Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice

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Lawyers as johns, and judges as prostitutes? Across the United States, attorneys ("johns," as the analogy goes) are giving campaign money to judges ("prostitutes") and then asking those judges for legal favors in the form of rulings for themselves and their clients. Despite its pervasiveness, this practice has been rarely mentioned, much less theorized, from the attorney's ethical point of view. With the surge of money into judicial elections (e.g., Citizens United v. FEC), and the Supreme Court's renewed interest in protecting justice from the corrupting effects of campaign money (e.g., Caperton v. A.T. Massey Coal Co.), these conflicting currents and others will force the practice to grow both in its pervasiveness and in its propensity to debase our commitment to actual justice and the appearance of justice. This Article takes, in essence, the first comprehensive look at whether attorneys' campaign contributions influence judicial behavior and our confidence in the justice system (they do), whether contributions have untoward systemic effects (again, they do), and most fundamentally, whether attorneys act ethically when they contribute to judges before whom they appear (they do not, all else being equal).

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INTRODUCTION

I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race.

—Ohio Supreme Court Justice Paul Pfeifer

Justice is a special commodity. The more you pay for it, maybe the less it's worth.

—Sandra Day O'Connor

Lawyers as Johns? Although I have occasionally heard lawyers likened to prostitutes, it is striking to hear lawyers likened to "johns"—with judges as their prostitutes. When money changes hands in judicial elections, however, many striking things happen. In this "new politics of judicial elections," things have reached the "fever pitch," becoming a "noisier, nastier, and costlier" "arms race." If even one of these descriptions is correct, we have cause for collective


3. See infra Part III (noting the prevalence in the legal ethics literature of "lawyer as" articles, in which the lawyer's ethical role is typically analogized to some other benevolent role, such as "friend").

4. See Mitra Sharafi, A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire, 32 LAW & SOC'Y INQUIRY 1059, 1080 (2007) (noting that lawyers have been called "intellectual prostitutes"); cf. Rogelio Perez-Perdomo, Lawyers, Rule of Law, and Social Justice: A Latin American Perspective, 5 U. ST. THOMAS L. REV. 730, 730 (2008) (telling the following lawyer joke: "Lawyers differ from prostitutes because prostitutes sometimes do it for love."). The term "john" generally refers to a prostitute's patron: someone who pays for sex instead of, or in addition to, getting it for free. Although I have just framed it for this Article's lead-in quotation, I should acknowledge that I have never been a big fan of its content. Perhaps the justice said it partly in jest, but failing that, it strikes me as callous and sophomoric for a state supreme court justice to compare his circumstances to those of a "hooker." It strikes me as less callous (but still somewhat sophomoric) to apply this admittedly provocative label to lawyers and judges themselves, whose circumstances are generally far more comfortable but whose campaign-funding activities nevertheless risk corrupting justice for money. See, e.g., infra Part I; see also infra note 4 (noting that the prostitute-john analogy is also ripe with potentially sexist implications).

5. See infra Part III (noting the prevalence in the legal ethics literature of "lawyer as" articles, in which the lawyer's ethical role is typically analogized to some other benevolent role, such as "friend").

6. See supra note 4 (noting that the prostitute-john analogy is also ripe with potentially sexist implications).

7. See supra note 4 (noting that the prostitute-john analogy is also ripe with potentially sexist implications).

8. See supra note 4 (noting that the prostitute-john analogy is also ripe with potentially sexist implications).
concern: Nearly ninety percent of state court judges face a form of election, and state courts handle nearly ninety-eight percent of lawsuits in this country. 

Interestingly, almost no one bothers to ask “where are the lawyers” in this time of crisis; no one bothers to approach the crisis from the perspective of attorneys and their ethics. That is mystifying because attorneys, in the aggregate, contribute lavish amounts of money to judicial elections, and they then appear and reappear before their paid judges asking for legal relief.

This Article thus frames and explores one seemingly simple question: What are the ethics and professional responsibilities of attorneys who contribute to judges’ election campaigns and then appear before those judges? Empirical studies reveal a “strong correlation,” but not always causation, between attorneys’ contributions and judges’ subsequent decisions. In addition to empirical evidence, common sense seems even stronger in its conclusion that contributions appear to influence the judges receiving those contributions; in other words, “under a realistic appraisal of psychological tendencies and human weakness,” judges rule more


10. Brandenburg, supra note 5, at 619 (“Because state courts handle more than 98% of all lawsuits in America, the judicial independence of these high courts is especially important, and yet, would-be justices must raise millions of dollars from individuals and groups with business before the courts.”).

11. See, e.g., Conn. Comm. Prof’1 Ethics Informal Op. 02-07 (2002) (“Despite the fact that the four most populous states in the nation elect judges [among many other less populous states], there is a dearth of ethics opinions and case law regarding the ethical issues posed by the election of judges.”). Indeed, a judicial clerk only a few months ago had to fill some of the large void left by professors and practitioners. Nancy M. Olson, Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers’ Campaign Contributions and the Common Practice of “Anything Goes”, 8 CARDOZO PUB. L. & ETHICS J. 341, 349-53 (2010) (examining contributions under four Model Rules of Professional Conduct). The much belated academic debate should finally arrive, and in a hurry, in light of Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009), which held that due process generally requires state court judges to recuse themselves from cases in which litigants have contributed large sums of money in support of the judges’ elections.


13. See infra Part I.A (describing the results).
favorably for contributors than for non-contributors. In short, all else being equal, attorney-contributors fare better than attorney-cheapskates. Thus, the answer, like the question, seems simple: Attorney contributions should be prohibited. Yet, in every elective jurisdiction, attorneys legally can—and often do—contribute to judges and then appear before those judges requesting relief.

To be sure, some jurisdictions are ambivalent about the practice and attempt, often weakly, to limit campaign contributions or require judges to disqualify themselves from cases involving unusually high-dollar contributors. But even these weak attempts are always directed toward the judges, with the implication that—viewed from the attorneys' perspective—their actions are above reproach. Moreover, with the possible exception of Montana, no state strongly limits lawyer contributions, although some lawyers voluntarily (and frugally) contribute only de minimis amounts. Although any earmarked contribution presents some threat that the judge will show favoritism toward the contributor either for that contribution or for the hope of future contributions, the bulk of my analysis is not addressed to indisputably de minimis contributions. A word of distinction is

14. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (quoting in part Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (concluding that a judge should be disqualified whenever "'under a realistic appraisal of psychological tendencies and human weakness,' the [judge's] interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented'"). To the extent that "common sense" approximates the views of the majority of Americans, public polling routinely reveals that Americans believe that judicial campaign contributions influence judicial decisions. See infra Part I.B (providing the survey data).

15. Post-Caperton, such half-hearted efforts will seem even more hollow: As a matter of due process, judges who preside over their large campaign contributors are constitutionally suspect. See Caperton, 129 S. Ct. at 2263. A state effort that does little more than parrot the federal Constitution's supreme requirements is simply redundant. One state that arguably does more is Mississippi. Its judicial ethics rules allow a party to move for disqualification in any case involving a "major donor." MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (2002). A "major donor" need not be that "major"; rather, it is anyone who contributed more than $2000 to an appellate court judge or $1000 to a trial court judge. MISS. CODE OF JUDICIAL CONDUCT pmbl. (2002). This rule, however, does not clearly require disqualification of major donors, although it clearly singles them out for special scrutiny. Moreover, a state task force has recently recommended that the rule be amended, and confusingly, the proposed rule is much fuzzier with respect to financial contributions. See MISS. CODE OF JUDICIAL CONDUCT STUDY COMM., PROPOSED 2010 MISSISSIPPI CODE OF JUDICIAL CONDUCT (Apr. 5, 2010), available at http://www.mssc.state.ms.us/rules/rulesforcomment/2010/CodeofJudicialConduct.pdf. On the brighter side, New York has recently proposed a rule requiring disqualification whenever a lawyer or party contributes $2500 or more. See Assignments and Disqualification Involving Contributors to Judicial Campaigns, N.Y. R. OF CHIEF ADMIN. OF CTS. Pt. 151 (proposed Feb. 1, 2011), available at http://www.courts.state.ny.us/attorneys/pdfs/2011_02_14_14_04_54.pdf; William Glaberson, New York Takes Step on Money in Judicial Elections, N.Y. TIMES, Feb. 13, 2011, http://www.nytimes.com/2011/02/14/nyregion/14judges.html?_r=2&scp=1&sq=new%20york%20judicial%20election&st=cse.

16. See infra app. (listing contribution limits); cf. Caperton, 129 S. Ct. at 2264 (determining that, for due process analysis of the impact of a particular contribution, the reviewing court should assess "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election"); see also supra note 15 (noting a promising development in New York, which occurred after this Article was sent to production).

17. If the contribution is large enough for us to debate whether it is purely de minimis, however, consider it included in this Article's analysis. Cf. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2004) (requiring that
also in order for those many lawyers and judges who—no matter how large or otherwise consequential a contribution—never give or receive campaign money with untoward purposes in mind. I do not doubt the accuracy of that statement, and those lawyers and judges are owed much credit for their principle, but the poor public perception and dangerous subconscious influences of the practice of contributing may arguably pull back into the analysis even those lawyers and judges.  

I also have no doubt that many principled and other lawyers would turn to rules of professional responsibility for a compass to navigate these dangerous waters. Amazingly, however, the Model Rules of Professional Conduct—the governing blueprint for virtually every attorney’s professional responsibilities in the United States—does not directly speak to the practice of contributing, and what little is mentioned affirmatively encourages the practice. Indeed, the closest official comment begins with the declaration that attorneys “have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office.” That is true as a descriptive matter, but it might not be invariably true as an ethical matter.

In any event, the official comment does not actually address the harder question, which is not whether attorneys are permitted to contribute to judicial campaigns—they are as a matter of First Amendment doctrine—but whether attorneys who contribute to judicial campaigns may then appear before their judges recuse themselves whenever their “impartiality might reasonably be questioned” (emphasis added); Code of Conduct for United States Judges Canon 3C (2009); Model Code of Judicial Conduct Canon 3E(1) (2004) (same); Mark I. Harrison & Keith Swisher, When Judges Should Be Seen, Not Heard, 64 N.Y.U. Ann. Surv. Am. L. 559, 589-90 (2009) (explaining this national standard of mandatory disqualification); infra Part I.B (noting that voters, lawyers, and judges believe in supermajority numbers that judges are not impartial toward their contributors).

18. See generally infra Parts I-II (explaining the costs of the practice).

19. See generally ABA/BNA Lawyers’ Manual on Professional Conduct § 1:3 (2010) (showing that forty-nine states and the federal courts have adopted the ABA Model Rules of Professional Conduct or the former ABA Model Code of Professional Responsibility either in whole or in substantial part); Harrison & Swisher, supra note 17, at 564 (noting and commending the corresponding Model Code of Judicial Conduct for its national regulation of judicial ethics). The closest rule, Model Rule 7.6, deters “pay-to-play” arrangements in which an attorney must contribute to a public official before the attorney is eligible to receive legal services contracts. Thus, these pay-to-play arrangements have little to do with this Article’s topic. See Model Rules of Prof’l Conduct R. 7.6 (2010) (hereinafter Model Rules) (“A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.”). See generally ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005 785 (2006) (describing the rule and its drafting history). The two topics are not completely unrelated, however. Judges are public officials, of course, and in the event that judges, explicitly or implicitly, require contributions in exchange for a “legal engagement or appointment,” or a perhaps even another benefit such as a favorable ruling, the topics almost fully align. See Model Rules R. 7.6 cmt. 1 (noting that “when lawyers make or solicit political contributions in order . . . to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit . . . [and] the integrity of the profession is undermined”).

sponsored judges. In their appearances, of course, they request legal relief from their sponsored judges. Indeed, it is not just legal relief for their clients: In our current system of professional misconduct regulation, attorneys can also appear for themselves before their sponsored judges even when those judges are asked to discipline or otherwise rule against their sponsoring attorneys.

Now people operating in ethically questionable regimes have many rationalizations (or irrationalizations) to cope with their participation: “Everybody is doing it,” “it is the lesser of two evils,” “the pressure is coercive,” and so on. In theory, at least, it is time—and probably past time—to explore (i) whether attorneys should abstain from contributing (e.g., to avoid aiding and abetting judges’ ethical violations), (ii) whether attorneys should engage in contributing (e.g., to further their clients’ interests), or (iii) whether the ethical duty more accurately rests somewhere in between.

In this Article, I ultimately show that, in the main, attorneys—both as a profession and as individuals—would be ethically better off contributing “the

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21. The official comment later appears to recognize the threat of quid pro quo treatment whenever an attorney pays money to a judge’s campaign and then appears before the judge requesting legal relief. Model Rules R. 7.6 cmt. 6 (“If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated,” which prohibits crimes reflecting adversely on the attorney’s fitness to practice law). Of course, the comment is at best a tautology; by punting the matter to existing criminal bribery statutes, the comment adds nothing to the status quo of our knowledge or regulation.

22. See, e.g., David Barnhizer, “On the Make”: Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361, 392-93 (2001) (“One of the worst consequences of money’s corrupting influence on judicial behavior is found in judges’ failure to regulate the unprofessional behavior of lawyers coming before them. . . . For state court trial judges, lawyers’ contributions are the primary source of campaign funds. How can these judges effectively discipline and criticize lawyers if they are dependent on the lawyers for campaign contributions?”).

23. The “pressure” excuse has some merit for some attorneys. Occasionally, judges will unethically extract contributions directly from the attorneys in their courtroom. See, e.g., In re Yacknin (N.Y. St. Comm’n on Jud. Conduct Dec. 29, 2008), available at http://www.scjc.state.ny.us/Determinations/Y/yacknin.htm (“By soliciting support for her candidacy for Supreme Court from an attorney in her court, moments before the attorney was scheduled to appear before her with a client, respondent engaged in conduct that compromised her impartiality and independence and promoted her political interests in the courtroom”; noting also that, from the perspective of the attorney before her, the judge’s solicitation was “particularly coercive”). More frequently, judges and their campaign committees follow ethical solicitation practices, but the elective system itself places pressure on attorneys not to alienate their judges (or themselves) by failing to show financial support.

24. A pervasive practice without a theory can be anything from a waste of time to a “menace.” See THE NOTEBOOKS OF LEONARDO DA VINCI, at x, § 19 (Jean Paul Richter ed., 1970); Karl N. Llewellyn, On What Is Wrong with So-Called Legal Education, 35 COLUM. L. REV. 651, 662 (1935). Most courts refuse to disqualify judges on the basis of campaign contributions, at least when those contributions are relatively low and the judge has no other ties to the contributing lawyer. See, e.g., Pierce v. Pierce, 39 P.3d 791, 796, 798 (Okla. 2001) (noting that courts typically hold that a contribution, in and of itself, is insufficient to warrant disqualification, but holding that a judge is disqualified under both the state disqualification laws and constitutional due process when “(1) a lawyer makes a campaign contribution to that judge in the maximum amount allowed by statute, and (2) a member of that lawyer’s immediate family makes a comparable maximum contribution, and (3) that lawyer further assists the judge’s campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge”).
money to a good charity” instead of presiding judges. Part I first answers the most basic concern: Do contributions affect case outcomes? In short, contributions likely affect both actual justice and the appearance of justice. Part II lists both the desirable and (mostly) undesirable systemic consequences of the pervasive practice of contributing to judicial campaigns. The consequences are explicated through the dyadic tale of two judges and four lawyers: good judge, bad judge; good lawyer, bad lawyer; and rich lawyer, poor lawyer.

Part III walks these lawyers through four primary models of the lawyer’s ethical role. For several decades now, legal ethicists have created and critiqued these models with a justificatory eye toward what lawyer behavior is (or is not) ethically defensible. Using these models, and while ideally being mindful of the broader consequences articulated in Parts I and II, each lawyer has to decide whether and how to contribute (or for judges, to accept contributions) in a world in which contributions are legally permissible and matter not just to the judges, but also to the lawyers themselves and their clients. Ultimately, Part III contains a split of ethical authority, so to speak, which makes the practice of contributing right for some lawyers and wrong for most lawyers. Finally, for the benefit of both lawyers and judges, Part IV raises several practical concerns with contributing, over and above (or under and below) these difficult ethical quandaries. These concerns include the potential for aiding and abetting judges’ ethical violations and provoking motions to disqualify.

I. DO CONTRIBUTIONS MATTER?: ALWAYS AND WHY

This Part ultimately demonstrates that attorney contributions to presiding judges “always” matter as a matter of justice, in one or two ways. The first way is that some judges may actually sell justice for money, as shown through the following survey of the empirical research attempting to prove or disprove that contributions influence judicial decisions. The second way is that judges also apparently sell justice for money, as shown through a later survey of the public polling data containing the opinions of voters, lawyers, and even judges themselves.

A. EMPIRICAL RESEARCH FINDINGS

One of the most well-respected legal empiricists recently announced that “[w]hile some make causal claims (or assumptions) about the effect of campaign

25. Ronald D. Rotunda, A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates, 14 PROF. LAW. 16, 18 (2003) (quoting Daniel C. Vock, Dem Majority Aside, High Court Leans Right, CHI. DAILY L. BULL., Sept. 3, 2002) (reporting the reaction of a plaintiffs’ attorney who had given thousands of dollars to a court before whom he lost more than he won: “Had I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity.”).
contributions on the judges' future decisions, as far as I can tell not one cites any rigorously and systematically developed social science evidence making the link" and "such evidence does not seem to exist." 26 Although in this context proving causality (in other words, proving whether judicial "decisions follow dollars" or "dollars follow decisions") is difficult, it is an overstatement to imply that no valid and reliable study focuses on the matter. 27 The following studies provide significant preliminary insight—and several tentatively conclude that money can buy influence.

Professor Joanna Shepherd's recent work is exciting, at least in its breadth. She attacks the question using a data set consisting of virtually every state supreme court decision between 1995 and 1998, which covers over 28,000 cases involving over 470 justices. 28 The results first revealed a strong relationship between campaign contributions and judges' decisions. In particular, for "judges elected in partisan elections, contributions from various interest groups have a statistically significant relationship with the probability that judges vote for litigants that the interest groups favor." 29 For example, "contributions from pro-business groups" and insurance companies "increase the probability that judges will vote for the business litigant in a business-versus-person case, for the business litigant in a

26. Lee Epstein, Shedding (Empirical) Light on Judicial Selection, 74 Mo. L. Rev. 563, 565 (2009) (referring in part to the various briefs filed in Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)). In addition to the empirical evidence about to be discussed in this Section, there presumably will always be the common sense argument that contributions affect judicial decision-making:

Gaining and retaining judicial office is obviously one of several important factors that influence judges' conduct on the bench. Anecdotal evidence suggests that judicial candidates believe that being able to outspend opponents is critical to winning elections, and the accuracy of this belief is supported by several studies. It is, therefore, reasonable to assume, as previous researchers have, that judges faced with the need to communicate with voters through costly media outlets, and to pay for other campaign related expenses, would be biased when making decisions in favor of firms that have supported them with financial contributions.

Aman McLeod, Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making, 85 U. Det. Mercy L. Rev. 385, 388-89 (2008) (footnotes omitted); see also MELINDA GANN HALL & CHRIS W. BONNEAU, IN DEFENSE OF JUDICIAL ELECTIONS 54, 76-78 (2009) (describing the power of campaign spending in judicial and other elections); Clive S. Thomas et al., Interest Groups and State Court Elections: A New Era and Its Challenges, 87 JUDICATURE 135, 139 (2003) ("Campaign contributions are becoming the most decisive factor in determining the outcome of judicial elections in some states.").


products liability case, and for the original defendant (which is often a business) in tort cases."30 In contrast, contributions from lawyers, most of which are plaintiffs’ lawyers, reduce the probability that judges will vote for litigants that are typically defendants," such as businesses.31

Professor Shepherd then employed a model to discern "which way causality runs" by comparing the votes of judges running for reelection, who need campaign funds, with retiring judges, who obviously do not need campaign funds.32 In short, if contributors fare better with nonretiring judges and worse with retiring judges, it suggests that contributions influence judicial decisions.33 The results again revealed that "the strong relationship shown [above] between campaign contributions and how nonretiring judges vote is due, at least in part, to campaign contributions causing the judges to change their votes."34

Two political scientists, both of whom are experts in judicial selection, recently completed a one-year study of the highest courts in Michigan, Nevada, and Texas.35 While the results did not speak in one clear voice, they did provide cause for concern: "While we do not find any evidence of a relationship between contributions and the votes of judges in Nevada, it does appear that there is a quid pro quo relationship between contributors and votes in Michigan and Texas."36 Interestingly, for the state whose data commendably showed a lack of "quid pro

30. Shepherd, supra note 28, at 669.
31. Id.
32. See generally McCall, supra note 27, at 328-30 (explaining the difficulties in proving that a contribution caused a favorable judicial decision and conversely disproving that favorable judicial decisions caused the contribution).
33. Shepherd, supra note 28, at 672-73 ("If contributions have a weaker relationship with the voting of retiring judges, then this suggests that some of the relationship between contributions and voting can be explained by judges’ voting in a way that will likely increase the future contributions from interest groups at the time of their next reelection campaign; that is, a weaker relationship for retiring than nonretiring judges would suggest that an interest group’s campaign contributions can convince judges to change their rulings, rather than just increasing the probability of election of judges whose rulings happen to favor the interest group.").
34. Id. at 673 ("That is, if the relationship was due merely to the campaign contributions permitting the election of a higher proportion of judges who naturally already vote the way that the interest groups prefer, then campaign contributions should have the same relationship with the voting of all judges, whether retiring or not."). In an even more recent study, Professor Shepherd and a coauthor likewise find that business-group contributions likely affect judges’ decisions, but only in partisan judicial elections. Kang & Shepherd, supra note 29. Notwithstanding these consistent findings (at least with respect to partisan judicial elections), the authors caution that they have not specifically "tease[d] apart" whether dollars follow decisions or decisions follow dollars, and in their opinion, "both causal explanations are likely to be correct to varying degrees . . . ." Id. Professor Epstein calls Shepherd’s earlier work "quite interesting" but did not embrace the work because it apparently was not subjected to peer review. Epstein, supra note 26, at 565 n.17.
35. Bonneau & Cann, supra note 28. With respect to research design, the authors noted: "Using an instrumental variables probit model, we are able to control for the endogeneity between contributions and votes and thus can conclude that contributions drive judicial votes, and not the other way around." Id.
36. Id. These results notwithstanding, I should note that at least one of the study’s authors is still a proponent of judicial elections for other reasons. See Hall & Bonneau, supra note 26, at 139 (calling judicial elections "highly efficacious institutions of democracy that in many ways serve as the prototype for what state elections should be in the United States").
quo relationship”—Nevada—the result was apparently aided by its use of nonpartisan elections, according to the authors. Both Michigan (which has a partisan nomination process) and Texas (which has partisan elections), in contrast, use a partisan system. Several federal circuit courts, however, have recently struck down, as inconsistent with the First Amendment, the judicial ethics rules that effectively promoted nonpartisan elections by prohibiting judges from announcing themselves as Democrat, Republican, or other party affiliation.\(^3\) Thus, perhaps Nevada is ultimately destined to fall as well, if it has not already.\(^3\)

While the above studies indicate that (some) judges can be (partially) bought, a few studies point the other way. Ron Rotunda, a well-known legal ethicist, performed a “preliminary” empirical analysis of the highest courts in Illinois, Michigan, and Wisconsin.\(^3\) He found no positive relationship between attorneys’ contributions and their success before their respective state supreme court. Indeed, he often found just the opposite: that contributing attorneys lost more often than they won. There are, however, at least two reasons to be cautious in relying on this “preliminary” study: (1) to discern an impact on judicial behavior, the study apparently looks only to whether contributing attorneys won their appellate case, not to the more accurate measure of whether contributing attorneys won the particular vote of the justice or justices to whom they had contributed;\(^4\) and (2) as Rotunda himself notes, the results do “not preclude an argument that the contributions are corrupting; perhaps, if the contributors had given less, they would have lost even more . . . .”\(^4\) Nevertheless, his findings are


\(^{38}\) See Michael J. Goodman & William C. Rempel, In Las Vegas, They’re Playing with a Stacked Judicial Deck, L.A. TIMES, June 8, 2006, at 3 (exposing numerous instances in Nevada of seemingly corrupt campaign-funding practices by both attorneys and judges). Of note, in the November 2010 elections, Nevada voters decided to keep judicial elections (over a proposed move to merit selection) by a fifty-eight percent majority, even though the proposal had several prominent backers, including retired Justice Sandra Day O’Connor. See, e.g., Doug McMurdo, Voters Reject Changing Judge Selection, LAS VEGAS REV. J., Nov. 3, 2010, available at http://www.lvrj.com/news/voters-reject-changing-judge-selection-1065977233.html (“A majority of attorneys, business groups, unions and both Republican and Democratic lawmakers—and most notably retired U.S. Supreme Court Justice Sandra Day O’Connor—supported merit selection of judges; but 58 percent of voters who cast a ballot for Question 1 disagreed.”).

\(^{39}\) See Rotunda, supra note 25.

\(^{40}\) See, e.g., Margaret S. Williams & Corey A. Ditslear, Bidding for Justice: The Influence of Attorneys’ Contributions on State Supreme Courts, 28 JUST. Sys. J. 135, 153 (2007) (noting that their findings “suggest that the effect of campaign contributions on votes is best understood by looking at the individual vote, not the aggregate outcome of the case”).

\(^{41}\) Rotunda, supra note 25, at 18.
surprising notwithstanding their limitations, and the following study provides some further support, at least in Wisconsin.

In a ten-year study of the Wisconsin Supreme Court, two political scientists returned with mixed results.\textsuperscript{42} They concluded that "at least in Wisconsin, little conclusive evidence exists to indicate that the judges of the Wisconsin Supreme Court are systematically influenced by contributions to their campaigns[; t]here is, however, some evidence that a few judges may be influenced by contributions under specific conditions."\textsuperscript{43} In short, while the slight majority of justices did not appear to change their voting behavior for money, three justices appeared to do just that.\textsuperscript{44}

Notwithstanding these mixed results and Rotunda's negative results, and in addition to the positive studies explained above, problems with contributions have been exposed in several other judicial venues. Professor Stephen Ware, for example, found a "remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds" in a four-year study of the Supreme Court of Alabama.\textsuperscript{45} Correlations (and sometimes causality) have also been found for other types of cases and in other locales, including: (1) the Supreme Court of Georgia;\textsuperscript{46} (2) the Texas Supreme Court;\textsuperscript{47} and (3) tort cases in

\textsuperscript{42} See Williams & Ditslear, supra note 40. The years under analysis appear to overlap identically with Rotunda's analysis. Compare id. at 139 (1989 through 1999), with Rotunda, supra note 25, at 18 n.32 (same).

\textsuperscript{43} Williams & Ditslear, supra note 40, at 153. The study analyzed only seven justices, and the authors found that three of those justices might be influenced by contributions. See id.

\textsuperscript{44} In particular, the authors describe those justices, their altered voting patterns, and the seemingly odd behavior of a fourth justice, as follows:

One judge (Bradley) appears to be influenced by contributions; her likelihood of voting liberally changes significantly depending on the amount of the contribution or which side has a contribution advantage. Another (Geske) appears to be affected by the time since a contribution. However, a third (Wilcox) appears to be voting in a direction opposite the ideology of those making contributions to his campaign. Liberal contributions, especially when the contribution exceeds the average, make him more likely to vote conservatively; conservative contributions increase the likelihood of a liberal vote. Another judge (Steinmetz) also appears to be affected by contributions; when the liberal side contributes more, Judge Steinmetz is more likely to vote in a liberal direction than would be the case absent any contribution imbalance. These findings provide some limited leverage for the critics who seek reform of judicial elections that rely on private contributions. In addition, they suggest that the effect of campaign contributions on votes is best understood by looking at the individual vote, not the aggregate outcome of the case.

\textsuperscript{45} Stephen J. Ware, Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama, 30 CAP. U. L. REV. 583, 584 (2002). Professor Ware acknowledged, however, that this "strong correlation" does not prove causation. Id. at 601-02.


\textsuperscript{47} McCall, supra note 27, at 330; see also Madhavi M. McCall & Michael A. McCall, Campaign Contributions, Judicial Decisions, and the Texas Supreme Court, 90 JUDICATURE 214, 217, 225 (2007) (finding in a study of the Texas Supreme Court including 503 cases and 2202 individual votes that "the probability of a party garnering votes increases if the party contributed to a given justice's campaign" and that "the findings at
Alabama, Kentucky, and Ohio. Finally, there is some evidence that money at least buys access if not necessarily votes, which is consistent with the literature on congressional contributions.

In sum, as Professor Lee Epstein rightly cautioned, the jury is still out on many elective courts. More research is certainly needed, paying more attention to contributing at the trial court level, coding “victories,” isolating and comparing the impact of different contribution sources, and discerning causality, as noticeable examples. At the same time, however, many courts have been shown corruptible by money, to a degree unlikely to be the result of chance. Moreover, in the court of public opinion, the jury has long returned a guilty verdict. These opinions, rehearsed below, are perhaps relevant on the merits in that so many people believe that money corrupts judges—because widely shared judgments from widely different people from widely different places tend to be more accurate than individual judgments—but their opinions are more clearly relevant in showing that the practice creates an “appearance of impropriety” and brings the judiciary into disrepute. Either result (appearance of impropriety or judicial disrepute) should be concerning for lawyers.
B. PUBLIC OPINION POLLS

The opinion survey data shows that a supermajority of voters, lawyers, and even judges believe that campaign contributions influence judges' decisions. In several oft-cited nationwide polls, at least seventy percent of voters believed that campaign contributions influence judicial decisions. In a somewhat surprising poll of a subset of voters—"business leaders"—they too believed in overwhelming percentages that campaign contributions influence decisions and thereby jeopardize the rule of law. Furthermore, again according to nationwide polls,
more than ninety percent of respondents believed that judges should not sit on cases in which they have received campaign contributions from the participants. Statewide surveys similarly reveal negative sentiments concerning campaign contributions and failures to recuse in light of those contributions.

Likewise, lawyers—the contributors—typically believe that money buys influence. A Texas Supreme Court and State Bar study uncovered that seventy-six percent of responding attorneys believed that campaign contributions have a significant influence on judicial decisions. In another Texas study, seventy-nine percent of responding attorneys believed that campaign contributions significantly affect judicial decisions. Beyond such polls, the anecdotal evidence of this belief is quite expansive.

Finally, a significant percentage of judges themselves believe that campaign contributions influence their judicial decisions. In one nationwide survey, over twenty-six percent of respondent-judges as stated that contributions have at least some influence on judicial decisions; the survey was nationwide and included a state-by-state listing of relevant surveys.

55. Joan Biskupic, Supreme Court Case with the Feel of a Best Seller, USA TODAY, Feb. 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm (citing poll); ZOGBY INT'L, supra note 54, at 7; see also Justice at Stake Poll, supra note 53 (recording widespread opinion that a judge should recuse herself from cases involving large campaign contributors and that a different judge should decide disqualification motions).


59. See generally ABA STANDING COMM. REPORT, supra note 12 (describing several studies finding that attorneys, judges, and voters believe that campaign contributions influence judicial decisions); ABA STANDING COMM. ON JUDICIAL INDEPENDENCE ET AL., PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 25 (Feb. 2002), available at http://www.abanet.org/judind/pdf/commissionreport4-03.pdf (quoting in part Buying the Bench, GAMBIT WEEKLY, Nov. 30, 1999) (recounting the comments of former Texas Supreme Court Justice Bob Gammage who "was reported to have 'quit after one term because contributions were corrupting the system'" and decrying that "'people don't go pour money into contributions because they want fair and impartial treatment. . . . They pump money into campaigns because they want things to go their way.'"); Olson, supra note 11 (citing several instances in which contributing attorneys have stated or implied that they could buy influence).

60. GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002) [hereinafter JUSTICE AT STAKE], available at http://faircourts.org/media/cms/1ASJudgesSurveyResults_EA8838C0504A5.pdf (recording at least twenty-six percent of respondent-judges as having stated that contributions have at least some influence on judicial decisions); see also id. at 9 (recording that over fifty percent of respondent-judges reported being "concern[ed] a lot" with the fact that campaign contributors appear before the judges to whom they contributed). The survey was nationwide and included
fifty percent of judges from all court tiers believed that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." 61

In sum, essentially all involved—from the voters, to the "johns" (lawyers), to the "prostitutes" (judges)—believe that (i) campaign contributions affect case outcomes and (ii) judges should not sit on cases involving campaign contributors, whether lawyers or parties. 62 And moving from belief to reality, there is some evidence that courts are increasingly willing to take public opinion surveys into account in structuring recusal law. 63 Thus, through empirical evidence and widely held opinion, we can safely say that campaign contributions are consequential. The next Part weighs whether these impactful contributions promote or corrupt our system of justice.

II. THE IRONIES, BENEFITS, AND COSTS OF CONTRIBUTING

This Part explicates the systemic consequences of contributing through the use of dyads: good judge, bad judge; good lawyer, bad lawyer; and rich lawyer, poor lawyer. While some of the practice’s consequences are, or can be, laudable, the attendant costs seem to dwarf the benefits.

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61. Justice at Stake, supra note 60, at 11; see also id. at 9 (recording also that over fifty percent of respondent-judges from both elective and non-elective states reported being "concerned a lot" with the fact that campaign contributors appear before the judges to whom they contributed); Geyh, supra note 58, at 1470-71 (citing Lawrence N. Hansen, Editorial, Contribution Limits Protect Democracy, Chi. Sun-Times, Jan. 30, 2000, at 28) (noting that nearly fifty percent of responding judges in Texas believed that money influenced judicial decisions).

62. To be sure, many of the polls and empirical data do not address de minimis contributions, such as the fifty dollar contribution in a race in which hundreds of thousands of dollars are or will be in play. Cf. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264 (2009) (determining that, for due process analysis of the impact of a particular contribution, the reviewing court should assess "the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election"). With the possible exception of Montana, no state requires contributions to be clearly de minimis, although some lawyers voluntarily (and frugally) contribute only de minimis amounts. See infra app. (listing contribution limits). Although any contribution presents some threat that the earmarked judge will show favoritism toward the contributor either for that contribution or for the hope of a future contribution, the bulk of my arguments below are not addressed to indisputably de minimis contributions.

A. GOOD JUDGE, BAD JUDGE, AND THE IRONY OF ATTORNEY CONTRIBUTIONS

From above, we can see that the practice of contributing has obvious case effects, but there is less literature on whether the practice also has judge effects, in terms of favorable judicial selection. The most frequently raised support for the practice is that attorneys are the most "in the know" about which judges are good and which judges are bad; and therefore, attorneys should be permitted, nay encouraged, to act on this unique knowledge and support the best judges financially. Here rests the irony of it all: the truer that claim, the more dangerous the practice becomes. In particular, if attorneys are truly using their repeated in-court contact with judges to assess judges’ competence and then to fund those judges, the more dangerous that funding becomes—because more contact with the (now) financially rewarded judges means more justice is at risk of being corrupted. Furthermore, even the most well-intentioned of these attorneys—i.e., the ones who, out of a vested concern for the administration of justice in elective states, contribute solely to install or maintain good judges—are almost paradoxically harming or appearing to harm the administration of justice by

64. This phrasing was inspired by David Pozen’s fine work exposing several other ironies in judicial elections. David E. Pozen, The Irony of Judicial Elections, 108 Colum. L. Rev. 265 (2008). I do not address in this Article every bit of irony, and at times ludicrousness, of the practice. For instance, while the practice is pervasively accepted outside the courtroom—and from lawyers who routinely appear before the judges inside the courtroom—any solicitation or contribution inside the courtroom is sharply banned, even when neither the lawyer nor the judge earmarked the contribution for a particular case or ruling. See, e.g., Joel Stashenko, Commission Admonishes Two N.Y. Judges, 239 LEGAL INTELLIGENCER 7 (Jan. 12, 2009) (reporting that the New York State Commission on Judicial Conduct admonished a judge who directly solicited a campaign contribution from a lawyer in the courtroom).

65. E.g., New York St. Bar Assoc., Prof’l Ethics Comm. Op. 289, at 3 (1973) (citing ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 189 (Nov. 11, 1938)) ("Because lawyers may be ‘better able than laymen to appraise accurately the qualifications of candidates for judicial office’, it would not be appropriate, given the safeguards (nondisclosure of the donors’ identity and limitation on amount of contribution) contained in the following guidelines."); ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 226 (1941) (similar). The first safeguard on which the committee relied (namely, “nondisclosure of donors’ identity”) has been completely removed. See, e.g., LAWYERS’ POLITICAL CONTRIBUTIONS REPORT, supra note 52, at 19 (“Effective disclosure of campaign contributions has been federal law since 1971. And all 50 states require campaign finance disclosure although, of course, the precise requirements and the effectiveness of their administration do vary."). This is an unfortunate, and perhaps unintended, effect of disclosure rules in this context. See Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 Chi.-Kent L. Rev. 133, 145 (1998) ("Yet, in the context of judicial elections, disclosure requirements actually have a destructive effect: they ensure that judges know who gave and how much was contributed. Judicial candidates, like all candidates for elected office, must sign the disclosure statements that they file and swear that the information is accurate."). Professor Chemerinsky does not believe that disclosure requirements should be eliminated, but he finds them to be singly insufficient to combat the corrupting effects of money in judicial elections. See id. at 145-46.

66. Williams & Ditslear, supra note 40, at 136-37 (explaining why attorneys are potentially the most dangerous contributors); see also Chemerinsky, supra note 65, at 136-37 (noting that lawyers, along with litigants, are the “primary” contributors to judicial elections and providing examples of large contributions and expenditures).
passing money to those judges (and then appearing before them).

Anecdotally—for all we have here are anecdotes—the good part of the practice may hold true at least some of the time. If so, that is, some courtroom-savvy attorneys laudably are assessing and financing the most competent judges. Unfortunately, however, attorneys do not contribute only to the most competent judges. Attorneys also, quite legally, give to judges who are not the most competent, perhaps even incompetent. For example, attorneys almost invariably contribute to incumbents, but incumbents are not necessarily the best of the lot. Moreover, to assume a perfect positive correlation between attorney contributions and judicial competence is both unproven and highly implausible. There are too many races in which some attorneys are contributing to one judicial candidate (whether incumbent or challenger), other attorneys are contributing to the other candidate, and other attorneys are contributing to both candidates. Indeed, “substantial contributions are made to judges who are

67. Cf. ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 189 (Nov. 11, 1938) (“But the lawyer who endorses a judicial candidate or seeks that endorsement from other lawyers should be actuated by a sincere belief in the superior qualifications of the candidate for judicial service and not by personal or selfish motives; and a lawyer should not use or attempt to use the power or prestige of the judicial office to secure such endorsement. On the other hand, the lawyer whose endorsement is sought, if he believes the candidate lacks the essential qualifications for the office or believes the opposing candidate is better qualified, should have the courage and moral stamina to refuse the request for endorsement.”). Trial judges should arguably receive more scrutiny of their routine contributions than appellate judges. See, e.g., N.Y. St. Bar Assoc. Prof’l Ethics Comm. Op. 289, at 3 (1973) (cautioning trial judges from accepting and lawyers from contributing to trial judges “before whom the lawyer has a pending case”). See generally Barry Temkin, Lawyer Contributions to Judicial Election Campaigns (unpublished manuscript) (Jan. 27, 2007), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=barry_temkin (analyzing Op. 289). This distinction between trial and appellate judges—with the latter being the preferred recipients of attorneys’ campaign dollars—is generally logical as a matter of degree. The distinction has at least two obvious points, both of which suggest that trial court contributions tend to be more corruptive: (1) appellate races tend to cost more than trial court races, which means more campaign money is generally necessary and only higher-dollar contributions are likely to stand out, and (2) with many exceptions, trial attorneys tend to appear and reappear before the same judges more than appellate attorneys. These points do not invariably apply, however, and wherever they do not (e.g., in an appellate race with little costs or donors or in an appellate court in which the contributing attorney is appearing or, worse, reappearing), the logic of the distinction runs out. Indeed, the logic occasionally runs the other direction: Trial court elections are often sleepy affairs in which the judges are relatively unlikely to lose their seats. In those circumstances, trial judges have obviously little reason to covet—and perhaps even to care about—campaign contributors. I have therefore used a unified analysis in this Article, which does not distinguish contributors solely by virtue of the court-tier to which their contributions are directed. The trial-appellate distinction nevertheless seems deserving of further study in the literature.

68. Generally, incumbents owe their repeated success to three or so advantages: money, the fact of incumbency (if communicated to voters), and name recognition, with each advantage generally reinforcing the others. Not surprisingly, incumbents usually win reelection. See, e.g., Waltenburg & Lopeman, supra note 48, at 245-46 (discussing advantages of incumbency).

69. Bradley A. Siciliano, Note, Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety, 20 Hofstra L. Rev. 217, 227 (1991) (citing Mark A. Grannis, Note, Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich. L. Rev. 382, 408 (1987)); see also McCall, supra note 27, at 330 (finding that plaintiffs were contributing to conservative justices with whom they unlikely shared ideological characteristics; noting that these plaintiffs were not likely using their “campaign contributions to
running unopposed . . . or to the winner after the election." 70 Too much of this behavior is consistent with favor-currying and inconsistent with merit selection. Moreover, the very premise of the argument—i.e., unless we allow attorneys to contribute to judges and then appear before those judges, almost no attorneys will contribute—suggests one or two concerning things: (i) when the values of a quality bench and a better personal practice conflict, the better-practice value trumps; and/or (ii) more controversially, that unless something is in it for these attorneys or their clients (such as favorable treatment from their sponsored judges), they will not contribute. Thus, the argument that these attorneys are merely being good legal citizens and supporting their elective community seems strained from the start. For those attorneys who are unsure of their motives, they should ask themselves whether they would still contribute even in a world (not ours) in which judges do not know the identity of their contributors. 71

In short, either virtually every judge is the “best” for the job or (more likely) the rationale that attorneys finance only (or even usually) the best judges has an unacceptably high error rate. 72 In light of this error rate, we might look for judicial-competence assessors who, unlike lawyers, have less of their professional livelihood at stake. Fortunately, we already have these assessors in place: the voters. Of course, voters are no panacea, particularly in judicial elections. 73 A relatively recent trend in judicial selection, however, offers in theory a way to decouple the benefits of lawyers’ courtroom knowledge (and legal knowledge

70. Siciliano, supra note 69, at 227 (citing Jeffrey M. Shaman, Politics and Ethics in Electing Judges, Chi. DAILY L. BULL., Sept. 1, 1987, at 2; Grannis, supra note 69, at 408); see also McLeod, supra note 26, at 391 (footnotes omitted) (noting not only that attorneys give to unopposed candidates, but also that they give “out of fear that the judges would not be as receptive to their arguments if they did not contribute”).

71. As an introspective approach, would-be contributing lawyers should first ask themselves whether they would still make the contributions if their names were anonymous. If not, they must be expecting something in return for their contribution, and they should ask themselves what that is. Apart from introspective exercise, contributors are not anonymous in reality, both as a matter of state law and signaling practices. Stuart Banner, Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 STAN. L. REV. 449, 471-72 (1988). Interestingly, although the cited work is listed as a law student “Note,” Banner has since become a well-known UCLA law professor.

72. Indeed, even in a world (again, not ours) in which attorneys’ financial contributions were completely banned, attorneys would still be free to assist judicial campaigns in other ways, such as chairing the election campaign committee, as attorneys often do now. That said, a ban on dollars changing hands would, at a minimum, go a long way toward eliminating the appearance of corruption.

generally) from the detriments of their funding influence in the courtroom. This trend, often called judicial performance review, involves surveying attorneys (and other courtroom participants) to discern their opinions on the judges before whom they appear and then disseminating the results to the voters to inform their vote. This is a good idea, but a few fatal problems make it only a distant solution. First, elective states have not implemented this good idea to any significant extent. Second, even in those states that have implemented the idea (which primarily consist of retention election states), the voters have generally failed to take advantage of the information. 

Perhaps, then, we are left without a viable alternative to lawyers. To be sure, this is a troubling concession in light of the problems suggested in Part I, coupled with the fact that lawyers and litigants have no right to any particular judge. Nevertheless, let us concede, for the sake of the ubiquitous argument, that the only way to insert lawyers' valuable courtroom knowledge into judicial elections is through permitting lawyers' unfettered funding of judicial elections. Were we to ban lawyers from contributing and then appearing, so the argument continues, lawyers would choose not to contribute rather than not to appear; and in the resulting absence of lawyers' contributions in judicial elections, either the current contributions (from sources other than lawyers) would become relatively more influential or interest groups would step in to fill the contribution void.


75. There are arguable exceptions, however. North Carolina, for instance, issues the Judicial Voter Guide. See N.C. GEN. STAr. § 163-278.69 (providing voters with each judicial candidates' statement and their professional and educational experience).

76. See, e.g., Dann & Hansen, supra note 74, at 1439 (showing through exit polls that almost fifty percent of retention election voters did not know that judicial performance review even existed, and of the voters who did, a significant percentage failed to review the information provided).

77. Cf Chemerinsky, supra note 65, at 147 (predicting that, if we were to "require recusal of a judge any time a lawyer or party in the case made an expenditure," "no lawyer or party ever would donate or spend on behalf of those . . . they regarded as likely to be the best judges because any expenditures or contributions would prevent those judges from ever hearing their cases"). Professor Chemerinsky also predicts that "[i]n fact, it would create the perverse incentive to contribute or spend for those that they perceived as the judges that they would least want to hear their cases." Id. Of course, this concern is almost entirely eliminated by the procedural mechanism of allowing only the non-contributing side to bring the motion to disqualify. The non-contributing side can presumably see through such a sham and opt not to move to disqualify.

78. Of course, lawyers have no claim to superiority in political participation, and at least in the abstract, whatever these other contributors are after is entitled to equal weight; on the other hand, and again in the abstract, lawyers' objectives should not be inferior to others. The problem, particularly in light of Part I, is that lawyers likely (or at least apparently) receive a direct or indirect financial benefit from contributing—which is precisely the reason that most lawyers probably contribute. If citizens likewise received a financial benefit from contributing, and they were rational, they would contribute as well. Indeed, the subcategory of citizens who do receive a financial benefit—i.e., parties—contribute in significant numbers. It might be that this financial bias...
After identifying this potential benefit of the practice, however, virtually all discussions to date deem it dispositions convincing and abruptly end the analysis. The analytical deficiency is that, even if the practice of contributing produces this benefit, it should not be adopted without first weighing the corresponding costs. Therefore, the next Sections begin to remedy this deficiency by identifying and weighing some of the practice’s costs.

B. GOOD LAWYER, BAD LAWYER

The good lawyer, bad lawyer dichotomy is not new, but it is striking in this context. Applying the dichotomy, I am immediately concerned with two problems: (1) less competent ("bad") lawyers can even the playing field, if not favorably tilt it, by paying money; and (2) lawyers who represent the objectively "bad" side can corrupt the law and justice of a case in their favor also by paying money.

1. BUYING COMPETENCE

At least in our current state of empirical knowledge, the first concern may well be overdrawn. While it is true that less competent lawyers could likely compensate for their inadequacies by giving significant funds to a judge’s campaign, there is no evidence that less competent lawyers give disproportionately; in fact, there is no solid evidence that incompetent lawyers give at all. In the absence of such evidence, it is a reasonable assumption that both competent and incompetent lawyers, and every gradation in between, give to judges. Indeed, many incompetent lawyers either do not know at all or do not fully concede that they are incompetent. Furthermore, lawyers with at least certain forms of incompetency seem less likely to contribute because they might not realize, or care enough about, the salience of campaign contributions; thus, in the absence of empirical data to the contrary, a competent attorney seems more likely to contribute, and an incompetent attorney seems less likely to contribute.

But even if I am wrong about the probabilities—that is, even if bad attorneys

renders appearing lawyers (and parties) unfit contributors, who are in this controversial sense “inferior” to contributors with no, or a less direct, financial interest. For example, we need to look no further than the seeming shenanigans mentioned above (e.g., when the same lawyer contributes to both judicial candidates): Presumably, no other contributor would do that. My point, however, is at least partially a challenge to the (unproven) empirical premise that lawyers fund the most competent judges, a premise that I am supposed to be conceding for the time being. I can honor my concession, however, and still question whether a world without appearing-lawyer contributions would be worse. In light of the actual and apparent favors lawyers receive from their contributions, and the systemic costs of these favors discussed below, we have little reason to assume our world is much better than a world in which interest groups' contributions, including those of non-appearing lawyers, play an influential role in judicial elections, but appearing-lawyers' (and presumably also parties') contributions do not.

79. It is unrealistic to assume, for example, that these lawyers, who do not care about their clients' filing deadlines or their clients' phone calls, will care about making contributions to aid these same clients' causes.
are in fact frequently compensating for their deficiencies through significant contributions—the phenomenon is not necessarily bad. The reason is simple: Bad attorneys hurt their presumably innocent clients, and if contributions actually helped those clients mitigate the impact of their incompetent lawyers, the objection would become more attenuated and perhaps even wrongheaded. To sustain it, we might have to craft a very scary world—one in which lawyers are disincentivized to become competent attorneys because they know that they can "buy" competency, and therefore more clients are coupled with incompetent attorneys. If the scenario ended there, however, the damage would be unclear, because by hypothesis incompetent attorneys would be buying out of their incompetency through their campaign contributions, and their clients would thereby remain relatively unscathed. For us to buy the objection, we would also have to assume that the incompetent attorneys—who never became competent because they knew that they could buy a replacement for competency—would then fail, contrary to their original plan, to contribute, which would surprisingly counsel for more contributions, not less. To be frank, this scenario is bizarre and hard to follow; it thus provides little support for banning the practice.

In sum, rather than the scenario in which incompetent lawyers can buy their way to the top, it is equally, if not more, likely that competent lawyers are buying themselves an even greater advantage. This result is particularly undesirable because it means that the bad lawyers' innocent clients now doubly do not stand a fair chance in court. For the competent ("good") lawyers, a parting cost is a morale effect. Most lawyers like to "win," and they like to win most on the basis of their own merits, such as their trial skills. For lawyers who fund their presiding judges, their subsequent "wins" can never be free of suspicion. Any given win might be, wholly or partially, attributable to merit or money—we simply cannot be certain, and neither can these lawyers. In this vein, these lawyers' professional pride likely decreases with every dollar spent. It is a form of

80. If, however, I have guessed wrong and incompetent lawyers are buying out of their incompetency, the result might be tolerable because it would alleviate the potential damage to their presumably innocent clients, as explained above. If this is so, perhaps many lawyers still do not support the practice because it seems unfair. That is, the skill of lawyers should matter. This argument is analogous to the Supreme Court's conclusion in Hickman that (incompetent) lawyers should not sponge off of the "wits borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516 (1947). I would agree with Bill Simon that this argument seems "clearly wrong," generally speaking. William H. Simon, Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives, 23 GEO. J. LEGAL ETHICS 987, 990-91 (2010) ("Much of what the lawyer does is designed to help the other side," including "[d]rafting pleadings, producing material in discovery, giving notice of witnesses, restricting argument to matters of record, and refraining from misrepresentation[, which] are core practices of lawyering... "). I would also agree with the proponents, however, that we (i) want competent lawyers and (ii) would not want unnecessary disincentives to achieving competence. See also infra Part II.C (discussing briefly the impact on lawyers who cannot afford to contribute). For the reasons articulated in the above text, however, we have little reason to worry about the practice of contributing creating, or otherwise promoting, incompetent lawyers.

81. Part I's survey should all but guarantee significant doubt in these lawyers' minds. See supra Part I.
self-debasing, and the effect is presumably demoralizing.\textsuperscript{82} 

In sum, and perhaps counterintuitively, contributions likely give competent lawyers an even greater advantage, but these lawyers may be compromising their professional pride to obtain this advantage.

\section*{2. Buying Justice}

The second critical implication of the practice—that justice is skewed, if not rendered subservient, by contributions—is the even more troubling one. Indeed, it is likely the one driving the commonly held intuitive aversion to the practice of attorneys giving money to judges before whom they appear.\textsuperscript{83} Here, I award the “good lawyer” or “bad lawyer” label simply according to the cause championed in the lawyer's representational capacity. It does not mean that lawyers themselves are necessarily bad (or good) for representing the bad side of a case.\textsuperscript{84} It merely means that in all but the hardest and closest of cases, there is one side whose arguments fall closer to the law and justice of the case than the other side's arguments. As a default matter, we want judges to get it right—i.e., to rule for the good lawyer—at least where the right answer is discernable.\textsuperscript{85}

In elected states, however, this default is either factually or apparently in jeopardy in every case in which money has changed hands. If the lawyer represents the bad side, the lawyer might be able to buy a fix for that handicap.\textsuperscript{86} Since at least the time of the Legal Realists in the first quarter of the last century, it has been clear that judges make law.\textsuperscript{87} Thus, contributing lawyers may well be

\begin{itemize}
  \item \textsuperscript{82} Cf., e.g., Ronit Dinovitzer & Bryant G. Garth, \textit{Lawyer Satisfaction in the Process of Structuring Legal Careers}, 41 \textit{Law & Soc'y Rev.} 1, 1-2 (2007) (collecting the well-known accounts of lawyer depression and professional dissatisfaction); William H. Simon, \textit{The Practice of Justice} 2-3 (1998) (discussing the depression of lawyers who ignore justice in their work).
  \item \textsuperscript{83} See supra Part I.B (presenting polls of the public, attorneys, and judges).
  \item \textsuperscript{84} See, e.g., \textit{Model Rules R. 1.2(b)} (“A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.”).
  \item \textsuperscript{85} See generally Ronald Dworkin, \textit{Justice in Robes} (2006) (discussing many of the author's famous views on adjudication, including hard cases and right answers); Ronald Dworkin, \textit{Hard Cases}, 88 \textit{Harv. L. Rev.} 1057, 1082-1101 (1975) (similar). At the same time, the law is ordinarily malleable enough so that a biased judge could decide to reach a result for a particular side (say, the side whose attorney contributed) and then post hoc apply the law in a way that produces the desired result. See, e.g., Duncan Kennedy, \textit{Freedom and Constraint in Adjudication: A Critical Phenomenology}, 36 \textit{J. Legal Educ.} 518 (1986) (describing how a judge might use the law to support the desired result); see also Karl N. Llewellyn, \textit{Some Realism About Realism—Responding to Dean Pound}, 44 \textit{Harv. L. Rev.} 1222, 1239 (1931) (“[I]n any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case at hand.”). For empirical corroboration of this fact in the context of contributing, see Part I.A above.\textsuperscript{86} Indeed, as noted above, the lawyer may be buying a fix not just for her clients, she may also be buying a fix for herself, should she ever come before those judges in a malpractice or disciplinary matter.
\end{itemize}
buying that law. While that sounds facially objectionable, it is even more so when we consider the good-bad dichotomy: Buying good law is palpably better than buying bad law, and buying bad law is palpably worse than buying good law. This resulting problem is probably unsolvable: It seems both administratively nightmarish and borderline absurd to pre-screen the merits of the cases so that only lawyers with meritorious cases can contribute to judges before whom they appear. And in the absence of such a screening method, allowing contributions coupled with court appearances appears too dangerous to our system of justice.

Another danger to our justice system is the wealth rift: the commonly held belief and commonly observed evidence that we have one justice system for the wealthy and another, lesser justice system for the poor. Contributions have the potential to exacerbate this rift, not only for litigants, but also for lawyers.

C. RICH LAWYER, POOR LAWYER

The third dichotomy is the rich lawyer, poor lawyer problem. Permitting both contributions and appearances puts rich lawyers at an advantage over poor lawyers. The problem is not about spreading lawyer wealth—although the status quo may well ensure that the current mix of rich versus poor lawyers is maintained, if not exacerbated. The problem instead is about justifying why lawyers with larger bank accounts receive an “in” with judges, while lawyers with smaller bank accounts do not. The answer cannot plausibly be that better lawyers have more money, and therefore they should receive double the

88. See, e.g., MODEL RULES pmbl. cmt. 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”); MODEL RULES pmbl. cmt. 5 (“A lawyer should demonstrate respect for the legal system and . . . it is also a lawyer’s duty to uphold legal process.”); MODEL RULES pmbl. cmt. 6 (“In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”); MODEL RULES pmbl. cmt. 12 (“The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”).

89. I do not mean to disregard entirely the negative appearance—that is, the appearance of partiality whenever judicial behavior is apparently affected by money, irrespective of which side gives it. The point is—in addition to that potentially deleterious appearance—buying bad law is worse than buying good law. Law in this context includes adjudication, not just codified law.

90. Some of the difficulties of screening would include that lawyers often contribute (1) before they have even taken the particular case at issue and (2) before the judge is officially assigned to the case; not all problem cases, that is, involve attorneys who contribute to the judge only after they know both the case and the judge. If judges were to control the practice on a case-by-case basis, another crushing difficulty might be that the same judge who received the contribution would presumably be pre-screening the merits of the case to discern whether the contributing attorney represents the winning side, and a cynic would be quick to point out that this judge would be inclined to find that the contributing attorney more often than not represents the winning side.

91. For example, if rich lawyers are allowed to use their financial advantage to assist them in winning cases—and thereby please their clients and their pocketbooks—they may become richer, while the relatively poor lawyers become poorer.
advantage. First, I have not seen a credible argument that lawyers with less money are necessarily, or even probably, lesser lawyers. Good—and sometimes even the best—lawyers work for legal aid, public defender, and prosecutorial entities; others work privately but for less wealthy clients; and others work on more pro bono cases than their peers.

Second, even if the first premise were true (i.e., when money is up, skill is up), it would not follow that skilled lawyers (and ultimately their clients) should receive an advantage unrelated to the merits of their causes. Perhaps in a zero-transaction-cost world in which all clients are always able to choose the best lawyers with relative ease and success, we could effectively punish the clients who nevertheless neglectfully choose the poor lawyers (who, again, are bad judging by the small size of their pocketbooks). But even Coase acknowledged that a zero-transaction-cost world does not exist, and clients frequently choose lawyers with little competence through little fault of their own. In any event, the more lasting point is that both premises are incorrect (zero transaction costs and poor equals bad)—and punishing the poor lawyer for her relative poverty also punishes her client on the basis of a criterion unrelated to the law and justice of the case. Notably, because the rich can install the “right” kind of judges in the first place, this inequality can be experienced even in cases in which those “right” judges’ individual decisions (contrary to the evidence in Parts I and II) are not influenced by contributions.

Although much political theory addresses the implications of wealth imbalances on politics generally, I have yet to find a plausible justification for increasing the impact of wealth imbalances in courtroom proceedings. We should address the opposite concern, however: whether contributions reduce the impact

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92. Of course, I must be realistic in acknowledging that, in fact, better lawyers often gain better results, and they do so in imperfect correlation to the justice of the case in which those results are received. Cf., e.g., Francois Villon, The Testament (Louis Simpson trans., Story Line Press 2000) (1461) (“But a good cause also needs a good lawyer.”).


94. Cf., e.g., Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95 (1974) (discussing systemic distortion of legal rules by repeat, and often wealthy, players). My discussion of poor lawyers assumes that they are representing poor clients, but that does not necessarily follow. When a poor lawyer is coupled with a rich client, the lawyer could—and under some views, should—advise his client to contribute to the presiding judge’s campaign. But see infra Part IV.D (noting some limits on such advice).

95. See Ian Ayres & Jeremy Bulow, The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence, 50 Stan. L. Rev. 837, 845 (1998) (“Even if candidates’ behavior were wholly independent of potential donations (candidates uncorrupted by donations), the ability of wealthy contributors to fund candidates of their liking might increase the chance that those candidates will win.”).

of wealth imbalances. If, almost paradoxically, the contribution system actually equalized the have-nots with the haves, we should ask whether contributions would be justifiable in that event. Anecdotally, there is some evidence that this paradoxical state of affairs once existed.

Tort reformers have claimed that have-nots-representing plaintiffs' attorneys used to give substantial sums to presiding judges' campaigns, which was true (and remains true today). An equally interesting but more controversial claim is one of causation: These tort reformers claim that the plaintiffs' attorneys started the contribution war; in other words, because plaintiffs' attorneys were giving so much to judges (and presumably gaining advantages in doing so), it forced insurance companies and pro-business advocates to give substantial sums as well. In that interim period (i.e., before the haves threw their money at the situation), however, the question for us is whether plaintiffs' attorneys' contributions were praiseworthy. Those plaintiffs' attorneys may well have noted the preexisting system-tilting effects on their poor and injured clients. Their adversaries were wealthy corporations, for example, with many lawyers and other providers assisting their lavish, and sometimes evasive, defenses. Perhaps in such a world, contributions offset imbalances of power, paying the way for more just resolutions.

In the present day, because both sides contribute, both sides now have the argument that they must contribute to "even out the playing field." Regrettably, that may be correct. And indeed, that the playing field would not otherwise be "even" is a concession that the system is tilted. Interestingly for an Article focusing on ethics, the strongest argument in defense of certain contributions may well be this need to even out the playing field. If an attorney rests on


98. See Federalist Soc'y Judicial Appointments White Paper Task Force, supra note 97, at 377-78 (claiming that plaintiffs' attorneys and organized labor contributions forced the business community to respond with its own contributions). Indeed, such groups now generally contribute more than plaintiffs' attorneys. See, e.g., Sample et al., supra note 97, at 8 (showing that businesses gave more to state supreme court elections than lawyers and lobbyists combined).

99. See, e.g., Galanter, supra note 94 (discussing systemic distortion of legal rules by repeat, and often wealthy, players).

100. See David Luban, Lawyers and Justice: An Ethical Study 63-65 (1988) (arguing that more zealous advocacy might be warranted in cases in which a relatively poor, "one-shot" client is squaring off against a wealthy, sophisticated, and veteran adversary). Below, I resume the discussion of this hard issue (i.e., whether contributions might be justified to fight injustice). See infra Part III (discussing models of the lawyer's role and how those models might apply to lawyers' campaign contributions).

101. See, e.g., Sample et al., supra note 97 (documenting numerous instances, across virtually all elective states, of both trial lawyers and "tort reformers" having contributed large sums to judicial campaigns).

102. Of course, whether contributing is permissible is debatable as a matter of ethics. It may well be forbidden by those who hold the view, presumably on a more sophisticated level, that "two wrongs don't make a right." Of course, there are at least two questions here: (1) whether it is wrong at all; and (2) if so, what action is
principle, while the other side cuts the check, the attorney’s client may be the one who pays the price. If the client, after receiving full disclosure and giving informed consent, decides that she would like to rest on principle as well, then any resulting blow is less severe. But again, the ultimate ethical evaluation folds back in part to the justice of the case. The principle-respecting client might have deserved to win, or to win more, but she might have lost in whole or in part because neither she nor her lawyer contributed. Thus, the current system risks, and even encourages, resolutions indifferent to justice and thereby penalizes those who stand on principle and refuse to contribute.

Effectively, lawyers are placed in a prisoner’s dilemma of sorts, with four options: (i) “if both sides unleash their campaign spending monies without restrictions, then I think mutually-assured destruction is the most likely outcome;” (ii) if only the lawyer’s side unleashes its campaign spending, then it may assure the destruction of the other side; (iii) if only the other side unleashes its campaign spending, then it may assure the destruction of the lawyer’s client or permissible in response to the wrong. This Article ultimately answers (1) in the affirmative, at least whenever contributions might jeopardize justice.

103. See, e.g., MODEL RULES R. 1.2(a) (requiring that lawyers “abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued”); MODEL RULES R. 1.4 (requiring “informed consent”). Although standing on principle is often a stance that only the wealthy can afford, in this instance standing on principle might well be the only affordable option for the poor lawyer (and the poor client). When we think of someone standing on principle, we typically assume that the person had at least a choice of acting contrary to principle. Laudably, some judges have stood on principle and refused to accept attorneys’ contributions (or limited those contributions to de minimis amounts, such as fifty dollars). See, e.g., Josh Stockinger, Kane County Judges’ Race: Donations Debated, CITI. DAILY HERALD, Dec. 7, 2009. Standing on principle also costs these judges, who may have less campaign money to spend in the absence of attorneys’ contributions and thereby risk losing their (re)election.

104. To be sure, contributing also risks devaluing several process values. For example, whether one is right or wrong as a legal matter, there is value in providing a litigant with an apparently unbiased forum in which to be heard; and the need for an unbiased forum is more compelling when the government is the host. I do not mean to slight these values. Instead, substantive justice seems to condemn these contributions sufficiently; process values would further condemn these contributions. Moreover, in the scenario under discussion (i.e., when the other side has, or likely will, contribute), many of the process values are already breached, at least by the other side.


106. Adam Liptak, Former Justice O’Connor Sees Ill in Election Finance Ruling, N.Y. TIMES, Jan. 27, 2010, at A16 (quoting retired Supreme Court Justice Sandra Day O’Connor). If we look at substantive justice, however, this result does not necessarily follow. Certainly, as Justice O’Connor said, the parties’ contributions might result in “mutual . . . destruction,” but it might also put both parties on an even playing field. Of course, if the parties had cooperated before they spent their money, they could have saved their money and still achieved the same result. Moreover, in addition to saving money, the appearance of fairness is preserved. Mutual compliance is easy to monitor because judges must make a record of contributors and contributions, submit that record to the state election authorities, which in turn make the record available to the public. This cooperation is palpably better for the poor lawyer: A few studies have shown that, in instances in which both parties have contributed, it is not just the fact of contribution that matters but also the disparity between contributions; that is, the contributor who contributes the most money receives the most judicial favoritism. See, e.g., McLeod, supra note 26, at 399-400; supra Part I.A (listing several studies that controlled for this variable). These studies, to my knowledge, did not control specifically for the possibility that the effect may vary when a lawyer, instead of a party, is the contributor.
perhaps even the lawyer herself; and (iv) only in the event that both sides stay their campaign spending will justice be served (at least in the sense that a more impartial judge will decide the case according to the merits).\textsuperscript{107} In game theory, the scenarios look like this:

<table>
<thead>
<tr>
<th>Cooperation Costs</th>
<th>(3) Lawyer B Does Not Contribute</th>
<th>(4) Lawyer B Contributes</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Lawyer A Does Not Contribute</td>
<td>No Advantage</td>
<td>Lawyer B Advantaged; Lawyer A Disadvantaged</td>
</tr>
<tr>
<td>(2) Lawyer A Contributes</td>
<td>Lawyer A Advantaged; Lawyer B Disadvantaged</td>
<td>Both Disadvantaged</td>
</tr>
</tbody>
</table>

To reach the best outcome, which seems to be box (1), (3) as a default matter, cooperation is key.\textsuperscript{108} When viewed in this way, lawyers and their clients ideally should reach an agreement early on that neither side will contribute to the presiding judge.\textsuperscript{109} The rich lawyer, poor lawyer imbalance provides the rich lawyer with the option of contributing, however, while the poor lawyer may not have the option (and may not have enough financial credibility even to bluff). Therefore, this imbalance provides less incentive for the rich lawyer to cooperate; after all, box (2), (3) is the most materially advantageous to her and her client, and she can afford to buy her way into that box.\textsuperscript{110} And cooperation and ethics aside, rational lawyers with less meritorious cases should opt to contribute (which of course might, but might not, trigger mutual contribution), which illustrates yet another reason why the current state of affairs is suboptimal.

When so much hangs on whether two adversarial lawyers cooperate—when it is a game in which the losing lawyer’s innocent client may well suffer

\textsuperscript{107} Process values are reinserted here. \textit{See supra} note 104.

\textsuperscript{108} Unlike some prisoner’s dilemmas, I have not inserted numerical values. As is often the case, those values would merely be arbitrary visual aids for a point that the table already illustrates. I have also simplified the game theoretical model, with apologies to those who might have understood a more elaborate approach; the simplified approach serves my purposes and is more reader-inclusive.

\textsuperscript{109} If it turns out that one of the attorneys has already contributed to the judge eventually assigned to preside over the case, the attorneys could agree in advance that the contributing attorney will join in a motion to disqualify should the non-contributing lawyer choose to file one (or, where applicable, the attorneys could stipulate to a change of judge). The contributing attorney might be able to justify this agreement to the client at the time it is reached because (i) it is mutual (in other words, the judge assignment could go either way) and (ii) the fact that some presiding judges bend over backward not to favor contributors (in other words, the presiding judge might not favor the client or even affirmatively disfavor the client). \textit{See also infra} note 155 (noting potential instances of this phenomenon). For private agreements, and for recusal law generally, the qualifier that only the non-contributing attorney (or party) may bring a motion to disqualify nullifies almost all strategic contributions. \textit{See Lawyers’ Political Contributions Report, supra} note 52, at 39 (urging this procedural cure because it effectively removes attorneys’ ability to contribute to a disfavored judge or her opponent and thereby guarantee disqualification of the disfavored judge).

\textsuperscript{110} For the poor lawyer, it would be box (1), (4), if he could afford it.
injustice—the situation cries out for a systemic solution. We should, in effect, force the lawyers to cooperate to reach the optimal box (namely, (1), (3)). Perhaps the greatest systemic fix—although it has never been optimally “systemic”—is listed in the Appendix: Most (but not all) states have imposed at least some limits on the amounts that lawyers and law firms may contribute to judges. This currently spotty example has shown us the way: If the profession would commit to promoting universally low limits, we could achieve the practically optimal solution.

In sum, the practice of contributing produces significant costs—costs that seemingly outweigh the benefit of increased lawyer participation in judicial elections. Indeed, the costs are distressing and systemic, and because the rules are (best case) inadequate and (worst case) aiding the practice, the situation cries out for a change in the rules. I presumably must be wrong about this balance, however, because the practice is pervasive and attorneys are afforded the individual discretion to contribute or not—a discretionary weapon of sorts. In light of that reality, let us now turn to whether and how attorneys should exercise their discretion.

111. See infra app. (listing contribution limits by state and contributor type); infra Data Set (listing contribution limits by court tier, state, and contributor type). This systemic solution, however, is admittedly overbroad for our purposes because it limits the contributions of all lawyers—not just the ones who appear before their sponsored judges. It is also underinclusive in that many states have no limits or extremely high limits. Furthermore, at least for legislative and gubernatorial elections, low limits have been recently rendered constitutionally infirm. See Randall v. Sorrell, 548 U.S. 230, 248-49 (2006) (striking down, but in a plurality opinion, Vermont’s contribution limits, which included a $200 contribution limit for gubernatorial elections) ("[C]ontribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.").

112. Perhaps surprisingly, Montana and Texas shine through as fitting examples. Montana limits lawyers’ contributions to approximately $300 (and even less for lower courts), and Texas limits accumulated contributions from members of the same law firm to fifty dollars. See infra app. But see supra note 111 (listing some reasons to be cautious about this solution). Another solution might be to require that attorneys’ contributions be kept anonymous. See generally Ayres & Bulow, supra note 95, at 837 (arguing that mandatorily anonymous contributions would lessen corruption). The difficulties in implementation include mandatory campaign contribution disclosure laws, which permit and even require judges (and other elected office holders) to learn the identity of their contributors, and local practices that likewise expose the contributors’ identities. See, e.g., Banner, supra note 71, at 470-74; Roy A. Schotland, Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?, 2 J.L. & Pol. 57, 123-24 (1985). Owing to these difficulties, among others, the ABA sadly gave up on the solution of requiring contributor anonymity two decades ago. Lisa L. Milord, The Development of the ABA Judicial Code 55 (1992) (explaining why the ABA abandoned the previous judicial ethics rule requiring contributor anonymity when it revised the Model Code of Judicial Conduct). That is not to say that the call for anonymity has completely died in the states. See, e.g., Michael H. Hoskins, IBA Creates PAC Option for Judicial Campaign Donors, IND. LAW., Aug. 17, 2010, http://www.theindianalawyer.com/iba-creates-pac-option-for-judicial-campaign-donors/PARAMS/article/24550 (reporting that in the wake of the Caperton case the Indiana Bar Association recently approved a political action committee to distribute lawyers’ contributions anonymously and evenly to the full slate of judicial candidates).
III. LAWYERS AS CONTRIBUTORS OR CHEAPSCKATES: AN ETHICAL FRAMEWORK OF DECISION

By now, we have seen five distressing, but by no means completely surprising, realities of the practice of contributing: (1) It is permissible under both the rules of professional and judicial conduct and applicable election law; (2) it endangers just resolutions both in fact and in appearance; (3) it consequently can be harmful to attorneys and their clients to refuse to contribute and stand on principle while the other side contributes; (4) it advantages rich lawyers (and clients) over poor lawyers (and clients); and (5) its most venerated defense—that attorneys use their contributions to install only the most qualified judges—is erroneous to a significant extent, and in any event, is outweighed by significant costs. Lawyers are asked to deal with these five realities with no clear, much less binding, guidance.

In this puzzling absence of any existing ethics rules directly on point, the pervasive practice is left almost entirely to lawyers' discretion. As Karl Llewellyn cautioned, "[i]deals without technique are a mess, [b]ut technique without ideals is a menace."113 Those quoting Llewellyn's famous sentiment have several times switched the word "ideals" with "morals."114 But for our purposes, either word drives home the point: Practice without ideals or morals can be a menace. Similarly, Leonardo da Vinci famously acknowledged that "[p]ractice must always be founded on sound theory": "Those who are in love with practice without knowledge are like the sailor who gets into a ship without rudder or compass and who never can be certain whither he is going."115 Before attorneys continue to contribute unthinkingly and en masse, then, we must ask whether a theory of lawyers' ethics supports the practice. In particular, this Part begins to answer whether contributing would be consistent with the lawyer's ideal, or at least desirable, role—both in the abstract and in the troubling context captured in Parts I and II above.

There are several models of lawyers' ethics to frame lawyers' discretion in elective states. Nearly every legal ethicist, at some point in her career, writes a "Lawyer as" piece, in which the lawyer's role is analogized to any number of other benevolent roles, such as "Friend,"116 "Moral Activist,"117 "Citizen,"118 or

113. Llewellyn, supra note 24, at 662.
117. See, e.g., Luban, supra note 100, at 160 (adopting this approach).
"Civics Teacher."\textsuperscript{119} There is not the time (or presumably reader patience) to do justice to every good role piece out there. Let me instead focus on four of the most famous, and at least arguably, representative of the lot; these are called the (A) standard, (B) client-centered, (C) moral activist, and (D) contextualist models.\textsuperscript{120} I ask what guidance each offers to lawyers considering a contribution.

A. THE STANDARD CONCEPTION

I would be remiss not to start with the "standard conception" or the "dominant view" of the lawyer's ethical role.\textsuperscript{121} The "core principle" of which is "that the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action . . . ."\textsuperscript{122} This principle, in turn, can be broken down into two constitutive principles: "(1) a role obligation ('the principle of partisanship') that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the 'principle of nonaccountability,' which insists that the lawyer bears no moral responsibility for the client’s goals or the means used to attain them."\textsuperscript{123} In blunt terms, then, this understanding views "lawyers as hired guns, whose duty of loyalty to their clients means that they must, if necessary, do


\textsuperscript{119} Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice, 50 WM. & MARY L. REV. 1207, 1213-15 (2009); see also Keith R. Fisher, Repudiating the Holmesian "Bad Man" Through Contextual Reasoning: The Lawyer as Steward, 2008 J. PROF. L. 13. Notwithstanding this Article’s provocative title, I have yet to divine my own unified model. In the interest of saving face, I tend to believe that Professor Andrew Kaufman captured my reasoning best when he warned of the vast contexts in which lawyers find themselves and concluded that a one-size-fits-all approach was underinclusive, although he too had a "feeling of nakedness" without his own model. See Andrew L. Kaufman, A Commentary on Pepper's "The Lawyer's Amoral Ethical Role", 4 AM. B. FOuND. RES. J. 651,651-52 (1986).

\textsuperscript{120} I must issue several warnings before rehearsing each model. First, each model is complex in its own way, and my brief repackageging does not do justice to these complexities. Second, individual adherents (and sometimes coalitions) in each model have charted discrete analytical territories, which again do not receive justice below. Finally, no model to my knowledge has specifically addressed attorneys' campaign contributions to any significant extent; I therefore have had to put a few words in the founders' mouths, which as the reader well knows, is not an invariably accurate feat. If I have put words there that they would have never uttered themselves, I offer my apologies and invite replies.

\textsuperscript{121} These labels are, in the main, synonymous. See, e.g., LUBAN, supra note 100, at 393-403 app. 1; SIMON, supra note 82, at 7-8; Norman W. Spaulding, Reinterpreting Professional Identity, 74 U. COLO. L. REV. 1, 53 (2003).

\textsuperscript{122} SIMON, supra note 82, at 7. See generally Monroe Freedman, Lawyers' Ethics in an Adversary System (1975) (articulating a famous strand of the model); Fried, supra note 116, at 1060-61 (another famous strand); Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 4 AM. B. FOuND. RES. J. 613 (1986) (another). Monroe Freedman has partially distinguished himself from the standard conception. In short, he agrees with its dictates once the lawyer has decided to enter the attorney-client relationship, but he disagrees that the lawyer (unless a public defender) is not morally accountable for the choice of client. See Monroe H. Freedman, The Lawyer's Moral Obligation of Justification, 74 TEX. L. REV. 111, 116-17 (1995) [hereinafter Freedman, Lawyer's Moral Obligation].

everything that the law permits to advance their clients' interests—regardless of whether those interests are worthy or base, and regardless of how much collateral damage the lawyer inflicts on third parties.” 124 Whether this view is literally “standard” or “dominant” is highly debatable and indeed debated, but it is beyond debate that this view is influential. 125

As reasonably anticipated, the dominant view of lawyers' ethics comes the closest to justifying lawyers' decisions to contribute to presiding judges. In light of the empirical and common-sensical suspicions listed in Part I, it would seem that a zealous advocate should (i) contribute to presiding judges' campaigns and (ii) advise her clients to do so as well. 126 Neither the contribution nor the bare advice is illegal, 127 and the evidence suggests that both may assist the client in obtaining his legal ends. Taken to the extreme, however, “zealous advocacy” would call for many things that lawyers do not invariably do, such as buying their clients makeovers and psychological counseling or jeopardizing long-term relationships with judges and fellow attorneys through scorched-earth strategies. Indeed, under the prevailing ethics rules, lawyers are explicitly forbidden from providing most forms of direct financial assistance to their clients. 128 At least on its face, though, the approach calls for pressing for every advantage for the client. 129 If that is the case, then it is seemingly clear that the lawyer should

124. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 9 (2007). Luban now refers to this view as “neutral partisanship.” Id.

125. I agree with Luban that “[t]he standard conception is never completely dominant,” but “at the very least, it is critically important.” LUBAN, supra note 100, at 403 (citing Ted Schnyer, Moral Philosophy's Standard Misconceptions of Legal Ethics, 1984 WIS. L. REV. 1529). Moreover, various Model Rules of Professional Conduct both support and hedge this view, a point to which I turn shortly.

126. See supra Part I (listing empirical and public opinion data indicating that contributions favorably bias judges). For the reasons noted in Part IV below, this advice should be given cautiously.

127. But see infra note 198 (providing examples of the lawyers who crossed the line in their advice and were consequently disciplined). To be sure, there are many instances in which a contribution—at least at the time the lawyer signs the check—is not on behalf of the lawyer's client in particular or her litigation clients in general; and in those instances, the lawyer may not be acting, and not intending to act, in the “lawyer's role.” This subset is of little moment, however, because I am concerned only with the coupling of contributions and appearances, and once this coupling occurs (and even when it is likely to occur), the contribution has significant implications on the (likely) appearance.

128. See, e.g., MODEL RULES R. 1.8(e) (prohibiting attorneys from providing financial assistance to clients “in connection with pending or contemplated litigation,” except for advances of “court costs and expenses of litigation”); In re Zajac, 748 N.W.2d 774, 777 (Wis. 2008) (disciplining attorney for violating Rule 1.8(e) by personally paying a claim lodged against the client).

129. In the famous and dramatic words of Henry Lord Brougham:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

contribute healthily for her client, and in addition to exhausting her own funds, she ought to tell the client to contribute as well.

The problem with this view is that it has never been so extreme, as either a descriptive or normative matter. As a descriptive matter, even if it does serve as the ideal advocate's role (which again is debated), it is not what attorneys ordinarily do in practice, as noted above. As a normative matter, even its proponents have ordinarily been unwilling to defend the model's logical extremes, and even for those few who do, they are stuck in the unattractive position of pushing an ethical agenda that is almost impossible to achieve in practice. Thus, much hedging takes place, and this hedging is apparent in, among other places, the official comment to the *Model Rules of Professional Conduct*:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.130

If we were to stop reading there, the dominant view would be undiluted. Yet, in the very next sentences, the view is qualified for largely unarticulated reasons:

A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics.131

Thus, under the qualified "dominant" view, a would-be contributing lawyer is permitted (i) not "to press for every advantage" and (ii) to determine "the means by which a matter should be pursued."132 It seems, then, that the matter is soundly within the lawyer's discretion; but again, the harder question is whether and how the lawyer should exercise that discretion.

If the lawyer understandably were to fall back on what appeared to be the "first principle" of the dominant view, she should contribute because doing so would likely advance the client's legal interests, and contributing is not illegal. Indeed, the *Model Rules* appear to place with the lawyer the authority to choose the

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131. *Model Rules R.* 1.3 cmt. 1. I note that although buying justice seems like an "offensive tactic," the drafters probably did not have it in mind. The end of the last quoted sentence raises the somewhat distinct values of "courtesy and respect," which were likely driving the ban on "offensive" tactics. *Id.*

132. *Model Rules R.* 1.3 cmt. 1; *see also Model Rules R.* 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").
means of pursuing the representation because lawyers have the technical expertise as to which means will prove more effective under the legal circumstances.\textsuperscript{133} And we know from the evidence above that the means of contributing are likely to be effective; perhaps, then, the lawyer must adhere to the practice to realize and protect her "first-class citizen" client's autonomy through law.\textsuperscript{134}

In sum, the lawyers' responsibilities even under the dominant view are not crystal clear with respect to campaign contributions. In its purer and purest forms, however, the dominant view indeed encourages campaign contributions. In conclusion, a lawyer who "buys" this approach may contribute, subject to the considerations mentioned in the next Part.\textsuperscript{135}

\textbf{B. THE CLIENT-CENTERED APPROACH}

Another softer model is the "client-centered" approach. Of course, the dominant view is "client-centered" in its fidelity to the client's legal desires, but the "client-centered" approach aims, in part, to avoid the charges of paternalism and litigious tunnel-vision arguably associated with the dominant view. The client-centered approach's "focus on understanding clients' objectives more broadly and holistically tends to break down the boundaries between legal and non-legal strategies for addressing clients' problems."\textsuperscript{136} It is a commendable approach that allows clients to participate more actively in their own legal affairs, thereby increasing their autonomy and control.

\textsuperscript{133} See \textsc{Model Rules R. 1.2 cmt. 2} ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."). Of note, the comment then states "lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." \textsc{Model Rules R. 1.2 cmt. 2}. Whether the attorney-client arrangement calls for clients to reimburse lawyers for their contributions, and whether such an arrangement is invariably legal, is beyond the scope of this inquiry's concern. I note in passing that client-provided funding apparently cannot be a prerequisite for the dominant view because that would conflict with pro bono representation, certain government representation, and so on. Moreover, the ethics codes make only minimal concessions of zeal for pro bono, government, or any other form of representation. \textsc{Cf. Model Rules R. 1.3} (requiring the same amount of diligence and promptness for all clients); \textsc{Model Rules R. 6.5} (relaxing slightly the conflicts of interest rules for participation in nonprofit or court-annexed legal services programs).

\textsuperscript{134} See Pepper, supra note 122, at 615-17. Again, contributing is an apparently effective way of achieving the client's fullest legal goals. See supra Part I.A; see also McCall & McCull, supra note 47, at 220 (finding that when a lawyer contributes to a judge, and when both the lawyer and the client contribute, the client is significantly more likely to win the judge's vote).

\textsuperscript{135} See infra Part IV (discussing several "complications" for contributing lawyers). In situations in which contributing might work injustice, the "standard" lawyer might engage in a "moral dialogue" with the client to inform her of the ramifications. See Pepper, supra note 122, at 613. Alternatively, and assuming the issue of whether to contribute is discussed with the potential client before the attorney-client relationship has been established, the attorney might refuse to enter the relationship if he does not agree with the client's intentions with respect to contributing. See, e.g., Freedman, \textit{Lawyer's Moral Obligation}, supra note 122, at 116-17.

\textsuperscript{136} Katherine R. Kruse, \textit{Beyond Cardboard Clients in Legal Ethics}, 23 Geo. J. LEGAL ETHICS 103, 128 (2010); see also id. at 127-28 ("The hallmarks of the client-centered approach include understanding the client's problem from the client's point of view and shaping legal advice around the client's values."). See generally \textsc{David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach} (2d ed. 2004) (explaining the client-centered approach's focus on understanding clients' objectives more broadly and holistically tends to break down the boundaries between legal and non-legal strategies for addressing clients' problems."
approach in its scope, but it is unclear whether it can be profitably applied to the problem at hand. Indeed, it might not even aim to address the problem; it arguably advocates a particular approach to the client irrespective of the resolution of the contribution issue.

To be sure, the approach might more frequently counsel for out-of-court resolutions (construed broadly) and thus fewer instances in which contributions are relevant. Once the client and lawyer decide that litigation is necessary (or once litigation has ensnared them), however, contributions are relevant, and the holistic, full-client-regarding approach certainly does not automatically preclude contributions as a consideration. But the approach offers little insight in resolving the issue, with the exception of clients who might find contributions morally unacceptable—because lawyers who take this approach are more likely to discover that sentiment and respect it. On the other hand, because this approach is just as likely to identify clients who might want to contribute to judges to maximize their chances of winning, it thus results in zero net gain to our inquiry.137

Shifting our focus from client-centered models, we next view the problem from the eyes of attorneys whose raison d'être is somewhat less about the client and more about morality or justice. Here, we run the practice of contributing through two sister views of lawyers' ethics: moral activist and contextualist. Each is addressed in turn.

C. THE MORAL ACTIVIST

The moral activist lawyer views role differentiation with skepticism, recognizing the need for constant justification whenever lawyers get to facilitate bad deeds without thereby becoming blameworthy. For the moral activist lawyer operating in the adversary system, she must "determine the moral justification for the adversary system in the context in which he or she practices and ... weigh the strength of that moral justification against the moral offense resulting from actions ... she takes."138 This view, in short, typically grants the adversary general approach). To be sure, the "client-centered" approach is arguably a refined subset of the dominant view, and I have thus paired the two together geographically.

137. To the extent that the approach requires that an informed client's desire for the lawyer to contribute should be respected and presumably followed, it is an interesting—and probably highly controversial—suggestion that clients would have control over the lawyer's pocketbook (unless the client would be the one funding the lawyer's contribution, relegating the lawyer to a strawman who might transgress election and other laws). I doubt that adherents would adhere to this conclusion, but I invite a response if I am wrong. Perhaps, for instance, they would claim that a contribution is simply a business expense of a type that we should expect from competent, client-concerned lawyers, such as dress suits or even malpractice insurance.

system weak-to-no justificatory power in civil cases, and moderate-to-strong justificatory power in criminal cases.\textsuperscript{139} Aside from criminal cases and roughly analogous civil exceptions, then, the view would not likely support contributions as a method of winning. The view generally shuns both (i) "manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit" and (ii) "the pursuit of substantively unjust results."\textsuperscript{140} As Parts I and II reveal, the practice of contributing can cause or aid one or both of these shunned results. To be sure, the practice of contributing is in some sense extra-legal and precedes adversary engagement, and as such, it typically has been understudied in the existing literature. What is in the literature, however, suggests that the practice would not be highly regarded in the abstract, with one exception to which I will turn after I discuss the contextual view.\textsuperscript{141}

In sum, it is doubtful that the moral activist would embrace contributing coupled with appearing.

**D. THE CONTEXTUALIST**

The final view to frame lawyers’ discretion is what Professor Bill Simon calls the contextual view.\textsuperscript{142} Under this view, "[I]awyers should take those actions [and only those actions] that, considering the relevant circumstances of the particular case, seem likely to promote justice."\textsuperscript{143} Justice under this view is synonymous with "legal merit," the determination of which requires "judgments grounded in the methods and sources of authority of the professional culture."\textsuperscript{144} The contextual view by nature rejects categorical rules; thus, it would be wrong to conclude that it always rejects (or welcomes) contributions designed to influence

\textsuperscript{139} See, e.g., Kruse, supra note 138, at 423 (describing Luban’s work).

\textsuperscript{140} LUBAN, supra note 100, at 157.

\textsuperscript{141} With respect to general political participation, moral activist lawyers would, likely and unsurprisingly, provide support to potential judges who they believe will rule in the interests of justice. The issue here, of course, is not this general participation; it is what may happen later when the lawyer chooses to appear before the sponsored judge (or chooses to contribute to the judge once the fact of her assignment to the case is announced). It is this participation that is questionable under the moral activist view. Indeed, the practice of contributing could actually render the morally activist lawyer’s job more difficult. Because contributing encourages resolutions unrelated to the justice, or even merits, of a case, and assuming that not infrequently will the lawyer’s client be on the wrong side of justice or the merits, the moral activist lawyer’s own act of contributing might be the deciding, or at least a contributing, factor in an unjust result. In that event, she would be forced to undo, somehow, the potential effect of her contribution.


\textsuperscript{143} SIMON, supra note 82, at 138.

\textsuperscript{144} See id. ("I use ‘justice’ interchangeably with ‘legal merit.’ The latter has the advantage of reminding us that we are concerned with the materials of conventional legal analysis; the former has the advantage of reminding us that these materials include many vaguely specified aspirational norms."); Keith Swisher, The Moral Judge, 56 DRAKE L. REV. 637, 641-42 (2008) (describing and adapting Simon’s view).
judicial behavior. It would view the practice skeptically, however, because the practice threatens to compromise rulings consistent with "legal merit" or "justice."

Indeed, "[t]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution."145 It would seem counterproductive, then, for lawyers through their contributions to promote judges who are "corrupt, politically intimidated, or incompetent."146 To bias an otherwise unbiased adjudicator shifts the ethical responsibility for a substantively just result to the lawyer, who approximately fifty percent of the time might represent the party who has the most to lose by a substantively just result. Thus, the lawyer’s own contributing ways would cause unnecessary ethical problems, and it is thus unlikely that a contextualist would routinely commission problems for herself.147 Moreover, to the extent that the contextualist (or moral activist) approach more closely approximates "ordinary" morality—i.e., morality not peculiar to lawyers—the "ordinary" person on our streets would probably conclude (at least in the abstract and not as applied to his case) that tilting justice with money is wrong.148 Thus, contributing to presiding judges may well be wrong not only for lawyers, but also for parties and perhaps other stakeholders.149

Notwithstanding the foregoing comments on the moral activist and contextualist views, both views do have a consequentialist strand. The previous discussion assumed an otherwise "unbiased" judge to whom the lawyers were contributing.150 If the judge (or all judges) were biased, however, either view might permit contributions to counteract this bias. For example, if the other side had given generously to the judge, there is a credible argument that the moral activist and the contextualist lawyer might resort to contributions, if those contributions

145. SIMON, supra note 82, at 140; see also Wasserstrom, supra note 138, at 13 (questioning both the "fairness" and "the capacity for self-correction" of our legal system, and owing in part to that skepticism, role differentiation may not be justified).

146. SIMON, supra note 82, at 140. I do not mean to imply through Bill Simon’s words that all presiding judges who have accepted campaign contributions from the appearing lawyers are necessarily "corrupt, politically intimidated, or incompetent," but realistically, these judges are more likely to be, or appear to be, any of these traits.

147. Perhaps, however, if the lawyer represented only those who, in the absence of contributions, would suffer grave injustice, she might be permitted to contribute across the board. See, e.g., William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1722-23 (1993) (recognizing that criminal defendants face serious injustices, such as "insanely" disproportionate prison sentences and incompetent counsel, and that this context might counsel for sharper practices); Keith Swisher, The Judicial Ethics of Criminal Law Adjudication, 41 Ariz. St. L.J. 755, 775-76 (2009) (exploring the implications of this unfortunate context for judicial ethics).

148. Simon, supra note 80, at 987 (criticizing the distance sometimes supposed between lawyers' ethics and "ordinary" ethics).

149. See also Part I.B (listing public opinion data showing that voters, lawyers, and judges have qualms about campaign contributions generally and to presiding judges particularly).

150. Indeed, judges routinely tell us that there is a presumption that they are unbiased. See, e.g., Tripp v. Exec. Office of the President, 104 F. Supp. 2d 30, 34 (D.D.C. 2000) ("Judges are presumed to be impartial.").
would avoid injustice or promote justice. Moreover, lawyers living under these models would presumably want to know whether their client has equal standing before the judge, and if not, whether a contribution might provide it.

E. CONCLUSION: THE CHOICE OF MODEL

Not surprisingly, the choice of ethical model matters. Speaking generally, of the four models surveyed above (namely, standard, client-centered, moral activist, and contextualist), the first two seem to permit (but not clearly require) the practice of contributing, while the second two seem to forbid the practice in all but presumably rare situations. These latter models, moral activism and contextualism, are more contextually dependent, which obviously makes them more difficult to base broad statements of permissible practices. On the upside, however, they seemingly solve the problem to which I alluded above: Because contributions can be defended (if at all) only when they save justice from corrupting influences, these models would arguably screen potential contributions and permit them only in instances when justice would likely be served. It is primarily for this reason that these models, and not the dominant or client-centered models, should be applied to the practice of contributing.

As the foregoing discussion suggests, the choice of model makes a significant difference, not just for my fellow legal ethicists, but for the practitioner who must decide what to do both for herself and her client. In this Article, my point has not been to cram down the practitioner’s throat one particular model over another. While that may seem like an arduous ethical requirement, some states already have procedures, and other states are considering such procedures, that painlessly allow a change of judge. See, e.g., ARIZ. R. CRIM. P. 10.2 (2004) (permitting either side in a criminal case to change one judge as a matter of right, although several exceptions apply to this “right”); Deborah Goldberg et al., The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 WASHBURN L.J. 503, 522 (2007) (noting that several states have rules allowing attorneys to disqualify an assigned judge, at least once, with little-to-no showing of cause). From the judges’ perspective, recent attempts to mandate recusal on the basis of contributions have been mixed. See, e.g., Brandenburg, supra note 1, at 213-15 (discussing post-Caperton state recusal reform); James J. Sample, Court Reform Enters the Post-Caperton Era, 58 DRAKE L. REV. 787, 787 (2010).

151. See SIMON, supra note 82, at 140; Richard Wasserstrom, supra note 138, at 13; supra note 147 (indicating that the criminal defense context, for example, might call for such drastic measures).

152. This screening function would have relatively straightforward application with respect to attorneys’ ex ante decisions whether to contribute to the presiding judge. Many contributions, however, have already been paid. That is, the attorney may have contributed to the presiding judge before the case was assigned, and in that instance, the attorney must decide whether she should withdraw from the case or seek to disqualify the judge. While that may seem like an arduous ethical requirement, some states already have procedures, and other states are considering such procedures, that painlessly allow a change of judge. See, e.g., ARIZ. R. CRIM. P. 10.2 (2004) (permitting either side in a criminal case to change one judge as a matter of right, although several exceptions apply to this “right”); Deborah Goldberg et al., The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 WASHBURN L.J. 503, 522 (2007) (noting that several states have rules allowing attorneys to disqualify an assigned judge, at least once, with little-to-no showing of cause). From the judges’ perspective, recent attempts to mandate recusal on the basis of contributions have been mixed. See, e.g., Brandenburg, supra note 1, at 213-15 (discussing post-Caperton state recusal reform); James J. Sample, Court Reform Enters the Post-Caperton Era, 58 DRAKE L. REV. 787, 787 (2010).

153. The dominant and client-centered models do not typically temper their mandates by justice or occasionally even by the merits (save certain exceptions, such as Rule 11 of the Federal Rules of Civil Procedure or Model Rule 3.1, which both bar frivolous claims). See FED. R. CIV. P. 11; MODEL RULES R. 3.1. Whether that is right in the main is beyond the scope of this Article. For the particular practice of contributing, which is discretionary under the models and which risks corrupting the justice system on a structural level and for reasons unrelated to truth or merit, the omission of a justice component is frightening.
contribute, the choice of model is necessarily left to the practitioner. I take some comfort in knowing that any theory is usually better than no theory, and my hope is that practitioners will consult these theories in making these tough decisions. The theories should be chosen and applied in light of both the systemic consequences articulated in Parts I and II and several practical considerations, addressed immediately below.

IV. FROM THEORY TO PRACTICE: SELECTED ADVICE FOR CONTRIBUTORS

Under the dominant adversarial model, attorneys might well need to contribute to judges, or at least, advise clients to contribute. Profession-minded attorneys, however, who believe that they have a duty to avoid bringing the justice system into disrepute likely would conclude that contributions simply look too corrupt (and the public would generally agree) and therefore refrain from contributing. Finally, attorneys who believe that they should promote justice, or avoid substantial injustice, might go either way, depending on the case or client. Irrespective of which model an attorney most closely resembles, the attorney should consider several practical problems before engaging in, or ignoring, the practice of contributing: (A) dodging or lodging Caperton motions to disqualify, (B) researching the other side’s campaign contributions, (C) disclosing the lawyer’s own contributions; and (D) advertising the practice of contributing to clients. 

A. DEALING WITH CAPERTON MOTIONS

With respect to this first concern, attorneys may well have a conflict that, at a minimum, should be disclosed to their client and arguably even to the court and the other side. Depending on the size of the contribution, the other side might now have a meritorious “Caperton motion,” whose namesake is a “pathbreaking”

154. See, e.g., In re Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)) (noting that not only actual justice, but also the “appearance of justice,” must be satisfied); see also supra note 153.

155. On a more speculative level, there is also a fifth problem of a sponsored judge bending over backward not to favor contributors—even to the point of disfavoring contributors. Cf. e.g., Williams & Ditslear, supra note 40, at 153 (finding that contributions appeared to be affecting the vote of a Wisconsin Supreme Court justice, but noting that the contributions were affecting his vote in the most unexpected of ways, i.e., “a direction opposite the ideology of those making contributions to his campaign”); Rotunda, supra note 25, at 18 (finding in a limited study that contributors lost more cases than they won).

156. Cf. Wolcott v. Ginsburg, 746 F. Supp. 1113, 1114 (D.D.C. 1990) (holding that legal malpractice claim survives law firm defendants’ summary judgment motion in light of plaintiff’s claim that defendants had given the arbitrator a $10,000 “retainer,” which had not been disclosed on the record and which ultimately provoked costly appellate litigation over whether this failure to disclose warranted termination of the arbitration). Generally, however, attorneys are not required to disclose campaign contributions to the other side and arguably even the judge herself.
and "momentous" Supreme Court decision from just last year.\textsuperscript{157} This motion to disqualify—even if it ultimately is defeated—will cost the client time and money defending against it.\textsuperscript{158} An attorney could avoid the problem altogether by simply not contributing to judges before whom she thought she would be appearing; if she instead contributes to such judges, the following discussion should be consulted.

To be sure, not every contribution should reasonably provoke a \textit{Caperton} motion.\textsuperscript{159} In the narrowest form of the Court's holding, the Court conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.\textsuperscript{160}

Attorneys are "persons" who have a "personal stake" in every case for which they are, or will be, paid.\textsuperscript{161} The only question, then, will be whether the attorney's contribution (or other form of campaign assistance) "had a significant and disproportionate influence" in getting the judge elected.\textsuperscript{162} The answer to that question can be uncertain and is always context-dependent, which will make the \textit{Caperton} motion potentially worth litigating whenever the contribution was

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157. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (holding that due process requires state court judges to recuse themselves from cases in which parties have directly contributed, or independently expended, large sums of money in support of the judges' election); James J. Sample, \textit{Caperton: Correct Today, Compelling Tomorrow}, 60 SYRACUSE L. REV. 293, 298 (2010) (noting that \textit{Caperton} is "in the words of Rick Pildes, a 'pathbreaking' decision of 'momentous' import 'for the future of judicial elections and disputes over judicial bias').

158. \textit{Cf.}, e.g., Leslie W. Abramson, \textit{Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"}, 14 GEO. J. LEGAL ETIcs 55, 99 (2000) (noting that "[i]t is not surprising that counsel file motions to recuse when adversary counsel supports the judge-candidate"). If the contributing lawyer and client have no objection to the motion (i.e., they do not care if the judge is disqualified), the process of awaiting the ruling, assigning a new judge, and waiting for the new judge to get up to speed on the case may still cause significant delay.

159. Indeed, the Court said as much: "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." Caperton, 129 S. Ct. at 2263.

160. \textit{Id.} at 2263-64. Significantly, the Court used the term "person" and not "party," which arguably would have excluded attorneys from the analysis.

161. See, e.g., Tumey v. Ohio, 273 U.S. 510, 523 (1927) (concluding that a judge's twelve dollar stake in the outcome violated due process); see also \textit{MODEL CODE OF JUDICIAL CONDUCT} R. 2.11(A)(4) (2007); \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 3E(1)(c) (2004) (requiring disqualification whenever "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [ ] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than . . . ([$ ] for an individual or [ $ ] for an entity) . . . ."). Attorneys may fairly be said to have a personal stake of sorts in other cases, such as "cause" pro bono cases. Because that stake is ordinarily not a financial one, I leave this inquiry for another day.

162. The timing of the contribution also matters, but that is a matter-of-fact inquiry that is unlikely to be heavily litigated. In a state with long term limits, however, even if a contribution had "a significant and disproportionate influence" in getting a judge elected and (now) on the attorney's case, both sides might duel over whether a stale contribution still possesses a significant-enough potential to influence the judge.
significant in amount and somewhat close in time. Chief Justice Roberts and three other dissenters feared exactly this, concluding that Caperton would result in a flood of disqualification motions. This conclusion—that Caperton implicates several issues ripe for litigation—follows even under the narrow reading of the Court’s holding, but there is also a plausible broader reading.

In particular, the opinion’s language, and the precedent on which it rests, has broader application—application not only to extremely high contributions given very recently. Rather, the Court’s “objective” inquiry is not so easily contained. The inquiry asks whether the contribution at issue causes “serious risk[s]” of “actual bias or prejudgment,” “debt[s] of gratitude,” or “possible temptations” for the judge. According to the Court, we are to answer this broader inquiry using a “realistic appraisal of psychological tendencies and human weakness[es].” Part I accordingly uses a “realistic appraisal” of judges’ tendencies and weaknesses when they receive significant campaign contributions, and the results suggest that judges tailor their judicial behavior for contributors (or, at a minimum, judges seem at “serious risk” of such tailoring). Moreover, to the

163. The answer requires an analysis of “the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” Caperton, 129 S. Ct. at 2264. The Court was quick to caution that “[w]hether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.” Id. Rather, a “certain conclusion” is unnecessary, and disqualification is required as a matter of due process whenever “an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.’” Id. (quoting in part Tumey, 273 U.S. at 532).

164. “The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical.” Caperton, 129 S. Ct. at 2264-65. In Caperton, it “was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.” Id.

165. Id. at 2273 (Roberts, C.J., dissenting) (“I believe we will come to regret this decision ... when courts are forced to deal with a wide variety of Caperton motions, each claiming the title of ‘most extreme’ or ‘most disproportionate.’”); see also id. at 2274 (Scalia, J., dissenting) (“The Court’s opinion will ... add] to the vast arsenal of lawyerly gambits what will come to be known as the Caperton claim. The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.”). While Caperton indeed implicates several issues ripe for litigation, the dissenters’ fears have not been realized. Swisher, supra note 9, at 371-72 (noting in the first ten months following the opinion “fifty cases citing Caperton appear[ed] in LexisNexis and Westlaw databases,” but “no court—trial or appellate, state or federal—has granted a disqualification motion on the basis of Caperton”).

166. While there are many matters ripe for litigation, I disagree with the dissenters’ dramatic exaggeration of the likely number of cases and even with the assumption that high numbers would necessarily be a problem. See also supra note 165.

167. Caperton, 129 S. Ct. at 2262-64.

168. Id. at 2263 (quoting in part Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (concluding that a judge should be disqualified whenever “under a realistic appraisal of psychological tendencies and human weakness, the [judge’s] interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented’”); see also Swisher, supra note 9, at 345-46 (restating the various standards listed in Caperton).
extent that the opinions of the public, lawyers, and judges themselves approach "objective," those opinions hold that contributions bias our judges to a significant extent.\footnote{169}

Furthermore, this broader inquiry and its likely conclusion—i.e., that significant campaign contributions risk biasing judges and that a resulting \textit{Caperton} motion should therefore prevail—is highly consistent with the larger due process backdrop. In all of the following instances of financial interest, the Court has held that due process requires judicial disqualification:

\begin{itemize}
  \item[I.] for a twelve-dollar interest in the case's outcome;\footnote{170}
  \item[II.] for a more attenuated interest in the general fisc of a town;\footnote{171}
  \item[III.] for a licensing proceeding involving a business competitor;\footnote{172} and
  \item[IV.] for relatively small business dealings with a party approximately one year before the case.\footnote{173}
\end{itemize}

Because significant campaign contributions aid the judge in getting and staying elected—in other words, aid the judge in keeping the judge's means of professional livelihood—the resulting temptation to be biased is as strong as, or even stronger, than these four examples.

It is worth noting before concluding that judges' strong temptation to be biased toward their contributors mostly disappears when reelections disappear, which could happen because the judge does not intend to seek reelection or because the applicable state does not force judges to seek reelection once elected.\footnote{174} To be precise, the temptation diminishes, not disappears, because there is still a "debt of gratitude" for contributions of significance.\footnote{175} For those significant and dispropor-
tionate contributions, there will still be Caperton. But the bigger temptation—the worry of a withdrawal of the attorney’s ongoing financial support—is rendered ineffectual once reelection is out of the picture.

In conclusion, while it is difficult to prevail on a Caperton or Caperton-like claim, contributing attorneys should at least disclose the risk of disqualification and related litigation to their clients, and noncontributing attorneys should at least consider lodging the motion when the opposing attorney has contributed healthily.

B. DISCOVERING CONTRIBUTIONS

Caperton also makes the search for contributions more meaningful. When I began this research, I was (overly) confident that, at a minimum, attorneys had a due diligence obligation to their clients to check whether opposing attorneys (or parties) had contributed to the assigned judge. When I then confirmed that contributions are a matter of public record in virtually every state, my confidence was ratcheted up to near certainty. In a strange twist, there is actually little specific authority supporting these propositions. Although I still believe that attorneys presumptively have duties of competence and diligence to investigate contributions in many circumstances—and Caperton has since restored some confidence in this regard—the quest for on-point authority has admittedly been quixotic.

To be sure, under any conception of lawyers’ ethics (whether system-protecting, client-protecting, or anywhere in between), everyone accepts the duty not to be gullible, which is more formally known as the twin duties of “diligence” and “competence.” Under a plain reading of those duties, attorneys are apparently under an obligation—seemingly backed by the risk of a legal malpractice or disciplinary action—to investigate whether the other side (lawyer

176. See Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010) (Stevens, J., dissenting) (“At a time when concerns about the conduct of judicial elections have reached a fever pitch, ... the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps ‘Caperton motions’ will catch some of the worst abuses.”) (internal citations omitted). Before Caperton, perhaps the three most infamous cases involving large attorney (and party) contributions and judges who then failed to recuse themselves were Avery v. State Farm Mutual Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005) (involving $1.3 million in campaign contributions from attorneys, parties, and their affiliates); Consol. Rail Corp. v. Wightman, 715 N.E.2d 546 (Ohio 1999) (involving $50,000 in campaign contributions from attorneys and their family members); Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. App. 1987) (involving $10,000 campaign contribution from attorney, but even higher contributions were later in issue). See generally Schotland, supra note 7, at 1077 n.98 (noting that the Supreme Court denied or dismissed certiorari in each of these notable cases).

177. Indeed, because campaign contributions are a matter of public record, parties have been held to have constructive knowledge of them. Greene v. Jefferson Cnty. Comm’n, 13 So.2d 901, 908 n.9 (Ala. 2008) (“Campaign contributions are a matter of public record; therefore, the Greene parties are deemed to have constructive knowledge of the alleged violation of [the disqualification statutes].”).

178. E.g., MODEL RULES R. 1.1, 1.3 (codifying the duties of competence and diligence, respectively).
or litigant) has contributed to the assigned judge.\(^{179}\) Of course, unchecked diligence and competence would also require that attorneys (i) advise their solvent clients to contribute and (ii) contribute themselves.\(^ {180}\) Yet, no authority exists for these rather extreme duties, and indeed, most lawyers would hotly contest them.

These extreme duties aside, it is positively odd that no authority specifically tells lawyers to perform a public records search for contributions from the other side.\(^ {181}\) It has long been the case that no rule explicitly requires contributing attorneys to disclose their campaign contributions directly to the other side.\(^ {182}\) Thus, if the burden to check for such contributions falls to anyone, it must fall to

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179. See *Ex parte* Kenneth D. McLeod Family Ltd. P'ship XV, 725 So. 2d 271, 273 (Ala. 1998) (holding that, in order to maintain a motion to disqualify on the basis of a campaign contribution, the party must have exercised “due diligence” to discover the contribution: “It is certainly no secret that political campaigns are largely financed through the contributions of private persons. By securing a copy of the judge’s disclosure form from the secretary of state’s office, Katie McLeod or her attorneys could have discovered the contribution and could have used it as a basis for a recusal motion. We believe that these circumstances were sufficient to put Katie McLeod on notice that grounds for a recusal motion might exist and to impose on her a duty to inquire into the public record so that she could determine if such grounds were in fact present.”). *But see* Urias v. Harris Farms, Inc., 285 Cal. Rptr. 659 (Ct. App. 1991) (“[W]e find no authority requiring a party or his counsel to investigate to ascertain a judge’s former clients. Rather, the responsibility lies with the judge, especially when he is recently appointed to the bench, to disclose to the parties that a party to the proceeding was a client of his former law firm. Thus, there is nothing in the record to support Harris Farms’s claim that Urias waived the disqualification by failing to raise it earlier.”); Betz v. Pankow, 20 Cal. Rptr. 2d 841 (Ct. App. 1993) (“Likewise, we find no duty on the part of a party or the party’s counsel to investigate an arbitrator’s former clients. While those facts may have been a matter of public record, respondent has not alleged that such representation was a matter of common knowledge. Further, although they may be a matter of public record, the facts bearing on disqualification are not related to the merits of the controversy, and the parties cannot reasonably be expected to launch a tedious search through every courthouse in the state in pursuit of information that is required to be disclosed. Consequently, the record does not support respondent’s claim that appellant failed to use reasonable diligence in discovering the facts bearing on disqualification.”).

180. *Cf. supra* Part III (noting that even attorneys whose model is that of the zealous advocate have never gone this far). *But see, e.g.,* McCall & McCall, *supra* note 47, at 220 (finding that when a lawyer contributes to a judge, and when both the lawyer and the client contribute, the client is significantly more likely to win the judge’s vote).

181. *But see supra* notes 177, 179.

182. Conn. Comm. Prof’l Ethics Op. 02-07, at 2-3 (2002); Nassau County Bar Ass’n Op. 87-22 (1987) (concluding, surprisingly, that a lawyer with extensive monetary and non-monetary campaign connections need not disclose such connections to the other side in pending litigation). But the Nassau opinion backpedals: When the full ethics committee considered the matter, it attached a cautionary, and arguably nullifying, note to the end of the opinion, stating “this committee’s determination . . . that there is no duty of disclosure, is not intended to discourage disclosure in those cases (i) where the individual attorney prefers to make such a disclosure, or (ii) where the nature or degree of involvement may support a concern for the appearance of impropriety.” *Id.*

Alabama houses the truly rare exception—a statutory requirement that appellate attorneys submit a campaign contribution disclosure form to all other attorneys on a case. *See Ala. Code § 12-24-2(b)* (2006); *cf. In re Weinstein, 545 N.E.2d 725, 729 (Ill. 1989)* (holding that, under the state version of the former *Model Code of Professional Responsibility*, “the respondent’s conduct in arranging the loan [to the judge] while the case was still pending and his failure to inform opposing counsel of the loan transaction compromised the fairness and impartiality of the tribunal and prejudiced the administration of justice”). I would urge that this disclosure rule be adopted in every elective state; it places only a mild burden on the lawyer (i.e., the contributor), who has the most ready access to the information. It is, in short, significantly efficient.
the noncontributing attorney.\textsuperscript{183} In light of the evidence adduced in Part I, noncontributing attorneys would be hard-pressed to convince themselves—much less their clients—that contributions are irrelevant to justice.\textsuperscript{184} To boot, requesting the contribution records, which are typically compiled in one location, on the assigned judge is a very simple step; a step that the client might reasonably assume the attorney will perform on her behalf.

Only time will tell, however, whether this seemingly common sense conclusion will be reduced to law.\textsuperscript{185} In the meantime, attentive attorneys should proceed on their common sense in fulfilling their ethical and fiduciary duties to their clients—if for no other reason than to avoid the angst and perhaps even wrath of a client who finds out belatedly, and through sources other than her trusted attorney and advisor, that the opposing lawyer or party contributed thousands of dollars to the judge.

C. DISCLOSING CONTRIBUTIONS

This Section shifts the focus from discovering campaign contributions to disclosing contributions—and thus from the noncontributing attorney to the contributing attorney. The contributing attorney’s decision to refrain from

\textsuperscript{183} Of course, judges have a duty to disclose, at least arguably. \textit{Model Code of Judicial Conduct} Canon 1, R. 1.2 (2007) (“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.”); \textit{Model Code of Judicial Conduct} Canon 5C(2) cmt. (1990) (“Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge’s impartiality and be cause for disqualification . . . .”). In brilliant examples of poor reasoning, however, some judicial ethics opinions have told judges that they need not disclose. See, e.g., Fla. Sup. Ct. Comm. on Standards of Conduct Governing Judges, Op. 78-7 (1978); James J. Alfini & Terrence J. Brooks, \textit{Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7}, 77 Ky. L.J. 671, 714-15 (1989) (noting same). Others, however, have been more reasonable in their advice. See, e.g., Okla. Judicial Ethics Advisory Panel, Judicial Ethics Op. 2001-5, 73 P.3d 270 (2001) (“We believe a $5 donation would not require any disclosure at any time; we believe that a $5,000 donation would require disclosure for a long period of time. As to a large donation (such as $5,000), we suggest the judge should recuse without a request from counsel for a least a year after the campaign. . . .”), superseded by Okla. Judicial Ethics Advisory Panel, Judicial Ethics Op. 2007-3, 162 P.3d 986 (2007) (“A $5,000 contribution or a contribution in a `substantial’ sum would require the judge to disclose to adverse counsel for a period of one (1) year from the beginning of the next term of office. A contribution considered to be a de minimis without more does not require disclosure. However a small contribution coupled with additional factors may also require disclosure for a period of one (1) year.”); cf. Cal. Judges Ass’n Comm. on Judicial Ethics Op. 48 (1999) (concluding that judges should disclose on the record all contributions of $100 or more received by a lawyer or party within the preceding two years).

\textsuperscript{184} Attorneys might consider, for example, the client’s understandably upset reaction when she is told after losing the case that the other side contributed thousands of dollars to the judge’s campaign. The reaction might channel itself into a bar complaint or malpractice suit against the attorney for failing to take the relatively simple step of performing a public records check to discover whether the opposing attorney or client contributed to the assigned judge’s campaign. \textit{Cf.}, e.g., \textit{Ex parte} Kenneth D. McLeod Family Ltd. P’ship XV, 725 So. 2d 271, 273 (Ala. 1998) (holding that, in order to maintain a motion to disqualify on the basis of a campaign contribution, the movant must have exercised “due diligence” to discover the contribution).

\textsuperscript{185} As suggested above, \textit{Caperton} moved a small step toward this end. \textit{See supra} Part IV.A.
disclosing her contributions should not be made lightly. An often overlooked ethics rule, Model Rule 8.4(f), complicates that decision for the contributing attorney. Model Rule 8.4(f), on its face, does no such thing; it simply requires that lawyers not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”\textsuperscript{186} The rule’s ramifications are significant, however. It incorporates the Model Code of Judicial Conduct, which (depending on the jurisdiction’s word-smithing) typically requires judges to disclose campaign contributions.\textsuperscript{187} Therefore, if a judge fails to disclose the contribution and the contributing attorney likewise stands mute and stays on the case, that attorney arguably assists the judge’s violation.\textsuperscript{188} To be

\textsuperscript{186} MODEL RULES OF PROF’L CONDUCT R. 8.4(f) (2003).

\textsuperscript{187} See MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2 (2007) (“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.”); MODEL CODE OF JUDICIAL CONDUCT R. 4.4 cmt. 3 (“Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office.”); MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) cmt. (1990) (“Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge’s impartiality and be cause for disqualification . . . .”); W. VA. CODE OF JUDICIAL CONDUCT Canon 5C(2) cmt. (1994) (“Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification . . . .”); Cal. Judges Ass’n Comm. on Judicial Ethics, Op. 48 (1999) (concluding that judges should disclose on the record all contributions of $100 or more received by a lawyer or party within the preceding two years). But see supra note 183 (noting that some judicial ethics opinions have opined that judges need not disclose campaign contributions). Disclosure or no disclosure, elective judges rarely decide that they must recuse themselves on the basis of the campaign contributions they have received. See, e.g., Alfini & Brooks, supra note 183, at 714; Randall T. Shepard, Judicial Professionalism and the Relations Between Judges and Lawyers, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 223, 240-41 (2000) (recounting seemingly strong cases for disqualification in Alabama and Texas, but noting that the courts in both states refused to order disqualification); Jay M. Zitter, Annotation, Disqualification of Judge Because of Political Association or Relation to Attorney in Case, 65 A.L.R. 4TH 73 (1988 & Supp. 2010) (collecting cases). There are, however, some judges who commendably recuse themselves even when they view the decision (wrongly or rightly) as a matter of discretion. See, e.g., Dean v. Bondurant, 193 S.W.3d 744, 752 (Ky. 2006).

\textsuperscript{188} Similarly, attorneys are not allowed to “knowingly assist or induce another to [violate the Rules of Professional Conduct, including Model Rule 8.4(f)], or do so through the acts of another.” MODEL RULES R. 8.4(a); cf. In re Weinstein, 545 N.E.2d 725, 729 (Ill. 1989) (holding that, under the state version of the former Model Code of Professional Responsibility, “the respondent’s conduct in arranging the loan [to the judge] while the case was still pending and his failure to inform opposing counsel of the loan transaction compromised the fairness and impartiality of the tribunal and prejudiced the administration of justice”); In re Lidov, 544 N.E.2d 294 (Ill. 1989) (suspending attorney for loaning campaign money to the same judge). For particular disciplinary violations resulting from Model Rule 8.4(f), see for example Lisi v. Several Attorneys, 596 A.2d 313, 316 (R.I. 1991) (concluding that lawyers violated Rule 8.4(f), among other rules, for making loans to judges before whom they regularly appeared), and In re Dean, 129 P.3d 943 (Ariz. 2006) (concluding that prosecutor violated Rule 8.4(f), among other rules, when she was involved in a romantic, undisclosed relationship with a judge before whom she regularly appeared).
sure, this is an apparently novel theory as applied to contributions, but the only completely safe course in light of it would be to disclose the contribution or withdraw from the case.

The other important ramification of Model Rule 8.4(f) is that it reincorporates the “appearance of impropriety” standard, at least in these circumstances. Unlike the current lawyers’ ethics rules, the Codes of Judicial Conduct have long contained the controversial “appearance of impropriety” standard, which is contravened whenever “the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” Similarly, judges are prohibited from sitting in cases in which their “impartiality might reasonably be questioned.” Thus, if a campaign contribution—or merely the failure to disclose the contribution—creates a reasonable appearance of impropriety or impartiality, the attorney’s continued participation arguably violates 8.4(f). Indeed, attorneys may still be independently disqualified from a case for creating the “appearance of impropriety”—irrespective of the judge’s ethical duties.

Therefore, the arguably safest course here again—aside from not contributing in the first place—would be to disclose on the record (or withdraw from the case).

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189. In light of the authority cited above, it is certainly not a completely novel claim as a more general matter. See supra note 188 (citing examples of lawyers disciplined for violating Rule 8.4(f), and similar rules, for assisting in a judge’s unethical conduct).


191. Model Code of Judicial Conduct R. 2.11(A) (2007); see also Code of Conduct for United States Judges Canon 3C (2009); Model Code of Judicial Conduct Canon 3E(1) (2003) (same); Harrison & Swisher, supra note 17, at 589-90 (explaining this national standard of mandatory disqualification); supra Part I.B (noting that voters, lawyers, and judges believe in supermajority numbers that judges are not impartial toward their contributors).

192. Cf. Ex parte Kenneth D. McLeod Family Ltd. P’ship XV, 725 So.2d 271, 273 (Ala. 1998) (“If a judge failed altogether to publicly disclose the contributions she had received, or if she actively concealed them, then an appearance of impropriety would exist. But the judge in this case publicly reported the contribution and in no way attempted to cover up the fact that [the defendant] had made a contribution to her.”). Obviously, appearances standards examine appearances, not actualities. The appearance here, depending on the timing and the dollar amount, often is quite bad. In addition to the public survey data listed in Part I.B, see for example Stretton v. Disciplinary Board, of the Supreme Court of Pennsylvania, 944 F.2d 137, 145 (3d Cir. 1991) (“It is no secret that . . . judicial campaigns must focus their solicitations for funds on members of the bar. This leads to the unseemly situation in which judges preside over cases in which the parties are represented by counsel who have contributed in varying amounts to the judicial campaigns.”) (emphasis added).

193. See, e.g., Flamm, supra note 190, at 342 (listing twenty-three states that still use the appearance of impropriety as a basis for attorney disqualification; listing several more states that still use it as a factor, but insufficient of itself, in determining disqualification).
Importantly, neither attorney-client privilege nor the duty of confidentiality would preclude the attorney’s disclosure. Finally, beyond the somewhat ghost-like 8.4(f) problem with failing to disclose, the ABA’s Judicial Disqualification Project just culminated a four-year study of state disqualification principles with the resolution that states should require disclosure from “litigants or lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing.” Thus, disclosure is not only ethically implicated, but it is arguably aligned with the profession’s emerging trend. This emerging trend can be easily implemented: For example, Alabama appellate attorneys already are statutorily required to submit a campaign contribution disclosure form to all other attorneys on a case. This requirement is quite efficient in that it places the (mild) burden on contributing attorneys, who have the readiest access to the information. In short, it is an ahead-of-its-time rule that I hereby highly recommend to other states.

D. DISCUSSING CONTRIBUTIONS

The final practical concern that I briefly raise exposes the profession’s ambivalence to the practice: We must not speak of it. Model Rule 8.4(e) enjoins attorneys from “stat[ing] or imply[ing] an ability to influence improperly a government agency or official or to achieve results by means that violate the Model Rules or other law.” Moreover, a few cases have suggested, albeit in unusually sinister circumstances, that attorneys should not brag about a campaign contribution or solicit a contribution from a client by implying that the contribution might affect the outcome of the case. For the contributing

194. The information that should be disclosed (i.e., the fact and amount of contribution) was not obtained from a confidential client conversation and is not new information relating to the representation. See, e.g., MODEL RULES R. 1.6 (extending the duty of confidentiality only to “information relating to the representation of a client”). Indeed, the attorney often learns of this information (again, the fact and amount of disclosure) before the attorney-client relationship is formed or even contemplated.

195. ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION (2011), available at http://new.abanet.org/committees/judind/PublicDocuments/JDP%20Resolution%20and%20Report%201-19-11.pdf (noting further that this resolution “would facilitate a determination of whether the judge’s impartiality might reasonably be questioned”). The resolution was withdrawn during the ABA’s mid-year meeting. Suffice it to say that the withdrawal was based, at least in part, on the professional ambivalence alluded to in this Article. I cannot, however, give these developments worthy treatment because they have unfolded in the post-production stage of this Article.

196. See ALA. CODE § 12-24-2(b) (2006). This model should be broadened to include trial attorneys, not just appellate attorneys.

197. MODEL RULES R. 8.4(e).

198. See Okla. Bar Ass’n v. Evans, 747 P.2d 277 (Okla. 1987) (suspending attorney for four years for asking client whether he would be willing to pay a “campaign contribution,” presumably to the prosecutor but perhaps also the judge, if the contribution was necessary to prevent the filing of criminal charges against him); Miss. Att’y v. Miss. St. Bar, 453 So. 2d 1023 (Miss. 1984) (concluding that lawyer violated ethics rules by stating that judge would not find lawyer in contempt because he had helped get the judge elected); see also Office of Disciplinary Counsel v. Atkin, 704 N.E.2d 244, 245-46 (Ohio 1999) (per curiam) (disbarring lawyer because
attorney, then, she should be hesitant to tell the client about the practice in anything but the most matter-of-fact way.\textsuperscript{199}

In sum, contributing is suspect not just on multiple theoretical and policy levels, but also on several practical ones. In the shadow of \textit{Caperton}, attorneys should contribute, if at all, with caution and, apparently, in silence.

**CONCLUSION**

In light of the foregoing passages, attorneys who yearn to contribute rarely can juggle three balls at once: \textit{(i)} Give money to judges; \textit{(ii)} appear before those judges; and \textit{(iii)} continue to practice ethically. Like anyone learning to juggle, it is relatively easy to juggle any two of these balls at once successfully, but the addition of the third ball invariably leads to a fall. Of course, the analogy is imperfect: With juggling, practice makes perfect, and falls are soon averted; with attorneys' campaign contributions, however, the more practice, the more justice falls.\textsuperscript{200} And, as we have seen, the practice of contributing is pervasive.

As a profession, however, we have been unwilling to ban attorneys from contributing to and appearing before the same judge.\textsuperscript{201} That is not to say that we are proud of the practice. Indeed, as if the practice of contributing were not already marred enough in guilt and shame, the ethics rules partially require attorneys to keep the practice hidden from clients.\textsuperscript{202} Speech bans notwithstanding, it is puzzling that we still permit the practice in the first place.

In both over- and underinclusive ways, however, we have been saved from ourselves: Many state legislatures have imposed campaign contribution limits on

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\textsuperscript{199} To clarify, as discussed in Part IV.B, attorneys likely have a duty to investigate the other side's contributions to the assigned judge. They can and should discuss this issue with their client. The prohibition of discussing the practice with the client applies only to attorneys who boast or otherwise advertise that their own contributions, or the future contributions of the client, will likely influence the assigned judge. Apparently, that legal realism is too real for disciplinary authorities to hear.

\textsuperscript{200} See, \textit{e.g.}, Mauro, \textit{supra} note 2 (quoting retired Justice Sandra Day O'Connor) ("Justice is a special commodity[:] The more you pay for it, maybe the less it's worth.").

\textsuperscript{201} See, \textit{e.g.}, \textit{LAWYERS' POLITICAL CONTRIBUTIONS REPORT, supra} note 52, at 36 (claiming, dismissively, that an outright ban "would work only in cloud-cuckoo land").

\textsuperscript{202} See \textit{supra} Part IV.D (noting, among other things, that any boasting to the client about financial contributions—with the explicit or implicit implication that those contributions have bought, or will buy, an "in" with the judge—may be disciplinable).
This external regulation is overinclusive in that it suppresses all attorneys—not just those who contribute to judges before whom they then appear and ask for legal favors. The regulation is underinclusive, however, in that many states either have no limits at all or have limits set so high that corruption is unlikely to be averted. For attorneys in those states, whether and how they comport themselves with their professional role obligations in these tempting circumstances is a dilemma with no fast answer. The practice of contributing presses on and this Article has framed the fundamental question of professional discretion: whether attorneys should contribute in a world in which they are permitted but not required to do so. Indeed, in the absence of collective agreement on the lawyer’s fundamental role obligations, the answer may vary from attorney to attorney.

Using this Article, at least, attorneys can choose a framework for exercising their discretion, knowing full well the systemic and case-specific consequences that often follow from the practice of contributing. Because privately funded judicial elections have been around for 150 years and counting, justice may always be hooking on the corner; the dilemma for lawyers will always be whether it is right to stop the car for a rendezvous before heading to the courthouse.

203. See infra app. (listing contribution limits by state and contributor type); Data Set (listing contribution limits by court tier, state, and contributor type); see also supra note 111 (providing further cautionary concerns with contribution limits). Contribution limits have often been disparaged because they intuitively decrease electoral competition (by limiting the ability of challengers to raise money to beat entrenched incumbents), but interestingly, contribution limits may actually have the opposite effect: increasing electoral competition. See CIARA TORRES-SPELLISCY ET AL., ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS (2009), available at http://brennan3cdn.net/8b28d2860605922003_vwm6ib37g.pdf (finding, among other things, that lower contribution limits increase electoral competition, contrary to the Supreme Court’s assumption in Randall v. Sorrell, 548 U.S. 230 (2006)). This observation notwithstanding, I do not purport to give adequate treatment to electoral competition studies in this Article.

204. For a history of the rise of judicial elections in the United States, see Shugerman, supra note 9.
APPENDIX:
CONTRIBUTION LIMITS*

I. CHART ONE:
CONTRIBUTION LIMITS IN NON-PARTISAN JUDICIAL ELECTION STATES

* All limit levels are in U.S. Dollars and track the contribution limits applicable to judicial elections of the justices of the states' highest court. For the contribution limits of lower courts, among other details, see the following Data Set.

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* Many thanks to Kellen Bradley, J.D. Candidate 2012, Arizona State University Sandra Day O'Connor College of Law, and Tzvee Wood, J.D. Candidate 2012, Fordham University School of Law, for their work on this Appendix.
II. Chart Two: Contribution Limits in Partisan Judicial Election States

*All limit levels are in U.S. Dollars and track the contribution limits applicable to judicial elections of the justices of the states' highest court. For the contribution limits of lower courts, among other details, see the following Data Set.
III. DATA SET: CONTRIBUTION LIMITS (IN $) FOR LAWYERS, LAW FIRMS, CORPORATIONS, AND PACS (BY COURT AND STATE)

<table>
<thead>
<tr>
<th>Individuals/Lawyers</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
<th>All Others</th>
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</thead>
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<td>6,100</td>
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</tr>
<tr>
<td>ID</td>
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<td>5,000</td>
<td>1,000</td>
</tr>
<tr>
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<td>125,000</td>
<td>125,000</td>
</tr>
<tr>
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<tr>
<td>WV</td>
<td>1,000</td>
<td>1,000</td>
<td>1,000</td>
</tr>
</tbody>
</table>

No Limit States: AL, MN, MO, ND, OR, PA

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i. Arkansas places no limit on the amount that candidates can contribute to their own campaigns. Ark. Code Ann. § 7-6-203(c) (2010).


iii. "[N]o person may contribute more than one hundred fifty thousand dollars within the state in connection with the nomination or election of persons to state and local public offices and party positions within the state of New York in any one calendar year." N.Y. Elec. Law §14-114(8) (Consol. 2010).

iv. The Texas Court of Criminal Appeals and the Supreme Court of Texas have the same contribution limits. The limits for the Texas Court of Appeals and “All Others” range from $1000 to $5000 depending on the population of the judicial district. Lawyers in contributing law firms are limited to a fifty dollar contribution under certain circumstances. See Tex. Elec. Code § 253.157 (2009).
<table>
<thead>
<tr>
<th>Law Firms</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
<th>All Others</th>
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<td>GA</td>
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<td>1,000</td>
<td>1,000</td>
</tr>
</tbody>
</table>

No Limit States: MN, MO, OR

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v. See supra note ii.

vi. The annual overall limit from a law firm as a corporation is $5000. N.Y. ELEC. LAW § 14-116(2) (Consol. 2010).

vii. A judicial candidate may not accept a contribution of more than fifty dollars from a member of a law firm’s restricted contributor class (including the law firm and persons and entities affiliated with the law firm) if the total of all contributions already accepted from members of the law firm’s restricted class exceeds the above limits (or if the contribution would cause the total to exceed the above limits). If the judicial district population is from 250,000 to one million, the limit to the Court of Appeals and “All Others” is $15,000. If the judicial district population is less than 250,000, the limit to the Court of Appeals and “All Others” is $6000. TEX. ELEC. CODE § 253.157.
## Corporations

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No Limit States: MN, MO, OR

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ix. See supra note ii.


xi. Corporations treated analogous to Law Firm for purposes of this data set. See N.Y. ELEC. LAW § 14-116(2).

xii. Corporations treated as Law Firms for purposes of this data set. See TEX. ELEC. CODE § 253.157.
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**xiii.** See supra note ii.

**xiv.** The Louisiana Supreme Court has $80,000 overall limit per candidate and election cycle. The Court of Appeals has a $60,000 overall limit per candidate and election cycle. Other courts’ overall limit is $20,000. See LA. REV. STAT. ANN. § 18:1505.2(H)(7)(i)-(iii).

**xv.** Annual overall limit for non-family contributions per candidate of $150,000. N.Y. ELEC. LAW § 14-114(8).

**xvi.** The Texas Supreme Court’s limit is used as the overall PAC contribution limit per candidate. The Court of Appeals’ limits range from $52,500 to $75,000. “All Others” range from $15,000 to $52,500. See TEX. ELEC. CODE §§ 253.160, 253.168 (2009).