

## **Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism**

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American courts are under siege. Again. This time it is (for the most part) angry conservatives who have accused “liberal activist” judges of usurping power by striking down abortion restrictions, outlawing public displays of the Ten Commandments, lifting prohibitions on gay marriage, and so on. A generation ago it was conservatives again, who were grouching about the excesses of the liberal Warren Court. A generation before that, it was irate liberals who accused conservative courts of usurping political power by declaring Populist, Progressive and New Deal legislation unconstitutional.

There is a dance step to these periods of anti-court sentiment—periods that have come and gone at generational intervals since the nation was founded.<sup>2</sup> Typically, cycles begin with courts that decide one or more cases in ways that anger politically powerful segments of the public or their elected representatives. Those factions incite some combination of legislators, governors, presidents, the media or voters to excoriate allegedly rogue judges and threaten them and their courts with a variety of retaliatory actions that may include impeachment, budget cuts, curtailment of subject matter jurisdiction, changes in methods of judicial selection, disestablishment of judicial offices, judicial discipline, court-packing, or defeat at the ballot box. Court defenders then

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<sup>2</sup> For a detailed description of the cycles of anti-court sentiment in the federal system, *see* CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2006) (discussing six cycles of court-directed hostility during the Jeffersonian era, the Jacksonian era, Reconstruction, the Populist-Progressive period, the Warrant Court era and today).

mobilize to oppose the anti-court crusade. Voters or appointing authorities select new judges whose views are likely to be compatible with those of the majority; the courts may adjust their decision-making to take a less confrontational tack; court critics lose their political steam before making good on many if any of their threats; and equilibrium is restored.

A primary concern of court defenders in each of the last three cycles of anti-court sentiment (the Populist-Progressive period, the Warren Court era, and today) has been that virulent attacks on judges have diminished public confidence in the courts. While court defenders have denied that judges are to blame for these attacks and have resisted proposals to subject judges to greater political control, they have actively explored other ways in which public confidence in the courts might be restored and promoted.

Public confidence is a matter of perception or appearance that may be present or absent irrespective of whether public confidence is warranted in fact. Court defenders, who are convinced that judges (on the whole) have acted properly and deserve the public's trust, have thus devoted themselves to ensuring that judges *appear* to act properly too. This chapter explores the century-long campaign to regulate appearances of judicial impropriety and the consequences of that campaign—intended and not—for an impartial judiciary and public confidence in the courts.

The principle that public officials should not only behave properly, but appear to behave properly has come to occupy a prominent place in contemporary American political culture. The prevailing view declares that if public officials appear to act improperly, people will lose faith in those officials and the institutions of government that they serve; and in a representative democracy, preserving the trust and confidence of

the governed in the leaders and institutions that govern them is regarded as critically important, for reasons explained by the American Bar Association's Commission on the 21<sup>st</sup> Century Judiciary:

Appearances matter because the public's perception of how the courts are performing affects the extent of its confidence in the judicial system. And public confidence in the judicial system matters a great deal . . . . First, and perhaps foremost, public confidence in our judicial system is an end in itself. A government of the people, by the people and for the people rises or falls with the will and consent of the governed. The public will not support institutions in which they have no confidence. The need for public support and confidence is all the more critical for the judicial branch, which by virtue of its independence is less directly accountable to the electorate and, thus, perhaps more vulnerable to public suspicion.<sup>3</sup>

And so, when it comes to the judiciary, the American Bar Association's Model Code of Judicial Conduct (some variation of which has been adopted by virtually every state judicial system and the federal courts) declares that judges "shall avoid impropriety and the appearance of impropriety in all the judges activities," and adds that judges "shall act at all times in a manner that promotes public confidence in the integrity and independence of the judiciary."

This escalating preoccupation with appearances is understandable, given contemporaneous changes in the ways that the public receives information about politics and government. Television, almost by definition, reorients viewer focus toward issues of image or appearance, which has facilitated the emergence and entrenchment of manufactured news, what Daniel Boorstin coined "pseudo-events."<sup>4</sup> Indeed, the age of political campaigning in the modern media was inaugurated in 1960 with the first televised presidential debates between Richard Nixon and John Kennedy, where "the

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<sup>3</sup> AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21<sup>ST</sup> CENTURY JUDICIARY 10 (2003) (JUSTICE IN JEOPARDY).

<sup>4</sup> DANIEL BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA (1961).

most important determinant” for who won the debates “seemed to be the ‘style’ of a candidate . . . and his personality.”<sup>5</sup>

Moreover, the time that major television networks have been willing to commit to delivering hard news is limited. As early as 1958, Edward R. Murrow warned that the television networks had oriented themselves almost completely toward programming that entertained, and relegated “occasional informative programs” to the “intellectual ghetto on Sunday afternoons.”<sup>6</sup> Between 1977 and 1997, entertainment and “human interest” stories in television news programs and in major newspapers increased from fifteen to forty-three percent of the total.<sup>7</sup> Inevitably, news about politics and government became correspondingly compressed. One political scientist described the consequences: “The average news story on television takes about a minute, just enough time to announce that an event has taken place and present a fact or two about it. Complex stories may have to be scratched entirely if they cannot be drastically condensed.”<sup>8</sup> Indeed, in 1968, the average “sound bite” from presidential candidates in televised election stories was 42.3 seconds long; by 1988, it had diminished to less than ten seconds, and by 2000 it had dwindled to seven.<sup>9</sup> Insofar as the news is communicated in short, image-oriented segments, the public’s understanding of judges and the judiciary will, of necessity, be

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<sup>5</sup> LEE M. MITCHELL, WITH THE NATION WATCHING: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON TELEVISED PRESIDENTIAL DEBATES 44-45 (1979).

<sup>6</sup> Edward R. Murrow. RTNDA Convention, October 15, 1958 (“There are, it is true, occasional informative programs presented in that intellectual ghetto on Sunday afternoons. But during the daily peak viewing periods, television in the main insulates us from the realities of the world in which we live.”).

<sup>7</sup> Neil Hicky, *Money Lust: How Pressure for Profit is Perverting Journalism*, in THE POWER OF THE PRESS 36 (Beth Levy & Denise Bonilla eds 1999) .

<sup>8</sup> DORIS GRABER, MASS MEDIA AND AMERICAN POLITICS 93 (1989)

<sup>9</sup> Gerry Yandel, *TV Watch*, THE ATLANTA JOURNAL AND CONSTITUTION, June 23, 1992; CMPA Election Watch, Oct. 30, 2000 (<http://cmpa.com/election2004/JournalistsMonopolize.htm>).

impressionistic; and to the extent that public opinion influences how policymakers regulate the judiciary, the public's impressions of judges become very important.

In this chapter, I begin by chronicling the emergence and eventual entrenchment of rules regulating the appearance of judicial impropriety. As regulators came to take appearances ever more seriously, they promulgated enforceable rules that prohibited judges from saying things or associating with others in ways that could create appearance problems. Paradoxically, this effort to strengthen rules regulating appearances by making them more enforceable may (to an as yet uncertain extent) have had the opposite effect, rendering them vulnerable to constitutional challenge on first amendment grounds. The net effect has been a detectable shift away from rules prohibiting speech or association that creates appearance problems, toward rules that implicitly authorize the underlying speech or association but require judges who thereby create appearance problems to disqualify themselves from cases in which such problems would call their impartiality into question.

This development has potentially profound implications. It suggests the possibility of a new paradigm, one in which judges are welcomed into the marketplace of ideas and encouraged, not just permitted, to say what is on their minds (on the theory that more speech is always better than less), so that litigants can better inform themselves of judicial biases that may warrant disqualification. One possible consequence of relying on disqualification to protect the public from judges who vent their prejudices and thereby call their impartiality into question on a more regular basis could be to limit the available judicial workforce in unprecedented ways, by greatly expanding the universe of judges subject to disqualification. A second, and in my view a more likely consequence, will be

to force a reinterpretation of disqualification rules to allow judges to hear cases despite appearance problems created by their speech and association, so as to ensure an adequate judicial workforce. In that event, what was once a system of regulation designed to minimize appearance problems will have gradually given way to a system that cultivates them.

### **The Appearance of Appearances**

Prior to the twentieth century, the arsenal for regulating judicial conduct in England, and later America, was limited to blunt instruments. In England, apart from several obscure, little used common law mechanisms for intra-judicial removal<sup>10</sup>, judges were initially subject to removal by the king, or upon impeachment by Parliament — competing mechanisms that, beginning in the early 19th century, gave way to a unified system of removal by the King upon address by both houses of Parliament.<sup>11</sup> The United States Constitution established an impeachment process authorizing Congress to remove judges for “treason, bribery, and other high crimes and misdemeanors,” while the states adopted impeachment mechanisms of their own.<sup>12</sup> In addition, over half the states provided for removal via legislative address, whereby legislatures could petition the governor for a judge’s ouster<sup>13</sup>; some states mandated automatic removal for judges convicted of specified criminal offenses<sup>14</sup>; still others created mechanisms for judicial

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<sup>10</sup> Edward Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 13-15 (1977) (describing three procedures: the scire facias process for repealing a judge’s letter of patent; removal upon criminal conviction; and the Lord Chancellor’s authority to remove county judges for misbehavior).

<sup>11</sup> MARY VOLCANSEK, *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* 68-74 (1996).

<sup>12</sup> JEFFREY SHAMAN, STEVEN LUBET & JAMES ALFINI, *JUDICIAL CONDUCT AND ETHICS* §1.12 (3rd Ed. 2000).

<sup>13</sup> Schoenbaum, *supra* note 10 at 4-5; *see also*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205, 227 n. 81 (1985).

<sup>14</sup> SHAMAN, LUBET & ALFINI *supra* note 12 at §14.12.

recall<sup>15</sup>; and, beginning in the latter half of the 19th century, an increasing number of judges were subject to removal in periodic elections.<sup>16</sup>

With enforcement efforts focused almost exclusively on actual improprieties serious enough to warrant removal (or worse), it is not especially surprising that the “appearance” of impropriety commanded little attention among early writers concerned about judicial ethics. Prior to the twentieth century, the most comprehensive code of judicial conduct was devised in the 1600s by Sir Matthew Hale, Lord Chief Justice under King Charles II, who wrote “Rules for His Judicial Guidance, Things Necessary to be Continually Had in Remembrance.”<sup>17</sup> His rules consisted of eighteen points: seven elaborated on the need for a judge to remain impartial<sup>18</sup>; five were directed at promoting just case outcomes<sup>19</sup>; three emphasized the need for diligence, commitment and integrity<sup>20</sup>; two underscored the need for a judge’s allegiance to God, King and country<sup>21</sup>; and one called upon the judge to direct court personnel to avoid personal, financial or

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<sup>15</sup> Schoenbaum, *supra* note 10 at 8-9; William Ross: *The Resilliance of Marbury v. Madison: Why Judicial Review has Survived so Many Attacks*, 38 WAKE FOREST L. REV. 733, 741-42 (2003).

<sup>16</sup> AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 1-2 (2002).

<sup>17</sup> Quoted in J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 208 (1873).

<sup>18</sup> “IV. That in the execution of justice I carefully lay aside my own passions”; “VI. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard”; “VII. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard”; “X That I not be biased with compassion to the poor, or favor to the rich”; “XI. That popular or court applause, or distaste, have no influence into anything I do in point of distribution of justice”; “XII. Not to be solicitous of what men will say or think, so long as I keep myself exactly according to the rules of justice”; “XVI. To abhor all private solicitations . . . in matters depending”.

<sup>19</sup> “VIII. That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country;” “IX. That I be not too rigid in matters conscientious, when all the harm is in diversity of judgment”; “XIII. “If in criminals it be a measuring cast, to incline to mercy and acquittal;” “XIV. In criminals that consist merely in words when no harm ensues, moderation is no injustice”; “XV. In criminals of blood, if the fact be evident, severity is justice.”

<sup>20</sup> “II. That [the administration of justice] be done 1st, uprightly; 2ndly, deliberately; and 3dly, resolutely”; “V. That I be wholly intent upon the business I am about”; “XVIII. To be short and sparing at meals, that I may be fitted for business.”

<sup>21</sup> “I. “That in the administration of justice, I am entrusted for God, the king , and country;” and “III. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.”

professional entanglements in matters before the court.<sup>22</sup> Noticeable by its absence (at least when viewed through the lens of twenty-first century sensibilities) is any allusion to the need for avoiding the appearance of impropriety, for preserving public confidence in the judiciary, or for conducting oneself with dignity or in a manner that is above reproach.

This is not to suggest that concern for appearances was altogether absent. In 1620, for example, Sir Francis Bacon was impeached and removed on charges that he accepted gifts from litigants, despite a showing by Bacon that the gifts had not influenced his judgment (as evidenced by several instances in which he decided cases against his benefactors).<sup>23</sup> Accepting gifts under such circumstances may have created an appearance of corruption sufficient to justify removal, even if Bacon had not been corrupted in fact.<sup>24</sup> In the 1852 decision of *Dimes v. Grand Junction Canal*, Lord John Campbell concurred in a decision of the House of Lords to render voidable the ruling of a judge who had been a shareholder in the plaintiff-corporation, with the observation that “This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.”<sup>25</sup> And at approximately the same time on the other side of the Atlantic, Massachusetts Attorney General Rufus Choate opined that a judge “must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest . .

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<sup>22</sup> “XVII. To charge my servants: 1st, not to interpose in any business whatsoever; 2nd, not to take any more than their own fees; 3d, not to give any undue precedence to causes; 4th, not to recommend counsel.”

<sup>23</sup> VOLCANSEK, *supra* note 11 at 70-71.

<sup>24</sup> The Bacon impeachment, however, warrants an asterisk on a list of judicial removals in England and the United States that is otherwise confined largely to cases of actual—not apparent—misconduct, which may help to explain why, after Bacon was removed, the king quickly intervened, released Bacon from the Tower of London, remitted his fine and granted him a full pardon. *Id.*

<sup>25</sup> *Dimes v. Grand Junction Canal*, 10 Eng. Rep. 301, 315 (H.L. 1852).(Campbell, concurring).



. is not yet enough. He must be believed such.”<sup>26</sup> Such infrequent, temporally scattered references, however, pale in comparison to the systematic attention directed toward the appearance of impropriety and its relationship to public confidence in the courts that began at the turn of the 20th century.

In the cyclical attacks on courts and judges alluded to earlier, court defenders intent on preserving the independence of judges and the judiciary have invariably squared off against court critics equally intent on subjecting judges to greater popular and political control. The most protracted of these cycles occurred during the populist-progressive period at the turn of the 20th century, when, as William Ross writes:

[C]ountless . . . antagonists of the courts between 1890 and 1937 alleged that a “judicial oligarchy” had usurped the powers of Congress and thwarted the will of the people by interfering with the activities of labor unions and nullifying legislation that was designed to ameliorate the more baneful effects of the Industrial Revolution.<sup>27</sup>

Many state and federal courts of this period subjected populist and progressive reforms to exacting scrutiny, as emblemized by the United States Supreme Court’s 1905 decision in *Lochner v. New York*,<sup>28</sup> which declared that state legislation fixing the maximum hours for bakers at sixty hours per week, violated the due process clause of the fourteenth amendment by interfering impermissibly with the freedom of owners and bakers to contract. Court defenders, such as William Howard Taft and Roscoe Pound, did not share the view that *Lochner*-era judges had usurped legislative power, and opposed proposals to subject judicial decision-making to greater popular control. Pound, however, was concerned by a growing public *perception* that judges and courts were

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<sup>26</sup> Reprinted in ADDRESSES AND ORATIONS OF RUFUS CHOATE 360-63 (6th Ed. 1891).

<sup>27</sup> WILLIAM ROSS, A MUTED FURY 1 (1994).

<sup>28</sup> 198 U.S. (1905).

behaving badly. In a seminal address to the American Bar Association in 1906, entitled “The Causes of Popular Dissatisfaction with the Courts,” Pound called attention to “the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today,” and called for sweeping reform of court administration and procedure.<sup>29</sup> “Courts are distrusted,” he declared, and attributed the development in part to “public ignorance of the real workings of the courts due to ignorant and sensational reports in the press,” and to “putting courts into politics,” which “has almost destroyed the traditional respect for the Bench.” In 1908, American Bar Association President Jacob M. Dickinson echoed that “[j]udicial judgments are not accorded the same respect as formerly, and that “not *a* court but *the* courts are frequently and fiercely attacked.”<sup>30</sup> The net effect, he concluded, was “to destroy confidence in the courts and to make a subservient judiciary.”

The same year as Dickinson’s speech, the American Bar Association adopted the Canons of Professional Ethics, its first stab at a code of conduct for lawyers.<sup>31</sup> Given the ongoing crisis of confidence in the courts, one might have supposed that the time would be auspicious for developing a comparable code applicable to judges. But as Charles Boston, a New York lawyer and the principal drafter of the first Code of Judicial Conduct Charles Boston would later explain, it was precisely because the judiciary was under intense fire that the ABA made no such move: “[T]he agitation for recall of the judiciary and recall of judicial decisions” was such that “it was not deemed wise to add fuel to that flame by intimating through the adoption of Canons of Judicial Ethics that the judiciary

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<sup>29</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Courts*, reprinted in 20, J. OF THE AM. JUDICATURE SOC. 178 (1936).

<sup>30</sup> *Address of the President*, 33 REPORT OF THE 31ST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 341 (1908)

<sup>31</sup> STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 4 (2005).

were in fault.”<sup>32</sup> In other words, the bar implicitly believed that the improprieties judges stood accused of committing in the court of public opinion were largely a matter of appearance, not reality, and that imposing a Code of conduct on judges at that juncture would create the appearance that the bar regarded those alleged improprieties as actual, rather than merely perceived. The age of obsession with appearances had begun.

The Bar’s latitude to temporize ended twelve years later when a scandal encircling District Judge Kennesaw Mountain Landis brought the issue to a head. Judge Landis had been a semi-professional baseball player in his youth and, in 1905, was appointed district judge for the northern district of Illinois. In 1919, several members of the Chicago White Sox baseball team were bribed to throw the World Series. In the aftermath of the so-called “Black Sox” scandal, baseball owners responded by establishing the position of baseball commissioner and appointed Judge Landis to the post in 1920. Judge Landis thereupon assumed the duties of baseball commissioner at a salary of \$42,500, which he undertook in earnest, without relinquishing his judgeship or its \$7,500 salary. Congressman Benjamin Welty of Ohio introduced an impeachment resolution in February of 1921, accusing Judge Landis of “neglecting his official duties for another gainful occupation.” Although the focus of the charges was on the *actual* impropriety that Judge Landis had neglected his judicial duties, he was also charged with fostering an *appearance* of impropriety: by serving both as a sitting federal judge and commissioner of baseball, Welty asserted, “the impression will prevail that gambling and other illegal acts will not be punished in the open forum as in other cases.”<sup>33</sup> The charges were filed too late in the 66th Congress for the House Judiciary Committee to complete

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<sup>32</sup> Quoted in JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 182 (1974)

<sup>33</sup> 6 Cannon’s Precedents §536 (1935).

its investigation. In a brief report issued in March, a majority of the Committee nonetheless warned:

[S]aid act of accepting the employment aforesaid, if proved, is. . . at least inconsistent with the full and adequate performance of the duty of the , , , Honorable Kenesaw Mountain Landis, as a United States district judge, and that said act would constitute a serious impropriety on the part of said judge.<sup>34</sup>

The Committee's minority, report, however, put its finger on a problem: moonlighting did not necessarily rise to the level of a crime or misdemeanor susceptible to removal by impeachment:

No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of these grounds would have to be established before impeachment proceedings could be maintained.<sup>35</sup>

At its annual meeting in 1921, the American Bar Association adopted a resolution rebuking Judge Landis in terms that emphasized the deleterious impact of his actions on the public's perception of the judiciary. The delegates declared that the judge's conduct "meets with our unqualified condemnation, as conduct unworthy of the office of judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary."<sup>36</sup> Judge Landis ultimately resigned from the bench in 1922.

Impeachment may have been too extreme a remedy for an offense of the sort Judge Landis committed. His conduct was nonetheless troubling to many, gave the judiciary a black eye at a time when it could scarcely afford one, and called for some

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<sup>34</sup> Impeachment Charges Against Judge Kenesaw Mountain Landis, House Rep. No. 1407, 66th Cong. 3d Sess., March 2, 1921.

<sup>35</sup> *Id.*

<sup>36</sup> quoted in MACKENZIE, *supra* note 32 at 181

other means to address judicial misconduct. Charles Boston, arguing that “the time is now ripe” to draft a Code of Judicial Conduct, successfully lobbied the ABA to establish a committee for that purpose.<sup>37</sup> That committee, chaired by Chief Justice (and former President and ABA President) William Howard Taft, issued a draft of the Canons of Judicial Ethics that was approved by the American Bar Association in 1924.

The Canons of Judicial Ethics were replete with guidance exhorting judges to avoid conduct that could create appearance problems and thereby undermine public confidence in the courts. Canon 4 declared that a judge’s official conduct should be “free from . . . the appearance of impropriety.” Eleven other canons cautioned judges to avoid conduct that could create “suspicion” of misbehavior or “misconceptions” of the judicial role that might “appear” or “seem” to interfere with judicial duties, or that could “create the impression” of bias.<sup>38</sup>

A majority of the state judiciaries subsequently adopted the Canons of Judicial Ethics, but the Canons were destined for obscurity, almost by design.<sup>39</sup> There were no “shalls” in the Canons that might serve as standards for enforcement, only “shoulds”—

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<sup>37</sup> *Id.*

<sup>38</sup> Canon 19 opined that to “avoid[] the suspicion of arbitrary conclusion [and] promote[] confidence in his judicial integrity,” judges should explain the basis for their rulings. Canon 24 encouraged a judge not to incur obligations that would “appear to interfere with his devotion to the expeditious and proper administration of his official functions.” Canon 25 urged a judge to avoid creating “any reasonable suspicion that he is using the power or prestige of his office” to advance his private interests. Canon 26 counseled the judge against maintaining relationships that would “arouse the suspicion that such relations warp or bias his judgment.” Canon 27 declared that a judge should refrain from holding fiduciary positions that would “seem to interfere with the proper performance of his judicial duties.” Canon 28 warned judges against engaging in political activities that could give rise to the “suspicion of being warped by political bias.” Canon 30 advised a candidate for judicial office to do nothing “to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.” Canon 31 provided that in jurisdictions where judges were authorized to practice law part-time, the judge should not “seem[] to utilize his judicial position to further his professional success.” In Canon 33, the judge was encouraged to avoid conduct that could “awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.” Canon 34 provided that “in every particular [a judge’s] conduct should be above reproach.” And Canon 35 observed that allowing cameras in the courtroom “create[s] misconceptions . . . in the mind of the public and should not be permitted.” AMERICAN BAR ASSOCIATION, CANONS OF JUDICIAL ETHICS (1924).

<sup>39</sup> Robert Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411.

hortatory pronouncements “intended to be nothing more than the American Bar Association’s suggestions for guidance of individual judges.”<sup>40</sup> The Canons were thus crafted to operate behind the scenes—to advise judges on how they should conduct themselves rather than to serve as a code of conduct that judges violated at the peril of formal disciplinary action. Moreover, the cycle of court-directed animus that had spawned a perceived crisis of public confidence in the courts and fueled a movement to create the Canons in the first place was already on the wane by the time the Canons were adopted in 1924 and would effectively end thirteen years later when a majority of the Supreme Court acquiesced to Franklin Roosevelt’s New Deal agenda in the shadow of his proposed plan to pack the federal courts with New Deal sympathizers.<sup>41</sup> The subsequent period of relative calm ensured that judges could quietly go about their business of following the canons (or not) without political pressure to do more.

This is not to suggest that judicial concern for the “appearance of impropriety” simply dropped off the face of the earth. Throughout the middle of the twentieth century, state supreme and appellate courts sporadically alluded to a judge’s ethical duty to avoid the appearance of impropriety in the context of appellate decisions that: disqualified trial judges from hearing particular cases; evaluated trial judge conduct in the context of reviewing lower court orders; or sanctioned judges qua members of the bar in lawyer discipline actions.<sup>42</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> MacKenzie, *supra* note 32 (Quoting Charles Boston, the chief drafter of the Canons of Judicial Ethics, as saying that by 1922 “the agitation for the recall appears to have diminished, and, perhaps, to have spent its force.”). See Ross, *supra* note 27 at 311 (discussing the relationship between the Supreme Court majority’s reversal of position on the constitutionality of New Deal legislation and the end of the cycle of court-directed hostility that had begun in 1890).

<sup>42</sup> *In re Filipiak*, 113 N.E.2d 282, 284 (Ind. 1953) (Emmert, concurring); *In re Heggerty*, 241 So. 2d 469 (La. 1969) *In re Somers*, 182 N.W. 341 (Mich. 1971); *Estate of Lynde*, 250 N.Y.S. 2d 358 (N.Y. App. Div. 1964); *La Rue v. Township of East Brunswick*, 172 A. 2d 691 (N.J. App. Div. 1961); *State v. Lawrence*,

By the 1960s, however, the Canons of Judicial Ethics had become increasingly antiquated, and the next wave of anti-court sentiment had arrived. Decisions of the Warren Court ordering racial desegregation, banning prayer in public schools, and expanding the constitutional protections afforded criminal defendants had led to calls for the impeachment of Earl Warren, the introduction of legislation to strip the federal courts of jurisdiction to hear school prayer cases, and a campaign pledge by presidential candidate Richard Nixon to dismantle the Warren Court and appoint “strict constructionists” to the bench. Inquiries into the conduct of two Warren Court liberals—William O. Douglas and Abe Fortas—further fanned the flame. Former ABA President Whitney North Seymour explained at the time:

Suddenly, toward the end of the 1960’s a series of events pointed up their [the Canons of Judicial Ethics’] inadequacy. In the controversies over the activities of Justices Fortas and Douglas, and in the inquiries into the qualifications of Judge Haynesworth for appointment to the Supreme Court, the inadequacies of the canons became particularly apparent. Members of Congress began to advocate legislative regulation of judicial conduct going far beyond anything then on the books. . . In 1969, ABA President Segal wisely decided that the time had come for the bar to re-examine the old Canons of Judicial Ethics and bring them up to date.<sup>43</sup>

First and foremost among the perceived problems afflicting the old Canons was that they had been purely advisory. The net effect, critics complained, was to make compliance optional. And so, in 1972 the ABA promulgated the “Code of Judicial Conduct,” comprised of seven broadly worded canons and a series of more specific provisions underlying each, accompanied by a preamble which declared that “the canons and text establish mandatory standards unless otherwise indicated.”

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123 N.E. 2d. 271 (Oh. 1954); *In re Stanley Greenburg*, 280 A.2d. 370 (Pa. 1971); *In re Gorsuch*, 75 N.W. 2d 644 (S.D. 1956); *Tharp v. Massengill*, 28 P.2d 502 (Wa. 1933).

<sup>43</sup> Whitney North Seymour, *The Code of Judicial Conduct from the Point of View of a Member of the Bar*, 1972 UTAH L. REV. 352, 352.

Regulating appearances remained an important part of the 1972 Code. Like old Canon 4, new Canon 2 declared that “a judge should avoid impropriety and the appearance of impropriety in all his activities” and added in Section 2A that a judge “should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” In addition, the Code retained (or added) at least eight other provisions regulating appearances.<sup>44</sup>

Then came Watergate and the crisis of confidence in American government that it catalyzed. Within the executive and legislative branches, rules aimed deterring conduct that could create an appearance of impropriety were dusted off and enforced with unprecedented zeal.<sup>45</sup> As to the judiciary, Congress enacted a federal disqualification statute, the first paragraph of which focused on appearances, declaring that a judge must disqualify himself from “any proceeding in which his impartiality might reasonably be questioned.” Judicial conduct commissions—bodies typically within the state judicial branch authorized to enforce their respective codes of conduct—began to appear in the 1960s and proliferated quickly during the 1970s until by 1981, such organizations were in place in all fifty states.<sup>46</sup> Sanctioning a judge who created an appearance of impropriety,

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<sup>44</sup> Canon 2B provided that a judge “should not convey or permit others to convey the impression that they are in a special position to influence him”; Canon 3C stated that “a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned”; Canon 4 authorized a judge to engage in certain “quasi-judicial” activities “if in so doing he does not cast doubt on his capacity” to decide matters impartially; Canon 5A limited a judge’s permissible extra-judicial activities to those that “do not detract from the dignity of his office,” and Canon 5B restricted a judge’s civic and charitable activities to those that do not “reflect adversely on his impartiality,” and Canon 5C imposed a similar limitation on a judge’s financial dealings. Canon 6 authorized judges to receive compensation or reimbursement for extracurricular activities, if “the source of such paragraphs does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety.” Finally, Canon 7B declared that candidates for judicial office “should maintain the dignity appropriate to judicial office.”

<sup>45</sup> Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 *Stan. L. Rev.* 593 (1992).

<sup>46</sup> JEFFREY SHAMAN, STEVEN LUBET & JAMES ALFINI, *JUDICIAL CONDUCT AND ETHICS*, *supra* note 12 at §1.03 (3rd Ed. 2000)



typically by engaging in an actual impropriety for which sanctions were simultaneously imposed, became commonplace.

In 1990, the ABA revised its Code of Judicial Conduct again. Although the preface to the 1972 Code had indicated that its terms were intended to impose “mandatory standards,” recurrent use of the term “should” instead of “shall” in the body of the Code had led to a common “misunderstanding” that the Code remained hortatory only—a misunderstanding exacerbated in several jurisdictions that did not adopt the preface.<sup>47</sup> To eliminate all room for doubt, the 1990 Code substituted the term “shall” for “should” whenever mandatory standards were contemplated and reorganized a series of specific sections imposing explicitly obligatory standards around a series of generally worded, but nonetheless obligatory canons. Thus, the latest iteration of Canon 2 now declared that “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities,” while section 2A added that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The net effect, then, of the drafters’ resolve to make the 1990 Code more clearly mandatory and hence enforceable was to give the appearance provisions even more bite.

Thirteen years later, the ABA revisited the Code one more time at the urging of its Commission on the 21<sup>st</sup> Century Judiciary, which had studied the impact of the latest cycle of anti-court sentiment on state judiciaries. The Commission emphasized the linkage between public enforcement of the Code of Judicial Conduct and restoring public confidence in courts under attack, with the observation that “If adequately publicized . . . codes of conduct can reassure the public that there are established ethical constraints on

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<sup>47</sup> LISA MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 8 (1992).

judicial conduct.”<sup>48</sup> It then found that another look at the Code was warranted sooner than might otherwise be necessary because “the last comprehensive revision of the Model Code of Judicial Conduct occurred in 1990, prior to the acceleration of events leading to a heightened level of interest in and concern over issues of judicial independence and accountability around the country.”<sup>49</sup> The subsequently appointed Joint Commission to Evaluate the Model Code of Judicial Conduct wrestled with the code’s directive that judges avoid the appearance of impropriety, but ultimately committed to retain the essential features of the clause at the urging of the Conference of Chief Justices.

### **The Erosion of Appearances**

Regulatory commitment to ensuring that judges not only behave well but appear to behave well has grown in fits and starts since the early 20<sup>th</sup> century, as reflected in the preceding section. More recently, however, the regulation of appearances has encountered philosophical, practical and constitutional objections which have placed its long-term future in limbo.

*Philosophical Objections:* The core philosophical objection to enforcing a rule that prohibits perceived improprieties, is that obsession with appearances diverts attention from actual improprieties where regulatory efforts ought to be focused. This general concern has three specific sub-variations: 1) judges who have not behaved badly may be dragged through the mud by unscrupulous accusers just for appearing to behave badly; 2) preoccupation with appearances leads judges to be more concerned with how they look than how they are in fact doing their jobs; and 3) when judges are punished for appearing

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<sup>48</sup> JUSTICE IN JEOPARDY, *supra* note 3 at 57.

<sup>49</sup> *Id.* At 58.

to act improperly, it motivates them to conceal those appearances, which frustrates the public's ability to detect problems and address them.<sup>50</sup>

With one partial exception, these philosophical objections have failed to capture the hearts or minds of the regulatory community, because none of them undermines the core public confidence rationale for regulating appearances. No one seriously suggests that regulators should be more concerned about apparent improprieties than actual ones. The point is simply that addressing actual improprieties alone will not be enough to preserve public confidence in the courts if the public perceives improprieties as persisting—hence the need to regulate both improprieties and their appearance.

With respect to the first specific objection, judges who have not behaved improperly in fact may well be accused of and disciplined for appearing to behave improperly, but that is the point of a rule designed to preserve public confidence in the courts by telling judges to pay attention to how the public perceives them. As to the second objection, judges will be more concerned about how they are perceived than how they act only if regulators sanction apparent misbehavior more harshly than actual misbehavior, and there is no evidence to suggest that the tail has wagged the dog in that way. And the third objection—that judges will make problems harder to detect and ameliorate if they are told to conceal the appearance of such problems—confuses the appearance of impropriety with the appearance of imperfection: Problems with the administration of justice—even serious ones—do not necessarily constitute ethical improprieties, the appearance of which would subject judges to discipline. With respect to those problems that *do* involve misconduct, the unethical judge will seek to conceal the

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<sup>50</sup> Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS, February 2005 at 19; Peter Morgan, *supra* note 45.

evidence (and so the appearance) of wrongdoing, irrespective of whether the appearance of impropriety is separately proscribed.

There is, however, a subset of this third objection that cannot be so easily dismissed: What of the otherwise honorable judge, who harbors a deep-seated prejudice against a particular class of litigant, who avoids creating the appearance of prejudice by dutifully avoiding public statements or associations that would expose his bias? Here, at least, it would seem that there may be something to the concern that by directing judges to conceal apparent partiality (as a subset of apparent impropriety), it complicates regulators' ability to ferret out actual partiality—an issue that I revisit in a later section.

*Practical Objections:* Regardless of the philosophical merits of directing judges to avoid the appearance of impropriety, from a practical perspective, critics have argued that it is unworkable. There is no way to know what an “appearance of impropriety” is, they contend, and thus no way to enforce such a provision coherently.<sup>51</sup>

This concern surfaced with a vengeance when the ABA made an ill-fated attempt to import an appearances standard into the lawyer's code. The American Bar Association's 1969 Model Code of Professional Responsibility included Canon 9, which declared that “A lawyer should avoid even the appearance of professional impropriety.”<sup>52</sup> The provision was added for reasons explained by the United States Court of Appeals for the Fifth Circuit, which should, by now, be quite familiar: “[S]ome conduct which is in fact ethical may appear to the layman as unethical and thereby could erode public

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<sup>51</sup> The vagueness problems discussed here can exceed the practical and become constitutional, insofar as subjecting judges to sanction for violating unduly vague rules deprives them of their right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. As discussed below, however, the courts have rejected constitutional objections to the appearance of impropriety rule; for that reason, vagueness is discussed here as a practical problem, rather than a constitutional one.

<sup>52</sup> AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1969).

confidence in the judicial system or the legal profession.”<sup>53</sup> Canon 9 did not sit well or long.

The primary concern was that the provision was deemed too vague to be enforceable. The Restatement (Third) of the Law Governing Lawyers opined that it “fail[s] to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it.”<sup>54</sup> By 1975, the ABA itself conceded that the appearance standard was “too vague to be useful,”<sup>55</sup> and in 1983, when the ABA promulgated the Model Rules of Professional Conduct, the appearance of impropriety had disappeared. Draft commentary explained why:

In the context of private practice, the test has no apparent limits except what a particular tribunal might regard as an impropriety . . . . [S]uch a standard is too vague and could cause judgments about the propriety of conduct to be made on instinctive, ad hoc, or ad hominem criteria.”<sup>56</sup>

In the years since, a small number of states have retained the appearance of impropriety in vestigial form, as a basis upon which to disqualify counsel in litigation, where, if the commentary is any indication, it remains a provision that lawyers love to hate.<sup>57</sup>

As compared to the vituperative response to the appearance of impropriety standard in the lawyer’s Code, criticism of its corollary in the Code of Judicial Conduct has been less sustained. Even so, the standard has had its share of critics: Justice Arthur

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<sup>53</sup> Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976).

<sup>54</sup> Restatement (Third) of the Law Governing Lawyers § 5(c) (2000).

<sup>55</sup> ABA Formal Op. 342, n. 17 (1975).

<sup>56</sup> ABA Comm. On Evaluation of Model Rules of Prof’l Conduct 53 (Prop. Final Draft 1981).

<sup>57</sup> Cynthia Jacob, *A Polemic Against R.P.C. 1.7(C)(2): The Appearance of Impropriety Rule*, THE NEW JERSEY LAWYER 23 (June,1996); Brian Buescher, *Out with the Code and in With the Rules: The Disastrous Nebraska “Bright Line” Rule for Conflict of Interest: A Direct Consequence of the Shortcomings in the Model Code*, 12 Geo. J. LEGAL ETHICS 717 (1999).

Goldberg characterized it as “unbelievably ambiguous.”<sup>58</sup> Judicial ethics scholar Leslie Abramson opines that “lack of specificity as to what makes a judge vulnerable to a charge of appearance of impropriety raises serious due process concerns. Leaving the rules unidentified while expecting them to be observed is bound to burden judges with uncertainty.”<sup>59</sup> And the Association of Professional Responsibility Lawyers, whose members defend judges in disciplinary actions “question[ed] whether a standard that has been rejected as a basis for disciplining lawyers should continue to be used to discipline judges,” and added that such “vague and overbroad language should be removed from the Model Code of Judicial Conduct because it presents too great a risk of subjective interpretation, placing judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities.”<sup>60</sup>

Objections concerning the vagueness of the appearance standard have not won the day. First, the perceived need for judges to avoid the appearance of impropriety may be greater than for lawyers, so much greater that it offsets attendant vagueness concerns. Although public confidence in the system of justice may depend on all its participants—including lawyers—being above reproach, that is uniquely true of judges, whose continued credibility atop the justice system’s organizational chart depends on their perceived integrity, impartiality and independence. Second, unlike the lawyer’s code, the judge’s code has included an appearance of impropriety standard since its inception; it is language that that courts have interpreted with relative frequency and that judges have come to accept—which may help to explain why it has been upheld in disciplinary

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<sup>58</sup> Non judicial activities of Supreme Court Justices: Hearing on S. 1097 Before the Subcomm. On Separation of Powers of the Senate Comm. On the Judiciary, 91st Cong. 1st Sess. (1969).

<sup>59</sup> Leslie Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 955 (1996).

<sup>60</sup> Letter from Ronald Minkoff, on behalf of the Association of Professional Responsibility Lawyers, to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Jun 30, 2004 at 6, 9.

proceedings over objections that it should be declared void for vagueness. When, in 2004, the ABA Joint Commission proposed to modify the way in which the Code regulated appearances to accommodate the vagueness concerns that some critics had raised, the proposal was greeted with a torrent of criticism. The Commission “seems to have missed” the essential point that “Americans don’t appreciate it when judges behave in ways that undermine the judicial system's fairness and integrity,” complained a New York Times editorial, which dismissed vagueness concerns as “overblown.”<sup>61</sup> The commission withdrew the proposal, and after further deliberation and vacillation, ultimately strengthened the appearance of impropriety standard at the insistence of the Conference of Chief Justices, by embedding it in an enforceable, freestanding rule.

*Constitutional Objections:* In the past generation, the first amendment freedoms of speech and association have been invoked with increasing frequency to limit regulators’ authority to prohibit judges from engaging in conduct that creates appearance problems.

1. Campaign Finance: In recent years, spending in judicial election campaigns has skyrocketed. Evidence of *actual* improprieties in the form of outright bribery, wherein donors offer judicial candidates campaign dollars in exchange for the candidate’s assurance that she will decide particular cases in particular ways, is virtually non-existent. But appearance problems abound: why would contributors with an obvious interest in the outcomes of the cases that judges decide give significant amounts of money to their favorite judges, if not to buy influence? Unsurprisingly, then, between eighty and ninety

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<sup>61</sup> Editorial, *Weakening the Rules for Judges*, THE N.Y. TIMES, May 22, 2004 at A16

percent of the public believes that judges are influenced by the campaign contributions they receive.<sup>62</sup>

There are, however, serious first amendment impediments to eradicating this appearance problem.<sup>63</sup> Proceeding from the premise that spending money on candidates for public office is a form of political expression fully protected by the First Amendment, the Supreme Court has made it clear that the government is powerless to cap campaign spending. The government may offer public financing for judicial and other campaigns, but only if candidate participation is completely voluntary—in other words, candidates retain the first amendment right to reject public financing and solicit private contributions. And while the government may impose contribution limits on individual contributors, those contributors have the right to spend limitless amounts on independently organized campaigns for and against particular candidates.

2. Judicial Education: A limited number of universities and private organizations have gotten into the business of judicial education by hosting seminars for judges, often at luxury resorts in attractive places, and typically on subjects of interest to the corporate sponsors who underwrite the events. The more frantic critics of these “junkets for judges” claim that the corporations involved are buttering up or brainwashing judges into changing their votes on cases before them. The mainstream press, however, has fixated more on the appearance problem: when organizations host seminars for judges at weekend retreats in idyllic settings at the expense of corporations that have an interest in

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<sup>62</sup> See polling data cited in Charles Garner Geyh, *Why Judicial Elections Stink*, 64 OH. ST. L. J. 43, 54-55 (2003).

<sup>63</sup> For a summary of the first amendment impediments to regulating judicial campaign finance, see AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 34-37 (2002).



the outcomes of cases that those judges decide, it creates the perception that the corporate sponsors are seeking to buy influence or access.

When members of Congress introduced legislation to ban judicial participation in expense-paid seminars, however, the Judicial Conference of the United States opposed the bill on the grounds that it “raises potential constitutional issues such as imposing an undue burden on speech.”<sup>64</sup> It bears emphasis that the Judicial Conference is comprised entirely of federal judges, headed by the Chief Justice; and while the Conference’s position may not have constituted an advisory opinion in the technical sense, it nonetheless gave Congress a pretty clear idea of how the federal courts might rule if the legislation was enacted.

3. Judicial Speech: The Code of Judicial Conduct includes myriad restrictions on judicial speech and association.<sup>65</sup> For the most part, these restrictions are calculated to prevent judges from saying things or associating with people that could call their fairness and impartiality into question. These proscriptions are often more concerned with the appearance of impartiality than its reality. Thus, for example, the Code declares that “a judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” The judge who violates

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<sup>64</sup> Administrative Office of the U.S. Courts, *News Release: Judicial Conference Opposes Sweeping Restrictions on Educational Programs*, September 19, 2000.

<sup>65</sup> Judges shall not: “convey the impression” that others are in a special position to influence the judge; “hold membership in any organization that practices invidious discrimination” on specified bases; “by words or conduct manifest bias or prejudice”; “initiate . . . ex parte communications”; “make any comment that might substantially interfere with a fair trial or hearing;” “make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;” “commend or criticize jurors for their verdict”; “disclose . . . nonpublic information acquired in a judicial capacity;” “appear at a public hearing before . . . an executive or legislative body” except on specified subjects; “personally participate in the solicitation of funds” for civic or charitable organizations; or engage in a range of political activities except in specified circumstances.

this rule may *appear* to have closed her mind by committing (or promising) to decide a legal issue in a specified way, but in reality remains impartial as long as she is willing to reconsider her prior commitment (or renege on her earlier promise) at the point of decision; by the same token, the judge who honors the rule may *appear* to be impartial, but in reality is not if she allows unspoken commitments to prejudice her decision-making.

Once again, however, the First Amendment has been construed to impose potentially significant restrictions on the state's authority to curb judicial speech. In the 2002, the U. S. Supreme Court decided *Republican Party of Minnesota v. White*.<sup>66</sup> In *White*, the United States Supreme Court invalidated the so-called "announce clause" in the Minnesota Code of Judicial Conduct, which the Court construed to bar a judge from announcing "his views on any specific, nonfanciful legal question within the province of the court for which he is running." The Court ruled that the announce clause imposed a content-based restriction on judicial speech that was subject to strict constitutional scrutiny and could survive only if it was "narrowly tailored" to serve a "compelling government interest." While the Court appears to have conceded the possibility that the state had a compelling interest in preserving an open-minded and, hence, impartial judiciary, the Court did "not believe that the Minnesota Supreme Court adopted the announce clause for that purpose." Rather, concluded the Court, the *real* purpose for the clause was to "undermin[e] judicial elections" by "preventing candidates from discussing what the elections are about."

The implications of *White* remain uncertain but are potentially far-reaching. Critics of the decision who are committed to restricting what judges may say and with

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<sup>66</sup> 536 U.S. 765 (2002)

whom they may associate as a means to preserve judicial impartiality and its appearance have construed *White* narrowly, to mean only that states may not prevent judicial candidates from stating their views on disputed legal issues. For them, *White* does not apply to restrictions on speech outside the context of judicial campaigns and does not affect the state’s authority to restrict other forms of campaign speech, such as pledges or commitments, where the nature of the state’s interest in regulating the speech is more compelling or otherwise different. Whether the critics will be vindicated, however, remains unclear. The basic approach taken by the Court in *White* was to regard state-imposed restrictions on the content of judicial speech as presumptively invalid—a presumption that the state cannot overcome without a compelling justification. Whether the state’s interest in preserving the appearance of impartiality is a sufficiently compelling justification to uphold other content-based restrictions on judicial speech within or without judicial campaigns remains to be seen.

In *Mississippi Commission on Judicial Performance v. Wilkerson*,<sup>67</sup> decided two years after *White*, the Mississippi Supreme Court offered a glimpse into the brave new world of deregulated judicial speech. In that case, a county judge wrote a letter to his local newspaper, stating that “I got sick on my stomach” after reading an article about legislation in other states “granting gay partners the same right to sue as spouses,” adding that “in my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.” The Commission on Judicial Performance concluded that the judge’s conduct violated two provisions of the Code: Canon 2A, which directed the judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and Canon 4A, which

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<sup>67</sup> 867 So. 2d 1006 (Miss. 2004).

required the judge to “conduct all extra-judicial activities so that they do not cast doubt on the judge’s capacity to act impartially as a judge.” The Mississippi Supreme Court rejected the Commission’s conclusions in light of the U.S. Supreme Court’s decision in *White*. Of pivotal importance to its decision was the court’s conclusion that the state had no compelling interest in preserving the appearance of impartiality under the circumstances of this case:

No credible person could dispute that having impartial judges is a compelling state interest. But “impartiality” is not the same as the “appearance of impartiality.” We find no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial.

To the contrary, the court observed, “forcing . . . judges to conceal their prejudice” would undermine “the more compelling state interest of providing an impartial court for all litigants.” If enforcement of the Code dissuaded judges like Wilkerson from speaking their minds, “unsuspecting gays or lesbians” would be “[u]naware of the prejudice and not know[] that they should seek recusal,” which “surely would not work to provide a fair and impartial court to those litigants.”

The implications of *White* and *Wilkerson*, logically extended, are potentially profound. Rules that prohibit judges from manifesting bias, making public statements on pending cases, joining discriminatory organizations, “conveying the impression” that others may influence them inappropriately, engaging in any extrajudicial speech or associations that call their impartiality into question, or campaigning like other elected officials must be reassessed. Is the state’s interest in preserving appearances generally—by prohibiting judges from engaging in various forms of speech and association that could call their impartiality into question—offset by the state’s interests in “outing”

biased judges so that litigants can protect themselves by moving to disqualify judges who reveal their prejudices? If so, the state's interest in preserving the appearance of impartiality is debunked and the judge's first amendment right to say what is on her mind must prevail. The net effect would be to require a shift in regulatory emphasis away from telling judges to avoid speech or associations that appear to compromise their impartiality, toward telling them that they may say what they please and associate with whom they wish, as long as they disqualify themselves from hearing cases in which their prior statements or associations might call their impartiality into question. That way, judges' First Amendment rights to speak and associate are protected, while litigants' due process right to an impartial judge is preserved.

This shift in regulatory emphasis from telling judges they may not create appearance problems, to telling them that they must disqualify themselves after they create appearance problems, is not merely speculative. To address the appearance problem that arises when judges receive campaign contributions in amounts sufficient to create the perception of influence, the ABA revised its Model Rules of Judicial Conduct in 1999, to require that judges disqualify themselves if they accept campaign contributions in excess of a specified amount.<sup>68</sup> As to "junkets for judges," the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct ultimately rejected invitations from the *New York Times* and others to ban judicial attendance at judicial seminars outright, in favor of commentary elaborating on when attendance at such seminars may give rise to appearance problems that would necessitate their disqualification. And in 2003, in direct response to the Supreme Court's decision in

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<sup>68</sup> AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT, Canon 2.E.(1)(e); *see also*, JAMES ALFINI, CHARLES GARDNER GEYH & STEVEN LUBET, JUDICIAL CONDUCT AND ETHICS §4.02 (3d Ed. 2004 Supp).

*White*, the ABA repealed a Model Code provision prohibiting judicial candidates from making statements that “appear[] to commit” them with respect to issues that could come before them later as judges, and added a new provision subjecting judges who make such statements to disqualification.

### **The Emergence of Partial Impartiality**

The preceding sections of this chapter reveal a striking paradox. On the one hand, the business of regulating appearances is booming. The history of judicial ethics in the 20th and 21st centuries tells the story of the birth and ascendance of rules aimed at discouraging the appearance of impropriety, as a means to promote public confidence in the judiciary. To punctuate their escalating commitment to monitoring appearances, regulators have striven to make rules governing the appearance of judicial impropriety increasingly enforceable.

On the other hand, the business of regulating appearances is at risk of going bust. The *appearance* of impropriety is often reflected in words or associations suggestive of underlying judicial bias, partiality or misconduct. By manifesting their commitment to discouraging the appearance of judicial impropriety in the promulgation and enforcement of rules that restrict judicial speech and association, regulators have pitted one great Twentieth century movement (promoting public confidence in government) against another (protecting individual rights). If it comes down to a confrontation from which the individual rights movement emerges triumphant—and cases like *White* and *Wilkinson* suggest that possibility—the century-long effort make rules regulating judicial appearances tougher may, paradoxically, culminate in making them weaker.

To avoid such a confrontation, disqualification has become the new frontier in the regulation of appearances. Let judges speak, the argument goes. We are kidding ourselves if we think that judges are unencumbered by the same prejudices that burden the rest of us. By encouraging them to share their positions and predilections we can better protect ourselves from judges whose biases render them unfit to sit. Under this new paradigm, disciplinary rules would no longer be a barrier at the edge of the cliff so much as an ambulance at its base: rather than stopping appearance problems before they occur (through the promulgation of rules that restrict the speech and association of judges in problematic ways), the emerging approach is to let the appearance problem occur and mop up afterward with disqualification.

It is premature, perhaps, to speak in terms of a new disqualification regime because disqualification too is under attack. In the aftermath of *White*, activists on the political left and right have peppered judicial candidates with questionnaires soliciting their views on a range of substantive issues, implicitly or explicitly threatening them with retaliation at the ballot box if they decline to answer. From their perspective, the holding of *White* would be eviscerated if judges were enabled to share their views on issues that matter to voters, only to be told that if judges did so they would later be disabled from deciding cases raising those issues. If judges may not be subjected to discipline and thereby punished directly for expressing their views, they argue, then judges may not be punished indirectly by disqualifying them from hearing cases that raise the very issues to which their views pertain.<sup>69</sup>

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<sup>69</sup> See, e.g., Matthew Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072 (2004).

Those who defend a disqualification regime may counter that disqualification does not prohibit judges from speaking their minds (as the provision invalidated in *White* did). Moreover, to the extent disqualification rules burden judicial speech indirectly by encouraging judges to keep silent so as to avoid subsequent disqualification, it is a burden justified by the government's interest in protecting the due process rights of litigants who are entitled not to have their cases heard by judges who are biased or appear to be so. There is an almost post-apocalyptic quality to the parallel universe in which judges have a constitutional entitlement to rule on cases that they appear to have prejudged: Put yourself in the position of plaintiff in a sexual harassment suit where the presiding judge has a "right" to adjudicate your claim despite having told an audience of corporate managers from the campaign stump that "I have no patience for sexual harassment claims, which by their nature enable lower echelon employees to terrorize hard-working middle-managers."

If the emerging disqualification regime survives constitutional attack, it may lead in one of two different directions. One possibility is that the new regime will work as intended. To the extent that is so, it calls to mind the old adage: be careful what you wish for. If norms shift and judges are encouraged to air their views, vent their biases, and display their allegiances as long as they disqualify themselves later from any case in which their prior statements and associations could call their impartiality into question, one can reasonably anticipate a sizable jump in the number of cases where disqualification would be necessary. The impact on the administration of justice in areas where judges are in relatively short supply, which is to say anywhere outside of major metropolitan areas, could be especially acute. Even in urban areas, the added



administrative burden could be considerable, as cases are shunted this way and that to protect litigants from judges whose extrajudicial pronouncements, membership in discriminatory organizations, or political activities disqualify them from hearing cases involving gays, racial minorities, unmarried mothers, immigrants, Christian conservatives, women, and so on.

There is reason to suspect, however, that crippling levels of disqualification will not materialize, given a second possibility : that judges will simply reassess when an appearance problem sufficient to warrant disqualification arises, so as to limit the circumstances under which recusal is necessary. Judges have permitted the practical needs of judicial administration to trump the appearance problems that come from non-disqualification in a multitude of settings. Four examples will suffice.

The first, and certainly the most notorious example, is Justice Antonin Scalia's decision not to disqualify himself from participating in a case in which Vice President Dick Cheney was a party, despite the fact that Scalia had recently flown with Cheney on a government jet to a camp in Louisiana for several days of duck hunting. Justice Scalia rejected the suggestion that he should "resolve any doubts in favor of recusal" because with one justice out, "[t]he Court proceeds with eight justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case."<sup>70</sup>

A second example is Justice Stephen Breyer's decision to sit in a case addressing the constitutionality of the criminal sentencing guidelines despite the fact that Breyer had, as a Senate staffer assisted in creating the guideline system, and as a federal judge had served as a member of the Sentencing Commission. Professor Stephen Gillers, who

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<sup>70</sup> Cheney v. United States District Court, 541 U.S. \_\_\_ (2004).

Breyer consulted, advised that disqualification was unnecessary. Gillers reasoned that although Breyer had been a longstanding advocate for the guidelines, he had not previously spoken to the precise issue before the Court, and that if he were disqualified under such circumstances it would pose a practical bar to accomplished advocates becoming judges.<sup>71</sup> Professor Jeffrey Shaman concurred: “If we applied the rule strictly, we would be disqualifying a lot of judges.”<sup>72</sup>

A third example is the so called “rule of necessity.” As one encyclopedia of law summarizes the rule, “[t]he majority view is that the disqualification of judges must yield to the demands of necessity.”<sup>73</sup> Where all available judges would be disqualified from hearing a matter, disqualification requirements are overridden, and an otherwise disqualified judge may decide the matter. Thus, judges may resolve disputes the outcomes of which will affect their own jobs or income, insofar as all judges within the jurisdiction would be similarly affected.<sup>74</sup>

A fourth and highly relevant example concerns disqualification on the basis of a judge’s prior relationships with lawyers or parties. Available data show that rural judges are less inclined to disqualify themselves on the grounds of bias or relationships than urban judges.<sup>75</sup> As one commentator has explained:

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<sup>71</sup> Tony Mauro, *Breyer Consulted Ethics Expert Over Sentencing Case Recusal*, LEGAL TIMES, January 17, 2005.

<sup>72</sup> *Id.*

<sup>73</sup> 46 Am. Jur 2d Judges 91.

<sup>74</sup> *United States v. Will*, 449 U.S. 200 (1980)(authorizing federal judges to decide case challenging Congressional action depriving federal judges of statutory salary increase) ; *Olson v. Cory*, 26 Cal. 3d 672 (Cal. 1980) (rule of necessity authorizes state judges to hear case concerning cost of living adjustments for judges); *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) (judge did not err in refusing to disqualify himself from case challenging the constitutionality of financial disclosure requirements imposed on federal judges)..

<sup>75</sup> Jonna Goldschmidt and Jeffrey Shaman, *Judicial Disqualification: What Do Judges Think?*, 80 JUDICATURE 68, 71 (1996).

Rural court judges often know the participants in the court case and may have strong feelings about the lawyers who litigate frequently before them. Where there are no other local judges to hear the matter, a rural judge must often sit on cases where multi-court judges would defer to another judge.<sup>76</sup>

To some extent, a judge's familiarity with the parties and lawyers presents less of an appearance problem in a small town, than an urban setting; but courts have been quite candid that their "ethical relativity" is animated at least in part by the demands of practical necessity.<sup>77</sup>

In short, if the paradigm changes and judges en masse begin to vent their spleens in public fora on legal issues of the day for the benefit of voters, Oprah Winfrey or their own immortality, it could conceivably trigger an avalanche of mass-recusals. If appearance problems can be avoided only at the expense of widespread disqualifications that compromise efficient judicial administration, however, the foregoing examples suggest that judges will opt instead to endure and discount appearance problems by interpreting disqualification rules in a more forgiving manner and settling for what amounts to "partial impartiality." In either case, the public's perception will be that the judiciary is peopled with jurists who strive to elaborate upon their prejudices, rather than keep them in check.

### **Conclusion**

Lillian Hellman once wrote: "Nobody can believe in an unprejudiced point of view, outside of a baby carriage or a judge's chamber." With the triumph of legal

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<sup>76</sup> Marla Greenstein, *Ethical Relativity*, 41 JUDGES J. 38, 38 (2002).

<sup>77</sup> *Id.* (referring to issue as one of "ethical relativity"); In re Antonio, 612 A. 2d 650, 654 (R.I. 1992) ("To hold that mere acquaintanceship between bench and bar requires recusal of the trial justice, particularly in a state the size of Rhode Island, would result in a collapse of the state's judicial system"); In re McCutcheon, No. 3 JD 03 (Pa. Ct. of Jud. Discipline, April 15 2004 (it was proper for judge to hear the traffic case of his grandson's friend, "given the realities of the administration of justice in small towns").

realism, it is probably safe to assume that most of us would regard her observation as overstated in its application to judges—judges are people too, and as such, are subject to the same prejudices as the rest of us. But she succeeds in isolating an essential aspect of the judicial role that renders it virtually unique in the American experience. Perhaps it is not possible for judges to be unprejudiced, uncommitted, and viewpoint neutral, but unlike others, their role as fair and impartial arbiters of disputes in an adversarial system demands that they resist their predispositions to remain as open-minded as possible.

The United States Supreme Court has told us that judges who stand for election (who constitute over 80% of the total) have a right to announce their positions on issues that they will be called upon later to decide. To concede that judges have a right to do it, however, is not to concede that judges are right to do it. It is superficially appealing to say, as the Mississippi Supreme Court did in *Wilkerson*, that the state has no legitimate business hiding a prejudiced judge, and that litigants can learn what they need to know to seek the judge's disqualification only if a judge is encouraged to air her prejudices. But this argument misses two essential points. First, the good judge should not cultivate or celebrate her prejudices. She should struggle to minimize them, for the benefit of a judicial role that depends on her remaining receptive to opposing points of view. To encourage a judge to enter the extrajudicial marketplace of legal ideas as a celebrity buyer or seller, is to encourage her to vest herself publicly in points of view from which it will be doubly difficult to retreat later in the context of specific cases or controversies without looking spineless, stupid, or duplicitous. Second, if the paradigm shifts and the public venting of judicial spleens becomes routine, the likely result will not be mass disqualification of all judges who have called their impartiality into question. Given the

continuing need for an adequate judicial workforce, the likelier result will be a reinterpretation of the disqualification rules that downplays the size of the axes judges have been grinding so as to enable them to sit, lingering appearance problems notwithstanding.

For over a generation, regulators have sought to promote public confidence in the courts through a system of enforceable rules that direct judges, under threat of discipline, to avoid the appearance of impropriety. Appearance problems, however, often manifest themselves in judicial speech or association that when targeted for disciplinary action can provoke constitutional challenges—challenges that began in the campaign arena and have since spilled over into other contexts. The approach of the American Bar Association, which promulgates the Model Code of Judicial Conduct that most jurisdictions follow, has been to stay the course. In the ABA’s view, the state’s interest in preserving public confidence in the integrity, independence and impartiality of the courts justifies a range of restrictions on judicial speech and association. And so, the ABA has modified its rules to the minimum extent necessary to accommodate cases such as *White*, but has rejected calls to embrace the spirit of *White* by deregulating judicial speech and association generally, and has determined not to go there unless and until the Supreme Court says it must.

The ABA’s approach is one I support (and have assisted in developing). But there is no denying the possibility that over time, the Supreme Court may force the ABA to yield, just as it forced the ABA to abandon its longstanding restrictions on lawyer advertising and solicitation in the 1970s. The ABA’s emerging fallback position would appear to be that if it must permit a judge to speak and associate in ways that create

appearance problems, it can at least insist that the judge disqualify himself later from any case in which his impartiality might reasonably be questioned, but as I have argued, over time, such an approach is likely to be compromised to accommodate systemic needs.

Even if the Supreme Court invalidates additional—or, for that matter, all—disciplinary rules that seek to avoid appearance problems by restricting judicial speech and association, it would be premature to predict a sea change in the way judges perceive their roles or conduct themselves. To no small extent, the current disciplinary rules codify the norms of an Anglo-American legal culture that has been centuries in the making. For centuries, judges have created physical distance between themselves and those they are called upon to judge by sitting aloft on benches, dressed in black. For centuries, judges have created psychological distance between themselves and those they are called upon to judge with informal norms that counsel judges to struggle against popular prejudices and preserve their impartiality.<sup>78</sup> And for over a century, judges have been impressed with the need to promote public confidence in the courts by watching what they say, where they go, and with whom they associate to preserve not just the reality but also the appearance of judicial independence, integrity and impartiality.

This deeply entrenched normative structure is unlikely to topple simply because the Supreme Court wakes up one morning and declares that the government is forbidden from imposing formal discipline upon isolated deviants who now have a First Amendment right to say what they please and associate with whom they wish—unless the bench and bar let it. After all, the norms at issue emerged long before formal disciplinary processes were even in existence.

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<sup>78</sup> See, e.g., the rules of judicial conduct developed by Sir Matthew Hale, *supra* notes 17-18.

Regardless, then, of who prevails in the ongoing battle between regulators and civil libertarians over the extent to which the state may control judicial speech to guard against the appearance of judicial impropriety, those who seek to restore public confidence in the courts in an age of skepticism would be well-advised to return to the roots of a legal culture that has promoted judicial independence, integrity and impartiality far longer than any system of enforceable rules. At those roots is a principle worth preserving and inculcating: that lawyers who don the robe are doing more than accepting a new job. They are accepting a new way of life, in which they should sometimes sublimate their rights for the greater good of the public they serve, by curtailing their actions, speech and association so as to earn and retain the public's trust.