

**REBUTTAL OF “THE LOUISIANA SUPREME COURT IN QUESTION:
AN EMPIRICAL AND STATISTICAL STUDY OF THE EFFECTS OF
CAMPAIGN MONEY ON THE JUDICIAL FUNCTION”**

BY

KEVIN R. TULLY AND E. PHELPS GAY¹

“A lie can travel halfway around the world while the truth is putting on its shoes.”

– Mark Twain, (attributed)

or

“Figures often beguile me, particularly when I have the arranging of them myself;
in which case the remark attributed to Disraeli would often apply with justice and force:

‘There are three kinds of lies: lies, damned lies, and statistics.’”

Mark Twain, *Chapters from My Autobiography*, published in the North American Review,
No. DCXVIII, July 5, 1907

The purpose of this article is to rebut, from a practitioner’s point of view, the postulation authors Vernon Valentine Palmer and John Levendis set forth in their Tulane Law Review article entitled, *The Louisiana Supreme Court in Question: An*

¹ Kevin R. Tully, a native of Washington, D.C., graduated from Butler University with Honors, obtained his Master’s Degree in history from the University of Virginia, and earned his law degree from Washington University School of Law in St. Louis in 1982. Thereafter, he joined Christovich & Kearney, L.L.P., where he currently serves on the Firm’s Management Committee. Mr. Tully is admitted to practice before the United States Supreme Court, the United States Fifth Circuit Court of Appeals, and the United States District Courts for the Eastern, Middle and Western Districts of Louisiana and of the Southern District of Texas. Mr. Tully is a member of the Maritime Law Association, the Defense Research Institute and the International Association of Defense Counsel.

A graduate of Princeton University and Tulane University School of Law, E. Phelps Gay is the Managing Partner of Christovich & Kearney, LLP. He is a past president of the Louisiana State Bar Association and has served on the Board of Directors of the Louisiana Association of Defense Counsel, the New Orleans Bar Association, the Louisiana Bar Foundation, the Louisiana Judicial College, and the Pro Bono Project. A member of the Federation of Defense and Corporate Counsel, Mr. Gay received that organization’s Andrew C. Hecker Award in 2004 for his article, *Professionalism in Depositions: The Sound of Silence*, 54 FED’N DEF. & CORP. COUNS. Q. 213 (2004).

Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 82 TUL.L.REV. 1291 (March 2008). Briefly stated, Palmer and Levendis opine that “[s]tatistically speaking, campaign donors have a favored status among litigants appearing before the justices.” *Id.*, at 1292. Palmer and Levendis make this bold and false assertion while later conceding – and burying – in a footnote that “[i]t is worth observing that this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors’ positions.” *Id.*, at 1294, fn 14. (Emphasis added.) Palmer’s and Levendis’s concession – that their study does not show any cause and effect between a donation and a judicial decision – renders their assertions, made throughout the body of their article and in their concluding paragraph, meaningless.

The Palmer and Levendis article’s assumptions and conclusions are not based upon real-life experience before the courts nor are derived from any objective evidence a practicing attorney would use to inquire whether a campaign contribution influenced a particular Supreme Court Justice’s ruling in a specific case before the Court. Moreover, the “data set” of cases and contributions upon which Palmer and Levendis rely abounds with errors, undermining any credibility or legitimacy to which the article may have aspired. Even putting aside such errors arising from the authors’ apparent failure to read the cases upon which they relied, the authors’ purely statistical approach to the subject, devoid of factual or legal analysis of any particular case, betrays a fundamental misunderstanding of the nature of the judicial process. Palmer and Levendis merely focus on an alleged statistical “correlation” between a judicial decision and a campaign contribution, but omit any review or analysis of the

discrete facts and law underlying the decisions rendered on the cases included in their “data set,” or any showing that a case was decided incorrectly.

Although unpersuasive on its face, the Palmer and Levendis article – and the authors themselves – generated a certain amount of publicity. Because the Palmer and Levendis article contains so many errors and unfairly disparages the Louisiana Supreme Court and its Justices, we respond here to set the record straight.²

I. INTRODUCTION

Palmer provided THE NEW YORK TIMES with an advance preliminary draft of his article and expressed his opinions in a news piece authored and published by Adam Liptak on January 29, 2008. Thereafter, on February 7, 2008, Palmer and Levendis aired their opinions on New Orleans’s radio station WWL and in the Press, including the TIMES-PICAYUNE, and commentators picked up the story.

Hamstrung without a copy of the article or the underlying data in order to fashion the Louisiana Supreme Court’s response, the Court repeatedly asked the Tulane Law Review to provide a copy of the article to enable the Court to respond in a timely fashion. Ultimately, the Tulane Law Review forwarded a copy of the first draft of the article in late February 2008.³ So the Court’s response could be read

² The authors, private attorneys asked by the Court to review, analyze, and check the accuracy of the Palmer and Levendis article, prepared an earlier version of this Rebuttal which was distributed during the General Assembly of the Annual Meeting of the Louisiana State Bar Association on June 12, 2008. Both the Louisiana Supreme Court and the Tulane Law Review placed that version of the Rebuttal on their respective websites.

³ About two weeks before it was published, the Tulane Law Review sent us a copy of the “final” version of the article. The latter version differed substantially from the

simultaneously with Palmer's and Levendis's published article, we asked the Tulane Law Review to print our Rebuttal in the same edition of the Tulane Law Review. Our request was refused.

This Rebuttal, along with the companion Critique by Louisiana State University Professors Robert J. Newman and Dekalb Terrell and by University of New Orleans Professor Janet Speyrer, responds for the Supreme Court to the contentions Palmer and Levendis make.⁴

II. PALMER AND LEVENDIS EMPLOYED FAULTY METHODOLOGY

Economics professors Newman, Terrell, and Speyrer demonstrate in their Critique that Palmer and Levendis employed faulty methodology in their study, leaving their article to consist of “essentially . . . invalid statistical results and

first version, including the admission of no cause and effect relationship between a prior donation and a particular judicial vote.

⁴ Professor Newman, who obtained his Ph.D. from UCLA, is the Department Chairman of the Louisiana State University Department of Economics. Dek Terrell is an Associate Professor at LSU, having obtained his Ph.D. from Duke University. Professor Terrell is a member of many professional organizations, including the American Economic Association; the Econometric Society; the American Statistical Association; and the Royal Economic Society. Both professors Newman and Terrell have spoken and published frequently on topics involving econometrics – the type of economic analysis and study implicated in the Palmer and Levendis article. Professor Speyrer obtained her Ph.D. from the Johns Hopkins University and is a professor with the Department of Economics and Finance at the University of New Orleans. As the Director of the Division of Business and Economic Research at UNO, Professor Speyrer has developed a sophisticated forecasting model for the New Orleans metropolitan area. In contrast to these authors and economics professors, Professor Palmer does not claim to be trained as an economist or in econometric principles. Professor Palmer's primary fields of interest, according to the Tulane University Law School website, are the civil law, comparative law and legal history with a particular interest in European legal systems. His co-author, John Levendis, obtained his Ph.D. five years ago and is an assistant professor in the college of business at Loyola University.

unproven assertions.”⁵ Claiming there has been “little empirical research” on the effect of campaign contributions on judicial decision making, Palmer and Levendis missed “a very large literature in economics” on the subject. They failed to cite Henry W. Chappell’s seminal 1982 paper which recognizes the probable simultaneity between the effect of campaign contributions on judicial decisions and the effect of judicial decisions on campaign contributions. Quoting from an influential study by Thomas Stratman published in 1995 – similarly overlooked by Palmer and Levendis – Professors Newman, Terrell, and Speyrer frame the issue as whether contributions influence the voting behavior or whether expected voting behavior influences contributions. Palmer’s and Levendis’s disregard of this literature and their failure to use the Chappell logit-Tobit model constitute poor scholarship, yielding flawed statistical results. The reader is directed to the Newman, Terrell and Speyrer article published elsewhere in this Volume.

In our article we, as practicing lawyers and not statisticians or econometric experts, address the means Palmer and Levendis used to select (or omit) cases included in their statistical, albeit faulty, analysis and refute the assumptions they draw.

After receiving a draft of the article in late February 2008, we took particular note of how Palmer and Levendis selected cases for inclusion in their statistical

⁵ See Newman, Speyrer & Terrell, *A Critique of “The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function.”*

examination. According to the article as originally written, Palmer and Levendis used the following selection methods:

Our analysis included every case decided by the court from 1992 to 2006 in which there was at least one dissent. All criminal and lawyer discipline cases were excluded. [Footnote omitted.] The exclusions yielded a set of 181 cases falling within eight subject areas: torts/negligence, employment/labor, domestic relations/family law, constitutional law, government, real property, health, and ‘other.’ As previously explained, in 47% of these cases, there was at least one donor before the court who had contributed to a justice’s campaign.

Because the Tulane Law Review had refused us access to the data set to which the article referred, we attempted without success to duplicate Palmer’s and Levendis’s described Westlaw method to obtain their 181 sample of cases. Instead, our repeated Westlaw inquiries yielded 350 – not 181 – cases. The Director of the Louisiana Law Library verified our results.

We told the Tulane Law Review about our discovery and again asked for the data Palmer and Levendis had described, because we had concluded that: (1) the authors had not accurately described the research method employed; or (2) their Westlaw research technique failed to obtain the full body of cases that would be included in their self-defined study.

The Tulane Law Review declined our request without explaining the discrepancy between Palmer’s and Levendis’s portrayed research results and our Westlaw research results. Not until we received the “final” version of the article was the discrepancy resolved. In the published version of their article, Palmer and Levendis either (1) completely changed the method by which they conducted their

Westlaw research so as to gather a new data set, or (2) more accurately described their research methodology once we pointed out that, as described, their research results could not be duplicated.

This is how the Palmer and Levendis published article describes their method to isolate certain cases for inclusion in their data set:

Our analysis included every case decided by the court from 1992 to 2006 in which (1) there was a donor to a *current* justice before the court [footnote 19 omitted], and (2) there was at least one dissenting opinion. All writ applications, criminal cases, and lawyer disciplinary cases were excluded. [Footnote 20 omitted.] These criteria yielded a set of 186 cases falling within eight subject areas: torts/negligence, employment/labor, domestic relations/family law, constitutional law, government, real property, health, and ‘other.’ [Emphasis original]⁶

Gone is the data set described as consisting of at least one-dissent cases, totaling 181, of which 47 percent (85 cases) had “at least one donor before the court who had contributed to a justice’s campaign.” Now, with no apparent explanation, the “new” data set emerges: 186 cases with at least one dissent and with at least one donor. Comparing the two versions shows the percentages Palmer and Levendis quote change greatly too, usually significantly downward.⁷

In any event, Palmer’s and Levendis’s selection process, choosing only decisions with one or more dissents; ignoring unanimous decisions; and discounting

⁶ See *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL.L.REV. at 1297.

⁷ Despite this substantial change, apparently made after reviewing their mistakes that we brought to their attention, Palmer and Levendis, to our knowledge, failed to acknowledge the errors made in their initial version that was leaked to the Press.

writ of *certiorari* denials (the practical effect of which on litigants is profound), does not instruct the reader on the workings of the Louisiana Supreme Court or explain how cases are decided.

III. IS THE PALMER AND LEVENDIS DATA SET TRUSTWORTHY?

Curiously, in the published version of the Palmer and Levendis article there is no reference to the source from which Palmer and Levendis gathered the lists of contributors to judicial campaign committees from which they then selected cases (at least one dissent and at least one donor) to comprise their limited data base. In the earlier version of the article, however, Palmer and Levendis indicated they had obtained the campaign contribution information from the Louisiana Ethics Administration's Web site, <http://www.ethics.state.la.us/>. We assumed this was the public site from which Palmer and Levendis gathered the campaign contribution information, so we used that web site as well.

We first set out to check on a limited basis whether Palmer's and Levendis's data set – selected cases with votes attributed to the Justices for “plaintiff” or “defendant” and receipt of campaign contributions by “winners” or “losers” – was itself accurate. To see, we examined the contributors to Justice John Weimer's campaign committee and compared those contributors to the Palmer and Levendis data set. We selected Justice Weimer because he is the newest Justice on the Court and, therefore, he has the fewest number of cases in the data set to review.

We went to the Louisiana Ethics Administration's Web site and downloaded a list of all contributors to Justice Weimer's campaign committee for 2001 and 2002. We then looked at all parties – plaintiffs, defendants, amicus or third parties – and

their respective attorneys named in each of the cases Palmer and Levendis cited in reference to Justice Weimer. Next, we compared the parties and attorneys, to the extent possible, to the contributor list and the amount of contributions was noted and summarized.

To our great surprise, we found the Palmer and Levendis data set, at least insofar as Justice Weimer was concerned, contained substantial errors. Our comparison of the publicly-available campaign contribution reports to the Palmer and Levendis data set shows: (1) errors in the amounts of contributions; (2) contributions where none existed; and (3) cases in which Justice Weimer did not participate. A Certified Public Accountant verified those findings of errors in the financial contribution data attributed to Justice Weimer.

For instance, in *Fontenot v. Reddell Vidrine Water District*, 2002-0439 (La. 1/14/03); 836 So.2d 14, Palmer and Levendis show in their data set that Justice Weimer sided for plaintiff and that plaintiff had contributed \$2,000 to the Justice's campaign committee 14 months before the decision. Our review of the records revealed no contribution to Justice Weimer's campaign committee by plaintiff or by plaintiff's attorneys.

In *Greater New Orleans Expressway Commission v. Olivier*, 2004-2147 (La. 1/19/05); 892 So.2d 570, Palmer's and Levendis's data set attributes a \$500 contribution from the prevailing plaintiff to Justice Weimer's campaign committee, yet the public records indicate no contribution to the Justice's campaign committee from plaintiff or plaintiff's attorney.

In *Salvant v. State*, 2005-2126 (La. 7/6/06); 935 So.2d 646, the Palmer and Levendis data set shows defendant contributed \$1,000 to Justice Weimer's campaign committee fifty-seven months before the case. Our search of the public records can find no such contribution from the defendant State of Louisiana or from the State's attorneys or their law firm.

While the mistakes discussed above are bad enough, Palmer and Levendis made even bigger blunders. In *ANR Pipeline Company v. Louisiana Tax Commission*, 2002-1479 (La. 7/2/03); 851 So.2d 1145, a tax case in which five interstate pipeline companies brought claims against the Tax Commission concerning *ad valorem* taxes paid under protest, Palmer and Levendis contend that plaintiff contributed \$1,000 to Justice Weimer's campaign committee and that Justice Weimer had voted for plaintiff. But, *reading the case* shows that Justice Weimer did not vote for plaintiff or for defendant. Justice Weimer was recused from the case as unnumbered footnote * shows:

Retired Judge Walter F. Marcus, Jr., assigned as Justice *ad hoc*, sitting for Associate Justice John L. Weimer, recused.

ANR Pipeline Company, 2002-1479, *1; 851 So.2d at 1146, footnote *.⁸

In sum, even our cursory review of the cases Palmer and Levendis selected and in which Justice Weimer participated yielded errors about who contributed, the

⁸ Justice Weimer was recused because while he had served as a Judge on the Court of Appeal, he had ruled on a matter in the litigation.

amounts of contributions, and inclusion of a case in which Justice Weimer had not participated.⁹

⁹ In addition to the methodology flaws noted by several economists in a separate paper in this Volume, a review by several distinguished statisticians specifically revealed significant problems in the campaign contribution data on Justice Weimer used in the article. Frances F. Barbera, Ph.D., retired from the faculty of the Information Systems & Decision Sciences Department of Louisiana State University, and Joni A. Nunnery, Ph.D., presently on the faculty of the Louisiana State University ISDS Department, were asked to assume that the Palmer and Levendis article contained six errors out of the twenty-four cases they attributed to Justice Weimer voting in favor of a contributor. (There were in fact at least six errors, if not more, as discussed above). Professor Barbera and Dr. Nunnery were then asked to analyze and run a statistical analysis of this error rate.

According to Dr. Barbera and Dr. Nunnery, “extreme accuracy” in a data set would be one misclassified case in one hundred. In a well-done study, Dr. Barbera and Dr. Nunnery would thus expect only 0.24 misclassifications out of twenty-four cases, whereas the Palmer and Levendis article (insofar as Justice Weimer was concerned) contained six errors out of twenty-four. Assuming “extreme accuracy,” six errors out of twenty-four should occur less than one time in one million.

If only “reasonable accuracy” were expected – that being five cases out of one hundred cases being misclassified – according to Dr. Barbera and Dr. Nunnery, the Palmer and Levendis article should have had only 1.2 misclassifications out of the twenty-four cases the authors attributed to Justice Weimer. The number of Palmer and Levendis errors – six out of twenty-four – should only occur less than nine times in 10,000.

As Dr. Barbera and Dr. Nunnery related, “accurate data classification was not achieved” by Palmer and Levendis. “Moreover,” according to Dr. Barbera and Dr. Nunnery, “based on the above calculations there is evidence of gross error in the data classification which formed the foundation of the article’s conclusions. In our opinion, this is unacceptable for a ‘scientific study.’ When data is flawed, any conclusion based on the data is likewise flawed and invalid.”

Likewise, L.W. Shell, Ph.D., Distinguished Service Professor of Management, retired, Nicholls State University, read the Palmer and Levendis article along with the data set and also found numerous and significant mistakes in the data set and in the methodology the article described. For instance, Professor Shell noted that while permissible in the context of gambling or gaming, the article’s use of “odds” was inappropriate in statistics or economics. In Professor Shell’s view, the proper methodology to employ is to use probability or percentage. Professor Shell concluded the data set was methodologically flawed and incapable of producing the analysis and findings Palmer and Levendis published. In his opinion, the article

Although we are not statisticians, it seemed reasonable to surmise that errors in the data set regarding Justice Weimer would replicate in the data involving the remaining Justices. And, indeed, Palmer's and Levendis's data set contains errors as to the other Justices.

In light of the errors uncovered in the data Palmer and Levendis attributed to Justice Weimer, we set about to examine all of the cases listed in the Palmer and Levendis data set. We sought to determine: (1) if Palmer and Levendis always correctly identified the party for whom a given Justice voted; and (2) if there would be further examples of Palmer's and Levendis's wrongly attributing a ruling to a Justice in a case where the Justice did not participate. To our amazement, we found more errors, of both types, than we imagined we would. Significantly, we found errors made in the data set in over twenty percent of the opinions included in the study. In other words, in thirty-seven of the 186 opinions included in the study, the information about the case on which Palmer and Levendis based their conclusions is just plain wrong, such as how a Justice voted or even if the Justice was on the panel that decided the case. Below, in summary fashion, we cite to those cases contained in the data set where we found Palmer and Levendis erred and we identify their error. Because the copy of the data set the Tulane Law Review supplied to us was unnumbered, we manually consecutively numbered the data set pages – one through twenty – and the page number we reference is our pagination of the data set.

“should never have been published” and “Tulane Law Review should disavow this article in its entirety and retract it with apologies to the Court and its Justices.”

Here are the mistakes we found that Palmer and Levendis made in gathering and reporting their data set:

- On page 1 of their data set, Palmer and Levendis list *American Waste and Pollution Control Co. v. St Martin Parish Police Jury*, 92-1433 (La. 11/30/92); 609 So.2d 201, and their data reports that Justice Kimball ruled for plaintiff. Their data is wrong because Justice Kimball was not on the panel; rather, her predecessor on the Court, Justice Luther Cole, ruled on this case.
- On page 1 of their data set, Palmer and Levendis list *Smith v Matthews*, 92-0700 (La. 1/19/93); 611 So.2d 1377, and their data reports that Justice Kimball ruled for plaintiff; their data is wrong because Justice Kimball was not on the panel. Like *American Waste*, Justice Luther Cole was on the panel and ruled.
- On page 1 of their data set, Palmer and Levendis list *Talley v Succession of Stuckey*, 92-2298 (La. 2/22/93); 614 So.2d 55, and their data reports that Chief Justice Calogero ruled for plaintiff; their data is wrong because Chief Justice Calogero recused himself and did not participate on the panel.
- On page 1 of their data set, Palmer and Levendis list *Horton v McCrary*, 93-2315 (La 4/11/94); 635 So.2d 199, and their data claims Chief Justice Calogero ruled for plaintiff and Justice Kimball also ruled for plaintiff. Palmer and Levendis are wrong. The Chief Justice and Justice Kimball did not rule the same; instead, Chief Justice Calogero ruled with the majority while Justice Kimball dissented.
- On page 1 of their data set, Palmer and Levendis list *Stelly v Overhead Door Company of Baton Rouge*, 94-0569 (La 12/8/94); 646 So.2d 905. Palmer's and Levendis's data says Justice Victory ruled for defendant, but that is incorrect because Justice Victory was not on the panel.¹⁰
- On page 1 of their data set, Palmer and Levendis list *Martin v Champion Ins. Co.*, 95-0030 (La 6/30/95); 656 So.2d 991. Their data says Chief Justice Calogero ruled for plaintiff. But, in fact, the Chief Justice did not rule for any party in *Martin* because Chief Justice Calogero was not on the panel.
- On page 1 of their data set, Palmer and Levendis list *Garrett v. Seventh Ward Hospital*, 95-0017 (La 9/22/95); 660 So.2d 841, and report that Chief Justice Calogero ruled for defendant; Justice Johnson ruled for plaintiff; and that Justices Kimball and Victory ruled for plaintiff in a case where the Supreme Court

¹⁰ When the Court issued the *Stelly* opinion on December 8, 1994, Justice Victory was not yet on the Court. The reference to Justice Victory's willingness to grant a rehearing came after the opinion was rendered and after Justice Victory had joined the Court, starting on January 1, 1995.

affirmed the Court of Appeal's ruling in favor of the defendant-employer which ordered a reduction in benefits owed by defendant employer. Palmer and Levendis were wrong on how the Justices ruled. In fact, Justices Kimball and Victory joined in the majority opinion for defendant, not plaintiff. Chief Justice Calogero dissented in favor of plaintiff and Justice Johnson was not on the panel and so ruled for neither plaintiff nor defendant. *In sum, Palmer and Levendis made four separate errors in their data set on this one case alone.*

- On page 2 of their data set, Palmer and Levendis list *Ledbetter v. Concord General Corp.*, 95-0809 (La 1/6/96); 665 So.2d 1166, and their data claims Justice Victory ruled for defendant, but that is wrong because Justice Victory recused himself and did not participate in the case.
- On page 2 of their data set, Palmer and Levendis list *Leonard v. Parish of Jefferson*, 95-1082 (La 1/16/96); 666 So.2d 1061, and claim that Justice Kimball ruled for plaintiff; the data is in error because Justice Kimball was not on the panel.
- On page 2 of their data set, Palmer and Levendis list *Olivier v. LeJeune*, 95-0053 (La 2/28/96); 668 So.2d 347, and their data set shows that Chief Justice Calogero ruled for defendant. But the Palmer and Levendis data is wrong because the Chief Justice was not on the panel.
- On pages 2 and 3 of their data set, Palmer and Levendis list *Smith v Dep't of Health and Hospitals*, 95-0038 (La 6/25/96); 676 So.2d 543, and report that Justice Kimball ruled for defendant. That assertion is incorrect because Justice Kimball was not on the panel and did not participate in the decision.
- On page 3 of their data set, Palmer and Levendis list *O'Rourke v Cairns*, 95-3054 (La 11/25/96); 683 So.2d 697, and state that Justice Johnson ruled for defendant. Justice Johnson was not on the panel and did not participate in the case because she had recused herself.
- On pages 4 and 5 of their data set, Palmer and Levendis list *Thompson v State*, 97-0293 (10/31/97); 701 So.2d 952, and claim that Justice Kimball ruled for defendant while Justice Victory sided for the plaintiff. In fact, the Court ruled for the defendant with Justice Victory in the majority and Justice Kimball dissenting.
- On page 5 of their data set, Palmer and Levendis list *Lejano v Bandak*, 97-0388 (12/12/97); 705 So.2d 158, and claim that Justice Knoll ruled in defendant's favor; Justice Knoll did not rule either for or against the defendant because she was not on the panel and did not participate in the *Lejano* decision.
- On page 9 of their data set, Palmer and Levendis list *Banks v. New York Life Ins. Co.*, 1998-0551 (La. 7/2/99); 737 So.2d 175, and claim that Justice Kimball ruled

for defendant. But, Palmer and Levendis erred because Justice Kimball was not on the panel, having recused herself.

- On page 9 of their data set, Palmer and Levendis list *Jurisich v Jenkins*, 1999-0076 (La 10/19/99); 749 So.2d 597. As they did in *Banks* above, Palmer and Levendis wrongly attribute a vote for a party to Justice Kimball. But, as in *Banks*, Justice Kimball was not on the panel and did not participate in the *Jurisich* decision.
- On page 10 of their data set, Palmer and Levendis list *Timmons v. Silman*, 1999-3264 (La. 5/16/00); 761 So.2d 507, and say that Justice Traylor ruled for plaintiff. This is wrong because Justice Traylor ruled for the majority opinion which held for defendant. This is a striking error because Palmer and Levendis correctly noted that the dissenters, Chief Justice Calogero and Justice Johnson, ruled for plaintiff and were, therefore, not on the same “side” of the case as Justice Traylor.
- On pages 10-11 of their data set, Palmer and Levendis list *St. Bernard Police Jury v. Murla*, 2000-132 (La 6/30/00); 761 So.2d 532, and claim that Justice Traylor ruled for plaintiff. Justice Traylor was not on the panel and, therefore, did not participate in the case.
- On page 11 of their data set, Palmer and Levendis list *Carrier v. Grey Wolf Drilling Co.*, 2000-1335 (La 1/17/01); 776 So.2d 439. This time, Palmer and Levendis failed to note any vote by Chief Justice Calogero, implying that the Chief Justice was not on the panel. This is another mistake because Chief Justice Calogero was on the panel and ruled with the majority and in favor of the defendant.
- On page 12 of their data set, Palmer and Levendis list *Clark v. State Farm Mut. Auto. Ins. Co.*, 2000-3010 (5/15/01); 785 So.2d 779, and state that Justice Traylor ruled for plaintiff. This attribution is wrong because Justice Traylor dissented from the majority’s holding in favor of plaintiff.
- On page 12 of their data set, Palmer and Levendis list *Riddle v. Bickford*, 2000-2408 (La. 5/15/01); 785 So.2d 795, and claim that Chief Justice Calogero and Justice Kimball ruled for defendant. Their data set is incorrect because both Chief Justice Calogero and Justice Kimball dissented from the majority opinion that affirmed the lower court’s ruling in defendant’s favor.
- On page 13 of their data set, Palmer and Levendis list *Elevating Boats, Inc v. St. Bernard Parish*, 2000-3518 (La 9/5/01); 795 So.2d 1153, and state that Justice Johnson ruled for defendant; but Justice Johnson did not participate in the *Elevating Boats* decision.

- On page 13 of their data set, Palmer and Levendis list *Hunter v. Wal-Mart Supercenter of Natchitoches*, 2001-299 (La 10/16/01); 798 So.2d 936. Their data set has no vote for Chief Justice Calogero, but that is wrong. The Chief Justice was on the panel and ruled in favor of the defendant.
- On page 14 of their data set, Palmer and Levendis list *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 2001-1725 (La 4/3/02); 815 So.2d 27, and their data shows no votes for Chief Justice Calogero and Justices Traylor and Knoll. The data is in error because Chief Justice Calogero, Justice Traylor, and Justice Knoll were on the panel; the Chief Justice and Justice Knoll ruled for the defendant while Justice Traylor sided with the plaintiff.
- On pages 15 and 16 of their data set, Palmer and Levendis list *Industrial Co. v. Durbin*, 2002-665 (La. 1/28/03); 837 So.2d 1207. Their data claims Justices Johnson and Knoll ruled for plaintiff. But that is incorrect. Chief Justice Calogero wrote the majority opinion in favor of plaintiff from which opinion Justices Johnson and Knoll dissented.
- On page 16 of their data set, Palmer and Levendis list *Gregor v. Argenot Great Cent. Ins Co.*, 2002-1138 (La 5/20/03); 851 So.2d 959, and claim that Justices Knoll and Traylor sided with plaintiff. But the data is wrong because Justice Johnson wrote the opinion in favor of plaintiff, Justice Knoll dissented and Justice Traylor was not on panel as he had recused himself.
- On page 16 of their data set, Palmer and Levendis list *East Baton Rouge Parish School Board v. Foster*, 2002-2799 (La 6/6/03); 851 So.2d 985, and state that Justice Traylor ruled for plaintiff. That is wrong because Justice Kimball wrote the opinion favoring plaintiff from which opinion Justice Traylor dissented.
- On page 16 of their data set, Palmer and Levendis list *ANR Pipeline Co. v. Louisiana Tax Commission*, 2002-1479 (La. 7/2/03); 851 So.2d 1145. As we noted *supra*, the data erroneously has Justice Weimer voting for the plaintiff whereas in fact Justice Weimer was not on the panel, having recused himself from the case.
- On page 17 of their data set, Palmer and Levendis list *Talbot v. Talbot*, 2003-814 (La 12/12/03); 864 So.2d 590, and state that Justice Victory ruled for plaintiff. This is incorrect as Justice Knoll authored the majority opinion in favor of defendant and Justice Victory ruled with the majority and hence for defendant.
- On page 17 of their data set, Palmer and Levendis list *Hutchinson v. Knights of Columbus*, 2003-1533 (La. 2/20/04); 866 So.2d 228, which data claims that Justice Johnson ruled for the plaintiff. The data is wrong because Justice Johnson was not on the panel, having recused herself.

- On page 18 of their data set, Palmer and Levendis list *Hall v. The Folger Coffee Co.*, 2003-1734 (La 4/14/04); 874 So.2d 90, and the data states Justices Kimball and Traylor ruled for defendant; the data is in error because Chief Justice Calogero wrote the majority opinion for defendant and Justices Kimball and Traylor both dissented in favor of plaintiff.
- On page 18 of their data set, Palmer and Levendis list *Toston v. Pardon*, 2003-1747 (La. 4/23/04); 874 So.2d 791, and claim Justice Weimer sided in plaintiff's favor. Palmer and Levendis are wrong about the party for whom Justice Weimer sided. In their data set, Palmer and Levendis say six Justices, including Justice Weimer, sided with plaintiff while Justice Victory sided for the defense in a dissent. The reported case shows otherwise and, specifically, that Justice Weimer *joined* in Justice Victory's dissent and against – not for – plaintiff. The relevant portion of *Toston* is quoted below and shows that Justice Weimer did not rule in favor of the plaintiff as Palmer and Levendis mistakenly report:

**AFFIRMED IN PART; REVERSED IN PART;
REMANDED.**

VICTORY, J., dissents and assigns reasons.

WEIMER, J., dissents for the reasons assigned by VICTORY, J.

VICTORY, J., dissenting.

I dissent from the majority opinion because I agree with the court of appeal's decision which found James Pardon, the drunk driver, to be 100% at fault in causing this accident. *Toston v. Pardon*, 36,880 (La.App. 2 Cir. 5/14/03), 847 So.2d 119.

* * *

Accordingly, I respectfully dissent.

La., 2004.

- On page 18 of their data set, Palmer and Levendis list *Medine v. Roniger*, 2003-3436 (La. 7/2/04); 879 So.2d 706, and claim that Justices Kimball and Johnson ruled for the defendant. That is incorrect for Chief Justice Calogero wrote the majority opinion for defendant and Justices Kimball and Johnson dissented.
- On page 19 of their data set, Palmer and Levendis list *Louisiana Municipal Association v. State*, 2004-227 (La. 1/19/05); 893 So.2d 809, and the data reports

that Justice Johnson ruled for plaintiff. In fact, however, Justice Johnson was not on the panel and had recused herself from the case.

- On page 19 of their data set, Palmer and Levendis list *Trahan v. Coca Cola Bottling Co. United, Inc.*, 2004-0100 (La 3/2/05); 894 So.2d 1096, and state that Justices Victory and Traylor ruled for plaintiff. The data is wrong because Justice Kimball wrote the opinion for the majority affirming the judgment for plaintiff and Justices Victory and Traylor dissented.
- On page 20 of their data set, Palmer and Levendis list *Lemann v. Essen Lane Daiquiris, Inc., et al*, 2005-1095 (La. 3/10/06); 923 So.2d 627, and their data shows that Justice Johnson ruled for defendant. But the data is incorrect, because Justice Weimer wrote an opinion for the majority affirming defendant's summary judgment and Justice Johnson dissented, siding with plaintiff.
- Finally, on page 20 of their data set, Palmer and Levendis list *Salvant v. State*, 2005-2126 (La.7/6/06); 935 So.2d 646, and claim that Chief Justice Calogero sided with defendants. This is in error because Justice Victory wrote the opinion in favor of defendant-medical providers and Chief Justice Calogero dissented in plaintiff's favor.

The significant errors we identify in more than twenty percent of the cases Palmer and Levendis included in their data set call into suspicion whether *anyone* involved in the Palmer and Levendis article carefully read, let alone factually and procedurally analyzed, the cases while they compiled their questionable data set.

Palmer and Levendis do not claim they read any of the cases which comprise their data base. Instead, they report “[e]ach case was thoroughly read and analyzed by a researcher. Once the cases and contribution information were gathered, we entered our observations into a standard data table.”¹¹ Neither the reader nor we know who the “researchers” were or what qualifications they possessed to “analyze” a single case. But, the mistakes in the Palmer and Levendis data set suggest the

¹¹ Palmer and Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL.L.REV. at 1298.

“researchers” read the cases superficially at best. Palmer and Levendis acknowledge in an unnumbered footnote that “[a]ny errors that remain [in their article] are of course our own.”¹²

We, of course, did not participate in creating the Palmer and Levendis data set. But, we think we understand at least one reason the Palmer and Levendis data is compiled incorrectly. Pursuant to Act 512 of 1992, amending LSA—R.S. 13:101.1 and 13:312.4, an additional judgeship was created for the Court of Appeal for the Fourth Circuit to be elected from the First District of the Fourth Circuit. The new Judge was “immediately assigned to the Louisiana Supreme Court” and remained on that Court until a special election was held for a newly-created Orleans Parish Supreme Court district. To accommodate this eighth justice until the Court reverted to seven Justices, the Supreme Court adopted amendments to Rule IV of the Louisiana Supreme Court, effective January 3, 1993. Amended, Louisiana Supreme Court Rule IV, Part II, provided:

PART II – Assignment of Writs; Deciding Cases.

Section 1. Each of the seven elected justices and the assigned justice shall participate and share equally in the cases, duties and powers of the court. The justices shall be assigned on a rotating basis to panels of seven justices, and the cases shall be assigned randomly to the seven-justice panels for decision.

Section 2. Each application for writs shall, upon being filed, be assigned to a panel of seven of the eight justices on a rotating basis. The justice who is not assigned to a panel may nonetheless participate in discussions of the application in conference, but shall not have a vote on any such application.

¹² *Id.*

Section 3. Each writ granted for argument and opinion shall be reassigned to a panel of seven justices selected on a rotation basis, without regard to which justices participated in the grant of the writ. The seven justices on the panel will be responsible for the case through final decision and rehearing, if necessary. The justice who is not assigned to a panel may nonetheless participate in conference consideration and discussion, but shall not have a vote on the case.

In other words, from January 1993 until around September 2000, the Louisiana Supreme Court had eight members, but a panel comprised of only seven Justices – with the eighth not voting – would decide a given case. Examining the Palmer and Levendis data set, as outlined above, seems to indicate they did not understand this fact and therefore attributed to a Justice a vote in a case when, in fact, the Justice was not on the panel that decided the case. Reading the cases carefully would have revealed this information to the “researchers” who reviewed the cases and to Palmer and Levendis because the cases clearly state which of the Court’s Justices was not sitting on the panel deciding the case.¹³

Even one error should necessarily skew the findings Palmer and Levendis present; the number of errors we discovered in our review of the data set calls into doubt not only the accuracy of Palmer’s and Levendis’s underlying data, but the conclusions they draw from that data. If Palmer’s and Levendis’s data – the foundation upon which they built their thesis – is defective, their statistically-derived conclusions necessarily must fall. *Falsus in uno, falsus in omnibus.*

¹³ See, e.g., *Aucoin v. State of Louisiana through DOTD, 97-1967* (La. 4/24/98); 712 So.2d 62, where a footnote following the name of Justice Knoll, who authored the majority opinion, stated “Victory, J., not on panel. Rule IV, Part 2, § 3.” The other cited cases show the same information was available to the researchers.

IV. PALMER'S AND LEVENDIS'S ASSUMPTIONS ARE FLAWED

Even assuming for argument's sake that the Palmer and Levendis data set were accurate, their incomplete snapshot of Court decisions is flawed by several unwarranted assumptions.

Palmer and Levendis justify their limited selection of cases to those involving at least one dissent by stating:

Our rationale for limiting the study to cases involving one or more dissents was to exclude simple and routine cases and thus hopefully to capture those in which, as shown by the court's own internal disagreement, the issues were significant and difficult. The purpose of this limiting feature, therefore, was to test the question of the influence of money in significant cases.¹⁴

Palmer and Levendis take for granted – or ask the readers to accept – that limiting the scope of cases to those in which there is “at least one dissent” excludes “simple and routine” cases and captures cases involving “significant and difficult” issues. But the authors never cite any authority or studies to support their assumption nor provide the reader with specific case information upon which to accept or reject their hypothesis. Moreover, Palmer and Levendis ignore the scholarly literature that suggests unanimously-decided cases, rather than being “simple and routine” cases, are often ones involving “highly salient issues of public policy.”¹⁵ Even a cursory review of unanimous Louisiana Supreme Court decisions shows many significant ones which

¹⁴ Palmer and Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL.L.REV. at 1297-98.

¹⁵ See, e.g., Brace, Paul and Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, *Journal of Politics*, Vol. 52, No. 1, February 1990, pp. 54-58.

undermines the rationale Palmer and Levendis provide to explain their selection criteria.

Simply put, the approach Palmer and Levendis adopted suggests a lack of practical understanding of which cases the Court hears and how the Court operates as detailed below.

SUPREME COURT RULE X

First, the authors are either unaware of or overlooked Supreme Court Rule X that eliminates “simple and routine” cases from the Supreme Court’s consideration. Under the Louisiana Constitution, unlike the district courts and the five courts of appeal, excepting a narrow range of cases, including constitutional and death penalty cases, a civil litigant has no right of appeal to the Louisiana Supreme Court. Instead, a litigant who has not prevailed in the court of appeal may file a writ of *certiorari* with the Louisiana Supreme Court, asking that his or her case be accepted for review. The Court has discretion whether to grant a writ of *certiorari*.

Supreme Court Rule X sets forth the “character of the reasons” the Court considers in deciding whether to grant a writ of *certiorari* and hear a particular case.¹⁶

¹⁶ Rule X reads:

Section 1. Writ Grant Considerations.

(a) The grant or denial of an application for writs rests within the sound judicial discretion of this court. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of the reasons that will be considered, one or more of which must ordinarily be present in order for an application to be granted:

1. Conflicting Decisions. The decision of a court of appeal conflicts with a decision of another court of appeal, this court, or the Supreme Court of the United States, on the same legal issue.

As can be seen, Rule X first requires that the case or issue a litigant seeks to bring before the Supreme Court meet certain stringent considerations. Civil cases the Supreme Court *may* consider on writ of *certiorari* are those where conflicting decisions by the various courts of appeal are involved; a significant issue of law is unresolved; a controlling precedent should be examined and perhaps overturned; a court of appeal has erroneously interpreted a law or the constitution so as to “cause material injustice or significantly affect the public interest;” or where a court of

2. Significant Unresolved Issues of Law. A court of appeal has decided, or sanctioned a lower court's decision of, a significant issue of law which has not been, but should be, resolved by this court.

3. Overruling or Modification of Controlling Precedents. Although the decision of the court of appeal is in accord with the controlling precedents of this court, the controlling precedents should be overruled or substantially modified.

4. Erroneous Interpretation or Application of Constitution or Laws. A court of appeal has erroneously interpreted or applied the constitution or a law of this state or the United States and the decision will cause material injustice or significantly affect the public interest.

5. Gross Departure From Proper Judicial Proceedings. The court of appeal has so far departed from proper judicial proceedings or so abused its powers, or sanctioned such a departure or abuse by a lower court, as to call for an exercise of this court's supervisory authority.

(b) The application for writs shall address, in concise fashion, why the case is appropriate for review under the considerations stated in subsection (a) above, in accordance with Section 3 or 4 of this rule.

appeal has so far departed from proper judicial proceedings as to call for the Court's supervisory authority.

Rule X thus excludes "simple and routine" cases from those in which writs of *certiorari* are granted by the Supreme Court. Palmer's and Levendis's method of allegedly winnowing out "simple and routine" cases from those involving "significant and difficult issues" merely injects a limitation (one or more dissents) which does not rest upon any objectively-verifiable basis.

UNANIMOUS DECISIONS ARE NOT "SIMPLE AND ROUTINE"

Second, a brief review of cases the Louisiana Supreme Court has decided in which there was *no* dissent demonstrates that Palmer's and Levendis's thesis is wrong. For example, without dissent, the Court in *Albright v. Southern Trace Country Club of Shreveport, Inc.*, 2003-3413 (La. 7/6/04); 879 So.2d 121, held that denying a female member of a country club access to and service in the club's "men only" dining room violated the woman's state constitutional right to be free from arbitrary, capricious, or unreasonable discrimination based on gender. In *Louisiana Seafood Mgmt. Council v. Louisiana Wildlife and Fisheries Commission*, 1997-1367 (La. 5/19/98); 715 So.2d 387, the Court unanimously overturned the district court's ruling that a law banning the use of gill nets by commercial fishermen amounted to a taking of property without just compensation and therefore violated the takings clause of the Louisiana Constitution. Also, applying the First Amendment rights of persons to have access to public records, the Court unanimously held the divorce pleadings of a prominent businessman should be unsealed and open to the public just as everyone else's public records are. *See Copeland v. Copeland*, 2007-0177 (La. 10/16/07); 966

So.2d 1040. Although there were no dissents in these cases, surely they involved significant issues and cannot be characterized as simple and routine.¹⁷

*PALMER'S AND LEVENDIS'S "LAW REVIEW"
ARTICLE REVIEWS NO LAW*

Third, in presenting their conclusions, Palmer and Levendis fail to draw the reader to a single case or show how a particular Justice voted on the issues presented. This neglect highlights the disconnect between the authors' purely statistical approach and the real-life work of judges who address themselves diligently and impartially to specific cases with discrete issues to decide. Judges do not keep a scorecard of their rulings in favor of one party or another, nor do they decide a case by the flip of a coin. Instead, their duty is to decide particular cases on the evidence presented and on the governing law.

For Palmer and Levendis to imply judicial bias or improper influence because of campaign contributions, without the slightest consideration of any particular case or cases, strikes us as simply wrong and constitutes a disservice to the judiciary and the public. Palmer and Levendis fail to cite and discuss a single case, much less demonstrate how a case was decided erroneously.

Palmer's and Levendis's remarkable omission of any case reference is exacerbated by their simplistic division of litigants before the Court as "plaintiffs" or

¹⁷ Were Palmer and Levendis to apply their selection criterion (at least one dissent) to decisions the United States Supreme Court rendered they would exclude as "simple and routine" and not significant the landmark *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 689 (1954), a unanimous decision.

“defendants” and their attempt to draw conclusions about a particular Justice’s vote in a case either for or against an anonymous “plaintiff” or “defendant.”

Palmer and Levendis suggest that their work shows that a campaign contribution skews an expected voting pattern of a particular Justice, philosophical or otherwise. But their analytical framework is devoid of any categorization of the decisions that provides a hint as to how a Justice might be expected to rule in a given case.¹⁸ Palmer’s and Levendis’s nondescript use of the terms “plaintiff” and “defendant” provides the reader with no useful information to consider about the parties, the facts and law of any particular case, or how any individual Justice’s judicial philosophy may have played a role in the decision.

The reader is further confounded because Palmer and Levendis also included as donors a “lawyer who had donated to one of the justices’ campaigns”¹⁹ The inclusion of attorneys as donors contrasts with a study of the Ohio Supreme Court which excluded attorneys from the main findings because “[l]awyers are far more likely than other contributors to give to judges across the ideological spectrum, and they generally do not have the direct and consistent interest in the outcomes of cases

¹⁸ Scholars and authors examining judges’ decision-making processes have constructed models to show judicial ideology. See, e.g., Brace, Paul, Laura Langer, and Melinda G. Hall, 2000, *Measuring the Preferences of State Supreme Court Judges*, *Journal of Politics*, 62:387-413 (the PAJID matrix); Spaeth, Harold J., UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1997 TERMS [Computer file]. 9th ICPSR version, East Lansing, MI: Michigan State University, Dept. of Political Science [producer], 1998, Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1999.

¹⁹ Palmer & Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 *Tul.L.Rev.* at 1294.

that their many and varied clients do.”²⁰ Under Palmer’s and Levendis’s approach, if a fifty-attorney law office makes a campaign donation to Justice “A,” does that mean that every client of that law firm who appears before the Court is considered a donor? The reader has no way of knowing.

Another sign of the disconnect between the Palmer and Levendis article and the actual day-to-day work of Justices appears in their assertion that a particular Justice’s voting pattern cannot be the product of “pure chance,” that is, that it must show evidence of bias toward a contributor. The authors do not seem to consider the voting pattern might evidence honest and careful consideration of the facts and law of each particular case (the substance of which Palmer and Levendis apparently paid scant attention.) The authors apparently fail to consider, for they do not address, how a Justice’s analysis of the facts and law explains a decision in a particular case. Nor do the authors demonstrate that any case in their data set was decided incorrectly. And, contrary to Palmer’s and Levendis’s mistaken belief, cases do not come before the Louisiana Supreme Court – or any court – with a fifty percent chance of being decided one way or the other. Instead, each case arrives as a distinct, individualized matter to be reviewed and decided according to its merits, not on a coin toss.²¹

In simple terms, it is insufficient to use the terms “plaintiff” and “defendant” and then mechanically draw conclusions about why a Justice voted either for or against a nondescript “plaintiff” or “defendant.”

²⁰ THE NEW YORK TIMES, *How Information was Collected*, September 30, 2006.

²¹ See Palmer & Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul.L.Rev. at 1300-01, 1307.

V. WHY EXCLUDE WRIT OF *CERTIORARI* DENIALS?

The theme Palmer and Levendis strike is that campaign contributions to a Justice's election committee influence the way a Justice decides a case. This theory of causation leaves many questions unasked and unanswered, including this one: if campaign contributions affect outcome, how to explain the Court's denial of applications for *writs of certiorari*, some of which no doubt are filed by campaign donors, whether the party or an attorney? In other words, if cash influences judicial behavior, what explanation is there for the Court's refusal to hear a donor's case?

During the period Palmer and Levendis isolated (1992 to 2006), the Supreme Court had a total of 24,790 civil filings from which the Court rendered 2,982 civil opinions. The difference, 21,808, represents dismissed, not considered, denied, and transferred applications. Given Palmer's and Levendis's supposition, some of these other decided opinions, as well as the cases where the Court denied *certiorari*, would have included parties or attorneys who had contributed to a Justice's or Justices' campaign committee.

Palmer and Levendis ignore the obvious which undermines their idea that "campaign contributions" have "significantly influenced" the Court.²² What about those campaign contributors who failed to gain access to the Court because their writ of certiorari petitions were denied? The decision whether to grant a writ – from a donor-litigant's point of view – is as significant as a practical matter as a decision on the merits.

²² See *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL.L.REV. at 1291.

VI. CASES REVIEWED BY THE SUPREME COURT HAVE A HISTORY, A POSTURE, WITH UNIQUE FACTS AND PARTIES BEFORE THE COURT

Except in cases where a statute has been found unconstitutional and thus can be directly appealed to the Supreme Court, before any civil case is heard in the Louisiana Supreme Court, at least *four* lower court judges have considered it and rendered their respective decisions. The case is initially heard in one of Louisiana's state district courts. If a jury trial is held, generally the jurors review and decide the facts while the Judge interprets and applies the law. If it is a judge-decided case – whether decided through motion practice or after a full trial on the merits – the district court judge hears, reviews and decides the facts and applies the law. Either process, judge or jury trial, produces a judgment in which, generally speaking, one side prevails and the other side does not.²³

Second, if an appeal is taken, the appeal is heard before a Court of Appeal. Louisiana has five courts of appeal. *See* La.Const. Art. 5, §8; LSA—R.S. 13:312. On appeal, three appellate judges review both the facts and law. Where the judge or the jury below made the factual findings, the courts of appeal generally afford those findings of fact deference, although the courts of appeal are required to examine the record as a whole to determine whether the trial court's factual findings are clearly wrong or manifestly erroneous. *See, e.g., Lewis v. State of Louisiana, Through Depart. Of Trans. and Dev.*, 94-2370 (La. 4/21/95); 654 So.2d 311, 314. In

²³ There are numerous possible permutations to this general statement. For instance, an injured plaintiff may prevail on liability, but be disappointed by the amount awarded in damages. In such a case, the injured plaintiff may appeal, the liable defendant may appeal, or *both* parties may appeal.

examining the lower court's findings of law, the courts of appeal decide whether the trial court was legally correct or incorrect without affording any deference to the lower court. *See, e.g., Dixon v. First Premium Insurance Group*, 2005-0988, *5 (La.App. 1 Cir. 3/29/06); 934 So.2d 134, 139, *writ denied*, 2006-0978 (La. 6/16/06); 529 So.2d 1291; *Snyder v. Belmont Homes, Inc.*, 2004-0445, p. 3 (La.App. 1 Cir. 2/16/05), 899 So.2d 57, 60, *writ denied*, 2005-1075 (La.6/17/05), 904 So.2d 699. *Also see Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 2006-0582, *9 (La.11/29/06); 943 So.2d 1037, 1045. In disposing of the appeal, the Judges of the Court of Appeal may reverse the lower court's judgment, render their own judgment, remand the case for further action, or affirm. In an appeal of a civil matter, when a judgment of a district court is to be modified or reversed and one judge dissents, the case must be reargued before a panel of at least five appellate judges of which a majority must concur to render judgment. La.Const. Art. 5, §8(B). Thereafter, the non-prevailing party or parties and possibly both sides of the litigation may file a writ of *certiorari* to the Louisiana Supreme Court, seeking the Court's discretionary review of the underlying decision.

When a case is docketed in the Louisiana Supreme Court, it has a procedural history, a record, a myriad of factual findings and conclusions of law, prevailing and non-prevailing parties (except in those cases where both sides feel aggrieved by the

decisions below), and discrete issues presented that the Supreme Court found worthy to consider when deciding to grant the writ of *certiorari*.²⁴

To illustrate the point, we examine here one of the cases contained in Palmer's and Levendis's data set to which they refer in footnote 21 of their article. In *St. Jude Medical Office Building v. City Glass*, 619 So.2d 529 (1993), the Supreme Court addressed the issue whether the purchaser at a judicial sale of an office building had a right to intervene in the former owner's suit against the building's contractor for negligent construction. The underlying facts are briefly set forth below.

The St. Jude Medical Office Building Limited Partnership contracted with Spaw Glass, Inc. to construct the St. Jude Medical Office Building. Spaw Glass contracted with various sub-contractors. The building was completed after which the Partnership applied to Travelers for permanent financing. Travelers advanced \$25 million on the Partnership's promissory note. The note was secured primarily by a real and chattel mortgage on the building, the underlying property, and all related land and improvements. The note and mortgage contained *in rem* language limiting Travelers' default remedy to judicial sale of the property.

After closing the loan with Travelers, the Partnership discovered defects in the building's construction, including water leaks through windows and skylights and ground settling damage to the sidewalks and driveways. The Partnership ultimately sued Spaw Glass and the sub-contractors.

²⁴ As noted earlier, in considering whether to grant a writ of *certiorari*, the Supreme Court examines the important factors set forth in Rule X to determine if a case merits discretionary review.

Thereafter, the Partnership defaulted on its note. Travelers filed suit in the United States District Court for the Eastern District of Louisiana, seeking recognition of its *in rem* mortgage on the building, a judgment for the amount due on the note, and seizure and sale of the building. On November 24, 1990, the federal court entered a partial final judgment in favor of Travelers, recognizing its mortgage and awarding damages of approximately \$26 million. Travelers executed on the judgment with a writ of *feri facias* directing the marshal to seize and sell the building. Travelers acquired the building at a judicial sale for \$7.5 million.

After the United States Marshal had seized the property but before Travelers bought the building at the judicial sale, Travelers had petitioned to intervene in the Partnership's state court lawsuit against the building's contractor and subcontractors.

In response to Travelers' intervention, the defendant contractor and subcontractors filed an exception of prematurity which the district court judge granted. The Court granted Travelers leave to refile its petition if it acquired title to the building. After purchasing the building, Travelers again filed a petition of intervention, alleging that it was subrogated to the Partnership's claims for construction breaches of express and implied warranties. The Partnership and several of the defendants filed exceptions of no cause of action and no right of action.

The trial court sustained both exceptions and dismissed Travelers' petition with prejudice. Travelers appealed. The Court of Appeal, with one of the three judges concurring, affirmed the trial court's decision. *St. Jude Medical Office Building v. City Glass*, 608 So.2d 236 (La.App. 5th Cir.1992). Travelers sought a writ of *certiorari* which the Supreme Court granted. 613 So.2d 959 (La.1993).

The Supreme Court, with one dissenting justice, affirmed the Court of Appeal. In affirming the lower court, the six justices in the majority thoroughly reviewed the law, distinguishing the case *Travelers* cited in support of its alleged right to intervene, and so held that *Travelers* did not have a right of action and hence no right to intervene in the former owner's lawsuit against the contractor. *Id.*

According to Palmer's and Levendis's data set, one of six Justices had formerly received (through a campaign committee, obviously) a contribution from the prevailing party (or its attorney). But of course, Palmer and Levendis concede in their footnote 14 that they do not show "a cause and effect relationship between prior donations and judicial votes in favor of donors' positions." The outcome of the case was not decided by the Justice whose committee had received a campaign contribution, being a six to one decision (as most of the cases in Palmer's and Levendis's data set appear to be.)

Nor do Palmer and Levendis show in *St. Jude Medical Office Building* that the "donee" Justice's decision was flawed or inconsistent with prior jurisprudence. Indeed, it would be hard to characterize this decision as one expected from a judge who is considered a "plaintiff's judge" versus a "defendant's judge," terms Palmer and Levendis use, but without defining anywhere in their article.²⁵ Palmer and Levendis fail to analyze a single case on its merits, discuss the possible legal issues or approaches a court or a judge might take, or question the ultimate decision reached in any case. Finally, Palmer's and Levendis's flawed, simplistic statistics-only approach

²⁵ See *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL.L.REV. at 1303.

overlooks the fact that in *St. Jude Medical Office Building*, the Justice whose committee had earlier received a campaign contribution decided the case like *nine other judges*: the district court judge; the three judges who looked at the issue and rendered the Court of Appeal decision; and the five other Justices who were in the majority. Perhaps the better legal view on the narrow issue before the Court was the one adopted by the trial court, the intermediate court, and the six other Justices on the Supreme Court.

VII. PALMER AND LEVENDIS ASSUME, WITHOUT ANY FACTUAL SUPPORT, THAT WHEN A LITIGANT IS BEFORE THE COURT THE JUSTICES ARE AWARE OF WHETHER THE LITIGANT OR HIS ATTORNEY HAD MADE A CAMPAIGN CONTRIBUTION

Fundamental in reaching their conclusion is Palmer's and Levendis's unstated assumption that when a party appears before the Louisiana Supreme Court, the Justices know whether the party or his attorney has contributed to the Justice's campaign election committee and know the amount of the past contribution. The article's authors state no facts to support this unstated conclusion, but merely assume it is correct.²⁶

Palmer and Levendis entirely fail to acknowledge (or fail to comprehend) that candidates for election to Louisiana judicial office, including those persons seeking election to the Louisiana Supreme Court, are prohibited from personally soliciting or

²⁶ Palmer's and Levendis's "data table" is full of examples where the campaign contribution, say of \$500, was made *four, five, six, seven, eight, nine, ten or eleven years before the case was docketed, let alone decided by the Supreme Court*. It stretches belief to suggest that a Justice of the Supreme Court (1) recalls that his or her campaign committee received a \$500 contribution eight years before; and (2) with that ancient memory recalled, decided to vote in favor of the long-ago donor.

accepting campaign contributions. *See* Code of Judicial Conduct, Canon 7(D). Instead, campaign committees of responsible persons may conduct campaigns for the judicial candidate and the committee may solicit and accept campaign contributions and manage the expenditure of those funds. *See* Code of Judicial Conduct, Canon 7(D)(2) and (3).

Palmer and Levendis accord little significance to the monetary limits placed upon a campaign contribution to a judicial campaign committee. No person, corporation or PAC²⁷ may give more than \$5,000 to the campaign committee of a judicial candidate for the Louisiana Supreme Court. LSA—R.S. 18:1505.2H(1)(a)(i). This cap serves the purpose of limiting campaign contributions to any judicial candidate, a goal several professional organizations have endorsed and which limits Louisiana adopted long ago.²⁸

The authors also overlook the time period a Justice serves – ten years, *see* La.Const. Art. 5, §3 – which isolates the Justices further from any past campaign contributions their election campaign committee may have obtained. This ten year period is longer than the six year period Ohio Supreme Court Justices serve, the Court

²⁷ A PAC with over 250 members each of whom contributed at least \$50 to the PAC during the preceding calendar year and has been certified as meeting that membership requirement may give \$10,000 to a major office candidate. LSA—R.S. 1505.2H(1)(b)(i).

²⁸ *See, e.g.,* Williams, Marc E., “Welcome to the Judicial Silly Season,” *For the Defense*, March 2008, p. 1.

Liptak reported on in the New York Times and to which study Palmer and Levendis frequently refer.²⁹

VIII. PALMER’S AND LEVENDIS’S SUGGESTION OF A NEW RECUSAL RULE WOULD INVITE MISCHIEF

Palmer and Levendis suggest that judges, including Justices, should recuse themselves whenever a party or an attorney has contributed to their campaigns for election or re-election. Palmer’s and Levendis’s proposition is unworkable.

No state has adopted the proposal Palmer and Levendis advance and for good reason.³⁰ Were such an automatic rule in place, litigants or their attorneys could manipulate the system by donating campaign money to judges whose judicial philosophy and leanings the donors did not share and thereby guarantee that a particular judge or Justice would *not* hear any cases involving the donor. Rather than solving a problem that does not exist, Palmer and Levendis propose an unworkable “solution” that invites mischief and gamesmanship by attorneys and litigants to remove judges from deciding cases by doing nothing more than writing a small check to a campaign committee.

The better way to ensure campaign contributions do not influence a Justice’s decision in any given case is how Louisiana has approached the subject, namely by

²⁹ The campaign committee cannot solicit contributions for a judicial candidate’s campaign any earlier than two years before the primary election and contributions can only be solicited after the election to extinguish the campaign’s debt, if any. *See* Code of Judicial Conduct, Canon 7(D)(3).

³⁰ Louisiana law provides for recusal of any judge because of bias or partiality. LSA—C.C.P. art. 151-161. Additionally, Canon 3 of the Code of Judicial Conduct, modeled upon the American Bar Association’s Model Code of Judicial Conduct, requires a judge to “perform judicial duties without bias or prejudice.” Code of Judicial Conduct, Canon 3(A)(4).

limiting the amount and timing of campaign contributions that can be made to a judicial candidate and preventing a judicial candidate from personally soliciting or receiving a campaign contribution. Palmer and Levendis overlook the obvious: it is not reasonable to suppose that a Justice of the Louisiana Supreme Court would surrender his or her judicial integrity because of the happenstance of having either a party or an attorney before the Court who donated \$500 or \$2,500 to the Justice's campaign committee two or ten years earlier. Palmer's and Levendis's faulty, statistically-based study does not comport with real-life observations of the way Justices of our Supreme Court undertake their duties. Their barely concealed allegation is unwarranted and unfair.

Palmer and Levendis advise their readers that “[w]e began this study with no preconceptions as to what we would find, and we emerge from it with results that draw into question the voting behavior of our highest court.”³¹ But, based upon statements made to the Press it appears that Palmer had a preconceived notion when he embarked upon his study. In an interview he gave to THE NEW YORK TIMES in January 2008, Palmer related that he could not understand how justices of the Louisiana Supreme Court could routinely hear cases involving people who had given the Justices campaign contributions.³²

³¹ See Palmer & Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul.L.Rev. at 1314.

³² Liptak, Adam, *Looking Anew at Campaign Cash and Elected Judges*, THE NEW YORK TIMES, January 29, 2008.

According to Liptak’s interview with Palmer, Palmer had earlier written letters to each of the seven justices asking them to adopt a rule making disqualification mandatory in cases in which a donor was present. Six months went by without a response, so Palmer wrote again, bemoaning his use of “seven more stamps” that led to “still . . . no reply.”³³ According to Liptak, Palmer was “peeved” and “decided to take a closer look at the Louisiana Supreme Court” which led to Palmer’s and Levendis’s article.³⁴ Palmer’s reported statements to the NEW YORK TIMES indicate he *did* have a preconceived notion, despite his representations to his readers to the contrary.

IX. CONCLUSION

Our experience tells us that judges do their utmost to be fair. Naturally, each Judge or Justice must individually decide the facts and legal issues before the Court.

To the extent that Palmer and Levendis intended to provoke or contribute to the scholarly debate on the judicial selection process – whether through election or appointment – or the rules for disqualification of judges in certain circumstances, Palmer and Levendis failed. Their article, replete with errors and false assertions, contributes nothing to the ongoing scholarly debate on these public policy questions. Readers wishing to reflect intelligently upon those issues must look elsewhere.

The data set Palmer and Levendis constructed contains a myriad of substantial errors, including who contributed, the amounts of contributions, and attribution of contributions where none were made. Of more concern, the data set repeatedly

³³ *Id.*

³⁴ *Id.*

mistakenly described which Justices ruled for which side of a case and showed that a given Justice participated in a decision when, in fact, the respective Justice did not participate in the voting, had recused himself or herself from the case, or was not on the panel that decided the case. These mistakes add up to a data set so profoundly wrong as to be untrustworthy as a source from which to draw, as Palmer and Levendis did, any valid conclusions about the Court, even if statistics-only conclusions could be legitimately derived.

Even if the Palmer and Levendis data set were reliable (which demonstrably it is not), the Palmer and Levendis statistically-based analysis, lacking reference to a single case and simplistically cataloging litigants as either “plaintiff” or “defendant,” paints a false picture of our Supreme Court Justices. The *Critique* authored by Professors Newman, Terrell, and Speyrer, which demonstrates that Palmer and Levendis employed faulty methodology in their study, buttresses our belief. Our repeatedly-denied requests to the Tulane Law Review for information (specifically the underlying data used in the study) to address our concerns only confirmed to us that we are correct. At the core, the Palmer and Levendis conclusions do not withstand common sense and practical scrutiny.

CK_DOCS 400510v1