Fordham International Law Journal

Volume 36, *Issue* 1 2013 *Article* 3

Perceptions of Justice- An International Perspective on Judges and Apperances

Debra Lyn Bassett* Rex R. Perschbacher†

*Southwestern Law School

†University of California

PERCEPTIONS OF JUSTICE: AN INTERNATIONAL PERSPECTIVE ON JUDGES AND APPEARANCES#

Debra Lyn Bassett & Rex R. Perschbacher+*

 We presented portions of this Article at the 2012 International Conference on Law and Society in Honolulu, Hawai'i.

* Justice Marshall F. McComb Professor of Law, Southwestern Law School. Many thanks to Dean Bryant Garth and Interim Dean Austen Parrish for their encouragement and research support.

+ Professor of Law and Daniel J. Dykstra Chair in Law, University of California, Davis. Many thanks to the Martin Luther King, Jr. Hall Research Scholar summer grant program for its financial research support, and to Dean Kevin Johnson for his encouragement and research support.

INTRODUCTION

Judges, whether presiding over bench and jury trials as they do in the United States, or serving as specially-trained careerists as they do in civil law countries, are at the heart of the fact-finding and legal inquiries required of judicial officers. As the individuals charged with implementing an entire nation's justice system, judges carry a weighty mantel.

We expect all judges to have certain baseline characteristics, including competence, independence, and, of particular significance to this Article, impartiality.[1] A judge lacking impartiality taints case outcomes and makes a mockery of so-called "justice."[2]

Often honored in legal commentary but downplayed in practice is the importance—indeed, the necessity—that judges are *perceived* as being impartial.[3] Perceptions of justice ultimately

---

1. *See* Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United, *Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 883 (2010) ("Although the issues might differ across countries, the objectives are similar, including decision-makers who are competent, efficient, and neutral . . . .").

2. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.4.1, at 150 (1996) ("Judicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based.").

3. *See* FLAMM, *supra* note 2, § 5.4.1, at 150 ("Since an appearance of bias may be just as damaging to public confidence in the administration of justice as the actual presence of bias, acts or conduct giving the appearance of bias should generally be avoided in the same way as acts or conduct that inexorably bespeak partiality."); Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 89 JUDICATURE 35, 35 (2005) ("To hold judges to the highest standard of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is neither overly suspicious nor unusually gullible."); Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 291 (2010) [hereinafter Moore, *Appearance of Impropriety*] ("Avoiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public's willingness to accept judicial decision-making and submit to the rule of law."); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996) ("[J]udges must not only be impartial in fact, they must *appear* to be impartial."); *see also* UNITED NATIONS OFFICE ON DRUGS & CRIME, COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 17 (2007) [hereinafter *Commentary on the Bangalore Principles*] ("[J]udges must not only meet objective criteria of impartiality but

determine the judiciary's reputation and success by instilling public confidence in the courts.[4] Regardless of nationality, a nation's judiciary is measured in terms of its fairness and impartiality, both actual and perceived.[5]

We begin this Article with a brief look at the prevailing international norms for judicial impartiality. We take a close look at five common law countries and their approaches to the need for judicial impartiality. We explain that there is an acknowledged international norm requiring a competent and impartial judiciary.[6] Although this norm is not seriously disputed anywhere, adherence to the norm frequently falls short

---

must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society."). *See generally* FEDERAL JUDICIAL CENTER, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1 (2d ed. 2010) ("[P]ublic confidence in the administration of justice is indispensable. It is not enough that judges *be* impartial; the public must *perceive* them to be so.").

4. *See* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."); JEFFREY M. SHARMAN, AM. JUDICATURE SOC'Y, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 13 (1996) ("Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system."); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610 (2002) ("That judicial decision-making must *appear* to be free of bias is premised on the widely held belief that public confidence is essential to upholding the legitimacy of the judiciary.") (emphasis added); *id.* at 611 ("[T]he judiciary—especially the appointed judiciary—derives its authority and legitimacy from the willingness of the people and sister branches of government to accept and submit to its decisions. Because public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function."); Theodor Meron, *Judicial Independence and Impartiality in the International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 369 (2005) ("[J]udicial independence . . . depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.").

5. *See* Greene, *supra* note 1, at 883 ("Although the issues might differ across countries, the objectives are similar, including decision-makers who are . . . neutral, neither biased nor appearing to a reasonable observer to be biased . . . .").

6. *See* R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1814 (2005) ("The expectation of judicial impartiality is a hallmark of most modern legal systems. In fact, resolution of disputes by an unbiased tribunal has been characterized as a fundamental human right.").

everywhere.[7] The guiding principles are well-intentioned, but they fail to more fully address the core concern that justice both be *and appear to be* impartial.

After a brief look internationally, we take a pointed, fine-grained look directly at the United States itself. With that background, we conclude that two consistent problems lie in judicial recusal worldwide—problems concerning both the process and the substance of determining when a judge should be disqualified from hearing a particular matter.[8] The substantive problem concerns an undue emphasis on an objective recusal standard, to the neglect of appearances of impropriety. The process problem stems from a notion that is central to the need for impartiality—the fundamental premise of Anglo-American jurisprudence, and one repeated throughout the globe—that "no man should be a judge in his own case."[9] This ideal, repeated so frequently that it has become a cliché, can be found in the Latin, *nemo debet esse iudex in propria causa*;

---

7. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (stating that in both civil and criminal proceedings, one is entitled to a hearing before "an independent and impartial" tribunal); *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (determining that everyone has the right to a fair and impartial tribunal).

8. This Article will use the terms "recusal" and "disqualification" interchangeably. Traditionally, "recusal" has referred to a judge's discretionary, voluntary decision to step down. *See* FLAMM, *supra* note 2, § 1.1, at 4 (noting this traditional view); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 n.3 (1984) [hereinafter Moore, *Appellate Review*] (noting that although the term "recusal" often is used as a synonym for disqualification, "it technically refers to a voluntary decision of the judge to step down"). "Disqualification," in contrast, refers to a motion for the statutorily or constitutionally mandated removal of a judge. FLAMM, *supra* note 2, § 1.1, at 4–5. Despite the technical distinction between "recusal" and "disqualification," they are often treated as synonyms. In many jurisdictions the term "disqualification" has been defined in such a way as to include both removal by a judge on his own motion and removal at the request of a party. In fact, in modern practice the terms "disqualification" and "recusal" are frequently viewed as synonymous and are often used interchangeably. *Id.* § 1.1, at 5.

9. *See* Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B.), 8 Co. Rep. 113b, 118a; *see also* John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970) (citing 1 EDWARD COKE, INSTITUTES 141a for the axiom that "[n]o man shall be judge in his own case.").

in the United States, it is found in *The Federalist Papers*[10] and more recently in *Caperton v. A.T. Massey Coal Co.*,[11] which we discuss below. Yet almost universally, judges are the first and often the last evaluators of their own bias and impartiality—it is the challenged judge who rules on her own impartiality. This process issue is joined by a troubling dilemma that is not confined to law—the difficulty that human actors have in judging their own conduct when challenged by parties whose sensibilities differ from their own.[12]

I. *THE INTERNATIONAL LANDSCAPE*

"We are all inclined to judge ourselves by our ideals; others, by their acts." ~ Sir Harold George Nicholson[13]

The distance between ideals and reality is found throughout all human endeavors, including within the world of law. One of the many places in which this dichotomy plays out is within the judiciary, in the requirement that judges decide cases impartially and without bias. The "first world" of international law—its official organs, the United Nations and the leading Non-governmental Organizations ("NGO")—endorses strong statements about the need for impartial and unbiased judging.[14] Yet nowhere (and this includes the United States) is the ideal of a fair and impartial judge fully and effectively honored.

---

10. THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

11. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886 (2009).

12. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921) ("We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.").

13. Sir Harold George Nicholson was an English diplomat and author. JOHN RAYMOND COOK, ASPHALT JUSTICE: A CRITIQUE OF THE CRIMINAL JUSTICE SYSTEM IN AMERICA 117 (2000); HIGH IMPACT QUOTATIONS 4 (Richard Pound ed., 2004); WISDOM OF THE ELDERS: THE ULTIMATE QUOTE BOOK FOR LIFE 70 (Bohdi Sanders ed., 2011).

14. *See* Greene, *supra* note 1, at 883–84 ("International and domestic principles of the rule of law, including the internationally respected model The Bangalore Principles of Judicial Conduct, require that judges be impartial. To the same effect are the United Nations Principles on the Independence of the Judiciary, noting that judges shall decide 'impartially . . . without any improper influences, inducements . . . for any reason.'").

Two reasons underlie this failure. First, the consistent judicial disqualification procedure employed in common law countries, whereby the challenged judge is the sole evaluator of the disqualification motion, undermines the judiciary's ability to achieve genuine impartiality. Second, as a matter of substance, too little attention is paid to the need to satisfy the *appearance* of impartiality in all of the legal systems that we will examine in connection with this Article. Judges should act without actual bias and without the appearance of bias—a concept recognized long ago in the Roman Code of Justinian.[15] The central question for this inquiry is how to determine the absence of bias as an objective matter. The test is not whether the judge considers herself biased. However, the so-called *objective* test collapses the standard into the judge's judgment even when the objective is to determine the appearance of bias.

A. *International Models*

The United Nations' *Universal Declaration of Human Rights* has declared since 1948 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal."[16] In 1966, the United Nations adopted the *International Covenant on Civil and Political Rights*, a multilateral treaty that proclaims: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law."[17]

In 2000, under the auspices of the United Nations' Global Programme Against Corruption, chief justices from eight

15. CODE JUST. 3.1.16 (Justinian 531) ("Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before [an] issue joined, so that the cause go to another . . . ."), *translated in* Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923).

16. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 10 (Dec. 10, 1948).

17. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

countries formed the Judicial Integrity Group.[18] The Judicial Integrity Group subsequently drafted the *Bangalore Principles of Judicial Conduct,*[19] which were adopted by the Round Table Meeting of Chief Justices at The Hague in 2002. The *Bangalore Principles* are internationally respected and recognized as providing essential elements of the rule of law and the need for impartial and uncorrupted judges.[20] By their own declaration, the *Bangalore Principles* "are intended to establish standards for the ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct."[21]

The *Bangalore Principles* expressly address the need for judicial impartiality, stating that as a general principle: "Impartiality is essential to the proper discharge of the judicial

---

18. *See* JUDICIAL INTEGRITY GRP., *History of the Group 2000–2011*, http://www.judicialintegritygroup.org/resources/documents/JIG%202000-2011.pdf (last visited Dec. 3, 2012).

19. *See* JUD. INTEGRITY GRP., *Bangalore Principles of Judicial Conduct*, www.judicialintegritygroup.org/resources/documents/ECOSOC_2006_23_Engl.pdf [hereinafter *Bangalore Principles*] (last visited Dec. 3, 2012).

20. *See* Greene, *supra* note 1, at 883 (stating that the Bangalore Principles are an "internationally respected model"); *see also Commentary on the Bangalore Principles, supra* note 3, at 5 ("The Bangalore Principles of Judicial Conduct have increasingly been accepted by the different sectors of the global judiciary and by international agencies interested in the integrity of the judicial process. In the result, the Bangalore Principles are seen more and more as a document that all judiciaries and legal systems can accept unreservedly. In short, these principles give expression to the highest traditions relating to the judicial function as visualized in all cultures and legal systems.").

21. *Bangalore Principles, supra* note 19. The Bangalore Principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to offer the judiciary a framework for regulating judicial conduct. Six core values are recognized: independence, impartiality, integrity, propriety, equality, and finally competence and diligence. The Principles define their meaning and elaborate in detail on what kind of conduct is to be expected in concrete terms of the persons concerned in order to put the respective value into practice. A number of specific instructions are given under each of the values. Not only have some states adopted the Bangalore Principles but others have modelled their own principles of judicial conduct on them. International organizations have also looked at them with favor and given them their endorsement. The United Nations Social and Economic Council, by resolution 2006/23, has invited member states consistent with their domestic legal systems to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of the members of the judiciary. The United Nations Office on Drugs and Crime has actively supported it and it has also received recognition from bodies such as the American Bar Association and the International Commission of Jurists. The judges of the member states of the Council of Europe have also given it their favourable consideration. *Id.*

office. It applies not only to the decision itself but also to the process by which the decision is made."[22] They continue: "A judge shall perform his or her judicial duties without favour, bias or prejudice"[23] and "shall ensure that his or her conduct . . . maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."[24] As a result, "[a] judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially . . . ."[25]

Although these are laudable aspirations, there are at least two fundamental issues here. One is integral to the principle

---

22. *Id.* ¶2 (impartiality).

23. *Id.* ¶ 2.1.

24. *Id.* ¶ 2.2.

25. *Id.* ¶ 2.5. In full, the provisions concerning impartiality within the Bangalore Principles state:

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

2.1. A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

(a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or

(c) The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice. *Id.*

itself; the other is a matter of process. The integral issue concerns linking the perception of bias in the "reasonable observer" standard. What does this mean in practice? The standard, it is frequently said, is designed to protect against excessive disqualifications by devaluing any purely subjective fear of bias by the litigating parties.[26] Although we are not aware of any crisis anywhere that has created excessive judicial disqualifications, we do accept the need for an objective standard.

However, experience with the recusal standard in common law countries shows that this test of impartiality, stated so carefully as an "objective" standard, is linked to the community being judged: the perspective of a "reasonable observer" is seen through the prism of the judiciary making the judgment. This issue links directly to the second procedural issue: it is the challenged judge herself who decides whether she should be disqualified.[27] Both issues are corollaries of the maxim that no man should be a judge in his own case.[28]

B. *Judicial Recusal in Canada, the United Kingdom, Australia, and South Africa*

R. Matthew Pearson's 2005 research found surprising uniformity at the highest court level in both the standards and processes for recusal requests in Canada, the United Kingdom, Australia, and South Africa.[29] Not only does the challenged judge review the petitioner's request that the judge disqualify herself, but the standard applied is one that asks the challenger to stand in the shoes of the *judge* being challenged. This is in contrast to asking the judge to consider the matter from the point of view of the challenger. This undermines the appearance of impropriety standard and the need for public confidence in the judiciary.

In Canada, the standard for judicial recusal is "apprehension of bias [that] must be a reasonable one, held by

---

26. *See, e.g.*, Pearson, *supra* note 6, at 1812–13.

27. *See id.* at 1815, 1820, 1824, 1827 (reporting that in the United States, England, Canada, Australia, and South Africa, the challenged judge rules on the disqualification motion).

28. *See supra* note 9 and accompanying text.

29. *See generally* Pearson, *supra* note 6.

reasonable and rightminded persons."[30] There, the reasonable person is "an informed and right-minded member of the community"[31] who approaches the question of bias with a "complex and contextualized understanding of the issues of the case."[32] Canada appears to have translated the determination of possible bias into a subjectivized standard—from the viewpoint of informed members of the judicial branch. It is not enough that the challenger is convinced in a way that is reasonable from her perspective that there is the possibility of bias. Instead, the apprehension of bias must be based on a thorough knowledge of the facts and circumstances and result from a careful consideration of those facts in light of the dispute.

The United Kingdom has a similar approach. It initially considered using a "reasonable suspicion" test, but rejected it in favor of a test that considers a "real danger of [judicial] bias."[33] Ten years later, the House of Lords revised the original test.[34] The new test emphasizes the importance of an objective assessment based on the person who "adopts a balanced approach" to the issue of bias.[35]

Australia, too, has a similar approach. Australia emphasizes the importance of public perception in recusal determinations[36] and rejects the English approach as attributing to the general public too much knowledge of the law and faith in the judicial process.[37] However, Australia still requires that the greater emphasis be placed on the perception of the hypothetical reasonable person over the apprehension of bias as perceived by the parties.[38]

---

30. Comm. for Justice & Liberty v. Nat'l Energy Bd., [1978] 1 S.C.R. 369, 394 (Can.) (de Grandpre, J., dissenting). This test initially appeared in a dissenting opinion but is now the accepted test. *See* R.D.S. v. The Queen, [1997] 3 S.C.R. 484, ¶ 94 (Can.) (Cory & Iacobucci, JJ., concurring).

31. R.D.S. v. The Queen, [1997] 3 S.C.R. 484, ¶ 46 (Can.) (L'Heureux-Dube & McLachlin, JJ., concurring).

32. *Id.* ¶ 48.

33. *See* The Queen v. Gough, [1993] A.C. 646, 660 (U.K.).

34. *See* Porter v. Magill, [2002] 2 A.C. 357, 494 (U.K.).

35. Lawal v. N. Spirit Ltd., [2004] 1 All E.R. 187, 193 (U.K.).

36. *See* Livesey v. New S. Wales Bar Association., [1983] 151 C.L.R. 288, 293–94 (U.K.).

37. *See* Webb v. The Queen, [1994] 181 C.L.R. 41, ¶ 18 (Austl.).

38. *See id.* ¶ 2 (Austl.). *See generally* ENID CAMPBELL & H.P. LEE, THE AUSTRALIAN JUDICIARY 134 (2001) (discussing Australia's reasonable apprehension of bias recusal standard).

South Africa presents something of an alternative.[39] Its Constitutional Court selected the "reasonable suspicion" test over the "real likelihood" test.[40] However, the analysis still begins with the presumption that judges will approach controversies impartially,[41] and the inquiry "is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge . . . will not bring an impartial mind to bear on the adjudication of the case."[42] In addition, "[t]he reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience."[43] It must be assumed that they can disabuse their minds of any irrelevant beliefs or predispositions.[44] Accordingly, South Africa's approach is indeed different by virtue of selecting the "reasonable suspicion" test. However, its insistence that the observer knows the "correct facts" and its further insistence on a presumption of judicial impartiality render the standard less consonant with giving more weight to appearances than it might initially appear.

Thus, in each of these common law systems, the challenged judge assesses her own impartiality using an "objective test." But, the test assesses bias from the judge's point of view, rather than considering the *appearance* of impropriety or giving any substantial weight to litigants' apprehensions. With this international background, we now turn to these same recusal issues in the United States.

---

39. *See generally* JENNIFER A. WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA (2001) (discussing the African courts).

40. *See* President of the Republic of S. Afr. v. S. Afr. Rugby Football Union, 1999 (7) BCLR 725 (CC) para. 36 (S. Afr.).

41. *Id.* ¶ 40.

42. *Id.* ¶ 48.

43. *Id.*

44. *Id.*

II. *THE UNITED STATES*

There is remarkably little difference between US recusal norms and those in other countries.[45] In the United States, the responsibility of ensuring a fair trial lies squarely with the judge due to the adversarial nature of litigation within the US legal system. In *Caperton v. A.T. Massey Coal Co.*,[46] the US Supreme Court examined the ultimate line in the sand—the line that, when crossed, constitutes a deprivation of constitutional due process. In a five to four decision, the *Caperton* Court held that the judge's refusal to recuse himself amounted to a deprivation of the litigant's constitutional due process rights. Though decided on due process grounds, *Caperton* presents a helpful context for examining recusal-based issues because it provides a vivid illustration of the perils associated with both directing recusal motions to the challenged judge, as well as the inability (or refusal) of some judges to consider the appearance of impropriety as required by the recusal standard.

A. *The* Caperton *Case*

Hugh Caperton and several related businesses (collectively, "Caperton") sued A.T. Massey Coal Company and its affiliates (collectively, "Massey") in a West Virginia state court, alleging that Massey's activities destroyed Caperton's business.[47] The jury awarded Caperton US$50 million in compensatory and punitive damages.[48]

After the verdict's entry, but before Massey's appeal, West Virginia conducted its judicial elections. One of the positions subject to this election was a state supreme court position in which attorney Brent Benjamin challenged the incumbent justice.[49] Don Blankenship, Massey's chairman, president, and chief executive officer contributed heavily to Benjamin's

45. *See* Pearson, *supra* note 6, at 1827 ("[R]ecusal policy . . . has developed similarly in many countries . . . [, and] it is clear that certain common principles are found in the way most modern common law systems address disqualification of judges.").

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

47. *Id.* at 872.

48. *Id.*

49. *Id.* at 873.

campaign—and Benjamin won.[50] Blankenship's campaign contributions were extraordinary, exceeding "the *total* amount spent by *all* other Benjamin supporters,"[51] amounting to "three times the amount spent by Benjamin's *own* committee,"[52] and "[US]$1 million more than the total amount spent by the campaign committees of *both* candidates *combined*."[53] After the election, Caperton moved to disqualify the newly-installed Justice from participating in the *Caperton* appeal on the basis of Blankenship's contributions to Justice Benjamin's campaign. Justice Benjamin denied the motion,[54] and in a three to two decision with Justice Benjamin in the majority, the state Supreme Court reversed the US$50 million verdict against Massey.[55] Caperton sought rehearing and again sought Justice Benjamin's disqualification.[56] Justice Benjamin again refused to recuse himself.[57]

The state Supreme Court granted Caperton's motion for rehearing, and Caperton filed a third motion seeking to disqualify Justice Benjamin, which Justice Benjamin denied.[58] On rehearing, the state Supreme Court again held for Massey, reversing the US$50 million verdict by a 3–2 vote with Justice Benjamin in the majority.[59] After granting certiorari, the US Supreme Court, in a 5–4 decision, relied on the Constitution's Due Process Clause in holding that recusal was required. Repeatedly emphasizing that the facts of the case were extreme,[60] the Court concluded that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case,"[61] that "Blankenship's

50. *Id.*
51. *Id.* (emphasis added).
52. *Id.* (emphasis added).
53. *Id.* (emphasis added).
54. *Id.* at 873–74.
55. *Id.* at 874.
56. *Id.*
57. *Id.* at 875.
58. *Id.*
59. *Id.*
60. *Id.* at 886–87 ("On these extreme facts the probability of actual bias rises to an unconstitutional level."); *see id.* at 884 (noting that "this is an exceptional case"); *id.* at 887 ("Our decision today addresses an extraordinary situation . . . ."); *id.* ("The facts now before us are extreme by any measure.").
61. *Id.* at 884.

extraordinary contributions were made at a time when he had a vested stake in the outcome,"[62] and that accordingly, "there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal."[63] The Supreme Court noted that the constitutional due process standard forming the basis for the *Caperton* decision would arise only in "rare instances" due to the greater protections afforded by the state codes of judicial conduct.[64] Accordingly, the vast majority of disqualification motions are not grounded on deprivations of due process. Instead, most judicial disqualification motions are based on state codes of judicial conduct or statutes based on the American Bar Association's ("ABA") *Model Code of Judicial Conduct*, which requires recusal when necessary to avoid an "appearance of impropriety" or when the jurist's impartiality might reasonably be questioned.[65]

B. Caperton's *Illustrative Utility*

The *Caperton* decision aptly illustrates both of the previously identified recusal issues central to this Article. The applicable recusal standard under West Virginia law, where *Caperton*'s events occurred, is "whether 'a reasonable and prudent person, knowing [the] objective facts, would harbor doubts about [the judge's] ability to be fair and impartial.'"[66] However, Justice Benjamin repeatedly declined to recuse himself under this standard, stating that he had "no 'direct, personal, substantial, pecuniary interest' in [the] case."[67] Justice Benjamin also opined that employing "a standard merly of 'appearances' . . . seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."[68] Indeed, a recurring theme throughout Justice Benjamin's opinion defending his

62. *Id.* at 886.

63. *Id.*

64. *Id.* at 889–90.

65. ABA MODEL CODE OF JUDICIAL CONDUCT pmbl. (2012); *id.* R. 1.2 cmt. 3; *id.* R. 2.11.

66. *Caperton*, 556 U.S. at 875 (internal quotation marks omitted).

67. *Id.* at 876 (quoting Caperton v. A.T. Massey Coal Co., 223 W. Va. 698 (2008) (Benjamin, J., concurring), *rev'd*, *Caperton*, 556 U.S. 868 (2009)).

68. *Id.* (quoting *Caperton*, 223 W. Va. at 707).

participation in the *Caperton* case is the rejection of any consideration of "appearances" of impropriety, and instead, an insistence that only "actualities" matter.[69] Accordingly, Justice Benjamin's opinion is an example of substituting an "actual bias" standard for the one required by law.

Thus, we return to two potential sources of difficulty: one procedural and one substantive. The procedural issue arises from the practice of directing the recusal motion to precisely the one judge who is alleged to lack impartiality. The substantive issue arises from the judge's implementation of the recusal standard; in particular, the problem that judges may focus on their subjective belief in their own impartiality, rather than focusing on how the situation may appear to others, as required by the recusal standard.

III. *WORLDWIDE CONSISTENCY, WORLDWIDE SHORTCOMINGS*

The judicial disqualification approach in common law countries memorializes consistent and inherent flaws. As we have identified, those flaws concern both the decision maker and the standard that the decision maker employs in determining whether recusal is required.

---

69. *See, e.g.*, *Caperton*, 223 W. Va. at 686 (Benjamin, J., concurring) ("If the touchstone of a judicial system's fairness is *actual* justice, which I believe it is, its legitimacy is measured in actualities, not in the manipulation of appearances . . . ."); *id.* at 687 n.2 ("The notion of . . . 'appearance-driven' justice in West Virginia conveys the message that appearances and rhetoric—particularly when contrived—mean more than actualities."); *id.* at 693–94 ("[N]either the Dissenting opinion nor the Appellees herein point to any actual conduct or activity on my part which could be termed 'improper.' Rather both the Dissenting opinion and the Appellees focus on appearances."); *id.* at 693 n.12 ("The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process."); *id.* at 694–95 ("The fundamental question raised by the Appellees and the Dissenting opinion herein is whether, in a free society, we should value 'apparent or political justice' more than 'actual justice.'"); *id.* at 707 (Benjamin, J., concurring) ("The determination of the composition of an appellate court panel by a standard merely of 'appearances' seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.").

A. *Presenting the Recusal Motion to the Challenged Judge*

As we saw in *Caperton*, judicial disqualification motions in the United States—as in other common law countries—are directed to, and ruled upon by, the very judge whose impartiality is questioned.[70] In effect, the subject of the disqualification motion is thus serving as the judge of her own case.[71] In *Caperton*, Justice Benjamin ruled on the recusal motions that challenged his impartiality and sought his disqualification. The practice of filing disqualification motions with the challenged judge implicates at least three issues: (1) the difficulty of appellate review, (2) potential issues of retribution or retaliation, and (3) intentional or unintentional self-deception in assessing one's actual, or the perceived, ability to be impartial.

1. Appellate Review

If a trial judge denies a recusal motion, the moving party may eventually seek appellate review, but because the ruling is not a final judgment, immediate appellate review typically is not available unless the party seeks a writ of mandamus.[72] Even once

---

70. *See Caperton*, 556 U.S. at 873–75 (explaining that Caperton unsuccessfully moved three times to disqualify Justice Benjamin); *see also* United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993) (noting that it is the challenged judge who rules on a disqualification motion); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 536 (2005) (noting that the recusal decision "is almost always made in the first instance by the very judge being asked to disqualify himself"); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987) (noting the "bizarre rule" requiring "the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias"); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 633 (1987) [hereinafter Stempel, *Recusal*] (noting that "the recusal motion is ruled upon by the district judge whose ability to decide fairly is the very subject of the motion").

71. *See supra* note 9 and accompanying text; *see also In re* Murchison, 349 U.S. 133, 136 (1955) (stating that "no man can be a judge in his own case"); *Judicial Disqualification: Hearing on S.1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 12 (1973) (statement of Sen. Bayh, Member, S. Comm. on the Judiciary) ("Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias.").

72. *See* Stempel, *Recusal*, *supra* note 70, at 634 ("The denial of a disqualification motion is never a final order subjecting the case to immediate appeal since the case remains to be decided on the merits. Ordinarily, then, the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits.") Such appeals may be

the matter reaches the appellate court, the appellate court reviews the disqualification ruling pursuant to the highly deferential abuse of discretion standard.[73]

When the subject of a judicial disqualification motion is a federal appellate judge, or a state supreme court justice (such as Justice Benjamin in the *Caperton* case), appellate review is theoretically available, but the likelihood of review by the US Supreme Court is remote.[74]

At the very highest court level—the supreme court of the land—the ability to review a recusal decision varies from nation to nation. In the highest courts of the United Kingdom, Australia, and South Africa, precedent indicates that a high court judge's failure to recuse is subject to review.[75] In Canada and the United States, however, there is no procedure for reviewing a recusal decision involving a judge (or justice) of the highest court.[76]

2. Potential retaliation

A judge's position combines structural privilege with the human frailties of anyone accused of bias. With their positions insulated to some degree from popular influence, judges may be tempted to retaliate if challenged with disqualification. As one commentator has observed:

---

interlocutory, by writ of mandamus, or on direct appeal of a final order. *See id.* at 636 (noting that "[t]raditionally, the most likely avenue for interlocutory review of recusal orders has been the writ of mandamus"); Moore, *Appellate Review*, *supra* note 8, at 830 (discussing circumstances in which interlocutory appeal is appropriate).

73. *See, e.g.*, *In re* Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) (stating that "[t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion"); Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1164–66 (5th Cir. 1982) (finding that on an appeal of recusal motion under 28 U.S.C. §§ 144 or 455, "we ask only whether [the district judge] has abused [his or her] discretion").

74. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1237 (2002) [hereinafter Bassett, *Judicial Disqualification*] ("If the motion to disqualify an appellate judge is unsuccessful, there is essentially no further recourse. . . . Further review of a recusal decision is discretionary and rarely granted."); Stempel, *Recusal*, *supra* note 70, at 639–40 ("One can argue that the chances of obtaining Supreme Court review of even the worst district and appellate recusal decisions are so rare as to amount to no review at all.").

75. *See* Pearson, *supra* note 6, at 1828.

76. *See id.*

> [W]hile not all judges take umbrage at the filing of disqualification motions, there have been many examples of cases in which judges who have been accused of possessing a disqualifying interest or bias have taken such an accusation both personally and very seriously . . . . It must be acknowledged . . . that filing a disqualification motion has the potential to antagonize the challenged judge, either consciously or subconsciously, with the result that the moving litigants and their counsel may suffer.[77]

Even if the judge does not engage in overtly retaliatory behavior that affects the outcome of the litigant's case, other retribution tactics may nevertheless occur. One US judge recommended criminal charges against lawyers who questioned his impartiality;[78] Justice Benjamin recorded a rebuke of Caperton's lawyers in his opinion denying their disqualification motion.[79] Finally, even if the challenged judge does not act on her own, other judges on the court may note the failed challenge and project the challenge on themselves or voice their displeasure at the challenge.[80]

3. Potential Self-Deception

A major roadblock in seeking a more effective recusal process is the human tendency to see oneself as unbiased and able to disregard any improper influence. Disqualification motions suggest an actual or perceived lack of impartiality, when

---

77. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 204 (2011) (quoting FLAMM, *supra* note 2, § 1.7, at 18 (footnotes omitted)); *see* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 708 (2011) ("Disqualification rules give litigants a means to challenge judicial impartiality, which is at the core of the judge's self-definition.").

78. *See* Debra Cassens Weiss, *Federal Judge Recommends Criminal Charges for Lawyers Who Questioned His Impartiality*, A.B.A. J., Jan. 11, 2011.

79. *See* Caperton v. A.T. Massey Coal Co., 223 W. Va. 624, 709 (2008) (Benjamin, J., concurring) ("I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. . . . The absence of such a critical analysis here, indeed the lack of even an acknowledgement of the motions' actual weaknesses, is directly relevant to the legal credibility of the said motions. It is my purpose here to remind counsel appearing before this Court of their obligations to this Court and this judicial system.").

80. *See* Alison Frankel, *In Stunning Order, 9th Circuit Blasts Recusal Motion in Death Case*, REUTERS (Sept. 28, 2012), http://newsandinsight.thomsonreuters.com/New_York/News/2012/09_-_September/In_stunning_order,_9th_Circuit_blasts_recusal_motion_in_death_case.

judges want to believe that they can be fair and objective: "People believe they are objective, . . . see themselves as more ethical and fair than others, . . . and experience a "bias blind spot," the tendency to see bias in others but not in themselves . . . . These tendencies make it difficult for judges to identify their own biases."[81]

One of the recurring problems in judicial disqualification is that a judge's *belief* in her own impartiality misses the point. "[P]ublic confidence in the judiciary does not result from the *judiciary's* perception of impartiality; it results from the *public's* perception of impartiality. Thus, a judge's belief that she is not biased is of little consequence to a recusal determination."[82] The recusal standard is based on promoting public confidence in the judiciary and, by its terms, extends to an "appearance" of impropriety, even in circumstances where there is no actual impropriety. As a Seventh Circuit decision explained:

> Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.[83]

A jurist's perception of her own impartiality also suffers from the failure to acknowledge the existence of unconscious motivations.[84] Human psychology complicates assessments of impartiality because people are slow to recognize their own

---

81. Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOLOGY 24, 24 (2010). *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) ("[J]udges are typically appalled if their impartiality is called into question[,] . . . believ[ing] themselves to be consistently objective, impartial and fair.").

82. Bassett, *Judicial Disqualification*, *supra* note 74, at 1245–46 (emphasis added).

83. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990).

84. *See generally* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) [hereinafter Rachlinski, *Heuristics and Biases*] (noting that judges are susceptible to various biases).

biases.[85] Psychological studies have repeatedly confirmed that individuals may harbor unconscious stereotypes, beliefs, biases, and prejudices.[86] In addition, other psychological processes, such as framing effects and confirmation bias, may impact decision making.[87] The existence of such unconscious

---

85. *See id.* at 65–66 (noting that "biases are easier to spot in others than in oneself"); Justin Kruger & Thomas Gilovich, *"Naïve Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 743–44 (1999) (noting tendency to see bias in others more readily than in ourselves).

86. *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious gender stereotyping in fame judgments, and finding that explicit expressions of sexism or stereotypes were uncorrelated with the observed unconscious gender bias; Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding that "stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism . . . has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways"); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, Black category labels facilitated stereotype activation under automatic and controlled processing conditions."). *See also* Bassett, *Judicial Disqualification*, *supra* note 74, at 1249–50 nn.179–83 (discussing these and other psychological studies into unconscious motivations and bias); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing unconscious bias). The American Bar Association ("ABA") Section of Litigation recently created a Task Force on Implicit Bias, which "will partner with the National Center of State Courts to address implicit bias in the judicial system." *See* Mark A. Drummond, *ABA Section of Litigation Tackles Implicit Bias*, LITIG. NEWS (Feb. 1, 2011), http://apps.americanbar.org/litigation/litigationnews/top_stories/020111-implicit-bias-research.html.

87. *See generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (discussing psychological processes in the work of judges and lawyers); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784–821 (2001) (presenting a study of magistrate judges and concluding that judges rely on the same cognitive decision-making processes as laypersons and other experts, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias, leaving judges vulnerable to cognitive illusions that can produce poor judgments); Rachlinski, *Heuristics and Biases*, *supra* note 84, at 99–101 ("Courts identify cognitive illusions that might affect juries and adapt to them, but fail

motivations means that honest and well-intentioned judges who subjectively believe that they are and will remain impartial may nevertheless harbor biases.[88]

B. *Implementing the Recusal Standard*

The recusal standards in Canada, the United Kingdom, Australia, and South Africa unduly emphasize the objective nature of their judicial recusal standards without adequate attention to appearances.[89] In the United States, the need for judges to preserve the appearance of impartiality has traditionally been a cornerstone of the ABA *Model Code of Judicial Conduct*[90] and appears nearly universally in state and federal

---

to identify cognitive illusions that affect judges and fall prey to them. . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment."). *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 595–602 (1998) (discussing hindsight bias and its effects on the judiciary).

88. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT xi (2d ed. 1992) ("[I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary."); *see also* Leubsdorf, *supra* note 70, at 277 (noting that "even honest judges . . . may be swayed by unacknowledged motives"); Nugent, *supra* note 81, at 3 ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process."); W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 41 (2010) (noting that "a judge with the best of intentions may believe herself to be making her best efforts to put aside feelings of partiality or loyalty, but may be unable to override the influence of unconscious biases").

89. *See supra* note 26 and accompanying text.

90. *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2012) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *id.* R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."). *See* Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets*, 94 MINN. L. REV. 1914, 1920–36 (2010) (tracing the development of the appearance of impropriety standard in the United States).

regulations.[91] Unfortunately, implementing the recusal standard has fallen short. As Professor Stempel observed, rather than taking pains to inspire public confidence in the judiciary, "the implicit governing notion" with respect to recusal appears to be that "the judge will only recuse if she is convinced that nearly every sane person would hold a reasonable question regarding the judge's impartiality."[92] In addition to inconsistencies in applying the standard,[93] there have been other attempts to undermine the appearance of impropriety standard. For example, during the most recent revision of the *Model Code of Judicial Conduct*, opponents challenged the appearance of impropriety standard as too vague to be workable.[94] Similarly, Justice Scalia of the US Supreme Court has criticized the

---

91. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 2, 3, *reprinted in Code of Conduct for United States Judges*, 175 F.R.D. 363, 365–73 (1998); Marie McManus Degnan, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 227 (2010) ("All fifty states have adopted the American Bar Association's Model Code of Judicial Conduct . . . in substantial part.").

92. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 739 (2011); *see id.* at 737–38 ("[A] broader concept of what constitutes a 'reasonable question as to impartiality' is one that does not implicitly seek an unattainable consensus but instead recognizes that the health of the judicial system is threatened whenever a substantial portion of the public harbors significant, nonfrivolous concern over the neutrality of a judge who insists on continuing to preside over a matter.").

93. *See infra* note 98.

94. *See* Letter from Ronald C. Minkoff, Sec'y, Ass'n of Prof'l Responsibility Lawyers, to ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct (June 30, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_rules_minkoff_063004.authcheckdam.pdf (calling for abolition of the appearance of impropriety standard); Memorandum from Charles E. McCallum, Chair, ABA Standing Comm. on Ethics and Prof'l Responsibility, to Mark I. Harrison, Chair, ABA Comm'n on Evaluation of the Model Code of Judicial Conduct (April 12, 2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_rules_aba_ethics_committee_41205_ddt.authcheckdam.pdf; *see also* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1343–44 (2006) (stating that "the ABA should *not* adopt its proposed Rule 1.02, which provides: 'A judge shall avoid impropriety and the appearance of impropriety.'. . . The ABA should replace the vague 'appearances' rule with specific restrictions.") (emphasis added). *But see* Moore, *Appearance of Impropriety*, *supra* note 3, at 299 (rejecting a list of specific restrictions because "there are many ways in which a judge's conduct can create the appearance of impropriety, and there is no way that specific rules can capture all these situations").

appearance standard as too broad, and instead seemed only concerned with actual demonstrable bias.[95]

Striking the best balance is difficult. A truly objective standard preserves the judiciary from abusive challenges, but at the expense of undervaluing the perspective of the challenger. In our view, such a truly objective standard fails to consider appearances of impartiality. The objective standard should stand apart from both the "reasonable judge" and the "tainted litigant."

"Appearance" means "the way things *seem* to be."[96] Accordingly, an appearance of impropriety can exist due to the way things seem to be, regardless of the ultimate factual accuracy of that perception.[97] There is a serious risk that the judiciary is subjectivizing the objective standard: judicial explanations of the recusal standard very nearly require that the "reasonable person" is actually a reasonable *judge*.[98]

---

95. *See* Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 541 U.S. 913, 914 (2004) (Scalia, J. mem.) (stating that whether a judge's impartiality can reasonably be questioned is to be made in light of the facts as they existed, and not as they were reported); *id.* at 916 ("Why would [the need for recusal] follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation?"); *id.* at 924 ("It is well established that the recusal inquiry must be 'made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances.*'") (quoting Microsoft Corp v. United States, 530 U.S. 1301, 1302 (2000)). *See also* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 658–60 (2005) (discussing the *Cheney* case); Geyh, *supra* note 77, at 710 (noting that Justice Scalia "categorically dismissed public expression [questioning his impartiality in the *Cheney* case]of views to the contrary as unreasonable and ill-informed"). In this respect, Justice Scalia's approach to recusal might be viewed as consistent with Professor Geyh's description of the first of four regimes in the history of judicial disqualification. This first regime, in contrast with the approach today, was an approach "characterized by an almost ironclad presumption of impartiality." *Id.* at 675.

96. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 68 (4th ed. 2002) (emphasis added).

97. *See* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 1.2 cmt. 3 (2012) ("Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.").

98. Some might argue that this line has already been crossed. *Tumey v. Ohio* defined the requisite test as whether the situation "would offer a possible temptation *to the average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphasis added). Two subsequent cases, In re *Murchison*, 349 U.S. 133, 136 (1955) and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), quoted the same language from the *Tumey* decision. However, in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822

These issues of substance and procedure highlight serious problems with the current approach to judicial recusal. Appearances—the way things *seem* to be—include a perception component, as the *Caperton* majority recognized.[99] Requiring disqualification when the judge's impartiality "might reasonably be questioned"[100] similarly imports public opinion through its use of a reasonableness standard. If, in applying the appearance of impropriety standard, the judge disregards public perception, the standard is thereby impermissibly converted to one requiring actual bias, as illustrated by Justice Benjamin's opinion.[101]

III. *PROPOSALS FOR JUDICIAL RECUSAL WORLDWIDE*

Part III offers a three-step approach to improving judicial recusal practices worldwide. We recommend: (1) in implementing the recusal standard, that judges honor appearances of impropriety as well as actual bias; (2) instituting

---

(1986), the Court, although again citing to *Tumey*, abbreviated the quotation to "the average . . . . judge." The modified *Tumey* quote appeared again in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988). In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the majority cited to the standard twice—once using the full *Tumey* quotation, and later using the abbreviated "average judge" version. *Caperton*, 556 U.S. at 878, 879. Chief Justice Roberts's *Caperton* dissent questioned whether the applicable standard was that of "a reasonable person, a reasonable lawyer, or a reasonable judge." *Id.* at 896 (Roberts, C.J., dissenting). Not surprisingly, the lower court decisions reflect similar inconsistencies. *Compare* United States v. Lopez, 944 F.2d 33, 37 (1st Cir. 1991) (stating that the applicable standard is "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the [movant], but rather in the mind of the reasonable man"), *with* Deluca v. Long Island, 862 F.2d 427, 428–29 (2d Cir. 1988) (focusing on whether an objective, disinterested observer, fully informed of the facts underlying the grounds on which recusal is sought, would entertain significant doubt that justice would be done absent recusal); *see also* United States v. Wade, 931 F.2d 300, 304 (5th Cir. 1991) (relying on whether a reasonable person, knowing relevant facts, would expect that "a justice, judge, or magistrate knew of circumstances creating an appearance of partiality"). *See generally* FLAMM, *supra* note 2, § 1.6, at 14 (noting that "the modern American case precedents that deal with judicial disqualification issues are replete with inconsistencies").

99. *See Caperton*, 556 U.S. at 884 (concluding that there was a serious risk of bias "based on objective and reasonable perceptions").

100. *See* 28 U.S.C. § 455(a); AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2012).

101. *See supra* notes 66–69 and accompanying text (discussing Justice Benjamin's rejection of appearances as a basis for recusal).

peremptory challenge procedures, and (3) using alternative or additional decision makers in reviewing disqualification motions. We describe each of these recommendations in turn.

First, judges should honor the appearance of impropriety standard, which already forms the basis for judicial recusal in the applicable judicial rules. To the extent that judges have attempted to evade the appearances standard by requiring actual bias, or by considering only the perceptions of those who are "fully informed," such attempts fail to follow the applicable law. Instead, judges should recuse themselves whenever a reasonable observer might question the judge's impartiality.

Second, with respect to peremptory challenges, an oft-articulated objection is the fear of potential judge shopping, where the moving party has no legitimate fear of judicial bias, but instead is attempting to increase the odds of obtaining a more favorable judge.[102] Certainly nearly any procedure can be misused or abused. However, if each side is given only one peremptory challenge, there are serious limits upon its potential misuse.[103] Our third recommendation is to establish an alternative to the universal practice in common law countries of filing disqualification motions with the challenged judge. Several alternative procedures are possible. One alternative that a number of states already employ involves the discretionary transfer of a disqualification motion to another judge in the same system.[104] Another alternative would permit parties to

---

102. *See* Bassett, *Judicial Disqualification*, *supra* note 74, at 1254 ("The most frequent objection to previous proposals involving peremptory challenges to federal judges has involved the fear of gamesmanship or judge-shopping."); JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 5 (2008), *available at* http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf (noting that "the potential for gamesmanship is a concern" with judicial peremptory challenges); *see also* FLAMM, *supra* note 2, § 3.5.2, at 65 ("Of the many varieties of 'abuse' to which peremptory disqualification provisions are susceptible, 'judge-shopping' has widely been recognized to be the most common.").

103. Indeed, approximately one-third of the state judiciaries, including California and Texas, employ a peremptory disqualification procedure. *See* SAMPLE ET AL., *supra* note 102, at 5 (noting that "[a]bout a third of the states already permit counsel to strike one judge per proceeding"); *see also* FLAMM, *supra* note 2, ch. 27, at 768–839 (detailing the peremptory challenge procedures of each state).

104. *See, e.g.*, TEX. GOV'T CODE ANN. § 74.059 (West 1995); UTAH R. CIV. P. 63(b), *construed in* Anderson v. Anderson, 368 P.2d 264, 265 (Utah 1962); People v. Mercado, 614 N.E.2d 284, 287–89 (Ill. App. Ct. 1993); State v. Thompson, 544 So. 2d 421, 428

submit disqualification motions to the court clerk, who would forward the motion to the challenged judge for initial review. If the challenged judge agreed that recusal was appropriate and recused herself from the case, no further action would be necessary. If, however, the challenged judge declined to recuse, the clerk would forward the motion to another judge within that jurisdiction for review.[105]

We recognize that no change in the rules for disqualification of judges, nor any new set of processes, can ever fully reform this area beset, as it is, with human responses including both failures of perception and understandable protective impulses. A "cure" is not possible. Instead, we suggest one structural response that, over time, may reorient the judiciary, as well as two modest procedural changes that will help to mitigate the natural human responses at play in judicial disqualification. In time, an emphasis on the appearance of impropriety will remove the subjective element from recusal. Judges will come to recognize that they are not being personally challenged—it is the appearance that matters. The procedural changes are only palliative. They make mechanical changes that remove the judge as the focus of the inquiry and as the evaluator of her own biases. A number of states, such as California, have functioned smoothly with a peremptory challenge procedure at the trial court level, with the process becoming an accepted procedure by both the bench and bar. A judiciary sensitive to conflict of interest concerns can easily understand having disqualification motions decided by other judges.

CONCLUSION

Under current practices and procedures in common law jurisdictions worldwide, circumstances involving potential appearances of impropriety have spawned inconsistencies in judicial recusal. The problem is not with the underlying ideal, but with the failure to implement this ideal. This failure is perhaps not surprising: law is the creature of, and must be

(La. Ct. App. 1989); City of Columbus v. Bonner, 440 N.E.2d 606, 609 (Ohio Ct. App. 1981).

105. We have offered this proposal previously. *See* Bassett & Perschbacher, *supra* note 77, at 213.

implemented by, human actors. Whether those actors are lawyers, lay participants, or judges, individuals are poor judges of their own biases and of their ability to set aside those biases.

However, more than the human condition itself, the legal norms used to resolve questions of judicial disqualification have structural flaws that, combined with the human actors in charge of carrying them out, make them unlikely to achieve their purported goals. The underlying purpose of judicial recusal is to instill public confidence in the judiciary. If judges base their recusal rulings either upon their personal, non-public knowledge of the underlying circumstances or upon their personal belief in their own impartiality, the standard becomes a subjective one that does little to further recusal's underlying purpose.

In this Article, we identified two problems with judicial recusal, one involving the decision-maker and the other involving the applicable standard. To address the problem with the decision maker, we proposed instituting a peremptory challenge procedure, using decision makers other than the challenged judge. To address the problem with the recusal standard, we proposed implementing the existing appearance of impropriety whenever a reasonable observer might question the judge's impartiality, with judicial acknowledgement that an appearances standard is necessarily based on perceptions rather than full and complete information.