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THE REVIEW OF LITIGATION

2010 Volume 30 2011

Current Issues in Judicial Disqualifications

Michael W. Martin*

I. INTRODUCTION

In connection with the January 2011 Annual Meeting of the Association of American Law Schools (AALS) held in San Francisco, California, the AALS Section on Litigation (Litigation Section) sponsored a panel discussion on "Current Issues in Judicial Disqualification" (the Program). The AALS Sections on Professional Responsibility and Civil Procedure co-sponsored the Program, which featured a call for papers—the winners of which follow here.

Our judicial branch of government is critical to the nation's stability, and its legitimacy has allowed it to weigh in on many of this country's most divisive issues, not the least of which being *Bush v. Gore*,[1] the United States Supreme Court decision that effectively decided the 2000 presidential election. However, the legitimacy of our judicial branch depends on the impartiality of our judges.

Ten years ago, the Litigation Section spotlighted judicial bias in its 2001 annual program when it questioned the impartiality of the Louisiana Supreme Court. The court limited Louisiana's law student practice rule, effectively barring the Tulane University Law School's Environmental Clinic (Tulane Clinic) from representing community groups that had successfully blocked construction of chemical plants

* Clinical Associate Professor of Law at Fordham University School of Law and the 2010 Chair of the American Association of Law Schools' Section on Litigation.

1. 531 U.S. 98 (2000).

in low-income, largely African-American communities overburdened with environmentally hazardous businesses.[2] The Tulane Clinic's success in a string of such representations mobilized the business community, which heavily contributed to the electoral campaigns of the popularly elected Louisiana Supreme Court justices. The business community lobbied heavily for a change to the student practice rule.[3] A classic follow-the-money chart could then be drawn from the business lobbyists to the chambers of the chief justice of the Louisiana Supreme Court, who then changed the student practice rule in Louisiana to effectively bar the Tulane Clinic from representing these types of communities.[4] The Tulane Clinic case spotlighted how campaign contributions could create an appearance of bias in a judiciary reliant on such funds for re-election. More generally, it cast doubt on judges' impartiality and whether judges can be trusted to step aside if their impartiality could reasonably be called into question.

The media attention on this[5] and other examples of judges acting with apparent questionable impartiality[6] has helped fuel a potential crisis in the public's confidence in our judiciary, particularly over the question of whether our judiciary is truly impartial. This concern has spurred interesting shifts in the judicial recusal landscape in the decade that has followed the Litigation Section's 2001 Tulane Clinic-inspired program.

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2. Adam Glaser, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 GEO. J. LEGAL ETHICS 751, 751–52 (1999); Sam A. LeBlanc III, *Debate over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 225 (1999).

3. LeBlanc, *supra* note 2, at 223.

4. Glaser, *supra* note 2, at 751. The changes to the amended Rule XX were almost identical to those proposed by the business groups. *Id.* at 760.

5. *E.g.*, *Frontline, Justice for Sale* (PBS television broadcast Nov. 23, 1999); *60 Minutes II, Justice for Sale?* (CBS television broadcast Mar. 24, 2000); Ralph Blumenthal, *DeLay Case Turns Spotlight on Texas Judicial System*, N.Y. TIMES, Nov. 8, 2005, at A1; Cary Goldberg, *Judge's Speech at Abortion Rally Sets Off Dispute on Free Speech and Impartiality*, N.Y. TIMES, Mar. 22, 1997, § 1, at 18.

6. Other high profile examples include the following: Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009); Dan Collins, *Scalia-Cheney Trip Raises Eyebrows*, CBS News Politics (Jan. 17, 2003), *available at* http://www.cbsnews.com/stories/2003/12/15/politics/main588582.shtml.

II. SHIFTS IN THE JUDICIAL RECUSAL LANDSCAPE SINCE 2001

Seismic shifts in the judicial recusal landscape since 2001—an area known for its glacial pace of change—led the Litigation Section to return to the topic of judicial bias this year. Three U.S. Supreme Court cases have provided much of the momentum. First, in June 2002, the Court invalidated many restrictions on judicial campaign speech in *Republican Party of Minnesota v. White*.[7] In *White*, the Court held that judicial candidates have a First Amendment right to announce their views on issues that they may decide as judges[8] and, in doing so, opened up a debate as to whether such pronouncements threaten to undermine public confidence in judicial impartiality.

Next, in 2009, the Court ruled in *Caperton v. A.T. Massey Coal Co.*[9] that due process required disqualification of a West Virginia Supreme Court justice whose campaign received $3 million in campaign support from A.T. Massey Coal Company's CEO.[10] The CEO contributed via independent expenditures, rather than direct campaign contributions, which were limited to $1,000 under state law.[11] With Justice Kennedy writing for a 5–4 majority, the Court decided that due process required state judges to recuse themselves from cases in which a financial donor, who has played a significant monetary role in the judge's successful electoral bid to serve on the very bench before which the donor's case is pending, is a party before the court.[12] Justice Kennedy wrote that without an objective rule that requires a "realistic appraisal of psychological tendencies and human weaknesses"[13] of the judicial mind, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case."[14] Justice Kennedy's calling for an objective rule prevailed over the Justice Roberts-led dissent, which pointedly argued, "[t]here is a 'presumption of honesty and integrity in those serving as adjudicators.' All judges take an oath to uphold the Constitution and

7. 536 U.S. 765, 788 (2002).
8. *Id.* at 781–82.
9. 129 S. Ct. 2252 (2009).
10. *Id.* at 2263–64.
11. *Id.* at 2257.
12. *Id.*
13. *Id.* at 2255 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
14. *Caperton*, 129 S. Ct. at 2263.

apply the law impartially, and we trust that they will live up to this promise."[15]

Lastly, in 2010, *Citizens United v. Federal Election Commission*[16] invalidated restrictions on direct corporate expenditures concerning political issues.[17] Though not dealing directly with judicial recusal, *Citizens United* struck down a carefully crafted congressional statute meant to limit direct corporate electioneering and sent a message that campaign finance laws cannot hope to limit such electioneering. In doing so, it raised the stakes with regard to potential appearances of partiality resulting from judicial electoral processes. The scope of *Citizens United* remains a matter of debate, as reflected in the famous dustup between President Obama and Justice Alito during the 2010 State of the Union address.[18] Nonetheless, as Justice Stevens suggests in his ninety-page *Citizens United* dissent,[19] the floodgates have opened for shareholder and union money to pour into judicial elections, with only *Caperton*'s narrow limits stemming the flow.[20]

The Supreme Court's decisions in *White* and *Citizens United* exacerbated the potential for crisis in the public's confidence in the

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15. *Id.* at 2267 (Roberts, J., dissenting) (citations omitted).

16. 130 S. Ct. 876 (2010).

17. *Id.* at 896–98.

18. *See* Emily Bazelon, *Mysterious Justice*, N.Y. TIMES, Mar. 20, 2011, at MM13 (reporting the instance in which Justice Alito mouthed "not true" when President Obama referred to the *Citizens United* ruling as reversing long-standing precedent to benefit corporate interests).

19. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) ("The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races." (citation omitted)). Justice Stevens also noted that, after *Citizens United*, states "may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems." *Id.*

20. Indeed, this term, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 64 (U.S. Nov. 29, 2010) (No. 10-238), and *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-239), the Supreme Court is expected to strike down, on First Amendment grounds, a provision in Arizona's campaign finance law that would allow a publicly-financed candidate to receive public funds that would match the sum of a privately-financed opponent's contributions and the value of independent expenditures on behalf of the opponent. *Court Skeptical of Ariz. Campaign Finance Law*, NAT'L PUB. RADIO (Mar. 28, 2011), http://www.npr.org/templates/story/story.php?storyId=133961588.

judiciary by invalidating laws that protected the perceived impartiality of elected state judges. In recent years, the American Bar Association has attempted to address this crisis by amending its Model Code of Judicial Conduct (the Code), which since 1924 has been the model on which states base their codes of judicial ethics.[21] Since 1999, the ABA has added two enumerated presumptive categories of disqualification to the section of the Code addressing judicial disqualification,[22] including the disqualification of judges from (1) hearing cases involving significant campaign contributors[23]

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21. The history of the ABA's involvement with a code of ethics for judges extends back to 1924, when an ABA Committee chaired by then Chief Justice of the Supreme Court William Taft produced the Canons of Judicial Ethics, which the ABA House of Delegates adopted in 1924. *See* Preface, MODEL CODE OF JUD. CONDUCT (2004), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_preface.html (noting that the Code replaced the Canons of Judicial Ethics). Though the Canons represented the first cohesive framework to inform judges of their ethical obligations, their language was aspirational and not mandatory. In 1972, the ABA House of Delegates replaced the Canons with the Code of Judicial Conduct, which contained "mandatory standards." CODE OF JUD. CONDUCT, Preamble (1972). In 1990, the House of Delegates adopted an amended Code of Judicial Ethics (*see* MODEL CODE OF JUDICIAL CONDUCT, Preface (2004) (discussing publication of the Code)), and did so again in 2007. *See* MODEL CODE OF JUD. CONDUCT, Preface (2007) (incorporating the "housekeeping" revisions approved by the ABA Standing Committee on Ethics and Professional Responsibility).

22. Rule 2.11 of the 2007 ABA Code of Judicial Conduct, entitled "Disqualification," captures a total of six presumptive categories of disqualification and includes a residuary clause addressing when the judge's impartiality might reasonably be questioned, regardless as to whether it is covered in the six presumptive categories. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007). The six presumptive categories are: (1) personal bias in favor of or against a party or lawyer, or personal knowledge of facts relevant to the controversy; (2) the judge (or a close relation) is counsel, a party, a person with a more than *de minimis* interest, or a material witness in the case; (3) the judge (or a close relation) has an economic interest in the outcome of the case; (4) the judge has received political contributions from a lawyer or party in a case; (5) the judge has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result in a case; and (6) the judge participated as a lawyer, party, or material witness in the case prior to joining the bench. *Id.* at R. 2.11(A)(1)–(6).

23. *Id.* at R. 2.11(A)(4). The Canon left to states how many previous years contribution were made and the threshold amounts of the contributions. *Id.* Even if the amount of the donation was under the proscribed amount or the donation occurred outside of the proscribed period, a motion for recusal could still be made under Rule 2.11(A)'s residuary clause.

and (2) issues on which they had made prior public statements that would appear to commit them to the issues' resolutions.[24] In addition, in 2007, the ABA's Standing Committee on Judicial Independence launched the Judicial Disqualification Project to evaluate state judicial disqualification around the country and recommend reforms.[25]

However, also in 2007, the ABA almost downgraded the avoiding-the-appearance-of-impropriety standard from an enforceable standard to an aspirational goal, given the vagueness of the standard. Ultimately, at the urging of the Conference of Chief Justices and a number of legal organizations, the ABA retained the "appearance of impropriety" as an enforceable rule.[26]

Following the ABA's lead, states have responded to these shifts in the judicial recusal landscape. Some have revised rules to bar elected judges from hearing cases involving lawyers and others who make significant contributions to their campaigns.[27] Yet, of the twenty-nine states that have adopted the revised 2007 ABA Code of Judicial Conduct, only ten have included the provision on campaign contribution limits.[28] Although some states may have omitted the campaign contribution limit provision for purely practical reasons, such as their judges not being popularly elected, most of the states omitted the provision to avoid either the contribution limit itself or the political fight over the contribution limit.[29]

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24. *Id.* at R. 2.11(A)(5).

25. ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 JUDICATURE 12, 12 (2008).

26. *See generally* Charles Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 695 (2011); CHARLES E. [SIC] GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 17–18 (2007) (noting the inclusion of the "appearance of impropriety" language). *See also* Editorial, *The A.B.A.'s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18 (describing reinstatement of the "appearance of impropriety" standards).

27. William Glaberson, *State is Cutting Judges' Ties to Lawyers Who Are Donors*, N.Y. TIMES, Feb. 13, 2011, at A1.

28. CTR. FOR JUDICIAL ETHICS, AM. JUDICATURE SOC'Y, JUDICIAL DISQUALIFICATIONS BASED ON COMMITMENTS AND CAMPAIGN CONTRIBUTIONS 1–2 (2011), *available at* http://www.ajs.org/ethics/pdfs/Disqualificationcommitments contributions.pdf; Joel Stashenko, *State Bar Adopts Updated Judicial Conduct Code*, N.Y.L.J., Apr. 6, 2011, at 1.

29. The New York State Bar Association (NYSBA) adopted amendments to its Judicial Code of Conduct that brought it into conformity with the 2007 ABA Code of Judicial Conduct, but it did not include the contribution limit provision. Stashenko, *supra* note 28, at 1. Instead, the NYSBA chose to debate a

These developments, along with the zealous assertions of interest groups into judicial elections[30] and emerging research on the risk of judges' unconscious biases,[31] reveal that issues of judicial disqualification are more prominent than ever in litigation. The Litigation Section's 2011 Program spotlighted this shift in momentum on judicial recusal. The Program (1) explored the current landscape of the recusal rules in state and federal court; (2) reviewed the path that future revisions to the judicial recusal rules would likely take; and (3) ended with a focus on the practical effects that judicial recusal motions raise for the litigators who must make these motions. The papers that follow here are the fruits of that discussion.

III. OVERVIEW OF THE PAPERS

Four papers follow herein and focus on (1) the current state of the recusal rules and law in the federal courts; (2) a vision of the recusal rules moving towards a more procedural-based regime, where discretion is lessened and the goal of the appearance of impartiality trumps the aim for judicial efficiency; (3) a more tempered view of change with procedural-based reform, but otherwise maintaining the current appearances-based model that allows for greater discretion and judicial efficiency; and (4) a call for First Amendment protection for lawyers making colorable recusal

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contribution limit separately, as it is now entertaining a rule proposed by the chief judge of the state's highest court to require recusal of judges in cases involving parties or lawyers who have contributed $2500, or law firms that have contributed $3500, to the judge's campaign. *Id.*

30. *See* Press Release, Brennan Ctr. for Justice at New York University School of Law, TV Ad Spending By Special Interest Groups Tops $1 Million in Wisconsin Judicial Election (Mar. 3, 2011), *available at* http://www.brennancenter.org/content/resource/tv_ad_spending_by_special_interest_groups_tops_1_million_in_wisconsin_judic/ (identifying three interest groups which spent more that $1.14 million on TV ads during the last Wisconsin Supreme Court election).

31. *See generally* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (concluding that judges are not immune from implicit biases); Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569, 1592–95 (2010) (discussing how partisan elections may cause judges to distribute justice based on political contributions).

motions to preserve their clients' rights to an impartial judge.

A. *Honorable M. Margaret McKeown's Overview of the Federal Recusal Scheme*

The Honorable M. Margaret McKeown, a distinguished federal appeals judge on the Court of Appeals for the Ninth Circuit and the Chair of the Committee on Codes of Conduct of the Judicial Conference of the United States (Judicial Conference Committee on Codes of Conduct), provides an overview of the recusal rules in the federal courts, while also cautioning against overreaction to episodic publicity that obscures the effectiveness of the current recusal regime. Judge McKeown, who has testified before Congress on judicial disqualification issues, summarizes 28 U.S.C. §§ 144 and 455(a), which formally govern judicial recusal for federal judges.[32] Judge McKeown then shows how the recusal statutes dovetail with the Codes of Conduct for United States Judges, which apply to all federal judges, except for the Justices of the United States Supreme Court. She also reviews the functioning of the Judicial Conference Committee on Codes of Conduct, which annually issues approximately 100 advisory opinions and 1,000 responses to informal requests, giving fascinating insight into how the committee assists judges around the country with ethical quandaries, often within days. Practically speaking, the issue of recusal in the federal judiciary is far less controversial than in the state system because of the lack of publicly elected judges. Nonetheless, as Judge McKeown notes, the substantial procedural requirements in the federal system, coupled with the high degree of professionalism among the federal judiciary, minimizes the potential for judicial recusal controversy in the federal system. Indeed, even where a recusal issue may be less clear, Judge McKeown's Committee assists in ensuring that the judges get it right. Judge McKeown's analysis suggests that further procedural reform at the federal level is unnecessary and may come at the cost of inefficiencies of frivolous motions, if not outright judge shopping.

32. 28 U.S.C. §§ 144 & 455(a) (2006).

B. Professors Charles Geyh and Jeffrey Stempel Debate Future Approaches to the Recusal Rules

Professors Charles Geyh[33] and Jeffrey Stempel[34] offer competing views on the future of judicial recusal rules. Both see error in the commonly held view that disqualification motions and attorney allegations of partiality or bias are an affront to the individual judge's personal judicial integrity and find this dynamic to be at the core of the problem. They differ in that Professor Geyh seeks procedural reform to rein in a judiciary unable to believe that reasonable jurors might question its impartiality, while Professor Stempel, perhaps quixotically, holds out hope that judges can move away from viewing recusal motions as personal attacks.

Professor Geyh first reviews the history of judicial disqualification to highlight four distinct regimes: (1) an almost iron-clad common-law presumption of impartiality, in which courts refused to entertain even the possibility of judicial bias; (2) a statutory approach based on conflict of interest, in which judges were required to disqualify themselves when confronted with specifically enumerated conflicts of interest in a statute; (3) a disqualification procedure that required judges to recuse themselves automatically if aggrieved parties made specified allegations pursuant to specified procedures; and (4) an appearances-based regime that organizes disqualification standards around the principle that a judge should step aside when her impartiality "might reasonably be questioned."[35] Professor Geyh notes how vestiges from each regime remain, "coexisting peacefully at some times and uneasily at others."[36]

Professor Geyh then spotlights the "disqualification paradox" for judges: in taking their judicial oath of office, judges commit themselves to being and appearing to be impartial, and yet, the disqualification rules require judges to find themselves not to be, or

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33. Professor Geyh is the Associate Dean for Research and John F. Kimberly Professor of Law at Indiana Bloomington School of Law, the Director of the ABA Judicial Disqualification Project, and the Reporter to four ABA Commissions relevant to judicial recusal, including the Joint Commission to Evaluate the Model Code of Judicial Conduct.

34. Professor Stempel is the Doris S. and Theodore B. Lee Professor of Law at the University of Nevada at Las Vegas.

35. Geyh, *supra* note 26, at 675.

36. *Id.*

not to appear, impartial. This inherent tension suggests that most judges would find themselves to be impartial despite facts that might cause parties to reasonably question the judges' impartiality. As such, the paradox favors procedural-based reform that creates greater distance between the judge and the decision to recuse, through such procedures as assigning disqualification petitions to a different judge; subjecting disqualification to the adversarial process; requiring reasoned explanations for disqualification rulings; adopting substitution procedures for trial judges; subjecting non-disqualification decisions to de novo review; establishing a process for review of non-disqualification by appellate judges; and devising procedures to replace disqualified appellate judges. In suggesting these procedures, Professor Geyh attempts to manage the judiciary's chronic ambivalence to disqualification by encouraging judges to appreciate the dual psychological impediments to judicial self-evaluation: a lack of recognition of their own biases and an inability to see themselves and their actions as the public might reasonably perceive them. Thus, the innocuous behavior that gives rise to an appearance of partiality should not result in an inference of impropriety. Professor Geyh also makes a persuasive case for procedural reform by suggesting that ensuring judicial impartiality and the public's confidence in the judiciary is worth the inefficiencies procedural reforms will likely engender.

Professor Stempel would not abandon an appearance-based review in favor of Professor Geyh's call for a procedural-based regime. He accepts Professor Geyh's call for procedural reform but only as a buttress to an appearance-based model. The appearance-based regime focuses on what reasonably objective people might feel about a judge's impartiality in a given situation, and, according to Professor Stempel, this construct appropriately underlies the recusal analysis. Both Professors Geyh and Stempel agree that "traditionalist judges"—those less likely to recuse themselves and a substantial majority of judges overall—hold a strong presumption of judicial impartiality and look for overwhelming evidence that their impartiality can reasonably be called into question. These judges either dismiss or are otherwise unaware of cognitive biases that cast doubt on this traditionalist notion of presumed impartiality. Both professors also believe only that a modest presumption of judicial impartiality should reign. Professor Stempel breaks with Professor Geyh by insisting that judges can and should change their views as to this presumption of impartiality and, consequently, should recuse

when an appearance-based review requires them to step away.

Professor Stempel argues that judges must accept an enhanced conception of a "reasonable question" as to impartiality and that "consensus—or even a clear majority view"—is unnecessary to justify recusal.[37] Professor Stempel believes judges must be significantly more aware of their biases. With this awareness, judges will be far less inclined to adopt such a strong presumption of their impartiality. Thus, both a stronger definitional sense of the appearance of fairness and some substantial judicial consciousness-raising are necessary. In addition, Professor Stempel would use the procedural reforms identified by Professor Geyh to improve upon the dominant appearance-based review currently in use. Professor Stempel acknowledges that a strengthened procedural approach to judicial disqualification is critical to enhancing judicial impartiality and public confidence in the courts, even at the cost of some attendant logistical burdens. However, he insists that there must also be a broadened definition of the existence of a "reasonable question" as to impartiality and greater sensitivity on the part of the bench, the bar, and the public.

While Professor Geyh might agree with Professor Stempel that judges should change their enhanced presumption of their own impartiality, he is less optimistic that judges will in fact do so. Therefore, Professor Geyh relies on procedural reforms to overcome this bias in favor of finding impartiality. Professor Stempel concedes that his vision for improving the recusal regime may not be attainable in the current climate: "Jurists—particularly at the Supreme Court level—have occasionally shown a disturbing defensiveness, insensitivity, and even some seeming ignorance regarding the area . . . . Until the judiciary accepts this notion, litigants are inadequately protected from potential judicial bias and public confidence is inadequately nurtured."[38]

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37. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 739 (2011).

38. *Id.* at 740.

C. *Professor Margaret Tarkington's Call for First Amendment Protection for Lawyers Who Impugn Judicial Integrity in the Context of Recusal Motions*

Akin to Alice's needing to be able to tell the Queen of Hearts that her croquet game is fundamentally flawed without fearing the Queen's wrath ("Off with her head!"),[39] Professor Margaret Tarkington[40] argues that lawyers should have a free speech right to make colorable arguments in court proceedings and to preserve the constitutional rights of clients. Recusal motions are ripe for this protection. The Court in *Caperton* found that an individual's due process rights could be violated if a judge declined to recuse herself.[41] A lawyer's duty to protect her client includes making motions that would ensure the due process rights of her client. As Professor Tarkington notes, judges tend to react sharply to having their impartiality questioned, and, in a number of instances, judges have punished attorneys for speech questioning judicial impartiality, even when done as part of a motion to disqualify a judge. Professor Tarkington also shows that the *Caperton* majority rightfully viewed disqualification as being disassociated with reputational harm to the judiciary and, as such, not warranting punishment.

The inherent risks associated with the recusal motion further suggest that punishment for such motions is unnecessary. Any litigator knows that to question a judge's impartiality is to take an enormous *strategic* risk in the litigation, given there is no guarantee that the motion will be granted. This is a powerful deterrent to unwarranted recusal motions. But even if that were not enough, attorneys also face the strictures of Federal Rule of Civil Procedure 11 and Model Rule of Professional Conduct 3.1, which require a reasonable basis in fact for such motions. Thus, as Professor Tarkington persuasively argues, Free Speech Clause rights in the

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39. LEWIS CARROLL, ALICE IN WONDERLAND 121–25 (The MacMillan Co. 1897).

40. Professor Tarkington is an Associate Professor of Law at Brigham Young University School of Law. Her scholarship has examined the punishment of attorney speech, which in the context of good faith representation of clients, is critical of the judiciary. *See* Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 363 (2010) (discussing why a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court proceedings).

41. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009).

context of recusal motions would only eliminate the lawyer's personal risk that such motions might fall within the bounds of Rule 11 and the Model Rules of Professional Conduct—*i.e.*, motions made with a good faith basis.

IV. CONCLUSION

Public confidence in the judiciary's integrity is critical, and public trust that judges will remain impartial is crucial to that integrity. All of the authors in this symposium recognize the need to ensure that judges, attorneys, litigants, and the public cease equating disqualification with reputational harm and thus with potential discipline for impugning judicial integrity. This may be the lynchpin in ensuring that judicial impartiality—in fact and appearance—remains a hallmark of our judicial branch. Until that re-education is accomplished, it may be time to pass procedural reforms that seek to limit the discretion of judges less inclined to find that a reasonable observer might find a lack of impartiality in recusal motions.

To Judge or Not to Judge: Transparency and Recusal in the Federal System

The Honorable M. Margaret McKeown*

Following the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*,[1] in which the Court held that a state supreme court justice should have recused[2] himself as a matter of due process, media interest and public scrutiny of judicial recusal issues have escalated. Although *Caperton* highlights a campaign contribution question specific to elected judges,[3] the truth is that the courts and the public have long focused on the importance of judicial impartiality.[4] Indeed, "[w]hether it is the United States Supreme

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* Judge M. Margaret McKeown sits on the United States Court of Appeals for the Ninth Circuit and chairs the Judicial Conference of the United States Codes of Conduct Committee. She is a past member of the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct and lectures extensively on judicial ethics. The views presented here are her own. She thanks her law clerks, Rupa Singh (New York University School of Law 1999) and Laurie Ball (Yale Law School 2010), for their research assistance. This article is adapted from Judge McKeown's presentation on judicial recusal as part of the Association of American Law Schools Section on Litigation Symposium, Current Issues in Judicial Disqualification: Assessing the Landscape Post-*Caperton*, *Citizens United*, and the 2007 ABA Model Code for Judicial Conduct (January 7, 2011), and her testimony before the House Committee on the Judiciary, *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey: *Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 6–20 (2009).

1. 129 S. Ct. 2252 (2009).

2. The terms recusal and disqualification are used interchangeably.

3. In *Caperton*, the court held that due process required disqualification of a justice because of extraordinary corporate contributions to his election campaign from executives of a company with a case pending before the court. Caperton v. Massey, 129 S. Ct. 2252, 2265 (2009).

4. *See, e.g.*, Adam Liptak, *When a Judge Offers an Opinion Away From the Bench*, N.Y. TIMES, Apr. 16, 2007, at A12 (discussing possible disciplinary action

Court, the federal . . . bench, a state supreme court, or a county court, public scrutiny is rigorous."[5] The issue, however, need not reach constitutional proportion to have practical meaning.

Federal judges are bound by the broad, ethical admonition to avoid both actual bias and circumstances "in which the judge's impartiality might reasonably be questioned."[6] The mandate to avoid even the appearance of impropriety requires judges to engage in a thoughtful inquiry about actual or apparent conflicts arising from their conduct, relationships, financial holdings, and personal views, and to foster trust in a fair and transparent judiciary, regardless of the level of episodic publicity or scrutiny.

This article provides a brief overview of the recusal standards that apply to federal judges, outlines the extensive framework through which the judiciary seeks to abide by the recusal rules to accord each case a fair and impartial forum, and explains the role that the Judicial Conference of the United States Codes of Conduct Committee ("Codes Committee") plays in advising judges on ethics issues, including recusal.

I. THE PERCEPTION AND THE REALITY OF JUDICIAL RECUSAL

Public discourse about recusal is a positive development, yet media coverage is often anecdotal and obscures the reality of a robust disqualification regime. This may be because it often focuses on the egregious conduct of a few individual judges.[7] Rarely has a

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against state appeals court judge); Tony Mauro, *Judicial Ethics Draw Increased Scrutiny*, 29(5) LEGAL TIMES, Jan. 30, 2006, at 12 (discussing judicial ethics developments); Maggie Barron, *Impartiality Still an Issue After WV Judge's Riviera Scandal*, BRENNAN CENTER FOR JUSTICE, (May 15, 2008), http://www.brennancenter.org/blog/archives/impartiality_still_an_issue_aftre_wv_judges_riviera_scandal/ (discussing a relationship between a West Virginia Supreme Court justice and a litigant).

5. Hon. M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 45 (2005).

6. 2 ADMIN. OFFICE OF THE U.S. COURTS, *Code of Conduct for United States Judges*, GUIDE TO JUDICIARY POLICIES AND PROCEDURES pt. A, ch. 2, Canon 3C(1) (2009), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf [hereinafter *Code of Conduct*].

7. For example, the financial and other improprieties that led to the recent impeachment of Judge G. Thomas Porteous, including his failure to recuse himself from cases in which he had conflicts based on financial or business dealings, stand

controversy arisen over a judge's decision to recuse in a case. Rather, the cascade of publicity has arisen in cases where the judge decided *not* to recuse.[8] This episodic publicity obscures the day-to-day workings of a disqualification system in which judges routinely recuse from cases in which the judge holds a financial interest, has a close friend, relative, or recent law partner involved in the case, or concludes that even though there is no bias "the judge's impartiality might reasonably be questioned."[9]

Apart from media reports, judicial decisions provide an informative overview of the recusal process. An electronic search reveals that the recusal process is alive and well. In 2009, federal circuit courts issued at least sixty-nine published opinions and nonprecedential (but publicly available) decisions addressing recusal under the primary federal recusal statute, 28 U.S.C. § 455.[10] In 2010, these courts issued nearly ninety decisions addressing recusal under the statute. Federal trial courts handed down many more decisions on recusal, and trial judges recused themselves in thousands of cases.

Looking back over the last decade, published decisions suggest that litigants have not shied away from challenging judges. It is no surprise that the decisions on recusal motions run the gamut. As would be expected, recusal is not required for challenges based on substantive legal determinations,[11] unfavorable rulings,[12] adverse

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out as exceptional instances, hardly representative of the federal judiciary. Pamela A. MacLean, *Federal Judiciary Asks House to Impeach Louisiana Judge*, NAT'L L.J., (June 20, 2008), http://www.law.com/jsp/article.jsp?id=1202422429431&slreturn=1&hbxlogin=1. Indeed, the Judicial Conference of the United States recommended Congress begin impeachment proceedings against Porteous, based largely on his failure to follow ethical canons. *Id.*

8. *See* Barron, *supra* note 4 ("[J]udges and justices across the country are not recusing themselves when their impartiality is in question, like when they have accepted large campaign contributions.").

9. *Code of Conduct*, *supra* note 6, at Canon 3C(1).

10. Figures in this paragraph are based on a Westlaw search for 28 U.S.C. § 455. The results were filtered to include only cases substantively addressing recusal of federal judges under the statute.

11. Wright v. Comm'r of Internal Revenue, 571 F.3d 215, 220 (2d Cir. 2009) (holding recusal was not required due to the denial of pre-trial motions or on remand from the appellate court).

12. Draper v. Reynolds, 369 F.3d 1270, 1279 (11th Cir. 2004) (holding that a

evidentiary findings,[13] or dissatisfaction with case management techniques.[14] The cases also deal with more nuanced issues, such as a judge's spouse's indirect connection with a law firm.[15]

Nor can a judge be faulted for failing to recuse where there is no conflict and a motion requesting disqualification has never been filed. In one high-profile case involving a former governor and a corporate executive, the appellate court affirmed the district court's denial of a motion to disqualify the judge.[16] Not only was the motion filed over nine months *after* trial, but it was based on information readily available before trial (from the judge's financial disclosure reports), lacked merit due to the attenuated nature of the alleged financial interests, and had "all the earmarks of an eleventh-hour ploy based upon [the defendant's] dissatisfaction with the jury's verdict and the judge's post-trial rulings."[17] In some cases, recusal motions are simply frivolous,[18] or border on harassment or intimidation.[19]

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prior adverse ruling against the counsel was not grounds for recusal); Cooney v. Booth, 262 F. Supp. 2d 494, 501 (E.D. Pa. 2003) (finding mere speculation as to allegedly improper bases for judicial rulings does not warrant recusal).

13. United States v. Lentz, 524 F.3d 501, 530–31 (4th Cir. 2008) (holding that a trial judge's determination of admissibility of testimony did not constitute prejudgment on the issue of guilt).

14. Scenic Holding, LLC v. New Bd. of Trs. of Tabernacle Missionary Baptist Church, 506 F.3d 656, 663–65 (8th Cir. 2007) (holding that routine trial administration, including judge's conduct during cross examination and prior rulings in related hearings, was not grounds for recusal); United States v. Wecht, 484 F.3d 194, 218 (3d Cir. 2007) (holding that trial judges have broad discretion in managing cases and case management techniques; therefore, allowing filings under seal does not demonstrate bias).

15. O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 987–89 (7th Cir. 2001) (holding that a judge's spouse's distant connection with a law firm representing a party does not require recusal).

16. *See* United States v. Siegelman, 561 F.3d 1215, 1243 (11th Cir. 2009) (per curiam) (upholding denial of an untimely motion to recuse based on the party's opposition to the judge's confirmation twenty years prior), *vacated on other grounds,* 130 S. Ct. 3542 (2010).

17. *Siegelman*, 561 F.3d at 1243.

18. Swan v. Barbadoro, 520 F.3d 24, 25–26 (1st Cir. 2008) (per curiam) (holding frivolous a motion for recusal of all Circuit judges based on the plaintiff's naming three of the Circuit's judges in earlier litigation in an effort to impugn tax violation convictions).

19. Smartt v. United States, 267 F. Supp. 2d 1173, 1177 (M.D. Fla. 2003) (stating that a party may not force recusal or intimidate a judge through baseless ethical attacks).

Yet other cases present legitimate grounds for recusal, and even where the trial court may decline to recuse, the appellate courts have stepped in to mandate recusal. Emblematic of these cases are recusals due to relationships,[20] ex parte contacts,[21] injection of a judge's personal views into the judicial process,[22] and the appearance of impropriety based on a judge's prior involvement in a party's case.[23]

And finally, recusal issues have arisen in the context of judicial security, which remains a compelling concern in the judiciary. Threats against judges are on the rise,[24] but even so, not every threat merits recusal. Courts have distinguished between genuine threats that are grounds for disqualification and other threats that do not rise to that level.[25] The courts consider all of these recusal issues in the context of a broad framework of statutory and ethical principles outlined below.

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20. Moran v. Clarke, 296 F.3d 638, 649 (8th Cir. 2002) (noting that the depth and duration of personal relationships must be considered when contemplating recusal).

21. *In re* Kensington Int'l, Ltd., 328 F.3d 289, 316 (3d Cir. 2004) (holding that recusal was required where an ex parte communication with advisors created the appearance of partiality).

22. *In re* Boston's Children's First, 244 F.3d 164, 171 (1st Cir. 2001) (holding that a judge's comments on the merits of a pending petition creates the appearance of impropriety and requires recusal); United States v. Snyder, 235 F.3d 42, 48 (1st Cir. 2000) (affirming a district court judge's sua sponte recusal due to inability to apply sentencing guidelines based on personal belief).

23. United States v. Lindsey, 556 F.3d 238, 247 (4th Cir. 2009) (vacating the defendant's sentence because the sentencing judge had been involved in the defendant's case years earlier).

24. EVALUATIONS AND INSPECTIONS DIVISION, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, PROTECTION OF THE JUDICIARY AND FEDERAL PROSECUTORS 1 (2009), *available at* http://www.justice.gov/oig/reports/plus/e1002r.pdf.

25. *In re* Basciano, 542 F.3d 950, 956–58 (2d Cir. 2008) (considering both the severity or plausibility of the threat and the judge's subsequent behavior and holding recusal not necessary in response to an insincere threat by defendant); *In re* Nettles, 394 F.3d 1001, 1002–03 (7th Cir. 2005) (holding that a genuine threat against the judge that amounts to more than an effort to disqualify the judge requires recusal).

II. THE LAW GOVERNING FEDERAL JUDICIAL RECUSAL

Since 1792, one or more federal statutes have compelled judges to disqualify themselves from proceedings due to impartiality concerns. Originally limited to requiring recusal when a judge had a financial interest in the suit or had represented a party,[26] the statutory bases of recusal have been expanded over time to include a judge's disability, bias, and relationship to a party or its counsel.[27] Two key statutes now formally govern federal judicial recusal: 28 U.S.C. § 144 and 28 U.S.C. § 455(a). Section 144 narrowly permits a party to file an affidavit to attempt to establish personal bias or prejudice of a district court judge.[28] Section 455, which functions as the primary recusal statute, is broader: it requires federal judges[29] to recuse themselves when their "impartiality might reasonably be questioned" and in five other specific circumstances.[30] In addition to these two provisions, a variety of other ethics statutes apply to the judiciary specifically and to federal officials generally.[31] The Judicial Conference of the United States imposes further ethical

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26. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (repealed 1911).

27. *See, e.g.*, Act of June 25, 1948, ch. 646, 62 Stat. 908 (expanding recusal due to the judge's relationship with the party's counsel); Act of Mar. 3, 1911, Pub. L. No. 61-475, §§ 20–21, 36 Stat. 1087, 1909 (enacting a provision requiring recusal if a judge was a material witness, expanding the basis of recusal to include bias in general, and further amending the provision governing judicial disability); Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (repealed 1911) (expanding basis of recusal to include any relationship or connection with a party that the judge felt would make it improper to sit); Act of Mar. 2, 1809, ch. 27, 2 Stat. 534 (repealed 1911) (revising provisions for dealing with situations where district judge was disabled).

28. 28 U.S.C. § 144 (2006).

29. Section 455 is applicable to "[a]ny justice, judge, or magistrate judge of the United States." 28 U.S.C. § 455 (2006).

30. *Id.* at § 455(b).

31. *See, e.g.*, 28 U.S.C. § 454 (2006) (forbidding judges from engaging in the practice of law); 28 U.S.C. § 47 (2006) (prohibiting judges from hearing an appeal from a decision in a case tried before them); 28 U.S.C. § 458 (2006) (disallowing appointment or employment of judges' relatives within the same court); 5 U.S.C. § 3110 (2006) (precluding public officials from appointing, employing, or promoting relatives in any agency in which they serve or over which they exercise jurisdiction); 5 U.S.C. §§ 501–505 (enacting, as amended, the Ethics Reform Act of 1989, which limits federal officials' ability to solicit or accept outside earned income, outside employment, honoraria, and gifts); *Code of Conduct*, *supra* note 6, at Canon 3C(1) (providing a non-exhaustive list of instances in which federal judges should disqualify themselves).

constraints through the Code of Conduct for United States Judges (the "Code of Conduct"), which includes general requirements to maintain judicial fairness and integrity[32] and specific provisions to guide judges in avoiding actual and apparent conflicts.[33] The Code of Conduct both parallels and expands on the recusal statutes.

A. A Brief History of the Canons of Judicial Ethics

Modern-day judicial ethics codes can be traced to two disparate sources: Roman law and baseball. Under the Roman Code of Justinian, a party who deemed the judge "under suspicion" was permitted "to recuse him before issue joined, so that the cause go to another."[34] Recusal based on "suspicion" of bias continued in civil law countries, though common law countries initially required disqualification only on the basis of direct financial interest.[35] In the twentieth century, the United States revived the principle that judges should avoid even the appearance of bias after a sports scandal brought to light inadequacies in the judicial ethics regime.

In what would later become known as the Black Sox scandal, eight baseball players with ties to the underworld "threw" the 1919 World Series between the Chicago White Sox and the Cincinnati Reds. When the scandal became public, team owners asked a prominent federal district court judge in Chicago, Kenesaw Mountain Landis, to serve as the first Commissioner of Baseball for significant compensation.[36] Landis's agreement to serve

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32. *See Code of Conduct*, *supra* note 6, at Canon 3A(1) ("A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.").

33. *See, e.g.*, *Code of Conduct*, *supra* note 6, at Canon 3C(1)(d)(iii) (requiring disqualification where the judge, the judge's spouse, a person related to either within the third degree of relationship, or the spouse of such a person is "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding").

34. McKeown, *supra* note 5, at 46.

35. *Id.*

36. Hon. Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 915–16 (2007); *see also* J.G. Taylor Spink, JUDGE LANDIS AND 25 YEARS OF BASEBALL 72 (1947) (discussing Landis's agreement to serve as Commissioner). For a discussion of Landis's role, *see* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180–82 (1974) (discussing Landis's

simultaneously as a judge and the baseball commissioner drew widespread criticism because it seemed to exploit his prestige as a federal jurist for financial and other private gain.[37] Amidst congressional calls for his impeachment, the American Bar Association ("ABA") censured Landis in 1921 for undermining public confidence in judicial independence.[38] Landis resigned from the bench the following year.[39]

The Landis affair highlighted the dearth of ethics guidelines for judges. In response, the ABA in 1922 appointed recently confirmed Chief Justice William Howard Taft to chair a Commission on Judicial Ethics.[40] Two years later, the ABA adopted the Canons of Judicial Ethics proposed by the Commission, purely as a declaration of what judges should aspire to and what was expected of them.[41] The original thirty-six canons included an important principle that remains in the Code of Conduct today: A judge should avoid both impropriety and the appearance of impropriety in all activities.[42]

In 1972, the ABA Model Code of Judicial Conduct replaced the original Canons of Judicial Ethics, reducing the number of canons to seven and significantly revising the disqualification provision.[43] The adoption of an objective disqualification standard

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role after the scandal).

37. Bowie, *supra* note 36, at 916.

38. *American Bar Association Forty-Fourth Annual Association Meeting*, 7 A.B.A. J. 470, 477 (1921).

39. Bowie, *supra* note 36, at 917.

40. Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273 (2007).

41. *Id.*; ABA ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 3 (Arthur Garwin, ed., 2004).

42. MACKENZIE, *supra* note 36, at 190; *Code of Conduct*, *supra* note 6, at Canon 2.

43. *Compare* CANONS OF JUDICIAL ETHICS Canon 29 (1924), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924canons.authcheckdam.pdf (providing that a judge "should abstain from performing or taking part in any judicial act in which his personal interests are involved") *with* MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) (expanding greatly the provisions on disqualification). *See also* AMERICAN BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT Preface (1990), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_preface.html (outlining briefly the history of the Model Code of Conduct); Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV.

shifted the inquiry from a judge's subjective view of whether recusal was appropriate, to whether the judge's "impartiality might reasonably be questioned."[44]

In 1973, the Judicial Conference adopted the Code of Conduct for United States Judges, which was virtually identical to the 1972 ABA Model Code with only "slight variations."[45] In the aftermath of significant changes to the ABA Model Code, the Code of Conduct has undergone two major revisions, first in 1992 and then again in 2009.[46] The Code of Conduct, in contrast to the ABA Model Code, has retained the important aspirational approach.

Of particular relevance here, Canon 3 of the Code of Conduct exhorts that "[a] judge should perform the duties of the office fairly, impartially, and diligently,"[47] whereas the specific disqualification provision of the Code, Canon 3C, and § 455 mandate that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[48] Congress added this objective recusal standard to the statute in 1974.[49] The choice to incorporate an objective standard was noteworthy because it eliminated a doctrine that had developed in the decade before the amendment known as "the duty to sit."[50] In 1964, the Fifth Circuit Court of Appeals articulated the duty to sit doctrine as follows: "It 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."[51] As Justice William Rehnquist noted in a 1972 memorandum decision

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1337, 1352 (2006) (describing the process by which the ABA replaced judicial canons with the 1972 Code of Judicial Conduct).

44. *See* MACKENZIE, *supra* note 36, at 190 (listing canons relating to the appearance of impropriety); *see also* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 8–9 (1973) (discussing Canon 2 and the disqualification of judges).

45. Lievense & Cohn, *supra* note 40, at 276.

46. *Code of Conduct*, *supra* note 6, Introduction.

47. *Code of Conduct*, *supra* note 6, at Canon 3C.

48. *Id.*; 28 U.S.C. § 455(a) (2006). Canon 3C mirrors § 455, but with slightly different wording.

49. Bowie, *supra* note 36, at 932; *see also* Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609 (outlining the objective recusal standard).

50. Bowie, *supra* note 36, at 932.

51. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (citations omitted).

explaining his determination not to recuse in a particular case, the duty to sit came to be accepted by all circuit courts.[52]

The 1974 amendment to § 455 abolished the duty to sit doctrine and its corresponding presumption against recusal, and harmonized the statutory and ethical recusal standards.[53] Instead, federal judges are now governed by the "general proposition that, in the absence of a legitimate reason to recuse [one]self, a judge should participate in cases assigned."[54] This proposition recognizes the importance of judges hearing cases absent a reason for recusal. Absent this proposition, judges could "pick and choose [their] cases, abandoning those that [they] find difficult, distasteful, inconvenient or just plain boring. [The] mythic Justice, represented by a blindfolded figure wielding a balance and a sword, hears all cases coming before her, giving no preference—whether in priority or result—to the station or economic status of such persons."[55]

B. Disqualification Under Canon 3C and Section 455(a)

The Code of Conduct's disqualification standard, which mirrors § 455, is found in Canon 3C.[56] Canon 3C and § 455 provide the following five specific situations in which recusal is mandatory, and not subject to waiver by the parties: (1) the judge has a personal bias about a party or has personal knowledge of disputed facts in the case; (2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter; (3) the judge, judge's spouse, or minor child has any financial interest in the subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding;[57]

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52. Laird v. Tatum, 409 U.S. 824, 837 (1972) (Rehnquist, J., mem.).

53. JAMES ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.02 (2007).

54. United States v. Holland, 519 F.3d 909, 912 (9th Cir. 2008).

55. *Id.*

56. *Compare Code of Conduct*, *supra* note 6, at Canon 3C(1) (requiring a judge to disqualify himself or herself when "the judge's impartiality might reasonably be questioned"), *with* 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

57. Unlike the ABA Model Code and many state judicial codes, in the federal system there is no "de minimis" exception for recusal based on a financial interest; rather, a bright line rule requires recusal based on ownership of even a single share

(4) the judge, judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or (5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.[58]

In addition to these five specific mandatory recusal situations, Canon 3C and § 455 also require disqualification whenever the judge's impartiality might reasonably be questioned by an objective, "reasonable" observer, unless the parties waive the conflict.[59] If the judge is disqualified under this standard, both the Code and § 455 permit the judge to sit if all parties waive the disqualification. This transparent waiver process, known as "remittal of disqualification," is designed to avoid placing any actual or perceived pressure on parties to waive a judge's decision to recuse by requiring that the judge disclose the basis for disqualification on the record; give the parties and their lawyers an opportunity to confer outside the judge's presence; and then proceed if "all agree in writing or on the record that the judge should not be disqualified."[60]

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of stock in a party. 28 U.S.C. § 455(d)(4) (2006); *Code of Conduct*, *supra* note 6, at Canon 3C(3)(c). Also, a judge cannot avoid recusal by placing assets in a blind trust or by avoiding knowledge of the judge's financial holdings but must remain informed about the judge and the judge's family members' financial interests. *See* 28 U.S.C. § 455(c) (2006) ("A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household."); *Code of Conduct*, *supra* note 6, at Canon 3C(2) (stating that a judge "should inform himself" about his financial interests and "make a reasonable effort to inform himself" about his family's financial interests). Finally, recusal is not required if the judge (or spouse or minor child) divests a disqualifying financial interest other than one that could be substantially affected by the outcome of the proceeding. 28 U.S.C. § 455(f) (2006); *Code of Conduct*, *supra* note 6, at Canon 3C(4).

58. *Code of Conduct*, *supra* note 6, at Canon 3C(1); 28 U.S.C. § 455(a) (2006).

59. *Code of Conduct*, *supra* note 6, at Canon 3C(1); 28 U.S.C. § 455(a) (2006).

60. *Code of Conduct*, *supra* note 6, at Canon 3D; 28 U.S.C. § 455(e) (2006).

III. RECUSAL PROCEDURES IN FEDERAL COURTS

A. Institutional Safeguards

The judiciary has implemented procedures to promote transparency and provide multiple checkpoints in the recusal process itself; together these efforts operate to supplement the recusal statutes and the Code of Conduct. The institutional safeguards begin with systems that randomly assign cases to the judges within a particular court.[61] At the outset, the judge has an obligation to assess whether disqualification is required. As an overlay to the random assignment process, the Judicial Conference requires all judges to use an electronic conflicts screening system to ensure that judges do not inadvertently fail to recuse based on financial interests in a party.[62] Under this mandatory policy, each judge must develop a list of financial interests that could trigger recusal.[63] Special conflicts-screening software compares a judge's recusal list with information filed in each case.[64] The system flags potential conflicts, which enables the judge to decline an assignment or, if the case has been assigned, to recuse if necessary.[65] Once a case is assigned, a judge has a continuing obligation under the Code to monitor the case for potential recusal triggers,[66] a requirement also contemplated by § 455.[67]

In addition to using conflicts-screening software, federal judges must file detailed annual financial disclosure reports under the Ethics in Government Act.[68] These reports include extensive detail concerning all financial holdings, dates of acquisition and disposition of even partial interests, board memberships, gifts and

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61. *See generally*, *Frequently Asked Questions: Filing A Case*, UNITED STATES COURTS, http://www.uscourts.gov/Common/FAQS.aspx (last visited April 4, 2011) ("The majority of courts use some variation of a random drawing.").

62. *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey*: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 12 (2009) (prepared testimony of Hon. M. Margaret McKeown, Chair, U.S. Judicial Conference Codes of Conduct Committee).

63. *Id.*

64. *Id.*

65. *Id.* at 13.

66. *Code of Conduct*, *supra* note 6, at Canon 3C(3)(d).

67. *See* 28 U.S.C. § 455(d)(1) (2006) (defining "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation").

68. 5 U.S.C. app. §§ 101–111 (2006).

reimbursements.[69] By statute, financial disclosures are available on request.[70]

Further, the Judicial Conference requires judges to disclose their attendance at privately funded judicial education seminars, while seminar providers are required, in turn, to disclose their sources of funding.[71] The seminar reports are publicly available on court websites so that litigants may check on financial or other interests that might require a judge to recuse from a case.[72]

Beyond these systemic safeguards, designed to minimize conflicts before the possible need for a recusal motion arises, the litigation process itself provides ample opportunity for any party to challenge a judge's qualification to hear a case by moving for recusal under either § 144 or § 455.[73] A party objecting to the judge's order granting or denying a recusal motion also has recourse to appellate review.[74]

Finally, the statutory judicial discipline process, under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, may be available to provide a check on flagrant violations of the recusal rules.[75] For example, a judge who openly decides to hear a case in which the judge holds a financial interest in a party could be the subject of a judicial conduct complaint initiated by a litigant, a member of the public, or the chief judge of the circuit.[76] In 2008, the

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69. *Id.* at § 102.

70. *Id.* at § 105(b).

71. Administrative Office of the U.S. Courts, *Overview of Privately Funded Seminars Disclosure System*, UNITED STATES COURTS, http://www.uscourts.gov/RulesAndPolicies/PrivateSeminarDisclosure/PrivatelySeminarsDisclosureOverview.aspx (last visited Apr. 4, 2011).

72. *Id.*

73. 28 U.S.C. § 144 (2006); 28 U.S.C. § 455 (2006).

74. *See, e.g.*, Wright v. Comm'r of Internal Revenue, 571 F.3d 215, 220 (2d Cir. 2009) (reviewing a tax court's denial of a recusal motion); United States v. Lentz, 524 F.3d 501, 530–31 (4th Cir. 2008) (reviewing a district court's denial of a recusal motion); Draper v. Reynolds, 369 F.3d 1270, 1278–79 (11th Cir. 2004) (same).

75. Judicial Councils Reformed Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(c), 94 Stat. 2035, 2036 (1980) (codified as amended at 28 U.S.C. § 351(a) (2006)).

76. *See Judicial Conduct & Disability Act: Resources*, UNITED STATES COURTS, http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx (last visited April 4, 2011) (giving the codes of

Judicial Conference revised and strengthened the procedures under the Judicial Conduct and Disability Act[77] by adopting all of the recommendations of the Breyer Committee, which was formed by the Chief Justice to examine the Disability Act's implementation, particularly with respect to complaints against judges.[78]

B. *The Codes Committee: Balancing Confidentiality and Transparency*

To help federal judges comply with the wide array of recusal standards and safeguards, the judiciary turns to the Judicial Conference Committee on Codes of Conduct (the "Codes Committee") for confidential advice. The Codes Committee seeks to balance an individual judge's need for confidentiality with the needs of the judiciary as a whole for generally applicable advice and the public's demands for transparent assurances of an impartial judiciary.

The Codes Committee's jurisdiction—which is set by the Judicial Conference of the United States—broadly encompasses ethics policy for the judiciary and focuses on providing federal judges with advisory opinions upon request.[79] The Committee has fifteen members, including a representative from each judicial circuit, a bankruptcy judge, and a magistrate judge.[80] The Codes

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conduct in each circuit).

77. *National Rules Adopted for Judicial Conduct and Disability Proceedings*, UNITED STATES COURTS (Mar. 11, 2008), http://www.uscourts.gov/News/NewsView/08-03-11/National_Rules_Adopted_for_Judicial_Conduct_and_Disability_Proceedings.aspx.

78. The Chief Justice of the United States Supreme Court created the Breyer Committee to look into "the way in which the Judicial Conduct and Disability Act of 1980 is being implemented . . . [and] whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended." THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1–2, 107–26 (2006), *available at* http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf.

79. *See Code of Conduct*, *supra* note 6, Introduction (stating that the Codes Committee has been authorized to issue advisory opinions); John S. Cooke, *Judicial Ethics Education in the Federal Courts*, 28 JUST. SYS. J. 385, 386–87 (2007) (discussing the Committee's primary roles of interpreting the *Code of Conduct* and ethics regulations, issuing advisory opinions, and recommending changes to judicial ethics rules).

80. *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey:

Committee serves as an advisory body on ethics issues, including recusal.[81] In contrast, the Committee on Judicial Conduct and Disability has the authority to investigate, adjudicate, and resolve matters of judicial discipline.[82] This separation of functions encourages judges to come to the Committee for confidential guidance and advice. Among its activities, the Codes Committee (1) develops ethics codes and regulations; (2) advises judges and employees promptly and confidentially on ethics matters, including recusal considerations under Canon 3C; (3) develops tailored, interactive ethics education programs at national and regional meetings of federal judges and judicial employees, and through the Federal Judicial Center; (4) provides periodic ethics updates, videos, booklets, as well as internet-based training for judges, law clerks, and other judicial employees, such as ethics quizzes on a variety of topics, including recusal; (5) oversees the mandatory conflicts screening system; and (6) approves the process authorizing judges to divest and roll over holdings to mutual funds to avoid unnecessary recusals.[83]

In addition to responding annually to more than one thousand requests for informal advice and issuing approximately one hundred letters of formal advice—all on a confidential basis and with the ability to expedite responses as needed—the Codes Committee also issues published and publicly available Advisory Opinions addressing topics that arise frequently.[84] The Committee has published a wide range of guidance on recusal issues, from disqualification based on financial interest to that based on spousal or other relatives' employment or other activities.[85] These published

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Hearing Before the H. Comm. on the Judiciary, 111th Cong. 15 (2009) (prepared testimony of Hon. M. Margaret McKeown, Chair, United States Judicial Conference Codes of Conduct Committee).

81. *Id.*

82. *Id.*

83. *Id.*; *see also Code of Conduct*, *supra* note 6, at Canon 3D (providing for remittal of disqualification).

84. McKeown, *supra* note 5, at 16–17.

85. For example, the following opinions address disqualification issues: Advisory Op. No. 20, Disqualification Based on Stockholdings by Household Family Member; No. 24, Financial Settlement and Disqualification on Resignation From Law Firm; No. 38, Disqualification When Relative Is an Assistant United States Attorney; No. 66, Disqualification Following Conduct Complaint Against

opinions provide general advice to the judiciary. The Codes Committee serves a particularly important function when it provides advice to judges seeking to apply the objective recusal standard and determine whether a complex circumstance presents a reasonable basis for questioning the judge's impartiality.[86]

IV. CONCLUSION

The public, the parties, the lawyers, and the judiciary share the important goal of maintaining an impartial and independent judiciary. Central to that goal is the principle that judges should avoid not only actual bias but also recuse themselves when "their impartiality might reasonably be questioned."[87] In the real world, this principle plays out every day as federal judges consider whether to sit on an assigned case. Balancing the notion that a judge should not recuse unnecessarily with the requirement to recuse in legitimate circumstances, judges look to the recusal statutes, the Code of Conduct, and common sense to address these sensitive issues.

As they seek to balance sometimes competing concerns, judges recognize that perceptions are critical to maintaining the public trust. Justice Kennedy put it well in his concurrence in *Liteky v. United States*:

> Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment

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Attorney or Judge; No. 70, Disqualification When Former Judge Appears as Counsel; No. 100, Identifying Parties in Bankruptcy Cases for Purposes of Disqualification; No. 101, Disqualification Due to Debt Interests; No. 106, Disqualification Based on Ownership of Mutual or Common Investment Funds; No. 107, Disqualification Based on Spouse's Business Relationships. *See also Code of Conduct*, *supra* note 6, Introduction (providing for issuance of advisory opinions).

86. *See* 28 U.S.C. § 455(a) (2006) (requiring disqualification if a judge's impartiality may be questioned).

87. *Id.*

> and impartiality. . . . In matters of ethics, appearance and reality often converge as one.[88]

88. Liteky v. United States, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring).

Why Judicial Disqualification Matters. Again.

Charles Gardner Geyh*

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* Associate Dean for Research and John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I'd like to thank Bert Brandenburg, Steve Burbank, Amanda Frost, Jim Gibson, Steve Lubet, Roy Schotland, and Jeff Stempel for their comments, and Jenna Norden, Mark Plantan and Laura Heft for their research assistance. Thanks likewise to Mike Martin for organizing and moderating the panel at the annual meeting of the Association of American Law Schools, where papers giving rise to this symposium were presented. From 2007 to 2009, I served as consultant to and director of the American Bar Association's Judicial Independence Project, under the auspices of the ABA Standing Committee on Judicial Independence. The views expressed here are mine alone, and not necessarily those of the Judicial Independence Project, the ABA Standing Committee on Judicial Independence, or the ABA.

I. INTRODUCTION

Judicial disqualification is hot—a phrase that, until recently, was likely turned only in sparsely attended conferences of lonely ethicists and marginalized proceduralists. Throughout the past decade, organizations such as the American Bar Association, the American Judicature Society, the Brennan Center for Justice, and the Justice at Stake Campaign have focused on disqualification problems,[1] and law review articles have covered the issue like kudzu.[2] A focal point has been the litigation in *Caperton v. A.T. Massey Company*, which spanned the better part of the last decade. It began in 2002, when a coal company lost a $50 million verdict in a West Virginia jury trial.[3] While an appeal of that verdict was impending, the company's CEO spent $3 million on a supreme court race to replace a disfavored incumbent with someone more to his liking. The incoming justice declined to recuse himself from hearing the case and cast the deciding vote in the coal company's favor.[4]

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1. *Judicial Disqualification After Caperton*, 93 JUDICATURE 4 (2009); JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards (reporting broadly on threats to impartiality of courts posed by lack of viable recusal systems); *see generally Caperton v. Massey Resource Page*, JUSTICE AT STAKE CAMPAIGN, http://justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/index.cfm (last visited Feb. 24, 2011).

2. *See, e.g.*, Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009) (discussing what *Caperton v. Massey Coal Co.* means for judicial elections and judicial regulation of politics); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009) (discussing the problem of "practical dependence" that occurs when judges rely on campaign contributions to secure their positions on the bench); Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010) (criticizing "serious risk of actual bias" test established by *Caperton v. Massey Coal Co.*); Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 353–54 (2010) (discussing the potential bias inherent in today's court system); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 134–36 (2009) (discussing the constitutionality of judicial elections in light of cases like *Caperton*).

3. Caperton v. A.T. Massey Coal, Co., 129 S. Ct. 2252, 2257–60 (2009).

4. *Id.*

John Grisham used the episode as fodder for his latest novel,[5] editorial writers were apoplectic, and in 2009, a closely divided United States Supreme Court ruled that the justice's failure to step aside violated the plaintiff's due process rights.[6]

While *Caperton* may be the flagship, there is a multitude of vessels in the flotilla of recent disqualification activity. In 1999, the American Bar Association revised its Model Code of Judicial Conduct to disqualify judges from hearing cases involving significant campaign contributors.[7] In 2003, the ABA revised its disqualification rule again, this time to disqualify judges from cases in which they had made prior public statements committing themselves to decide issues then before them in particular ways.[8] In 2004, Justice Scalia prompted a media outcry when he declined to disqualify himself from hearing a case in which Vice President Dick Cheney was a named party, after flying with the Vice President on a government jet to Louisiana for a weekend of duck hunting, while the appeal was pending.[9] Likewise in 2004, a newly elected Illinois Supreme Court justice provoked media ire after he declined to disqualify himself from hearing a case in which a corporate defendant and its employees had made significant contributions to his election campaign while the appeal was pending.[10] In 2005, that same justice cast the deciding vote in the defendant's favor.[11] In 2006, the New York Times ran an exposé on Ohio judges who received sizable contributions to their reelection campaigns from

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5. *See The Grisham Connection*, JUSTICE AT STAKE CAMPAIGN, http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/the_grisham_connection.cfm (last visited Feb. 24, 2011) (discussing Grisham's inspiration for his novel *The Appeal*).

6. *Caperton*, 129 S. Ct. at 2264–66.

7. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (2004).

8. *Id.* at Canon 3E(1)(f).

9. *See, e.g.*, Editorial, *The Court's Honor at Stake*, STAR-LEDGER (Newark, N.J.), Mar. 19, 2004, at 20; Editorial, *Duck Blinded: Scalia's Trip Doesn't Pass Smell Test*, OKLAHOMAN, Feb. 19, 2004, at 12A; Editorial, *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004, at A12; Editorial, *Position Looks Compromising*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 3, 2004, at 16A; Editorial, *Scalia's Conflict of Interest*, DENVER POST, Jan. 26, 2004, at B-07; Editorial, *Scalia Tries To Duck Conflict With Waterfowl Reasoning*, TAMPA TRIB. (Fla.), Jan. 26, 2004, at 18.

10. Deborah Goldberg, James Sample & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 509–11 (2007).

11. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005).

lawyers and parties appearing before them, concluding that "[i]n the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times."[12] In 2007, the ABA's Standing Committee on Judicial Independence launched a Judicial Disqualification Project to evaluate state judicial disqualification around the country and recommend reforms.[13] In 2009, the House Judiciary Committee held oversight hearings on federal judicial disqualification.[14] In 2010, the House of Representatives impeached Louisiana District Judge G. Thomas Porteous, in part for failing to disqualify himself from a case in which he had solicited money from an attorney in a pending case.[15] That same year, the national media reported on the non-disqualification of federal judges assigned to hear cases arising out of the BP oil disaster in the Gulf of Mexico, despite their ownership of petroleum company stock and mineral rights in lands leased to petroleum companies.[16] And, the West Virginia high court was back in the news when a justice initially declined to disqualify himself from a case concerning the constitutionality of a statute he had committed himself to uphold as a judicial candidate, and then angrily disqualified himself later when his non-disqualification was widely reported and criticized.[17]

Why the recent interest? Explanations tend to be piecemeal, with commentators delineating the scope of the problem with reference to whatever subtopic they are addressing: personal

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12. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, § 1, at 11, *available at* 2006 WLNR 16983797.

13. ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 JUDICATURE 12 (2008).

14. *Examining the State of Judicial Recusals After* Caperton v. A.T. Massey: *Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 111–18 (2009).

15. H.R. Res. 1031, 111th Cong. (2010); *see also* David Ingram, *House Impeaches Federal Judge*, 121 FULTON COUNTY DAILY REP. 13 (2010) (describing House debate on the impeachment of Judge Porteous).

16. Charlie Savage, *Drilling Ban Blocked; U.S. Will Issue New Order*, N.Y. TIMES, June 22, 2010, at A1; Laurel Brubaker Calkins and Jef Feeley, *BP, Transocean Spill Suits Shunned by Gulf-State Judges Citing Conflicts*, BLOOMBERG (June 1, 2010), http://www.bloomberg.com/news/2010-06-01/bp-transocean-spill-suits-shunned-by-gulf-state-judges-citing-conflicts.html.

17. Tony Mauro, *New Recusal Controversy in West Virginia High Court*, BLOG LEGAL TIMES. (Sept. 24, 2010, 4:10 PM), http://legaltimes.typepad.com/blt/2010/09/new-recusal-controversy-in-west-virginia-high-court.html.

relationships are inadequately regulated by disqualification rules;[18] particular judges do not understand how the public perceives their relationships;[19] judges are not concerned enough about appearance problems;[20] judges are too concerned about appearance problems;[21] contested judicial elections cause judges to take positions that compromise their impartiality;[22] privately funded judicial campaigns infuse big money into judicial races and create the perception that judges are influenced by the support they receive.[23]

The composite picture suggests that something more is afoot. In this article, I argue that the dominant regime that has structured judicial disqualification in the state and federal courts for nearly forty years (the last time judicial disqualification was hot) is crumbling, and the struggle for a successor regime has begun. My threefold purpose here is to explain why the prevailing regime is in trouble; to survey the field of new-regime wannabes; and to identify the likely frontrunner and assess its long-term prospects.

In Part II, I survey the history of judicial disqualification to the end of identifying four distinct regimes. The first was characterized by an almost ironclad presumption of impartiality; at common law, courts refused to entertain even the possibility of judicial bias. The second regime, which gradually intruded upon the monopoly of the first, carved out exceptions to the presumption of impartiality, in which judges were required to disqualify themselves when confronted with specifically enumerated conflicts of interest. The third regime, which held sway briefly, explored a procedural approach to disqualification that called upon judges to recuse themselves automatically if aggrieved parties made specified allegations pursuant to specified procedures. The fourth and current

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18. Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 579 (2006).

19. *See, e.g.*, Editorial, *Honest Justice*, N.Y. TIMES, June 8, 2009, at A26; Editorial, *Justice Scalia's Misjudgment*, N.Y. TIMES, Jan. 25, 2004, § 4, at 14, *available at* http://www.nytimes.com/2004/01/25/opinion/25SUN3.html.

20. Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, *supra* note 2, at 353–54.

21. Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 5–6 (2007).

22. Rachel Paine Caulfield, *In the Wake of* White*: How States Are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 635 (2005).

23. Meryl Chertoff, *Trends in Judicial Elections in the States*, 42 MCGEORGE L. REV. (forthcoming 2011).

regime dwells upon appearances, by organizing disqualification standards around the principle that a judge should step aside when her impartiality "might reasonably be questioned"—in other words, when she might *appear* less than impartial to a reasonable person. Although each regime has superseded its predecessor as an organizing principle for judicial disqualification, the vestiges—sometimes substantial—of former regimes remain in place, coexisting peacefully at some times and uneasily at others.

In Part III, I address the state of the current appearances regime. On the one hand, in principle, the legal establishment's commitment to preserving the appearance of justice remains strong. On the other hand, the appearances-based disqualification regime is in trouble. For an appearances regime to succeed, I argue, it is not enough that the legal establishment and the public agree that the judiciary should strive to preserve the appearance of impartiality. Rather, they must share a basic understanding of what constitutes an appearance of partiality. Currently, the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment. The general public is comparably divided, and between the legal establishment and the general public, there are still further divisions. The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.

Ultimately, then, recent interest in disqualification rules is emblematic of a larger struggle within the legal establishment over how best to preserve the legitimacy of the judiciary itself, at a time when our collective understanding of what properly influences judicial decision-making, and what perverts it, is unclear. In Part IV, I survey the field of potential successors to the appearances regime—each of which aims to retool or revitalize a predecessor regime—and conclude that a revamped procedural regime is the front-runner. At a time when disqualification standards are in flux (and achieving consensus on what those standards should be is thus impossible), seeking to enhance the legitimacy of disqualification practice through procedural reform makes sense. Moreover, procedural reform aimed at providing litigants with a fairer-seeming disqualification process may promote public confidence in ways that an appearance-based regime has not. That said, the future of a

nascent procedural regime remains unclear because judges remain ambivalent about disqualification and could thwart it as they have the implementation of prior regimes.

II. THE HISTORY OF JUDICIAL DISQUALIFICATION

The history of judicial disqualification, while interesting in its own right, is recounted here for the purpose of identifying four distinct disqualification regimes that have achieved prominence at different times. Each regime brought a different approach to bear that has taken its turn to dominate legal discourse on disqualification problems. New regimes, however, have not replaced the old, but have been built upon the foundations of their predecessors—meaning that the ruins of prior regimes have remained integral to the permanent disqualification landscape. Moreover, the current disqualification reform agenda, discussed in Part IV, is constituted largely of proposals to revise or resuscitate prior regimes. As a consequence, the current problems and proposed solutions can be better understood in historical context.

A. Regime 1: Common Law Presumption of Impartiality

The practice of judicial disqualification is old indeed. Under Roman law, litigants were entitled to petition for the disqualification of judges who were "under suspicion." In 530 A.D., the Justinian Code provided:

> It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being so recused, the parties have to resort to chosen arbitrators, before whom they assert their rights. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue be joined, so that the cause go

> to another; the right to recuse having been held out to him . . .[24]

So generous an approach to disqualification for perceived bias, while embraced by civil law systems, did not take root in English common law. William Blackstone acknowledged "civil and canon laws," under which "a judge might be refused upon any suspicion of partiality," but wrote that in England "the law is otherwise," and "it is held that judges or justices cannot be challenged."[25] This early difference in approach may be attributable to the different roles of the judge in civil and common law systems. Civil law judges are fact-finders. Common law judges are not. In common law systems, fact-finding is delegated to jurors who, like judges in civil law systems, have long been subject to disqualification for bias.[26] With a wink of reassurance to the worried, common law commentators noted that isolated episodes of judicial bias could be remedied by impeachment (of rogue judges) or appeal (to correct bias-caused error) but otherwise adopted a nearly ironclad presumption of impartiality for judges.[27] As Blackstone

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24. CODEX OF JUSTINIAN, Book III, title 1, No. 16.

25. WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

26. LILLIAN B. HARDWICK & B. LEE WARE, JUROR MISCONDUCT § 3.03[4] (2005).

27. Blackstone regarded judicial disqualification for bias as unnecessary, given the availability of impeachment because "such misbehaviour would draw down a heavy censure from those, to whom the judge is accountable for his conduct." BLACKSTONE, *supra* note 25, at 361. Writing during the 19th century, the California Supreme Court, in turn, saw judicial disqualification for bias as unnecessary, given the availability of appeal:

> The law establishes a different rule for determining the qualification of Judges from that applied to jurors. The reason of this distinction is obvious. The province of the jury is, to determine from the evidence the issues of fact presented by the parties; and their decision is final in all cases where there is a conflict of testimony. Therefore, the expression of an unqualified opinion on the merits of the controversy, which evinces such a form of mind as renders him less capable to weigh the evidence with entire impartiality, is sufficient to exclude a juror.
>
> The province of a Judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not

wrote: "[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[28]

Blackstone's observation that the judge's authority "greatly depends" on a presumption of impartiality, underscores the centrality of impartiality to the common law judge's self-identity. Further punctuating that point is Sir Matthew Hale's "Rules for His Judicial Guidance, Things Necessary to be Continually Had in Remembrance"—a code of judicial conduct that Hale drafted in the 17th century, as Lord Chief Justice under King Charles II.[29] Of eighteen points in Hale's code, seven elaborated on the need for a judge to remain impartial.[30] To challenge a judge for bias was, in effect, to accuse him of abdicating his role—an accusation that common law courts simply would not tolerate.

B. Regime 2: Statutory Conflicts of Interest

Under English common law, recusal was a distinctly limited practice guided by a single, pithy principle first announced in 1609 by Sir Edward Coke in *Dr. Bonham's Case*: "No man shall be a

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final; and, if erroneous, the party has his remedy by bill of exceptions and appeal.

McCauley v. Weller, 12 Cal. 500, 523–24 (1859).

28. BLACKSTONE, *supra* note 25, at 361.

29. *See* LORD J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 207–09 (1873) (quoting Hale's code of judicial conduct).

30. *Id.*

> . . . . 4. That in the execution of justice I carefully lay aside my own passions . . . . 6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard. 7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard. . . . 10. That I be not biassed [sic] with compassion to the poor, or favor to the rich . . . . 11. That popular or court applause, or distaste, have no influence into anything I do in point of distribution of justice. 12. Not to be solicitous of what men will say or think, so long as I keep myself exactly according to the rules of justice. . . . 16. To abhor all private solicitations . . . in matters depending.

Id.

judge in his own case."[31] While a judge could not be challenged on grounds of bias, he could be recused for having an "interest" in the cases he decided. Thus, in *Dr. Bonham's Case*, a judge was disqualified from a case in which he would receive the fines he assessed.[32] As one commentator has put it: "English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias . . . was rejected entirely."[33]

The distinction between bias and interest was an important one because disqualifying a judge for a conflict of interest averted the need to address actual partiality. Under circumstances in which a conflict of interest was present, disqualification was necessary, without regard to whether the judge was biased in fact, or could and would have set the conflict to one side and ruled impartially.

Under the common law, financial conflicts of interest were a discrete exception to a regime that presumed judicial impartiality. In the United States, however, state legislatures assumed control of disqualification early on by specifying and expanding upon the conflicts of interest that would require recusal, and courts reoriented their focus from the common law to those enactments.[34] The net effect was to create a new disqualification regime that increasingly governed recusal with reference to this list of conflicts, rather than the common law.

The federal system likewise was distinguished by an emerging statutory regime of conflicts of interest. In 1792, Congress enacted legislation (that would gradually evolve into what is currently 28 U.S.C. § 455) that codified the common law by calling

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31. Dr. Bonham's Case, 77 Eng. Rep. 646, 653 (1609).

32. *Id.* at 649, 653.

33. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947). Frank reported that at common law, disqualification did not extend to cases in which the judge was related to one of the parties. There appears to be some disagreement on that score. *See, e.g.*, Turner v. Commonwealth, 59 Ky. 619, 626 (Ky. 1859) ("At common law, there were but two objections that went to the disqualification of a judge to try a cause, to wit: interest in his own behalf in the result, or being of kin to others interested therein.").

34. *E.g.*, *Turner*, 59 Ky. at 624–27; McCauley v. Weller, 12 Cal. 500, 523–24 (Cal. 1859); Peck v. Freeholders of Essex, 20 N.J.L. 457, 466–67 (N.J. 1845); Thomas v. State, 6 Miss. 20, 29–31 (Miss. 1840); Jim v. State, 3 Mo. 147, 147 (Mo. 1832).

for disqualification of district judges who were "concerned in interest" but added that a judge could also be disqualified if he "has been of counsel for either party."[35] In 1821, relationship to a party was added as another ground for disqualification.[36] In 1891, Congress enacted legislation (later codified at 28 U.S.C. § 47) forbidding a judge from hearing the appeal of a case that the judge tried.[37] In 1911, the precursor to § 455 was further amended to require disqualification where the judge was a material witness in the case.[38]

C. Regime 3: An Experiment with Disqualification Procedure

A conflicts-based disqualification regime, read in tandem with the common law's presumption of impartiality, made no room for disqualification on grounds of bias generally. Granted, disqualification for conflicts of interest presupposed a risk of bias that a conflicts regime sought to avoid. When no conflicts rule applied, however, and the applicable disqualification statute was silent as to bias or prejudice per se, the presumption of impartiality filled the gap to foreclose disqualification on such grounds, despite occasional recognition that judicial bias was a legitimate concern. The California Supreme Court observed in 1859:

> The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the Court and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from sitting.[39]

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35. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178–79 (1792).
36. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (1821).
37. Act of July 30, 1894, ch. 172, § 2, 28 Stat. 161 (1894).
38. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090 (1911).
39. McCauley v. Weller, 12 Cal. 500, 523 (1859). *See also* Morris v. Graves, 2 Ind. 354, 357 (Ind. 1850) (holding that prejudice in the president judge is not among the statutory causes for a change of venue); Inhabitants of Northampton v. Smith, 52 Mass. 390, 396 (Mass. 1846). The *Northampton* court stated that:

Even as the English common law evolved to acknowledge disqualification for bias distinct from specific conflicts of interest, American state courts remained largely unyielding absent an explicit statutory directive.[40]

In the nineteenth century, a few jurisdictions provided for bias-based disqualification.[41] Given the ethos of impartiality that underlay the common law and judicial self-identity, it is understandable that trial judges would be reluctant to admit disqualifying bias and that appellate judges would be reluctant to second-guess their brethren.[42] A few states sought to circumvent this

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> It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test . . . it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action.

Northampton, 52 Mass. at 396.

40. Comment, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 322 (1969).

41. *E.g.*, Massie v. Commonwealth, 20 S.W. 704, 704 (Ky. 1892) (stating that if affidavits prove a judge is prejudiced against the defendant, he should vacate); Conn v. Chadwick, 17 Fla. 428, 440 (Fla. 1880) (stating that an act of the legislature, chapter 3120, provides that if a party in a suit pending in the supreme court believes a judge to be prejudiced then the judge shall be disqualified from the case); Hungerford v. Cushing, 2 Wis. 397, 5 (Wis. 1853) (quoting section one of chapter ninety-five of the Revised Statutes, which states that a party in a civil suit who believes the judge is prejudiced may request a change of venue).

42. *Hungerford*, 2 Wis. 397 at 3 (noting that statute authorized disqualification for prejudice if the trial judge was "satisfied of the truth of the allegations"). The *Hungerford* court held that the judge was "obliged to pass on the state of his own mind or feelings" and rejected the claim that the judge should "change the venue, if the facts contained in the affidavits are sufficient to satisfy a reasonable mind that prejudice exists," because then "all would be made the subjects of judicial investigation[.]" *Id.* at 5. *See also* Thomas v. State, 6 Miss. 20, 1840 WL 1620, at *7 (Miss. 1840) (declining to reverse non-disqualification where the judge had previously served as counsel for the prosecution in that case although "[t]he spirit of the law, the dignity of the state, and the reputation of the judiciary demand purity in the arbiters, and impartiality in the administration of justice," and stating reversal was unwarranted because "[t]here is no tribunal

problem by adopting a procedural approach, whereby a party who complied with specified procedures, sometimes including a facially sufficient affidavit of bias against the judge, triggered disqualification automatically.[43] In 1911, Congress followed suit, enacting legislation (later codified as 28 U.S.C. § 144) entitling a party to secure the disqualification of a district judge by submitting an affidavit that the judge had "a personal bias or prejudice" against the affiant or for the opposing party.[44] In 1921, in *Berger v. United States*, the United States Supreme Court interpreted this legislation as written to prohibit the judge from ruling on the truth of matters asserted in the affidavit supplied by the party seeking disqualification and to require automatic disqualification if the affidavit was facially sufficient.[45]

If judges remained ambivalent about disqualification for bias generally, they were especially ambivalent about a procedure that would subject judges to disqualification for *alleged* bias alone.[46] A procedural approach to judicial disqualification, however, proved to be a two-way street. While the statute ostensibly forced disqualification for alleged bias if the movant followed specified procedures, the judges themselves decided when those procedures were followed and, at the federal level at least, were ill-disposed to interpret procedural requirements generously. As the First Circuit explained with manifest pique, "courts have responded to the draconian procedure—automatic transfer based solely on one side's affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice toward a party[.]"[47] A

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adequate to decide a challenge to the judge when made in his own court" (quoting Lyon v. State Bank, 1 Stew. 442, 464 (Ala. 1828))).

43. Turner v. Commonwealth, 59 Ky. 619, 626–30 (Ky. 1859); McGoon v. Little, 7 Ill. 42, 42–43 (Ill. 1845).

44. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090 (codified as 28 U.S.C. § 47 (2006)).

45. Berger v. United States, 255 U.S. 22, 35 (1921).

46. *See, e.g.*, Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (adding to the disqualification order that "[p]robably the district court is right that there is no basis for the allegations" in the movant's affidavit, and expressing "sympathy with district judges confronted with what they know to be groundless charges of personal bias").

47. *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997); *see also* United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) ("Because the statute 'is heavily weighed in favor of recusal,' its requirements are to be strictly construed to prevent abuse.").

Federal Judicial Center monograph on judicial disqualification summarizes the procedural impediments that have tripped up affiants under § 144:

> The federal courts have indeed held that under § 144 a judge must step aside upon the filing of a facially sufficient affidavit; but they have been exacting in their interpretations of what a facially sufficient affidavit requires and of the procedural prerequisites to application of the statute. Thus, motions have been dismissed for untimeliness; because the movant failed to submit an affidavit, because the movant submitted more than one affidavit, because the attorney rather than a party submitted the affidavit or submitted more than one affidavit; because the attorney rather than a party submitted the affidavit; because the movant's affidavit was unaccompanied by a certificate of counsel or failed to make allegations with particularity; and because the certificate of counsel certified only to the affiant's—not counsel's—good faith.[48]

By its 40th birthday, the statute was moribund. In a seminal article on disqualification written in 1947, John Frank observed:

> Frequent escape from the statute has been effected through narrow construction of the phrase "bias and prejudice." Affidavits are found not "legally sufficient" on the ground that the specific acts mentioned do not in fact indicate "bias and prejudice," a reasoning which emasculates the *Berger* decision by transferring the point of conflict.[49]

Frank warned that "unless and until the Supreme Court gives new force and effect to the *Berger* decision the disqualification

48. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS UNDER FEDERAL LAW 83–84 (2d ed. 2010), *available at* http://earth.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf.

49. Frank, *supra* note 33, at 629.

practice of federal district courts will remain sharply limited."[50] No "new force and effect" was forthcoming. Section 144 remains on the books to this day but has been so eclipsed by subsequent amendments to § 455 that the Supreme Court remarked that § 144 "seems to be properly invocable only when § 455(a) can be invoked anyway . . . ."[51]

Ultimately, the procedural approach embodied in § 144 may be better cast as a failed experiment than a regime: It never had a heyday. In the federal system, § 144 was quickly and quietly hoisted on the petard of its own procedural requirements by unenthusiastic judges intent on marginalizing its impact.[52] Among the states, the legacy is more mixed. A significant number of jurisdictions—most in the western half of the United States—have adopted some variation of a procedural approach, enabling litigants to disqualify a judge by correctly completing and submitting the required paperwork[53] and in some cases making the necessary allegations of bias, without having to prove them.[54] Those jurisdictions, however, remain in the minority, and even among them, some have interpreted applicable procedural requirements strictly, thus following (to varying degrees) in the footsteps of their federal counterpart.[55]

If one steps back, however, and looks at the state of disqualification law as of the mid-twentieth century, a detectable trajectory begins to emerge. The nearly ironclad presumption of impartiality was gradually being eroded—first by a growing list of exceptions for financial and relational conflicts of interest, and more recently, by a patchwork of approaches to disqualify judges for bias

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50. *Id.* at 630.

51. Liteky v. United States, 510 U.S. 540, 548 (1994).

52. Frank, *supra* note 33, at 629.

53. ALASKA STAT. § 22.20.022 (2010); ARIZ. R. CIV. P. 42(f)(1) (2010); C.R.C.P. 97 (2010); FLA. STAT. § 38.10 (2010); HAW. REV. STAT. § 601-7 (2010); I.R.C.P. RULE 40(D)(1) (2010); 735 ILL. COMP. STAT. 5/2-1001 (2010); IND. R. TRIAL P. 76 (2010); MINN. STAT. § 542.16 (2009); MO. SUP. CT. R. 51.05 (2010); MONT. CODE ANN. § 3-1-804 (2010); NEV. S.C.R. 48.1 (2009); N.D. CENT. CODE §29-15-21 (2010); OR. REV. STAT. § 14.260 (2010); S.D. CODIFIED LAWS § 15-12-21 (2010); URCP RULE 63 (2010); WIS. STAT. § 801.58 (2010); WYO. R. CIV. PROC. RULE 40.1 (2010).

54. *E.g.*, CAL. CODE CIV. PROC. § 170.6 (2006); WASH. REV. CODE § 4.12.050 (2009).

55. *E.g.*, James W. Glover, Ltd. v. Fong, 39 Haw. 308, 314–15 (Haw. 1952); Home Depot, U.S.A., Inc. v. Saul Subsidiary I, Ltd. P'ship, 159 S.W.3d 339, 341 (Ky. Ct. App. 2004); Poulsen v. Frear, 946 P.2d 738, 741 (Utah Ct. App. 1997).

that did not fall within the scope of specified conflicts. By 1968, a majority of jurisdictions made some provision to disqualify judges for bias.[56] The multiplicity of approaches those states employed, however, reflected the ongoing search for an acceptable regime. Some states made no statutory or constitutional provision to disqualify judges for bias or prejudice. Among those states, some courts fell back on the common law rule and did not disqualify for bias, while other courts filled the gap with a disqualification rule of their own.[57] Other states disqualified judges for bias by statute or under the state constitution.[58] Of those, some placed a burden on the movant to show bias, others required a facially sufficient, factually specific affidavit alleging bias, while still others simply entitled litigants to seek a substitution of judge with or without a generally worded affidavit attesting to the affiant's belief that he would not receive a fair hearing before the judge in question.[59]

D. Regime 4: The Appearance of Partiality

In a seminal address to the American Bar Association in 1906, entitled "The Causes of Popular Dissatisfaction with the Courts," Roscoe Pound called attention to "the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today."[60] Two years later, American Bar Association President Jacob M. Dickinson echoed that "[j]udicial judgments are not accorded the same respect as formerly" and that "not *a* court but *the* courts are frequently and fiercely attacked"; the net effect, he concluded, was "to destroy confidence in the courts and to make a subservient judiciary."[61]

One of the legal establishment's primary responses to this public confidence problem was to approach it as a public relations problem. As such, it was not enough for judges to be fair, impartial,

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56. Comment, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 332 (1969).

57. *Id.* at 347, tbl.1.

58. *Id.*

59. *Id.*

60. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Courts*, *reprinted in* 20 J. AM. JUDICATURE SOC'Y 178 (1936).

61. *Address of the President*, 33 REPORT OF THE 31ST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 341 (1908).

and just; they must *appear* so to the public. In 1924, the American Bar Association adopted Canons of Judicial Ethics that exhorted judges to avoid appearance problems that could compromise public confidence in the courts. Canon four provided that a judge's conduct should be "free from . . . the appearance of impropriety."[62] Eleven additional canons warned judges to avoid behavior that could create "suspicion" of misbehavior or "misconceptions" of the judicial role that might "appear" or "seem" to interfere with judicial duties or that could "create the impression" of bias.[63]

This newfound desire to avoid appearance problems did not lead the authors of the Canons to call for disqualification when a judge was or appeared to be biased, but it laid the foundation for such a move later. In 1955, the Supreme Court described the "fair tribunal" to which litigants were entitled, with reference to the absence of bias and apparent bias:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence

62. AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS Canon 4 (1924).

63. *Id.* Canon nineteen opined that to "avoid[] the suspicion of arbitrary conclusion [and] promote[] confidence in his judicial integrity," judges should explain the basis for their rulings. Canon twenty-four encouraged a judge not to incur obligations that would "appear to interfere with his devotion to the expeditious and proper administration of his official functions." Canon twenty-five urged a judge to avoid creating "any reasonable suspicion that he is utilizing the power or prestige of his office" to advance his private interests. Canon twenty-six counseled the judge against maintaining relationships that would "arouse the suspicion that such relations warp or bias his judgment." Canon twenty-seven declared that a judge should refrain from holding fiduciary positions that would seem to "interfere with the proper performance of his judicial duties." Canon twenty-eight warned judges against engaging in political activities that could give rise to the "suspicion of being warped by political bias." Canon thirty advised a candidate for judicial office to do nothing "to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination." Canon thirty-one provided that in jurisdictions where judges were authorized to practice law part-time, the judge should not "seem[] to utilize his judicial position to further his professional success." In Canon thirty-three, the judge was encouraged to avoid conduct that could "awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct." Canon thirty-four provided that "in every particular [a judge's] conduct should be above reproach." And Canon thirty-five observed that allowing cameras in the courtroom "create[s] misconceptions . . . in the mind of the public and should not be permitted." *Id.*

> of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."[64]

In 1968, the Supreme Court decided *Commonwealth Coatings Corp. v. Continental Casualty Co.*, in which the Court held that an arbitrator's "appearance of bias" subjected him to disqualification.[65] In 1969, judicial disqualification made national headlines, when the United States Senate rejected President Nixon's nomination of Clement Haynsworth to the Supreme Court, at least in part because Haynsworth, as a circuit judge, had not disqualified himself from participating in several cases in which he owned stock or had some other ownership interest in a corporate party or its parent.[66] While Haynsworth's stock holdings were small, Senators complained that his sitting on the cases in question conflicted with the "appearance of justice."[67]

Shortly after the Haynsworth episode, Senator Birch Bayh introduced legislation to amend § 455 by requiring disqualification from any case in which the judge's participation would "create an appearance of impropriety."[68] Meanwhile, the American Bar Association established a Special Committee on Standards of Conduct, which promulgated a new disqualification rule in 1972, as part of a larger project to replace the Canons of Judicial Ethics with a Model Code of Judicial Conduct.[69] The Special Committee took its cue from the "appearance of bias" standard adopted by the Supreme Court four years earlier in *Commonwealth Coatings*, concluding that

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64. *In re* Murchison, 349 U.S. 133, 136 (1955) (citation omitted).

65. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148–49 (1968).

66. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 736 n.2 (1973).

67. John Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & CONTEMP. PROBS. 43, 60 (1970).

68. *Id.* at 68.

69. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 1, 60–71 (1973).

"[i]t can be said with certainty that the same standard would be applied by the Supreme Court to a judge . . . under similar circumstances."[70] Accordingly, the new rule required judges to disqualify themselves both when they had a "personal bias" and when their "impartiality might reasonably be questioned."[71]

This reform movement occurred against the backdrop of longstanding and ongoing judicial ambivalence over disqualification generally and disqualification for bias in particular, which, as previously discussed, had been in perpetual tension with the ancient presumption of impartiality.[72] In 1964, The United States Court of Appeals for the Fifth Circuit pushed back against over-disqualification with the so-called "duty to sit," declaring that "It 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."[73] In 1972, Justice William Rehnquist reported that the duty to sit had been accepted by all circuit courts and cited that duty in support of his decision not to disqualify himself from a case then before the Supreme Court.[74] In that case, he, as Assistant Attorney General under President Nixon, testified before a Senate Subcommittee on the district court's opinion in that case and expressed his view that the case was non-justiciable.[75]

In 1974, Congress, agitated over the Rehnquist imbroglio, sided with the ABA and adopted the 1972 Model Code's appearances-based disqualification rule as an amendment to § 455.[76] By virtue of its requirement that judges disqualify themselves when their impartiality might reasonably be questioned, the amendment was represented as ending the "duty to sit."[77] In 1990, and again in

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70. *Id.* at 60–61.

71. MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

72. *See supra* notes 24–30 and accompanying text.

73. Edwards v. United States, 334 F. 2d 360, 362 n.2 (5th Cir. 1964).

74. Memorandum of Mr. Justice Rehnquist, Laird v. Tatum, 409 U.S. 824, 837 (1972); Jeffrey Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009).

75. *Laird*, 409 U.S. at 824–25; Jeffrey Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987).

76. Stempel, *supra* note 75, at 594 ("The reformist tide was given additional force by Justice Rehnquist's participation in *Tatum*.").

77. S. REP. NO. 93-419 at 5 (1973) ("This language also has the effect of removing the so called 'duty to sit.' Such a concept has been criticized by legal writers, and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality

2007, the ABA retained the appearance of partiality standard in its disqualification rule.[78] That standard, which has been adopted in at least forty-eight states,[79] is more than just another entry in the ever-growing laundry list of disqualifying circumstances. It is an organizing principle that subsumes all other grounds for disqualification, by characterizing the specific, disqualifying conflicts of interest that had accumulated over the course of the preceding two centuries as comprising an incomplete list of circumstances in which the judge's impartiality might reasonably be questioned.[80]

III. THE CURRENT STATE OF THE APPEARANCES-BASED DISQUALIFICATION REGIME

As noted at the outset of this article, judicial disqualification is hot[81]—heat attributable to concern over the state of judicial disqualification in an appearances-based regime. To evaluate the performance of that regime, it is useful to begin by identifying regime goals. First, a disqualification regime that concerns itself with how judicial conduct is reasonably perceived seeks to promote public confidence in the courts.[82] By ending the duty to sit and

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of the judicial system."). *Judicial Disqualification: Hearing before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary on S. 1064*, 93d Cong. 14 (1973) (statement of Sen. Birch Bayh) ("Finally, the bill relaxes the so-called duty to sit in cases where the judge is not disqualified by the provisions of the statute, and give him fair latitude to disqualify himself in other instances where 'in his opinion, it would be improper for him to sit.'").

78. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

79. ABA Judicial Disqualification Project, *supra* note 13.

80. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(a) (2007). The federal corollary differs slightly, by characterizing enumerated conflicts of interest as additional grounds for disqualification, rather than as illustrative circumstances of when impartiality might reasonably be questioned. 28 U.S.C. § 455(a) (2006).

81. *See supra* notes 1–18 and accompanying text.

82. *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary on S. 1064*, 93d Cong. 8 (1974) (statement of J. Traynor) ("It is not enough that people have confidence in the sturdiness of judicial procedures. They must have utmost confidence in the integrity of their judges."); *Judicial Disqualification Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong. 14 (1971) (statement of Sen.

giving judges the authority to withdraw from cases in which their participation would create perception problems, the public's confidence in the courts, it was claimed, would be enhanced.[83] Second, because it employs an objective standard that evaluates bias problems from the perspective of a reasonable outside observer, an appearances regime seeks to make disqualification more workable and less capricious by obviating the need to rely on subjective assessments of a judge's state of mind.[84] Third, a disqualification regime that enables judges to withdraw for perceived partiality without having to concede actual bias seeks to make disqualification

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Bayh) ("If we are concerned, as most of us are with the need to shore up public confidence in our public institutions, we need to remove any scintilla of doubt that the public might have that that judge would be prejudiced in his decision. And that is why the criteria that we establish in S. 1886 is rather strict"). Note, *Judicial Ethics—Recusal of Judges—The Need for Reform*, 77 W. VA. L. REV. 763, 773 (1975); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 746 (1973) ("[M]aintaining public confidence in the integrity of the judicial process, compels adoption of the appearance test.").

83. *Sen. Hearing on S. 1064*, *supra* note 77, at 2 ("[T]he real evil of our present law [is that] our system does not permit us to indulge the judge who would 'rather not' sit in a particular case. Our system says 'if you are not disqualified you must sit.'"); John Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377, 378 (describing a case in which a judge felt obligated to sit despite appearance problems and observing that the new rule would avoid such problems).

84. RICHARD FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 105 (2d ed. 2007) ("The objective standard was implemented in an effort to make judicial disqualification determinations less dependant on judicial caprice."); GEYH, *supra* note 48, at 17–18 (forthcoming 2011) ("[One justification for] making perceived partiality a grounds for disqualification [is that] disqualifying judges for outward manifestations of what could reasonably be construed as bias obviates the need to make subjective judgment calls about what is actually going on inside a judge's heart and mind."); Ellen M. Martin, Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 147 (1976) ("The other major revision of section 455 was intended to broaden the grounds for disqualification by replacing the old subjective standard for disqualification for relationship with the objective standard established in the new ABA Code. Rather than leave the decision regarding disqualification to the judge's own opinion, new section 455(a) required that a judge recuse himself 'in any proceeding in which his impartiality might reasonably be questioned.'"); Note, *Judicial Ethics—Recusal of Judges—The Need for Reform*, 77 W. VA. L. REV. 763, 773 (1975) ("The appearance test . . . by eliminating subjective speculation concerning the source and nature of a judge's mental state, makes the application of the standard easier.").

less stigmatizing and hence more acceptable to judges for whom impartiality is core to their self-definition.[85] A logical corollary to this third goal is that an appearances regime makes seeking disqualification less problematic for lawyers who do not wish to stigmatize or otherwise impugn the impartiality of judges before whom they appear.[86]

The first goal of an appearances-based regime—promoting public confidence in the courts—was foremost in the minds of those who framed the 1972 Model Code and the 1974 amendments to § 455.[87] The capacity of the regime to promote public confidence in the courts turns first on the assumption that the legal establishment is committed to preserving the appearance of judicial impartiality in principle—committed enough to implement an appearance-based disqualification rule in ways that serve its purpose. On that score, it is clear that the bench and bar remain firmly committed to the appearance of justice generally and the appearance of impartiality in particular. Calling upon judges to disqualify themselves when their impartiality "might reasonably be questioned" is a more recent byproduct of the legal establishment's century-long campaign to promote public confidence in the courts—a campaign that has

85. *Sen. Hearing on S. 1064*, *supra* note 77 at 18 (Statement of Sen. Bayh) ("One should not have to prove bias, because if you have to file an affidavit affirmatively alleging prejudice and bias before a judge, it is going to do one of two things, or maybe both: (1) It is going to prejudice that judge against that counsel who has to try cases before him every day, every week, every year; or (2) it is going to make that counsel reluctant to file a challenge alleging bias or prejudice even though he knows it exists, because he is going to be concerned about the prejudice this might establish in the judge's mind against him in future cases."); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (asserting that the appearance-based disqualification standard "saves face for the judiciary, because a judge may be removed while appellate courts continue to proclaim their confidence in her impartiality").

86. *Sen. Hearing on S. 1064*, *supra* note 77, at 14 (Statement of Sen. Bayh) ("I think it is important for us not to put any of the attorneys practicing before the bench in the position where they have to say to the judge, 'All right, we will go along, Your honor, although we are concerned.' There is a great reluctance on the part of counsel to suggest to the judge that he is prejudiced, because they are going to have to go ahead and practice before that judge later.").

87. *See supra* note 82 and accompanying text.

focused in large part on how judges are perceived by the public they serve.[88]

Since the 1920s, the United States Supreme Court has repeatedly manifested its concern for the risk of judicial bias, the appearance of judicial bias, and temptations that could foster judicial bias, separate and distinct from judicial bias itself.[89] In addition, state and federal ethics codes almost universally admonish judges to avoid the "appearance of impropriety."[90] The ABA Model Code of Judicial Conduct, upon which state and federal codes are fashioned, defines "impropriety" to include "conduct that undermines a judge's . . . impartiality."[91] In a comment accompanying the rule directing judges to avoid the appearance of impropriety, the Model Code explains that "[c]onduct that compromises or appears to compromise the . . . impartiality of a judge undermines public confidence in the judiciary," and that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception" that the judge (among other possibilities) engaged in "conduct that reflects adversely on the judge's . . . impartiality."[92] In short, the legal establishment's commitment to preserving the "appearance" of propriety and impartiality in principle is sound.

The legal establishment's commitment to the appearance of impartiality in principle, however, does not translate into a consensus on when appearance problems worthy of disqualification arise. For an appearances-based disqualification regime to enhance public confidence in the courts, it is not enough for the legal establishment to recognize that appearances matter, and that judges should disqualify themselves when reasonable people might doubt their impartiality. The legal establishment and the public must also share a basic understanding of when it is reasonable to doubt the

88. Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH-PRESS: THE COLLISION OF THE COURTS, POLITICS AND THE MEDIA 22 (Keith Bybee, ed., Stanford University Press 2007); *see also* Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 616 (1992) (describing and critiquing the legal establishment's longstanding commitment to avoiding the appearance of impropriety).

89. Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should have Said*, 59 DEPAUL L. REV. 529, 543–49 (2010).

90. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

91. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

92. MODEL CODE OF JUDICIAL CONDUCT R. 1.2, cmt. 5 (2007).

impartiality of a judge. Absent this common understanding among judges, disqualification standards will fracture and fail; absent such an understanding between judges and the public, disqualification scenarios that cause the public to doubt the impartiality of its judges will not coincide with disqualification scenarios that judges deem worthy of concern; and absent a common understanding among members of the public, decisions rendered in an appearances-based disqualification regime will simply affront some as they reassure others.

Achieving the appearances-based regime's second goal of making disqualification more workable by relying on an objective standard to determine whether a judge's impartiality might reasonably be questioned, likewise assumes that there is a shared view of when to doubt a judge's impartiality that can be embodied in the "reasonable person" of song and story. Absent common ground, the "reasonable" view is no easier to ascertain or apply than crawling inside the skull of a particular judge to ascertain her actual motives. For the reasons elaborated upon below, however, this all-important consensus is lacking within the bench and bar, between the bench and bar and the public, and within the public itself.

A. Fractures Within the Bench and Bar

The bench and bar agree that they should strive to avoid appearance problems. It is harder, however, to agree on how to operationalize the appearance of impropriety or partiality as an enforceable legal standard. In 1969, the ABA promulgated the Model Code of Professional Responsibility, Canon 9, which admonished lawyers to "avoid even the appearance of professional impropriety."[93] Fourteen years later, the ABA dropped the provision from its Model Rules of Professional Conduct; draft commentary explained that "such a standard is too vague and could cause judgments about the propriety of conduct to be made on instinctive, ad hoc, or ad hominem criteria."[94]

A similar debate occurred in 2007, in the context of deliberation over the "appearance of impropriety" rule in the ABA's proposed Model Code of Judicial Conduct. After three years of review, the ABA's Joint Commission to Evaluate the Model Code of

93. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1969).

94. MODEL RULES OF PROF'L CONDUCT 53 (Proposed Final Draft 1981).

Judicial Conduct proposed to downgrade avoiding the appearance of impropriety from an enforceable standard (as it had been widely construed to be in the 1990 Model Code) to an aspirational goal.[95] It did so, out of "continuing concern over the vagueness of the 'appearance of impropriety' as an enforceable standard," despite objections that the proposal would dilute the Code's (and by implication, the legal establishment's) commitment to avoiding appearance problems.[96] A scathing editorial in the *New York Times* followed, and when the new Model Code was being debated on the floor of the ABA House of Delegates, the Commission acquiesced to an amendment restoring the "appearance of impropriety" as an enforceable rule, at the urging of the Conference of Chief Justices and a number of legal organizations.[97]

The ABA debate over the appearance of impropriety in the Model Code of Judicial Conduct did not extend to the role that appearances plays in disqualification, but the implications of that debate for an appearances-based disqualification regime are nonetheless present.[98] A judge's impartiality "might reasonably be questioned" for purposes of disqualification when he creates an appearance of partiality. The appearance of partiality, in turn, is a subset of the "appearance of impropriety," which the Commission that reviewed the Model Code concluded was too indefinite to enforce. One could argue that an appearance of partiality is more

95. CHARLES E. [SIC] GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 17–18 (2007).

96. *Id.*

97. Editorial, *The A.B.A.'s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, *available at* http://www.nytimes.com/2007/02/09/opinion/09fri3.html (charging the ABA commission with "following internal politics, not sound legal principle"); GEYH & WILLIAMS, *supra* note 95, at 17–18.

98. As an active participant in the Code reform project, I am nonetheless left to speculate why opponents of the appearance of impropriety in Rule 1.3 did not likewise oppose the appearance of partiality embedded in the disqualification rule (Rule 2.11(a)). The answer, I suspect, lies in the fact that the appearance of impropriety rule is often enforced in disciplinary proceedings, and opposition to that rule was led by the Association of Professional Responsibility Lawyers, whose members represent judges in such proceedings. The disqualification rule, in contrast, is employed first and foremost as a procedural rule for judges to recuse themselves sua sponte, or for litigants to seek a judge's disqualification, and is used as a basis for discipline only rarely, when a judge's erroneous failure to disqualify is willful. JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS, § 4.01 (4th ed. 2007).

"definite" than an appearance of impropriety because the former is a narrower subset of the latter. This assumes, however, that concern over the "appearance of impropriety" standard relates primarily to the vagueness of the term "impropriety," rather than "appearance," which may not be the case. In short, the legal establishment is united in the view that judges should avoid appearance problems but is less certain about whether it has a common understanding of when appearance problems arise that is sufficient to serve as the basis for enforcing a rule.

Decisions concerning the appearance of impropriety generally, and when a judge's impartiality might reasonably be questioned for purposes of disqualification in particular, are not unguided; rather, they are informed by precedent. As an author who has taken money from publishers to write or co-write treatises on judicial ethics and disqualification, I cannot be heard to say that the precedent those treatises organize and digest is unhelpful to judges who seek guidance on when to disqualify themselves under an appearance-based disqualification regime. The question, however, is whether that precedent is helpful enough to create a shared understanding within the legal establishment of when a judge's impartiality might reasonably be questioned. Such an understanding is needed for an appearances-based disqualification regime to achieve its goals.

One preliminary complication, which has been bemoaned by others, is that disqualification precedent and analysis are deficient for reasons having to do with the process by which they are generated.[99] First, the judge who disqualifies herself at the prompting of a party or on her own initiative typically does so without explanation; likewise, the judge who denies a motion to disqualify may or may not see fit to explain her decision.[100] Second, disqualification disputes are between the movant and the judge, rather than between the parties, as a consequence of which disqualification motions are often spared the rigors of the normal adversarial process.[101] Third, appellate review of disqualification decisions is confined almost exclusively to allegedly erroneous non-disqualification; review of

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99. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 551–53 (2005); Steven Lubet, *It Takes a Court*, 60 SYRACUSE L. REV. 221, 226 (2010).

100. Frost, *supra* note 99, at 536.

101. *Id.*

allegedly erroneous disqualification, while not unheard of, is extremely rare.[102] Fourth, with rare exception, non-disqualification is subject to a highly deferential standard of review on appeal (for abuse of discretion or clear error).[103] The net effect is that appellate precedent is of limited utility to judges seeking guidance: appellate courts do not decide when a judge is wrong to disqualify herself; they do not decide when a judge is wrong *not* to disqualify herself, except when she is *so* wrong that she abused her discretion; and when they affirm a trial judge's decision not to disqualify herself, it may be because they thought that the trial judge was right, or it may be because they thought that the trial judge was not wrong enough to override her discretion.

These concerns, while legitimate, should not be exaggerated: appellate courts can and do manage to offer trial judges meaningful guidance on their obligations under disqualification rules, in the context of appellate opinions. As a consequence, precedent has settled questions about whether a judge's impartiality might reasonably be questioned in a variety of specific contexts.[104] My primary concern, however, is not with the disqualification questions that precedent has settled but with the unsettled questions that have pushed disqualification into the spotlight. The structure of the appearances-based disqualification rule proceeds from the unstated premise that impartial judges are the norm, or default position. It is reasonable to deviate from that default position and doubt the impartiality of a judge under the rule only when one can point to specific facts, events, or conduct upon which such doubt is reasonably founded. Put another way, the traditional view that animates the appearances regime begins with a presumption of impartiality, in which "reasonable" people would agree that the prototypical judge is committed to disregarding extralegal influences and following the law. The question then becomes whether there is evidence sufficient to overcome this presumption and lead a reasonable person to doubt a particular judge's impartiality.

The history of judicial disqualification under the common law began with an almost irrebuttable presumption of impartiality followed by centuries of struggle to weaken that presumption in different ways: by requiring disqualification for conflicts of interest

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102. GEYH, *supra* note 48, at 22–30 (forthcoming 2011).
103. FLAMM, *supra* note 84, § 33.1.
104. *Id.*

that pose a risk of bias; by crafting procedural mechanisms aimed at forcing disqualification without a finding of actual bias; and by forcing disqualification for reasonably perceived, rather than actual bias.[105] An ironclad presumption of impartiality is consistent with the traditional and formalist view that judges bracket out extralegal influences and follow the law. The ensuing agitation for more stringent disqualification rules reflects a sentiment more closely tied to the realist tradition—that judges are people too, and as such are subject to extralegal influences;[106] hence, they should disqualify themselves when those influences risk getting the better of them.

In order for the judiciary to articulate a coherent view of when a judge's impartiality might reasonably be questioned, there must be a rough consensus as to how sturdy the presumption of impartiality should be. Such a consensus, however, is lacking: judges of a more traditionalist bent will guard the presumption of impartiality far more zealously than those with, for want of a better term, more "realist" leanings.

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court confronted the question of whether a plaintiff's due process rights were violated by a state supreme court justice who refused to recuse himself after receiving over $3 million in independent support for his election from the defendant's CEO, while the case was pending.[107] Commentary on *Caperton* has tended to dwell on the "probability of bias" test that led the five-member majority to rule that Caperton's rights were violated, the Pandora's box of uncertainties that the four dissenters claimed the majority's new test had opened, and *Caperton*'s implications for judicial campaigns.[108] Lurking beneath

105. *See supra* Part II.

106. ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 37–59 (2d ed. 2005).

107. Caperton v. Massey v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

108. *See, e.g.*, Richard M. Esenberg, *If You Speak Up You Must Stand Down: Caperton and Its Limits*, 45 W. VA. L. REV. 1287, 1333–36 (2010) (relating the Caperton standard to judicial campaign support); Norman L. Greene, *How Great Is America's Tolerance For Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 891–910 (2010) (discussing the majority and dissenting opinions and *Caperton*'s relation to judicial elections); Leon D. Lazer, *The Probability of Actual Bias, Objective Standards, and Pandora's Box*—Caperton v. A.T. Massey Coal Company, 26 TOURO L. REV. 665 (2010) (discussing the "probability of bias"

these issues, however, was a more fundamental rift over how deep the presumption of impartiality ought to go. The dissenters subscribed to the traditional view: "There is a 'presumption of honesty and integrity in those serving as adjudicators' . . . . All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."[109] The majority, in contrast, exhibited realist or scientific inclinations. Its opinion emphasized the frailties of the human mind and the risk of unconscious bias, which led it to question the capacity of judges to make subjective assessments of their own impartiality. Without an "objective" rule, the majority opined, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case."[110] The objective rule that the majority articulated, asked "whether, 'under a realistic appraisal of psychological tendencies and human weaknesses,' the interest [of the judge in question] 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"[111]

Caperton may have established a new test for determining when non-disqualification gives rise to due process problems, but it did nothing to remediate the underlying divide over how strong the presumption of impartiality should be. Even assuming that in future cases the four dissenters relent and acquiesce to the "risk of actual bias" test, it is safe to anticipate that that their assessment of that risk will be colored by their underlying view that judges can be trusted to abide by their oaths to remain impartial. In other words, except in extreme or clearly settled cases, disqualification for bias, probable bias, or perceived bias will remain a deeply fractured process as long as judges lack a basic, shared understanding of when the presumption of impartiality should yield.

This intra-judicial fracture has given rise to competing and conflicting narratives describing the current disqualification

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standard in the majority opinion and the criticisms of the standard in the dissents); Stanley A. Leasure, *Cash Justice and The Rule of Law: Post-Caperton Financing of Judicial Elections* 46 IDAHO L. REV. 619 (2010) (discussing *Caperton*, its jurisprudential foundation, and the issues related to judicial elections); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009) (discussing the majority and dissenting opinions and offering criticisms of the dissent).

109. *Caperton*, 129 S. Ct. at 2267.

110. *Id.* at 2263.

111. *Id.* (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

landscape. One narrative is that judges take umbrage at disqualification motions, which they regard as a slight to their honesty and integrity. Lawyers are loath to seek disqualification except in truly extreme cases because it will anger the judge without leading to his disqualification.[112] A second narrative is that lawyers seek disqualification strategically, not because they doubt the judge's real or perceived impartiality, but because they suspect that the judge will be unsympathetic to their clients on the merits.[113] A third narrative is that an appearances-based disqualification regime leads to unnecessary disqualification by judges who are overly sensitive to appearance concerns or are looking for excuses to avoid uncomfortable situations.[114]

While seemingly at odds, these conflicting narratives make sense in a system where disqualification norms are fractured. Traditionalist judges will take offense at the suggestion that they are less than impartial—an appearances-based regime may seek to lessen the stigma of disqualification by sparing judges the need to acknowledge actual partiality, but when judges are accused of

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112. *See* Frost, *supra* note 99, at 567–68 ("[F]or example, a district court judge stated that he found the motion for his disqualification 'offensive' and he asserted that it 'impugned [his] integrity'" (quoting Hook v. McDade, 89 F.3d 350, 353 (7th Cir. 1996))); *see also*, Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of "Anything Goes,"* 8 CARDOZO PUB. L. POL'Y & ETHICS J. 341, 365 (2010) (arguing that recusal is an "illusory tool" because "litigants fear bringing valid recusal motions because they may anger judges, and because the odds of success are extremely low"); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 500–01 (2009) (arguing that the "structural emphasis on judicial self-recusal creates a major weakness in existing recusal standards—litigants fear judicial retribution").

113. *See* Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizen's United, *Their Implication for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 906 (2010) ("[T]here are also concerns about strategic recusals, where one judge or group of judges is inclined to disqualify another principally because of a voter disagreement, as opposed to a recusal standard necessarily being met."); Shugerman, *supra* note 88, at 536–37 (2010).

114. *See generally* Cravens, *supra* note 21, at 12 (noting that one of many ways in which the current approach goes awry is in its promotion of over-recusal); Dmitry Bam, *Understanding* Caperton*: Changing the Role of Appearances in Judicial Recusal Analysis*, 42 MCGEORGE L. REV. 65 (2010) (arguing that states ought to tailor new recusal procedures in response to *Caperton*).

apparent bias, it is easy enough to understand why they would receive it as an unwelcome accusation of bias with a candy-coating. Lawyers who risk angering traditionalist judges by seeking their disqualification will thus think twice about doing so, unless they have concluded that the judge will be averse to their position on the merits, in which case they have less to lose by seeking disqualification. Judges with realist tendencies, in contrast, may be utterly unfazed by motions to disqualify and, in some cases, may bend over backwards to preserve the appearance of impartiality by stepping aside when asked, even when claims of perceived bias are strained. In short, an intra-judicial schism over the strength of the presumption of impartiality compromises the correctness of an assumption key to the success of an appearances-based regime: that judges share a common understanding of when impartiality might reasonably be questioned.

B. Fracture Between the Bench and Bar, and the Public

The schism over the presumption of impartiality is not only intra-judicial, but between the bench and bar, on the one hand, and the people they serve on the other, including the people's elected representatives in legislatures. The fracture lines between the legal establishment and the public are best understood in historical, legal, and psychological terms.

1. The Historical Divide

The history of judicial disqualification recounted in Part II is a history of legislators, who are doubtful of judges' impartiality, enacting disqualification laws with which judges, convinced of their own impartiality, grudgingly comply. Thus, cases arose in which judges sat after concluding that the presumption of impartiality had not been overcome by a specific conflict of interest rule. Unhappy legislatures responded with new conflict of interest rules. Judges interpreted the new rules to permit cases to fall through cracks between them, and legislatures responded with more conflict rules and procedures to disqualify judges for alleged bias. Ambivalent judges gave the new procedures a parsimonious construction, and legislatures responded with rules requiring disqualification for

perceived bias.[115] Judges loath to acknowledge perceived partiality, in turn, have declined to disqualify themselves in a number of high-profile cases which have provoked a public outcry, as described at the outset of this article. The overall effect is what John Leubsdorf has aptly described as a "vicious cycle," in which litigants move for disqualification, judges resist, Congress responds with more stringent disqualification rules, which are then subjected to judicial interpretations that contort the rules again.[116]

2. The Legal Divide

Fracture lines between the bench and bar on the one hand, and the public on the other, are likewise visible in the law of judicial conduct. For judges generally, commitment to impartiality is entrenched and robust: Sir Matthew Hale's Code of Conduct demanded it, Blackstone's commentaries presumed it, and canons of judicial ethics promulgated in the early twentieth century called upon judges to avoid even the appearance of "impropriety," which subsumes the appearance of partiality. Current "law" governing judicial conduct perpetuates this ethos of impartiality. The first words of the first Canon of the Model Code of Judicial Conduct, adopted with modifications in virtually every jurisdiction, declare: "A judge shall uphold and promote the independence, integrity and

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115. This history likewise reflects a continued intra-judicial schism; the American Bar Association's Model Code of Judicial Conduct, which proposed the first appearance-based disqualification rule, was propagated among the states by supreme courts which adopted the Model Code. *Taking Disqualification Seriously*, *supra* note 13, at 14 ("The Model Code's general provision, requiring disqualification if a judge's 'impartiality might reasonably be questioned,' has been adopted by every jurisdiction, with the possible exceptions of Montana and Michigan."). Supreme courts adopting an appearance-based rule clearly approved of the approach in principle and the discretion it afforded judges to disqualify themselves when necessary. That supreme courts approved of the approach in principle, however, does not mean that judges shared a common understanding of when disqualifying appearance problems arose.

116. Leubsdorf, *supra* note 85, at 245 ("Litigants seeking to recuse unfavorable judges file motions; judges step aside or resist, with the most biased judges the least willing to withdraw; Congress and commentators survey the questionable results, seeking to end them with more sweeping legislation; the new legislation is thrown to the courts, where it undergoes the same pressures that twisted its precursors."). *See also* Frost, *supra* note 99, at 534 ("[H]istory shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves.").

impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[117] Canon 2 states: "A judge shall perform the duties of judicial office impartially."[118] Rules underlying Canon 2 elaborate—Rule 2.3, for example, directs that a judge "shall perform the duties of judicial office . . . without bias or prejudice."[119]

Closely linked to the duty to remain impartial is the duty to abide by the Rule of Law. Rule 2.2 states that a judge "shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially," and an accompanying comment explains that "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."[120] Rule 2.4(B), in turn, states that a judge "shall not permit family, social, political, financial or other relationships to influence the judge's judicial conduct or judgment."[121] An accompanying comment adds that "[a]n independent judiciary requires that judges decide cases according to the law and facts, without regard to whether the particular law or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family,"[122] and the Reporters' Notes explain that this comment "link[s] the duty not to be swayed by the public, friends, or family to the judge's primary obligation to follow the law and facts impartially."[123]

In short, within the legal establishment, a "good" judge is an ethical judge and an ethical judge is impartial, avoids the appearance of partiality, and follows the law. When a party asks a judge to disqualify himself because his impartiality might reasonably be questioned, it implies one of two possibilities: either the party is alleging that the judge appears to be partial but has not stepped aside on his own initiative, in contravention of his ethical duty to avoid the appearance of impropriety;[124] or the party is finessing an accusation

117. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

118. *Id.* at Canon 2.

119. *Id.* at R. 2.3(A).

120. *Id.* at R. 2.2 cmt. 1.

121. *Id.* at R. 2.4(B).

122. *Id.* at R. 2.4 cmt. 1.

123. GEYH & HODES, *supra* note 95, at 31.

124. In some cases, for example, when the disqualification motion is grounded in extrajudicial statements of the judge creating an appearance of bias, it is the

that the judge is biased in fact, in contravention of the judge's ethical duty to be impartial.[125] For judges who are truly committed to administering justice impartially, neither possibility is one they will concede lightly. Therein lies the problem for the third goal of the appearances-based regime: judges will not find it appreciably less stigmatizing to disqualify themselves for creating an appearance of partiality if an appearance is itself problematic or if an allegation of appearing partial is understood as a polite euphemism for partiality in fact.

In the preceding section of this article, I pointed to a schism within the bench and bar, in which some judges, including the majority in *Caperton*, are willing to second-guess judicial impartiality more readily than others. On the whole, however, judges are naturally going to be slower than the public they serve to second-guess the real or perceived impartiality of fellow judges.[126] Disqualification can be conceptualized in two ways: as a matter of litigation procedure and as a matter of judicial ethics.[127] Those who

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statements themselves that give rise to an appearance problem. *See, e.g.*, United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); United States v. Roebuck, 271 F. Supp. 2d 712 (V.I. 2003). In other cases, for example, where the judge is a close personal friend of a litigant, the underlying conduct—a personal friendship—may be innocuous enough, but an appearance problem arises as a result of the judge's failure to step aside on his own initiative after the case is filed. No jurisdiction would discipline a judge for failing to disqualify himself before a motion was filed, or for refusing to disqualify himself after a motion was filed, if the refusal was in good faith. ALFINI, ET AL., *supra* note 98, § 4.01. The point, however, remains that, except when the judge is unaware of the conduct giving rise to the motion (e.g., the judge is unaware that a close relative recently acquired a financial interest in a party appearing before the judge), the unstated premise of the motion is that the judge is being asked to remedy an appearance problem that he could (and implicitly should) have resolved by recusing himself *sua sponte*.

125. There is a more innocuous, third possibility that I discuss later: the judge did not recognize the appearance problem until it was called to her attention. For this possibility to gain traction with judges, however, the scientific or realist approach to disqualification must be more widely accepted. *See infra* notes 213–18 and accompanying text.

126. Courts have acknowledged this difference in world view by evaluating whether a judge's impartiality might reasonably be questioned from the perspective of a fully-informed, objective observer who is not a judge because judges will be less skeptical of a fellow judge's impartiality than the general public. GEYH, *supra* note 48, at 18. Such an approach, however, begs the question of whether judges will credit the reasonableness of an objective outsider's skepticism as readily as outsiders would.

127. GEYH, supra note 48, at 2.

conceptualize disqualification requirements largely as rules of practice and procedure that good lawyers exploit for the benefit of their clients (contributing to the narrative that lawyers seek disqualification for strategic reasons), may be unconcerned by the implications of disqualification motions. If those judges have internalized the lessons of legal realism and are sensitive to the "psychological tendencies and human weaknesses" of the judicial mind, they may be receptive, or at least not hostile, to disqualification requests.[128] On the other hand, to the extent that judges as a whole remain mindful of the ethical dimension to disqualification, they are likely to embrace a more muscular presumption of impartiality and be inherently skeptical of calls for their disqualification. Even the *Caperton* majority, which concluded that the circumstances there overcame the presumption of impartiality, nevertheless took pains to emphasize numerous times how exceptional those circumstances were.[129]

Juxtaposed against this deep and abiding commitment to impartiality and the rule of law embedded in codes of judicial conduct are the disqualification rules themselves. Disqualification rules enumerate the circumstances in which judges cannot be trusted to rule impartially and according to law, i.e., when the risk is too great that a judge's personal prejudices or preferences will get the best of her. Disqualification rules thus challenge the ethos of impartiality pervading codes of conduct and the judge's self-definition. Although disqualification rules commonly appear in codes of conduct that supreme courts adopt, the engine driving their development is housed in legislatures that have been far more skeptical of judicial impartiality than have judiciaries.

As previously noted, there is a presumption of impartiality implicit in a rule-making disqualification, an exception to the norm in contrast to a hypothetical rule proceeding from the opposite presumption—that judges were disqualified except in enumerated circumstances. The strength of that implicit presumption, however, is unstated in the rules themselves, and the vicious circle described by Leubdsorf can best be explained as a struggle between the weaker presumption of impartiality shared by legislators who make disqualification rules, and the stronger presumption of impartiality held by judges who interpret and apply those rules. Thus, the

128. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009).
129. *Id.*

burgeoning number of disqualifying events that legislatures have added to their lists over the years, has been offset by a comparably impressive list of rules of judicial construction that judges have crafted to curtail the reach of disqualification requirements.[130] Such rules of judicial construction include: creating a powerful presumption of impartiality;[131] strictly construing disqualification procedures against movants;[132] offsetting the duty to disqualify with a duty to sit;[133] delegating disqualification decisions to the judge whose impartiality is challenged;[134] limiting acceptable evidence of judicial partiality to that emanating from extrajudicial sources;[135] subjecting non-disqualification to deferential standards of review;[136] subjecting non-disqualification of judges on courts of last resort to no review at all;[137] and limiting the application of disciplinary sanctions for non-disqualification to circumstances deemed willful rule violations.[138]

Illustrative of the resulting schism between judges and their defenders, on the one hand, and legislators and the public they represent, on the other, is the fractious debate over "judicial activism" and the rule of law. Impartiality subsumes a lack of bias and an open mind enabling judges to set their personal prejudices aside and uphold the rule of law.[139] Judges and court defenders, seeking to shield judges from attacks by court critics, have rallied around the principle that judges who are insulated from threats and intimidation will bracket out extralegal influences and follow the

130. *See infra* notes 131–38.

131. FLAMM, *supra* note 84, § 3.3.

132. United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993).

133. FLAMM, *supra* note 84, § 20.8.

134. *Id.* § 17.6.

135. *Id.* § 19.8.

136. *Id.* § 33.1.

137. *See* Steven Lubet, *Ducks Redux*, 92 JUDICATURE 223, 259 (March/April 2008) (noting that Supreme Court Justices exercise unreviewable discretion when their impartiality is questioned); Robert S. Greenberg, *Scalia Defends His Impartiality in Cheney Case*, WALL ST. J., Mar. 19, 2004, at B1 (same).

138. ALFINI ET AL., *supra* note 98, § 4.01.

139. MODEL CODE OF JUDICIAL CONDUCT Terminology ("'Impartial,' 'impartiality,' and 'impartially' mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.").

law.[140] In contrast, court critics in legislatures and elsewhere accuse judges of disregarding the law and acting on their personal feelings and ideological appetites.[141] Survey data show that while public confidence in the courts remains strong, most people do not believe judges when they say that they always follow the law and think judges often base decisions on their personal feelings.[142]

I do not mean to imply that judges are or should be subject to disqualification for their ideological predilections, except in extreme cases when their views are so strongly held that they have publicly pre-committed themselves to reach a particular result before the case is heard.[143] My point is simply that judges and the public do not share a common view of what influences judges and their decision-making and to what extent. In the context of disqualification, it means that the public will be quicker to question the impartiality of judges than will judges themselves.[144] That, in turn, compromises the ability of an appearances-based disqualification regime to promote public confidence in the courts because the judges who implement that regime will be untroubled by episodes of non-disqualification that may be of much greater concern to a more skeptical public.

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140. *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 279–82 (2006).

141. *See id.* (noting post realist critics that argue that judicial independence undermines the preferences of political majorities).

142. Maxwell School of Citizenship and Public Affairs, *Maxwell Poll on Civic Engagement and Inequality: Law and Courts Questions from 2005 Poll*, 1–4 (2005) *available at* http://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf.

143. This is the line that the Model Code of Judicial Conduct draws. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(a)(5).

144. Disqualification precedent arguably addresses this problem by directing judges to evaluate a judge's impartiality from the perspective of the public, or at least an objective, external observer. *E.g.*, *In re* United States, 441 F.3d 44, 56 (1st Cir. 2006); United States v. Salemme, 164 F. Supp. 2d 86, 91 (Mass. Dist. Ct. 1998). As discussed in the next section, however, there are significant psychological impediments to judges accurately assessing how they are perceived by others.

3. The Psychological Divide

Finally, the schism between the bench/bar and the public can be understood in psychological terms. A multistate study conducted by the American Judicature Society found that judges are ambivalent about disqualification.[145] Given the foregoing discussion, that should come as no surprise: disqualification rules give litigants a means to challenge judicial impartiality, which is at the core of the judge's self-definition.

At a more elemental level, however, disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct. Neither assumption is safe.

Studies reveal that people generally are poor at self-assessment and tend to be overly optimistic judges of their own abilities.[146] Inflated preconceptions of their abilities, in turn, lead subjects to over-estimate their competence in performing specific tasks.[147] Unsurprisingly, then, test subjects "report being less susceptible than their peers to various cognitive and motivational biases."[148] They tend to exhibit a blind spot to their own biases, take their perception of the world as objective reality, and attribute contradictory perspectives to bias in others, rather than themselves.[149]

Drawing conclusions about judges from such data is risky because judges differ from the general population in their training, experience, and commitment to objectivity and impartiality. One study, however, has found that judges are susceptible to implicit racial bias.[150] Another has shown their vulnerability to egocentric

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145. JEFFREY SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 42 (1995).

146. David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 PSYCHOLOGICAL SCI. PUB. INT. 69, 71–73 (2004).

147. David Dunning et al., *Why People Fail to Recognize Their Own Incompetence*, 12 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCI. 83, 86 (2003).

148. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 374 (2002).

149. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37–38 (2006).

150. Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1222 (2009).

bias—the propensity to overestimate one's own abilities.[151] Therefore, one can reasonably suspect that when evaluating the extent of their own bias, judges' professed commitment to impartiality may render them especially vulnerable to overly-optimistic self-assessments or as Professor Steven Lubet calls it: "introspection deficit disorder."[152]

Disqualification for the appearance of bias can serve as a gentle proxy for suspected bias in fact, but when applying the appearance-based test, judges do not ask whether they are biased in fact, but whether they might reasonably appear so to another. Data shows, however, that people view themselves differently than others view them: whereas actors tend to evaluate their conduct in situational terms (I was late because my alarm clock did not go off), observers tend to evaluate actors' conduct in dispositional terms (he was late because he is not a punctual person).[153] Whereas actors evaluate their own conduct through introspection based on internal inputs, observers evaluate the conduct of actors through extrospection based on external cues.[154] That leads actors to overvalue their introspections and undervalue or ignore those of others.[155]

To the extent judges evaluate their own conduct differently than observers do, a schism between judges and the public is inevitable. The conduct, or external cues, leading observers to suspect that the judge has a biased disposition, will be marginalized by the judge who: does not think himself biased; attributes his conduct to the exigencies of the situation; and discredits opposing inferences as uninformed. Thus, judges will be less inclined to find themselves biased than the public at large would and will likewise be less inclined to credit public suspicions of bias than will the public.

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151. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811–16 (2001).

152. STEVEN LUBET, THE IMPORTANCE OF BEING HONEST 6 (2008).

153. Edward Jones & Richard Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, NEW YORK: GENERAL LEARNING PRESS 79, 80 (1971).

154. Emily Pronin, *How We See Ourselves and How We See Others*, 320 SCIENCE 1177, 1177 (2008).

155. Emily Pronin & M. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 566 (2006).

The historical, legal, and psychological schism between judges and the public has manifested itself in several recent episodes. Justice Scalia clung tenaciously to his conclusion that sitting on a case in which one of the parties was a personal friend with whom he had recently been duck hunting could not reasonably call his impartiality into question and categorically dismissed public expression of views to the contrary as unreasonable and ill-informed.[156] A New York Times investigation of judicial campaign contributions in Ohio revealed that judges rarely disqualified themselves from cases in which contributors appeared before them, while an overwhelming majority of the public in Ohio and elsewhere believed that campaign contributions influence judicial decisions.[157] The majority rule in the state and federal courts continues to be that the presumption of impartiality judges enjoy justifies them deciding their own disqualification motions, while survey data shows that the vast majority of the public thinks that disqualification requests should be assigned to a different judge.[158] In short, the prospects for an appearances-based disqualification regime to promote public confidence in the courts are undercut by recurrent divergence of public and judicial views over when a judge's impartiality appears doubtful.

C. *Fractures Within Public Attitudes*

The capacity of an appearances-based disqualification regime to achieve its goals depends on a more or less coherent conception of when it is reasonable to question a judge's impartiality that judges and the public share. If, however, the public itself is deeply divided

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156. Memorandum of Scalia, J., Cheney v. United States, 541 U.S. 913, 927–29 (2004).

157. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, § 1, *available at* 2006 WLNR 16983797; T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

158. ABA Judicial Disqualification Project, *supra* note 13 (noting that most states authorize the subject judge to rule on disqualification); *see* Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers, (Feb. 22, 2009), *available at* http://www.justiceatstake.org/newsroom/press_releases.cfm?show=news&newsID=5677 (finding that 81% of survey respondents thought that a different judge should decide disqualification motions).

over whether and when to trust its judges to be impartial, the search for that coherent, shared conception becomes elusive if not illusory.

A majority of the public thinks that judges are impartial.[159] One recent study has found that fully one-third of the public is so confident in the impartiality of its judges that it does not second-guess their impartiality, even in extreme-seeming scenarios where parties make sizable contributions to a judge's reelection campaign.[160]

Not all Americans share that view. A significant minority lacks confidence in the courts and questions their impartiality. Of particular concern, there is a noticeable divide along racial lines. In one survey, a majority of whites (62%) believe that judges are fair and impartial, while a majority of African-Americans (55%) believe that judges are not fair and impartial.[161] Consistent with these results, a major study conducted by the National Center for State Courts found that "African-Americans tend to have distinctly lower

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159. *See* ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 17 (2003).

160. James Gibson & Gregory Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Legitimacy of the Courts Be Rescued by Recusal?*, at 21 (July 2, 2009) (on file with authors) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723##. The authors' core finding that two-thirds of the public *does* think that a judge's impartiality is compromised when he receives campaign contributions from parties is obscured by two additional findings that fixate their attention: first, that the public is as troubled by rejected offers of support to a judge's campaign as accepted ones; and second, that disqualification did not fully rectify the perception problems that campaign contributions created. *Id.* at 30, 32. The first point, while interesting, simply reinforces the importance of existing rules that require judges to create campaign committees to receive contributions in their stead, where offers of support rejected by campaign committees will not come to the judge's attention. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8). The second finding is based on survey results showing that disqualification does not restore the public's confidence in the impartiality of the disqualified judge. *Id.* at 32. Such an inquiry is puzzling: If, for example, a judge recuses himself from a women's rights case because he is a raging misogynist, the data point that few respondents think the act of disqualification will cure him of his misogyny is neither surprising nor relevant from a regulatory perspective. The relevant point, which needs no survey support, is that by disqualifying himself, the case will be heard by a different judge, who is unencumbered by the disqualified judge's bias.

161. *See* Editorial, *Judicial diversity—an essential component of a fair justice system*, AM. JUDICATURE SOC'Y (Mar. 2010), http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=907 (citing survey conducted by Justice at Stake in 2001).

evaluations than do Whites of the performance, trustworthiness, and fairness of courts."[162] For example, in a juror survey, 63% of white respondents thought court outcomes tended to be fair, while only 21% of African-American respondents thought so.[163]

The default position of an appearances-based disqualification regime is that judges are impartial: Disqualification is triggered by information that leads a reasonable person to question a judge's impartiality. When, however, a significant and identifiable subset of the general population does not accept that default position and begins from the premise that judges are not impartial, it leads to one of two conclusions. Either the views of the subset—in this case, African-Americans—are categorically unreasonable, or reasonable people do not necessarily share the presumption of impartiality upon which an appearances-based regime is grounded. Implicitly, the "law" has opted for the former conclusion, by clinging to the presumption that most African-Americans do not share—an understandable tack, given the impracticable alternative of disqualifying judges categorically as partial-seeming. My ultimate point, however, is that the efforts of an appearances-based disqualification regime to promote public confidence in the courts is doomed from the start, to the extent that a segment of the public that ought to be of primary concern to the legal establishment (because its confidence in courts is low) does not share the presumption of impartiality that the regime employs as its starting point.

IV. PROPOSED ALTERNATIVES TO THE APPEARANCES-BASED DISQUALIFICATION REGIME

I am not alone in my doubts about the future of an appearances-based disqualification regime. Others have proposed alternatives that, in effect, seek to resurrect and rehabilitate one of the three predecessor regimes discussed in Part II.

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162. DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY, FINAL REPORT 10 (2003), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf.

163. *Id.* at 65.

A. Revitalizing the Presumption of Impartiality

Although the legal establishment as a whole remains committed to the appearance of justice in principle, some have dissented from the view that keeping up appearances is a worthy goal.[164] Doubts about the intrinsic merits of obsessing over appearances, coupled with the inability of the appearances-based regime to articulate a coherent and enforceable standard for disqualification, has led Professor Sarah Cravens to argue that "actual justice" should replace the appearance of justice as the lodestar for disqualification.[165] Such an approach effectively reverts to a robust presumption of impartiality that focuses attention on the reasons a judge offers for the decisions she makes and requires disqualification only when those reasons reflect the judge's inability or unwillingness to do actual justice in the case.

For Cravens, presumably, none of the problem cases discussed at the outset of this article are problem cases because the judges in question offer reasons for their decisions that manifest no incapacity to reach a result that does actual justice. West Virginia Justice Brent Benjamin adopted this approach himself when declining to disqualify himself from *Caperton*, arguing that a disqualification rule based on appearances was too vague and that the focus ought to be on the "actuality" of justice as reflected in the reasons justifying the decisions he made.[166]

Proposals for the return of a strong presumption of judicial impartiality that can be overcome only when necessary to do actual justice are provocative but wrongheaded, for two reasons. First, these approaches fixate on the lesser concern of over-disqualification, which is already subject to independent regulation.[167] Second, and more fundamentally, approaches which

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164. *See* Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 595 (1992); *see also* Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS, Jan.–Feb. 2005, at 19.

165. Cravens, *supra* note 21, at 5.

166. Caperton v. A.T. Massey Coal, Co., 679 S.E.2d 223, 292–93 (W. Va. 2008) (Benjamin, J., concurring).

167. MODEL CODE OF JUDICIAL CONDUCT, R. 2.7 (2007), provides that "a judge shall hear and decide all matters assigned to the judge, except when disqualification is required," and an accompanying comment cautions that "[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally."

pay no heed to the real, probable, or perceived bias of the judge and focus exclusively on the reasons a judge gives for her decisions, reflect a problematic conception of "actual justice."

For proponents of an "actual justice" approach, the primary problem with an appearances-based disqualification regime is that it leads to over-disqualification by judges who are impartial and would do actual justice but who disqualify themselves to avoid perception problems—or cases they would rather not decide. The problem of over-disqualification is largely one of squandering judicial resources on the administration of unnecessary disqualifications, whereas the problem of under-disqualification is one of subjecting litigants to the loss of life, liberty, or property in an unfair (or seemingly unfair) process. As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling.[168] To the extent that over-disqualification arguably damages public confidence by creating unwarranted doubts about judicial impartiality,[169] it is proscribed by a separate ethics rule that judges violate on pain of discipline: "A judge shall hear and decide matters assigned to the judge, except when disqualification is required."[170] A comment accompanying this rule in the Model Code explains that "the dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues."[171] Over-disqualification is thus a lesser, independently regulated concern that would hardly seem to warrant a regime change.

More fundamentally, a disqualification standard that purports to ensure "actual justice" by looking exclusively at the reasons judges give for their rulings reflects an anachronistic understanding of judicial decision-making and embraces an impoverished conception of justice. One need not be an exponent of critical legal

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168. Shugerman, *supra* note 89, at 552.

169. Chief Justice Roberts made a related argument in his dissent in *Caperton*: "The Court's new 'rule' . . . will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (Roberts, C.J., dissenting).

170. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007).

171. *Id.*

studies to recognize that able lawyers (and judges) can conjure plausible reasons for varying outcomes in every case that is not so frivolous as to warrant sanctions for the suit being filed or defended. Were a judge to place those reasons on a wheel and explain her decisions with reference to whichever one she stuck with a dart, no theory of which I am aware would claim that justice was done simply because the reason so chosen was plausible. The same would be true if the judge's choice of reasons was dictated by bias instead of a dart. Codes of conduct promote judicial independence, integrity, and impartiality because "actual justice" demands more than rationality—it demands that the decisions judges make be unsullied by bias, dependence, or dishonesty, regardless of whether a biased, dependent, or dishonest judge can rationalize his decisions coherently. Yet, a disqualification regime that evaluates a judge's fitness to sit with exclusive reference to whether the decisions he renders are supported by acceptable reasons would, of necessity, bar disqualification for suspected bias, actual bias, and even corruption, as long as judges are clever enough to devise plausible explanations for their decisions. In a post-realist age, when the best empirical work to date shows that the decisions judges make cannot be divorced from the judges who make them because judicial decision-making is subject to a complex array of legal and extralegal influences,[172] confining proof of judicial partiality to an analysis of the opinions judges generate seems strangely naïve.

B. Reinvigorating a Conflicts Regime

A multi-state study of judicial disqualification conducted in the 1990s found that while judges were ambivalent about disqualification generally, they were less so about disqualification for conflicts of interest.[173] To the extent that problems with disqualification arise in the absence of intra-judicial consensus on when a judge's impartiality might reasonably be questioned, one possible solution is to diminish reliance on that standard by expanding the list of specifically enumerated conflict scenarios in which disqualification is automatic. In other words, requiring judges to withdraw in specified circumstances (when rule-makers deem the

172. WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011).

173. SHAMAN & GOLDSCHMIDT, *supra* note 145, at 67.

risk of bias too high) reduces, if not eliminates the discretion that has caused the appearances-based disqualification regime to fracture.

In the past few years, the American Bar Association, as keeper of the Model Code of Judicial Conduct, has sought to guard against under-disqualification by crafting new conflicts rules to address disqualification scenarios that would otherwise be regulated by the general appearances-based standard. In 1999, the ABA revised the Model Code to require disqualification for campaign contributions in excess of a dollar threshold, in response to concerns that judges were not disqualifying themselves from cases in which parties or their lawyers had contributed substantially to the judge's election campaign.[174] In 2003, the ABA revised its Model Code again, to require disqualification when judges had previously committed themselves to deciding the issue now before them in a particular way.[175] This was a response to the Supreme Court's decision in *White*, which declared that judicial candidates had a right to announce their views on issues that they were likely to decide as judges.[176] In 2010, the ABA's Standing Committee on Judicial Independence proposed a post-*Caperton* rule that would require disqualification when parties or lawyers then before the judge had lent independent support to the judge's campaign, under circumstances specified in the rule.[177]

There is nothing wrong per se with a conflicts-based approach to disqualification. Inevitably, however, specific, conflicts-based disqualification "solutions" operate one step behind the innumerable disqualification problems that arise and cannot address those problems until they have recurred with frequency and force sufficient to prompt a rule change. Moreover, disqualification is often desirable under circumstances that are insusceptible to capture in clearly worded rules. For example, it is generally accepted that a judge's impartiality might reasonably be questioned when especially close friends appear before the judge as litigants, lawyers, or witnesses but not when mere acquaintances do.[178] In the aftermath of imbroglios such as Justice Scalia's duck hunt with Vice President Cheney while the latter's case was pending before the

174. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (2005).
175. *Id.* at Canon 3E(1)(f).
176. Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002).
177. Draft on file with the author.
178. ALFINI ET AL., *supra* note 98, § 4.09.

Supreme Court, it is tempting to propose a conflicts-based rule to bar judges from hearing cases in which personal friends appear before them, and at least one scholar has made such a proposal.[179] As a practical matter, however, a rule that legislates the distinction between friends and acquaintances can be no more helpful than the general, appearances-based disqualification rule it replaces. If such a rule simply declares that judges must disqualify themselves when close friends appear before them, it does no more than codify existing precedent under the general disqualification rule and avoids the very question it needs to address. If the rule seeks to guide judges on the distinction between friends and acquaintances, such guidance must either draw arbitrary lines (by requiring disqualification if a party is the judge's former roommate, maid of honor, godparent to the judge's child, etc.) or revert to general standards of reasonableness or perception that afford judges the discretion that specific, conflicts-based rules seek to constrain.

Several existing conflicts rules illustrate this latter problem by trading bright lines for flexibility in ways that promote reasonable outcomes at the expense of predictability, thereby blurring the distinction between a conflicts-based approach to disqualification and an appearances regime. For example, under Model Code Rule 2.11(A)(3), a judge must disqualify himself if he has an "economic interest" in the subject matter of the case.[180] The Code defines "economic interest" to mean more than a "de minimis" interest. "De minimis," in turn, is defined to mean "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality"—which circles the analysis back to an appearances-based standard.[181] Similarly, Rule 2.11(A)(5) calls on a judge to disqualify herself for making a prior public statement that "appears to commit the judge to reach a particular result" in the case. Presumably, whether a judge "appears" to have committed herself must be evaluated from the perspective of the same elusive, objective, reasonable observer that has caused the appearances-based disqualification regime to fracture.

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179. Miller, *supra* note 18, at 577–78.

180. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(3) (2007).

181. The same issue arises with a separate rule that calls for disqualification for other interests that are "more than de minimis," which, as just noted, is a term defined with recourse to appearances. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(c) (2007).

I do not mean to beat a straw man into horse bedding here. Proponents of new, conflicts-oriented disqualification rules seek discrete solutions to specific problems. They do not propose such rules, alone or in combination, as a global cure for what ails the law of disqualification, and there is no need for me to critique a regime change that no one advocates. My point is simply that conflicts rules are, by their nature, piecemeal reforms that may serve their limited purposes well but which remain too limited in scope to remedy the larger problems of an appearances-based disqualification regime.

C. Resurrecting a Procedural Regime

The first procedural regime was limited in scope; it sought to facilitate judicial disqualification for bias by enabling litigants to invoke procedures that required the judge to withdraw without a showing that the judge was biased in fact.[182] More recently, scholars and good government organizations began supporting a wider range of disqualification proposals that can be loosely organized under the heading of procedural reform. Such proposals include: expanding the use of peremptory challenge procedures for trial judges;[183] assigning a different judge to decide disqualification motions;[184] integrating disqualification practice into the adversarial process by enabling both litigants (not just the movant) to participate in framing the operative issues;[185] requiring the judge to provide the parties with reasoned explanations for disqualification rulings;[186] subjecting non-disqualification to de novo review on appeal;[187] establishing a process for review of non-disqualification by appellate judges;[188] and devising a procedure to replace disqualified appellate judges.[189]

182. *Supra* Part II.B.

183. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526–27 (2007).

184. *Id.* at 530; Frost, *supra* note 99, at 583–84.

185. Frost, *supra* note 99, at 582.

186. Goldberg et al., *supra* note 183, at 531.

187. *Id.* at 531–32.

188. Frost, *supra* note 99, at 584.

189. Goldberg et al., *supra* note 183, at 532.

1. The Case for Procedural Reform

The recent push for procedural reform manifests an ongoing struggle for disqualification to join the mainstream of judicial administration. Having a judge rule on the propriety of his own conduct, without the benefit of adversarial argument, without the need to explain his decision, and subject to a deferential standard of review or no review at all, reflects the extent to which disqualification has been marginalized. Taking disqualification more seriously by subjecting it to the traditional rigors of the legal process is thus a significant step in its evolution. Professor Amanda Frost comes closest to articulating a unifying theme for these procedural reforms when she advocates a "process-oriented approach to judicial recusal"[190]:

> It is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made. The solution I offer is to incorporate into recusal law the core tenets of adjudication . . . essential to maintaining the judiciary's legitimacy . . . . Chief among these are the adversarial system in which parties present facts and arguments to an impartial judge, who then issues a reasoned explanation for her ruling.[191]

Put in broader context, at a time when the appearances-based regime is crumbling because consensus on the application of substantive disqualification rules is lacking, reorienting the focus toward procedural reform is a natural next step. The goals of an appearance based disqualification regime have been to promote public confidence in the courts by linking the need for disqualification to public perception and to end under-recusal by de-stigmatizing disqualification and obviating the need for subjective assessments of actual bias. While procedural reform seeks to improve the quality of disqualification decision-making generally, it does so in ways that further the goals that the appearances-based regime has pursued but failed to achieve. For example, preemptory

190. Frost, *supra* note 99, at 531.
191. *Id.* at 535.

challenge procedures address under-disqualification without recourse to stigmatizing challenges to a judge's impartiality or inquiries into the judge's state of mind. Reassigning disqualification motions to a different judge promotes public confidence by dispelling suspicions that the fox is guarding the henhouse.

Of particular importance, procedural reform can promote public confidence in the disqualification process despite an ongoing lack of consensus over the interpretation of substantive disqualification standards that judges apply. Research on public satisfaction with courts has yielded several important findings. In a study of misdemeanor cases, Professor Tom Tyler found that among defendants, case outcomes had "no direct effect on assessments of the judge or of the court system beyond what could be explained by perceptions of fairness," which led Tyler to conclude that defendants who "fare poorly at trial will not denigrate the judge or the system so long as they believe their outcomes are fair ones reached by fair procedures."[192] Later studies reached similar conclusions in felony cases and civil actions.[193] A major study by the National Center for State Courts Study concurred that "perceptions that courts use fair procedures and treat groups equally are the strongest predictors of favorable evaluations of court performance."[194] Taken together, "studies have consistently found that judgments of the fairness of the procedures that occur when citizens deal with legal authorities influence citizen satisfaction and evaluation of those authorities."[195]

Tyler's work further reveals that from the public's perspective, "procedural justice" in court settings is a multifaceted concept that brings at least seven considerations to bear: (1) the judge's efforts to be fair, (2) the judge's honesty, (3) the ethics of the judge's conduct, (4) the parties' opportunity for representation, (5) the quality of the judge's decisions, (6) the opportunity for appeal, and (7) the judge's bias.[196] Each of these seven considerations is implicated by one or more proposed reforms to disqualification

192. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 69–70 (1984).

193. TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 82–83 (1997).

194. ROTTMAN ET AL., *supra* note 162, at 60.

195. Tom Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 117 (1988) (citations omitted).

196. *Id.* at 121.

procedure. Mechanisms providing a different judge to decide disqualification motions and enabling parties to strike a judge they distrust aim to reassure litigants that their judge will be fair, honest, ethical (respectful of their right to an impartial decision-maker),[197] and unbiased. Requiring judges to explain their disqualification rulings aims to improve the quality of decision-making, as does subjecting disqualification questions to the rigors of the adversarial process, with the latter also increasing (at least indirectly) the parties' opportunity for representation in the disqualification process. Finally, proposals to end deferential review of disqualification determinations by trial judges and establish a means to review non-disqualification of Supreme Court justices effectively enhance the opportunity for meaningful appellate review.

Given the complex, multifaceted character of procedural fairness, studies have shown that the perceived fairness of procedure is context-dependent.[198] However, "there is considerable consensus among Americans about what constitutes a fair procedure within a particular setting."[199] It is thus unsurprising, for example, to find widespread agreement that in disqualification proceedings, rulings should not be made by the judge whose disqualification is sought.[200] In sum, research on procedural justice tells us that if courts follow disqualification procedures that the public regards as fair, public confidence is less likely to be adversely affected by disagreement over the substantive outcomes of disqualification rulings that courts make.

2. Procedural Reform and the Public Confidence Puzzle

The primary argument against procedural reform is the claim that it is unnecessary. Judges who are committed to and convinced of their collective impartiality may regard the campaign for

197. In Tyler's study, "ethical" related to whether the judge treated litigants with courtesy and respected their rights. *Id.* at 129.

198. TYLER ET AL., *supra* note 193, at 92.

199. *Id.*

200. *See* Pronin et al., *supra* note 148 (discussing the social psychology study's conclusion that one who is susceptible to bias has difficulty avoiding that bias, but when the bias is negative, one works hard to avoid that bias and denies susceptibility to that bias. Thus, a biased judge cannot avoid his bias, even if he seeks to avoid it and denies his susceptibility.).

disqualification reform as much ado about nothing, or as Judge Edith Jones told the press, "a solution in search of a problem."[201] Such categorical pronouncements are belied by the analysis in Part III, which shows the extent to which an appearances-based disqualification regime has failed to achieve its objectives.

Nevertheless, recent survey research suggests the possibility that concern over non-disqualification and its impact on public confidence in the courts is overblown. For example, Professor James Gibson has reported that the public is untroubled by judicial candidates who announce their views on issues they will decide as judges or who promise to decide issues in specific ways;[202] presumably, the public would likewise be untroubled if those judges declined to disqualify themselves from subsequent cases in which those issues arose. Similarly, Gibson and Professor Gregory Caldeira have reported that while a majority is concerned when judges accept campaign contributions from parties who appear before them, they are equally concerned when the judge declines contributions offered and in neither case does disqualification allay their suspicions.[203] Finally, despite the recurrence of non-disqualification stories in the news, survey data show that public confidence in the judiciary remains high and relatively stable.[204]

One can quarrel with these results on a question by question basis (and I have).[205] My overriding point for purposes here, however, is a more general one, with a twofold thrust. First, survey

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201. David Ingram, *Congress Set to Take Aim at Judicial Recusals*, NAT'L L.J., Nov. 2, 2009, at 1.

202. James L. Gibson, *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1294 (2009).

203. James Gibson & Gregory Caldeira, Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals? 22 (Feb. 24, 2010) (unpublished manuscript) (on file with author).

204. Annenberg Foundation Trust at Sunnylands, *2006 Annenberg Judicial Independence Survey*, prepared for the Princeton Survey Research Associates International, *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_Courts20060928/Courts_Release_20060928.pdf; Beldon et al., *Access to Justice and Constitutional Rights Versus Political Pressure: Defining the Battle for the Courts*, *in* JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 13, 17 (2006).

205. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276–77 n.94 (2008); *see also supra* note 160 and accompanying text.

data should be relied upon with caution because so much depends on how survey questions are framed. Second, the "public" that social scientists and pollsters survey is not the "public" of primary concern to the legal establishment, which creates confusion when public confidence problems of concern to the bench and bar are not reflected in survey data (and vice versa).

In debates over public confidence in the courts, survey data are routinely impressed into the service of opposing arguments. Judge Harold Leventhal's observation about the use of legislative history in statutory interpretation—that it is like "looking over a crowd and picking out your friends"[206]—applies equally to the use of surveys. To no small extent, the answers one gets turn on how the questions are framed: To support an argument that the public favors "judicial independence," one can rely on surveys in which respondents are asked whether they favor efforts to threaten or intimidate judges, and they do not.[207] To oppose such an argument, one can turn to surveys that ask whether the respondents favor holding judges accountable for their decisions and stopping judges who repeatedly ignore voter values, and they do.[208] To support an argument that the public embraces "legal realism," one can ask whether respondents favor judges who seek to achieve fair or just results, and they do.[209] To oppose that argument, ask them whether

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206. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation of the author with Harold Leventhal).

207. Beldon et al., *supra* note 204, at 13, 18 (indicating that 63% of respondents disapproved of threatening a judge with impeachment for a single decision); *see also* The Maxwell Poll, *Law and Courts Questions from 2005 Poll* (2005), http://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf (indicating that 71.9% of respondents agree that "[j]udges should be shielded from outside pressure and allowed to make their decisions based on their own independent reading of the law").

208. John Russonello, *Speak to Values: How to Promote the Courts and Blunt Attacks on Judiciary*, 41 CT. REV. 10, 11 (2004) (indicating that 70% of respondents desire that the court not stray far from community norms); Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis,"* ABA J. E-REPORT, Sept. 30, 2005 (indicating that 56% either somewhat or strongly agreed with the proposition "that court opinions should be in line with voters' values," and judges going against those values should be impeached).

209. Justice at Stake, *2001 National Bipartisan Survey* (2001) [hereinafter *2001 National Bipartisan Survey*], *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F9927

they favor judges who disregard the law and act upon their personal or political preferences, and they do not.[210] Public support for "judicial activism" can be found in surveys that show respondents favor judges who protect individual rights against political branch encroachment;[211] on the flip side, the public opposes "activists" who act upon their ideological predilections.[212]

Notwithstanding such manipulations, understanding the public's views is of enormous importance to a body of law that seeks to promote public confidence in the courts. As with "judicial independence," "legal realism," and "judicial activism," the views of the "public" likewise depend on how the term "public" is framed. Public opinion surveys prepared by social scientists and polling organizations define the "public" literally to mean everyone—or at least a representative subset of everyone with the acuity and enthusiasm needed to operate a pencil or answer a telephone and complete a survey.

Although the legal establishment sometimes cites general public opinion surveys in its policy analyses, the public of primary concern to judges and lawyers is narrower. First, as a philosophical matter, the legal establishment is concerned about the institutional legitimacy of government, which, in a democratic republic, depends on the consent of the "public" being governed.[213] This concern,

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2D4.pdf (indicating that 63% of respondents rated "[e]nsuring fairness under law" as at least 8 out of 10, with 10 being the most important duty of a judge).

210. Keith Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011) ("Polls show that large majorities of Americans expect federal judges to apply the law impartially and distrust judges who advance narrow ideological interests.").

211. James Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Gardner Geyh, ed., forthcoming 2011) (indicating that 51.8% of respondents rated "Defending constitutional rights and freedoms" as 10 out of 10 with 10 signifying the most important function of a judge); *see also 2001 National Bipartisan Survey*, *supra* note 209, at 6 (indicating that 93% of respondents found the proposition "[o]ur courts' most important job is to protect our civil and constitutional rights" either very or somewhat convincing).

212. Neil, *supra* note 208, at 1 (indicating that 56% agreed with the statement that there is a judicial activism crisis).

213. AMERICAN BAR ASSOCIATION, *supra* note 159, at 10 ("[P]ublic confidence in our judicial system is an end in itself. A government of the people, by the people, and for the people rises or falls with the will or consent of the governed.").

however, does not necessarily implicate the "public" in the universal sense of the term: The consent of the governed is unaffected by the views of the passive, indifferent, and disengaged—that segment of the public which may report its ennui over governmental institutions in telephone surveys but is insufficiently concerned to act upon it by rebelling or otherwise actively withholding its "consent" to be governed.[214] Hence, few within the legal establishment would seriously suggest that Congress loses its legitimacy to govern when its approval ratings dip below 50% in public opinion surveys.

Second, as an instrumental matter, without "public" confidence in the judiciary, proposals to control the courts in ways that the legal establishment finds wrongheaded and threatening will gain traction.[215] From this perspective, the "public" that matters to the legal establishment is the public that is engaged enough to act upon its dissatisfaction by, for example, electing representatives who are committed to curbing the courts—which can be a minority of the public as a whole.

Third, as a customer relations matter, the "public" that matters to the legal establishment is the public that the judiciary serves as litigants, witnesses, and jurors.[216] From this perspective, the views of those who have no direct contact with the courts are of secondary concern relative to consumers of judicial services, who courts affect directly. For the legal establishment, this may be the "public" that matters most. It is the segment over whom the legal establishment has direct influence, and it is disaffected litigants and their families, friends, lawyers, and elected representatives who are most likely to be members of the other "public" of concern—those who agitate for court reform and who may ultimately challenge the legitimacy of the judiciary itself.

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214. Of course, events may lead the passively disaffected to become actively disaffected, and thereby morph them into members of a "public" that *does* matter to the legal establishment.

215. AMERICAN BAR ASSOCIATION, *supra* note 159, at 13–14 ("If the public loses faith in a judiciary it perceives to have run amok, the obvious solution will be to bring the judiciary under greater popular control to the ultimate detriment of judicial independence and the rule of law that judicial independence makes possible . . . .").

216. *Id.* at 65–66 ("Public perceptions of the courts . . . . can be profoundly shaped by direct contact with the judicial system as jurors, witnesses, or litigants, or indirectly when a friend or family member serves in those capacities. These points of contact should be capitalized upon.").

To illustrate this divide between general public opinion and the narrower public opinion of concern to the bench and bar, many judges, lawyers, and law professors have argued that the Supreme Court's decision in *Republican Party of Minnesota v. White*—which held that judicial candidates have a first amendment right to announce their views on issues that they may decide as judges[217]—threatens to undermine public confidence in judicial impartiality.[218] That concern fueled an amendment to the Model Code of Judicial Conduct, which required judges to disqualify themselves from cases in which they had previously committed or appeared to commit themselves to reach a particular result on an issue now before them.[219] As previously noted, however, Gibson found that the public welcomed information about where judicial candidates stood on various issues and was unfazed by judges who made campaign promises to resolve issues in specified ways. Such findings, however, do little to dispel concerns within the legal establishment. From the perspective of judges and lawyers, the public confidence problem must be assessed from the perspective of parties whose confidence in the impartiality of the courts may be undermined by appearing before judges who have (or appear to have) committed themselves to rule in particular ways before a party's case is even called.

A comprehensive study of public confidence in the courts conducted by the National Center for State Courts found that confidence levels were consistently lower among respondents who had first hand exposure to the justice system.[220] That may explain why the legal establishment is chronically more concerned about the state of public confidence in the courts than would seem to be

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217. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

218. *See, e.g.*, David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 268 (2008); Rachel Paine Caufield, *In the Wake of White: How States are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 642 (2005).

219. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007) (stating that a judge shall disqualify himself or herself if "[t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to read a particular result or rule in a particular way" in a proceeding or controversy before them).

220. ROTTMAN ET AL., *supra* note 162, at 60 ("People with recent court experience tend to hold less positive views of the courts than do those without that experience."). This finding is corroborated by other studies. *Id.* at 15–16.

warranted by rosy-seeming results in general public opinion surveys. Given the legal establishment's customer relations concern coupled with the results of Tyler's research discussed earlier,[221] a revamped procedural regime, which seeks to make the disqualification process more transparent and fair-seeming for litigants, has obvious appeal.

3. The Future of Procedural Reform

Procedural overhaul may represent the next wave in the history of disqualification reform, but its likely impact remains unclear. Some scholars attribute the chronic inability of rigorous disqualification standards to gain traction to judicial self-dealing by biased judges, who contort the rules to thwart their objectives.[222] In my view, the problem is better explained as a paradox: Disqualification standards that are designed to second guess the impartiality of judges are interpreted and applied by judges who are so committed to their own impartiality that they are loath to second guess themselves. The real "enemies" of reform, then, are not bad judges intent on subverting disqualification requirements but good judges whose commitment to their own impartiality interferes with the achievement of disqualification objectives.

The first procedural regime fell victim to the disqualification paradox, as judges, troubled by procedures enabling litigants to secure disqualification with unsupported allegations of bias, interpreted statutory requirements so strictly as to defeat the legislation's purpose. A similar future may await a new procedural regime. In 2009, the American Bar Association's Standing Committee on Judicial Independence circulated a draft resolution proposing that states consider (not adopt, but merely "consider") a package of reforms to disqualification procedure, including several of the proposals listed above.[223] The draft resolution, and the

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221. Tyler, *supra* notes 192, 193, 195–99 and accompanying text.

222. Leubsdorf, *supra* note 85, at 245 (attributing the cyclical inability of disqualification rules to be fully implemented to "the most biased judges," who are "the least willing to withdraw"); Frost, *supra* note 99, at 534 (attributing the repeated narrowing of disqualification standards enacted by Congress to "self-dealing" by judges).

223. Telephone conversation with William Weisenberg, Chair of the ABA Standing Committee on Judicial Independence, March 4, 2011. From 2007 to 2009, I served as consultant to and director of the ABA Judicial Disqualification Project, under the auspices of the ABA Standing Committee on Judicial

underlying Report upon which it was based, was withdrawn following objections from representatives of the ABA's Judicial Division (and other ABA entities).[224] Unlike the ABA, Congress and state legislatures may be willing to enact procedural reform in the teeth of objections from judges, but then, administration of the new procedures will once again fall to those same judges.

Focusing on the proposed reforms themselves, some will be easier than others to implement without provoking an allergic reaction from the judiciary. For example, a rule that entitles both parties to be heard in disqualification proceedings by a judge who must give a reasoned explanation for her rulings does not impugn the presumption of impartiality and should not implicate the disqualification paradox (although judges who think disqualification practice is driven by lawyers angling for strategic advantage may still object to such procedures as an unnecessary waste of time). The same is true of proposals to replace disqualified high court judges. Peremptory challenge procedures are a mixed bag. Judges for whom such a procedure implies bias among jurists may construe procedural requirements strictly; on the other hand, if substitution is automatic and unencumbered by an implication that the targeted judge is less than impartial (e.g., because no attestation of bias is required), judges may accept peremptory challenge procedures without resistance.

More likely to encounter resistance are proposals that convey skepticism of judicial motives and impartiality, which implicate the judicial disqualification paradox directly. Assigning disqualification motions to a different judge implies that the target judge cannot be trusted to rule impartially; subjecting non-disqualification to a *de novo* standard of appellate review implies that no deference is due the trial judge's assessment of her own fitness; and establishing a mechanism to review non-disqualification by appellate judges implies that appellate judges cannot be trusted to have the final word on their own impartiality. If these proposals are imposed upon a skeptical judiciary, judges may once again implement them less rigorously than rule-makers intend. Fellow judges may err on the side of non-disqualification when ruling on motions to disqualify colleagues; appellate courts may impose an implicitly deferential

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Independence. In my capacity as present and former project consultant/director, I was privy to events described in the text accompanying notes 223 and 224, as corroborated by Chairman Weisenberg in our telephone conversation.

224. *Id.*

standard of "*de novo*" review; and judges assigned to review the non-disqualification of appellate colleagues may likewise do so with undue deference.

The long-term solution lies in managing the judiciary's chronic ambivalence to disqualification. Such ambivalence cannot and should not be eliminated altogether. As long as "good" judges are women and men who strive to look and be impartial, then asking them to disqualify themselves or colleagues who are or appear less than impartial—and implicitly, less than "good"—is something that judges will do reluctantly. By design, the appearances-based disqualification regime enables judges to disqualify themselves or their brethren for an appearance of partiality without the need to find or concede actual bias. But that is not enough to overcome judicial ambivalence, if conceding an appearance of partiality is tantamount to conceding an appearance of impropriety. The two will be synchronous whenever a judge makes inappropriate statements, or engages in inappropriate conduct that calls her impartiality into question. In these situations, judicial ambivalence to disqualification is, to some extent, inherent and inevitable. There is an even broader array of situations, however, in which the appearance of partiality is created by conduct that is not improper and does not give rise to an appearance of impropriety. Such will be the case whenever harmless relationships, associations, and life experiences put the judge's impartiality in doubt, under circumstances unique to a given case. In these situations, ambivalence may nonetheless persist, insofar as the judge is put on the defensive by a motion to disqualify which calls her out for an appearance problem she failed to fix by recusing sua sponte.

Assigning disqualification motions to a different judge will avoid self-interested judges "grading their own papers" but may not overcome the ambivalence judges feel about questioning the impartiality of colleagues.[225] Overcoming ambivalence requires that judges more fully appreciate the dual psychological impediments to judicial self-evaluation: that judges (like the general population) have difficulty detecting their own biases, and that judges see themselves differently than others see them. Because of this, judges can misperceive how their conduct "reasonably" appears to the

225. One study found that judges were, if anything, more reluctant to recommend the disqualification of a colleague than themselves. SHAMAN & GOLDSCHMIDT, *supra* note 145, at 42.

public. Thus, when innocuous conduct gives rise to an appearance of partiality that triggers the need for disqualification, no inference of impropriety should arise from the underlying conduct or from the judge's failure to appreciate the perception problems she created. When judicial conduct creates both an appearance of partiality and an appearance of impropriety, those same psychological impediments may disable the errant judge from appreciating the appearance problems she has caused. There should be no dishonor in that, even if the underlying conduct is unacceptable and must be called to the judge's attention.

The simple-seeming solution of openly acknowledging the psychological impediments to judicial self-evaluation is complicated by its profound implications. The traditional view of the judicial role, reinforced by codes of conduct and the judiciary's institutional culture, is that judges are independent and impartial men and women of integrity who uphold and apply the law and disregard extralegal influences. To concede a susceptibility to real or perceived bias, and a psychological blind spot to detecting it, is in obvious tension with this traditional view.

Recent social science research has shown us that judicial decision-making is subject to a host of influences: law, political ideology, motivated reasoning, strategic considerations, the audience for whom the judge is writing, the desire for elevation to higher judicial office, and—the focus of this article—bias.[226] Whereas the legal establishment and its detractors implicitly characterize the proper judicial role in dichotomous terms—good judges follow the law, while bad judges succumb to extralegal influences—reality is much more complicated. From a regulatory perspective, a more realistic approach is to recognize that influences on judicial decision-making lie on a continuum, from the desirable to the intolerable. The goal of judicial oversight generally, should be to manage extralegal influences in ways that minimize the unacceptable. The goal of disqualification, in turn, should be to draw a line on that continuum, where the threat of unacceptable extralegal influences compromises the fairness—real or perceived—of a given proceeding.

If the legal establishment re-conceptualizes the nature of legal and extralegal influences on judicial decision-making in terms

226. WHAT'S LAW GOT TO DO WITH IT?, *supra* note 172.

of a continuum instead of a dichotomy, the prognosis for the proposed procedural regime improves dramatically. Once judges acknowledge that the best among them are subject to extralegal influences, including bias, and that it is extremely difficult for a judge to accurately self-assess where her real or perceived biases fall on a continuum, then procedural protections aimed at better detecting and managing judicial bias become unobjectionable.

Procedural reform itself may aid in this acclimation process. Imposing procedural rigor requires judges to be more exacting in their approach to disqualification problems and in so doing conveys to those judges a heightened institutional commitment to taking disqualification problems seriously. If disqualification proceedings are run more like other adjudicatory proceedings, in which disinterested judges issue rulings accompanied by reasoned explanations after adversarial argument, judges may more fully accept judicial disqualification into the practice and procedure mainstream.

The history of judicial resistance to disqualification notwithstanding, the prospects for this re-conceptualization are relatively bright. In *Caperton*, a majority of the Supreme Court—albeit a bare one—underscored the unconscious nature of judicial bias that renders it insusceptible to self-detection. Although the *Caperton* Court reserved the application of its constitutional due process analysis to exceptional cases, it emphasized that the states were free to (and typically did) regulate real and perceived bias more rigorously and routinely. In a similar vein, a significant minority of jurisdictions have adopted meaningful peremptory challenge procedures and procedures for reassigning disqualification requests to other judges, which embody the view I am expounding.[227] To capitalize on the momentum *Caperton* created, the next step is to create forums for judges from jurisdictions that have embraced such procedures to share their experiences with judges from jurisdictions that have not, and for judges generally to become more familiar with recent research on the psychology of bias.

227. ABA Judicial Disqualification Project, *supra* note 13 and accompanying text.

V. CONCLUSION

A muscular presumption of impartiality suits a formalist world in which the neutrality of judges is widely accepted as an article of faith, and dissenters can be discounted as unreasonable outliers. But in a modern world influenced by the lessons of legal realism, where scholars and citizens alike entertain complex and divergent views on how judges think, achieving a consensus on when doubts about a judge's impartiality are "reasonable" becomes ever more problematic. As a consequence, we are witnessing an escalating battle over disqualification in a range of settings, where judges who have internalized traditional presumptions of impartiality and decline to disqualify themselves are being called out by litigants, the media, and good government organizations that view the same events in fundamentally different ways. In short, the appearances paradigm is crumbling because it has been balkanized; it is increasingly reasonable to draw divergent inferences from the same events, for which reason regulating disqualification with reference to how a judge's conduct appears to a reasonable person has become increasingly unmanageable.

Against that backdrop, a resurrected and revitalized procedural regime that seeks to promote public confidence in the disqualification process, even if substantive disqualification standards are applied inconsistently, holds considerable promise. The prospects for a new procedural regime, however, turn on whether judges are ready to accept the ethos of disqualification embodied in procedures aimed at taking disqualification more seriously or whether they will remain resistant in ways that lead them to marginalize the new regime as they have its predecessors. Recent developments, which manifest growing awareness among judges of the complex psychology of judicial bias, are encouraging, but time will tell.

In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities

Jeffrey W. Stempel*

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* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Les Abrahamson, Bill Boyd, Charles Geyh, David Herr, Doris Lee, Ted Lee, Mike Martin, Ann McGinley, Jim Rogers, Tuan Samahon, Margaret Tarkington, John White, and participants in the Section on Litigation program at the 2011 Annual Meeting of the Association of American Law Schools. Thanks also to Jeanne Price, David McClure, and Kathleen Wilde for valuable research assistance.

Questions of judicial impartiality inspire strong assessments and emotions that now run particularly high in the wake of *Caperton v. A.T. Massey Coal Co.*,[1] *Citizens United*,[2] and another season of big money, interest group, sound-bite laden judicial elections[3] that

1. 129 S. Ct. 2252 (2009). In *Caperton*, the Court in a 5–4 decision held that due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself in a case involving review of a $50 million judgment levied against a company where the company's CEO had accounted for $3 million in campaign support for the state court justice in a hotly contested election in which the Justice unseated an incumbent. *See* Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?, Giving Adequate Attention to the Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 2–62 (2010) (concluding that Justice Benjamin's conduct was so clearly in violation of established law as to call into question his competence or integrity); *see also* Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249, 250–68 (2010) (summarizing *Caperton* decision and arguing for expansion of *Caperton*'s constitutional recusal standard as a backstop in cases of severe error in failing to recuse by state court judges).

2. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 889 (2010) (relying on the First Amendment to greatly limit the range of permissible government regulation and interpreted by many to permit largely unlimited corporate spending on electoral contests).

3. *See* James Sample et al., *The New Politics of Judicial Elections*, JUDICATURE, Sept.–Oct. 2010, at 50 (explaining that special interest groups put millions into campaigns in an attempt to affect their outcomes); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 591–604 (2011) (summarizing decision); *see also id.* at 611–15 (predicting that Court will apply the decision differently regarding judicial elections and spending as contrasted with legislative and executive elections).

included the failure of merit selection initiatives[4] and the removal of three Iowa Supreme Court Justices for the "crime" of issuing a decision striking down state prohibition of same-sex marriage.[5]

As Professor Charles Geyh has noted, issues of judicial impartiality and disqualification are at the forefront of contemporary debates about the state of the legal system.[6] Judicial disqualification

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4. For example, a proposed revision to the Nevada Constitution to adopt a variant of the Missouri Plan, in which judges are initially appointed by the governor from a short list generated by a merit selection committee that includes lawyers and laypersons and then are required to prevail in retention elections to maintain their posts, was soundly defeated. *See General Election Results*, LAS VEGAS REV.–J., Nov. 4, 2010, at 4B (stating that ballot Question No. 1 regarding judicial appointments lost with 58% (390,370 votes) voting "No" and 42% (285,746 votes) voting "Yes"). In a bit of a dark day for judicial reform, creation of an intermediate appellate court (Nevada is the largest state with no such court) lost by a 53% to 47% vote. *Id. But see* Sylvia R. Lazos & Chris W. Bonneau, *Appoint judges? No thanks*, LAS VEGAS REV.–J., Oct. 31, 2010, at 4D (departing from prevailing academic sentiment, a law professor and political scientist support election of judges).

5. *See* A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1 (stating that voters chose to remove all three justices on the liberal Iowa Supreme Court who were seeking new terms). *See also* Varnum v. Brien, 763 N.W.2d 862, 872 (2009) (holding unanimously that Iowa's definition of marriage as between man and woman violated the state and federal constitutions). *But see* Editorial, *Iowa's Total Recall*, WALL ST. J., Nov. 6, 2010, at A12 (cheering the defeat of the judges and describing gay marriage decision as "precisely the kind of judicial arrogance—finding a right to gay marriage in the state constitution after many decades in which no one noticed it—the recall election was designed for," and criticizing Missouri Plan merit selection as "allowing the lawyers guild that dominates the nominating process to get virtual lifetime tenure for their selections," but supporting executive appointment of judges rather than election; stating "[a] better system would be to let the Governor nominate anyone he chooses and have the legislature offer advice and consent, as in Washington").

6. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 673–74 (2011) (noting that the combination of the 2007 revisions to ABA Model Code of Judicial Conduct, high-spending, high-profile state court elections, and the Supreme Court's *Caperton* decision has focused greater attention on judicial disqualification). *See also* Leslie Abramson, Remarks at Current Issues in Judicial Disqualification: Assessing the Landscape Post-*Caperton*, *Citizens United* and the 2007 ABA Model Code of Judicial Conduct (Jan. 7, 2011) (stating that although the ABA 2007 Model Code seeks to expand grounds for judicial disqualification to include receipts of campaign contributions from interested litigants or counsel, states have been slow to adopt proposed change and abandon historical norms viewing campaign support as non-

is "hot" and "matters—again."[7] Judge M. Margaret McKeown might respond that judicial impartiality has always mattered and that the judicial establishment has been addressing the issues vigorously[8] despite occasional news stories that portray some members of the bench in an unfavorable light.[9] My own view is that while many judges and much of the judicial establishment are to be commended for the seriousness with which disqualification and other ethics issues are addressed,[10] the problem remains under-addressed rather than overstated.[11]

In that regard, I largely agree, but take some modest issue with, aspects of Professor Geyh's contribution to this symposium in which he embraces, seemingly with more resignation than enthusiasm, "procedural" or process-oriented approaches as a pragmatic but perhaps second-best response to the problem of

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disqualifying; the status quo continues not to see political friendships as disqualifying).

7. Geyh, *supra* note 6, at 671, 672. In her contribution to this symposium, Professor Margaret Tarkington touches on these themes and the importance of counsel as legal "canaries" in the litigation "coal mine" who must be sufficiently free to question judicial impartiality and to question alleged misconduct in order for the system to work properly. Margaret Tarkington, *Attorney Speech and the Right to an Impartial Adjudicator*, 30 REV. LITIG. 849, 850 (2011).

8. *Examining the State of Judicial Recusals After* Caperton v. A.T. Massey: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 2–4 (2009) (prepared testimony of Hon. M. Margaret McKeown). Judge McKeown, Chair of the Committee on Codes of Conduct of the Judicial Conference of the United States, noted the extensive system of financial disclosure, judicial education, and advice regarding disqualification as well as the comprehensive rules regarding recusal. *Id.* at 1–12.

9. *See, e.g.*, Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431–40 (2004) (collecting instances of judicial misfeasance). *See also* Geyh, *supra* note 6, at 674 (describing impeachment of Louisiana District Judge G. Thomas Porteous, "in part for failing to disqualify himself from a case in which he had solicited money from an attorney in a pending case" (citation omitted)).

10. *See* McKeown, *supra* note 8, at 4–10 (describing extensive infrastructure designed to raise ethical consciousness of federal judges).

11. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 62–82 (noting with disappointment that despite great lapses in judicial professional responsibility, there have been no disciplinary consequences for Justice Benjamin, the non-recusing justice of *Caperton* fame); Stempel, *Completing* Caperton, *supra* note 1, at 296–326 (arguing for broader and more aggressive use of Due Process Clause to police egregious situations in which state court judges fail to follow applicable law of judicial disqualification).

judicial recusal.[12] A strengthened proceduralist approach to judicial disqualification is an important and practically necessary means of helping to enhance judicial impartiality and public confidence in the courts.[13] But more than Professor Geyh, I also embrace a regime of appearance-based judicial recusal—one strongly supported by effective procedural prerogatives for litigants—as a potentially effective, realistic means of improving judicial disqualification practice and outcomes.[14] In particular, a broader concept of what constitutes a "reasonable question as to impartiality" is one that does

12. *See* Geyh, *supra* note 6, at 719 ("[A]t a time when the appearances-based regime is crumbling because consensus on the application of substantive disqualification rules is lacking, reorienting the focus toward procedural reform is a natural next step.").

13. *Id.* I also agree with Professor Geyh's succinct but illuminating history of attitudes toward judicial disqualification in which he observes four major approaches: (1) the Blackstonian Common Law's "almost iron-clad" and nearly irrefutable presumption "that judges were uniformly impartial and essentially immune from disqualification"; (2) a regime that "carved out exceptions" to this presumption by requiring disqualification for particular conflicts of interest such as being a "judge in one's own case" where the outcome of the matter could affect the judge's financial interests; (3) a brief, almost abortive approach in which judges were to be automatically disqualified "if aggrieved parties made specific allegations pursuant to specified procedure"; and (4) the current regime, which Professor Geyh views as under attack and perhaps losing sway, that "dwells upon appearances, by organizing disqualification standards around the principle that a judge should step aside" when the judge's impartiality may be reasonably questioned, "in other words, when [the judge] might appear less than impartial to a reasonable person." *Id.* at 677–90.

14. For purposes of this article (and in my writings on the subject generally), I treat "disqualification" and "recusal" as synonyms. However, there traditionally has been a technical distinction between the two terms in that disqualification is more often used to connote a legal requirement that a judge not participate in a case, while recusal traditionally carries the connotation of a judge voluntarily stepping aside even when perhaps not absolutely required. In modern practice, the terms are used interchangeably. *See, e.g.*, RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8 (2d ed. 2007) (noting a traditional distinction but using the terms interchangeably throughout the treatise); J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 4.04 (4th ed. 2002) (tending to use disqualification as a preferred term but using recusal as an acceptable synonym); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223 (2002) (using the terms interchangeably); Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENVER U. L. REV. 335, 338, n.10 (2010) (noting that despite some traditional differentiation between the terms, disqualification and recusal are used as synonyms today).

not implicitly seek an unattainable consensus but instead recognizes that the health of the judicial system is threatened whenever a substantial portion of the public harbors significant, nonfrivolous concern over the neutrality of a judge who insists on continuing to preside over a matter.

If the legal system is to achieve its aspiration of impartiality beyond reasonable question, greater procedural protections are of course required, notwithstanding some attendant additional logistical burdens. There must also be a broadened definition of the existence of reasonable question as to impartiality and greater sensitivity on the part of bench, bar, and the public. Like Odysseus, who tied himself to the mast to prevent him from leading his ship to ruin in response to the Sirens' Song,[15] the judiciary would be wise to institute a more stringent system of recusal practice than currently prevails. One can view judicial recusal as an example of a situation where the imposition of stronger pre-existing rules (both procedural and substantive) constraining or "nudging"[16] judicial authority can enhance judicial impartiality by forcing necessary recusal that would

15. HOMER, THE ODYSSEY 76–77 (Robert Fagles, trans., Penguin Books 1996). Odysseus was returning from the Trojan War, a task taking a decade (an *Odyssey* by any definition) and forcing his encounter with all manner of dangerous, strange, and wonderful things. *Id.* Among them were the Sirens, women who dwelled near a rocky shoreline and sang a song so sweet that it lured sailors so close to the shore that their ships wrecked and they drowned. *Id.* at 76–77. Odysseus wanted to both hear the Sirens' Song and avoid death and loss of ship and crew. He arranged for his crew to wear earplugs (thus protecting them from the seductive allures of the Sirens' Song) and to lash him (sans earplugs) to the ship's mast, where he could hear the Song and, squirm and yell as he might, would not be able to direct the ship too close to the rocky shore. *Id.*

Notwithstanding its creepy sexist origins (attractive but deadly women luring clueless or insufficiently disciplined men to their deaths), the story of Odysseus and the Sirens has become a staple of philosophical, political, and legal discussion regarding the wisdom of imposing pre-existing constraints in order to avoid making mistakes in moments of haste, weakness, or temptation. The classic discussion is in JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN THE SUBVERSION OF RATIONALITY (1983). As of December 2010, Elster's work has been cited more than 300 times in law review literature while the Odysseus story has been cited more than 400 times. *See also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 41–42 (2008) (popularizing cognitive psychology of decision-making by employing the Odysseus example).

16. *See* THALER & SUNSTEIN, *supra* note 15, at 11–13 (stating that people can be guided toward better decisions through use of mental framing devices, regulation, limitation of choices, and paternalism).

not result if individual jurists were left to their own devices under the status quo.

Judges and the legal body politic should move toward more frequent use of the appearance-based standard of impartiality, which is slower to accept judging by those who may have inclinations to favor certain litigants on the basis of social, economic, and political affiliation.[17] This requires that the legal system and society must move away from what appears to be the implicit governing notion as to when a reasonable question exists as to impartiality, wherein the judge will only recuse if she is convinced that nearly every sane person would hold a reasonable question regarding the judge's impartiality. This system tends to minimize concerns of partiality if the concern falls short of a consensus. Traditionally, this has meant that the court deciding the recusal motion must be convinced that the mythical "objectively reasonable" person, accurately informed of the situation, would entertain serious doubts as to the neutrality of the judge.

This standard overlooks the reality that in the modern (or post-modern) world there will be disagreements and differences in perception among "reasonable" people. In many disqualification cases, it will be impossible, as a practical matter, to attain the type of consensus or near-unanimity presupposed by the traditional articulation of the appearance of impartiality standard. Rather than ignoring this elephant in the room, the legal system should confront the problem by requiring disqualification whenever a substantial portion of adequately informed, objectively reasonable observers would entertain serious questions as to the impartiality of the judge under challenge.

Beyond procedurally based protections, the modern status quo of judicial disqualification would also profit from an enhanced conception of a "reasonable question" as to impartiality and a recognition that there need not be consensus—or even a clear majority view—about a given situation to support disqualification.

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17. An important component of enforcing this improved regime regarding judicial recusal is the greater "breathing space" for attorneys urged by Professor Tarkington. *See* Tarkington, *supra* note 7, at 876 (urging that attorney speech central to client representation be judged according to a FRCP 11 or Rule of Professional Conduct 3.1 standard as to whether attorney assertions have a basis in law or fact, while attorney criticisms of judges be assessed according to a *N.Y. Times v. Sullivan* actual malice inquiry as to whether counsel knew statements were false or were uttered with reckless disregard as to their truth or falsity).

Thus, both a stronger definitional sense of the appearance of fairness and some substantial judicial consciousness-raising are in order. Coupled with the procedural protections advocated by Professor Geyh[18] and most others in the academy (as well as the protection of attorney speech urged by Professor Tarkington[19]), a sounder, more confidence-enhancing recusal regime is possible.

Whether this improved recusal regime is attainable in the current climate remains questionable. Jurists—particularly at the Supreme Court level—have occasionally shown a disturbing defensiveness, insensitivity, and even some seeming ignorance regarding the area of recusal.[20] As Professor Geyh notes, there is a gulf separating traditionalist judges with a strong presumption of judicial impartiality from realist judges with a much weaker, more easily rebutted presumption of judicial impartiality.[21] Without doubt, the realist judges are correct. Only a modest presumption of judicial impartiality should reign. Until the judiciary accepts this notion, litigants are inadequately protected from potential judicial bias and public confidence is inadequately nurtured.

I. FACING REALITY: JUDGING AND JUDGES IN THE REAL WORLD

A. Unconscious Bias and Insufficient Self-Awareness

Judges are, of course, human beings.[22] Like all humans, they are

18. Geyh, *supra* note 6, at 676.

19. Tarkington, *supra* note 7, at 851.

20. *See infra* notes 278–81 (Scalia), 302 (Breyer), 318 (Ginsburg, Scalia, and Olson) (describing questionable recent behavior of some Justices).

21. *See* Geyh, *supra* note 6, at 698–99 (noting the divide between judges with strong presumption of judicial impartiality and judges more willing to accept the notion that judicial neutrality may be compromised by various external factors).

22. *See* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 42 (1931) (concluding, perhaps unsurprisingly, that the answer is "yes" and that the law must account for this humanity rather than projecting unrealistically Herculean qualities upon judges); *see also* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 15, 74, 118–19 (2006) (finding significant correlation between political backgrounds of judges and rulings in particular classes of cases); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1516–

subject to cognitive constraints when assessing their own conduct or that of friends, co-workers, or those with whom they identify.[23] Applied in the judicial context, one can make a persuasive argument that the natural human foibles such as status quo bias,[24] overconfidence,[25] and false consensus bias[26] become exacerbated, rather than reduced, because of the isolation in which judges work and the pedestal upon which they are placed.

Additionally, there now exists extensive literature establishing that humans are likely to have extensive unconscious biases and prejudices regarding people, companies, attorneys, race, gender, ethnicity, religion, national origin, and other matters.[27] The

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17, 1580–81 (2010) (concluding that Justices' very human motivations and responses to incentives make the Court more interested in elite opinion, particularly elite opinion about the Court's performance, rather than the long-term impact of Court decisions on society).

23. *See infra* notes 26–36 and accompanying text (noting that people's perspectives vary by demographic traits and pointing out that judges are not immune from this trait).

24. *See infra* note 41 and accompanying text (stating that "status quo bias" or a "general tendency to stick with the current situation" is a prevalent human trait); *see also* THALER & SUNSTEIN, *supra* note 15, at 34–36 (same).

25. *See infra* notes 34–35 and accompanying text (noting that people, including judges, tend toward excessive optimism and overconfidence); *see also* THALER & SUNSTEIN, *supra* note 15, at 31–33 (same).

26. *See* Lawrence M. Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1269 (2008) (stating that individual readers of contract language are quite certain that they know what the language means and that others agree with them, and that as a whole, readers assign substantially different meanings to the same language).

27. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1433–35 (2008); *see* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276–1281 (2002) (applying cognitive psychology literature to posit that judges and juries, like everyone else, are subject to biases and prejudices and advancing strategies for overcoming these traits); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007) (stating that police officers are more likely to shoot at black subjects than white subjects when actions of the subject are ambiguous); *see also* SUNSTEIN ET AL., *supra* note 22, at 15, 74, 118–19 (finding significant correlation between political backgrounds of judges and rulings in particular classes of cases); Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS. L. REV. 597, 603–09 (2003) (summarizing empirical research regarding gender and racial differences in judicial behavior); Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal*

point is so uncontroversial that it is reflected in a recent ABA Litigation Section calendar.[28] As Professor Geyh has noted, "disqualification practice proceeds on two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct. Neither assumption is safe."[29]

Well before modern research regarding cognitive theory, the point was recognized as a matter of common sense by an anonymous law student, who observed that "[a] biased mind rarely realizes its own imperfection."[30] Although judges may be able to dampen these reactions through training, experience, and discipline, it is highly

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Model" of Judicial Decision Making, 26 LAW & SOC. INQUIRY 465, 467–78 (2001) (reviewing the political science research on judicial behaviorism); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 882–93 (2010) (noting impact of implicit bias in media accounts of crime and adjudication); Natalie Bucciarelli Pedersen, A Legal Framework for Uncovering Implicit Bias, 79 U. CIN. L. REV. (forthcoming 2011) (accepting as a given reality the implicit biases and prejudices in people), *available at* http://papers.ssrn.com/6013/papers.cfm?abstract_id=1701966.

28. *See* American Bar Association, Section on Litigation, 2011 Calendar, February 2011 (discussing "implicit bias" and the Litigation Section's implicit bias training film and program as well as noting "Drs. Kenneth and Mamie Clark's famous 'doll studies'" cited by the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954)); *see also Implicit Bias in the Judicial System*, A.B.A., http://www.americanbar.org/groups/litigation/initiatives/goodworks/implicit_bias_in_the_judicial_system.html (last visited March 14, 2010).

> There is compelling scientific research showing that the unconscious and conscious associations built up over time shape people's preconceptions and responses to life's situations.
>
> One study showed that prospective jurors given the same set of facts for a defendant named "William" versus one named "Tyrone" more frequently remembered aggressive details for the one named "Tyrone."

American Bar Association, Section on Litigation, 2011 Calendar, February 2011.

Interestingly, the Litigation Section's focus was on implicit bias in jurors rather than judges, although there is no basis for believing that judges are any less influenced by the William-Tyrone perception than are jurors. Criticism of the Court's invocation of the Clark doll studies in *Brown* and the bona fides of that study are beyond the scope of this paper.

29. Geyh, *supra* note 6, at 708.

30. Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 81 (1927).

unlikely that judges can consistently overcome or even recognize their own biases and prejudices.[31]

Studies reveal that people are generally poor at self-assessment, and tend to be overly optimistic evaluators of their own abilities. Inflated preconceptions of their abilities, in turn, lead subjects to over-estimate their competence in performing specific tasks. Unsurprisingly, then, test subjects "report being less susceptible than their peers to various cognitive and motivational biases."[32] They tend to exhibit a blind spot to their own biases, take their perception of the world as objective reality, and attribute contradictory perspectives to bias in others, rather than themselves.[33]

The trait of self-serving or egocentric bias, like all biases, is well-established in people generally and has been reflected in judges as well.[34] Judges, like all of us, simply think they are better than

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31. Traditional usage sometimes characterizes "bias" (and the term is so used in Solan et al., *supra* note 26, at 1268–69) as a preference for someone or something, while "prejudice" is an antipathy to someone or something. Thus, a traditionalist might distinguish the two terms and speak in favor of being biased in favor of X and prejudiced against Y. Modern usage, however, treats the two words as synonyms meaning "a personal and sometimes unreasoned judgment." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 110 (10th ed. 1996). For ease of reference, this article will at times use the terms interchangeably.

32. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY AND SOC. PSYCHOL. BULLETIN 369, 374 (2002).

33. Geyh, *supra* note 6, notes 146–52 and accompanying text (footnotes omitted).

34. *See* THALER & SUNSTEIN, *supra* note 15, at 31–33 (stating that surveys of students "reveal a high degree of unrealistic optimism about performance in the class" and "people are unrealistically optimistic even when the stakes are high" which "can explain a lot of individual risk-taking;" applied to judges, these prevalent human traits suggest that judges will be unduly slow to recognize situations in which their ability to be neutral is impaired and the degree to which outside observers will concur in their assessments); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156–58 (2009) (finding significant differences in rulings based on race of judge); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811–16 (2001) (finding judges susceptible to cognitive bias and error at rates substantially similar to that of the general population); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197–1204 (2009) (concluding that the answer largely is "yes" and noting presence of implicit biases among judges that appear to impact decision-making); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 101 (2000) (finding judges subject to same cognitive factors affecting all persons).

they actually are. Because judges have considerably more power over the lives of others than do most people, this essentially human trait becomes more troublesome in judges (as well as police officers, prosecutors, business executives, high public officials, and military leaders) than it would be in most other settings in which the over-confident have less opportunity to adversely impact others. What may be tolerable where individuals have relatively little practical power to do harm becomes unacceptable in the judicial setting and requires potentially over-inclusive protection in order to avoid injustice.[35]

This type of cognitive error is often accompanied by false consensus bias as well. A false consensus bias occurs when one is erroneously overconfident that everyone else—or at least all objectively rational, intelligent people—see a situation in the same

35. For example, a law professor's excessive self-confidence may produce the erroneous belief that his or her more recent manuscript is a paradigm-shifting breakthrough. If, however, the professor is wrong (which is almost certainly the case, as real breakthroughs of this sort are comparatively rare), the realistic worst that can happen is that misguided members of a legal periodical may share the same misconception and publish the manuscript in lieu of better submissions. Alternatively, articles editors have the power to deny space to the manuscript altogether and readers are of course free to skip the article or disagree with it, even to ridicule it. When the professor submits the supposedly path breaking manuscript to the law review at her own school, this could raise genuine questions of whether the students at the professor's own school are sufficiently impartial about the merits of the manuscript. No one treats this as a serious problem because article selection is not adjudication and is simply not that important in the grander scheme of the world. However, if the professor were to blackmail students in an attempt to attain publication (e.g., withholding or awarding grades on the basis of the review's decision) or retaliate against students if the article were rejected, a rational law school would presumably take stern action to discipline the professor and protect the students.

By contrast, the law professor as a teacher has considerably more authority when conducting class and awarding grades (although it is, of course, a lot less power than that exercised by judges twenty to thirty times per day). If there are allegations of prejudice against a student (e.g., because the student is an employee of a company involved in litigation against the professor or bullied the professor's child during high school), the professor may be inclined to think that he would not discriminate against the student in assigning grades. No law school in the country, however, would keep the student in Professor X's class under these circumstances (assuming the allegation is accurate). The academy, whatever it lacks in other regards, understands that the person impacted is unlikely to be a good judge of his actual impartiality and that—more important by analogy to the Judicial Code—there are serious grounds for doubting Professor X's impartiality under such circumstances.

way.[36] For example, experiments have suggested that people reading contracts or other texts, no matter how turgid or arguably ambiguous the language, tend to decide the text has a particular meaning and then believe that almost all readers of the text would assign it the same meaning.[37] Often, however, there is much greater division of opinion about the text than the initial reader acknowledges.[38] In other words, the presumed consensus does not exist.

By analogy, a judge assessing his or her own impartiality is likely to perceive that no other reasonable observer could disagree with the judge's conclusion and that there exists no reasonable question as to the judge's ability to be impartial in a pending case, but there will almost certainly be more disagreement than the judge anticipated. Case law reflects this through reversals of decisions declining disqualification and the division we have seen at the United States Supreme Court on matters of judicial disqualification. *Caperton v. A.T. Massey Coal Co.*, for example, was a 5–4 decision.[39] Nevertheless, each individual Justice writing alone

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36. *See* Solan et al., *supra* note 26, at 1290 (interpreting answers to a questionnaire and finding that "subjects overestimate the extent to which other participants understand the term the same way they do").

37. *See* Solan et al., *supra* note 26, at 1289–92 (finding that lay people overestimate, by a significant deviation, how many of their peers would give an ambiguous word the same meaning they would give it; also noting that people are excessively confident in the accuracy of their predictions).

38. *Id.*

39. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256, 2263–64 & 2268 (2009) (finding situation carries unacceptably high risk of actual bias in favor of campaign supporter or against his litigation opponents, while dissenting Justices Roberts, Scalia, Thomas, and Alito not only disagree with the reach of the Due Process Clause as applied to disqualification, but see little risk that West Virginia Supreme Court Justice Brent Benjamin would be swayed by $3 million in campaign support received from interested litigant); *see also,* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864–65 (1988) (5–4 decision reversing lower court where trial judge presided over case notwithstanding his status as trustee of University that stood to gain from particular litigant's victory); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986) (setting aside, in 5–4 decision, Alabama Supreme Court decision on due process grounds where participating justice had pending similar suit against insurer party to the case); Tumey v. Ohio, 273 U.S. 510, 531–35 (1927) (overturning imposition of traffic violation conviction where trial judge funded by revenues generated from traffic citations and convictions); United States v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996) (reversing trial judge's failure to recuse in case involving political ally of President Clinton due to trial judge's personal friendship with Hillary Rodham Clinton);

would believe that the overwhelming majority of observers agreed with his or her assessment, just as West Virginia Supreme Court Justice Brent Benjamin appears not to have contemplated that anyone could entertain reasonable questions as to his impartiality.[40] As discussed in Part II.B of this article, the tendency of judges to think no reasonable observer could disagree with the judge's conclusion argues for a broader and more robust approach to disqualification based on reasonable questions as to impropriety in addition to a requirement that recusal motions be heard before a judge other than the judge who is the target of the disqualification motion.

Other commonly found cognitive biases can also hamper judging. Research has identified a "hindsight bias" which "suggests that people often think, in hindsight, that things that happened were inevitable, or nearly so."[41] This undoubtedly can contribute to the spoliation-like problem discussed below,[42] in which an appellate court reviewing rulings by a judge who should have been disqualified may make excessive use of the harmless error concept and be unable to see how the case could have come out differently had an untainted judge presided.

Related to this is the availability heuristic in which persons overestimate the chance of a future event (e.g., an alligator attack)

Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (reversing an Oklahoma City federal trial judge's failure to recuse himself in trial of alleged bomber).

40. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 34–55 (noting Justice Benjamin's repeated assertions of impartiality and hostility to those who questioned his continued participation in case). Similarly, the individual decisions denying recusal by Justice Scalia in *Cheney v. U.S.* Dist. Ct., 542 U.S. 367 (2004), and Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824 (1972), met with widespread, nearly universal criticism, again illustrating the sometimes embarrassing gulf between judicial opinion and public perception. *See* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 851–68, 900–07 (2009) (discussing adverse public and professional reaction and substantial criticisms of Justices Scalia's and Rehnquist's failures to recuse).

41. *See* CASS R. SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 4 (Cass R. Sunstein, ed., Cambridge Univ. Press 2000) ("[P]eople often think, in hindsight, that things that happened were inevitable, or nearly so. The resulting 'hindsight bias' can much distort legal judgment.").

42. *See* discussion *infra* Part I.C (discussing spoliation concerns; suggesting that "both private and public decisions may be improved if judgments can be nudged back in the direction of true probabilities").

where there has been a recent well-publicized such event.[43] Although this cognitive trait is less likely to affect disqualification practice, it holds potential to bring about bad decisions (of either undue resistance or hair-trigger disqualification) due to recent high profile episodes of recusal motion abuse or undue judicial resistance to disqualification.[44]

In addition, there is the representativeness heuristic that prompts people to complete an indeterminate picture in accord with pre-conceived patterns of thought, experience, or association.[45] Applied to disqualification practice, this may make judges too quick to dismiss recusal motions as merely mirroring previously unsuccessful similar motions, or to reflexively deem recusal motions strategic rather than meritorious, or insufficiently serious based on a judge's long-standing track record of generally avoiding criticism despite a longstanding practice of being resistant to recusal.

Without doubt, people are generally subject to a status quo bias in which they harbor a "general tendency to stick with their

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43. THALER & SUNSTEIN, *supra* note 15, at 26.

44. For example, in 2006, an investigative reporting series by the *Los Angeles Times* suggested that Las Vegas area judges were overly influenced by powerful litigants and lawyers. *See* Michael J. Goodman, *Juice vs. Justice: A Judge Who Isn't Playing by Fast and Loose Rules*, L.A. TIMES (June 8, 2006), *available at* http://www.latimes.com/news/politics/la-na-vegasside8jun08,1,4286554.story (highlighting Judge John S. McGroaty's avoidance of conflicts of interest in a "juice town," referring to money and influence); Michael J. Goodman & William C. Rempel, *Juice vs. Justice: For this Judge and his Friends, One Good Turn Led to Another*, L.A. TIMES (June 9, 2006), http://articles.latimes.com/2006/jun/09/nation/na-vegas9 (describing pattern of some judges in regularly awarding court-appointed receiver or special master work to lawyers with whom they have personal or professional ties); Michael J. Goodman & William C. Rempel, *Juice vs. Justice: In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. TIMES (June 8, 2006), http://articles.latimes.com/2006/jun/08/nation/na-vegas8 (describing discrete judicial treatment of cases that could be embarrassing to influential litigants); Michael J. Goodman & William C. Rempel, *Juice vs. Justice: Special Treatment Keeps them Under the Radar*, L.A. TIMES (June 10, 2006), http://articles.latimes.com/2006/jun/10/nation/na-vegas10 (exploring the alleged corruption of Las Vegas's senior judges). In response, local attorneys and others perceived a reaction of greater judicial willingness to recuse in reaction to the black eye the newspaper series had inflicted on the local bench. Of course, this perception may have been due to cognitive error by the observers.

45. *See* THALER & SUNSTEIN, *supra* note 15, at 26–28 (exploring the representativeness heuristic).

current situation."[46] Because, by definition, disqualification motions (other than peremptory challenges of right) occur after a judge has been assigned to the case, status quo bias generally works against the grant of a disqualification motion. With Judge X already on the case, both Judge X and any colleague to whom the recusal motion is assigned will tend to oppose granting the motion if the case is close, to better maintain the status quo. Added to this may be a notion of professional pride that attaches some stigma to being too quick to recuse.

Another important cognitive trait is "anchoring," in which "people make probability judgments on the basis of an initial value, or 'anchor,' for which they make insufficient adjustments" even though "[t]he initial value may have an arbitrary or irrational course."[47] For judges (and the legal system generally), an important anchor is the presumption of judicial impartiality. For many judges, the anchor is firmly set in favor of a very strong, hard to rebut presumption of impartiality, although even realist and less traditionalist judges also have this anchor.

In all cases, then, judges will resist disqualification motions, sometimes resisting greatly with the traditionalist's anchor outweighing information which calls impartiality into question. To the extent that a strong impartiality presumption is arbitrary, irrational, or even merely overstated, this cognitive trait of humans will warp recusal decisions, particularly where, like all humans, judges make insufficient adjustments once their anchor point is set.

Humans also are subject to "loss aversion" behavior in which they place greater value on retaining something than in gaining something new.[48] A cognitive cousin is the "endowment effect" in

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46. *See* THALER & SUNSTEIN, *supra* note 15, at 34–36 (exploring status quo bias).

47. SUNSTEIN, *supra* note 41, at 5 (noting that when anchor points are arbitrary or have an irrational source "probability assessment may go badly wrong"); THALER & SUNSTEIN, *supra* note 15, at 23–25.

48. *See* SUNSTEIN, *supra* note 41, at 5 ("People are especially averse to losses. They are more displeased with losses than they are pleased with equivalent gains—roughly speaking, twice as displeased."); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 269 (1979) (finding that a "psychological principle—the overweighting of certainty—favors risk aversion in the domain of gains and risk seeking in the domain of losses").

which already owned items are valued at a rate above market value.[49] This is why someone will refuse to accept $20 for a widget already owned even when that same person would never pay $20 for the same widget in a store.[50]

Applied to judging, one might reasonably posit that the initially assigned judge gains "possession" of a case or is endowed with the case. A disqualification motion then presents the possibility of loss. The judge, like other humans with loss aversion, may be overly inclined to avoid the loss and keep the case even in the face of serious questions regarding impartiality. Similarly, the judge with a case in hand may be unwilling to "sell" it back to the clerk of court for reassignment because the judge has subconsciously assigned the currently possessed case a greater value than a prospective replacement case.[51]

In short, there are a several cognitive traits that suggest judges will be unduly inclined to reject disqualification motions. In the face of these factors, the legal system needs to ensure that its rules and procedures regarding judicial disqualification are sufficiently vigorous to overcome these cognitive barriers.

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49. *See* SUNSTEIN, *supra* note 41, at 5 ("Contrary to economic theory, people do not treat out-of-pocket costs and opportunity costs as if they were equivalent."); *id.* at 6 (indicating that assignment of a legal entitlement "creates an *endowment effect*, that is, a greater valuation stemming from the mere fact of endowment").

50. *See* THALER & SUNSTEIN, *supra* note 15, at 33–34 (using example of mug given to half of class of college students, with result that students with mugs demand higher price to sell than students without mugs will pay to buy).

51. *See* SUNSTEIN, *supra* note 41, at 5–6 (applying the concept to conclude that the Coase Theorem is at least partially incorrect).

> Recall that the Coase Theorem proposes that when transaction costs are zero, the allocation of the initial entitlement will not matter, in the sense that it will not affect the ultimate state of the world, which will come from voluntary bargaining. The theorem is wrong because the allocation of the legal entitlement may well matter, for those who are initially allocated an entitlement are likely to value it more than will those without the legal entitlement.

Id.

B. *The Inevitable Socio-Political Element of Adjudication*

Because of the cognitive factors noted above, there is almost no question that different judges will react differently to the same cases, litigants, lawyers, and legal questions. In this sense, complete uniformity of dispute outcomes is an unattainable goal.[52] Inevitably, judges will bring their own values, orientations, ideologies, and jurisprudential views to the adjudication task. Justice Rehnquist's memorandum defending his erroneous decision not to recuse in *Laird v. Tatum* is deservedly maligned,[53] but the memorandum contains at least one kernel of truth, noting that a judge without any legal or world views coming to the bench would not be fit to take the bench.[54]

Jurisprudential and demographic diversity may actually contribute to improved adjudication even at the cost of uniformity in that these types of variances among judges create a type of judicial

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52. *See* Jeffrey W. Stempel, *Shady Grove and the Democracy-Enhancing Potential of* Erie *Formalism,* 44 AKRON L. REV. (forthcoming 2011) (arguing that *Erie* "hawks" preferring to apply state law even when it is part of the state's procedural code are excessively concerned with symmetry of state and federal court outcomes, a forlorn quest because similar legal and factual disputes invariably produce disparate adjudication outcomes because of differences in litigant and lawyer charisma, juries, timing, and outside influences).

53. *See* Laird v. Tatum, 409 U.S. 824, 826–28 (1972) (Rehnquist, J., mem.) (explaining and defending Justice Rehnquist's refusal to recuse in case challenging Department of Defense domestic surveillance program even though he had approved program as a Justice Department official prior to joining Court); JOHN MACKENZIE, THE APPEARANCE OF JUSTICE 222–23 (1977) (criticizing Rehnquist's decision not to recuse and noting its effect on the credibility of the Court); John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 246–48 (1986) (criticizing Rehnquist decision in *Laird v. Tatum* and identifying Justice Rehnquist as outside the mainstream of opinion regarding judicial disqualification); Jeffrey W. Stempel, *Chief William's Ghost*, *supra* note 40, at 860–62 (2009) (noting criticism of Justice Rehnquist's failure to recuse and the content and rationale of his memorandum, in particular criticism of noted legal ethics experts); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 593–96 (1987) (discussing Justice Rehnquist's memorandum and its aftermath).

54. *See* Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.").

pluralism[55] similar to electoral pluralism that traditionally has been praised by political scientists and policymakers.[56] But when the

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55. *See, e.g.*, Nadia A. Jilani et al., *Gender, Consciousness Raising, and Decision Making on the Supreme Court of Canada*, JUDICATURE, Sept.–Oct. 2010, at 59 ("The analysis of patterns of voting by male justices indicates quite clearly that as the number of women on the Court increased, the behavior of male justices changed in ways that were both statistically significant and substantively important.").

A particular example from the article involved *Safford Unified Sch. Dist. No. 1 v. Redding*, which concerned the constitutionality of a school's strip search of a 13-year-old girl to discover whether or not she had illegal drugs in her possession. 129 S. Ct. 2633, 2638, 2642–44 (2009). Two judges considered similar in jurisprudential philosophy appeared to clash because of different perspectives on the intrusiveness of such a search:

> Justice Breyer suggested that it's no big deal when kids strip. After all, they do it for gym class all the time. [Plaintiff] Savana Redding didn't reveal her body beyond her underclothes, said Breyer. Justice Ginsburg, the court's only female justice, bristled, her eyes flashing with anger. She noted that there's no dispute that Savana was required to shake out her bra and the crotch of her panties. Ginsburg seemed to all but shout, boys may like to preen in the locker room, but girls, particularly teenage girls, do not.

Nina Totenberg, *Supreme Court to hear school strip search case*, NAT'L PUB. RADIO (April 21, 2009), http://www.npr.org/templates/story/story.php?storyid=103334943. *See also* Transcript of Oral Argument at 45, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf ("I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym . . . ."). Ultimately, Justice Breyer, like Justice Ginsburg and the Court majority, ruled that the school's strip search violated the girl's Fourth Amendment rights. *Safford United*, 129 S. Ct. at 2641–43. This perhaps provides more evidentiary support for the thesis that availability of a woman's perspective on the bench can make a difference.

Of course the value of adding different life experiences and attendant consciousness raising to a court is not the same thing as judges voting for the stereotypes and biases of their own demographic group. Consequently, I am not suggesting that the type of seemingly beneficial education judges may receive when serving with judges of different backgrounds makes a case for seeking a more variegated bench of judges exercising unconscious bias. I am willing to be agnostic, however, on the question of whether the negative additional biases in judging may co-exist with the positive of a more aware bench due to its diversity. Alternatively, even if a diverse bench is at its worst a fractured bench of judges unconsciously biased toward their favored groups, this still may be an

judicial variance stems not from a different intellectual attack on legal questions but instead results from cognitive bias due to extra-judicial traits, injustice rather than enrichment seems the more likely result.[57]

Some "slanting" of the bench becomes inevitable to the extent that members of the legal profession exhibit different beliefs, values, ideologies, and jurisprudential preferences, and to the extent that the larger political context occasionally favors some beliefs, values, ideologies, and jurisprudential preferences over others. To use an obvious example, Republican presidents and governors will tend to appoint a greater percentage of politically and legally conservative judges than will Democratic presidents and governors. Executives of both parties will be constrained in their choices by legislatures, merit selection panels, the organized bar, and other factors—with the mix of these factors changing over time. The same holds true where judges are elected in that the relative electoral impact of the plaintiff's bar, the defense bar, organized labor, business, civil rights groups, and law enforcement will vary over time.[58]

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improvement of a more uniform bench tending to be biased toward a particular group or groups.

56. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 124–51 (1965) (arguing that pluralist contest among various interests is generally healthy, producing sound public policy and making for robust democracy). During the past 50 years, however, intellectual opinion has tended to shift from optimism about pluralism to concern over the undue influence of powerful interest groups not necessarily representative of the greater public good. *See* ROBERT A. DAHL, DILEMMAS OF A PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 40–52 (1982) (discussing independent organizations and their potential role in stabilizing injustices and distorting the public agenda); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 118–20 (1971) (discussing group theory and potential problems of pluralism).

57. A biased or even a corrupt judge is not necessarily chronically in error. Just as a broken clock is correct at least twice each day, it may be the case that litigants unfairly aided by a judge's prejudices (or litigants that purchased the judge's decision) are legally entitled to victory under the prevailing law if fairly applied. However, even if this were true more often than the broken clock gives the correct time, it would hardly be a justification for a more relaxed attitude toward judicial impartiality.

58. *See* Curtis Wilkie, *In Search of the South Long Lampooned for its Backwater Politics and Plantation Mentality, the Region Now Defies Stereotypes. Today's Presidential Candidates Find Themselves Confronted with a Diverse and Shifting Landscape,* GLOBE (Boston) Mar. 6, 1988, at 14, *available at* 1988 WLNR 618982 (detailing the changing demographics of the Southern electorate);

To the extent that these variances reflect only differing judicial orientation of appointees and candidates, this is not only inevitable but probably unobjectionable. No thinking person familiar with a subject is totally without at least tentative views about it. Recusal on this basis would lead to the absurdity warned about in the otherwise faulty and justly infamous Rehnquist Memorandum in *Laird v. Tatum*.[59] However, where a judge's orientation goes beyond legal philosophy or opinion and becomes pre-existing extra-judicial preference for particular litigants or case outcomes, this violates judicial impartiality. Sound recusal policy would reach these situations where there is an appearance of such impartiality.[60]

C. Spoliation Concerns

1. The Inherent Difficulty of Demonstrating the Impact of a Tainted Judge and the Harm of Harmless Error Analysis

In addition to the difficulty of self-evaluation, there exists the perhaps larger problem of sorting out the impact, if any, on adjudication presided over by a judge whose impartiality is subject to question. In many cases, the presiding judge may be subject to a reasonable question as to his or her impartiality. Nevertheless, the judge may continue to sit under circumstances clearly in violation of the law, or at least under circumstances that cause discomfort but where there may be little or no indication that the same outcome would not have been obtained before a completely impartial judge.

As a result, appellate review based on impact will likely be insufficient as it is often difficult to demonstrate that a particular outcome resulted from lack of impartiality rather than the closely

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see also CURTIS WILKIE, THE FALL OF THE HOUSE OF ZEUS: THE RISE AND RUIN OF AMERICA'S MOST POWERFUL TRIAL LAWYER 81–89 (2010) (describing the downfall of prominent plaintiff's attorney Richard "Dickie" Scruggs, the extensive culture of corruption and favoritism in Mississippi, and the pitched electoral and financial battle for ideological/political control of the Mississippi Supreme Court).

59. *See* Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.) (noting that complete absence of thought in general legal area of concern suggests lack of judicial competence more than neutrality).

60. *See infra* text accompanying notes 215–55 (discussing recusal standards and the "substantial group of doubters" trigger for recusal).

contested merits of the case. In addition to the problem of cognitive and unconscious bias, judicial decision-making is affected by what might be termed a spoliation problem. Even where a clearly ineligible judge presides over a proceeding, it is often difficult to determine whether the tainted judge's participation affected the outcome.[61] As a result, reviewing courts may be disinclined to undo the resulting case outcome.

Although one scholar has implicitly defended this phenomenon by advocating for an "actual justice" test rather than the articulated "reasonable question as to impartiality" test,[62] such a move would only make judicial disqualification worse by leading to insufficient disqualification in cases where actual injustice has probably resulted but cannot be affirmatively demonstrated. By contrast, the appearance standard, while perhaps leading to some over-disqualification, provides greater protection to litigants at relatively low cost in terms of judicial resources and probably no cost in terms of substantive outcome. As Professor Geyh correctly observed:

> The problem of over-disqualification is largely one of squandering judicial resources on the administration of unnecessary disqualifications, whereas the problem of under-disqualification is one of subjecting litigants to the loss of life, liberty or property in an unfair (or seemingly unfair) process. As between promoting fairness and administrative efficiency, the former goal is intuitively more compelling . . . .[63]

Going a step beyond this observation, my own normative assessment is that there is no doubt that a legal system should be more concerned with ensuring the fairness of presiding judges than in conserving judicial resources unless the efficiency savings are enormous. Almost certainly, whatever savings would result from a

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61. *See supra* text accompanying note 41 (discussing hindsight bias).

62. Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 7–8 (2007).

63. Geyh, *supra* note 6, at 714; *see also* Stempel, *Completing* Caperton, *supra* note 1, at 324–25 (arguing that any adjudication presided over by a judge whose impartiality is not beyond reasonable question deprives litigants of due process and that *Caperton*'s higher "unreasonable probability of actual bias" standard is insufficiently protective of litigants and justice).

stingier recusal regime would be modest. It simply is not very burdensome to adopt the procedural protections urged in this article, nor is it very burdensome to err on the side of disqualification through the use of the appearance-of-impartiality-standard rather than to err on the side of unfairness through the proof-of-actual-injustice standard.

Although harmless error is a valuable judicial concept that can provide substantial economy and even justice, it becomes problematic when applied to failure-to-recuse cases. Despite this, the harmless error doctrine has substantial support in recusal practice. Although "[t]he traditional rule was that when a disqualified judge sat in violation of an express statutory standard, his rulings were to be vacated on appeal,"[64] the majority of states and at least a substantial number of the federal circuits appear to apply the harmless error doctrine to recusal,[65] particularly if there has been extensive activity in the case prior to recusal or failure to recuse.[66]

Where risk of actual bias (as opposed to questions of neutrality and appearance) is thought low,

> . . . and no prejudice to the complaining party has been shown, or is readily apparent on review of the appellate record, appellate courts have proven reluctant to reverse a lower court's judicial

64. FLAMM, *supra* note 14, § 33.8, at 1012.

65. *See* FLAMM, *supra* note 14, § 33.8 at 1012–13 (listing jurisdictions that do not necessarily require reversal of judgments or vacatur of orders handed down by judges who failed to recuse themselves); *see also, e.g.*, Doddy v. Oxy USA, Inc., 101 F.3d 448, 458 (5th Cir. 1996) (holding that judge erred in reentering case after prior recusal but error did not require vacating all trial court rulings); United States v. Troxell, 887 F.2d 830, 833 (7th Cir. 1989) (holding that the trial judge was not required to recuse himself); Lyons v. Sheetz, 834 F.2d 493, 495 n.1 (5th Cir. 1987) (noting that even if the judge should have recused himself from the third action since he presided over the first action and was a party himself to the second action, his failure to recuse himself was harmless error since "no other judge could reasonably have reached a different result"); Powell v. Anderson, 660 N.W. 2d 107, 115 (Minn. 2003) ("[N]ot every case involving judicial disqualification deserves vacatur.").

66. *See* FLAMM, *supra* note 14, § 33.8, at 1013 ("[I]t is generally agreed that only those errors that result in an unfair trial, or deprive a party of its substantial rights, are sufficient to warrant reversal or remand."). *See generally* Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 386 (W. Va. 1995) (holding that violation of the recusal standard "involving only the appearance of impropriety does not automatically require a new trial").

> disqualification decision, either in civil cases or in criminal ones. This is so even where the lower court judge clearly erred in failing to disqualify himself.[67]

Where there was a substantial risk of actual bias by the judge rather than merely a reasonable question as to impartiality or a seemingly minor violation of one of the financial, professional, or factual grounds for disqualification found in 28 U.S.C. § 455(b) or ABA Model Code of Judicial Conduct R. 2.11,[68] failure to recuse is often not treated as harmless error.[69] But at the same time, "even when actual bias has been shown, disqualification or reversal will not necessarily be ordered unless the situation is one in which it would be unreasonable to require the complaining party to establish prejudice."[70]

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67. FLAMM, *supra* note 14, § 33.8 at 1013–15 (citations omitted).

68. *See infra* note 106 and accompanying text (reviewing these grounds for disqualification).

69. *See* FLAMM, *supra* note 14, § 33.8, at 1013 (stating that where the risk that the judge was actually biased is substantial, the error in failing to recuse is not harmless, and any judgment rendered by the judge may be reversed).

70. *Id.* at 1015 (citations omitted).

> Reversal of a decision based on a judicial bias claim is especially unlikely to be ordered where the malfeasance alleged is either excusable; where only an appearance of bias or impropriety is involved, rather than actual bias or impropriety; where the complaining party, despite knowledge of grounds for disqualification, did not seek to disqualify the trial judge before his decision on the merits of the matter was rendered; or where the appellate court is in a position to either remedy any inequities that arguably may have been occasioned by the challenged judge's failure to disqualify himself, or to independently confirm the correctness of the lower court judge's decision on the merits. Under such circumstances the error may be deemed to be harmless, and the disqualification issue may be deemed to be moot.

Id. at 1015–16 (citations omitted). Flamm further notes that "[t]he harmless error rule is especially likely to be invoked in circumstances in which the case came to the appeals court upon the grant of a motion for summary judgment," because the appellate court, in giving plenary review to the summary judgment grant will, if affirming the grant, likely think that where "summary judgment was proper, remanding the case to another judge would be an exercise in futility." *Id.* at 1016–17 (citations omitted). *See also* Pierce v. Pierce, 39 P.3d 791, 799 (Okla. 2001) ("We have indicated in a divorce case that we would affirm a decree if it was just and equitable even if a trial judge showed bias. . . . On the other hand, we have

A significant number, but still a seeming minority of jurisdictions, take the view that "once an appearance of partiality has been shown prejudice is presumed," and the matter must be remanded, heard, and decided again by a new judge.[71] The Supreme Court, despite not being consistently clear on the issue, stated in *Arizona v. Fulminante* that the administration of a case by a judge lacking impartiality is among the "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards,"[72] but the *Fulminante* case appears to have been one of actual bias rather than merely a reasonable question as to judicial impartiality.[73] Moreover, in its most significant modern decision applying the federal disqualification statute, the Court stated that reversal of a decision was likely only where there

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said that a party is entitled to reversal of a proper judgment when the judge was statutorily required to disqualify.").

71. FLAMM, *supra* note 14, § 33.8, at 1012; *see, e.g.*, United States v. Antar, 53 F.3d 568, 573 n.7 (3d Cir. 1995) (stating that the integrity of the judiciary is the touchstone of recusal); United States v. Van Griffin, 874 F.2d 634, 637 (9th Cir. 1989); Buttrum v. Black, 721 F. Supp. 1268, 1296 (N.D. Ga. 1989).

72. Arizona v. Fulminante, 499 U.S. 279, 310 (1991); *accord* Neder v. United States, 527 U.S. 1, 7–8 (1999) (stating that the harmless error analysis is not apt in cases involving a biased trial judge); Bigby v. Dretke, 402 F.3d 551, 559 (5th Cir. 2005) (stating adjudication before a biased trial judge "represents a structural error subject to automatic reversal"); State v. Esparza, 660 N.E.2d 1195, 1196 (Ohio 1996) (stating that if judge who is not impartial is present on the bench, it is structural constitutional error).

73. *Arizona v. Fulminante* involved the voluntariness of a confession given by a murder suspect to an undercover informant. 499 U.S. at 282–84. A new trial was ordered without admission of the tainted confession. *Id.* at 284. Although the discussion was not strictly necessary to its decision, a majority of the court drew a strong distinction between "classic 'trial error'" that involves a mere mistake by the adjudicator and structural error that invalidates the entire proceeding, using as one example the lack of an impartial judge. *Id.* at 309–10. In *Fulminante*, the Court used failure to provide counsel in felony prosecutions, exclusion from grand jury on basis of race, denial of right to self-representation, and denial of public trial as examples of structural error. *Id.* Thus, the U.S. Supreme Court appears to have rejected a harmless error approach to erroneous failure to recuse. *See, e.g.*, Del Vecchio v. Ill. Dept. of Corr., 31 F.3d 1363, 1371 (7th Cir. 1994) ("[B]ad appearances alone should not require disqualification to prevent an unfair trial. What may appear bad to an observer, especially in hindsight, may not have influenced—or more importantly, may not have had any real possibility to influence . . . the judge . . . .").

was actual bias or impropriety rather than merely the appearance of bias or impropriety.[74]

Harmless error review thus appears to be the norm in cases where disqualification is sought based on appearance, financial holdings, past professional affiliations, or factual connections to a case. Judicial failure to recuse on these grounds will not require reversal if the reviewing court believes the same outcome would be obtained before a neutral judge. Although this may seem a reasonable exercise in judicial economy, it unduly weakens the disqualification regime.

As one judge put it, "[t]he issue is not whether a judge whose partiality might reasonably be questioned has been shown to be biased . . . [but, rather,] whether a judge whose partiality might reasonably be questioned should even conduct the proceeding in the first place."[75] The answer, of course, is that the judge about whom there exists a reasonable question regarding impartiality should not preside. Everything taking place in the case after the improper failure to recuse is wrongful, and the resulting outcome should logically be viewed as a nullity even if it is not viewed as an abomination.

In addition to this logical ground for vacating the outcomes at trials presided over by tainted judges, adjudication before a judge that should have recused creates difficult forensic problems of assessing the degree to which lack of judicial neutrality was a factor in the result and determining whether other reasonable outcomes could have resulted absent the tainted judge's participation.

In many cases, determining whether a tainted judge's participation affected trial results will be reminiscent of that genre of science fiction movies in which moderns travel back in time to the site of famous historical events.[76] Will the intrusion of the moderns alter the subsequent course of history? No one knows until the final scene when, in nearly all cases, history remains unchanged, due to a little luck and audience suspension of disbelief.[77]

In similar fashion, appellate courts reviewing trial outcomes may find it difficult to believe that a seemingly clear case could have

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74. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858–59 (1988) (describing the recusal rule under 28 U.S.C. § 455a).

75. Lofton v. State, 944 S.W.2d 131, 136 (Ark. App. 1997) (Griffen, J., dissenting).

76. *E.g.*, BACK TO THE FUTURE (Universal Studios 1985).

77. *Id.*

come out differently had it been officiated by a judge free of disqualifying traits. Perhaps. However, one is hard-pressed to make this determination post hoc. Metaphorically, it attempts to put the genie back in the bottle or close Pandora's Box. Trial outcomes are at least as path dependent as other parts of life, perhaps more. The judge's initial orders (e.g., injunctive relief, scheduling, etc.) and interaction with the parties, including even subliminal reaction to the case on the merits, logically affects everything else going forward. Judicial rulings on discovery, which almost never get tested on appeal, can have a particularly shaping effect.

Under these circumstances, it is unwise to apply a harmless error analysis to judicial error in failing to recuse. Requiring vacatur and remand in such cases creates in the courts a strong incentive to treat disqualification matters seriously and to err on the side of disqualification in close cases, a generally preferable approach to the resistance to recusal that has frequently animated the courts.[78]

Disqualification matters can be complicated or close, and many denials of disqualification are not obviously incorrect. In such cases, a de facto form of harmless error analysis may animate reviewing courts. Where a case looks clear on the merits, the reviewing court may be excessively inclined to resolve recusal questions against disqualification, particularly if the failure to recuse is not an egregious misapplication of the law.

In effect, the appellate court will be tempted to affirm a failure to recuse under questionable circumstances because it appears, at least subconsciously to the appellate judges, that the trial judge's participation did not change the seemingly inevitable outcome of the case. Perhaps the trial judge made the same internal calculus when declining to recuse in the first instance, subconsciously finding recusal and transferring to (i.e., burdening) another judge a greater cost than the perceived modest risk of biased judging.

A variant of this problem may have been at work in *Caperton* and other disqualification cases that have divided the Supreme Court under circumstances where the judge under review appears clearly to have erred in failing to recuse. The overt split in the *Caperton* Court was over the wisdom of extending constitutional due process

78. *See infra* text accompanying note 191 (discussing procedural reforms designed to prompt more serious treatment of judicial disqualification decisions by courts).

protections to litigants harmed by a state court judge's failure to recuse (and Justice Benjamin's failure to disqualify himself was clear error under the applicable law of West Virginia).[79] The dissenters, however, may have been motivated by a "does it make any difference?" inquiry, coupled with an "is this worth the time and effort of remand?" question.[80]

Without doubt, the *Caperton* litigation had already been extensive and, despite plaintiff Caperton's $50 million verdict at trial, several state supreme court justices had accepted defendant Massey's legal defenses based on arguments of claim preclusion and failure to enforce a forum selection clause.[81] My own analysis, like that of the *Caperton* dissenters in the West Virginia high court,[82] is that those arguments were woefully weak.[83] They nonetheless

79. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 20–25 (detailing substantial and repeated legal error by Justice Benjamin in approaching and deciding four separate disqualification motions; noting that Justice Benjamin consistently applied a subjective approach asking whether he personally thought he could be fair rather than the required approach of asking whether an observer might have reasonable questions as to his impartiality). *Caperton* itself stands as an example of the negative things that can happen when judges do not take appearance standards sufficiently seriously.

80. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 25–30 (noting variety of dissenter concerns).

81. According to the U.S. Supreme Court, the West Virginia Court's rationale for vacating the trial court decision was, in part, "that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and second, that res judicata barred the suit due to an out of state judgment to which Massey was not a party." Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009) (citations to record omitted).

82. *See* Caperton v. A.T. Massey Coal Co., 679 S.E. 2d 223, 284 (W. Va. 2008) (Albright & Cookman, JJ., dissenting) (labeling state court *Caperton* majority opinion setting aside judgment against Massey on claim preclusion and forum selection grounds as "unsupported by the facts and existing case law").

83. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 15 n.50 (reviewing Massey's preclusion and forum selection arguments and finding them unpersuasive); *see also* Stempel, *Completing* Caperton, *supra* note 1, at 257–59 (discussing Massey's procedural attacks on *Caperton* verdict in more detail).

In brief, Massey argued that because a Caperton company, Harman Mining, had previously won a breach of contract suit against a Massey subsidiary, this judgment precluded the business fraud claim prosecuted by Caperton in West Virginia. The argument is not well-taken because the scope and nature of the West Virginia fraud litigation is so different in quality and kind than the breach of contract action in Virginia. Although it is correct that Massey's alleged intentional breaching of the Virginia contract was part of its purported scheme to destroy

enjoyed support from three real jurists who were not subject to the same ethical cloud that hovered over Justice Benjamin.[84] After the U.S. Supreme Court's remand, the *Caperton* verdict was again set aside, this time by a 4-1 vote, as the West Virginia Court ruled that a forum selection clause in a coal contract between a Caperton company and a Massey subsidiary required trial of all "related"

Caperton, it was but a part of a much larger, company-wide effort that went far beyond a single contract, transaction, or facility.

At the very least, a finding of claim preclusion under these circumstances is an unusually broad application of the doctrine, prompting one to wonder why some West Virginia Justices would be so eager to extend a doctrine that effectively limits a plaintiff's day in court and permits a company to escape punishment for allegedly very bad business behavior. Subsequent events have made the West Virginia Court's affection for Massey all the more puzzling. Massey, it should be recalled, is the parent company of Upper Big Branch Mine, the site of a tragic mining disaster in which nearly thirty miners died. The mine had been the subject of approximately 1,300 safety infractions in five years. Ken Lawless, *Massey's Massive Massacre,* INDUSTRIAL WORKER, Oct. 2010, at 11.

Defenders of the Court will undoubtedly argue that this simply means that even unsavory defendants such as Massey and Blankenship received fair and objective application of "the law" of res judicata. In my view, however, they received an excessively generous application of the doctrine. One might have expected that from a Court faced with an impoverished widow and young children being subjected to multiple SLAPP (Strategic Lawsuits Against Public Participation) designed to throttle their objections to construction of a planned polluting facility in a residential neighborhood. It makes no sense to see expansion of a doctrine that has the potential to prevent full adjudicative airing of alleged reprehensible business behavior, particularly in the context of a predatory company attempting to corner more of the coal market, to the potential disadvantage of West Virginia consumers, workers, and competing businesses.

84. Prior to the U.S. Supreme Court's ruling, *Caperton* was heard and decided twice by the West Virginia Supreme Court. *See* Caperton v. A.T. Massey Coal Co., No. 33350, 2007 WL 4150960 at *4 (W. Va. Nov. 21, 2007), *vacated,* 679 S.E.2d 223 (W. Va. 2008). In the first decision, the court voted 3-2 to reverse the decision, with two justices joining the ultimately disqualified Justice Benjamin. *Id.*

The rehearing and recusal motions were based on information about state court Chief Justice Spike Maynard vacationing on the French Riviera with Massey CEO Don Blankenship, a childhood friend of Maynard's, while the case was pending. *Caperton,* 129 S. Ct. at 2258. Justice Maynard ultimately recused himself, as did Justice Larry Starcher, who had voted in favor of Caperton in the first decision. *Id.* Justice Benjamin, as acting Chief Justice, appointed two judges to replace Maynard and Starcher. *Id.* The replacement judges split on the questions of claim preclusion and forum selection, resulting in another 3–2 victory for Massey in the Court's second decision of April 2008. *Caperton,* 679 S.E.2d at 223.

matters—including Caperton's allegations of an effort to destroy him—in Buchanan County, Virginia, making the West Virginia proceedings—and Hugh Caperton's $50 million verdict—a nullity.[85]

Although this seems to be an additional miscarriage of justice, the forum selection clause and claim preclusion arguments cannot be totally dismissed and are, whatever their analytical shortcomings, the "law" of West Virginia.[86] Under these circumstances, where a case comes out the same with or without a tainted judge who should have been recused at the outset, many judges may view the situation, at least unconsciously, as evidence that excessive sensitivity about the appearance of judicial impartiality merely adds additional cost without affecting substantive case outcomes.

Similarly, the Supreme Court's most prominent disqualification case prior to *Caperton* was *Liljeberg v. Health Services Acquisition Corp.*, was also a 5–4 decision.[87] The Court divided over the propriety of the conduct of a New Orleans federal trial judge who failed to recuse in a case in which Loyola University, on whose board he sat, had a financial interest.[88] In addition to disputing the judge's state of mind and the wrongfulness of the

85. *See* Caperton v. A.T. Massey Coal Co., 690 S.E. 2d 322, 332 (2009) (vacating judgment for Caperton on forum selection clause grounds; claim preclusion argument not addressed by Court on remand).

86. Technically, of course, the West Virginia Court's 2008 decision on claim preclusion has been vacated but it nonetheless, as a practical matter, stands as support for Massey's position on the issue. Caperton, 679 S.E. 2d at 223. On the other hand, the failure of the Court to address claim preclusion in its November 2009 decision, 690 S.E. 2d 322, finding for Massey on the merits based on only the forum selection clause, may reflect some judicial retreat from the broad view of res judicata expressed in the Court's November 2007, No. 33350 (W. Va. Nov. 21, 2007), and April 2008 opinions. 679 S.E. 2d 223.

87. 486 U.S. 847 (1988).

88. *Id.* (Stevens, J., for the majority; Rehnquist, C.J., dissenting; O'Connor, J., dissenting). *See also id.* at 870 (Rehnquist, C.J., dissenting, joined by White and Scalia, JJ.); *id.* at 874 (O'Connor, J., dissenting). Justice O'Connor's dissent, however, was partially procedural in that she "believe[d] the issue [of whether the trial judge had actual knowledge of disqualifying information] should be addressed in the first instance by the courts below" and "would therefore remand . . . ." *Id.* Like the other dissenters, however, she refused to find that a trial judge's constructive knowledge of disqualifying information could be a "basis for a violation of 28 U.S.C. § 455(a)." *Id.*

judge's conduct,[89] the *Liljeberg* dissents can be read as reflecting hesitancy to set aside a judgment that may have been correct (particularly since the dissenters were reluctant to find actual knowledge of disqualifying information by the trial judge despite a "quite remarkable" set of facts raising suspicion)[90] and would merely result again after disqualification, remand, and a repeat of court proceedings.[91]

Although such sentiments are understandable, they make for an inappropriate approach to judicial disqualification. To be sure, there are many cases that will come out the same way regardless of the judge's biases or prejudices. The party favored by judicial bias—even a bribing or blackmailing party—may deserve to win on the merits just as a party against whom the judge is prejudiced may deserve to lose on the merits. But such bottom line concerns miss the point. A central tenant of the judicial system is adjudication before a neutral judge and fair jury. The alleged inevitability of an outcome cannot justify a lax attitude toward recusal.[92]

That reviewing judges, or judges assessing their own impartiality, seldom state openly their view that the case is "clear" or "easy" does not negate the real risk that they are doing so silently and subconsciously. To combat this tendency, a more rigorous

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89. Ultimately, the *Liljeberg* majority appears to have been dramatically vindicated on the issue of whether the trial judge in question was being "punished" through disqualification merely because of inadvertence, or whether there was something more nefarious afoot. The judge was later convicted for bribery, conspiracy, and obstruction of justice and sentenced to seven years imprisonment. STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 602 (8th ed. 2009). Despite this, he refused to resign and "continued to draw his salary *while in prison*" before finally resigning in the face of impending impeachment. *Id.* He was also disbarred. *Id.*

90. *Liljeberg*, 486 U.S. at 851–52 & 855–58 (reviewing damning facts suggesting judicial impropriety); *see also* Kenneth M. Fall, Liljeberg v. Health Services Acquisition Corp.; *The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(A)*, 1989 WIS. L. REV. 1033, 1049–51 (1989) (describing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858–59 (1988), noting questionable conduct by trial judge that would give rise to concern about neutrality).

91. It appears that the *Liljeberg* litigation settled after remand as there are no further reported adjudicatory proceedings.

92. This is why any move toward an "actual justice" standard, *see, e.g.*, Cravens, *supra* note 62 and accompanying text, rather than strict enforcement of the reasonable-question-as-to-impartiality standard, is mistaken in light of the goals and commitments of the legal system.

attitude toward disqualification is required. As discussed in Part II.B.5 of this article, this should include replacement of the abuse of discretion standard of review and elimination of a harmless error approach when a trial judge erroneously fails to recuse.

A more practical and less normative objection to relaxing judicial recusal in cases where no miscarriage of justice seems to have resulted is the difficulty in determining whether results in a case were, in fact, largely preordained by the inarguable merits of the case. This is particularly true where failure to recuse occurs at trial. At least on appeal, there are other judges familiar with the record who can see the matter differently and call out the non-recusing appellate judge, as took place in *Caperton*.[93] The trial judge acts alone, however, in shaping the record that will be reviewed on appeal and characterizing the nature of the parties' legal arguments.

With the case so cast by a judge that should have recused, the results may seem on their face to be obvious and inevitable; but what if a different judge, not subject to disqualification, had shaped the record and assessed the arguments in first instance? Even searching re-examination by an appellate court often (perhaps usually) cannot answer these questions. The "genie" of a tainted opinion by a tainted judge is out of the metaphorical bottle and cannot be put back in the container. Only a new proceeding before a judge whose impartiality is not subject to reasonable question can ensure that the case on appeal is fairly presented.

2. The Inherent Difficulty of Uncovering and Demonstrating Bias or Prejudice in Judges

In addition, questions of judicial impartiality are afflicted with another, perhaps even more difficult, type of spoliation problem. Sometimes, perhaps most of the time, it is very hard to determine the prejudices of a decision-maker. To take an extreme example, a judge may harbor deep-seated racism, sexism, or homophobia but be sufficiently cautious in utterances that she is never found out. While a judge disciplined enough to avoid any

93. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 284 n.16 (W. Va. 2008) (Albright, J., dissenting); *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009) (citing Judge Starcher's dissent in the superseded No. 33350 (W. Va. Nov. 21, 2007), in which he called the majority decision "morally and legally wrong").

such public utterances or conduct may also be disciplined enough to keep these prejudices outside the adjudication process, this is unlikely. More probably, the hidden biases of such judges manifest themselves in a subtle manner adverse to the disfavored litigants or lawyers: a refusal to adequately credit the testimony of a woman; excessive reliance on the testimony of a Hispanic witness or member of the same college fraternity; concern that a black plaintiff has been insufficiently willing to persevere through pain to get back to work. To the extent any of this happens, some litigants are not getting adequate due process.

Even though judges are relatively high profile members of society, the risk of failure to discover these attitudes is significant. Consider the latest revelations about former President Richard Nixon, who led the nation from 1969 until his Watergate-fueled resignation in mid-1974.[94] For a quarter-century, Nixon was a significant force in national policy as a congressman, senator, vice-president, and as President elected in 1968 and re-elected in 1972 in a landslide.[95] Although Nixon had more than a few critics during his rise to power and reign, he was not regarded as racist, bigoted, or anti-Semitic.[96] Had Nixon been a judge,[97] no one would have

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94. *Richard M. Nixon*, THE WHITE HOUSE, http://www.whitehouse.gov/about/presidents/richardnixon (last visited March 14, 2011).

95. Returning to California after service in the Pacific during World War II, Richard Nixon became a rising political star, elected first to the U.S. House of Representatives, then as the state's U.S. Senator before being chosen as President Dwight Eisenhower's 1952 vice-presidential running mate, a position he held for eight years before losing the 1960 presidential election to John F. Kennedy. *Id.* Nixon also lost the 1962 California gubernatorial election to Edmund G. "Pat" Brown, father of current California Governor Jerry Brown and went into a period of political exile during which he became a named partner in New York's Mudge Rose law firm. *Id.* Nixon continued to serve as an elder statesman and intellectual leader of the Republican party between 1962 and 1968. *Id.* His rehabilitation was so sufficiently complete in 1968 that he emerged as the GOP nominee and was elected President, defeating Democrat Hubert Humphrey, Lyndon Johnson's vice-president and long-time U.S. Senator, as well as Alabama Governor George Wallace, who ran as a third-party candidate. *Id. See generally* MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON (2003); RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE (2001); ROGER MORRIS, RICHARD MILHOUS NIXON: THE RISE OF AN AMERICAN POLITICIAN (1990); IRWIN F. GELLMAN, THE CONTENDER: RICHARD NIXON: THE CONGRESS YEARS 1946-1952 (1999); RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON (1978).

96. This is not to say that Nixon's policies were not accused of being anti-black, anti-woman, and so on, in that Nixon frequently supported conservative policies generally unpopular with some groups, such as a "law-and-order"

successfully obtained his disqualification on this basis. However, the secret tapings of White House conversations he ordered have raised substantial questions about his prejudices toward certain groups. In these private conversations, Nixon made very disparaging remarks about Jews, blacks, Italians, and the Irish.[98]

Thus, as a judge, Nixon could have presided for decades over cases involving litigants and lawyers who he disliked or discounted simply because of their background. Imagine Judge Nixon presiding over a barroom brawl assault and battery case where one of the combatants was an Irish-American who had consumed a few beers before the incident, or a job discrimination case filed by an Italian-American where the purported reason for discharge was the employee's disorganization, or a similar suit by an African-

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campaign platform, support for restrictive abortion laws, etc. *Id.* Nixon was also accused of corruption, a charge he successfully defused in his famous "Checkers" speech (so named for a dog he received as a gift which he used to illustrate the idiocy of charges that he had been accepting improper donations). *See* Richard Nixon, Address at University of Virginia (Sept. 23, 1952); *"Checkers" Speech (September 23, 1952) Richard Milhous Nixon*, UNIV. VA., http://millercenter.org/scripps/archive/speeches/detail/4638 (last visited March 14, 2011). Despite all this, it does not appear that any credible critic ever successfully tagged Nixon with the label of being biased or prejudiced on the basis of sex, race, ethnicity, national origin, or religion—at least not until the release of the White House tapes.

97. This is hardly a far-fetched hypothetical. Despite spending most of his adult life as a full-time politician, Nixon was a lawyer and by all accounts one with strong legal skills, some of which were on display as early as 1936. *See, e.g.*, Richard M. Nixon, Note, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476 (1936). Had his political fortunes not revived during the mid-1960s, Nixon would have been a strong and credible nominee for a judicial post in a Republican Administration.

98. Adam Nagourney, *In Tapes, Nixon Rails About Jews And Blacks*, N.Y. TIMES, Dec. 11, 2010, at A12, *available at* http://www.nytimes.com/2010/12/11/us/politics/11nixon.html. For example, in a conversation with an adviser, Nixon denied being prejudiced but stated that he "just recognized that, you know, all people have certain traits," mentioning Jews as an example. *Id.* "[T]he Irish can't drink. What you always have to remember with the Irish is they get mean." *Id.* As for Jews, "they are just . . . very aggressive and abrasive and obnoxious" [but] "insecure. And that's why they have to prove things." *Id.* Regarding blacks, Nixon took issue with his Secretary of State's opinions that black Americans were making progress after decades of oppression and suggested that black progress would be slow because of inadequate support in black culture for achievement and too much "inbreeding." *Id.* By contrast, "Italians, of course, those people course [sic] don't have their heads screwed on tight. They are wonderful people, but [voice trailing off]." *Id.*

American accused of insufficient work ethic. What about business disputes between Christians and Jews in which the Jew was accused of fraud, duress, or bad faith opportunism? Any reasonable member of any of these groups who was aware of Judge Nixon's private attitudes would presumably want Judge Nixon off their case. However, without revelations such as the White House tapes (which would never have come into existence if the man had been Judge Nixon rather than President Nixon), there would be no apparent basis for recusal under current federal law. The attorneys for these disfavored litigants might have a strong hunch that Judge Nixon had his prejudices but they would be stuck with Judge Nixon for the duration of the matter.

It is likely that there are many cases of undiscovered bigotry on the bench (and in the Oval Office and in Congress). While it may be that the constraints of the system prevent such judges from harming litigants because of hidden biases, realism requires a strong commitment to paying more, rather than less, attention to judicial impartiality. The extent to which discovering the "true self" and inner-most attitudes of a judge is difficult or impossible, which strongly argues for setting high substantive standards of impartiality and enforcing them through a broad set of procedural protections. Although this may result in some unbiased judges occasionally passing a case on to a judge with a greater perception of fairness, it seems a fair price to pay for enhancing confidence in the courts.

II. THE PROMISE OF PROCEDURAL PROTECTIONS

A. Per Se Disqualification Standards (Without Exception) as Useful Procedural Protections

Faced with a situation where evaluating judicial behavior and its impact on ultimate case outcomes is difficult, the judicial system has wisely (if at times haphazardly) evolved in the direction of procedural and process-based disqualification.[99] Continuing and enforcing the trend holds the best promise for protecting judicial impartiality in the post-*Caperton* world.

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99. *See* Geyh, *supra* note 6, at 727–31 (noting modern movement toward objective and per se, procedurally based disqualification justified by particular connections between judge and litigants or lawyers, such as financial investments, family ties, or professional affiliations).

As discussed above, attaining accurate information about judicial biases and prejudices is difficult.[100] Even when there appears to be a substantial basis for questioning a judge's impartiality, many judges will be reluctant to recognize the problem or will be unwilling to recuse despite a compelling reason to do so.[101] Judges appear to divide substantially as to the degree of suspicion that requires disqualification.[102] On appeal, reviewing judges are likely to defer to the non-recusing judge, particularly if the judge enjoys an otherwise good reputation and the case for disqualification is anything less than clear-cut.[103] Even where recusal was clearly required, the reviewing court may find that the judge's failure to disqualify did not affect the case outcome.[104]

Under these circumstances, any softening of attitudes toward judicial disqualification could be disastrous. One can make a strong case that under the status quo, many judges subject to serious questions about their impartiality fail to recuse in too many cases. To combat the factors that promote under-policing of judicial impartiality, the legal system needs to strengthen its procedural protections. While a cost-benefit analysis is problematic due to the difficulty of quantifying the recusal situation, it favors erring toward recusal, at least if the system assigns a reasonably high value to achieving greater impartiality and public confidence. The cost of a stronger recusal regime simply is not that significant.[105] It largely

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100. *See supra* Part I.C.2 (observing that because educated, sophisticated, politically savvy people such as lawyers and judges seldom vocalize their prejudices, detecting bias is inherently difficult).

101. *See supra* Part I.C.1 (explaining that high settlement rates of cases and the possibility that a party was favored by a biased judge limits ability to detect and correct disqualification errors on appeal).

102. *See supra* note 87 and accompanying text (noting division of the Supreme Court in *Caperton* and *Liljeberg* cases, both 5–4 decisions in instances where it appears clear that recusal was required).

103. *See supra* text accompanying notes 76–78 (pointing out that the tendency of reviewing judges to give judge under review benefit of the doubt combined with hindsight bias further limits review on appeal as a correction for disqualification errors).

104. *Id.*

105. As a percentage of government and social expenditures, adjudication as a whole is cheap, generally consuming only 3% or so of government budgets. *See, e.g.*, LEGISLATIVE BUDGET BOARD, TEXAS FACT BOOK 46 (2010), *available at* http://www.lbb.state.tx.us/Fact_Book/Texas_FactBook_2010.pdf (showing that only 4% of the state budget goes to the judiciary). Consequently, even a disqualification regime that increases adjudication costs considerably will never be

involves only the logistical burdens of transferring cases to judges who are not subject to impartiality concerns.

To be sure, the Code of Judicial Conduct and federal disqualification statutes go a long way in advancing procedural protections by providing for automatic disqualification in cases of disqualifying financial or family ties,[106] but some substantive fine-tuning is required. For example, in addition to the substantive appearance standard and the requirement that a judge recuse where the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,"[107] both state and federal law require that a judge disqualify himself from further proceedings where the judge:

> • served as a lawyer in the matter, had a partner serving as counsel, or was a material witness;[108]
>
> • served while in government as counsel, advisor or material witness in the matter, or expressed an "opinion concerning the merits of the particular case in controversy;"[109]

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a particularly large proportional imposition on governments, taxpayers, or the citizenry as a whole. Although judicial assignment and scheduling will be more complex under an aggressive disqualification regime, it is unlikely to be burdensome even if it may at times be sufficiently annoying to engender judicial complaints. By analogy, law schools providing rescheduled examinations and insisting on anonymous grading of exams raises administrative costs for the law school. Nevertheless, no one in the academy doubts that these costs are greatly exceeded by the benefits of greater fairness to students and a perception that grades are not the product of a professor's personal liking or disliking of a student exam-taker.

106. 28 U.S.C. § 455(b)(2)–(3) (2006) (professional ties), (b)(4)–(5) (family ties); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)–(3) (2007) (family and financial ties), (A)(6) (professional ties).

107. 28 U.S.C. § 455(b)(1) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007).

108. 28 U.S.C. § 455(b)(2) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(6) (2007) (including as grounds for disqualification that judge "previously presided as a judge over the matter in another court"). Although federal case law is in accord with this additional aspect of the Model Judicial Code, 28 U.S.C. § 455 could be improved by specifically setting forth this ground for disqualification.

109. 28 U.S.C. § 455(b)(3) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(6) (2007).

> • has knowledge that in individual or fiduciary capacity, he or a minor resident child has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.[110] In addition, the judge must "inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household[;]"[111]
>
> • has a spouse or other reasonably close relative who is a party, a lawyer in the proceeding, [is] likely to be a material witness, or [is] "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . ."[112]

These are important bulwarks of judicial impartiality and public confidence in the courts, the product of the forward-looking 1972 version of the ABA Model Code of Judicial Conduct (continued through with the 1990 and 2007 versions of the Model Code) and the 1974 amendments championed by former U.S. Senator Birch Bayh.[113] But there remain some gaping holes in this

110. 28 U.S.C. § 455(b)(4) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(3) (2007).

111. 28 U.S.C § 455(c) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(B) (2007).

112. 28 U.S.C. § 455(b)(5) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2) (2007).

113. *See generally* MACKENZIE, *supra* 53, at 209–23 (explaining that changes to the federal statute governing judicial disqualification were prompted by changes in the ABA Model Code and an adverse reaction to Rehnquist's failure to recuse in *Laird v. Tatum*, 409 U.S. 824, 826–28 (1972) (Rehnquist, J., mem.)); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 62–63 (1970) (discussing later-enacted legislation proposed by Birch Bayh (D-Ind.) designed to widen grounds for disqualification and eliminate or narrow exceptions); Leubsdorf, *supra* note 53, at 247 (explaining that the 1974 amendments to the disqualification statute were designed to address perceived problems, including resistance to recusal exemplified by Justice Rehnquist's failure to recuse in *Laird v. Tatum*); Jeffrey W. Stempel, *Chief William's Ghost*, *supra* note 40, at 825–32 (describing history and development of

edifice designed to be a bulwark of required disqualification in what are the most objectively obvious sources compromising judicial integrity.

1. Limiting Waiver

A significant shortcoming of the ABA Model Code, upon which most state disqualification laws are patterned, is that the Code permits the litigants to waive disqualification except in cases where the judge has "personal bias or prejudice concerning a party's lawyer or personal knowledge of facts that are in dispute in the proceeding."[114] By contrast, federal law prohibits judges from accepting waiver of disqualification in cases involving any of the these largely financial, business, or litigation connected ties listed in 28 U.S.C. § 455(b).[115]

Although there is some safeguard in that lawyers and litigants may not be forced to make this decision in the potentially intimidating presence of the judge or court personnel (who may

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1972 Model Judicial Code and 1974 legislation); Jeffrey W. Stempel, *Rehnquist, Recusal & Reform*, *supra* note 53, at 631–32 (same).

114. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007) (listing personal bias or prejudice as grounds for disqualification). The Model Judicial Code Rule 2.11(c) provides the following:

> A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

115. *See* 28 U.S.C. § 455(c) (2006) (forbidding judges from accepting waiver of disqualification grounds based on § 455(b)). *See also* text accompanying notes 46–51 (highlighting that although parties may consent to trial before the judge becomes subject to § 455(a) reasonable-question-as-to-impartiality disqualification, consent is not permitted where disqualification is based on one or more enumerated grounds of § 455(b)). In contrast to the corresponding Model Code provision, § 455(c) states that "[n]o justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)." 28 U.S.C. § 455(c) (2006).

themselves be intimidating or will report to the judge a party's hesitancy or unwillingness to waive disqualification), the Model Code approach nonetheless permits too much danger that lawyers and litigants will be mugged by the "velvet blackjack" of de facto coercion.[116]

Where a financial, professional, or factual basis for disqualification arises, it is seldom symmetric. Almost by definition, it favors one party over others. Consequently, the favored party (absent concerns of reversal on appeal[117] or a judge's overcorrection in favor of the opposite party in order to refute any suspicion of bias),[118] will likely be quite willing to waive. The party

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116. *See* MACKENZIE, *supra* note 53, at 97 (using the term to describe the situation where Judge Learned Hand would ask litigants to consider waivers of disqualification based on Hand's investment in companies involved in dispute).

117. Although a waiver of disqualification may be technically correct and not in itself reversible, the outcome of the case at trial may be more vulnerable on appeal in cases where a reviewing appellate court may be uncomfortable about a judge's participation notwithstanding obtainment of a waiver of disqualification.

118. The federal judge for whom I clerked, Raymond J. Broderick (E.D. Pa.), was convinced this type of overcorrection took place in a case in which he appeared before a Pennsylvania state court trial judge (Judge Flood) who had been his "preceptor" (a type of assigned mentor at a time when such mentorship/apprenticeship was required for bar admission in Pennsylvania), but this was not viewed as a problem by counsel or the parties in the case, who proceeded through with a bench trial before Judge Flood.

Judge Broderick was surprised to suffer an adverse outcome in the case, one in which he was convinced that the facts and law strongly favored his client. Years later, he broached the matter with Judge Flood, who replied that perhaps he had been unduly tough on young lawyer Broderick "because I wouldn't want anyone to think I was favoring you." Rather than try to cite to a specific "interview" with Judge Broderick, I simply note that he was sufficiently upset about the episode decades later for me to hear the story at least three times during my two-year clerkship. In retrospect, Judge Broderick stated that he would have insisted on Judge Flood's disqualification in order to have assigned a judge completely freed of possible temptations for favoritism for a former mentee or the alternative over-correction against the mentee so that observers would not wonder about judicial bias.

It is of course possible that Judge Broderick misconstrued the situation (although in my experience he was a shrewd and accurate observer of courtroom events and the relative strengths and weaknesses of cases) or that Judge Flood was engaged in some mistaken etiquette by ascribing the case loss to being too close to the presiding judge. My point is simply that episodes of this type, which should give rise to concern, can be eliminated entirely by barring waiver of financial, professional, or personal connection grounds for recusal.

disadvantaged by the financial or other connection may find it difficult and uncomfortable to resist waiver.

When the great Southern District of New York Judge Learned Hand presided over trials, his apparently diversified financial interests raised recusal issues with some frequency, with the financial interest in question often being significant but not overwhelming. In what came to be known as the velvet blackjack, Judge Hand routinely sought and obtained waivers from the

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The Broderick/Flood view that one may "bend over backwards" to avoid being accused of favoritism to one side and in the process unwittingly give undue favor to the opposite side has support in academic literature. *See, e.g.*, Christin Jolls, Cass R. Sunstein, and Richard H. Thaler, *A Behavioral Approach to Law and Economics, in* SUNSTEIN, BEHAVIORAL LAW & ECONOMICS, *supra* note 41, at 13, 24–26 (describing Matthew Rabin's "model of fairness" and concluding that reputation and aspirations to be seen as fair are powerful motivators).

Although less obviously applicable, the literature on context-dependent decision making is consistent with the occasional tendency of judges to over-correct even if the general norm is one of resistance to recusal. *See* Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making, in* SUNSTEIN, BEHAVIORAL LAW & ECONOMICS, *supra* note 41, at 61 (presenting results of a series of case studies tending to prove that context affects the legal decisions of judges and jurors). In the normal context, where the disqualification norm involved common professional connections not normally seen as grounds for recusal, a jurist like Judge Flood presumably is making whatever decision he would otherwise make. But where the context changes to involve a former mentee but the judge fails to recuse, the internal cognitive dissonance (to use Leon Festinger's memorable phrase) about deciding a case with this greater degree of professional tie could push the judge toward deciding against the mentee. *See generally* LEON FESTINGER, HENRY W. RIECKEN & STANLEY SCHACHTER, WHEN PROPHECY FAILS (1956) (introducing the social psychology theory of internal cognitive dissonance).

Similarly, a person's tendency to make a "second-order" decision, defined as "decisions about the appropriate strategy for reducing the problems associated with making a first-order decision" could explain part of a judicial over-correction. Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, *in* SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS, *supra* note 41, at 187. In this anecdote, Judge Flood made a first-order decision not to recuse (just as then-attorney Broderick made a decision not to seek recusal). Thereafter "stuck" with his decision to stay on the case, Judge Flood may have consciously or unconsciously realized that one way to mitigate any criticism of his participation in the case was to rule against his former law clerk. I am applying the term a bit differently than Sunstein and Ullmann-Margalit in that they suggest that use of second-order decisions (e.g., forming a commission or delegating to an administrative agency) is often a way of avoiding that first-order decision altogether rather than compensating for a first-order decision.

parties.[119] Informed by this episode, the drafters of the 1974 revisions to 28 U.S.C. § 455 included the non-waiver provision.[120] For similar reasons, the Model Judicial Code should follow suit. Under the Code's approach, no matter how honorable the intentions of those involved, it is impossible to prevent the impression that waivers are obtained (and possibly coerced) under circumstances where the ground for disqualification is weighty enough that the judge should not have presided, notwithstanding the litigants' apparent agreement that the judge's financial, professional, or factual tie to the case was not a problem.

2. Eliminating *De Minimis* Exceptions to Financial, Professional, or Factual Disqualification

Another shortcoming is that the ABA Model Code is not as rigorous as federal statutory law. Although the Code provides for the disqualification of judges where the financial ties listed above are present, it defines the requisite "economic interest" triggering disqualification as "ownership of more than a *de minimis* legal or equitable interest," with a *de minimis* interest defined as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality."[121] In addition, unless the judge

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119. *See* MACKENZIE, *supra* note 53, at 97 (describing Hand's conduct). Of course, it is possible that litigants agreed to Judge Hand's participation because he was Learned Hand, one of the most revered judges in American law. *See* James L. Oakes & Roger K. Newman, *Learned Hand*, *in* YALE BIOGRAPHICAL DICTIONARY AMERICAN LAW 248 (2009) ("Although appellate opinions often resemble pebbles cast in a passing stream, Judge Hand's opinions have cast a long intellectual shadow."). Oakes and Newman also note that Hand "recognized that he had biases and struggled to be impartial," and described Hand's examination of patents and re-creation of accidents in a manner that could suggest inappropriate judicial investigation rather than assessment of facts introduced at trial. *Id.*; *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) (providing an overview of Judge Hand's approach to judicial decisions).

120. *See* MACKENZIE, *supra* note 53, at 98 (noting that the absence of a *de minimis* exception to recusal based on financial ties to litigant in federal statute was a reaction to perceived abuses in which judges extracted waivers from litigants in cases of small financial holdings, as exemplified by Judge Hand's practice); Jeffrey W. Stempel, *Rehnquist, Recusal & Reform*, *supra* note 53, at 628–31 (describing congressional awareness of problem of extracted waivers of disqualification).

121. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

is managing the economic interest or it is one that "could be substantially affected by the outcome of a proceeding before a judge," it does not include investments in mutual funds, government securities or religious and charitable securities, deposits in mutual savings associations, credit unions, or similar holdings.[122]

This escape route from financial disqualification, although well intended, unfortunately leaves open the door to self-serving assessments by challenged judges and charitable review on appeal. State disqualification practice, which generally follows the ABA Model Code, would be improved by adopting the strict federal approach in which there is no exception for *de minimis* financial ties. Any of the listed financial interests should be sufficient to disqualify the judge.

Although the Code's definition of *de minimis* interests contains the objective "reasonable person" ground for assessing the possible impact of judicial financial ties to a litigant or dispute, policing this aspect of the Code with any rigor requires significant expenditure of judicial resources that becomes unnecessary if there instead exists a per se bar to judicial participation where the judge has any of the Code or § 455(b)'s forbidden financial ties.

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122. *Id.* In its effort to be brief, the summary in the text may lack precision. The complete language of the exception discussed reads as follows:

> Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:
>
> (1) An interest in the individual holdings within a mutual or common investment fund;
>
> (2) An interest in securities held by an educational, religious, charitable, fraternal, or civil organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
>
> (3) A deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
>
> (4) An interest in the issuer of government securities held by the judge.

Id. "Fiduciary" is defined to include "relationships such as executor, administrator, trustee, or guardian." *Id.*

Further, what may be termed insufficiently large to create a "reasonable" concern over impartiality itself requires some difficult determinations on which courts have divided.[123] In addition, accurate determinations of "reasonable" risk may be hard to obtain where the judge's own cognitive biases and a reviewing court's tendency to avoid suggesting that a fellow judge may be cheaply bought or that the financial tie in question, although small, is but the tip of the iceberg of strongly held judicial attitudes toward a particular entity, industry, or activity.

A variant of this problem is presented when enforcing the provisions of federal and state law that require disqualification "in any proceeding in which [the judge's] impartiality may be reasonably questioned."[124] Nevertheless, the presence of a catch-all criterion for disqualification regarding questionable impartiality is necessary to catch threats to judicial independence that do not fall neatly within the enumerated categories of statute or code.[125] The use of a potentially elastic term like "reasonable" is probably a necessary evil when crafting such a catch-all.[126]

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123. *See supra* text accompanying note 87 (noting sharp division of the U.S. Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)).

124. 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

125. Certainly, this has been the view of the legal profession for the past four decades during which the reasonable question as to the impartiality standard has been part of the ABA Model Judicial Code and the federal disqualification statute. The importance of this ground for disqualification is reflected in the frequency with which it is invoked and addressed by courts. For example, 3,788 cases in the Westlaw database mentioned 28 U.S.C. § 455(a) between 1975 and January 1, 2011—an average of 108 per year. Search for "28 U.S.C. § 455(a)," WESTLAW, http://www.westlaw.com (last performed Apr. 20, 2011) (filtering citing references for 28 U.S.C. § 455 by (1) document type, federal and state cases; (2) locate terms and connectors, "455(a)"; and (3) date, after 1/1/1975 and before 1/2/2011).

126. During development of the 1972 ABA Model Code of Judicial Conduct, in which this ground for disqualification first appears, and during amendment of 28 U.S.C. § 455, there was considerable focus on the wording of the provision and the means of operationalizing the concept that disqualification should be required where a reasonable observer might have doubts about a judge's neutrality even though there was no proof of actual bias or prejudice. The "reasonable question as to impartiality" language resulted, and it is now widely accepted throughout the profession. *See* JAMES J. ALFINI ET AL., *supra* note 14, at §4.04 (reviewing development of the "reasonable question as to impartiality" standard); FLAMM, *supra* note 14, at chs. 1–2 (reviewing development of the

By contrast, it is a mistake to introduce the concept of the reasonable observer's degree of concern when attempting to apply sound recusal policy based on the judge's financial ties to a case. Where financial ties are considered, there is no need to introduce potential disagreements and difficulties of empiricism in determining what people may think. Rather, a broad, easily applicable bright-line rule is more useful. A simple statement that disqualification for any financial interest of the type prohibited by § 455 and Rule 2.11 limits problems of application and removes the risk that self-serving bias or deference to colleagues will prevent the system from recognizing that a relatively small economic interest is indeed large enough to warp judgment and undermine fairness.

By way of comparison, one cannot help but note that both federal law and the Model Code use such an approach to the question of disqualification based on prior professional or factual connection to the case. The rules do not provide for disqualification only if the judge's former lawyering activity related to the matter (or that of a colleague) was significant, important, or would lead a reasonable observer to wonder about the judge's neutrality. On the contrary, if the judge was involved in the matter, disqualification is required, period.[127]

Similarly, disqualification on the basis that the judge was a material witness in a matter does not depend on what reasonable observers would think. If the judge has been a witness, disqualification ensues.[128] Even for less measurable problems such as whether a former government lawyer "expressed an opinion

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disqualification catch-all provision and the bases for disqualification); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 70 (2000) (discussing the difference between objective and subjective assessments of impartiality).

127. *See* 28 U.S.C. § 455(b)(2) (2006) (requiring disqualification where in private practice the judge served as a lawyer in the matter); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(6)(a) (2007) (requiring disqualification for former legal activity of judge or former colleague regardless of the quantity or depth of such involvement).

128. *See* 28 U.S.C. § 455(b)(2) (2006) (requiring disqualification when the judge has been a material witness concerning the matter); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(6)(c) (2007) (requiring disqualification where judge serves as a witness regardless of importance or impact of testimony and regardless of whether judge's perceptions have changed or whether testimony and past impressions are still remembered by judge).

concerning the merits of the particular case in controversy," there is no escape hatch similar to that available for *de minimis* economic interests.[129] The former government lawyer is not asked whether his prior opinion was well-developed, deeply held, tentative, or irrevocable. The mere existence of the prior opinion requires disqualification.[130]

If economically based disqualification is to be applied with sufficient seriousness, it too should be stripped of any possible avoidance based on differing notions of what amount of economic interest might compromise a judge's ability to be fair. Although the financial tie in question may not be large in absolute terms or in relation to the judge's overall wealth, it may still hold considerable power to warp judgment.[131] Investment or ownership may easily create a type of allegiance that undermines impartiality and may be especially problematic in cases where the value of the economic interest is relatively small and thus affects the judge subconsciously while the judge believes he has banished from his mind the possibility that the economic tie has colored his perception.[132]

2. Recognizing Substantial Campaign Support as a Disqualifying Interest

Perhaps the greatest weakness of the economic interest aspects of current disqualification law is the degree to which it largely overlooks the problems created by judicial election campaigns. Until the 2007 revisions, the ABA Model Code essentially avoided the issue. The current Model Code encourages states with elected judiciaries to adopt a version of Rule 2.11(4), which provides that a judge should disqualify where the judge has

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129. 28 U.S.C. § 455(b)(3) (2006).

130. *Id.*; MODEL CODE OF JUDICIAL CONDUCT R. 2.11(6)(b) (2007).

131. *See* THALER & SUNSTEIN, *supra* note 15, at 33–35, 120–21 (observing that the phenomena of status quo bias and "loss aversion," in which people tend to overvalue what they already possess relative to what could be gained, may make judges reluctant to transfer a case to another judge due to a perceived inability to handle the matter and cause judges to be wary of alienating supporters by creating situations in which supporters are effectively punished by not being able to have their cases heard by judges originally thought qualified).

132. *See supra* text accompanying notes 23–26, 30 (discussing cognitive biases and the difficulties people have in realizing their own biases and prejudices).

received substantial campaign contribution support from a party or the party's lawyer.[133]

To date, only two states have adopted the ABA's proposed standard requiring disqualification where the judge has received significant electoral support form lawyers or parties,[134] although a few states have provisions giving greater scrutiny to disqualification where the judge has received campaign support from a litigant or lawyer.[135] Roughly eighty percent of the state systems have some form of judicial elections,[136] although only about twenty states have what might be termed direct elections in the matter of other political offices (six partisan and fifteen non-partisan),[137] while many states provide for retention elections after judges are initially appointed to the bench through some type of merit selection process.[138]

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133. *See infra* text accompanying notes 147–50 (describing the serious problems of campaign contributions in judicial elections). A "contribution" is defined as "both financial and in-kind contributions such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure." MODEL CODE OF JUDICIAL CONDUCT Terminology (2007). "Aggregate" contributions "mean[] not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent." *Id.*

134. ARIZ. CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11(A)(4) (2010); UTAH CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11(A)(4) (2010).

135. ALA. CODE § 12-24-2(c) (2006); MISS. CODE OF JUDICIAL CONDUCT 3E(2) (2008); *see also* Adam Skaggs & Andrew Silver, *Promoting Fair and Impartial Courts Through Recusal Reform*, BRENNAN CENTER FOR JUSTICE 7–8 (2011) ("To date, however, only Utah and Arizona have adopted the [ABA Model] rule . . . . Since *Caperton*, several states have implemented new rules that, to varying degrees, respond to the different forms of spending seen in today's expensive judicial election environment.").

136. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52–53 (2003) (highlighting that forty-two states "call for at least some of their judges to stand for election," while eighty percent of American judges are subject to some form of election).

137. *See* Jan Witold Baran, *Judicial Elections: Changes and Challenges*, 42 CT. REV. 16, 16 (2006), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1021&context=ajacourtreview&seiredir=1#search=%22Judical+Elections:+Changes+and+Challenges,%22 ("Six states have partisan elections, 15 have nonpartisan elections, and 17 have uncontested retention elections after an initial appointment." (citations omitted)).

138. *See* Geyh, *Judicial Elections*, *supra* note 136, at 52–53 (summarizing state selection methods); Baran, *supra* note 137, at 16–17 (same); AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL

To perhaps state the obvious, this creates a situation in which judicial candidates (even the incumbents facing only a retention election) tend to need, and usually do receive, significant financial support. Not surprisingly, much of that support comes from business entities or lawyers with a substantial amount of litigation business; the typical contributor to a judicial election or retention campaign is not an individual sending a small check in the mail.[139]

Although judges in judicial election states are not permitted to have more than a *de minimis* investment or employment interest in the litigants or in their counsel, the current system simultaneously permits judges to receive large, perhaps even vital economic aid from litigants and lawyers appearing before them. Whatever misgivings one may have about the *de minimis* exception to the economic interest disqualification standard, it at least is a standard that attempts to prevent compromised judges from presiding over cases. By contrast, the rules regarding electoral support are comparatively no rules at all, save for whatever campaign finance regulations may exist.

State regulation on judicial campaign spending varies and, in some cases, sets fairly tight restrictions on direct campaign contributions to judges seeking election or retention. Even this, however, is too little protection for judicial impartiality and public confidence. In the notorious *Caperton v. Massey* situation, West Virginia limited permissible direct campaign contributions to $1,000, an amount for which judges presumably would not sell out.[140]

JURISDICTION COURTS, INITIAL SELECTION, RETENTION, AND TERM LENGTH (2009), *available at* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf (same).

139. *See* James Sample, *Court Reform Enters the Post-*Caperton *Era*, 58 DRAKE L. REV. 787, 791 (2010) (emphasizing that primary sources of judicial campaign contributions are "often the litigants, lawyers, and litigation stakeholders appearing before the judges they support"). *See also* AM. JUDICATURE SOC'Y, JUDICIAL CAMPAIGNS AND ELECTIONS (2011), *available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state (last visited Apr. 25, 2011) (listing campaign contributions by state; reflecting large portion made by attorneys and commercial or institutional entities likely to be more frequent litigants than individuals).

140. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009). *See also* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 3–5 (describing the reaction to *Caperton*); Stempel, *Completing* Caperton, *supra* note 1, at 281–90 (analyzing the criticisms of *Caperton*).

Massey CEO Don Blankenship[141] evaded this restriction by establishing an advocacy group to which he contributed approximately $2.5 million that was largely spent in support of judicial candidate Brent Benjamin;[142] Blankenship also spent $500,000 of his own money on behalf of the Benjamin candidacy without funneling the funds through the official Benjamin campaign.[143] Where campaign finance laws are so easily surmounted, the case for an expanded recusal regimen based on campaign support grows.

The problem of money in judicial politics is serious. Surveys consistently suggest that a large majority of the electorate perceives that judicial decisions are impacted by campaign contributions.[144] In *Caperton*, the plaintiffs, after having lost three prior disqualification motions, conducted a survey showing that West Virginians supported Justice Benjamin stepping aside in view of the large financial support he had received from Blankenship.[145]

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141. Blankenship has since resigned as Massey CEO, apparently as a result of adverse publicity and criticism regarding Massey's poor safety record and the 2010 Upper Big Branch mining disaster in which twenty-nine coal miners died. Clifford Krauss, *Massey Energy's Chief Is Quitting, Renewing Talk of a Takeover*, N.Y. TIMES, Dec. 4, 2010, at B7. Prior to this eventual capitulation, Blankenship appeared relatively impervious to criticism. He was outspoken in his pro-business, anti-labor, anti-government, anti-environment beliefs and his seven-figure support of the Benjamin supreme court candidacy. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 4 n.5 (describing Blankenship's support of Benjamin).

142. *Caperton*, 129 S. Ct. at 2255–60; *See* Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts' Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 9–20 (2009) (describing case background and Blankenship's financial support of Justice Benjamin).

143. *Id.*

144. *See Facts & Stats*, JUSTICE AT STAKE, http://www.justiceatstake.org/resources/facts_stats_and_quotes/facts__stats.cfm (last visited Mar. 19, 2011) (pointing out that "76% of Americans believe campaign contributions have at least some impact on a judge's courtroom decisions").

145. Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 47. Undaunted, Justice Benjamin refused to disqualify himself for a fourth time, labeling the survey an unpersuasive "push poll" designed for litigation rather than research. *Id.* at 49.

Although his skepticism was not without some basis in that the question was a bit loaded, the concern expressed by the survey respondents was so overwhelming that, absent proof of outright fraud in the polling, it should have mattered more to a reasonable judge facing a recusal motion in a large, high profile case. Public

To the extent that substantial campaign support creates the impression (and perhaps the reality) that special interests can shape the bench to their liking, it greatly undermines both the ideals of neutrality and fairness, as well as public confidence in and support for the courts. Where judges receive contributions from those who appear before them or who have direct interest in case outcomes, the public (to the extent it knows of the situation) likely becomes more disillusioned. At a minimum, losing litigants and counsel are less likely to accept judicial outcomes, which may lead to the specific problems of protracted appeals, attempts to avoid paying judgments or complying with injunctions, as well as the more general problem of diminished authority of the courts.[146]

The contrast between elected judges in the states with campaign fundraising and appointed judges in the federal system indicates the breadth and depth of the problem. In the most recent example of federal judicial corruption to hit the headlines, Eastern District of Louisiana Judge G. Thomas Porteous, Jr. was impeached "in part for failing to disqualify himself from a case in which he had

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confidence in the West Virginia high court was clearly at risk, but Justice Benjamin, as he did consistently over a two-year period, applied an erroneous legal analysis to the issue of his participation and continued to incorrectly conclude that he could participate in the case so long as he personally felt he could be impartial. *See id.* at 38 (describing errors of Justice Benjamin's legal analysis); *see supra* text accompanying note 93 (noting that the presence of additional judges sitting on an appellate panel or state supreme court may create greater informal pressure for recusal of an individual judge or justice); *see infra* text accompanying note 215 (discussing application of reasonable-question-regarding-impartiality standard of judicial recusal).

146. An extreme example of unwillingness to accept a case outcome (although, ironically from a state where judges are not elected) is *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159 (Mass. 1997). Two lawyers representing elements of the Demoulas family in a pitched battle for control of the family's grocery store interests were so obsessed with losing at the trial court level that they engaged in extensive deception and role-playing designed to get the judge's law clerk to provide information about the judge's corruption (which the law clerk and all credible sources knowledgeable about the matter denied). *Crossen, Curry disbarred by Mass. Supreme Judicial Court*, MASS. LAWYERS WEEKLY, Feb. 11, 2008, *available at* http://masslawyersweekly.com/2008/02/11/crossen-curry-disbarred-by-sjc/. The overarching ruse involved pretending to be interested in recruiting the law clerk for a fictitious job with a fictitious entity, followed by harassment of the clerk. *Id.* Eventually, the two distrustful-cum-paranoid attorneys were disbarred. *Id.*

solicited money from an attorney in a pending case."[147] Without attempting to undervalue the importance of other factors leading to the impeachment, one could describe this aspect of the basis for disciplining Judge Porteous as merely everyday business-as-usual in many state courts. In the states with judicial elections, judges preside every day over cases where the lawyers, the parties, or both have contributed to their campaigns, often asymmetrically. What might get a federal judge removed from the bench is standard operating procedure in many state courts.

To its credit, the ABA Model Code of Judicial Conduct attempts to prompt states to combat the problem. ABA Model Code Rule 2.11(4) invites states to adopt a provision requiring recusal where the judge

> [k]nows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer, has within the previous [insert number] years[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $ [insert amount] for an entity][[is reasonable and appropriate for an individual or an entity].[148]

Under the ABA approach, states with elected judiciaries are encouraged to adopt a customized rule of recusal for judicial disqualification in cases where the amount of campaign support is sufficiently high to raise reasonable questions as to a judge's impartiality. "Contributions" are defined in the ABA Model Code as "both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance which, if obtained by the recipient otherwise would require a financial expenditure."[149] An "aggregate" contribution could be "contributions in case or in kind made directly to a candidate's campaign committee" or "all contributions made indirectly with the understanding that they will be used to support the election of a

147. Geyh, *supra* note 6, at 674; H.R. Res. 1031, 111th Cong. (2010) (impeaching of Judge Porteous); Jennifer Steinhauer, *Senate, for Just the 8th Time, Votes to Oust Federal Judge*, N.Y. TIMES, Dec. 9, 2010, at A27.

148. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(4) (2007).

149. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

candidate or to oppose the election of the candidate's opponent."[150] The intent is to address all monetary support from all sources and not only direct contributions to a judicial candidate's official campaign.[151] Many states have specific statutes limiting the amount of such direct contributions,[152] but as the *Caperton* case revealed, such limitations on direct campaign funding are easily evaded.

As of the end of 2010, only two states have adopted some version of the ABA's suggested limit on campaign support.[153] Most states have declined the ABA's invitation to take action. Those that have acted have set the bar at a level quite solicitous of judicial candidates and their potential contributors, permitting substantial financial assistance to judicial campaigns without triggering an obligation to recuse.[154] For example, in Nevada, the state judiciary

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150. *Id.*

151. It remains to be seen whether even the broad language of the ABA Model Code of Judicial Conduct would reach all so-called independent expenditures for judicial candidates, such as the $3 million in campaign support from Don Blankenship that ultimately resulted in Justice Benjamin's disqualification in *Caperton*. Although Blankenship's intent to aid the Benjamin candidacy (and to diminish that of Benjamin's opponent, incumbent Justice Warren McGraw) was obvious, in less severe situations one might argue that contributions to advocacy groups were made with a sufficiently clear "understanding that they will be used to support" a candidacy. *See id.* (explaining that the definition of "aggregate contributions" also includes indirect contributions made with the understanding that they will be applied to support a candidate or attack the candidate's opposition).

For a description of the manner in which the Blankenship money was used to fund an advocacy organization and to purchase advertising support, see Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009) (discussing Blankenship's contributions to "And For the Sake of Kids," an advocacy organization that attacked Benjamin's opponent); Stempel, *Completing* Caperton, *supra* note 1, at 256 (discussing how Blankenship used the "Kids" organization to purchase advertising highly critical of incumbent Justice Warren McGraw and implicitly supportive of Benjamin); Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 12 (describing how in addition to "Kids" attack ads directed at McGraw, Blankenship individually purchased pro-Benjamin advertisements).

152. *See Judicial Campaigns and Elections*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state (last visited Mar. 11, 2011) (reporting large campaign expenditures in judicial elections, particularly for state supreme court seats in large states).

153. CYNTHIA GRAY, AM. JUDICATURE SOC'Y, JUDICIAL DISQUALIFICATION BASED ON COMMITMENTS AND CAMPAIGN CONTRIBUTIONS 2 (2011), *available at* http://www.ajs.org/ethics/pdfs/Disqualificationcommitmentscontributions.pdf.

154. *Id.* at 4–7.

rejected the unanimous recommendation of its Advisory Commission in an episode that illustrates the difficulty faced by recusal reformers.[155]

In mid-2008, the Nevada Supreme Court constituted an Advisory Commission (the Commission) to review the 2007 ABA Model Code of Judicial Conduct and to make recommendations regarding Nevada's potential adoption of the Model Code.[156] For the most part, the Commission endorsed the Model Code, recommending it to the Nevada Supreme Court in 2009; the court largely adopted the Commission's recommendations[157]—except to the extent that the Commission attempted to broaden and toughen recusal practice.

In addition to recommending abolition of the duty to sit, Nevada's Commission, acting in the wake of *Caperton*, recommended a version of ABA Model Rule 2.11(4) that would require per se disqualification where a judge received more than $50,000 in campaign support and would provide for recusal on a reasonable question as to the impartiality where there existed significant financial support below $50,000.[158] The Nevada Supreme Court rejected both recommendations without official

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155. *See supra* text accompanying note 139 (noting limited success of ABA Model Code's effort to prompt states to require recusal based on campaign support).

156. I was a member of the Commission and its lone law school professor, joined by University of Nevada-Reno political scientist and sociologist James Richardson, an expert in judicial disqualification and campaign finance. *See, e.g.*, James Richardson, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433 (2001) (discussing the application of the *Daubert* test to judicial decisions). The Commission was chaired by retired Nevada Supreme Court Chief Justice A. William Maupin, with former Clerk of Court Janette Bloom serving as Reporter, and benefited from the assistance of ABA General Counsel George Kuhlman. It was comprised of six judges and a dozen distinguished practitioners representing a variety of fields and practices. Obviously, I am biased, but I think any objective observer would have to characterize it as a pretty sophisticated, representative group, well-positioned to represent the larger public interest.

157. *Compare* NEVADA CODE OF JUDICIAL CONDUCT (2009), *with* COMM'N TO REVISE THE NEV. CODE OF JUDICIAL CONDUCT, NEVADA SUPREME COURT, FINAL REPORT: EVALUATION OF THE 2007 ABA MODEL CODE app.A (2009) (proposing a Revised Code of Judicial Conduct).

158. *See* COMM'N TO REVISE THE NEV. CODE OF JUDICIAL CONDUCT, NEVADA SUPREME COURT, FINAL REPORT: EVALUATION OF THE 2007 ABA MODEL CODE app.A (2009) (proposing a Revised Code of Judicial Conduct).

comment,[159] although the chief justice of the court was quoted describing the recommendation as "killing a fly with a sledgehammer."[160]

Perhaps as one of the authors of the Commission's rejected proposal I am unduly sensitive. Nonetheless, it is a little disturbing to have one of the top jurists of an American state characterize problems of judicial impartiality and disqualification as a mere "fly" buzzing around the figurative head of the justice system. Like other members of the Commission, I find this characterization inapt in light of the history of insufficient judicial recusal and the recent *Caperton* case.[161] Whatever the chief justice thought about the

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159. *See* NEVADA CODE OF JUDICIAL CONDUCT R. 2.11 (2009) (containing no version of ABA Model Code of Judicial Conduct R. 2.11(4)). In perhaps a partial victory for the Commission, the current Nevada Code does not endorse the duty to sit, as did its predecessor. *See* NEVADA CODE OF JUDICIAL CONDUCT CANON 3(e)(1) (2009) (otherwise patterned on 1990 ABA Model Code of Judicial Conduct). That development presumably makes it easier for the Supreme Court in subsequent decisions to end the duty to sit or at least ignore or diminish it. *See* Ham v. Eighth Judicial Dist. Ct., 566 P.2d 420, 424 (Nev. 1977) (adopting the duty to sit doctrine); *see also* Millen v. Eighth Judicial Dist. Ct., 148 P.3d 694, 696–97 (Nev. 2006) (reaffirming duty to sit and balancing against party right to choose counsel, concluding that "when a judge's duty to sit conflicts with a client's right to choose counsel, the client's right generally prevails, except when the lawyer was retained for the purpose of disqualifying the judge and obstructing management of the court's calendar."); Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Ct., 5 P.3d 1059, 1061 (Nev. 2000) (requiring trial judge who had recused to preside over case). Ironically, Nevada embraced the duty to sit after Congress rejected it in the 1974 amendments to 28 U.S.C. § 455(a) (2006). *See* Ham v. Eighth Jud. Dist. Ct., 566 P.2d 420, 424 (Nev. 1977) ("A trial judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary."). Without diminishing the progress made in removing the codification of a problematic doctrine, one would have preferred that the Court eliminate the duty to sit doctrine altogether. *See* discussion *infra* Part II.B.4 (discussing detriments of duty to sit doctrine).

160. Jane Ann Morrison, *Judge's Duty to Sit Still Knows No Contribution Limits*, LAS VEGAS REV. J., Jan. 11, 2010, http://www.lvrj.com/news/judges-duty-to-sit-still-knows-no-contribution-limits-81121272.html (quoting then-Chief Justice of the Nevada Supreme Court, James Hardesty).

161. While it may not rival West Virginia, Nevada's track record in this regard is nothing to crow about. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 918–34 (providing an extensive description of the traditionally lax attitude toward judicial disqualification in Nevada); *see, e.g.*, Valladares v. Second Jud. Dist. Ct., 910 P.2d 256, 257 (Nev. 1996) (indicating that the judge was not disqualified from presiding over a case in which his former election opponent was

Commission's proposal, the problem it sought to address was not trivial.

Similarly, it seems almost hyperbolic to label the proposed recusal-triggering contribution amount of $50,000 as a "sledgehammer," with its connotation of overkill, when describing the notion that a judge who has received $50,000 from a litigant or lawyer should not sit in judgment on the contributor's cases. Hit men (admittedly hit men of lower stature than George Clooney)[162] reportedly can be hired for a tenth of that amount.[163] Even when one

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counsel even though judge had questioned the honesty and competence of counsel during the judicial election campaign).

162. *See* THE AMERICAN (Focus Features 2010) (telling the story of an international assassin hiding out in picturesque Italian hill town from enemies and former colleagues turned enemies, indulging—because he is, after all, George Clooney—in fine food, wine, and the companionship of an upscale prostitute).

163. It appears that one can find people willing to kill total strangers with whom they have no conflict at shockingly low prices. *See* Art Barnum, *No bail for ex-husband in plot; Supposed hit man was undercover cop who recorded alleged job offer*, CHI. TRIB., July 17, 2009, at 10C (noting the stated fee used by undercover officer, which ex-husband was willing to double for killing of former wife, was $1,500); Missy Diaz & Barbara Hijek, *From Matrimony to Murder Plot; Whether Motivated by Greed or a Messy Divorce, Amateur Killer-For-Hire Cases in South Florida Usually Involve a Spouse or Lover*, FT. LAUDERDALE SUN-SENTINEL, Nov. 18, 2009, at 1A (according to the Palm Beach County Sheriff's Office, the "going rate for a contract killing is between $5,000 and $10,000"); Tom Jackman, *Scam, Like A Nesting Doll, Hid Even More; Cigarette Probe Found Sweatshop*, WASH. POST, Jan. 11, 2009, at C1 (discussing how an organized criminal offered $2,500 to undercover cop for contract killing); Susan Jacobson, *Restaurateur charged in plot to kill ex-worker*, ORLANDO SENTINEL, Oct. 27, 2008, at A15 (discussing a $3,000 fee for a thwarted contract killing that was to include beheading of victim). *See also* Kieran Crowley et al., *L.I. Wife Got a Cheap 'Hit'—Thrilled With 20G Price: DA*, N.Y. POST, Mar. 6, 2010, at 7 (discussing how a wealthy Long Island housewife "allegedly hired" undercover cop to kill husband for $20,000).

Of course, the average judge has dramatically more scruples than the average hit man, as well as significantly more to lose if caught. However, judicial partiality, if it is even recognized, is hardly the functional equivalent of cold-blooded murder. Even the most honest judge may easily convince himself that he finds the defendant's witnesses more credible based on the merits of their testimony and not because defendant's law firm collectively donated $100,000 to his re-election campaign. Nonetheless, the bench as a whole refuses to recognize the problem. *But see* Editorial, *Bold Step for Fair Courts in New York*, N.Y TIMES, Feb. 14, 2011, at A28 (discussing New York Court of Appeals Chief Judge Jonathan Lippman and state judicial board's proposed ban on elected judges "hearing cases involving any lawyer or party who contributed $2,500 or more to the judge's campaign in the preceding two years").

accounts for the ordinarily law-abiding nature of judges, is it realistic to suggest that the $50,000 demarcation point is so trivial to the judicial campaign enterprise that no judge will be influenced, even subconsciously, by the munificence of an interested litigant or lawyer? If this is the attitude of the state court bench, the prospects for improved disqualification jurisprudence appear dim indeed.[164]

Given the lukewarm reaction to ABA Model Code of Judicial Conduct Rule 2.11(A)(4) to date, it further appears that increased rigor regarding policing of electoral financial support and disqualification will need to come from legislators. In addition to maintaining and perhaps strengthening existing campaign spending laws, state legislatures should enact appropriate versions of Rule 2.11(A)(4) to reduce the influence of money in judicial politics and—equally important—the perception that money makes a difference in states that elect judges.

B. A Punch List of Procedural Improvements

In addition to the expansion of stringent application of the grounds for disqualification that admits of no *de minimis* exceptions, the legal system would benefit from a universal application of a number of sound procedural protections for litigants seeking judicial neutrality. Regarding financial interest disqualification, the federal

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The prospect of contributions of this magnitude is not far-fetched, even when examined solely with reference to state campaign spending laws. For example, in Nevada, the maximum direct contribution to a judicial campaign is $10,000. *See* Nev. Rev. Stat. § 294A.100(1) (1997) ("A person shall not make a contribution or contributions to a candidate for any office, except a federal office, in an amount which exceeds $5,000 for the primary election . . . and $5,000 for the general election . . . ."). In a firm with ten equity partners, the firm can easily—and legally—give $100,000 to the judge's candidacy, notwithstanding what in isolation appear to be reasonably stringent campaign contribution limits.

164. Justice Hardesty, the quipster behind the "killing a fly with a sledgehammer" quote, is generally regarded in the Nevada Bar as a good jurist concerned with law reform. Attorneys who practice before the court, who wish not to be identified by name, have privately told me they consider him one of the "intellectual leaders" of the court. He overwhelmingly won re-election with no serious challenge. *See* Richard Lake, *Most Candidates Paid Dearly,* LAS VEGAS REV.-J., Nov. 8, 2010, http://www.lvrj.com/news/most-candidates-paid-dearly-106873943.html (reporting that Hardesty was re-elected to state supreme court seat with seventy-five percent of the vote). If this type of judge is not only unwilling to support enhanced recusal practice, but also finds it necessary to belittle the enterprise, the prospects for state court-led recusal reform are hardly heartening.

courts have been stronger than most state courts.[165] In particular, the federal system stands significantly ahead of states with elected judiciaries in protecting litigants from the potential corruption of a judge's financial ties. Regarding procedural protections, some state courts have outpaced the federal system; nevertheless, both state and federal systems stand in need of improvement in this area.

1. Peremptory Challenges

One area in which the federal judicial system has lagged is its acceptance of litigants' peremptory challenges of judges. Under this sort of system, each litigant in a dispute has one opportunity, usually exercisable only at the outset of the case, to have the initially assigned judge removed without question or articulated cause.[166] This approach to recusal operates in the manner of a peremptory challenge of prospective jurors.[167] Litigants or counsel may ask for a different judge simply because of their bad feelings about or prior bad experiences with the judge.[168] As part of this process, all courts—including the federal courts—should embrace a system where each litigant is afforded one peremptory challenge to the initially assigned judge.

Although reasonably widespread among the states, the idea of judicial peremptory challenges has been controversial. Critics have labeled it a system in which a litigant can "pick" his or her

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165. *See supra* text accompanying note 106 (describing different federal statutory and ABA Model Code approaches to financial interest disqualification; urging that ABA and states take a zero-tolerance approach and eliminate the de minimis exception to financial interest disqualification).

166. *See* FLAMM, *supra* note 14, at §26.1, 753–54 (describing nature of peremptory challenges).

167. *See* 28 U.S.C. § 1870 (2006) (providing for peremptory challenges to prospective jurors); *see also* FLAMM, supra note 14, §§ 26.1, 26.3–26.4 (describing procedure for exercising preemptory disqualification rights).

168. *See* FLAMM, *supra* note 14, at § 26.3 (describing automatic and peremptory challenges of judges and identifying states that permit some variant of this approach); *id.* at §§ 26.1–27.19, at 790–822 (listing specific peremptory disqualification provisions for the eighteen states providing for peremptory challenge of judge); *see also* JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS, 26–27 (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (identifying nineteen states with peremptory challenges and recommending wider adoption of the device).

judge, but that is a mischaracterization of the approach.[169] Federal judges in particular have resisted the idea, appearing to regard it as an attack on the overall integrity and competence of the federal bench.[170] Federal judges may also find this an undue imposition in view of their already extensive procedures for maintaining impartiality.[171] The costs of the approach, however, are minimal, and the potential gains significant.[172]

Although the "reasonable question as to impartiality" standard for recusal reflected in 28 U.S.C. § 455(a) and Rule 2.11 of the ABA Model Code is already reasonably stringent,[173] it is not self-

169. To perhaps state the obvious, if a litigant is given but one peremptory challenge of a judge, it hardly follows that the litigant or lawyer is able to obtain the judge of one's choice, even in a jurisdiction with a relatively small number of judges. When a peremptory challenge is exercised, this simply means that the initially assigned judge is removed from the case and that another judge is assigned to the case. In a multi-party case, there exists the possibility of several peremptory challenges and judicial assignments, but without doubt no single litigant or lawyer is provided with any right (and hardly any possibility) of obtaining a preferred judge. *See, e.g.*, 28 U.S.C. § 1870 (2006) ("In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly."). State peremptory challenge systems largely follow the federal model. *See, e.g.*, Nev. Rev. Stat. § 16.40 (1997) (providing that each party has four peremptory challenges as a matter of right; in multi-party cases, judge has discretion to give all parties on one side minimum requirement of four challenges or to provide up to eight challenges).

170. *See* McKeown, *supra* note 8, at 2–4; David Ingram, *Congress Examines Judge Recusals: House Panel Considers Changing Disqualification Rules for Federal Judiciary*, NAT'L L.J., Nov. 2, 2009, at 1.

171. *See* 28 U.S.C. § 455(b)(3) (2006) (requiring recusal where immediate family member has even a modest financial interest in a litigant); 28 U.S.C. § 455(b)(4) (2006) (requiring recusal where first cousins or closer relatives of judge have even modest professional or financial ties to litigants); 28 U.S.C. § 455(b)(1) & (2) (2006) (requiring recusal where judge has relatively modest professional connection to case or "has been a material witness" concerning case); *see also* McKeown, *supra* note 8, at 3–8 (describing aspects of current system supportive of judicial impartiality). By contrast, ABA Model Judicial Code 2.11(A)(2), which requires recusal for family financial connections to the case, nevertheless permits an exception where the interest is "de minimis," defined as "an insignificant interest that could not raise a reasonable question as to the judge's impartiality." *Id.* at Terminology.

172. *See infra* text accompanying notes 273–74 (outlining minimal costs of transferring a case from one judge to another).

173. *See* 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge . . . shall disqualify himself in any proceeding in which his impartiality might

executing. The substantive standard has the power to police judicial recusal only to the extent that it is correctly applied with sufficient frequency by the bench. There exists considerable disagreement within the legal profession as to when the standard is met.[174] Further, even if there were a uniform, conscious, and articulated consensus regarding the definition of a reasonable question as to impartiality, there would remain the problems of unconscious bias and cognitive error that sufficiently blind judges (like all persons), so that they might frequently fail to recognize when they should apply their own standards for disqualification.[175]

In addition, a widely followed regime of peremptory challenges provides an important indication of judicial performance as well as greater protection against cases being heard before a judge lacking sufficient neutrality. When litigants and lawyers "vote with their feet" to remove the initially assigned judge from a case and to obtain a new judicial assignment, they are not only registering concerns about Judge A's impartiality, but are often also expressing reservations about Judge A's competence. Although challenging a judge's competence may not be the primary goal of the judicial peremptory challenge, it is, in my view, a valuable collateral benefit that can help court administrators and policymakers identify problematic judges. Perhaps this is why the judiciary resists it so much.

Here, Nevada provides a positive illustration on the issue (as contrasted with the state's embarrassing embrace of the duty to sit and resistance to financial contribution limits with teeth).[176] Nevada

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reasonably be questioned."); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) (A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, defining impartiality in the Terminology section as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.").

174. *See* Geyh, *supra* note 6, at 676 ("[T]he appearances-based disqualification regime is in trouble . . . [in part because] the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment.").

175. *See supra* text accompanying notes 22–32 (describing cognitive traits that undermine judicial ability to correctly identify disqualification issues).

176. *See supra* text accompanying notes 156–58 (describing Nevada's reluctance to abolish duty to sit and resistance to the idea of automatic recusal based on financial contributions).

law provides that litigants may move to disqualify the initially assigned judge from the case; each party gets one such peremptory challenge.[177] If the litigant who has used a peremptory challenge dislikes the subsequently assigned judge, the litigant is "stuck" unless there exists an affirmative ground for recusal pursuant to the Judicial Code.[178]

In practice, lawyers have used peremptory challenges not only to replace judges thought to be biased or prejudiced, but also to replace judges disfavored because their legal abilities are widely questioned in the organized bar. Over time, a pattern has emerged in which a small group of trial judges is most frequently targeted by such recusal motions.[179] Logically, this same handful of judges cannot be more biased or prejudiced regarding particular litigants or cases than the bench as a whole. What must be happening (and what lawyers privately tell me is happening) is that certain judges are challenged not only because of bias or prejudice, but also because they are simply not considered very good by lawyers in the community.[180] Often these judges are removed because counsel

177. *See* NEV. SUPREME COURT R. 48.1 (providing that party may disqualify initially assigned judge as a matter of right upon paying $450 administrative fee; thereafter, any attempt to remove judge must be for cause); FLAMM, *supra* note 14, § 27.11 (describing Nevada peremptory challenge process). *See also* Towbin Dodge, LLC v. Eighth Jud. Dist. Ct., 112 P.3d 1063, 1066 (Nev. 2005) (discussing judge's discretion to reject untimely request for change in judge); Turnipseed v. Truckee-Carson Irrigation Dist., 13 P.3d 395, 399 (Nev. 2000) (ruling peremptory challenge may not be exercised after judge has ruled on contested matter in case).

178. *See* Nev. Rev. Stat. § 1.230 (1997) (listing grounds for recusal); *see also* Nev. Supreme Court R. 48.1 (allowing each side only one peremptory challenge as a matter of right).

179. *Judicial Performance Evaluation – 2010*, LAS VEGAS REV.-J., *available at* http://media.lvrj.com/documents/Judicial _Report_2010.pdf; *see also* Frank Geary, *Lawyers Give Poor Scores to Nine Judges*, LAS VEGAS REV.-J., May 10, 2010, at 1A (noting that nine judges had approval ratings—defined as respondent's willingness to retain judge—of less than fifty percent). Peremptory challenges are directed toward these judges at higher-than-average rates. On condition of anonymity, area lawyers inform me that their use of such challenges against these (and some other judges) is often based on concerns about judicial competence rather than a belief that these judges are more frequently compromised by issues of bias or prejudice toward litigants or counsel.

180. This assessment has been communicated to me repeatedly during the past ten years or so by Nevada lawyers. Although, like any collection of anecdotes (or inferences drawn from broader data), it could be wrong—but I find it persuasive. Every lawyer making this observation to me over the years was a reasonably successful, well-respected attorney. Presumably their judgment both

thinks the judge will not correctly understand the case and will not rule wisely on discovery, joinder, and summary judgment motions, jury instructions, and evidence. In some cases, the judge is removed because he or she is perceived as inconsistent, erratic in demeanor, slow, or prone to error that may result in needless reversal.[181]

Although some may decry the situation as a misuse of recusal-driven peremptory challenges, I rather like the market system feedback it provides. By examining the pattern of peremptory challenges, one can get a pretty good idea of which judges are held in low esteem by the bar and, conversely, which judges are highly regarded by a wide spectrum of litigants and lawyers. Although this pattern appears not to translate into meaningful electoral feedback,[182] this information at least has the *potential* to affect whether judges keep their seats in subsequent elections. More immediately, however, it provides a relatively low-cost way for wiser counsel to keep weaker judges from presiding over their cases. To the extent that wiser counsel are associated with more complex, high-stakes cases with substantial impact, the system provides a benefit in the reduced chance that a weaker judge will preside over a complex matter.[183]

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about the abilities of judges and the motivations of their colleagues, formed after years of practice, is relatively accurate. At a minimum, they know their own reasons for exercising a peremptory challenge and, as far as I can determine, have no reason to misrepresent their motivations in casual conversations with me.

181. Again, I base these assessments on years of informal conversations with Nevada litigators, largely from the Las Vegas area. For obvious reasons, I am disinclined to attribute the comments to particular lawyers who must practice before judges regarded as problematic. I am also refraining from naming the judges in question, although it is no secret in the local legal community that a half-dozen or so of the Clark County trial judges are considered noticeably weak, just as some are considered exceptionally good.

182. The judges who are most frequently the subject of peremptory challenges appear to win re-election with comparative consistency and ease and at the same rate as do highly regarded judges. *See Judicial Performance Evaluation – 2010,* LAS VEGAS REV.-J., *available at* http://media.lvrj.com/documents/Judicial_Report_2010.pdf; Geary, *supra* note 179. Despite the considerable variance in approval ratings, nearly all incumbent Nevada trial judges are re-elected, notwithstanding adverse publicity sometimes received as a result of the Judicial Performance Evaluation survey. Since 2000, only six Las Vegas area trial judges have lost their seats due to adverse election outcomes.

183. To a degree, the Eighth Judicial District of Nevada has institutionalized this goal of putting the most complex or difficult cases in the hands of judges thought to have particular expertise in that it has established a "business court" docket in which complex, large, or protracted commercial cases

2. Recusal Motions Should Be Heard by Independent Judges

As noted above, the cognitive limitations of human beings make them particularly ill-suited to examine their own conduct objectively.[184] Simply put, a challenged judge is often simply too invested in the matter to be in the best position to assess the merits of a recusal motion. West Virginian Justice Benjamin's stubborn refusal to step aside in *Caperton* provides an amazingly extreme example of judicial recalcitrance which indicates the extent to which judges' emotional investments in disqualification may blind them and cause them to produce poor legal analysis.[185] The solution is obvious: recusal motions should be heard and decided, even in first instance, by another trial judge in the relevant district. Where a challenge targets an appellate judge, it should be heard and decided by other members of the panel or, if necessary, by the court as a whole. Where the challenge targets a United States Supreme Court Justice or a judge or justice of any other jurisdiction's highest court, the disqualification decision should be made by the entire court.[186]

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are assigned to a subset of judges widely viewed as particularly adept. *See* NEV. 8TH JUD. DIST. CT. R. 1.61 (2009), *available at* http://www.leg.state.nv.us/CourtRules/EighthDCR.html (establishing "business court" docket in which particularly involved or complex cases are assigned to particular judicial departments; although not readily apparent from the face of the Rule, the business court is intended to be something of an elite court. Rule 1.61(c) provides for designation of business court judges by the chief judge with no mention of criteria for selection. But to date, the designation has thus far been given to trial judges considered particularly competent and experienced).

184. *See supra* notes 30–32 and accompanying text (noting that it is "highly unlikely that judges can consistently overcome or even recognize their own biases and prejudices").

185. *See* Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 34–80 (describing how Justice Brent Benjamin denied recusal motions, sometimes in very defensive fashion, four times over a three-year period, enlisted state supreme court bureaucracy in his defense, and lobbied U.S. Supreme Court to deny certiorari). Observing Justice Benjamin's tenacity in repeatedly refusing to correctly apply governing disqualification law, one might reasonably conclude that his violation of the law was intentional. However, giving him the benefit of the doubt that this was mere error, it must result from emotional investment warping judgment.

186. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 899–918 (noting instances of insufficient sensitivity to disqualification issues and impartiality values under current United States Supreme Court approach); Stempel, *Rehnquist, Recusal and Reform*, *supra* note 53, at 845 (urging that the Court cease the practice

Here again is an area where many of the states are ahead of the federal system in that a significant number of states use this procedure,[187] while the federal model is one in which the trial judge that is the target of the recusal motion makes the decision on the motion, subject, of course, to appellate review.[188] In addition, state and federal courts should give serious consideration to a system in which recusal motions bypass the challenged judge entirely so that the judge does not become aware that his participation has been challenged.

Lawyers think long and hard before bringing disqualification motions and may well be too reluctant to make meritorious (or at least colorable) motions out of fear of alienating a judge who will preside over the matter if the motion is denied.[189] Placing such motions before a judge who will not be in an immediate position to punish counsel during the remainder of the case if the motion is denied will give further breathing space to lawyers wishing to exercise the rights of free speech advocated by Professor Margaret Tarkington.[190] To make this aspect of the system effective, the judge

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of allowing each individual justice to make an unreviewable decision on his or her own participation in cases).

187. *See* William E. Raftery, *"The Legislature Must Save the Court From Itself"?: Recusal, Separation of Powers, and the Post-*Caperton *World*, 58 DRAKE L. REV. 765, 772 (2010) (explaining that as of 2000, fifteen states provided for decision on recusal motions by a different judge, and although four states have since given serious consideration to this procedure, the number of states providing for this protection remained static).

188. *See* 28 U.S.C. § 455 (2006) (setting forth recusal standards but permitting trial judge in question to make initial disqualification decision, which is like all trial rulings subject to appellate review at the conclusion of the case, or perhaps earlier, if an exception to the final order rule applies).

189. *See* Geyh, *supra* note 6, at text accompanying notes 85–86 (explaining that because recusal motions are often denied, party and attorney making motion face significant risk that not only will purportedly disqualified judge remain on the case but also will be even more inclined to rule against the movant based on defensiveness over the motion). Certainly, this is consistent with litigation protocol in the law firm where I practiced in Minneapolis, Minnesota during the 1980s and is the consistent view expressed by lawyers I have known in the legal communities of Minneapolis, New York, Florida, and Nevada.

190. *See* Tarkington, *supra* note 7, at 850–51 (expressing concern that attorneys exercising free speech rights on behalf of clients or the judicial system face substantial risks of reprisal by judges). *See generally* Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity*, 51 B.C. L. REV. 363, 364–66 (2010) (arguing that lawyers have substantial constitutional and ethical right to criticize judges but that attorneys are too often improperly or unduly punished for

who is the subject of the motion should not even be aware of which party is making the motion.

In advocating for disqualification rulings made by a different judge, I am to some degree backtracking on my views of a quarter-century ago, a time when I viewed the federal model as adequate at the trial level[191] but problematic at higher levels, particularly in the U.S. Supreme Court.[192] Over time, I have become either wiser or

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making such criticisms); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech and Judicial Reputation*, 97 GEO. L.J. 1567, 1569–75 (2009) (arguing that courts reviewing attorney speech have been unduly sensitive to judicial reputation and public appearances but too insensitive to the value of attorney criticism alerting courts and the public to purported judicial improprieties).

The attitude that lawyers question judges at their peril appears to be widely held among judges themselves. In December 2010, I was quoted in a local television newscast commenting on a Las Vegas state court judge's management of a trial in which she required jurors to deliberate almost until dawn so that the case could be concluded in time for her planned vacation. Doug McMurdo, *Judge Stands by Decision to Keep Jurors Overnight*, LAS VEGAS REV.-J., Dec. 31, 2010, at 1B. Not surprisingly, the comments had a bit of a critical tone, although I was careful to note that sometimes uncontrollable circumstances impose burdens on courts and jurors and to defend a judge's general right to flexible scheduling and conducting court business as necessary outside the nine-to-five time slot. Much to my surprise, the story was picked up by national wire services and even included a brief appearance on *Fox and Friends* (largely without my qualifying nuances).

Later that month, I ran into a judge from another state who is a long-time acquaintance and who had seen the story and found it amusing, albeit with some empathy for the judge who had lost control of her scheduling. My friend's assessment of the consequences of saying anything even this mildly critical of the judge: "If you ever have to appear before her, you can forget about winning that case." Obviously, I hope that judges are not this thin-skinned. As this anecdote indicates, however, strong disqualification practice is essential to a fair judicial system.

191. *See* Stempel, *Rehnquist, Recusal and Reform*, *supra* note 53, at 632–37 (generally approving of federal system in which challenged trial judge makes initial determination regarding disqualification because of backstop of appellate review).

192. Although each justice acts as his or her own unreviewable umpire in this regard, there may be informal consultation on such matters by particular justices in particular cases. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 813–14 (noting that Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.), despite making a decision as to his own participation, consulted with colleagues and sought their approval of his decision to issue a memorandum explaining his decision not to recuse).

Although this is better than nothing, it hardly solves the problem. In *Laird v. Tatum*, for example, Chief Justice Warren Burger and Justices Potter Stewart and

more cynical, and now believe that there is simply too much inertia in favor of non-disqualification, which results in insufficiently frequent recusal when challenged judges assess questions of their own impartiality or public perception of it.

In addition, I have come to appreciate the manner in which the final order rule, whatever its overall attributes, exacerbates the problems of disqualification at the trial court level. Under the final order rule, matters in a case are not generally subject to appellate review unless the case has been resolved on the merits.[193] By definition, an order granting or denying judicial disqualification does not decide the case on the merits and thus, it is not automatically eligible for appellate review.[194] Neither is Rule 54(b) certification available,[195] and because the recusal decision does not grant, deny or modify an injunction, it is also not immediately reviewable pursuant to 28 U.S.C. § 1292(a).[196]

Byron White all rallied to Justice Rehnquist's defense, supporting his position of non-disqualification under circumstances where it was clear he should never have participated. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 813–14, 851–63 (describing support of other Justices for Justice Rehnquist's widely criticized failure to recuse in *Laird v. Tatum*).

Although this reaction may indicate widespread insensitivity to recusal in the Court, it more likely represents the power of personal relationships and collegiality to warp independent judgment or to result in conflict avoidance. The other justices, presuming they understood the situation (and they may not have, depending solely on Justice Rehnquist's memorandum, which presented the matter favorably to his decision) should have told Justice Rehnquist to forgo the memorandum, step aside, and support rehearing.

193. *See* 28 U.S.C. § 1291 (2006) (codifying final order rule); FLAMM, *supra* note 14, ch. 32 at 959–81 (outlining law of appellate review of disqualification decisions generally); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 966–67, 969–70 (4th ed. 2009) (addressing final order rule).

194. *See* 28 U.S.C. § 1291 (2006) (providing appellate jurisdiction over all "final decisions" of trial courts). A final decision is generally defined as one that completely ends the litigation on the merits and leaves "nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

195. Because a ruling on a disqualification motion does not even address the merits of the lawsuit, much less decide them, Rule 54(b) immediate appeal is not available for denials of disqualification. *See* FED. R. CIV. P. 54(b) (providing for immediate appeal when *final judgment* is entered against fewer than all parties in a case or on fewer than all claims in a case where the judge finds no just reason for delay).

196. *See* 28 U.S.C. § 1292(a)(1) (2006) (providing for immediate appeal of orders granting, denying, or modifying injunctions); *see also* FLAMM, *supra* note 14, ch. 32 at 959–81 (outlining law of appellate review of disqualification decisions).

The additional limitation of the collateral order doctrine exception to the final order rule[197] makes appellate review an unlikely vehicle for immediately challenging recusal decisions. Certification for immediate review pursuant to 28 U.S.C. § 1292(b) is ineffective because the certifying judge must be convinced that the decision certified is a reasonably close one on which there is substantial ground for difference of opinion.[198] For the cognitive reasons previously discussed,[199] judges are unlikely to think their failure to recuse was erroneous or even a close call (and may even assert that if the matter had been a close one, recusal would have been ordered). This leaves only the petition for mandamus as a vehicle for immediate review of a disqualification decision, and mandamus is an extraordinary remedy that, as a practical matter, is only successful when there appears to have been a clear abuse of discretion by the trial judge.[200]

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197. *See* Mohawk Indust., Inc. v. Carpenter, 130 S. Ct. 599, 604–08 (2009) (holding court order of disclosure rejecting assertion of attorney-client privilege not eligible for immediate appellate review under collateral order doctrine, which provides that an order that is not final on the merits may be accorded interlocutory review where the order fully decides an important issue completely separate and independent from the merits that cannot be effectively reviewed after final judgment on the merits); FLAMM, *supra* note 14, § 32.4 (describing collateral order doctrine); TEPLY & WHITTEN, *supra* note 193, at 972 (describing collateral order doctrine).

198. *See* 28 U.S.C. § 1292(b) (2006) (setting forth requirements for discretionary certification of a matter for interlocutory appeal; requiring controlling question of law, substantial ground for difference of opinion, and judge's conclusion that immediate appeal will advance ultimate termination of the case); FLAMM, *supra* note 14, § 32.3 (describing codification of disqualification orders). In addition, an appellate court is free to reject the trial court's conclusions as to whether a matter qualifies for § 1292(b) certification where the trial judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2006). In effect, three out of four judges on a panel addressing a denial of a disqualification motion must find the § 1292(b) criteria satisfied if there is to be interlocutory appellate review of the denial.

199. *See supra* notes 24–45 and accompanying text (explaining that cognitive traits and biases affecting people logically affect judges as well, distorting their ability to correctly assess their own impartiality).

200. *See* TEPLY & WHITTEN, *supra* note 193, at 972 (describing review by writ of mandamus); FLAMM, *supra* note 14, §§ 32.6–32.8 (addressing interlocutory review of recusal denials through writs of mandamus or prohibition).

Under these circumstances, the legal system would do well to invest more resources to ensure that initial recusal decisions are as accurate as possible. Reassignment to a different judge—even at the trial court level in federal court—is a wiser system worth the extra expenditure of judicial resources. Additionally, all parties to the litigation should be permitted to be involved in the recusal motion process to better ensure that the recusal motion will not be granted too quickly and that litigants who are perfectly comfortable with the challenged judge will be heard. In general, a fuller airing of disqualification issues is desirable at the outset of litigation.

3. Written Decisions Regarding Disqualification Motions with Reasons (Considered Published and Citable)

Disqualification decisions should also be made in writing or on the record in open court, accompanied by reasons for the court's decision to recuse or remain on the case. Although it is not the gravest problem with modern disqualification, the clipped, abrupt, and uninformative manner in which many disqualification decisions are delivered undermines the public confidence the process should inspire. Many decisions are simple orders with no information about the nature of the motion, the asserted grounds for disqualification, or the court's rationale. Recusal practice would be enhanced by reasoned opinions that force judges to give greater reflection to an issue and reduce the chance that decisions will be made hastily or reflexively.

Written explanations of recusal decisions would also in turn develop a more comprehensive body of precedent to guide the legal community and the bench. In the service of greater information and transparency, these written and explanatory opinions should be easily available on court websites and available in legal research databases such as Lexis and Westlaw. Similarly, recusal decisions should be considered citable precedent that can be used by lawyers and litigants in making and resisting recusal motions.

Unsurprisingly, the U.S. Supreme Court is perhaps the worst court in America in this regard.[201] The public is routinely informed

201. *See* Stempel, *Chief William's Ghost*, supra note 40, at 813–14, 851–68 & 899–918 (discussing the Supreme Court's tendency to take judicial qualification less seriously than lower courts); *see generally* Caprice L. Roberts, *The Fox*

only that Justice X took no part in the consideration or decision regarding a case. Citizens are left to ponder whether Justice X had health problems, was financially disqualified due to personal interests or those of a relative, or instead invoked 28 U.S.C. § 455(a) notwithstanding the lack of any pending motion. Although Court-watchers can often figure out the basis for recusal (e.g., Justice Elena Kagan sitting out cases involving the federal government stemming from her service as Solicitor General), the situation is unduly secretive and uninformative. Admittedly, lack of information about a voluntary recusal is less of a problem than Justices unreasonably failing to step aside and making these decisions unilaterally without review. Nonetheless, this cryptic aspect of Court practice is in keeping with the Court's generally arrogant attitude toward disqualification.[202]

This minimalist treatment of disqualification matters is also puzzling given the Court's professed concern for recusal or absences that reduce the number of participating judges. If, as the Justices assert, the absence of even a single Justice raises important concerns because of the unavailability of substitutes,[203] one would logically expect that the Court would treat a Justice's absence sufficiently seriously to provide an explanation for the absence. In addition, the regular announcement of reasons for voluntary recusals would help to establish working guidelines on the issue for litigants, counsel, and the public.

Guarding the Henhouse: Recusal and the Procedural Void in the Court of Last Resort, 57 RUTGERS L. REV. 107, 153–65 (2004) (voicing concern that U.S. Supreme Court disqualification process is particularly problematic because there exists no review of an individual justice's denial of disqualification, even when denial is clearly erroneous).

202. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 899–918 (reviewing and criticizing Court's approach to disqualification).

203. Press Release, United States Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), *reprinted in* GILLERS & SIMON, *supra* note 89, at 724–25 (stating it was signed by Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Thomas and Ginsburg; Justices Blackmun and Souter did not sign); *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 899–918 (noting the Court's position to this effect and the Court's generally lax attitude toward judicial disqualification).

4. Elimination of the Pernicious "Duty to Sit"

As discussed above, the so-called "duty to sit" mindset needs to be more formally and completely eradicated from the system.[204] In attacking the duty to sit, I want to be clear that I am not attacking the sentiment expressed in ABA Model Code of Judicial Conduct, which provides that a judge has a "responsibility to decide" cases and directs that the judge "shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."[205] This admonition that judges not shirk duties or dodge difficult, controversial, or unpopular cases[206] reflects what should not need to be said. To the extent it establishes a "duty" to sit, it is a benign and reasonable concept of the duty, one that must yield to the need for disqualification.

However, a different concept of the duty to sit began in the nineteenth century and held the most sway during the mid-twentieth century.[207] Properly understood, even these precedents need not

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204. *See infra* text accompanying note 209 (arguing that duty to sit concept is problematic because it encourages judges to decide against disqualification in close cases when inclination should be exactly the opposite).

205. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007).

206. Comment 1 to Rule 2.7 (the sole Comment to the Rule) fleshes out the concept embodied in the Model Code:

> Judges must be available to decide matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

MODEL CODE OF JUDICIAL CONDUCT R. 2.7 cmt. 1 (2007).

Although I might have preferred that this implicit aspect of judging (at least I always assumed that part of the attraction of judging was the opportunity to face difficult, controversial or unpopular cases) not be codified at all lest it be misinterpreted as an edict to unduly resist recusal, Rule 2.7, properly understood, creates no barrier to sound disqualification practice pursuant to ABA Model Code Rule 2.11 or 28 U.S.C. § 455.

207. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 840–51 (tracing the evolution of duty to sit concept and its relation to the older, now outdated

create a barrier to sound recusal practice.[208] Nevertheless, the notion of a judge's obligation not to shirk work and responsibility morphed into a more pernicious concept of the duty to sit, one that encouraged judges to be unduly resistant to disqualification and to resolve close cases against disqualification.[209] This "pernicious" version of the duty to sit concept should be distinguished from its more benign cousin stressing judicial responsibility.[210]

Although this pernicious version of the duty to sit was abolished in federal courts in 1974 and was effectively eliminated in the ABA Model Codes by 1972, it remains in effect in about a half-

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Blackstonian notion that judges were reliably impartial and virtually beyond challenge).

> Although the roots of the doctrine can be traced to Blackstone and the pre-1800 English attitude that only direct financial stake in a case disqualified a judge, neither the 1924 [ABA] Canons [of Judicial Ethics] nor the 1972 [ABA] Code [of Judicial Conduct] embraced the duty to sit in their texts, although the 1990 [ABA] Code [of Judicial Conduct], like the 2007 [ABA] Code [of Judicial Conduct], notes that judges have an obligation to discharge their responsibilities as judges. The first reported American case to use the term appears in 1824, one of approximately twenty cases using the term in the nineteenth century, most after 1880. The duty to sit as a basis for declining to recuse in non-compelling cases began appearing with more frequency in reported opinions during the 1950s and 1960s. Perhaps the most prominent duty to sit case, *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964), was decided in 1964, less than a decade before Justice Rehnquist's memorandum invoking the concept in defense of his failure to recuse in *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.).

Id. at 846–47 (citations omitted).

208. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 847–51 (discussing *Edwards v. United States*, a widely cited duty to sit case, and demonstrating that the Fifth Circuit was not advocating a pernicious version of the doctrine unduly resistant to judicial recusal). *See also id.* at 850–51 (explaining that *Edwards* was "really only applying the benign version of the duty to sit rather than its more pernicious cousin") (citation omitted).

209. *See id.* at 847–68 (noting development of duty to sit concept is excessively resistant to valid recusal motions and its use by Justice Rehnquist in *Laird v. Tatum*, a move sufficiently unpopular that it helped spur the abolition of the pernicious duty to sit doctrine in the 1974 amendments to the federal disqualification statute; noting also absence of duty to sit rationale opposing recusal in 1972 ABA Model Code of Judicial Conduct).

210. *See id.* at 818–34 (discussing concept and distinctions between the two forms of the duty to sit doctrine at greater length).

dozen states, with some lingering use in judicial decisions in jurisdictions (including in the federal system) where the doctrine has been eliminated.[211] To a degree, this continued use appears to result from courts' reliance on Justice Rehnquist's *Laird v. Tatum* memorandum without any apparent appreciation that the Rehnquist memorandum is viewed by most informed observers as legally erroneous and an embarrassment to the judiciary.[212]

For whatever reason, the pernicious duty to sit doctrine continues as official policy in a few states and exerts influence on judges in others, with this form of the doctrine urging courts to resist disqualification as a general matter and to resolve close questions against disqualification. For reasons that I hope are obvious, sound recusal practice should aim in exactly the opposite direction. Where a disqualification question is close, the court should err on the side of recusal in order to avoid inadvertent lack of neutrality due to unconscious bias and to enhance public and litigant confidence in the courts. Properly understood, ABA Model Rule 2.7 is not to the contrary.[213]

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211. *See id.* at 891–94 (listing Alabama, Arkansas, Mississippi, Nevada, and South Carolina as states formally retaining duty to sit, while states in which the pernicious form of the doctrine appears to have some continued vitality, or at least in which there is some non-overruled duty to sit case law, are Alaska, California, Colorado, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Maryland, New Mexico, North Dakota, Oklahoma, Texas, Utah, Vermont, West Virginia, and Wyoming).

212. *Id.* at 860–62. *See also* Stempel, *Rehnquist, Recusal and Reform*, *supra* note 53, at 594–96 (noting legal community's criticism and essential rejection of Rehnquist's analysis in his memorandum defending participation in *Laird v. Tatum*).

213. *See supra* text accompanying note 199 (positing that judges are unlikely to recognize a failure to recuse as erroneous or even a close question because of cognitive biases); MODEL CODE OF JUDICIAL CONDUCT 2.7 (2007) (providing that the judge "shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law"). By specifically referencing the disqualification provisions of Rule 2.11, the ABA Model Code expressly resolves close cases of recusal in favor of disqualification rather than adhering to a duty to sit irrespective of other factors. This is not to suggest that the current system lacks these procedural protections completely. On the contrary, the American justice system as a whole in my view scores rather well on this dimension. Nonetheless, examples like *Caperton* or other miscarriages of recusal justice are too frequent. *See generally* Miller, *supra* note 9, at 450, 454, 460–62 (discussing egregious examples of judges sitting in cases where they should have recused); *see infra* text accompanying notes 226, 303–04 (noting that individual judges may be very confident of assessments that prove to be "wrong"

5. Disqualification Decisions Reviewed De Novo with an End to Abuse of Discretion Review and Harmless Error Exceptions

Because a variety of psychological, sociological, and professional cultural forces auger against disqualification even in cases where the judge's ability to be impartial may be in question,[214] some recalibration of appellate review of disqualification decisions is in order. Historically, trial court disqualification decisions have been reviewed under the deferential abuse of discretion standard[215] and, as

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at least as measured by appellate court review and reversal); Stempel, *Chief William's Ghost*, *supra* note 40, at 868–954 (noting the degree to which the wrongfulness of the former Chief Justice's failure to recuse in important case continues to be under-appreciated, as are other instances of Supreme Court Justices' failures to recuse); Stempel, *Completing Caperton*, *supra* note 1, at 254–67 (noting the great error of West Virginia Justice Benjamin in refusing to recuse despite multiple opportunities and strong arguments repeatedly made by Caperton counsel); Stempel, *Impeach Brent Benjamin Now!?*, *supra* note 1, at 7–10 (arguing that despite ultimate disqualification of Justice Benjamin, the matter as a whole was a disgraceful black eye for the American legal system).

214. *See supra* text accompanying notes 33–43 (discussing unconscious cognitive factors affecting judges).

215. *See* FLAMM, *supra* note 14, § 33.1 (stating that abuse of discretion is the dominant yardstick for appellate review of judicial recusal).

Abuse of discretion review is contrasted with de novo review, in which the appellate court treats the issue (e.g., whether there exist grounds for disqualification) as one of first impression, and is less deferential than abuse of discretion review. *See generally* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW: CIVIL CASES AND GENERAL REVIEW PRINCIPLES (4th ed. 2010). Most deferential to trial courts is review under a "clearly erroneous" test under which a trial court's decision is set aside only if the reviewing court is left with the definite and firm impression that a mistake has been made. *See* STEVEN ALAN CHILDRESS, FEDERAL STANDARDS OF REVIEW §§ 4.21 & 4.22 (1992) (stating that in determining whether a trial court has abused discretion, focus is on the reasonableness of judge's actions).

Under the abuse of discretion standard, a judge's determination is reversed only if the reviewing court concludes that the judge has exceeded the bounds of permissible discretion or "abused" the discretion accorded the judge. *Id.* § 4.21 at 4-162, 4-165 By definition, a reviewing court's determination to apply the abuse of discretion standard presumes that the decision to be made regarding disqualification is one of discretion. This imbedded assumption is arguably erroneous. The governing statutes and the ABA JUDICIAL CODE Rule 2.11 (2007) do not expressly make recusal a matter of discretion and there is not a logical reason that a judge should be able to deny recusal on a discretionary basis if the movant has established the requisite grounds for recusal. Accordingly, de novo

previously noted, harmless error analysis has usually been applied even in cases where a refusal to disqualify was erroneous.[216]

In combination, these approaches make it unduly difficult to overturn trial court decisions mistakenly concluding that reasonable observers could not have reasonable doubts about a judge's ability to be impartial in a particular matter. The prevailing tendency of judges to shrink from criticizing or countermanding one another in public, combined with difficulties and divisions in such cases, make it likely that refusals to recuse will be under-policed by appellate courts.

To combat this result, the abuse of discretion standard of review should be replaced with de novo appellate review of disqualification decisions.[217] Where trial court decisions are found to be incorrect, matters should be remanded to the trial court without appellate inquiry into whether a mistaken failure to recuse was "harmless" error. As discussed above, a harmless error backstop for incorrect failures to disqualify creates too much risk of injustice in an area where sorting out the impact of a tainted judge is difficult. A matter may look to have been correctly resolved on the merits even though the judge should have recused. However, because it is difficult, if not impossible, to know what the case's result would have been absent the tainted judge, the apparent inevitability of the substantive outcome of a case may be a mirage created by the activities of a presiding trial judge who should have stepped aside.[218]

Appellate inquiry unbounded by the deference of the abuse of discretion standard and harmless error limits to remedy would serve as an important quality control mechanism for disqualification practice.

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review makes more logical sense as well as better vindicating the values underlying disqualification law.

216. *See supra* text accompanying notes 64–65 (discussing the prevalence of harmless error analysis for appellate review of disqualification matters and outlining harmless error concept).

217. *See supra* note 215 (describing de novo appellate review standard).

218. *See supra* text accompanying notes 61–75 (discussing "spoliation" problems of determining impact of tainted judge when conducting both merits review and harmless error review).

III. AVOIDING THE ACCLAMATION FALLACY: A MORE REASONABLE TRIGGER OF THE REASONABLE QUESTION AS TO IMPARTIALITY STANDARD AND THE IMPLICATIONS OF THE NEW APPROACH FOR POLITICALLY AND IDEOLOGICALLY BASED APPEARANCES OF PARTIALITY

Although procedural protections are important, an effective disqualification regime requires the breadth, flexibility, and backstopping characteristics of a stricter "reasonable question as to impartiality" standard. The appearance-based standard can catch situations of concern that might otherwise fall through the metaphorical "cracks" of a system of procedural protections. It can also set an overall tone in the judicial community of erring on the side of ensuring judicial impartiality and public confidence rather than lionizing judges, ignoring unconscious bias, privileging efficiency, and unduly fearing strategic disqualification motions.

According to Professor Geyh, however, the reasonable-question-as-to-impartiality standard is under attack and seemingly in eclipse, perhaps primarily because of the great division of opinion in the legal profession.

> [I]t is not enough that the legal establishment and the public agree that the judiciary should strive to preserve the appearance of impartiality. Rather, they must share a basic understanding of what constitutes an appearance of partiality. Currently, the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial judgment. The general public is comparably divided, and between the legal establishment and the general public, there are still further divisions. The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.[219]

219. Geyh, *supra* note 6, at 676.

I quibble a bit with the breadth of this statement. Although there has been, particularly at the United States Supreme Court level, sharp division over disqualification law,[220] the judiciary is, at least ostensibly, united behind a basic vision of the rules of recusal. Nevertheless, courts still divide at the margin regarding issues such as whether the Constitution should reach recusal errors by state judges,[221] or whether constructive or actual knowledge supports disqualification (*Liljeberg v. Health Services Acquisition*).[222] Among opinion leaders or public intellectual forces such as media outlets and commentators, there also appears to be more consensus than Professor Geyh posits. The public at large is perhaps most united in sentiment but appears to hold stronger views about threats to impartiality than the legal and political intelligentsia. This is reflected in surveys showing that four out of five Americans believe that a judge's acceptance of a campaign contribution violates the appearance of the impropriety ideal.[223] If the legal profession and political elites agreed with the public, mandatory disqualification in cases involving campaign contributors would be the rule.[224]

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220. *See supra* text accompanying notes 39, 87–88 (discussing 5–4 Supreme Court splits in *Caperton v. Massey* and *Liljeberg v Health Services Administration*).

221. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (Robert, C.J., dissenting with three other justices from majority decision to apply Due Process Clause to require recusal of state court justice due to massive electoral support provided to justice by CEO of litigant).

222. Liljeberg v. Health Servs. Acquisition, 486 U.S. 847, 864–67 (1988). *See supra* text accompanying notes 39, 87–88 (discussing Court splits in *Caperton* and *Liljeberg*). Of course, it is possible that the dissenting Justices in *Caperton* and *Liljeberg*, although outwardly disagreeing with the majority based on these more technical grounds, were actually opposed to the disqualifications in those cases because they simply saw nothing improper in the judicial behavior under review. There is certainly some of this tone in Justice Roberts's *Caperton* dissent, and particularly in Justice Scalia's dissent. 129 S. Ct. at 2273–74 (Roberts, C.J., dissenting); 129 S. Ct. at 2274–75 (Scalia, J., dissenting); *see also* Stempel, *Playing Forty Questions*, *supra* note 142, at 27–65 (dissecting Justice Roberts's dissent and concluding that Roberts's technical and operational objections to the majority holding are not well-taken and readily resolved).

223. *See generally* Bert Brandenburg, *The Role of Public Opinion in the Debate Over Recusal Reform*, 58 DRAKE L. REV. 737, 738–45 (2010) (reviewing survey data consistently reflecting that a majority of the public lacks confidence in the impartiality of judges receiving campaign contributions from lawyers or litigants who appear before them).

224. *See* Baum & Devins, *supra* note 22, at 155–56. (pointing out that justices are relatively unmoved by public opinion, which expresses concern about

At present, there is insufficient empirical information to effectively resolve whether there is as much consensus on when the impartial appearance standard overcomes a rebuttable presumption of judicial neutrality, as I posit, or whether there is as much division on the question as is posited by Professor Geyh.[225] But without doubt, his observation is true at its core: there is substantial disagreement among both lawyers and laity as to what constitutes a reasonable question as to impartiality.[226] Nevertheless, Professor Geyh and I divide over what impact this disagreement should have on the positive law of disqualification. He suggests that the division requires increased use of procedural mechanisms upon which there is wider consensus and that these are the best means for policing judicial neutrality.[227] I agree, but also argue that the legal system and the body politic needs to accept an updated, "post-modern," approach to operationalizing the appearance standard.

Professor Geyh seems to suggest, as does disqualification case law, that the appearance standard is not triggered until there is widespread, almost universal agreement that the appearance of impartiality standard has been breached.[228] As I read his assessment, case precedent, and scholarly commentary, a judge's impartiality is not subject to reasonable question unless nearly the entire viewing audience—as represented by the hypothetical "reasonable person"—has this perception.[229] At the very least, the judge deciding the motion has this perception about the hypothetically well-informed lay public's perception. This de facto insistence on consensus is the

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judicial neutrality due to judicial elections and political activity by judges; justices are more concerned with opinions of social, economic, and political elites).

225. Geyh, *supra* note 6, at 676.

226. *Id.* at 701.

227. *Id.* at 719.

228. *See id.* at 694 ("Achieving the appearances-based regime's second goal of making disqualification more workable by relying on an objective standard . . . assumes that there is a shared view of when to doubt a judge's impartiality that can be embodied in the 'reasonable person' of song and story.").

229. *See, e.g.*, *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (judges must imagine how a single well-informed observer of the judicial system would react; no suggestion that reasonable well-informed observers may divide over a judge's impartiality). *See also* FLAMM, *supra* note 14, § 5.6.3 (discussing "[t]he Reasonable *Person's* Point of View" and the mind of a reasonable, uninvolved observer) (emphasis added) (citations omitted); *id.* at § 5.7 (focusing on a single reasonable person as an exemplar of all opinion on questions regarding judicial impartiality).

norm even if it is not expressly articulated.[230] As a leading commentator summarized:

> Even when it is accepted that a judge's impartiality is to be determined from the standpoint of the fictitious "reasonable person," rather than from that of the judge or a party litigant or its counsel, problems may and often do arise in determining precisely who this so-called "reasonable person is, and how she would determine an appearance of bias or impropriety."[231]

Note that the inquiry described in this treatise is filtered through a single reasonable person that purports to represent what any and all reasonable lay observers would conclude. In a world of varying opinions, this standard seems hopelessly outmoded. It is a little like attempting to intuit what the mythical reasonable person will conclude regarding deficit spending, tax rates, universal health care, or the Obama presidency. On issues like these, the public is

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230. *See* FLAMM, *supra* note 14, § 5.1 at 104 (noting that standard for disqualification based on reasonable question as to impartiality is "an objective one, pursuant to which recusal is called for whenever a judge's impartiality might reasonably be questioned by a disinterested observer") (citations omitted); JAMES J. ALFINI ET AL., *supra* note 14, § 4.04 at 4–11 ("The test for an appearance of partiality is meant to be an objective standard, that is, whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. This is objective in the sense that the standard is filtered through the eyes of a reasonable observer, rather than through the subjective view of the judge in question.") (citations omitted). *Accord*, Tyler v. Purkett, 413 F.3d 696, 704 (8th Cir. 2005) (stating that test for disqualification "asks whether, from the perspective of 'the average person on the street,' a reasonable man knowing all the circumstances 'would harbor doubts about the judge's impartiality'"); Higganbotham v. Okla. Transp. Comm'n., 328 F.3d 638, 645 (10th Cir. 2003) (same proposition); United States v. Wilderson, 208 F.3d 794, 797 (9th Cir. 2000) (same proposition); Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (same proposition).

Implicit in these treatise summaries and the prevailing case law is the notion that the yardstick for this inquiry is a hypothetical, reasonable, disinterested, adequately informed lay observer who represents the entire populace. There is no mention of the possibility of division among objective lay observers or consideration of a substantial minority view. Rather, the unspoken assumption is that all reasonable observers can only see the disqualification issue one way—as either a case where the judge's impartiality is questionable or a case where it is not.

231. FLAMM, *supra* note 14, § 5.7, at 130 (citations omitted).

deeply divided. Although we each may have our favored positions on these matters, can it really be said that those with whom we disagree are unreasonable? In effect, we do something like this under current disqualification practice by embracing the fallacy that there will be consensus or supermajority agreement on all matters of recusal and then relegating any potential disagreement to the category of the unreasonable.

The current implicit operational definition to policing judicial neutrality is almost doomed to failure in the modern–post-modern world of diverse communities, differing ideologies, varied backgrounds, and competing ideologies that often color perceptions of neutrality. Even in cases as extreme as Justice Benjamin's refusal to recuse in *Caperton* despite benefiting from $3 million of political support from someone involved in the case[232]—the archetypical "extreme" case envisioned by Professor Geyh[233]—has its defenders. The defenses may vary, but collectively there is a non-trivial segment of society that appears to see nothing wrong with Justice Benjamin's behavior,[234] and a larger group (including four Supreme Court Justices) that is willing to allow such behavior notwithstanding the awful appearance.[235]

Against this backdrop of a segmented society, disqualification law is unduly constricted if the legal system adopts (even implicitly) the notion that there must be broad consensus approaching uniformity before it may deem a situation one that raises a reasonable question as to a judge's impartiality. The system begins with a presumption of judicial impartiality that, although not as strong as in Blackstone's time, remains quite vigorous.[236] Added to this presumption is some inevitable lack of transparency.[237]

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232. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256 (2009) (Robert, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.).

233. Geyh, *supra* note 6, at 676.

234. *See* Jeffrey W. Stempel, *Playing Forty Questions*, *supra* note 142, at 4 (noting that although *Caperton* holds that disqualification was widely praised, a significant number of commentators, including The Wall Street Journal, The Tampa Tribune, and the Las Vegas Review-Journal, opposed disqualification and supported the dissenters).

235. *See supra* text accompanying notes 1, 39 (reviewing the *Caperton* decision and the 5–4 division of the Supreme Court).

236. *See supra* text accompanying notes 197–205 (highlighting the persistence of pernicious version of duty to sit doctrine).

237. *See supra* text accompanying notes 193–95 (noting the cryptic nature of many recusal decisions).

Society and the legal profession can seldom know what a judge really thinks about people, companies, situations, and the world, unless the judge is unusually loose-lipped.[238] Beyond this, judges, like everyone else, are subject to unconscious attitudes that may undermine their neutrality.[239] Additionally, when assessing recusal motions directed at them, judges deciding these motions are gripped by cognitive traits that reduce their ability to assess themselves fairly and accurately.[240] When assessing recusal motions directed at colleagues, judges remain subject to these and other cognitive and sociological traits that make for under-enforcement of the impartiality norm.[241]

Under these circumstances, insisting on something approaching consensus before deciding that the appearance standard has been met is a prescription for unduly weak disqualification law. Rather, the legal system's notion of when reasonable questions as to impartiality exists must expand to match the reality of illusive consensus. Instead of insisting that *every* "reasonable" observer harbor questions as to impartiality in order to trigger disqualification, we should find the standard met whenever a *substantial segment* of the reasonable public would harbor doubts about a challenged judge's impartiality.

My rough stab at operationalizing this notion would look something like this. Judges deciding recusal motions cannot, as a practical matter, conduct a plebiscite or public opinion survey. Even if it was possible logistically and financially, getting the electorate or the respondents adequately informed would be nearly impossible. Often, the facts surrounding a recusal motion are too numerous, detailed, or subtle to adequately communicate to outsiders with any efficacy. Judges are necessarily reduced to conducting a thought experiment as to how the hypothetical informed layperson would react to a potential disqualification scenario.

In conducting this thought experiment, however, judges should not be imagining whether every observer would harbor

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238. *See supra* text accompanying notes 93–99 (noting the difficulty in knowing degree to which judge may harbor bias or prejudice).

239. *See supra* text accompanying notes 23–27 (discussing human tendency toward unconscious bias or prejudice).

240. *See supra* text accompanying notes 30–32 (discussing judges' tendency toward cognitive error in evaluating their own abilities).

241. *See supra* text accompanying note 23 (describing cognitive constraints affecting judges' assessments of colleagues' conduct).

questions about the judge's impartiality or even whether a majority would have reasonable questions regarding judicial neutrality. Rather, the judge should be asking whether a substantial segment of the public would have such doubts. Although there is no magic figure for this inquiry (at least not one I would advance at this time), my instinctive view is that if twenty-five to thirty-five percent of observers would question a judge's impartiality, the judge should step aside.

I set out this rough standard by reference to the common practice of democratic societies in establishing supermajority standards for decision in matters of great importance. For most government decision-making, even for many important matters, a simple majority rules. John F. Kennedy, Richard Nixon, George H. W. Bush, Bill Clinton, and George W. Bush won presidential elections by relatively small or even razor-thin margins.[242] Neither Clinton nor the younger Bush was supported by a majority of those voting.[243] But nonetheless, all were accepted as legitimate winners by the vast bulk of the body politic and, to state the obvious, all obtained unquestioned executive authority.

But in a number of areas, American political society has long demanded supermajorities for decision-making deemed particularly important or otherwise subject to special circumstances. The United States Constitution may be amended only if the proposed amendment is supported by two-thirds of Congress and ratified by three-quarters of the states.[244] Presidential vetoes may be overridden only with a two-thirds vote of both houses of Congress.[245] Treaties

242. *See President,* CHI. TRIB., Nov. 7, 1996, at 4 (showing that in 1988 George Bush, Sr. won by a little over seven million votes—approximately 7.8%; in 1992 Bill Clinton won by 5.8 million votes—approximately 6.9%; in 1996 Bill Clinton won by a margin of 7.7 million votes—approximately 9%); Eric Black, *The 2004 Election in Historical Context,* STAR TRIB., Dec. 13, 2004, at 5A (discussing that in 2000 George W. Bush had .5% less of the popular vote than Al Gore but received five additional electoral college votes; in 2004 George W. Bush won by 2.9% of the popular vote); Philip E. Converse, Angus Campbell, Warren E. Miller & Donald E. Stokes, *Stability and Change in 1960: A Reinstating Election*, 55 AM. POL. SCI. REV. 269, 275 (1961) ("Popular vote tallies show that Kennedy received 49.8 percent of the two-party vote outside of the South and 51.2 percent of the popular vote case in the South."). *See generally* J. CLARK ARCHER, ET AL., HISTORICAL ATLAS OF U.S. PRESIDENTIAL ELECTIONS 1788–2004 (2005).

243. ARCHER, *supra* note 242, at 1788-2004.

244. U.S. CONST. art. V.

245. U.S. CONST. art. I, § 7.

must be ratified by two-thirds of the U.S. Senate.[246] Although a president may be impeached by a majority vote of the House of Representatives,[247] he may only be convicted by a two-thirds vote of the Senate.[248] Senate matters can be thwarted by a forty percent minority through use of the filibuster, which requires sixty votes for cloture and a vote on the merits of the matter.[249]

Analogously, many states have similar rules in their state constitutions[250] while many cities have supermajority requirements for charter amendment.[251] Many private organizations take a similar attitude toward important decision-making. For example, corporations frequently require a supermajority of sixty to seventy-five percent support for changes to bylaws or removal of officers or

246. U.S. CONST. art. II, § 2.

247. U.S. CONST. art. I, § 2.

248. U.S. CONST. art I, § 3.

249. Standing Rules of the Senate, H.R. DOC. NO. 102-9, at 16 (2007); RICHARD S. BETH, VALERIE HEITSHUSEN, & BETSY PALMER, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 2 (2011).

250. *See* OKLA. CONST. art. V, § 33 (two-thirds vote of legislature required to override governor's veto); R.I. CONST. art. IX, § 14 (same); NEV. CONST. art. 4, § 35 (same); *see also* Elmer Cornwell, *Constitutionalism in Rhode Island: Continuity of Colonial Design*, in THE CONSTITUTIONALISM OF AMERICAN STATES 565, 573 (George E. Connor & Christopher W. Hammons eds., 2010) (stating that Rhode Island requires three-fifths vote to override veto); Ronald M. Peters, Jr. & Michael K. Avery, *Oklahoma's Statutory Constitution*, in THE CONSTITUTIONALISM OF AMERICAN STATES 565, 573 (George E. Connor & Christopher W. Hammons eds., 2010) (noting that the Oklahoma constitution requires three-fourths vote of legislature to initiate new taxes or raise income taxes).

251. *See* EUGENE MCQUILLIN, 4 THE LAW OF MUNICIPAL CORPORATIONS § 13.31.20 (3d ed. 2010) ("Acts regarded as of more than ordinary importance may require a two-thirds vote, or in some cases considered of greater public interest a three-fourths vote, of the local legislative body; for example, in event of remonstrance on the part of property owners, where they are required to pay for the contemplated improvement by local assessment or special tax, or in case of proposed restrictions in the use of real property, as so-called zoning regulations. Other examples are to remove an officer, expel a member, or to vacate a street. To accomplish certain things, even a greater vote, such as four-fifths, may be prescribed; e.g., to expend money for extraordinary purposes, as to celebrate some notable event of general or local interest. Where protest of a specified percentage of the owners of property likely to be affected is made, sometimes a unanimous vote is exacted; and such a vote is sometimes required to alter a zoning district or to change a highway grade.") *See also* LAS VEGAS MUN. CODE §19.06.090(1)(6) (describing three-fourths vote requirement for designating a historic district if there is community objection).

directors.[252] Many law schools (including my own at UNLV) require a two-thirds vote for hiring or for tenure and promotion.[253] Retention election systems for state court judges sometimes require more than a majority vote in favor of retaining a judge.[254]

Reviewing these longstanding practices in politics, academia, and business, one is left with the general feeling that our system strives to ensure that particularly important matters enjoy more than mere majority support, with the two-third figure frequently cropping up. My hypothesis is that public confidence in the impartiality of judges is a sociopolitical value on a par with constitutional amendment, treaty confirmation, important hiring and retention matters, or changes to organizational rules. Applying society's implicit calculus, I posit that the public and profession should be confident—to at least a two-thirds level—that adjudication outcomes do not involve judges hampered by reasonable questions regarding impartiality. If something approaching a third of the profession or public harbors such questions, the adjudicatory outcome does not sufficiently enjoy the confidence of the profession or the public.

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252. *See* WILLIAM MEADE FLETCHER, FLETCHER CYC. L., PRIVATE CORPS. § 4209.10 (2011) ("Supermajority voting and quorum requirements can be cumbersome. Nevertheless, shareholders in closely held corporations frequently choose them to protect their interest, and directors in publicly traded corporations will adopt them to help fend off takeover bids."); *Id.* at §5760.10 ("State corporations codes generally allow shareholders to impose supermajority quorum or voting requirements on themselves, either in the articles of incorporation or in the bylaws if the articles of incorporation authorize such bylaws.")

253. *See, e.g.*, William S. Boyd School of Law, University of Nevada Las Vegas, Bylaws art. 2.6 (Nov. 19, 2010) (requiring a two-thirds vote for faculty hiring and amendments to bylaws); William S. Boyd School of Law, University of Nevada Las Vegas, Substantive Standards and Procedural Guidelines for Promotion and Tenure §§ IV(B)(& IV(D) (Feb. 2010) (requiring a two-thirds vote for promotion from assistant professor to associate professor and from associate professor to full professor).

254. *See, e.g.*, N.M. CONST. art. VI, § 33A (57% required for retention); ILL. CONST. art. 6 § 12(d) (60% required for retention). Nevada's proposed merit selection system, which failed to obtain the necessary two-thirds vote for a state constitutional amendment, would have required a 55% vote for retention. *But see* Sarah Elizabeth Saucedo, Note, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico's Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 177–78 (2006) ("In all but two of the states that employ some form of merit selection followed by retention elections, judges are required to garner only a bare majority of the vote (i.e., more then 50%) to remain in office.").

Consequently, judges should order recusal whenever that confidence level is unmet.

One can make a good case that a three-quarters or seventy-five percent rule is superior to my proposed two-thirds rule. Perhaps. But for now, I would be satisfied to see the legal system move away from the current notion that there is an insufficient question about impartiality in the absence of uniform shock or rioting in the streets regarding a failure to disqualify. Further, imposing a supermajority rule regarding public perception could cause excessive administrative problems by making recusal too common and excessively empowering a relatively small minority of observers. Even long-established and logical supermajority rules are subject to the criticism that they can lead to de facto minority tyranny. Requiring recusal when less than thirty percent of the hypothetical reasonable audience has doubts could give an unrepresentative group excessive power.

Even if the judge is in fact neutral and even if a majority of observers perceive no reasonable question as to impartiality, the legal system should not be conducting adjudications about which one-third of the public has serious concerns regarding fairness. Public confidence is unduly undermined as is the confidence of the system's participants: litigants; their constituents (e.g., taxpayers and corporate shareholders); interested parties (e.g., the investment and banking communities); lawyers; witnesses (to the extent they are aware of the issue); court and government staff (including law enforcement personnel frequently in contact with adjudication); and other judges (who over time will slouch toward weaker recusal practice themselves after witnessing adjudication where such large segments of the community have doubts about judicial neutrality).

An obvious objection to my "substantial group of doubters" trigger for recusal is that it seems inconsistent with the traditional legal view that community sentiment is to be measured through the vessel of a single objectively reasonable person. This standard, however, although useful in many areas of law such as determining negligence in tort, is both unrealistic and unattainable in many instances. Perhaps more important, the legal system's use of the reasonable person standard for substantive law usually carries with it an automatic mini-plebiscite in the form of a jury determination. In effect, the jury as mini-society decides whether given conduct is reasonable. No similar controlled public feedback takes place regarding judicial failure to recuse unless the matter results in

appellate review after final order or through mandamus, becomes salient in an election, or is sufficiently egregious to trigger impeachment or corruption challenges.[255] Rather, under current practice, the trial judge decides disqualification questions in a unilateral vacuum, subject to limited review by an electorate of three appellate judges inclined to defer to a colleague under the abuse of discretion standard and harmless error review.

Another undoubted objection to my standard for triggering appearance-based disqualification is that it can be characterized as a heckler's veto in which the views of a small minority thwart the larger public interest. Obviously, my suggestion would not create a classic "heckler's veto," as Professor Harry Kalven used the term.[256]

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255. One potential counter-argument to my view that a substantial minority's concerns should satisfy the reasonable question standard is that the system regularly allows a single judge to determine that no reasonable person could find facts sufficient to support a party's claims and therefore grants summary judgment. As discussed below (*see infra* text accompanying notes 256–60), cases like *Scott v. Harris* and the cognitive illiberalism problem make suspect much of the modern rationale favoring a "strong," more jury-displacing approach to summary judgment suspect. *See generally* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Value of Adjudication*, 49 OHIO ST. L.J. 95, 159–81 (1988) (arguing that the shift in this direction by the U.S. Supreme Court's 1986 trilogy of summary judgment decisions was insufficiently sensitive to the possibility of law disagreement); Samuel Issacharoff & George Loewenstein, *Second Thoughts on Summary Judgment*, 100 Yale L.J. 73, 108–14 (1990) (presenting a similar criticism of trilogy cases).

Even if these concerns are misplaced (and I think, if anything, the judiciary has been too dismissive of academic criticisms of the modern trend toward greater use of summary judgment), the fact remains that the judge granting summary judgment is nonetheless looking to establish that there is not a single reasonable law observer who could find the material, legally controlling facts undisputed. If there is even a small perceived minority who might find the light red rather than green or who might characterize conduct as unreasonable rather than legally permissible, the court is supposed to deny summary judgment, at least if it is following the rules. *But see* Stempel, *supra* note 14, at 343 (noting that forty percent of trial court summary judgments are reversed, hardly a very comforting tract record for trial judges if in fact they are following the rules regarding determination of a genuine factual issue).

256. *See* Geoffrey R. Stone, *Harry Kalven, Jr.*, in ROGER K. NEWMAN, THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 305 (2009) (noting that Kalven invented the term "heckler's veto" to describe circumstances in which government stifled speech due to objections of some in a potential audience and that terms such as heckler's veto and "public forum"—also invented by Kalven—

I would require a ***substantial*** segment of the community to have nontrivial and reasonable concerns about a judge's impartiality as a prerequisite to recusal. A single person or even a fairly significant minority group would not be enough to command disqualification unless their numbers amounted to something approaching a third of the public (and their concerns about impartiality had sufficient intellectual rigor, a qualifier discussed in more detail below).

Although there is of course some diminution of judicial legitimacy whenever there is any question among any persons regarding a judge's neutrality, an inevitable corollary to the contemporary pluralistic world is that there will almost always be some people who are not only dissatisfied with adjudication outcomes but who also question the bona fides of the adjudicator with whom they disagree. This "tail" of public or legal community sentiment cannot be permitted to wag the metaphorical "dog" of sound recusal practice and effective court administration.

Under my proposed triggering point, there must be a sufficiently large group of doubters regarding impartiality and their doubts must be, in the minds of the adjudicator, sufficiently reasonable that they cannot be dismissed as the ravings of the lunatic fringe, even where it is a relatively large fringe. There must be at least colorable concerns regarding a judge's impartiality and they must be shared by a sufficiently substantial segment of the legal community or the public before a judge must recuse. Unlike the status quo's implicit standard of a single, unrealistically uniform view regarding neutrality, or Professor Geyh's notion of rough consensus of at least a majority of doubters required to force disqualification, my proposal would set a more realistic and more frequently met standard, resulting in somewhat more judicial disqualification.

In my view (which I admit will not be universally shared in a pluralistic legal community), this move toward a more easily pulled trigger and more disqualification will enhance actual and perceived fairness at minimal cost to the system. The legal community need not agree on precisely what triggers the reasonable-question-regarding-impartiality standard in all circumstances and it need not wait for an overwhelming community verdict on the matter. Rather, the judicial system should look only for sufficient rational doubt

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"transformed not only the language but also much thinking about First Amendment issues").

regarding a judge's impartiality shared by a substantial segment of the community that is based on nonfrivolous grounds. With this yardstick, the appearance standard becomes sufficiently vigorous to catch current non-disqualification falling through gaps in the wall of procedural protections endorsed by most commentators and also generally moves the bench toward disqualification in close cases rather than excessively clinging to initial case assignments of judges.

My suggestion has at least the implicit intellectual support in the emerging notion that the judicial system must be wary of "cognitive illiberalism" among judges. The term is most associated with an important law review article criticizing the U.S. Supreme Court's decision in *Scott v. Harris*,[257] in which the court affirmed summary judgment for police officer defendants in a suit brought by a plaintiff injured in a high-speed car chase.[258] With only Justice Stevens in dissent,[259] the Court found that there was no genuine dispute of material fact regarding the police actions in conducting the chase and intercepting the plaintiff-suspect (which resulted in his car hitting a tree and severe injury).[260] The Court reached this near-consensus on the basis of a trailing police cruiser's video of the chase, which the Court found so persuasive it posted it on the Court's website for all to see.[261]

Taking the Court's invitation, Professors Dan Kahan, David Hoffman and Donald Barman conducted a survey in which respondents viewed the tape and expressed their opinions as to the reasonableness of the police behavior.[262] Although a clear majority of the viewers agreed with the Court majority that the tape revealed the plaintiff creating a dangerous situation justifying the police interception of his flight, a substantial minority of viewers disputed this or at least had doubts regarding the propriety of the police action.[263] Further, a substantial segment of the substantial minority

257. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARVARD L. REV. 837, 838 (2009).

258. Scott v. Harris, 550 U.S. 372, 374–75 (2007).

259. *Id.* at 389 (Stevens, J., dissenting).

260. *Id.* at 381–86.

261. *Id.* at 378 n.5.

262. *See* Kahan et al., *supra* note 257, at 841–43 (detailing how respondents were shown police videotape of car chase at issue in *Scott v. Harris* and asked to categorize police conduct as reasonable or unreasonable).

263. *See id.* at 865–68 (emphasizing that majority of those viewing the videotape agreed with *Scott v. Harris* that fleeing suspect created dangerous

were African-American, perhaps reflecting their personal or their community's past interactions with law enforcement.[264]

Professor Kahan and his co-authors labeled the Court majority's inability to even imagine that reasonable persons could view the tape in a way different than its own as "cognitive illiberalism."[265] The term has caught on and was labeled by the New York Times as one of the "big ideas" of 2009.[266] In the roughly eighteen months that the study has been in the public domain, it has already been cited more than seventy-five times in scholarly law journals[267] and mentioned prominently in popular news accounts.[268] Even before the phenomenon was given its catchy moniker, viewers of adjudication had long observed that too much judicial decision-making proceeds on the judge's notion (or the panel's or Supreme Court's notion) that no sane person could view the case in any other way than does the deciding court.[269]

Obviously, this sort of empirical certainty is incorrect. The judiciary itself demonstrates this again and again when judges themselves disagree regarding what is "negligent" or "material" or "ambiguous." The Kahan study of the *Scott v. Harris* video demonstrates that even when there is widespread consensus among a

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situation justifying police bumping maneuver, but that one-third disagreed and saw no such exigent circumstances).

264. *See id.* at 843–48 (responding to the Court's invitation to "see for yourself" and concluding that the "obvious" views come from troubling psychological bias).

265. *Id.* at 843. *See generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

266. *See* Christopher Shea, *Ninth Annual Year in Ideas*, N.Y. TIMES MAGAZINE, Dec. 13, 2009, at 30, *available at* http://www.nytimes.com/projects/magazine/ideas/2009/#c-1 (noting attention gained by Kahan, et al. study and finding notion of differing impressions and conclusions varying by viewer as one of 2009's major emerging ideas).

267. This information is based on a search of the LexisNexis Legal Periodicals database on February 15, 2011 (search of Dan w/2 Kahan w/9 Scott w/2 Harris).

268. *See, e.g.*, Christopher Shea, *Ninth Annual Year in Ideas*, N.Y. TIMES MAGAZINE, Dec. 13, 2009, at 30 (describing the concept of cognitive illiberalism articulated in the Kahan article as one of the major ideas of 2009); Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, Week in Review at 1 (noting the Kahan study and racially differential responses to the *Scott v. Harris* videotape); Ben Arnoldy, *In video age, a rush to judgment?*, CHRISTIAN SCIENCE MONITOR, Jan. 13, 2009, at 1 (referring to the study and quoting Kahan).

269. *See supra* text accompanying note 255 (discussing similar issues presented by excessive judicial enthusiasm for summary judgment).

particular group of judges, there may be considerably more division among other legal or lay observers.[270] As a result, some greater degree of judicial humility is required, as well as a more realistic test for determining a reasonable question as to impartiality that does not insist on uniformity, consensus, or even majority rule.

Presumably fearing that open acknowledgement of the implications of differences of perception and opinion will undermine judicial authority, courts persist in pretending that there is greater certainty or inevitability of adjudication results than is actually the case—but that is a topic for another day.[271] Applied to judicial disqualification, the import of the cognitive illiberalism concept is that the bench must be more willing to entertain the possibility that a judge's or appellate panel's view regarding impartiality does not necessarily represent public consensus. It may not even represent a majority view of the laity. Even if it does represent the majority view, a huge proportion of the public may disagree, perhaps even strongly, and therefore distrust any subsequent judicial outcomes involving the judge in question. Faced with this reality in a diverse, pluralistic society, courts should not only strengthen procedural provisions designed to enhance judicial neutrality but also adjust their thinking as to when the appearance standard is triggered.

In this regard, disqualification is different than adjudication on the merits. After a decision on the merits, there is always some disagreement and often substantial disagreement. At a minimum, there are disappointed litigants and often other observers with similar

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270. *See supra* notes 265–68 and accompanying text (noting that group of observers, all presumably reasonable people, can hold variety of views in circumstances where judge or group of judges assumed lack of such divergent views).

271. For example, courts routinely refuse to concede that a particular standardized contract provision is ambiguous even though courts have differed dramatically as to the meaning of the provision. *See* JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 4.08[B] at 4-76 to 4-79 (3d. ed. 2006 & Supp. 2010) (noting that courts almost uniformly take the position that differing judicial constructions of identical contract or insurance policy language do not establish the ambiguity of the language). *See, e.g.*, EMERIC FISCHER, PETER NASH SWISHER & JEFFREY W. STEMPEL, PRINCIPLES OF INSURANCE LAW §§ 11.06, 11.11, 11.12 & 11.14 (3d ed. 2004) (reproducing and discussing cases in which courts have taken diametrically opposing views of the very same insurance policy language). *See also* Solan et al., *supra* note 26, at 1269 (noting that people generally underestimate the degree to which others may disagree with their construction of words).

interests who are upset. For example, after a judicial ruling favoring plaintiffs, insurers, banks, employers, or other groups likely to be future defendants in such cases typically criticize the decision and at a minimum warn of its implications for the future. After a decision in favor of any of these groups, workers, unions, policyholders, or borrowers may make countervailing criticisms. The public may be similarly divided, with these divergent groups waging public relations campaigns as part of an effort to influence judges and prospective jurors.

Notwithstanding society's commitment to the "rule of law," this sort of disagreement is tolerable except to the extent it is intertwined with more troublesome lobbying efforts, such as runaway spending on judicial election campaigns. At least in normal circumstances, the legal profession and society accept that after adjudication, there will be winners and losers. So long as the process is perceived as sufficiently fair, adjudicative decisions are accepted, even by those working to reverse or revise them, and society finds the rule of law upheld. But where there is a substantial, serious question about a judge's impartiality, the legal community and the public's acceptance of the decision is imperiled. This in turn requires a more sensitive approach to judicial disqualification than has historically prevailed.[272]

Because the financial and logistical costs of a more vigorous approach to recusal are relatively low, my proposed fine-tuning of the reasonable-question-as-to-impartiality test also passes cost-benefit analysis. Although some may complain about the perceived cost of transferring cases and making available a new judge after a successful challenge to the initially assigned judge,[273] there simply is

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272. Considerable work by social scientists suggests that people have a strong desire for procedural justice that may equal or surpass their desire for substantive justice and fairness. Research suggests that where disputants feel they have enjoyed a chance to be sufficiently heard by a neutral, respectful decision-maker, they are inclined to accept even adverse substantive outcomes without much complaint. *See generally* Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 68–69 (Joseph Sanders & V. Lee Hamilton eds. 2001) (stating that parties to disputes are likely to accept tribunal's resolution of dispute as legitimate if they have been accorded respectful opportunity to be heard before a decision-maker perceived as neutral); E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (same).

273. *See, e.g.*, Las Vegas Downtown Redev. Agency v. Dist. Court, 5 P.3d 1059, 1060–62 (Nev. 2000) (requiring judge that had disqualified himself on a

not much staff time and money required to effect a substitution of judges, particularly if recusal takes place during the early stages of litigation.[274] Under my proposed triggering point, the already existing costs of disputing recusal will decrease as the bench is relieved of the need to search for certainty of community opinion or

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case because of receipt of campaign contributions from litigants to retain the case, in part because the judge's recusal had triggered a "chain" of additional recusals when the next two judges to whom the case was assigned disqualified themselves on this basis; expressing concern that disqualification under this standard will make staffing of cases difficult and impose undue costs on the system).

A three-link chain is fairly short and reflects the degree to which courts may tend to overstate the burdens of expanded disqualification doctrine. In a case like *Las Vegas Downtown*, the administrative costs of upholding judicial disqualification due to receipt of campaign funds would be low. It simply does not take much of a court clerk's time to move a file from one office to another. Even if most of the district's thirty judges were disqualified, this would still require perhaps a half-day or so of a court worker's time (estimating fifteen minutes or so to transfer a file from chambers to chambers) as well as some limited judicial time considering and ruling on the motion (likely to be short because the inquiry is fairly simple and objective). Although this cost may not be trivial, neither is it enough of a burden to justify a failure to recuse if there is a serious question about judicial impartiality.

In cases like this and others involving important commercial interests in litigation (in this case, several casino companies were interested in the redevelopment project that was the subject of the case), the perceived problem (based on what attorneys and judges involved in the case have said to me privately) is fear that a culture of disqualification based on any campaign contribution holds the potential to spur a culture of excessively easy recusal and a rash of disqualifications inconsistent with ABA Model Code of Judicial Conduct Rule 2.7, as judges in an elected system routinely attempt to duck cases in which there is the potential for alienating useful friends or making powerful enemies. In this situation, there may indeed be a justification for what I have termed the "benign" concept of the duty to sit. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 818–25, 933–35.

274. It appears that the Administrative Office of the United States Courts and state court administrators do not maintain data regarding the costs specifically arising from transfer of cases between judges after disqualification of the initially assigned judges. Logically, however, the cost cannot be large. Such transfers, unless voluminous, are unlikely to require the hiring of additional court staff. Existing staff are expected to perform assigned duties in a reasonably expeditious manner and are generally salaried employees who do not receive overtime pay should they stay later than 5 p.m. or work weekends, which is seldom done in any event. Although there is undoubtedly some internalized expense or opportunity cost when court workers transfer a file rather than perform another task, no opponent of strong disqualification practice appears to have set forth any price tag occasioned by more aggressive recusal practice.

ascertain with some care whether a majority of the community harbors doubts as to impartiality. In return for this modest increase in judicial system resources already spent on disqualification, the system receives greater guarantees of impartiality and greater confidence in the fairness of adjudication.

IV. IMPLICATIONS OF THE NEW APPROACH FOR POLITICALLY AND IDEOLOGICALLY BASED APPEARANCES OF PARTIALITY

Adoption of my suggested modification of prevailing notions of when reasonable question as to impartiality exists will in general shift disqualification law in the direction of greater protection for neutrality without creating wholesale new categories of disqualification. One possible exception, however, is the possibility that my substantive approach to recusal may require greater imposition of disqualification based on judges' political and ideological activities. As discussed in Part I.B. above, it is inevitable that judges come to the bench with prevailing attitudes about the law, the world, economics, and politics. We accept this as the price for having educated, intelligent people on the bench. But we should be unwilling to accept judicial participation in cases where the judge has been involved in activity that a substantial portion of the public regards as excessively partisan or ideological. This participation, under my yardstick, raises a reasonable question as to impartiality. Such activity is not only unseemly for judges but also may make them excessively committed to results favored by affiliated persons or organizations, thereby undermining the aspiration of neutrality for judges notwithstanding that judges often or even usually come to the bench as liberals, conservatives, Republicans, or Democrats.

Separating mere judicial preference from inappropriate judicial ties to political and interest group activity presents difficult issues of line-drawing. Two recent episodes illustrate the problem. Most recently, U.S. Supreme Court Justice Antonin Scalia was booked as a speaker at a "Conservative Constitutional Seminar" sponsored by the Tea Party.[275] As the *New York Times* put it with some understatement, it "was a bad idea for him to accept this

275. Editorial, *Justice Scalia and the Tea Party*, N.Y. TIMES, Dec. 18, 2010, at WK7, *available at* http://www.nytimes.com/2010/12/19/opinion/19sun3.html.

invitation."[276] At least I hope most every member of the legal profession will agree that being a featured speaker at an avowedly political and partisan organization's event extolling a particular jurisprudential philosophy with a heavy dose of result orientation is a bad idea. In addition, this behavior from Justice Scalia, who has a history of some arguable lapses of judgment regarding disqualification—and a tendency to extreme defensiveness when challenged about it—is troublesome.[277]

Justice Scalia's combativeness regarding his elbow-rubbing with the right wing of American politics goes beyond simple bad behavior. At a minimum, it raises nontrivial concern for many that he approaches the Court's pending docket with a political or ideological agenda tied to that of groups like the Tea Party or entities like the Bush–Cheney Administration. This goes beyond merely having a world view when coming to the bench. It instead smacks of a justice willing and proud to carry adjudicative water for these groups, entities, or persons.[278]

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276. *Id.* *But see* Richard Eisenberg, *If You Speak Up, Must You Stand Down:* Caperton *and its Limits*, 45 WAKE FOREST L. REV. 1287, 1302–21 (2010) (suggesting that public utterances of judges should ordinarily not be grounds for recusal).

277. *See* Stempel, *Chief William's Ghost*, *supra* note 40, at 900–09 (describing Justice Scalia's now-infamous duck hunting with former Vice President Dick Cheney while a case against Cheney was pending before the Court, and other instances of arguably inappropriate behavior); Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 229–30 (2004) (excoriating Justice Scalia's defense of his failure to recuse); Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of* Cheney v. United States District Court, 84 N.C. L. REV. 181, 183–84 (2005) (criticizing Scalia's failure to recuse and his defense).

278. The Scalia Tea Party star turn recurred in a slightly different form when he was booked for what was originally planned as a private question-and-answer session with the Tea Party Caucus in Congress, a group largely comprised of more conservative elements of the Republican rank-and-file and whose principal public face has been outspoken conservative Representative Michelle Bachman (R-Minn.). *See generally* Nina Totenberg, *Justice Scalia Speaks to Tea Party Caucus, Democrats*, NAT'L PUB. RADIO (Jan. 25, 2011), http://www.npr.org/2011/01/25/133195963/scalia-speaks (reporting Scalia's appearance at Tea Party cause was relatively brief and included question-and-answer session; noting that although initially planned as private, it was opened to the press after complaints and concern that in the absence of media coverage, speculation could ensue about the Justice's statements as pre-commitments on issues pending before the Court). Representative Bachman gave the Tea Party Caucus response to President

Just as seriously, the act of traveling or affiliating with, or appearing before particular political or ideological entities poses significant risk that the jurist involved becomes, by virtue of this involvement, less able to view their causes with sufficient neutrality. Substantial socio-psychological research suggests that when someone takes action or publically expresses a view, they become more wedded to that view.[279]

Obama's State of the Union address, which was viewed by at least one commentator as upstaging the Republican Party's official response delivered by Representative Paul Ryan (R-Wis.). *See generally* Frank Rich, *The Tea Party Wags the Dog*, N.Y. TIMES, Jan. 30, 2011, Week in Review at 8, *available at* http://www.nytimes.com/2010/01/30/opinion/30rich.html (describing the State of the Union and responses as well as expressing opinion regarding media reaction to Bachman response). As discussed below, this appearance can be differentiated from the other Tea Party event, particularly after the sponsors invited others to attend. It nonetheless raises concerns.

The problem with either event goes beyond appearances and is heightened when a jurist appears before an ideological group as a featured speaker. The Justice may have made statements reflecting a pre-commitment to particular case outcomes that would make his continued participation in some matters inappropriate. Although this can, of course, occur over dinner with a friend or during family conversation, I accept that, much as I would like, certain windows into the potentially prejudiced soul of a judge are simply closed as a practical matter. Nevertheless, the recusal regime of American courts needs to be more sensitive to the prospect that judges in private sessions with interest groups may make inappropriate pre-commitments on issues.

As a practical matter, one cannot realistically insist that judges give up interactions with friends or family that pose some dangers of undermining impartiality. However, we can insist that judges forgo speaking gigs and honoraria opportunities which pose such risks. Judging is supposed to be a full-time job. Judges hardly have a "right" to make star turns at political party functions or attend lavish retreats or summer law seminars in Europe. To the extent that a significant portion of the body politic finds these extracurricular activities to pose too great a threat to judicial impartiality, the legal system logically should prohibit such outings.

Although there is undoubtedly some benefit in having a judge or justice preside over a legal seminar in one of the great capitals of Europe, it is by no means clear that the students and sponsoring institution would not do as well or better with another instructor while eliminating the risk that the jurist will be inappropriately lobbied or influenced on an issue in that private setting. By contrast, when Judge Richard Posner writes a book, he does so in the solitude of his home or chambers, and the resulting product is in plain public view should anyone wish to use it as a basis for a disqualification motion.

279. *See* THALER & SUNSTEIN, *supra* note 15, at 55–60 (noting that respondents tend to agree with prior opinions consistently expressed by others even when experiment has been structured so that prior opinions or statements are

The arguably harder question is whether such episodes might provide a basis for recusal. Under the current status quo and the implicit Geyh view requiring consensus or a strong majority opinion to trigger reasonable-question-as-to-impartiality review, the answer fairly clearly is that such behavior by sitting judges, although regrettable, is probably not ground for disqualification.[280] Where a

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clearly incorrect; such "[c]onformity experiments have been replicated and extended in more than 130 experiments from seventeen countries"); ROBERT CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 52 (4th ed. 2000) (explaining that initial decision on a question or issue makes it more likely that same decision will be made if issue is subsequently presented); Soloman Asch, *Opinions and Social Pressure*, in READINGS ABOUT THE SOCIAL ANIMAL 13, 17–26 (Elliot Aronson ed., 1995) (observing that people dislike holding views or taking positions at odds with those of peers); *see also* TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON 157–59 (2011) (discussing conformity bias and socio-psychological research identifying the trait in people). *See generally* LEE ROSS & RICHARD NISBETT, THE PERSON AND THE SITUATION (1991) (arguing that people seek to be consistent and adhere to prior determinations made).

See also supra notes 22–43 and accompanying text regarding cognitive biases generally. For example, a judge who appears before an interest group and expresses views favored by the interest group has arguably established a status quo consistent with that interest group's agenda. The judge may then be in at least the partial grip of a status quo bias favoring that interest group as the status quo of his or her thinking on an issue. In addition, the judge is now particularly aware of the interest group's position on legal issues, which may make the judge's future adjudicative thinking more vulnerable to the availability heuristic.

To some extent, this is common sense. We have all had the experience of seeing a person take a public position on an issue (in a political campaign, in a faculty meeting, at work, in court) and then later cling to that position out of pride or defensiveness even as further developments make the position appear unwise. Judges should as a general rule avoid putting themselves in situations where this phenomenon is likely to occur.

280. *See* Totenberg, *supra* note 278 (discussing how by the evening of the Scalia story's revelation, "there appeared to be more fizzle than sizzle to the charge of unseemly partisanship by a Supreme Court justice"). *See also* FLAMM, *supra* note 14, at § 10.4, (discussing how political affiliations of a judge alone rarely compel recusal); *id.* at § 10.5 (discussing how institutional affiliations of a judge rarely support recusal); *id.* at § 10.7 (discussing how a judge's ideological or public policy views rarely support recusal); *id.* at § 9 (discussing how political connections to a judge are generally not a sufficient basis for recusal unless the tie is particularly close); *id.* at § 8 (discussing how social relationships, unless particularly close, tend not to result in disqualification); *id.* at § 7.8 (discussing how formal business or financial relationships may warrant disqualification but informal acquaintance due to prior business activity generally does not). *But see In re* Sch. Asbestos Litig., 977 F.2d 764, 781–84 (3d Cir. 1992) (requiring judge's

judge makes appearances to a range of groups, the conventional wisdom lines up even more strongly against recusal.[281] Perhaps the current mainstream does not even see these episodes as regrettable. "There's nothing wrong with it," according to one prominent legal ethics expert,[282] while another saw it as a healthy exercise in civic education: "I think this is a good thing. I think it should be done maybe monthly, with a quiz at the end."[283]

Notwithstanding the tongue-in-cheek tone of the last comment, the norm that there are no neutrality problems when judges speak in public is in need of serious reconsideration. This sort of insensitivity to appearances certainly strengthens the case for expanding per se procedural tools for fostering judicial neutrality rather than relying solely on the reasonable question as to impartiality standard. It also raises questions about whether jurists are devoting enough of their available energy to judging. More troublesome are the risks, outlined above, that the judge's interaction with the group and even the act of public speaking may create reasonable concern over his or her impartiality.[284]

When the judge speaks only to interest groups of particular stripe or to more partisan incarnations of a group, the risks of improper appearances are increased. For example, one might excuse a judge speaking to the Tea Party Caucus because it is composed of

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recusal in asbestos cases where he attended at asbestos litigation conference sponsored by plaintiff lawyers featuring as speakers plaintiff's expert witnesses).

To some extent, however, the possibility that the Scalia Tea Party caucus appearance would be seen as a serious recusal concern was mitigated when "the caucus then broadened the invitation to include Democratic members of Congress, too . . . ." However uncomfortable the Scalia star turn may make people like me, if the event is open to the press and on the record, this provides litigants with an opportunity to seek recusal on the basis of the particular content of any remarks even if the Justice takes the position that the appearance itself is not disqualifying. In addition, one of the attending Democrats (Rep. Jan Schakowsky of Illinois) described the Justice's remarks as "very dry," hardly good fodder for a disqualification motion. Totenberg, *supra* note 278, at 283.

281. *See id.* ("Legal ethics experts largely agreed that Scalia violated no ethics rules, especially because he has spoken to liberal as well as conservative groups in the past.").

282. *Id.* (quoting Northwestern University Law School Professor Steven Lubet).

283. *Id.* (quoting New York University Law Professor Stephen Gillers).

284. One goal of judicial ethics is maintenance of public confidence, which may be undermined where judge or justice appears to be unduly friendly with partisan political group.

elected governmental representatives and at least some of the Caucus activity can be described as lawmaking despite the clear electoral overtones.[285] One might draw the line, however, where a judge had addressed the Tea Party organization itself, because this entity has no mantle of government legitimacy and is engaged in more obviously partisan electioneering.[286]

Under my proposed standard of impartiality assessment, the question of disqualification based on appearances with interest groups is far closer than under the status quo, which implicitly concludes that unless nearly everybody is outraged by a judicial star turn before an interest group, there is no recusal problem. Certainly,

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285. For example, when members of the Tea Party Caucus congregate at meetings such as that attended by Justice Scalia, they presumably discuss legislative goals that they can then further pursue in their capacity as elected members of Congress affiliated with the Republican party that currently controls the House of Representatives and holds significant power in the Senate.

286. *See* Maureen Dowd, *Mad Men and Mad Women,* N.Y. TIMES, April. 3, 2011, Week in Review at 10 (noting widespread influence of Tea Party on Republican legislative activity and active collaboration and overlap of organizational leadership). Ironically, however, Justice Scalia himself appears to have "waived" the right to make this argument. Although he is apparently happy to talk in private session with the Tea Party Caucus and is willing to continue talking if Democrats are invited to the session, Justice Scalia (along with Justices Thomas and Alito) declines to attend the President's State of the Union address, suggesting that the official lawmaking status of the speaker or others in the audience is of minimal import to him. *See* Joan Biskupic, *Tensions Rise Between Supreme Court, Politicians*, USA TODAY, Jan. 15, 2011, http://www.usatoday.com/news/washington/juicial/2011-01-15-Rwcourtpolitics23STN.htm. (noting non-attendance of justices at State of the Union speech, widely thought to be reaction to President's criticism of *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876 (2010) during prior year). Nonetheless, the distinction between the Tea Party itself and its per se political events and the Tea Party Caucus is probably worth making in assessing whether a judge's interaction with these types of groups creates a reasonable question as to impartiality.

Notwithstanding my criticisms of Justice Scalia regarding the Tea Party and duck hunting with Dick Cheney, he (and Justices Thomas and Alito) have it exactly right regarding State of the Union attendance. The entire Supreme Court should skip that party. It makes perfect sense that Congress should attend the speech. The President is, notwithstanding his obvious public relations objectives, attempting to outline goals for which he is attempting to enlist congressional support. By contrast, the Court is not supposed to be any part of any political program. It is not supposed to be part of the President's "team" and need not be subjected to the pep rally atmosphere of the speech nor any intended or inadvertent lobbying by any of the other attendees.

if my proposed standard replaced that of Professor Gillers ("it should be done maybe monthly, with a quiz)"[287] we would at least not be praising such behavior—a long overdue step.[288] Applying this article's proposed "substantial segment of the public raising a colorable concern" standard, a court reviewing similar behavior by a judge in a case implicating Tea Party interests or Tea Party political goals would ask whether a reasonable argument can be made that featured speaker status creates reasonable questions about the judicial speaker's impartiality. If so, the second question is whether a substantial segment of the public would in fact harbor doubts as to the speaker's impartiality.

Depending on case and context, my proposed approach to appearances disqualification could make a difference concerning disqualification. On the easy end of the spectrum are cases where the Tea Party itself is a litigant. Even under the current status quo and the Geyh consensus trigger for appearance recusal, a judge in Justice Scalia's position should now be barred from participating in Tea Party cases, at least for a reasonable length of time after the speaking engagement or other affiliations with the group.[289]

If a case arises in which the Tea Party is substantially interested (e.g., a challenge to the election of a favored candidate), the judge would probably be disqualified, because it is quite reasonable to have legitimate concerns about the speaking judge's

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287. Totenberg, *supra* note 278, at 283.

288. Professor Gillers' comment implicitly suggests that there is some great educational gain or elevation of public policy debate and lawmaking when Supreme Court justices interact with lawmakers (he would have both liberal and conservative justices make these appearances). I am honestly at a loss to understand his rationale. Is it that the legislators might learn something about constitutional law in a twenty-minute gab session? Can the legislators not simply read a book or law review article (or several)? Or, more realistically, don't they have staff that can brief them on these things? Even if we accept the implicit premise of the Gillers comment—that legislators aren't particularly voracious readers—what is the magic in having a sitting justice or judge interact with the legislators? Prominent liberal and conservative academics or litigators (e.g., Harvard Law Professor Lawrence Tribe and former Al Gore counsel David Boies on the left, Stanford Law Professor Michael McConnell and former Bush counsel Ted Olson on the right) could serve the bill as well or better without raising any concerns about judicial impartiality. There simply is not enough additional payoff from judicial involvement to warrant even a trivial risk of undermining judicial neutrality.

289. Where the Tea Party participates as an amicus, the analysis would be like that when a case presents legal questions of great interest to the Party.

impartiality regarding matters near and dear to the sponsoring organization and because a considerable portion of the community (e.g., the *New York Times*, *Times* readers, liberals, Democrats, and judicial ethics purists) would have questions as to such a judge's neutrality in such situations.

More difficult are questions where a case involves an issue of importance to the Tea Party. Litigation about the nation's deficit or tax structure or foreign policy or something like a challenge to Oklahoma's recent initiative barring use of Sharia law[290] are examples that might someday present themselves in real cases. Applying the "nonfrivolous concern and substantial amount of concern" tests to such cases is not easy. But it is no more difficult or indeterminate than applying the current template of the mythical single reasonable observer.

Although many will be upset if a "Judge" Scalia were to preside over such a case, it is unlikely a clear majority would hold this view because of popular attitudes considering adjudication to be inevitably political and value-laden and the likely opinion of many that the Tea Party's interests in the matter are simply too attenuated. With my suggested lower threshold of disqualification, however, the case is sufficiently close that it may result in disqualification that would not take place today. If Tea Party interests are sufficiently tied to resolution of a pending legal determination, it is not at all frivolous for reasonable observers to question the ability of a judge who has been a featured Tea Party speaker to be impartial in the matter. Much of the public (more than my twenty-five to thirty-five percent target) is likely to share this concern and feel better if the featured speaker judge does not participate in the case.

Under my suggested approach, jurists who accept speaking invitations or other adulation from groups with defined legal interests and agenda would be at considerably higher risk of disqualification than at present. This would be a positive development. Under the status quo, jurists, as exemplified by Justice Scalia's behavior, play fast and loose regarding appearances of impartiality but do so with near impunity.

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290. *See* Associated Press, *Oklahoma: New Amendment Is Delayed,* N.Y. TIMES, Nov. 9, 2010, at A21 (noting how in November 2010, Oklahoma voters approved a state constitutional amendment forbidding the application of "Sharia law," international or Islamic law, by courts sitting in the state).

More headline-grabbing than Justice Scalia's Tea Party invitation was Judge Henry Hudson's ruling that the Obama administration's health care reforms exceeded congressional power under the Commerce Clause.[291] Two previous decisions had backed the Administration in this regard and the basic constitutional law of the situation has been relatively clear since at least *Heart of Atlanta Motel*[292] and probably since *Wickard v. Filburn*.[293] Medical care and medical insurance are trillion dollar industries and frequently involve the movement of patients, providers, and equipment across state lines. The consequences of medical care and insurance are widespread. To a traditional constitutional lawyer, there is almost no

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291. *See generally* Kevin Sack, *Core of Health Care Law Is Rejected by U.S. Judge: Mandatory Insurance Is Called Unconstitutional*, N.Y. TIMES, Dec. 14, 2010, at A1 (reporting trial court ruling that mandate to buy health insurance if not covered under employer plan exceeds scope of congressional power under the Commerce Clause); *see also* Kevin Sack, *Judge Hints He May Rule Against Health Law*, N.Y. TIMES, Dec. 17, 2010, at A10 (describing similar litigation in Northern District of Florida); Jason Mazzone, *Can Congress Force You To Be Healthy?*, N.Y. TIMES, Dec. 17, 2010, at A31 (describing case and finding Judge Hudson's rationale more defensible than many, and suggesting that a majority of the Supreme Court may be receptive to his reasoning narrowing the reach of the Commerce Clause).

292. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 261–62 (1966) (finding Commerce Clause power sufficiently broad to support application of federal law requiring non-discrimination in public accommodations to hotel in Georgia that did not advertise in other states or affirmatively seek customers from other states); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 3.3.4 (2006) (regarding the expansion of the Commerce Clause generally in the twentieth century). Certainly, the argument that substantive due process and freedom of contract prevents broad and stringent government regulation has been largely rejected since *West Coast Hotel v. Parrish*, 300 U.S. 379, 386–88, 400 (1937) (upholding state minimum wage law), the famous case in which the "switch in time" (by Justice Owen Roberts who had previously supported freedom of contract and substantive due process restrictions on such regulation) "saved nine" by reducing support for President Franklin Roosevelt's proposal to "pack" the Supreme Court with favorable nominees by increasing its size to fifteen. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 115–21 (2010).

293. *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1944) (holding that the Commerce Clause allows the federal government to regulate sale of wheat even absent a showing that particular wheat will cross state lines because grain trading industry generally operates across state lines). *See generally* CHEMERINSKY, *supra* note 292, § 3.3.4 (stating that since late 1930s or 1940s, Supreme Court has taken expansive view of Commerce Clause power of Congress to regulate).

question that Congress had Commerce Clause power to enact the Obama health care packages.[294]

Nonetheless, Judge Hudson found the Commerce Clause not to have the breadth taught about in law schools. Even under some more recent retrenchment, such as *United States v. Lopez*,[295] Judge Hudson's decision seems incorrect in light of the traditional canon and what seems settled law. When this entire drama is played out, Judge Hudson may have the last laugh in that the only other judicial body likely to strike down the law is the U.S. Supreme Court, which consists of at lease four justices who appear to dislike the post-New Deal, post-Civil Rights Act breadth of the Commerce Clause, while favoring business interests in general.[296]

Predictably, liberal constituencies were upset with Judge Hudson's ruling.[297] But their pique was not restricted solely to the Judge's arguable attempt to turn back the clock on the Commerce Clause. In addition to his overall conservative orientation (which is not disqualifying and was presumably known to the Senate when he

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294. *See generally* JOHN NOWAK & RONALD ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 334–92 (4th ed. 2010) (noting breadth of the Commerce Clause and its reach in permitting federal government to regulate a wide variety of social and economic activity); CHEMERINSKY, *supra* note 292, § 3.3 (same); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.4, at 807–24 (3d ed. 2000) (same). Professor Tribe's analysis of these cases is consistent with his treatise writings a decade ago. *See* Laurence H. Tribe, Op-Ed., *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 8, 2011, at A27, *available at* http://www.nytimes.com/2011/02/08/opinion/08tribe.html? (predicting Supreme Court will uphold health care law by comfortable margin).

295. *See* 514 U.S. 549, 551–53 (1995) (striking down the "Gun Free School Zone Act of 1990" as exceeding scope of power to legislation pursuant to Commerce Clause; concluding that local schools lack sufficient nexus with interstate commerce).

296. *See* Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (reporting that common thread in decisions of Roberts Court has been rulings largely favorable to business interests). Of course, business interests are not always monolithic. By most accounts, some elements of the medical provider community and the employer community (most private health insurance in the U.S. is group insurance provided by employers) favor at least some parts of the Obama health care law. But large insurers in particular are opposed to the law and are a major force in the U.S. business community and the American economy. At the risk of oversimplifying, I regard attacks on the health care law as representing the overall position of the business community.

297. *See Letters: A Judicial Setback for the Health Law*, N.Y. TIMES, Dec. 14, 2010, at A30 (reproducing four letters to the editor, three voicing criticism of Judge Hudson's ruling and one defending it).

was confirmed after nomination by President George W. Bush), Judge Hudson, it turns out, has an ownership interest in a consulting firm that regularly works for Republican clients and that has worked for such Big "R" Republicans and Big "C" Conservatives such as Jon Boehner, Michele Bachmann, and John McCain. Estimates are that the judge received somewhere between $15,000 and $50,000 in 2009 as a result of his interest in the firm.[298] Although the firm and its clients may not have been directly involved in the health plan litigation, concern has been raised that Judge Hudson's financial and business ties to a company so allied with politicians bent on upending the health care law (including a former client of his firm, the Virginia Attorney General who brought the suit) prevent him from being impartial in the matter.[299]

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298. *See* John Cook, *Judge Who Ruled Health Care Reform Unconstitutional Owns Piece of GOP Consulting Firm*, GAWKER.COM (Dec. 13, 2010, 1:49 PM), http://gawker.com/#!5713041/judge-who-ruled-health-care-reform-unconstitutional-owns-piece-of-gop-consulting-firm:

> As the Huffington Post and others first noted last July, Hudson's annual financial disclosures show that he owns a sizable chunk of Campaign Solutions, Inc., a Republic consulting firm that worked this election cycle for John Boehner, Michele Bachmann, John McCain, and a whole host of other GOP candidates who've placed the purported unconstitutionality of health care reform at the center of their political platforms. Since 2003, according to the disclosures, Hudson has earned between $32,000 and $108,000 in dividends from his shares in the firm (federal rules only require judges to report ranges of income).
>
> Campaign Solutions was instrumental in the launching of Sarah Palin's PAC (though Palin has since split with the firm), and Ken Cuccinelli, the Virginia attorney general who filed the lawsuit that Hudson rules in favor of today, paid Campaign Solutions $9,000 for services rendered in 2009 and 2010.

299. *See* Cook, *supra* note 298 (exemplifying how Judge Hudson was criticized for presiding over challenge to health care legislation, opposition to which was central to political platform of clients of consulting firm in which he owns interest). *See also* Kevin Sack, *Legal Battles on Health Care Law Stir Questions of Partisanship in the Courts*, N.Y. TIMES, Dec. 16, 2010, at A26 ("Judge Hudson has deep Republican roots as a state and federal prosecutor in Northern Virginia. He is also a passive minority owner of a Republican political consulting firm, Campaign Solutions, Inc. Among its former clients is Mr. Cuccinelli, the attorney general who is the plaintiff in the Virginia case. Mr. Cuccinelli stopped using the firm this year after news accounts disclosed Judge Hudson's investment."); Dahlia Lithwick & Sonja West, *Unplugged: When Do Supreme Court Justices Need to Just Sit Down and Be Quiet?*, SLATE.COM (Dec.

Under the traditional approach to recusal and its seeming search for public consensus or a strong majority view, Judge Hudson's ties to the GOP marketing machine are perhaps insufficient to require disqualification. But under this article's proposed approach to appearance-based disqualification, he almost certainly should have stepped aside. A nonfrivolous argument posits that a judge this invested financially and ideologically with a partisan political stance toward pending litigation should not hear cases with such palpable partisan implications. Further, a substantial portion of the public appears to agree.[300] Judge Hudson's participation in the health care law litigation is the functional equivalent of a co-owner of James Carville's political consulting business presiding over the Paula Jones litigation against Bill Clinton or litigation related to the Clinton's Whitewater investments.[301] Republicans and conservatives would scream—and rightly so. Democrats and liberals are justified in having similar objections to Judge Hudson's behavior.

Whatever the merits of the Commerce Clause debate relative to the health care law, the judicial system would be better served if decisions on the matter—particularly decisions that cut against the grain of prevailing precedent—were rendered by judges free of taint or suspicion. That's not Judge Hudson. Further, substitution of another judge, particularly at the outset of the case where the matter should have been raised by Judge Hudson himself, would pose little

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14, 2010), http://www.slate.com/id/2277915/ ("Today the Internet is buzzing with accusations that Virginia's Judge Henry Hudson has a financial connection to a group that worked to oppose the Obama health reform law."); Rosalind S. Helderman, *Advocacy Group Calls for Recusal of Health-Care Judge Over Investments*, WASH. POST, Aug. 3, 2010, *available at* http://voices.washingtonpost.com/virginiapolitics/2010/08/advocacy_group_calls_for_recus.html; Sam Stein, *Henry Hudson, Judge in Health Care Lawsuit, Has Financial Ties to Attorney General Bringing the Case*, HUFFINGTON POST, July 30, 2010, *available at* http://www.huffingtonpost.com/2010/07/30/henry-hudson-judge-in-hea_n_665240.html (discussing Judge Hudson's receipt of dividends from Campaign Solutions).

300. *See supra* note 299 (explaining that media coverage of Judge Hudson's participation in case challenging health care law was largely critical).

301. James Carville is a prominent liberal political consultant and commentator (perhaps sufficiently prominent that this footnote is unnecessary) who was a top advisor to President Bill Clinton. It would of course be improper for a "Judge Carville" to preside over lawsuits in which President Clinton was interested or involved such as Jones v. Clinton, 520 U.S. 681 (1997) (involving sexual harassment allegations levied against Clinton arising out of incidents during his time as Governor of Arkansas).

logistical burden on the courts. In return, the judicial system and the public would receive an opinion free from concerns about judicial impartiality. Even if the health care law is ultimately overturned by the U.S. Supreme Court, a result certain to outrage many, the decision will be accepted if judicial impartiality is assured. Judge Hudson's decision has, by contrast, been examined as much for his uncomfortably close ties to the partisan aspects of the case as for his legal analysis. A broader approach to appearance-based disqualification and a lower threshold for requiring recusal in such situations would better serve the system.

In similar fashion, a more realistic approach to questions of judicial impartiality requires a fresh look at the degree to which the status quo has tended to overlook or minimize a range of judicial ties to partisan politics or ideology. A good recent example is provided by Justice Clarence Thomas and his wife.[302] Virginia Thomas is a

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302. I would prefer that liberal judges or justices provide some examples of questionable political behavior for testing my proposed revised test for determining reasonable question as to impartiality. Unfortunately, however, the liberal justices seem not to have as high a partisan or ideological political profile as their conservative colleagues. To be sure, however, this article's proposed greater scrutiny of judicial extra-curricular activities would apply to the summer law school classes, seminars, and retreats frequented by liberal jurists as well. It appears, for example, that all justices engage in some form of this type of activity, which, as discussed above, *supra* notes 277–82 and accompanying text, is problematic.

In addition to summer law teaching and the like, we have examples such as Justice Blackmun's frequent attendance at Aspen Institute summer seminars addressing philosophical issues related to the law. Although none of these have the blatant political-ideological-interest group overtones of a Tea Party gathering (or a union meeting or a corporate shareholders meeting), they nonetheless pose risks that judges will be improperly influenced by extra-judicial factors or make pre-adjudication commitments to case outcomes. Although in the final analysis many of these outings may not require recusal under my proposed approach, these sorts of activities clearly pose more serious disqualification questions than the system has acknowledged.

To be sure, liberal jurists can violate norms of judicial recusal just as easily as conservatives. For example, Professor Monroe Freedman makes a compelling case of error by Justice Breyer. *See generally* Monroe H. Freedman, *Judicial Impartiality in the Supreme Court – The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 514–15, 527–32 (2005) (discussing concerns about Justice Breyer's transgressions in failing to recuse himself, particularly emphasizing the Justice's role as chair of the Judicial Conduct and Disability Act Committee). In Freedman's view, Justice Breyer's conduct violated existing law. There is no need to adopt my proposal to find that Justice Breyer erred in failing to recuse.

long-time conservative activist who has worked for a number of advocacy groups that appear to be keenly interested in certain public policy matters likely to come before the Supreme Court. Justice Thomas recently received criticism for failing to provide information regarding her employment on the annual financial disclosure statements required of federal judges.[303] This is regrettable and appears to have resulted from rather gross negligence on the part of Justice Thomas. But more than Justice Thomas's behavior in a particular case, the legal system should re-examine its view that disclosure alone is an inadequate way of dealing with a jurist's ties (through the jurist or close family members) to particular interest groups.

Rather than treating disclosure as a sufficient response to concerns that judges will be insufficiently neutral because of the extra-judicial influence of a spouse's political activism, these sorts of situations should be tested according to this article's proposed revised approach to operationalizing the reasonable question as to the impartiality standard for recusal. Certainly, a reasonable question can be raised as to whether Justice Thomas can be sufficiently impartial in cases involving issues of particular import to his wife's employer. If a substantial portion of lay observers hold this view, Justice Thomas should be disqualified in such cases or Virginia Thomas should find other employment.[304]

Related to the problem of excessive judicial coziness with interest groups is the structural problem of judges being lobbied by interest groups under the guise not only of speaking engagements but also purported judicial education programs. The "business model" of these interest groups is now familiar. Vested interests establish an ostensible think tank that conducts education seminars with a curriculum and array of speakers heavily slanted in an analytical direction favoring the interest group. Seminars are located in posh

303. *See* Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES, Jan. 24, 2011, at A16, *available at* http://www.nytimes.com/2011/01/25/us/politics/25thomas.html (noting that for several years, Justice Thomas failed to disclose employment of his wife, Virginia, with a conservative think-tank and advocacy group interested in issues of legal policy arguably implicated in cases pending before the Court).

304. A job change for Virginia Thomas may not be enough, of course, in that a spouse's identification with a particular interest group agenda at issue in litigation before the Court might nonetheless require disqualification, even if the spouse is not formally employed by the interest group.

resorts or similar settings (on the beach, in the mountains, or at some other desirable locale). Judges are invited to attend for free, are charged a nominal fee that does not approach the actual cost of the program, or are given "stipends" or "scholarships" for attendance by the sponsoring organization. The judge attends and in this paradise-like setting is brainwashed for a week or two. If things go as planned for the sponsoring organization and its interest group constituents, the judge returns to the bench more inclined to see the world as does the interest group.[305] To paraphrase the cliché about communism, the judge has received "re-education in the country" that may well influence votes in future cases.

Astonishingly, the legal and political system has allowed such subtle corruptions for decades, although more attention has been paid to the issue in recent years. Although there are some reporting requirements of disclosure concerning judicial attendance and payment under the 2007 ABA Model Code, the fact remains that judges can largely attend such programs in the manner described above.[306] At present, all that keeps the judge from being brainwashed is the judge's own sense of perspective. This may actually be rather good protection in that judges are generally of reasonably strong mind and even the dimmest judge can identify the politics and goals of the sponsoring organization and its supporters.

But, as discussed above, judges, like all humans, are subject to cognitive biases and undue influence provided by context and surroundings, including the other attendees, sponsors, organizers and

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305. *See generally* Douglas Kendall & Jason Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65, 129–34 (2004) (arguing that judicial attendance at luxurious conferences funded by interest groups and presenting programs favoring interest group positions on issues poses significant threat to judicial impartiality). For a short overview of these sorts of seminars and the ethics questions they pose, *see* GILLERS & SIMON, *supra* note 89, at 607–08 (describing the phenomenon, summarizing criticism, and noting ABA Model Code's approach to the problem).

306. *See* MODEL CODE OF JUDICIAL CONDUCT R. 3.14 & 3.15 (2011) (permitting judge and guest to receive "reasonable" reimbursement for attending such programs and to report attendance within thirty days of event and to post on court website where feasible); GILLERS & SIMON, *supra* note 89, at 608–09 (summarizing Rules 3.14 and 3.15 and noting official but nonbinding comment that a judge "must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality").

seminar faculty.[307] Where this faculty and peer group has a stake in pending litigation or related matters, greater caution is required than has been displayed by the system to date. Even where there is no direct link to pending litigation, application of a more stringent test for determining questions regarding impartiality may require that judges attending such seminars not preside over certain types of cases. But at present, generalized efforts to lobby the judge toward a particular perspective on the law or a type of legal issue in such posh seminar settings do not result in disqualification.

The Second Circuit refused to disqualify a seminar attendee judge from presiding over a remanded environmental case involving Texaco even though the judge had attended a seminar sponsored by the Foundation for Research on Economics and the Environment (FREE), a pro-business group supported financially by Texaco.[308] Although this decision may be correct according to current recusal law, it almost certainly would not pass muster under my proposed approach. But at least the appellate court recognized the seriousness of the problem:

> [W]e caution judges that recusal may be required after accepting meals or lodging from organizations that may receive a significant portion of their general funding from litigants or counsel to them—whether or not in connection with an unbalanced presentation . . . [A]ccepting something of value from an organization whose existence is arguably dependent upon a party

307. *See supra* notes 22–51 and accompanying text (discussing the unconscious bias that affects judges).

308. *See In re* Aguinda, 241 F.3d 194, 198 (2d Cir. 2001) (holding that a judge did not abuse his discretion in attending the seminar because there was a "lack of showing that . . . the seminar touched upon an issue 'material' in the case"). A case like this, even though it did not result in disqualification, perhaps contradicts the prior statement in this text about judges being savvy enough to know when an organization or program may be slanted. A judge need not be Louis Brandeis to figure out that a group named "FREE" that has the money to provide the judge with free trip to an upscale Western lodge and is interested in the economics of environmentalism is probably a lobbying organization for various commercial energy interests. One does not see the Sierra Club or the National Resources Defense Council putting on this sort of subsidized Club Med for judges. A judge with any judgment would avoid such junkets, irrespective of whether there was a specific link to pending or possible litigation before the judge.

> to litigation or counsel to a party might well cause a reasonable observer to lift the proverbial eyebrow.
>
> Presentations at bar association meetings or law schools may well relate to particularized issues, and recusal should be considered seriously, but on a case-by-case basis. Judges should be wary of attending presentations involving litigation that is before them or likely to come before them without at the very least assuring themselves that parties or counsel to the litigation are not funding or controlling the presentation . . . . Where parties or counsel to them fund or control such a presentation, the appearance created bears too great a resemblance to an ex parte contact.[309]

Perhaps once again, Professor Geyh is right to call for per se rules and procedural protections.[310] In a rational world, judicial attendance at such programs would be absolutely prohibited.[311] If judges want to learn more about the cost-benefit considerations of environmental and energy regulation and litigation, they can procure court-appointed experts, demand additional briefing by the parties, appoint a special master with expertise, lean on their law clerks for some research, and just plain study the issue. They hardly need to be "educated" through a vacation-like seminar.

In the absence of an express prohibition, an enhanced and expanded notion of the trigger of appearance-based disqualification can reach these cases. Under this article's suggested standard, when a court concludes that a substantial portion of the lay public would (to use the Second Circuit's words) "lift a proverbial eyebrow" over a judge's presiding over a case linked to attendance at a judicial

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309. *In re* Aguinda, 241 F.3d at 206; *see also In re* Sch. Asbestos Litig., 977 F.2d 764, 781–85 (3d Cir. 1992) (disqualifying judge who, along with spouse, attended a conference where many of those making presentations regarding the science of asbestos-related injury were also expert witnesses for plaintiffs and where plaintiffs' law firm was the source of the funding).

310. Geyh, *supra* note 6, at 719.

311. Lest I seem excessively critical of judges, I hasten to add that in a rational world, judges would be paid twice their current salaries so that they and their families could take nice vacations without being tempted to sponge off interest groups.

seminar, disqualification would be required.[312] Unlike the Second Circuit and the status quo, this test is met not only if there is a direct link between parties, counsel, and a case, but also may be met where the sponsoring organization is seeking extrajudicial influence on judicial thinking about an issue presented in a current or subsequent case before the court.

Well-heeled interest groups are in it for the long haul and have broad interests beyond a given case involving a given supporter. They are hoping to generally bring judges to their point of view regarding a particular area of law. That is fine in an adversary system in a free country, so long as their efforts take place openly through the adjudication process through test case litigation, amicus briefs, or support for litigants. It becomes improper when attempted through extrajudicial channels such as the judicial seminar junket.

People are influenced by their surroundings and their peer groups. Placing a judge in an environment (a vacation-like environment to lower the attendee's mental guard about indoctrination) that consistently promotes a particular worldview (both overtly and subtly) through instructors, curriculum, and perhaps peers can have an impact on anyone, at least on a subconscious level.[313] It is not outlandish for observers to think that a judge exposed to these types of events will become significantly more likely to decide cases based on these influences and do so in a manner that favors the interest groups that arranged this soft-sell indoctrination.[314]

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312. *In re* Aguinda, 241 F.3d at 206.

313. *See supra* notes 33–43 and accompanying text (regarding cognitive psychological influences affecting humans).

314. Significant empirical research has established that in all major sports the home team enjoys a substantially higher winning percentage, ranging from a "mere" 54% win rate for baseball teams at home to 65% for college sports and nearly 70% for Major League Soccer (U.S.). (Soccer purists may be relieved to know that in the English Premier League, the home team wins at "only" a 63% clip.)

After addressing a plethora of explanations, two researchers conclude that the salient factor is favorable treatment of the home team by the officials (the home team typically has fewer penalties) resulting from the home field atmosphere. *See generally* MOSKOWITZ & WERTHEIM, *supra* note 279, at 157–67 (2011) (noting that social context of home-crowd enthusiasm and partisanship likely influences officials even if they are consciously attempting to be neutral and fair).

> The pressure exerted on officials in favor of the home team is not a "kill the umpire" sort of straight-on intimidation, but the more subtle result of context and spectator enthusiasm influencing the judgment calls made by umpires and referees. Officials are not immune to social pressure, and that's where we think the explanation for home team bias lies. Referees are, ultimately, human. In test after test, psychologists have found that social influence has a powerful effect on people's behavior and decisions—*without their even being aware of it.* Psychologists call this influence *conformity* because it causes an individual's opinion to conform to a group's opinion. In other words, when humans are under enormous stress—say, making a crucial call with a rabid crowd yelling a few feet away—it is natural for them to want to alleviate it. Making snap judgments in favor of the home team is one way to do that. Umpires also may be taking cues from the crowd when they're uncertain. They don't know whether that tailing 95-mph fastball crossed the strike zone, but the crowd's reaction may change their perception.
>
> In that case, umpires aren't consciously favoring the home team; they are doing what they believe is right. In trying to make the right call, they conform to a larger group's opinion, swayed by thousands of people, witnessing the exact same play they did.

Id. at 159.

Chief Justice John Roberts famously has analogized judging to being a sports umpire or referee. *See* Stempel, *Playing Forty Questions*, *supra* note 142, at 67 n.3 (detailing that during confirmation hearings, Chief Justice Roberts analogized judicial role to that of umpire officiating between competing legal teams); *see generally* Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007) (noting that at his confirmation hearings, Justice Roberts "captured the public's imagination" with the umpire analogy in which Roberts stated that the role of both the judge and the umpire was to "make sure everybody plays by the rules, but it is a limited role"). Although the analogy rightfully has its critics (*e.g.*, RICHARD A POSNER, HOW JUDGES THINK 35–37 (2008)), it is not completely without basis. More importantly, this comparison is commonly used to describe Anglo-American judges (as contrasted to the more involved "inquisitorial" judges of continental European systems). Having embraced this comparison, Justice Roberts and the judiciary need to live by it and appreciate that the same contextual factors affecting officiating decisions are almost surely present in adjudication as well, although one hopes with less extremity.

To state the obvious, judging does not take place in an arena filled with rabid partisans. When it does, this would be grounds for reversal. *See* Sheppard v. Maxwell, 384 U.S. 333, 356 (1966) (reversing murder conviction of Cleveland-area physician Sam Sheppard because of prejudicial media portrayals and circus-like atmosphere of the trial, remarking that "[i]n this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life") (internal citation omitted).

Is a case like *Bush v. Gore* so different, however, from the pressure inflicted on referees at a pack football game? *See generally* Bush v. Gore, 531 U.S. 98

For example, a litigant making a product liability or race discrimination claim is assigned a judge who has recently returned from a conservative law and economics conference probably has a

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(2000) (holding that the Equal Protection Clause was violated by Florida's attempts to recount ballots in dispute during presidential election requiring cessation of recount proceedings). For example, interested partisans appear to have attempted to intimidate election officials, if not the courts. There was the invasion of Broward County's ballot-counting and other demonstrations designed to intimidate opponents or influence public and judicial opinion (e.g., Republican protestors surrounding the Vice President's residence and chanting that Al Gore should "Get out of Dick Cheney's house"). Patty Reinert, *Throwing in towel, Gore urges Americans to unite*, HOUSTON CHRON., Dec. 14, 2000, at A1. Both sides regularly conducted press conferences spinning the facts and circumstances of the dispute, most famously in Bush representative James Baker's attack on the Florida Supreme Court for unwarranted judicial activism, a charge that appeared to have visibly cowed some Florida justices at the next hearing on the matter. In addition, non-partisan media relentlessly expressed gloom-and-doom concern about the fate of the country if the election outcome remained uncertain for too long. *See generally* Laurence H. Tribe, *eroG v. hsuB: Through the Looking Glass*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed. 2002) (noting that media portrayal of case important to public perception, and "Bush spinmeisters outspun those of Gore" with result that "succession of television images does more than represent the case . . . it profoundly shaped the Supreme Court's understanding of the stakes involved and its ultimate holding . . . .").

In addition, concerns were raised about whether three of the Justices who eventually supported George Bush's position in the case should have recused. *See* GILLERS & SIMON, *supra* note 89, at 589 (noting that two of Scalia's sons were members of law firms arguing on behalf of Bush, that Virginia Thomas was "at the time gathering resumes for potential Bush administration jobs on behalf of the Heritage Foundation, a conservative think tank," and that Justice O'Connor was reported to have been upset at prospect of Gore victory as it would compel her to remain on the Court until her successor could be nominated by a Republican president). Even if these arguments were not persuasive under current disqualification law—the view of Professor Gillers in STEPHEN GILLERS, TEACHER'S MANUAL FOR REGULATION OF LAWYERS 202 (2009)—this concern added to the Super Bowl-like atmosphere of *Bush v. Gore* that may have influenced the "referees" deciding the case. *See also* Thomas Boswell, *In the End, Somebody Wins, Somebody Loses and Everybody Goes Home*, WASH. POST, Nov. 15, 2000, at D1 (sports writer comparing public posturing of Bush and Gore campaigns to athletic coaches attempting to influence referees or "working the refs").

Although one does not want to push the sports-umpire comparison too far, it is yet another reminder of what should be more obvious and admitted by judges—they are vulnerable to extrajudicial environmental influences. Logically, the law of disqualification should impose or at least encourage judges to avoid such corrupting influences.

good basis for fearing that the judge now has unduly heightened concern about the cost of safety protocols or interference with management personnel decisions. If I were that litigant or her lawyer, I would harbor doubts (which I believe to be reasonable, or at least non-frivolous) regarding the judge's ability to be impartial regarding my claim. I might even have doubts simply because the judge was willing to subject himself to this sort of indoctrination in the first place. If a sufficiently substantial portion of the legal community or the public agrees, disqualification should result. In the absence of procedural protections such as an outright ban on judicial attendance at such conferences, recusal doctrine is all that protects litigants from biased judging resulting from such brainwashing efforts.

I realize I am pushing the disqualification envelope regarding this last example. By one popular and generally sound definition (ironically articulated by Justice Scalia)[315] impartiality simply means indifference to which litigant wins or loses a dispute. Judicial attitudes about liability, free markets, cost-benefit analysis, economic efficiency, the wisdom of discrimination law or other regulation of markets can thus be viewed as something beyond the reach of disqualification law. Although this may be true as a general matter, particularly intense or hardened judicial attitudes on these dimensions implicate recusal law and practice to the degree that they are sufficiently strong to encourage or compel results in favor of certain litigants irrespective of the record in the case. In such instances, disqualification based on judicial attitudes acquired through specific extrajudicial sources such as speaking engagements, political activity, business interests, or conference attendance should be fair game for analysis under a broader view of the reasonable-question-as-to-impartiality test.

For example, in the hypothetical above, a product liability plaintiff may have a very legitimate claim that the judge exposed to seminars stressing the undue expense of such laws cannot be impartial in her individual case and has an ideological bent so strong that favoring the manufacturer is inevitable. The judge is no longer indifferent to whether the manufacturer loses and must pay (or have

315. *See* Republican Party of Minnesota v. White, 536 U.S. 765, 776 (2002) ("One meaning of 'impartiality' in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law.").

its insurer pay) a judgment for plaintiff's injuries. Similarly, the discrimination plaintiff may have a legitimate reason to doubt the judge's neutrality (and ability to be indifferent to the case outcome) if the judge has been told repeatedly at a recent conference that the majority of job discrimination claims are merely efforts to extract severance pay for substandard employees under the guise of crying discrimination.[316]

Taking recusal seriously and deploying the revised test set forth in this article also has implications for assessing whether judges should recuse more often on the basis of social affiliations with parties or counsel. Ironically, both the federal statute and the ABA Judicial Code require that judges step aside if a family member or former law firm colleague is involved as counsel in a case.[317] But neither forbids a judge from hearing a case where a close social or professional friend is involved as counsel.

The distinction between friends, former co-workers, and family rests on tenuous grounds. One may care at least as much about the fortunes of a friend trying an important case as one would about the fortunes of a former law partner or a family member, particularly about family members "within the third degree of relationship" (cousins and closer) specified in 28 U.S.C. § 455(b)(5). I actually like my cousins and most of the people in the law firms for which I have worked. But I like and care about my friends just as much or more. But under the current regime, I would, as a judge, be required to recuse from cases involving former colleagues and cousins I have not seen in twenty years while remaining free to aid the causes of friends involved in litigation.

Unless my value structure is insufficiently tribal or organizational as compared to the populace generally, this is a pretty good indication that these relationship-related disqualification

316. To a degree, judicial seminars, retreats, and conferences may not be much different from the judge simply socializing with persons who indoctrinate the judge informally (e.g., his rich neighbors; her former plaintiffs' lawyer buddies). This type of extrajudicial influence on judges has generally not been viewed as grounds for recusal, although perhaps this attitude needs to change as well. *See generally* Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 595 (2006) (arguing that disqualification should be automatic if friend of judge is involved as party or counsel). In any event, these sorts of informal associations that may bias judges should be tested rigorously.

317. 28 U.S.C. § 455(b) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

grounds should be expanded to include social friendships. In the absence of such a reform, this article's suggested approach to determining a reasonable question as to impartiality provides the additional benefit of encouraging disqualification in cases that now are too quickly accepted as acceptable.

To take a well-publicized example, Justices Scalia and Ginsburg and their families have a tradition of celebrating the holidays with former Solicitor General Ted Olson, now a frequent advocate before the Court.[318] For reasons I cannot fathom, this causes little stir. Regardless of the Justices' predispositions on a case and its merits, it is hardly farfetched to suggest that in matters sufficiently close, the Justices' close relation with Olson may sway them in favor of his client or amicus position. A reasonable lay observer could legitimately entertain serious doubts about the Justices' impartiality in cases argued by Olson. If a large enough proportion of observers harbor such doubts (this article's suggested benchmark of one-third of the reasonably well-informed public), recusal would be required under the proposed revised approach. Although Olson's holiday socializing with Justices Scalia and Ginsburg is probably the most well-known example of such chumminess between jurists and a frequently appearing advocate, it is probably only the tip of the iceberg.[319]

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318. *See* Joan Biskupic, *Familiar Faces Revolve Through Supreme Court; Elite Lawyers with Ties to Justices Make Multiple Arguments*, USA TODAY, Dec. 15, 2008, at A9 ("When former Solicitor General Theodore Olson stands at the lectern, which he has done 51 times, he faces several friends among the nine, including two of his regular New Year's Eve dining partners, Justices Antonin Scalia and Ruth Bader Ginsburg."); Joan Biskupic, *Justices Strike a Balance: Pals Ginsburg, Scalia Ring in the New Year, Then Duke It Out In Court*, USA TODAY, Dec. 26, 2007, at D1. Presumably, this social tradition continues notwithstanding the 2010 death of Justice Ginsburg's husband Martin, a renowned tax law expert.

319. For example, journalist Jeffrey Toobin relates the story of an impromptu car pool during a Washington snow storm in which Justices Scalia and Kennedy rode to the Court with noted attorney Carter Phillips, who was representing a party in a case before the Court that day. JEFFREY TOOBIN, THE NINE, 121–22 (2007).

Although this makes for a good story and perhaps even falls under a weather-related version of the "rule of necessity," it also illustrates the degree to which some lawyers are reasonably close social friends or acquaintances with judges, an advantage not enjoyed by all advocates. Even if the day's cases were not discussed on the ride through the snow, Phillips opposing counsel probably wished he or she had been part of this particular car pool.

If disqualification were required in such instances, judges and justices might be willing to assess whether their friendships with litigants or lawyers, particularly with lawyers frequently appearing in their courts, need to be dialed back. The traditional answer to this concern is an almost reflexively defensive argument that judges should not be forced to give up friendships and related outside activities in return for appointment to the bench.[320] But no one urging reform is demanding that judges sever social ties, only that the judge recuse in cases involving attorneys (or parties) who are significant social friends. If this results in unduly frequent recusal (the so-called small town problem), the judge needs to make a decision. Although some distancing from former friends is unfortunate, it is a small price to ask of jurists who wish not to be disqualified in cases involving lawyers or litigants who appear with considerable frequency. In a world of many judges and relative ease of travel and communication, there is no need to impose on concerned parties or counsel the risk that their opponents enjoy an extrajudicial advantage because of social friendship.

V. AN AGENDA FOR FUTURE RESEARCH

Although there is substantial research suggesting that judges, like others, make decisions on the basis of a variety of unconscious factors correlated with their differing demographic characteristics,

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More disturbingly, one is left to wonder how many other court–counsel links exist that are never brought to light in the media, and which may raise more disturbing questions of excessive coziness between judges and counsel or litigants.

320. *See, e.g.*, Noah Feldman, *Sometimes, Justice Can Play Politics*, N.Y. TIMES, Feb. 12, 2011, at 9 (Week in Review), *available at* http://www.nytimes.com/2011/02/13/opinion/13feldman.html (arguing that judges and justices should be permitted considerable latitude in outside activities; defending Justice Scalia's appearance before Tea Party caucus, contending that "critics of Scalia and Thomas ignore the history of the court" and that "the justices' few and meager contacts with the real world do little harm and perhaps occasionally some good."). *See generally* NOAH FELDMAN, SCORPIONS (2010) (focusing on careers of Supreme Court Justices Felix Frankfurter, Hugo Black, Robert Jackson, and William O. Douglas; book laced with examples of their political and social ties to President Roosevelt and other politicians during their time on the Court).

this field of inquiry is new and almost fallow.[321] In order to better inform litigants, lawyers, and judges addressing disqualification issues, considerably more information is needed about the relationship of various characteristics of judges and their decision-making. The legal profession and the public have the right to inquire as to the degree to which a judge's ruling and a case outcome turns on the judge's race, gender, age, religion, political affiliation, ethnic background, economic status, prior litigation experience, or other factors. To the extent there exist powerful correlations between these traits and judicial outcomes, they must be factored into the process of determining whether to disqualify a judge.

Even if the correlation is strong, this does not necessarily compel automatic disqualification. Automatic recusal based on some patterns would probably be unworkable or even at odds with the legal system and the democratic process. For example, a judge who has worked as a prosecutor may sentence differently than a judge who was a public defender prior to ascending to the bench. A jurist who was an insurance defense lawyer may be more inclined to grant summary judgment for a defendant than a judge who formerly represented personal injury plaintiffs.

Although such correlations raise questions, it would prove too much to require blanket disqualification of any of these groups from presiding over particular types of cases, particularly in states where judges are elected. In the federal system or state counterparts, the executive may be appointing some of these judges precisely because of their former backgrounds as prosecutors or defenders, or claimant lawyers or defense lawyers because of what it reflects about their background or orientation.

But only an irrational system would fail to inquire as to these relationships or fail to take them into account in deciding whether recusal is required. Regardless of background (whether immutable or experiential), we expect judges to be indifferent to which party prevails in a dispute even if the judge has jurisprudential or ideological views that may readily be described as pro-plaintiff or pro-defendant. Where there are serious questions as to whether a judge is able to reach this level of neutrality, the governing law already requires recusal. Greater empirical knowledge of the

321. *See supra* text accompanying note 25–55 (discussing the variety of behavioral science factors that affect decision-making).

relationship between judicial outcomes and judicial background can only enhance application of the law.

Although it would prove too much to require that former defense lawyers consistently recuse in cases where a corporate entity is a defendant, plaintiffs suing corporate entities should be able to obtain recusal of judges who they have reasonable ground to suspect cannot rise above their past representation and decide fairly. If the judge has recently attended educational seminars sponsored by the corporation or has received its "Person of the Year" award, this is qualitatively different than simply knowing that the judge has a pro-business bent. Because these situations are often not clear-cut, increasing knowledge about the degree to which judicial decisions are a product of the judge's background tend to strengthen the case for providing at least one peremptory challenge to litigants.

VI. CONCLUSION

In a world of occasionally egregious judicial misconduct in failing to recuse and a world populated by humans saddled with cognitive limitations, particularly when evaluating themselves, the legal system would profit from having greater procedural guarantees of judicial neutrality notwithstanding its occasional and systematic costs. Among this article's proposals in this vein are peremptory challenges, elimination of the *de minimis* exception to financially based disqualification, referral of disqualification motions to a neutral judge for decision, elimination of the duty to sit, and adherence to a regime that resolves close cases in favor of recusal. In addition, review of denials of disqualification should be de novo, rather than application of the harmless error doctrine.

Additionally, the basic approach to determining whether a reasonable question as to judicial impartiality exists needs to be revised to account for the relative impossibility of achieving consensus or even overwhelming majority opinion on such matters. Nonfrivolous concern over judicial neutrality shared by a substantial portion of society should be enough to require recusal in order to preserve the actual and perceived integrity of the judiciary. At the end of the day, judicial impartiality is a value of such sufficient importance that it outweighs all but the most oppressive administrative costs.

Attorney Speech and the Right to an Impartial Adjudicator

Margaret Tarkington*

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I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court held that an "objective" "potential for bias" could rise to a denial of due process.[1] *Caperton* thus buttressed the individual litigant's enforceable due process right to an impartial adjudicator. Some commentators have criticized *Caperton*'s approach, arguing that an individual right is an insufficient solution to systemic problems concomitant to modern judicial elections. Indeed, the Supreme Court has appeared to exacerbate problematic judicial elections by invalidating laws that arguably improved the perceived (and perhaps actual) impartiality of elected state judges. Notably, in *Republican Party v. White*, the Supreme Court held that Minnesota could not constitutionally prohibit judicial candidates from announcing their views on disputed legal or political issues,[2] and in *Citizens United v. Federal Election Commission*, the Supreme Court opened campaign doors to independent expenditures from the general funds of corporations and unions.[3] Indeed, there seems to be an inherent tension between *Caperton*, which recognized that a probability of bias of constitutional proportions could be created merely through campaign contributions and expenditures, and *Citizens United*, which invalidated restrictions on corporate campaign expenditures thus arguably paving the way for increased instances of *Caperton*-style unconstitutional bias.

If the individual due process right recognized by the *Caperton* Court is to be the primary means for ensuring a constitutional "fair trial in a fair tribunal" (despite aggressive judicial elections and the Supreme Court's own limitations on structural reforms), then attorneys need to be free to fully pursue the protection of that due process right on behalf of their clients. Unfortunately, many judges do not appreciate having their impartiality questioned, and, in a number of instances, judges have harshly punished attorneys for speech questioning judicial impartiality even when done as part of a motion to recuse or disqualify a judge (including

1. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009).
2. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002).
3. Citizens United v. Fed. Election Comm'n, 130 S. Ct 876, 929 (2010).

arguments that a litigant has been denied due process).[4] Members of state and federal judiciaries have often failed to see disqualification as a method to preserve the overall impartiality of the system, but instead have viewed disqualification motions and attorney allegations of partiality or bias as an affront to the individual judge's personal judicial integrity.

In this paper, I will explore the appropriate level of First Amendment protection for attorney statements made in court filings, particularly motions for disqualification or assertions of denial of due process based on judicial bias. Securing attorneys' freedom to raise colorable arguments of judicial bias and disqualification is particularly important, as will be discussed in Part I, in light of the Supreme Court's limitations on other structural reforms to judicial elections, which in turn make the individual litigant's due process right the primary method for providing adequate impartiality in adjudication. In Part II, I will review the traditional understanding that attorneys have little, if any, free speech rights when their speech is made in court proceedings, which means they can be freely punished for such speech. This view is flawed, which I will discuss in Part III, because attorneys should have speech rights commensurate with their essential functions in the United States legal system, which includes raising colorable arguments in court proceedings and preserving the constitutional rights of clients. In recognizing such a free speech right, it is essential that courts, attorneys, and litigants cease equating disqualification with reputational harm and thus with potential discipline for impugning judicial integrity. Nevertheless, disqualification motions can and should be held to the same requirements imposed upon any allegation of fact asserted in a legal proceeding: namely, that the allegation have a reasonable basis in fact as required by Federal Rule of Civil Procedure 11 and Model Rule of Professional Conduct 3.1.

4. *See infra* note 57 and accompanying text (citing cases in which attorneys have been disciplined for their speech made in court filings attempting to disqualify a judge for bias or seeking a change of judge).

II. THE SET-UP: INDIVIDUAL RIGHT AS METHOD TO PRESERVE IMPARTIAL JUDICIARY

A. The Unconstitutionality of Certain Judicial Election Reforms

Thirty-nine states elect some or all of their judiciary, with twenty-two states electing all members of the state judiciary.[5] Judicial elections by their very nature create problems by infusing politics into what is supposed to be a fair and impartial adjudicative process.[6] The November 2010 Iowa elections are a stark and sobering example of the politics undergirding even a merit system of retention elections.[7] States have made efforts to reform their judicial

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5. *See Judicial Selection in the States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Feb. 13, 2011) (collecting methods of judicial selection). There are twenty-two states that popularly elect their judiciary: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. *Id.* Of the eleven that popularly elect trial court judges while appointing appellate court judges who are then subject to a retention election, seven states elect all trial court judges (California, Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee), and four states popularly elect some of their trial court judges, with appointment and retention elections for other trial court judges (Arizona, Kansas, Maryland, and Missouri). *Id.* The six states that appoint all of their judges but subject them to a popular retention election are Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. *Id. See also White*, 536 U.S. at 790 (O'Connor, J., concurring) (noting that thirty-nine states employ judicial elections for their appellate courts, trial courts, or both).

6. *See* Sandra Day O'Connor, *Choosing (and Recusing) Our State Court Justices Wisely: Keynote Remarks by Justice O'Connor*, 99 GEO. L.J. 151, 153 (2010) ("No amount of election or recusal reform will remove the politics inherent in partisan judicial elections because they are specifically *designed* to infuse politics into the law. Elections are intended to make our courts responsive to electoral politics, and that is the flaw in the concept.") (emphasis in original).

7. *See, e.g.*, A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, at A1, *available at* http://www.nytimes.com/2010/11/04/us/politics/04judges.html (stating that the election demonstrated, even in Iowa's "apolitical," "merit selection" system, the ability to "effectively target and remove judges who issue unpopular decisions"); *id.* (quoting Dean Erwin Chemerinsky as stating "What is so disturbing about this is that it really might cause judges in the future to be less willing to protect minorities out of fear that they might be voted out of office. . . . Something like this really does chill other judges."); Maura Dolan, *New anxiety on the bench,*

elections to improve the probability of impartiality despite the inherent politics involved in any election process. Nevertheless, the United States Supreme Court has forbidden certain types of reform on the theory that the reform measures violated the Free Speech Clause of the First Amendment.

In *Republican Party v. White*, the Supreme Court held that Minnesota's "announce clause" was unconstitutional.[8] The announce clause prohibited candidates for judicial office from announcing their views on disputed legal or political issues.[9] The decision in *White* had far-reaching effects. *White* called into question other state "judicial ethics provisions that restricted political speech and conduct" of judiciary members and candidates in an attempt to preserve judicial impartiality and neutrality.[10] Indeed, former Justice O'Connor, who provided the necessary vote for a five-justice majority in *White*, recently reflected on its "unwelcome consequences":

> [B]efore *White*, there were cannons of judicial ethics in many states, allowing candidates and requiring them to refuse to answer questionnaires concerning how they would rule on certain policy issues. . . . *States repealed their judicial campaign restrictions* for fear they *might* violate *White*; that *in turn emboldened interest groups to increase spending* and use questionnaires *to pressure judicial candidates into publicly taking positions on controversial issues.* Interest groups can then put their money behind

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State chief justice sees rejection of Iowa judges as a disturbing political trend, L.A. TIMES, Nov. 5, 2010, at 1 (Extra), *available at* http://articles.latimes.com/2010/nov/05/local/la-me-gay-justice-20101105 (quoting Dean Allan W. Vestal as remarking that the Iowa retention election "was an attempt to intimidate judges" as "[i]t had no immediate practical effect").

8. *White*, 536 U.S. at 788.

9. *Id.* at 768.

10. Penny White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 150 n.204 (2009) (citing cases in multiple states addressing the impact of *White* on the states' respective judicial ethics rules).

> candidates whose legal opinions furthered a particular political agenda that the donor wanted to pursue.[11]

Justice O'Connor sees *White* as having the obvious consequence of pressuring judicial candidates to openly take sides on controversial or specific political issues and the less obvious consequence of increasing spending in judicial elections, particularly by special interest groups. It should not be too surprising that if a donor (individual, associational, or corporate) or special interest group can determine in advance how a judge would likely rule on certain issues, that knowledge would increase a donor's willingness and desire to financially back candidates favorable to the donor's positions and interests. Along similar lines, Professor Penny White has written that "[s]uccess by advocates in post-*White* litigation" in striking down other judicial ethics regulations "led some states to eliminate political restrictions and others to soften restrictions considerably, resulting in a largely unchecked and unsavory financial arms race in judicial elections."[12] Writing on the eve of *Citizens United*, Professor White argued that "states . . . *must invigorate campaign finance regulations* and disclosure requirements, particularly as they apply to judicial campaigns."[13]

Despite the fact that "concerns about the conduct of judicial elections ha[d] reached a fever pitch,"[14] in January 2010, the United States Supreme Court held that prohibitions on independent expenditures from the general funds of corporations and unions violated the First Amendment.[15] *Citizens United v. Federal Election Commission* unleashed "a tsunami of commentary" and criticism,[16] and promised to exacerbate concerns in the judicial election arena. Indeed, Justice O'Connor commented that by "invalidating some of

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11. O'Connor, *supra* note 6, at 154.

12. White, *supra* note 10, at 150.

13. *Id.* at 149.

14. Citizens United v. Fed. Election Comm'n, 130 S. Ct 876, 968 (2010) (Stevens, J., dissenting).

15. *Id.* at 913.

16. Paul M. Smith et al., *Proceed with Caution: A Guide to* Citizen's United, 1849 PLI/CORP 751, 753 (2010); *see also* Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143 (2010) ("*Citizens United v. FEC* unleashed a torrent of popular criticism, a pointed attack by the President in the State of the Union address, a flurry of proposed corrective legislation in Congress, and various calls to overturn the decision by constitutional amendment.").

the existing checks on campaign spending, the majority in *Citizens United* has signaled that the problem of campaign contributions [and expenditures] in judicial elections might get considerably worse, and quite soon."[17]

Although the Supreme Court's holding invalidated regulation of corporate and union expenditures in all elections, *Citizens United* appears to create particular problems for judicial elections. In fact, Professor Samuel Issacharoff has called *Citizens United* "a distraction of limited consequence" for most elections, yet he notes that the decision could have real effects for judicial elections.[18] Issacharoff's contrasting conclusions regarding the potential impact of *Citizens United* on non-judicial and judicial elections are based on information from elections in states that did not prohibit corporate expenditures prior to *Citizens United.* This data showed that corporations, when given the opportunity, are not big spenders in elections because "elections are a precarious and indirect means for advancing their interests," while lobbying generally works.[19] However, Issacharoff notes the existence of exceptions to corporate reticence to election involvement, including local elections, but "especially judicial elections."[20] The Brennan Center for Justice reports data for judicial elections that is exactly contrary to the data on which Issacharoff relies regarding non-judicial elections.[21] Notably, "in states where corporations have not been barred from election spending, [corporate] spending constitutes a significantly greater proportion of overall election fundraising than in states which previously restricted the use of corporate dollars."[22]

Why would such divergence exist? Although anecdotal, perhaps one reason can be found in a statement made by an Ohio union official: "We figured out a long time ago that it's easier to

17. O'Connor, *supra* note 6, at 156.

18. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 142 (2010).

19. *Id.* at 132–33.

20. *Id.* at 133.

21. ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS 8 (2010), *available at* http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1.

22. *Id.*

elect seven judges than to elect 132 legislators."[23] The problem seems particularly acute for elections for the states' highest courts—which have the last word in the interpretation, application, and validity of state law.

As reported by the Brennan Center for Justice, at the time *Citizens United* was issued, "22 states prohibited corporations from using treasury funds for campaign advocacy, and two more states strictly limited corporate expenditures."[24] Notably, "[s]ome or all judges face elections in 21 of the 24 states in which *Citizens United* will invalidate restrictions on corporate spending."[25] As with *White*, the Court's *Citizens United* decision invalidated judicial election reform. Further, as with *White*'s subsequent "unwelcome consequences,"[26] the ultimate reach of *Citizens United* is unknown: How many other campaign finance reforms may states determine are unconstitutional and so either water down or eliminate?

The combined effect of *White* and *Citizens United* is to hamper structural and systematic reform to judicial elections. While some structural options still remain open for states wanting to promote a fair and impartial judicial system—including eliminating elections for judicial candidates (although a proposed change from general elections to a merit system was unsuccessful in Nevada's 2010 election),[27] public financing for judicial elections (recently

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23. *Id.* at 12.

24. *Id.* at 8.

25. *Id.*

26. O'Connor, *supra* note 6, at 154.

27. A ballot initiative presented to Nevada voters in the November 2010 elections would have eliminated popular elections for judges, and instead created a merit system where the governor would appoint Nevada's District and Supreme Court judges with retention elections. The initiative was defeated with 57.7% of voters disapproving the change. *See Election 2010*, N.Y. TIMES, http://elections.nytimes.com/2010/results/nevada (last visited Mar. 4, 2011) (detailing the results of Nevada's 2010 elections).

The ballot initiative was sponsored by Nevada State Senator William ("Bill") J. Raggio, who was reprimanded for his speech regarding the Nevada Supreme Court in 1971 in the case *In re* Raggio, 487 P.2d 499, 500–01 (Nev. 1971) (per curiam). *See* Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech and Judicial Reputation*, 97 GEO. L.J. 1567, 1606–07 (2009) (discussing *Raggio* at length, in which the Nevada Supreme Court reprimanded Senator Raggio for publicly decrying the court's affirmance of a death penalty when he was serving as a district attorney and thus allegedly eroding public confidence in the justice system).

adopted in North Carolina and Wisconsin),[28] and heightened disclosure requirements for contributions and expenditures[29]—the Supreme Court has closed significant doors in *White* and *Citizens United.*

B. The Proffered Solution: Caperton's *Due Process Right*

Having foreclosed some methods of systematic reform in judicial elections, the Supreme Court has recognized, and recently buttressed, another tool for promoting a fair trial in a fair tribunal: the individual litigant's enforceable due process right. In *Caperton v. A.T. Massey Coal Co.*, the Court held that Caperton's due process rights were violated when West Virginia Supreme Court of Appeals Justice Brent Benjamin refused to recuse himself from an appeal in a case between Caperton and Massey Coal.[30] Justice Benjamin had benefited from substantial campaign contributions and independent expenditures from Don Blankenship, Massey Coal's CEO. Blankenship donated the maximum campaign contribution of $1,000, independently spent $500,000 for direct mailings and letters in support of Benjamin, and donated $2.5 million to an organization supporting Benjamin.[31] Just prior to the campaign and election, Massey Coal had received an adverse jury verdict of $50 million that Massey wanted to appeal to the West Virginia Supreme Court of Appeals.[32] After helping elect Benjamin to the Court, Massey Coal brought its appeal.[33] Caperton repeatedly moved to disqualify

28. *See, e.g.*, James Sample, *Court Reform Enters the Post-*Caperton *Era*, 58 DRAKE L. REV. 787, 802–04 (2010) (discussing new public financing laws for judicial elections in Wisconsin and North Carolina).

29. *See, e.g.*, TEX. ELEC. CODE ANN. § 254.0611 (West 2010) (listing additional reporting requirements for judicial candidates); 10 ILL. COMP. STAT. ANN. 5/9–10 (West 2011) (same); MICH. COMP. LAWS ANN. §§ 169.235–236 (West 2011) (requiring a candidate committee for a judicial office to file a campaign statement). The Court in *Citizens United* upheld the challenged disclosure laws as constitutional, leaving disclosure as a regulatory option. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913–17 (2010).

30. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–65 (2009).

31. *Id.* at 2257.

32. *Id.*

33. *Id.* at 2258.

Justice Benjamin, but Justice Benjamin denied the requests.[34] In two 3-2 decisions (one of which was on rehearing and both of which had Justice Benjamin in the majority), Massey Coal's $50 million verdict was reversed.[35] The Supreme Court reversed and held that Caperton had been denied due process by Justice Benjamin's participation in the case.[36]

The *Caperton* majority explained that "most matters relating to judicial disqualification [do] not rise to a constitutional level" and are left for state and federal legislatures to determine.[37] Yet, the court recognized that there are "instances which, as an objective matter, require recusal"—specifically, situations "in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[38] While the precise contours of *Caperton*'s due process right "cannot be defined with precision,"[39] the Court stated the general test as an objective inquiry examining "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[40] That is, whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"[41]

The *Caperton* majority indicated that other situations might exist where there was an unconstitutional risk of bias.[42] Both

34. *Id.* at 2257–59.
35. *Id.* at 2258.
36. *Id.* at 2263–65.
37. *Id.* at 2259 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).
38. *Id.* (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
39. *Id.* at 2261 (quoting Aetna Life Ins. v. Lavoie, 475 U.S. 813, 822 (1986)).
40. *Id.* at 2262.
41. *Id.* at 2263 (quoting *Withrow*, 421 U.S. at 47).
42. *See, e.g.*, *id.* at 2261 (stating that "what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision") (citations omitted); *see also id.* at 2259 (explaining, despite earlier narrow interpretations of disqualification as a due process right, that "[a]s new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal," namely "circumstances in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable") (internal citations omitted).

litigants and the academy will just have to wait and see (and explore) what other situations will be found to violate due process. Further, the Court was unclear as to how much a litigant must spend in a campaign before a judge is required by due process to recuse herself from cases involving that litigant. The Court agreed that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," but it held that in this circumstance, the campaign contributions and expenditures were just too much.[43] The Court noted that relevant factors included "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total a movant spent in the election, and the apparent effect such contribution had on the outcome of the election."[44]

Caperton denoted that "an impartial, unbiased tribunal is the *sine qua non* of due process of law,"[45] which must be protected by an enforceable due process right belonging to litigants. While the rhetoric and holding of *Caperton* are very appealing, the case has been criticized due to the Supreme Court's attempt to fix problems created by invalidating systematic reform (for example in *White*, which created problems later exacerbated by *Citizens United*) through the recognition of an individual's due process right to an unbiased tribunal. Professor Pamela Karlan argues that "*Caperton* continues the Court's problematic insistence on addressing structural problems through the lens of protecting individual rights."[46] Karlan explains:

> The initial decision to elect judges set into motion a series of potential consequences for their performance in office. Subsidiary choices, such as *the Court's decisions immunizing independent expenditures or judicial campaign speech from meaningful regulation*, have themselves changed the nature of judicial elections in ways that may affect judges on the bench

43. *Id.* at 2263.

44. *Id.* at 2264.

45. SKAGGS, *supra* note 21, at 13.

46. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 81 (2009).

> and *shape the responses available to protect litigants against a risk of judicial bias.*[47]

That is, the Court has frustrated the ability of states to effectively and systematically regulate judicial campaign speech and campaign finance to avoid the inherent impediments to impartiality created by judicial elections. *Caperton* attempts to fix the problems created by judicial elections where judges are coerced into making statements regarding political issues and which are infused with money from various interest groups, litigants, and attorneys.[48] Thus, Karlan's criticism: "*Caperton* is really trying to deal with a structural problem—the way in which money undermines judicial impartiality and public confidence in the judicial process—by recognizing an individual right."[49]

Caperton's recognition of a due process right to solve structural problems was soon undermined by the Court's subsequent decision in *Citizens United*, which arguably further eroded the States' options in using campaign finance reform to mitigate the problems of judicial elections and impartiality. Indeed, as noted above, *Citizens United* invalidated campaign finance restrictions in twenty-one states that elect their judiciary.[50] As Justice O'Connor observed:

> *Caperton* showed America how judicial campaign contributions [and expenditures] can poison our justice system. And in invalidating some of the existing checks on campaign spending, the majority in *Citizens United* has signaled that the problem of campaign contributions [and expenditures] in judicial elections might get considerably worse, and quite soon.[51]

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47. *Id.* at 102–03 (emphasis added).

48. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009).

49. Karlan, *supra* note 46, at 101. Karlan notes: "For years, scholars of the law of democracy have argued that a critical feature of the Court's districting jurisprudence has been its misguided insistence on analyzing structural questions through an individual rights framework. *Caperton* provides a powerful illustration of the ways in which such a framework fails to fully appreciate the issues involved." *Id.*

50. SKAGGS, *supra* note 21, at 8.

51. O'Connor, *supra* note 6, at 156.

Both the dissent and the majority in *Citizens United* struggled with the disjunction between the majority opinions in *Caperton* and *Citizens United* (both majority opinions were authored by Justice Kennedy). The *Citizens United* majority suggested that there was no inconsistency in the two opinions because *Caperton* merely recognized an individual due process right that would afford relief for problems created by judicial campaign spending—it did not purport to limit campaign spending at all.[52] This is precisely the problem that Karlan attempts to illustrate.[53] The Supreme Court continues to restrict areas of structural reform to judicial elections and attempts to fix the problems created thereby through an individually cognizable due process right. The dissent, in contrast, was not convinced that *Caperton*'s due process right could effectively solve problems created by campaign spending. Justice Stevens, writing for four justices, explained:

> At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races. *Perhaps* "Caperton *motions" will catch some of the worst abuses*. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.[54]

Although states with elected judiciaries still have regulatory options available to them after *Citizens United* to improve on the problems exposed in *Caperton* (including stringent campaign finance

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52. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 910 (2010) (stating that *Caperton* "is not to the contrary" and that *Caperton*'s "remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge" and thus "was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned").

53. *See* Karlan, *supra* note 46, at 101 ("Caperton provides a powerful illustration of the ways in which [an individual-rights] framework fails to fully appreciate the issues involved [in a structural problem].").

54. *Id.* at 968 (Stevens, J., dissenting) (emphasis added).

disclosure laws combined with more stringent recusal and disqualification requirements for judges who have either received campaign funding from a litigant or attorney or who have made specific campaign promises or statements indicating a significant potential for bias in given cases),[55] *Caperton*'s due process right needs to be available and used to its full extent. Since the Supreme Court has left the constitutional sufficiency of court processes to be protected primarily through an individual litigant's due process right, that right needs to be fully available to litigants and to encompass situations beyond the "extreme" facts of *Caperton*.

There are inherent difficulties in using *Caperton*'s due process right to deal with problematic judges. In many jurisdictions the recusal or disqualification motion is addressed initially, and sometimes conclusively,[56] by the allegedly biased judge. Further complicating matters, if the motion is denied the attorney will be litigating before a judge that the attorney has affronted, a built-in deterrent to the motion.

An additional deterrent in many jurisdictions is created through the judiciary's power to punish attorneys for their speech, especially when it is allegedly "disrespectful" to the court or impugns the court's integrity. Indeed, there are a number of cases in which attorneys have been sanctioned or punished for speech made in court filings raising an argument that the judge is biased or otherwise seeking to obtain a change of judge.[57]

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55. The Court in *Citizens United* upheld the challenged disclosure laws as constitutional, leaving disclosure as a regulatory option in the wake of the invalidation of the restrictions it held unconstitutional. *Citizens United*, 130 S. Ct. at 913–17. Further, the *Caperton* Court noted that states are free to have more stringent disqualification rules than those required by the Constitution, which could include greater disqualification on account of contributions or expenditures by a litigating party. *Caperton*, 129 S. Ct. at 2267 ("States may choose to 'adopt recusal standards more rigorous than due process requires.'").

56. *See, e.g.*, State v. Allen, 778 N.W.2d 863, 873–74 (Wis. 2010) (splitting the court as to whether state supreme court judges have the power to review the decision of another justice to deny a motion to recuse).

57. *E.g.*, Bd. of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1012–14 (Wyo. 2009); Stilley v. Supreme Court Comm. on Prof'l Conduct, 259 S.W.3d 395, 404–05 (Ark. 2007); State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007); *In re* Simon, 913 So. 2d 816, 827 (La. 2005) (per curiam); Burton v. Mottolese, 835 A.2d 998, 1019 (Conn. 2003); Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam); U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 864, 868 (9th Cir. 1993); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 284 (W. Va. 1991); *In re* Graham, 453 N.W.2d 313, 325

For example, in 2007, the Utah Supreme Court warned attorneys of "the pitfalls" that accompany arguments that a litigant (in this case a criminal defendant) was denied due process because of a biased judge.[58] The Court cautioned: "Any allegation that a trial judge became biased against a defendant should be supported by copious facts and record evidence. And any such allegation should be made in a reserved, respectful tone, shunning hyperbole and name-calling."[59] Putting teeth into its warning, the court referenced a prior decision where it had summarily affirmed a factually and legally erroneous decision as a sanction against an attorney who had attributed nefarious motives to the lower court.[60] Rather than be concerned that a criminal defendant may have been denied due process, the court deterred attorneys from raising claims regarding judicial bias or partiality by threatening severe sanctions (including dismissal of the case).[61] In a similar vein, in *Florida Bar v. Ray*, Ray used the established immigration court practice for complaining about a judge and seeking relief.[62] Ray was disciplined for violating MRPC 8.2 by impugning judicial integrity.[63] In the context of statements made in court filings, the Ohio Supreme Court broadly declared in 2003 that "[u]nfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law."[64] Such threats of serious sanctions to attorneys and clients work to frustrate *Caperton*'s individual due process right and its ability to adequately preserve a fair trial in a fair tribunal.

(Minn. 1990) (per curiam); *In re* Frerichs, 238 N.W.2d 764, 767 (Iowa 1976). *But see* United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995) (refusing to discipline or sanction an attorney for alleging judicial bias in his motion for a new trial under Rule 8.2(a) of the Louisiana Rules of Professional Conduct); *In re* Green, 11 P.3d 1078, 1080 (Colo. 2000) (per curiam) (concluding that the First Amendment prohibited disciplining a lawyer on the basis of his communications with the judge since the communications did not make or imply false statements of fact).

58. *Santana-Ruiz*, 167 P.3d at 1044.

59. *Id.*

60. *Id.* (referring generally to *Peters v. Pine Meadow Ranch Home Association*, 151 P.3d 962 (2007)).

61. *Santana-Ruiz*, 167 P.3d at 1044.

62. *Ray*, 797 So. 2d at 557–58.

63. *Id.* at 558.

64. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (2003).

III. OVERVIEW OF PUNISHMENT OF ATTORNEY SPEECH REGARDING THE JUDICIARY

The judiciary has long preserved its reputation through the punishment of attorney speech that allegedly impugns judicial integrity. In numerous cases attorneys have been severely punished for statements made in *any* forum—including court filings, statements to the press, leaflets, letters to the judiciary, and even on blogs.[65] Courts imposing such sanctions generally fail to distinguish between situations where the attorney makes statements in court proceedings and when the attorney makes a statement regarding the judiciary to the press or outside of court processes.[66] Sanctions have also been imposed regardless of whether the attorney is engaged in a proceeding before the criticized judge.[67]

A. "Officers of the Court" Lack Free Speech Rights

Despite the general failure of courts to apply different standards for situations involving speech made by an attorney in a proceeding before the criticized judge and situations involving speech made by an attorney in other non-court contexts, the academy has generally argued that attorneys should have full free speech protection for speech made as a citizen. For example, Professor Bradley Wendel argues that outside the court context, "[c]lear cases of protected [attorney] speech include even the most vitriolic criticism of judges."[68]

Nevertheless, even in the academy, it is generally argued that attorneys have few, if any, First Amendment rights where speech is undertaken in an attorney's official capacity as a lawyer or officer of

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65. *See* Tarkington, *supra* note 27, at 1569–73 (citing cases in which attorneys have been punished for their speech in court filings).

66. *See* Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 423–26 (2010) (showing how courts cite and rely on cases involving in-court speech and public speech unrelated to a court proceeding without distinguishing between the two).

67. *See, e.g.*, Idaho State Bar v. Topp, 925 P.2d 1113, 1117 (Idaho 1996) (finding attorney violated professional rules by impugning a judge's reputation through comments made to the press about a case in which the attorney was not involved).

68. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 440 (2001).

the court.[69] This idea is buttressed by dicta in *Gentile v. State Bar of Nevada* where the Court declared: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[70] Prevailing academic theories of attorney speech rights recognize little if any speech rights for statements made in the lawyer's official capacity as an attorney, including in filing papers with a court.[71]

One of the primary theories undergirding restriction of attorney speech is constitutional conditions. Under this theory, an attorney gives up her right to engage in certain forms of speech as a condition of practicing law.[72] Thus the Missouri Supreme Court explained in its oft-cited opinion, *In re Westfall*, that "an attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary."[73] A corollary to the constitutional conditions idea is that attorneys have no speech rights for speech they are able to engage in by virtue of their license to practice law.

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69. *See, e.g.*, Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK L. REV. 687, 702 (1997) ("[T]he First Amendment has, (properly) never been thought to apply . . . to a vast array of lawyer and legal system activity[.]").

As described, *infra* notes 70–78 and accompanying text, both courts and commentators have relied upon theories of attorney speech that provide little, if any, protection for attorney speech made in court proceedings or otherwise made in the attorney's capacity as an officer of the court, including constitutional conditions arguments, analogies of attorney speech to areas of limited speech protection, and public-private dichotomies. *See* Wendel, *supra* note 68, at 375–81 (analogizing attorney speech to public employee and government-funded speech); *id.* at 373–74 (discussing constitutional conditions arguments); Kathleen H. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 585–87 (1998) (analogizing attorney speech to public employees' speech, government-funded speech, and speech in a non-public forum); *id.* at 584–85 (discussing public-private dichotomy for protection of attorney speech); Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–90 (2008) (analogizing attorney speech to public employee speech).

70. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991) (citations omitted).

71. *See supra* note 69 (noting several theories in the literature that either fail to recognize or dilute speech rights for the legal profession).

72. This classic view was expressed by Benjamin Cardozo: "Membership in the bar is a privilege burdened with conditions." *In re* Rouss, 221 N.Y. 81, 84 (N.Y. 1917).

73. *In re* Westfall, 808 S.W.2d 829, 834 (Mo. 1991).

Thus, because an attorney could not have filed a motion to disqualify a judge on behalf of a litigant prior to becoming an attorney, she has no pre-existing free speech right that is violated by punishing or restricting that speech as an attorney.[74]

Further, several commentators have analogized attorney speech protection to other areas of limited First Amendment protection. Under these analogies, First Amendment protection for attorney speech is analyzed by comparison to speech protection for public employees, speech made in a non-public forum, and government-funded speech.[75] All of these analogies are unsatisfactory in certain respects. Under any of them, there is little or no protection for attorney speech made in the capacity of an attorney, including in filing papers with the court.[76]

The Supreme Court has provided mixed signals at best in the area of attorney free speech. While in some contexts the Supreme Court has employed normal First Amendment protection when analyzing restrictions on or punishment of attorney speech, the Court has done so sporadically.[77] As summarized by Frederick Schauer,

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74. This idea is illustrated by a hypothetical posed by Bradley Wendel:

> Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is to no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state because the lawyer had no preexisting right to address a jury in a courtroom.

Wendel, *supra* note 68, at 373.

75. *See, e.g.*, Sullivan, *supra* note 69, at 569, 585–87 (analogizing attorney speech to public employee speech, government-funded speech, and speech in a non-public forum); Wendel, *supra* note 68, at 375–81 (analogizing attorney speech to public employee and government-funded speech); Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–90 (2008) (analogizing attorney speech to public employee speech).

76. Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, *supra* note 66, at 392–413.

77. In a number of cases, the Supreme Court has applied full First Amendment protection to attorney speech, including strict scrutiny for limitations on political speech or speech regarding public officials. *E.g.*, Republican Party of Minn. v. White, 536 U.S. 765 (2002); Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001); NAACP v. Button, 371 U.S. 415 (1963). The Supreme Court has also struck down several restrictions on attorney advertising as violative of normal First Amendment analysis applicable to commercial speech. *E.g.*, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637–44 (1985); *In re* R.M.J., 455 U.S. 191, 203–06 (1982);

the doctrine and discourse of the First Amendment generally has not been applied to regulation of attorney speech, with only occasional "outbursts" of First Amendment recognition.[78] Kathleen Sullivan has argued that the Supreme Court's jurisprudence (sometimes imposing normal First Amendment doctrines and sometimes not) can be understood as applying a private/public distinction.[79] She argues that the Court has provided normal First Amendment protection when attorneys are speaking "as participants in ordinary public or commercial discourse on a par with other speakers in those realms," but that attorney free speech rights are limited (or even lost) when speaking in their role of attorney as officers of the court or "delegates of state power."[80] Importantly, under any of these theories of First Amendment protection for attorney speech, the attorney has little or no protection against punishment and sanctions for speech made in her capacity as an attorney representing a client's interests.

Bates v. State Bar of Arizona, 433 U.S. 350, 365 (1977).

However, the Supreme Court has also indicated that attorneys are entitled to lesser protection in cases such as *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991), where the Court upheld restrictions on pretrial publicity and stated broadly: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. . . . Even outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." Additionally, in *Florida Bar v. Went for It*, 515 U.S. 618, 634–35 (1995), the Supreme Court upheld restrictions on targeted direct-mail solicitation by attorneys, noting that "[s]peech by professionals obviously has many dimensions," but recognizing, nevertheless, that "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." As the Seventh Circuit has summarized, "given cases such as *Gentile* and *Went For It* the Constitution does not give attorneys the same freedom as participants in political debate." *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

78. Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK. L. REV. 687, 694–95 (1997).

79. Sullivan, *supra* note 69, at 584.

80. *Id.*

B. *Specific Aspects of Punishment*

In order to discuss the appropriate standard for punishing attorney speech (and the extent to which it should be protected under the Constitution), it is necessary to review some of the basic features involving punishment of attorney speech for impugning judicial integrity. Notably, these aspects are applicable in cases where speech occurred outside of a court context as well as in court filings, so the cases cited in this section come from both contexts and provide an overarching view of punishment of speech for impugning judicial integrity.

1. The Rationale: Preserving the Public Perception of Integrity

The overarching rationale for punishing speech that impugns judicial integrity—whether made in court proceedings, to the press, or in other public outlets—is "the state's compelling interest in preserving public confidence in the judiciary."[81] The Fourth Circuit has said: "the public interest and the administration of the law demand that the courts should have the confidence and respect of the people," and thus, "[u]njust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and *to destroy public confidence in their integrity,* cannot be permitted."[82] In a similar and oft-quoted vein, the Indiana Supreme Court has explained that by speaking derogatively of the judiciary, an attorney commits a "wrong . . . against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations."[83] That is, the preservation of a fair and impartial judicial system is apparently to be accomplished in part by punishing attorneys (and thereby chilling the speech of other would-be-critical attorneys) for speech that harms the judiciary's reputation. It is important to recognize that

81. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam).

82. *In re* Evans, 801 F.2d 703, 707 (4th Cir. 1986) (emphasis added).

83. *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam); *In re* Cobb, 838 N.E.2d 1197, 1213 (Mass. 2005) (quoting *Terry*); *Gardner*, 793 N.E.2d at 432 (same); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (same); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam) (same).

when courts refer to punishing speech to preserve the public's *confidence* in the judiciary, what that means is that speech is being punished in order to preserve judicial reputation.[84]

2. The Objective Standard

In punishing attorney speech for impugning judicial integrity, courts have generally rejected the constitutional standard created in *New York Times v. Sullivan* for punishment of speech regarding public officials. Often called the "actual malice" standard, the *Sullivan* Court held that allegedly defamatory speech regarding public officials could only be punished if the speaker knew the statement was false or acted with reckless disregard as to the truth or falsity of the statement.[85] The rejection of *Sullivan*'s actual malice standard is particularly surprising because the attorney is often being punished for violating MRPC 8.2, which on its face adopts *Sullivan*'s actual malice standard.[86] Nevertheless, state and federal courts have adopted an "objective" standard for punishing speech that impugns judicial integrity, which is generally done under the guise of MRPC 8.2. This is so even when speech is made to the press or outside of a court proceeding.

The objective standard comes in two variations—although some courts combine them and apply both. Under the first approach, courts examine whether the attorney had an objectively reasonable basis for her statements. This approach would appear on its face to approximate the standard employed under FRCP 11 or MRPC 3.1.[87] However, in applying the reasonable basis in fact standard, courts

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84. Tarkington, *supra* note 27, at 1630–31.

85. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

86. *See* MODEL RULES OF PROF'L CONDUCT R. 8.2 (2007) (forbidding attorneys from making statements "that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge").

87. *See* FED. R. CIV. P. 11 (requiring that "factual contentions submitted to a court be based on the attorney's knowledge, information, and belief formed after an inquiry reasonable under the circumstances"); MODEL RULES OF PROF'L CONDUCT Rule 3.1 (2007) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so that is not frivolous . . . .").

have tended to require a much greater factual showing than that used to satisfy the requirements of FRCP 11 or MRPC 3.1. For example, one court articulated this standard as requiring "an objective, reasonable belief that the assertions were true."[88] A leading case from the Ninth Circuit is illustrative. In *United States District Court v. Sandlin*, the court determined that Sandlin lacked a reasonable basis in fact when he accused a judge (in a complaint to the AUSA) of having substantively edited a transcript, because the judge in fact only edited the transcript for stylistic and grammatical errors.[89] Sandlin had been told of the editing by the court reporter and had consulted an expert on the matter.[90] Certainly such factual grounds would be sufficient under a Rule 11 standard to supply a reasonable basis in fact.

The standard for complying with FRCP 11 or MRPC 3.1 is relatively low. Federal appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown even when there is only weak evidence to support it. An attorney does not violate Rule 11 "unless a particular allegation is utterly lacking in support"[91] or is made in "deliberate indifference to obvious facts."[92] Further, "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement."[93] In contrast, courts requiring a reasonable basis for statements made about the judiciary have required that the attorney have "substantial competent evidence"[94] or "copious facts"[95] supporting the assertions, have discounted circumstantial evidence, and penalized overstatement and rhetorical hyperbole.[96]

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88. Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 516 (Conn. 2006).

89. 12 F.3d 861, 867 (9th Cir. 1993).

90. *Id.*

91. O'Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996).

92. Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998).

93. Navarro-Ayala v. Hernandez-Colon, 3 F.3d 464, 467 (1st Cir. 1993).

94. Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam).

95. State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007).

96. *See, e.g.*, *In re* Wilkins, 777 N.E.2d 714, 716–17 & n.2 (Ind. 2002) (per curiam), *modified by*, 782 N.E.2d 985, 987 (Ind. 2003) (punishing attorney for what would generally be characterized as rhetorical hyperbole in footnote of brief, and discounting circumstantial evidence brought by attorney to demonstrate basis for statement); U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 863–64, 867–68 (9th Cir. 1993) (punishing attorney for stating that judge materially edited transcript, when judge in fact had the transcript edited, but not

Further, some courts have construed attorney statements regarding the judiciary in the worst-possible light and with the most insulting meaning, and thus the attorney may be in the unfortunate position of trying to demonstrate that she had a reasonable basis in fact to say something that she did not intend to assert. For example, in *In re Frerichs* an attorney wrote in a petition for rehearing that the court had "willfully avoid[ed] the substantial constitutional issues" raised in that and two other cases.[97] The Iowa Supreme Court construed this statement as "easily" being read as "alleg[ing] commission of public offenses," including specific misdemeanor and felony offenses, and thus, it constituted accusing the court of "sinister, deceitful and unlawful motives and purposes."[98] The Missouri Supreme Court's construction of attorney statements in *In re Westfall* invited a stinging dissent that accused the court of adopting "at least six unsupportable paraphrases of the respondent's actual words" to support punishment of the attorney, each of which, "are the words of the writer [the court], not the words of" Westfall.[99]

The second variation on the objective standard is to ask what "the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances."[100] This reasonable attorney standard is not applied in the same manner as a normal professional standard of care. In cases applying this standard, there is never any evidence offered, or even any discussion as to what the reasonable attorney would say or do. Rather, courts

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substantially); *In re* Frerichs, 238 N.W.2d 764, 765 (Iowa 1976) (punishing attorney for using the term "willfully avoided" in petition stating that the court had not addressed properly raised constitutional issues); *see also infra* notes 97–99 and accompanying text regarding court construction of attorney statements.

97. *Frerichs*, 238 N.W.2d at 765.

98. *Id.*

99. *In re* Westfall, 808 S.W.2d 829, 841 (Mo. 1991) (Blackmar, C.J., dissenting).

100. Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam); *see also In re* Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam) (interpreting the predecessor to Model Rule 8.2 and stating that under it the appropriate standard is whether "a reasonable attorney would believe in the truth of the allegations"); *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991) (upholding *Graham*'s objective standard); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (promoting the objective standard of a reasonable attorney in similar circumstances).

appear to assume that the reasonable attorney does not make derogatory statements about the judiciary.[101] Generally in cases employing this standard, the court states what the standard is and then summarily concludes (without any discussion of the facts or circumstances) that a reasonable attorney would not make such statements about the judiciary.[102]

3. Truth or Falsity

In traditional defamation claims, truth is an absolute defense, and under *Sullivan* and its progeny, the plaintiff has the burden of proving the falsity of statements regarding a public official.[103] In the context of speech impugning judicial integrity, there have been cases where the defendant was denied the ability to prove the truth of the underlying assertions. For example, the Supreme Court of Kentucky has flatly rejected the argument that "truth or some concept akin to truth, such as accuracy or correctness, is a defense."[104] Indeed, in light of this statement, the United States District Court for the Eastern District of Kentucky concluded in April 2011 that MRPC 8.2 prohibits the making of true statements as long as they are "recklessly" made.[105] Other states may allow the attorney to bring

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101. *See* Tarkington, *supra* note 27, at 1589–90 (discussing cases applying the reasonable attorney standard).

102. *Id.*

103. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964). The plaintiff or punishing authority must prove the falsity of the statement because "[t]ruth may not be the subject of either civil or criminal sanctions," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), and because speakers will be chilled even though a statement "is believed to be true and even though it is in fact true, because of doubt whether it can be proved." *Sullivan*, 376 U.S. at 279. *See also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986) (citing to *Sullivan* and *Garrison* as establishing that a public figure or public official as "plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation").

104. Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 182–83 (Ky. 1996); *see also* Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Slavin, 145 S.W.3d 538, 549 (Tenn. 2004) (quoting *Waller*).

105. *See* Berry v. Schmitt, No. 3:09-60-DCR, 2011 WL 1376280, at *7–*8 (E.D. Ky., April 12, 2011). The district court rejected a constitutional challenge based on this reading of MRPC 8.2 that even true statements that are recklessly made are punishable, holding that "[a]lthough the rule extends to some constitutionally protected speech—namely, reckless true statements—it does not reach a 'substantial number of impermissible applications' . . . and is narrowly

evidence to prove the truth of the statements with the burden of proof on the attorney, which is akin to a traditional (pre-*Sullivan*) defamation action.

Nevertheless, and consistent with *Sullivan* and its progeny,[106] some courts have required a disciplinary authority to prove the falsity of the statement in order to impose discipline under MRPC 8.2. The Ninth Circuit in *Standing Committee on Discipline v. Yagman* initially recognized this requirement for punishment under MRPC 8.2, and other jurisdictions subsequently adopted it.[107] Nevertheless, the Ninth Circuit rejected *Sullivan's* actual malice standard and adopted an objective standard instead.[108]

Another problematic requirement associated with proving falsity of statements or demonstrating a basis of fact is that some courts rely conclusively on the testimony or denial by the accused judge. Such courts, therefore, determine that the assertions were false or lacked a reasonable factual basis by asking the criticized judge whether or not the statements are true.[109]

C. Post-Caperton Reform?

The courts that have addressed the problem of punishment of attorney speech since *Caperton* in large part have not changed their approach. The published decisions generally continue to apply an

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tailored to serve the state's compelling interest in maintaining public confidence in its judiciary." *Id.* at *8 (quoting New York v. Ferber, 458 U.S. 747, 771 (1982)).

106. *See supra* note 103 (citing cases holding that statements in question must be false for there to be civil or criminal liability).

107. Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430, 1458 (9th Cir. 1995); *see also* Smith v. Pace, 313 S.W.3d 124, 135 (Mo. 2010) (adopting *Sullivan*'s actual malice standard, including requiring the disciplining authority to prove the falsity of the statements).

108. *Yagman*, 55 F.3d at 1444–45.

109. *See, e.g.*, Disciplinary Counsel v. Frost, 909 N.E.2d 1271, 1276 (Ohio 2010) ("Testifying before the hearing panel, Judge Adams firmly denied any prejudice or other impropriety."); Idaho State Bar v. Topp, 925 P.2d 1113, 1116–17 (Idaho 1996) (determining that falsity of attorney statement was conclusively established by stipulation that judge would deny alleged political motivation if called to testify).

objective standard and proceed under pre-*Caperton* methodologies.[110]

One notable exception is *Smith v. Pace*,[111] a contempt case from the Missouri Supreme Court. Although the case deals with contempt rather than disciplinary sanctions, the Court discusses generally applicable principles for punishing attorney speech regarding the judiciary made in court filings.[112] The court does not cite to *Caperton*, yet the court recognizes the need for some protection for attorney speech regarding the judiciary.[113] Further, the court questions its prior pronouncement regarding the lack of protection for attorney speech made in *In re Westfall*—a case that has been relied upon in a number of jurisdictions.[114] The court in *Smith* specifically recognized that "[t]he scrutiny of a state's interest in

110. *See, e.g.*, *Frost*, 909 N.E.2d at 1277–78 (applying objective standard in punishing speech for impugning judicial integrity and explaining that the compelling state interest is "preserving public confidence in the judiciary"); *In re* Oladiran, No. MC-10-0025-PHX-DGC, 2010 WL 3775074, at *3 (D. Ariz. 2010) (applying objective standard from *Yagman*, along with *Yagman*'s requirement that the disciplinary authority prove the falsity of the statements); *Berry*, 2011 WL 1376280, *7–*8 (holding that MRPC 8.2 prohibits even true statements as long as recklessly made, and that such a prohibition is justified by "the state's compelling interest in maintaining public confidence in its judiciary").

111. 313 S.W.3d 124, 135 (Mo. 2010).

112. *Id.* at 134–35.

113. *Id.* at 135.

114. *In re Westfall* was one of the major decisions adopting the objective standard for punishing speech for impugning judicial reputation under Rule 8.2. The objective standard had previously been adopted by the Minnesota Court in interpreting MRPC 8.2 in *In re Graham*, 453 N.W.2d 313 (Minn. 1990)—a case that the Missouri Supreme Court relied upon in *Westfall*. The court in *Graham* argued that "the standard cannot be equivalent to that of *Sullivan* and its progeny, because the standard for determining actual malice must be objective when dealing with attorney discipline . . . because of the interests attorney discipline serves." *In re* Graham, 453 N.W.2d at 321–22.

The Missouri Supreme Court's *Westfall* decision is relied upon in such notable cases as *Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1437 & n.12 (9th Cir. 1995); *U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 865, 867 (9th Cir. 1993); *Peters v. Pine Meadow Ranch Home Ass'n.*, 151 P.3d 962, 966 & n.11 (Utah 2007); *Notopoulous v. Statewide Grievance Comm.*, 890 A.2d 509, 520 n.14 (Conn. 2006); *In re Cobb*, 838 N.E.2d 1197, 1212 (Mass. 2005); and *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003).

regulating lawyer speech may be significantly higher today than when this Court decided *Westfall*."[115] Thus the court in *Smith* held:

> Before a lawyer can be found guilty of criminal *contempt for what is written in his or her pleadings*, there must be some finding that the lawyer's statements were *made with actual knowledge* of their falsity or that the statements were *in fact false* and were *made with reckless disregard for whether they were true or false*.[116]

The court appeared to adopt this subjective *Sullivan* approach not solely for contempt but for a broad range of cases. The court explained its holding as being applicable to "cases involving lawyers' statements," and further explained that such cases "require some knowledge of falsity or, at the very least, a reckless disregard for whether the false statement was true or false."[117] Further, the court specifically discussed this standard as being applicable in the attorney "disciplinary process," which the court thought "may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or falsity of the lawyer's statements."[118]

Importantly, the *Smith* court also refused to credit the judge's testimony as establishing the falsity of the accusations.[119] The *Smith* court noted that "[t]he only witness in this case was Judge Carter, the complainant," who "testified that Smith's written statements were false."[120] Yet the factfinder had not been asked to determine whether or not the statements were false.[121] Rather, the charge proceeded (as in the cases mentioned above) on the basis that the statements were

115. Smith v. Pace, 313 S.W.3d 124, 135 n.15 (Mo. 2010) (citing *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), and to scholarly commentary criticizing the *Westfall* decision).

116. *Smith*, 313 S.W.3d at 136 (emphasis added).

117. *Id.* at 135.

118. *Id.*

119. *Id.* at 136.

120. *Id.*

121. *Id.* at 135.

established to be false solely by the judge's testimony as to their falsity. The *Smith* court rejected this approach.[122]

Smith is important for a number of reasons. First, it recognizes a Free Speech Clause right for attorney speech made in court filings. Second, it rejects its prior adoption of the objective standard and instead adopts *Sullivan*'s subjective actual malice standard for punishing attorney speech critical of the judiciary. Third, it rejects the method of conclusively establishing the falsity of the attorney's statements solely through the judge's own denial of impropriety.

Nevertheless, the *Smith* court's approach is flawed, especially to the extent it is interpreted to establish First Amendment protection to prevent all forms of punishment of attorney statements made in court filings regarding the judiciary absent a showing of actual malice. As will be discussed below, in the disqualification context, it is important that disqualification be separated from reputational harm—in the eyes of all involved. Further, while the *Sullivan* standard is appropriate where a court is punishing an attorney for impugning judicial integrity, courts should and do have the ability to require attorneys to have a reasonable factual basis for statements made in court filings in accordance with MRPC 3.1 and FRCP 11.

IV. ATTORNEY SPEECH RIGHTS TO CHALLENGE JUDICIAL IMPARTIALITY

A. A Speech Right Commensurate to Fulfill the Attorney's Function

The approach taken by courts and commentators in examining speech rights of attorneys contains a major defect: namely, under each of the theories discussed above, attorneys lack speech rights when speaking in their capacity as attorneys. This is exemplified by the constitutional conditions theory, as well as its corollary that attorneys have no free speech right to engage in speech that the attorney could not have engaged in prior to becoming an attorney. Consequently, the attorney has no free speech protection

122. Smith v. Pace, 313 S.W.3d 124, 137 (Mo. 2010) (noting that proof of the falsity of the lawyer's statements is an essential element of a contempt charge based on such statements).

for speech made in court filings in a representative capacity because the attorney could not have engaged in such speech prior to becoming an attorney.[123] Kathleen Sullivan has similarly explained that the recognition of free speech rights for attorneys in Supreme Court cases can be understood as recognizing rights when the attorney speaks as a private citizen, but denying or limiting free speech rights when the attorney acts in his role as an attorney.[124] All of the scholarly analogues for examining the constitutionality of attorney speech restrictions call for a similar categorization.[125]

The Supreme Court has seemed to support this categorical approach to attorney speech in some cases. Notably, in the area of punishing attorney speech made in court filings, courts often quote the Supreme Court's statement in *Gentile*: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[126] Further, in 2010, in *Holder v. Humanitarian Law Project* the United States Supreme Court took this categorical approach to an extreme when it held that attorneys lacked First Amendment protection for lawful, nonviolent legal advice and assistance to or on behalf of organizations designated by the Secretary of State as Foreign Terrorist Organizations.[127] The determining factor for the Court in holding that the plaintiff attorneys lacked a First Amendment right to engage in such speech was that "[t]he statute does *not* prohibit independent advocacy or expression of any kind."[128] According to the Court, "plaintiffs may say anything they wish on any topic,"[129]

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123. *See, e.g.*, *supra* note 74 and accompanying text (illustrating this corollary to the constitutional conditions theory).

124. Sullivan, *supra* note 69, at 584.

125. *See* Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, *supra* note 66, at 393–413 (discussing persuasiveness of analogies).

126. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991). Several cases have cited *Gentile*—in the context of punishing attorney statements made in court filings—as establishing the limited nature of the First Amendment's protection of official attorney speech. *E.g.*, *In re* Cobb, 838 N.E.2d 1197, 1211 (Mass. 2005); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam); *In re* Shearin, 765 A.2d 930, 938 (Del. 2000).

127. 130 S. Ct. 2705, 2730 (2010) (emphasis added).

128. *Id.* at 2723.

129. *Id.* at 2722–23.

and "Congress has not, therefore, sought to suppress ideas or opinions in the form of 'pure political speech.'"[130] Rather, the statute only prohibits speech performed "under the direction of, or in coordination with" the plaintiff attorney's proposed clientele and thus was constitutional.[131]

Holder thus represents the pinnacle, the *reductio ad absurdum*, the ultimate declaration that attorneys enjoy free speech rights in their private citizen capacity (and thus the plaintiffs could engage in "independent advocacy or expression" on "any topic"), but lack free speech rights for speech made in their role as attorney (and thus plaintiffs can be prohibited from engaging in all speech undertaken "in coordination with or at the direction of" their proposed clientele). Such a distinction is acutely troubling because it denies the attorney's core function in the United States legal system. The essence of the role of the attorney is to speak in coordination with and on behalf of clients. Attorneys, when acting as attorneys, do *not* speak for themselves or independently. It is nearly absurd to say that an attorney's speech rights have not been abridged because the attorney is "only" prohibited from speaking "in coordination with or at the direction of" their desired clientele. The attorney's very role is to speak on behalf of someone else; to invoke the law for someone else; to provide legal advice to someone else on how to act or invoke the law; and to raise arguments and claims in court proceedings for someone else. Indeed, the attorney cannot fulfill any of these functions without speaking to and in coordination with the client.

The central problem with the traditional distinction for First Amendment protection of attorney speech is that, taken to its extreme, it means that attorneys can be punished for and restricted from fulfilling their essential role in our legal system.[132] In the context of attorney speech aimed at preserving a client's due process right to an impartial adjudicator, or preserving other rights to seek disqualification of a judge, the attorney must have speech rights

130. *Id.* at 2723.

131. *Id.* at 2723; *see also id.* at 2728 ("[M]ost importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.").

132. Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, U.C. DAVIS L. REV. (forthcoming Nov. 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669617.

commensurate to fulfilling the attorney's role in raising and presenting such arguments without fear of punishment.

Yet, not all of the Supreme Court's decisions support the traditional dichotomy. Indeed, in *NAACP v. Button*, the Virginia legislature attempted to thwart desegregation by prohibiting the methods used by the NAACP lawyers to inform African Americans about their rights and institute legal action on their behalf.[133] The Supreme Court recognized First Amendment rights of speech, association, and petition that protected the NAACP's activities from such regulation. The Court eloquently stated, "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion."[134] In a similar vein, in *Legal Services Corp. v. Velazquez*, the Supreme Court recognized a Free Speech Clause right held by both the attorneys and their clients to raise relevant and colorable claims in a court proceeding.[135] In *Velazquez*, Congress had prohibited attorneys receiving funds from the Legal Service Corporation from representing or advising clients in welfare benefits cases if the client's case included a challenge to the validity of existing welfare laws. The Court recognized that the restrictions "prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power."[136] This was so because Congress had sought to "insulate its own laws from legitimate judicial challenge,"[137] including insulation "from constitutional scrutiny and certain other legal challenges."[138] That is, Congress enacted a law that prohibited attorneys from exploring the constitutionality and legal validity of congressional laws. To the extent that such a prohibition on attorney speech is successful, the Constitution itself is undermined. As the Supreme Court acknowledged, "Congress cannot wrest the law from the Constitution which is its source."[139] Thus, the Court recognized that attorneys should be able to "present

133. NAACP v. Button, 371 U.S. 415, 419 & n.2 (1963).
134. *Id.* at 429.
135. 531 U.S. 533, 548–49 (2001).
136. *Id.* at 545.
137. *Id.* at 548.
138. *Id.* at 547.
139. *Id.* at 545.

all the reasonable and well-grounded arguments necessary for proper resolution of the case."[140]

The Court's *Velazquez* decision has potent applicability in the context of the judiciary punishing speech of attorneys who challenge judicial impartiality in court proceedings. Like Congress in *Velazquez*, judges who punish or threaten attorneys with punishment for raising arguments of judicial bias effectively insulate their own actions from constitutional and other legal scrutiny and challenge. This is particularly important when, as noted above, a litigant's right to an impartial adjudicator is protected primarily through the recognition of an individual due process right.[141] The constitutional validity of judicial power requires an impartial adjudicator. As the *Caperton* Court recognized, a basic requirement of due process is a fair trial in a fair tribunal.[142] Yet, just as the *Velazquez* Court recognized that the validity of congressional power must be subject to meaningful constitutional scrutiny, so too, the validity of judicial power must be subject to meaningful scrutiny. Thus, attorneys must be able to raise "all the reasonable and well-grounded arguments" for challenging judicial impartiality and preserving their client's rights to due process and court access.

In line with the Supreme Court's *Velazquez* and *Button* cases, I have proposed a theory of First Amendment protection for attorney speech that protects at its core the essential functions of the attorney in the United States legal system.[143] Under this access-to-justice theory of the First Amendment, attorney speech is entitled to protection under the Free Speech Clause where such speech is key to providing or ensuring access to justice or the fair administration of the laws.[144] The basic idea of the theory is that attorneys perform a

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140. *Id.*

141. *See supra* Part I (outlining the development of a litigant's due process right to a fair trial in a fair tribunal following the Supreme Court's invalidation of states' attempts to reform judicial elections on a structural level).

142. Caperton v. A.T. Massey Coal Co., 129 S. Ct.. 2252, 2259 (2009).

143. Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, *supra* note 132.

144. *See id.* In *A First Amendment Theory for Protecting Attorney Speech*, I identify four categories of attorney speech that are essential to the attorney's function and thus are entitled to special protection under the access-to-justice theory. Namely, core free speech protection is warranted for (1) attorney speech invoking the law on behalf of a client, or informing the client on how to invoke the law, (2) attorney speech advising a client as to the lawfulness or unlawfulness of proposed or past conduct, (3) attorney speech raising relevant and colorable claims

key function in access to justice and the fair administration of the laws in the United States legal system, and attorneys need speech protection commensurate to that role. As the *Velazquez* Court recognized, restrictions on attorney speech can "distort[] the legal system by altering the traditional role of . . . attorneys."[145] While a great deal of attorney speech would not fall within this core area of speech protection, speech raising relevant and colorable legal claims in court proceedings, as well as attorney speech aimed at preserving constitutional rights, is protected. The theory also recognizes that certain restrictions on attorney speech (such as confidentiality) should be constitutional because such restrictions are also required to preserve the attorney's special role in access to justice and the fair administration of law.

In the context of attorney speech regarding the judiciary in motions for disqualification or asserting a denial of due process, attorneys must be able to raise such arguments without threat of punishment for questioning judicial integrity. Thus, in the *Santana-Ruiz* case noted above, the Utah Supreme Court was manifestly out of line when it admonished attorneys to be wary of the "pitfalls" of raising arguments that a litigant or criminal defendant was denied due process because of a biased judge.[146] The Court brought its threat home by citing to a case where an attorney and his client were severely punished for questioning the motives of a lower court.[147]

On the other hand, speech restrictions like FRCP 11 or MRPC 3.1, which require an attorney to have a reasonable basis in fact for statements filed in a court proceeding, are equally essential to the proper functioning of the judicial system. Part of the idea of a fair trial in a fair proceeding includes a reasonable degree of factual "truth" forming the basis for a court's decision. If attorneys were only subject to *Sullivan*'s actual malice standard in statements filed in the court system, an attorney could include any factual assertions as long as the attorney did not subjectively believe the assertions to

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in court proceedings, and (4) attorney speech necessary to protect the constitutional rights of others.

145. *Velazquez*, 531 U.S. at 544.

146. State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007).

147. *Id.* (citing Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007)).

be false or act with reckless disregard as to their truth or falsity. It would be up to the judge to demonstrate their falsity before punishing an attorney for making such statements. Such a standard for statements of "fact" on which we expect a system of justice to produce fair adjudication would be completely unworkable. Thus, under the access-to-justice theory, it certainly does not frustrate the role of the attorney to impose a requirement like the reasonable basis in fact requirements of FRCP 11 and MRPC 3.1 on attorney speech; instead, such restrictions on attorney speech are themselves essential to the proper functioning of the judicial system and thus are constitutionally permissible.

B. Disassociating Disqualification from Impugning Judicial Integrity and Defamation

Recognizing that attorneys have a First Amendment right to raise colorable and relevant claims of judicial disqualification or denial of due process is only part of what should happen to help *Caperton*'s individual due process right be a more successful method for preserving an adequate level of impartiality in the judiciary. Additionally, disqualification must be disassociated from impugning judicial integrity and from defamation.

1. Disqualification and Impugning Judicial Integrity

It is precisely because "a fair trial in a fair tribunal is a basic requirement of due process"[148] that judges are hesitant to agree that a disqualification motion has merit. The judge understands that it is an essential function of her job to be a neutral, fair, and impartial adjudicator. Assuming she takes this role seriously, she likely makes a concerted effort in all of her cases not only to appear, to act, and to be neutral, but also to overcome any temptations to "not hold the balance nice, clear, and true."[149] Thus, for the judge to agree or find that there is a basis to find a lack of such qualities is tantamount to an admission that the judge lacks the most essential qualification (apart, perhaps, from competence) for her job. A disqualification

148. Caperton v. A.T. Massey Coal Co., 129 S. Ct.. 2252, 2259 (2009) (quotations omitted).

149. *Id.* at 2261 (quotations omitted).

motion can therefore be seen as an impeachment of the judge's character or as impugning judicial integrity.

The problem is exacerbated by the Supreme Court's insistence that impartiality is primarily protected through the recognition of individual litigant rights to challenge impartiality in court proceedings before the allegedly biased judge. As noted above, both *Citizen's United* and *White* frustrate state attempts to improve impartiality through judicial election reforms regarding donations, as well as campaign promises and statements. The Court's rulings hamper state attempts to control judicial elections in a manner that curbs bias or its appearance before either is created (through limiting corporate or union campaign expenditures or through circumscribing campaign promises or statements). The result of allowing judicial elections, and allowing (indeed, requiring) judicial elections to be carried out in a manner that increases potential for bias or its appearance, is that the appearance of bias (and perhaps bias itself) occurs in judicial proceedings.

Nevertheless, the majority in *Caperton* correctly treated disqualification—even where it is necessitated by the constitution's guarantee of due process under "extreme facts"—as not impugning the integrity of Justice Benjamin at all.[150] Indeed, the Court credited his determination that he was not actually biased, and stressed the importance to the judicial system of preserving the appearance of impartiality.[151] As explained by Penny White, "the majority regarded the way the judicial action appears to an objective outsider as more important than whether the judge personally believes she can be impartial" because "[a] decision rendered by an apparently biased judge is unacceptable, even if the decision is legally correct and the judge is not, in fact, actually biased."[152] Professor White concludes that the *Caperton* majority realized that "the purpose of recusal motions is to enforce the right to a fair trial, thereby assuring

150. *See id.* at 2263 ("Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.").

151. *Id.*

152. White, *supra* note 10, at 136.

the integrity of the justice system" but, importantly, that "[r]ecusal motions *are not pejorative*."[153]

Professor White contrasts the majority's view of disqualification as not itself being pejorative or impugning the individual integrity of the judge with the view of the *Caperton* dissenters. As White notes, the dissenters' questions reveal a concern with protecting the individual reputation of the judge being disqualified.[154] Reputation, however, is only at stake if one "consider[s] a recusal motion based on probable bias to be an affront to judicial dignity."[155] The *Caperton* dissent begins by noting the existence of a "presumption of . . . integrity" of judges, explaining that "we trust that [judges] will live up to" their promise to "uphold the Constitution and apply the law impartially."[156] Further, as White notes,[157] the dissent's questions thirty-nine and forty are entirely focused on the ability of the judge to preserve her reputation. Specifically, the court asks whether "the judge get[s] to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case," and questions whether, where a case settles, the judge is left "with no way to salvage his reputation[.]"[158]

For *Caperton*'s due process right to be effective, judges, litigants, and attorneys should recognize that even a successful disqualification motion does not serve the purpose of attacking the ultimate integrity of the judge, nor should it generally be seen to soil the judge's reputation. Generally, the harm to be remedied is not categorical unfitness for judicial office, but is a conflict of interest or appearance of bias in the specific underlying case. Judges should come to terms with this idea, should not be too insistent on their ability to turn on neutrality blinders (even when improbable), and should avoid becoming offended by the suggestion that they may not always be, or may not always appear, neutral.

It would also be helpful for attorneys to recognize that a disqualification issue in a given case should not serve the purpose of

153. *Id.* (emphasis added).

154. *See id.* at 136–37 (discussing the possibility of tarnishing a judge's reputation).

155. *Id.*

156. *Caperton*, 129 S. Ct. at 2267 (Roberts, J., dissenting).

157. White, *supra* note 10, at 137 (discussing the dissent's focus on the effects of recusal motions).

158. *Caperton*, 129 S. Ct. at 2272 (Roberts, J., dissenting).

attacking the ultimate integrity of the judge. If attorneys limited their arguments to the issue of disqualification, they might use less invective and rhetorical hyperbole. By overstating their case and using strong language, they invite the judge to see the motion as one that is aimed at discrediting the judge's personal integrity and as one requiring the judge to respond (be it in writing or through punishment) by denying any impropriety and defending her honor.

One of the few cases in the attorney speech context to recognize this point is *United States v. Brown*. In *Brown*, the Fifth Circuit reversed the suspension of a lawyer in the Western District of Louisiana for seeking a new trial based on a judge's partiality.[159] The Fifth Circuit explained that "[a]ttorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court."[160] The court in *Brown* explained that it was "wary, as a matter of policy, of equating an attorney's questioning of the court's conduct of a trial with the sort of character attack proscribed by Rule 8.2."[161]

If disqualification is disassociated from reputational harm (defamation), then the question becomes whether there is an objective appearance of bias, which could arise even if a judge is not actually biased and which should generally be recognized as a non-reputational affront. This is the approach taken in *Caperton*. The Court refused to "determine whether there was actual bias,"[162] even where the case involved "extreme facts."[163] Yet at the same time, the Court held that there was an unconstitutional "objective risk of actual bias."[164] The Court explained that "objective standards may also require recusal whether or not actual bias exists or can be proved," recognizing that "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"[165]

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159. United States v. Brown, 72 F.3d 25, 27 (5th Cir. 1995).
160. *Id.* at 29.
161. *Id.*
162. *Caperton*, 129 S. Ct. at 2263.
163. *Id.* at 2265.
164. *Id.* at 2256.
165. *Id.* at 2265 (citation omitted).

Thus, the *Caperton* majority views disqualification as being disassociated from impugning judicial integrity.

An important problem with intertwining disqualification and reputational harm (the dissent's approach in *Caperton*), is that it puts the judge in a very difficult position when presented with a motion to recuse. The judge who is asked to grant the motion is being asked to impugn her own integrity and basically admit that she is not doing her job. The problem is only exacerbated where the judiciary is elected and feels pressure to self-promote from an electorate.

Moreover, to the extent that the idea that a disqualification motion impugns judicial integrity prevails, the rationale for punishing the speech of the attorney is increased. As noted, the primary "compelling state interest" in punishing such attorney speech is to preserve public perception of and confidence in the integrity of the judiciary.[166] If a disqualification motion itself is seen as impugning judicial integrity, then judges have an incentive to deny or respond by defending their character—punishing attorney speech is one way of accomplishing that end. If, on the other hand, courts (and litigants, and parties) view motions for disqualification as being a regular and primary method of ensuring adequate levels of the impartiality (and thus the integrity) of the judicial system, including cases in which judges are not actually biased, then even if motions for disqualification are common, and even if they are granted, the perception of judicial integrity should not be harmed.

2. Disassociating Disqualification from the Defamation Context

Once disqualification is disassociated from impugning judicial integrity or imposing reputational harm on a judge, then the appropriate circumstances for punishing attorney speech become easier to identify. First, the fact of an allegation of bias or appearance of bias should not be seen as *per se* objectionable, as impugning judicial integrity, or as raising a possible violation of MRPC 8.2. That said, attorneys are still required (as they are with any type of court filing) to have a reasonable basis in fact for their allegations and to have performed an inquiry that is reasonable under

166. Disciplinary Counsel v. Frost, 909 N.E.2d 1271, 1277 (Ohio 2010).

the circumstances. These requirements are expressed in FRCP 11 (and its state rule counterparts)[167] and in MRPC 3.1.[168]

Thus, when an attorney does not have a reasonable basis in fact for her factual assertions made in a motion for disqualification, the Court can punish the attorney under either FRCP 11 or a disciplinary authority can punish the attorney under MRPC 3.1. In such scenarios, the burden is on the attorney to demonstrate a reasonable factual basis, although, as shown below, complying with such a requirement is not very difficult.

Where, however, a judge is punishing an attorney for harming the judge's reputation—that is, for impugning judicial integrity (usually under MRPC 8.2)—then *Sullivan*'s actual malice standard should apply. The recognition and use of this standard for punishing statements impugning judicial reputation in the context of out-of-court statements improves self-government and the ability to check abuse of judicial power, increases robust public debate regarding public officials, and counters judicial self-entrenchment.[169] It also avoids the smack of self-dealing inherent in carving out an exception to *Sullivan* by the judiciary when judicial reputation is on the line.

Further, using *Sullivan*'s actual malice standard in these circumstances would curb punishment on the basis of impugning judicial reputation and help disassociate reputational harm to the judiciary with statements made in court filings about the judiciary. Under current objective approaches to MRPC 8.2 and similar rules, attorneys can easily be found to have violated MRPC 8.2, which makes it more likely that courts will find a violation and increases the judicial perception that such conduct is wrongful and should be punished. By employing *Sullivan*'s subjective standard, the judiciary is deterred from finding such a violation.[170] Rather, the focus in

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167. FED. R. CIV. P. 11(b).

168. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]").

169. *See generally* Tarkington, *supra* note 27 (outlining the problems in rejecting the *Sullivan* standard).

170. Indeed, perhaps there should be immunity from punishment for impugning judicial reputation (thus prohibiting discipline for violating MRPC 8.2) through statements made in court proceedings, similar to the general litigator's

court proceedings will be (and should be) whether the attorney had a reasonable basis in fact as that phrase is defined in cases interpreting FRCP 11 and MRPC 3.1.

Thus, while the Missouri Supreme Court in *Smith* (happily) recognized the need to reform their extreme holding in *Westfall*, the court nevertheless erred in evaluating in-court attorney speech under the *Sullivan* standard. Although *Smith* focused on the specific problem of contempt, the Court indicated that in order to punish attorney speech regarding the judiciary there must be a showing that the attorney knew the statement was false or acted with reckless disregard as to its falsity.[171] The *Smith* court applied this subjective standard, even where the speech was written in a court filing.[172] The *Smith* court was right in holding that to punish the speech for impugning judicial integrity (which is likely the basis for the contempt charge anyway), the actual malice standard must be met.[173] The court was incorrect, however, in indicating that to punish any attorney speech regarding the judiciary, the actual malice standard must *always* be shown.[174] Instead, in cases where an attorney lacks a

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privilege. It is somewhat curious why an attorney is privileged to say anything regarding a witness or party and is absolved from liability in defamation, but is held accountable to the judiciary for statements made that impugn judicial reputation or integrity.

Notably, in explaining the expected reach of MRPC 8.2, the drafters of the modern rule indicated that statements made in court filings do not fall within the ambit of Rule 8.2 by stating that "[t]he permissible scope of comment *to or about a judge in the course of a proceeding* is determined by Rule 3.5." MODEL RULES OF PROF'L CONDUCT R. 8.2 legal background at 207 (Proposed Final Draft 1981) (emphasis added). MRPC 3.5 proscribes conduct disruptive to the tribunal. Thus, perhaps MRPC 8.2 should be construed as being applicable only to punishment of extrajudicial speech, while using normal content-neutral rules regarding court conduct and the appropriate level of factual basis for punishment of speech in court proceedings.

171. Smith v. Pace, 313 S.W.3d 124, 135 (Mo. 2010).

172. *Id.* at 135–36.

173. *See* Tarkington, *supra* note 27 at 1636 (arguing that courts are required to follow *Sullivan* in punishing attorney speech on the basis that speech impugned judicial integrity); Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, *supra* note 66 at 422–30 (arguing that courts are required to apply the *Sullivan* standard when punishing speech to preserve judicial reputation, but that courts can still punish attorneys for failing to comply with content-neutral court rules requiring factual basis for allegations).

174. *Smith*, 313 S.W.3d at 135 (explaining that "cases involving lawyers' statements require some knowledge of falsity or, at the very least, a reckless

reasonable basis in fact for a statement made in court filings and proceedings, the judge should be able to impose normal Rule 11 sanctions (and a disciplinary authority should be able to punish the attorney for violating MRPC 3.1), even if actual malice is not shown.

C. Employing a Normal Rule 11 Standard

In the disqualification context, having courts abandon punishment for impugning judicial integrity and instead controlling for falsity through Rule 11's reasonable factual basis standard is important for four reasons. First, the Rule 11 standard preserves the court's interest in having a reasonable basis in fact for assertions made in the adjudicative process. The access-to-justice theory of Free Speech Clause protection only protects attorney speech that serves an essential function of the attorney's role. This allows for content-neutral regulations and court rules that serve legitimate government purposes—which include those interests that are central to the adjudicative process. Certainly Rule 11's requirement that factual allegations have a reasonable basis in fact and be made after an inquiry reasonable under the circumstances is a permissible rule attuned to the legitimacy of adjudication and court processes. Court decisions bring the force of government power against the losing party, and as an essential fairness function, courts must be able to require that the facts on which it brings this power to bear have some reasonable basis in reality.

Second, employing Rule 11 avoids the true-false dichotomy found in defamation. Judges who think of disqualification motions as impugning their integrity (that is, as harming their reputation) are quick to "find" the alleged fact of bias false. Although *Sullivan*'s general requirement that punishment for statements requires that the statements be "proven false" is fairly difficult, in the context of statements regarding the judiciary, the requirement of proving falsity has sometimes been made superficial or meaningless because the lack of bias or partiality is proven "true" by the judge's testimony

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disregard for whether the false statement was true or false" in the "disciplinary process").

that she is not biased.[175] Of course, as is true for defamation, "truth" generally is a defense. However, it is not advisable to require attorneys to prove the "truth" of an underlying allegation of probability of bias or impartiality. Under Rule 11, the attorney need not prove the ultimate "truth" of an assertion to avoid punishment.[176] Further, a judge's assertion that she is not biased would not be treated as demonstrating a lack of a factual basis for the attorney's assertion. Unlike defamation, FRCP 11 is not focused on demonstrating either ultimate truth or falsity (neither of which is workable in the context of examining a particular judge's appearance of impartiality or lack thereof). Instead, under FRCP 11, the focus is whether there is a reasonable basis in fact for the statements. Is there some evidentiary support? If there is, then the allegation is permissible and should not be punished even if it is ultimately shown to be untrue.

Third, Rule 11 comes with a body of case law defining the appropriate standards and limits in determining the requisite factual basis for assertions and warranted punishment, if any.[177] Courts employing the "objective" standard discussed above appear to be imposing something similar to Rule 11. Yet, the objective standard for punishing attorney speech is keyed to protecting reputation and results in significantly harsher punishments for statements that under a normal application of FRCP 11 would have been found to have a reasonable foundation.[178] Thus, not only is FRCP 11 the appropriate

175. *See, e.g.*, *id.* (addressing freedom of speech in the legal profession); Disciplinary Counsel v. Frost, 909 N.E.2d 1271, 1276 (Ohio 2010) (addressing judge's testimony that she was not prejudiced); Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996) (relying on judge's testimony that decisions were not politically motivated).

176. *See* Fed. R. Civ. P. 11(b) (West 2010) (requiring only that attorneys certify to the best of their knowledge, information, and belief, and after a reasonable inquiry, that the factual contentions they make have evidentiary support or will have evidentiary support after a reasonable opportunity for investigation or discovery).

177. *See, e.g.*, 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1331–1339 (4th ed. 2008) (collecting cases and discussing requirements of and sanctions under Rule 11).

178. *See* Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, *supra* note 66, at 428 ("[C]ourts imposing punishment for impugning judicial integrity have imposed exceptionally severe punishments, including suspending attorneys from the practice of law or summarily deciding cases in favor of the opposing party. In contrast, under [Rule] 11, the sanction

standard, but punishment for statements made regarding the judiciary under FRCP 11 or MRPC 3.1 must be done in accordance with punishment under those rules in other contexts. To the extent that judges require heightened factual support for statements regarding the judiciary made in court filings, they are preserving their own reputation rather than requiring the necessary factual foundations for statements made in court filings.

Fourth, the standards of FRCP 11 and MRPC 3.1 are lenient, calling only for punishment where there is clearly no factual basis for the statements.[179] Indeed, the existence of immunity for defamation in the context of statements made in court proceedings allows attorneys to make the strongest reasonable inferences possible on their clients' behalf without risking liability if such allegations are ultimately determined to be inaccurate or untrue. Attorneys, therefore, become accustomed to asserting facts that approach the outer limits of a reasonable factual basis. This leeway with respect to statements of facts as to other participants in the litigation process should be granted to attorneys in preserving their client's rights to an impartial adjudicator.

D. The Judge's Belief of Her Own Impartiality Should Not Demonstrate Rule Violation

Some of the arguments for reform in recusal mirror problems in the area of attorney speech restriction. For example, as Michigan has recognized post-*Caperton*, it is problematic to have the very judge who is alleged to appear biased or partial be solely responsible for adjudicating the disqualification motion.[180] In a similar vein, violation of FRCP 11 or MRPC 3.1 (or of MRPC 8.2 for impugning judicial integrity) should not be demonstrated by testimony from the judge that he was not biased or that the allegations were untrue. Rather, for both FRCP 11 and MRPC 3.1, the relevant inquiry is

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must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.") (quotation omitted).

179. *Supra* notes 87–88 and accompanying text.

180. *See* Pellegrino v. AMPCO Sys. Parking, 789 N.W.2d 777 (Mich. 2010) (discussing the new disqualification rule); *see also* MICH. CT. R. 2.003 (2010) (allowing referral of a challenge to a judge other than the challenged judge).

whether the attorney had a reasonable basis in fact as that standard is interpreted in other Rule 11 cases.

Finding a violation of the rule based on the judge's testimony is troubling for a number of reasons. First, and obviously, it contains the same conflict of interest problem that exists in the recusal context of having the judge make the first (and sometimes the conclusory) determination of whether the judge should be disqualified. Second, a judge, particularly an elected judge, has every incentive to convince herself of her impartiality and testify thereto rather than testifying that she is biased or partial. It is absurd to expect a judge to testify that assertions questioning the judge's impartiality are true. An example can be found in *Idaho State Bar v. Topp*.[181] Topp, a part-time county attorney, was disciplined for implying that a judge making a decision regarding a county expenditure was motivated by "political ramifications."[182] Topp presented circumstantial evidence from which he could infer such motivation.[183] The parties stipulated that if called as a witness, the judge would deny any such political motivation. The Idaho Supreme Court treated the fact that the judge would testify that he was not politically motivated as conclusive evidence as to the lack of any political motivation and thus imposed discipline on Topp for impugning judicial integrity in violation of MRPC 8.2.[184]

The Missouri Supreme Court in *Smith v. Pace* recognized this problem.[185] In Smith's criminal contempt proceeding, the only witness as to the foundation for the attorney's statement was the testimony of the judge denying the ultimate assertions.[186] The court in *Smith* held that an attorney could not be held in criminal contempt for statements made in a brief unless the attorney knows them to be

181. 925 P.2d 1113 (Idaho 1996).

182. *Id.* at 1115.

183. *Id.* Specifically, Topp pointed to the following facts: (1) there had been "a political frenzy" in the county on the issue, of which the judge certainly was aware, (2) the judge rendered an oral decision "immediately after the close of argument" and released a written decision "within minutes" of the end of the hearing; Topp argued that this expediency supported "an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly," and (3) "another district judge in a similar case had reached a different decision." *Id.* at 1114, 1117.

184. *See id.* at 116–17 ("[T]he parties failure to stipulate as to the truth of [the judge's testimony] is irrelevant.").

185. 313 S.W.3d 124, 137 (2010).

186. *Id.* at 128.

false, and that testimony from the judge as to the ultimate truth of the assertions is not indicative of "the requisite state of [the attorney's] mind regarding the falsity of the statements."[187] Although the *Smith* court's adoption of *Sullivan*'s actual malice standard should not apply to punishment of speech under Rule 11, the *Smith* court appropriately recognized that when punishing an attorney for speech regarding the judiciary, the reviewing court's focal point cannot be the judge's assertion that the statement is false, but rather the attorney's basis for the statements.

Fundamentally, however, the problem is that the *Caperton* standard does not require a showing that the judge was actually biased, but creates a due process right whenever there is a constitutionally significant "potential for bias," which is "based on objective and reasonable perceptions."[188] Further, *Caperton*'s objective due process right, as noted, has become a primary method for preserving judicial impartiality in the wake of the Supreme Court invalidation of other controls in *White* and *Citizens United*. Thus, to allow or threaten punishment for accusing a judge of bias when the judge will assert a lack of bias is contrary to the underlying theory of the *Caperton* right itself. *Caperton*'s right is based on an objective appearance of bias and not necessarily on a finding of actual bias.[189] As noted, the Supreme Court did "not question [Justice Benjamin's] subjective findings of impartiality and propriety."[190] Thus, the fact that a judge testifies that she is not biased should not open up the possibility of sanctions or punishment for an attorney who makes assertions of partiality as long as the attorney's assertions comply with Rule 11's requirements.

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187. *Id.* at 136.

188. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262–63 (2009).

189. The *Caperton* majority indicated that a showing of actual bias would also be sufficient to require recusal. Consequently, attorneys must also have a free speech right to raise allegations regarding actual bias. *See id.* at 2263 (noting that while a showing of actual bias was not required, "actual bias, if disclosed, no doubt would be grounds for appropriate relief"). But even where an attorney is alleging actual bias, the relevant question for punishment should not be whether the judge agrees that she actually is biased, but whether the attorney has a sufficient factual basis to make such allegations under a normal Rule 11 standard.

190. *Id.* at 2255.

V. CONCLUSION: PRESERVING IMPARTIALITY AND ITS PERCEPTION

The underlying rationale for prohibiting attorney criticism of the judiciary is the need to preserve the public's perception of judicial integrity. Such a rationale is inherently unsatisfying if there are in fact deficiencies in judicial integrity. Rather than focusing on chilling complaints regarding judicial integrity, the underlying deficiencies in integrity should be addressed or remedied.

As noted, methods for improving deficiencies in judicial integrity could be accomplished through eliminating judicial elections or through increasing campaign finance disclosure requirements and tightening recusal and disqualification procedures. But in order for improved recusal and disqualification procedures or the due process right recognized in *Caperton* to be effectual, attorneys must be able to freely raise such problems without fear of punishment.

Indeed, the traditional rationale for punishing attorney speech—preserving the public perception of judicial integrity—must be accomplished by methods that will (1) work to preserve impartiality itself and (2) preserve the public perception of judicial impartiality. Punishing attorney speech for questioning or impugning judicial integrity is aimed at accomplishing the second purpose (preserving the perception of impartiality) without any indication that impartiality itself is being preserved or is even being subjected to scrutiny. Further, there is a very real question whether even the *perception* of impartiality is preserved by punishing attorney speech critical of the judiciary. If a colorable claim for judicial disqualification exists under either statutory or constitutional standards, then punishing attorney speech for raising it (even where the attorney employs rhetorical hyperbole), is likely to raise public, litigant, and attorney suspicions as to judicial partiality. In a different context, the Supreme Court has recognized:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment,

> suspicion, and contempt much more than it would enhance respect.[191]

Allowing attorneys to freely question impartiality in recusal and disqualification motions, and improving recusal procedures so that a judge is disqualified when a reasonable person objectively would question her partiality, can perhaps preserve both the perception of impartiality (by requiring recusal when the public objectively would question it) and impartiality itself (by disqualifying judges when the perception exists).

191. Bridges v. California, 314 U.S. 252, 270–71 (1941).