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IN PURSUIT OF ACTUAL JUSTICE

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ABSTRACT

This Article proposes that the fundamental goal of judicial ethics and practice is to achieve actual justice in judicial decisionmaking. To that end, it argues that current attempts to resolve concerns about impartial judicial decisionmaking through appearance-based recusal and disqualification standards are ill-conceived and ineffective. It proposes a substantial curtailment of recusals and a corresponding strengthening of the judicial duty to sit. It proposes to resolve fundamental concerns about actual justice and, at the same time, to address concerns about public confidence in the judiciary through a requirement that judges provide explanations of adequate internal legal reasons supporting their dispositive decisions. Such a move puts the focus on those reasoned elaborations in the assessment of the legitimacy of both the decisions and the performance of the judges who reached them rather than on a focus on mere guesswork about what might be influencing judges in their deliberations.

"Judicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct."[1]

I. INTRODUCTION

Current attempts to resolve concerns about impartial judicial decisionmaking through appearance-based recusal and disqualification standards are ill-conceived and ineffective. The better approach to resolve fundamental concerns about actual justice—and at the same time to address the issue of public confidence in the judiciary—is through the imposition of a requirement that judges provide explanations of adequate legal reasons supporting their dispositive decisions and, more importantly, a shift in focus to make those stated reasons the focus for the assessment of the legitimacy of the decisions and the performance of the judges who reach them.[2]

The current approach to recusal and disqualification of judges, with some minor variations in various jurisdictions, puts a heavy emphasis on appearance-based analysis.[3] This emphasis on appearances in the recusal rules is motivated in large part by an effort to promote public confidence in the judiciary. It is also motivated in part by an idea that such an approach

1. Alex Kozinski, *The* Real *Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

2. There is arguably a tacit understanding already in place among judges that they are bound to provide explanations of their dispositive decisions in some form, but there is no concrete requirement that they do so at this point.

3. A few states do not rely on appearances in their analysis, but in general the emphasis lies on appearance analysis due to evidence-related and face-saving principles. *See* discussion *infra* Subpart II.C.

will require more recusals than an actual-bias standard would, and in thus capturing more than is necessary, it will at least capture all of the actual-bias cases. That is, while there is implicit acknowledgement in the case law and ethics opinions that appearance-analysis is over-inclusive, this is thought to be an acceptable price to pay for accomplishing the goals of eliminating actual bias and promoting public confidence in the impartiality of the judiciary. However, an appearance-based approach does not really accomplish either of these goals satisfactorily, and it does other damage besides.

An appearance-based approach results in too many unnecessary recusals and fails, in its over-deterrence of judges, to ensure the capture of many cases that would constitute improper bias under even its own theory of what constitutes improper bias. If the motivation behind the recusal and disqualification rules is, at its root, to ensure impartial judging, one must ask why impartial judging is the goal. The fundamental goal of judicial ethics and practice is to achieve actual justice in judicial decisionmaking; that is, to reach outcomes that are supported by adequate internal legal reasoning. It is to that ultimate goal that concerns about impartial judging are directed. If the concerns about impartial judging are focused on process, the rules, standards, and guidelines constructed to address those process concerns must be clear, predictable, and uniform in their application. It is highly unsatisfactory to address concerns about "due" or "fair" process by providing process protections that lack these qualities. Appearance analysis is just such a protection. It does not, in the end, serve the purpose of ensuring a legal entitlement to actual justice.

Along similar lines, aiming at apparent bias is an ill-judged way to get at the problem of public confidence. The rules should not be—and indeed I will argue that even as currently structured they actually are not, when properly understood—about promoting public confidence, but rather should be about the elimination of actual bias in judicial decisionmaking. In pursuing the goal of eliminating actual bias, there are, in turn, far better and more effective ways to resolve public confidence concerns and to do so with less damage to the integrity of the judicial role.

An explanation of some of the jurisprudential underpinnings of this approach to the specific problem of recusals is necessary at this point. I assume, for the sake of argument, that the function of law is that of coordination and settlement of ongoing normative disputes.[4] Such settlement and coordination will work only if they are reasoned. Law consists of the reasons that support that settlement. So when a concrete dispute arises, we look to the law for those reasons that connect with the underlying moral or political values that are the source for the disagreement. Thus, the giving of reasons to justify the resolution of concrete disputes is a (if not the) fundamental link between judges and the reason we have law in the first place. Thus,

4. *See* discussion *infra* Subpart III.B (discussing further the function of law and the role of the judge in fulfilling that function).

the giving of reasons should be the primary focus of the analysis of the ethics of the judicial role. Not all reasons that judges provide will be adequate or even correct. Judges will make mistakes, both intentional and unintentional. However, the best approach to the analysis of the legitimacy of a given decision is to focus on a critique of the reasons judges give rather than making guesses about what their hidden motivations might be or worrying about how things appear. To rely on guesswork about appearances, rather than the legitimacy of the reasons given in support of an outcome, would be to return to a regime that does not rely on law to resolve disagreements.

Real legitimacy—real success in judicial practice—is about actualities not about appearances. The overall aim of rules governing judicial ethics and practice should be actual justice, not the appearance of justice. In short, this Article opposes the view expressed by the Supreme Court in *Offutt v. United States*[5] and takes the position that actual justice does *not* in fact have to satisfy the *appearance* of justice.[6] Rules governing recusal or disqualification of judges are properly aimed at the elimination of actual bias—that is, those situations in which a judge is cognitively incapable of properly reaching an actually just outcome due to a too-close personal involvement in the matter before him. They may also be properly aimed at promoting, or at any rate maintaining, public confidence in the impartiality of the judiciary, nt because that confidence is required for the justice of the outcome but rather because of a need for some level of buy-in to the process in the first place. While both of these goals may have played a role in the original construction of current practices, both have been diverted or undermined along the way so that they are no longer achieving their proper ends.

The way to get at impartial judging—i.e., to eliminate actual bias—and promote public confidence is not through the development or application of unreliable recusal and disqualification standards but through an effort to achieve greater transparency by requiring judges to provide adequate legal reasoning for their decisions in written form. There may be a plurality of adequate legal reasons, and those reasons may even tend in different directions or to different outcomes. A judge need not, in this new framework, provide "the" one right reason, but simply "an" adequate legal reason for the outcome. If the judge can give such a reason, any other possible "hidden" reasons (such as some apparent or even actual bias) simply do not matter for purposes of ensuring actually just outcomes. There is no entitlement to any particular outcome, only to one that falls within the range of reasonable outcomes based on suitable, adequate, or "public" legal reasoning.

Judging is hard. Judges have a strong duty to sit and to decide cases impartially. Doing so involves discretion and thus requires the use of judgment. Personal views *will* color any judge's perceptions and judgments, but

5. 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). See further discussion *infra* Subpart III.C on the questionable basis and value of this and similar statements in Supreme Court cases.

6. *See* discussion *infra* Subpart III.C.

what matters above all is a legally justified outcome. To do the job well (that is, reliably and impartially) requires practice. Analysis focused on appearances and thus encouraging over-recusal establishes counter-productive incentives for judges and ultimately undermines the big-picture goals. Transparency of legal reasoning, rather than guesswork about appearances or what might be going on behind the curtain, provides judges and observers with something real and concrete from which to assess constructively whether the goal of actual justice is being achieved.

This Article proposes not the elimination but rather the strict curtailment of recusals. Indeed, it goes so far as to propose the elimination of disqualification motions for alleged bias, whether actual or apparent. In place of these unreliable and largely unworkable mechanisms, it proposes a requirement of a written explanation, however short or simple, of either the reasons for a recusal decision or the legal basis for the judgment reached on the merits of the case if the judge sits. That is, there would be no requirement of an explanation of why a judge sat on the case (did not recuse), just an explanation to show the legal reasoning on which the ultimate judgment was made. Such a rule would adequately and more efficiently address the concern of actual improper bias while eliminating the potential damage to the integrity of the judicial role that comes with an appearance standard for recusals.

This approach would be more helpful to judges in developing their skill at judging impartially (separating their personal beliefs from their decision-making about what the law requires in a given instance); in protecting the integrity of the judicial role itself by supporting the ability of judges to do their job (rather than encouraging them to abdicate their role by over-recusal based on vague standards); and in more meaningfully addressing public confidence concerns by increasing transparency through the giving of explanations rather than reliance on appearances.

II. PROBLEMS WITH THE CURRENT APPROACH TO RECUSALS

A. Current Appearance-Based Approach to Recusals

The current regime of rules regarding judicial recusals and disqualifications[7] is dominated in practice by an appearance-based analysis. The Ameri-

7. There is a technical distinction between recusals and disqualifications, but what may have begun as sloppy usage of the terms has in any event led to a muddling of the two terms so that they "are often used interchangeably." CTR. FOR PROF'L RESPONSIBILITY, JUDICIAL DIV., AM. BAR ASS'N, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 186 (2004) [hereinafter ANNOTATED MODEL CODE]. "Recusal" is properly used to refer to a judge's sua sponte decision not to sit on a case that has been assigned to him. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1 (1996). "Disqualification" is properly used to refer to what a party seeks when that party believes the judge ought to have recused in the first place. *See id.* Because I am primarily interested in the concept of the judge's own consideration of the issues and seek to encourage members of the judiciary to give thoughtful consideration to their own impartiality in every case, and because I will ultimately propose the elimination of disqualification motions for alleged bias, I focus on what is most properly referred to

American Bar Association's *Model Code of Judicial Conduct* ("MCJC," "Code," or "Model Code"),[8] recently revised,[9] sets out the most basic rules for the regulation of judicial behavior but does not begin to answer the hard or interesting questions about judicial ethics.[10] For example, the MCJC tells a judge very specifically the parameters of permissible involvement in fund-raising efforts for a charitable organization of which she is a member[11] but does not tell her the extent to which her judgment or discretion may include a reflection of the personal values that drove her to become involved with such an organization. It informs her when she may or may not buy a ticket to a political party dinner[12] but leaves unclear the precise balance between the permission to speak about "the law, the legal system, [and] the administration of justice"[13] and the prohibition against speech about issues likely to come before the court which would appear to be inconsistent with impartiality on the bench.[14] Nor does the Code inform her whether (or how) those same thoughts, left unspoken in public, may be brought to bear on her solitary reasoning of a case within her chambers. In short, the bulk of the real specificity in the Code is to be found in the Canons dealing with extra-judicial activity while the material relating to actual conduct on the bench is vague at best.

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as "recusal" rather than "disqualification." In the end, however, even if disqualification for bias remains, it is only sensible to reach conclusions about standards and practices that will apply equally to both categories, so unless specifically stated otherwise, I mean the discussion to encompass both.

8. MODEL CODE OF JUDICIAL CONDUCT (1990).

9. *See* MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf; ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct Homepage, http://www.abanet.org/judicialethics/ (last visited Sept. 26, 2007); *see also* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR A'SSN, FINAL DRAFT REPORT (2005), *available at*

http://www.abanet.org/judicialethics/IntroductoryReportFinal.pdf (last visited Sept. 26, 2007). On February 13, 2007, the ABA House of Delegates approved a new version of the Model Code which incorporated the appearance of impropriety standard into a Rule, meaning that a violation constitutes sanctionable conduct. The new version of the Model Code is currently available only through the ABA website. Although the ABA has made its decision to approve this new version of the Model Code, each jurisdiction must still determine whether and how to incorporate similar changes into its own version of the binding or aspirational rules governing judicial conduct. There is sufficient continuing disagreement about the use of appearance standards, in particular, to believe that the subject will continue to be a matter for debate into the future. *See, e.g.*, Adam Liptak, *A.B.A. Panel Would Weaken Code Governing Judges' Conduct*, N.Y. TIMES, Feb. 6, 2007, at A14; *see also* Editorial, *The A.B.A.'s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18. Because the revisions are so recent, of course, all of the case law discussed in this article makes reference to the numbering and language of the 1990 version of the Model Code, and, since no jurisdiction has yet revised its operable version, I have kept to those 1990 designations for this discussion. However, where pertinent to the discussion, I have provided both the 1990 numbering and the 2007 numbering for clarity and comparison.

10. *See, e.g.*, Kozinski, *supra* note 1, at 1103–04; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238–39 (1987).

11. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4C(3)(b) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(1–3, 5) (2007).

12. MODEL CODE OF JUDICIAL CONDUCT Canons 5B, 5C(1) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 4.3, 4.2 (2007).

13. MODEL CODE OF JUDICIAL CONDUCT Canon 4B; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 1 (2007).

14. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(11) (2007).

The provisions of the 1990 MCJC most directly relevant to matters of recusal and disqualification appear in Canons 2 and 3.[15] Canon 2 states that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" and further specifies that:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgement.[16]

Canon 3E states that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[17] In addition to the provisions in the Model Code, there are two federal statutes on judicial recusal and disqualification that apply to lower federal court judges.[18] In reference to district court judges, 28 U.S.C. § 144 provides that [w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.[19] This is the only federal statute that actually provides for a party to move to disqualify, and it applies only to district court judges.

By contrast, 28 U.S.C. § 455 applies to more judges but provides only for sua sponte recusal, stating that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[20] Unfortunately, because

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15. For excellent and very thorough explanations of the basic practical workings of these two canons, see LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992) and Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949 (1996). The 2007 revisions move the old Canon 2 materials to the new Canon 1, and the old Canon 3 materials to new Canon 2. *Compare* MODEL CODE OF JUDICIAL CONDUCT Canons 2, 3 (1990), *with* MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2 (2007).

16. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

17. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R 2.11 (2007).

18. *See* 28 U.S.C. §§ 144, 455 (2000).

19. *Id.* § 144.

20. *Id.* § 455(a). In addition, § 455 provides further that:

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

these federal statutes and the Model Code provisions come both without sufficient indications of the procedures to be used in implementing them and without sufficient explanation of the meaning of their terms, their interpretations have been inconsistent.[21] The terms of the statutes, particularly 28 U.S.C. § 455, are vague at best in their guidance, setting a standard for disqualification of when the judge's impartiality "might reasonably be questioned"[22] without giving any idea of whose perspective to take in that analysis, how to take the facts, etc. It is unclear who can bring a challenge under either of these code sections,[23] who should hear such challenges, and what standard should be applied.[24]

Given the vagueness of the statutes, it can be a dangerous strategy for a concerned individual to bring a challenge unless he is absolutely certain that the judge cannot properly sit on the case, and thus that he will prevail on the disqualification motion. The risk of insulting the judge by questioning his impartiality is high.[25] Thus, one who is certain about the judge's inability to sit on the case really ought to be asserting a charge of actual bias, leaving challenges based on "appearances" as a mere face-saving device for the judge. However, this only masks the real underlying problem. Overall, interpretations of the federal statutes tend to be inconsistent and overcautious, interpretations of the Model Code can be highly formalistic, and both of these approaches take the analysis further and further from the real

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(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Id. § 455 (b)–(c).

21. For useful practical discussions of how the statutes work and technical deficiencies in the procedures for applying them, see, for example, Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046 (1993); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 20–34 (1994).

22. 28 U.S.C. § 455(a).

23. FLAMM, *supra* note 7, § 17.4.

24. *See, e.g.*, *id.* at § 25.4 (discussing ambiguities regarding who decides motions under 28 U.S.C. § 144); *id.* § 5.5, at 154 (noting appearance standard is "elusive"); *id.* § 5.6.1, at 156 (noting general neglect of specifying what the standard means); Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 543–45 (1994) (arguing that a judge other than the one being challenged should decide these issues). *See generally* Abramson, *supra* note 15 (noting lack of specificity).

25. *See, e.g.*, Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729–30 (1997).

concerns these provisions are meant to address. That is, if a party believed so strongly in the judge's improper bias as to risk the motion being denied (and leaving the potentially insulted judge still sitting on the case), surely that party must believe the bias is real. If the bias were only apparent, after all, there would be no reason for the party to be bothered by it. Thus "appearance" allows for flexibility both in requirements for what evidence must be brought forward and in allowing judges to save face (their own and others' whose rulings they review), but it cannot have any genuine or sensible meaning as an independent ground for disqualification.

The recently adopted revisions reorganize and restructure the MCJC to follow a pattern that looks more like the ABA Model Rules of Professional Conduct for attorneys, but keep the same basic principles at work.[26] The ABA committee charged with the revisions of the MCJC continued to debate and make changes to the handling of a general appearance of impropriety standard up through the meeting of the House of Delegates in February 2007. Some drafts promoted this standard (found in the commentary to the 1990 version's Canon 2A) to the status of an enforceable "Rule"[27] while others moved it to the language of the proposed new Canon 1[28] where it would arguably have had greater prominence than in the 1990 version, but would still not have been strictly enforceable. In the end, the ABA House of Delegates met on February 12, 2007, and approved a further revised version which did incorporate the appearance standard in Rule form.[29] In addition, the newly adopted Rule 2.11(A) would require disqualification wherever the judge's "impartiality might reasonably be questioned."[30] The debate over the wisdom and practicality of the appearance standard[31] will continue as each jurisdiction considers whether and how to incorporate the revisions into its operable code. The revisions suggest that the appearance standard may take on yet more importance than it has had under the 1990 version, and, if so, this will be a move in decidedly the wrong direction.

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26. *See* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR A'SSN, PRELIMINARY INTRODUCTORY REPORT 3 (2005), http://www.abanet.org/judicialethics/IntroductoryReport.pdf.

27. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.02 (Proposed Draft Dec. 2005), *available at* http://www.abanet.org/judicialethics/Canon1Final.pdf; *see also* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, FINAL INTRODUCTORY REPORT 4 (2005), http://www.abanet.org/judicialethics/IntroductoryReportFinal.pdf.

28. *See* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, REPORT TO THE ABA HOUSE OF DELEGATES 4, http://www.abanet.org/judicialethics/house_report.pdf (discussing proposed changes to Canon 1).

29. *See* HOUSE OF DELEGATES, AM. BAR ASS'N, DAILY JOURNAL, 2007 MIDYEAR MEETING 8–9 (Feb. 12, 2007), http://www.abanet.org/leadership/2007/midyear/docs/journal/DAILYJOURNALFINALVERSION.doc.

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

31. The Committee Report to the ABA includes an account of the debate over appearances. *See* JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, REPORT 4 (2006), http://www.abanet.org/judicialethics/report.pdf (discussing Principal Substantive Areas of Concern and Changes from the 1990 Code).

The extreme cases are clear under any standard. The judge who fixes traffic tickets for family and friends,[32] or the judge who awards settlement money to himself and to his friends,[33] has violated the ethical obligations of his professional role by giving preference to his own personal interests over the rule of law. However, in the current regime as well as under the revisions to the Model Code,[34] whether a judge recuses remains almost wholly discretionary.[35] The guidelines that exist are flawed both by vagueness and misdirection. They will not efficiently or effectively address the real concerns for judicial impartiality that give rise to the need for recusal analysis in the first place.

There is a significant absence of guidance in the Code and the relevant statutes, particularly regarding procedures for implementation of the standards.[36] For example, on a motion to disqualify, the Code itself gives a judge no guidance as to who should decide the motion.[37] Furthermore, there also is no procedure akin to voir dire for requiring disclosure of facts sufficient to meet the burden for disqualification in 28 U.S.C. § 144.[38] Furthermore, the remedies for a failure to recuse sua sponte are extraordinarily limited.[39]

In addition to the lack of procedural structure, under the current law of recusals and disqualifications, there is neither a requirement nor even any suggestion that a judge must provide any explanation regarding a sua sponte decision to recuse or not to recuse.[40] Nor is there any requirement that a judge should issue any statement of reasoning for a decision either way on a party's motion to disqualify the judge.[41] Occasionally, particularly in prominent cases in which the media may take a particular interest, a judge

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32. *See In re* Singleton, 605 S.E.2d 518, 518–21 (S.C. 2004) (affirming removal of magistrate judge who adjudicated seventeen traffic tickets issued to his father, mother, daughter, two sisters, brother, sister-in-law, and a friend, ultimately rendering only three guilty verdicts, but suspending sentences on all three of those).

33. Roger Alford, *Judge Resigns Amid Accusations He Profited From Fen-Phen Case*, LAW.COM, Feb. 28, 2006, http://www.law.com/jsp/article.jsp?id=1141047298335 (detailing public reprimand and resignation of judge who gave attorneys, including personal friends, between $86–104 million from a 2001 diet drug settlement and allowed $20 million "to be put into a charitable fund" of which "he became a paid director . . . receiving $5,000 a month plus a $350 monthly expense allowance").

34. *See* MODEL RULES OF JUDICIAL CONDUCT Canon 3 (1990); MODEL RULES OF PROFESSIONAL CONDUCT Canon 2 (2007).

35. *See, e.g.*, People v. Wilson, 497 N.E.2d 302, 302–03 (Ill. 1986); *cf.* United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999) (per curiam) (noting that, under the federal recusal statutes, "the standard of review is abuse of discretion, [and] we will affirm a district judge's refusal to recuse himself unless we conclude that the impropriety is clear and one which would be recognized by all objective, reasonable persons.").

36. For extensive analysis of the specific workings and failings of the various devices for recusal and disqualification, see generally FLAMM, *supra* note 7.

37. *See* Abramson, *supra* note 24, at 544.

38. *See* Leubsdorf, *supra* note 10, at 241–42.

39. *See* Bassett, *supra* note 21, at 1235–36.

40. *See, e.g.*, *Wilson*, 497 N.E.2d at 303. *But cf.* Selkridge v. United of Omaha Life Ins. Co., 360 F.3d 155, 170 (3d Cir. 2004) (holding "that a trial judge cannot, without explanation, recuse himself in a substantial number of cases and, at substantially the same time, decline to recuse himself in another group of cases that appears indistinguishable for purposes of recusal.").

41. *See, e.g.*, Laird v. Tatum, 409 U.S. 824, 824 (1972) (Rehnquist, J.).

might issue a written memorandum explaining a determination about recusal.[42] Perhaps more often, but still rarely, a judge might issue a written opinion explaining a determination on a disqualification motion filed by one of the parties.[43] This lack of available explanations for earlier determinations only exacerbates the problems of uncertainty and inconsistency in interpreting and applying the standards, and in its lack of transparency undermines the attempt to promote public confidence that is, according to most interpretations of the standards, the very point of the current and recently revised standards.[44]

The value most commonly singled out in the context of judicial recusal or disqualification discussions (and certainly the value underlying the general appearance of impropriety standard) is that of public confidence in the impartiality of the judiciary.[45] Both in the application of the current rules in case law and ethics opinions and in the recent revisions to the MCJC, this concern is weighed most heavily.[46] The potential damage the Code seeks to avoid by means of an appearance standard is to the value of public confidence in the judiciary.[47] It proceeds from the assumption that observers may have difficulty believing that a judge can divorce himself from those things that affect him personally in some way—from people or issues to which he is personally attached beyond his official role in the proceedings. This is a perfectly respectable concern when it is kept within reason, but it is being carried further than it ought to be by the mechanisms of recusal and disqualification, so much so that it may even undercut (rather than simply fail to efficiently achieve) the goal.

The concern for public confidence arises from a concern to ensure stability by maintaining a sort of public "buy-in" to the process.[48] If people trust that judges will be fair, this theory goes, they will submit their disputes to those judges and abide by their decisions.[49] If, on the other hand, they

42. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004) (Scalia, J.).

43. *See* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 569–70 (2005). It is, of course, more typically the case that any written opinion on the propriety of a decision not to recuse or disqualify would be that of a higher court reviewing a lower court's course of action, which is less useful in understanding the original reasoning process.

44. Concern for the promotion of the value of public trust prompted one of the members of the ABA committee considering revisions to the MCJC to resign over what he saw as the undervaluing of appearances. *See* Liptak, *supra* note 9.

45. *See, e.g.*, ANNOTATED MODEL CODE, *supra* note 7, at 29–58; ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct Homepage, *supra* note 9; Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 66 (2005).

46. *See, e.g.*, *In re* McFall, 617 A.2d 707 (Pa. 1992); Earls v. Earls, No. M1999-00035-COA-R3-CV, 2001 WL 504905 (Tenn. Ct. App. May 14, 2001); MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2 (2007).

47. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT pmbl., Canon 1, Canon 1 cmt. (2007).

48. *See* PAUL W. KAHN, THE REIGN OF LAW 201–05 (1997); *see also, e.g.*, Tennant v. Marion Health Care Found. Inc., 459 S.E.2d 374, 384 (W. Va. 1995).

49. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–6 (1990) (providing analysis of people's views of legitimacy of and compliance with legal authority based on an empirical study of "the connection between normative commitment to legal authorities and law-abiding behavior").

believe that judges' decisionmaking processes are tainted in some way, the judicial system will lose the public's trust and thus the ability to provide stability and order.[50] There is even a possibility that without sufficient grounds for trust in the system, there is a greater risk of injustice for weaker parties with legitimate cases who will not pursue their rights (and in the long run the body of the law as a whole will suffer). This concern for stability and public buy-in is a perfectly legitimate one. However, the way to address this concern is not through recusal or disqualification of judges based on analysis of appearances.

B. Problems of Over-Deterrence and Under-Deterrence

One of the many ways in which this current approach goes awry is in its promotion of over-recusal. Most of the case law on recusals and disqualification relates to questions of judges improperly *sitting* on cases (failing to recuse themselves), rather than improperly *recusing* themselves from sitting on cases (simply because there would be no obvious grounds for complaint by the parties),[51] but the latter case may be problematic as well, albeit in different ways. The vagueness of the appearance concept and its problems of perspective and degree, in combination with the reputational ramifications for a judge who miscalculates, lead to over-cautious application of the standard by judges.[52] Even when a judge is not attempting to err on the side of caution, the current standard will over-deter (in relation to the proper underlying substantive concern for fair and unbiased decisionmaking), requiring the removal of judges who in fact have no actual bias and could judge a case fairly.[53]

Such over-deterrence is not helpful to judges or to the public observing them.[54] Judges would benefit from more guidance and from a strengthened duty to sit. It would give them practice, and it would save them having to

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50. *See id.*

51. *See, e.g.*, Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660 (1996) ("Controversy arises when judges hear cases, not when they recuse themselves.").

52. *See, e.g.*, *Professional Responsibility: Comments on Recusal*, 73 DENV. U. L. REV. 919, 919–24 (1996) (comments of five Tenth Circuit judges in response to questions by members of the Denver University Law Review).

53. Evidence from jurisdictions allowing for peremptory challenges of judges without any reasoning offered demonstrates that the rate of challenges is generally very low indeed, indicating that high rates of recusal are not, on the whole, considered necessary, even by the parties. *See, e.g.*, Memorandum from the Staff of the Alaska Judicial Counsel to the Alaska Judicial Counsel (Jul. 15, 2002),

http://www.ajc.state.ak.us/Retention02/retgen5.htm (detailing peremptory challenge records for judges on the ballot in 2002); Memorandum from the Staff of the Alaska Judicial Counsel to the Alaska Judicial Counsel (Apr. 24, 2000),

http://www.ajc.state.ak.us/retention00/retgen5.htm (detailing peremptory challenge records for judges on the ballot in 2000). There are occasional exceptions to these low rates. *See, e.g.*, Hornaday v. Rowland, 674 P.2d 1333, 1335 n.1, 1341 (Alaska 1983) (on need to transfer one judge to another location due to high challenge rate).

54. *See, e.g.*, THOMAS E. BAKER, THE GOOD JUDGE 55–56 (1989) (background paper in the Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility).

over-recuse in order to be sure to err on the side of caution when they cannot tell where the boundaries of propriety are.[55]

Consider, for example, a judge who refuses up front to rule in any cases involving abortions.[56] Perhaps the judge perceives this to be an area in which he cannot, because of his personal convictions, make a fair judgment, or, more to the point, he does not wish to impose the law of his jurisdiction and will not force himself to do so because he believes it is wrong. This is both an improper basis for recusal[57] and an example of an individual's improper choice to take on the judicial role in the first place. A judge may not simply declare that there is a law or a swath of the law that he refuses to administer because he does not like it or cannot agree with it.[58]

On the other hand, from an actual justice perspective, the appearance standard under-deters as well. Appearance analysis is motivated in part by an idea that such an approach will require more recusals than an actual-bias-only standard would, and, in thus capturing more than is necessary, it will at least capture all of the actual-bias cases. That is, there is implicit acknowledgement in the case law and ethics opinions that appearance-analysis is over-inclusive, but this is assumed to be an acceptable price to pay for accomplishing the goals of eliminating actual bias and promoting public confidence in the impartiality of the judiciary. However, focusing on appearances, and, more importantly, on guesswork about the meaning of those appearances, fails to hold judges to account in a way that would ensure capture of whatever sources of actual bias might be either unapparent to outside observers, particularly if they are unapparent to the particular litigants in a given case or even unapparent to the judges themselves. In short, an appearance-focused approach does not ensure accomplishment of either of the goals of actual justice or the promotion of meaningful public confidence in the judiciary, and it does other damage besides.

The job of a judge is (and should be) a real challenge. It requires the one taking on that role to separate as far as possible personal beliefs and legal interpretation and judgment. Even if an exception might be made for very narrow areas in which the judge feels, in a particular case, too personally emotionally involved in the subject matter to make a fair decision, this kind of recusal can in the present regime go much too far.[59] A perceptive appel-

55. *See* discussion *infra* Subparts III.E. and IV.E.

56. A number of judges on the Memphis Circuit Court in Tennessee have issued just such a blanket recusal. *See* Adam Liptak, *On Moral Grounds, Some Judges are Opting out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at 21.

57. A group of law professors sent a letter to the Chief Justice of the Supreme Court of Tennessee suggesting the court address the impropriety of such recusals. *See* Letter from law professors to Chief Justice Frank F. Drowota, III, Tenn. Supreme Court (Aug. 12, 2005) (on file with author). A spokesperson for the court responded, perhaps predictably, that the professors' complaint should be made to the state body handling judicial discipline. Liptak, *supra* note 56.

58. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canons 3A, 3B(1), 3B(2) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.1, 2.2, 2.4, 2.5, 2.7 (2007); Letter to Chief Justice Drowota, *supra* note 57.

59. *See* discussion of hypothetical case study *infra* Subpart III.A.

late court opinion from Alaska analyzes this type of challenge to the judiciary as follows:

> Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.60

In short, the obligation to sit, and to do so impartially, is and should be strong.[61] The real problem to be avoided is actual injustice, not the appearance of injustice. Appearances are important, and they are important for exactly the reason relied upon by the Code (for maintaining public confidence), but that concern can be addressed in more reliable ways, primarily through greater transparency in the provision of adequate legal explanations of judicial reasoning.

C. Problems of Imprecision and Inconsistency

The Supreme Court has on occasion presented the appearance standard as an issue of due process.[62] However, it is highly unsatisfactory to address a problem of process with a standard that lacks sufficient clarity of substances and procedures to implement it consistently or reliably. Furthermore, the Justices of the Supreme Court do not always err on the side of caution themselves in worrying about appearances, as indicated by the rather famous examples of Justice Rehnquist in *Laird v. Tatum* and Justice Scalia in *Cheney v. U.S. Dist. Court for D.C.*[63] If this issue of appearance were of paramount importance as a matter of due process, those cases might have been balanced quite differently.[64] I would argue that both of those mat-

60. Feichtinger v. State, 779 P.2d 344, 348 (Alaska Ct. App. 1989).

61. MODEL CODE OF JUDICIAL CONDUCT Canons 3A, 3(B)(1) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.1, 2.7 (2007).

62. *See, e.g.*, *In re* Murchison, 349 U.S. 133, 136 (1955). *But see infra* Subpart III.C. (explaining limitations on significance of Supreme Court statements of this principle).

63. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004) (Scalia, J.); Laird v. Tatum, 409 U.S. 824 (1972) (Rehnquist, J.).

64. Indeed, due process has traditionally not been the principle upon which the need for disqualification for apparent bias has been based. *See, e.g.*, FLAMM, *supra* note 7, § 2.3.3. As Flamm notes, the appearance standard found in the Code and the federal statutes covers more than is required by the Constitution. "[T]he due process clause has generally . . . been interpreted to require only an absence of actual bias on the judge's part . . . ." *Id.* at 34–35.

ters were decided correctly by the Justices in question, and that the "appearance of bias" or "appearance of justice" should not be raised to the level of a Constitutional due process concern.[65]

If the concern that drives an appearance standard for recusals were really about actual process (and therefore actual justice), the standard would have to be clear, consistent, objective, and reliable. As the rules on recusals currently stand, while they provide some guidelines, they are rough and vague, and the decisions remain almost wholly discretionary.[66] The analysis is left to the discretion of the judges who are the subjects of the appearance concerns, and their findings are typically given great deference by the courts reviewing the analysis on appeal, but the entire analysis entails significant pressure to err on the side of caution for reputational reasons, both personal and institutional.[67]

Analysis of appearances is especially out of place and imprecise in making determinations of bias due to the fact that actual biases may well be contrary to appearances, and judges may well be unaware of some of their own biases and the potential effects of those biases.[68] As Justice Frankfurter once explained, "reason cannot control the subconscious influence of feelings of which it is unaware."[69] This amounts to just another aspect of a larger problem with the issue of transparency.

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65. Of course, recusal at the Supreme Court level comes with a unique set of attendant concerns, already well-detailed in, for example, Lubet, *supra* note 51. While many high profile examples of recusals or motions for disqualification involve justices of the Supreme Court, it is crucial to remember that there are over 30,000 state and federal judges of various other kinds in the United States today. *See* National Center for State Courts Overview of State Court Caseloads, at *11, http://www.ncsconline.org/D_Research/CSP/2001_Files/2001_Overview.pdf (last visited Sept. 26, 2007) (giving year 2000 numbers of state court judges and quasi-judges at 29,243). Thus, it would be unhelpful to focus too much on the situation of these nine unique occupants of the judicial role where recusal is concerned.

66. Sua sponte recusal is of course discretionary in the first place, and even motions to disqualify are only reviewed for abuse of discretion, so while there may be some bounds on the courts deciding these cases, they are not very strictly enforced. *See supra* note 35.

67. Indeed, this preference for erring on the side of caution is what others would recommend on its merits, beyond the reputational reasons for such a preference. *See, e.g.*, JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 2 (1995). This approach establishes the wrong incentives for judges and sends the wrong message to litigants and other observers of the judiciary.

68. *See* discussion *infra* Subpart III.A.

69. *See* Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 466 (1952) (Frankfurter, J.) (articulating reasons for non-participation). In this case, however, Justice Frankfurter was contemplating personal feelings of which he was aware (an apparently quite vehement dislike of the practice of radio broadcasting on public transportation). *Id.* at 466–67. He went on to make the argument that the appearance of disinterestedness does matter, so that when there is ground for believing that one's feelings might enter into a judgment or when others might believe that to be the case, the judge should recuse. *Id.* I disagree on the point of appearances. The very point he raises about the possibility of unconscious influences demonstrates the unreliability of appearances. However, I agree strongly with Justice Frankfurter's assessment in the same discussion that:

> The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved

There is another problem of muddied distinctions in this area that arises out of a misdirected attempt to promote public confidence that in turn leads to over-deterrence of judges from sitting on cases they could (and should) properly judge. One of the interesting patterns that emerges in looking at the analysis in disqualification cases is the prevalent face-saving use of an appearance of impropriety standard when the real concern on the facts of a given case seems to be about actual bias and not its mere appearance.[70] That approach may grease the works in some way, but it does more harm than good in the end by masking the real underlying concern about unbiased judging. A better approach would be to aim at satisfying both goals (actual justice and public confidence) in a more efficient and effective manner by focusing on the provision of reasoning for outcomes.

There is a certain amount of internal inconsistency in the current approach. A number of examples illustrate the acceptance of even actual bias (not to mention where there might be a mere appearance of bias) under the provisions of the MCJC. For example, it is acceptable for judges to continue to sit when they have developed feelings of some kind about the case before them in ways that would otherwise seem inconsistent with the code's general approach to appearance-based recusals.[71] That is, when over the course of the judge's professional involvement in the case the judge develops an animosity toward one of the litigants or one of the attorneys in a given case, the judge may remain unless the animosity is so extreme as to indicate that the judge is effectively prejudiced against that party.[72] Had such bias (whether personal to the participants or with regard to subject matter with which the judge was not previously familiar) existed prior to the commencement of the case, it would have necessitated recusal.[73] In a case of distaste or animosity that develops in the course of presiding over the case, the Supreme Court has made clear that this is not generally disqualifying because it is not from an "extra-judicial source," and so the judge may proceed even if there is evidence that the judge has become apparently disposed to disfavor a particular side for some reason.[74] By the same token, a

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> through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.

Id. at 467. His conclusion is appealing as well in support of the ultimate suggestion of this article. Justice Frankfurter explained, "I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case." *Id.*

70. *See, e.g.*, BAKER, *supra* note 54, at 55–56; FLAMM, *supra* note 7, § 5.3, at 145–146; Leubsdorf, *supra* note 10, at 243. The disingenuousness of this approach ultimately only further erodes public confidence in the judiciary. As an example, see *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440 (Cal. Ct. App. 1995).

71. *See* Liteky v. United States, 510 U.S. 540, 550–51 (1994).

72. *Compare id. with* Cobell v. Kempthorne, 455 F.3d 317, 331–35 (D.C. Cir. 2006).

73. *See, e.g.*, ANNOTATED MODEL CODE, *supra* note 7, at 226. *See generally* Jeremy S. Brumbelow, Note, Liteky v. United States*: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 ARK. L. REV. 1059 (1995); Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787 (1994).

74. *See Liteky*, 510 U.S. at 550–52 ("The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly

judge may remain on a case after developing a sympathy for a litigant or a witness or an attorney, even though the same attitude might necessitate recusal if present at the outset of the case.[75] In either of these scenarios, there *is* bias. It is even *actual*, rather than apparent, bias. But even so, the judge may stay because the balance of considerations (actual justice, efficiency, fairness, and appearances) has been weighed in favor of proceeding rather than bowing to public confidence concerns for appearances. Along similar lines, where the judge's stake with regard to the outcome of the case will be no different from that of any other member of the public, so that there may well be both actual and apparent bias, the judge may still sit.[76] The same result occurs when there is no other eligible judge who is less affected by the case under the "Rule of Necessity."[77]

Perhaps the position betraying the greatest internal inconsistency in the reasoning behind an appearance-based standard founded on concern for public confidence is that found in Canon 3F (and in an analogous statutory provision in 28 U.S.C. §455(e)),[78] which permits waiver of a problem of judicial bias, as long as it is not bias personal to a party.[79] Canon 3F encompasses not just problems of appearance but also problems of actual bias.[80] It makes little sense to have a rule that purports to actually "disqualify" a judge from sitting but that can be overridden by consent of the parties. Either a judge is or is not qualified to sit on a case.[81] Either actual justice can be achieved or it cannot. Furthermore, even assuming that the primary driving force behind recusals were not a concern with actual justice, but rather a concern with public confidence in the impartiality of the judiciary, the remittal of disqualification rule puts a very narrow interpretation on the idea

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reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.").

75. *Cf. id.* at 550–51.

76. *See, e.g.*, *In re* N.M. Natural Gas Antitrust Litig., 620 F.2d 794, 797 (10th Cir. 1980); State v. Lead Indus. Ass'n, No. Civ.A. 99-5226, 2005 WL 1984443, at *3 (R.I. Super. Aug. 11, 2005).

77. *See* United States v. Will, 449 U.S. 200, 200–01 (1980). This would be the scenario in the case of judges who might be asked to rule on disqualification motions against their colleagues on the bench, a clear example of what is simply a challenge to which judges must rise, to separate their personal relationships with their colleagues from their professional obligations to judge impartially.

78. 28 U.S.C. § 455(e) (2000) ("No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.")

79. MODEL CODE OF JUDICIAL CONDUCT Canon 3F (1990) ("A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007).

80. MODEL CODE OF JUDICIAL CONDUCT Canon 3F (1990).

81. *See Professional Responsibility: Comments on Recusal*, *supra* note 52, at 921 (comment by Judge Kelly: "There are no close cases. You either are or are not biased.")

of who needs confidence in the judiciary by asking only the parties whether they object to the judge's bias, whether actual or only apparent.

Finally, and again along similar lines, a disqualification motion can be denied on the grounds of untimeliness, effectively placing greater value on efficient use of judicial resources than on the appearance of bias.[82] If apparent bias raised genuine concerns about actual justice, if a judge really was "disqualified" from sitting, timing should not overcome that problem.

The whole scheme—all of these ways in which bias, whether actual or only apparent, is explicitly permitted to persist—demonstrates some level of acceptance of the idea that judges may well be capable of adequately separating their individual biases from their legal decisionmaking. They are inconsistent in forcing judges out of some cases where there is no actual bias and yet not actually reaching all those cases in which there may be bias of one kind or the other that has not come to light. In the end, all of this undermines arguments for an appearance-based standard and suggests the need to rethink what constitutes bias that matters and how best to structure rules and practices of judging to eliminate that kind of bias. If there is bias that reaches to a level at which the Code deems the judge unqualified to sit, then the judge *is* unqualified to sit, so the disqualification should not be waivable. If appearances really matter, it should be as a matter of systemic concern, not just for the parties themselves. From the perspective of seeking actual justice, either a judge can judge fairly in a given case or she cannot. Anything in between calls into question the integrity of the judicial role.

D. Overvaluing Public Confidence and Undervaluing Actual Justice and the Integrity of the Judicial Role

The concern for public confidence in the judiciary is being overvalued, or at any rate ineffectively promoted, by the use of an appearance-based analysis. If recusal analysis is viewed primarily from an angle of boosting public confidence in the judiciary, the current appearance standard urges judges to take what is effectively a "bad man" view of themselves in the recusal analysis.[83] By focusing on public confidence in the judiciary, and therefore on an appearance standard, we get off track about what matters more, in terms of impartiality, which is the reality of bias.[84] However, actual justice, rather than the appearance of justice, is the proper end to be seeking, and the rules and practices of judging should be constructed to achieve it.

It is possible to overvalue the concern about public confidence at the expense of other values against which it must be balanced. In the great effort to promote the value of public confidence in the judiciary, we are in

82. *See* FLAMM, *supra* note 7, § 18.1.

83. *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897). Where Holmes would have the law interpreted from the perspective of the "bad man," *see id.,* the appearance standard encourages judges to imagine the scenario as it might appear in its worst light.

84. *See* discussion *infra* Subpart III.D (regarding concerns other than judicial impartiality, for which the analysis of public confidence and appearances may be different).

danger of actually undercutting that confidence in other ways, and at present we have not found the right balance of values. It is worth noting that there are any number of ways in which judges may undermine confidence in the judiciary outside of the manner in which they handle recusal and disqualification issues. Undignified behavior is one commonly noted example in judicial ethics opinions.[85] However, there may be some ways in which judges undermine confidence in the judiciary in perfectly legitimate ways, under the heading, for example, of speaking publicly about improvements to the law or the legal system.[86] For example, Judge Alex Kozinski, of the Ninth Circuit Court of Appeals, has been outspoken in his statements about how the judges of his circuit do not have ample time to spend on their decision-making in order to give it the reliability that would be necessary to make all of their decisions precedential, noting particularly the amount of work done by law clerks.[87] This is not to say that Judge Kozinski should not make such statements—on the contrary, such transparency and honesty about the realities of judging are quite useful. This is simply an example to show that public confidence in the judiciary is not the only or even the primary concern around which rules and practices of judging should be structured.

Concerns about perception are legitimate, but they must be viewed from more than one perspective. Asking judges to recuse themselves whenever there is an appearance of impropriety, without any more specific standard or criteria for making that determination, leaves the door wide open to increasingly broad categories or characteristics that might give rise to an appearance of impropriety concern. Ultimately, this line of reasoning brings into question whether *any* case can be apparently impartially judged. That is, for example, if it is improper for a judge of one political party to sit on a case because of the appearance of bias, how can it possibly be proper for a member of an opposing party to take her seat instead where the basis for the concern is purely based on party membership?[88] To open the door so wide ultimately undermines the whole concept of what the judiciary is supposed to be expected to do, i.e., put on the robe and reach a just outcome.

Another core value against which the concern for public confidence must be balanced, for instance, is the integrity of the judicial role, and, by extension, the integrity of judicial decisions, both of which eventually impact the corpus of the common law as a whole.[89] A judge's capability to

85. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 451 (2004) (citing a wide range of examples of inappropriate conduct in a judicial capacity).

86. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1990) (suggesting judges are in a position to improve the law); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 1, R. 2.10(D) (2007).

87. *See* Hon. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 38.

88. For an example of such a scenario, see discussions of the series of disqualifications of judges in the criminal case against Tom DeLay. *See, e.g.*, Ralph Blumenthal, *DeLay Case Turns Spotlight on Texas Judicial System*, N.Y. TIMES, Nov. 8, 2005, at A17; Ralph Blumenthal, *Judge in DeLay Case Is Ordered to Recuse Himself*, N.Y. TIMES, Nov. 2, 2005, at A18.

89. For further discussion of this idea, see Sarah M.R. Cravens, *Judges as Trustees: A Duty to*

judge fairly in actuality may be undermined by a rule requiring judges to recuse themselves whenever anyone might *think* they cannot judge fairly.[90] In the first place, there must be a concern here about weighting the assumptions of those unfamiliar with the workings of the system more heavily than the views of those intimately familiar with the mechanics and the realities of that system. Perhaps more importantly, there is a legitimate concern that if repeatedly told they cannot judge fairly even where there is no actual bias, but only the appearance of impropriety, judges (as well as observers) may begin to believe that there is a vanishingly narrow category of cases that they can judge fairly. The value to be promoted here is that of judicial virtues that judges ought to seek to embody.[91] The judicial role carries significant obligations.[92] The rules must be structured to take seriously the imposition of that obligation and expect judges to try their utmost to fulfill their obligations rather than encouraging them to abdicate their role.[93]

An overvaluing of public confidence concerns may also ultimately so pervasively influence judges' concerns about appearance that they will make their decisionmaking less transparent. They may be less candid in their opinions, giving less explanation of their reasoning or even none at all.[94] They may come to value concerns for appearances over and above concerns for actual judging, just as the current version of the statutes and Model Code arguably encourage them to do.[95] At the other end, it might

Account and an Opportunity for Virtue, 62 WASH. & LEE L. REV. 1637 (2005).

90. An extensive discussion and annotation of the problem of different perspectives used in this analysis appears in FLAMM, *supra* note 7, §§ 5.6–5.8. *See also* ANNOTATED MODEL CODE, *supra* note 7, at 31–33 (explaining "appearance" as an objective standard, noting "reasonable person" is neither cynic nor highly trained, just an average citizen, and deeming judge's own perception to be irrelevant). Furthermore, as a demonstration of the problem of perspective in assessing appearances, one empirical study has found evidence that judges tend to believe their colleagues do *not* need to recuse themselves in many situations in which they would assume they needed to recuse themselves on the basis of appearances. *See* SHAMAN & GOLDSCHMIDT, *supra* note 67, at 10–11.

91. *See generally* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

92. *See* further discussion of judicial role-based obligations *infra* Subpart III.E. and note 133.

93. *See, e.g.*, Laird v. Tatum, 409 U.S. 824, 839 (1972) (Rehnquist, J.); Amidon v. State, 604 P.2d 575, 577 (Alaska 1979) ("[A] judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has [an obligation to disqualify himself] in the presence of valid reasons."); ANNOTATED MODEL CODE, *supra* note 7, at 87–88. Judges are required (in general, not only with regard to recusal questions) to "step[] up to the plate of justice . . . ." Stemple v. Dunina, No. 04CA40, 2005 WL 2697328, at *2 (Ohio Ct. App. Oct. 21, 2005). For example, a judge may not avoid sitting on a mass tort case just because she thinks it would be too time consuming or would involve administrative hassles. A judge may not decline to take the time to figure out complex background facts (for example, those involving scientific or other technical principles) because they are uninterested in them or find them too difficult. Similarly, a judge who has a personal moral objection to the imposition of the death penalty is required by her initial opt-in to the judicial role to banish her personal views while she is involved with a case. This should mean not only that she will not opt out of sitting on the case, but that she will not inject her personal views into the reasoning and decision of the case to affect the result. That is all part of the duty to decide.

94. *See, e.g.*, Cravens, *supra* note 89, at 1637–45; Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1334–79 (1995); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 738–50 (1987).

95. *See supra* Part II.A. As long as judges are encouraged to err on the side of recusing, the lower standard of "appearance" rather than actuality will necessarily become the focus of the deliberation on these matters.

even encourage judges to think *less* (in a recusal context) about the possibilities of improper bias that parties might not know to bring up in a disqualification motion because, if judges did think about it, they would end up having to recuse themselves more and more and appear somehow less fit for or successful in their judicial roles. Either of these potentialities risks the problem of muddying the body of the common law by judges reaching the judgments they believe to be right but giving reasoning that will be more palatable in appearance than their "real" reasoning. This has the effect of undervaluing transparency of decisionmaking and the predictability or stability of the law.[96]

III. IN PURSUIT OF A BETTER APPROACH

A. A Case Study of Influences

As discussed above, the way to eliminate actual bias is not through recusal rules (whatever they might be based on) because they will always be too imprecise and will always suffer from a problem of perspective and a problem of lack of information. To demonstrate how these problems may play out, consider a hypothetical judge who is a fifty-five year-old married white upper-middle class protestant male, father of two, who is a member of a major political party, but not particularly active in it, who was formerly in a general practice law firm in the jurisdiction in which he sits, who owns a dog and likes to watch baseball, but finds golf dull, hates eating green vegetables, and rides his bike to work whenever the weather permits. Of course, any of these characteristics might indicate a potential bias based on age, gender, marital status, educational background, political party affiliation, area of law practice, religious affiliation, etc.[97] These facts about the judge and the potential biases he may bring with him to the bench would be either easily apparent to the general public or at any rate to the community of lawyers who practice before the judge.

Consider in addition a few things the outside observer might be less likely to know. Add to the picture that he was a Boy Scout for a while but did not really enjoy it; that he always says "*gesundheit*" when someone sneezes; that he prefers Schoenberg to Beethoven; and that he likes to go bow hunting. These factors, too, could conceivably have relevance for a case that could come before him. It is a matter of chance which of these facts members of the public happen to be aware of, and one might easily

96. *See* discussion *infra* Subpart IV.E.

97. *See* Leubsdorf, *supra* note 10, at 250–51, 285–86 (concerning which preconceptions are acceptable); *see also*, *e.g.*, Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (denying disqualification motion based on assertion that judge's previous engagement in civil rights litigation and her gender constituted sufficient evidence of bias to disqualify her from a sex discrimination case); Pennsylvania v. Local Union 542 Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 157 (E.D. Pa. 1974) (annihilating disqualification motion based on his race and past speech on civil rights as basis for disqualification sought in racial discrimination case).

draw incorrect inferences from them about how this judge would reason through a case. The judge himself might even be unaware of how certain characteristics could affect his decisionmaking process. Furthermore, over time any one of these characteristics could change. No assessment based on appearances can adequately account for the imponderables here. Perhaps he says "*gesundheit*" because he is an atheist, so he refuses to say "God bless you." Perhaps his love of bow hunting speaks to an anti-firearm position. Perhaps he rides his bike to work because he enjoys it or because his doctor told him to or because he has a deep hatred of the automobile industry or because he is a champion of the environment. The point is that we cannot know for certain, and guesswork is a particularly inept approach to resolving that uncertainty.

Imagine an additional extra-judicial influence—perhaps this judge attended a seminar put on by a hypothetical private organization called the Foundation for Research on Enviro-Economic Development (FRED) whose mission is to educate judges about environmental and economic policy in land use issues and which is known to direct its energies towards the creative use of eminent domain to promote private development. Attending such a seminar may or may not influence the judge's decisionmaking, but it is no more significant for the judge's ability to obtain an actually just outcome than whatever the judge might read in the privacy of his own home, so it ought not to carry any greater force for disqualification simply because it is publicly known.[98] Imagine the judge is later faced with a case that requires him to make a determination as to whether eminent domain may be appropriately used under *Kelo v. New London*[99] for the purpose of taking a small area of green space with an uninhabited schoolhouse and allowing a downtown car dealership to expand its lot. The judge must resolve the legal question of whether the use of the property is rationally related to a conceivable public purpose.[100] The judge must find eminent domain to be inappropriate if there is only a mere pretext of public purpose with an actual purpose to bestow a private benefit.[101] The standard of judicial review is deferential, but there is still a genuine role for the judge to play.[102] Thus, in determining whether the plan serves a public purpose, perhaps the seminar content will

98. For a discussion of how acceptance of free trips to seminars offered by private entities (as opposed to the continuing education offered to judges by, for example, the Federal Judicial Center or state equivalents offering continuing judicial education) may potentially undermine public confidence in the judiciary, see, for example, Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004).

99. 545 U.S. 469 (2005).

100. *Id.* at 480.

101. *Id.* at 478.

102. In fact, Justice Kennedy's concurrence provides a useful analogy for how we might view the obligation of judges in general to provide reasons in support of their decisions. *See id.* at 490 (Kennedy, J., concurring). That is, we should look to the judge's opinion for a rational and adequately reasoned elaboration of the basis for the outcome. Decisions should not be struck down unless they are clearly erroneous. It is an insufficient objection to argue that there were also other bases for the decision, even bases that would be improper if they had served as the only or the primary reasons, so long as there is an adequately reasoned elaboration of proper public reasons in support of the outcome.

enter the judge's mind. It is, however, no different from, and indeed is probably inseparable from, whatever other influences the judge has encountered along the way. Perhaps a salient influence is instead whatever has convinced the judge to ride his bike to work instead of driving a car. The point here is that whatever room exists for the judge to make this determination, guesswork about extra-judicial influences do not advance the assessment of whether the judge has achieved an actually just outcome. If the judge can articulate the reasoning he has used to determine whether the legal standard is met, the focus should fall on that reasoning itself. If it demonstrates a proper internal point of view, that is sufficient to prove the outcome legitimate.

It is generally accepted that judges come to the role with background traits such as those in this illustration of the hypothetical judge. Cardozo urges us not to worry about them, arguing that because judges come to the bench with such a diversity of background traits and underlying philosophies of law, they will all just cancel each other out in the long run.[103] However, those background traits must of course have some meaning and therefore some impact on the decisionmaking process and therefore on the outcomes for particular litigants, so it is not entirely satisfying to focus on the "big picture" where these things may indeed even out over time.[104] There is some useful empirical data to indicate that judges are indeed influenced by their personal backgrounds and attitudes, but at the same time do feel significantly constrained by precedent.[105] Ultimately, all judges are human and their human fallibility will in many and varied ways pervade their decisionmaking.[106]

All that said, however, to quote one commentator on issues in the judicial confirmation process, "one need not have an empty head to have an open mind."[107] Judges do not come to the bench as blank slates, but surely

103. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 177 (1921).

104. *See, e.g.*, Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1240–46 (2006); *see also* Nugent, *supra* note 21, at 34–48 (suggesting further efforts at judicial education to combat the effects of gender, racial, ethnic, economic, regional, and other background biases in decisionmaking).

105. *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1988) (examining influence of ideology on decisionmaking in context of Sentencing Reform Act and Sentencing Guidelines); *see also* Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) (charting emergence of empirical work on judicial ideology); discussion *infra* Subpart III.C and note 170 (concerning bias as it relates to judges as stakeholders).

106. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie et al., *Judicial Mind*] (examining vulnerability of judges to five common cognitive illusions); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (detailing "illusions of judgment" to which judges are susceptible); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) [hereinafter Wistrich et al., *Deliberately Disregarding*] (examining ability of judges to avoid being influenced by relevant but inadmissible information).

107. Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105 YALE L.J. 549, 575 (1995) (book review).

we would not want them to.[108] Rather, their ability to understand the people before them, and to apply reason to the situations before them, depends upon their not being blank slates but having experience to draw on, all of which will ultimately matter in the decisionmaking in ways that we basically accept.[109]

B. The Role of the Judge in the Pursuit of Actual Justice

If the motivation behind the recusal and disqualification rules is, at root, to ensure impartial judging, one must ask why impartial judging is so important. As discussed briefly in Part I, the function of law is to provide for reasoned settlement of normative disagreements.[110] In order for judges to play their role in that function, they must rely on internal legal reasons in reaching their judgments.[111] The achievement of actual justice by the reasoned use of adequate internal legal reasons is the primary function of judges.[112] It is the purpose for which they exist and therefore must be the driving force behind the development of the rules and practices that establish the practical and ethical structure of the role. The primary assessment of whether judges are fulfilling these role-based obligations should in turn be focused on the "reasoned elaboration" of judicial decisions.[113]

There may be a plurality of proper (i.e., adequate or perhaps "public"[114]) internal legal reasons that will be justifiable in the elaboration of a decision in a given case.[115] This is not about requiring a judge to give the *one* right

108. *See* Nugent, *supra* note 21, at 19–20 ("[J]udges' early lives, their experiences both on and off the bench, and their professional careers instill in them certain ideas, beliefs and attitudes about issues and people (including oneself), all of which facilitate the organization of information by telling judges how to define situations and encouraging them to take action consistent with their ideas, beliefs or attitudes.").

109. *See, e.g.*, ABRAMSON, *supra* note 15, at x–xi, 24; Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 606 (1996).

110. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 11–25 (2001); JEREMY WALDRON, LAW AND DISAGREEMENT 1–4 (1999); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 457–58 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997). One might also think of this as a "coordination" function. *See, e.g.*, W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 378, 378 n.70 (2004).

111. *See* H.L.A. HART, THE CONCEPT OF LAW 116 (1961); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1481–83 (2006).

112. For further discussions of the leading importance of justice in society, see JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999), and Jeremy Waldron, *The Primacy of Justice*, 9 LEGAL THEORY 269 (2003).

113. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (explaining concept of "reasoned elaboration"); *see also* Wendel, *supra* note 111, at 1481–83 (on judicial reason-giving).

114. I use the term "public reasons" here in the sense used in JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1993), and as further explained in Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006).

115. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES 114 (1991). Obviously this article does not subscribe to a Dworkinian "right-answers" thesis. While there may be some value in an aspirational preference for outcomes with greater fit and justification, there is no entitlement to the "best" of these or to any other particular outcome among those that can be supported by reasoned legal explanation. If the

reason, but about giving at least *a* right reason and an explanation of why it is a (or even "the") right reason in this case.[116] This is the fundamental meaning of actual justice, of impartial judicial decisionmaking. If a knowledgeable observer cannot find fault with the legal reasoning provided, then, even if there were other possible ways to go, even if there were things that were not done entirely properly, or ideally, in terms of process, there are no grounds for complaint about the decision.[117] "Hidden" reasons, in particular, would not be grounds for complaint as long as the reasons provided were legitimate—that is, adequately supported by legal authority.

There is no fundamental entitlement to any particular outcome, only an entitlement to one that falls within the range of reasonable outcomes based on adequate legal reasoning. One might argue that there is an entitlement to the *opportunity* to get to any of the outcomes in that range and that what a party (or indeed the observing public) has lost if a judge has, for whatever reason, closed himself off from consideration of certain legal reasons within that range is that very opportunity for a different outcome.[118] However, law in other areas, such as tort, indicates that exposure to risk alone is insufficient injury to give rise to a right of recourse.[119] Harm must accrue. This is true, of course, in other areas of judicial error as well. Unless they constitute "harmful error," actual errors by judges are not sufficient grounds for reconsideration of an otherwise legal outcome.[120] Thus, if a judge who had no improper considerations in mind could have reached the same conclusion

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"best" answer were determinable as a matter of law, the other answers a judge might come to would not be adequate.

116. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]t is more important that the applicable rule of law be settled than that it be settled right.")

117. For far more detailed accounts of what constitutes such adequate reasons, see generally RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RAWLS, *supra* note 114; and Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004). For a discussion that defines the adequacy of legal reasoning in terms of judicial independence, see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 972 (2002), who state that:

> Judicial independence seeks first and foremost to foster a decisionmaking process in which cases are decided on the basis of reasons that an existing legal culture recognizes as appropriate. To use a rough heuristic device, judicial independence seeks to ensure that cases are decided for reasons that can be offered publicly in a brief or oral argument, and not for reasons that, if offered publicly as a basis for decision, would be deemed unethical, improper, or irrelevant. This still leaves room for debate over what sorts of considerations ought to be acceptable in litigation, because that debate is itself part of the public discourse of law and so an appropriate aspect of adjudication.

118. It is certainly possible to find case law to support the proposition that a litigant is entitled to an impartial judge, and more than that, entitled to a judge that also *appears to be* impartial. *See, e.g.*, Brister v. Council of Tacoma, 619 P.2d 982, 989 (Wash. Ct. App. 1980). However, the point of this article is to question the legitimacy of that entrenched conception of the judiciary, so the analysis simply cannot stop there.

119. For further discussion of the concept of risk as harm in tort law, see, for example, Stephen R. Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321 (David G. Owen ed., 1995), and John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002).

120. *See, e.g.*, United States v. Troxell, 887 F.2d 830, 833 (7th Cir. 1989); Lyons v. Sheetz, 834 F.2d 493, 495 n.1 (5th Cir. 1987). *But see* Scott v. United States, 559 A.2d 745, 750, 754–56 (D.C. 1989) (not requiring harmful error).

for the reasons stated by the judge with the hidden reasons in mind, there is no harm on which to base a complaint.[121]

The ideal of judicial impartiality might be described in many ways, but one common popular description draws an analogy of the judge as umpire, calling balls and strikes in a game of baseball.[122] Certainly, there are many "easy" legal cases to which it can be applied, but as soon as a case comes along that does not have an easy or obvious single valid legal outcome, the umpire analogy fails by oversimplifying the job the judge must do.[123] Fairness to judges requires a more critical, perhaps more honest,[124] look at the intent and the meaning of the demand for judicial impartiality, particularly as it involves the practical balance between the judge's personal integrity and professional role-obligations, and a consideration of the implications of the balance we are seeking for the establishment of rules and practices that might more effectively encourage this virtue.

This idea of balancing or minimization of the role of personal views in judicial decisionmaking raises questions not just about the role of the judge but about what constitutes the law that judges are meant to find, follow, and apply. At the most basic level, the judge's task is to decide cases "according to the law," and therefore implicitly, "not according to something else," whether that be personal bias, agenda, whim, or any of a number of other unacceptable bases.[125] Thus a "good" judge (an impartial judge) is one who exhibits excellence at separating personal moral beliefs from decisions about what the law requires in a given case.[126] However, the law is, in some

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121. If nothing else, one can at least be assured that this scenario is no worse than in the current regime in the way it deals with the problem of the disingenuous judge.

122. In his opening statement at his confirmation hearings before the Senate Judiciary Committee, then-Judge John Roberts stated that it was his job to "call balls and strikes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2005) (statement of John Roberts, Nominee for Chief Justice of U.S. Supreme Court), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html. A lawyer and judge as intelligent and experienced as Chief Justice Roberts cannot possibly believe that his job is so simple and straightforward. He was clearly saying this for an audience other than those in the room (although it succeeds as a coded message to that more immediate audience as well). However, even the ABA uses this terminology on its website, explaining the role of judges. *See* ABA website, The Role of Judges, http://www.abanet.org/publiced/courts/judge_role.html (last visited Sept. 27, 2007). Judges who know better may use this analogy specifically because it is the kind of thing that gives the public confidence, but it is false confidence, so it would be better not to perpetuate the metaphor.

123. *See, e.g.*, CARDOZO, *supra* note 103, at 164–65; Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1983–84).

124. *See* CARDOZO, *supra* note 103, at 167–168 (writing, on the theme of subconscious forces on the mind of the judge: "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.").

125. There are of course plenty of other improper bases for legal decisionmaking—tossing a coin, taking a bribe, etc.—but this essay focuses on those relating strictly to the problem of impartiality as it more concretely implicates the ethical challenge to the judge in separating out matters of personal integrity.

126. *See* SARAH M. R. CRAVENS, *Impartiality: Balancing Personal and Professional Integrity in Judicial Decisionmaking*, *in* PROFESSIONAL ETHICS AND PERSONAL INTEGRITY (forthcoming) (on file with author).

instances, insufficiently determined so that, in such cases, considerations that might be deemed "extra-legal" will ultimately come into the reasoning.[127] That is, there are gaps to fill and judges have discretion to fill them, albeit within certain constraints.[128] It is for this reason, among others,[129] that the balls and strikes analogy, so attractive for the purposes of public confidence in an impartial judiciary, will not work. The umpire ideal is not possible to achieve in full in the role of the judge, both because "the law" will not answer every question presented and because the empirical studies of judges prove to us that human beings are simply not capable of completely excluding all of their personal perspectives in their reasoning.[130] Nor would it be a desirable thing even if it were possible. The discretion to fill gaps and to select between multiple legally acceptable paths of reasoning ought to be exercised thoughtfully rather than mechanically.[131] Benjamin Cardozo addressed the point eloquently:

> You may say that there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged

127. There is significant continuing debate about the existence and scope of judicial discretion and what actually constitutes an "extra-legal" consideration, all of which is rather beyond the scope of this paper. *See, e.g.*, DWORKIN, *supra* note 117; HART, *supra* note 111; Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

128. There is room for debate about whether judges, in the exercise of discretion, should reflect what they perceive to be societal norms, or only what they perceive to be the norms built into the corpus of the common law itself. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 236 (1962). There may be insufficient agreement about current societal norms to allow for the former, but there are valid arguments for the attempt. For example, one might argue that judges may want to keep their interpretations of long-standing laws in step with developing norms of the society in which that law continues to be applied. On the other hand, one might argue that it is not the role of the judge to actually guide the development of social norms and that the best practice would be to interpret the law in accordance with what is in the corpus and leave legislators as representatives of the society to make whatever changes appear necessary. For the purposes of this paper, I argue only what I think is easier to settle on in this debate—that the judge should not be *directly* reflecting personal norms and values as controlling determinants in her legal decisionmaking. For an excellent example of how such direct influence on a decision might appear, see discussion in Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 31–33 (1997). That does not mean that there is no room for practical wisdom (Aristotle's judicial trait of "phronesis"). Perhaps that practical wisdom may be in some way a reflection of societal norms, as perceived by a particular judge, but it should not constitute an imposition of the judge's personal morality. For useful discussion of how the judge may bring "situation sense" or "intuition" to judging without directly introducing personal morality, see, for example, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 121–54 (1960), and Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 39 S. TEX. L. REV. 889 (1998).

129. Another failure of the analogy is simply its confusion of impartiality and passivity.

130. *See, e.g.*, John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999); Guthrie et al., *Judicial Mind*, *supra* note 106 (examining vulnerability of judges to five common cognitive illusions); Sisk et al., *supra* note 105 (examining influence of ideology on decisionmaking in context of Sentencing Reform Act and Sentencing Guidelines); Sisk & Heise, *supra* note 105 (charting emergence of empirical work on judicial ideology); Wistrich et al., *Deliberately Disregarding*, *supra* note 106 (examining ability of judges to avoid being influenced by relevant but inadmissible information).

131. *See* Solum, *supra* note 91, at 196–97.

> somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere. Their conclusions must, indeed, be subject to constant testing and retesting, revision and readjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom. The recognition of this power and duty to shape the law in conformity with the customary morality is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice, the *arbitrium boni viri*. That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law . . . . Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side.[132]

Personal, individual perspectives make judges better at doing their jobs, not worse.

C. Defining Actual Bias

If the ideal of judicial impartiality is to fulfill the threshold obligation to sit at the same time as the threshold obligation to separate the personal from the professional, the rules and practices regarding recusal (among other things) need to be reordered. Before getting to how those rules should look, we must examine what constitutes the kind of bias that matters in a way that actually *requires* recusal. There will always be some conceivable bias, given the human nature of judges, so we must balance the competing values at stake in order to determine when bias is of a kind that cannot be tolerated.[133] If the function of judges is the achievement of actual justice, the

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132. CARDOZO, *supra* note 103, at 135–37 (footnote omitted).

133. Apart from what particular people may expect of particular judges, we may separately examine the systemic expectations of judges when they opt into the role. (Of course, even this initial opt-in may impose different requirements for different kinds of judges, but that is a subject for a separate discussion.) The system demands, at a minimum, that from the point of the opt-in forward, judges make every effort while in the role, and to a certain extent even while out of the role (or out of the robe, at any rate, if it is not possible to completely escape the role), to properly separate and balance their personal views and their professional obligations. There is fairly robust agreement that no judge comes to the role as a blank slate, but this initial opt-in requires a person in the judicial role to attempt to put aside passionately held personal beliefs. Judges are typically not considered to be afforded the kind of across-the-board "out" that lawyers are afforded, even after they have opted into their professional role. A judge cannot choose to be a "cause-judge" or a "white-shoe judge" or a "revolutionary judge," and maintain any kind of role-fidelity. Judges have a duty to sit that constrains their choices in ways that lawyers are not constrained. Taking on the role of judge, whether that role is as an impartial umpire or as a trustee of the common law (and therefore arguably to some extent an advocate for the law itself), there is less room for individual moral judgment. This paper argues for a very limited range of acceptable reasons for which the institution will excuse a judge from performing her role. Within that narrow range, where the institution allows her to refrain from performing her role, the idea is that she is excused because she cannot perform her role because her personal role will in those situations dominate over her professional role. Thus, where she is allowed to recuse, she should be required to recuse.

only bias that ultimately matters is whatever impedes the judge's ability to reach a decision supported by an adequate legal reason.

While judges are not currently required to give written reasons for their denials of disqualification motions, more than one judge has written at length to explain that background characteristics, such as age, gender, race, and even previous practice or scholarly focus are insufficient grounds for disqualification.[134] Bias matters when it moves the decisionmaking away from reasoning or outcomes that are in accordance with the law and towards those that are in accordance with something else (e.g., personal, non-legal reasons). There will always be some bias that does not rise to a level meriting recusal, but it is an insufficiently rigorous approach to simply tip the balance toward more recusals, assuming that such an approach will adequately overcompensate by requiring more recusal than is strictly necessary, and thus will at least eliminate all of the bias that does matter along with some bias that does not. This approach is flawed for at least two important reasons. First, it fails to account for bias that does matter but is not perceptible to the outsider, or even, perhaps, to the judges themselves. Thus, *over*-compensating actually does not guarantee compensation for all that the rule might seek to cover. Second, an improper choice to recuse can actually be damaging in the big picture, so over-compensating in this way is not without costs. As discussed below, a system that encourages over-deterrence establishes improper incentives for judges, eliminates necessary opportunities for judges to develop their skills, and sends the wrong messages to observers about judges' capabilities.[135]

Thus, there is always going to be some source of potential bias, and over-compensating will not effectively resolve that situation, so it is necessary to find some more principled way to narrow the category of bias that matters such that a judge must be disqualified from sitting. This requires a closer look at the values underlying the ideals of impartiality and public confidence in the judiciary to explore further how those values, in the context of the reality of judges' need for a private life off the bench, can be balanced with the need to maintain a robust integrity in the judicial role and a concern for the reality, rather than the appearance, of proper legal outcomes.[136]

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134. *See*, *e.g.*, Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (denying disqualification motion based on assertion that judge's previous engagement in civil rights litigation and her gender constituted sufficient evidence of bias to disqualify her from a sex discrimination case); Pennsylvania v. Local Union 542 Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974) (annihilating disqualification motion based on the fact that he was black and gave a speech on civil rights as basis for his disqualification from a racial discrimination case); *see also, e.g.*, BAKER, *supra* note 54, at 55–56; Leubsdorf, *supra* note 10, at 250–52.

135. *See* discussion *infra* Subpart IV.E.

136. Of course there are other, more apparently mundane values to be brought into balance, too, such as concerns for efficient use of judicial resources, avoidance of abuses like potentially improper judge-shopping efforts. *See, e.g.*, BAKER, *supra* note 54, at 55–56. There have been interesting proposals to deal with some of these other issues, for example the use of peremptory challenges against particular judges. *See, e.g.*, ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE (1981). As noted earlier, I take the position that a wholesale shift of focus is necessary,

At some points, the values at stake may be consistent with one another, but there are also tensions that cannot be totally resolved. Aristotelian virtue ethics may provide a useful background principle for the balancing act here.[137] Any given virtue, according to Aristotle, is a balance between opposing vices.[138] Put another way, excessive deference to any of the values we seek to promote through structuring of judicial opt-in or opt-out choices may turn them to vices, and if we focus too narrowly on avoidance of one potential harm, we are in danger of slipping into another.[139]

Pursuing recusals based on appearances risks the elimination, or at least the significant under-valuing, of the concern that judges should be sufficiently personally involved in their societies and communities so that they can understand the experiences of those before them, understand the real life ramifications of their decisions, and so on. Their opportunities to use and further develop the judicial virtue of "practical wisdom" (Aristotle's *phronesis*)[140] is too strictly limited if they are forced to absent themselves from any involvement or activity that might require their recusal on the basis of an appearance standard. To put this another way, we should not so highly value the appearance (or even the reality) of impartiality that we would require a judge to come to the bench as a blank slate. Nor is it even possible to successfully define what would constitute a total lack of improper biases.[141] Perhaps hypothetically there could be a judge who possesses a set of values identical to the set of values embodied in the law itself, but this hypothetical would be more or less impossible to relate reliably to reality.[142] If there is insufficient agreement about what that set of values includes (and I think there is), we would never come to an agreement about which judges possessed them.[143]

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,[144] a friendship,[145] or some family rela-

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rather than piecemeal changes, to address particular values or concerns. *See* discussion *infra* Subpart IV.A.

137. *See* ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., Hackett 2d ed. 1999).

138. *See id.* at 67–72.

139. *See id.*

140. *See* ARISTOTLE, *supra* note 137.

141. *See* Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 486, 496 (2005).

142. *See* Leubsdorf, *supra* note 10, at 261–67.

143. *See id.* Again, judges and justices, particularly in courts of last resort, will regularly deal with moral issues that can easily be characterized as questions of constitutional law. Something of the judges' personal morality is bound to be incorporated at some level in those decisions, but the more transparency is required in terms of opinion-writing, the better.

144. *See* Judicial Qualifications Comm'n v. Schirado, 364 N.W.2d 50, 56 (N.D. 1985) (censuring judge for failure to recuse from case involving former client); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(b) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(6) (2007).

145. *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(a) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a* Per Se *Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575 (2006).

tionship)[146] to another party in the case; a financial stake in the outcome of the case;[147] or a personal belief the parties believe will render the judge's mind less than fully open to the arguments to be presented.[148] The idea behind these concerns is that justice cannot be achieved due to the judge's pre-existing bias in one direction or another. It is important to remember at this stage that there is actually a difference between a bias or an influence and an actual prejudice.[149] If there is prejudice, then we may look for harmful error in the outcome.[150] If there is only influence in some direction, this is something that the judge can and must overcome through discipline and practice.[151]

This Article proposes that the only "bias" that matters is bias that amounts to actual prejudice, and the only scenarios in which recusal is an appropriate antidote to such bias are in matters touching the judge's closest personal relationships.[152] Of course, any standard that involves assessment of human relationships is bound to suffer from certain difficulties of line drawing.[153] However, rather than over-correcting for the possibility of error in that line-drawing process, the proposal here is to rely more heavily on explanations of the legal basis for outcomes.[154] There may be difficulties, for example, in determining exactly when the judge has some personal experience that would not rise to the level of a creating a cognitive incapability to do the job properly.[155] However, this is at least no more indefinite than a standard of apparent bias—it simply encourages a different perspective on the analysis, one oriented toward actuality rather than appearance.

Returning briefly to the line of Supreme Court cases asserting that actual justice must satisfy the appearance of justice affords an opportunity to look at more specific analysis of actual versus apparent bias. The Supreme

146. *See Ex parte* Jackson, 508 So. 2d 235 (Ala. 1987) (mandating recusal where judge's brother was director of bank involved in litigation); *In re* Van Rider, 715 N.E.2d 402 (Ind. 1999) (reprimanding judge for failure to recuse from criminal proceeding against his son); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2) (2007).

147. *See* 28 U.S.C. § 455(b)(4) (2000); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(c) (1990); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(3) (2007).

148. *See* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 916 (2004) (Scalia, J.) (referencing grounds for recusal in Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945 (2003)).

149. *See* FLAMM, *supra* note 7, § 4.1.

150. *See* discussion *infra* Subpart III.D.

151. *See* Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 466–67 (1952) (Frankfurter, J.).

152. I would include in the concept of such close personal relationships or involvements those that involve the judge's personal involvement with an entity before the court that implicates a significant financial stake in the outcome. Such a tie to the case would clearly constitute a matter of actual prejudice, and, as with personal relationships with people, there is reason both to allow the judge room to maintain such stakes and, in these rare instances, to allow the judge to refrain from judging the case. For an argument that even financial interests rising to a level that creates actual bias may be overestimated at present, see Howard J. Bashman, *Is the Stock Ownership Recusal Requirement Too Unforgiving?*, LAW.COM, May 8, 2006, http://www.law.com/jsp/article.jsp?id=1146819928933.

153. On the general difficulty of differentiating between degrees of personal relationships, see SHAMAN & GOLDSCHMIDT, *supra* note 67, at 61. *See also* Miller, *supra* note 145.

154. *See* discussion *infra* Subparts IV.C. and IV.D.

155. This is akin to asking a judge to play both black and white in a game of chess. My thanks to Brad Wendel for this apt analogy.

Court cases that have made this and similar statements stand on shaky ground, most of them because they simply are not really cases about appearances but rather about actualities along the lines described here. *In re Murchison*,[156] for example, deals with the judge who has taken a role in judging the case at an earlier stage.[157] In such a situation the judge has already made some kind of judgment and would be asked, effectively, to play the game against himself. Along similar lines, in *Tumey v. Ohio*,[158] another case cited in support of the reliance on appearances as a matter of due process, the mayor's court judge (that is, the mayor himself in the system as it then operated),[159] actually directly received a portion of the fines he levied against defendants, thus again actually making the judge play against himself, so to speak.[160]

Both *Offutt v. United States*[161] and *Mayberry v. Pennsylvania*[162] involved judges who were alleged to have become personally embroiled in the litigation/prosecution before them. That is, there were effectively what would now be considered *Liteky* scenarios at issue (although of course *Liteky* had not then been decided). As long as there is no extra-judicial source, according to the current standard under *Liteky*, there is no need for the judge to recuse, though he may have become biased for or against a particular party, unless it has gone so far as to render the judge incapable of fair judgment—i.e., unless the judge has become prejudiced on the matter.[163] There is certainly a question as to how such a state can be determined, but *Mayberry* actually gives a strong example here in the concurring justice's

156. 349 U.S. 133 (1955). The Court determined in this case that where a judge had presided as a "one-man grand jury" before whom witnesses had testified, that same judge could not preside in a later contempt hearing regarding the behavior of those witnesses. *Id.* at 134. The Court held that the judge's bias in such a scenario constituted a violation of due process. *Id.*

157. *See id.* at 136 (on relevance of appearances, "justice must satisfy the appearance of justice" (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))).

158. 273 U.S. 510 (1927). The defendant in *Tumey* was convicted before an Ohio village court mayor. *Id.*at 514.

159. In Ohio, mayors now appoint judges to the mayor's courts, so the recipient of a fine is not the same person who passes judgment. *See* OHIO REV. CODE ANN. § 1905.05 (2005). Under an appearance standard, one might argue that such a change does not fix the problem of apparent bias (due to the underlying relationship between the judge and the official who appointed him), but in the approach suggested by this Article, such a change *would* entirely fix the actual bias problem.

160. *Tumey*, 273 U.S. at 517–20. However, language from the opinion itself demonstrates what sets this situation apart from anything to do with mere appearances: "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.* at 534.

161. 348 U.S. 11 (1954). The defendant in *Offutt* was convicted of criminal contempt based on disrespect shown to the judge in the course of his trial for abortion. *Id.* at 11–12. The Court determined that the judge who had become personally embroiled in an antagonistic relationship with the defendant before him should have sought reassignment of the case to another judge based on considerations of justice. *Id.* at 17. The Court in *Offutt* did not state this principle expressly in due process terms. *See id.*

162. 400 U.S. 455 (1971). The defendant in *Mayberry* was convicted of criminal contempt based on his misconduct during the course of his trial for prison breach and holding hostages in prison. *Id.* at 455–56. The Court determined that the trial for the contempt charges had to be held before a judge other than one "reviled" by the defendant as a matter of due process. *Id.* at 466.

163. *See* Liteky v. United States, 510 U.S. 540, 543–56 (1994); *supra* notes 71–75 and accompanying text.

assessment of the sentence handed down as "unprecedented."[164] That is, there was a result that could not be justified with adequate legal reasoning.[165] And in any event, both cases were really in the end about actual bias not an appearance of bias.[166]

There is good reason, beyond that of more principled line-drawing, to protect the judge from the extreme cognitive difficulty of sitting in judgment on matters to which he is so closely tied that he cannot rid himself of a personal prejudice (whether for or against a particular party involved in the case) that does not implicate the same problems that occur if the judge is allowed to recuse for issue—rather than person—related interests. That is, in order to make it palatable (or indeed possible) for qualified individuals to take on that difficult role, it may be helpful on these separate grounds to afford them some sphere of protection for a private life, particularly in terms of their personal relationships. This sphere of protection around the core of their personal lives, keeping the demands of the professional role out as far as possible, may operate as a kind of release valve. It may make it possible for them to do their jobs, but, even so, it should not be extended to eliminate every situation in which it will be a challenge for the judge to separate the personal from the professional. Judges must not use the option of recusal as a crutch. However, in those rare cases in which a judge simply could not separate personal knowledge and involvement from the professional in order to reach an actually just outcome, this small area of "room" for living a private life kept totally separate from professional obligations may be an incidental benefit. In these limited scenarios of personal bias as prejudice, we may safely permit (indeed even require) a judge to step aside, without doing damage to the integrity of the judicial role and without perceptible costs to the resources of the courts.

There are of course other aspects to this concept of bias as prejudice which would allow for proper recusals as a matter of simple facts—that is, where the judge himself has some prior involvement in the matter, whether as an attorney for one of the parties or as a participant in the activities at issue, or as a judge in a lower court, the judge may be said to have knowledge that must prevent him from achieving an adequate separation from the matter to be able to judge it without actual prejudice of some kind.[167]

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164. *Mayberry*, 400 U.S. at 469 (Harlan, J., concurring).

165. For a more contemporary example with a different kind of indicator of error, see *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006), where the appellate court disqualified, albeit reluctantly, a district court judge who had shown a similar level of personal emotional involvement and had a record of many reversals on appeal.

166. *Peters v. Kiff*, 407 U.S. 493 (1972), presents a somewhat different scenario, and one that is at least arguably closer to an appearance case but which can still be distinguished. Peters was not about judges per se but rather about the legitimacy of a conviction based on an indictment by a grand jury that was illegal in its composition due to the arbitrary exclusion of those of a particular race. *See id. at* 496–97, 505. One might draw an analogy to judges though (and the Supreme Court does so itself in order to support its assertion about the importance of appearances), *see id.* at 501–05, but again, all of the cases cited about both judges and jurors are really about actual rather than apparent bias.

167. Several analogous provisions currently appear in MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990), MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007), and 28 U.S.C. § 455(b)(1) (2000)

All of these kinds of bias as prejudice are not (or at any rate ought not properly to be conceived of as) comparable to a judge's personal moral belief in some matter of principle, some idea about what the law should require or how it should work. Personal beliefs in principles may matter to the judge, in fact may matter a great deal, but this is where the job of the judge gets challenging. Prejudice with respect to issues, unlike those involving particular people or entities, should not be curable by allowing the judge to step aside. The implications simply go too far. In order to preserve the integrity of the office, and in order to maintain appropriate confidence in those who hold that office, judges must not be able to pick and choose what laws they will apply. They simply must, as far as possible, divorce themselves from personal views while on the bench.[168]

If the judicial role is to retain any robust kind of integrity, it must make challenging demands of its occupants. As discussed above, further extensions may only bring further into question whether a judge can be impartial in *any* case.[169] It is conceivable that this approach would make it particularly difficult for the judge in cases that hang on matters such as credibility of parties or witnesses, but there will be some margin of error in any arrangement, and in the greater scheme, the potential harm appears less in this arrangement. Others have raised the possibility that there are further personal stakes that might influence a judge's ability to remain impartial, such as incentives for promotion or job offers outside the judiciary.[170] However, these are scenarios in which the judge simply must take seriously the obligations of the professional role, make judgments with an open mind, and provide for review the legal basis for the outcome ultimately reached.

A judge simply may not properly recuse herself on the basis of a personal moral conviction that some aspect of the law is wrong. Even when she has a personal interest in the case, based on her principles or beliefs, she must sit, putting aside her personal principles and focusing on the law.[171]

(judge's personal knowledge of pertinent facts); *id.* § (b)(2)–(b)(3) (judge previously involved as lawyer in the matter); *id.* § (b)(4) (judge's financial interest); *id.* § (b)(5) (judge's involvement as a party or participant in the matter at issue). These provisions are more extensive than those I would propose, but I point to them here to indicate that they are all at least present in some form in the current standards being imposed.

168. One might raise an objection here, arguing that a judge might hold a stake in the outcome of a case (giving rise to actual prejudice) based on his principles but not involving a significant financial interest, a close personal relationship to a person involved in the litigation, etc., if, for example, the judge believes he will face some kind of eternal punishment for an action the law required him to take counter to of his personal religious beliefs. However, as with the earlier discussion of the impropriety of a blanket recusal in all cases in a given area, this Article works on a threshold assumption that the role of the judge requires a basic acceptance of some form of role-differentiated ethics, so that if an individual feels bound to privilege personal integrity over basic professional obligations, that individual should not take on the role of the judge in the first place.

169. *See* discussion *supra* Subpart II.D.

170. *See, e.g.*, Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005) (discussing influence of promotion potential on judicial decisionmaking); Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187 (2006).

171. *See* Wendel, *supra* note 111, at 1479 (on requirement that judge recognize rules of game as legitimate).

For example, even when a judge has a strong personal conviction that it is wrong for anyone to kill another human being, if she is assigned to a case in which administering the relevant law may result in a death, she must sit and apply that law. Certainly she cannot completely escape her personal conviction as she deliberates and reaches a judgment, but she must be rigorous in restricting her reasoning to the framework of existing law.[172] A requirement of transparency in giving written reasoning will be a useful check in such instances.

Allowing judges to recuse themselves whenever their personal principles conflict with law in such a way that they might not wish to sit on a case establishes a potential imbalance, leaving only those in favor of those same laws to administer them. Such an imbalance would undermine the useful exchange over the interpretation and application of those laws among those who view them differently, a process that helps the common law move forward with integrity. This is true particularly for judges who sit on panels as a matter of horizontal dialogue between, or conversation among, those judges in order to reach a balanced conclusion, but it can also be true in matters of vertical dialogue or exchanges between judges at different levels.[173]

Perhaps a more difficult question is whether to allow judges to express their opposition to particular points of law in their opinions, even as they apply the law properly.[174] Such opposition is best expressed in their personal roles off the bench, which is, incidentally, further reason to allow greater freedoms there without fear of ramifications in terms of disqualification (which for many jurisdictions would, of course, require some changes in rules regarding judicial speech, a topic that is beyond the scope of this paper). In their professional roles, when judges speak from the bench or produce written opinions, they ought to stay in their roles and act as agents of the common law itself, leaving their personal views about the law out of the picture. However, in the pursuit of actual justice, it is ultimately unnecessary to excise all remarks extraneous to the legal analysis; their mere pres-

172. If the judge buys into both the social agreement function of the law and her role in enforcing that agreement, which it seems to me ought to be the case with any judge, this may help when she is otherwise somewhat torn between two matters of integrity. That is, she may in difficult cases be forced to choose between violating her personal integrity (by reaching a result that is contrary to some aspect of her personal morality) or violating her professional integrity (by allowing her personal morality to trump her professional obligations). However, if it is a part of her personal moral integrity to respect the rule of law, her job should be easier to do when some substantive issue of law conflicts with one of her beliefs.

173. For further discussion of the role of judicial dialogue, see, for example, VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT (2006); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); and Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73 (2000). *See generally* BICKEL, *supra* note 128 (on role of Supreme Court in public dialogue about constitutional issues).

174. For fuller discussions of the expression of personal views contrary to the legal outcome reached in judicial opinions, see, for example, ROBERT M. COVER, JUSTICE ACCUSED 226–67 (1975), and Kent Greenawalt, *Legal Reasoning and Personal Convictions*, *in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 125 (Werner Krawietz et al. eds., 1994).

presence alongside legitimate analysis does not undermine the actual justice achieved.

All of this is not to say that judges may not from time to time end up unable to fulfill their obligations. Part of their human nature may manifest itself in an inability in an isolated incident to apply the law as it stands due to some moral objection. My point here is only to note that a recusal under such circumstances ought to be characterized as civil disobedience of some kind, requiring discipline.[175] Dependence on recusal in such scenarios is not the right approach in the big picture. Furthermore, by requiring a written explanation of the inability to sit, we make judges seriously reflect on what they are doing, and we make transparent issues that may indicate the judge does not belong in the role.

D. Why Reason-Giving Will Work

Thus, a better approach to the elimination of actual bias is to focus both the work of judges and the assessment of the outcomes they reach on the reasoned elaboration of those outcomes. Judges must give reasons publicly, and those reasons must be internal legal reasons (or what might also be termed "public reasons" or "adequate legal reasons"). This transparency should do more to promote meaningful confidence in the judiciary as well.

A potential objection here is that the written reasoning given, however legally adequate, may be pretextual, may not be the "real" reasoning for the judge's decision, and thus bias will enter in and still be masked.[176] Take the

175. When the judge is viewed as more or less an agent of the common law, the boundaries of legal and ethical behavior for the professional role are largely co-extensive. There may be some complication to this concept when an outcome may be justified in valid legal terms, but some element of improper decisionmaking entered the process along the way. However, if the outcome can in fact be justified in valid legal terms, this may be a level of error we should accept. There is going to be some level of error in any arrangement designed to get at improper bias or improper considerations in the judicial decision-making process. At present, recusals and disqualifications based on appearances err on the side of being far more over-inclusive than necessary. This does damage to the integrity of the judicial role that exceeds the damage (if any) done when a justifiable legal outcome is reached at least in part on an (unknown) improper basis. As long as we are in a position from which we are only guessing at what went into a judge's decisionmaking process, we should simply look for a satisfying legal justification of the outcome, rather than disqualifying the judge from the start based on a guess that has the capacity to undermine the judge in multiple ways.

176. Some of those with whom I have discussed this proposal have suggested that the problem of pretext has an analogy in employment discrimination law and in *Batson* challenges. In those situations, when there is a question about a possible unacceptable basis for a decision, a valid non-discriminatory explanation for the course of action taken (e.g., for the challenge of a potential juror or the termination of an employee) must be given. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 97–98 (1986); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). The situation is somewhat different here because, among other reasons, the credibility of the person giving the reason is bound up in the analysis of the validity of the reason. There is simply less in these discrimination scenarios that can be split into categories of "adequate" and "inadequate" than what is possible in the context of giving internal legal reasons for judicial decisions. *See* discussion *infra* Subpart III.A (comparing other approaches to pretextual reasons).

Having said this much, it is worth going further to assert that in the recusal scenarios that arise under an appearance analysis, the situations most prone to speculation about improper influences are those in which the underlying law—the test that must be analyzed or the standard that must be met—is subject to a variety of interpretations or leaves ample room for characterization. Of course there is a temptation to

example of a judge who tosses a coin[177] or takes a straw poll[178] of those in the courtroom, purporting to consider making his decision on the basis of the results. If either of these results formed the "real" basis for a judge's decision, but the judge could nonetheless articulate a valid legal explanation for why the outcome reached was the proper one, without any reference to breaking a tie by arbitrary means, it is not at all clear that an objection could be raised to the validity of the outcome.[179] Take, on the other hand, a hypothetical judge who considers in the privacy of his chambers the merits of the litigants' opposing arguments, determines that each has an effectively equally valid argument, and ultimately chooses between the two based on the toss of a coin—all behind closed doors. If the judge were to state publicly that, while it is a close call, the reason for the outcome is that on the whole the plaintiff's argument is "more persuasive" or "a better policy," as long as that argument is in fact a valid legal consideration for the case at hand, the secret coin toss need not affect the legitimacy of the outcome.

The one major difference between these two coin toss scenarios is that of appearances. In the one, the coin toss was public and in the other it was private. In both, however, the outcome of the case could be supported by an adequate legal reason. The question becomes one of whether the damage to public confidence in the judiciary that comes from the public coin toss is sufficient to delegitimize the legally supportable outcome. As long as the fundamental concern of judicial ethics is to provide actually just outcomes, the coin toss should not delegitimize the *outcome* in either scenario. It demonstrates a different problem, one that ought certainly to be dealt with—that is, the degradation of the judicial role. It tarnishes the dignity of the role, and on those grounds, it may well be appropriate to discipline the judge who tosses a coin in public. However, whatever lack of dignity, whatever lack of

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wonder about influences on judges who must make determinations based on relatively indeterminate standards, such as whether a plan for a piece of property is "for public use," but the problems these phrases raise ought not to be laid at the feet of the judges who must interpret and apply them. These are problems (if they are problems at all) of indeterminacy in the authority of substantive law. There may be value in such indeterminacy. It would be disingenuous to assert that there are not many ways that such standards might be interpreted, but that is a part of the law, and, in such circumstances, judges have discretion within the bounds of reasonable interpretation. *See* further discussion of discretion *supra* note 128.

177. *See In re* Daniels, 340 So. 2d 301, 307 (La. 1976) ("We find that on numerous occasions during the period in question, respondent engaged in conduct in open court that gave the appearance he was deciding the guilt or innocence of defendants upon the toss of a coin. However, evidence does support respondent's position that, prior to the coin flipping, a decision of guilt or innocence had already been made by respondent and transmitted by him to his bailiff either on a slip of paper or by a pre-arranged signal. Nevertheless, we agree with the commission that respondent's conduct gave a contrary appearance to the public. Such unjudicial conduct cannot be condoned.").

178. *See In re* Best, 719 So. 2d 432 (La. 1998). In this case, the judge requested those present in courtroom to vote on whether they believed the pro se defendant in a battery case was guilty or not guilty (by a show of standing or sitting at the judge's direction). *Id.* at 434. The judge asserted that the purpose of the poll was to "involve the public in the judicial process" but that he did not in fact rely on any input from the experiment in reaching his determination of the defendant's guilt. *Id.* at 435.

179. The courts in each of these cases focused on the problem of judicial conduct and the bad effect on public confidence but did not specifically question the legitimacy of the actual legal bases for the outcomes. *See In re Best*, 719 So. 2d at 432–37; *In re Daniels*, 340 So. 2d at 301–09.

respect for the job and for the power entrusted to the judge may have been shown, it does nothing to undermine the validity of the outcome as long as the outcome can be supported by an adequate legal reason.[180] That is, as long as a judge who did not perform a coin toss could have reached the same result based on the same legal reasoning, the problem lies with the judge's behavior, not with the judgment.[181]

Where concerns other than judicial impartiality are at issue, the analysis may be different. When considering the standards for upholding the dignity of the judicial role—another value bearing closely on public confidence—appearances may matter as much as or perhaps even more than actuality, regardless of the uncertain relationship between those appearances and the accomplishment of actual justice. It is inappropriate for a judge to announce in open court that he will make his decision about the outcome of a case on the basis of a coin toss or a vote of the crowd assembled in the courtroom for two reasons. First, such conduct gives the appearance of an abdication of the judge's duty to decide cases according to the law and thus undermines public confidence in the judiciary. Second, by the terms of such an announcement, the judge is violating a separate duty to preserve the dignity of the office.[182] If the judge who asks for the vote in the courtroom, or tosses the coin is actually kidding, and has no intention of giving any weight to such arbitrary tie-breakers in making his decision, and even if no one in the room even attempts to vote one way or the other, then there is still an appearance problem that matters even though there may be no problem in terms of reaching a legitimate legal result.[183] The reason that appearance is significant in such a situation, however, is that the underlying value at stake (dignity of the office) is one that is almost entirely *about* appearances, whereas the more significant underlying value at stake with regard to judicial impartiality is the actual fairness of the decisionmaking process.[184]

Thus, if there is nothing wrong with the substantive legal reasoning provided by the judge, there is no meaningful difference between the coin toss (public or private), the judge's intuition, or any other method a judge

180. *See* Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 947–64 (2006) (arguing that Geyh's proposed taxonomy overstates demarcation among types of accountability); Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political* Rhetoric, 56 CASE W. RES. L. REV. 911, 917–24 (2006) (describing taxonomy of judicial accountability).

181. *See* Geyh, *supra* note 180, at 919–22 (describing "behavioral" type of accountability).

182. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl., scope (2007). The word "dignity" was eliminated from the portions of the 2007 revised version that specifically subject the judge to discipline—that is, it no longer appears in a "Rule," but remains an aspirational standard in the Preamble and Scope sections. *See id.*; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1, Canon 1 cmt., Canons 3B(4), 4A(2) (1990).

183. Indeed, in *In re Best*, the judge who polled the courtroom asserted he had no intention of relying on a courtroom poll in his decisionmaking. 719 So. 2d at 435. The court reviewing the incident pointed to the behavior as problematic because it "destroys the credibility of the judiciary and undermines public confidence in the judicial process." *Id.* at 436. There is no claim by the reviewing court that the behavior actually demonstrated that the outcome was illegitimate due to actual improper influences in the decisionmaking process. *See id.*

184. *See generally* discussion *supra* Subpart III.C.

might have for deciding a "very hard case."[185] It is equivalent to a "judgment call" and as long as the judge can articulate some basis for that judgment, whether honest or not, the outcome is no less legal. Again, if the judge actually articulates an illegitimate reason, there will be basis for an appeal, and depending on the degree of the problem with the reason given, there may be some basis for removing the judge from the role entirely.[186] But to simply guess at what might be going on in the judge's head is too unreliable an approach. Judges ought to be carefully selected, and thereafter carefully observed and challenged where warranted, but overall they ought to be given the benefit of the doubt.

Another potential objection to the legitimacy of a scheme that relies on the giving of adequate legal reasons might raise the issue of judicial cleverness. It is possible to imagine that a judge may be inclined to work harder to find a clever or roundabout but legally justifiable way to reach the outcome that aligns with her personal beliefs. However, as long as we can never know what judges' "secret reasons" for reaching certain outcomes may be, we must simply rely on looking at the legitimacy of the reasoning as they explain it. One might take this logical contortion a step further with the following example of what could conceivably happen in a panel decision context:[187] Judge A wishes, for purely personal reasons, to see Outcome X achieved. However, Judge A does not see a legally justifiable way to get to Outcome X. Instead, Judge A manages to convince his fellow panelists of some disingenuous but superficially acceptable reasoning to get to Outcome X. (Judge A sees the flaw in the reasoning, but does not explain it to his fellow panelists and neither of them discovers the flaw independently.) Judges B and C sign a majority opinion reaching Outcome X in reliance upon the superficially acceptable reasoning. Judge A dissents without opinion, thus preserving, he would argue, both his personal and his professional integrity. This is a far-fetched possibility in several aspects, but it is worth considering. The advantage of requiring and relying upon written reasoning for opinions is that it, better than any guesswork about appearances, has a better chance of ferreting out even a convoluted problem like this one. First, in explaining the hypothetical majority opinion, Judges B and C are more likely to discover the flaw in the first place. Second, Judge A would be re-

185. The harder question is what to do with improper reasons that are provided in an opinion *in addition to* proper reasons. If what a judge says in an opinion indicates that the judge may be relying on improper reasons, or if it indicates some kind of inappropriate methodology indicating the judge is unsuited to the requirements of the role, then the solution is to rethink removal procedures, not to use appearance standards for recusal to encourage judges to keep their views quiet. Others would simply advise judges to keep quiet about the personal reasoning they use to tip the balance in very hard cases to avoid problems of any kind. *See* Kent Greenawalt, *Religious Expression in the Public Square—The Building Blocks for an Intermediate Position*, 29 LOY. L.A. L. REV. 1411, 1418–19 (1997) (noting that even if judges do use, for example, religious reasons, to tip the balance, they should not say so).

186. *See* Geyh, *supra* note 180, at 922–24, 934 (discussing "decisional" accountability, noting intentional error as violation of oath).

187. This hypothetical was raised by Hon. Guido Calabresi in conversation at the Boston University symposium on "The Role of the Judge in the 21st Century" in April, 2006.

quired to explain the reason for the dissent, which might short-circuit the plot. Third, the flaw may be discovered by those reading the opinion and reconsideration may be sought. In the long run, the requirement of producing a written explanation will produce a set of results that makes for greater integrity of the common law as well as the judicial role.[188]

Public confidence in the judiciary is valuable, but only if it really means something. It can only mean something if it has a reliable basis. Guesswork about the personal proclivities of judges will not provide a sufficiently reliable basis, and thus should not be used for the purpose of promoting public confidence. Even if it were advisable to focus on appearances for the sake of public confidence, it would be better to look at the appearance of the stability or the determinedness of the law, rather than the identity of the judges. Such an approach might be just as doomed in some ways, but it would at least put everyone on the same footing for arguing about the substance of the legal reasoning and conclusions rather than requiring guesswork about the workings of judicial minds, a matter which the judges themselves may not even understand.

E. Discretion, Gap-Filling, and Judgment—Promoting the Integrity of the Role

It is essential for both judges and observers to accept that judging is difficult, and that it is difficult, at least in part, because it requires judgment. And to be fair, it is only a perverse logic that seeks to make judges' lives easier by imposing a complex set of rules about recusals in order to let them off the hook where it would be difficult to perform their jobs properly. It will never be possible for a judge to eliminate all personal beliefs and biases, so the important question is what to do about them. Assessment of judging simply cannot be based on appearances; it has to be based instead on realities. Appearance analysis sets up the wrong incentives and sets the stage for muddied distinctions. Ultimately it goes so far as to eliminate certain conditions that are necessary for judges to achieve the kind of judicial virtue that they need to develop to be successful at their difficult job.

The current regime, while nominally setting out a duty to sit on cases whenever the rules permit,[189] in fact undermines the meaningful fulfillment of that duty to sit by excusing judges under an appearance standard. To excuse judges from fulfilling their role obligations for any reason should be rare because the less judges are required to practice their difficult task, the less opportunity they have to improve at it, the more eroded the areas be-

188. *See also* discussion *infra* notes 224–28 and accompanying text.

189. To be fair, courts are not entirely consistent in their approaches to the question of the duty to sit. *Compare* Bradley v. Milliken, 426 F. Supp. 929, 932–33 (D. Mich. 1977) (judges have duty to sit unless the law requires recusal), *with In re* School Asbestos Litig., 977 F.2d 764, 784 (3d Cir. 1992) (questioning existence of general duty to sit). For a discussion contemplating an affirmative duty to decide, see Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121 (2005).

come in which a judge's impartiality is accepted, and the less legitimacy judicial decisionmaking can retain—thus, ultimately, there will only be further damage to the integrity of the judicial role itself.[190]

If a judge cannot work out some form of role-differentiated moral theory to comfortably balance her personal and professional integrity, then she should not opt into the judicial role in the first place. If she can envision herself being incapable of executing a particular law because she is opposed to it, then this is the wrong job for her. It takes a person of strong character to succeed in the judicial role.[191] That is not to say that there are no avenues by which she might vent her frustration with the law as it stands, but as a threshold matter, she must be *capable* of applying the law, whatever it may be.[192] She may have deeply held moral convictions—she may believe that it is wrong to participate in the death of another human being, for example, but she may not legitimately *use* that belief as the basis for reversing death sentences or denying judicial bypass petitions when there is no adequate legal reason to support her doing so.

A judge simply has to buy in, as a threshold matter, to the idea of enforcing basic social agreements about the substance of the law—much more so than a lawyer has to, for instance.[193] A judge has to buy in so strongly that she is willing to administer that law in any context, excepting of course, those rare cases that involve some personal connection that renders the analysis not about willingness, but about cognitive incapability to separate the personal from the professional. The judge is bound by her role and by the substantive body of legal authority that she interprets and applies. Hard questions that are not clearly answered by the law itself, or questions for which more than one answer appears, of course leave room for—and indeed *require*—judgment. That may not be an explicit invitation for the judge to *rely* on personal convictions, but it requires an acknowledgement that those convictions will play some part in shaping or shading the judge's decisionmaking approach to whatever guidance the body of established law does provide.

Real legitimacy depends more on reality than appearances. Appearances will always be subject to the significant problem of perspective. If judges give public reasons, observers can focus on those and deal in terms of what is real rather than worrying about what might be going on behind the curtain, so to speak. Actual justice is ultimately more important than the appearance of justice, and therefore the focus of the set of rules and practices governing judicial practices such as recusal and reason-giving should focus on actualities, not appearances of what might be.

190. *See generally* Cravens, *supra* note 89.

191. *See* Solum, *supra* note 91, at 189–94.

192. *See* COVER, *supra* note 174, at 226–56; Letter to Chief Justice Drowata, *supra* note 57.

193. *See* discussion *supra* note 133 (on opt-in expectations).

IV. PROPOSAL FOR A NEW APPROACH TO RECUSALS, BIAS, AND PUBLIC CONFIDENCE

A. Why Other Proposals Do Not Go Far Enough

It is worth laying out briefly some of the proposals that others have made about fixing problems in the current regime of recusals in order to show where the proposal of this article fits into that landscape.[194] For example, some who have written in this area have suggested the implementation of peremptory challenges of judges, an approach that would largely eliminate the need to make decisions about realities versus appearances by giving the parties power to remove a judge automatically for any reason or no reason.[195] Such an approach might lend a certain efficiency to the process and may satisfy the parties to the case, but avoids rather than resolves the problems of actual justice and public confidence. Others suggest an attempt to educate judges in specific ways to limit the effects of bias.[196] Such an approach perhaps laudably aims at the problem of perspective and perhaps even the problem of public confidence, but it is unworkable and does not satisfactorily address the issue of achieving actual justice in a determinable way. Still others have suggested alterations in who makes particular decisions about disqualifications.[197] However, without eliminating appearance-based analysis, it is impossible to completely avoid the problem of the unreliability and inconsistency of *perspective* on bias.[198] Furthermore, it will simply require more work of judges and may even undermine public confidence to have judges judging each other.

Another suggestion, obviously only applicable to those jurisdictions that maintain popular elections as a method of selection for the judiciary, would tighten rules for recusals in relation to campaign contributions.[199] There is even proposed legislation to create an Inspector General for the federal courts which could conceivably have an effect on recusals and disqualifications as well.[200] It is not clear exactly what effect this would have if the stat-

194. Not everyone thinks there is a problem in need of a solution here. For arguments in support of the current appearance standard see, for example, Gray, *supra* note 45, and Deborah Hellman, *Judging By Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653 (2001).

195. *See* Bassett, *supra* note 21, at 1251–56; CHASET, *supra* note 136; *see also* Miller, *supra* note 85 at 482–87 (including proposal for "panel-exclusion approach").

196. *See* Nugent, *supra* note 21, at 58–59.

197. *See* Abramson, *supra* note 24, at 559–61.

198. For a discussion of a procedural approach to the problem that still maintains an emphasis on appearances, see Frost, *supra* note 43, at 552–66. Prof. Frost makes useful suggestions for ways to deal with the potential problems of assessing the need for recusals on the basis of appearances, primarily by adding more layers of procedure, more safeguards, and so on. *Id.* However, rather than adding more process, I suggest that we approach the problem from a wholly different angle that will require less judicial time and energy and will ultimately be more transparent and more satisfactory where it really matters, which is in the achievement of actual justice rather than mere appearances.

199. *See* Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667 (2001).

200. *See* Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong.

ute were passed, but it would in all likelihood be a bad development for public confidence and would be no greater guarantee of actual justice.

Finally, one very insightful analysis proposes three general principles as guidelines for making decisions about whether to sit.[201] Developing a model of "[a]djudication as [c]onstrained [d]ialogue,"[202] Professor Leubsdorf suggests that judges must exclude personal considerations,[203] "be willing and able to consider all arguably relevant arguments,"[204] and not be allowed to sit "if she has extrajudicial knowledge of facts relevant to the case before her."[205] As should be clear from what has gone before, I agree wholeheartedly with each of these prerequisites for judging, but I believe, first, that they require stricter application and second, that there needs to be a more concrete way to assess whether they have been sufficiently achieved—that is, whether actual justice has been done. Professor Leubsdorf's proposal is admirable—it just does not go quite far enough beyond aspirational theory.

Thus, this sampling of alternative approaches suffers from a variety of problems. Some only address a small part of the overall problem, some lack sufficient guidance or force, some would be impractical to implement, and some would only raise other difficult problems. Instead, a wholly different and larger-scale new framework for addressing issues of impartiality in judicial decisionmaking is necessary. This Article does not propose the total elimination of recusals but rather their severe curtailment. Several of the specifically enumerated categories requiring recusal in the current version of the Model Code are perfectly logical and would remain under my proposal, though in altered forms and for different reasons.[206] However, on the whole, I would so change the approach, particularly as regards the appearance standard, as to be writing more or less on a blank slate.[207]

B. Curtailing Recusals

Judges should recuse less often. The duty to sit and to decide on the merits must be acknowledged and fulfilled. A judge should not step aside just because she feels strongly about an issue or an individual involved in a

(2006); S. 2678, 109th Cong. (2006) (companion bill).

201. *See* Leubsdorf, *supra* note 10, at 279–89.

202. *Id.* at 279.

203. *Id.* at 283.

204. *Id.* at 286.

205. *Id.* at 289.

206. *See* discussion *supra* text accompanying notes 144–51.

207. There is a difficult balance when proposing a new approach to any component of a system, between accepting the other parts of the system as they are and allowing for arguments for other adjustments to be made. I assume for the sake of the arguments here that any change will have to occur as a part of a more comprehensive overhaul of the process that will take time and require a certain amount of flexibility. A prime example in this context is the issue of judicial selection mechanisms. One might well argue that the approach I propose would not be workable in those jurisdictions that maintain popular elections of judges. I agree that judicial elections would throw a wrench in the works of this approach and would, for reasons too numerous to cover in a footnote, prefer the elimination of popular elections of judges to the reworking of the approach to recusals.

matter before her court. First, as discussed above, allowing judges to abdicate their role through unnecessary recusals would eliminate the kind of balance and dialogue that are essential to the ongoing improvement of the law.[208]

Second, such a possibility would allow judges to pick and choose the parameters of the law they will enforce, giving the impression that they are in some way above the law.[209] Consequently, it could give rise to the idea (both in the minds of judges who would exercise such a prerogative given the opportunity, and in the minds of those observing them) that a judge's application of a given law constitutes a personal endorsement of that law. This would create just the kind of confusion of the personal and the professional in the practice of judging that detracts from the ideal of judicial impartiality. Whenever one judge might decline to apply the law in some area—as the Tennessee judges have with respect to bypass petitions[210]—it would put additional pressure on other judges to take up the slack, giving the possible impression in the process that those judges who do handle the case are making some sort of statement by doing so. Ultimately, such a chain of events would undermine both the authority of law and the legitimacy of the judicial role.

Third, an approach that would require judges to do their job across the board, rather than selectively, might actually better protect judges in their personal lives. That is, strengthening the requirements imposed by the role may aid them in drawing a brighter line to separate the personal and the professional. A manifest reduction in the opportunity to exercise personal choice in the professional role and a strengthening of the obligation to apply the law in all cases may make it easier for a judge to go forward in a case that challenges his personal views, understanding his personal and professional roles to be clearly morally differentiated.[211] As a practical matter, the more judges have to sit and make tough decisions, the better they should become at doing so, and the less difficult it may come to seem to them. Furthermore, judges can address any qualms they may have about how they are perceived for issuing opinions that may be counter to their own understandings of what is morally right by providing clear explanations of the legal principles they are obligated to follow.[212]

Finally, assuming it were not a part of a pattern of similar behavior, if the judge felt strongly enough that in some particular case it would not be possible for him to judge impartially, the judge could choose not to sit on the case, but in doing so would be abdicating the judicial role in a way that

208. *See* discussion *supra* text accompanying note 173.

209. *See* Letter to Chief Justice Drowata, *supra* note 57.

210. *See, e.g.*, *id.*

211. *See, e.g.*, COVER, *supra* note 174, at 243–49 (discussing John McLean's adherence to law in spite of strong abolitionist views).

212. *See id.* at 232–36 (pointing out emphasis on formal constraint by abolitionist judges who disagreed with the law they applied).

would amount to civil disobedience rather than a proper recusal.[213] Most importantly, in the approach proposed here, the judge would be required to provide reasons for doing so so that observers might meaningfully assess the judge's performance in his professional role.

C. When to Recuse and How to Give Reasons

As discussed earlier, it is necessary to acknowledge the reality that every judge will come to every case with some background traits that will have a bearing on her decisionmaking. However, this proposal differs from the rest in eliminating recusals for anything other than relationships to people or entities that are so significantly tied to the judge personally as to render the judge effectively incapable of distancing herself sufficiently to reach an actually just outcome. Such circumstances should be rare. Furthermore, they would be best judged by the judge herself.[214] This is not about appearances or about public confidence, but rather about allowing the judge an escape hatch where it would be unfair to demand that the judge achieve actual justice. What matters in this proposal is to get at bias that really matters, bias that amounts to prejudice that will impede the judge's ability to reach an actually just outcome. This exception to the duty to sit must be limited. It does not extend to particular issues about which the judge has strong feelings one way or another. In those matters the judge may have a challenging job to do in separating the personal from the professional to achieve the ideal of impartiality, but that is the nature of the job, and is knowingly undertaken at the outset, when a person chooses to inhabit the judicial role. Only with such a strong duty to sit can the judicial role maintain sufficiently robust integrity.

I propose a rule by which judges would recuse themselves sua sponte only when they have an improper bias that amounts to a closed mind in a given case. Thus, a judge should, in any given case, consider whether there is anything that sets him apart from other judges such that he cannot act impartially in that case. If, on reflection, the judge determines that he or she cannot actually maintain an open mind, this condition would not be waivable by the parties or subject to any time constraints. The judge would be required in these rare instances to provide a written explanation of the basis for the recusal, however brief, as long as it is clear. That explanation might be kept under seal at the discretion of the chief judge of the particular court, in case of highly personal or sensitive matters, in order to protect a judge's or other person's privacy as needed. The explanation need not be published in any specific way, but should, at a minimum, be available upon request

213. *See supra* text accompanying note 175.

214. *See* Fieger v. Ferry, 471 F.3d 637, 644–46 (6th Cir. 2006) (a challenge to the constitutionality of the Michigan Supreme Court rule allowing judges to decide these issues for themselves argues against this proposition).

(either freely, or in case of an explanation under seal, on a showing of cause).

Under this new approach, there would be no more disqualification motions filed by parties for alleged bias.[215] A party might file a disqualification motion for improper judicial conduct, such as taking bribes or conducting coin tosses in open court, but the basis for those motions would not be either actual or apparent bias. The basis for those motions would be the judge's failure to comply with other aspects of the code of conduct, such as preserving the dignity of the office or failing in some other way to do the job of the judge. Those motions would be based on some indication that the judge is failing to comply with basic obligations of judicial office, but not the judge's apparent prospective inability to reach an actually just outcome due to bias.[216]

Such motions, if filed while a case were still pending, would be directed to the chief of the court in question. The chief might then remove the judge from the case for conduct that indicated to the chief that the judge in question could not reach an actually just outcome in the case, or for any other conduct-related reason the chief found compelling, but not on the grounds of apparent bias alone. If the chief found no violation requiring removal from the case, the complaint might simply be forwarded to the ordinary body handling disciplinary matters, and the judge would proceed with the case, ultimately giving a reason for the outcome that could be, at that later point, assessed for its legal adequacy. Otherwise, a litigant who would in the current regime desire to file a motion to disqualify for alleged bias (actual or apparent) would, under the new framework, simply proceed with the case and wait for the legal reasoning provided by the court for the outcome reached. If there were a problem with this reasoning, then there would be grounds for an appeal and, as necessary, a disciplinary complaint, but if there were no problem with the reasoning, then ultimately no party could argue that they have lost something to which they had an entitlement in the first place.[217]

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215. Such a suggestion may sound extreme and would indeed go strongly against current practice, but it is worth noting that at common law there was no such thing as disqualification of a judge for bias. *See, e.g.*, FLAMM, *supra* note 7, §§ 1.2.2, 1.4; Leubsdorf, *supra* note 10, at 246. I suggest we have taken the wrong track and would do better to start fresh and correct our direction with a wholly different approach. I hardly expect that this suggestion will be comfortably received—the idea of disqualification for bias appears to be too deeply entrenched at this point. Instead, the real aim of this project has been to better understand the underlying conceptual structure of the judicial role by exploring that structure as it has to do with recusals. This, however extreme it may appear, is the suggestion I have come to.

216. For a thoughtful account of the concept of behavioral accountability, see Geyh, *supra* note 180, at 919–22.

217. It has been suggested that this proposal allows judges effectively to play with loaded dice—that such a scheme would allow judges to be results-oriented and make it look like deliberative reasoning in the public explanations of their decisions. This analogy will not work. The very point of rolling dice is to get a result with the assurance of randomness, whereas randomness is hardly a desirable goal in judicial decisionmaking. The point of judicial decisionmaking is to arrive at a result that can be adequately supported through reasoned elaboration of the authority of law and its application to a particular set of circumstances. The processes are simply too dissimilar to analogize in this way.

D. When to Sit and How to Give Reasons

In this new framework, any time a judge sits on a case, she need not provide any explanation of why she did not recuse.[218] Instead, she must provide adequate legal reasons to explain her decision so that an observer may determine (on the basis of realities rather than appearances) whether the decision is legitimate.[219] This explanation should be available in some written format. It need not be long or elaborate, just sufficient to explain the basis of the ultimate judgment to provide a record on which to assess whether that judge is in fact deciding cases for legally viable reasons.[220] Provision of public reasoning allows scrutiny on a level playing field. If the reasoning does not hold up as adequate, the parties could then go through the process of an appeal to get to the right reasoning, but might do so without having to rely on guesswork or struggle with problems of perspective.

An objection likely to be raised specifically by members of the judiciary is that the requirement of providing written explanations of legal reasoning for all dispositive outcomes is too great a burden—that it will take too much extra time to comply with such a requirement, resulting in a further backlog of cases (with all the accompanying negative ramifications of such a backlog). This argument is not compelling. Looking first at the legitimacy of the objection, if the judge cannot easily explain the outcome and justify it, that only indicates that the judge should not yet have reached a conclusion. It should not constitute an insurmountable increase in labor to have to articulate an adequate legal reason for a decision. However, even to the extent that the objection has any legitimacy in the first place, there are many avenues available to address it. The extra time required to reduce the reasoning to written form, in the vast majority of cases, should not be significant. These explanations need not be exhaustive, they need only be sufficient to make clear the reasoning and authority relied upon. Furthermore, particularly in the case of trial court judges, who often make rulings from the bench, a transcript would be sufficient to count as a writing, so long as the verbal ruling included a sufficient legal basis for the decision.[221] A state-

218. To explain sua sponte why it *is* appropriate to sit on the case would likely raise more questions than it would settle, indicating that there was at least some cause for concern to make the judge speak to the question.

219. *See, e.g.*, Ferejohn & Kramer, *supra* note 117, at 972; Solum, *supra* note 114, at 1469.

220. Of course another problem with failure to provide reasoning for recusal or disqualification in the current regime is that it may preclude review on appeal. *See, e.g.*, Slizyk v. Smilack, 901 So. 2d 999, 1000 (Fla. Dist. Ct. App. 2005).

221. On the topic of trial court level judging, one might object that this approach to recusals fails to take into account the numerous individually non-dispositive decisions that a judge makes from the bench—decisions on the admissibility of evidence, the validity of objections, etc.—that may subtly shape and direct an outcome that the judge may never actually reach herself. The shaping and direction may affect a jury's decision, it may push for an out-of-court settlement, etc., and in such scenarios, the judge would never be placed in a position of providing an explanation for the outcome. However, each of those decisions along the way can, in fact, be examined for its legitimacy after the fact. There should be a record of all of those issues as they came up in court and as the judge made rulings. The record should provide a solid resource for an interested person to point out the illegitimacy of particular deci-

ment on the record such as "I'm going to deny this" or "I'm going to sentence the defendant to [x number of] years" would be insufficient. There has to be a "because" somewhere in the ruling, along with a citation to legal authority or other manifestly legal reasoning. Furthermore, to the extent that even in light of these points, there is still too much extra work for judges to do, one obvious approach to resolving that problem is to expand the judicial ranks.[222] This is, of course, a move that judges have, as a body, largely rejected in the past.[223]

E. Ancillary Benefits of a New Approach

There are several potential ancillary benefits of the proposal presented here. First, the discipline and practice may develop (and by being required, may better institutionally support) good habits.[224] If the judge's reasoning is solid, it should not take significant additional effort to write it out once the judge has thought it out. However, if there are flaws in the reasoning, they will be much more readily apparent when the judge attempts to reduce that reasoning to writing—what is often referred to by judges as an "opinion that won't write."[225] Thus, the proposal to require written reasoning provides a benefit beyond addressing public confidence concerns about judicial impartiality: it has the potential to avoid erroneous outcomes.[226]

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sions made. And, if no error is apparent, if the judge had discretion to rule as he did, there is no entitlement to a different result.

222. Many would argue, and I would wholeheartedly agree, that this step of expanding judicial ranks is one that needs to be taken for reasons both related to and independent of these concerns about producing written explanations of decisions. *See, e.g.*, William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

223. *See, e.g.*, J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994). *But see* Hon. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 LOY. L.A. L. REV. 1 (1993). *See generally* GORDON BERMANT, EDWARD SUSSMAN, WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (Federal Judicial Ctr. 1993), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/impomora.pdf/$file/impomora.pdf.

224. For those who subscribe to the concept of virtue jurisprudence, this makes particular sense in light of the Aristotelian focus on the importance of practice and habit in developing virtues. ARISTOTLE, *supra* note 137, at 9.

225. Reason-giving is appealed to in other legal contexts outside of opinion-writing for added accuracy in results. For example, the IRS requires attorneys to "describe the reasons for the conclusions, including the facts and analysis supporting the conclusions" for opinions on tax avoidance. 31 C.F.R. § 10.35(c)(3)(ii) (2006). The repeated emphasis in this subsection on the practitioner's ability to reach a reasoned conclusion on any given issue, or else to explain the concerns that render the practitioner uncertain about the conclusion, shows the value placed on forcing the proponent of a conclusion to back it up with explanation.

226. A group of authors who focus on empirical studies of the cognitive psychology of judging suggest that another way to achieve this goal of better deliberative (rather than intuitive) decisionmaking would be to focus on other techniques, such as divided decisionmaking, where possible. *See* Chris Guthrie, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Judicial Intuition* (Feb. 9, 2007), https://www.law.berkeley.edu/institutes/csls/lawemotion_conference/Judicial_Intuition.pdf. This and other approaches suggested by these authors are appealing, and can be promoted and complemented by the ways in which other rules and practices of judging are structured, particularly through the requirement that the judges go through the process of explaining their reasoning. It will be harder (though

Furthermore, judges, being forced to focus on legal reasoning to write their opinions—however much intuition may enter into it, the requirement that in the end the reasoning expressed in writing be legal in nature—will over time develop the habit of focusing on that legal reasoning and avoiding temptations to fall back on personal ideologies. That habit may also make their jobs easier to do. The more the requirement of providing legal reasoning compels judges to do what may be difficult and separate the personal from the professional, the more that habit may make their jobs easier to do and their private lives easier to live in the long run.

Finally, another ancillary benefit of the proposal here is that it may bolster the integrity of the judicial role by stopping the erosion of the areas in which judges can fulfill the obligations of the role, and, by getting at realities rather than impressions, it furthers the ability of the observer to analyze a judge's fulfillment of the role.

This proposal can also address public confidence concerns more effectively than the use of an appearance standard for recusals. It provides greater transparency due to the requirement of written reasoning. Part of that transparency is just the fact of giving reasons that generate less suspicion about what is going on behind the scenes.[227] Another part of the transparency, however, which is equally if not more helpful for public confidence, is the substantive reasoning given by judges provides greater consistency for the public to have greater confidence that judicial decisionmaking is more constrained than they might otherwise imagine.

V. CONCLUSION

In the end, what really matters is actual justice. Appearances are insufficiently reliable; they can easily mislead or undermine the pursuit of actual justice. Judges must sit, even when it is difficult to do so, unless the circumstances present a scenario in which it would be cognitively implausible to function properly in the role. Judges should err, in determining where that line falls, on the side of sitting rather than recusing and should rely on reason-giving, on legal analysis, to guide them to the proper result. Through such practice judges will improve, reason-giving will improve, and public confidence in the judiciary will either improve or at least be set on more reliable ground, insofar as all those with an interest in getting to the bottom of the issues will have equal access to the pertinent information.

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certainly still not impossible) to rely entirely on intuition rather than deliberation if the judge must provide a written explanation.

227. For a broader discussion that puts current United States Supreme Court practices on the giving of written reasoning into perspective with French and European Union practices, see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004).