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# CAMPAIGN CONTRIBUTIONS AND RISK-AVOIDANCE RULES IN JUDICIAL ETHICS

W. Bradley Wendel\*

## INTRODUCTION

To a large extent, our legal system relies on the professionalism of individual judges to safeguard against the risk that campaign contributions will create a financial conflict of interest that undermines the judiciary's impartiality. The U.S. Supreme Court's decision in *Caperton* creates the possibility of due process challenges to judicial conflicts of interest, but as the majority repeatedly emphasized, only in extraordinary circumstances, when a contribution has a "significant and disproportionate influence" on the judge's decision.<sup>1</sup> This Article argues that it may be necessary to expand *Caperton*-style disqualification proceedings to a wider range of circumstances for reasons of behavioral ethics. Well-understood, predictable psychological mechanisms create "blind spots" in which the effect of a conflict of interest is not apparent to someone subject to it.<sup>2</sup> The effect of campaign contributions on judges' perceptions of bias is often unconscious.<sup>3</sup> To make matters worse, judges also remain unaware of their unawareness<sup>4</sup> resulting in a persistent and difficult-to-dispel illusion of objectivity. Judges, like other professionals, believe their ethical commitments are sufficient to withstand the bias effects of external factors, such as financial conflicts of interest.

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1. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

2. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74 (Don A. Moore et al. eds., 2005); Paul Thagard, *The Moral Psychology of Conflicts of Interest: Insights from Affective Neuroscience*, 24 J. APPLIED PHIL. 367 (2007); John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177 (2005); Ann M. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223 (2004); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189 (2004).

3. Chugh et al., *supra* note 2, at 83.

4. *Id.* at 81.

Judges may sincerely believe, as did the judge whose financial conflicts of interest were at issue in *Caperton*, that they can set aside the bias resulting from campaign contributions. Indeed, they should be committed to principles of professionalism that include deciding cases impartially. The regulation of judicial ethics also assumes that, for the most part, judges' impartiality can be sustained by judges themselves, who are able to separate their ethical duties from any personal attachments or interests they may have. It is easy to find numerous cases relying upon the presumption that a "judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath."<sup>5</sup> I do not mean to doubt the genuineness of those judges' who perform their duties in accordance with their oath of office. The concern here is not with intentional wrongdoing, such as judges accepting bribes in exchange for their decisions.<sup>6</sup> Rather, this Article focuses on the unconscious effect of financial largesse from interested third parties. By analogy, I believe most people have an intuition that physicians try to sincerely do what is in the best interests of their patients, yet empirical evidence has shown that gifts to physicians from pharmaceutical companies affect prescribing behavior at an unconscious level.<sup>7</sup> One could be concerned about the effect of gifts without assuming that doctors are consciously and intentionally deciding to do something unethical. Unintentional and unconscious self-serving biases may distort judgment, and ironically be even more pernicious because of the psychological mechanisms that seek to sustain our self-image as "moral, competent, and deserving."<sup>8</sup> Oaths of office, ethical commitments, and professionalism by contrast are processed differently, operate through different mechanisms, and therefore may be ineffective to combat contributors' attempts to influence judicial decisions.<sup>9</sup> "[W]hen professional responsibilities clash with self-interest, the two motives tend to be processed differently: Self-interest exerts a more automatic influence than do professional responsibilities, which are more likely to be invoked through controlled processing."

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5. *In re Aguinda*, 241 F.3d 194, 204 (2d Cir. 2000).

6. See, e.g., WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.6 MILLION KICKBACK SCHEME* (2012) (detailing scandal from Luzerne County, Pennsylvania, in which two judges accepted bribes to sentence children to terms in a for-profit juvenile detention center).

7. Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 J. AM. MED. ASS'N 252 (2003) (reviewing empirical evidence on conflicts of interest and concluding that self-serving bias is unintentional).

8. Chugh et al., *supra* note 2, at 81.

9. See Moore & Loewenstein, *supra* note 2, at 190.

This Article proposes a decrease of the reliance on judges' ethical commitments and sense of professionalism and suggests shifting to a model that more closely resembles the regulation of attorney conflicts of interest. Attorney conflicts rules seek to avoid multiple client relationships, personal interests, and other entanglements that present a significant *risk* that the attorney may compromise her performance of duties owed to the client, such as loyalty, diligence, confidentiality, and independent professional judgment.<sup>10</sup> This approach makes sense because the conflicts provisions in state rules of professional conduct are significantly redundant with duties inherent in the law of agency and fiduciary relationships. The attorney-client relationship is the paradigmatic professional relationship that is characterized by a high degree of dependence, trust, and reliance upon the lawyer to comply with standards of conduct that exceed the morals of the marketplace.<sup>11</sup> Conflicts rules regulate prophylactically, prohibiting certain types of relationships that threaten to interfere with the performance of the heightened duties owed by a fiduciary.

It seems odd to think of judges as fiduciaries since they differ from lawyers in not having clients. But fiduciary political theory views all government officials, including judges, as having a position of public trust which implies obligations to serve the interests of others. Judges do not serve *constituents*, as a legislator might, but act as a fiduciary with respect to something else, such as the public interest or the law itself.<sup>12</sup> As the Supreme Court has said, "Judges are not politicians, even when they come to the bench by way of the ballot."<sup>13</sup> The most important policy goal of judicial ethics is to ensure judges' fidelity to the public trust and the impartial application of law. That may require, in some cases, a broader scope of disqualification than would be

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10. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 10.4, at 10–12 (3d ed. & Supp. 2014) (noting that in modern attorney conflicts law, "a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is 'at risk,' *even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates*") (emphasis in original); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 *GEO. J. LEGAL ETHICS* 823 (1992). See also *IBM Corp. v. Levin*, 579 F.2d 271, 280 (2d Cir. 1978) (foundational attorney conflicts case stating that "[t]he fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence"). I have argued for more openness to the attorney-conflicts approach in judicial ethics, relying on the behavioral psychology literature discussed here. See W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 *McGEORGE L. REV.* 35 (2010).

11. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (AM. LAW INST. 2000).

12. See Ethan J. Leib et al., *Mapping Public Fiduciary Relationships*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 388 (Andrew S. Gold & Paul B. Miller eds., 2014).

13. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

necessary absent the powerful unconscious effects of campaign contributions.

## II. PROFESSIONALISM AND THE ETHICAL COMMITMENTS OF JUDGES

It is commonplace that, while lawyers must be zealous advocates for their clients' interests, judges must strive to be impartial.<sup>14</sup> Justices of the Supreme Court have frequently identified impartiality as the central normative commitment of the judiciary. In his confirmation hearings, Chief Justice John Roberts famously analogized judges to baseball umpires, who just call balls and strikes.<sup>15</sup> Writing for the Court in *Caperton*, Justice Kennedy defined the duty of a judge as deciding cases based on "proper controlling factors" and not "some personal bias or improper consideration."<sup>16</sup> And in the recent *Williams-Yulee* decision, Chief Justice Roberts elevated judicial impartiality to the level of a compelling state interest, justifying some restrictions on the solicitation of campaign funds by candidates for judicial offices: "A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money."<sup>17</sup> Two years after the Court's *Citizens United* case,<sup>18</sup> *Williams-Yulee* distinguished judicial candidates from candidates for representative offices. Concurring in *Williams-Yulee*, Justice Breyer wrote, "[u]nlike politicians, judges are not expected to be responsive to the concerns of constituents. . . . Instead, it is the business of judges to be indifferent to popularity."<sup>19</sup>

Numerous provisions of the Code of Judicial Conduct, applicable to state court judges, reinforce the ethical obligation of impartiality.<sup>20</sup>

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14. See Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 610–11 (1996) (describing ideal of detachment with reference to conduct and attitudes of Justice O.W. Holmes, Jr.).

15. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005).

16. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009).

17. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

18. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

19. *Williams-Yulee*, 135 S. Ct. at 1673–74 (Breyer, J., concurring) (citations omitted).

20. The American Bar Association first entered the field of judicial ethics in 1924 when it promulgated the Canons of Judicial Ethics. In the wake of the collapse of Abe Fortas' nomination to the U.S. Supreme Court after the revelation of financial improprieties, the ABA formalized the previously aspirational Canons in 1973 into an enforceable Code of Judicial Conduct, revised in 1990, 2007, and 2011. Revision by the ABA does not necessarily imply change at the state level, so judges must consult the version of the Code of Judicial Conduct in effect in their jurisdiction. See generally CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS §1.03 (5th ed. 2013). All states and the District of Columbia have established some type of judicial conduct commission, which can investigate allegations of misconduct by judges and im-

Judges are required to “uphold and apply the law” and to perform all their judicial duties fairly and impartially.<sup>21</sup> Judges are exhorted not to be “swayed by public clamor or fear of criticism” and not to permit external interests, including political and financial interests, to “influence the judge’s judicial conduct or judgment.”<sup>22</sup> These general duties or aspirations are buttressed by more specific obligations of disqualification or recusal.<sup>23</sup> The Code states that a judge should disqualify herself “in any proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>24</sup> The Code provides a non-exclusive list of circumstances requiring recusal, but there is an overarching standard: whether “an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt” concerning the judge’s impartiality.<sup>25</sup>

### A. *The Principle of Professionalism and the Duck-Hunting Case*

Federal judges are subject to disqualification under a federal statute when their impartiality may reasonably be questioned.<sup>26</sup> One of the most entertaining cases in judicial ethics arose out of litigation brought by the Sierra Club and other plaintiffs seeking to obtain records of a White House task force on energy policy headed by Vice President Dick Cheney. In the course of the litigation, some of the parties sought the recusal of Associate Justice Antonin Scalia, after it was revealed that he had gone on a duck-hunting trip with Cheney.<sup>27</sup>

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pose appropriate sanctions. In order to safeguard the independence of the judiciary, these commissions are controlled to a significant extent by judges. Commission decisions are appealable to a state court. *See id.* at §1.05.

21. MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS’N 2011) [hereinafter “MODEL CODE OF JUDICIAL CONDUCT”].

22. MODEL CODE OF JUDICIAL CONDUCT r. 2.4(A), (B).

23. The terms “recusal” and “disqualification” are used interchangeably in the Code of Judicial Conduct. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 1.

24. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A).

25. GEYH, *supra* note 20, § 4.05.

26. 28 U.S.C. §455(a). The statute applies to “[a]ny justice, judge, or magistrate judge of the United States,” including Supreme Court Justices. Recent controversy centers on whether the Code of Conduct for United States Judges should be made applicable to the Supreme Court. Some commentators have called for its extension to the Supreme Court, while Chief Justice Roberts has resisted this expansion. *See* Lincoln Caplan, *Does the Supreme Court Need a Code of Conduct?*, NEW YORKER (July 25, 2015), <https://www.newyorker.com/news/news-desk/does-the-supreme-court-need-a-code-of-conduct>.

27. *See* *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004). The Code of Conduct for United States Judges and the federal recusal statute, 28 U.S.C. § 455 (2012), are sources of guidance for Supreme Court Justices but there is no mechanism for adjudicating recusal motions concerning Justices. *See* James J. Alfani, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF’L LAW. 10 (2012). Thus, the request for Justice Scalia’s recusal was directed to the Justice himself. Justice Scalia chose to provide a memorandum explaining his

Leaving aside more technical issues such as whether the lawsuit was against Cheney in his personal or official capacity, and whether a flight on a government-owned Gulfstream jet is really equivalent to flying commercial, Justice Scalia focused his response on the asserted reason for his recusal. The motion to recuse was based on the fact that the hunting trip was evidence of an existing friendship between a judge and a party to the litigation. Friendships between Supreme Court Justices and high-ranking government officials are historically unremarkable, Justice Scalia argued. Playing poker with presidents was apparently a regular feature of social life for Justice Douglas and Chief Justice Vinson, Justice White went skiing with then-Attorney General Robert Kennedy and his family, and “Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House”<sup>28</sup>—a practice I think we can all hope to see revived.

Justice Scalia’s principal argument against recusal, however, was that a judge must be presumed to be able to decide cases impartially, notwithstanding certain other interests, relationships, loyalties, or commitments:

The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor[.]<sup>29</sup>

In other words, Justice Scalia should be presumed to have the capacity to set aside whatever warm feelings he may have for Dick Cheney, and any fond memories of freezing in a duck blind with him, and decide the case on its merits. The single-justice decision creates uncertainty regarding the so-called duty to sit, which states that “[i]t is a judge’s duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation.”<sup>30</sup> Recognition of a duty to sit has the effect of putting a judge’s own thumb on the scale in opposition to disqualification. The duty to sit in effect shifts the burden of persuasion to the judge to become satisfied that grounds exist for disqualification, as opposed to presuming that a conflict creates a reasonable appearance of bias.

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decision not to recuse himself from the litigation; this is referred to as the single-Justice opinion (or decision) in the case.

28. *Cheney*, 541 U.S. at 918.

29. *Id.* at 928.

30. *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964); see also GEYH, *supra* note 20, at § 4.07[4], 4–30 (suggesting that Justice Scalia’s opinion may have revived the duty to sit, which had been abolished in the federal recusal statute in 1974); Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 202–03 (2011) (same).

This stance by Justice Scalia can be referred to as the presumption of *professionalism*. Professionalism in this sense refers to an ability or disposition to set aside what would otherwise be considerations relevant to a decision or action. As a matter of everyday ethics, an ordinary person named Nino Scalia, who is friends with someone named Dick Cheney and has shared many enjoyable hunting trips with him, would seek to protect his friend's reputation from unjustified attacks. But judges take an oath to uphold the Constitution and apply the law impartially. They are subject to the role-differentiated ethical demands of the judicial office.<sup>31</sup> Having assumed a professional role and its associated normative commitments, *Justice* Scalia must be presumed to make a psychological effort to ignore the personal affection he has for a party before him.<sup>32</sup> The neutrality or setting aside of personal interests that is central to professionalism is familiar in many domains of practical ethics. Teachers know they must grade papers and exams fairly, regardless of whether they are written by a delightful student or an annoying one. Lawyers are instructed that the representation of a client does not imply agreement with the client's "political, economic, social or moral views or activities."<sup>33</sup> Moreover, the ideal of professionalism seemed to be behind the controversy that arose during the confirmation hearings for Supreme Court Justice Sonia Sotomayor, after President Obama had said she would bring her life experience and empathy to the Court. Senator Jeff Sessions, then the ranking Republican member of the Senate Judiciary Committee, assailed empathetic judging as a failure of professionalism:

I will not vote for, and no senator should vote for, anyone who will not render justice impartially . . . Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it's not law . . . In truth, it's more akin to politics, and politics has no place in the courtroom.<sup>34</sup>

Sessions implied—wrongly in my view—that Sotomayor was confessing to a lack of professionalism, rather than arguing for a more expansive conception of judicial impartiality in which a judge can draw from life experiences to find the best way to interpret the law.

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31. See, e.g., TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (2009) (explaining that role-differentiated morality can sometimes impose heightened demands on occupants of social and institutional roles).

32. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (noting the "presumption of honesty and integrity in those serving as adjudicators").

33. MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 2016) [hereinafter "MODEL RULES OF PROF'L CONDUCT"].

34. See Robert Barnes, Amy Goldstein & Paul Kane, *In Senate Confirmation Hearings, Sotomayor Pledges "Fidelity to Law"*, WASH. POST (July 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR20090713011154.html>.



B. *Caperton and the Limits of Professionalism*

Professionalism has its limits; otherwise there would be no need for disqualification provisions in the Code of Judicial Conduct. In some cases, it is implausible to believe that a judge is capable of setting aside some outside interest, relationship, or commitment. Indeed, the Supreme Court has said that due process may demand more than a professional commitment to set aside the biasing effects of financial contributions to a state court judge's election campaign.

In *Caperton*, the president of Massey Coal Company, Don Blankenship, made a \$2.5 million donation to a "dark money" organization called, with painful bathos, "And For The Sake Of The Kids," established to oppose a sitting justice on the West Virginia Supreme Court and support the challenger, Brent Benjamin.<sup>35</sup> After winning the election, the recipient of Blankenship's largesse denied that the contribution would affect the way he decided a pending appeal filed by Massey Coal. After careful consideration, Justice Benjamin wrote he found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial."<sup>36</sup> Then lo and behold, in a 3-2 decision, Justice Benjamin was the deciding vote and the West Virginia Supreme Court reversed the jury verdict against Massey.<sup>37</sup> Subsequently, the Supreme Court reviewed a series of decisions involving Due Process Clause challenges of judicial conduct that threatened impartiality. The Court distilled this principle from the cases: Due Process may be offended by a financial interest that "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."<sup>38</sup> The issue was thus presented: Would the debt of gratitude felt by Justice Benjamin to Don Blankenship for securing his election to the West Virginia Supreme Court create a strong enough temptation that he would be unable to "hold the balance nice, clear and true"?

In answering this question, the Court accorded relatively little importance to the presumption of professionalism relied upon by Justice Scalia in *Cheney v. U.S. District Court*. Justice Benjamin said he had conducted an introspective analysis and found that he had no bias or

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35. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

36. *Id.* at 874.

37. *Id.*

38. *Id.* at 879, 885 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Ward v. Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))).

improper feelings of partiality toward Blankenship or Massey Coal.<sup>39</sup> In other words, Justice Benjamin believed his professionalism was a sufficient guarantee of his impartiality. Based on Justice Scalia's reasoning, this should be sufficient. Interestingly, however, rather than relying on professionalism alone, the Court chose to emphasize a legal process consideration—the commitment of judges to elaborate on the reasons for decisions in written opinions:

The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.<sup>40</sup>

It is not just introspection that constrains potential bias, but the discipline of giving a reasoned explanation.<sup>41</sup> It may happen that a judge finds an opinion just “won’t write,” as judges sometimes say.<sup>42</sup> But if it is possible to articulate defensible grounds for a decision, how can a judge say whether bias was at work, or whether the decision was reached on the basis of proper, controlling factors? When evaluating the ethics of judges, one of the hardest problems arises from the lack of *ex ante* agreement on what the correct outcome of a judicial decision should be. The decision reversing the jury verdict against Massey Coal was 3-2, and Blankenship had not lavishly funded the election campaigns of the other two justices. There must have been *some* reason supporting the decision, beyond Benjamin's feelings of gratitude toward Blankenship. At the very least, it seems difficult to say that voting with the majority is even *prima facie* evidence of bias. Perhaps the feasibility of giving a principled justification for one's decision is a sufficient basis for concluding the judge was not impermissibly biased,

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39. *Id.* at 884.

40. *Id.* at 883.

41. See, e.g., GERALD J. POSTEMA, *LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* 135 (2011) (discussing the work of Edward Levi and Karl Llewellyn); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995).

42. See, e.g., MARTIN P. GOLDING, *LEGAL REASONING* 3 (2001).

particularly given the strong commitment to impartiality that is characteristic of assuming the role of judge.<sup>43</sup>

I do not mean to set up a straw-man position here. I am generally disposed to find reliable legal process constraints such as the requirement of furnishing a reasoned elaboration of a decision. There are numerous issues within judicial ethics, all of which implicate the value of impartiality, of which the only sensible resolution is either reliance on professionalism or legal process safeguards. For example, a judge's religious commitments may appear to favor one party or the other in cases involving reproductive rights, same-sex marriage, or capital punishment.<sup>44</sup> Expense-paid gigs as speakers at legal-education seminars sponsored by industries or think tanks in swanky resorts may leave judges with a lingering fondness for the ideological point of view expressed by seminar organizers.<sup>45</sup> Judges speak and write on topics of public importance, sometimes before groups associated with a particular ideological agenda, and may be assumed by litigants or members of the public to hold those views while deciding cases touching on the same issues. In some cases, an invitation to a meeting is extended because of the judge's record of support for a cause.<sup>46</sup> Before taking the bench a judge may have represented clients in private practice who have strong attitudes or preferences regarding an area of law. As noted by Justice Scalia in *Cheney*, judges may be friends with political officials or other litigants, and judges may also have spouses or other family members who are identified with particular political or ideological positions.<sup>47</sup> Not only do these allegiances and entanglements not constitute a due process violation, but depending on the circum-

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43. See, e.g., Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283 (2008).

44. See, e.g., Lisa Miller, *Justice Scalia Speaks for Himself on Death Penalty, Not the Catholic Church*, WASH. POST (Oct. 27, 2011) (describing Justice Scalia's statements that he personally believes capital punishment is morally permissible, and arguing that he wrongly believes the Roman Catholic Church agrees with him).

45. See, e.g., Editorial, *The Justices' Junkets*, WASH. POST, Feb. 20, 2011.

46. See, e.g., Kate Zirnike, *Secretive Republican Donors are Planning Ahead*, N.Y. TIMES (Oct. 19, 2010) (reporting on a meeting of donors in Palm Springs to "develop strategies to counter the most severe threats facing our free society and outline a vision of how we can foster a renewal of American free enterprise and prosperity," which was attended by Justice Scalia and Thomas).

47. Supreme Court Justice Clarence Thomas's wife, Ginni, has long been involved in conservative political activism, including in a senior role in the Heritage Foundation, which lobbied strenuously against the Affordable Care Act ("ACA"). The constitutionality of the ACA was twice an issue before the Supreme Court. Some have suggested that Ginni Thomas' activism should require Justice Thomas' recusal in cases presenting issues on which his wife has taken a strong position. See, e.g., Stephanie Mencimer, *Is Ginni Thomas' Expanding Activism a Problem for Supreme Court Justice Clarence Thomas?*, MOTHER JONES (July 26, 2013).

stances, many of them do not require recusal under the Code of Judicial Conduct. The reason is that in many cases, we trust professionalism and process constraints to be effective enough to sustain public confidence in an impartial judiciary, even though these situations present potentially conflicting interests for the judge.

*C. Attorney Conflicts Rules Do Not Rely Solely on Professionalism*

Attorney conflicts of interest are handled very differently. As noted previously, the most important difference between judicial disqualification rules and attorney conflicts is that the latter are characterized by a “risk-avoidance” approach.<sup>48</sup> For example, an attorney would be prohibited from representing a co-party in civil litigation, even where the parties’ interests are nominally aligned, if “there is a significant risk that the representation of one” of the parties “will be materially limited by the lawyer’s responsibilities to” the other party.<sup>49</sup> A comment to that rule clarifies that a conflict of interest exists when there is a significant risk that the concurrent representation will materially limit the lawyer’s ability to “consider, recommend or carry out an appropriate course of action” for one client due to responsibilities owed to another client.<sup>50</sup> A concurrent conflict of interest can also arise from a lawyer’s responsibilities to a third party or from the lawyer’s own interests, including financial interests. The risk of this interference must be significant, not merely speculative. However, the crucial point of distinction here is that a commitment by a lawyer to professionalism is not sufficient. A lawyer may, in complete and subjective good faith, believe herself able to disregard the interest giving rise to the conflict and represent the client effectively. But the rules will not allow her to do this, without the informed consent of the client.

Moreover, the enforcement of attorney conflicts rules does not simply rely on the professionalism of lawyers to protect clients from harm. Clients who believe the representation of another client or the attorney’s own interests presents a substantial risk to their lawyer’s undivided loyalty may enforce the protections of the conflicts rules through motions to disqualify and actions for an injunction. The downsides for lawyers can be significant. In one recent case a conflict of interest created by a law firm merger resulted in the disqualification of a large firm from a case in which it had earned \$12 million in fees

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48. See *supra* notes 11–13 and accompanying text.

49. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2).

50. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 8.

that it was forced to disgorge.<sup>51</sup> In another recent case, a law firm was disqualified from a patent infringement case where the client had hired away former in-house counsel of the alleged infringer.<sup>52</sup> These penalties tend to focus the attention of attorneys on conflicts of interest and bring a secondary process of external scrutiny to bear on the lawyer potentially laboring under a conflict. Law firms have in-house risk-management lawyers who attempt to avoid fiascoes such as these, largely by developing and administering internal procedures for recognizing and handling conflicts.

There is really no comparable mechanism in judicial ethics. Although judges can be disciplined for failure to disqualify themselves in appropriate cases, generally discipline will only be imposed for willful violations.<sup>53</sup> The failure of a judge to disqualify herself may also warrant remedial action by an appellate court, including reassignment to another trial court judge on remand and possible reversal of the judgment.<sup>54</sup> However, these drastic remedies are rare. As discussed in the next Section, there are subtle framing effects in the differences between attorney conflicts rules and judicial disqualification rules. Additionally, judges are no different from other people in holding to a self-conception as ethical and competent. This self-conception tends to interfere with the introspective process of determining when a potential source of bias should be regarded as disqualifying. Given the reliance on individual professionalism—which requires judges to either set aside biasing interests while deciding cases or identify disqualifying conflicts as a basis for recusal—the behavioral psychology of detecting and responding to conflicts of interest has potentially far-reaching implications for judicial ethics. In particular, financial support of judicial election campaigns by interested parties may not rise to the level of a disqualifying conflict, at least for some judges. It may, however, create unconscious bias on the part of the judge. The next Section explains how a decent, honorable, well-intentioned judge, fully committed to the ethical ideal of impartiality, may come to acquire an unconscious bias in favor of one of the parties to a case pend-

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51. *Western Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074 (C.D. Cal. 2015).

52. *Dynamic 3D Geosolutions LLC v. Schlumberger Ltd.*, 837 F.3d 1280 (Fed. Cir. 2016).

53. *See, e.g., In re Schenck*, 870 P.2d 185, 189 (Or. 1994).

54. *See, e.g., Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013) (disqualifying district judge in litigation over city's "stop and frisk" policy where judge's statements to the media might cause a reasonable observer to question her impartiality); *United States v. Microsoft Corp.*, 253 F.3d 34, 107–11 (D.C. Cir. 2001) (district court judge in antitrust case committed ethical violations that were "deliberate, repeated, egregious, and flagrant" by giving secret interviews to reporters and making public statements about the pending litigation).

ing before the judge. The existing law and procedure of judicial disqualification is reasonably well suited to address conscious bias, but must be modified to handle the threat to judicial impartiality posed by unconscious bias.

### III. THE BEHAVIORAL PSYCHOLOGY OF JUDICIAL CAMPAIGN CONTRIBUTIONS

Before going deeper into the psychological aspect, it is important to acknowledge a methodological issue that poses a challenge for judicial ethics. The difficulty is in specifying the baseline of an unbiased judicial decision, or otherwise measure a judge's deviation from what other judges, not subject to a conflict of interest, might decide. Consider the case of medical ethics and the influence of gifts from pharmaceutical companies. The effect of a gift may be measured by comparing the prescribing behavior of a group of physicians who received gifts with those who have not. A study showing greater frequency of prescribing the drug produced by the benefactor company, as compared with other physicians practicing who did not receive gifts, indicates an effect resulting from the gift.<sup>55</sup> There is a sizeable control group of physicians that differs from the treatment group in one way—they have not received a gift from a drug company. It is much more difficult to find a control to isolate the effect of a campaign contribution or other conflict of interest on a judge's decision. In *Caperton*, another pro-business judge might have also reversed judgment in the plaintiff's misrepresentation and tortious interference claims, either on substantive or procedural grounds (the latter was the basis for the West Virginia Supreme Court's decision).<sup>56</sup> As Jed Shugerman correctly notes, judges tend to resist acknowledging the legal realist observation that they may actually be "pro-business" or "pro-consumer."<sup>57</sup> It seems reasonable to believe, however, that there may be lower-court judges or lawyers in West Virginia who are generally sympathetic toward businesses and might have ideas about whether forum-selection clauses in contracts should be enforced. Thus, they might have some preconceptions about how the underlying state court litigation in *Caperton* should be resolved.<sup>58</sup> They may

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55. See Dana & Loewenstein, *supra* note 7, at 254.

56. The decision of the state court in which Justice Benjamin participated relied on a forum selection clause and *res judicata*. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008).

57. Jed H. Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DEPAUL L. REV. 529, 538 (2010).

58. See CHRIS W. BONNEAU, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 5–6 (2012) (discussing difficulty of establishing causality from correlation measures,

choose to run for an open position on the West Virginia Supreme Court, attract campaign contributions from the President of Massey Coal and, if elected, might rule in favor of the company. Is a vote for Massey Coal due to (1) the judge's preexisting favorable attitude toward forum-selection clauses; (2) the judge's gratitude to Massey Coal for its financial support or expectation of future financial support from other energy companies; or (3) an independent, impartial judgment that under West Virginia law, the forum-selection clause is enforceable?

There are numerous studies showing that judges in general tend to favor one party or another in decided cases (e.g., plaintiffs or defendants, in-state or out-of-state litigants) or that some subset of judges (e.g., those appointed by Republican or Democratic presidents) can be associated with particular outcomes.<sup>59</sup> A recent study specifically took up the empirical issue underlying the *Caperton* decision and investigated the degree to which financing for judicial campaigns is associated with judicial decisions favoring the interests of donors.<sup>60</sup> The authors imply the first answer to the above hypothetical is plausible—i.e. that judges who are already disposed to vote in favor of business interests will attract campaign financing from pro-business donors.<sup>61</sup> In *Caperton*, Justice Benjamin's vote is not likely explicable by a general pro-business orientation because the plaintiff in that case was itself a business, and also in the coal-mining industry. This fact may simply heighten the perception that *Caperton* is an anomaly.

In a case where the influence of a campaign contribution is comparably egregious, there may well be a violation of the Due Process

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because contributors may support a judge who is already predisposed to take a liberal or conservative position).

59. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Max M. Schanzbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. ECON. REV. 125 (2001); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Alexander Tabarok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999); Stephen J. Ware, *Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

60. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

61. *Id.* at 72.

Clause. In more ordinary cases, it can be difficult to separate preexisting attitudes and values from the effects of campaign contributions. There are reasons to believe, however, that campaign contributions have an effect over and above the influence of preexisting dispositions to favor a particular class of litigants. For example, while campaign contributions from business groups are associated with a greater likelihood that judges will favor business interests, pro-business judges who are in their last term before mandatory retirement do not have the same tendency to favor business interests. This “lame duck effect” suggests a causal relationship between campaign fundraising and judicial decision-making.<sup>62</sup> A follow-up study using the same data set finds a similar influence on judicial decisions from contributions made by groups that might be characterized as anti-business, such as labor unions.<sup>63</sup>

Thus, there is at least some evidence of a causal relationship between receipt of campaign contributions, or the desire for future financial support, and judicial decisions favorable to the contributor. On its face this evidence appears to support the belief of many members of the public that justice is for sale.<sup>64</sup> However, the explanation for the effect of campaign contributions on judicial decision-making is not necessarily corruption, and certainly not as that word is understood as a characterological defect.<sup>65</sup> It may be in some cases, of course, but the most plausible explanation for large-scale empirical findings of a causal relationship between contributions and judges’ decisions is unconscious bias.

#### A. *Unconscious Effects on Ethical Decision-making*

The starting point for this explanation is the now-familiar finding that humans employ two parallel decision-making processes. One is fast, automatic, associative, relatively effortless, concrete, and unconscious; the other is slow, deliberate, rule-based, effortful, sometimes abstract, and conscious.<sup>66</sup> The influence of the unconscious process

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62. *Id.* at 75.

63. Michael Heise, *The 2017 Monsanto Lecture: The Complicated Business of State Supreme Court Elections: An Empirical Perspective*, 52 VAL. U. L. REV. (forthcoming 2018).

64. See Charles Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003) (reporting that “roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive”).

65. See LAURA S. UNDERKUFFLER, *CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW* (2013).

66. See, e.g., Thomas Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in *SOCIAL PSYCHOLOGY* 542, 566 (Thomas Gilovich et al. eds., 2011); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6–9 (2007); Moore & Loewenstein, *supra* note 3, at 190. This research has been popularized by books by or about the pioneering



results in departures from what might be expected if all decisions were the product of the conscious, rational process. Moreover, these departures are patterned and predictable. Without being aware of it, we tend to rely on cognitive shortcuts, known as heuristics, which speed up decision-making but can lead to errors. The modern biases-and-heuristics literature is immense, but this Article draws from the important subdiscipline of behavioral ethics, which studies the patterned and predictable effects of unconscious psychological processes on *ethical* decision-making.

One can detect “bounded ethicality” when one sees an action that is inconsistent with the actor’s conscious commitments or values.<sup>67</sup> Along with Justice Scalia in *Cheney* and Justice Benjamin in *Caperton*, judges sincerely assert their ability to judge cases impartially because their role requires it. Yet in some cases judges appear to have been influenced and exhibit gratitude or favoritism toward a campaign contributor. The reason for this discrepancy is that unconscious perceptual and cognitive processes cause us to overlook or explain away evidence that might lead the actor to recognize and avoid ethical wrongdoing.

These blind spots are the result of a predictable and pervasive feature of ethical decision-making. We begin with a conception of ourselves as moral, competent, and deserving.<sup>68</sup> People tend to overestimate the degree to which they can make objective decisions, free from self-interest. Thus, we believe a conflict of interest will not distort our judgment. Evidence shows that people believe themselves to be better than others at a range of tasks, including negotiating, driving, cooperating, and decision-making. Objective evidence can sometimes counteract this illusion of objectivity, for example when someone who believes herself to be an above-average tennis player is soundly beaten by a better opponent. This gives rise to cognitive dissonance with one’s prior belief, which may by necessity be overcome

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psychologists Daniel Kahneman and Amos Tversky. See, e.g., MICHAEL LEWIS, *THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS* (2016); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013); MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124 (1974).

67. BAZERMAN & TENBRUNSEL, *supra* note 2, at 5; see also Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 659 (2015) (reviewing studies showing effects of unconscious mental processes, and arguing that because judges are unaware of their effects, judges are not well-positioned to consider motions to disqualify for bias); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1114–17 (2013) (reviewing research on ethical blind spots).

68. Chugh et al., *supra* note 2, at 81–86.

by objective evidence. Ethical decision-making, however, involves competencies for which objective evidence is less clear and available:

[A]ssessments of general beliefs such as one's awareness of, concern for, understanding of, and interest in environmental issues and problems are difficult to confirm or disconfirm. In contrast, assessments of how well one performs on specific activities such as recycling, donating money to environmental organizations, and using energy-saving lightbulbs can be checked against objective measures.<sup>69</sup>

The problem for ethical decision-making is that our belief that we possess above-average levels of honesty or fairness is less likely to be revealed as inconsistent with objective data.<sup>70</sup> To these experimental findings can be added the observation made above: legal questions often do not have clear, objectively verifiable right or wrong answers. Unlike the soundly beaten tennis player, a judge on one side of a 3-2 decision is likely to assume only that she has one of two reasonable views about how the case should have come out. Thus, a judge in the position of Justice Benjamin in *Caperton* has sufficient evidence to believe that he acted competently, fairly, and free from any influence of the contributions made in support of his campaign. The ideology of judicial neutrality, under which judges are sincerely committed to the belief that they just call balls and strikes, also exerts a powerful framing effect that causes judges to construe a situation as not involving ethical issues.<sup>71</sup> The ethical dimensions of a situation are not as salient if there are external cues, such as the pervasive belief in the efficacy of professionalism to ensure impartial judicial decisions, which in turn affects the way a decision-maker construes facts.<sup>72</sup>

A judge's belief that she is moral and competent may be reinforced by the framing of a decision the judge is required to make. Framing effects are pervasive in cognitive psychology. The most familiar, particularly for readers familiar with the work of Kahneman and Tversky, is the importance of whether a decision is framed as involving the possibility of a gain or loss.<sup>73</sup> For example, when a sample of law students were asked to role-play the plaintiff or defendant in a mock settlement negotiation, they were given the following choices: Plaintiffs were told they could accept a certain \$200,000 settlement offer or take

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69. *Id.* at 82.

70. *Id.* at 85.

71. Tenbrunsel & Messick, *supra* note 2, at 231–33.

72. *See also* Darley, *supra* note 3, at 1191–93 (noting that when someone commits to a group, her first task is to become a prototypical member of the group, which may include adopting the implicit or explicit moral perspectives of the group).

73. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 794–96 (2001) (discussing findings of Kahneman and Tversky).

a 50% chance of winning \$400,000 at trial (which of course carried a corresponding 50% chance of obtaining nothing at trial); defendants had the option of paying a \$200,000 settlement to the plaintiffs or facing the same 50% chance of losing \$400,000 at trial. The investigator found that 77% of plaintiffs preferred settlement, while only 31% of defendants opted for settlement.<sup>74</sup> The reason is that the plaintiffs were choosing among options presenting gains, so they preferred the risk-averse option; the defendants, who were choosing among losses, preferred the risk-seeking alternative. But the idea of framing is broader than gains versus losses. For example, whether something is presented as an “ethical decision” or a “business decision” may affect the likelihood that the parties behave unethically.<sup>75</sup> In a famous study, social psychologist Lee Ross and his colleagues asked subjects to play a Prisoner’s Dilemma game, in which betraying the other player is in one’s rational self-interest.<sup>76</sup> While they all played the same game, the twist was that half of the subjects were told they were playing the “Community Game” and the other half that they were playing the “Wall Street Game.” When told they were playing the Community Game, 70% of participants cooperated, even though it was not in their self-interest; the results were precisely the opposite for the Wall Street Game, with 70% behaving self-interestedly.<sup>77</sup>

It bears repeating that these processes operate unconsciously, without the person subject to them being aware of their effect.<sup>78</sup> As the result of these unconscious processes, people are subject to what psychologists call behavioral forecasting errors.<sup>79</sup> When approaching a decision, we think about what we ought to do—based on ethical commitments, professionalism, codes of conduct, and so on. But at the time of decision, different motivations kick in and we are more likely to do something in our self-interest, as opposed to the ethical option.<sup>80</sup> The ethical dimensions of the decision fade in the moment. Then, in

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74. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

75. See Tenbrunsel & Messick, *supra* note 2, at 231–33.

76. Varda Liberman, Steven M. Samuels & Lee Ross, *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner’s Dilemma Game Moves*, 30 PERSON. & SOC. PSYCH. BULL. 1175 (2004).

77. The same study was run on a group of Israeli fighter pilots, and in that study their flight instructors had been asked to make predictions in advance concerning the cooperativeness of their students. The instructors’ predictions turned out to have no validity whatsoever, despite extensive knowledge of their students’ decision-making derived from hours of intense training. However, the framing as *Bursa* (the Hebrew word for marketplace) or *Kommuna* (community) had the same effect as it did on American college students. See *id.* at 1179–80.

78. BAZERMAN & TENBRUNSEL, *supra* note 2, at 19, 45.

79. *Id.* at 63.

80. *Id.* at 69–70.

hindsight, in order to justify the action to ourselves, “we find ways to internally ‘spin’ this behavior . . . [by] casting unethical actions in a more positive light.”<sup>81</sup> For most actors there is generally some frame available as a justification,<sup>82</sup> but nowhere is this more true than with respect to judges, who can almost always appeal to legal arguments favoring the position of the party for whom they decide.

*B. Evidence of Bounded Ethicality in Judicial Decision-making*

This process was illustrated in *Caperton* where there was a non-frivolous argument supporting the defendant’s position. If Justice Benjamin’s decision was unconsciously influenced by gratitude toward Don Blankenship or the desire to receive future financial support, he would still be able to fall back—again, unconsciously—on the briefs and arguments of the defendant in the case. Thus, he would be able to maintain a conception of himself as an ethical judge, capable of excluding irrelevant considerations from his deliberations.

Judges have considerable training and experience in critically evaluating evidence, and may as a result believe themselves capable of fulfilling their professional commitment to decide cases impartially. In an important study, however, a trio of scholars including a cognitive psychologist and a federal magistrate judge, showed that judges are no better than jurors at disregarding inadmissible evidence, even when specifically reminded that the information is inadmissible.<sup>83</sup> Judges tend to agree with the assessment of Learned Hand, that cautionary instructions telling jurors to ignore inadmissible evidence requires “mental gymnastic[s]” beyond the ability of jurors to perform.<sup>84</sup> In fact, mock jury studies have found that instructions to ignore evidence may actually exacerbate the effect of the excluded evidence. In one study, mock jurors awarded more to a plaintiff after hearing evidence that the defendant had insurance coverage and being told to disregard it, as compared with a control group that did not hear evidence of insurance coverage and, more surprisingly, another control group that

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81. *Id.* at 74.

82. See, e.g., Thagard, *supra* note 2, at 368–69 (describing incident where city administrator played a pivotal role in approving a contract with a financing company that obligated the city to pay \$227 million (Canadian) over 30 years, instead of the \$112 million the city council had approved; when faced with allegations of corruption for having attended a hockey game and a golf tournament in Florida with the financing company’s vice-president, the city administrator noted that he had been instructed by the city council “to build relationships with potential partners”).

83. See Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

84. *Id.* at 1254 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

heard the evidence without objection.<sup>85</sup> Although subsequent experiments led to outcomes that diverge in some respects, many studies find that “attempting to ignore inadmissible information might backfire or rebound, with the paradoxical result that the inadmissible information becomes more influential than it would have been in the absence of such an attempt.”<sup>86</sup> When it comes to their own abilities, judges are considerably more optimistic and may, for example, be less strict with the rules of evidence in bench trials.<sup>87</sup> It makes sense to trust judges to ignore inadmissible evidence due to their specialized training and experience in making legal decisions.<sup>88</sup> In other words, reliance on the principle of professionalism may be warranted.

The mock juror studies suggest, however, that a judge who consciously tries to hold aside the influence of a relationship with a litigant (Justice Scalia in *Cheney*) or a campaign contribution (Justice Benjamin in *Caperton*) may have a more difficult time judging the case impartially. This difficulty is the result of several psychological mechanisms, including the fact that the effort to suppress one’s awareness of a thought requires constant self-monitoring, such that the thought is always present in one’s mind.<sup>89</sup> Try not to think about a white bear. Trying not to think about a white bear only makes it harder not to think about a white bear, because one is expending a great deal of cognitive effort on a white-bear-related task. Additionally, as information is acquired, it influences how we process, assess, and integrate new information.<sup>90</sup> People may have great difficulty forgetting or undoing the effect of knowledge that is acquired and quickly incorporated into an existing belief system.<sup>91</sup>

Information triggers a cascade of thoughts as part of the brain’s effort to construct and to maintain a coherent set of beliefs. Merely ignoring the information itself is not enough. The inferences that explain and accommodate the information into an integrated picture of the world must also be ignored, or the information will affect decision making indirectly.<sup>92</sup>

As a result of these and other mechanisms which operate largely unconsciously, judges have difficulty ignoring inadmissible evidence such

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85. *Id.* at 1270–71 (citing Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753–54 (1959)).

86. *Id.* at 1276.

87. *Id.* at 1256.

88. *Id.* at 1277.

89. Wistrich et al., *supra* note 83, at 1262–63.

90. *Id.* at 1265.

91. *Id.* at 1267–68.

92. *Id.* at 1269.

as a settlement offer previously made by one of the parties.<sup>93</sup> The most probable explanation is not that judges refuse to follow the law, but that they are human too, and like other humans have great difficulty ignoring information they are instructed to disregard.<sup>94</sup> Although the authors did not consider campaign contributions in a case like *Caperton*, it stands to reason that a judge would have similar difficulty setting aside her feelings of gratitude toward a significant financial supporter.

#### IV. MODELING JUDICIAL DISQUALIFICATION PROVISIONS ON ATTORNEY CONFLICTS RULES

The question is, of course, what should regulators do about the possibility that judges are unconsciously influenced by campaign contributions. The Code of Judicial Conduct sets out numerous instances in which disqualification will be required, but the overarching norm is that a judge should not participate in any proceeding in which her impartiality might reasonably be questioned.<sup>95</sup> This test is an objective one,<sup>96</sup> so my criticism is not based on the mistaken belief that judges must disqualify themselves only when they subjectively believe they cannot be impartial. Rather, the problem is that even this objective test is designed to be mostly self-executing, applied by the judges themselves, to determine whether a hypothetical fully-informed observer would entertain significant doubt about the judge's impartiality.<sup>97</sup> The test may be objective in theory, but in application it may be susceptible to the same cognitive errors that create the risk that campaign contributions will undermine judicial impartiality. Debra Bassett has argued, correctly in my view, that these unconscious biases are sufficiently pervasive to call into question the procedure under which judges rule on disqualification motions.<sup>98</sup> I would only add that many instances of potentially disqualifying biases are never litigated in dis-

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93. *Id.* at 1291–92. The study also reports similar effects from inadmissible evidence such as attorney-client privileged communications, the sexual history of the complaining witness in a rape prosecution, a defendant's prior criminal conviction, information obtained from a cooperating defendant and subsequently used against the defendant at sentencing, evidence obtained from a search without probable cause (which may not be considered in determining whether, *ex ante*, the police had probable cause for the search), and an inadmissible confession. *See id.* at 1294–1322.

94. Wistrich et al., *supra* note 83, at 1323–24.

95. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A).

96. GEYH et al., *supra* note 20, § 4.05 at 4–13.

97. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 708 (2011) (noting that judicial disqualification procedure assumes that judges can evaluate their own bias).

98. Bassett, *supra* note 67, at 669–72.

qualification motions, either because the parties do not know about the conflict of interest or because they are reluctant to risk angering the judge by taking an action that may be understood as an attack on the judge's integrity.

For this reason, I believe the approach to judicial disqualification requires changing the framing of the decision. Focusing on the judge's impartiality suggests that the judge is somehow a wrongdoer. This directly challenges the judge's self-conception as ethical and competent. Judges are ethically obligated to set aside irrelevant considerations, and after serving for some time on the bench may believe that they are good at it. A suggestion that a judge is not ethical or competent triggers unconscious processes that suppress the effect of a competing connection or interest, such as a significant campaign contribution. The judge will be motivated to downplay the significance of that consideration in her decision-making process, just as Justice Scalia mocked the suggestion that his friendship with Vice President Cheney would have any effect on his decision in the underlying litigation. The process of self-scrutiny *itself* is enough to set into motion unconscious processes that give rise to the belief that a decision is unbiased.<sup>99</sup>

Attorney conflicts rules, by contrast, do not rely on a presumption that the attorney in question will be unable to set aside the influence of another client relationship or a personal interest. The rules instead are implied from the fiduciary nature of the attorney-client relationship, which carries with it the need for the strictest safeguards to ensure the lawyer's loyalty and exclusive commitment to the client's interests. As a fiduciary, an attorney must be willing to accept constraints that overprotect the values of loyalty, confidentiality, and independence. From the point of view of behavioral psychology, the framing of attorney conflicts rules does not assume inability to set aside conflicting interests. Rather, it is a principle along the lines of "Caesar's wife must be above suspicion." Correct application of the attorney conflicts rules avoids inquiring into the actual ability of a lawyer to fulfill duties owed to the client. As a result, an attorney's decision to decline a representation due to a conflict of interest does not signal that the attorney is a wrongdoer. This approach to handling conflicts of interest avoids framing the decision in a way that triggers unconscious processes of self-defense that tend to create ethical blind spots. A judge would simply decide whether the facts warrant a reasonable person concluding there is a risk that *some* judge—not neces-

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99. *Id.* at 672–73 (citing Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 250 (2013)).

sarily the judge in question—might succumb to the temptation to be influenced in a decision. The subtle but important difference between this approach and existing judicial disqualification procedure is that the judge would not be making a determination that she is the type of person who could not resist temptation. The hypothetical decision frame is faithful to the objective standard underlying the Code of Judicial Conduct's disqualification provisions, but may help mitigate the unconscious tendency to see one's own ethical character in the best light.

One objection to this procedure is that attorney conflicts rules regulate fairly broadly, and may cut against any "duty to sit" that characterizes judicial ethics. Broad rules can also be overinclusive, and judges may be troubled by the number of cases that require recusation. In the attorney conflicts rules, Model Rule 1.7 does not create a *per se* rule of disqualification from any representation in which the interests of the client is somehow adverse to another client, or the attorney's personal interests. Rather, the party seeking disqualification for a conflict of interest must show a *substantial* likelihood of a *material* limitation on the attorney's ability to provide competent and diligent representation to the affected client.<sup>100</sup> Nevertheless, if judicial ethics adopted something like the attorney conflicts model for regulating disqualification, many of the questions posed by Chief Justice Roberts in his *Caperton* dissent would have to be addressed.<sup>101</sup> For example does it matter whether the contributor is not a party to the case, but has interests that will be affected by the decision?<sup>102</sup> Should we assume that a judge feels hostility toward an opponent of a financial supporter?<sup>103</sup> Are contributions by executives of a corporation imputed to their employer?<sup>104</sup>

In any event, the contemporary function of the duty to sit is to simply remind judges that if they are not duty-bound to disqualify themselves, they should not step aside merely for reasons of personal convenience.<sup>105</sup> The mandatory provisions of state codes of judicial conduct, the federal recusal statute, and the requirement of the Due Process Clause, all show that judicial disqualification is not an aberration, but is a common procedure that ensures the impartiality of the judge who eventually decides the litigants' case. The need to address

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100. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2).

101. See *Caperton*, 556 U.S. at 893–98.

102. *Id.* at 894 (question 11).

103. *Id.* at 895 (question 18).

104. *Id.* at 897 (question 29).

105. See GEYH et al., *supra* note 20 §4.03, at 4–11.



Chief Justice Roberts' questions does not discourage adoption of the risk-avoidance approach. Suppose, contrary to history, that attorney conflicts rules did not evolve organically, but one day state courts all adopted, by fiat, a prohibition on the representation of a client where the representation would be materially limited by the lawyer's responsibilities to another client.<sup>106</sup> A number of Roberts-style questions would arise: Would there be a conflict if the effective representation of Client A required the cross-examination of Client B, currently being represented in an unrelated matter?<sup>107</sup> If Client A and Client B are co-defendants in civil litigation, is there a conflict?<sup>108</sup> What if Client A is Coke and Client B is Pepsi, but the representation of both does not involve a Coke versus Pepsi litigated matter—do the adverse economic interests of the clients create a conflict of interest?<sup>109</sup> Suppose a law firm is representing Client A and suing a wholly owned subsidiary of Client A on behalf of Client B—is that a conflict?<sup>110</sup> If a law firm represents a class of plaintiffs, can another lawyer in the firm sue an unnamed class member?<sup>111</sup> Can a law firm represent the buyer and seller simultaneously in a simple real estate closing?<sup>112</sup> How about a more complex commercial real estate transaction?<sup>113</sup> Would a conflict arise if one lawyer in a firm possessed confidential information of Client A, and that information could be used to the detriment of Client A.<sup>114</sup> All of these, and many other questions have arisen in the course of applying the “material limitation” standard to attorney conflicts. While some of the questions are easily answered, others present thorny issues that are still vigorously debated in disqualification proceedings. The corporate-affiliate issue, for example, has generated an awe-inspiring body of case law and bar association

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106. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2).

107. Answer: yes. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 6.

108. Answer: maybe, depending on the defenses that may be asserted, settlement postures of the clients, possible cross-claims, and so on. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 23.

109. Answer: no. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 6.

110. Answer: it depends. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 34.

111. Answer: yes. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 25.

112. Answer: maybe, with consent; but it is clear that the conflicts rules apply to non-litigation representation. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 26, 29.

113. Answer: no way. See, e.g., *Baldasarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993).

114. Answer: heck yes. See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 19, 31; see also *A v. B*, 726 A.2d 924 (N.J. 1999) (law firm that represented husband and wife in preparation of joint estate-planning documents had a conflict resulting from simultaneous representation, by other firm lawyers, of the husband's girlfriend in a paternity action, where existence of girlfriend and husband's illegitimate child were unknown to the wife).

opinions.<sup>115</sup> The point is, simply, that application questions will always arise with respect to a legal standard stated in general terms. That does not mean the standard is unworkable, only that its precise contours will develop over time, as it is applied by courts in the variety of factual situations.

There is a well-developed body of case law dealing with similar questions applicable to federal judges, under the federal disqualification statute.<sup>116</sup> Chief Justice Roberts asks, how long does a presumption of bias last?<sup>117</sup> One federal court decision held that a judge was not required to recuse himself based on his social relationship with a party that ended eight years prior to sentencing.<sup>118</sup> Similarly, the Chief Justice wonders, “What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received ‘disproportionate’ support from individuals who feel strongly about either side of that issue?”<sup>119</sup> Guidance may be found in cases involving pro-choice judges presiding over lawsuits brought by pro-life organizations,<sup>120</sup> and vice-versa. What if the judge disagrees with the tactics used by the organization?<sup>121</sup> If the disagreement pertains to conduct within the proceedings, the extrajudicial source rule states that “determinations of bias or partiality cannot be based on opinions, rulings, or incidents arising out of the course of the proceedings in question.”<sup>122</sup> Again, the point is simply that application questions pertaining to risk-avoidance rules can be worked out over time as issues are raised in connection with specific disputes.

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115. See, e.g., *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 210–12 (2d Cir. 2010); *Certain Underwriters at Lloyd’s v. Argonaut Ins.*, 264 F. Supp. 2d 914, 922–24 (N.D. Cal. 2003); *Discotrade v. Wyeth-Ayerst Int’l Inc.*, 200 F. Supp. 2d 355, 358–361 (S.D.N.Y. 2002); *JPMorgan Chase Bank v. Liberty Mutual Ins. Co.*, 189 F. Supp. 2d 20, 22–24 (S.D.N.Y. 2002); *Morrison Knudsen Corp. v. Hancock, Rother & Bunshoft*, 81 Cal. Rptr. 2d 425 (Ct. App. 1999); *Brooklyn Navy Yard Cogeneration Partners, LP v. Superior Court*, 70 Cal. Rptr. 2d 419 (Ct. App. 1997); *Reuben H. Donnelley Corp. v. Sprint Publ’g and Advert., Inc.*, 1996 WL 99902 (N.D. Ill. 1996); *Stratagem Dev. Corp. v. Heron Int’l N.V.*, 756 F. Supp. 789, 792–794 (S.D.N.Y. 1991); *Hartford Accident & Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 535, 539–542 (S.D.N.Y. 1989); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 95-390 (1995); N.Y.C. Bar Ass’n Comm. on Prof’l & Judicial Ethics, Formal Op. 2007-03.

116. 28 U.S.C. § 455 (2012).

117. *Caperton*, 556 U.S. at 894 (Roberts, C.J., dissenting) (question 7).

118. See, e.g., *United States v. Lovaglia*, 954 F.2d 811, 817 (2d Cir. 1992), *overruled on other grounds as stated in United States v. Yousef*, 750 F.3d 254, 261 (2d Cir. 2014).

119. *Caperton*, 556 U.S. at 894 (Roberts, C.J., dissenting) (Question 9).

120. See, e.g., *Lasko v. American Bd. of Surgery*, 47 F. Supp. 3d 1122 (D. Nev. 2014), *vacated on other grounds*, 92 F. Supp. 3d 1013 (D. Nev. 2015).

121. *Caperton*, 556 U.S. at 895 (Roberts, C.J., dissenting) (Question 17).

122. *Piester v. Int’l Bus. Mach. Corp.*, 929 F. Supp. 595 (D.R.I. 1996) (quoting *Liteky v. United States*, 510 U.S. 540, 554 (1994)).

## V. CONCLUSION

The modification of the existing judicial-recusal doctrine to incorporate the risk-avoidance approach of attorney conflicts law is a modest one. In most cases, the results are likely to be the same as under current law. The difference is the evaluative frame the judge is being asked to take up with respect to her own conduct. Well-known psychological tendencies create blind spots when someone is asked to evaluate her propensity to engage in wrongdoing. We have a strong tendency to view ourselves as competent, ethical, and deserving. In addition, mechanisms of cognitive dissonance reduction operate at an unconscious level to exclude consideration of evidence that would tend to upset this self-conception. To the extent judicial disqualification law should be self-administered by judges, rather than requiring evaluation by a neutral decision-maker, it should require judges to think in terms of objectively stated risks to impartial adjudication, in contrast with the current approach that asks whether a judge may subjectively be unable to be impartial.