

# DISQUALIFYING JUDGES WHEN THEIR IMPARTIALITY MIGHT REASONABLY BE QUESTIONED: MOVING BEYOND A FAILED STANDARD

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In 1972, the American Bar Association adopted a Code of Judicial Conduct that it hoped would help restore public confidence in the judiciary. As part of its trust-building effort, the Code sought to instill uniformity and predictability in judicial *recusal decisions*. *Every jurisdiction adopted the new Code's disqualification provision, which barred a judge from presiding in any matter in which the judge's "impartiality might reasonably be questioned."* Unfortunately, this appearance-based disqualification test has been a documented failure. It has not decreased the arbitrariness, or increased the predictability, of recusal decisions. In fact, misuse of the standard to attack the impartiality of judges on the basis of a *judge's* religion, race, ethnicity, sex, or *sexual orientation* has actually reduced society's faith in the judiciary. It is time to end the 40-year experiment with the unworkable, counterproductive ABA disqualification standard.

This Article proposes a new disqualification regime for trial court judges. The proposal suggests replacing *the "might reasonably be questioned" test* with a procedure providing for the peremptory removal of a trial judge upon the timely and perfunctory request of a party. Eighteen states currently guarantee each party the right to remove one trial-level judge without cause. After exercising the right to an automatic change of judge, a litigant could challenge the successor judge if the judge is disqualified under a statute or court rule. All jurisdictions currently identify specific situations requiring recusal. Finally, the successor judge could be challenged under the Due Process Clause when the circumstances create a serious risk of partiality on the part of the judge. A peremptory challenge system, coupled with a list of disqualifying factors, *and the right to challenge a judge's impartiality* on due process grounds, will provide a superior disqualification process.

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## INTRODUCTION

On November 7, 1972, Richard M. Nixon was reelected President of the United States, winning every state except Massachusetts.<sup>1</sup> No longer able to credibly deny participation in the illegal activities of his reelection committee and facing impeachment, the President acceded to the public outcry for his resignation and surrendered the Oval Office on August 9, 1974.<sup>2</sup>

Less than three months before Nixon's reelection, the American Bar Association (ABA) House of Delegates adopted a new set of model rules governing the professional and personal lives of judges.<sup>3</sup> The impetus for the ABA's Code of Judicial Conduct (1972 Code) came in part from the U.S. Senate's rejection of Nixon's Supreme Court nominee Clement Haynsworth.<sup>4</sup> The Senate refused to confirm Judge Haynsworth because he created an appearance of impropriety by failing to recuse himself from cases involving corporations in which he held a financial interest.<sup>5</sup> To make matters worse, Haynsworth was nominated to fill the vacancy created by the resignation of Justice Abe Fortas. Justice Fortas had also created an improper appearance by accepting a "consulting fee" from the Wolfson Family Foundation shortly before the Foundation's director was indicted for selling unregistered stock.<sup>6</sup> In an effort to allay the fears of the public and the press about judicial improprieties both in fact and in appearance, the 1972 Code mandated a judge's disqualification from a proceeding if for any reason the judge's "impartiality might reasonably be questioned."<sup>7</sup>

The new disqualification rule announced in the 1972 Code constituted an unprecedented expansion of the grounds for judicial recusal.<sup>8</sup> Under the

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1. JONATHAN AITKEN, *NIXON: A LIFE* 448 (1993).
  2. *Id.* at 510–22.
  3. CODE OF JUDICIAL CONDUCT (1972). The ABA House of Delegates adopted the Code of Judicial Conduct on August 16, 1972. LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 110 (1992).
  4. Taking Disqualification Seriously, 92 *JUDICATURE* 12, 13–14 (2008) ("In 1972, the ABA, responding in part to the Haynesworth [sic] episode, adopted the Model Code of Judicial Conduct, which sought to encapsulate the ethics of disqualification into a unified rule.").
  5. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 *MINN. L. REV.* 1914, 1929 (2010).
  6. *Id.* at 1926–28.
  7. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).
  8. Considered synonymous in modern practice, the terms "disqualification" and "recusal" will be used interchangeably in this Article. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* § 1.1, at 4 (2d ed. 2007) ("[I]n modern practice 'disqualification' and 'recusal' are frequently viewed as synonymous, and employed interchangeably."); see also *In re Sch. Asbestos Litig.*, 977 F.2d 764, 770 n.1 (3d Cir. 1992) ("Whether or not there was ever a distinction between disqualification and recusal, the courts now commonly use the two terms interchangeably.").

predecessor ABA Canons of Judicial Ethics (1924 Canons),<sup>9</sup> a judge's disqualification was mandated only in two very limited circumstances, both involving an actual conflict of interest. The 1924 Canons provided for the removal of a judge from a proceeding in which: (1) the judge's near relative was a party<sup>10</sup> or (2) the judge's personal financial interests were involved.<sup>11</sup> These two narrowly drawn disqualifying circumstances served the traditional purpose of recusal rules—to ensure judicial impartiality. But the drafters of the 1972 Code believed that protecting the actual impartiality of judges was, in itself, insufficient to restore public confidence in the judiciary.<sup>12</sup> To safeguard public faith in the courts, recusal rules had to be taken to the next level. Not only would the new disqualification rules protect the traditional interest in judicial impartiality, but they would also protect against the appearance of partiality. Thus, Canon 3C(1) of the 1972 Code retained the requirement that a judge be excused from cases involving his financial interests or his near relatives, but added a new disqualification provision barring a judge from a case “in which his impartiality might reasonably be questioned.”<sup>13</sup> Under the new test, the reasonable, lay observer, rather than the judge, would determine whether the circumstances created an appearance of partiality.<sup>14</sup> In this way, the ABA hoped to ensure that recusal decisions would be based on an objective evaluation of the circumstances, instead of a judge's subjective view of his ability to be fair.

It is not surprising that in the aftermath of the Watergate scandal's devastating effect on public confidence in elected and appointed government officials,<sup>15</sup> virtually every state adopted the 1972 Code, including its new appearance-based recusal standard.<sup>16</sup> The states, like the drafters of the 1972 Code,

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9. CANONS OF JUDICIAL ETHICS (1924).

10. *Id.* Canon 13 (“[A judge] should not act in a controversy where a near relative is a party.”).

11. *Id.* Canon 29 (“[A judge] should abstain from performing or taking part in any judicial act in which his personal interests are involved.”). Under the common law, personal interests only included financial interests. See John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 609 (1947) (“The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.”).

12. See *infra* notes 103–07 and accompanying text.

13. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972); see E. WAYNE THODE, *REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT* 61 (1973) (stating that under the 1972 Code, a judge was disqualified if his participation in a proceeding created “the appearance of a lack of impartiality” or an “appearance of impropriety”).

14. THODE, *supra* note 13, at 60 (“Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's ‘impartiality might reasonably be questioned’ is a basis for the judge's disqualification.”).

15. See STEPHEN E. AMBROSE, *2 NIXON: THE TRIUMPH OF A POLITICIAN 1962–1972*, at 558 (1989) (characterizing the Watergate scandal as “the political story of the century”).

16. See James J. Alfani et al., *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 *S. TEX. L. REV.* 889, 908 (2007) (“[M]ost states adopted the JCC [1972 Code] in the wake of the Watergate scandal, a time when the press and the public were demanding greater accountability from public officials.”).

hoped that the new Code would help reinstall public confidence in the impartiality and integrity of the judiciary.<sup>17</sup> Spurred by the Fortas and Haynsworth affairs, and by the criticism of Nixon's Supreme Court appointee William Rehnquist's failure to disqualify himself in *Tatum v. Laird*,<sup>18</sup> Congress amended the federal disqualification statute in 1974 to parrot the "might reasonably be questioned" language of the 1972 Code.<sup>19</sup>

Congress and the states hoped that the new appearance-based disqualification regime would increase public confidence in the judiciary by making recusal decisions more workable, more objective, and less capricious.<sup>20</sup> Proponents also argued that the new standard would promote public trust by signaling to society that the government was so committed to providing a neutral

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17. See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 692 (2011) ("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 [28 U.S.C.] § 455.").

18. See Aaron S. Bayer, *The Rule of Necessity*, NAT'L LAW J. (Apr. 23, 2007), <http://www.wiggin.com/files/TheRuleofNecessity.pdf> ("Justice William H. Rehnquist caused great controversy by refusing to recuse himself in [*Tatum v.*] *Laird*, having previously testified for the Justice Department in congressional hearings about the domestic surveillance program that was the subject of the suit."); Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106, 121 (1973); Fred P. Graham, *Determined Not to 'Bend Over Backward'*, N.Y. TIMES, Oct. 15, 1972, at E8; Rehnquist Defends His Role in Decision of Spying by Army, N.Y. TIMES, Oct. 11, 1972, at 1; Editorial, *Rehnquist Memorandum*, N.Y. TIMES, Oct. 12, 1972, at 46. Members of the U.S. Senate expressed their disapproval of Justice Rehnquist's failure to recuse himself in *Tatum* during the Senate debate concerning the confirmation of Justice Rehnquist as Chief Justice in 1986. See, e.g., 132 CONG. REC. 22,804 (1986) (statement of Sen. Edward Kennedy) ("Shortly after he joined the Court, Justice Rehnquist refused to recuse himself in the important case of *Tatum* versus *Laird*, and thereby demonstrated an ethical lapse that, in my view, should by itself disqualify Justice Rehnquist from being Chief Justice."); *id.* at 22,826 (statement of Sen. Thomas Eagleton) (arguing that Justice Rehnquist was required to disqualify himself in *Tatum v. Laird* because "[a] judge is required to disqualify himself 'in any proceeding in which his or her impartiality might reasonably be questioned'"); *id.* at 23,043, 23,053 (statement of Sen. Alan Cranston) (claiming that Justice Rehnquist's refusal to recuse "as judicial ethics and propriety seemed to require" demonstrated that "William Rehnquist is a zealot, more committed to the outcome in a particular case than to a desire to serve fairness and justice, or, as importantly, the appearance of fairness and justice").

19. Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589, 594 (1987) (stating that the move to amend the federal disqualification statute to reflect the appearance-based recusal standard of the 1972 Code "was given additional force by Justice Rehnquist's participation in *Tatum*").

20. See *Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 13 (1971 & 1973) [hereinafter *Hearings*] (statement of Sen. Birch Bayh) (identifying the need to bring "clarity and certainty" to the federal disqualification rules); FLAMM, *supra* note 8, § 5.2, at 105 (concluding that the objective disqualification test was designed to make disqualification decisions "less dependent on judicial caprice"); Geyh, *supra* note 17, at 691 (stating that appearance-based disqualification seeks to make disqualification more workable and less capricious).

magistrate that it was willing to remove a judge from any case in which the circumstances suggested partiality, even if the judge was in fact impartial.<sup>21</sup>

Unfortunately, appearance-based disqualification has failed to live up to expectations. It has neither decreased the arbitrariness nor increased the consistency of recusal decisions.<sup>22</sup> Further, there is no evidence that public trust in the judiciary has improved since the ABA's adoption of the new recusal standard in 1972.<sup>23</sup> Indeed, the misguided designation of the reasonable person as the arbiter of when appearances create a disqualifying circumstance guarantees that the standard will never result in an enhanced image of the judiciary.<sup>24</sup> Moreover, the "might reasonably be questioned" test has unwittingly provided a vehicle upon which litigants can ruthlessly and capriciously attack a judge's partiality by claiming that the judge's race, sex, ethnicity, religion, or sexual orientation creates an "appearance of partiality."<sup>25</sup> Equally devastating to public confidence, appearance-based bias claims are the first choice of partisan groups seeking to remove a judge from a case, not to protect the right to a fair judge, but to reconstruct the court to increase the odds of a decision consistent with the group's partisan agenda.<sup>26</sup>

By default, the ABA has become the "authoritative actor" in drafting judicial conduct codes.<sup>27</sup> ABA proposals usually become the law regardless of their positive or negative effect on the legal system.<sup>28</sup> As a result, despite its demonstrable and uncorrectable shortcomings, the ABA appearance-based disqualification test continues to be considered the gold standard by all fifty states,<sup>29</sup> Congress,<sup>30</sup> and the federal courts.<sup>31</sup>

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21. See Hearings, *supra* note 20, at 14 (statement of Sen. Birch Bayh) (supporting a new federal disqualification rule to "remove any scintilla of doubt" in the public eye that a judge might be partial); *id.* at 16 (describing Congress's duty to "give a complete appearance of [judicial] propriety").

22. See *infra* Part II.A.

23. See *infra* Part II.C.

24. *Id.*

25. See *infra* Part II.D.

26. See *infra* Part II.E.

27. Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 *YALE L. & POL'Y REV.* 123, 139 (2011).

28. See Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 *HOFSTRA L. REV.* 1337, 1358-59 (2006) (stating that the ABA Model Judicial Codes come with a presumption of authority and are likely to be adopted by state and federal courts).

29. A study conducted by the Brennan Center for Justice in 2008 disclosed that the judicial conduct codes of every state except Montana, Michigan, and Texas required disqualification when a judge's "impartiality might reasonably be questioned." JAMES SAMPLE ET AL., *FAIR COURTS: SETTING RECUSAL STANDARDS* 17 (2008). Subsequent to the study, Montana incorporated the "might reasonably be questioned" standard into its code of judicial conduct. *MONT. CODE OF JUDICIAL CONDUCT R. 2.12* (2009). The Michigan Supreme Court amended its disqualification rule in 2010 to mandate disqualification when a judge, "based on . . . reasonable perceptions . . . (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."

It took the public two short years to correct its mistake in electing Richard Nixon to a second presidential term. Recognizing his destructive effect on the government and on the public's faith in governmental institutions, he was forced to resign. A few months before Nixon's reelection, another error of judgment was made, this time not by the people, but by the drafters of the 1972 Code, who were trying to recapture the people's trust in the judiciary. Now, forty years later, it is time to admit failure and try a new approach to judicial disqualification, one with a much better chance of achieving an impartial judiciary in fact and in appearance.

This Article proceeds in three Parts. Part I traces the transformation of judicial disqualification standards from their common law antecedents, which were concerned only with safeguarding the right to a neutral magistrate, through the modern-day rules constructed by the ABA, Congress, and the states to cultivate the perception rather than the reality of judicial impartiality. Part II documents how the vagueness of the ABA standard prevents the development of a disqualification jurisprudence to assist judges in evaluating when their impartiality may reasonably be questioned. Consequently, judges "divide substantially as to the degree of suspicion that requires disqualification," which results in hopelessly inconsistent disqualification decisions.<sup>32</sup> Part II also examines the misuse of the appearance standard to challenge minority and women judges and to advance the agendas of partisan interest groups. Finally, Part II establishes that employing the hypothetical reasonable person as the centerpiece of a disqualification regime will never enhance public confidence in the impartiality of the judiciary. The objective, reasonable observer, so skilled at judging facts in a manner acceptable to the general public, was never designed to evaluate appearances, much less appearances of partiality. A proposal to replace the "might reasonably be questioned" disqualification standard with the right to an automatic peremptory challenge of one trial-level judge by each party is outlined in Part III. A peremptory challenge procedure, coupled with an expanded list of disqualifying factors in statutes and court rules, and the right to challenge a judge's impartiality

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MICH. CT. R. 2.003(C)(1)(b) (2013). Michigan's "appearance of impropriety" disqualification standard is "indistinguishable" from the might reasonably be questioned standard. See *Pellegrino v. AMPCO Sys. Parking*, 789 N.W.2d 777, 780 (Mich. 2010) (Kelly, C.J., concurring) (describing the two disqualification tests as "indistinguishable"). Texas Rule of Civil Procedure 18b, which governs recusal in civil cases, provides that "[a] judge must recuse in any proceeding in which (1) the judge's impartiality might reasonably be questioned." TEX. R. CIV. PROC. 18b(b)(1) (2011). Texas Rule of Civil Procedure 18b also applies in criminal cases. See *Kniatt v. State*, 239 S.W.3d 910, 914 n.9 (Tex. Ct. App. 2007) (citing *Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993)). Thus, every state expressly sanctions appearance-based disqualification.

30. See 28 U.S.C. § 455(a) (2012) (requiring disqualification when a judge's "impartiality might reasonably be questioned").

31. See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1) (2009) (requiring disqualification when a "judge's impartiality might reasonably be questioned").

32. 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, 768 (2011).

on due process grounds, will provide a superior disqualification process. This new process will provide an impartial judge for the parties and the appearance of an impartial judiciary for the public.

### I. THE EXPANDING UNIVERSE OF JUDICIAL DISQUALIFICATION

Under the common law, a judge was only removed from a case if he possessed a direct financial interest in the matter. The presumption of impartiality protected judges from all other claims of interest or bias.<sup>33</sup> Slowly, the grounds justifying recusal expanded to include other discrete circumstances that created an actual conflict of interest for the judge.<sup>34</sup> But the “big bang” in the expanding universe of judicial disqualification came in 1972, when the ABA decided that promoting public confidence in judicial impartiality, rather than protecting a litigant’s right to a fair judge, supplied the primary rationale for disqualifying judges. Promoting public trust in the judiciary meant removing a judge from a case any time the objective, lay observer “might reasonably question” the judge’s impartiality.<sup>35</sup>

#### A. Common Law Antecedents

The anointing of judicial impartiality as the core principle of a government-sponsored adjudicatory system has a long history in religious<sup>36</sup> and political thought<sup>37</sup> and is considered a component of “natural justice.”<sup>38</sup> Based on firsthand experience, American colonists knew that the legitimacy of the judicial branch of government depended upon the impartiality of its judges. The Declaration of Independence justified the separation from England, in part, on the

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33. See *infra* Part I.A.

34. See *infra* Part I.B–C.

35. See *infra* Part I.C.2.

36. See, e.g., Babylonian Talmud, Tractate Sabbath 10a, in 1 EMANUEL B. QUINT & NEIL S. HECHT, *JEWISH JURISPRUDENCE* 6 (1980) (“Every judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One, blessed be He, in the work of creation.”); Deuteronomy 1:16–17 (New Living Translation) (“At that time I instructed the judges, ‘You must hear the cases of your fellow Israelites and the foreigners living among you. Be perfectly fair in your decisions and impartial in your judgments. Hear the cases of those who are poor as well as those who are rich. Don’t be afraid of anyone’s anger, for the decision you make is God’s decision. Bring me any cases that are too difficult for you, and I will handle them.’”)

37. See Kiyoshi Shimokawa, *Locke’s Concept of Justice*, in *THE PHILOSOPHY OF JOHN LOCKE* 66 (Peter R. Anstey ed., 2003) (describing the basic tenet of Aristotle’s concept of corrective justice as “[j]ustice consists in equal or impartial treatment of litigants by a judge . . . .”); *id.* at 67 (stating that John Locke believed that “[t]he primary function of political society is to serve as an impartial judge over all disputes of rights that arise between its members”); see also JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 13, 19–20 (1690) (describing the need for impartial judges to avoid violence and self-help in the resolution of disputes).

38. See *City of London v. Wood*, (1706) 88 Eng. Rep. 1592, (K.B.) 1593 (stating that a man serving as both a party and judge in a proceeding was “against natural justice”).



fact that the King, not the law and the facts, dictated judicial decisions.<sup>39</sup> The delegates to the Constitutional Convention of 1787 sought to ensure judicial impartiality by granting federal judges life tenure and compensation immune from executive or legislative interference.<sup>40</sup> And the Due Process Clause was enacted in large part to guarantee every person “an impartial and disinterested tribunal in both civil and criminal cases.”<sup>41</sup>

The common law recognized that, while essential, impartiality was a fragile pillar upon which to hinge public acceptance of judicial decisions because “[i]mpartiality is not a technical conception [but] . . . a state of mind.”<sup>42</sup> Determining a magistrate’s state of mind, case by case, even if feasible, was not desirable. Instead, the presumption of impartiality was created to insulate the judiciary from doubts about the fairness of individual court decisions.<sup>43</sup> Common law judges and commentators did not miss the essential role of the presumption in maintaining the legitimacy of the judiciary. Blackstone summarized the presumption by stating that “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice.”<sup>44</sup> Blackstone further recognized that a judge’s “authority greatly depends upon that presumption and idea.”<sup>45</sup> Significantly, Blackstone placed the emphasis on the presumption and not on the fairness or unfairness of a particular judicial decision. The presumption was warranted not only because judges took a solemn oath of impartiality, but also because frequent “challenges to judicial impartiality would undermine public respect for the legal system.”<sup>46</sup> The rare instance in which a judge violated his sworn duty and demonstrated partiality would be addressed not through disqualification, but through discipline of the offending judge.<sup>47</sup> Initially the

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39. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (condemning King George III for “[making] Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries”).

40. Eugenia Schraa, Note, Delegational Delusions: Why Judges Should Be Able to Delegate Reasonable Authority over Stated Supervised Release Conditions, 38 *FORDHAM URB. L.J.* 899, 904 (2011) (“The historical record indicates that the framers considered Article III’s requirement that federal judges enjoy life tenure and undiminished compensation a ‘guarantee of judicial impartiality.’”) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

41. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

42. *United States v. Wood*, 299 U.S. 123, 145 (1936).

43. See *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (“A person could find something in the background of most judges which in many cases would lead that person to conclude that the judge has a ‘possible temptation’ to be biased . . . . We expect—even demand—that judges rise above these potential biasing influences, and in most cases we presume judges do.”).

44. 3 *WILLIAM BLACKSTONE, COMMENTARIES* \*361.

45. *Id.*

46. Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 *BUFF. L. REV.* 813, 841 (2009) (quoting *FLEMING JAMES ET AL., CIVIL PROCEDURE* § 3.2, at 394 (5th ed. 2001)).

47. 3 *WILLIAM BLACKSTONE, COMMENTARIES* \*361 (stating that if a judge did, contrary to his oath, rest a decision on bias or favor “there is no doubt but that such

presumption was conclusive except when a judge had a direct pecuniary interest in the subject matter of the litigation.<sup>48</sup> The presumption remained irrebuttable even when judicial bias was claimed or the judge was closely related to a party or a party's attorney.<sup>49</sup>

In sum, the common law required disqualification only when a judge possessed a direct financial interest in the outcome of a proceeding. The entrenched presumption of judicial impartiality shielded individual judges from claims of other disqualifying circumstances and in that way served to maintain public confidence in the judiciary.

### B. Congress's Early Entry into Judicial Disqualification

Many jurisdictions in the United States viewed disqualification for personal interest slightly more broadly than the common law. Congress's first disqualification statute, passed in 1792, forbade district court judges from sitting if they had a personal interest in a lawsuit or served as counsel to a party before the court.<sup>50</sup> Under this statute, "personal interest" meant a direct financial stake in the litigation, and disqualification based on a judge's prior attorney-client relationship was confined to representation in the same matter before the court.<sup>51</sup> In 1821, the statute was amended to require recusal when the judge "is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit."<sup>52</sup> Pursuant to the 1821 amendment, the degree of relationship compelling recusal was controlled by the law of the forum state, and was usually defined as the third or fourth degree of consanguinity or affinity.<sup>53</sup>

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misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct").

48. See Frank, *supra* note 11, at 609; *Brookes v. Rivers*, (1679) 145 Eng. Rep. 569 (Ex.) (finding that a judge was not disqualified from hearing his brother-in-law's case because, except for direct financial interest in a proceeding, "favour shall not be presumed in a judge").

49. See Frank, *supra* note 11, at 611 ("[T]he English courts . . . early held that a judge was not disqualified by relationship, but that a jury was."); Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 *CORNELL L. REV.* 191, 250 (2012) ("'Impartiality' has been a defining feature of the judicial role for centuries, and at common law, the presumption of impartiality was irrebuttable: judges could not be disqualified for bias.").

50. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79.

51. See Frank, *supra* note 11, at 627 (stating that "personal interest" was defined in terms of the common law requirement of direct pecuniary interest and that an "attorney-client relationship" between the judge and a party prior to the case in dispute was never considered sufficient to require disqualification).

52. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.

53. See Frank, *supra* note 11, at 615 n.43; see also *Wilson v. Wilson*, 36 Ala. 655, 664 (1860) (citing a state statute prohibiting a judge from presiding over a matter in which he is related within the fourth degree of consanguinity or affinity to a party); *People v. Ebey*, 93 P. 379, 380 (Cal. 1908) (quoting a provision of the California Code of Civil Procedure requiring disqualification when a judge is related to a party or attorney "by consanguinity, or affinity, within the third degree"); *State ex rel. Caro v. Reese*, 195 So.

Seventy years later, as part of the Act creating the circuit courts of appeal, Congress barred appellate judges from reviewing their own trial court decisions.<sup>54</sup> A provision requiring recusal when the judge was needed as a material witness in a matter was added in 1911.<sup>55</sup> Like the other disqualifying factors enacted by Congress, this new provision was construed narrowly to remove a judge from a proceeding only when no other witness was available to testify to the facts known by the judge.<sup>56</sup> Departing from the common law rule refusing to recognize bias or prejudice as a ground for disqualification, Congress enacted legislation in 1911 making “any ‘personal bias or prejudice’ a basis for recusal.”<sup>57</sup> Consistent with Congress’s intent,<sup>58</sup> the statute unambiguously provided that upon the filing of an affidavit claiming bias or prejudice on the part of the assigned judge, the matter would be automatically transferred to another judge for further proceedings.<sup>59</sup>

But a statute mandating judicial disqualification on the basis of bias or prejudice was too far ahead of its time in 1911 for courts to apply as Congress intended.<sup>60</sup> The federal courts refused to interpret the statute to provide for an automatic change of judge. Instead, the courts gave effect to the statute only where

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918, 918 (Fla. 1940) (citing a 1933 statute mandating recusal when the judge is related to a party or attorney within the third degree); *City of Macon v. Huff*, 60 Ga. 221, 225 (1878) (citing a state statute requiring disqualification when a judge is related to a party within the fourth degree of consanguinity or affinity).

54. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826, 827. A few states had similar disqualification provisions. See, e.g., *Jones v. State*, 32 S.W. 81, 83 (Ark. 1895) (citing a state constitutional provision removing a judge from any matter in which he “presided in any inferior court”).

55. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090. Some states also disqualified a judge from a proceeding in which he was a material witness. See, e.g., *State ex rel. Van Horne v. Sullivan*, 188 N.E. 672, 673 (Ind. 1934) (citing a statutory provision removing a judge from a case in which he is identified as a material witness); *Gray v. Crockett*, 10 P. 452, 455 (Kan. 1886) (“[W]here a judge is a material and necessary witness in a case, he is ‘disqualified to sit.’”); *Goad v. State*, 279 P. 927, 928–29 (Okla. Crim. App. 1929) (disqualifying a judge who was a material witness). But see *State v. Barnes*, 34 La. Ann. 395, 399 (1882) (“The law could not disqualify a Judge, even if the Judge were a material witness.”); *In re Cameron*, 151 S.W. 64, 74 (Tenn. 1912) (observing that since 1824, Tennessee law has considered a judge a competent witness in cases before him no matter how “inconvenient or embarrassing” it may be for the parties to cross-examine the judge or for the judge to rule on objections to his own testimony).

56. *Frank*, supra note 11, at 627–28 (“Disqualification of a judge on the ground that he was a material witness was confined to situations where the party could find no adequate substitute . . .”).

57. *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011).

58. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 542 (2005) (“The legislative history [of Section 21] explains that judges are to be automatically disqualified from any case in which such an affidavit is filed, even if they disagree with the claimed basis for disqualification.”).

59. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090.

60. At the time, a few states required automatic disqualification of a trial judge upon the filing of an affidavit claiming bias or prejudice. See, e.g., *McGoon v. Little*, 7 Ill. (2 Gilm.) 42 (1845); *Krutz v. Griffith*, 68 Ind. 444, 447 (1879).

the affiant proved that a personal bias or prejudice dominated the judge's thinking so as to completely:

beget a mental or moral condition which makes the judge willing to do wrong although he sees the right, regarding the justiciable matters brought before him, or else, though the judge's intentions be good, render him incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties to the suit.<sup>61</sup>

An affidavit establishing no more than a prima facie case of bias or prejudice was insufficient.<sup>62</sup> The affidavit's factual allegations had to be much stronger in order "to overthrow the presumption in favor of the trial judge's integrity and of the clearness of his perceptions."<sup>63</sup> Of course, mere allegations that a judge had prejudged the merits of a cause, even if true, did not establish a personal bias or prejudice.<sup>64</sup> *Berger v. United States*<sup>65</sup> demonstrates the overt and flagrant prejudice necessary to challenge successfully a federal judge in the early twentieth century.

On February 2, 1918, the defendants in *Berger* were indicted for violations of the Espionage Act.<sup>66</sup> The defendants filed a motion and affidavit charging the judge assigned to the case, Judge Kenesaw Mountain Landis, with a personal bias against the defendants because of their German ancestry.<sup>67</sup> After establishing the defendants' German heritage, the affidavit alleged that Judge Landis uttered the following remarks during the sentencing of a German American in an unrelated case in November of 1917:

If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. . . . One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. . . . You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived

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61. *Ex parte N.K. Fairbank Co.*, 194 F. 978, 990 (M.D. Ala. 1912).

62. *Id.*

63. *Id.*

64. *Henry v. Speer*, 201 F. 869, 872 (5th Cir. 1913).

65. 255 U.S. 22 (1921).

66. *Id.* at 27.

67. *Id.* at 27–29. Judge Kenesaw Mountain Landis "always was headline news." J.G. TAYLOR SPINK, *JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL* 26 (1947) (quoting A. L. Sloan, political editor of the *Chicago Herald-American* newspaper). Among his other exploits, Judge Landis hoped to try Kaiser Wilhelm in his federal district court at the end of World War I for the murder of a Chicagoan who died during the sinking of the *Lusitania* in 1916, dug the ceremonial first spade of dirt from a Grant Park exhibit designed to give civilians an idea of the realities of trench warfare in Europe, was the target of a failed mail bomb, and, in 1907, fined Standard Oil the then-record amount of \$29,240,000. *Id.* at 20, 23, 24. For a time, he also simultaneously served as a federal district court judge and the first commissioner of major league baseball. See DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS* 169–72 (1998).

here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country . . . . Your hearts are reeking with disloyalty. I know a safe-blower . . . who is making a good soldier in France . . . and as between him and this defendant, I prefer the safeblower.<sup>68</sup>

Judge Landis denied the disqualification motion.<sup>69</sup> The defendants were convicted and sentenced to twenty-year prison terms.<sup>70</sup> On appeal, the U.S. Court of Appeals for the Seventh Circuit, apparently unsure about the sufficiency of the affidavit to support a recusal request based on bias, certified the question to the Supreme Court.<sup>71</sup>

The Supreme Court held that the affidavit sufficiently alleged a personal bias or prejudice on the part of Judge Landis to require the transfer of the case to another judge.<sup>72</sup> Three Justices dissented.<sup>73</sup> One dissenting Justice found that the affidavit insufficiently alleged a personal bias because “[i]ntense dislike of a class does not render the judge incapable of administering complete justice to one of its members.”<sup>74</sup>

The extreme difficulty of proving actual bias and the almost impenetrable presumption of impartiality readily explain why applications for a change of judge in federal court in the early twentieth century usually failed unless, like in *Berger*, the judge spewed incontrovertible evidence of bias from his own mouth.<sup>75</sup>

### C. The ABA Dictates Disqualification Standards

Since the early 1900s, the ABA has been the dominant actor in legal and judicial ethics.<sup>76</sup> Over the last eighty-eight years, it has produced four model

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68. *Berger*, 255 U.S. at 28–29.

69. *Id.* at 27.

70. *Id.*

71. *Id.* at 27–28.

72. *Id.* at 36.

73. *Id.* at 37–43.

74. *Id.* at 43 (McReynolds, J., dissenting).

75. See *Okocha v. Fehrenbacher*, 655 N.E.2d 744, 752 (Ohio App. 1995) (“The existence of prejudice or bias against a party is a matter that is particularly within the knowledge and reflection of each individual judge and is difficult to question unless the judge specifically verbalizes personal bias or prejudice toward a party.”) (citing *In re Adoption of Reams*, 557 N.E.2d 159, 166 (Ohio App. 1989)); see also *Bracy v. Schomig*, 248 F.3d 604, 614 (7th Cir. 2001) (“Absent a lopsided record, the only hard proof of compensatory bias can issue from the judge’s own mouth.”).

76. See ABA, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 4 (2010) (“The ABA has traditionally taken the leadership role in providing guidance to the States on matters of judicial ethics and conduct.”); Lucian T. Pera, Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct, 30 OKLA. CITY U. L. REV. 637, 648–49 (2005) (recognizing an essential function of the ABA to be its “leadership in legal and judicial ethics (especially including the adoption and promulgation of model rules and standards)”).

judicial codes with the intent that the states' highest courts adopt each successive version, "thereby improving and clarifying the standards of conduct for the judiciary throughout the nation and creating national uniformity."<sup>77</sup> As a testament to the ABA's influence, "every state has a judicial code of conduct modeled after one or more of the ABA's Codes."<sup>78</sup> The states listen when the ABA speaks on ethics matters, including pronouncements describing the grounds and rationale for judicial disqualification.

#### 1. The Canons of Judicial Ethics (1924)

The 1924 Canons devoted few words to the issue of judicial disqualification. Canon 13 advised that a judge should not sit in a case in which a "near relative is a party."<sup>79</sup> Canon 29 required disqualification when a judge's "personal interests are involved."<sup>80</sup> These two disqualifying factors reflected the standards employed by most states when the 1924 Canons were adopted.<sup>81</sup> Also mirroring the judgment of the majority of jurisdictions, the Canons did not include a judge's personal bias or prejudice as a basis for recusal.<sup>82</sup> The Tennessee

77. See Mark I. Harrison, *Chair's Introduction* to MODEL CODE OF JUDICIAL CONDUCT, xv–xvi (2007).

78. Remus, *supra* note 27, at 139.

79. CANONS OF JUDICIAL ETHICS Canon 13 (1924).

80. *Id.* Canon 29.

81. See, e.g., *State v. Wall*, 26 So. 1020, 1020–21 (Fla. 1899) ("Our statute provides that 'no judge of any court shall sit or preside in any cause to which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties.'"); *Horton v. Howard*, 44 N.W. 1112, 1112 (Mich. 1890) ("Section 7245, How. St. Mich., enacts: 'No judge of any court can sit as such in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties.'"); *Jenkins v. State* 570 So. 2d 1191, 1192 (Miss. 1990) ("Section 165 of the Mississippi Constitution of 1890 requires a judge to disqualify himself 'where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties.'"); *Oakley v. Aspinwall*, 3 Comst. 547, 551 (N.Y. 1850) ("The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares, that 'no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties.'"); *McIntosh v. Bowers*, 126 N.W. 548, 550 (Wis. 1910) ("Our statute wisely provides that a judge of a court of record who is interested in any action or proceeding 'shall not have power' to hear and determine the action or proceeding, or make any order therein, except by consent of the parties."); see also *Recent Cases, Judges—Qualification—Relations to Parties. —Ex Parte West*, 132 S.W., 339 (Tex.), 20 YALE L.J. 415, 415 (1911) ("Under the common law a judge was not disqualified by relationship to a party to a cause. . . . But it is now generally provided by statute that relationship between the judge and a party litigant disqualifies the judge.").

82. See Note, *Disqualification of a Judge on the Grounds of Bias*, 41 HARV. L. REV. 78, 79–80 (1927) ("While it is commonly held that interest is a sufficient ground for disqualification, prejudice is not. There are numerous decisions to the effect that a judge is

Supreme Court expressed the commonly accepted rationale for rejecting bias as a disqualifying circumstance:

It is entirely conceivable that an upright and honest judge may decide justly and impartially as between his bitter personal enemy and his warm personal friend, administering the rules of law without fear or favor. . . . It is exceedingly easy for litigants and counsel to imagine that a judge is prejudiced against a party, or against his counsel, who has failed to successfully prosecute, or successfully defend, any one or more cases. It is an infirmity of human nature that counsel . . . are frequently unable to attribute want of success to the inherent weakness of the case, or to their own shortcomings . . . . To allow personal feelings like these on the part of counsel to determine what judge shall try a case . . . would be disastrous.<sup>83</sup>

The states' aversion to recognizing bias and prejudice as a disqualifying factor continued in the mid-twentieth century.<sup>84</sup> As late as 1969, "[n]early half of the states [had] no constitutional or statutory procedure for disqualifying a judge on the grounds of prejudice or bias."<sup>85</sup> But the landscape was changing. By amending state statutes and by judicial fiat, states slowly added bias and prejudice to the list of disqualifying circumstances.<sup>86</sup> And any lingering debate over the issue ended with the release of the new ABA Code of Judicial Conduct in 1972.<sup>87</sup>

## 2. The Code of Judicial Conduct (1972)

The 1972 Code brought two major changes to the world of judicial disqualification. First, the new Code expanded the grounds supporting recusal to include bias and prejudice for or against a party.<sup>88</sup> The ABA's imprimatur on the subject ensured that bias and prejudice would be uniformly recognized in state and federal courts as a disqualifying factor. Second, and more importantly, the 1972 Code departed from the traditional view that removing a judge from a case was only justified when a specifically enumerated conflict arose from a judge's relationship to, or interest in, a party or proceeding. While the new Code continued

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competent although he has expressed a premature opinion of the merits of the case and is hostile to one party . . . .").

83. *In re Cameron*, 151 S.W. 64, 74 (Tenn. 1912).

84. ABA, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 9 (Sept. 2008 Draft), available at [http://www.americanbar.org/content/dam/aba/administrative/judicial\\_independence/jdp\\_geyh\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf) ("As of the mid-twentieth century, common law aversion to judicial bias as grounds for disqualification continued to exert considerable influence.").

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

86. See FLAMM, *supra* note 8, § 3.2, at 55 ("Over time, however, bias was added to the available grounds for seeking a judge's disqualification, both by Congress and by the legislatures of most states.").

87. The ABA House of Delegates adopted the Code of Judicial Conduct on August 16, 1972. MILORD, *supra* note 3, at 109.

88. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1972).

to list specific disqualifying conflicts,<sup>89</sup> it added an overarching rule requiring recusal despite the absence of one of the enumerated conflicts, whenever a judge's impartiality "might reasonably be questioned."<sup>90</sup> The ABA would never examine or question the effectiveness and workability of this new appearance-based rationale. From 1972 forward, disqualification would be governed by perception, not reality.

#### a. Bias and Prejudice as Disqualifying Factors

The drafters of the 1972 Code believed the disqualification provisions of the predecessor 1924 Canons to be unsatisfactory because they were incomplete and lacked guidance for judges.<sup>91</sup> To remedy one of the perceived shortcomings, the 1972 Code added a judge's personal bias or prejudice for or against a party to the list of circumstances mandating disqualification.<sup>92</sup> Soon, virtually every jurisdiction mandated disqualification when actual bias or prejudice could be established.<sup>93</sup>

The ultimate acceptance of bias and prejudice as a sufficient cause for recusal substantially broadened the grounds upon which a judge could be removed from a case, but did not alter the overarching purpose of judicial disqualification. Judicial disqualification continued to serve a single purpose—ensuring that the parties had the benefit of a neutral magistrate.<sup>94</sup> As long as impartiality remained the goal, the presumption of impartiality played a significant role in the application of recusal rules and in maintaining public confidence in the judiciary. But the essential role that actual impartiality played in the recusal process ended with the adoption of the 1972 Code. No longer would disqualification be based on the existence of identifiable, delineated, conflict-creating circumstances such as interest or bias. Canon 3C(1) of the 1972 Code mandated disqualification when, for any reason, an impartial judge appeared to be partial.<sup>95</sup>

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89. Id. Canon 3C(1)(a)–(e).

90. Id. Canon 3C(1).

91. THODE, *supra* note 13, at 60.

92. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1972); THODE, *supra* note 13, at 61–62.

93. See Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 442 (2008) (citing the "nearly universal" adoption of the 1972 Code's bias disqualification standard).

94. Comment, *Disqualification for Interest of Lower Federal Court Judges*: 28 U.S.C. 455, 71 MICH. L. REV. 538, 560 (1972–1973) ("The basic goal of disqualification for interest is to ensure that a litigant receives a fair trial.").

95. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.").



**b. Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned**

The hope that judicial officers would not only avoid actual impropriety but also the appearance of impropriety was formally introduced into judicial ethics by the 1924 Canons.<sup>96</sup> Canon 4 advised that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety” and that a judge’s “everyday life, should be beyond reproach.”<sup>97</sup> The 1972 Code incorporated and enhanced these propositions in two ways. First, the drafters showcased the appearance of impropriety standard by titling Canon 2 of the Code, “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.”<sup>98</sup> Second, the appearance standard was freed of the hortatory restraints imposed by the 1924 Canons and made an enforceable rule of judicial conduct.<sup>99</sup> Thus, under Canon 2, a judge could be disciplined for violating a provision of the 1972 Code and for conduct that appeared to violate the Code but in reality did not.

Once the prevention of bad appearances became the “gold-standard of judicial conduct,”<sup>100</sup> it was unavoidable that the core of judicial disqualification would shift from reality to perception. Paying homage to the past, the 1972 Code listed five specific grounds for disqualification of a judge: (1) financial interest; (2) bias and prejudice; (3) personal knowledge of disputed facts; (4) prior service as a lawyer in the matter; and (5) relationship to the parties or their lawyers.<sup>101</sup> Of course, to prevail on these grounds a litigant had to prove the existence of one of the circumstances. For example, an allegation of a personal bias would require proof of an improper state of mind, a nearly impossible task when facing a robust presumption of impartiality.<sup>102</sup>

While these five grounds for disqualification might be sufficient to protect parties from actual partiality, they were considered woefully inadequate to protect the image of the impartial judge in the public’s eye. The authors of the 1972 Code thought that in order to build public trust, the legal system must not only provide a bias-free judge, but must eliminate every instance in which a judge,

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96. See CANONS OF JUDICIAL ETHICS Canon 4 (1924); see also McKoski, *supra* note 5, at 1925 (“[T]he paramount mission of the 1924 Canons [was] to encourage judges to avoid any professional or personal conduct that could be perceived to damage the ideal image of a judge as an impartial decision-maker and model citizen.”).

97. CANONS OF JUDICIAL ETHICS Canon 4 (1924); see *id.* Canon 34 (“In every particular [the judge’s] conduct should be above reproach.”).

98. CODE OF JUDICIAL CONDUCT Canon 2 (1972).

99. Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 879 (2007) (stating that the 1972 Code strengthened the commitment to regulating improper appearances by making a violation of the Code a basis for judicial discipline).

100. Editorial, *The ABA’s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18.

101. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a)–(d) (1972).

102. See Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 516 (2013) (“Divining judicial bias . . . requires an assessment of the judge’s subjective state of mind—a difficult task that courts have long been reluctant to undertake.”).

although bias-free, might appear to be partial.<sup>103</sup> To serve this public image purpose, an additional nonspecific, all-encompassing ground for recusal was created. Beginning with the 1972 Code, each ABA Model Code would render a judge ineligible to preside in a matter if for any reason the “judge’s impartiality might reasonably be questioned.”<sup>104</sup> This new, catch-all disqualification test was fashioned to enhance public confidence in judicial impartiality<sup>105</sup> by focusing on public perceptions, rather than the substantive rights of the parties or defects in the administration of justice caused by partial judges.<sup>106</sup> As stated by the Seventh Circuit Court of Appeals:

[I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of misleading appearances.<sup>107</sup>

Thus, after centuries of very limited and narrowly interpreted grounds for disqualification, each requiring proof of an operative fact that created a judicial conflict, recusal was suddenly required any time an objective observer might conclude that a judge’s participation in a matter created an appearance of partiality. The new standard expanded over the next 40 years to cover ever more

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103. See THODE, *supra* note 13, at 61 (stating that *Commonwealth Coatings Corporation v. Continental Casualty Co.*, 393 U.S. 145 (1968), stood for the proposition that the “appearance of bias” was a basis for disqualification).

104. See CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

105. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988).

106. See *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989) (“[I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of misleading appearances.” (quoting *United States v. Balistreri*, 779 F.2d 1191, 1205 (7th Cir. 1985))); *State v. Gomes*, 995 P.2d 314, 320 (Haw. 2000) (same) (quoting *United State v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989)); *United States v. Murphy*, 768 F.2d 1518, 1540 (7th Cir. 1985) (“[Section] 455(a) is concerned with perceptions rather than actual defects in the administration of justice.”); *United States v. Salemme*, 164 F. Supp. 2d 86, 93 (D. Mass. 1998) (“Where, as here, only § 455(a) is implicated, there is no question that the judge is actually able to preside fairly. Section 455(a) attacks the appearance of bias.”); see also John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 344 (1998) (“The point of subsection [455](a) is to promote public confidence in the integrity of the judiciary, not to guarantee the parties actual fairness.”); Linda H. Green, *The Spotless Reputation and Federal Law Clerk Employment Negotiations*, 25 U. MEM. L. REV. 127, 138 (1994) (“Section 455(a) addresses itself to the appearance of a flawed judiciary, not to actual flaws.”).

107. *United States v. Balistreri*, 779 F.2d 1191, 1204–05 (7th Cir. 1985).

situations, to the point where one commentator characterized the rule as mandating recusal whenever a judge's participation in a case "raised eyebrows."<sup>108</sup>

Once the ultimate question became whether the judge appeared to be partial, the presumption of impartiality was rendered irrelevant. Prior to the 1972 Code, actual impartiality was the issue, and therefore, the presumption had a prominent place in the inquiry. The judge was presumed to be impartial until the presumption was overcome by evidence of partiality of a personal nature.<sup>109</sup> But under the appearance regime of recusal, whether the judge suffers from actual bias is absolutely of no moment.<sup>110</sup> Instead, the controlling question is whether the circumstances indicate that the judge's impartiality might reasonably be questioned. If actual impartiality is irrelevant, so is the presumption that it exists. And, to date, no one has been bold enough to advocate for a presumption of an appearance of impartiality.

### 3. The Model Code of Judicial Conduct (1990)

The Model Code of Judicial Conduct (1990 Code) adopted in 1990 expanded the list of disqualifying factors. Under Canon 3E(1)(a) of the 1990 Code, a personal bias or prejudice concerning a party's lawyer now disqualified the judge.<sup>111</sup> Another new provision in the Code prohibited a judge from presiding over a matter in which the judge's spouse or other relative within the third degree of relationship, or a spouse of such person (1) was likely to be a material witness or (2) possessed "a more than de minimis interest that could substantially be affected by the proceeding."<sup>112</sup> Unlike the 1972 Code, which found a conflict when a spouse or minor child residing with the judge possessed an interest in a proceeding or party,<sup>113</sup> the 1990 Code mandated recusal when a spouse, child, or parent, wherever residing, or any other family member residing with the judge, had an interest in the litigation or in a litigant.<sup>114</sup>

With a minor change to ensure gender-neutral language, Canon 3E(1) carried over the catch-all recusal provision of the 1972 Code mandating disqualification "in a proceeding in which the judge's impartiality might

108. See John G. Beault, *Show Me the Money*, 98 A.B.A.J. 48, 52 (2012) ("By the early 21st century, however, grounds for recusal had greatly expanded to cover just about any circumstance where a judge's conduct may raise eyebrows.").

109. See *FLAMM* supra note 8, § 4.1, at 81 ("[T]o be disqualifying a judge's alleged bias must be 'personal' rather than 'judicial' in nature.").

110. See *Liljeberg*, 486 U.S. at 860 (stating that under § 455(a) disqualification is required whenever an appearance of partiality exists even if the "judge is pure in heart and incorruptible"); *FLAMM*, supra note 8, § 5.3, at 113 ("[T]he fact is that both state and federal courts have now adopted the Code of Judicial Conduct's view that it is the appearance of bias or impropriety that is the material issue—not a litigant's or attorney's ability to prove the existence of actual bias.").

111. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(a) (1990).

112. *Id.* Canon 3E(1)(d)(iii)–(iv).

113. CODE OF JUDICIAL CONDUCT Canon 3C(1)(c) (1972).

114. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(c) (1990). See generally *MILORD*, supra note 3, at 26–28.

reasonably be questioned.”<sup>115</sup> Adding another layer of guesswork to an already ambiguous standard, a new comment to Canon 3 provided that if no “real” basis for disqualification existed, the judge should nevertheless disclose any information that the parties or their lawyers might consider relevant to the question of the judge’s impartiality.<sup>116</sup> Attempting to fathom what information a partisan and likely suspicious litigant might consider germane in assessing judicial impartiality in the absence of any “real” basis for disqualification added to the already impossible burden on the judiciary in deciding recusal issues.<sup>117</sup>

Over the next 13 years, the ABA House of Delegates expanded the grounds for disqualification twice. In 1999, Canon 3 of the 1990 Code was supplemented to require disqualification when a judge’s election or retention campaign committee received contributions above a specified amount from a litigant or litigant’s attorney.<sup>118</sup> Four years later, subsection (f) was added to Canon 3E(1), requiring recusal if a judge, or a candidate for judicial office, made a public statement that committed or appeared to commit the judge or candidate with regard to an issue or controversy in a proceeding.<sup>119</sup>

#### 4. The Model Code of Judicial Conduct (2007)

Appointed in September 2003, the members of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission) discussed revisions to the 1990 Code for three and one-half years before adopting a new model code in 2007.<sup>120</sup> During that time, the members of the Joint Commission thoroughly examined and hotly debated whether the appearance of impropriety standard should continue as a basis for judicial discipline or be

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115. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990); see MILORD, *supra* note 3, at 26 (“The 1990 Code Committee retained the general standard for disqualification that had appeared in the 1972 Code as Section 3C(1); requiring disqualification in a proceeding in which the judge’s impartiality might reasonably be questioned.”).

116. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (1990). Use of the word “should” in the comment indicates that the duty to disclose was permissive, not mandatory. See Preamble to MODEL CODE OF JUDICIAL CONDUCT (1990) (“[W]hen ‘should’ . . . is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.”). But contrary to the preamble of the 1990 Code, judges have been disciplined for failure to disclose information the litigants might find relevant to the judge’s impartiality. See, e.g., *In re Frank*, 753 So. 2d 1228, 1238–41 (Fla. 2000) (reprimanding judge in part for failure to disclose his daughter’s relationship to an attorney).

117. The Comment was reworded in the Model Code of Judicial Conduct adopted by the ABA in 2007 to provide: “A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 5 (2007).

118. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1990) (amended Aug. 10, 1999).

119. *Id.* Canon 3E(1)(f) (amended Aug. 12, 2003).

120. See Harrison, *supra* note 77, at xv.

demoted to a purely aspirational guideline.<sup>121</sup> After studying the issue, the Joint Committee, and eventually the ABA House of Delegates, decided to retain the appearance of impropriety as a basis for sanctioning a judge.<sup>122</sup> No such debate or analysis took place concerning the continued viability of appearance-based disqualification.<sup>123</sup> The legal profession still accepted on blind faith the unproven and counterintuitive assumption that removing a judge when his or her impartiality might reasonably be questioned was essential to build public confidence in the judicial system.<sup>124</sup>

#### D. Due Process and Judicial Disqualification

State and federal disqualification rules modeled after the ABA's Model Codes are not mandated by the U.S. Constitution.<sup>125</sup> In narrowly defined circumstances, however, the Constitution protects a litigant's constitutional right to a fair and impartial judge.

The Due Process Clause was intended to ensure that no person would be deprived of life, liberty, or property at the hands of the government without a fair opportunity to contest the validity of the deprivation.<sup>126</sup> Although dependent somewhat on the precise nature of the interest at stake,<sup>127</sup> the fairness demanded by due process usually includes notice and the opportunity to be heard by an impartial decision-maker.<sup>128</sup> These simple procedural protections were designed to

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121. See McKoski, *supra* note 5, at 1931–35 (detailing how the Joint Committee vacillated on the issue of treating the appearance of impropriety as a disciplinary standard).

122. Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 *JUST. SYS. J.* 257, 262–63 (2007).

123. See Geyh, *supra* note 17, at 695 (“The ABA debate over the appearance of impropriety in the [2007] Model Code of Judicial Conduct did not extend to the role appearances play in disqualification . . .”).

124. See M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 *REV. LITIG.* 653, 668 (2011) (“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.’”).

125. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009) (“Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.”).

126. *Carey v. Piphus*, 435 U.S. 247, 259–60 (1978) (“[Due process] rules ‘minimize substantially unfair or mistaken deprivations of’ life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.”) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)).

127. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (“The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.”).

128. See *Sill v. Pa. State Univ.*, 462 F.2d 463, 469 (3d Cir. 1972) (“The basic elements [of due process] are notice and the opportunity to be heard by a fair and impartial tribunal legally constituted and having jurisdiction of the cause.”).

“minimize the risk of erroneous decisions”<sup>129</sup> and to help achieve the “ultimate goal of all procedural due process rules”—an accurate judgment.<sup>130</sup>

A biased judge presents the greatest threat to the promise of due process because a judge’s conscious or unconscious partiality will infect the process and outcome of a trial.<sup>131</sup> To protect against that threat, due process bars a judge from presiding over a matter in which an actual judicial bias or prejudice can be demonstrated. But because proof of actual partiality is difficult and because a neutral magistrate is central to a fair hearing, the Due Process Clause requires removal of a judge not only upon a showing of actual bias, but any time the circumstances create a strong probability of bias on the part of the average judge.<sup>132</sup> In *Caperton v. A.T. Massey Coal Company*,<sup>133</sup> the Court reiterated this principle, stating that due process requires disqualification under 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.”<sup>134</sup> And the probability of bias will exceed constitutional limits whenever under an objective and “realistic appraisal of psychological tendencies and human weaknesses” there is “a serious risk of actual bias.”<sup>135</sup>

Thus, in the context of judicial disqualification, the purpose of the Due Process Clause is simply to protect the accuracy of the fact-finding process by prohibiting a judge who is actually or most probably biased from derailing the truth-finding process. Due process is concerned with the reality of justice—not the appearance of justice.<sup>136</sup> It may be that by ensuring an impartial judge in fact, the Due Process Clause fosters the appearance of impartiality and thereby builds public confidence in the judiciary. But the Clause was not designed, intended, or

129. *Addington v. Texas*, 441 U.S. 418, 425 (1979); see also *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (“The function of legal process, as that concept is embodied in the constitution . . . is to minimize the risk of erroneous decisions.”).

130. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 48 n.260 (1992) (“Indeed, all of procedural due process can be reduced to this interest in accuracy.”).

131. See JOHN V. ORTH, *DUE PROCESS OF LAW* 9 (2003) (concluding that due process “procedural essentials can be encapsulated in the requirement of an accessible, impartial, and effective decision-maker, or to put it simply, a good judge”).

132. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883–84 (2009).

133. *Id.*

134. *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

135. *Id.* at 883–84 (quoting *Withrow*, 421 U.S. at 47).

136. *United States v. Rodriguez*, 627 F.3d 1372, 1381–82 (11th Cir. 2010) (rejecting claim that an appearance of bias violates the Due Process Clause and distinguishing the appearance of bias from the probability of bias standard enunciated in *Caperton v. A.T. Massey Coal Co.*); *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (concluding that under the Due Process Clause, “bad appearances alone do not require disqualification. Reality controls over uninformed perception.”); *Davenport Pastures v. Morris Cnty.*, 238 P.3d 731, 740 (Kan. 2010) (“[T]he mere appearance of impropriety is insufficient to constitute a due process violation.”).

implemented to protect appearances.<sup>137</sup> And the Court “has never rested the vaunted principle of due process on something as subjective and transitory as appearance.”<sup>138</sup> Protecting appearances lies strictly within the providence of nonconstitutionally based disqualification rules adopted by federal and state legislatures and courts.<sup>139</sup>

Due process protects the rights of litigants and is an essential component of the disqualification equation. Appearance-based disqualification statutes like § 455(a) are directed to a larger audience and intended to protect appearances, not parties. And while building public trust in the integrity and impartiality of the judiciary is necessary, that goal is better obtained by abandoning the hopelessly flawed appearance-based disqualification regime.

## II. THE FAILURE OF APPEARANCE-BASED DISQUALIFICATION

The appearance-based disqualification scheme adopted by the ABA, Congress, and the states has failed on every level. It was hoped that requiring recusal, not only when a judge subjectively recognized his or her own biases, but any time that an objective, lay observer questioned a judge’s impartiality, would result in disqualification decisions “less dependent on judicial caprice.”<sup>140</sup> But the

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137. Del Vecchio, 31 F.3d at 1391–92 (Easterbrook, J., concurring) (providing an historical analysis supporting the conclusion that “[a]n ‘appearance’ of impropriety alone has never led the Supreme Court to find that a party did not receive due process of law”).

138. *Id.* at 1371–72.

139. See Caperton, 556 U.S. at 890 (“Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.”); FLAMM *supra* note 8, § 2.5.2, at 37 (“Thus, where only the appearance of bias is involved, Congress and the majority of states afford a standard for seeking judicial disqualification that is much less stringent than the standard imposed by the Due Process Clause.”).

140. FLAMM, *supra* note 8, § 5.1, at 105; see H.R. Rep. No. 93-1453, at 5 (1974) (“Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which ‘his impartiality might reasonably be questioned.’ This sets up an objective standard, rather than the subjective standard set forth in the existing statute . . . .”); THODE, *supra* note 13, at 60 (explaining that Canon 3C(1) of the 1972 Code of Judicial Conduct created a new objective standard requiring disqualification when “a reasonable man knowing all the circumstances” concluded “that the judge’s ‘impartiality might reasonably be questioned’”); Geyh, *supra* note 17, at 691 (“[B]ecause 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.”). The appearance-based disqualification standard was also intended to eliminate the “duty to sit” doctrine relied upon by judges in denying disqualification motions in close cases. See H.R. Rep. No. 93-1453, at 2 (1974) (“The [might reasonably be questioned] language also has the effect of removing the so-called ‘duty to sit’ which has become a gloss on the existing statute.”). Although on hiatus temporarily as a result of the adoption of appearance-based disqualification, the judge’s duty to sit is back in full force in the 2007 Code. MODEL CODE OF JUDICIAL CONDUCT R.2.7 (2007) (“A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”).

“might reasonably be questioned” standard is simply too vague to foster uniformity and predictability in recusal decisions. If anything, disqualification decisions have become more random and inconsistent because of the “fact-driven” nature of classifying appearances as acceptable or unacceptable.<sup>141</sup> When the unique facts of a case control the decision, prior disqualification jurisprudence is of little assistance to the judge struggling with a recusal issue. Moreover, the “objective” disqualification test is objective in name only. Comparing the reasonable person’s fingerprints with those of the challenged judge will invariably establish a match. In practice, the arbiter of recusal decisions turns out to be the judge in reasonable person’s clothing.<sup>142</sup> And not only has the ABA standard failed to enhance public trust in the judiciary, it has actually reduced public confidence by providing a vehicle upon which litigants and others can claim that a judge’s personal characteristics create a disqualifying appearance.<sup>143</sup>

### A. Vagueness

The standard requiring judicial disqualification when a judge’s impartiality might reasonably be questioned has been accurately described as “troublesomely vague,”<sup>144</sup> “vague and understandably disturbing,”<sup>145</sup> “frighteningly empty of content,”<sup>146</sup> “elusive,”<sup>147</sup> “abstract,”<sup>148</sup> and “ambiguous.”<sup>149</sup> Unfortunately, the history behind the adoption of this appearance-based test by the ABA and Congress provides no help in defining its parameters. Nor does disqualification jurisprudence aid litigants, judges, or the public in determining whether circumstances mandate removing a judge from a proceeding.<sup>150</sup> State and federal judicial ethics committees, established to assist judges in interpreting and applying judicial conduct codes,<sup>151</sup> have fared no better

141. See *infra* Part II.A.2.

142. See *infra* Part II.B.

143. See *infra* Part II.D.

144. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 *LAW & CONTEMP. PROBS.* 43, 59–60 (1970); see Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 *ALA. L. REV.* 1, 8 (2007) (“The terms of . . . 28 U.S.C. § 455, are vague at best in their guidance . . .”).

145. *California v. Kleppe*, 431 F. Supp. 1344, 1347–48 (C.D. Cal. 1977).

146. Hearings, *supra* note 20, at 39–40 (statement of John P. Frank).

147. *Foster v. United States*, 618 A.2d 191, 195 (D.C. 1992) (describing the phrase “in which his impartiality might reasonably be questioned” as “a somewhat elusive concept”).

148. *United States v. Tucker*, 82 F.3d 1423, 1428 (8th Cir. 1996).

149. Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman’s The Impartial Judge: Detachment or Passion*, 45 *DEPAUL L. REV.* 633, 645 (1996) (“[J]udicial disqualification rules are general and ambiguous.”).

150. Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 *DRAKE L. REV.* 751, 761 (2010) (“Existing judicial disqualification jurisprudence does not provide much guidance to parties and their counsel as to when disqualification is warranted in a particular case.”).

151. See, e.g., *KAN. CODE JUDICIAL CONDUCT R.* 650 (2012) (“Pursuant to Article 3, Section 15 of the Constitution of the State of Kansas and the inherent power of the Supreme Court, there is hereby created a judicial ethics advisory panel to serve as an



than the courts in clarifying when a judge's impartiality might reasonably be questioned. Without guidance, judges rely on their own subjective view of the circumstances when applying the "objective" appearance-based disqualification standard. Consequently, there is no uniformity or predictability in recusal decisions.

### 1. Legislative History

The ABA Special Committee on Standards of Judicial Conduct (Special Committee) charged with drafting the 1972 Code made no effort to explain its brand new standard requiring disqualification whenever a judge's "impartiality might reasonably be questioned." The commentary accompanying Canon 3C of the 1972 Code does not mention the new disqualification test, much less provide instruction on how it is to be applied by the courts.<sup>152</sup> Just as surprising, Professor E. Wayne Thode, Reporter to the Special Committee, failed to include the Code's unprecedented shift to appearance-based disqualification in his account of the "highlights" of the 1972 Code.<sup>153</sup> Professor Thode, however, mentions the groundbreaking recusal standard in his Reporter's Notes to Code of Judicial Conduct.<sup>154</sup>

First, Thode characterizes the new test as an objective inquiry because "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a sufficient basis for the judge's disqualification."<sup>155</sup> But Professor Thode stops there and fails to explain how the reasonable person is to assess facts or appearances in a disqualification context.

Second, the Reporter's Notes disclose that the drafters viewed the appearance-based recusal provision of Canon 3C(1) as closely related to Canon 2's command that a judge's professional and personal life be free from impropriety and the appearance of impropriety. Construing the Canons together, Thode advises that a judge's impartiality "might reasonably be questioned" when the judge: (1) commits an impropriety under Canon 2 that would lead the reasonable person to question the judge's impartiality; (2) creates an appearance of impropriety under Canon 2 that would lead the reasonable person to question the judge's impartiality; or (3) creates "the appearance of a lack of impartiality."<sup>156</sup>

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advisory committee for judges seeking opinions concerning the compliance of an intended, future course of conduct with the Code of Judicial Conduct."); Kan. Judicial Ethics Advisory Panel, Op. JE 172 (2012) (advising a judge on a disqualification issue).

152. See CODE OF JUDICIAL CONDUCT Canon 3C cmt. (1972) (containing no commentary concerning the "might reasonably be questioned" standard).

153. E. Wayne Thode, The Development of the Code of Judicial Conduct, 9 SAN DIEGO L. REV. 793, 797–803 (1972).

154. THODE, *supra* note 13, at 60–61.

155. *Id.* at 60.

156. *Id.* at 60–61. Professor Thode states:

Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality 'might

This attempted clarification of the relationship between impropriety, the appearance of impropriety, and disqualification says no more than a judge must recuse when her impartiality might reasonably be questioned. It does nothing to explain how the reasonable person should distinguish between circumstances that create the appearance of partiality and those that do not. In short, Canon 3C(1) of the 1972 Code, the accompanying Committee Commentary, and the Reporter's Notes provide no help in ensuring a uniform application of the catch-all recusal provision.

Nor does the legislative history behind Congress's amendment of 28 U.S.C. § 455 to include the "might reasonably be questioned" standard suggest how to interpret and apply the novel test. In the early 1970s, Congress desperately desired to "shore up public confidence in our public institutions" by instilling a "new, more rigorous, sense of propriety" in government officials.<sup>157</sup> Achieving this goal in the judicial branch meant "remov[ing] any scintilla of doubt that the public might have that [a] judge would be prejudiced in his decision."<sup>158</sup> According to Senator Birch Bayh, a "major revision"<sup>159</sup> of federal disqualification law was needed to assure a judge's recusal when his participation in a case "would create even an appearance of impropriety."<sup>160</sup> Taking the lead on the issue, Senator Bayh introduced Senate Bill 1886, which sought to amend 28 U.S.C. § 455 to require recusal when a judge's participation in a case created an "appearance of impropriety."<sup>161</sup> Later, Senator Bayh withdrew Senate Bill 1886 and introduced Senate Bill 1064, which replaced the "appearance of impropriety" language with the "might reasonably be questioned" language found in the 1972 Code. This substitution was made to align the federal disqualification statute with Canon 3C(1) of the 1972 Code.<sup>162</sup> Congress understood that the ABA standard included

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reasonably be questioned' is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety in violation of Canon 2 that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard, as does participation by the judge in the proceeding if he thereby creates the appearance of a lack of impartiality.

Id.

157. Hearings, *supra* note 20, at 14, 10 (statement of Sen. Birch Bayh).

158. Id. at 14.

159. Id. at 10.

160. Id. at 11–12; see also *id.* at 16 (stating that it is Congress's responsibility to insure a "complete appearance of propriety, the avoidance of any appearance of impropriety" in the judiciary); *id.* at 76 (identifying the absence of a duty to disqualify to avoid the appearance of impropriety as a shortcoming in the federal disqualification law).

161. Id. at 6–8 (reproducing S. 1886 introduced by Senator Bayh in May 1971). Senate Bill 1886 provided that "[a]ny justice or judge of the United States shall disqualify himself and shall not accept waiver of disqualification . . . in any case in which his participation in the case will create an appearance of impropriety[.]" Id. at 8; see also *id.* at 12 ("[M]y disqualification bill [S. 1886] specifically requires disqualification in any case in which the judge's participation would result in 'an appearance of impropriety,' a ground for disqualification mentioned by the Supreme Court in the Commonwealth Coatings case.").

162. See *id.* at 50 (testimony of John P. Frank) ("Yes; on that score, in an effort to get to be at one with the ABA, I would suggest that we adopt their language in which its

all improper appearances that would create a reasonable question as to the judge's impartiality.<sup>163</sup> Also consistent with the ABA model, the new federal disqualification test would be an objective one, based on the objective assessment of the hypothetical reasonable observer, rather than the judge's subjective view of his ability to remain impartial.<sup>164</sup>

Other than classifying the "might reasonably be questioned" standard as an objective test that protected against the appearance of impropriety, the legislative history is void of any attempt to aid judges in interpreting and applying § 455(a).<sup>165</sup> This absence is especially disturbing since the need for guidance should have been obvious to the members of the Senate Judiciary Subcommittee during the hearings conducted on Senate Bills 1886 and 1064. Professor Thode's testimony before the Subcommittee foreshadowed future difficulty in applying the disqualification standard of Canon 3C(1) with any semblance of consistency.

On May 17, 1973, Professor Thode testified before the Subcommittee on Improvements in Judicial Machinery concerning Senate Bill 1064.<sup>166</sup> During his testimony, Thode was asked to apply the 1972 Code's disqualification provisions to the following hypothetical situation: A judge's distant cousin is a lawyer representing a litigant in a matter before the judge. The judge is not close to his cousin and has not seen him in thirty years.<sup>167</sup>

This should not have been a difficult question for Professor Thode because the commentary to Canon 3C of the 1972 Code discussed this precise situation. The commentary provided that a cousin was not within the prohibited third degree of relationship and therefore the judge "would not [be disqualified] if a cousin were a party or lawyer in the proceeding."<sup>168</sup> But knowing that nothing is

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impartiality might reasonably be questioned. While I like [our appearance of impropriety standard] better, again this is a matter of trying to work out a unified standard.").

163. See *id.* at 110 (testimony of E. Wayne Thode) (stating that the "might reasonably be questioned standard" included any impropriety or appearance of impropriety that reasonably placed a judge's impartiality in question).

164. See *id.* at 33 (testimony of John P. Frank) (characterizing the appearance of impropriety disqualification standard as an external standard dependent on how the circumstances are viewed by "the people who are receiving the justice"); *id.* at 110 (testimony of E. Wayne Thode) (stating that the reasonable person controls disqualification); see also *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998) ("Congress revised the disqualification statute in 1974 and instituted an objective standard in § 455(a) to replace the old subjective standard.").

165. See Comment, *The Elusive Appearance of Impropriety: Judicial Disqualification Under Section 455*, 25 DEPAUL L. REV. 104, 126 (1975) ("The legislative history of [455(a)] suggests that this standard is determined by reference to the reasonable man, but nowhere does the legislative history indicate how the reasonable man judges impropriety or the appearance thereof."); Cravens, *supra* note 144, at 7–8 (noting that because § 455 and the ABA Model Code disqualification provisions "both came without sufficient explanation of the meaning of their terms, their interpretations have been inconsistent").

166. Hearings, *supra* note 20, at 91.

167. *Id.* at 112.

168. CODE OF JUDICIAL CONDUCT Canon 3C(5)(A) cmt. (1972).

certain in the ephemeral world of appearance-based ethics, Thode could do no better than respond to the hypothetical by stating that the judge could sit in the case unless, of course, “he decided that his impartiality might reasonably be questioned under those circumstances.”<sup>169</sup>

After playing midwife for three and one-half years during the birthing of the new judicial code, a recognized expert in judicial ethics could not definitively answer whether Canon 3C required a judge to disqualify himself from a case involving a fourth-degree relative whom the judge had not seen for thirty years. Fully cognizant of the ambiguity of the “might reasonably be questioned” standard, the Reporter of the Code of Judicial Conduct declined to offer an opinion on a recusal issue even though the precise issue was addressed in the Code’s commentary. This certainly did not bode well for the uniform interpretation and application of Canon 3C(1) or 28 U.S.C. § 455(a).

## 2. Disqualification Jurisprudence

Courts and commentators agree that “the existing judicial disqualification jurisprudence does not provide much guidance to parties and their counsel as to whether disqualification is warranted in a particular case.”<sup>170</sup> Prior court decisions provide little assistance in evaluating recusal motions for several reasons. First, the ambiguity of the “might reasonably be questioned” standard prevents courts from achieving a “common understanding” as to when a set of circumstances reaches the recusal threshold.<sup>171</sup> Second, most disqualification decisions are made without explanation.<sup>172</sup> And when an explanation is given, it usually supports the denial of a disqualification motion, rendering the jurisprudence lopsided in favor of rulings denying recusal requests.<sup>173</sup> Third, some opinions carefully analyze and explain why disqualification is unwarranted only to conclude with the judge’s recusal.<sup>174</sup> But the primary reason for the failure of decisional law to foster uniformity is that

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169. Hearings, *supra* note 20, at 112.

170. Flamm, *supra* note 150, at 761; see *Clemens v. District Court*, 428 F.3d 1175, 1178 (9th Cir. 2005) (stating that judges should not look to prior disqualification jurisprudence in deciding disqualification issues, but instead must rely on an independent examination of the facts before the court).

171. See Geyh, *supra* note 17, at 696.

172. *Id.*; Frost, *supra* note 58, at 569 (“Judges who recuse themselves rarely issue a decision explaining why.”).

173. See Flamm, *supra* note 150, at 761 (“[W]hile federal judges do recuse themselves in many situations, a judge who does so rarely writes an opinion explaining why.”).

174. See, e.g., *People v. Jeter*, 930 N.Y.S.2d 176 (N.Y. Sullivan Cnty. Ct. 2011) (explaining why recusal was unwarranted and then granting the motion to recuse in an “abundance of caution”); *Novak v. Farneman*, No. 2:10-CV-768, 2011 WL 4688630, at \*4 (S.D. Ohio Sept. 30, 2011) (finding “recusal in this case is most certainly not required” but nevertheless granting a motion to recuse “to avoid even the remote possibility that the further proceedings might be tainted with a suggestion of bias or impropriety”); *Kennametal, Inc. v. Sandvik, Inc.*, No. 2:09-cv-00857, 2012 WL 6681401, at \*14 (W.D. Pa. Dec. 21, 2012) (excusing the special master from the case even though no reasonable person could question the master’s impartiality).

the “fact-driven” nature of appearance-based disqualification precludes a meaningful role for precedent in deciding recusal issues.<sup>175</sup> As stated by the Fifth Circuit Court of Appeals:

Our Circuit has recognized that section 455(a) claims are fact driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue.<sup>176</sup>

With no help from either the drafters of appearance-based recusal rules or prior jurisprudence, judges had one last hope for meaningful guidance in the analysis and resolution of disqualification issues: judicial ethics advisory committees.

### 3. Judicial Ethics Advisory Committees

Forty-five states and the District of Columbia have advisory committees charged with providing advice to judges on questions of judicial ethics and conduct, including recusal decisions.<sup>177</sup> These committees provide valuable advice to judges on many important ethical issues, but disqualification is not one of them. The lack of guidance by the drafters of the “might reasonably be questioned” standard, together with the courts’ abdication of their duty to provide a dependable disqualification jurisprudence, leave the volunteer committee members to their

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175. See *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (“Disqualification under section 455(a) is necessarily fact-driven and may turn on subtleties in a particular case. Consequently, ‘the analysis of a particular section 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue.’” (quoting *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999))); *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1130 (N.D. Cal. 2011) (same); *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (“[C]ases within § 455(a) are extremely fact driven ‘and must be judged on [their] unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.’” (quoting *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995))); *Osmar v. Orlando*, 844 F. Supp. 2d 1242, 1243 (M.D. Fla. 2012) (same); *Carolina Cas. Ins. Co. v. Helsley*, No. 1:10-cv-916-LJO-MJS, 2010 WL 4955547, at \*2 (E.D. Cal. Nov.30, 2010) (“Motions to disqualify are fact-driven and the Court’s analysis must be guided by the unique facts and circumstances of this case rather than by comparison to similar situations in prior jurisprudence.”); *Green v. Stevenson*, No. 12–432, 2012 WL 2154123, at \*3 (E.D. La. June 13, 2012) (same).

176. *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999); see *United States v. Jordan* 49 F.3d 152, 157 (5th Cir. 1995) (“The Fifth Circuit has established a body of case law applying the Section 455(a) standard. Unfortunately, but not surprisingly, no case is precisely on point; after all, each § 455(a) case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.”).

177. See *Links to Judicial Ethics Advisory Committees by State*, AM. JUDICATURE Soc’y, <https://www.ajs.org/judicial-ethics/advisory-committees/> (last visited Apr. 16, 2014).

own subjective devices. The ineptness of advisory committees in recusal matters is illustrated by their opinions addressing whether a social or personal relationship with a lawyer requires a judge's recusal from that lawyer's cases.

Many committees simply sidestep the issue by claiming an "historical reluctance"<sup>178</sup> to evaluate whether a relationship with a lawyer might cause the judge's impartiality to be questioned.<sup>179</sup> Other committees give the appearance of providing guidance without really doing so. For example, the Kentucky Supreme Court endorsed the following advice offered by the Kentucky Judicial Ethics Advisory Committee concerning judge-attorney relationships and the appearance of partiality:

Recusal is generally required by Canon 3E(1) in a proceeding in which the judge's impartiality might reasonably be questioned. . . . Thus, the intensity of a judge's relationships might be viewed on a continuum. On the one side is the judge's complete unfamiliarity with a lawyer . . . except in a judicial setting. No recusal is required. On the other extreme is a judge's close personal relationship with a lawyer . . . such as a family member or a spouse. Recusal is required under Canon 3E(1). At some point between these two extremes, a judge and a participant in a case may have such a close social relationship that a judge should disclose the relationship to attorneys and parties in a case and, if need be, recuse.<sup>180</sup>

In other words, the Kentucky Advisory Committee and the Kentucky Supreme Court counsel that if a judge is unfamiliar with a lawyer, recusal is not necessary, but that if a lawyer is the judge's spouse, recusal is necessary. Neither of these propositions is particularly controversial or helpful. Between these two extremes, the Committee and Kentucky Supreme Court leave the judge to her own devices, suggesting that if the relationship with the lawyer is close enough the "judge should disclose the relationship . . . and, if need be, recuse" herself—hardly a legal standard.<sup>181</sup>

Trying to provide more concrete advice, the West Virginia Judicial Investigation Commission came to diametrically opposed conclusions on two virtually identical fact patterns. In one opinion, the Committee determined that a judge must disclose that he planned to vacation with a lawyer who appeared before

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178. See, e.g., Mass. Comm. on Judicial Ethics, Op. 2004-9 (2004) (stating that the Committee "historically has been reluctant" to advise judges whether a social relationship with a lawyer creates a situation where the judge's impartiality might reasonably be questioned because each case is fact specific).

179. *Id.* ("You [the judge] are the ultimate arbiter of whether you have an excessively close or personal relationship with the attorney or have created that appearance. Where that line is drawn is a decision that you will have to make."); U.S. Comm. on Codes of Conduct, Op. 11 (2009) ("Ultimately, the question [of recusal] is one that only the judge may answer.").

180. *Alred v. Judicial Conduct Comm'n*, 395 S.W.3d 417, 430 (Ky. 2012) (quoting Kentucky Judicial Ethics Advisory Comm., Op. 119 (2010)) (omission in original).

181. See Ky. Judicial Ethics Comm., Op. JE-119 (2010) (emphasis added).

the judge and must recuse himself if requested to do so.<sup>182</sup> In another opinion, the Committee found no need to disclose or recuse where the judge and lawyer had vacationed together and in addition were “close personal friends” belonging to the same social clubs and often shopping together.<sup>183</sup>

The unsuccessful, but valiant, effort of the well-respected New York Advisory Committee on Judicial Ethics to guide judges through disqualification issues when an attorney–friend appears before a judge best demonstrates the futility of any attempt to uniformly apply a “might reasonably be questioned” standard. In Opinion 11-125, the New York Advisory Committee identified three categories of judge–lawyer relationships relevant to the question of disqualification: (1) acquaintance; (2) close social relationship; and (3) close personal relationship.<sup>184</sup> The Committee defined the acquaintance category to include attorneys with whom a judge casually socializes in unplanned or coincidental situations. Examples given in the opinion include a lawyer and judge who belong to the same social club, church, or country club, or whose children attend the same school.<sup>185</sup> According to the Committee, a judge need not disclose acquaintanceships or recuse herself from cases involving acquaintances. But because uncertainty is inherent in appearance-based recusal, the Committee felt compelled to add that an acquaintanceship requires disqualification if the social contact between the judge and lawyer creates an “appearance of impropriety.”<sup>186</sup> Of course, the opinion does not discuss the circumstances under which a permissible acquaintanceship creates an appearance of impropriety.

According to the Committee, the next level of relationship, “close social relationship,” requires disclosure of the relationship by the judge.<sup>187</sup> If a party objects to the judge’s continued participation in the case the judge is not necessarily disqualified. Instead, whether the judge remains in the case is “solely within the judge’s discretion.”<sup>188</sup> In exercising that discretion, the judge must recuse herself if remaining on the case would create a situation in which the judge’s “impartiality can reasonably be questioned.”<sup>189</sup> In other words, if a lawyer is a close social companion, the judge must disclose the relationship and recuse if, under the circumstances, the judge’s “impartiality might reasonably be questioned.” This circular reasoning offers no help to the judge. To provide even this minimal level of guidance, however, the Committee was forced to disavow three of its previous opinions. One of the rescinded opinions held that a judge must disqualify himself from any case involving an attorney with whom the judge has a “close social relationship.”<sup>190</sup> The other two retracted opinions conflicted with new

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182. W.Va. Judicial Investigation Comm’n, Op. 6-12-08.

183. W.Va. Judicial Investigation Comm’n, Op. 3-29-04.

184. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See Advisory Comm. on Judicial Ethics Opinions 05-89/05-90 (2005), modified by N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

Opinion 11-125 in that they advised judges that there was no need to disclose or recuse from a case in which (1) the judge and attorney had been friends for seventeen years,<sup>191</sup> or (2) the judge and attorney frequently ate meals together.<sup>192</sup> Under the Committee's new interpretation of the "might reasonably be questioned" standard expressed in Opinion 11-125, disclosure and possibly recusal is now required in both situations.

Finally, the Committee decided that disqualification is mandatory whenever a judge and lawyer maintain a "close personal relationship" because in those situations the judge's impartiality is automatically subject to question.<sup>193</sup> The defining feature of a close personal relationship, in the Committee's view, is the sharing of intimate aspects of one's life, such as sharing confidences, socializing regularly, vacationing regularly, and celebrating significant events in each other's lives.<sup>194</sup> Once again, in order to identify mandatory recusal situations in even these general terms the Committee had to expressly jettison two ethics opinions that it authored earlier in the same year.<sup>195</sup> First, the Committee disavowed Opinion 11-20, which had concluded that a "close personal relationship" required disclosure but not necessarily disqualification.<sup>196</sup> Second, the Committee modified Opinion 11-45<sup>197</sup> by stating that the relationship between the judge and lawyer, described in that opinion as a "close social relationship," was, upon further consideration, a "close personal relationship."<sup>198</sup> Most telling, the Committee declared its disagreement with the New York Commission on Judicial Conduct's disciplinary decision in *In re Huttner*.<sup>199</sup> There, the New York Commission on Judicial Conduct characterized Judge Huttner's relationship with an attorney as a "close social relationship" requiring disclosure but not recusal.<sup>200</sup> In Opinion 11-125, the New York Judicial Ethics Advisory Committee disagreed, categorizing the relationship in Huttner as a "close personal relationship" mandating recusal.<sup>201</sup>

In sum, judges are faced with applying an admittedly vague disqualification standard without assistance from those who developed the

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191. See N.Y. Advisory Comm. on Judicial Ethics, Op. 93-87 (1993) (deciding that a judge was not required to disqualify himself from a case involving an attorney with whom the judge had graduated law school and maintained a friendship for 17 years, nor was the judge required to disclose the relationship), modified by N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

192. See N.Y. Advisory Comm. on Judicial Ethics, Op. 92-22 (1992) (finding no impropriety where a judge had breakfast, lunch, or dinner with an attorney who practices in the judge's court, so long as pending matters were not discussed and there is no appearance of impropriety), modified by N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

193. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

194. *Id.*

195. *Id.*

196. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-20 (2011).

197. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-45 (2011).

198. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).

199. *In re Huttner*, Determination (N.Y. State Comm'n on Judicial Conduct July 5, 2005).

200. *Id.*

201. N.Y. Advisory Comm. on Judicial Ethics, Op. 11-125 (2011).



standard and without the benefit of a useful disqualification jurisprudence. Add to the mix judicial ethics advisory committees that, at best, advise judges to recuse “if need be,” and at worst issue discordant opinions and opinions that patently conflict with decisions rendered by the same state’s judicial disciplinary body, and it is no wonder that Professors Jeffery Shaman and Jona Goldschmidt concluded that:

Because of the difficulty of obtaining adequate guidance with regard to disqualification rules that are often extremely general, ambiguous, or conflicting from one jurisdiction to another, judicial disqualification frequently is subjective, random, and arbitrary. In particular, cases that involve only the appearance of partiality pose a special dilemma for judges, who believe that they are in fact impartial but must make the difficult determination of whether in the public eye they appear to be biased.<sup>202</sup>

Vagueness alone is sufficient reason to abandon appearance-based disqualification. But other equally serious flaws permeate the ABA’s standard.

#### **B. An Objective Standard in Name Only**

The disqualification test found in 28 U.S.C. § 455(a) and virtually every state judicial ethics code designates the reasonable person as the arbiter of a judge’s ability to remain on a case.<sup>203</sup> Assigning the disinterested observer to this key position permits the disqualification test to be labeled an “objective” test, which is touted as far superior to a subjective test, where judges assess their own fairness. But exactly who is this “objective,” hypothetical observer of judicial conduct?

Various described as the “average citizen,”<sup>204</sup> an “objective onlooker,” “disinterested bystander,”<sup>205</sup> “lay observer,”<sup>206</sup> and “average person on the

202. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, *AM. JUDICATURE SOC’Y, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* 4–5 (1995); see Debra Lyn Basset, *Judicial Disqualification in the Federal Appellate Courts*, 87 *IOWA L. REV.* 1213, 1253 (2002) (noting the inconsistent application of judicial recusal and disqualification criteria).

203. See *State Farm Fire & Cas. Co. v. Hood*, No. 2:07cv188-KS-MTP, 2007 WL 4191976, at \*2 (S.D. Miss. Oct. 10, 2007) (finding that every circuit court of appeals “has adopted some version of a reasonable, prudent person standard” in applying the might reasonably be questioned test); CHARLES GARDNER GEYH, *FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW* 18 (2d ed. 2010) (same); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably be Questioned,”* 14 *GEO. J. LEGAL ETHICS* 55, 73 (2000) (noting the states’ uniform view that the reasonable person determines whether a judge’s impartiality might reasonably be questioned).

204. *Gibson v. United States*, 792 A.2d 1059, 1068 (D.C. 2002).

205. *Robin Farms Inc. v. Bartholome*, 989 S.W.2d 238, 246 (Mo. App. 1999).

206. *United States v. Chandler*, 996 F.2d 1073, 1104 (11th Cir. 1993).

street,”<sup>207</sup> two traits are consistently attributed to the reasonable person of judicial ethics codes. First, the reasonable person is fully informed of all the facts and circumstances surrounding the disqualification dispute.<sup>208</sup> The courts are “quite insistent on the fully informed component of the inquiry.”<sup>209</sup> Second, the objective arbiter of judicial disqualification is a lay person and not a member of the judiciary.<sup>210</sup> Thus, the reasonable person is fully informed of the facts and circumstances surrounding the recusal request and, at least in theory, is someone other than a judge.

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207. *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002); see *In re Kensington Int’l*, 368 F.3d 289, 302–03 (3d Cir. 2004) (“[W]e perceive no reason to depart from the traditional ‘man on the street’ standard.”).

208. *Sao Paulo State of Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232–33 (2002) (stating that § 455 assumes that the reasonable person knows all the circumstances); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (statement of Chief Justice Rehnquist considering disqualification) (describing the reasonable observer as one who is “informed of all the surrounding facts and circumstances”); *Newport News Holdings Corp., v. Virtual City Vision*, 650 F.3d 423, 433 (4th Cir. 2011) (describing the reasonable person as a “well-informed observer who assesses all the facts and circumstances” (quoting *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998))); *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008) (imputing knowledge of all the circumstances to the reasonable person); *Chandler*, 996 F.2d at 1104 (describing the reasonable person as “fully informed of the facts”); *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011) (“The reasonable examiner must be fully informed of the facts and circumstances.”); *State v. McCabe*, 987 A.2d 567, 572 (N.J. 2010) (describing the reasonable person as fully informed); *Tracey v. Tracey*, 903 A.2d 679, 684 n.6 (Conn. App. 2006) (stating that the reasonable person must be fully informed of the facts and circumstances underlying the disqualification motion); *THODE*, *supra* note 13, at 60–61 (stating that the 1972 Code required disqualification when a judge’s conduct would lead a reasonable man “knowing all the circumstances to the conclusion that the judge’s ‘impartiality might reasonably be questioned.’”).

209. *Midwest Generation EME v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 945 (N.D. Ill. 2010) (“The Supreme Court is quite insistent on the ‘fully informed component of the inquiry.’ . . . So, too, are the courts of appeals.”) (citations omitted).

210. *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (“The hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside of the judicial system.”); *Hayes v. Williamsville Cent. Sch. Dist.*, 506 F. Supp. 2d 165, 173 (W.D.N.Y. 2007) (“The [disqualification] inquiry must be made from the perspective of a reasonable observer from outside of the judicial system.”); Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 197 (2007) (“[T]he courts also stress that ‘the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system.’” (citing *DeTemple*, 162 F.3d at 287)); R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1812 (2005) (“Much of the case law discussing the [disqualification] standard is concerned with explaining that the reasonable person is, at the very least, not a judge.”).

### 1. The Fully Informed Reasonable Person

A few states consider the reasonable observer fully informed if he possesses no more than “the facts in the public domain.”<sup>211</sup> But most courts reject a definition of “fully informed” that limits the reasonable person’s knowledge to what is publicly available because no important legal issue should be decided by “what a straw poll of the only partly informed man-in-the-street would show.”<sup>212</sup>

The vast majority of courts insist that the reasonable person possess all material facts, including details not known by the general public.<sup>213</sup> In short, the objective observer knows everything the judge knows.<sup>214</sup> It is assumed that the reasonable person has examined the record and the law,<sup>215</sup> “appreciate[s] the significance of the facts in light of relevant legal standards and judicial practice,”<sup>216</sup> and is “aware of the facts of life that surround the judiciary.”<sup>217</sup> A few illustrations will demonstrate the virtually unlimited, obscure, and sometimes disputed nature of the factual and legal knowledge imputed to the lay observer.

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211. See, e.g., *Sears v. Olivarez*, 28 S.W.3d 611, 615 (Tex. App. 2000) (stating that the disqualification test is “whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge’s conduct, would have a reasonable doubt that the judge is actually impartial”).

212. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (“Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.”); *Wessmann v. Bos. Sch. Comm.*, 979 F. Supp. 915, 916 (D. Mass. 1997) (“The test is not whether anyone, with a modicum of knowledge about the case, the judge or the situation, or having seen only television soundbites or news captions ‘might’ believe the judge to be partial. Rather, it is whether a reasonable person, knowing ‘all the circumstances, would harbor doubts about the judge’s impartiality.’”).

213. See *Haynes v. State*, 937 S.W.2d 199, 203 (Mo. 1996) (“[T]he reasonable person knows all that has been said and done in the presence of the judge.”); 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, 190 n.52 (2005) (“The reasonable observer is a person who is apprised of all the material facts, including those not known by the general public.”).

214. See *Curvin v. Curvin*, 6 So. 3d 1165, 1171 (Ala. Civ. App. 2008) (defining the reasonable person as “knowing all the facts known to the judge”). The drafters of the 1972 Code of Judicial Conduct intended the reasonable person assessing a disqualification issue to know everything the judge knew. See E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 UTAH L. REV. 395, 402 (stating that under the new appearance-based disqualification provision of the 1972 Code, the test was “[w]ould a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge find there is a reasonable basis for questioning the judge’s impartiality.”).

215. *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008).

216. *In re Sherwin-Williams Co.*, 607 F.3d 474, 478 (7th Cir. 2010).

217. *Kirby v. Chapman*, 917 S.W.2d 902, 909 (Tex. Ct. App. 1996).

Federal courts considering disqualification motions based on a judge's political activities assume that the fully informed observer understands the role politics plays in the appointment of judges and that "merit selection" means no more than the appointment of a judge from a list of finalists who have gained finalist status often, and sometimes exclusively, on political considerations.<sup>218</sup> The average citizen is imputed with knowledge "that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or . . . both."<sup>219</sup> In states with elected judiciaries the reasonable person is viewed as approving, or at least accepting, the facts of elective life, including the role that money plays in the campaign process.<sup>220</sup> As former Chief Justice Max Osborn of the Texas Eighth Court of Appeals observed:

In states which elect judges, the "reasonable" person must know that judges have to stand for election on a regular basis, that elections cost money and that in metropolitan areas and in state-wide races those races are very expensive for an effective campaign. That "reasonable" person must also know that in judicial races most contributions are made by practicing attorneys. We might even expect the "reasonable" person to have some knowledge as to the motives for contributing to a judicial campaign.<sup>221</sup>

The arbiter of disqualification motions is also expected to realize that fundraising and grass-roots support for judges comes largely from persons, including lawyers and litigants, who have a financial, political, or other interest in

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218. See *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *Higginbotham v. Oklahoma ex rel. Okla. Transp. Comm'n*, 328 F.3d 638, 645 (10th Cir. 2003) ("It is, of course, 'an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.'" (quoting *United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987))); see also Mark S. Hurwitz & Drew Noble Lanier, *Judicial Diversity in Federal Courts*, 96 *JUDICATURE* 76, 77 (2012) ("Judges of the federal courts are political veterans, having been involved in politics for much of their professional lives . . .").

219. *Home Placement Serv., Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984).

220. See *Storms v. Action Wis. Inc.*, 754 N.W.2d 480, 487 (Wis. 2008) ("Both the public and knowledgeable persons within the judicial system, are fully aware of, and likely comfortable with, the fact that people will support an individual for judicial office with various levels of assistance, monetary support or endorsements." (quoting Wis. Supreme Court Judicial Conduct Advisory Comm., Op. 03-1 (2003))); *Kirby*, 917 S.W.2d at 909 (finding that the reasonable person knows that judges must stand for reelection and fund their campaigns with contributions). These opinions ignore the fact that "[a] series of polls going back more than a decade reflect a steady—if not growing—belief among the public that campaign contributions directly affect judicial decision-making." Shira J. Goodman, *The Danger Inherent in the Public Perception that Justice Is for Sale*, 60 *DRAKE L. REV.* 807, 809 (2012) (citations omitted).

221. *Aguilar v. Anderson*, 855 S.W.2d 799, 805 (Tex. Ct. App. 1993) (Osborn, C.J., concurring) (citations omitted). For a discussion of possible motives behind contributions to judicial candidates, see Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 *STAN. L. REV.* 449, 479–81 (1988).

the judicial process.<sup>222</sup> And the courts cannot fathom how the public could reasonably expect judges to be disqualified simply because they participate in a “rough and tumble” election campaign.<sup>223</sup>

In the context of matrimonial law matters, a state judge found that the reasonable person examining the grounds asserted in the recusal motion would know and understand the realities of a family law practice,<sup>224</sup> including that litigants in divorce cases are often under stress and at a “low-ebb” of their lives, causing them to say and do things that they would not otherwise say and do.<sup>225</sup> The judge also concluded that the objective observer realizes that some litigants deliberately attempt to provoke a judge’s recusal by filing complaints against the judge, but that judges are trained to ignore such extraneous issues because they have a responsibility not to be bullied out of cases by disqualification motions.<sup>226</sup>

Courts regularly imbue the reasonable person with other specialized information much more likely to be within the knowledge of the judge than the lay observer. For example, in the context of recusal motions, courts have declared the reasonable person to be conversant with: (1) the judicial ethics rules of Wisconsin;<sup>227</sup> (2) Rules 2.2 and 2.4 of the Minnesota Code of Judicial Conduct;<sup>228</sup> (3) the challenged judge’s “jurisprudence over the years,”<sup>229</sup> including a judge’s voting record in personal injury cases while a member of the appellate court;<sup>230</sup> (4) the fact that a judge had heard numerous capital cases without a challenge to her impartiality;<sup>231</sup> (5) the population, number of lawyers, and number of judges in a

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222. See *Rodgers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995) (Enoch, J., concurring, responding to the declaration of recusal) (“I would expect the reasonable person to know that both fundraising and grass-roots support will come largely from those who are interested, financially or otherwise, in the work of the courts.”).

223. *Id.* at 882.

224. *Brown v. Brown*, No. FA074028466, 2011 WL 1888201, at \*2 (Conn. Super. Ct. Apr. 28, 2011); see *Ex parte Ellis*, 275 S.W.3d 109, 116–17 (Tex. Ct. App. 2008) (“[C]ourts must assume that the community member is aware of the realities of the practice of law.”).

225. *Brown*, 2011 WL 1888201, at \*3.

226. *Id.* at \*4.

227. Wis. SUP. CT. R. 60.04(4) (2012) (stating that the reasonable person is “knowledgeable about judicial ethics standards and the justice system”).

228. *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011).

229. *Miles v. Ryan*, 697 F.3d 1090, 1091 (9th Cir. 2012) (order denying motion to recuse) (“No ‘well informed, thoughtful observer,’ particularly one who has followed Judge Graber’s jurisprudence over the years, would believe that Judge Graber [was] . . . biased or partial in the particular case.”).

230. *Doe v. Stegall*, 900 So. 2d 357, 362 (Miss. 2004) (finding that the reasonable person would consider the judge’s voting record in personal injury cases while a member of the appellate court); *Perry v. Schwarzenegger*, 630 F.3d 909, 916 (9th Cir. 2011) (Reinhardt, J., denying Motion for Disqualification) (concluding that a reasonable person familiar with Judge Reinhardt’s judicial record throughout his career would find no reason to doubt his impartiality).

231. *Miles*, 697 F.3d at 1090–91.

judicial district;<sup>232</sup> and (6) that a judge plays a different role at sentencing than at other stages of a criminal case.<sup>233</sup> In other words, the objective observer evaluating whether a judge appears partial possesses precisely the same factual, legal, and practical information as the challenged judge, much of which only the judge could know.

## 2. The Reasonable Person Is Not a Judge?

In theory at least, the reasonable person is not a judge and certainly not the judge whose impartiality is being questioned.<sup>234</sup> As previously demonstrated, however, the level of knowledge attributed to the reasonable person is identical to the knowledge the judge possesses.<sup>235</sup> Further eroding the myth that the objective observer stands outside the judiciary, the “challenged judge is ordinarily the one to decide the disqualification motion.”<sup>236</sup> This is true of federal judges.<sup>237</sup> And while a few states assign recusal requests to a judge other than the subject of the request,<sup>238</sup> most state court judges decide whether their own impartiality might reasonably be questioned.<sup>239</sup> The rationale behind the rule requiring judges to

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232. E.g., *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998); see *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 473 n.6 (Ky. 2010) (finding that a reasonable observer would not assume that the judge knew that a litigant was the parent of the judge’s campaign treasurer and personal accountant, in part, because the judge served in a large urban area).

233. E.g., *Haynes v. State*, 937 S.W.2d 199, 203 (Mo. 1996) (“[T]he reasonable person understands that the judge’s role is different during sentencing than at earlier stages of a criminal proceeding.”).

234. See *supra* note 210 and accompanying text.

235. See *supra* notes 211–17 and accompanying text.

236. FLAMM, *supra* note 8, § 5.1, at 105.

237. *United States v. Balistreri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985) (“Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge.”); *Da Silva Moore v. Publicis Groupe*, 868 F. Supp. 2d 137, 150 (S.D.N.Y. 2012) (“Discretion is confided in the district judge in the first instance to determine whether to disqualify himself.”); *Pharmacy Records v. Nassar*, 572 F. Supp. 2d 869, 875 (E.D. Mich. 2008) (“The trial judge himself must rule on a motion for recusal under 28 U.S.C. § 455.”); CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2011) (“All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge’s own initiative.”).

238. See, e.g., VT. R. CIV. P. 40(e)(3) (2011) (requiring a judge whose disqualification is sought by a party to either recuse himself or refer the motion to the administrative judge for hearing or reassignment).

239. R. GRANT HAMMOND, *JUDICIAL RECUSAL* 83 (2009); *id.* at 61 (“The general practice in the United States, both in the federal and state jurisdictions, is that it is the judge to whom the application to recuse is directed who determines that application.”); *SAMPLE ET AL.*, *supra* note 29, at 19 (stating that most state courts “let the challenged judge decide [recusal] motions herself”); Geyh, *supra* note 49, at 233 (noting the “prevailing view” that a judge decides his or her own recusal requests).

decide challenges to their own impartiality is that the presiding judge is in the best position to know and appreciate the facts and circumstances controlling the disqualification decision.<sup>240</sup> Thus, under appearance-based disqualification, a judge must imagine how a reasonable nonjudge would view the potential conflict. Of course, this is nearly impossible because the judge is part of the judiciary<sup>241</sup> and, besides, few individuals, including judges, can be expected to disinterestedly assess their own impartiality.<sup>242</sup> Requiring judges to apply the “might reasonably be questioned” standard as both its interpreter and its object fatally undercuts any claim that appearance-based recusal employs an objective standard.<sup>243</sup>

To remedy this problem, some commentators recommend that a judge other than the challenged judge hear a disqualification motion.<sup>244</sup> But this suggestion is unlikely to gain widespread support. Not only have judges decided their own recusal issues since the founding of the nation<sup>245</sup> but, more importantly, the law of disqualification is intimately tied to judicial ethics, not civil or criminal procedure.<sup>246</sup> And judicial ethics codes place the responsibility for disqualification squarely on the challenged judge. For example, each ABA Model Code of Judicial Conduct expressly provides that a judge decide his or her own disqualification

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240. In re Kan. Pub. Emps. Ret. Sys., 85 F.3d 1353, 1358 (8th Cir. 1996) (“[T]he judge presiding over a case is in the best position to appreciate the implication of those matters alleged in a recusal motion.” (quoting In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1998))); Da Silva Moore, 868 F. Supp. 2d at 150 (same); United States v. Mitchell, 377 F. Supp. 1312, 1315 (D.D.C. 1974) (“Only the individual judge knows fully his own thoughts and feeling and the complete context of the facts alleged [in the recusal motion].”); Smulls v. State, 10 S.W.3d 497, 500 (Mo. 2000) (“[A] particular judge is in the best position to determine if recusal is necessary.”); Commonwealth v. King, 839 A.2d 237, 245 (Pa. 2003) (“The jurist at issue is in the best position to assess the effect of the alleged disqualifying factor(s).”).

241. See In re Mason, 916 F.2d 384, 386 (7th Cir. 1990) (“Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system . . .”).

242. See Randall J. Litteneker, Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U. CHI. L. REV. 236, 250 (1978) (“[N]o person can be expected to evaluate disinterestedly his own fairness.”).

243. See FLAMM, supra note 8, § 5.1, at 105 (“[T]he challenged judge is ordinarily the one to decide the disqualification motion; and, therefore, is usually obligated to apply the ‘appearance’ standard as both its interpreter and its object.”); Frost, supra note 58, at 571 (“The Catch-22 of the law of judicial disqualification is that the very judge being challenged for bias or [prejudice] is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case.”).

244. See, e.g., Frost, supra note 58, at 583–87.

245. Louis J. Virelli III, Congress, the Constitution, and Supreme Court Recusal, 69 WASH. & LEE L. REV. 1535, 1547 (2012) (“Around the time of the Founding, recusal was both procedurally and substantively a purely judicial question. Recusal doctrine was the product of judge-made common law, and judges were empowered to make the initial (and, in the case of United States Supreme Court Justices, the final) ruling as to their own recusal.”).

246. See id. at 1540 (stating that Congress and commentators treat recusal exclusively as a question of judicial ethics).

issues.<sup>247</sup> Similarly, § 455(a) requires a federal judge to “disqualify himself in any proceeding in which his impartiality may reasonably be questioned.”<sup>248</sup> Requiring that a disinterested judge decide recusal motions would also run counter to the goal of encouraging judges to recuse in close cases because a disinterested judge is less likely to grant a recusal request than the challenged judge.<sup>249</sup>

In sum, the objective observer knows all the facts, including the facts exclusively within the judge’s knowledge. The observer also knows and understands substantive and procedural law on par with the judge, the rules of judicial ethics, the prior jurisprudence of the judge, the realities of the appointive and elective modes of judicial selection, the practicalities of the practice of law, the motives of the parties, and any other information the challenged judge knows and deems relevant to the recusal decision. In addition, it is the challenged judge who applies the “objective” standard to determine if the reasonable person (who just happens to possess the exact same knowledge as the judge) might question the judge’s impartiality. Claiming that the reasonable lay person makes recusal decisions may make the standard appear objective, but in reality, each judge subjectively determines whether she will remain on a case.

### C. Public Confidence

The ABA hoped to increase public confidence in the courts by creating an objective framework that would reduce the arbitrary nature of judicial disqualification decisions.<sup>250</sup> But as demonstrated in Part IIA, the ambiguous “might reasonably be questioned” standard has failed to infuse consistency or uniformity in disqualification outcomes. Thus, if the appearance-based approach to disqualification has enhanced public trust in the judiciary, it must be for some other reason. Maybe, the fact that the appearance standard allows judges to boast that they are so sensitive to avoiding partiality that they remove themselves from cases any time a possible perception of bias exists has itself increased public confidence in judicial impartiality. Unfortunately, no empirical evidence supports that conclusion. Nor is it conceivable that data could be gathered demonstrating that removing judges on the basis of bad appearances increases the esteem with which judges are held. To establish such a correlation, the public would need to be aware that the “might reasonably be questioned” test governs the disqualification of state and federal judges. And knowledge of that obscure fact among the general

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247. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) (“A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .”); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might 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 . . . .”).

248. 28 U.S.C. § 455(a) (2012) (emphasis added).

249. SHAMAN & GOLDSCHMIDT, *supra* note 202, at 67 (“The data from this survey show that judges are more inclined to disqualify themselves than they are to recommend that a colleague do so.”).

250. See *supra* note 20 and accompanying text.



populace is highly unlikely considering that only 39% of respondents in an ABA survey could identify the three branches of government and a full quarter of respondents could not name any branch of government.<sup>251</sup>

Indirect evidence appears to dash any hope that the disqualification regime initiated by the 1972 Code has increased public trust in the judiciary. In the year the ABA adopted the appearance standard, Gallup's annual Governance Survey reported that 17% of survey respondents had a "great deal of trust in the judicial branch of government."<sup>252</sup> Thirty-five years later the Gallup survey showed that 15% of the respondents had a "great deal of confidence in the judicial branch."<sup>253</sup> The Harris Poll, which has measured confidence in the judiciary since 2003, shows a decline in the number of people who have a "great deal of confidence" in the courts and the justice system, from 22% in 2005, to 19% in 2011.<sup>254</sup> An ABA report issued in 1997 concluded that the "perceived decline of public confidence in federal and state courts is supported by persuasive evidence."<sup>255</sup> Law professors and other commentators share the opinion that "[p]ublic confidence in the court system has greatly diminished and continues to

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251. ABA, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 19 (1999).

252. Jeffrey M. Jones, Low Trust in Federal Government Rivals Watergate Era Levels, GALLUP NEWS SERVICE (Sept. 26, 2007), <http://www.gallup.com/poll/28795/Low-Trust-Federal-Government-Rivals-Watergate-Era-Levels.aspx>.

253. Id; see Editorial, Congress Broke It, Now Congress Must Fix It, 96 JUDICATURE 97, 98 (2012) ("According to the Gallup Poll, public support for the United States Supreme Court has reached a 25 year low.").

254. Confidence in Congress and Supreme Court Drops to Lowest Level in Many Years Table 2A, HARRIS INTERACTIVE (May 18, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/780/ctl/ReadCustom%20Default/Default.aspx>.

255. ABA, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 59 (1997).

wane,”<sup>256</sup> and that “[d]iminished public confidence in the judiciary has become one of the most important issues facing American courts.”<sup>257</sup>

The fact of the matter is that defining a judge’s ability to hear a case on the basis of how circumstances appear to the reasonable person will never increase public confidence in the courts. Appearance-based disqualification as a confidence-building mechanism is doomed from the start because of its faulty underlying premise. The opinion of the reasonable person can only build public trust if the public agrees with, or at least accepts, the hypothetical observer’s decision. But members of the public accept the evaluation of the objective observer only when society and the reasonable person share a common framework of accepted principles that dictate the reasonable person’s decision. So, for example, in the context of an automobile negligence action, the reasonable person’s assessment of whether a driver exercised due care is likely to be accepted by the public because society shares the reasonable person’s view of the rules of the road. Whether conservative or liberal, or prochoice or prolife, citizens will agree with the objective observer that a driver who crosses the center line or ignores a stop sign has failed to exercise reasonable care. Society shares a common experience, training, and expectation of what constitutes sensible conduct behind the wheel. The same cannot be said, however, when the reasonable person judges appearances instead of facts. Society shares no common experience, training, or expectation of what circumstances cause a judge’s impartiality reasonably to be questioned. Unlike the collective view of appropriate conduct by the operator of a motor vehicle, the question of whether a judge’s impartiality might reasonably be questioned lies in the eye of the beholder and is often influenced by partisan, biased, and selfish interests.<sup>258</sup>

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256. Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 163–64 (2010); see Arthur M. Monty Ahalt, *Remaking the Courts and Law Firms of the Nation: Industrial Age to the Information Age*, 31 TEX. TECH. L. REV. 1151, 1164 (2000) (finding persuasive evidence that public trust and confidence in the courts and legal profession is at an all-time low); Jonathan Berman, *You May Know the Law but I Know the Judge: Why Congress Can and Should Get Involved in State Judicial Election Reform*, 34 J. LEGAL PROF. 145, 174 (2009) (claiming that “the low confidence the general public has in the impartiality of state judiciaries is justified”); Geyh, *supra* note 99, at 875–76 (expressing concern for “flagging” public confidence in the courts); A. Thomas Levin, *Skeleton Dance*, 75 N.Y. ST. B.A.J. 5, 5 (2003) (“[T]here is little doubt that the public’s trust and confidence in the judicial system are diminishing.”); Norman Siegel et al., *The Trouble with Eminent Domain in New York*, 4 ALB. GOV’T L. REV. 77, 103 (2011) (“[P]ublic confidence in the government and the courts [is] already at a low ebb . . . .”); Andrea Specht, *The Government We Deserve? Direct Democracy, Outraged Majorities, and the Decline of Judicial Independence*, 4 U. ST. THOMAS L.J. 132, 152 (2006) (noting the “low level of confidence the judiciary enjoys among members of the public”).

257. Michael D. Schoepf, Note, *Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases*, 93 MINN. L. REV. 341, 341 (2008).

258. See Jennifer Jerit & Jason Barabas, *Partisan Perceptual Bias and the Information Environment*, 74 J. POL. 672, 677 (2012) (identifying a perceptual bias

Consequently, the public would have no problem agreeing with the objective observer's conclusion that Justice Kagan or Justice Thomas violated the standard of care by driving through a red light. But no such consensus is possible concerning whether Justice Kagan created an impermissible appearance by hearing the challenge to the Patient Protection and Affordable Care Act (Affordable Care Act) because of her involvement with the legislation while serving as President Obama's Solicitor General.<sup>259</sup> Of course, it was partisan conservative activists opposed to the Affordable Care Act who called for Justice Kagan's recusal.<sup>260</sup> One such group, Judicial Watch, filed an amicus brief requesting Justice Kagan's disqualification from the case, in part on the basis that her "impartiality might reasonably be questioned" because of her alleged advice to the Obama Administration regarding the health care legislation.<sup>261</sup>

Not to be outdone by their conservative adversaries, seventy-four House Democrats, led by New York Congressman Anthony Weiner, sent a letter to Justice Thomas suggesting that he disqualify himself from the health care case because of his wife's role in lobbying against the legislation.<sup>262</sup> The letter claimed

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whenever a fact has "partisan relevance"; *id.* at 672 (stating that Democrats and Republicans are thought to be especially susceptible to biased information processing).

259. See Sherrilyn A. Ifill, Debate, Judicial Recusal at the Court, 160 U. PA. L. REV. PENNUMBRA 331, 335 (2012) ("Concerns about Justice Kagan's impartiality arise largely from whether, as Solicitor General in the Obama administration, she may have been involved in providing advice to members of the Administration on the soundness or constitutionality of the health care law."); Editorial, *The Supreme Court's Recusal Problem*, N.Y. TIMES, Dec. 1, 2011, at A38 ("Conservatives insist that Justice Elena Kagan should remove herself from the case because they claim as solicitor general she was more involved in shaping the new law than she lets on.").

260. *The Supreme Court's Recusal Problem*, *supra* note 259 (stating that liberals in Congress insist that Justice Thomas should recuse himself from the Affordable Care Act case, while conservatives insist that Justice Kagan should remove herself from the case); Ariane de Vogue, Groups Suggest Kagan, Clarence Thomas Should Be Recused from the Health Care Challenge, ABC NEWS (Nov. 16, 2011, 2:25 PM), <http://abcnews.go.com/blogs/politics/2011/11/groups-suggest-elena-kagan-clarence-thomas-should-be-recused-from-health-law-decision> ("[A]dvocacy groups on both sides of the ideological spectrum are hoping to get a Justice—with potentially opposing views—dismissed from hearing the challenge."); *id.* (reporting that "the chief counsel of the conservative group Judicial Crisis Network called for the recusal of Kagan").

261. Brief of Freedom Watch as Amicus Curiae Supporting Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan 7, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (seeking Justice Kagan's disqualification under 28 U.S.C. §455(a) because the objective observer might reasonably question her impartiality).

262. Felicia Sonmez, House Democrats Say Justice Thomas Should Recuse Himself in Health-Care Case, WASH. POST (Feb. 9, 2011, 12:21 PM), <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html>; *The Supreme Court's Recusal Problem*, *supra* note 259, at A38. Other liberals also called for the disqualification of Justice Thomas. See, e.g., Al Sharpton, The Supreme Court Cannot Have Its Own Conflict of Interest—Justices Thomas and Scalia Must Recuse Themselves, HUFF POST POLITICS (Nov. 15, 2011, 11:03 AM), [http://www.huffingtonpost.com/rev-al-sharpton/supreme-court-health-care\\_b\\_1094867.html](http://www.huffingtonpost.com/rev-al-sharpton/supreme-court-health-care_b_1094867.html).

that “[t]he appearance of a conflict of interest” warranted Justice Thomas’s recusal.<sup>263</sup>

In the end neither Justice recused him or herself. But should they have? The answer is yes if either Justice’s impartiality could have reasonably been questioned. But regardless of how the reasonable person resolved the recusal issue, a large segment of the public would have rejected the conclusion. The appearance of bias test promotes public confidence in the judiciary only when society shares the common values applied by the reasonable person in determining whether circumstances warrant a judge’s removal from a case. But when partisan, selfish interests, rather than objective, shared principles, control the public’s view of an issue, the reasonable person is useless. Even assuming that the objective observer arrives at the “correct” conclusion, that conclusion will not build public trust. Nevertheless, appearance-based disqualification does serve a role in the debate over judicial recusal. It provides a handy vehicle by which partisan organizations can malign Supreme Court Justices, politicize the judicial process, and hope to remove a Justice who odds-makers think might vote contrary to the group’s biased agenda.<sup>264</sup>

#### **D. Challenging Judges on the Basis of Irrelevant Personal Traits**

Abuse of the appearance standard is not limited to attacking Supreme Court Justices on political or ideological grounds. Appearance-based disqualification motions find a special misuse in challenging judges based upon irrelevant personal characteristics including the judge’s religion, race, ethnicity,<sup>265</sup> sex, and sexual orientation. These groundless motions undermine the integrity and legitimacy of the challenged judge and the judiciary in general. They further perpetuate stereotypical thinking and place pressure on judges to remove themselves from cases when there is no legal or ethical reason to do so. And, even when the litigants are satisfied with the judge’s impartiality, that does not preclude partisan interest groups from claiming an appearance of partiality on the basis of the judge’s irrelevant personal traits.

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263. Sonmmez, *supra* note 262.

264. Cf. de Vogue, *supra* note 260.

265. The 2007 Model Code apparently considers race and ethnicity as distinguishable concepts. See MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2007) (prohibiting judges from manifesting bias or prejudice based on “race, sex, gender, religion, national origin, ethnicity . . .”). But the concepts of race and ethnicity are difficult to define and “suspiciously similar.” Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1758 (2001); see Stephen Cornell & Douglas Hartmann, *Conceptual Confusion and Divide: Race, Ethnicity, and the Study of Immigration*, in NOT JUST BLACK AND WHITE 25 (Nancy Foner & George M. Fredrickson eds., 2004) (“‘Race’ and ‘Ethnicity’ sometimes have been treated as referring to the same things, sometimes as referring to very different things, sometimes as referring to subcategories of each other—and their meanings have changed over time.”). This Article applies the conventional definitions in which “race” is considered a method of characterizing persons who share, or are believed to share, the same physical characteristics and “ethnicity” characterizes persons who share, or are believed to share, a common culture and traditions. See *id.* at 25–26.

## 1. Religion

Courts universally reject the claim that a judge should be removed from a case because of his or her religious beliefs.<sup>266</sup> But that fact has not deterred litigants from seeking judicial disqualification on the basis of a judge's religion.<sup>267</sup> Faith-based recusal motions take many forms, but generally rely on the argument that a judge's religious beliefs or affiliation creates an appearance of partiality.<sup>268</sup> Some motions seek a judge's disqualification because a religious organization to which the judge belongs has taken a position on a social or political issue pending before the judge. For example, Catholic judges have faced disqualification motions in abortion cases because of Catholicism's position on the issue.<sup>269</sup> Similarly, judges belonging to the Church of Jesus Christ of the Latter-day Saints have received recusal requests in proceedings involving the equal rights amendment because of the Mormon Church's opposition to the amendment.<sup>270</sup> Other motions claim that a judge's impartiality might reasonably be questioned because a litigant and judge share a common faith. Thus, Catholic judges have received challenges in

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266. See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002) (observing that courts have consistently held that "membership in a church does not create a sufficient appearance of bias to require recusal"); *FLAMM*, supra note 8, § 10.4, at 266 ("[I]t is universally agreed that the fact that a judge happens to be of a particular faith is no basis for disqualification.").

267. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting) ("Claims that have little chance of success are nevertheless frequently filed.").

268. See, e.g., *In re McCarthy*, 368 F.3d 1266, 1269–70 (10th Cir. 2004) (affirming denial of motion to disqualify district judge claiming that the judge's impartiality might reasonably be questioned because of his membership in the Episcopal Church); *Bryce*, 289 F.3d at 659–60 (affirming denial of motion to disqualify judge on the basis that the judge's impartiality might reasonably be questioned because of his membership in the Episcopal Church); *Palmer v. City of Prescott*, No. CV-10-8013-PCT-DGC, 2010 WL 3613868, at \*1–2 (D. Ariz. Sept. 8, 2010) (denying motion to disqualify a judge on the basis that his religious affiliation created an appearance of bias); *Poplar Lane Farm LLC v. The Fathers of Our Lady of Mercy*, No. 08-CV-5095, 2010 WL 3303852, at \*1 (W.D.N.Y. Aug. 19, 2010) (rejecting claim that the judge's membership in the Roman Catholic Church placed the judge's impartiality in question); *Hoatson v. N.Y. Archdiocese*, No. 05 Civ. 10467(PAC), 2006 WL 3500633, at \*1 (S.D.N.Y. Dec. 1, 2006) (denying plaintiff's motion to remove judge because his "strong ties to the Catholic Church . . . create[d] an appearance of impropriety"); *Petruska v. Gannon Univ.*, No. 1:04-cv-80-SJM, 2007 WL 3072237, at \*1–2, 4 (W.D. Pa. Oct. 19, 2007) (rejecting an argument that the judge's impartiality might reasonably be questioned because of his affiliation with the Catholic Church); *Bey v. Phila. Passport Agency*, No. 86-4906, 1986 WL 14733, at \*1–2 (E.D. Pa. Dec. 24, 1986) (denying disqualification request brought under § 455(a) alleging "religious resentment" on the part of the judge); *Menora v. Ill. High School Ass'n*, 527 F. Supp. 632, 635, 637 (N.D. Ill. 1981) (rejecting faith-based recusal motion brought under 28 U.S.C. §455(a) claiming that the judge's impartiality might reasonably be questioned because of his Jewish faith).

269. See, e.g., *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400–01 (9th Cir. 1995) (denying motion to disqualify a judge from a case involving an abortion clinic based on his Roman Catholic faith).

270. *Idaho v. Freeman*, 507 F. Supp. 706, 710 (D. Idaho 1981).

lawsuits alleging sexual abuse by a priest,<sup>271</sup> and a Jewish judge's removal was sought in a lawsuit challenging a high school athletic association's rule prohibiting players from wearing headgear, including Yarmulkes, during a basketball game.<sup>272</sup> A more creative lawyer challenged a Mormon judge because his client was a self-proclaimed "Evangelical Christian" who actively opposed Mormon beliefs and practices.<sup>273</sup> Another litigant sought to remove a Mormon judge because his lawsuit involved an attack on the "theocratic power structure of Utah."<sup>274</sup> And in Wisconsin, counsel for the creditors of the Archdiocese of Milwaukee sought removal of a bankruptcy judge arguing that the judge's impartiality might reasonably be questioned because his relatives were buried in Catholic cemeteries.<sup>275</sup>

While failing on the merits, these appearance-based motions often succeed on another front by generating press coverage of the groundless attacks on a judge's integrity and impartiality.<sup>276</sup> In some cases, the motions produce the desired result by convincing the judge to step aside even though the motion is unfounded.<sup>277</sup> The appearance-based disqualification standard of Rule 2.11 of the

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271. See, e.g., *In re Disqualification of Fuerst*, 674 N.E.2d 361, 361–62 (Ohio 1996) (denying motion to disqualify a state supreme court justice because his Catholicism created an appearance of impropriety).

272. *Menora*, 527 F. Supp. at 637; see also *Bryce*, 289 F.3d at 659–60 (affirming denial of a disqualification motion based on the judge's membership in the Episcopal Church).

273. *Palmer*, 2010 WL 3613868, at \*1.

274. *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984).

275. Memorandum in Support of Official Committee of Unsecured Creditors' Motion to Recuse the Honorable Rudolph T. Randa from the Cemetery Trust Litigation and Cemetery Related Proceedings at 1, *In re Archdiocese of Milwaukee*, 496 B.R. 905 (E.D. Wis. 2013) (No. 11-20059-SVK), available at <http://online.wsj.com/public/resources/documents/judge.pdf>. The judge denied the motion. See Annysa Johnson, *Judge Won't Exit Cemetery Lawsuit: Randa Says He Can Rule on Archdiocese*, MILWAUKEE J. SENTINEL, Oct. 2, 2013, at 6.

276. See, e.g., Bruce Cadwallader, *Judge Refuses to Remove Himself*, COLUMBUS DISPATCH, Sept. 8, 2007, at 1B (reporting denial of a disqualification motion filed against a Catholic judge on the grounds that the accused was charged with the attempted robbery of parishioners in a Catholic Church); James F. McCarty, *Catholic Judges Unwanted on Case: Attorney Files Motion in Sex-Abuse Lawsuit*, CLEVELAND PLAIN DEALER, Sept. 5, 2003, at B1 (reporting litigant's motion requesting that the Ohio Supreme Court disqualify all Catholic trial court judges from presiding over a civil racketeering lawsuit against the Cleveland Catholic Diocese); Marc Parry, *Judge Rejects Request for Recusal*, ALBANY TIMES UNION, Dec. 5, 2006, at B11 (reporting denial of a recusal request filed against a Catholic judge by a Catholic priest who sued the New York Catholic Diocese); Bruce Vielmetti & Karen Herzog, *Judge Has Ties to Catholic Cemeteries: Creditors Want Randa Off Archdiocese Case*, MILWAUKEE J. SENTINEL, Aug. 15, 2013, at 1; David Yonke, *Judge Won't Step Down in Robinson Case*, THE BLADE (Toledo, Ohio), Mar. 28, 2008 (reporting the denial of a disqualification motion erroneously alleging that the judge was a Catholic).

277. See, e.g., Ramon Bracamontes, *Judge Recuses Self from Case Against Catholic Diocese*, EL PASO TIMES, Apr. 27, 2009 (reporting that a trial judge voluntarily recused himself from a lawsuit filed against the Catholic Diocese even though the faith-based motion was without merit in order to "advance judicial economy and assist the parties

2007 Code and 28 U.S.C § 455(a) encourages frivolous assertions that a judge's religious beliefs or affiliation will "appear" to influence courtroom decisions. Without any hint of actual bias, motions claiming the "appearance" of a religious bias flourish and negatively impact the public's perception of the impartiality of the judiciary.<sup>278</sup>

## 2. Race

Like religion, race is an irrelevant personal characteristic tailor-made for appearance of partiality claims. Although lawyers and litigants may claim that a judge's race creates both an actual bias and an appearance of bias, the ultimate question comes down to one of appearances. Judge A. Leon Higginbotham recognized this in a celebrated opinion in which he refused to recuse himself from a lawsuit alleging that African-American union members suffered discrimination at the hands of union officials.<sup>279</sup> The union's motion to disqualify was brought under 28 U.S.C. § 144, which recognizes only actual bias as a ground for recusal.<sup>280</sup> The union did not, and could not, claim that the judge's race created an appearance of bias under 28 U.S.C. § 455(a) because Congress had not yet enacted § 455(a).<sup>281</sup> But understanding that perception, not reality, would be the future of disqualification law, Judge Higginbotham titled the portion of his opinion explaining why the impartiality of African-American judges cannot be challenged on the basis of race "Being Black, and the Appearance of Impartiality."<sup>282</sup> In effect, Judge Higginbotham made it clear that seeking the removal of an African-American judge on the basis of racial bias, in fact or in appearance, perpetuates the demeaning and public-confidence-diminishing stereotype that "true impartiality can be exercised only by white male judges."<sup>283</sup> Unfortunately, his thoughtful opinion has not thwarted the continuous flow of appearance-based recusal motions against judges of racial minorities.

Specious allegations of actual bias fabricated around a judge's race have been characterized as "intolerable"<sup>284</sup> and found in proper circumstances to subject an advocate to discipline.<sup>285</sup> Claims alleging only improper appearances, however,

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bringing resolution to the issues"); Kathleen A. Shaw & Richard Nangle, Judge Fecteau Pulls Out of Rev. Kelley's Civil Case, TELEGRAM & GAZETTE (Worcester, Mass.) Oct. 25, 2003, at A14.

278. See supra notes 268–75 and accompanying text.

279. Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 158 (E.D. Pa. 1974).

280. Id. at 159.

281. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (codified at 28 U.S.C. § 455(a) (2012)).

282. Commonwealth, 388 F. Supp. at 162.

283. Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. REV. 95, 118 (1997).

284. MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 157 F.3d 956, 963 (2d Cir. 1998) ("[I]t is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background.").

285. See MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 138 F.3d 33, 38–39 (2d Cir. 1998) (affirming district court's sanction against an attorney for sending a letter to the judge

brought under § 455(a) or Rule 2.11 carry no such disapproval. Thus, lawyers and litigants continue to demean judges with impunity and place the judiciary in a false public light by filing motions baldly alleging that the judge's race may cause someone, somewhere, to doubt the judge's fairness.<sup>286</sup>

### 3. Sex

Claims of partiality, in fact and in appearance, based on sex serve to undermine the legitimacy of women judges and perpetuate ancient stereotypes of women in general. Female judges have suffered the demeaning and public-trust-shattering allegations that they should not sit on sex discrimination or rape cases because they will inherently identify, or appear to identify, with the victim.<sup>287</sup> "Motherly instincts" have been asserted as a basis to preclude a woman judge from presiding over a sex abuse case involving child victims.<sup>288</sup> Relying on the same

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questioning the judge's impartiality because of his race and ethnicity); *In re Evans*, 801 F.2d 703, 706 (2d Cir. 1986) (disbarring an attorney for sending a judge a letter accusing the judge of "incompetence and/or religious and racial bias").

286. See, e.g., *Maringo v. Dept. of Homeland Sec.*, 351 Fed. Appx. 867, 869 (5th Cir. 2009) (affirming district court's denial of disqualification motion based in part on the fact that no Caucasian or African-American judge could fairly hear the case); *United States v. Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987) (finding that a judge's membership in a racial minority does not raise doubts about his impartiality); *United States v. Alabama*, 582 F. Supp. 1197, 1205–08 (N.D. Ala. 1984) (finding that an African-American judge's impartiality could not be questioned reasonably in a lawsuit against Auburn University alleging that the University maintained and perpetuated racial discrimination); *LeRoy v. City of Houston*, 592 F. Supp. 415, 419–20 (S.D. Tex. 1984) (finding that a judge's race did not create an appearance of impropriety); *Man Asks Judge to Step Down from Obama Case*, DAILY HOME (Talladega, Ala.), Jan. 12, 2012, at 14 (reporting a plaintiff's motion to disqualify an African-American judge assigned to hear the plaintiff's challenge to President Obama's inclusion on Alabama's primary election ballot because of the judge's race); *Paul Woolverton, Court Denies Motion to Have Fayetteville Judge Removed from Racial Justice Act Case*, FAYETTEVILLE OBSERVER, Nov. 11, 2011 (reporting defense counsel's suggestion that racism was a factor in the State's attempt to disqualify a minority judge by subpoenaing him as a witness); *Pasco: Week in Review: Judge Staying on Neo-Nazi Murder Trial*, TAMPA TRIB., July 26, 2009, at 2 (reporting denial of defendant's motion to disqualify an African-American judge because of his race).

287. See, e.g., *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4–5 (S.D.N.Y. 1975) (challenging the propriety of a female judge presiding over a civil rights action brought against a law firm by a female employee); *Johnson v. State*, 430 S.E.2d 821, 822 (Ga. Ct. App. 1993) (affirming denial of motion requesting transfer of a rape and kidnapping case from a woman judge to a male judge); see also Alicia Fabbre, *Lawyer Says Female Judge Shouldn't Hear Case*, CHI. DAILY HERALD, Nov. 8, 2003, at 1 (reporting that a criminal defense attorney could not see "how a female . . . would be fair, because of the nature of the allegations" accusing the defendant of groping a hospital nurse).

288. See, e.g., *Allee v. Morrow*, 28 P.3d 651, 652 (Or. Ct. App. 2001) ("Petitioner filed a motion to recuse Judge Rhoades . . . asserting that he believed he would be unable to receive a fair and impartial hearing before Judge Rhoades on the ground that a female judge, and in particular Judge Rhodes, would be gender-biased against him in a sex abuse case involving children.").



fallacious argument used to deny women the right to vote and to serve on juries,<sup>289</sup> a wife in a divorce proceeding sought to disqualify a woman judge because the judge would naturally be swayed, or at least appear to be swayed, by an attractive man like the wife's husband.<sup>290</sup> Not only is the relief sought in these motions belittling to all judges, but often the specific allegations are reprehensible. For example, a litigant recently provided an affidavit in support of a disqualification motion claiming that the judge's "extra-judicial bias and prejudice" against him was "the admitted result of Judge Zeldon's acting like a 'woman scorned' . . . ."<sup>291</sup>

#### 4. Sexual Orientation

Not satisfied with attacking judicial impartiality on the basis of race, religion, and sex, litigants have now added a judge's sexual orientation to the list of irrelevant personal characteristics claimed to create an appearance of partiality.

On August 4, 2010, U.S. District Court Judge Vaughn Walker held that the amendment to the California Constitution popularly known as "Proposition 8," which provided that "[o]nly marriage between a man and a woman is valid or recognized in California,"<sup>292</sup> violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>293</sup> In April 2011, two months after his retirement from the bench, Judge Walker publicly disclosed that he was gay and that he was in a long-term, same-sex relationship at the time he presided over the Proposition 8 lawsuit.<sup>294</sup> Three weeks later, the defendants filed a motion to vacate the judgment invalidating Proposition 8, on the basis of the judge's relationship.<sup>295</sup> Depending on the particular commentator's social and political leanings, the

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289. See Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1168 (1993) (stating that one justification for denying women the right to serve on juries "was that women would skew the otherwise reliable fact finding process. It was speculated that they would vote only for handsome men, whether at elections or on juries.").

290. *Rivero v. Rivero*, 216 P.3d 213, 233 (Nev. 2009). In addition to alleging a bias in favor of attractive men, Ms. Rivero also claimed that the judge would be biased against an attractive woman such as herself. *Id.*

291. Sworn Affidavit of Bradlee Dean on Behalf of Himself and You Can Run but You Cannot Hide International at 5 ¶ 8, *Bradlee Dean v. NBC Universal*, No. 2011 CA 006055B, (D.C. Super Ct. July 9, 2012), available at <http://www.scribd.com/doc/99718372/Recusal-Final-With-Exhibits>.

292. CAL. CONST. art. I, § 7.5.

293. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010).

294. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1121 (N.D. Cal. 2011). Judge Walker disclosed his sexual relationship during an interview with the press. See Dan Levine, U.S. Gay Judge Never Thought to Drop Marriage Case, *REUTERS* (Apr. 6, 2011, 7:39 PM), <http://www.reuters.com/article/2011/04/06/gaymarriage-judge-idUSN0627343820110406>.

295. *Perry*, 790 F. Supp. 2d at 1122 ("Accordingly, the Motion to Vacate Judgment on the sole ground of Judge Walker's same sex relationship is denied.").

motion to vacate was described as “compelling”<sup>296</sup> on its facts or “one of the most contemptible legal claims advanced in decades.”<sup>297</sup>

The motion to vacate alleged that by presiding over the Proposition 8 case, Judge Walker violated two provisions of the federal disqualification statute. First, pursuant to § 455(b)(4), the defendants claimed that the judge possessed a nonpecuniary interest in the litigation that could be substantially affected by his ruling on the validity of Proposition 8.<sup>298</sup> That interest was identified as the possibility that the judge and his partner might get married if Proposition 8 was invalidated.<sup>299</sup> Of course, possibilities and maybes are insufficient under the actual bias standard of § 455(b)(4).<sup>300</sup> And even if Judge Walker wished to marry, that fact would not constitute bias or prejudice.<sup>301</sup> Recognizing the futility of the actual bias argument, the defendants suggested that the court need not decide whether the judge violated § 455(b)(4), because the judge’s sexual orientation created an appearance of partiality under § 455(a).<sup>302</sup>

The defendants’ central argument was that the judge’s sexual orientation and same-sex relationship created a circumstance in which the judge’s impartiality might reasonably be questioned. Getting to the heart of the matter, the motion to vacate described the “undeniable” appearance of judicial impropriety.<sup>303</sup>

Given that Chief Judge Walker was in a committed, long-term, same-sex relationship throughout this case (and for many years before the case commenced), it is clear that his “impartiality might reasonably [have been] questioned” from the outset. 28 U.S.C. § 455(a). He therefore had, at a minimum, a waivable conflict and was obligated either to recuse himself or to provide “full disclosure on the record of the basis for disqualification,” *id.*, § 445(e), so that the parties could consider and decide . . . whether to request his recusal.

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296. Ed Whelan, *Motion to Vacate Walker’s Anti-Prop 8 Judgment for Failure to Recuse*, NAT’L REV. ONLINE (Apr. 25, 2011, 8:00 PM), <http://www.nationalreview.com/bench-memos/265587/motion-vacate-walker-s-anti-prop-8-judgment-failure-recuse-ed-whelan#>.

297. Dahlia Lithwick, *Too Gay to Judge?*, SLATE (June 13, 2011, 5:33 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/too\\_gay\\_to\\_judge.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/too_gay_to_judge.html).

298. Defendant-Intervenors’ Motion to Vacate Judgment at 8, *Perry v. Schwarzenegger*, 09-CV-2292 JW (N.D. Cal. Apr. 25, 2011) [hereinafter *Motion to Vacate Judgment*], available at <http://www.scribd.com/doc/53893574/Motion-to-Vacate>.

299. *Id.* at 9–10.

300. See *Perry*, 790 F. Supp. 2d at 1124 (“Unlike Section 455(a), Section 455(b) provides for mandatory recusal in cases of ‘actual bias’ . . .”).

301. See *id.* at 1125–27.

302. *Motion to Vacate Judgment*, *supra* note 298, at 3 (characterizing the purported violation of § 455(a) as “undeniable”).

303. *Id.*

His failure to do either was a clear violation of Section 455(a), whose “goal . . . is to avoid even the appearance of partiality.”<sup>304</sup>

The defendants’ near-total reliance on appearances is demonstrated by reference to § 455(a) or the appearance of bias on 15 pages of their 18-page motion.<sup>305</sup> The defendants had no law or facts to support a disqualification motion, so they resorted to appearances. In the context of judicial disqualification, the motion, in effect, modernized the old lawyers’ adage: “If the law is on your side, pound on the law. If the facts are on your side, pound on the facts. If neither is on your side, pound on the table.”<sup>306</sup> And if you do not even have a table, pound on appearances.

### 5. Ethnicity

Lawyers also misuse ethnicity to question a judge’s impartiality.<sup>307</sup> In *Melendres v. Arpaio*,<sup>308</sup> the plaintiffs brought an action against the state of Arizona, Maricopa County, and County Sheriff Joseph Arpaio, alleging racial profiling and unlawful detention of persons of Hispanic appearance or descent during the enforcement of federal immigration laws.<sup>309</sup> The defendants filed a motion to disqualify federal district court Judge Mary H. Murguia, alleging that the judge’s identical twin sister was the President and CEO of the National Council of La Raza (NCLR), the largest Latino civil rights organization in the United States.<sup>310</sup> NCLR opposed efforts to make state and local law enforcement agencies responsible for the enforcement of immigration laws, claiming that the delegation of such authority would lead to racial profiling.<sup>311</sup> NCLR had criticized Sheriff Arpaio and called for an investigation of his office. NCLR also created a website which contained articles personally attacking the sheriff and his employees.<sup>312</sup>

The motion to disqualify Judge Murguia first claimed that: (1) the judge harbored an actual bias or prejudice against the defendants; (2) the judge or her sister had a financial interest in the subject matter of the litigation; and (3) the

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304. *Id.* at 2 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988)).

305. References to § 455(a) or the appearance of bias appear on pages 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, and 14 of the Motion to Vacate Judgment. *Id.* at 1–14.

306. ARTHUR BLOCH, *MURPHY’S LAW: LAWYERS* 104 (2000).

307. See, e.g., *Nguyen v. N. Life Ins. Co.*, 234 Fed. Appx. 526, 527 (9th Cir. 2007) (finding no duty to recuse where the judge and potential witnesses were members of the same ethnic group); *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 37–39 (2d Cir. 1998) (affirming sanctions imposed on counsel for claiming that the district court judge was not impartial because he was appointed by the Clinton Administration and was Asian American); *Ward v. Urling*, 167 P.3d 48, 57–58 (Alaska 2007) (rejecting the argument that the trial judge was partial to a litigant because both were Asian).

308. *Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 WL 2132693 (D. Ariz. July 15, 2009).

309. *Id.* at \*1.

310. *Id.*

311. *Id.* at \*3.

312. *Id.* at \*15.

judge or her sister had a nonfinancial interest in the litigation that could be substantially affected by the proceedings.<sup>313</sup> The court quickly rejected these arguments: There were simply no facts indicating an actual bias or prejudice on the part of the judge or a prohibited financial or other interest held by the judge or her sister in the subject matter of the litigation.<sup>314</sup> Not surprisingly, Judge Murguia found “the more difficult question” to be whether her sister’s activities created an appearance of impropriety under 28 U.S.C. § 455(a).<sup>315</sup> Acknowledging the lack of guiding jurisprudence,<sup>316</sup> Judge Murguia noted that she was unaware of any case holding that a judge’s sibling’s social or political affiliations and opinions could arguably place the judge’s impartiality in question. Judge Murguia also recognized the need to carefully avoid permitting her sister’s opinions and “public profile to serve as a proxy for a race-based recusal challenge.”<sup>317</sup>

The defendants claimed that siblings, especially identical twins, are likely to influence each other’s thinking, share common pursuits and political ideology, and that one sibling would be unlikely to take a position inconsistent with another sibling’s ideology or political interests.<sup>318</sup> Of course, such a position is ludicrous and unsupportable and therefore unavailable as a ground for recusal under any rule requiring an actual bias or conflict of interest. So, the defendants structured their argument around “appearances.” They argued that the judge “might be seen” by the reasonable person as sharing a common ideology with her sister or as unwilling to rule contrary to a sibling’s political beliefs.<sup>319</sup> The defendants sought to bolster their appearance argument by citing comments in the media as illustrative of public perceptions, including the following online reader responses to newspaper articles about the case:

- “Of course this Judge will let the lawsuit stand. Her sister is the President of La Raza. Can you say CONFLICT OF INTEREST!”
- “They [The Arizona Republic] seem to have left out that Judge Murguia is the sister of the head of La Raza. Kind of important fact to leave out, don’t you think?”
- “Judge Murguia . . . is only making her sister’s job easier.”
- “[Judge] Murguia is the twin sister of Janet Murguia, president and CEO of the National Council of La Raza, a leading Hispanic advocacy group. This judge should be impeached for not recusing herself.”<sup>320</sup>

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313. Id. at \*8–10.

314. Id.

315. Id. at \*11.

316. Id. at \*14 (“In weighing the Parties’ competing views, there is little, if any, guidance from case law.”).

317. Id. at \*12.

318. Id. at \*14.

319. Id.

320. Id. at \*2.

Only in the world of appearance-based ethics could anonymous internet postings be presented in support of a motion seeking to declare a judge unfit to carry out her sworn duty. And although not insensitive to the postings,<sup>321</sup> the judge dismissed the comments by reaffirming that a recusal decision is not based on “a straw poll of the only partly informed man-in-the-street.”<sup>322</sup>

Judge Murguia found that neither her sister’s role with NCLR nor the public comments made by her sister in that role would cause a reasonable person to question the judge’s impartiality.<sup>323</sup> The judge considered it a much closer call whether her impartiality might be questioned due to articles posted on a NCLR website, “We Can Stop the Hate Campaign.”<sup>324</sup> The website called the Maricopa County deputy sheriffs “thugs” and referred to the sheriff as a “relentlessly self-promoting caricature,” who has “less than stellar respect for civil rights and due process,” and who is “unrepentant, arrogant, and monumentally disingenuous.”<sup>325</sup> The articles addressed the issues to be litigated in the lawsuit, including whether the deputy sheriffs had engaged in racial profiling or detained immigration suspects on appearance alone.<sup>326</sup> Even though Judge Murguia had no connection to “We Can Stop the Hate Campaign” and nothing indicated that the judge’s sister wrote or approved the critical articles,<sup>327</sup> the judge removed herself from the case.<sup>328</sup> The judge’s decision was made “in an abundance of caution,”<sup>329</sup> to avoid “even the slightest appearance of impropriety”<sup>330</sup> and “avoid even the slightest chance that [her] continued participation in a high profile lawsuit could taint the public’s perception of the fairness of the outcome.”<sup>331</sup>

Melendres illustrates many of the problems created by appearance-based disqualification. First, Judge Murguia lamented the absolute lack of guidance in the disqualification jurisprudence. Second, the judge felt compelled to remove herself from the case even though: (1) there was no indication of bias or prejudice; (2) neither the judge, nor her sister, had any financial or other cognizable interest in the litigation; and (3) no reasonable person could legitimately attribute a sibling’s social or political beliefs or goals to her sister. Indeed, not only was there no suggestion that Judge Murguia would violate her oath by furthering her sister’s agenda, but no evidence was presented that she even liked her sister. Third, the disqualifying circumstances were totally outside the judge’s control. Fourth, the facts that Judge Murguia found sufficient to disqualify her from the “high profile”

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321. The judge felt compelled to cite one reader’s comment in support of the judge’s ability to remain impartial despite her sister’s position with NCLR. *Id.* at \*12 n.7.

322. *Id.* at \*12.

323. *Id.* at \*14.

324. *Id.* at \*15 (“Whether the Court’s impartiality might reasonably be questioned based on the content of these internet-based articles is a difficult issue.”).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

litigation involving the sheriff's office did not bar her from hearing "countless" other civil cases in which the sheriff was a party, or in which the sheriff or one of his "thugs" testified.<sup>332</sup> No rule of judicial ethics, including a disqualification rule, should be applied in one manner in cases that generate publicity and in another manner in cases that stay below the radar.<sup>333</sup> But when it is appearances that count, unjustified disparities result. Fifth, as demonstrated in Part II.D.6, appearance-based disqualification places a special pressure on minority judges to grant motions for disqualification.

#### 6. Special Pressure on Minority Judges

The appearance standard puts more pressure on minority judges to recuse themselves than it places on white male judges. Illustrating this fact is the motion seeking to disqualify Judge Stephen Reinhardt from the appeal of a federal district court order declaring unconstitutional the California constitutional amendment, known as "Proposition 8."<sup>334</sup> The defendants moved to disqualify Judge Reinhardt on the same basis that the sheriff's office moved to disqualify Judge Murguía—the publicly expressed beliefs of a family member. Judge Reinhardt's wife, Ramona Ripston, made public statements as Executive Director of the American Civil Liberties Union of Southern California (ACLU/SC) in opposition to Proposition 8 and in support of the district judge's decision invalidating the amendment.<sup>335</sup> The motion to recuse Judge Reinhardt rested primarily on the argument that the judge's impartiality might reasonably be questioned in light of his spouse's activities.<sup>336</sup>

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332. *Id.* at \*8, \*15. Judge Murguía observed:

Maricopa County and Sheriff Arpaio, are frequent litigants before this Court on a wide variety of civil matters. . . . [T]he Court has presided over a countless number of cases involving these Parties . . . . The Court can think of no other case involving either Maricopa County or Sheriff Arpaio where it has been accused of harboring a "personal animus or malice" towards either one of them. In fact, as recently as September 2008, the Court presided over a bench trial where Sheriff Arpaio was the only named Defendant . . . which included live in-court testimony given personally by Sheriff Arpaio . . . .

*Id.*

333. See *In re Sch. Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992) (recognizing that high-profile cases cause a greater problem in applying § 455(a)); *United States v. Brown*, No. 1:02-CR-146-02, 2012 WL 1580960, at \*1 (M.D. Pa. May 4, 2012) ("Congress enacted § 455 to ensure that the public's perception of the judiciary remained positive by avoiding harm to public confidence that would result from the appearance of bias, especially in high profile cases.").

334. CAL. CONST. art. I, § 7.5; see *supra* Part II.D.4.

335. *Perry v. Schwarzenegger*, 630 F.3d 909, 911–12 (9th Cir. 2011) (Reinhardt, J., denying Motion for Disqualification).

336. See Appellants' Motion for Disqualification at 1–8, *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), No. 10-16696 [hereinafter Appellants' Motion for Disqualification], available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/12/Prop.-8-recusal-motion-9th-CA.pdf>. The motion also claimed that the judge's wife had an interest that could be substantially affected by the outcome of the

Ms. Ripson was responsible for all phases of the ACLU/SC litigation and lobbying efforts that placed at the forefront “the fight to end marriage discrimination’ in California.”<sup>337</sup> The ACLU/SC unsuccessfully challenged Proposition 8 in state court, “sparing no effort to defeat” the amendment.<sup>338</sup> Responding to the state court’s order upholding the ban on gay marriage, Ms. Ripson declared “[s]hame on California”<sup>339</sup> and promised that a “renewed effort to overturn Proposition 8 begins today.”<sup>340</sup> Later, Ms. Ripson cosigned a letter stating that “LGBT people and our closest allies are first going to have to talk to close friends and family about . . . why this fight [for same-sex marriage] matters. Even if those people are already on our side, we need to talk to them to convince them to join the fight.”<sup>341</sup> In addition, the ACLU/SC had appeared as amici urging the federal district court to find Proposition 8 unconstitutional.<sup>342</sup> When the district court judge invalidated Proposition 8, Ms. Ripson publicly rejoiced in the decision because it “affirms that in America we don’t treat people differently based on their sexual orientation.”<sup>343</sup> She cautioned, however, that the district court did not have the final say on the validity of Proposition 8, and that “it’s a long road ahead until final victory.”<sup>344</sup>

Judge Reinhardt denied the motion to recuse, finding that it was based “upon an outmoded conception of the relationship between spouses.”<sup>345</sup> Judge Reinhardt emphasized his wife’s independent nature in advocating for social causes of her own choosing without the judge’s express or tacit approval or agreement:

The views are hers, not mine, and I do not in any way condition my opinions on the positions she takes regarding any issues. Therefore, a reasonable person with full knowledge of all the facts would not reasonably believe that I would approach a case in a partial manner due to her independent views regarding social policy, whether those views are publicly expressed and advocated for, or not, and whether

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Proposition 8 litigation. *Id.* at 9–10. That argument was easily disposed of by Judge Reinhardt. See *Perry*, 630 F.3d at 912–23.

337. Appellants’ Motion for Disqualification, *supra* note 336, at 1.

338. *Id.* at 2.

339. Court Upholds Prop. 8; State Continues to Recognize 18,000 Marriages, ACLU OF S. CAL. (May 26, 2009), <http://www.aclu-sc.org/court-upholds-prop-8-state-continues-to-recognize-18000-marriages>.

340. Appellants’ Motion for Disqualification, *supra* note 336, at 2.

341. *Id.* at 2–3. The letter, dated July 14, 2009, and addressed “Dear Marriage Allies,” is available at [http://www.aclu.org/lgbt-rights\\_hiv-aids/getting-rid-prop-8](http://www.aclu.org/lgbt-rights_hiv-aids/getting-rid-prop-8).

342. *Id.* at 3.

343. *Id.* at 4.

344. *Id.* The defendants’ noted in their Motion to Disqualify that the long road to victory would pass through the Ninth Circuit Court of Appeals. *Id.* at 7.

345. *Perry v. Schwarzenegger*, 630 F.3d 909, 912 (9th Cir. 2011) (denying Appellants’ Motion for Disqualification).

advocated for by her in her private capacity or in her capacity as head of the ACLU/SC.<sup>346</sup>

The point is not that Judge Reinhardt's decision was wrong. Clearly, it was correct. The point is that Judge Reinhardt could confidently declare that his wife's activities created no appearance of impropriety, while Judge Murguia felt compelled to remove herself from a case in which her sister was much less vocal and much less involved. The appearance of partiality standard takes a special toll on judges with a personal characteristic not shared by the majority of white male judges.<sup>347</sup>

### E. Misuse of the Appearance Standard by Nonparties

It would be bad enough if the misuse of the appearance of bias standard was exclusively within the province of the litigants. But just because the parties to a lawsuit are satisfied with the judge's impartiality does not preclude a partisan organization from promoting its own agenda by asserting that a judge's impartiality might reasonably be questioned. For example, Judge Sophia Hall was assigned to hear two lawsuits challenging an Illinois law prohibiting same-sex marriage.<sup>348</sup> The parties were aware that Judge Hall was a member of the Alliance of Illinois Judges, an organization "formed by the Lesbian and Gay Judges of the Circuit Court of Cook County" in order to "[p]romote and encourage respect and unbiased treatment for Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals as they relate to the judiciary, the legal profession and the administration of justice."<sup>349</sup> Satisfied that the judge would fairly decide the constitutionality of the Illinois marital law, no party or intervener filed a motion to disqualify Judge Hall. Nor did the parties or interveners exercise the right to an automatic substitution of judge available under Illinois law.<sup>350</sup> When the Thomas More Society intervened to defend the ban on same-sex marriage, it specifically

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346. *Id.* at 916.

347. Cf. Amber Fricke & Angela Onwuachi-Willig, *Do Female "Firsts" Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1538 ("[A]lthough all judges, including white male judges, have a race or a sex that can affect their outlook, judges of color, and especially female judges of color, are primarily the ones who have their ability to be neutral arbiters challenged. These actions reveal how both whiteness and maleness have been defined as the norm in society.").

348. The two cases are *Darby v. Orr*, No. 12 CH 19718 (Cir. Ct. of Cook Cnty., Ill., Ch. Div. filed May 30, 2012), and *Lazaro v. Orr*, No. 12 CH 19719 (Cir. Ct. of Cook Cnty., Ill., filed May 3, 2013). The cases have been consolidated under case number 12 CH 19718. See Decision, *Darby v. Orr and Lazaro v. Orr*, No. 12 CH 19719 (Cir. Ct. of Cook Cnty., 2013), available at <http://www.scribd.com/doc/171590353/12-CH-19718-Decision-on-Motion-to-Dismiss>.

349. Welcome to Website, ALLIANCE OF ILL. JUDGES, <http://www.theaij.com/index.html> (last visited Mar. 7, 2014); Mission Statement, Alliance of Ill. Judges, <http://www.theaij.com/mission.html> (last visited Mar. 7, 2014).

350. 735 ILL. COMP. STAT. 5/2-1001(a)(2)(i) (2006) (granting each party in a civil case one substitution of judge "without cause as a matter of right").



advised the press that it was not planning to remove the case from Judge Hall.<sup>351</sup> The plaintiffs' lawyers likewise dismissed sexual orientation as a basis for the judge's recusal.<sup>352</sup> But because the appearance of bias standard protects the public image of a judge and not the right to an impartial judge, the litigants' concessions concerning the judge's actual impartiality were beside the point. Thus, individuals and organizations not involved in the Illinois case, but staunchly opposed to gay marriage, used the appearance of impropriety in an attempt to prevent Judge Hall from fulfilling her constitutional function.

Rena Lindevaldsen, an Associate Dean at the Liberty University School of Law, called for Judge Hall's recusal, citing Illinois Supreme Court Rule 63, which, like most state judicial codes, calls for disqualification whenever a judge's impartiality "might reasonably be questioned."<sup>353</sup> In Professor Lindevaldsen's view, "[g]iven the significance of the case before her, Judge Hall should take steps to avoid even the perception of a conflict of interest, and recuse herself."<sup>354</sup> When pressed on the issue of whether Judge Hall was in fact partial, Lindevaldsen responded, "I'm not saying that [Judge Hall] can't rule fairly. I obviously don't know how she will rule."<sup>355</sup> That is the point. Judge Hall's impartiality is absolutely irrelevant in appearance-based disqualification. Once perception replaces reality, judicial recusal rests not with the judge, lawyers, or litigants, but is in the "eye of the beholder."<sup>356</sup> And every partisan special interest group views the circumstances through its own distorted lens. Consequently, misinformed, uninformed, and closed-minded individuals on every side of a social or political issue have a ready-made judicial code provision upon which to legitimize tasteless and baseless attacks on a judge's integrity and impartiality, thereby weakening the public's opinion of the judiciary.

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351. Tony Merevick, *Thomas More Society Won't Call for Lesbian Judge's Recusal in Marriage Case*, CHI. PHOENIX (July 31, 2012), <http://chicagophoenix.com/2012/07/31/thomas-more-society-wont-call-for-lesbian-judges-recusal-in-marriage-case> (reporting that the Executive Director of the Thomas More Society was not considering a challenge to Judge Hall because of her sexual orientation).

352. *Id.* (reporting plaintiffs' legal team's opinion that "a judge's sexual orientation is not a reason for recusal from a lawsuit that concerns discrimination against gay people").

353. ILL. SUP. CT. R. 63C(1) (2012).

354. Phil LaBarbera, *Chicago Judge Sophia Hall—Deciding ACLU's "Gay Marriage" Lawsuit—Is Open Lesbian*, AMS. FOR TRUTH ABOUT HOMOSEXUALITY (July 20, 2012), <http://americansfortruth.com/2012/07/20/chicago-judge-deciding-gay-marriage-lawsuits-sophia-hall-is-open-lesbian/>.

355. Merevick, *supra* note 351.

356. See *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 129 (2d Cir. 2003) ("[A]ppearances are often in the eye of the beholder."); *People v. Diaz*, 498 N.Y.S.2d 698, 701–02 (Cnty. Ct. 1986) ("Partiality, or the appearance thereof . . . is synonymous with impropriety; and the appearance of impropriety, like beauty, is in the eye of the beholder.").

### III. A PROPOSAL

Providing impartial judges and promoting public confidence in the judiciary are essential aims of any legitimate dispute resolution system. As demonstrated in Part II, appearance-based disqualification furthers neither objective. In restructuring recusal rules to ensure impartial judges and public confidence in the judiciary, the “might reasonably be questioned” disqualification standard must be replaced with a procedure providing for the peremptory removal of a trial judge upon the timely and perfunctory request of a party. After exercising the right to an automatic change of judge, a party could only challenge the successor judge in one of two ways. First, the litigant could seek removal of the new judge if the judge is disqualified under a statute or court rule. Second, a litigant could challenge the successor judge if the judge’s participation in the case would violate due process.

#### A. The Peremptory Disqualification of Judges

Eighteen states provide for the automatic disqualification of a trial court judge upon the timely request of a party.<sup>357</sup> Some states require that the request be supported by an affidavit stating that the challenged judge is so prejudiced that the litigant cannot receive a fair trial,<sup>358</sup> or that the litigant “believes” that the judge’s prejudice will prevent a fair trial.<sup>359</sup> Due to the perfunctory nature of the affidavit, most states with automatic change of judge statutes do not require an affidavit or any allegation of bias or prejudice in support of the substitution motion.<sup>360</sup>

Replacing the “might reasonably be questioned” standard with an automatic substitution of a trial judge has many advantages. First and foremost, the

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357. See ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES 6 n.17 (2011) (identifying the states permitting the peremptory challenge of at least one trial judge in a proceeding to include Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming). All of the states with peremptory challenge provisions have retained the “might reasonably be questioned” disqualification standard or its functional equivalent. See also *supra* note 29.

358. See, e.g., 725 ILL. COMP. STAT. 5/114-5(a) (2012) (providing for the substitution of a judge in a criminal case when a defendant’s written motion requests a substitution “on the ground that [the] judge is so prejudiced against him that he cannot receive a fair trial”).

359. See, e.g., ARIZ. REV. STAT. §12-409(A)–(B) (2012) (requiring an automatic change of judge in a civil case upon the filing of an affidavit alleging that the litigant “has cause to believe and does believe that on account of bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial”).

360. See, e.g., ALASKA R. CRIM. P. 25(d)(2) (2009) (providing that the “Notice of Change of Judge” may be signed by an attorney and need not specify grounds or be accompanied by an affidavit); MO. SUP. CT. R. 51.05(a) (2011) (directing a change of judge in any civil action upon the filing of a written application by a party without the need for verification or a statement of cause); NEV. SUP. CT. R. 48.1 (2011) (establishing the right to change judges in a civil action by filing a “Peremptory Challenge of Judge” signed by a party or attorney, which need not specify grounds or be accompanied by an affidavit).

peremptory challenge is simple.<sup>361</sup> A motion seeking to exercise the right to a new judge is short, uncomplicated, requires no discussion of statutory or case law, and is easily prepared by pro se litigants. For example, Montana allows for the disqualification of a district court judge upon submission of a simple, one sentence pleading stating that: “The undersigned hereby moves for substitution of District Judge \_\_\_\_\_ in this case.”<sup>362</sup> No response, hearing, or argument is necessary. There is no need to labor over the meaning or application of the “might reasonably be questioned” test or to conduct fruitless research into conflicting and unhelpful court decisions and judicial ethics advisory opinions.<sup>363</sup> Uniformity and predictability, the unachieved goals of appearance-based recusal, now become mechanical and universal. If the parties fail to exercise their right to the automatic removal of the assigned judge, the only possible conclusion is that those most interested in the litigation are satisfied with the judge’s fairness. If a party invokes the procedure granting a new judge, the debate over the impartiality of the assigned judge terminates immediately. Judges and the public will no longer suffer claims by the litigants that a judge’s religion, race, sex, sexual orientation, or ethnicity generates an appearance of partiality. Nor will partisan groups be able to hijack the appearance of partiality standard to advance their own interests.

The peremptory challenge system, unlike any other disqualification process, embodies a “triple threat” in advancing the goals of judicial disqualification by: (1) enhancing actual impartiality in the judicial process;<sup>364</sup> (2) strengthening the litigants’ belief in the fairness of the system;<sup>365</sup> and (3) reinforcing the public’s faith in the impartiality of the judiciary.<sup>366</sup>

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361. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526 (2007) (“Its great advantage, though, lies in its simplicity: by granting litigants one ‘free pass,’ peremptory disqualification allows [litigants] to secure an unbiased judge without the expense, unseemliness, and retribution risk of a disqualification challenge.”).

362. MONT. CODE ANN. § 3-1-804(2)(b) (2009); see also Mo. SUP. CT. R. 32.06 Comm. Note-1982 (2012) (suggesting that the motion to change judge in a criminal case is sufficient if it states, “\_\_\_\_\_ requests a change of judge”).

363. See supra Part II.A.2–3; see also Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49, 58 (1988) (emphasizing the advantage of a peremptory strike system in “avoid[ing] the necessity of repeatedly dealing with alleged improprieties or bias [allowing] the judges to spend more time on the merits of pending controversies as opposed to litigation over personal aspects of the judges’ lives and careers”); Stempel, supra note 32, at 791 (“There exists considerable disagreement within the legal profession as to when the [reasonable question of impartiality] standard is met.”).

364. *People v. Redisi*, 544 N.E.2d 1136, 1139 (Ill. Ct. App. 1989) (“The purpose of the provision for the automatic substitution of judge is to enhance the impartiality of the judicial process.”).

365. *Adams v. State*, 376 N.E.2d 482, 483 (Ind. 1978) (finding that the peremptory challenge serves to “assure that [a litigant] believes that he has an unbiased judge”).

366. See *Davcon, Inc. v. Roberts & Morgan*, 2 Cal. Rptr. 3d 782, 786 (Cal. Ct. App. 2003) (“The right to exercise a peremptory challenge [against a judge] is a substantial

Of course, any procedure authorizing the peremptory removal of a trial judge invites abuse. There is evidence that lawyers employ automatic substitution motions to achieve purposes other than the elimination of a potentially biased or prejudiced judge.<sup>367</sup> Peremptory challenges sometimes are employed in an effort to gain a procedural or substantive advantage by changing judges. The end game behind this maneuver can include delaying a hearing or trial,<sup>368</sup> avoiding “a judge who insists on high standards of practice or timeliness,”<sup>369</sup> increasing the likelihood of obtaining a judge perceived as a lenient sentencer,<sup>370</sup> avoiding the unpredictability of a newly elected or appointed judge or a substitute judge,<sup>371</sup>

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right and an important part of California’s system of due process that promotes fair and impartial trials and confidence in the judiciary.”); *State v. Holmes*, 315 N.W.2d 703, 710 (Wis. 1982) (declaring that part of the rationale behind the peremptory disqualification of judges is to maintain public confidence in the judicial system); Baron, *supra* note 363, at 57 (“The use of a peremptory challenge system in Texas would serve to enhance public confidence in the judiciary.”).

367. See Stephen B. Burbank, *Unwarranted Distrust of Federal Judges*, 81 JUDICATURE 7, 41 (1997) (“Any informed observer of federal civil litigation would agree that the great majority of attempts to recuse made by parties . . . are for purely strategic reasons, and not because a litigant seriously entertains an apprehension of disadvantage as a result of judicial bias or prejudice.”); see also Paul Payne, *Attorneys Seek Edge by Swapping Judges*, THE PRESS DEMOCRAT (Dec. 5, 2010), available at 2010 WLNR 24124865 (reporting a study of Soma County, California judges demonstrating that “[j]udges with a reputation of being tough on criminals received more [peremptory] defense challenges while those thought to be lenient were dismissed by district attorney motions.”).

368. *Solberg v. Superior Court*, 561 P.2d 1148, 1156 (Cal. 1977); *In re Robert P.*, 175 Cal. Rptr. 252, 256–57 (Cal. Ct. App. 1981) (recapping the Attorney General’s argument that a lawyer used the peremptory challenge procedure to obtain a trial continuance); Payne, *supra* note 367 (reporting a judge’s opinion that a lawyer could use a peremptory challenge as a tactic to obtain a trial continuance).

369. Memorandum from Alaska Judicial Council About Peremptory Challenge Rates 2 (Apr. 1, 2012) [hereinafter *Alaska Peremptory Challenge Memorandum*], available at <http://www.ajc.state.ak.us/retention/retent2012/perempt.pdf>; see ARIZ. R. CRIM. P. 10.2(b) (2012) (requiring an avowal in a “Notice of Change of Judge” that the motion is not brought for the purpose of delay); Jennifer Simpson, *Automatic Judicial Disqualification Under Idaho Criminal Rule 25(A): A Necessary Lawyering Tool or Potential Nuclear Weapon*, 43 IDAHO L. REV. 234, 254 (2006) (indicating that automatic changes may be used to avoid judges who hold lawyers accountable).

370. ALAN J. CHASET, *DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE* 55–56 (1981); see also ARIZ. R. CRIM. P. 10.2(b) (2012) (requiring an avowal in a “Notice of Change of Judge” that the motion is not brought to obtain an advantage or to avoid a disadvantage in connection with a plea bargain or sentencing); *Hornaday v. Rowland*, 674 P.2d 1333, 1343 (Alaska 1983) (summarizing a judge’s claim that the peremptory challenge statute was invoked by litigants unhappy with his sentencing policy).

371. *Alaska Peremptory Challenge Memorandum*, *supra* note 369, at 3 (“Challenges also often occur when a new judge is appointed because those judges are newly assigned to existing cases and because that judge is ‘unknown’ and thus less predictable.”); see also *People v. Walker*, 519 N.E.2d 890, 892 (Ill. 1988) (relating the trial judge’s statement that defense counsel told the judge that they exercised peremptory challenges against the judge when serving as a substitute judge in Chicago because he was a “downstate” judge).

avoiding a judge perceived as “too fair,” with the hope of reassignment to a judge with leanings more favorable to the movant’s case,<sup>372</sup> and removing a case from a judge whose prior rulings in unrelated cases may foreshadow an unfavorable ruling in the movant’s case.<sup>373</sup>

Equally concerning is the possibility that a litigant will use the peremptory challenge procedure to remove a judge based on the judge’s race, sex, religion, ethnicity, or sexual orientation.<sup>374</sup> Fear of such misuse has led one state to require a movant to “avow” that the automatic substitution motion is not made for the purpose of “remov[ing] a judge for reasons of race, gender or religious affiliation.”<sup>375</sup>

Critics accurately point out that the increased number of disqualifications created by an automatic strike system may add to a court’s administrative burden.<sup>376</sup> But, it is difficult to argue convincingly that the increased number of case reassignments will place a substantial burden on courts even in sparsely populated states or judicial districts with a single judge. Experience is to the contrary; administrative challenges have not been severe enough to convince any state to repeal its peremptory challenge procedure.<sup>377</sup> Alaska, for instance, consisting of 571,951 miles of territory,<sup>378</sup> maintains a peremptory system.<sup>379</sup> Other states have embraced the right to an automatic change of judge for more

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372. Alaska Peremptory Challenge Memorandum, *supra* note 369, at 2.

373. See Solberg, 561 P.2d at 1156 n.11 (reviewing appellant’s contention that the prosecution moved to disqualify a judge from a prostitution case because of the judge’s rulings in prior prostitution cases); FLAMM, *supra* note 8, § 26.2, at 757 (recognizing that peremptory challenges might be exercised because a “judge’s reputation or prior rulings suggest that he may oppose a particular litigant’s interests in a particular case”).

374. See Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenge of Judges*, 73 CHI-KENT L. REV. 509, 515 (1998) (“While the problem of race-based judicial challenges has certainly not been as pervasive as the problem of race-based juror challenges, it is nevertheless a real concern that should trouble those who champion the peremptory challenge of judges.”).

375. ARIZ. R. CRIM. P. 10.2(b)(4) (2012); cf. CAL. CIV. PROC. CODE § 170.2(a) (West Supp. 2006) (“It shall not be grounds for disqualification that the judge . . . is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.”).

376. See CHASET, *supra* note 370, at 41–53 (outlining potential administrative consequences of peremptory challenges in the federal courts); Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1144–45 (2011) (predicting that peremptory challenges will result in an increased number of disqualifications which will place an administrative burden on the courts).

377. But see Simpson, *supra* note 369, at 250–51 (detailing the suspension and temporary repeal of the Idaho Supreme Court Rule permitting peremptory disqualification in criminal cases).

378. Jeff D. May, *Alvarado Revisited: A Missing Element in Alaska’s Quest to Provide Impartial Juries for Rural Alaskans*, 28 ALASKA L. REV. 245, 246 (2011) (“Alaska is enormous. The state consists of 571,951 square miles, making its size roughly equivalent to one-fifth of the lower forty-eight states.”).

379. Alaska Peremptory Challenge Memorandum, *supra* note 369, at 1.

than 150 years.<sup>380</sup> Illinois has allowed peremptory strikes against trial judges since Abraham Lincoln practiced in the 14 counties that made up Illinois's Eighth Judicial Circuit, which was presided over by a single judge.<sup>381</sup>

No doubt inconvenience will result from a nationwide implementation of a right to the removal of a trial judge.<sup>382</sup> Abuse of the process, which has long been recognized, will continue to occur.<sup>383</sup> But the occasional misuse and administrative inconvenience attendant to a peremptory strike system is a small price to pay considering the overall gain to the justice system by substituting automatic disqualification for the unworkable and destructive appearance of impropriety disqualification standard.<sup>384</sup>

### B. Challenges for Cause

Allowing each party one peremptory challenge should satisfy most litigants that an impartial trial judge will decide their case.<sup>385</sup> But in the rare instance in which a party fears the partiality of the successor judge, the new judge may be challenged on the basis that she is disqualified under a statute or court rule.

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380. See, e.g., *Krutz v. Griffith*, 68 Ind. 444, 447–49 (1879) (interpreting a 1859 amendment to the state's civil practice act to require a trial judge to automatically grant a change of venue upon the filing of an affidavit alleging bias or prejudice).

381. See *McGoon v. Little*, 7 Ill. (2 Gilm.) 42, 42–43 (1845). Judge David Davis presided over matters in the Eighth Judicial Circuit from 1848 until he was appointed to the U.S. Supreme Court in 1862. See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 263, 264 n.21 (2011).

382. Implementation of a peremptory challenge system for reviewing court judges presents special problems. The possibility of an equally divided court or a lack of a quorum and the increased likelihood of "judge-shopping" militate in favor of limiting peremptory challenges to the trial courts at least until further state experimentation with appellate court peremptory challenges. The size of some multimember courts may preclude automatic disqualifications. See, e.g., *Judges, U.S. CT. OF APPEALS FOR THE FIRST CIRCUIT*, <http://www.ca1.uscourts.gov/?judges.htm> (last visited Mar. 3, 2014) (listing five active and four senior judges); *Meet the Justices, N.H. JUDICIAL BRANCH*, <http://www.courts.state.nh.us/supreme/justices.htm> (last visited Feb. 24, 2014) (stating that the New Hampshire Supreme Court consists of five justices).

383. The misuse of peremptory challenges may be reduced to some extent by assessing a fee to the party exercising the challenge. See NEV. SUP. CT. R. 48.1(2) (2011) (requiring that a \$450 fee accompany the filing of a "Notice of Peremptory Challenge of Judge").

384. Cf. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 212 (2011) (arguing that the benefits of a judicial peremptory challenge procedure outweigh the potential danger of "judge-shopping" by litigants); Stempel, *supra* note 32, at 790 ("The costs of the [peremptory challenge] approach, however, are minimal, and the potential gains significant.").

385. See Goldberg, *supra* note 361, at 526 ("[B]y granting litigants one 'free pass,' peremptory disqualification allows most of them to secure an unbiased judge . . ."); Ellen M. Martin, *Disqualification of Federal Judges for Bias Under 28 U.S.C Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 161 (1976) ("Granting one peremptory challenge should satisfy the needs of most litigants.").

All jurisdictions provide for a judge's removal under specific, enumerated circumstances usually based on the disqualification provisions of the 1990 or 2007 ABA Model Code. Rule 2.11(A) of the 2007 Code, for example, disqualifies a judge from any matter in which the judge:

- has a personal bias or prejudice concerning a party or attorney;<sup>386</sup>
- has personal knowledge of disputed facts or is a material witness;<sup>387</sup>
- served as a lawyer or was associated with a lawyer who served in the matter;<sup>388</sup>
- as a government employee or official participated personally and substantially in the matter or publicly expressed an opinion concerning the merits of the matter;<sup>389</sup>
- previously presided over the matter in another court;<sup>390</sup>
- received a campaign contribution exceeding a specified amount from a litigant or a litigant's lawyer;<sup>391</sup>
- made a statement that commits or appears to commit the judge to rule in a predetermined way.<sup>392</sup>

Rule 2.11(A) further disqualifies a judge when the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to such person (1) is a party, lawyer, or witness in the proceeding or (2) has more than a de minimis interest in the matter.<sup>393</sup>

Most provisions of Rule 2.11(A) concern situations in which a judge's impartiality traditionally has been suspect, including where: (1) the judge has a close family relationship with a participant in the proceeding; (2) the judge has been personally involved in the matter; (3) the judge or a close family member has a financial interest in the proceeding; or (4) the judge harbors a bias or prejudice against a party or lawyer.<sup>394</sup> But the 2007 Code also attempts to insulate the judicial process from decision-makers whose impartiality might be questioned based on more recently developed public concerns. For instance, Rule 2.11

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386. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007).

387. *Id.*

388. *Id.* R. 2.11(A)(6).

389. *Id.* R. 2.11(A)(6)(b).

390. *Id.* R. 2.11(A)(6)(d).

391. *Id.* R. 2.11(A)(4).

392. *Id.* R. 2.11(A)(5).

393. *Id.* R. 2.11(A)(2)(a)–(d).

394. See Cravens, *supra* note 144, at 30–31 (“Challenges to a judge’s impartiality are most often based on concerns that the judge cannot be impartial in the case because of a personal relationship (e.g., a professional association, a friendship, or some family relationship) to another party in the case, a financial stake in the outcome of the case, or a personal belief the parties believe will render the judge’s mind less than fully open to the arguments to be presented.”) (footnotes omitted).

prevents a judge from hearing a case in which a party or lawyer makes a contribution to the judge's election campaign above a specified amount<sup>395</sup> and removes a judge who has made an out-of-court statement that commits or appears to commit the judge to a predetermined result.<sup>396</sup>

The 2007 Code adequately defines disqualifying circumstances consistent with traditional and modern impartiality concerns. States choosing to abandon appearance-based disqualification, however, may wish to refine and supplement these specific disqualifying circumstances because the all-encompassing "might reasonably be questioned" provision will be no longer available to assess the propriety of a judge's participation in a case.

Some states have already broadened the ABA's list of disqualifying factors. Georgia requires recusal when a judge is related within the sixth degree, rather than third degree, of relationship to a party.<sup>397</sup> Alaska prohibits a judge from hearing a matter in which the judge's close relative is employed in any capacity by a party or law firm involved in the case.<sup>398</sup> Tennessee provides for the disqualification of a judge who is related to the victim of a crime<sup>399</sup> and precludes a judge from deciding any contested issue after participating in a settlement conference.<sup>400</sup> Several states expand the ABA prohibition barring a judge from presiding over an appeal of a case decided by the judge to include cases in which the judge's relative participated in the decision being reviewed.<sup>401</sup> Taking to heart the ABA's recommendation that a judge not hear cases in which a litigant or lawyer has contributed to the judge's political campaign in an amount that creates an appearance of partiality, Utah mandates disqualification when a contribution totals more than \$50 during a three-year period.<sup>402</sup>

States may wish to go further. One commentator suggests that states should reject the ABA rule permitting judges to remain on cases in which they have no more than a de minimis financial interest.<sup>403</sup> Instead, Professor Stempel endorses adoption of the federal rule that mandates disqualification regardless of the size of the judge's financial interest in the litigation or in a litigant.<sup>404</sup> Under the strict provisions of both 28 U.S.C. § 455(d)(4) and Canon 3C(1)(c) of the Code

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395. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

396. *Id.* R. 2.11(A)(5).

397. GA. CODE ANN. §15-1-8(a)(2) (1993).

398. ALASKA CODE OF JUDICIAL CONDUCT Canon 3E(1)(c)(ii) (2011).

399. TENN. CODE ANN. § 17-2-101(5) (2009).

400. TENN. CODE OF JUDICIAL CONDUCT R. 2.11(A)(6)(e) (2012).

401. See, e.g., FLA. CODE OF JUDICIAL CONDUCT Canon 3E(1)(c) (2008) ("A judge shall disqualify himself or herself . . . where . . . the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge."); OHIO CODE OF JUDICIAL CONDUCT R. 2.11(A)(6) (2009) (prohibiting a judge from hearing a matter when "the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person has acted as a judge in the proceeding").

402. UTAH CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2013).

403. Stempel, *supra* note 32, at 770–75.

404. *Id.* at 775.



of Conduct for United States Judges, a federal judge owning a single share of stock in a multibillion-dollar international corporation is precluded from hearing any matter involving the corporation.<sup>405</sup>

States may also wish to expand disqualification based on a party or lawyer's monetary contribution to a judge's election campaign. The ABA-sanctioned rule merely requires recusal when an interested person makes a monetary contribution above a preset level in support of a judge's election effort.<sup>406</sup> A comparable contribution to the judge's opponent might also warrant disqualification. In addition, state rules could require reassignment of a case when a party or lawyer appearing before the judge is simultaneously serving as the judge's campaign chairperson, treasurer, fundraising coordinator, or similar representative.<sup>407</sup>

Lastly, many courts and judicial ethics advisory committees agree that a judge's impartiality might reasonably be questioned in proceedings in which a lawyer appearing before the judge simultaneously represents the judge in a personal matter or in a lawsuit brought against the judge in his official capacity.<sup>408</sup>

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405. See 28 U.S.C. § 455(d)(4) (2012) (providing no exception for de minimis financial interests held by a judge); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(3)(b) (2009) (defining a disqualifying interest to include "ownership of a legal or equitable interest, however small"); U.S. Judicial Conference Comm. on Codes of Conduct, Op. 101 (2009) ("Ownership of any stock in a party, however small, automatically requires a [federal] judge's disqualification because it constitutes a financial interest in the party.").

406. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

407. See *Caleffe v. Vitale*, 488 So. 2d 627, 629 (Fla. Dist. Ct. App. 1986) (requiring disqualification when a lawyer appearing before a judge "is actually running the judge's ongoing reelection campaign"); Ill. Judicial Ethics Comm., Op. 96-20 (1996) (finding that a judge's impartiality might reasonably be questioned if a party is represented by the judge's campaign manager); see also N.Y. Advisory Comm. on Judicial Ethics, Op. 94-12 (1994) (concluding that a judge may not hear matters in which the judge's campaign manager appears as an attorney); see also Wis. Judicial Conduct Advisory Comm., Op. 03-1 (2004) (advising that a judge must recuse himself for a reasonable time from cases involving the judge's former campaign manager); *In re Doyle*, Determination 19-24 (N.Y. State Comm'n on Judicial Conduct (Nov. 12, 2013), available at <http://www.cjc.ny.gov/Determinations/D/Doyle.Cathryn.M.2013.11.12.DET.pdf> (removing a judge in part for presiding over matters involving an attorney who played a "significant role" in the judge's election campaign and served as campaign manager in the judge's reelection campaign).

408. See, e.g., *Ballard v. Campbell*, 127 So. 3d 693, 695 (Fla. Dist. Ct. App. 2013) ("The general rule is that disqualification is required if counsel for one of the parties is representing or has recently represented the judge."); *Sargent Cnty. Bank v. Wentworth*, 500 N.W.2d 862, 879-80 (N.D. 1993) (disqualifying a judge from a mortgage foreclosure proceeding because the bank's attorney also represented the judge in an unrelated personal matter); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1477 (1981) ("[W]hen a private lawyer is currently representing a judge, even in a matter involving the judge's official position or conduct, the judge should not sit in a case in which a litigant is represented by the lawyer or by the lawyer's partner or associate."); Ill. Judicial Ethics Comm., Op. 95-2 (1995) ("[T]he judge is disqualified from hearing any matters in which the judge's lawyer is counsel of record."); N.Y. Advisory Comm. on Judicial Ethics, Op.

These jurisdictions may wish to add a provision to their judicial disqualification statute or court rule requiring recusal in such situations.

### C. Due Process Challenges

If the judge appointed after the exercise of a party's automatic peremptory challenge is not disqualified under the jurisdiction's statutory or court rules, the judge may then only be removed through a due process challenge.

To establish a due process violation, a litigant need not prove actual bias, but only demonstrate a "serious risk of actual bias" on the part of the successor judge.<sup>409</sup> Unlike the "might reasonably be questioned" test, due process is designed to ensure judicial impartiality in fact, not in appearance. As a result, the ordinary, reasonable member of the public who dictates the disqualification result in an appearance-based regime is not the arbiter of whether a serious risk of bias exists under a due process analysis.<sup>410</sup> Due process is not concerned with gauging the public's view of the propriety of a judge remaining on a case. Instead, it is concerned with assessing the likelihood that the judge suffers from actual bias. The best person to weigh the likelihood of actual judicial bias is the average judge, not the average lay person. Therefore, due process is violated when the circumstances viewed objectively by the average judge present a serious risk of actual bias on the part of the judge.<sup>411</sup> Proving a constitutional violation is not an easy task. The average judge is much more likely than the average nonjudge to give credence to the judicial oath of impartiality<sup>412</sup> and the presumption of impartiality,<sup>413</sup> and to credit judicial training with enabling judges to lay aside personal opinions and predilections while on the bench.<sup>414</sup> Hence, the average judge is less likely than the

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94-33 (1994) (prohibiting a judge from hearing cases in which a lawyer appears who represents the judge in an adoption proceeding); Utah Judicial Ethics Advisory Comm., Informal Op. 00-4 (2000) (finding disqualification required where an attorney who represents the judge as a respondent in a disciplinary proceeding appears before the judge).

409. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009); see also Raymond J. McKoski, Judicial Disqualification After Caperton v. A.T. Massey Coal Company: *What's Due Process Got to Do With It?*, 63 BAYLOR L. REV. 368, 371-73 (2011) (examining the due process disqualification test established by the Court in Caperton).

410. See *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) (finding that the Due Process Clause requires disqualification when the "reasonable judge" so determines whereas § 455(a) requires disqualification where "others" might reasonably question the judge's impartiality).

411. See McKoski, *supra* note 409, at 372.

412. See, e.g., 28 U.S.C. § 453 (2012) (setting forth the oath taken by federal judges to "impartially discharge and perform" their duties).

413. *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995) ("[W]e are mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary.").

414. *McElhanon v. Hing*, 728 P.2d 273, 282 (Ariz. 1986) ("A judge often hears prejudicial evidence, allegations, or accusations against one party. Judges are trained to hear and consider such information and, if they find it irrelevant or inadmissible, to put it aside and discharge their duties in accordance with the law.").

average citizen to find bias or a serious risk of actual bias on any given set of facts.<sup>415</sup>

Under this proposal, due process will serve as a safety net to ensure that a judge appointed to a case after the exercise of a peremptory challenge will not suffer from partiality or be subject to circumstances likely to cause the average judge to lose neutrality.

### CONCLUSION

Lawyers make mistakes. Fortunately, the process for rectifying mistakes is not rocket science: The error must be recognized, admitted, and then corrected. In dealing with lawyers, the first two steps are often the most difficult. The legal profession does not want to recognize, much less admit, that appearance-based disqualification has been a documented failure, from its theoretical underpinning to its practical application. The “might reasonably be questioned” test is too vague to allow a disqualification jurisprudence to develop or to enable judges to uniformly decide recusal issues.<sup>416</sup> The objective observer, who has been employed successfully to gauge reasonableness in the realm of torts and contracts, was never designed to judge appearances. Hijacking the reasonable person in name only has not transformed recusal into an objective decision-making process. Disqualification decisions continue to be subjectively made by judges disguised to look like the reasonable nonjudge. Nor is there any indication that the appearance standard has increased public confidence in judicial impartiality. What evidence exists is to the contrary. The unworkable standard has reduced society’s faith in the judiciary by being misused by litigants and partisan interest groups to attack the impartiality of judges based on their religion, race, sex, sexual orientation, and ethnicity. It is time to recognize and admit the honest but misguided effort of the architects of appearance-based disqualification.

The objectives sought by the drafters of Canon 3C(1) of the 1972 Code and 28 U.S.C. § 455(a) can be realized by instituting a system of peremptory-based disqualification coupled with a descriptive set of disqualifying factors and the due process guarantee of an impartial decision-maker. Granting each party one automatic change of trial judge without cause creates an objective standard that mechanically dispenses uniform, predictable results. A successor judge may be challenged if his or her participation in a case violates a disqualifying circumstance set forth in the jurisdiction’s statutes or court rules. And the state and federal courts are free to establish as detailed a list of disqualifying factors as they deem appropriate. Of course, litigants always retain the right to remove a judge under the Due Process Clause when a serious risk of bias exists.

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415. See *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (“Judges, accustomed to the process of dispassionate decision-making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would.”).

416. See Stempel, *supra* note 32, at 791 (“There exists considerable disagreement within the legal profession as to when the [might reasonably be questioned] standard is met.”).

Lawyers do not generally embrace change.<sup>417</sup> Abandoning an entrenched legal standard in favor of an untested alternative causes apprehension. And that trepidation is justified when a proposed solution to a problem remains untested. But the soundness of every aspect of the approach to disqualification suggested in Part III has been confirmed. Eighteen states successfully employ the peremptory disqualification of trial judges. By statute or court rule, every state identifies specific situations in which recusal is required. And the Due Process Clause has been invoked for centuries as a safeguard against biased judges and judges faced with circumstances creating a serious risk that they will not remain impartial. Peremptory recusal, state and federally designated disqualifying circumstances, and due process work; appearance-based disqualification does not.

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417. Ruggero J. Aldisert, *GoodBye Dean, and Welcome Back, Provost – Professor*, 54 U. PITT. L. REV. 951, 954 (1993) (“[T]he brute fact is that lawyers and judges simply do not like changes.”).