Chris W. Bonneau & Melinda Gann Hall eds., 2017); Brian Frederick & Matthew J. Streb, *Paying the Price for a Seat on the Bench: Campaign Spending in Contested State Intermediate Appellate Court Elections*, 8 ST. POL. & POL’Y Q. 410, 413 (2008).

⁴⁰ Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

⁴¹ See, e.g., Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 474 (2002) (“Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates.”); Shira J. Goodman, Lynn A. Marks & David Caroline, *What’s More Important: Electing Judges or Judicial Independence? It’s Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 865 (2010) (finding that over 60% of the cases that were heard by the Supreme Court of Pennsylvania featured a party, attorney, or law firm who “had contributed to the election campaign of at least one justice”); see also *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010) (noting that lawyers who “appear before the candidate who wins” are often the key contributors to judicial campaigns).

⁴² ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST. & NAT’L INST. ON MONEY IN STATE POL., WHO PAYS FOR JUDICIAL RACES? THE POLITICS OF JUDICIAL ELECTIONS 2015-16, at 11 (2017), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf [<https://perma.cc/2CL9-2SCD>].

⁴³ Another key concern is whether the system puts undue pressure on attorneys to donate to judges. See, e.g., Mary Flood, *Got Money? I Beat the Guy You Supported*, CHRON (Nov. 19, 2008), <https://web.archive.org/web/20150225140925/https://blog.chron.com/legaltrade/2008/11/got-money-i-beat-the-guy-you-supported/> [<https://perma.cc/RC35-ARFU>] (commenting on an email reportedly sent to a Texas attorney from Court of Appeals Judge Jim Sharp which Flood reported read in part, “I trust that you will see your way clear to contribute to my campaign account in an amount reflective of the \$2,000 contribution you made towards my defeat . . .”).

⁴⁴ See Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges’ Decisions*, 26 J.L. & POL. 359, 366 (2011) (discussing the “reciprocity principle”). This problem was also recognized in *Caperton v. A.T. Massey Coal Co.*: “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.” 556 U.S. 868, 882 (2009).

pressured to reciprocate “would defy bedrock social norms.”⁴⁵ Others—most often judges—deny that such a connection exists. In the face of polls that indicated two-thirds of his electorate questioned his ability to be impartial in an embarrassingly public Supreme Court case, West Virginia Supreme Court Justice Brent Benjamin vehemently denied that the over \$3 million in independent spending on his behalf had anything to do with his decision.⁴⁶ However, even the judges who deny the influence that money may have on their decisions bemoan the position that fundraising puts them in ethically. One judge put it plainly: “Everyone interested in contributing has very specific interests. They mean to be buying a vote.”⁴⁷

But providing evidence of the effect of campaign donations is difficult, an empirical reality that has been well established by scholars attempting to identify the causal impact of campaign donations on the behavior of legislators.⁴⁸ Although studies repeatedly show campaign donors (including attorneys, parties, and special interest groups) fare better in the courtroom than nondonors,⁴⁹ such observations are consistent with at least two explanations. On the one hand, judges may be favoring contributors in their rulings (either intentionally or unintentionally—more on this distinction in Section II.A.2), leading to better outcomes for cases in which those contributors are participating. On the other hand, contributors may simply be donating to judges who harbor a legal or political sensibility that will

⁴⁵ Bam, *supra* note 19, at 639.

⁴⁶ *Caperton*, 556 U.S. at 873–75.

⁴⁷ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES (Oct. 1, 2006) (quoting Justice Paul E. Pfeifer (a member of the Supreme Court of Ohio)), <https://www.nytimes.com/2006/10/01/us/01judges.html> [<https://perma.cc/G3SY-W589>].

⁴⁸ For an early observation of this problem, see Henry W. Chappell Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REV. ECON. & STAT. 77, 83 (1982) (noting the imprecision of estimates of campaign finance impacts in the voting equation). See also Stacy B. Gordon, *All Votes Are Not Created Equal: Campaign Contributions and Critical Votes*, 63 J. POL. 249, 260 (2003) (noting that the results of empirical studies on the impacts of campaign contributions on legislative voting behavior “have been mixed at best”).

⁴⁹ See, e.g., Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999) (finding that an individual judge’s propensity for supporting arbitration is strongly correlated with the source of that judge’s election funding, with judges receiving funding from businesses more likely to support arbitration than those receiving funding from plaintiffs’ lawyers); Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241, 257 (2000) (examining tort cases before supreme courts in Alabama, Kentucky, and Ohio, and finding that judges rule in line with the interests of donors when they are approaching reelection, although that effect wears off in postelection years); Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291, 1294–96 (2008) (recognizing a positive correlation in Louisiana Supreme Court cases between a lawyer or litigant’s contributions to a judicial campaign and the likelihood of a favorable ruling from that judge, with stronger correlations for more recent donations).

naturally (and innocently) lead them to vote in ways that benefit the contributor.⁵⁰ While the former would correctly be perceived as a *quid pro quo* that is a clear violation of the norms of judicial impartiality, the latter is simply a consequence of democratically selected judges.

To make matters more complex, this causal question does not easily lend itself to experimentation—the methodological approach that best addresses causal concerns. Nonetheless, recent studies use clever empirical strategies that, to some extent, get around some of the causal problems inherent in the enterprise. For example, a pair of studies utilized variables the authors argued were exogenous predictors of the amount of campaign contributions a judge receives.⁵¹ Other scholars have leveraged existing institutional features that might create natural discrepancies in contributions across otherwise-similar judges, finding that judges respond to donations only when those donations are private (as opposed to through a public pool)⁵² and only when those judges know they will be running again in the future.⁵³ These findings were recently validated and extended by another national

⁵⁰ See CHRIS W. BONNEAU, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS (2012), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/PtUl1jqi2GnyqsloJAsJeYrQSxttUjJow1YSQRoh.pdf> [<https://perma.cc/QW59-M85Q>] (providing a particularly good explanation of this two-way causal problem); Douglas D. Roscoe & Shannon Jenkins, *A Meta-Analysis of Campaign Contributions' Impact on Roll Call Voting*, 86 SOC. SCI. Q. 52, 53 (2005) (discussing this sort of “friendly giving” in the context of the legislative branch).

⁵¹ Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281, 288 (2007); Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* 17 (Feb. 4, 2009) (unpublished manuscript), <https://ssrn.com/abstract=1337668> [<https://perma.cc/6CV9-QV49>] (instrumenting, or approximating true random assignment, for campaign contributions by using the presence of a public defender and the incumbency status of the judge during the campaign). This approach, while novel, has been criticized for using instruments that are likely not independent of the error term. See Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, 12 ANN. REV. L. & SOC. SCI. 353, 366 & n.16 (2016).

⁵² Morgan L.W. Hazelton, Jacob M. Montgomery & Brendan Nyhan, *Does Public Financing Affect Judicial Behavior? Evidence from the North Carolina Supreme Court*, 44 AM. POL. RSCH. 587, 608–09 (2015) (studying North Carolina’s opt-in public financing system for supreme court candidates and comparing the decisions of judges before and after they entered the system against those who privately funded all of their campaigns). The key causal concern here is that the judges who opted into the publicly funded systems might be (and probably are) systematically different from the judges who did not in their decision-making.

⁵³ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) (comparing state supreme court judges who were potentially running for an additional term against those who were prevented from doing so due to mandatory retirement rules and finding that there is a strong relationship between case outcomes and the business interests of campaign contributors); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 75 (2011) (same).

study, which found that nonbusiness interests of donors are also influential on judicial behavior.⁵⁴

The integrated implications of these studies are nuanced, in large part because the influence of campaign money on case outcomes seems to depend on the circumstances of the election and the nature of the campaign contribution. For example, judges who won by slimmer margins in their previous election were more likely to rule in favor of contributors than judges who won by wider margins,⁵⁵ and judges appeared to favor their donors' interests more greatly when approaching reelection.⁵⁶ Additionally, judges running as partisans appear to be more influenced by contributions than those in nonpartisan elections.⁵⁷ Ultimately, the weight of the current evidence suggests a positive causal relationship between the source of donations and the outcomes of court cases, with some studies showing that donation differences of just \$100 can have a significant effect on how a judge will determine the outcome of cases.⁵⁸

Nonetheless, there are still gaps in this relatively new body of scholarship. Of particular importance in the context of this Article's empirical study, these studies have almost always analyzed the relationship between money and judicial decisions in state *supreme* courts, giving little attention to intermediate and trial courts (a bias present in the empirical literature studying the federal court system as well).⁵⁹

Even if one is skeptical about the causal link between political donations and the outcomes of individual cases, donations to judges can still be detrimental to the legal system if there is a *perceived* relationship between the two. In fact, some evidence suggests that a public perception of impropriety and partiality is even more detrimental to the judiciary than actual bias itself.⁶⁰ And while the evidence supporting the link between

⁵⁴ Michael Heise, *The Complicated Business of State Supreme Court Elections: An Empirical Perspective*, 52 VAL. U. L. REV. 19, 25 (2017).

⁵⁵ See Ryan J. Rebe, *Analyzing the Link Between Dollars and Decisions: A Multi-State Study of Campaign Contributions and Judicial Decision Making*, 35 AM. REV. POL. 65, 85 (2016).

⁵⁶ See Waltenburg & Lopeman, *supra* note 49 (examining tort cases before supreme courts in Alabama, Kentucky, and Ohio across the judges' election terms).

⁵⁷ Bonneau & Cann, *supra* note 51, at 13–16, 19.

⁵⁸ See Damon M. Cann, Chris W. Bonneau & Brent D. Boyea, *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, in NEW DIRECTIONS IN JUDICIAL POLITICS 38, 48–49 (Kevin T. McGuire ed., 2012) (finding a significant relationship between the donations of attorneys and the outcomes of cases, with donating parties being roughly twice as likely to have a favorable decision after controlling for ideology and case-specific variables).

⁵⁹ Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 205 (2017) (noting that “most research on judges emphasizes decisions of the US Supreme Court”).

⁶⁰ See Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 122 (2000).

campaign spending and judicial behavior is open to criticism, the evidence is undeniably strong that the public, lawyers, and even judges are concerned with the effect that donations have on judicial decision-making.

Polling data have consistently shown that nearly every important demographic group sees the increased role of money in judicial elections as both a source of bias in individual cases and a general threat to the legitimacy of the court system. In a national poll, 76% of voters believed that campaign contributions had at least “some influence” on judicial decisions, and an additional 14% believed that there is “a little influence” on case outcomes.⁶¹ In another poll, more than 90% of those polled believed that judges should not hear cases involving contributors.⁶² Similarly, 90% of business leaders are concerned about the role that money plays in judicial behavior.⁶³

Professors James Gibson and Gregory Caldeira have further explored the mechanisms behind the public’s views on campaign spending in judicial elections,⁶⁴ leading a growing literature of survey experiments. By randomly varying the content of vignettes about a candidate’s judicial campaign, the authors show that when judicial candidates accept contributions, survey participants are more than 30 percentage points less likely to believe that the judge can be fair and impartial.⁶⁵ Perceptions of legitimacy are also damaged by judges who hear cases that feature campaign contributors relative to those who recuse—a 20-percentage-point difference.⁶⁶

Even lawyers and judges, presumably the individuals who would be best informed regarding the true impact that donations play in court decision-making, appear to be concerned about the impact that campaign contributions have on case outcomes. In a 2001 poll, 46% of state judges polled thought campaign contributions influenced judges’ decisions,

⁶¹ JUST. AT STAKE, STATE COURTS FREQUENCY QUESTIONNAIRE, *supra* note 9, at 4.

⁶² *Polling of Voters, Business Leaders and Judges Themselves Shows Overwhelming Concern About the Impact of Special Interest Money on the Integrity of American Courts*, JUST. AT STAKE (2009), <https://web.archive.org/web/20170707144607/http://www.justiceatstake.org/resources/polls.cfm> [<https://perma.cc/3HF9-6D2N>].

⁶³ CHRISTIAN W. PECK, ZOGBY INT’L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 5 (2007), http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf [<https://perma.cc/E32Z-MUHM>].

⁶⁴ James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. EMPIRICAL LEGAL STUD. 76, 78 (2013) [hereinafter Gibson & Caldeira, *National Survey*]; James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?*, 74 J. POL. 18, 19 (2012).

⁶⁵ Gibson & Caldeira, *National Survey*, *supra* note 64, at 85.

⁶⁶ *Id.* at 86.

compared to 36% who believed there was no influence.⁶⁷ Further, 56% of these judges supported proposals to make recusal mandatory in cases that feature parties who had financially supported the presiding judge's campaign, a statistic that will prove to be perplexing when contrasted with the rates at which those same judges actually recuse from such cases in Part IV of this Article.⁶⁸

C. *Recusal and Judicial Campaign Finance*

The growing empirical evidence that judicial campaign finance impacts the perception of, if not the actual decisions made by, the judiciary generates an important and valuable stress test for the limits of our current system of recusal. And this tension was in full public view in the touchstone case for discussing the confluence of judicial politics and recusal, *Caperton v. A.T. Massey Coal Co.*⁶⁹ The case features prominently in the introductions of nearly all post-2009 law review articles that cover judicial campaign finance or recusal, and it is easy to see why: the underlying facts are a spectacular example of the potential threats to judicial impartiality and legitimacy that come from judicial elections. A CEO of a company that had just lost a \$50 million case in the West Virginia trial courts spent \$3 million to support Brent Benjamin, a local attorney who was running for a seat on the state supreme court (a court the CEO knew would likely review the trial case on appeal).⁷⁰ Benjamin won his election and eventually helped overturn the case against the CEO's company while refusing to recuse himself from the case, finding "no objective information . . . to show that [he had] a bias for or against any litigant, that [he had] prejudged the matters which comprise this litigation, or that [he would] be anything but fair and impartial."⁷¹

But the extreme circumstances of the case also make it a somewhat unhelpful case study for understanding the current state of recusal law in the United States. Although the Supreme Court in *Caperton* ultimately found the judge's failure to recuse violated due process because the probability of judicial bias was "too high to be constitutionally tolerable,"⁷² the resulting

⁶⁷ The remaining 16% said they did not know whether contributions influenced decisions, and 2% did not answer the question. JUST. AT STAKE, STATE JUDGES FREQUENCY QUESTIONNAIRE, *supra* note 9, at 5.

⁶⁸ *Id.* at 11.

⁶⁹ 556 U.S. 868 (2009).

⁷⁰ *Id.* at 872–73.

⁷¹ *Id.* at 874.

⁷² *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The constitutional question at issue was specifically whether the donations and support given to Benjamin by the CEO (the validity of which were not in question) created an intolerable risk of bias, not "whether in fact [the justice] was influenced." *Caperton*,

precedent is so ambiguous and tied to such extraordinary facts that states have little guidance on how they should address the frequent but much more mundane conflicts created by campaign donors in the courtroom.

And yet, in some ways, this ruling was seen by many as a monumental shift in the approach that the Supreme Court takes toward elections and campaign spending, as it was one of the few times when the Court was willing to push back against the growing influence of campaign spending on elections and postelection activities.⁷³ Regarding recusal jurisprudence, however, the decision provided very little guidance. The Court made clear that there exists some “constitutional floor”⁷⁴ at which point judges must recuse due to campaign contributions but left questions regarding the possible bias associated with smaller, more common, donations (that is, donations less than \$3 million) as “matters merely of legislative discretion.”⁷⁵

Despite the *Caperton* ruling—and possibly because of it—recusal is still understood by many as the most practical antidote to judicial impartiality in this context. Recusal provides a post hoc remedy to a problem that is an inherent part of the current political regime without necessitating a wholesale dismantling of the regime itself. Indeed, in the case of campaign contributions, some have argued that recusal is not only the best means for dealing with bias but “the *only* effective means to ensure the impartiality of elected judges.”⁷⁶ However, the particular legal approach that states should take to regulate recusal in relation to campaign contributors is still an open question.

The American Bar Association and its Model Code of Judicial Conduct has led much of this discussion. Rule 2.11 calls for automatic recusal when

[t]he 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

556 U.S. at 879–84 (alteration in original) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). In fact, Justice Anthony Kennedy’s majority opinion made it clear that the Court was not questioning Benjamin’s impartiality and that “due process ‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’” *Id.* at 882, 886 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

⁷³ Note that the case was a 5–4 decision, and the dissent highlighted a number of important positions, including Justice Antonin Scalia’s view that the majority’s ruling was more harmful to the public’s perception of the judiciary than the facts of the case themselves. *Id.* at 903 (Scalia, J., dissenting).

⁷⁴ *Id.* at 889 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)).

⁷⁵ *Id.* at 876 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

⁷⁶ Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 692 (2009) (emphasis added).

amount] for an entity] [is reasonable and appropriate for an individual or an entity].⁷⁷

The specific contribution amounts at which the rule is triggered are left up to the individual states.

Only a handful of states have implemented Rule 2.11(A)(4)'s inclusion of campaign contributions in the list of enumerated per se recusal requirements.⁷⁸ Most prominently, California passed a 2010 amendment to the California Code of Civil Procedure to require recusal for trial judges if a party or an attorney in a case had donated more than \$1,500 in the previous six years or for any donation amount if a reasonable person might "entertain a doubt that the judge would be able to be impartial."⁷⁹ The Supreme Court of California also amended its code of judicial ethics to require recusal for appellate judges for donations above \$5,000.⁸⁰ Similarly, Arizona implemented mandatory recusal for aggregate contributions that exceed the campaign contribution limits at the time,⁸¹ and in 2014 Alabama adopted rules stipulating that judges must recuse if the contributions of a lawyer or party in a case exceed 10%, 15%, or 25% of the total money raised by the appellate, circuit, or district court judge respectively.⁸² On a much more extreme level, Utah similarly requires recusal for donations, except the cap is any aggregate contribution amount above \$50.⁸³ Other states have quashed

⁷⁷ MODEL CODE OF JUD. CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2020) (alterations in original).

⁷⁸ See FLAMM, *supra* note 20, §§ 22.1–.8, at 367–86 (comprehensively cataloguing and discussing recusal rules as they relate to campaign contributions); see also AM. BAR ASS'N, COMPARISON OF ABA MODEL CODE OF JUDICIAL CONDUCT AND STATE VARIATIONS (Aug. 16, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.pdf [<https://perma.cc/TJ6P-SE74>].

⁷⁹ CAL. CIV. PROC. CODE § 170.1(9)(A), (6)(A)(iii).

⁸⁰ CAL. CODE OF JUD. ETHICS Canon 3E(5)(j) (clarifying that "[n]otwithstanding [this rule], a justice shall disqualify himself or herself based on a contribution of a lesser amount if required by Canon 3E(4). The disqualification required under [this rule] may be waived if all parties that did not make the contribution agree to waive the disqualification").

⁸¹ Arizona's contribution limits change systematically every two years. ARIZ. REV. STAT. § 16-905(I).

⁸² 2014 Ala. Laws 2014-455 § 1(b) (codified at ALA. CODE § 12-24-3(b)). Interestingly, Alabama had previously had a mandatory recusal cap at \$4,000 that was never implemented. See *Little v. Strange*, 796 F. Supp. 2d 1314, 1318 (M.D. Ala. 2011) (dismissing a district court suit challenging the statute because of a lack of ripeness).

⁸³ UTAH CODE OF JUD. ADMIN. r. 2.11(A)(4) (requiring disqualification when "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 three years made aggregate contributions to the judge's retention in an amount that is greater than \$50"). Note that one reason why the cap is so low is because Utah judges fundraise only during retention elections, which are considerably less expensive than competitive races.

similar reforms for per se rules,⁸⁴ possibly because of the perverse “pay-not-to-play” incentives discussed in Part V.

Some states have explicitly incorporated considerations for campaign contributions into their recusal regimes but have stopped short of requiring the judge to remove herself for certain amounts. Mississippi now *allows* parties to file motions to recuse based on donations of more than \$2,000 for appellate judges and \$1,000 for trial judges, but this is not automatic and requires only that the motion be “considered and subject to appellate review as provided for other motions for recusal.”⁸⁵ Georgia incorporated a list of factors that “may be considered” to determine impartiality due to campaign support (which includes donation amount in addition to the timing and impact of that donation), but clarifies that “[t]here is a rebuttable presumption that there is no per se basis for disqualification where the aggregate contributions are equal to or less than the maximum allowable contribution permitted by law.”⁸⁶

Since 2010, similar provisions or amendments to existing code that address campaign contributions have also been made in Iowa,⁸⁷ Michigan,⁸⁸ Oklahoma,⁸⁹ Pennsylvania,⁹⁰ Tennessee,⁹¹ and Washington.⁹² Additionally,

⁸⁴ See, e.g., Tom Solberg, *Supreme Court Revises Judicial Recusal Guidelines*, STATE BAR OF WIS. (July 9, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=37&ArticleID=5912> [<https://perma.cc/WF2A-4SCM>] (describing two petitions quashed by the Wisconsin Supreme Court that would have mandated recusal in specific circumstances); CYNTHIA GRAY, NAT’L CTR. FOR STATE CTS.: CTR. FOR JUD. ETHICS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS (November 2016), https://www.ncsc.org/_data/assets/pdf_file/0024/16647/disqualificationcontributions.pdf [<https://perma.cc/4EVN-YFQN>] (outlining a number of other similar proposals).

⁸⁵ MISS. CODE OF JUD. CONDUCT Canon 3E(2).

⁸⁶ GA. CODE OF JUD. CONDUCT r. 2.11(A)(4) (emphasis omitted).

⁸⁷ IOWA CODE OF JUD. CONDUCT r. 51:2.11(A)(4).

⁸⁸ MICH. CT. R. 2.003(C)(1)(b).

⁸⁹ OKLA. CODE OF JUD. CONDUCT r. 2.11A(4).

⁹⁰ 207 PA. CODE OF JUD. CONDUCT r. 2.11(A)(4); see also Press Release, Robert A. Graci, Chief Counsel, Pa. Jud. Conduct Bd., Board Issues Statements of Policy Regarding Investigations of Campaign Contributions and Electronic Communications (Nov. 4, 2016), <http://judicialconductboardofpa.org/wp-content/uploads/11-04-2016-Press-Release-Board-Issues-Statements-of-Policy-Regarding-Investigations-of-Campaign-Contributions-Electronic-Communications.pdf> [<https://perma.cc/T8E2-HNEN>] (providing guidance for disqualification under Rule 2.11(A)(4)).

⁹¹ TENN. CODE OF JUD. CONDUCT r. 2.11(A)(4); see also *id.* cmt. 7 (listing factors a judge should consider when deciding whether their impartiality might reasonably be questioned).

⁹² WASH. CODE OF JUD. CONDUCT r. 2.11(D).

Arkansas,⁹³ Missouri,⁹⁴ New Mexico,⁹⁵ and North Dakota⁹⁶ have each added relevant language in the comments to their respective rules.⁹⁷

In states with recusal laws or rules that simply mention campaign contributions as a potential source of bias—a category that includes Wisconsin and Texas, the states featured in this Article’s field experiment—the question of whether a judge should recuse from cases in which a donor is a participant is governed by the generalized provisions regarding bias or appearance of bias discussed in Section I.A, *supra*. As a result, it is not surprising to see that, upon review of cases in which judges have refused to recuse,⁹⁸ the majority of state courts found that judges are not required to recuse due purely to campaign donations if those judges have determined that they can remain impartial.⁹⁹ This does not preclude judges from recusing themselves regardless of the absence of a precedential requirement to do so, but it does create a system of recusal that is firmly rooted in the subjective evaluation of the judge herself.

⁹³ ARK. CODE OF JUD. CONDUCT r. 2.11 cmt. 4A (“The fact that a lawyer in a proceeding, or a litigant, contributed to the judge’s campaign, or publicly supported the judge in his or her election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and the proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge’s impartiality under paragraph (A).”).

⁹⁴ MO. CODE OF JUD. CONDUCT r. 2-4.2 cmt. 1.

⁹⁵ N.M. CODE OF JUD. CONDUCT r. 21-211 cmt. 6, 7.

⁹⁶ N.D. CODE OF JUD. CONDUCT r. 2.11 cmt. 4.

⁹⁷ For a thorough overview of these changes and all the recent legal moves relating to recusal and campaign contributions, see GRAY, *supra* note 84.

⁹⁸ When evaluating patterns in the case law, it is important to be aware of how the institutional framework of the courts might result in a biased picture of the legal practice and outcomes in that area. With cases dealing with recusal motions, we should expect to find a disproportionate number of cases in which the initial judge has refused to recuse because it is unlikely (and legally tenuous) for parties to appeal in cases when the judge has either recused herself or granted a motion to recuse. Such decisions are often unappealable. See Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 71 (2011) (discussing this limitation in the context of recusals in the federal courts).

⁹⁹ See FLAMM, *supra* note 20, at 367–86 (providing a short review of the current approach to this issue by U.S. courts, including a summary of relevant cases); see also, e.g., *Rocha v. Ahmad*, 662 S.W.2d 77, 77–79 (Tex. App. 1983) (failing to require recusal despite the fact that two of the three judges had received thousands in contributions from one of the attorneys and had thrown their victory celebrations at the attorneys’ offices); *Storms v. Action Wis. Inc.*, 754 N.W.2d 480, 487 (Wis. 2008) (stating that there is “no case in Wisconsin or elsewhere” where recusal is mandated simply because a participant in the case made a contribution to the judge’s political campaign); *Williams v. Viswanathan*, 65 S.W.3d 685, 688 (Tex. App. 2001) (finding that because a reasonable person would certainly know that judges have to raise money in order to run for election, simply having received a donation from a participant in a case is not enough to warrant required recusal); *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 311 (E.D. Pa. 1998) (acknowledging that the state of campaign finance creates an unfortunate situation but that it would be unfair to punish the judge for accepting legal contributions by forcing recusal).

II. WHY JUDGES DON'T RECUSE THEMSELVES AND ATTORNEYS DON'T ASK THEM TO

This is not the first article to claim that the current system of recusal in the United States is toothless. Coming after the controversy surrounding *Caperton*, scholarship skeptical of recusal in the context of judicial elections has become a cottage industry.¹⁰⁰ Across this literature, the message—recusal does not work—is the same, but the concerns are varied. Below, I explore these concerns and build an informal framework of judicial behavior that identifies the various factors that disincentivize recusal, even when a legitimate conflict of interest exists. This is not a functional formal model—it does not provide a numerical framework for the decision—but it is an attempt to be comprehensive in consolidating the legal literature on judicial recusal with the most relevant empirical findings in psychology, sociology, political science, and economics. As argued below, the analysis leads to the conclusion that recusal rates, particularly when the recusal question pertains to campaign contributions, are likely very low—even lower than the already-skeptical literature might suggest.

The behavioral framework, which I also utilize to explore the incentives surrounding an attorney requesting recusal in Section II.B, focuses on the judge's behavior but accounts for three primary actors: the presiding judge for whom the conflict of interest is a potential issue; the “inside” party, who has the questionable relationship with the judge; and the “outside” party, who does not have the relationship with the judge. In this structuring, I will generally treat the parties to a case and their attorneys as single actors with unified preferences, although as I highlight in Section II.C, there are instances when the long-term interests and subsequent behavior of the attorney diverge from the short-term interests of her client.

A. *Why Judges Don't Recuse Themselves*

As was demonstrated above, most recusal rules in the United States put the decision squarely into the hands of the judge. While some rules mandate recusal in certain circumstances, most of the time, whether a judge recuses will depend on whether the judge herself perceives the potential conflict as problematic. At that point, the judge must still determine whether those concerns are serious enough to overcome the reputational and institutional costs of publicly admitting partiality and removing herself from the case. However, the nature of self-judging combined with these extralegal costs to recusal create a decision-making environment in which the behavioral expectations that undergird our current recusal regime—namely that judges

¹⁰⁰ See, e.g., *supra* note 7.

will be able to identify conflicts and then self-recuse when necessary—are likely false.

1. *Judicial Latitude in Recusal Determinations*

The recusal process itself is the foundational factor behind why judges are not likely inclined to recuse. In the first place, the entire premise of employing a judge to make legal determinations is based on the well-known edict that “[n]o man is allowed to be a judge in his own cause.”¹⁰¹ And yet, with few exceptions, the judge to whom the recusal motion is filed and the judge who rules on the recusal motion itself is the very individual whose impartiality is being questioned.¹⁰²

The extent to which self-recusal is a problem varies depending on the purported source of bias. For a fairly standard set of potential conflicts (familial relationships, financial interests, pre-judicial legal work on the case, etc.), judges are subject to bright-line per se recusal rules. In making determinations on these issues, the legal sufficiency of the allegations of bias are generally much easier to produce and evaluate, so less judicial discretion is involved.¹⁰³ The judge does technically have the option to refuse recusal, but doing so would almost certainly result in successful appeal and possibly an ethical sanction.¹⁰⁴

For most recusal decisions, however, judges are granted much more decisional discretion. Because it is impractical to predict and outline all circumstances that might warrant recusal, regimes generally employ broad “catchall” rules that require removal in circumstances in which the judge is sufficiently biased or, in most cases, may be perceived to be biased. In addition to being “slippery in practice,”¹⁰⁵ the standards used to make these self-recusal determinations vary across (and within¹⁰⁶) jurisdictions and are

¹⁰¹ THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961). The full quote states that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” *Id.*

¹⁰² As an example of an exception, Illinois recusal law allows for the substitution of the judge for recusal determinations in both civil cases, 735 ILL. COMP. STAT. 5/2-1001, and criminal cases, 725 ILL. COMP. STAT. 5/114-5, although doing so requires additional filings.

¹⁰³ See Marbes, *supra* note 24 at 287–88 (exploring the distinction between per se recusal rules and rules that rely on more judicial discretion and arguing that a separate legal regime should be applied to the two types of recusal decisions).

¹⁰⁴ Buhai, *supra* note 98, at 71 (reviewing cases in the U.S. circuit courts in which a decision not to recuse was appealed).

¹⁰⁵ See FLAMM, *supra* note 20, § 10.2, at 210 (internal quotation marks omitted) (quoting Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1477 (1981)).

¹⁰⁶ Compare *United States v. Mikalajunas*, No. 91-5119, 1992 WL 214506, at *2 (4th Cir. Sept. 2, 1992) (holding that the proper standard for recusal is whether a reasonable person “would” doubt the

largely underdeveloped, giving judges such wide latitude that the decision comes down as much to personal choice and perspective as it does to legal standards.¹⁰⁷ This is particularly true in the jurisdictions that use the appearance-of-bias test, as this standard generally requires the judge to “evaluate the evidence of possible bias in the same manner a reasonable and informed other would.”¹⁰⁸

The current regime of judicial recusal continues to put a premium on providing judges with broad flexibility to determine which cases warrant removal due in large part to the fact that judges vociferously defend their own decision-making territory. There is a fear that a full-scale reversion to the previous recusal rules—an approach hallmarked by ubiquitous automatic recusals and the assumption that judges are inherently biased in many cases—will reflect poorly on the judges and the judiciary more broadly.¹⁰⁹ It is no surprise, then, that the decisions of judges regarding recusal decisions in specific cases should be—as with their approach to recusal rules and regulation more broadly—partly self-preserving.

2. *The Psychology of Judicial Decision-Making*

Likely the best understood—and most discussed—factors that work to disincentivize judicial recusal are the cognitive and psychological difficulties in identifying and overcoming bias and partiality.¹¹⁰ A series of studies in psychology provides evidence that judges are susceptible to many, if not all, of the same cognitive errors and illusions impacting the decision-

judge’s impartiality), *with* United States v. Cherry, 330 F.3d 658, 665 (4th Cir. 2003) (holding that the proper standard is whether a reasonable person “might” doubt the judge’s impartiality).

¹⁰⁷ See FLAMM, *supra* note 20, § 11.2, at 227 (“The fact is . . . that the term ‘appearance of bias’ has, for the most part, not been defined; and, because that is so, courts have not always used that term to mean precisely the same thing.”). One of the likely reasons that this area of law is underdeveloped is that judges often do not need to state the reasons for their recusal on the record when they voluntarily recuse. See Patrick A. Woods, *Reversal by Recusal? Comer v. Murphy Oil U.S.A., Inc. and the Need for Mandatory Judicial Recusal Statements*, 13 U.N.H. L. REV. 177, 178 (2015). Similarly, voluntary recusal in a previous case does not necessarily demonstrate the need for recusal in subsequent cases. See Mackey v. United States, 221 F. App’x 907, 910 (11th Cir. 2007) (“It is simply not true that once recused, always recused.”); Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991) (“Prior recusals, without more, do not objectively demonstrate an appearance of partiality.”).

¹⁰⁸ See Marbes, *supra* note 24, at 288.

¹⁰⁹ See CHARLES GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 17–18 (2007) (chronicling the heated debate with the ABA regarding the appearance-of-bias standard); see also Charles Geyh, Myles Lynk, Robert S. Peck & Toni Clarke, *The State of Recusal Reform*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 516–18 (2015) (detailing a panel discussion on the evolution of recusal standards, particularly in regard to the ABA standards).

¹¹⁰ For a more substantial review of the importance of judicial psychology as it relates to recusal, see Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 249–50 (2013). See also Marbes, *supra* note 7, at 810; Marbes, *supra* note 24, at 242; W. Bradley Wendel, *Campaign Contributions and Risk-Avoidance Rules in Judicial Ethics*, 67 DEPAUL L. REV. 255, 255 (2018).

making processes that have long been identified in the wider psychological literature.¹¹¹ Judges, for example, are prone to hindsight bias (the tendency to underestimate the difficulty of past decisions once present outcomes are known)¹¹² and framing effects (the categorization of difficult decision options as a loss or a gain that depends on how the decision is initially presented),¹¹³ despite their legal training and perception as mechanistic legal arbiters.

Although these cognitive errors may arguably lead to the sorts of judicial partiality that might necessitate recusal rules in the first place, the “bias blind spot” is a cognitive error that is particularly relevant to the ability for judges to make self-recusal determinations. “Bias blind spots” relate specifically to one’s ability to judge oneself. Originally coined by social psychologist Professor Emily Pronin and her associates, the bias blind spot is a descriptor for two related psychological phenomena.¹¹⁴ First, individuals are systematically apt to underestimate or not even recognize the extent to which they are biased in a particular area. Second, individuals overestimate the extent to which others are prone to that same bias.¹¹⁵ So, because judges are required to self-determine the existence or perception of bias, they will likely not perceive the bias or dismiss it if claims of partiality are raised by outside sources (litigants, their attorneys, or third parties).

It is unclear exactly how susceptible judicial decision-making and recusal decisions specifically are to this blind spot—no empirical studies have used judges as subjects. However, leading scholars in recusal law and analysis have appropriately argued that current evidence suggests judges are

¹¹¹ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001) (featuring an empirical study of over 160 federal magistrate judges—one of the first psychological studies on actual judges—testing five common cognitive illusions that had previously been identified to exist among the lay population).

¹¹² See generally Stephen J. Hoch & George F. Loewenstein, *Outcome Feedback: Hindsight and Information*, 15 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY, & COGNITION 605 (1989).

¹¹³ For a detailed discussion and evaluation of framing, see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 221 SCIENCE 453 (1981); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 30 AM. PSYCH. 341 (1984); and Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986).

¹¹⁴ See Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCH. BULL. 369 (2002); see also Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCIS. 37 (2007); Joyce Ehrlinger, Thomas Gilovich & Lee Ross, *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCH. BULL. 690 (2005); Irene Scopelliti, Carey K. Morewedge, Erin McCormick, H. Lauren Min, Sophie Lebrecht & Karim S. Kassam, *Bias Blind Spot: Structure, Measurement, and Consequences*, 61 MGMT. SCI. 2648 (2015).

¹¹⁵ This second phenomenon may explain the dissonance between what judges say should happen in regard to recusal and what judges actually do in practice. For what they do in practice, see *supra* notes 48–49; *infra* Tables 2 and 3.

prone to the same errors as the rest of us, so it is reasonable to presume that they fall prey to the blind spot as well.¹¹⁶ In the context of recusal, this is particularly problematic because most non-per-se recusal determinations are almost exclusively up to the determination of the judge.¹¹⁷

But what of the judges who are successfully able to identify their partiality and sincerely seek to address it, whether through their own inner exploration or through the arguments of one of the parties? The circumstances surrounding *Caperton* are again illustrative in this regard. The West Virginia Supreme Court justice in question was well aware of the donations made by the CEO of Massey Coal and the potential, if not likely, effect that such a relationship could have on Justice Benjamin's ability to be a neutral decision-maker in the case.¹¹⁸ Yet Justice Benjamin adamantly defended his ability to ignore the money and stay on the case.¹¹⁹ And while some would argue that judges are particularly well suited to ignore these sorts of issues or even "debias" themselves, recent findings in psychology suggest otherwise.¹²⁰

3. *Reputational Costs*

Even if judges are successfully able to identify circumstances that lead to partiality or the appearance of partiality, the current ethos of judicial practice frames recusal in such a way that doing so may be seen as abdicating one's role as a judge. Recusal has long been associated with "bad" judging in this country's legal culture. William Blackstone (not an American jurist but influential nonetheless) was famously opposed to recusal: "[T]he law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."¹²¹ Within this cultural context, recusal can be seen as an abandonment of the judicial commitment to fairness as opposed to an attempt to maintain it. These cultural motivations are particularly salient when it is one of the participants in the case who raises the issue of bias as opposed to a sua sponte motion for recusal from the judge, as "a

¹¹⁶ See Guthries et al., *supra* note 111, at 780–83.

¹¹⁷ Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J.L. PRO. 85, 96–97 (2008).

¹¹⁸ In the case, the petitioner *Caperton* moved for recusal three times. It argued Justice Benjamin would be biased by the contributions and presented data from a push poll showing that 67% of West Virginians questioned his ability to be partial. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 875 (2009).

¹¹⁹ *Id.* at 874.

¹²⁰ Pronin et al., *supra* note 114, at 375 (finding that "even the immediate experience of having displayed a particular bias, and then being given an explicit description of it . . . , was insufficient to prompt confessions of susceptibility equal to that of one's peers").

¹²¹ 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

successful motion to recuse requires the [judge] to admit that he failed in the first instance to adhere to statutory and ethical requirements.”¹²²

In addition to affecting the broader judicial institution, judges may be concerned that recusing will impugn the judge’s colleagues and legal associates. In *Caperton*, one of the primary disagreements between the majority and dissent was the extent to which the justices felt that judges should be presumed to be impartial. Writing in dissent, Chief Justice Roberts argued that the court should be careful to find judges in violation of the “promise” of impartiality, implying that doing so would “impute to judges a lack of firmness, wisdom, or *honor*.”¹²³ In his own brief dissent, Justice Scalia not only expressed a strong presumption of impartiality but also emphasized that overly inclusive recusal requirements would actually “erod[e] public confidence in the Nation’s judicial system.”¹²⁴

4. Institutional Costs

In addition to potential social costs, recusal also brings institutional costs to the judges and the participants in a case. Any judicial transfer will inherently cause at least some administrative burden to the judge and the court system; the case will have to be formally transferred to another judge, requiring some paperwork, a physical transfer of files from one office to another, and some rescheduling.¹²⁵ Depending on the jurisdictional procedures and practices, recusal can also trigger a formal review by a peer or presiding judge.¹²⁶ As one judge who was interviewed for this Article said, “It really is a pain to my colleagues when I have to recuse from a case.”¹²⁷ Although such costs are likely de minimis when recusal occurs at the beginning of the adjudicative process, they can become substantial as the case develops and the judge expends time and effort on the case.¹²⁸

¹²² R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833–34 (2005).

¹²³ *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting) (emphasis added) (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941)).

¹²⁴ *Id.* at 903 (Scalia, J., dissenting).

¹²⁵ See, e.g., *GENERAL ORDER NO. 1.3 – Assignment or Transfer of Actions*, STATE OF ILL. CIR. CT. OF COOK CNTY. (Aug. 1, 1996), <https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/ArticleId/191/GENERAL-ORDER-NO-1-3-Assignment-or-Transfer-of-Actions> [<https://perma.cc/CR8S-UKGQ>] (requiring written transfer orders signed by both the transferring and presiding judges to transfer an action in the Illinois Circuit Court of Cook County).

¹²⁶ See FLAMM, *supra* note 20, at 765–68.

¹²⁷ This source is anonymous. See *supra* note ‡.

¹²⁸ See MATTHEW MENENDEZ & DOROTHY SAMUELS, *JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION* 16–17 (2016), <https://www.brennancenter.org/publication/judicial-recusal-reform-toward-independent-consideration-disqualification> [<https://perma.cc/ZU29-32X7>].

Moving from one judge to another can also result in significant loss of invested institutional capital, both to the departing judge and to the parties involved in the case. For cases that go beyond the initial stages, judges become familiar with the arguments and participants, meaning that it is difficult for a new judge to catch up mid-case. Similarly, although the legal system relies on, and is built to support, the general presumption that adjudicative disputes will be resolved in the same way regardless of the individual decision maker, it is well-known (and supported by empirical evidence) that judges do vary in their procedural approach, legal philosophy, and general disposition.¹²⁹ So, attorneys often tailor their legal arguments and case-management strategies to the specific judge who is presiding over the case.¹³⁰ Having to adjust to a new judge mid-case will likely require additional work hours for the attorneys.

5. *Future Elections*

Elected judges are likely even less incentivized to recuse when the source of potential bias stems from campaign donations because these judges must also consider how their decision to recuse might impact future election campaigns. The concern that elected judges might spurn the law in order to increase the likelihood that they are reelected lies at the heart of the debate regarding the legitimacy of popular elections as a method for selecting judges.¹³¹ I have already discussed the empirical research indicating that the legal decisions judges make are influenced by the proximity and competitiveness of reelection campaigns,¹³² and it is not unreasonable to

¹²⁹ See David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 376–77 (2012) (exploring variations in judges' sentencing behaviors towards defendants of differing racial categories); Sean Farhang, Jonathan P. Kastellec & Gregory J. Wawro, *The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual Harassment Cases*, 44 J. LEGAL STUD. 559, 560 (2015); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1890–91 (2018).

¹³⁰ See Cheryl Turner, *Tips on Crafting a Compelling Litigation Brief*, A.B.A. (Mar. 8, 2016) <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2014/tips-on-crafting-compelling-litigation-brief/> [<https://perma.cc/6BQB-VD5T>] (suggesting that attorneys should tailor their briefs to the writing style of the particular court).

¹³¹ See Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731 (2010) (noting that “elective judiciaries pose a risk to the rule of law, which is compromised whenever a judge’s ruling is influenced by majority preferences”).

¹³² See *supra* note 53 and accompanying text (finding that judges who are not eligible for reelection behave differently than judges who are eligible). For further examples of this behavior by judges, see Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 107 (2007), which notes that “judges in partisan systems sentence more severely than those in retention systems”; Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004), finding that judges become more punitive in criminal cases as the next election gets closer; and Richard R. W. Brooks & Steven

expect that the “majoritarian difficulty” plays a role in recusal considerations as well.¹³³

One might think that the pressures of reelection should actually incentivize higher rates of recusal. The electorate has, after all, shown that they are distrustful of judges raising money for election in large part because they are concerned that the money might impact the judges’ decisions in court cases.¹³⁴ It is not clear, however, that this is the direction that electoral incentives will push the judges. A survey experiment conducted by Gibson and Caldeira presented subjects with descriptions of various judicial campaigns in which some of the judges recused from cases featuring donors and some did not. Although the experiment found that individuals do perceive judges that recuse themselves as more impartial, the overall positive effect is minimal compared to the hit to legitimacy that judges take by accepting contributions in the first place.¹³⁵ Additionally, as discussed above, the act of recusal is often perceived to be an admission of bias, so as Bam has surmised, “judges might feel that recusing themselves for their campaign statements and conduct would imply that the campaigning itself had been improper.”¹³⁶

In addition to being potentially unpopular among the electorate, regular recusal from cases in which a party or attorney is a campaign contributor is likely going to decrease future donations and consequently jeopardize the judge’s chances for reelection.¹³⁷ Although many, if not most, such donors contribute to a judge simply because they want to help the judge win an

Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002), which finds that criminals convicted of murder are 15% more likely to be given the death sentence during the year leading up to the next judicial election.

¹³³ See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714 (1995) (“[T]he majoritarian difficulty . . . is implicated whenever judges are influenced by democratic pressures.”). As California Supreme Court Justice Otto Klaus famously put it, “[T]here’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.” LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 61 (2006) (quoting Justice Otto Klaus).

¹³⁴ See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 68–72 (2008); James L. Gibson, *“New-Style” Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1294, 1298 (2009).

¹³⁵ Gibson & Caldeira, *supra* note 64, at 19, 27.

¹³⁶ Bam, *supra* note 19, at 653.

¹³⁷ For a comprehensive review of the literature linking campaign spending and electoral success, see Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. POL. 1267, 1268 (2011), which found that while the link between spending and winning does exist in judicial elections, it is a nuanced one that depends in part on whether the candidate is an incumbent or challenger.

election, it would be naive to believe that all did so without the hope or the expectation that it would benefit them in the courtroom.

An empirical study on the behavior of judicial campaign donors by Professors Banks Miller and Brett Curry lends credence to this intuition. They examined the effect of an Alabama statute that required recusals for donations above a certain dollar amount and found that attorneys and business owners are respectively 81% and 47% less likely to donate more than the threshold amount, resulting in lower fundraising overall.¹³⁸ Correspondingly, Professor Joanna M. Shepherd found that judges who are eligible for reelection are more likely to rule in favor of past campaign contributors than judges who are not eligible for reelection, suggesting that judges rule “in a way that will likely increase the future contributions from interest groups at the time of their next reelection campaign.”¹³⁹

B. Disclosure as a Supplement to Recusal

As was highlighted earlier, scholars and policymakers have grown increasingly skeptical of the current system of self-recusal and have presented several potential remedies in the form of procedural reform, increased ethical training, and wide-scale institutional transformation. Of all these suggestions, increased transparency and disclosure of potential conflicts is almost universally believed to be among the most cost-effective and efficacious.¹⁴⁰

The logic behind these proposals is simple: if judges are not incentivized to pursue self-recusal, even when there is a legitimate conflict of interest, the rules should empower those individuals who *are* properly incentivized—namely the “outside” party and attorney who are likely to be disadvantaged by the conflict.¹⁴¹ The primary mechanism for such empowerment is informing interested parties of the conflict via in-court

¹³⁸ Banks Miller & Brett Curry, *The Effect of Per Se Recusal Rules on Donor Behavior in Judicial Elections*, 34 JUST. SYS. J. 125, 139–40 (2013).

¹³⁹ Shepherd, *supra* note 53, at 672. These findings were confirmed later in Kang & Shepherd, *supra* note 53, at 75.

¹⁴⁰ See, e.g., *supra* note 7; Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 39 PEPP. L. REV. 1109, 1143–44 (2011) (stating disclosure requirements and peremptory challenges would help make motions more affordable); David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 509 (“Mandatory disclosure would strengthen a currently ineffective method of disclosing past speech.”).

¹⁴¹ See DAVID M. ROTHMAN, RICHARD D. FYBEL, RONNI B. MACLAREN & MARK D. JACOBSON, CALIFORNIA JUDICIAL CONDUCT HANDBOOK 215–16 (2017) (“The purpose of the requirement of non-disqualifying disclosure is, in part, to give the attorneys information they would need for an affidavit of prejudice The purpose is to reaffirm the integrity and impartiality of the court In addition, because the parties are intimately aware of all the circumstances of their case, they are in a better position to bring to the judge’s attention information that might cause the judge to consider recusal.”).

disclosure.¹⁴² Although parties and attorneys are generally not able to unilaterally force the removal of a judge, they can raise the issue through a formal motion for recusal, push for more information from the judge and opposing party, and later appeal the judge's decision if they feel it was incorrect.¹⁴³ Even if the outside party decides not to ask a judge to recuse or affirmatively waives a recusal motion submitted by the court *sua sponte*, “[n]othing provides stronger evidence to the parties of . . . impartiality than open disclosure.”¹⁴⁴ Without proper disclosure, however, the issue may be unknown to the outside party, and none of (or very few of) the procedural protections will be in place to govern the decision-making process that normally exists for adversarial adjudication.¹⁴⁵

Unlike recusal rules, which feature prominently in the judicial disqualification statutes and ethical codes, in-court disclosure rules are given little attention in either the law or the literature. Recall that recusal procedures and rules in the United States generally fall into one of two categories: automatic (*per se*) recusal statutes and broad catchall provisions. To the extent that states and the federal courts have specific disclosure rules, they also follow that general pattern, although the list of enumerated circumstances requiring disclosure is much shorter.

Federal court rules contain the most substantial and well-known mandatory disclosure requirements, which relate to financial information. Under §§ 101 and 102 of the Ethics in Government Act, federal officers—including federal judges—are required to report nearly all their sources of income, gifts, property interests, investments, and liabilities on a yearly basis.¹⁴⁶ After a 2006 exposé by the *Washington Post* described a myriad of ethical conflicts in the federal courts,¹⁴⁷ most courts began to use these reports to create automatic screening procedures so that potential conflicts would always translate into in-court disclosures to the parties (and usually

¹⁴² See Marbes, *supra* note 7, at 868 (“The requirement of full disclosure of all interests and connections beyond the more limited disclosures now required by both the jurist and the parties will help insure that all the relevant information is available to both the litigants and the decision maker.”).

¹⁴³ The exception to this is in jurisdictions that allow for no-cause peremptory disqualifications, which are discussed further as potential solutions in Part VI, *infra*.

¹⁴⁴ *Merck & Co. v. Superior Ct.*, 2005 WL 880112, at *2 n.5 (Cal. Ct. App. 2005) (quoting ROTHMAN, *supra* note 141, at 215–16).

¹⁴⁵ See Frost, *supra* note 7, at 555–56 (identifying five procedural elements necessary for legitimate adjudication: “(1) litigants, not courts, initiate disputes; (2) the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views; (3) a rationale must be given for decisions; (4) decisions must refer to, and be restricted by, an identifiable body of law; and (5) the decisionmaker must be impartial”).

¹⁴⁶ Ethics in Government Act, 5 U.S.C. §§ 101–102 (2000).

¹⁴⁷ Stephens, *supra* note 4.

recusal).¹⁴⁸ However, as the recent work by the *Wall Street Journal* and legal researchers has shown, because this approach relies on full and accurate ex ante disclosure by the judge in order for the conflict to be flagged in a given case, over 135 judges in nearly 700 cases failed to recuse in the span of just eight years.¹⁴⁹

For other sources of judicial conflict in the federal system and in the fifty percent of states that do include formal disclosure rules and procedures, judges are usually required to actively inform the parties of relevant, potentially disqualifying information under broad catchall provisions similar to those used for recusal.¹⁵⁰ These provisions are often based on commentary in the ABA Code of Judicial Conduct, which suggests a rule that judges disclose any information that the parties or their attorneys “might reasonably consider relevant to a possible motion for disqualification.”¹⁵¹ Some state rules place an even broader obligation on the judge to disclose, such as in Tennessee, where “[a] judge should disclose on the record information that the judge believes the parties or their lawyers *might* reasonably consider relevant to a *possible motion* for disqualification, *even if the judge believes there is no basis for disqualification.*”¹⁵²

Because in-court disclosure has primarily been presented as a solution or supplement to recusal, as opposed to a topic of study unto itself, it is not well-known how judges approach these provisions when dealing with potential conflicts. On the one hand, the language in the legal provisions requires disclosure even when the judge may not believe there is a conflict, as long as the information might be considered relevant to the issue by one

¹⁴⁸ See, e.g., JUD. COUNCIL OF THE D.C. CIR., MANDATORY CONFLICT SCREENING PLAN (2018), [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Rules%20Policies%20Procedures%20-%20Mandatory%20Conflict%20Screening%20Plan/\\$FILE/MandatoryCircuitConflictScreeningPlanandCertificationStatementApprovedbyCouncil20220630.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Rules%20Policies%20Procedures%20-%20Mandatory%20Conflict%20Screening%20Plan/$FILE/MandatoryCircuitConflictScreeningPlanandCertificationStatementApprovedbyCouncil20220630.pdf) [https://perma.cc/YE5F-KRHA].

¹⁴⁹ Grimaldi et al., *supra* note 1; see also Johnson & Parton, *supra* note 4; Reity O’Brien, Kytja Weir & Chris Young, *Federal Judges Plead Guilty*, CTR. FOR PUB. INTEGRITY (Apr. 28, 2014), <https://www.publicintegrity.org/2014/04/28/14630/federal-judges-plead-guilty> [https://perma.cc/JXM5-Z78G].

¹⁵⁰ Professor Leslie Abramson suggests that such codes exist in roughly half of states. Abramson, *supra* note 7, at 304–05.

¹⁵¹ MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 5 (AM. BAR ASS’N 2011). This is a change from the previous code, which recommended disclosure that court participants “might consider relevant.” *Id.* Canon 3E(1) cmt. (AM. BAR ASS’N 2000). It is also unclear whether this provision, which states that judges “*should*” disclose, technically requires disclosure or is merely strongly permissive. See Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 430 n.116 (2014).

¹⁵² TENN. SUP. CT. R. 10, RJC Canon 3D, r. 2.11, cmt. 5 (emphasis added). For two other statutes that use nearly identical language to Tennessee’s rule, see FLA. CODE OF JUD. CONDUCT Canon 3(E)(1), and WIS. CODE OF JUD. CONDUCT 60.04 (4) cmt.

of the parties or their attorneys. This would suggest that at a minimum, disclosure rates should be at least as high as recusal rates, and that disclosure would likely occur much more frequently across a more diverse set of potential conflicts. In practice, however, because the decision to disclose involves even more discretion on the part of the judge than the decision to recuse, many of the same perverse incentives pushing a judge away from recusal likely play into the decision to disclose as well.¹⁵³ By definition, disclosure is to make public something that was previously unknown and is possibly problematic, so by introducing a potential conflict via disclosure, the judge is opening herself up to reputational and electoral costs.

Disclosures of campaign contributions may be particularly costly in these regards. Previous survey work on judicial campaign finance and recusal has shown that public knowledge of donors in the courtroom damages the perception of that judge, an effect that is only partially mitigated by the judge eventually recusing herself.¹⁵⁴ Disclosure may also be understood to be arming the opposition (generally the “outside” party) with more ammunition for a valid recusal motion. This, of course, is one of the primary purposes of disclosure, but as recusal scholar Grant Hammond noted, “[m]any judges will query why they should hand counsel a stick, with which they can then be beaten.”¹⁵⁵ Some jurists have also expressed concern that a disclosure of an innocuous potential bias may damage the litigant’s confidence in the judge’s ability to be impartial.¹⁵⁶

Before continuing in a discussion of disclosure, it is valuable to note that in the context of judicial conflicts of interest—particularly those coming from campaign contributions—disclosure is confusingly used to describe a variety of conceptually similar but legally distinct actions. This Article focuses on the formal, on-the-record disclosure of potential conflicts of interest to the parties within a legal case (what is sometimes called “in-court” disclosure). However, disclosure is also commonly used in reference to the laws and practices surrounding the provision of campaign contribution records to the state election commission by the candidate.¹⁵⁷ In the recusal

¹⁵³ See Abramson, *supra* note 7.

¹⁵⁴ Gibson & Caldeira, *supra* note 64.

¹⁵⁵ GRANT HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS 90 (2009).

¹⁵⁶ See Lord Woolf’s comments in *Taylor v. Lawrence*, [2003] QB 528, 549, opining that “judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias” at the risk of unnecessarily undermining the litigant’s confidence in the judge.

¹⁵⁷ In fact, most literature that addresses campaign finance “disclosure” does so in this regard. See, e.g., Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 11 (2018). Of course, these campaign finance disclosure rules, which exist in some form in all fifty states, are invariably

context, disclosure can also refer to transparency regarding the reasons that recusal was (or was not) made.¹⁵⁸

*C. Why Attorneys Don't Ask Judges to Recuse
(and Why Disclosure Doesn't Help)*

Fully understanding why a party may or may not formally make a motion for recusal, even when the potential partiality has been made known to the outside attorney, requires an exploration of the sometimes-perverse incentive structure surrounding the attorney's decision to request recusal in the first place. Attorneys know that judges don't like to recuse, are keenly aware that a judge is unlikely to recuse even if a recusal motion is made, and must account for the possibility that they will appear in front of that same judge again in the future—or if the request is denied, on that very same case.

1. Judges May Take Recusal Requests Personally

If, as I suggested above, judges do not like to recuse in part because they see it as a dereliction of their judicial duties, they will certainly not appreciate parties or their attorneys suggesting they do so.¹⁵⁹ Additionally, because a motion for recusal made by an attorney is necessarily done in the absence of the same *sua sponte* motion by the judge, it further suggests that the judge failed in appropriately raising the issue in the first place.¹⁶⁰ Asking for recusal due to campaign contributions—which inherently suggests some form of judicial and electoral impropriety in addition to partiality—is even more likely to offend a judge's sensibilities.

Many, if not most, judges are likely quite modest in their reactions to recusal motions. But given the relative power imbalances between judges and attorneys, the costs of angering some judges can range from mild social discomfort to outcome-changing bias and even professional repercussions

tioned to in-court disclosure. See Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 471 (1988) (“All fifty states and the District of Columbia require candidates for elective office to file reports disclosing all campaign contributions and, for contributions over a certain amount, the names of contributors.”).

¹⁵⁸ See Woods, *supra* note 107, at 178 (discussing the potential merits of requiring written explanations of why recusals were or were not made).

¹⁵⁹ See Penny J. White, *A New Perspective on Judicial Disqualification: An Antidote to the Effects of the Decisions in White and Citizens United*, 46 IND. L. REV. 103, 118 (2013) (observing, as a judge herself, that “[p]erhaps human nature causes judges to view disqualification motions as a challenge to their personal integrity. Certainly, no judge, and arguably no person, enjoys being told that he or she is, or appears to be, unfair. It is understandable, therefore, that some (perhaps, many) judges take umbrage at the filing of disqualification motions.”).

¹⁶⁰ See Richard K. Neumann Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 392 (2003).

for the attorney.¹⁶¹ The literature and legal cases dealing with judicial recusal are replete with examples showing judges' distaste for recusal motions, including the quote shared at the beginning of this Article¹⁶² and a similar sentiment expressed by a judge in the 19th century: "lawyers who wanted to try to disqualify a federal judge were . . . advised to write out their motion to disqualify on the back of their license to practice law."¹⁶³ In his dissent in *Caperton*, Chief Justice Roberts bemoaned the position that recusal motions put judges in, both at an individual and an institutional level.¹⁶⁴

2. *Attorneys Are Aware that Judges Will Probably Not Recuse*

In addition to accounting for the negative consequences of arguing that a judge is unable to be impartial, the submitting attorney must adjust the potential benefits of having the judge recuse according to the probability that the judge actually will recuse.¹⁶⁵ Although the experimental study in this Article is among the first to empirically demonstrate the low rates of recusal among judges with potential conflicts of interest, it appears to be well-known among practicing attorneys that asking a judge to recuse is not only dangerous but likely fruitless as well. When discussing the experiment in this Article, one Texas-based attorney stated: "There's been a number of times that I thought it would be best for my client if the judge was recused, but I knew that he wouldn't, so why risk it?"¹⁶⁶

The little collected research on the jurisprudence of recusal determinations bears these empirical observations out, particularly when it

¹⁶¹ See Marbes, *supra* note 24, at 275 n.158. There, the author cites Matthew Mosk & Brian Ross, 'Circus' Continues? Judge Goes After a Lawyer Who Challenged Her over Controversial Jet Deal, ABC NEWS (Feb. 11, 2015, 10:45 AM), <http://abcnews.go.com/US/circus-continues-judge-lawyer-challenged-controversial-jet-deal/story?id=28886937> [<https://perma.cc/FM6J-ENAR>], which describes a case in which a judge referred an attorney to the state disciplinary council for filing a recusal motion, and *In Re Cohen*, 99 So. 3d 926, 940 (Fla. 2012) (per curiam), which describes a case in which a judge threatened to report an attorney to the state bar for the same reasons.

¹⁶² "If you point the barrel of a recusal motion at a Texas judge, make sure it is loaded with a silver bullet." Nobles, *supra* note †.

¹⁶³ See *Sch. Dist. of Kansas City v. Missouri*, 438 F. Supp. 830, 835 n.2 (W.D. Mo. 1977).

¹⁶⁴ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 898, 902 (2009) (Roberts, C.J., dissenting) (asking whether "the judge get[s] to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case" and positing that "sometimes the cure is worse than the disease . . . I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts").

¹⁶⁵ See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 527–28 (2007) (noting that "[i]n the wake of the *White* decision, enhanced disclosure might be one of the simplest and most important reforms available," but also that "[d]isclosure is also an incomplete solution, in the sense that it provides only the grounds for disqualification; it does not guarantee that a judge will recuse").

¹⁶⁶ This source is anonymous. See *supra* note †.

comes to potential conflicts stemming from campaign financing. In addition to *Caperton*, in which a judge declined to recuse despite the CEO of one of the parties having spent more than \$3 million on the judge's campaign,¹⁶⁷ courts of appeals have reviewed a judge's refusal to recuse in cases featuring campaign donors in Louisiana, North Dakota, Pennsylvania, Nevada, Wisconsin, Georgia, Ohio, Texas, and Florida.¹⁶⁸ Judges have even refused to remove themselves for circumstances as extreme as the donor attorneys hosting the judge's election victory party at their law firm.¹⁶⁹

3. *Attorneys Are Often Repeat Players*

Even in the “best-case” scenario—where an attorney is aware of a potential conflict, submits a request for recusal, and the judge actually removes herself—the attorney still bears the risk of future prejudice against herself and her clients. In most court systems, particularly smaller state courts, the same attorney–judge pairings are frequent, both because attorneys generally practice within a limited geographic space and because some courts have only a few judges—or just one judge—to whom a case in that jurisdiction can be assigned. In the Wisconsin and Texas data featured in this Article's study, for example, some attorneys argued over twenty cases that were assigned to the same judge over a two-year period.

An attorney who is aware of a potentially deleterious conflict of interest must then weigh the benefits of submitting a motion for a judge to recuse against the likelihood that recusal occurs, the potentially increased bias against the attorney and her party if the judge does not recuse, *and* the potential bias against the attorney and her future parties whether the judge recuses or not. Not only does this disincentivize submitting motions or requests for recusal, but it also raises significant questions regarding the problem of imputed knowledge and attorney–client conflicts of interest.¹⁷⁰

¹⁶⁷ 556 U.S. at 872–73.

¹⁶⁸ See FLAMM, *supra* note 20. For cases reviewing a lower court judge's determination not to recuse due to campaign contributions, see *In re* Petition to Recall Dunleavy, 769 P.2d 1271, 1273 (Nev. 1988); *Gude v. State*, 709 S.E.2d 206, 209 (Ga. 2011); *In re* Disqualification of Burnside, 863 N.E.2d 617, 619 (Ohio 2006).

¹⁶⁹ See *Rocha v. Ahmad*, 662 S.W.2d 77, 77–79 (Tex. App. 1983).

¹⁷⁰ The potential conflicts of interest that can arise in these situations are distinct from the client-to-client conflicts of interest that are generally covered by ethical rules. In the traditional understanding of conflicts of interest involving multiple clients, the conflict arises from scenarios in which the general representation of one client is inherently at odds with the responsibilities that a lawyer owes to another client (e.g., codefendants in some criminal trials, opposing parties, etc.). For a general discussion of these conflicts, see MODEL RULES OF PRO. CONDUCT r 1.7–1.9, 1.18 (AM. BAR ASS'N 2020). Here, however, the conflict arises due to taking a procedural strategy that will potentially impact future clients through the dispositional approach of the judge, something that isn't recognized in the rules as a conflict, let alone one that would warrant informed consent or termination of representation.

4. *Attorneys May Have Donated to Other Judges*

When it comes to campaign finance contributions, attorneys may also be disincentivized from pushing for recusal because they themselves have donated to and appeared in front of judges in the past. Although the results of this Article's study do not support concerns that every attorney donates to every judge, attorney donations often constitute a significant portion of all the contributions that judges receive, meaning that a nondonor in one case may be a donor in another case. In such a system, strong or repeated motions for recusal could be seen as hypocritical if made by attorneys that are known to have donated to other judges. Successfully persuading a judge to recuse might also set a precedent that would disadvantage that attorney (and her clients) in the future when she argues in front of a judge to whom she donated and from whom she could have received preferential treatment.

5. *Judges May Not Actually Disclose*

Up to this point, this informal framework for attorney behavior has assumed that disclosure has been made and, as a result, the relevant parties were aware of the potential conflict. It is not clear, however, that this assumption is prudent, especially given the nebulous disclosure obligations imposed on judges by the current legal regime.¹⁷¹ As outlined in Section II.B, *supra*, the laws and rules dealing with recusal suggest that judges should ostensibly disclose potential conflicts at much higher rates than they recuse due to them. However, there is no previous empirical evidence of this, and many of the same factors that disincentivize recusal are relevant in regard to the judge's decision to disclose.¹⁷² Interested parties and attorneys may, of course, avail themselves of contribution data provided to the state election commission by the judge's campaign, but such data may be difficult to obtain (although the experimental study in this Article shows that doing so in some states is not prohibitively costly).¹⁷³

III. EMPIRICAL WORK ON RECUSAL AND DISCLOSURE

The interplay of so many varied factors to disincentivize judicial recusal is proof of the need for and importance of empirical analysis of judicial

¹⁷¹ See Abramson, *supra* note 7, at 305 ("In these provisions, a judge should disclose information that the judge believes a party or the party's lawyer might consider relevant to disqualification, a provision that depends on the judge's subjective belief about what a party or lawyer might think is relevant.").

¹⁷² For a valuable analysis of judicial behavior in relation to disclosure more generally, see Scott C. Idleman, *Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1395–1415 (1995), which presents a theory of judicial candor (in which disclosure is included). While Idleman does not address judicial recusal or conflicts of interest stemming from campaign finance, much of his analysis provides helpful framing for a discussion on the judge's decision to disclose.

¹⁷³ See *infra* Section IV.B for the descriptions of the data-collection processes.

behavior. Before discussing the particulars of this Article's field experiment, I briefly explore the existing empirical work relevant to the experiment's substantive claims and methodological approach. Section III.A begins with an overview of the previous empirical work that has been done on judicial recusal and disclosure. Section III.B then provides extra context for the methodological value of field experiments, their novelty in legal studies, and the critical ethical considerations that played into the design and implementation of the experiment presented in this Article.

A. Previous Empirical Work on Recusal and Disclosure

As discussed above, the literature expressing skepticism regarding recusal rules in U.S. courts is substantial. Scholars, policymakers, and even judges have identified a litany of problems with self-recusal and have called for various levels of reform, ranging from minor procedural adjustments to wholesale institutional restructuring. There has been almost no empirical evidence presented on whether these predictions play out, however.¹⁷⁴ This empirical lacuna is particularly stark regarding conflicts resulting from campaign finance. In fact, in my review of the literature, I found only four studies that reported on recusal rates at all, and only two of them featured an empirical evaluation on judicial recusal as part of the primary analysis.

In one of these studies, Professor Sande Buhai identifies all of the federal courts of appeals cases from 1980 to 2007 in which one of the parties appealed the district court judge's decision not to recuse.¹⁷⁵ She provides comprehensive descriptive data on the grounds on which the recusal request was made (the trial judge had a personal or professional relationship with an attorney, had a racial bias against the party, had prior rulings on the legal issue, etc.) and the rates at which the lower court decisions not to recuse were reversed—19.2% to 0.8%, depending on the grounds for recusal.¹⁷⁶

The second study addresses a very different question. In their 2013 article, Professors Banks Miller and Brett Curry take advantage of a change in Alabama law that made recusal mandatory if an attorney or party donated above \$4,000 to a judge's campaign.¹⁷⁷ Although the law was never

¹⁷⁴ See Epstein, *supra* note 11, at 564–65 (questioning “the wisdom of adopting any approach to recusal . . . in the absence of empirical evidence”).

¹⁷⁵ Buhai, *supra* note 104, at 70.

¹⁷⁶ *Id.* at 70–71.

¹⁷⁷ Miller & Curry, *supra* note 138, at 128. Their primary findings indicate that the per se recusal requirements have a substantial effect on the mechanisms donors use when donating to judges, with attorney donors moving towards indirect contributions through political action committees. *Id.* at 145.

enforced,¹⁷⁸ Miller and Curry found recusal was 450% more likely if the law’s donation threshold had been reached.¹⁷⁹

The other two studies were focused primarily on whether campaign donations affected case outcomes and only reported on recusal rates as supplementary data. In an empirical evaluation of the Louisiana Supreme Court, Professor Vernon Palmer found that, in 425 cases, judges never recused or even disclosed the donations, some of which exceeded \$35,000.¹⁸⁰ A similar study conducted on the Supreme Court of Ohio by *New York Times* journalists Adam Liptak and Janet Roberts found that in 215 cases that featured donor parties, judges only recused nine times, and that “[r]ecusals in cases involving [attorney] contributors were all but unheard of.”¹⁸¹

Unlike work on recusal itself, the common proposition that disclosure can augment the current recusal rules is based on a substantial amount of empirical and theoretical research exploring the effects of transparency. None of this research, however, has been directly applied to the realm of judicial disclosure, and as I argue above, the institutional framework in which recusal decisions are made—specifically the relationship between the attorney and the judge—is such that disclosure is likely to be less effective. Additionally, none of the aforementioned studies are experimental in nature.

B. *The Value and Ethics of Field Experiments*

Randomized experiments—also called randomized controlled trials, or RCTs—have long been considered the gold standard for making causal claims in the medical and “hard” sciences.¹⁸² Although social scientists did not fully embrace experimentation until more recently, experiments are now commonly used in nearly all research disciplines to answer a vast array of questions and theories.¹⁸³ This movement has found its way into legal scholarship, specifically research dedicated to studying judges and jurisprudence.¹⁸⁴

¹⁷⁸ See *supra* note 82 and accompanying text.

¹⁷⁹ Miller & Curry, *supra* note 138, at 129–30.

¹⁸⁰ 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 GLOB. JURIST (2010); Palmer & Levendis, *supra* note 49, at 1314 (concluding that “judicial voting bears a strong correlation to the campaign contributions” received by justices of the Louisiana Supreme Court).

¹⁸¹ Liptak & Roberts, *supra* note 47.

¹⁸² See Laura E. Bothwell, Jeremy A. Greene, Scott H. Podolsky & David S. Jones, *Assessing the Gold Standard—Lessons from the History of RCTs*, 374 N. ENGL. J. MED. 2175, 2175 (2016).

¹⁸³ See Druckman et al., *supra* note 12, at 3–14; Levitt & List, *supra* note 12, at 2.

¹⁸⁴ See Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 744–49 (2022) (reviewing experimental jurisprudence but also showcasing the growing number of randomized experiments that study judges and jurisprudence).

Field experiments are a subcategory of experiments that focus on conducting the experiment in a naturalistic context, making sure to use interventions, study actors, and measure outcomes in real-world settings.¹⁸⁵ While this approach to experimentation is substantially more difficult and expensive than traditional empirical methods, well-designed field experiments produce credible causal results that are methodologically sound and eminently well suited for testing actual law and policy.¹⁸⁶

Despite these benefits, field experiments have not been fully adopted by legal scholars. A 2014 review identified only seventeen field experiments featured in top law journals between 1990 and 2013.¹⁸⁷ And although field experiments have become more common in legal studies over the last decade, they are still exceedingly rare.¹⁸⁸ Indeed, the experiment featured in this Article is (at the time of writing) only the second field experiment to ever be conducted on actual judges in real cases. Moreover, this experiment advances the methodology of field experiments in empirical legal scholarship as the first in which judges were blinded to the study.¹⁸⁹

Additionally, a field experiment is a particularly appropriate methodology for answering the specific questions that are explored in this Article. While measuring base rates of recusal certainly does not require any experimental methods, identifying the effect of highlighting conflicts on judges' recusal behavior can only credibly be done using the identification power and realism of a field experiment. Further, as I show below, the resulting disclosure outcomes allow me to extend the benefits of randomization to the question of transparency and its effect on an attorney's propensity for requesting recusal—a critical question that can only truly be answered using this approach.

While the empirical value of this methodological approach is clear, field experiments directly intervene into real-world scenarios and therefore raise important ethical questions about the nature and value of empirical research. Like many field experiments involving human subjects, this project raises important ethical and legal issues.¹⁹⁰ Indeed, because the experiment is one

¹⁸⁵ See GERBER & GREEN, *supra* note 13, at 10–11.

¹⁸⁶ See Green & Thorley, *supra* note 14, at 65, 68.

¹⁸⁷ *Id.* fig.1.

¹⁸⁸ See Lynch et al., *supra* note 15, at 1078; Greiner & Matthews, *supra* note 15, at 297.

¹⁸⁹ See *supra* note 16 for a discussion of the initial publication in which portions of this experiment were presented, the only such field experiment that preceded this study, and a forthcoming field experiment on judges that further demonstrates the utility of this methodology.

¹⁹⁰ For a diverse and thorough review of the debates and positions surrounding the ethics of field experiments, see Dawn Langan Teele, *Reflections on the Ethics of Field Experiments*, in *FIELD EXPERIMENTS AND THEIR CRITICS: ESSAYS ON THE USES AND ABUSES OF EXPERIMENTATION IN THE SOCIAL SCIENCES* 115, 126 (Dawn Langan Teele ed., 2014).

of the first ever to take place in the court context, it was paramount that I take extra precautions and be particularly thoughtful about the potential effects the experiment could have on the judges, attorneys, and parties involved in the cases.

I will briefly outline some of those decisions here.¹⁹¹ First, I focused on contested civil cases and excluded all criminal cases due to the high stakes of criminal matters and the rapidity with which they proceed through the judicial system.¹⁹² Second, to minimize the burden of imposing delays and complications on cases in which the substantial proceedings had already commenced, I intervened only in “fresh” civil cases—cases in which the judge appeared to have taken no substantive actions. Third, I did not treat cases during the three months leading up to the 2015 and 2016 Wisconsin elections if the judges in those cases were running for reelection. Finally, I solicited a formal legal opinion from a leading law firm with established practice groups specializing in election law and nonprofits.

IV. THE RANDOMIZED FIELD EXPERIMENT

In this Part, I outline the design and implementation of the first-ever blinded field experiment conducted on judges in active cases. I identified active Wisconsin and Texas trial court cases in which one of the listed attorneys had donated to the judge’s previous election campaign(s), sent a random selection of those judges a letter highlighting the potential conflict and asking for recusal, and then tracked outcomes related to the decision to recuse. Each Section in this Part describes a step of the field experiment’s methodology: experimental setting (Section IV.A); random assignment of cases (Section IV.B); the procedure for sending treatment letters to judges (Section IV.C); measurement of outcomes (Section IV.D); and the estimation strategy (Section IV.E).

A. *Experimental Setting*

This Article’s field experiment was conducted on active cases in the Wisconsin Circuit Courts and Harris County District Courts (Texas). Although a full description of these court systems is included in Online

¹⁹¹ A detailed account of the ethical considerations at play and the design and implementation decisions made regarding the experiment are included in the appendix to a previous publication. See Krasno et al., *supra* note †, app. C at 5–8, https://www.journals.uchicago.edu/doi/suppl/10.1086/715069/suppl_file/200304appendix.pdf [<https://perma.cc/98AV-3KLQ>].

¹⁹² Both the Texas and Wisconsin courts have a fairly elaborate categorization system, which enabled me to further eliminate whole categories of civil cases.

Appendix A,¹⁹³ it is important to have a basic understanding of the setting in which the experiment was conducted in order to properly contextualize the results.

Both the Wisconsin Circuit Courts and the Harris County District Courts (the trial courts for each respective venue) hear civil and criminal cases in jurisdictions based roughly on county-level boundaries.¹⁹⁴ The judges who sit in these courts are selected through popular election. Wisconsin's elections are explicitly nonpartisan, while Harris County's are not. Wisconsin judges are elected to staggered six-year terms, whereas Harris County judges sit for four years. Judicial campaigns in both states are highly competitive—with Texas judges consistently reporting among the costliest campaigns in the country.¹⁹⁵

In both states, I used the publicly available campaign finance reports submitted by the judges. As a result, the campaign finance data consist of the winning judges who filed reports with the state, many of whom ran in contested elections. Table 1 (see Section IV.A, *infra*) provides descriptive statistics from the campaign finance data submitted by these winning judicial candidates. Also note that judges are required to report only if they received aggregate contributions above \$2,500 in Wisconsin, so I may not have captured some conflict cases in the Wisconsin sample if there were judges who raised small amounts of money.¹⁹⁶ Under Texas campaign finance rules all contributions must be reported.¹⁹⁷

Recusal procedures in Wisconsin and Texas generally reflect the federal approach to recusal outlined earlier in this Article, with a few important differences. Wisconsin Supreme Court Rules and Section 757.19 of the Wisconsin Statutes do not require recusal for reasons related to campaign

¹⁹³ The Online Appendix is hosted on Digital Commons and can be accessed here: <https://scholarlycommons.law.northwestern.edu/nulr/vol117/iss5/2>.

¹⁹⁴ *About the Courts: Wisconsin's Judicial Branch: Court System Overview*, WIS. CT. SYS. (Sept. 7, 2022), <https://www.wicourts.gov/courts/overview/overview.htm> [<https://perma.cc/M6KC-3BB4>]; TEX. JUD. BRANCH, STATE DISTRICT COURTS (2017), <http://www.txcourts.gov/media/914401/district-court-map-sept-2017.pdf> [<https://perma.cc/2HZP-MYWZ>].

¹⁹⁵ DANIEL BECKER & MALIA REDDICK, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES 2 (2003), <https://www.txcourts.gov/media/1441210/campaign-finance-reform-report-gie.pdf> [<https://perma.cc/55AF-ENNB>].

¹⁹⁶ WIS. STAT. § 11.0104(a) (2019–2020).

¹⁹⁷ TEX. ETHICS COMM'N, CAMPAIGN FINANCE GUIDE FOR JUDICIAL CANDIDATES AND OFFICEHOLDERS 22 (2022), https://www.ethics.state.tx.us/data/resources/judicial/jcoh_guide.pdf [<https://perma.cc/79X5-7N4V>]. Although judges in Texas may aggregate donations from an individual into one lump sum if the total contributions from that individual were \$50 or less (recent revisions have moved this amount to \$90 at the time of publication), this study's research design aggregates donations for all contributors, so this rule does not affect the Harris County sample.

donations,¹⁹⁸ but the relevant catchall provision of the Wisconsin Supreme Court Rules mandates it when “reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.”¹⁹⁹ Similarly, Texas rules do not require recusal in the conflicts I identify in this Article but do in “any proceeding in which . . . [his] impartiality might reasonably be questioned.”²⁰⁰ Additionally, Wisconsin is one of the few states that employs peremptory challenges, which allow a party to automatically remove a given judge without providing an explanation or legal argument.²⁰¹ That procedural wrinkle is discussed as a potential solution to nonrecusal and nondisclosure in Part V of this Article.

B. Identification and Assignment Procedure

While the recusal procedures are similar in Wisconsin and in Harris County, the process of identifying active cases in which an attorney had donated to the judge varied significantly.²⁰² In Wisconsin, I ran each judge’s campaign finance reports through the Simple Object Access Protocol (SOAP), a subscription-based service that automatically identifies any cases in which a donor attorney matched a listed attorney on the judge’s newly assigned cases.²⁰³ For any matches, I then used Wisconsin’s Circuit Court Access database to verify potential conflicts and access case-specific dockets and filings in order to measure experimental outcomes. Because Texas has a disaggregated online case system, I had to manually identify treatable cases using LexisNexis’s state court docket search engine. Each week, I ran searches for each judge who had received campaign donations, using a list of the last names of self-identified attorneys who had donated to that judge’s previous political campaigns. I obtained this list from Texas’s publicly available campaign finance disclosures.

¹⁹⁸ In fact, SCR 60.04(7) specifically states that “[a] judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge’s campaign committee’s receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.” WIS. SUP. CT. R. 60.04(7).

¹⁹⁹ WIS. SUP. CT. R. 60.04(4); *see also* WIS. STAT. § 757.19 (2019–2020) (“Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when . . . a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.”).

²⁰⁰ TEX. R. CIV. P. 18(b).

²⁰¹ *See* WIS. STAT. § 801.58 (2019–2020) (for civil cases); *id.* § 971.20 (for criminal cases).

²⁰² A detailed description of how I identified and verified potential conflicts is included in Online Appendix B.

²⁰³ This program now appears to be called the REST program. *WCCA REST Support*, WIS. CIR. CT. ACCESS, <https://wcca.wicourts.gov/rest-help.html> [<https://perma.cc/AM7U-4NE6>].

Although this data-collection method gives us access to information on all types of cases, I excluded certain case types from the study.²⁰⁴ Many of these case types are not treated because they are inherently noncontentious or simply matters of paperwork (i.e., legal name changes, adoption proceedings, and paternity acknowledgements). I felt that other cases, such as small claims and certain types of probate cases, were so uncontroversial that judges were less likely to take the treatment letters noting their potential conflict and requesting recusal seriously. I excluded restraining order/injunction cases because, by their nature, the most important portions of such proceedings are finished before I could treat the judges. As noted above, I omitted all criminal cases.

Over the course of the study, I identified over 700 cases (398 from Wisconsin and 307 from Harris County) that featured attorneys who had donated to the presiding judge's political campaign. Of these cases, 228 were excluded from the experimental sample because they were of an "untreatable" case type, the judge had been presiding over the case for too long, or I could not verify that the attorney on file was the same individual as the attorney from the campaign finance records. This resulted in 472 treatable cases (270 from Wisconsin and 202 from Harris County), an average of four cases per week.

Although all 472 of these cases were eligible for random assignment, not all of them were assigned to a treatment condition. As a general matter, I only assigned cases if they were presided over by a judge who had not previously had a case assigned to either the treatment-letter condition or the control (non-letter) condition. However, because the treatment period of the study lasted almost two years, I felt that judges with cases originally assigned to control (meaning the judge had not received a letter) would become reeligible for analysis after the original case had concluded or after a five-month cooling-off period.²⁰⁵ Any treatable case presided over by a judge five months after that judge was assigned to control or after the case had concluded was assigned according to the normal procedures described above. If, on the other hand, the judge presiding over a new treatable case had presided over a case that was assigned to the treatment group in previous weeks (meaning the judge had received a letter), the case was excluded from the assignment process.²⁰⁶

²⁰⁴ See *supra* note 34. A detailed list of excluded case types is included in Online Appendix B.

²⁰⁵ I was able to verify whether a case had concluded using the online docket systems.

²⁰⁶ Although these cases were therefore not included in the experimental analysis, they provide valuable supplementary data on the base rates of recusal among the broader population of cases, so I include descriptive statistics for them in the analysis.

If, in a given week, I identified only one assignable case, the case was randomly assigned to the treatment condition with a 50% probability of treatment. Near the end of the experiment, the probability of treatment was increased to 66.6% in order to bolster the size of the treatment condition.²⁰⁷ If I identified more than one treatable case in a given week, those cases were assigned in a block using a form of complete random assignment that ensured that the numbers of cases assigned to treatment and control were roughly equal.²⁰⁸ I account for the differing probabilities of assignment in the analysis.

The exception to this general assignment protocol occurred in the first week of treatment in both venues. When the experiment was launched (October 2014 in Wisconsin and April 2015 in Harris County), there was a backlog of treatable cases that were still “fresh” under the study’s criteria for inclusion. Each judge with more than one case in the backlog group was placed into individual blocks, with one of the judge’s cases randomly assigned to treatment and the others to control. Judges in the backlog group with only one case were placed into a single block for random assignment.

²⁰⁷ As described below, I account for this variation in treatment probability using inverse probability weights.

²⁰⁸ By “complete” assignment, I simply mean that instead of assigning each case individually (often called “simple” random assignment), I assigned the weekly group so that the number of treatment cases and control cases were predetermined. For weeks with an even number of cases, equal numbers of cases were assigned to each condition (with two cases, one case was assigned to each condition; with four cases, two cases were assigned to each condition; etc.). For weeks with an odd number of cases, equal numbers of cases were assigned to each condition with the remainder case assigned to the control condition (with three cases, two cases were assigned to the control condition and one to the treatment; with five cases, three cases were assigned to the control condition and two to the treatment).

FIGURE 1: TREATMENT LETTER

Dear Judge **XXX**:

It has recently come to our attention that you have been assigned to preside over **CASE NAME (CASE NUMBER)**. What attracted our attention is that Ms. **PARTY NAME**'s attorney, **ATTORNEY NAME**, has been a significant contributor to your election campaign. In particular, Ms. **ATTORNEY NAME** gave **\$AMOUNT** to your campaign committee.

We are sure that you agree that the administration of justice must be perceived as impartial to maintain public confidence. We have no connection to this case or any of the parties involved, but as citizens concerned about judicial integrity, we believe your involvement in **CASE NAME** may raise concerns due to Ms. **ATTORNEY NAME**'s ties to your campaign. In light of those potential concerns, we respectfully request that you recuse yourself from this case and ask that it be reassigned to a different judge.

Sincerely,

Judicial Integrity Project, Center for Electoral Politics and Democracy

C. Treatment Procedure

Except for the first week of treatment in Harris County, where thirteen treatment letters were sent in three waves over the course of two weeks, treatment letters were sent via UPS Next-Day Delivery to the corresponding judges' chambers (see Figure 1, *supra*, for letter text) within a week after a treatable case was identified. If chamber-specific addresses were not available, the letter was sent to the county court address, presuming that all mail would be delivered to the judges or their clerks. The treatment letters themselves came from the Judicial Integrity Project, which is housed at the Center for Electoral Politics and Democracy at Fordham University.²⁰⁹

Upon receiving a letter, four of the judges contacted the Judicial Integrity Project directly. When this occurred, the judges were given a simple description of the organization's goals—judicial integrity—and were told that we would not contact any parties other than the judge herself. All conversations proceeded in a way that I believe maintained the ethical and methodological integrity of the study.

²⁰⁹ Although the Judicial Integrity Project existed prior to the field experiment, during the study, the Judicial Integrity Project's only purpose was to send the treatment letters.

D. Measurement and Outcomes of Interest

Cases assigned to both treatment and control were monitored for the life of the trial-level adjudication. Outcomes were measured using the online dockets, which included information on the presiding judge, the attorneys involved with the case, and any case filings or activity. After each case concluded, I reviewed all relevant docket entries.

The primary outcomes of interest in this project were whether and when judges recuse and disclose the potential conflict. While in Harris County judges can simply recuse themselves from cases, judges in Wisconsin must submit an application for recusal (formally called an “Application for Judicial Assignment”) to the chief judge in the district. I have spoken with Wisconsin court officials and have been told that all recusals require such an application and that the submission of and reasons behind such applications should be noted in the online case history. For each case, I recorded applications for recusal made by the judge and recusals granted, although because one never occurred without the other, they are reported as one outcome.

I define judicial disclosure as any case document or docket activity in which the judge formally discloses the donation relationship between herself and the attorney. This can occur during recusal itself, through the submission of the treatment letter into the court record, or via a conversation between the judge and the parties. Because judges might also wish to resolve potential conflicts of interest through more informal and inconspicuous means than an actual recusal, I also tracked judicial transfers (changes in judicial authority via ways other than recusal) and whether the donor attorney left the case. To evaluate the impact that disclosures have on attorney behavior, I recorded requests for recusals made by any of the nondonor attorneys, including formal motions for recusal.

To measure the possible impact that the letters have on case outcomes, I recorded the number of days before a case was resolved and how the case was resolved (whether by default, settlement/stipulation, dismissal, or judgment after trial).²¹⁰

E. Estimation and Power Analysis

Because the probability of receiving the treatment in the experiment may vary case by case depending on the number of available cases presided over by the same judge, the data must be weighted to eliminate any confounding relationship between the assignment probability in a given

²¹⁰ I define the length of a case as the number of days it takes from the first day in the week in which I identified the case to the day the case is closed based on the online dockets.

week and unobserved factors that may affect outcomes. Following the procedures laid out in Gerber and Green,²¹¹ I reweighted the data using “inverse probability weights” (IPW). IPW enables us to obtain unbiased estimates of the average treatment effect using a weighted difference-in-means. I also obtained consistent estimates of the average treatment effect using multiple linear regressions with controls for baseline covariates.

I calculated p -values using randomization inference. Using the individual subject-level probability of assignment to the treatment condition (as described in Section IV.B, *supra*), I simulated 10,000 randomized experiments. These simulations created a distribution of the sharp null assumption of no treatment effect for each outcome of interest measured in the experiment.²¹² Plotting the actual estimates for each of the outcomes of interest in their respective distribution allows us to determine the likelihood of observing the estimates produced by the experiment simply due to random chance—creating a p -value that does not rely on any distributional assumptions. I account for the multiple comparisons problem using a Šidák correction.²¹³

Some additional robustness checks and tests, including subgroup analyses, bivariate linear regressions, and standard p -values, are included in Online Appendix C.

V. RESULTS

This Part presents the descriptive data collected on recusal and disclosure and analyzes the results of the randomized experiment. As the behavioral framework outlined in Part II predicts, judicial-recusal rates are quite low even when judges received the treatment letter asking them to remove themselves from the case. Disclosure rates are even lower; not one of the judges in the control group (those who did not receive a letter) disclosed the donation on the court record. Although judges who received the treatment letter did disclose at much higher rates (32%), attorneys in those cases were no more likely to ask the judge to recuse than those in which the judge did not disclose, supporting the hypothesis that attorneys are

²¹¹ GERBER & GREEN, *supra* note 13, at 75–77.

²¹² *Id.* at 61–66.

²¹³ The multiple-comparison problem occurs when a researcher uses probabilistic inferences (such as a p -value) while testing more than one outcome at the same time. When this is done, the confidence level that is applied to a single test should be adjusted to account for the increased probability that at least one of those tests will appear to be statistically significant due to random chance. A Šidák correction is one of many techniques used to address the multiple comparison problem. For a thorough explanation of this technique, see Zbyněk Šidák, *Rectangular Confidence Regions for the Means of Multivariate Normal Distributions*, 62 J. AM. STAT. ASS'N. 318, 626–33 (1967).

unwilling to move for recusal even when they are aware of a conflict that may disadvantage their clients.

The detailed results are presented and discussed in Section V.A. In Section V.B, I highlight some important limitations to keep in mind when interpreting the data, focusing specifically on generalizability, experimental assumptions, and measurement error. Some additional subgroup results and robustness checks are referenced below but are detailed in Online Appendix C.

One critical limitation warrants upfront recognition. Just one month into the Harris County arm of the study, the Judicial Integrity Project received a letter from a Harris County Court’s senior staff attorney writing on behalf of the Harris County district judges. The letter informed us that a few of the judges who had received the treatment letters had discussed their contents with court administration. According to this letter (although my reading of the relevant statutes is different), judges are not allowed to consider *ex parte* requests for recusal such as ours, and I “may continue to send these requests . . . but the response will be the same.”²¹⁴

To respect their request and prevent any potential experimental contamination, I discontinued the assignment of cases in Harris County. In all likelihood, however, at least some of the experimental results produced from the Harris County arm of the experiment are biased. Although there was no indication in the letter that the administration or the judges were aware that these letters were part of an academic study, any legitimate possibility that the judges have discussed the existence of the letters among themselves brings with it the likelihood of “spillover,” or contamination between (or within) the treatment and control groups.²¹⁵ In a perfectly clean experiment, none of the judges in the control group would be aware (directly

²¹⁴ The letter did not specify the law or rule that imposes such a restriction, although I suspect it may be Texas Code of Judicial Conduct, Canon 3:B(8):

A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties *between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee* concerning the merits of a pending or impending judicial proceeding.

TEX. GOV’T CODE ANN. tit. 2 app. B (West 2022) (emphasis added). I was familiar with this restriction before starting the Harris County arm of the experiment and understood it not to include communications such as the experimental treatment letter both because I was not “a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee” and, to a lesser extent, because the contents of the letter addressed a preexisting relationship between the judge and an attorney—an issue not directly related to the legal merits of the case. My interpretation is, of course, unimportant if the practical interpretation of this rule by the Harris County Court encompasses the experimental intervention.

²¹⁵ For a comprehensive discussion of the threat of spillover (more formally called a violation of the Stable Unit Treatment Value Assumption), see GERBER & GREEN, *supra* note 13, at 253–87 (2012).

or indirectly) of the treatment letters because their behavior in regard to their own conflict cases may be indirectly influenced simply by knowing that other judges are being asked to recuse. It is also possible that judges who were assigned to the treatment group but became aware of treatment letters sent to other judges treated their own letters differently.

Considering the potential bias, the results of the Harris County arm of the experiment should be subject to a more critical assessment than is normally warranted. The comparisons between the control and treatment groups for Harris County (see Table 2B, *infra*) are the most likely to reflect this potential spillover issue. However, empirical transparency necessitates a discussion of these results, and the control-group outcomes can still serve as an accurate and valuable baseline for the underlying (and very low) propensity for recusal and disclosure. As a result of these considerations, I briefly discuss the procedural outcomes and potential implications of the Harris County data but focus and base my proposals in Part VI primarily on the analysis of the Wisconsin results.

A. *Results and Analysis*

Over the course of the two-year experiment in Wisconsin, I identified 270 “treatable” cases—civil cases of an appropriate case type featuring an attorney who had donated \$200 or more to the presiding judge and had recently assigned to the donee judge. Sixty of these cases were selected to be part of the randomized experiment, with thirty-two cases assigned to the control group (control cases) and twenty-eight cases assigned to the treatment group (treatment cases). Although the other 210 cases (nonexperimental cases) are not a part of the experimental analysis, they are still valuable as an additional source for measuring baseline rates of recusal and disclosure, so they are included in the descriptive analysis below.

1. *Descriptive Data*

Based on statistical tests, the balance across the control and treatment groups in the following categories is consistent with truly random assignment: judge gender, donor-attorney gender, donor-attorney side (plaintiff or respondent), case type (e.g., divorce case), contribution amount, the ratio of the attorney contribution to the total amount raised by the judge, whether the judge graduated from an in-state school, whether the judge was initially elected or appointed, and whether the judge ran unopposed in their most recent election (see Table 1, *infra*).

TABLE 1: COVARIATE BALANCE ACROSS TREATMENT GROUPS (WISCONSIN)

Pretreatment Covariate	Control-Group Weighted Mean	Treatment-Group Weighted Mean	<i>p</i> -value**
Judge Gender (Male)	0.652	0.665	0.913
Attorney Gender (Male)	0.673	0.791	0.310
Attorney Side (Plaintiff)*	0.730	0.631	0.432
Case Type (Divorce)	0.210	0.225	0.894
Contribution Amount (\$)	333.214	350.534	0.746
Contribution Proportion*	0.041	0.033	0.675
In-State School (Wisconsin)*	0.635	0.560	0.562
Initially Elected*	0.936	0.830	0.216
Recently Unopposed*	0.323	0.452	0.317

* For “Attorney Side (Plaintiff),” the donor attorneys in the three probate cases were not assigned a side. “Contribution Proportion” is calculated as the ratio of the donor attorney’s contribution in dollars over the total amount of contributions in dollars made to the judge. “In-State School (Wisconsin)” reflects whether the judge graduated from a law school in Wisconsin. “Initially Elected” reflects whether the judge was initially elected or appointed. “Recently Unopposed” reflects whether the judge ran unopposed in their most recent election.

** *P*-values were calculated using 2-tailed weighted *t*-tests.

Attorney contributions in these cases ranged from \$200 to \$1,000, and the average donation was \$351 in the experimental cases and \$333 in the nonexperimental cases. Not surprisingly, the proportion of donation amount to total money raised by the judge was sometimes quite low (0.01% at the lowest), but some donations constituted a substantial portion of the judge’s total fundraising (66% at the highest), although some of those donations were made to judges who raised relatively little in total.

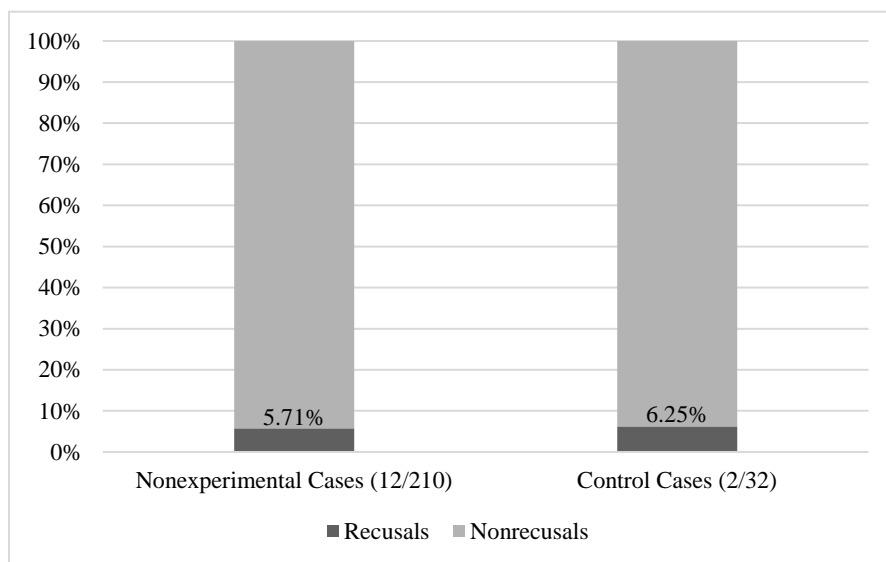
2. *Base Rates of Recusal and Disclosure*

As highlighted in Section IV.A, recusal due to campaign finance is not formally required in Wisconsin or Texas, so some level of nonrecusal is expected. Indeed, the only two existing studies that track recusal decisions in cases featuring campaign donors suggest that recusal rates should be quite low—somewhere between 0% and 4%.²¹⁶ The results from the field

²¹⁶ See Palmer, *supra* note 180, at 7 (reporting no recusals in the 425 Louisiana cases in which a party or attorney donated to the presiding judge); see also Palmer & Levendis, *supra* note 49, at 1294

experiment confirm this pattern (see Figure 2, *infra*). Of the 210 nonexperimental cases, judicial recusals occurred in only twelve of them. Similarly, in the thirty-two experimental cases assigned to the control group, there were only two recusals. Taken together, these results suggest that under normal circumstances, judges recuse in only 5.8% of cases that feature a donor attorney.

FIGURE 2: UNWEIGHTED BASE RATES OF RECUSAL (WISCONSIN)



But the rates of recusal tell only part of the story. We can evaluate the reasons for the recusals that did occur by reading the recusal paperwork that the judges provided to the chief judges. Court documents show that in one of the two recusals in the control group, the judge recused because the donor-attorney was retained. In the other case, however, recusal was due to the judge having “a close relationship with the parties.” This suggests that the main measurement for recusal may be overinclusive, and that the true rate of recusal due specifically to campaign donation is even lower.²¹⁷

(similarly reporting no recusals in the 186 Louisiana cases in which a party or attorney donated to the presiding judge); Liptak & Roberts, *supra* note 47 (reporting that judges on the Supreme Court of Ohio recused in only nine of the 215 cases that featured donor parties and that “[r]ecusals in cases involving [attorney] contributors were all but unheard of,” but not providing a precise percentage).

²¹⁷ Curiously, the subgroup analysis included in the Online Appendix (see Table A2 in Online Appendix C) shows that the relationship between underlying propensity for recusal and the amount that the attorney donated is negative (i.e., recusal is more common with lower donation amounts). However,

Judges rarely recuse in the potential conflict cases that were tracked, but do they at least *disclose* the potential source of bias to the parties in the case? Scholars and commentators generally expect moderate levels of disclosure even in the absence of recusal, as disclosure is usually required of judges even when recusal is not warranted.²¹⁸ Indeed, the Wisconsin Code of Judicial Conduct stipulates disclosure of relevant information that “the parties or their lawyers might consider relevant to the question of recusal, even if the judge believes there is no real basis for recusal.”²¹⁹

Nonetheless, the results show that disclosure is even less common than recusal. In fact, in the court records of the 210 nonexperimental cases and the thirty-two control group cases, I did not find a single mention of the contribution(s) made to the judge (see Figure 3, *infra*). This is true even when considering the fourteen recusals that occurred between the two groups. While it can be assumed that some of the recusals that occurred were done at least in part because of the relationship between the donor attorney and the judge, only a few of the recusal records referenced the specific reason for recusal in general terms.²²⁰ Critically, none of those mentioned campaign donations specifically, meaning that—at least according to this study’s measurement method—disclosure was never made.²²¹

this result is not an experimental outcome and should therefore be understood as merely descriptive context.

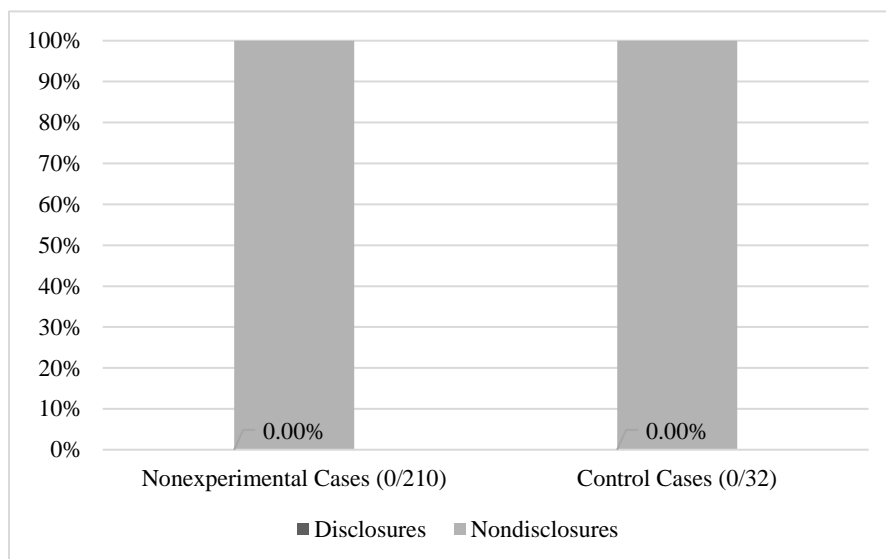
²¹⁸ See *supra* Section II.B for a discussion of the scholarly discussion and legal requirements of disclosure.

²¹⁹ WIS. SUP. CT. R. 60.04(4) cmts. Contrast the requirement to disclose with the catchall provision for actual recusal, which relies on the judge’s determination that “well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.” *Id.* R. 60.04(4).

²²⁰ For example, one judge “disclosed knowledge of plaintiff’s sister,” and gave the parties ten days to determine if they would like the judge to recuse. They subsequently submitted a joint application for judicial recusal.

²²¹ The fact that recusal records regularly did not express the exact reasons for recusal was initially surprising, as I had been told by Wisconsin judges and administrators that all recusals should include such details. Research by others suggests that this is a common issue. See, e.g., Woods, *supra* note 107, at 178.

FIGURE 3: UNWEIGHTED BASE RATES OF DISCLOSURE (WISCONSIN)



3. *Estimated Treatment Effects on Procedural Outcomes*

When designing this experiment, I hypothesized that the treatment letters would have a noticeable, albeit moderate, effect on the likelihood that judges would recuse from the conflict cases. The results of the experiment suggest otherwise. Regression results show that Wisconsin judges in the treatment group are only 1.5 percentage points more likely to recuse than judges in the control group, and this small effect is far from statistically significant (see Table 2A, *infra*).²²² Similarly, there was no significant effect of the letter on the likelihood of a judicial transfer or of the donor-attorney's withdrawal.

There was, however, a pronounced treatment effect on the propensity for disclosure of the campaign contribution. Although no disclosures were made in the control group, the treatment letter appears to have induced nearly one-third of the judges (31.8%) in the treatment group to discuss the contribution with the parties in the case, mention the contribution in the recusal documents, or include the treatment letter in the court record. This result is statistically significant at a level of $p = 0.002$.

²²² Note that with such a small sample size, the "null results" (i.e., the lack of a statistically significant difference between the groups as opposed to a substantively small but identifiable difference) here should be understood with some caution. See *infra* Section VI.B for a more detailed discussion of this limitation.

TABLE 2A: ESTIMATED AVERAGE TREATMENT ON PROCEDURAL OUTCOMES (WISCONSIN)

Outcomes	Control-Group Means* (n = 32)	Treatment-Group Means* (n = 28)	Estimated Average Treatment Effects**	p-values***	Standard Errors
Recusals Granted	0.033	0.035	0.015	0.382	0.052
Judicial Transfers	0.163	0.113	-0.003	0.539	0.089
Judicial Disclosure of Donations	0.000	0.315	0.318	0.002	0.094
Attorney Withdrawal	0.098	0.090	0.029	0.350	0.072
Any Action	0.228	0.384	0.235	0.036	0.118

* These values reflect means reweighted to incorporate probability of assignment to treatment, so they differ from raw means presented elsewhere in this Article.

** All estimates were independently calculated with multiple linear regressions using inverse probability weighting (IPW). Pretreatment covariates included: judge gender, donor-attorney gender, donor-attorney side (plaintiff or respondent), case type (binary divorce or not), the combined donation amount given to the judge by the donor attorney, the ratio of the donor attorney's contribution in dollars over the total amount of contributions in dollars made to the judge, whether the judge graduated from an in-state (Wisconsin) law school, whether the judge was initially elected or appointed, and whether the judge ran unopposed in their most recent election.

*** All *p*-values are 1-tailed, consistent with the experiment's preanalysis plan (2-tailed tests are included in Online Appendix C) and calculated using randomization inference. The Šidák correction for multiple comparisons (seven outcomes including those in Table 3) results in an adjusted *p*-value level of 0.007. Estimated average treatment effects with *p*-values in **bold** fall below the Šidák-corrected significance level.

As with the Wisconsin cases, there are very low baseline rates (zero) of recusal and disclosure among the control group in the Harris County arm of the experiment (see Table 2B, *infra*). Similarly, the effect of the treatment letter—keeping in mind the concerns regarding spillover²²³—was zero for recusals and judicial transfers. Interestingly, I do find an increase in attorney withdrawal in the treatment group, but that effect is substantively small (2.4 percentage points), not statistically significant, and is the result of just one additional withdrawal among the treated cases. As with Wisconsin, there is a fairly large increase in disclosures among the treated cases (10.8 percentage points), although this effect is of borderline statistical significance.

²²³ See *supra* note 215 and accompanying text.

TABLE 2B: ESTIMATED AVERAGE TREATMENT EFFECTS ON PROCEDURAL OUTCOMES
(HARRIS COUNTY)

Outcomes	Control Group Means (n = 32)	Treatment Group Means (n = 28)	Estimated Average Treatment Effects*	p-values**	Standard Errors
Recusals Granted	0.000	0.000	0.000	1.000	0.000
Judicial Transfers	0.000	0.000	0.000	1.000	0.000
Judicial Disclosure of Donations	0.000	0.036	0.108	0.049	0.052
Attorney Withdrawal	0.000	0.062	0.024	0.430	0.030
Any Action	0.000	0.098	0.132	0.031	0.058

* All estimates were independently calculated with multiple linear regressions using inverse probability weighting (IPW). Pretreatment covariates included: judge gender, donor-attorney gender, donor-attorney side (plaintiff or respondent), case type (auto accident or not), and the combined donation amount given to the judge by the donor attorney. All donor attorneys were plaintiff's attorneys in the Harris County arm. The additional covariates included in the Wisconsin tests were not collected for the Harris County arm.

** All *p*-values are 1-tailed, consistent with the experiment's preanalysis plan and calculated using randomization inference. None of the *p*-values falls below the Šidák-corrected significance level.

4. *Estimated Treatment Effects on Case Outcomes*

In addition to inducing recusal, transfer, disclosure, and attorney withdrawal, the letter treatment may also have had an effect on the outcomes of the cases, although my prestudy expectations were that such an effect would be de minimis. Because of the diversity of civil cases included in the experiment, it is difficult to define a “winner” across all case types. I did, however, measure the number of days it took for each case to conclude and whether each case concluded through a settlement between the parties.

As the results in Table 3, *infra*, demonstrate, treatment cases concluded 16 days faster than control cases (the raw weighted means, which do not account for the pretreatment covariates, show a larger difference), but this difference is not statistically significant. This difference in disposition time may be partly driven by the 1.5-percentage-point increase in the probability that a treatment case is settled by the parties, although that difference is also not significant.

TABLE 3: ESTIMATED AVERAGE TREATMENT EFFECTS ON CASE OUTCOMES (WISCONSIN)

Outcomes	Control-Group Means* (n = 32)	Treatment-Group Means* (n = 28)	Estimated Average Treatment Effects**	p-values***	Standard Errors
Length of Case (Days)	367.537	331.375	-16.174	0.869	89.565
Case Settled	0.231	0.350	0.015	0.912	0.126

* These values reflect means reweighted to incorporate probability of assignment to treatment, so they differ from raw means presented elsewhere in this Article.

** All estimates were independently calculated with multiple linear regressions using inverse probability weighting (IPW). Pretreatment covariates included: judge gender, donor-attorney gender, donor-attorney side (plaintiff or respondent), case type (binary divorce or not), the combined donation amount given to the judge by the donor attorney, the ratio of the donor attorney's contribution in dollars over the total amount of contributions in dollars made to the judge, whether the judge graduated from an in-state (Wisconsin) law school, whether the judge was initially elected or appointed, and whether the judge ran unopposed in their most recent election.

*** All *p*-values are 1-tailed, consistent with the experiment's preanalysis plan (2-tailed tests are included in Online Appendix C) and calculated using randomization inference. The Šidák correction for multiple comparisons results in an adjusted *p*-value level of 0.007 (seven outcomes including those in Table 2A). Estimated average treatment effects with *p*-values in **bold** fall below the Šidák-corrected significance level.

5. *Downstream Effect of Disclosure on Nondonor Attorney Behavior*

One of the empirical benefits of observing such a large treatment effect on disclosure rates in the Wisconsin sample is that the propensity for disclosure effectively becomes a function of the initial random assignment and can therefore be treated as a downstream treatment on subsequent case outcomes. In other words, with some slight adjustments to the estimation strategy, I can measure the causal effect of disclosure (specifically, the causal effect of a higher probability of disclosure) as if I randomly assigned increased disclosure itself—something that would be impractical to implement in the original design of the experiment. This then allows us to test the position of many authors in the recusal literature that disclosure can be a functional supplement to recusal procedure by informing the nondonor parties of the potential conflict, allowing them to raise the issue of recusal if they deem it appropriate.²²⁴

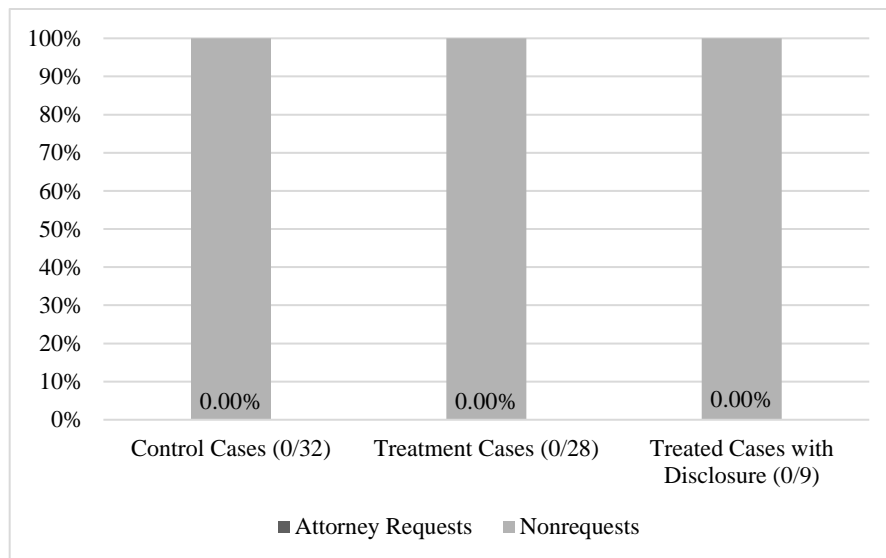
As with the other outcomes of interest, I measured requests for recusal using Wisconsin's online case-filing system. In contrast to the expectations of disclosure proponents, I did not find any evidence that attorneys requested recusal or sought a preemptory challenge in any of the experimental cases,

²²⁴ See *supra* note 7 (referencing studies that identify causal relationships between campaign donations and judicial decision-making).

including those in which a disclosure was made by the judge. Wisconsin court administrators assured us that any such requests would be included in the case documents and, based on a review of the nonexperimental cases, I have verified that this is true. Consequently, not finding any attorney requests among the experimental cases is a strong indication that none were made.

With no difference between the control and treatment groups, the more complicated empirical tests for downstream effects are unnecessary to conclude that the increased disclosure rates in the treatment group had no impact on the propensity for attorneys to request recusal. Figure 4, *infra*, presents the rates of requests for recusal in the control and treatment groups. I also included the number of requests made only in the cases in which the judge disclosed the contribution to highlight the noneffect that disclosure has. Clearly, increased disclosure—and the knowledge of a potential conflict that such a disclosure brings to nondonor attorneys—had no effect on the likelihood that attorneys seek judicial recusal.

FIGURE 4: UNWEIGHTED RATES OF ATTORNEY REQUEST FOR RECUSAL (WISCONSIN)



6. Summary

The experimental results establish three key findings. First, judges almost never recuse from cases in which one of the attorneys had contributed to the judge's political campaign, even when the potential conflict is highlighted by a third party. Second, on their own, judges rarely (if ever) disclose those potential conflicts on the record. Third, even when disclosure

of the potential conflict does occur and the potential conflict is made known to all parties and attorneys, the nondonor attorneys are still not sufficiently incentivized to ask the judge to recuse. These combined behavioral results are consistent with the legal and extralegal incentives outlined in Part II, painting a bleak picture both for the current recusal regime in the United States and the hope that simply implementing basic disclosure rules will do much to mitigate the problems of nonrecusal.

B. Key Limitations

The experiment presented in this Article provides much-needed empirical evidence regarding the frequency and efficacy of judicial disclosure and recusal, as well as general judicial and attorney behavior in cases that feature potential conflicts of interest. However, as with all empirical studies, the data presented above must be evaluated with the limitations of the study in mind.

1. Generalizability

Although Wisconsin and Texas are reasonably representative of the landscape of judicial elections nationwide, they each feature unique legal and social landscapes that may create different incentive structures for the judges and attorneys who work in them. Similarly, I collected data and ran the experiment only on cases in the Wisconsin and Texas trial courts. These cases are of a very different nature than appellate cases in terms of the role of the courtroom participants and the scope of the conflicts stemming from campaign contributions. Whereas cumulative donations to state supreme court justices can consistently reach millions of dollars, only a few of the judges in the sample raised more than \$100,000, and the attorneys rarely donated more than \$1,000. For example, the average donation amount in the Wisconsin sample was around \$340 (see Table 1, *supra*).

The experiment also deals only with conflicts of interest stemming from direct campaign contributions from attorneys. Many of the same threats to judicial legitimacy are at play when it is the *parties* who donate. *Caperton* itself features a donor party, not a donor attorney, and would therefore not have been included in the sample. Similarly, because the study relies exclusively on the publicly reported data provided by judges themselves, this study does not analyze the disclosure and recusal behavior of judges when attorneys contributed via indirect spending or undisclosed “dark money,” which a recent study has shown can limit the generalizability of studies dealing with campaign finance.²²⁵ While I expect that a replication of this study on cases dealing with other types of judicial conflicts of interest would

²²⁵ See Wood, *supra* note 157.

result in similar findings, those results are not empirically established in this Article.

2. *Experimental Limitations*

The experiment also has some potential methodological limitations related to its design and implementation. First, the Wisconsin sample is small—thirty-two cases in the control group and twenty-eight cases in the treatment group. While I was able to identify statistically significant results for some outcomes, the limited sample size does lower confidence in the null results observed and prevents a more statistically robust test of the downstream effects of disclosure. These null results may be due to a variety of factors, including an underpowered treatment (i.e., a treatment that does affect behavior but not in a large enough way to be statistically identifiable), issues in the practical implementation of the treatment, or that the treatment may actually induce more (or less) recusal. But the wide standard errors that result from such a small sample may prevent us from identifying that effect.²²⁶

Second, I cannot verify that all the judges in the treatment group read the recusal requests. Although I tracked the packages and confirmed they were delivered to the courthouses, it is possible that the letters were never given to the judges or that the judges simply threw the letters in the trash before reading them. However, because of the 32-percentage-point treatment effect on disclosures, it is clear that at least that many judges were actually treated.

Third, even with the Wisconsin arm of the study, there may have been experimental spillover between the control and treatment groups, particularly among the judges in the experiment who are housed in the same courthouse. Spillover occurs when the treatment category of a judge impacts the outcome of interest of another judge. As with nondelivery, the extent to which this was a problem in the experiment is difficult if not impossible to empirically measure. Although, as I explained above, there is reason to believe that it did occur in the Harris County sample.

3. *Measurement Error*

Finally, the results of the study should be evaluated with an understanding that the measurements of all the experimental outcomes are potentially underinclusive of the actual results. As noted, I relied exclusively on online case dockets that may not have included some actions or decisions.

²²⁶ For a general discussion of the reasons behind and ways to interpret null results in the context of a field experiment like the one conducted in this study, see Rekha Balu, *10 Things Your Null Result Might Mean*, EGAP, <https://egap.org/resource/10-things-your-null-result-might-mean/> [<https://perma.cc/7YJH-6HCL>].

However, I was assured by court officials that the online docket systems in Wisconsin and Texas accurately reflect the totality of events in a given case (excluding any information that is not disclosed for legal reasons). I also manually reviewed hard copies of the most relevant documents referenced in the dockets to ensure that they did not contain any critical information.

VI. ALTERNATIVES TO THE CURRENT REGIME

Having analyzed the evidence showing that judges are unlikely to recuse themselves from cases with attorney campaign donors—and that informing the outside attorneys and parties of that conflict does little to stimulate motions for recusal—this Article now turns to a discussion of alternative methods for dealing with conflicts of interest. As with much of this Article, these arguments are tailored specifically to conflicts stemming from campaign finance but should be applicable to judicial conflicts more broadly.

I discuss two proposals. The first, a procedural proposal, consists of a fusion of peremptory judicial challenges and automatic administrative disclosure of attorney donations. I argue that unlike other procedural reforms (most notably those simply mandating judicial disclosure), this approach accounts for the incentive structure facing both judges and, importantly, attorneys. Second, I briefly discuss anonymizing judicial campaign contributions as one of the few feasible (albeit still problematic) institutional-level reforms. In generating these alternatives, I adopt much from the ideas and discussions that have been presented in the extant recusal literature, particularly those that do not seek simply to tweak standard self-recusal procedure or remove the system of judicial elections entirely.²²⁷

A. *Procedural Reform*

The experimental analysis described above suggests the prominent procedural approaches to judicial conflicts of interest fall short for two primary reasons: (1) they afford too much discretion to the judge in question, allowing for the consideration and influence of extralegal factors that disincentivize recusal, and (2) they often rely on motions for recusal that are too costly for attorneys in all but the most extreme circumstances. Evidently, transparency and disclosure do little to facilitate the removal of potentially conflicted judges.

²²⁷ In my opinion, a pair of 2007 articles by Professors Deborah Goldberg, James Sample, and David E. Pozen provide the solutions that are the most aware of the sort of behavioral limitations that I have presented in Part II. The alternatives discussed in the subsequent literature appear to come mostly from these articles, and they are foundational to my suggestions here as well. Sample & Pozen, *supra* note 7; Goldberg et al., *supra* note 165.

Outside of the near-universal calls for disclosure, the most common procedural or rule-based solutions to the shortcomings of self-recusal either shift the recusal decision to another adjudicator or make recusal mandatory in all or a set of conflict cases. Both approaches correctly identify that for recusal to occur at a desirable rate, the recusal decision cannot be made by the adjudicator about whom the conflict is concerned. Nonetheless, neither of these approaches are likely to work when addressing judicial conflicts—especially conflicts due to campaign contributions—because they either do not account for the incentives of the ultimate decision-maker or do not account for the incentive structure of the attorneys in the case.

Several states have sought to avoid the problems associated with self-recusal by requiring third-party recusal determinations. Wisconsin, for example, requires the approval of a district's chief judge for any of the trial judges to be recused, although the request for such review must go through the judge in question.²²⁸ The Ohio Court of Common Pleas is another example of this, although whether the motion to disqualify is brought to the challenged judge or the chief judge of the Supreme Court of Ohio is determined by the Ohio Constitution.²²⁹ However, independent review of recusal motions is usually conducted by other elected judges who have also received campaign contributions and are therefore subject to many of the same incentives preventing self-recusal. Additionally, if, as I have argued in this Article, recusal is seen as an abdication of one's duty and judges dislike it when attorneys request recusal, judges are unlikely to require recusal from other judges except in the most egregious circumstances.²³⁰

If judicial-discretion issues remain even when the recusal determination is exported to outside judges, maybe the recusal determination should not be a judicial decision at all. Policymakers and scholars repeatedly argue this, suggesting to simply include campaign-donation conflicts as a circumstance that triggers automatic (*per se*) recusal.²³¹ Such a system can make recusal mandatory for cases in which a donation of any amount is made or, as the

²²⁸ WISCONSIN UNIFORM RULES FOR TRIAL COURT ADMINISTRATION TCA 3, at 1, <https://www.wicourts.gov/srules/docs/circuitrules.pdf> [<https://perma.cc/6URP-LKR9>].

²²⁹ See *State v. Dougherty*, 650 N.E.2d. 495, 498 (Ohio Ct. App. 1994); see also OHIO REV. CODE § 2701.03 (2014).

²³⁰ A 1995 survey experiment found that judges in Arkansas, Nebraska, New Hampshire, and Ohio were more likely to recuse themselves due to campaign donations by an attorney in the case than they were to recommend that their colleagues recuse from the same situation. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 8–11, 79 (1995).

²³¹ See, e.g., Serbulea, *supra* note 140, at 1143–44; Donald L. Burnett, *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 287–89 (2006) (suggesting *per se* recusals as a solution for nonrecusal in the campaign-speech context).

ABA Model Code suggests, make recusal automatic for donations that are of a certain amount or proportion of a judge's total fundraising.²³²

Although automatic recusal is tempting because it solves incentive issues for judges and outside attorneys by simply removing discretion, it nevertheless creates new concerns. Indeed, as noted recusal scholar Richard Flamm has documented, prior to the widespread adoption of the ABA Model Code in the 1970s, recusal regimes generally mandated automatic removal for campaign donations under the theory that such a transaction constituted a gift or favor, which created the perception that the elected judge would favor donor attorneys.²³³ And while this perception may be shared by many modern recusal scholars—and arguably supported by the empirical research on the topic—per se recusal for campaign donations inevitably means that those citizens arguably most informed and most invested in electing quality judges were effectively barred from the political process (at least if they wanted to appear in front of the judge).²³⁴

Additionally, unlike the other conflicts included in per se recusal statutes (e.g., familial relationships or previous professional experience with the case), campaign contributions are in the control of the donor, thereby allowing for the strategic creation of the conflict itself. Instead of donating to judges to support their candidacy or maybe garner favoritism from that judge, attorneys can instead “pay not to play” by donating to judges they perceive as unfavorable or unfriendly.

In Utah, for example, recusal is required if any of the parties or attorneys has, in aggregate, donated more than \$50 to the judge in the previous three years.²³⁵ This allows enterprising attorneys to avoid certain judges for a small, one-time fee—behavior that I have been told in informal interviews is at least contemplated by attorneys working within these states.²³⁶ To combat this, the rules could increase the threshold at which recusal becomes automatic, but this would inversely decrease the number of conflicts captured at all. Similarly, others have suggested that allowing the opposing side to waive automatic recusal could prevent this strategic behavior,²³⁷ but that would put the burden of identifying gamesmanship on the nondonor party and attorney, who are the least informationally equipped to make such a determination.

²³² MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 1999). *See supra* text accompanying note 77.

²³³ *See* FLAMM, *supra* note 20, at 374.

²³⁴ *Id.*

²³⁵ UTAH SUP. CT. R. PROF'L PRAC. 2.11(A)(4).

²³⁶ This source is anonymous. *See supra* note †.

²³⁷ *See* Goldberg et al., *supra* note 165, at 529–30.

I posit that a more tenable procedural approach to campaign donors in the courtroom is a combination of limited, no-cause peremptory challenges paired with mandatory disclosure by the administrative court system. A good number of states—most prominently, California—already allow for parties to submit one no-cause peremptory challenge in each case as long as they do so within the early stages of the case.²³⁸ These challenges result in an automatic, no-questions-asked transfer to another judge that generally occurs so early in the process that the judges are unaware that the case was ever assigned to them in the first place, avoiding much of the potential cost of the judge knowing an attorney asked for their removal.²³⁹

Proposing peremptory challenges is not wholly novel; several legal scholars have seen them as potential solutions for the failings of the current recusal regime.²⁴⁰ Some have expressed concerns that without proper restrictions, attorneys may make challenges in the middle of a case if they perceive the outcome to be developing against the interests of their client.²⁴¹ This could result in substantial administrative burdens to the court system and the opposing party.²⁴² In 2010, for example, government attorneys in California used the system to boycott judges who were perceived to be too light on crime by coordinating office-wide policies to skip those judges any time they were assigned to a case.²⁴³ To allay some of these concerns, this Article proposes a peremptory-challenge regime that is limited only to cases in which the conflict of interest (or potential conflict) exists—a certain

²³⁸ CAL. CIV. PROC. CODE § 170.6 (West 2011). Some other prominent examples of state-level peremptory challenge provisions include Alaska, ALASKA STAT. § 22.20.022, § 2, ch. 48 (1967), Idaho, IDAHO R. CIV. P. 40(a), Indiana, IND. R. TRIAL P. 76, Missouri, MO. SUP. CT. R. 51.05(a), and Wisconsin, WIS. STAT. ANN. § 801.58 (West 2021). Other states have peremptory challenges but include additional requirements, such as agreement among all parties to a change of judge. *See, e.g.*, UTAH R. CIV. P. 63A.

²³⁹ For a comprehensive review of peremptory challenges, see RICHARD E. FLAMM, RECUSAL AND DISQUALIFICATION OF JUDGES: FOR CAUSE MOTIONS, PREEMPTORY CHALLENGES AND APPEALS §§ 7.1–8.6, at 87–120 (2018).

²⁴⁰ *See, e.g.*, Peter A. Galbraith, Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109, 134–39 (1974) (criticizing existing judicial-disqualification and removal standards as too onerous and proposing an automatic-disqualification mechanism based on Oregon’s successful implementation of such a mechanism); Goldberg et al., *supra* note 165, at 526–27 (arguing that one “free pass” of peremptory disqualification allows litigants access to an unbiased judge and removes the risks of disqualification challenges).

²⁴¹ FLAMM, *supra* note 239, at 93, 108 (identifying various cases in which this sort of “judge shopping” was at issue).

²⁴² *See* Bassett, *supra* note 31, at 1251–56 (providing an exploration of the common objections to a peremptory challenge regime, specifically applied to the federal appellate court context).

²⁴³ *See* Michelle Quinn, *District Attorney’s Boycott of a Judge Raises Issues*, N.Y. TIMES (Mar. 20, 2010), <https://www.nytimes.com/2010/03/21/us/21sfcourt.html> [<https://perma.cc/4VTZ-NBSP>].

amount of total campaign donations to the presiding judge in the case of this proposal—and can be exercised only by the disadvantaged side.²⁴⁴

But even limited peremptory challenges are an insufficient prophylactic if attorneys are unaware that the underlying conflict exists, which this Article's study suggests is the norm. Additionally, even if the judges did disclose, the judge would likely realize why any subsequent peremptory challenges were made, reintroducing the behavioral structure that disincentivizes attorneys from seeking recusal in the first place.²⁴⁵ Indeed, as I detailed in Section III.C, Wisconsin attorneys had the ability to make peremptory challenges but did not do so in a single case I observed. As a result, I also propose that the peremptory challenges be paired with mandatory extrajudicial disclosure immediately after the case is assigned to a donee judge or a donor attorney joins the case. This would provide the attorneys a chance to get the case assigned to another judge in a timely manner with some degree of separation from the judge's knowledge of the conflict.

The most feasible mechanism for this sort of disclosure would likely be the inclusion of attorney or party contributions in the initial court documents. This system would naturally come with costs to the court administrative system, as the burden would fall on the court system to proactively identify potential conflict pairs.²⁴⁶ However, the information necessary to identify these cases is, by law, publicly available, and creating such a system or database should be well within the means of court administrations. My experience independently identifying conflict cases using the Wisconsin and Texas courts' own systems shows that this measure would not be prohibitively costly.

An accurate court record of donors will ultimately rely on accurate and full disclosure of the campaign finance data by the judge, which brings with it some concerns and limitations. First, most campaign finance disclosure laws are clearly inadequate at identifying all of the financial relationships that are created by donations, as corporate contributions—including those made by law firms—and dark money do not produce clear connections

²⁴⁴ If the subsequent judicial assignment also results in a donor conflict, the disadvantaged side can again ask for the judge to be removed.

²⁴⁵ ALAN J. CHASET, *DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE* 58 (1981) (“Judges, like other persons, are likely to resent charges of bias. Will they resent such a charge less if it is the basis for a peremptory challenge?”).

²⁴⁶ Serbulea, *supra* note 140, at 1145; *see also* Goldberg et al., *supra* note 165, at 527–28 (“Such a mandatory disclosure scheme would shift some of the costs of disqualification-related fact finding from the litigant to the state.”).

between individuals and candidates.²⁴⁷ Second, the administrative body will still need to rely on the judge—or at least the judge’s campaign committee—to be aware of and report all direct contributors to the court body responsible for identifying conflicts. Judges have raised this concern as a reason against adopting both mandatory disclosure and per se recusal for campaign donations, arguing that the burden of actively knowing and being able to identify all donors is too onerous.²⁴⁸ However, because the system I propose puts the onus of disclosure in a given case on the court administration, it would only require an initial report by the judges, which is something they already do as part of the required election law in their state.

B. Institutional Reform

Many scholars and policymakers concerned with the potentially detrimental influence of campaign donations on judicial behavior have focused their efforts on culling conflicts at their genesis by reforming (or removing) judicial elections. The ongoing debates regarding the respective virtues and vices of judicial elections and judicial appointments is rich and nuanced, and this Article does not provide theoretical or normative contributions on that front.

I do stress, however, that elections as a method of judicial selection are a consistently popular phenomenon that is the result of institutional dynamics and public attitudes that are still at play in the current political milieu.²⁴⁹ As a practical matter, then, an attempt to abolish judicial elections does not serve as a pragmatically viable approach for addressing judicial conflicts. I instead consider more focused, incremental institutional solutions specifically addressing the problems stemming from judicial campaign finance.²⁵⁰

One such approach is anonymized donations, where the identity of donors is blocked from the judge. The logic behind anonymization is straightforward: if judges are unable to know the identities of those who donated to their campaigns, they will be unable to favor (knowingly or

²⁴⁷ See Abby K. Wood, *Voters Use Campaign Finance Transparency and Compliance Information*, POL. BEHAV. (Feb. 10, 2022), <https://link.springer.com/article/10.1007/s11109-022-09776-4> [<https://perma.cc/C8PD-6T3F>]; Wood, *supra* note 157.

²⁴⁸ See, e.g., Geyh et al., *supra* note 109, at 521–22.

²⁴⁹ See Debra Cassens Weiss, *55% of Potential Voters Support Judicial Elections for State Judges*, ABA J. (Oct. 21, 2008, 5:08 PM), https://www.abajournal.com/news/article/55_of_potential_voters_support_judicial_elections [<https://perma.cc/U2KX-N6T2>]; JUST. AT STAKE, STATE COURTS FREQUENCY QUESTIONNAIRE, *supra* note 9.

²⁵⁰ I agree in large part with Professor Geyh, who believes that judicial appointments are most compatible with preserving an independent judiciary but argues that judicial elections are simply too popular and too beneficial to judicial legitimacy to be able to discard them. See Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333 (2018).

unknowingly) those individuals in the courtroom. Understanding this to be the case, the public would no longer harbor the suspicion of quid pro quo courtroom relationships, and the threat to judicial legitimacy would be minimized. Anonymous donations would ideally render ex post procedural solutions such as recusal largely unnecessary while still allowing the public—particularly the legal community—to financially support individual judges.

Many states currently have or have experimented with legal reform built to distance judges from their donors. Most states with judicial elections, for example, restrict or ban direct solicitation by judicial candidates, including in-person requests and even personally signed letters.²⁵¹ Judges in these systems are still able to raise money, but the actual exchanges can only occur between donors and designated noncandidate representatives. Similarly, a few states have implemented publicly financed judicial campaigns where judges are provided with set amounts of campaign funds by the state.²⁵²

In practice, however, judges in such systems are still not fully insulated against the influence of campaign finance. In states that prohibit direct solicitation, judges are generally still aware of their financial supporters' identities and are usually able to directly communicate with donors about their contribution after the donation has been made.²⁵³ Furthermore, the states that have or have had public financing are more appropriately understood as public-private hybrids, where participation is either entirely optional—as in New Mexico—or judges running publicly funded campaigns are still allowed to raise some level of private donation. Nonetheless, these reforms are valuable in that they have shown that there is both a public appetite for such restrictions and, importantly, that the U.S. Supreme Court has been

²⁵¹ Brief for the Am. Bar Ass'n, as Amici Curiae Supporting Respondents at 4, 2a-4a, 7a-8a, 10a-11a, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (No. 13-1499) (highlighting that thirty of the thirty-nine states that elect judges have adopted restrictions on personal solicitation of campaign funds by judges).

²⁵² See STANDING COMM. ON JUD. INDEP., AM. BAR ASS'N, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002), <https://www.opensocietyfoundations.org/uploads/08bac637-c19d-4cd2-ada1d4c7a1f08f61/commissionreport.pdf> [<https://perma.cc/V8FD-2R98>]; see also Lee Drutman, *Public Financing of Judicial Elections Worked. Too Bad North Carolina Ditched the System*, VOX (Sept. 16, 2015, 3:30 PM), <https://www.vox.com/polyarchy/2015/9/16/9337637/public-funding-judicial-elections> [<https://perma.cc/8AXL-L7F4>] (mentioning the states which provided public financing).

²⁵³ The ability for judges to send personalized thank-you letters while being unable to personally solicit funds was an inconsistency discussed at length by the dissent in *Williams-Yulee*, 575 U.S. at 463-67 (Scalia, J., dissenting).

more deferential to state efforts regulating judicial elections than to similar efforts in the executive or legislative context.²⁵⁴

Following Professors Ian Ayres and Jeremy Bulow,²⁵⁵ I suggest that for anonymization to work, the administrator accepting the donations should be independent of the judicial candidate or her campaign committee, and the system should be mandatory for all candidates. Those authors posit that the ideal system would utilize blind trusts established by the candidates and operated by private trust companies, but I feel that trusts run by a centralized governmental body would be less complicated and equally sufficient. To help ensure anonymity, donors would be prohibited from discussing the donations with candidates, and the administrator would report only on net contributions, as opposed to individual donation amounts.

As with nearly all large-scale institutional reforms, this sort of system is not without limitations and drawbacks. If judges do not know who donated to their campaign, judicial contributions will probably go down in both frequency and amount. Although such a decrease would be illustrative of the fear that much of the money involved in judicial politics is spent with the express intention of signaling support to and garnering favor from judges, judicial candidates will naturally bemoan smaller war chests.

Additionally, it would be naive to believe that any system of anonymization would act as a total bar to information. Motivated donors—potentially those that are most likely to engage in the sorts of quid pro quo relationships that are most concerning—will find ways to inform judges of their contribution²⁵⁶ or shift to less regulated forms of support. Furthermore, any system that would credibly keep the identities of donors from judges would, by necessity, also keep that information from the public, reversing the move towards transparency that has motivated much of the recent campaign finance reform.

²⁵⁴ See *id.* at 1667 (explaining that states may regulate judicial elections differently because a state's interest in preserving public confidence in judiciary integrity goes beyond that in legislative or executive elections).

²⁵⁵ Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 870–75 (1988); see also Banner, *supra* note 157, at 474–76 (reviewing efforts by some local bar associations at shielding judges from donor information); Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 986–88 (suggesting that the best approach might be a privatized system of blind trusts).

²⁵⁶ Professors Ayres and Bulow argue that such communication would necessarily be “cheap talk” because without the ability to prove a donation was made, anyone could claim financial support, and the judges would not know whether any purported donor was telling the truth. See Ayres & Bulow, *supra* note 255, at 855–56.

CONCLUSION

This Article makes two principal claims regarding the recusal regime used in most U.S. courts: first, that judges will not be incentivized to recuse from cases in which they may be partial; and second, that attorneys will not be incentivized to ask them to recuse from these cases, even if they are aware of the conflict and believe the judge is not impartial. The experimental evidence presented above is consistent with both claims. More generally, this Article highlights the importance of accounting for the nonlegal factors that go into adjudicative decision-making when crafting rules and procedure. It also demonstrates the value that randomized field experiments—an empirical methodology often thought to be unfeasible in the court context—can provide to the analysis of procedure and policy.

It is clear from the experimental data that judges almost never recuse from cases in which an attorney has donated to their political campaign. The rate of recusal within the thirty-two Wisconsin cases featured in the control group of the experiment as well as within the 210 nonexperimental cases that feature these potential conflicts is just below 6%. Surprisingly, these rates did not increase (at least not in a significant amount) even when the judges were sent a letter from a third party that identified the donation and asked the judge to recuse. Additionally, roughly half of the recusals that I did observe were purportedly done for reasons unrelated to the donation (relationships with the parties, generally).

If recusal procedures and rules are meant to lead judges to recuse in cases with conflicts, the failure of judges to recuse from the cases in this study is strong evidence that the rules are not fulfilling their purpose. Many who have written on recusal have guessed that the current recusal regime does a poor job of removing judges from cases in which they might be biased, but it is unlikely that any except for the most skeptical would have expected such low levels of removal. Critically, if judges themselves are to be believed, we should expect recusal in roughly half the cases: over 40% of trial court judges believe campaign contributions at least somewhat influence their—or at least their colleagues’—decisions, and nearly 60% support proposals that would make recusal mandatory in cases that feature parties who had financially supported the presiding judge’s campaign.²⁵⁷

The experimental results also show that attorneys do not ask judges to recuse, even when they are aware of the donations from the other attorney. Increased disclosure is a common procedural solution suggested by both skeptics and supporters of the current recusal regime, but attorneys in the study were no more likely to request recusal when the judge was induced to

²⁵⁷ JUST. AT STAKE, STATE JUDGES FREQUENCY QUESTIONNAIRE, *supra* note 9, at 5, 11.

disclose by the experimental treatment. This does not mean that disclosure does nothing to remedy judicial bias—judges who disclose may engage in higher levels of debiasing and attorneys may be more likely to appeal the outcomes of cases in which they know the judge may have been biased. But it does indicate that increasing disclosure is likely not enough to lead to more requests for recusals.

These results should be understood in the context of the study, which involved trial-level judges and campaign donations. However, the results are still strong evidence that the current recusal regime employed in the United States relies on faulty assumptions about judicial and attorney behavior and needs reform. The tailored procedural solution I propose more fully accounts for the often perverse incentives at play in making recusal determinations and should therefore result in more impartial judging and increase the public's sense of judicial legitimacy. Alternatively, one might consider addressing conflicts at their genesis through institutional reform such as anonymized donations, although this approach is practically difficult and may not be politically tenable.

ONLINE APPENDIX

The Online Appendix is hosted on Digital Commons and can be accessed here: <https://scholarlycommons.law.northwestern.edu/nulr/vol117/iss5/2>.

