

Volume 125 | Issue 1

Fall 2020

Mirror, Mirror, On the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform

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Recommended Citation

Zygmunt A. Pines, *Mirror, Mirror, On the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform*, 125 DICK. L. REV. 69 (2020).

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Mirror, Mirror, On the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform

Zygmunt A. Pines*

ABSTRACT

The article focuses on a troubling aspect of contemporary judicial morality.

Impartiality—and the appearance of impartiality—are the foundation of judicial decision-making, judicial morality, and the public’s trust in the rule of law. Recusal, in which a jurist voluntarily removes himself or herself from participating in a case, is a process that attempts to preserve and promote the substance and the appearance of judicial impartiality. Nevertheless, the traditional common law recusal process, prevalent in many of our state court systems, manifestly subverts basic legal and ethical norms.

Today’s recusal practice—whether rooted in unintentional hypocrisy, wishful thinking, or a pathological cognitive dissonance—has been habitually relegated to the periphery of our administration of justice when its rightful place should be its nucleus. Impartiality of judgment and the integrity of the judicial process are critical weaknesses of a recusal regime that vests virtually unfettered discretion in a jurist to conduct an ad hoc self-assessment of his or own impartiality, i.e., the paradox of biased

* Former State Court Administrator of Pennsylvania (2000–2015); Chief Legal Counsel, Administrative Office of Pennsylvania Courts (1991–2000); member, Board of Advisors, Pennsylvanians for Modern Courts (PMC). The genesis of this article was a conversation the author had in 2018 with Maida Milone, former Executive Director of PMC, regarding the critical importance of recusal, which was scheduled to be a focus of PMC’s future programs. Ms. Milone had participated in a national recusal project (“IAALS REPORT”). See note 39, *infra*. Gratitude is extended to Ms. Milone and PMC members for their encouragement and support for this article. The author is also grateful for the research assistance provided by Christopher Iacono, who graciously extended much time and effort while he was a third-year student at the University of Pennsylvania School of Law. The views herein are solely those of the author who assumes responsibility for any errors or omissions.

impartiality. In such circumstances, actual and apparent impartiality of a jurist, fortified by the mechanical application of the common law's presumption of judicial impartiality, is misguided and delusional.

The article opens with a brief overview of the historical development of recusal principles and judicial ethical codes, followed by an exposition of recusal theory and practice in a representative state (Pennsylvania). The background of ethical principles and practice culminates in a specific recusal proposal (a potential judicial rule or statute) based on over-arching categorical and procedural imperatives that can guide recusal reform efforts. The article, thus, goes well beyond the many good, but general, commentaries on recusal and fills the void of a prescribed process. The detailed recusal procedures represent an amalgamation of best practices urged by commentators and implemented, in varying degrees, in some states. The proposal is both practical and workable, applicable to elected and appointed judiciaries, and pertinent to the disturbing specter of judges' increasing reliance on money in judicial campaigns.

Thus, the article seeks to highlight the importance of specific procedural processes to meaningfully promote judicial fairness and ethical conduct in substance and appearance.

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INTRODUCTION

Are judges human? If judges are human, are they like umpires?

In 1931, a prominent legal philosopher and later federal circuit court judge, Jerome Frank, authored a law review article¹ teasingly questioning whether judges are human. Frank’s answer? Judges are indeed “incurably human”—their background and personality affect all their thinking and, therefore, their decisions. Fast forward 75 years when the Chief Justice of the United States addressed the U.S. Congress and employed a metaphor to describe the role of a

1. Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931). *See also infra* note 26. In her study encouraging a more holistic and humanistic legal framework through a better understanding and incorporation of psychoanalysis, Professor Dailey points out that Jerome Frank was responsible for bringing psychoanalytic ideas to the attention of the legal world. In quoting from Frank’s work, Dailey points out that Frank was critical of an unexamined assumption of purely objective reasoning, stating “[w]e shall not learn how judges think until we are able and ready to engage in ventures of self-discovery.” *See* ANNE C. DAILEY, *LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE* 59 (Yale Univ. Press 2017).

judge. In his view, judges are like umpires.² The sporting theory of justice, as Roscoe Pound vividly described America's peculiarly contentious procedural approach³ in his 1906 address to the American Bar Association ("ABA"), is a metaphor that possesses great didactic and rhetorical appeal.⁴

The reliance on such an often-invoked, simplistic sports analogy to describe the role of judging remains an interesting one because it brings into dramatic focus a critical aspect that the worlds of sports and law share—fundamental fairness of a highly formal-

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be the Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be the Chief Justice of the United States). See Theodore A. McKee, *Judges as Umpires*, 35 *HOFSTRA L. REV.* 1709 (2007) (federal judge's reflections on Chief Justice Robert's metaphor); and William J. Stevens, *Aside: The Common Law Origins of the Infield Fly Rule*, 123 *U. PA. L. REV.* 1474, 1478–79 (1975) (discussing the English origins of baseball and noting that the sporting concept of fair play has a moral basis analogous to the Anglo-American concepts of due process and justice).

3. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted at Symposium, *Centennial Reflections on Roscoe Pound's 1906 Address to the American Bar Association*, 48 *S. TEX. L. REV.* 853, 861 (2007), wherein Pound decried America's peculiar atavistic impulse to treat justice as a dueling sport that contributed to the public's crisis of confidence in the legal system, noting "[h]ence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point." See also Edward F. Sherman, *Dean Pound's Dissatisfaction with the "Sporting Theory of Justice": Where Are We a Hundred Years Later?*, 48 *S. TEX. L. REV.* 983 (2007). In response to Judge Learned Hand's jocular adieu to Justice Oliver Wendell Holmes to "do justice," Justice Holmes replied: "That is not my job. My job is to play the game according to the rules." See STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* 415 (2019). See also David R. Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary*, 50 *CATH. U. L. REV.* 361, 375 (2001) ("Judges are therefore the umpires of the community's conflicts and their fair and equitable treatment of disputants is required for the process to be legitimate."). Professor Friedman of the University of Michigan School of Law has expressed his interest in drafting a law school course that would study sports as legal systems. See Richard D. Friedman, *Just Say No to the Cheap Double Play*, 13 *FIU L. REV.* 931, 931 (2019) (noting that "the rules of sports offer fertile ground to explore legal concepts").

4. *But see* McKee, *supra* note 2, at 1710 and 1724, who posits that the metaphor is useful in a simplistic sense for public communication purposes but obscures a complex dynamic given that judges may not be able to systematically decide cases upon an objective and mechanical application of a set of rules, free of bias, personal, ideological, or political leanings. *Id.* at 1701. Judge McKee concludes that it may be more accurate to say that an umpire does not merely call balls and strikes but is also responsible for defining baseball's "strike zone." *Id.* at 1723–25. See also Chad M. Oldfather, *Umpires, Judges, and the Aesthetics of the Infield Fly*, 13 *FIU L. REV.* 957 (2019) (micro-symposium article that comments on the umpire metaphor and its tenuous relation to judicial decision-making).

ized process (i.e., a game or litigation) and the integrity of the person who sits in the awesome seat of judgment (i.e. an umpire, a referee, a judge). Fairness—in both substance and appearance—is integral to the public’s trust and confidence in the respective endeavors of sports and law.

When Serena Williams lost the U.S. Open finals tennis tournament in 2018, controversy swirled over whether gender bias had influenced the umpire.⁵ The public speculation was understandable given the tennis legend’s dramatic loss and the tempestuous circumstances leading to the umpire’s final and unreviewable decision that penalized Ms. Williams’ conduct on the court.⁶ The dramatic scenario between the referee and Ms. Williams was akin to a summary contempt of court confrontation. Regarding fairness in sports, one commentator has observed that psychological biases are endemic across every sport, stating, “[the referees] are just being human.”⁷ Studies have supported the existence of referee or umpire bias in various sports—tennis, baseball, soccer, hockey. Whether it is the “homey” (home field) advantage, or the sex, race, or even height of the players, bias exists in sports, as research demonstrates.⁸ As the *New York Times* columnist, David Brooks, noted:

5. See Frank Meehan, *It’s Time to Have All Tennis Umpires. No Sexism, Racism or Bias*, MEDIUM (Sept. 9, 2018), <https://bit.ly/2ZUCmKt> [<https://perma.cc/T7ZV-D8XM>]. See also Phil Birnbaum, *Is There Racial Bias Among Umpires?*, BASEBALL RES. J., Fall 2010, at 65–70, reprinted at <https://bit.ly/3iKdTA0> [<https://perma.cc/LJA7-JZF2>]; Arthur Dobrin, *Do Umpires Call Them as They Are or as They See Them?*, PSYCHOLOGY TODAY (July 8, 2014), <https://bit.ly/2OdpNEj> [<https://perma.cc/4X8Y-SCRX>]; Raj Persaud & Peter Bruggen, *Are Referees Unfair to Female Players?*, PSYCHOLOGY TODAY (Sept. 12, 2018), <https://bit.ly/3gLw5HZ> [<https://perma.cc/JE9M-5WF9>]; and Phil Hank, *Hands on Wisconsin: Kavanaugh Seems Like a Biased Umpire*, LA CROSSE TRIBUNE (Oct. 3, 2018), <https://bit.ly/2DlePdp> [<https://perma.cc/K7T4-VPWG>].

6. Ms. Williams was seeking a record-tying 24th Grand Slam singles title. She was defeated by Naomi Osaka. Ms. Williams had been warned by the referee about “coaching,” which is tantamount to cheating. A second violation occurred when Ms. Williams slammed her racket on the ground. She then received a penalty for “verbal abuse” when she called the referee a “thief” and a “liar.” Ms. Williams claimed she was being treated harsher than male players. Some commentators questioned whether sexism played a role in the umpire’s call, and others suggested a “soft warning” would have been more appropriate. See Danielle Rossing, *Serena Williams’ U.S. Open Outburst Leaves Women’s Tour Divided*, CNN (Sept. 24, 2018), <https://cnn.it/3iRcbNe> [<https://perma.cc/6HDM-WAR7>]. For a post-script, see *infra* note 340.

7. Persaud & Bruggen *supra* note 5.

8. See, e.g., Christopher A. Parsons et al., *White Favoritism by Major League Home Plate Umps Lowers Minority Pitcher Performance and Pay Baseball Study Finds*, SCIENCE DAILY (Sept. 9, 2011), <https://bit.ly/3ejxAeJ> [<https://perma.cc/A2FN-D9EU>]; Thomas Dolmen & Jan Sauermann, *Referee Bias*, 30 J. ECON. SURVEYS 679, 691–92 (noting, in reference to a referee’s principal duty of impartiality, that referees may “adapt their behavior consciously if there are monitoring

“In all societies, there are rules defining good conduct, and there are supposed to be impartial, honest referees that enforce those rules and make sure the game is fair And today, across society, two things are happening: Referees are being undermined, and many are abandoning their own impartiality Things begin to topple.”⁹

Another commentator, in analyzing the National Hockey League, has expressed the problem in terms of a subconscious “biased impartiality.” This bias results from a host of pressures on referees—e.g. spectators, peers, league officials, financial interests, maintenance of strong working relationships, good entertainment, appeasing a partisan crowd, audience noise—all of which have the potential to undermine public confidence in the fairness of the game.¹⁰

The question in both sports and the justice system is how does one deal with the human element in such high-stakes public decision-making? Some have suggested that the answer may rest in the promise of technology. One commentator asked if it is time to have artificial intelligence (“AI”) tennis umpires.¹¹ The AI idea has some allure. In a similar vein, another commentator asked: “Do we need human judges in the age of artificial intelligence?”—noting that technology and the law are converging in a way that challenges our notions of justice.¹² Such a facile approach, however, is mis-

systems” in place; and that “increased awareness [may also] inhibit[] subconscious decision-making s[o] that referees are less susceptible to succumb to social pressure”); Gil Imber, *Referee Bias: Quantifying the Homer Effect and Officiating Home-Field Advantage*, BLEACHER REP. (Nov. 29, 2011), <https://bit.ly/2Zg0b0d> [<https://perma.cc/UG5L-9YEH>](noting two types of soccer referees, the “homey” or “homer,” which operates subconsciously and favors the home team; and the “brave” type).

9. David Brooks, *It's Not the Collusion, It's the Corruption*, N.Y. TIMES (Apr. 19, 2019), <https://nyti.ms/2DnLn7j> [<https://perma.cc/M86Z-C5ZG>].

10. See Michael Lopez & Kevin Snyder, *Biased Impartiality Among National Hockey League Referees*, 8 INT'L J. SPORT FIN. 208, 221–22 (2013) (noting that the incentive to “even up” penalty calls to compensate for bias in favor of the home team may be motivated by the desire to achieve the perception of fairness and balance); cf. Charles G. Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 886 (2007) (discussing the concept of “partial impartiality” as representing the emergence of a new frontier in the regulation of appearances, in the context of judicial campaign speech that encourages judges to be upfront about their positions and predilections, concluding that relaxed disqualification standards, brought about by a “brave new world of judicial speech,” foster rather than ameliorate appearance problems).

11. See Meehan, *supra* note 5.

12. Ziyaad Borhat, *Do We Still Need Human Judges in the Age of Artificial Intelligence?*, OPENDEMOCRACY (Aug. 8, 2017), <https://bit.ly/2Cf4bF9> [<https://perma.cc/987C-QCKX>].

guided. Professor Kartid Hosan Agar of The Wharton School expressed his concern about algorithmic bias and its increasing use in scenarios in the justice system that must deal with life and death situations. Algorithms, he said, can go wrong because they are behavior-driven by the code that engineers give it and the data that they selectively input—such algorithms are neither 100 percent objective nor rational.¹³ Algorithmic bias exists. Agar brings this fairness-impartiality dilemma full circle by recognizing that humans—yes, humans—must be kept in the loop.¹⁴

Since judges and referees are human and must be kept in the decision-making loop, how does one deal with the problem of bias? Ironically, like a high fly ball that landed at the feet of the justice system, the genesis for ethical guidance may have come from Major League Baseball. In the 1920s, eight Chicago White Sox members were criminally charged in the so-called “Black Sox Scandal.” Various baseball players allegedly lost the 1919 World Series intentionally in exchange for money from a gambling syndicate. As a result of the national scandal, a federal judge—Kenesaw Mountain Landis—was brought in as baseball’s first commissioner to combat

13. See Christian Hetrick, *In New Book, Wharton Prof Shows How Facebook, Amazon, and Netflix Algorithms Shape our Decisions*, PHILA. INQ. (Mar. 18, 2019), <https://bit.ly/2XvZYoc>.

14. See *id.* See also Will Knight, *Biased Algorithms are Everywhere and No One Seems to Care*, MIT TECH. REV. (July 12, 2017), <https://bit.ly/3fw3MMY> [<https://perma.cc/7WKS-DVQF>]; Hannah Sassaman, *Pennsylvania’s Proposed Risk-Assessment Algorithm Is Racist*, PHILA. INQ. (last updated Sept. 4, 2019), <https://bit.ly/3ki5btm>. Aside from the public policy issue of using algorithms for decision-making in the justice system, there remains the fundamental challenge of the ability to define and embed elusive, fluid value judgments (like fairness, justice, ethics) into algorithmic design. The potential ethical dimensions of algorithmic design are the subject of an intriguing and thought-provoking study by two professors who explore how social norms could be defined and incorporated into algorithms. The authors acknowledge that qualitative decisions and judgments must remain firmly in the domain of human decision-making and that there may be some norms and values that we do not want to formalize or encode in algorithm design. In other words, there may be both scientific and moral limits to machine coding. See MICHAEL KEARNS & AARON ROTH, *THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN* (Oxford Univ. Press, 2019). See BRIAN CHRISTIAN & TOM GRIFFITHS, *ALGORITHMS TO LIVE BY: THE COMPUTER SCIENCE OF HUMAN DECISIONS* 167 (2016) (regarding the dilemma of uncertainty and the compulsion to over-see information in decision-making, the authors quote a Canadian academic and management consultant who asked: “What would happen if we started from the premise that we can’t measure matters and go from there? Then instead of measurement we’d have to use something very scary: it’s called judgment”). Cf. Daniel B. Rodriguez, *Bias in Regulatory Administration*, Northwestern Public Law Research Paper No. 19-14 (2019), nn. 242–43 (Aug. 1, 2019), available at <https://bit.ly/3grDegu> [<https://perma.cc/6QAQ-QCJR>] (discussing the role and evolving use of algorithms in administrative agency decision-making).

gambling and bribery influences in baseball. Through Landis's landmark leadership, eight players were barred for life—although later acquitted of criminal charges—and baseball's reputation for being a clean game was salvaged, an enduring benefit of Judge Landis's courageous leadership. Nevertheless, consistent with the adage that no good deed goes unpunished, lawyers harshly criticized Judge Landis for retaining his federal judgeship while serving as a baseball commissioner. His annual salary as a baseball commissioner was \$45,000, compared to his annual salary of \$7,500 as a federal judge. At the time, Judge Landis had not violated any ethical precept or law. Regardless, the ABA thereafter censured the controversial judge.¹⁵

Serendipitously, the Landis controversy provided the impetus and inspiration for the ABA to undertake the effort of promulgating, in 1924, the first comprehensive code of judicial ethics.¹⁶ The code counseled judges to avoid impropriety as well as the *appear-*

15. See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 915–17 (2007) (discussing the Landis controversy and the ABA censure). Kenesaw Mountain Landis (his name was derived from a Civil War battle) resigned from the bench but served as baseball commissioner until his death in 1944. Regarding his judicial career, Judge Landis had imposed a staggering \$29 million fine on John D. Rockefeller's Standard Oil Company in a 1907 antitrust case based on a 1462-count complaint. The fine, which electrified the nation, was the largest then imposed by an American court. See David Pietrusza, *Judge and Jury: The Life and Times of Judge Kenesaw Mountain Landis* 63 (1998). See also *Berger v. United States*, 255 U.S. 22 (1921) (regarding disqualification of Judge Landis because of his biased statements about Germany and German-Americans where the defendants were of German ancestry). For particularly good narratives of Judge Landis and the evolution of judicial ethics, see also Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1922–25 (2010); Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109 (2011); *Lomas v. Kravitz*, 130 A.3d 107, 132–45 (Pa. Super. Ct. 2015) (Stabile, J. concurring in part) [hereinafter referred to as "*Lomas – OISR*"], *aff'd* 170 A.3d 380 (Pa. 2017) [hereinafter referred to as "*Lomas-II*"]. Landis remains a controversial figure regarding allegations of his apparent racial bias when he was a baseball commissioner. See Ben Walker, *MLB: MVP Plaque Presenters to Discuss Landis' Name on Trophy*, GARDNER NEWS (July 2, 2020), <https://bit.ly/3gJzhEh> [<https://perma.cc/4GRD-YTCV>].

16. Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Code*, 34 HOFSTRA L. REV. 1337, 1350 n.67 (2006) (noting prior unsuccessful ABA attempts to promulgate canons of ethics in 1909 and 1917 and the ABA's approval to form a commission to draft rules in 1922); Bowie, *supra* note 15, at 911–41 (providing a good history of the development of the ABA's canons); and Symposium, *supra* note 3, at 1099 (noting that the professionalization of the organized bar during the Progressive Movement may have also influenced judicial ethical reform).

ance of impropriety. These nascent ethical precepts, however, were vague and purely advisory.¹⁷

Concerted efforts to systematically reform judicial conduct began in the 20th century.¹⁸ Central to ethical judicial conduct is the concept of “disqualification,” also commonly referred to as “recusal,” a process by which a judge—either voluntarily or pursuant to a motion—withdraws from participation in a judicial proceeding.¹⁹ The objective of recusal has been to identify and eliminate the potential for impropriety, such as bias or prejudice, in the judicial decision-making process. The terms “recusal” and “disqualification” will be used interchangeably herein.

While the issue of recusal, as it relates to bias and prejudice, has received considerable public attention—for example, in high-level federal confirmation proceedings²⁰—legal commentators view

17. See Rotunda, *supra* note 16, at 1350–51; McKoski, *supra* note 15, at 1923–24. Professor Geyh describes this period as the appearance of appearances. See Geyh, *supra* note 10, at 877. Professor Virelli has noted that recusal had been linked to specific scenarios, including a judge’s pecuniary interest in the proceeding, service as counsel for either party in the same case, appearance of a relative as a party before the judge, participation in an appeal of a case in which the judge presided below, or where he was a material witness in the case before him. See LOUIS J. VIRELLI, III, *DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION* 5–6 (2016). While these scenarios are not specifically linked to the concept of appearance, appearance is arguably implicated. Professor Virelli notes that the ABA’s actions concerning the appearance of impropriety formally introduced the concept of public perception as grounds for recusal. *Id.* at 8–9.

18. See, e.g., Charles G. Geyh et al., *The State of Recusal Reform*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 515 (2015) (identifying four phases of disqualification development); Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 512–16 (2007); M. Margaret McKewon, *Don’t Shoot The Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS, 45, 46–48 (2005).

19. See Goldberg et al., *supra* note 18, at 504 n.5 (observing that the terms are technically different, disqualification being mandatory, and recusal as voluntary, but functionally similar); MATTHEW MENENDEZ & DOROTHY SAMUELS, *JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION* 19 n.1 (2016) (noting that the terms are blurred in practice); and Judicial Ethics Comm., Pa. Conference of State Trial Judges, *Formal Advisory Opinion 2015-4* (2015) [hereinafter referred to as *PA Formal Advisory Op.*] (defining disqualification as “a specified fact, circumstance, or condition that makes one ineligible or unfit to serve or otherwise deprives the judge of the power to preside”; and defines recusal as an “act of removing or absenting oneself in a particular case because the judge concludes that the prevailing facts or circumstances could engender a substantial question in reasonable minds whether the judge can be impartial”). Rule 2.7 of the ABA Model Code of Judicial Conduct, however, does not employ the qualifier “substantial.” See *MODEL CODE OF JUDICIAL CONDUCT* r. 2.7 (AM. BAR ASS’N 2011).

20. See LAURENCE TRIBE ET AL., *UNRESOLVED RECUSAL ISSUES REQUIRE A PAUSE IN THE KAVANAUGH HEARINGS* (2016). See also Amanda Frost, *Keeping*

recusal as a linchpin in the preservation of a fair and impartial judicial system²¹ and an important component of the litigation process.²² The subject has received considerable commentary from prominent legal and judicial organizations, as well as legal scholars.²³ The scrutiny is understandable. One commentator has observed that there is a “terrible affliction” of biased judges.²⁴ And another has said that it is often the most biased judges who are least

Up Appearances: A Process-Oriented Approach to Judicial Recusals, 53 U. KANS. L. REV. 531, 539 n.31 (2005) (referring to the early case of *Marbury v. Madison*, 5 U.S. 137 (1803), wherein Chief Justice Marshall chose not to recuse himself in a case involving his failure to deliver a judicial commission and involving the legality of the commission which Marshall had to deliver as the Acting Secretary of State). Frost also offers commentary on the refusal of Justice Antonin Scalia to recuse in a case involving Vice-President Dick Cheney, which, she argues, undermined the reputation of the judiciary. *Id.* at 576–81. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004). In the executive branch context, the Administrative Conference of the United States adopted five recommendations to address actual and apparent bias. See *Adoption of Recommendations*, 84 Fed. Reg. 2139, 2139 (Feb. 6, 2019). For an interesting extended discussion of the limits of traditional due process or jurisprudential bias principles with respect to the assessment of bias in administrative decision-making and rule-making, see Rodriguez, *supra* note 14. For a high-profile exposure of a recusal controversy within the executive branch, consider the U.S. Department of Justice’s investigation into alleged Russian interference in the 2016 presidential election, which involved Attorney General Jeff Sessions’ decision to recuse and President Trump’s attempt to have him “unrecuse.” See THE MUELLER REPORT 310–13 (2019) and *infra* note 320. As to such “reversible recusal” at the judicial level, Justice Kelly of the Wisconsin Supreme Court announced his intention to unrecuse in a high-profile case involving the potentially substantial purging of Wisconsin’s voter list. In justifying his decision, he pointed to the absence of objections by the parties to his participation, the changed circumstances (the election, in which he lost his bid for a ten-year term, had been held) as well as his affirmative duty to hear every case. See Shawn Johnson, *Justice Daniel Kelly Will Lift Recusal in Voter Purge Case* (Apr. 29, 2020), <https://bit.ly/2W1Z7uF> [<https://perma.cc/LF6X-XLX4>].

21. Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. REV. 943, 949 (2011).

22. Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1174 (2015).

23. Commentators include the ABA, the Brennan Center for Justice at Stake (“Brennan Center”), the Center for American Progress, the Conference of Chief Justices (“CCJ”), and the Institute for the Advancement of the American Legal System (“IAALS”), whose works are cited *passim*. The focus of this article is on recusal as it applies to state judicial systems. For an extended description and enlightening analysis of federal recusal through a constitutional lens, as applied primarily to the United States Supreme Court, see VIRELLI, *supra* note 17; see also JOHN G. ROBERTS JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), <https://bit.ly/2O7Le9Z> [<https://perma.cc/KP46-C6WT>] (addressing recusal and ethics in the Supreme Court).

24. See Dmitry Bam, *Recusal Failure*, 18 LEGIS. & PUB. POL’Y 631, 631 (2015).

likely to recuse.²⁵ Judge Frank, a proponent of the philosophy of Legal Realism, viewed judicial bias as tantamount to corruption.²⁶ Others have stated that judicial bias represents a structural error that can have enormous corrosive and destructive impact.²⁷ The impact of judicial bias reaches beyond the parties and attorneys of a particular legal matter—it affects the legal profession, the judicial system, and the body politic because it undermines public trust and confidence in the fundamental fairness of our legal system. Recusal goes to the heart of our rule of law. As the U.S. Supreme Court cautioned in *Liljeberg v. Health Services Acquisition Corp.*: “. . . [P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”²⁸ The guiding principle, the Court added, is that “the administration of justice should reasonably appear to be disinterested as well as be so in fact.”²⁹

Against a backdrop of claims that current recusal processes are unconstitutional³⁰ and that the appearance-based recusal regime in

25. See Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 537 (2007).

26. See Frank, *supra* note 1 at 34–35. Judge Jerome Frank (1889-1957) was an American legal philosopher and author who played a significant role in the Legal Realism movement. Frank served on the Second Circuit Court of Appeals (1941–57). Frank also presided in the trial of Julius and Ethel Rosenberg. See *United States v. Rosenberg et al.*, 195 F. 2d 583 (1952), *aff'd* 346 U.S. 273 (1953). As to the Legal Realism movement, Professor Whittington has noted that in the early twentieth century, the “Realists” challenged old assumptions of the stability and objectivity of the law, contending that judges not only made policy from the bench but also did so in accordance with internal preferences instead of objective principles. The Legal Realists, whose heyday was in the 1920s and 1930s, eschewed a formalistic approach and believed that judges should be guided by a sense of purpose and attentive to policy concerns. It has been noted that others have referred to Legal Realism as the gastrointestinal theory of judicial decision-making. See Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1979 (2015); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997). The Realists believed that judges were influenced by psychological, sociological, and extralegal forces. See KEITH E. WITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 18 (1999).

27. See Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887, 893 (citing *Arizona v. Fulminate*, 111 S. Ct. 1246 (1991)); Raymond McKoski, *Living with Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491, 516 (2017) (noting that partiality destroys the foundation of the judicial process and can have an enormous destructive impact on the public’s perception of the judiciary). See also Rodriguez, *supra* note 14, at 9 n.32 (commenting on bias as arguably an aspect of corruption within the context of administrative decision-making).

28. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988).

29. *Id.*

30. See Bam, *supra* note 22, at 1136.

America is in trouble,³¹ ignoring the need to reform the principles and processes of recusal may be a fatal mistake.³² Recusal, of course, applies to both appointed and elected judges. Moreover, recusal reform may have acute relevance to judicial systems that elect their judges,³³ given the challenging realities of a significantly changed legal landscape—because of cases such as *Citizens United v. Fed. Election Comm’n*,³⁴ *Republican Party of Minnesota v. White*,³⁵ and *Caperton v. A.T. Massey Coal Co.*³⁶—as well as the corrosive impact of elected judges relying on money for their judicial campaigns and the consequential skeptical public perception of judicial impartiality.

Thus, it is important to analyze the principles *and* processes governing judicial disqualification. To provide a practical dimension to the nature of the recusal reformation challenge, particular attention will be given to one state, Pennsylvania, which has been criticized over the years for its recusal process.³⁷ Pennsylvania’s judiciary is an elected one, and its predominant recusal feature—a judge’s independent assessment of his/her own impartiality, subject to belated deferential standard of review in the event of an appeal—represents the most serious procedural and jurisprudential infirmity,³⁸ a structural problem it shares with many other states.³⁹

31. Charles G. Geyh, *Why Disqualification Matters. Again*, 30 REV. LITIG. 671, 676 (2011). In a critique of the appearance standard, the author observes that the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised a judge’s impartiality. The author advocates a revamped procedural recusal reform to promote public confidence. See text accompanying notes 160–75 regarding the problematic role of presumptions in the recusal context.

32. See Bam, *supra* note 21, at 953.

33. See generally Goldberg et al., *supra* note 18.

34. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

35. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

36. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). See AMERICAN BAR ASSOCIATION, HOUSE OF DELEGATES REPORT AND RESOLUTION 107 at 2 (August 8–9, 2011) [hereinafter referred to as “ABA RESOLUTION 107”] (noting that the *Caperton*, *Citizens United*, and *White* decisions “have significantly altered the landscape of judicial disqualification in the context of judicial election campaign support and have considerably raised the stakes in those 39 states where judges face some form of election”). ABA Resolution 107, adopted by the House of Delegates, called for clearly articulated procedures for judicial disqualification determinations, prompt review by another judge of denials of such requests, and, for states with judicial elections, disclosure requirements for litigants and lawyers, including guidelines for disclosure and disqualification.

37. See Kenneth S. Kilimnik, *Recusal Standards for Judges in Pennsylvania: Cause for Concern*, 36 VILL. L. REV. 713, 773 (1991).

38. Pennsylvania’s recusal processes have been referred to as a “black hole of judicial ethics.” See The Legal Intelligencer, *Recusal “Black Hole of Judicial Eth-*

This article culminates in a proposed recusal process—adaptable as a judicial rule or statute—incorporating overarching ethical and procedural imperatives that can guide recusal reform efforts. In this endeavor, it is beneficial to recall the sage advice that Judge Franks, the legal realist, once offered: “Ours is a system where [justice] is active but concealed. The concealment prevents our understanding our system. Let us become aware of its true nature. In that way, we can use it more efficiently and, if possible, improve it.”⁴⁰

I. RECUSAL AND THE CODIFICATION OF JUDICIAL ETHICS: FROM SUSPICION TO APPEARANCES

The pursuit of impartiality, regarding both the decision-making process and the decision-maker, is rooted in antiquity. In Egypt’s 18th dynasty, the vizier—one who occupied an exalted government position—swore to carry out his duties impartially in accordance with the Egyptian concept of *maat* (truth, justice, and righteousness). For example, at the vizier Rekhmira’s installation, the king admonished him: “These, then, are the teachings: you shall treat just[ly] the one known to you and the one not known to you, the one near you and the one far away.”⁴¹

Roman law afforded the right to disqualify a judge who was “under suspicion.” The Justinian Codex (circa 530 A.D.) provided:

It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges . . . Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before the issue is joined, so that the cause may go to another; the right to recuse having been held out to him . . .⁴²

ics” in *Pennsylvania*, PITTSBURGH POST-GAZETTE (Dec. 26, 2010), <https://bit.ly/2B0lvx8> [<https://perma.cc/67SJ-4G7E>].

39. See, e.g., Leslie W. Abramson, *Deciding on Recusal Motions: Who Judges the Judges?*, 28 VAL. L. REV. 543 (1994) (identifying states with self-disqualification procedures); Serbulea, *supra* note 15, at 1151–73 (appendix of state recusal practices); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, JUDICIAL RECUSAL PROCEDURES (2017) [hereinafter referred to as the “IAALS REPORT”].

40. See Frank, *supra* note 1, at 31.

41. See TOBY WILKINSON, *THE RISE AND FALL OF ANCIENT EGYPT* 226 (2010). The 18th dynasty spanned from 1539 B.C. to 1292 B.C.

42. See Geyh, *supra* note 31, at 677–78 (citing *Codex of Justinian*, Book III, title 1, No. 16); MENENDEZ & SAMUELS, *supra* note 19, at 3; Ralph Slovenko, *Je Recuse! The Disqualification of a Judge*, 19 LA L. REV. 644, 664 n.78 (1959). The historian, Caroline Humfress, remarks that Justinian (r. 527–565) made use of cler-

Common law adopted a considerably restricted disqualification approach. As Justice Scalia noted in *Liteky v. United States*,⁴³ mandatory judicial recusal for bias did not exist in England during the time of William Blackstone, an influential English law commentator.⁴⁴ Blackstone rejected absolutely that a judge could be challenged for bias. As Blackstone explained: “[T]he law will not suppose a possibility of bias or favour in a judge, who is sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”⁴⁵ The one incursion in the hardline common law stance on recusal was direct financial interest.⁴⁶ Nevertheless, the traditional direct financial interest exception was subject to its own exception, the so-called “rule of necessity,” an ethical dispensation that remains in recusal theory and practice today.⁴⁷

ics in many different legal contexts, including assigning bishops when a provincial judge’s neutrality or trustworthiness had been questioned. See CAROLINE HUMFRESS, *AGE OF JUSTINIAN* 179 (Michael Maas ed., 2005).

43. *Liteky v. United States*, 510 U.S. 540 (1994).

44. *Id.* at 541. See also Symposium, *supra* note 3, at 1097 (noting that the development of ethical standards for judges and means of enforcement can be traced back to 13th century England).

45. See Geyh, *supra* note 31, at 677–90 (identifying four historical stages of disqualification). See WILLIAM BLACKSTONE, III, *COMMENTARIES ON THE LAWS OF ENGLAND* 361 (1768), cited by Justice Scalia in *Liteky v. U.S.*, 510 U.S. 540, 543–44 (1994).

46. See *Dr. Bonham’s Case*, 77 Eng. Rep. 638 (K.B. 1610) (Coke, C.J.) (holding that a judge could not preside over a case in which he stood to benefit financially); see also John P. Frank, *Disqualification of Judges*, 56 *YALE L. REV.* 605, 611–12 n.27 (1947). On the issue of citing *Dr. Bonham’s Case*, see George P. Smith, II, *Marbury v. Madison, Lord Coke And Dr. Bonham: Relics of the Past, Guidelines for the Present – Judicial Review in Transition?*, 2 *UNIV. PUGET SOUND L. REV.* 255 n.2 (1979) (pointing out that “[t]he case is more properly referred to as *The Case of the College of Physicians* and is reported both by Coke in his capacity as Chief Justice of the Court of Common Pleas and by Brownlow, who served as the Court Prothonotary. See 8 Co. 114a, 77 *ENG. REP.* 646 (1610) and 2 *BROWNL.* 255, 77 *ENG. REP.* 646 (1610)”).

47. See Thomas McKevitt, Note, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 *HOFSTRA L. REV.* 818 (1996); *United States v. Will*, 449 U.S. 200 (1980) (providing a history of the common law rule); Aaron S. Bayer, *The Rule of Necessity*, *NAT’L L.J.* (Apr. 23, 2007), <https://bit.ly/30z45Su> [<https://perma.cc/M6WV-BW5M>]. The ABA Model Code, Rule 2.11, cmt. 3, acknowledges that the rule of necessity may override the rule of disqualification, for example, where there is judicial review of a judicial salary statute or where the judge is the only one available in a matter requiring immediate action. See, e.g., *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006) (judicial salary dispute). Application of the rule of necessity has been largely limited to courts of last resort. In actuality, the rule is neither a rule nor required given the modern realities of inherent judicial power and rules/statutes that provide an opportunity to replace or assign judges. Replacement is arguably a preferable approach given concerns of due process, fairness, and public perception when judges rule in cases in which they clearly have a self-interest. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813,

The U.S. Congress enacted the country's first recusal statute in 1792, incorporating the common law's financial conflict-of-interest ("concerned in interest") disqualification as well as the restriction regarding prior representation of a party.⁴⁸ The 1792 statute would eventually evolve into the current statutory provision—section 455⁴⁹—which, by its terms, applies to any "justice, judge, or magistrate judge of the United States."⁵⁰ Judicial recusal was discretionary, and courts applied the restricted English standard narrowly.⁵¹ Over the years, Congress identified additional grounds as justifications for judicial disqualification, including factors such as relationship to a party; in appeals, prior participation as the trial judge; and being a material witness in the case. These categorical disqualifying factors are common today.⁵² Courts continue to narrowly construe these mandatory grounds of disqualification.⁵³

It was not until 1911 that Congress enacted legislation providing for recusal for bias and prejudice through a seemingly automatic disqualification process based on a party's affidavit alleging the judge's "personal bias or prejudice" for or against a party. The pro-

828 n.5 (1986) (Court notes that Alabama law authorized the appointment of a special justice in the event of a justice's disqualification); *Barrow v. Raffensperger*, Case Nos S20M100, S20M1020 (Ga. Mar. 23, 2020) (in a high profile case involving the cancellation of a state election pertaining to a vacancy on the Georgia Supreme Court, five justices recused; the order noted that substitute justices were selected by the clerk of court at random from a pre-existing list). See also VIRELLI, *supra* note 17, at 42, 83–84 (discussing application of the rule to the United States Supreme Court); and *infra* note 331 (reassignment of cases).

48. See Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 178–79 (1792).

49. 28 U.S.C § 455 (2018).

50. See Geyh, *supra* note 31, at 680–81, 688–90 (providing a history of section 455's genesis and development); Randall J. Litteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978) (providing a good critical analysis of section 455 and its problematic relationship to section 144); see also *infra* note 66.

51. See Frost, *supra* note 20, at 540–41; see also Note, *Disqualification of a Judge on the Grounds of Bias*, 41 HARV. L. REV. 78, 79–80 (1927); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–77 (noting that at common law disqualification for bias or prejudice was not permitted, necessarily relegating the issue to statutes and judicial codes).

52. See *Liteky v. United States*, 510 U.S. 540, 543–44 (1994); Melinda Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. L. REV. 807, 811–19 (2015) (identifying common party-related problems); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintances)*, 33 PEPP. L. REV. 575 (2006) (discussing the development of recusal and urging expansion with respect to a friendship between the judge and a named party or attorney of record that exceeds ordinary and reasonable social intercourse and business associations).

53. See Frost, *supra* note 20, at 541.

vision to force recusal—section 144—applied to *district judges*.⁵⁴ Courts also interpret the statutory disqualification-by-affidavit provision narrowly.⁵⁵ The limited effectiveness of this disqualification provision has been largely attributable to its vulnerability to discretionary and varying judicial interpretations regarding facial sufficiency, timeliness, and definition of bias and prejudice.⁵⁶ The principal federal disqualification statutes—sections 144 and 455—overlap and have notably been the source of confusion.⁵⁷ Section 144 disqualification aims at *actual bias or prejudice*, whereas section 455 also deals with the *appearance of partiality*, the latter viewed as effectively subsuming the former.⁵⁸

Beyond the federal legislative sphere, the 20th century, spurred by the era's progressive movement, witnessed a more concerted national effort to address judicial impartiality through the codification of rules or codes of judicial conduct.⁵⁹ From a constitutional perspective, while fundamental fairness and impartiality are significant and overarching constitutional values, they have provided little practical guidance or assistance in judicial disqualification and

54. 28 U.S.C. § 144 (2018), which was originally enacted as section 21 of the Judicial Code of 1911, and later re-codified as section 144 without significant change. See *Liteky*, 510 U.S. at 544. Judge Bowie has noted that “issues of appearances of possible lack of impartiality remained on Congress’s stove from 1911 forward, in one form or another.” See Bowie, *supra* note 15, at 924.

55. See Frost, *supra* note 20, at 543, citing *Berger v. United States*, 255 U.S. 22 (1921), positing that the statute’s peremptory intent was eviscerated when the trial judge was given the authority to assess the legal sufficiency and timeliness of the motion.

56. See Frost, *supra* note 20, at 543–44, 587 (suggesting that peremptory procedure is a less efficient method of recusal, more susceptible to abuse, and does not give a jurist an opportunity to reflect on allegations of bias); Geyh, *supra* note 31, at 685 (noting that section 144 has been a failed experiment); *Liteky*, 510 U.S. at 544; and FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL CASE LAW UNDER SECS. 455 AND 144 3, 84 (2d ed., 2010). The recusal-by-affidavit or peremptory challenge is in use in a substantial minority (estimated to be approximately one-third) of states, primarily in the west and southwest. See Goldberg et al., *supra* note 18, at 522 n.103; ABA RESOLUTION 107, *supra* note 36, at 6 n.17; Serbulea, *supra* note 15, at 1123 (noting the risk of giving litigants a “free pass” to disqualify judges perceived as unfavorable). The IAALS REPORT, *supra* note 39, at 7, stated that the members of the recusal study were unable to reach a consensus about recommending the peremptory challenge approach to recusal.

57. Relevant, to a lesser extent, is 28 U.S.C. § 47 (2000), which concerns disqualification of a judge in an appeal where the judge had determined the underlying case or issue in the trial court.

58. See FED. JUDICIAL CTR., *supra* note 56, at 83–84.

59. See McKeown, *supra*, note 18, at 46; Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 258 (noting that there was no prescribed code of judicial conduct at the turn of the 20th century).

recusal matters, a reality that persists today.⁶⁰ Thus, the more significant route for safeguarding against judicial bias among the states came through the promulgation of codes or rules of ethical conduct, generally through the valiant reform efforts of the ABA.⁶¹ Against the backdrop of the White Sox scandal,⁶² the ABA approved the formation of a commission—chaired by Chief Justice William Howard Taft—to draft rules of judicial conduct in 1922. In 1924, the ABA promulgated its first set of ethical codes, Canons of Judicial Ethics (“1924 Canons”), which contained 36 canons.⁶³

Two facts about the 1924 Canons are noteworthy. First, the 1924 Canons were essentially an aspirational and advisory guide rather than a source of judicial disciplinary enforcement. Second, the concept of *appearance of impropriety* made its formal entrance onto the national stage. Canon 4 of the 1924 Canons, titled “Avoidance of Impropriety,” expressly stated, in part, that “[a] judge’s official conduct should be free of impropriety and the appearance of impropriety.”⁶⁴

Over the years, discontent with the essentially anemic 1924 Canons, exacerbated to some degree by public controversies implicating judicial improprieties,⁶⁵ helped create a climate of support for

60. See Marbes, *supra* note 52, at 824 (noting that due process represents an ideal and is least important for judicial disqualification); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887–88 (due process demarks only the outer boundaries of judicial disqualification); *Lomas – OISR*, 130 A.3d 107, 136 (Pa. Super. Ct. 2015). Professor Virelli examines recusal in the United States Supreme Court from the more stringent constitutional perspective. His analysis concludes that the Supreme Court’s treatment of recusal is evolving toward a more expansive and flexible approach. See VIRELLI, *supra* note 17, at 135–37. His study contains a good examination of the history and development of due process-based recusal.

61. See *Caperton*, 556 U.S. at 17–20 (noting that states have adopted the ABA’s model appearance of impropriety standard and that the Court’s due process disqualification cases deal with extreme or extraordinary facts and acknowledging that states are free to adopt more rigorous standards); Geyh et al., *supra* note 18, at 516–19; Rotunda, *supra* note 16, at 1350–52; *Lomas – OISR*, 130 A.3d 107, 132 (Pa. Super. Ct. 2015).

62. See text accompanying *supra* notes 3 and 15.

63. CANONS OF JUDICIAL ETHICS (AM. BAR ASS’N 1924). See Rotunda, *supra* note 16, at 1350 n.67 (noting prior resolutions in 1909 and 1917); Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUSTICE SYS. J. 271, 273–74 (2007). See generally Bowie, *supra* note 15 (providing a good historical narrative of the codification of judicial ethics).

64. See Rotunda, *supra* note 16, at 1350–51 (noting that the 1924 canons paved the way for more meaningful reforms); and VIRELLI, *supra* note 17, at 7–9.

65. See Lievense & Cohn, *supra* note 63, at 274–75 (mentioning the ethics controversies regarding the nomination of Abe Fortas and two other nominees); and Bowie, *supra* note 15, at 927–31 (discussing the backdrop of the Fortas and Haynesworth controversies as well as the Tenth Circuit Judicial Council’s removal of cases from District Judge Chandler, who unsuccessfully sought a writ of manda-

significantly revising the ABA's canons. In 1972, the ABA adopted the Code of Judicial Conduct ("1972 Code") to replace the 1924 Canons formulated almost 50 years earlier. The Canons were reduced from 36 to seven.⁶⁶ Significantly, the 1972 Code radically revamped judicial ethics by changing the lens of disqualification and recusal from a *subjective* to an *objective* one. In addition to specific categorical or *per se* circumstances of disqualification,⁶⁷ under Canon 3C(1), a judge was subject to an overarching disqualification when "*his impartiality might reasonably be questioned.*" This has often been described by commentators in varying terms, such as the reasonable observer, the objective appearance, the default or catchall standard of disqualification.⁶⁸ As stressed in *Liteky*, under the

mus). Consider also Justice Rehnquist's refusal to recuse in *Laird v. Tatum*, 409 U.S. 824 (1972).

66. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR. ASS'N 1972). Congressional action followed, resulting in a substantial revision to 28 U.S.C. § 455 based on the revised ABA Model Code. Justice Scalia in *Liteky*, 510 U.S. 540, 546 (1994), observed that before 1974, section 455 was nothing more than the 1821 prohibition against a judge's presiding in a case in which he had an interest or relationship to a party. Congressional revision of section 455 was also meant to eliminate the "duty to sit" doctrine that Justice Rehnquist had relied on in *Laird v. Tatum*, 409 U.S. 824. See Frost, *supra* note 20, at 545–47 (discussing Justice Rehnquist's refusal to recuse and the ABA's reaction); see also Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009). For a good summary of the duty to sit doctrine, see Roy J. Rodney, Jr. & John K. Etter, *The Last Stand of the Duty to Sit: Recusal in Louisiana*, 61 LA. BAR J. 255 (2013–14). It is important to note the current ABA Model Code, R. 2.7 (2011), makes the "responsibility to decide" subservient to the disqualification mandate of R. 2.11. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (AM. BAR ASS'N 2011).

67. Regarding the promulgation of the 1972 Code, see generally Walter P. Armstrong, Jr., *The Code of Judicial Conduct*, 26 SW. L.J. 708 (1972); see also Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 425–29 (2014). The enumerated disqualifying circumstances included, for example, personal bias or prejudice, participation as a lawyer or material witness, and financial interest.

68. See *Liteky*, 510 U.S. at 548 (referring to provision as a "catchall"). A word of caution is necessary since the term "objective" can be misleading. All decision-making, to some degree, is inherently subjective. "Objective" in the recusal context simply connotes that the ethical assessment is made from the perspective of a detached reasonable observer (regarding the alleged conduct or circumstances), one who does not have a personal interest in the assessment. Recognizing that all decision-making occurs somewhere on the subjective-objective spectrum, this article simply suggests that there should be an endeavor to optimize the potential for more objective, fairer decision-making and processes in recusal matters (consistent with and supportive of governing ethical principles), given the stark reality of an ever-present mystifying dynamic of subjectivity and the subconscious.

objective appearance standard, “the judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.”⁶⁹

The new ethical standard, however, was increasingly criticized as being ineffectively hortatory, not mandatory.⁷⁰ The 1972 Code was couched in terms of “should” rather than “shall.”⁷¹ Thus, in 1990, the ABA engaged in another reform effort to make clear that the ethical standards were mandatory and enforceable.⁷² Specifically, Canon 2 of the Model Code of Judicial Conduct (“1990 Model Code”) provided: “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.” Canon 3E(1) provided, in part: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”⁷³ The broad mandatory appearance standard, a critical aspect of the appearance of impropriety precept, is then fol-

69. See *id.* at 553 n.2 (emphasis in original) (referring to the federal disqualification statute); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (noting that actual bias is not determinative, stating “justice must satisfy the appearance of justice”). For purposes of the discussion herein, the standard shall also be referred to as the objective appearance standard. In some respects, the new objective appearance standard could be viewed as an historical echo of the Roman “suspicion” standard. See *supra* note 42 and accompanying text. It is also worth noting a limiting aspect of recusal. In *Liteky*, Justice Scalia emphasized the general rule that the prejudice warranting recusal must result from an extra-judicial source, i.e., from facts arising from other than the judge’s participation in the underlying case; but the source of bias is one factor a judge should consider. See *Liteky*, 510 U.S. at 553 n.2. Where the alleged bias or prejudice emanates from the proceeding itself to warrant recusal, the bias or prejudice must “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” See *id.* at 555. See also Toni-Ann Citera, *A Look at the Extrajudicial Source Doctrine under 28 U.S.C. § 455*, 85 J. CRIM. L. & CRIMINOLOGY 1114 (1995); see also *Thomas v. Walker*, 860 S.W.2d 579, 582 (Tex. App. 1993) (extrajudicial source rule is a threshold standard); see also *Commonwealth v. Lucky*, 2020 Pa. Super. 39 (2020) (sentence vacated and remanded for re-sentencing without prejudice to defendant’s right to file a motion to recuse where record demonstrated that defendant’s harsher re-sentence may have been the product of bias or ill will toward the defendant; appellate court could not remand to a different judge where trial judge was not asked to recuse and judge made no on-the-record recusal ruling).

70. See *Rotunda*, *supra* note 16, at 1351–52.

71. See *McKeown*, *supra* note 18, at 47.

72. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (AM. BAR ASS’N 1990). The 1990 Code was re-structured into four canons accompanied by black-letter rules and other sections (preamble, statement of scope, terminology, and application). See also *Harrison*, *supra* note 59, at 259.

73. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (AM. BAR ASS’N 1990). See also *Marbes*, *supra* note 52, at 831 n.142 (noting that of the 49 states that have adopted the ABA Model Code, only 16 still use “should” in their rules); see also Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949 (1996).

lowed by specific illustrative categorical instances automatically requiring disqualification.⁷⁴

Finally, in 2007, in the face of growing attempts to dilute the objective appearance standard,⁷⁵ the ABA engaged in a complete re-evaluation of the 1990 Model Code.⁷⁶ As a result, the ABA amended the 1990 Model Code to prominently position judicial disqualification as a black-letter rule. Rule 2.11(A) states, in part: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”⁷⁷ As one author noted: “Whether labeled as Canon 3(C)(1) (1972), Canon 3E(1) (1990), or Rule 2.11(A), the black-letter disqualifying principle has remained almost constant.”⁷⁸ For practical purposes, the objective appearance standard of recusal has become the benchmark or “gold standard” of judicial conduct, making proof of actual bias—an extremely difficult task—largely irrelevant.⁷⁹

As a result of the codification efforts by the ABA, most states have adopted the objective appearance disqualification standard of the Model Code of Judicial Conduct.⁸⁰ The objective standard, relying on external evidence of bias,⁸¹ embodies the foundational value emphasized in *Liljeberg*: “The guiding consideration is that

74. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (AM. BAR ASS’N 1990). The 1990 version also expanded the code’s provisions to include personal bias or prejudice concerning a party’s lawyer and expanded its reach regarding relationships. See McKoski, *supra* note 67, at 429–30. The ABA later revised the code to include the disqualifying factor of contributions to the judge’s judicial campaign from a litigant or a litigant’s attorney. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (amended 2003) (AM. BAR ASS’N 1990), Canon 3E(1)(e) (1990).

75. See Rotunda, *supra* note 16, for a critical assessment of the appearance standard; cf. McKeown, *supra* note 18, for a forceful judicial defense of the appearance standard.

76. See Harrison, *supra* note 59 (discussing the processes and significant changes attending the ABA’s comprehensive revision of the 1990 Code).

77. See MODEL CODE OF JUDICIAL CONDUCT Canon 2.11(A) (AM. BAR ASS’N 2007).

78. See Leslie W. Abramson, *What Every Judge Should Know About the Appearance of Impartiality*, 79 ALB. L. REV. 1579, 1583 (2015–16).

79. See McKoski, *supra* note 67, at 426, 429; see also Marbes, *supra* note 52, at 828 (noting that the Model Code’s disqualification standard is the benchmark for states); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (actual or subjective bias or prejudice is no longer the law).

80. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) (“Almost every State . . . has adopted the ABA’s objective [appearance of impropriety] standard.”).

81. See Marbes, *supra* note 52, at 831 (noting that the “might reasonably be questioned” standard requires an evaluation of external facts measured from an objective, not subjective, state of mind of the challenged jurist).

the administration of justice should reasonably appear to be disinterested as well as be so in fact.”⁸²

II. THE KEYSTONE STATE’S⁸³ APPROACH TO RECUSAL—A CASE STUDY

A. Overview—Ethical principles and infrastructure regarding recusal in Pennsylvania

Pennsylvania’s judiciary is an elected one.⁸⁴ Whether elected or temporarily appointed, all Pennsylvania jurists are constitutionally and statutorily required to comply with the judicial code of ethics, which is incorporated in the state’s constitution.⁸⁵

In *Republican Party v. White*, Justice Kennedy observed that states may adopt recusal standards more rigorous than due process requires.⁸⁶ In the same case, Justice O’Connor observed that states which have chosen to select judges through the popular electoral process have voluntarily assumed certain risks to judicial bias.⁸⁷ As with other states, to minimize such risks of bias, Pennsylvania adopted ethical principles and structures governing judicial conduct, including an independent judicial disciplinary system⁸⁸ and a code of judicial conduct.⁸⁹

82. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 869–70 (1988) (citing *Pub. Utilities Comm’n of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., in chambers)). See also *In re Murchison*, 349 U.S. 133, 136 (1955) (“[J]ustice must satisfy the appearance of justice.”) (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)); see also Andrew L. Kaufman, *Judicial Ethics: The Less-often Asked Questions*, 64 WASH. L. REV. 851, 854 (1989) (appearance of impropriety standard is foundational to the Code, “the one to which all other rules are mere commentary . . .”).

83. Pennsylvania is commonly referred to as the Keystone State. The historical origins are obscure. The label was used in the late 18th century by Jeffersonian Republicans who believed Pennsylvania was pivotal in the triumph of Jefferson’s presidential election, touting Pennsylvania as the “keystone in the democratic arch.” See SANFORD W. HIGGINBOTHAM, *THE KEYSTONE IN THE DEMOCRATIC ARCH* 1 (1952).

84. See PA. CONST. art. V, §§ 12–13. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 792, Justice O’Connor’s concurring opinion noted that 31 states use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges.

85. PA. CONST. art. V, § 17(b); 42 PA. CONS. STAT. § 3302 (2005) (judges shall not violate canons of judicial ethics). See also Kilimnik, *supra* note 37, at 717.

86. See *White*, 536 U.S. at 794 (Kennedy, J., concurring).

87. See *id.* at 792 (O’Connor, J., concurring) (providing a historical overview of judicial selection and election in the United States).

88. See PA. CONST. art. V.

89. See PA. CODE OF JUDICIAL CONDUCT (2014), which was substantially revised in 2014. The Code applies to all judges, including senior judges, above the magisterial district judge level, namely, the Supreme Court, the two intermediate appellate courts (Superior and Commonwealth), the trial courts (Common Pleas),

Pennsylvania's Code of Judicial Conduct substantially incorporates the provisions of the ABA's 2011 edition of its Model Code of Judicial Conduct.⁹⁰ Thus, Pennsylvania's Code of Judicial Conduct, similar to the ABA's Model Code, is replete with references to judicial impartiality, impropriety, and the appearance thereof.⁹¹ In particular, Pennsylvania's Rule 1.2. states that a judge "shall avoid impropriety and the appearance of impropriety." The accompanying comment states: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."⁹² In addition, Pennsylvania's Code of Judicial Conduct provides that "[a] judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law."⁹³

and Philadelphia Municipal Court. See PA. CODE OF JUDICIAL CONDUCT Application, para. 2 (2014). Specific rules governing standards of conduct for magisterial district judges, and judges of the Philadelphia Municipal Court/Traffic Division are set forth in the Rules Governing Standards of Conduct of Magisterial District Judges, which substantially replicate the disqualification standards of Pennsylvania's Code of Judicial Conduct. PA. RULES GOVERNING STANDARDS OF CONDUCT OF MAGISTERIAL DISTRICT JUDGES (2014). The applicable ethical provisions for the magisterial district judges can be found at Rules 1.1 to 4.5.

90. See PA. CODE OF JUDICIAL CONDUCT pmb., para. 9 (2014) (referring to MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2011)).

91. For example, preceding the black-letter rules, the Preamble, para. 3, states that "Judges should uphold the dignity of the judicial office at all times, avoiding both impropriety and the appearance of impropriety in their professional and personal lives." Pennsylvania's judicial code defines "impropriety" as "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." PA. CODE OF JUDICIAL CONDUCT Terminology (2014).

92. PA. CODE OF JUDICIAL CONDUCT r. 1.2, cmt. 5 (2014); see also *id.* r. 2.3, c.2 ("A judge must avoid conduct that may reasonably be perceived as prejudiced or biased."). See *infra* notes 94, 140 regarding Pennsylvania's complicating gloss on the application of the ABA's appearance standard.

93. See PA. CODE OF JUDICIAL CONDUCT r. 2.7 (2014), often viewed in terms of a "duty to sit." See *supra* note 66 and *infra* note 174 regarding the discredited "duty to sit" doctrine. Additionally, Pennsylvania's comment 2 to Rule 2.7 makes reference to the ABA's appearance standard and seems to embellish it by including the following "substantial question" consideration: "In addition, however, a judge may recuse himself or herself from presiding over a matter even in the absence of a disqualifying fact or circumstance where—in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters—concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification should be required." PA. CODE OF JUDICIAL CONDUCT r. 2.7, cmt. 2 (2014); see also *infra* note 140 (regarding Pennsylvania's apparent calibration of the ABA's standard).

Thus, for purposes of assessing the ethical imperative of recusal and disqualification, the pivotal provision is Rule 2.11(a). Embodying the catch-all objective appearance standard, Rule 2.11(A) states: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”⁹⁴ Rule 2.11’s appearance standard reinforces Rule 1.2’s appearance of impartiality mandate. Appearance of impropriety—the perception of judicial conduct by reasonable minds—is an ethical standard predicated on an *objective*, not subjective, analysis.⁹⁵ As with most state jurisdictions,⁹⁶ the black-letter rules of ethical judicial conduct are mandatory.⁹⁷

With respect to the ethical behavior and responsibilities of jurists, the Supreme Court of Pennsylvania is constitutionally vested with general authority to promulgate the Pennsylvania Code of Judicial Conduct and to administer the state’s unified judicial system. The Pennsylvania Code of Judicial Conduct is administered and interpreted in specific cases through the investigatory and prosecutorial Judicial Conduct Board,⁹⁸ the adjudicatory Court of Judicial Discipline,⁹⁹ the two intermediate appellate courts (Superior and Commonwealth), and ultimately subject to the supremacy of the Supreme Court of Pennsylvania’s pronouncements.¹⁰⁰

94. PA. CODE OF JUDICIAL CONDUCT I. 2.11 (2014).

95. Almost every state has adopted the ABA’s objective appearance of impropriety ethical standard. *See Lomas – OISR*, 130 A.3d 107, 137 n.26 (Pa. Super. Ct. 2015). Rule 2.11(A)’s appearance standard is, as in the ABA model code, followed by a list of *per se* disqualifying factors, such as personal bias or prejudice, economic interest in the subject matter, family and professional relationships, likelihood of being a material witness, prior involvement in the proceeding, and receipt of judicial campaign contributions that would raise a reasonable concern about fairness and impartiality. *See also supra* note 67 (discussing the enumerated disqualifying circumstances). Except for campaign contributions, such disqualifying factors have been historically common to modern recusal practice.

96. *See supra* note 73 regarding the terminology of “should.”

97. Pennsylvania’s Canons and Rules are couched in mandatory terms. The Model Code states that the Canons are overarching principles of judicial ethics that all judges must observe and that a judge may be disciplined only for violating a Rule. The Comments provide guidance and aspirational goals. The black letter of the Rules is binding and enforceable. *See MODEL CODE OF JUDICIAL CONDUCT* Scope, paras. 2, 3, 4, 6 (AM. BAR ASS’N 2007). The PA. Ethics Commission’s advisory opinion, *supra* note 19, has observed that while the ABA model code includes Comments as well as Canons, the Supreme Court of Pennsylvania adopted the Rules without mentioning the Comments, thereby creating uncertainty as to the legal weight of such comments. *See also infra* note 140.

98. PA. CONST., art. V, § 18(a).

99. *Id.* art. V, § 18(b).

100. Regarding the supreme court’s constitutional powers and responsibilities, *see id.* art. V, §§ 1 (Unified Judicial System), 2 (Pennsylvania Supreme Court), 10 (Judicial Administration), and 18(c) (Pennsylvania Supreme Court review of

B. *The Public Face of Recusal in Pennsylvania: Some Examples*

The issue of judicial recusal and disqualification in Pennsylvania is not an academic matter. Recusals and the appearance of judicial bias can have significant practical effects on the litigating parties and can affect the public's perception of an individual judge, as well as the fairness and integrity of the judicial system, especially in highly publicized cases.

A non-exhaustive data search has identified a substantial number of Pennsylvania cases—primarily appellate—that have involved recusal issues.¹⁰¹ Recusal, either directly or indirectly, has been an issue in numerous high-profile cases. In one particularly noteworthy case, *Williams v. Pennsylvania*, the U.S. Supreme Court criticized Pennsylvania's chief justice for an unconstitutional risk of bias when he denied a death penalty defendant's recusal motion, despite his prior involvement as a prosecutor in the defendant's case.¹⁰²

The electorate often hears about recusal controversies through media coverage in high-profile cases. Because of the notoriety of the parties or issues in a given case, recusal terrain can be wide-ranging. The following sample of cases are illustrative: a popular rapper—Meek Mill—embroiled in a highly contentious and protracted recusal challenge in which the supreme court could not agree whether its immediate intervention in the issue of the trial

final adverse orders). *See also In re Bruno*, 101 A.3d 635, 641 (Pa. 2014) (Pennsylvania Supreme Court controls judicial discipline pursuant to its King's Bench power). The PA. CODE OF JUDICIAL CONDUCT, *supra* note 89, pmbll., para. 8 provides that the Ethics Committee of the Pennsylvania Conference of State Trial Judges is given the authority to render advisory, non-binding opinions to judges and judicial candidates regarding judicial ethical concerns, which may be a factor in determining whether discipline should be recommended or imposed.

101. The search of relevant caselaw (beyond the trial court level) revealed the following numbers of cases that involved, either directly or indirectly, recusal issues (i.e., ordering or not ordering recusal) in the Pennsylvania courts: United States Supreme Court (recusal—2 cases); Pennsylvania Supreme Court (recusal—8; non-recusal—20); Superior Court (recusal—3; non-recusal—12); and Court of Judicial Discipline (recusal—1; non-recusal—1). An overwhelming majority of the cases span 1970 through 2019. The data search was not comprehensive and is intended only to demonstrate that recusal in Pennsylvania caselaw has not been infrequent.

102. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016) (noting “Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level”). The state's chief justice denied the recusal motion in the postconviction proceeding of a capital murder case without a hearing. The U.S. Supreme Court's five-to-four decision, reversing the judgment of sentence, was based on due process grounds, i.e., unconstitutional risk of actual bias.

judge's refusal to recuse was necessary;¹⁰³ a nationally popular actor—Bill Cosby—on trial for sexual assault charges;¹⁰⁴ legislative reapportionment implicating significant statewide political consequences;¹⁰⁵ a clerical sex abuse case in which litigants raised the issue of financial disclosure of the justices;¹⁰⁶ and the protracted litigation of a convicted cop killer—Abu-Jamal—a case generating substantial national and international attention.¹⁰⁷

Occasionally, and unfortunately less publicized, have been commendable instances of independent ethical introspection when a jurist acknowledged the potential risk of the appearance of partiality and recuses, sometimes with explanation—such as in the Penn

103. See *Commonwealth v. Williams*, 188 A.3d 382, 382 (Pa. 2018), in which an equally divided court denied Williams' Emergency Application for King's Bench Jurisdiction; Justice Baer, joined by Justices Todd and Donohue, would have ordered disqualification and re-assignment based on the trial judge's appearance of impropriety. See also Max Mitchell, *PA High Court Won't Toss Judge Brinkley from Meek Mill Case*, LEGAL INTELLIGENCER (Aug. 21, 2018), <https://bit.ly/3eL3G3M>. Thereafter, in *Commonwealth v. Williams*, 215 A.3d 1019, 1029 (Pa. Super. Ct. 2019), a three-judge panel of the Superior Court granted post-conviction relief and vacated the judgment of sentence. Because the trial judge had heard highly prejudicial testimony from a discredited material witness, the appellate court remanded the case to a different judge. The case was the subject of considerable and prolonged national media attention. As a result of his experience in the criminal justice system, Meek Mill became a vocal advocate for criminal justice reform.

104. *Commonwealth v. Cosby*, No. CP-46-CR-3932-2016, 2018 WL 4608703 (Montgomery Cty. Ct. C.P., Sept. 19, 2018) (trial court's memorandum opinion and order denying defendant's motion for recusal and reconsideration of its prior order of recusal and sentence of three to ten years), *aff'd*, 224 A.3d 372 (Pa. Super. Ct. 2019) (recusal issue waived), petition for allowance of appeal granted in *Commonwealth v. Cosby*, No. 9 MAL 2020, 2020 WL 3425277 (Pa. June 23, 2020) (review limited to two evidential issues). See, e.g., Maria Puente, *Bill Cosby Seeks to Dump Judge—Again—Two Weeks Before Sentencing of Sex-Crime Conviction*, USA TODAY (Sept. 11, 2018), <https://bit.ly/3ifp976> [<https://perma.cc/4WML-3RD7>]; Maryclaire Dale, *Bill Cosby's Wife Wants Ethics Board to Investigate Judge*, INTELLIGENCER (Sept. 17, 2018), <https://bit.ly/2BoKMBt> [<https://perma.cc/CQ6V-PZX2>].

105. *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1084 (Pa. 2018) (invalidating Pennsylvania's congressional districting scheme).

106. *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 563 (Pa. 2018) (regarding public access to a grand jury's report to reveal the names of the clerical sex abusers of minors). See Liz Navratil & Angela Couloumbis, *Pa. Supreme Court Justices Got More Than \$180K in Donations From Law Firms in Clergy Abuse Case, Records Show*, PHILA. INQUIRER (last updated July 11, 2018), <https://bit.ly/3dJ559K>. Justice Todd, followed by Justices Mundy and Wecht, issued a public letter acknowledging receipt of contributions from attorneys and law firms tied to the case and offered to consider any requests for recusal.

107. *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 127 (Pa. 1998) (justice's opinion in support of denial of appellant's motion for recusal). See *infra* note 137 regarding the protracted history of this case.

State Jerry Sandusky sex abuse case.¹⁰⁸ Likewise, there have been instances when a jurist has *denied* a motion to recuse, providing a good-faith ethical assessment and detailed public exposition of the facts to explain the decision and rationale.¹⁰⁹

Aside from published appellate opinions in which recusal is raised as a specific issue in an appeal, judicial disciplinary enforcement actions addressing the refusal to recuse sometimes culminate in published adjudications.¹¹⁰ Of course, there are many unre-

108. See *Commonwealth v. Sandusky*, 203 A.3d 1033, 1043 n.6 (Pa. Super. Ct. 2019) (post-conviction proceeding in which Judge Nichols notes Judge Cleland's *sua sponte* recusal; appellate court orders re-sentencing). Judge Cleland explained his recusal as follows:

In the current national environment in which some have chosen to embroil the courts and judges in controversy for less than honorable motives, the reality is that courts must err on the side of demonstrating fairness It would be imprudent to allow such a cloud to linger and to permit it to cast a shadow of legitimacy on the court, or any decision I would make.

Jeremy Roebuck, *Exasperated Sandusky Judge Withdraws From Case, Urges Probe of Lawyers*, PHILA. INQUIRER (Nov. 18, 2016), <https://bit.ly/3ggUYun>. Sandusky was resentenced (30–60 years). Judge Foradora, who had been assigned to resentence Sandusky, thereafter recused without explanation. See Phil Ray, *Sandusky Sentencing by Judge Skerda Scheduled for Friday*, TIMES OBSERVER (Nov. 22, 2019), <https://bit.ly/31wYM6D> [<https://perma.cc/49X9-QAAA>]. Other Pennsylvania examples include Chief Justice Saylor's voluntarily recusing (without explanation) in a matter involving the legal propriety of submitting to the electorate a proposed constitutional amendment to change the mandatory judicial retirement age. See *Sprague v. Cortes*, 145 A.3d 1136, 1136–37 (Pa. 2016) (evenly divided court unable to grant relief). In *Commonwealth v. Robinson*, 204 A.3d 326, 326–27 (Pa. 2018), Justices Saylor, Baer, and Todd recused in a post-conviction appeal challenging a former justice's participation in a prior appeal. See Zack Needles, *Justices' Even Split Dooms PCRA Petition Over Eakin's Porngate Emails*, LEGAL INTELLIGENCER (Dec. 14, 2018), <https://bit.ly/3gdmcy9>.

At the national level is the example of Justice Felix Frankfurter. Preliminarily noting that reason cannot control the subconscious influence of feelings, Justice Frankfurter recused in a case concerning the regulation of a street railway company's amplified radio programming through the loudspeakers of its passenger vehicles. In an extraordinary public acknowledgement of predisposition, he explained: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 466 (1952). Professor Dailey notes that Justice Frankfurter "had come to accept the central tenet of the unconscious and its influence on judicial decision-making." DAILEY, *supra* note 1, at 61.

109. Justice Wecht provided detailed explanations in the cases of *League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080 (Pa. 2018), and *Freilich v. Se. Pa. Transp. Auth.*, 191 A.3d 739 (Pa. 2018). See also Judge Stabile's explanation in *Commonwealth v. Spanier*, No. 1093 MDA 2017, 2018 WL 3802068 (Pa. Super. Ct. Aug. 10, 2018) (non-precedential memo opinion in support of denial of recusal motion alleging appellate jurist's prior personal association with appellant years ago).

110. Disciplinary-related recusal cases include: *In re Zupsic*, 893 A.2d 875, 890 (Pa Ct. Jud. Disc. 2005) (magisterial district judge failed to recuse from crimi-

ported and behind-the-scenes examples in which a jurist has voluntarily recused without explanation or for reasons revealed only to the parties and their attorneys, creating an unfortunate lacuna in recusal jurisprudence. Thus, it is largely through reports in the press and the medium of published opinions that the bench, bar, and public learn about how recusal is implemented and interpreted.

C. *From Theory to Practice: Recusal in Pennsylvania*

If one adopts the perspective that Justice O'Connor proffered in *White*,¹¹¹ Pennsylvania's electorate voluntarily assumed an increased risk of judicial bias when it embraced an electoral process for choosing its judges. The responsibility to safeguard against or minimize such risks of bias, consequently, falls upon the shoulders of the state's judicial system to apply and enforce the mandatory canons and aspirational objectives of its judicial code of ethics.

Commentators have not been charitable in describing and evaluating recusal in Pennsylvania. In his 1947 survey of American judicial disqualification practices, John Frank contrasted two states, New Mexico and Pennsylvania. The former was identified as an "easy" state regarding disqualification. Pennsylvania was labeled as a "hard" state—i.e. disqualification being difficult.¹¹² Similarly, Kenneth Kilimnik extensively analyzed and criticized Pennsylvania for its "backwards recusal rules," suggesting that the legislature should step in if the state's supreme court refuses to initiate reform.¹¹³ Another critic has described recusal in Pennsylvania as a "black hole of judicial ethics," given the absence of clear guidelines, public instances of questionable judicial conduct, and the infre-

nal case involving defendant whose father had close personal contacts with judge; judge is obligated to disqualify at any point in proceedings when it becomes obvious that judge's impartiality might reasonably be questioned); *In re Lokuta*, 964 A.2d 988, 1105 (Pa. Ct. Jud. Disc. 2008) (finding that a judge's bias against plaintiff's counsel equates to bias against the plaintiffs in medical malpractice case for purpose of appearance standard of recusal); *In re Jonathan Grine*, Compl. No. 2016-721 (Jud. Conduct Bd., Aug. 10, 2017) (judge had a "support relationship" with attorney in case making judge subject to improper influence because of the emotional and personal relationship; Letter of Counsel issued, as noted in *Commonwealth v. Buckley*, No. 1747 MDA 2017 (Pa. Super. Ct. Sept. 20, 2018), <https://bit.ly/31zQFGz> [<https://perma.cc/GD84-T5WY>]; and *Judicial Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 368–69 (Pa. 1987) (interjection of religion and religious bias in judicial proceedings warranted removal of judge).

111. *Republican Party of Minn. v. White*, 536 U.S. 765, 791–92 (O'Connor, J., concurring). See *supra* notes 86 and 87.

112. See Frank, *supra* note 46, at 609. His 1947 article cited *In re Crawford's Estate*, 160 A. 585 (Pa. 1931).

113. See Kilimnik, *supra* note 37, at 773.

quency of judicial recusals.¹¹⁴ Pennsylvania recusal caselaw and practice has been the subject of on-the-record insightful and thoughtful commentary by two Pennsylvania appellate jurists.¹¹⁵ Those jurists have publicly acknowledged that Pennsylvania recusal practice is confusing, substantively and procedurally.

It is difficult to make a principled analysis of Pennsylvania's recusal practices given the *ad hoc*, oftentimes confusing, conclusory pronouncements, which are unsupported by formal fact-finding. In a critical 1991 commentary, Kilimnik noted that "[b]efore 1972, recusal rules in Pennsylvania and elsewhere were generally set by statute or general court rule. The introduction of a judicial conduct code shifted the legal analysis from applying general legal norms to judging moral behavior of judges."¹¹⁶ Pre-1972 recusal practice, the author notes, was governed by various statutes that specifically provided for the transfer of recusal challenges to another judge for assessment.¹¹⁷ In an attempt to map one's way through the tortuous terrain of recusal in Pennsylvania, three cases can provide guidance: *Reilly*,¹¹⁸ *Goodheart*,¹¹⁹ and *Abu-Jamal*.¹²⁰

D. *Reilly*

Reilly is a critically important starting point. When the case reached the intermediate appellate level in 1984, the prospects for an enlightened, rational, and predictable recusal practice were bright. In an opinion by a widely-respected appellate jurist,¹²¹ the

114. See *supra* notes 38 and 101.

115. See Judge Stabile's opinion partially concurring in *Lomas – OISR*, 130 A.3d 107, 132–48 (Pa. Super. Ct. 2015), whose views were substantially echoed by Chief Justice Saylor's dissenting opinion in the Pennsylvania Supreme Court's subsequent review in *Lomas-II*, 170 A.3d 380, 391–400 (Pa. 2017). These thoughtful analyses, however, did not address the long-standing recusal problem of judicial self-assessment of impartiality, as discussed herein, *infra* Sections 4(D) and 5(1). *Lomas – OISR* provides a particularly good summarization of disqualification and the objective appearance standard.

116. See Kilimnik, *supra* note 37, at 716.

117. *Id.* at 719 n.21 and 726 n.66.

118. *Reilly* by Reilly v. Se. Pa. Transp. Auth. (*Reilly-I*), 479 A.2d 973 (Pa. Super. Ct. 1984), *aff'd* Reilly by Reilly v. Se. Pa. Transp. Auth. (*Reilly-II*), 489 A.2d 1291 (Pa. 1985) (but reversing portions of the Superior Court's opinion that had remanded for an evidentiary hearing on the issue of recusal of the trial judge).

119. *Goodheart v. Casey*, 565 A.2d 757 (Pa. 1989).

120. *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998).

121. Judge Edmund Spaeth was the president judge of the Pennsylvania Superior Court (1983–86) and a jurist for more than two decades. He declined to run for retention for a second term because he did not want to solicit contributions for political support in the belief that doing so was inconsistent with the appearance of impartiality. He was instrumental in the formation of Pennsylvanians for Modern Courts. He died in 2016. See Bonnie L. Cook, *Judge Edmund B. Spaeth, Jr.*, 95,

Superior Court of Pennsylvania determined that the issue of recusal, raised at the post-trial stage, had to be assessed by another judge because the challenged judge, given his alleged hostility, could not objectively resolve the issue of his own impartiality. The Superior Court majority said that the recusal standard was an objective one, requiring an assessment of whether a reasonable observer would question the judge's impartiality; proof of actual prejudice was not required. The concurring and dissenting opinion, however, complained that the factual record was inadequate.¹²²

The Supreme Court of Pennsylvania swiftly stepped in and demolished the Superior Court's recusal edifice. The Pennsylvania Supreme Court's opinion is abrasively authoritarian in tone¹²³ and largely uninformative about any prescriptive framework to replace the Superior Court's recusal process and analysis. As the court pointedly stated: "We declare this procedure inappropriate and preclude its use."¹²⁴ The Pennsylvania Supreme Court's approach was transparently autocratic, predicated on asserting and protecting judicial autonomy—institutionally (the supreme court) and individually (the challenged jurist). As others have recognized, the Pennsylvania Supreme Court's approach undermined the objective appearance standard and effectively endorsed an actual prejudice standard.¹²⁵

To a certain extent, however, the supreme court's jurisdictionally protective response was justifiable given the court's specific constitutional authority to establish rules of procedure and judicial conduct. Nevertheless, preoccupied with its supervisory powers and myopically viewing recusal primarily through the lens of disciplinary enforcement, the Pennsylvania Supreme Court pushed recusal into a rip tide far away from any safe harbor. Citing the

Headed Pa. Superior Court, PHILA. INQUIRER (Apr. 6, 2016), <https://bit.ly/2C4Ki3u>.

122. *Reilly-I*, 479 A.2d at 1003–04 (Johnson, J., concurring and dissenting).

123. The Pennsylvania Supreme Court (per Justice Papadakos) criticized the Pennsylvania Superior Court for its "unwarranted intrusions" and "impermissible meddling into the administrative and supervisory functions of this Court." *Reilly-II*, 489 A.2d at 1298–99.

124. *Id.* at 1298.

125. See Kilimnik, *supra* note 37, at 736–37. The Pennsylvania Supreme Court had criticized the Pennsylvania Superior Court for ignoring the necessity of showing actual prejudice. *Reilly-II*, 489 A.2d at 1298 ("Superior Court determined that a showing that a judge's rulings actually prejudiced a party[] was no longer required, contrary to our previous holdings . . .").

inapposite 1931 case of *In re Crawford's Estate*¹²⁶ and concerned with theoretical dangers, the Pennsylvania Supreme Court stated:

. . . If the judge feels that he can hear and dispose of the case fairly and without prejudice, *his decision will be final unless there is an abuse of discretion*. This must be so for the security of the bench and the successful administration of justice. Otherwise, unfounded and oftentimes malicious charges made during the trial by bold and unscrupulous advocates might be fatal to a cause, or litigation might be unfairly and improperly held up awaiting the decision of such a question or the assignment of another judge to try the case. If lightly countenanced, such practice might be resorted to, thereby tending to discredit the judicial system.¹²⁷

Nonetheless, the Pennsylvania Supreme Court added a jurisprudentially unremarkable but necessary concession, consistent with its holding in another opinion issued the same year¹²⁸; if the presiding judge desired a full exposition of the question of unfairness, he could follow the “unusual practice” of summoning another judge to decide it, “but he is not required to do so.”¹²⁹ Thus, in the

126. *In re Crawford's Estate*, 160 A. 585 (Pa. 1931). See *supra* notes 112 and 117 and accompanying text regarding past recusal practice. *Crawford's* statutory context was not acknowledged; the statute therein was later repealed.

127. *Reilly-II*, 489 A.2d at 1299 (emphasis supplied). The judicial autonomy approach to recusal is not unusual. See, e.g., *Consiglia v. Consiglia*, 711 A.2d 765, 769 (Conn. App. Ct. 1998) where the court recognized the independence of judges in recusal matters, noting that the presiding judge had no power to recuse another judge because recusal is “an intrinsic part of the independence of a judge.” Similarly, as explained in a Pennsylvania appellate court opinion, the county’s president judge in *Commonwealth v. McCullough* noted that, despite the trial judge’s referral of a recusal challenge to the president judge for an independent evidentiary hearing, the president judge had no authority to order the recusal of the trial judge because recusal was “completely personal” to the challenged jurist. 201 A.3d 221, 232 (Pa. Super. Ct. 2018) (opinion by J. Stabile); see also *Commonwealth v. Lucky*, No. 1672 EDA 2018, 2020 WL 727983, at *9 (Pa. Super. Ct. 2020) (notwithstanding that record called into question the appearance of the trial judge’s bias or ill-will toward the defendant, who abruptly received a harsher sentence, appellate court could not remand case to a different judge for resentencing where trial judge was not asked to recuse and made no recusal ruling). In *Goodheart v. Casey*, three supreme court justices noted with respect to their own court: “Where disqualification is raised before the Court and the merit of the motion obvious, the remaining Justices have the *duty to request* the Justice to accede to the recusal request.” 565 A.2d 757, 764 (Pa. 1989) (emphasis supplied). See also *infra* note 336, regarding the notion of *individual* judicial independence.

128. See *Municipal Publ'ns, Inc. v. Court of Common Pleas of Phila. Cty.*, 489 A.2d 1286, 1290 (Pa. 1985) where the court also noted that “fabricated, frivolous, or scurrilous charges” raised against the presiding judge could be summarily dismissed.

129. *Reilly-II*, 489 A.2d at 1299. The irony is that the option of transfer was statutorily in existence prior to 1972. See *supra* note 117 and accompanying text. Such an option was exercised in *Commonwealth v. McCullough*, wherein the judge

adjudicatory context, *Reilly* gave the trial judge sovereignty in handling and resolving a recusal challenge to the judge's impartiality, subject to a highly deferential abuse-of-discretion review in the event of an appeal.

E. *Goodheart*

Four years after *Reilly*, the Pennsylvania Supreme Court addressed the issue of recusal in a high-profile case involving a constitutional challenge to a statute that affected the interests of judges in a tangible way, namely, retirement benefits.¹³⁰ On application for reconsideration, which raised the issue of recusal of the justices who had participated (by concurring in the result) in the appellate decision, Chief Justice Nix issued an opinion that seemed to create an analytically distinct, two-prong substantive standard for recusal challenges.¹³¹ Chief Justice Nix's opinion prescribed the ethical standard as follows:

Where there is a question of the impartiality of one or more of the Justices, it is the individual Justice's responsibility to make a conscientious determination whether he or she can impartially assess the issues in question. It is to be emphasized that this assessment is two tiered. *First*, whether the Justice would have a *personal* bias or interest which would preclude an impartial review. *This is a personal and unreviewable decision that only the jurist can make.* *Second*, whether his participation in the matter would give *the appearance of impropriety*. '[T]o perform its high function in the best way, justice must satisfy the appearance of justice.'¹³²

cautioned that his review of the recusal challenge would be purely advisory. 201 A.3d at 232. See also *infra* note 142 and accompanying text.

130. *Goodheart*, 565 A.2d 757, 759 (opinion in support of reconsideration following *Goodheart v. Casey*, 555 A.2d 1210 (Pa. 1989)). The rule of necessity, see *supra* note 47, was not mentioned in connection with the later non-participation of the justices (Larsen, Zappala, and Papdakos) regarding reconsideration. As noted in note 3 of *Goodheart*, Justice Stout, the fourth justice, did not participate because she had retired from the bench at the time of the supreme court's reconsideration. *Goodheart*, 565 A.2d at 764 n.3.

131. Judge Stabile provided an insightful analysis of *Goodheart* in *Lomas – OSIR*, 130 A.3d 107, 132 (Pa. Super Ct. 2015) (Judges Bowes, Donohue, and Shogan joined in his concurring and dissenting opinion). As he noted: "The specific provisions of prior Canon [3 C] challenged in *Goodheart* can be found in current Rule 2.11 to Canon 1 of the current Code of Judicial Conduct that instructs "[a] judge . . . shall avoid impropriety and the appearance of impropriety." *Id.* at 148 n.27.

132. *Goodheart*, 565 A.2d at 764 (emphasis supplied) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As noted by Judge Stabile in *Lomas – OSIR*, 130 A.3d at 138, *Goodheart's* second-tier assessment incorporated the appearance of impropriety as part of Pennsylvania's substantive law. He cites, for

Optimistically embracing *Goodheart* as an attempt to create a distinct two-tier recusal standard (namely personal bias, appearance), however, may not be advisable. First, one can view the language in *Goodheart* as narrowly confined to the recusal of the state supreme court justices (not jurists in general), given the court's discussion and emphasis about the need to have a full complement of the state supreme court. Second, the court's three-justice opinion, resting on the non-participation of the other four justices, represented the view of only a minority of the seven-member court in the reconsideration proceeding.¹³³ Third, paradoxically, given that *Goodheart* has been cited as support for an independent appearance-of-impropriety standard, *Goodheart* utters troubling comments that may appear to diminish the importance of appearance, exhibiting Pennsylvania's confusing jurisprudence on recusal.¹³⁴ Finally and significantly, the *Goodheart* standard was undermined in the subsequent high-profile case of *Abu-Jamal*.¹³⁵

F. *Abu-Jamal*

As discerned by another jurist,¹³⁶ the Pennsylvania Supreme Court—either intentionally or unintentionally—identified in subsequent cases a recusal standard that deviated in a subtle, but significant way. Nine years after *Goodheart*, the Pennsylvania Supreme Court stated in *Abu-Jamal*:

example, *In re McFall*, 617 A.2d 707, 712 (Pa. 1992) (appearance of impartiality was deemed compromised because the trial judge was cooperating with federal law enforcement at the time of defendant's trial, mandating recusal, to support the contention that under Pennsylvania's substantive law, appearance of impropriety alone is sufficient to warrant recusal).

133. See *supra* note 130. See also Richard B. Cappelli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 340 (1999) (noting that a minimum of four justices constitutes a quorum and that "to create precedent at least three of four or five judges, and four of six or seven judges, must agree on a result and, expressly or implicitly, a rationale"). See also *Miller v. Keystone Ins. Co.*, 636 A.2d 1109, 1113 (Pa. 1994) (an opinion of less than four out of seven justices may not establish or reverse laws); Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule and the Mischief of Quorum Requirements*, (Univ. of Chicago Pub. Law & Legal Theory, Working Paper No. 227, 2008), <https://bit.ly/2VuXPZ4> [<https://perma.cc/6CBW-EEJR>].

134. *Goodheart* stated: "The second assessment [*viz.*, appearance of impropriety] is of lesser importance because 'appearances' are not justice. When a request for recusal is made upon the record, and the alleged impediment is made public, 'appearance' alone diminishes in importance . . ." 565 A.2d at 764.

135. *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 126–27 (Pa. 1998).

136. Judge Stabile in *Lomas – OISR*, 130 A.3d 107, 132–45 (Pa. Super. Ct. 2015). Among Pennsylvania jurists, Judge Stabile has appeared to be particularly knowledgeable and articulate about the ethical appearance standard and the need for jurisprudential clarity in recusal matters.

As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. *This is a personal and unreviewable decision that only the jurist can make.*¹³⁷

Notwithstanding the belief that *Goodheart's* two-tier analysis should govern recusal—consistent with other cases that have viewed the appearance of impropriety as a separate and distinct factor of analysis¹³⁸—subsequent caselaw has produced uncertainty as to the import and application of the appearance standard. Thus, Pennsylvania jurisprudence remains unclear whether appearance and/or the possible undermining of public confidence in the judiciary is an independent objective factor that should not be subordinated to the judge's subjective self-assessment of bias.¹³⁹

137. *Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998). Aside from the supreme court's rejection that the trial judge should have recused, Justice Castille had also denied Abu-Jamal's petition for the justice's recusal. *See Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998) (opinion in support of denial of appellant's motion for recusal). The case involved a highly publicized killing of a Philadelphia police officer. Abu-Jamal's appeal rights were reinstated by a post-conviction trial court judge in *Commonwealth v. Wesley Cook a.k.a. Mumia Abu-Jamal*, CP-51-CR-0113571-1982 (Dec. 27, 2018). The highly publicized (nationally and internationally) case has had a protracted history in state and federal courts. *See, e.g.*, George Parry, *Mumia Abu-Jamal, Back in Motion*, AM. SPECTATOR (May 2, 2018), <https://bit.ly/2Vy26eh> [<https://perma.cc/E67H-BGSX>]; Rick Riley, *Philadelphia DA Drops Fight Against Mumia Abu-Jamal's Latest Appeal*, Blavity (Apr. 18, 2019), <https://bit.ly/2BUUOtM> [<https://perma.cc/T3H2-C84Q>]. The supreme court exercised its extraordinary Jurisdiction (King's Bench) in ordering the appointment of a special master to examine and make recommendations regarding allegations of a conflict of interest involving the Philadelphia District Attorney's Office in the Abu Jamal's continued appellate proceedings. *See In re Conflict of Interest of the Office of the Philadelphia District Attorney*, No. 125 EM 2019 (Pa. Feb. 24, 2020) (C.J. Saylor, JJ. Baer and Todd not participating); Zack Needles, *Justices Tap Go-To Special Master to Probe Krasner's Office for Alleged Conflicts in Abu-Jamal Case*, LEGAL INTELLIGENCER (Mar. 3, 2020), <https://bit.ly/2Zncc2B>. Senior Judge John Cleland was appointed special master.

138. *Lomas – OISR*, 130 A.3d at 140–41 (citing cases supporting the proposition that a judge's self-evaluation must yield when there is an appearance of impropriety and that appearance of impropriety alone is sufficient to warrant recusal). *See also* *In the Interest of McFall*, 617 A.2d 707, 710 (Pa. 1992); *Commonwealth v. White*, 910 A.2d 648, 658 (Pa. 2006); and *Commonwealth v. Darush*, 459 A.2d 727, 731 (Pa. 1983).

139. *Lomas – OISR*, 130 A.3d at 140–41, acknowledges that a few cases may be viewed as presenting a view contrary to the *Goodheart* test, citing *Common-*

G. Reflections

Notwithstanding the difficulty of finding one's way through the fog of Pennsylvania's recusal jurisprudence, some generalizations are appropriate:

1. There remains a credible sense of uncertainty as to how one should assess and apply the objective standard with regard to a jurist's ethical duty of impartiality.¹⁴⁰

2. Regardless of the jurisprudential status of the objective appearance standard as a separate and independent factor in recusal assessment, ultimately the determination of recusal has been entrusted to the autonomous province of the challenged jurist—subject to the possibility of judicial review in the event that recusal is raised as an issue in a subsequent appeal.

3. While the actual prejudice or bias of a jurist may be ultimately inscrutable, the appearance of impropriety or partiality is not.

4. There are no prescribed processes or procedural safeguards that govern recusal challenges, assessments, and determinations.¹⁴¹ Deferential appellate review and disciplinary investigation (confidential) and enforcement, rather than prompt judicial review by a neutral jurist regarding a decision to deny recusal, provide the general regulatory framework for recusal.

wealth v. Druce, 848 A.2d 104, 106–07 (Pa. 2004) and *Commonwealth v. Travaglia*, 661 A.2d 352, 369 (Pa. 1995).

140. See *Lomas – OISR*, 130 A.3d at 134–37 *supra* note 131 and accompanying text; Kilimnik, *supra* note 37. It is clear that, in principle, Pennsylvania's judicial code of conduct, *supra* note 89, mandates disqualification under the appearance standard of Rule 2.11. Nevertheless, Pennsylvania seems to apply a stricter calibration of the appearance standard as reflected in its caselaw and commentary to R. 2.7, by requiring proof of “substantial doubt” or a “substantial question in reasonable minds.” See *supra* note 89; *Commonwealth v. Dip*, 221 A.3d 201, 206 (Pa. Super. Ct. 2019) (noting that the party requesting recusal has the burden “to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist’s ability to preside impartially,” citing *Abu-Jamal*, 720 A.2d at 89; trial court’s denial of Commonwealth’s motion and refusal to order an evidentiary hearing before another judge did not demonstrate abuse of discretion; trial court order affirmed without prejudice for the Commonwealth to develop the record below). To complicate recusal analysis further, although the commentary to PA. CODE OF JUDICIAL CONDUCT R. 2.7 (2014), makes clear that the common law test (“a significant minority of the lay community could reasonably question the court’s impartiality”) no longer applies, caselaw has cited it approvingly. See *Dip*, 221 A.3d at 207. But see *Commonwealth v. Spanier*, 2018 WL 3802068, at *9 n.3 (Pa. Super. Ct. 2018) (noting that the lay minority is no longer the applicable test for appearance of impropriety).

141. The Ethics Committee of the Pennsylvania Conference of State Trial Judges has offered an instructive “worksheet” to assist judges in responding to recusal challenges. See *PA Formal Advisory Op.*, *supra* note 19.

5. Neither caselaw nor any procedural rule, however, prevents a jurist, challenged for bias, from voluntarily asking the president judge to transfer a recusal motion to another jurist (including the president judge) for an independent *advisory* assessment of the disqualification challenge or simply asking the president judge to reassign the case in order to avoid any objective concerns of the appearance of impropriety.¹⁴²

III. CATEGORICAL IMPERATIVES GOVERNING RECUSAL REFORM

Pennsylvania serves as a useful case study because it exemplifies common and often-criticized problems regarding predominant judicial recusal practices among the states, including: the erosion of fundamental legal and ethical principles, *ad hoc* decision-making processes, lack of procedural safeguards, and the absence of timely and independent review mechanisms—all of which contribute to what the ABA has observed as overlapping, conflicting, and confusing substantive and procedural disqualification requirements.¹⁴³ Given the contention that common recusal practices may border on unconstitutionality,¹⁴⁴ recusal reformation should begin with an identification of overarching principles that can guide the construction of a recusal process that is fair, coherent, transparent, and workable.

A. *Judicial impartiality is a compelling state interest of the highest order and should not be inflexibly presumed in the recusal context.*

Socrates is attributed as having said that there are four things that belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.¹⁴⁵ Impartiality is a bed-

142. See, e.g., *Commonwealth v. McCullough*, 201 A.3d 221 (Pa. Super. Ct. 2018), illustrating the *ad hoc* option of referring a recusal challenge to the president judge. Formalizing such recusal referrals as a local rule of court, in the absence of approval by the supreme court, would probably be inadvisable because it might invite the type of jurisdictional skirmish that was involved in *Reilly-II*, 489 A.2d 1291 (Pa. 1985).

143. AM. BAR ASS'N, DRAFT REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 16–17, 29 (2008) [hereinafter referred to as the “ABA DRAFT REPORT”]. See Geyh, *supra* note 31, at 727–28 (noting that the ABA’s draft resolution and underlying report were eventually withdrawn).

144. See Bam, *supra* note 22, at 1136. The Supreme Court of the United States has not addressed the constitutionality of a state’s recusal procedures.

145. *Socrates Quote*, LIBQUOTES, <https://bit.ly/2ZnUJbE> [<https://perma.cc/KG47-6N22>] (last visited July 12, 2020). See Charles G. Geyh, *The Dimensions of Impartiality*, 65 FLA. L. REV. 493, 498 (2013).

rock principle of justice esteemed since ancient times.¹⁴⁶ Impartiality's importance, recognized since the formation of our republic,¹⁴⁷ is a paramount value of due process.¹⁴⁸ Judicial impartiality is a value of the highest order, one in which the state has a vital and compelling state interest.¹⁴⁹

In noting impartiality's importance to the independence of the judiciary, one commentator observed that "even the slightest hint of bias or undue influence must, as a general rule, disqualify a particular decisionmaker. Only when it is all but impossible to rectify bias should a potential lack of independence be tolerated."¹⁵⁰ International law accords with these views.¹⁵¹ An independent judiciary necessarily depends on the power and ability to monitor and regulate the conduct of those who exercise judicial power. Nevertheless, impartiality, while recognized as a bedrock principle of justice, has been identified as an elusive concept that is difficult to define.¹⁵² The Model Code of Judicial Conduct, which stresses im-

146. See Adrian Vermeule, *Contra nemo Index in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 386 (2012); Frost, *supra* note 20, at 565, n.166 and 167; text accompanying *supra* notes 41–46.

147. THE FEDERALIST NO. 10, at 57 (James Madison) (Easton Press 1979). See text accompanying *infra* note 221.

148. See Miller, *supra* note 52, at 577 (mandate of impartiality of judges is enshrined in at least three amendments, to the U.S. Constitution—the Fourth, Fifth, and Fourteenth).

149. See *In re Murchison*, 349 U.S. 133, 136 (1955) (fairness requires an absence of actual bias in the trial of cases, and our system has always endeavored to prevent even the probability of unfairness); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (given Florida's compelling interest in preserving public confidence in the integrity of its judiciary, Florida's ban on the personal solicitation of campaign funds by judicial candidates did not violate the First Amendment).

150. Martin H. Redish & Lawrence C. Marshall, *Adjudicating Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 504 (1986) (critical analysis of the Supreme Court's balancing approach to due process; advocating that due process must not be subordinated to government interests).

151. See Frost, *supra* note 20; Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice—An International Perspective on Judges and Appearances*, 36 FORDHAM INT'L L.J. 136 (2013); and C. Okpaluba & L. Juma, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa*, 14 POTCHEFSTROOMSE ELECTRONIC L.J. 13, 20–21 (2011).

152. See Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733 (2010–11); Okpaluba & Juma, *supra* note 151; Bassett & Perschbacher, *supra* note 151. Others have described impartiality as necessarily flexible, not absolute, exaggerated, and a misleading half-truth given the instances in which the principle has been compromised (for example, in the matter of judicial salaries and judicial immunity with respect to the rule of necessity). Nevertheless, notwithstanding competing values and trade-offs (such as expertise,

partiality in the captions of three of its four canons¹⁵³ defines “[i]mpartial, impartiality, impartially” as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”¹⁵⁴

Consequently, given the difficulty in defining an abstract concept, as well as the fallibility of human nature, impartiality cannot be achieved or defined in precise or absolute terms—“imperfect partiality” or being “impartial enough” is the more practical and attainable goal.¹⁵⁵ In some respects, the ideal of a completely objective adjudicator may be counterproductive because it will inevitably fail to achieve the abstract ideal of perfect objectivity.¹⁵⁶ It is a truism that the perfect can be the enemy of the good. Thus, it is probably wise to recognize that ethical probity, not human perfection, should be the animating principle to inspire reform efforts.

The flip-side of impartiality—i.e. partiality, bias, prejudice—can manifest in various ways by a judge who may be compromised by personal bias or extralegal influences, which may implicate personal, relational, or political interests in the outcome of the case.¹⁵⁷ The Model Code’s comment to Rule 2.3 notes:

Example of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.¹⁵⁸

institutional autonomy and independence, administrative efficiencies), impartiality remains an enduring and predominant value. *See also* Vermeule, *supra* note 146.

153. MODEL CODE OF JUDICIAL CONDUCT Canons 1–2, 4 (AM. BAR ASS’N 2011).

154. The ABA Model Code (“Terminology”) also implicates impartiality by including it in the definition of “impropriety.” *Id.* Terminology. *See also supra* note 91 regarding Pennsylvania’s Code of Judicial Conduct.

155. *See* Geyh, *supra* note 145, at 497 (perfect impartiality may be unattainable). *Cf.* Rodriguez, *supra* note 14, at 8 (discussing bias in the context of administrative agency decision-making regarding the pursuit of “optimal bias” as a realistic goal). The ABA Model Code stresses that the Canons, while binding and enforceable, are rules of reason designed to provide guidance. MODEL CODE OF JUDICIAL CONDUCT Canons Scope, para. 5 (AM. BAR ASS’N 2011).

156. *See* McKee, *supra* note 2, at 1711. Judge McKee’s life experiences on the bench prompted him to assess how his ideals and beliefs must confront everyday realities.

157. It has been suggested that there are three distinct dimensions of impartiality: procedural, political, and ethical. *See* Geyh, *supra* note 145, at 497; Marbes, *supra* note 52, at 866.

158. *See* MODEL CODE OF JUDICIAL CONDUCT Canons Scope, r. 2.3 cmt. 2 (AM. BAR ASS’N 2011). The ethical constraints, however, are presumptively

Bias or prejudice is a force that corrupts and destroys the fundamental integrity of the judicial process.¹⁵⁹ Given the preeminent role of the jurist in the adjudicatory process, bias or prejudice has been viewed as constituting a structural error, as opposed to a mere procedural error.¹⁶⁰ Even in the context of a multi-member court, the unacceptable and unconstitutional risk of actual bias is sufficient to require the vacating of a judgment.¹⁶¹

While impartiality is a noble, overarching value of justice, in some respects, it has occupied an uncomfortable and problematic presence when placed in the context of recusal. The expression that judges are presumed to be fair and impartial is commonplace in caselaw,¹⁶² a succinct and polite expression of respect and deferential faith in a Blackstonian image of an ideal judge.¹⁶³ The legal system is predicated on the presumption of impartiality. Impartiality is the baseline of judicial decision-making and is essential to inspire trust and confidence in the judicial system in the litigating

viewed as not encompassing a judge's judicial philosophy or views on public policy. See Geyh, *supra* note 145, at 496 n.9 (citing RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 10.7 (2d ed. 2007)).

159. See Frank, *supra* note 1, at 35 (“[T]he ‘pull’ exercised on a crooked, bribed judge is often no more powerful than the ‘pull’ which a strong bias exercises on a ‘straight’ judge.”); McKoski, *supra* note 27, at 516 (partiality destroys the foundation of the judicial process and has enormous destructive impact).

160. See Blanck, *supra* note 27, at 893.

161. See *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (employing an objective standard in analyzing and rejecting a harmless error approach in the context of bias where the state's chief justice, who denied a motion to recuse, had served as the district attorney at the time of the defendant's murder trial); Lauren Keane, *Williams v. Pennsylvania: The Intolerable Image of Judicial Bias*, 49 LOY. U. CHI. L.J. 181, 184 (2017).

162. See, e.g., *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 891 (2009) (Chief Justice Roberts noting, in dissent, that there is a “presumption of honesty and integrity in those serving as adjudicators”); *Armstrong v. Ypsilanti*, 640 N.W.2d 321, 336 (Mich. App. Ct. 2001) (insufficient evidence to overcome presumption of impartiality); *Commonwealth v. Druce*, 848 A.2d 104, 109 (Pa. 2004) (court presumes judges of the Commonwealth are honorable, fair and competent); *Commonwealth v. Dip*, 221 A.3d 201, 209 (Pa. Super. Ct. 2019) (appellate court says it was compelled to assume that judges are honorable, fair, and competent); ABA DRAFT REPORT, *supra* note 143, at 57 (noting that judges are “loath to abandon” the presumption given their oath of office, traditional conceptions of the judicial role, and the fear that conceding perceived bias might be viewed as a concession of the appearance of impropriety resulting in a greater reluctance to self-disqualify); Melinda A. Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors*, 7 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 238, 261 (2017).

163. See *supra* notes 44–46, and accompanying text, regarding the historical background of judicial ethical standards.

parties, the legal profession, and the public.¹⁶⁴ In the international context, one commentator has explained the nature and purpose of the common law presumption:

[T]he rationale for the presumption is founded on: (a) public confidence in the common law system, which is rooted in the fundamental belief that those who engage in adjudication must always do so without bias or prejudice and must be perceived to do so; (b) impartiality is the fundamental qualification of a judge and the core attribute of the judiciary; it is the key to the common law judicial process and must be presumed on the part of a judge; (c) in view of the training and experience; the fact that they are persons of conscience and intellectual discipline; and capable of judging a particular controversy fairly on the basis of its own circumstances, appellate courts inquiring about apprehension of bias grant considerable deference to judges by the presumption of impartiality on the part of judges; and (d) this presumption carries “considerable weight” since the law “will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon the presumption and idea.”¹⁶⁵

The almost unreflective application of the presumption of impartiality, however, has been criticized in the special context of recusal and a jurist’s independent self-assessment of impartiality. The modern appearance-based disqualification approach has challenged the traditional view of presumed judicial impartiality, given the inadequacy of procedural safeguards and the inherent unfairness of recusal processes.¹⁶⁶ As the subsequent discussion herein will explore,¹⁶⁷ how can one be impartial—or be presumed impartial—about oneself? It is humanly impossible. The presumption, recognizably mystifying in application,¹⁶⁸ presents practical difficul-

164. See Stempel, *supra* note 152, at 810 (noting “[t]he system begins with a presumption of judicial impartiality that, although not as strong as in Blackstone’s time, remains quite vigorous.”); Geyh, *supra* note 31, at 732 (noting that “[a] muscular presumption of impartiality suits a formalized world in which the neutrality of judges is widely accepted . . .”). The presumption of honesty and integrity has also been applied to the decision-making of administrative agency officials. See Rodriguez, *supra* note 14, at 16 n.79.

165. Okpaluba & Juma, *supra* note 151, at 23–24.

166. See Geyh, *supra* note 31, at 732.

167. See section 4(D) *infra*.

168. See McKoski, *supra* note 67, at 423 (referring to the “almost impenetrable presumption of impartiality”). The author also notes that the appearance standard effectively makes the presumption of impartiality irrelevant. See *id.* at 429; cf. Stempel, *supra* note 152, at 757 (noting that a minority of jurisdictions take the view that once the appearance of partiality has been shown, prejudice is presumed).

ties for a litigator who challenges the impartiality—actual or apparent—of a jurist. The litigator’s burden to rebut the presumption is a heavy one.¹⁶⁹

Consequently, in examining the presumption of impartiality, some commentators have opined that the presumption should be calibrated according to the context and competing values rather than be inflexibly or blindly applied.¹⁷⁰ With respect to assessing jurist’s self-assessment of impartiality and the appearance thereof, it makes eminent sense to conclude that the presumption of impartiality should be irrelevant.¹⁷¹ As an Illinois Supreme Court justice observed:

The law may presume that judges are impartial . . . but there is no presumption that they are in the best position to make an objective assessment of whether their own actions present an appearance of impropriety. To the contrary, individual judges may often be in the worst position to make such assessments.¹⁷²

169. The presumption affects the weighty burden of proving bias or prejudice. See *Commonwealth v. Dip*, 221 A.3d 201, 208 (Pa. Super. Ct. 2019) (speaking in terms of the burden of production and persuasion); *Commonwealth v. Spanier*, 2018 WL 3802068 at *2–3 (Pa. Super. Ct. 2018) (party bears the burden of proof to produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to jurist’s ability to preside impartially; burden of proof may be more exacting when the recusal motion is filed after a decision, noting also that the recusal assessment may be different when the impartiality of an appellate jurist is in question); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 313 (1920) (explaining that presumptions are creatures of policy requiring abnormal weight to be given to meet some judicially felt need or to accomplish some purpose judicially recognized as desirable); Miguel Mendez, *Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F.L. REV. 139, 140, 146–48 (2003).

170. See Vermeule, *supra* note 146, at 389 (urging that one should assess whether the conflict is avoidable or unavoidable, and whether it would be good or bad to avoid it; stressing also the importance of recognizing the risk of self-dealing or self-serving bias); Marbes, *supra* note 162, at 300–03 (acknowledging that there is a lack of consensus regarding the strength of the presumption in disqualification matters and proposing a flexible and lower presumption depending on whether the challenged jurist is the initial decision-maker; noting also, at 258, that there was no clear presumption of impartiality in ancient Roman law); cf. Rodriguez, *supra* note 14 (suggesting the re-calibration or re-balancing of bias principles toward the goal of “optimal bias” in the complex world of administrative law decision-making).

171. See McKoski, *supra* note 67, at 429.

172. See *In re Marriage of O’Brien*, 958 N.E.2d 647, 675 (Ill. 2011) (Karmeier, J. concurring) (quoting Goldberg et al, *supra* note 18, at 530). In *Vasquez v. Hilarity*, 474 U.S. 254, 263 (1982), Justice Marshall noted that “When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.”

In the words of one author, the common law principle of judicial impartiality should be reconceptualized.¹⁷³ More pointedly, another commentator, regarding the jettisoned concept of a jurist's "duty to sit,"¹⁷⁴ has suggested that, in the recusal context, there should be a logical presumption *in favor of* disqualification.¹⁷⁵

173. See Geyh, *supra* note 145, at 497–98 (advocating a reconceptualization of impartiality in reference to the contexts or dimensions of impartiality—procedural, political, and ethical). With respect to a judge's self-assessment of impartiality in the recusal context, might it be more appropriate to view or re-conceptualize the foundational presumption of judicial impartiality as a legal fiction that relies on a false, debatable or untested factual premise? Professor Peter Smith has analyzed the concept of "new legal fictions," explaining that they may reflect our aspirations for society and the law, such as expressing a positive value fundamental to our system of justice or promoting an unexpressed normative goal that legitimates some aspect of our legal system. See Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1440 (2007). Some cited examples include the presumption of the good faith of legislators in connection with the constitutionality of statutes, *id.* at 1460–61; the presumption that jurors can follow limiting instructions about inadmissible evidence, *id.* at 1450–52; the competency of jurors to assess the reliability of eyewitness testimony, *id.* at 1452–55; the presumption that the public is familiar with the law's requirements, *id.* at 1459; and the application of the reasonable person standard, *id.* at 1474. Such concealed or obscure legal fictions represent normative choices. Professor Smith concludes that, regardless of purpose or intent, there should be a presumption of candor to explain when and why a judge employs a legal fiction. *Id.* at 1480–95."

A critical examination of such legal fictions and the procedural use of presumptions inevitably leads one to a deeper dilemma, *viz.*, the presumption that sustains the legal and judicial edifice—the presumption (or legal fiction) of rationality. As Professor Dailey explains: "Why does the law insist on the presumption of rationality in the face of incontrovertible evidence of deeper forces at work? Law resorts to a fiction of rationality in large part because doing so seems essential to furthering the goals of a liberal legal system committed to the ideal of individual liberty. The law is a practical discipline requiring practical tools, and the presumption of rationality is one of them . . . We fear collapse of the system if the law were to dig beneath the surface of human conduct." See DAILEY, *supra* note 1, at 21. See also *supra* note 68 (regarding the quest for reasonable objectivity).

174. See *supra* notes 66 and 93 regarding the discredited duty-to-sit doctrine and *supra* note 20 regarding Wisconsin Supreme Court Justice Kelly's decision to "unrecuse" in a high-profile voter purge case. Recusal has been a hot button issue in Wisconsin. See *infra* note 277.

175. See Rodney & Etter, *supra* note 66, at 255. It is difficult to ascertain the practical effect of the presumption: is it a factor that tips the scales at the outset or is it a procedural device that can be employed to rationalize a result? In any event, at least with respect to appellate review of judicial self-assessments that deny motions to recuse, such a venerable presumption is unreasonable and should not be invoked. It is interesting to observe that, on occasion, there has been judicial acknowledgement that there may be limits to the presumption of impartiality and a judge's ability to adjudicate objectively. See *Commonwealth v. Williams*, 215 A.3d 1019, 1029 (Pa. Super. Ct. 2019), where the appellate court remanded the highly publicized case to another jurist because the trial judge had heard highly prejudicial testimony in the first trial from a material, discredited witness; prior efforts to disqualify the judge were unsuccessful. In addition, the presumption of impartiality can be a pliable concept and was turned on its head in Wisconsin where its

B. *The appearance of impartiality is an independent and essential component of procedural fairness in the recusal process.*

While actual impartiality is fundamental to the principle of fairness, the appearance of impartiality is equally fundamental. The objective reasonable person/appearance standard (that is, whether a “judge’s impartiality might reasonably be questioned”) represents the judicial system’s recognition that justice must also satisfy the appearance of justice.¹⁷⁶ The jurisprudential concept of appearances is not uniquely American. Viewing judicial conduct through the objective prism of appearances is consistent with international practice.¹⁷⁷ The appearance standard is a fundamental safeguard that addresses the practical reality of the *potential* impact of a jurist’s decision-making in a proceeding when facts might suggest bias or prejudice.¹⁷⁸

supreme court perceived that efforts to reform Wisconsin’s recusal rules were animated by a presumption of partiality, which the court strongly and summarily rejected. See *infra* note 277 regarding the Wisconsin Supreme Court’s (majority) summarily rejecting a motion for recusal reform brought by retired jurists.

176. See *Liteky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955).

177. See Okpaluba & Juma, *supra* note 151, at 14. The authors provide an analysis of South Africa’s recusal approach that is remarkably similar to the ABA Model Code’s objective appearance standard. The factual context of the case bears similarities to the Pennsylvania case of *Lomas v. Kravitz*, 130 A.3d 107 (Pa. Super. Ct. 2015) and 170 A.3d 380, wherein a belated full bench recusal request, seeking to salvage a substantial monetary judgment, was ultimately rejected. The commentators made references to American recusal caselaw. See also Kilimnik, *supra* note 37, at 762–70 (discussing Switzerland and Germany).

178. Litigants, the judicial system, and the public’s confidence in the judicial system are affected whether actual prejudice does or does not exist. The issue of appearance versus reality has received extended scholarly analysis, particularly with respect to the justifications for appearance-based regulations. See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1565 (2012), noting that an important reason to tolerate crude regulatory over-breadth (for example, through prophylactic rules) is that the feared conduct is too difficult to detect and that a clear proxy represents the preferable approach. *Id.* at 1567 n.11. Nevertheless, appearance-based regulation has been criticized as imprecise, vague, or difficult to implement. See Bam, *supra* note 21, at 992–1002 (suggesting a modified appearance-based procedural approach to recusal reform rather than the prevailing outcome-based recusal jurisprudence that focuses on substantive standards); Geyh, *supra* note 31, at 732 (noting that the appearances regime is crumbling and proposing procedural reforms); McKoski, *supra* note 15, at 1936–37. *But see* McKeown, *supra* note 18, at 58 (providing a forceful judicial response in favor of the appearance standard). Professor Stempel has asked whether the appearance disqualification standard requires a consensus/super-majority or a “substantial group of doubters” as a trigger; he favors the latter. See Stempel, *supra* note 152, at 806–23. In actuality, whether a judge’s impartiality might “reasonably be questioned” is no more self-defining than other elusive legal terms like abuse of discretion, proximate cause, best interests, or reasonable doubt. The quest for def-

The ABA Model Code provides commentary on how appearances can be manifested in subtle ways.¹⁷⁹ Instances of potentially disqualifying appearances are not susceptible to precise or to exhaustive identification, hence, the generality of the standard. However, the permutations of fact and circumstance that may raise legitimate concerns about the appearance of partiality are indeed myriad—including, for example, perceived prejudicial remarks on or off the bench; participation in a prior case involving a former client or former client's opponent; professional relationships with attorneys, other judges, and organizations; claims filed by or against the judge; judge's personal connection with the proceedings; family, social, or business relationships; and campaign activities, statements, or campaign contributions.¹⁸⁰

Proving actual prejudice is often impossible. An examination of a recusal challenge necessarily requires that judges be given initial deference regarding their self-assessment and assertions of impartiality; they know best what is in their hearts.¹⁸¹ Nevertheless, to

initial certainty or specificity of such value-laden terms is like a dog trying to catch its tail, ultimately an unproductive aspiration.

Some critics have touted the preemptory approach as a low cost, easy-to-apply mechanism to remove biased or problematic judges. *See id.* at 789–93. Others have suggested replacing the appearance standard with *per se* rules or standards. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably Be Questioned*, 14 *GEO. J. LEGAL ETHICS* 55, 56 (2000); McKoski, *supra* note 15, at 1984–86; Stempel, *supra* note 152, at 767–88. The need for more empirical research regarding the appearance of impropriety standard has been recognized. *See* Blanck, *supra* note 27, at 901.

179. ABA Model Code of JUD. CONDUCT r. 2.3 cmt. 2 (AM. BAR ASS'N 2011) states: “Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as biased or prejudiced.” Similarly, the Supreme Court of Pennsylvania has observed that a judge's exalted position underscores the potentially prejudicial significance of a judge's words and expressions upon the perceived fairness of the proceedings. *See* Commonwealth v. Hammer, 494 A.2d 1054, 1058–59, 1064 (Pa. 1985) (discussing the context of the judge's manifestation of personal bias through the judge's prosecutorial-like actions contributing to the prejudicial tenor of the trial).

180. Many of these potential concerns have been identified by Professor Abramson, *see* Abramson, *supra* note 178, at 76–101, who laments the lack of judicial ethical guidance. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 823–24 (1986) (discussing that state justice's participation in the case had the clear and immediate effect of benefitting his financial interests); *see also* Miller, *supra* note 52, at 614 (advocating that close friendships should be an additional *per se* factor); Okpaluba & Juma, *supra* note 151, at 15–16 (suggesting that actual or apparent bias can be demonstrated through the facts of the case, conduct of the judge (either before or during the proceeding), relationship of the judge to the parties, an interest in the outcome of the case, and circumstances surrounding the case).

181. As noted in *Lomas* the jurist's self-assessment of his or her personal bias or interest, sufficient to preclude an impartial review, is the initial step of a two-step process in assessing whether disqualification is warranted. *Lomas – OISR*,

grapple with the hidden (and often unconscious) possibility of prejudice or bias, the objective appearance standard provides a sensible and effective tool to address sub-conscious bias¹⁸² and to safeguard the rights of litigants to fundamental fairness in the proceeding and decision-making.¹⁸³ As a result, the objective appearance standard, rather than proof of actual prejudice, has necessarily become the predominant approach to recusal analysis.¹⁸⁴ Judge Margaret McKeown, a federal circuit judge and a strong advocate of the objective appearance standard, has observed that the standard is workable, manageable, and practical.¹⁸⁵

Being an essential component of procedural fairness, the appearance of partiality is itself sufficient to justify recusal—proof of actual bias is not required.¹⁸⁶ Furthermore, violation of the appearance standard does not require scienter. In *Liljeberg*,¹⁸⁷ the U.S. Supreme Court concluded that the federal appearance standard for disqualification can be violated even though the challenged jurist was not aware of the circumstances that created an appearance of impropriety. Quoting the lower appellate court, Justice Douglas stated that appearance-based disqualification may be warranted

130 A.3d 107, 137 (Pa. Super. Ct. 2015). See Okpaluba & Juma, *supra* note 151, at 35 (actual bias is hard to prove and is akin to proving fraud, noting that the due process standard in *Caperton*, based on the likelihood of bias, bears similarities to proving actual bias); *supra* note 169 (regarding the heavy burden of proof); see also Bam, *supra* note 21, at 943.

182. See Marbes, *supra* note 162, at 292; see also Samaha, *supra* note 178, at 1567 n.11 (regarding the utility of prophylactic rule-making).

183. See Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practice in the United States Supreme Court in Light of Cheney v. U.S. District Court*, 84 N.C. L. REV. 181, 182, 219–220 (2005) (with Justice Scalia’s refusal to recuse as a backdrop, author explains the recusal standards and practice in the Supreme Court and recommends recusal reform given that the appearance standard has not been met).

184. See Marbes, *supra* note 162, at 285–86; AMERICAN BAR ASS’N, RESOLUTION 105C ADOPTED BY HOUSE OF DELEGATES (2014) [hereinafter referred to as RESOLUTION 105C].

185. McKeown, *supra* note 18, at 49. Caselaw recognizes the importance of the appearance standard. As Justice Kennedy noted: “[I]n matters of ethics, appearance and reality often converge as one.” *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring); see also Okpaluba & Juma, *supra* note 151, at 14 (noting in reference to recusal under South Africa’s jurisprudence, appearance is just as important as the reality).

186. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (noting that justice must satisfy the appearance of justice and that proof of actual or subjective bias is not required; state justice’s financial interest demonstrated a possible temptation “not to hold the balance nice, clear, and true”); *Liteky*, 510 U.S. at 554 n.2 (the federal statutory appearance standard does not require a judge to be subjectively biased or prejudiced, so long as he appears to be so).

187. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

even if the challenged jurist is “pure in heart and incorruptible.”¹⁸⁸ At the state level, in an extended analysis of the appearance standard, a Pennsylvania jurist emphasized that appearance is independently important and sufficient to mandate recusal under appropriate circumstances.¹⁸⁹

C. Judges have an ethical duty to maintain and promote the public’s trust and confidence in the impartiality, as well as the appearance of impartiality, of the judiciary.

Judicial conduct must manifest ethical principles in order to inspire and promote public confidence in the judiciary. Judicial conduct that contravenes—or appears to contravene—precepts of ethical conduct and procedural fairness can contribute to the erosion of the public’s trust and confidence in the judicial system. As Justice Breyer reflected in a speech, “The judicial system, in a sense, floats in a sea of public opinion.”¹⁹⁰ The Model Code of Judicial Conduct embodies the importance of the public’s trust and confidence in the judicial system and rule of law.¹⁹¹ With respect to its investment in public trust and confidence, the judicial branch of government arguably may have a greater stake in its institutional reputation than the other two branches of government.¹⁹² As one commentator has explained, judges have for centuries relied on

188. *Id.* at 860 (applying the federal statutory appearance standard).

189. See *Lomas – OISR*, 130 A.3d 107, 122 (Pa. Super. Ct. 2015). The supreme court majority later rejected the recusal challenge on the basis of untimeliness. *Lomas-II*, 170 A.3d 380, 391 (Pa. 2017). Another commendable analysis of recusal in the context of a case can be found in the concurring opinion in *In re Marriage of O’Brien*, 958 N.E.2d 647, 667–86 (Ill. 2011) (Karmeier, J., concurring).

190. See Laurel A. Rigertas, *The Supreme Court and Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 939, 940 n.12 (2013) (citing Stephen Breyer, Assoc. Justice of the U.S. Supreme Court, *An Independent Judiciary: In Honor of the Sesquicentennial Anniversary of the Massachusetts Superior Court* (Sept. 22, 2009) (transcript available at <https://bit.ly/2ZMn5Lm> [<https://perma.cc/HB85-NU22>]); See Geyh, *supra* note 10, at 877 (noting that Pound’s 1906 speech, *see supra* note 3, provided the impetus for a growing recognition of the importance of the public’s trust and confidence in the courts).

191. See MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2011) Canon 1 r. 1.2 (Am. Bar Ass’n 2010); *see also id.* pmb., para. 1 (“Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”).

192. See Frost, *supra* note 20, at 553; *see also* AMERICAN BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 13 (2003) [hereinafter JUSTICE IN JEOPARDY] (stating: “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”).

public confidence to maintain a role in social life.¹⁹³ Appearances are as important and impactful as reality. There is a wide consensus that judges should *appear* impartial to inspire and promote public confidence in the judicial system and the rule of law.¹⁹⁴

The judicial system's concern for public confidence is a pragmatic one, rooted in years of experience. In his 1906 address to the ABA, Roscoe Pound acknowledged the public's growing dissatisfaction with the administration of justice and the need for reform.¹⁹⁵ Public and professional discontent with the courts has been an historical reality.¹⁹⁶ Recent surveys, while substantially positive in general about the image of the judiciary, nevertheless reveal the public's persistently negative views and concerns about the potential or apparent influence of political, economic, racial, and ethnic factors in the fairness of judicial decision-making.¹⁹⁷

Judge Kevin Burke, a district court judge, has exhorted state courts to be accountable for and publicly committed to procedural fairness. He cites a Pew Research Center survey, which documented that 75 percent of the American public believes judges' decisions are, from a moderate to significant extent, influenced by their political and personal philosophy, as well as their desire for elevation to a higher court.¹⁹⁸

Notwithstanding the potential problems about the statistical reliability of surveys and the definitionally elastic scope of "pub-

193. See Samaha, *supra* note 178, at 1566, 1603.

194. *Id.* at 1582.

195. See Pound, *supra* note 3, at 854.

196. See Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 L. & CONTEMP. PROBS. 69, 74 (1970) (historical overview regarding public confidence in the judicial system and the factors that affect such confidence); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) (acknowledging the reality of prevailing suspicions and doubts of the lay public about the judiciary).

197. See David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 COURT REV. 24, 24–29 (1999) (citing a national survey in 1999 sponsored by the National Center for State Court and the Hearst Corporation, which highlighted particular concerns from the African-American and Hispanic-American communities about the judicial system. Finding that the public's view of judges is not good and that there is apparently "extensive, and surprising dissatisfaction, with judges," the authors noted that 80% of the survey's respondents believed that judges' decisions are influenced by politics). Discontent has also been evident with respect to legislative threats to judicial independence. See *infra* note 339.

198. See Kevin S. Burke, *A Vision for Enhancing Public Confidence in the Judiciary*, 95 JUDICATURE 251, 252 (2012); see also Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4, 8 (2007); Marbes, *supra* note 162, at 255–56 (regarding new lows in public confidence in the justice system).

lic,”¹⁹⁹ such barometers of belief deserve serious reflection on how courts can and should improve the public’s confidence in the justice system’s credibility. As to the general problem of public trust and confidence, Judge Burke’s prescription is a straight-forward one:

There needs to be a direct confrontation of the attacks on the legitimacy of judicial decision-making. Legitimacy is achieved in part by building a reservoir of goodwill so that people will stand by courts when a decision is made with which they disagree. Legitimacy is also in part trust of the judges and courts. Trust is earned, not given.²⁰⁰

A symbiotic relationship exists between the public’s trust and confidence and the appearance of impartiality in the justice system. The ABA has stated that “[a]ppearances 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 . . . [P]ublic confidence in our judicial system is an end in itself.”²⁰¹

The public’s perception of the judicial branch is particularly relevant to the problem of recusal given the public’s documented suspicions about adjudicatory fairness, especially with respect to the disturbing specter of judges receiving increasingly large amounts of campaign contributions.²⁰² As to the impartiality of the decision-maker, *ad hoc* or woefully inadequate recusal procedures can foster

199. Commentators have noted the need for more and better empirical research in measuring public trust and confidence in the courts. See Samaha, *supra* note 178, at 1602 (lamenting the absence of serious empirical research despite the “mountain of legal scholarship” on appearance arguments). Samaha’s context is campaign finance regulation. A particular challenge is the definitional scope of the term “public” and particular difficulties in relying on survey data. See Geyh, *supra* note 31, at 721–27 (in the context of “the public confidence puzzle,” the author observes that the “public’s” perception goes beyond the general public and should factor in the views of parties, attorneys, and those who use the court system). See also Frost, *supra* note 20, at 53, cautioning, in the context of Justice Scalia’s duck hunting controversy, the media’s limited role in assessing the level and impact of public perception in the formulation of public policy; and Miller, *supra* note 196, at 73, 77, and 91 (endorsing the need for better empirical research and noting that “public” confidence represents multiple populations).

200. Burke, *supra* note 198, at 252. See Rottman & Tomkins, *supra* note 197, at 30. The authors observe that the public’s negative perceptions may make it “difficult for even demonstrable court improvements to become translated into higher levels of public confidence.”

201. See JUSTICE IN JEOPARDY, *supra* note 192, at 18. See also Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006); Damon M. Cann and Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for State Courts*, 36 AM. POL. RES. 297 (2008).

202. See Alicia Bannon, *Judicial Elections after Citizens United*, 67 DEPAUL L. REV. 169, 183 (2018) (citing a Brennan Center for Justice poll involving the

an image of arbitrary judicial decision-making and thus can contribute to diminished public confidence in the judicial system.²⁰³ To increase the public's trust and confidence, one obvious approach has been recommended—adopt fair procedures.²⁰⁴ With respect to elected courts, others have urged such courts to embrace the public's demand for accountability by taking concrete steps to preserve both the reality and appearance of justice while recognizing the need to “appreciably distance themselves from situations in which their fairness and impartiality might reasonably be questioned.”²⁰⁵ In other words, adherence to the objective standard of the appearance of judicial impartiality, integrated within a recusal process that is fair and transparent, should be viewed as ethically essential.

D. Judges are human—they do not have the capability of being objective or disinterested decision-makers when their actual or apparent impartiality is questioned.

In the Brothers Grimm's fairy tale about a beautiful and fair heroine, Snow White, the Queen of the story is described as often looking into a magic mirror and asking: “Mirror, mirror, on the wall, Who's the fairest one of all?” The mirror's consistent reply (at least until Snow White grew up) was: “You, O Queen, are the fairest of all.” As the Brothers Grimm remarked, “Then she was happy, for she knew that the mirror always spoke the truth.”²⁰⁶

issue of judicial campaign contributions and the public's belief that contributions skew judicial decision-making).

203. See Frost, *supra* note 20, at 534.

204. See Geyh, *supra* note 31, at 720 (citing a study by the National Center for State Courts regarding fair procedures as an important factor in promoting a favorable public perception); and Burke, *supra* note 198, at 253–54 (advocating a commitment to procedural fairness to enhance the public's confidence in the judiciary, adding, “As scary as it may seem, judges need to be willing to be publicly accountable for fairness . . . Procedural fairness is what judicial excellence is about.”).

205. See Goldberg et al., *supra* note 18, at 504 (noting that current disqualification doctrines and procedures are inadequate). See also Judge Bork's comment: “The democratic integrity of the law . . . depends entirely upon the degree to which its processes are legitimate.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 2 (1990).

206. JACOB GRIMM & WILHELM GRIMM, *Snow White*, in *THE ANNOTATED BROTHERS GRIMM* 240, 244 (Maria Tatar ed., W.W. Norton & Co., 2004). The Queen's self-infatuating gaze is reminiscent of a narrative in a fourteenth century book wherein, to entertain her companions during their attempted escape into the countryside from the Black Death, Emilia sings: “I'm so enamored of my loveliness . . . When in my looking glass I view myself, / I see the good that makes the mind content, / Nor can some new event or some old thought / Serve to deprive me of such sheer delight.” GIOVANNI BOCCACCIO, *THE DECAMERON* 44 (Norton Critical ed. 2016).

As with most fairy tales, there is a deeper meaning or didactic message. In an annotation of the story, Maria Tator offers this commentary:

“Who’s the fairest one of all?” The voice in the mirror may be viewed as a judgmental voice, representing the absent father or patriarchy in general, which places a premium on beauty. But that voice could also be an echo of the queen’s own self-assessment, one that is, to be sure, informed by cultural norms about physical appearances.²⁰⁷

Grimms’ fairy tale is particularly instructive when applied to the problem of judicial recusal. When faced with a recusal challenge, the judge will conduct a self-examination in the metaphorical mirror and—influenced (or pressured) by sacrosanct cultural norms, such as the presumption of judicial impartiality—will make a dispositive assessment about his or her ability to adjudicate without bias or prejudice. The judge will think that the self-assessment is “objective,” one that also may be believed to reflect the reasonable views of others.²⁰⁸ Naturally, the judge will believe that he or she knows all of the facts and is certainly in the best position to objectively assess them. The concept of true objectivity is, of course, chimeric, but certainly a worthy value and pursuit.²⁰⁹ Impartiality, like beauty, reveals itself to be truly in the eye of the beholder. In reality, the voice in the mirror is nothing more than an echo, paradoxically, of biased impartiality. From the perspective of Snow White’s fairy tale, one might say that the image in the mirror is a self-deceiving illusion—a manifestation of the Magical Mirror Syndrome.

The problem is compounded because, like the self-gazing Queen in Snow White, the judicial community has been unable—or willfully resistant—to acknowledge the untenability of objective self-assessment. Scholarly research and commentary confirm, however, that objective self-assessment of impartiality is a tenaciously romantic notion that presents a serious risk to the ideal of fundamental fairness. There is abundant literature regarding the problem of cognitive predispositions in judicial decision-making. The complicating psychological factors largely come under the rubric of “biases”—often analyzed in descriptive terms such as the “intro-

207. GRIMM & GRIMM, *supra* note 206, at 244.

208. It has been observed that there is consequently a serious risk that the self-assessment will be that of a “reasonable judge” rather than the “reasonable person.” See Bassett & Perschbacher, *supra* note 151, at 158.

209. See *supra* note 68 regarding the definitional implications of “objective.”

spection bias disorder”²¹⁰ or the Bias Blind Spot²¹¹—which, in turn, can be broken down into many specific psycho-analytical categories.²¹² Judicial systems, however, have refused to grapple with such mystifying subterranean psychological vulnerabilities when the issue of recusal arises.

Donning a black robe²¹³ or possessing superior intelligence does not magically confer infallibility, nor does an entirely sincere and deep-seated belief in one’s integrity or impartiality provide special ethical insulation.²¹⁴ The *Caperton* and *Williams* cases are par-

210. See Geyh, *supra* note 31, at 709 n.152 (citing STEVEN LUBET, *THE IMPORTANCE OF BEING HONEST: HOW LYING, SECRECY, AND HYPOCRISY COLLIDE WITH TRUTH IN LAW* 6 (2008)).

211. See Marbes, *supra* notes 52 and 162; Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCH. BULL. 309, 374 (2002) (discussing three surveys regarding self-serving attributions and the concept of naïve realism).

212. The constellation of biases has been conveniently referred to as “the fallibility of belief.” See SUSANNAH CAHALAN, *THE GREAT PRETENDER: THE UNDERCOVER MISSION THAT CHANGED OUR UNDERSTANDING OF MADNESS* 44 (2019). There are many analytical terms to describe particular biases. See, for example, Uphoff, *supra* note 25 (identifying egocentric biases, including *anchoring*, *hindsight*, and *self-serving*, and concluding, based on the author’s experience of 30 years, that the justice system faces a serious problem of bad judging and bad judges); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORN. L. REV. 777, 784 (2000–01) (identifying cognitive illusions, such as *anchoring*, *framing*, *hindsight bias*, *the representative heuristic*, *egocentricity*); ROBERT GREENE, *THE LAWS OF HUMAN NATURE* 28–32 (2018) (discussing generally the biases of *confirmation*, *conviction*, *appearance*, *group*, *blame*, *superiority*, and cautioning that “We imagine we are looking for the truth, or being realistic, when in fact we are holding on to ideas that bring a release from tension and soothe our egos, make us feel superior. This pleasure principle in thinking is the source of all our biases.” *Id.* at 28); Bassett & Perschbacher, *supra* note 151, at 155 n.86 (identifying various psychological studies and stressing the need to reform the recusal process with an emphasis on appearances); and Anne E. Mullins, *Opportunity in the Age of Alternative Facts*, 58 WASHBURN L.J. 577 (2019) (discussing cultural bias and judicial predispositions in the assessment of empirical evidence); and DAILEY, *supra* note 1, at 57–61 (discussing the psychoanalytical aspects of decision-making; author laments that “Psychoanalysis reveals how law’s failure to take human subjectivity seriously poses grave risks for a liberal system of justice committed to just treatment and fair outcomes.” *Id.* at 3).

213. See Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 346, 352 (2009–10) (judges may acquire a false sense of infallibility); Sam Stretton, *The Term “Black Robe Disease” Is Used to Describe Judges Who Let Their Own Self-Importance Cloud Their Good Judgment*, LEGAL INTELLIGENCER (July 10, 2012), <https://bit.ly/2WdCqUj>.

214. See Marbes, *supra* note 162, at 280–81 (no scientific evidence to support the belief that more intelligent persons are less prone to the Bias Blind Spot); Geyh, *supra* note 31, at 727 (noting the paradoxical problem of disqualification standards that are designed to second guess the impartiality of judges, standards which are interpreted and applied by judges who are so committed to their own impartiality that they are loath to second guess themselves). See also Slovenko,

ticularly egregious examples of judicial blinders in the self-assessments of impartiality, notwithstanding the fact that the state jurists presumably acted in good faith and with confidence in their capacity to be impartial.²¹⁵ In cautioning his fellow judges that “the tenacious tentacles of bias” can cloud objectivity, one federal jurist has acknowledged that the black robe is not magical: “[E]ach of us harbors some bias in some degree, and [] our biases may be impacting a given situation in ways in which we are simply not aware.”²¹⁶

What is particularly troublesome about the self-assessment aspect of the traditional recusal process is the obvious personal interest that a jurist has in his or her potential recusal.²¹⁷ When one’s reputational interest or professional image is implicated, objectivity about oneself is not possible. Judges are not immune from an understandable gravitational pull to defend and assert a positive image when faced with an unsettling—perhaps surprising or baseless—ethical challenge.²¹⁸ Because of such understandable self-interest, judges have an incentive to narrowly construe recusal and to resist a formalized process that constrains their authority and discretion.²¹⁹ Moreover, with respect to disqualification, a judge may be reluctant to admit his or her cognitive vulnerabilities because the judge may view the recusal challenge as a frontal attack on the judge’s competency and integrity, an especially serious con-

supra note 42, at 645 n.6, stating: “The act of becoming a judge does not convert a person into an individual without emotion and prejudice . . . As Judge Frank put it, ‘Much harm is done by the myth that, merely by putting on a black robe and taking the office as a judge, a man ceases to be a human and strips himself of all predilections, becomes a passionless thinking machine.’” Quoting Frank, *Cult of the Robe*, 28 *SAT. R. LIT.* 12 (Oct. 13, 1945). Slovenko adds: “My intimate acquaintance with judges confirms my impression that the robe works no major transformation.” Slovenko, *supra* note 42, at 645 n.6.

215. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). Professor Virelli characterizes *Williams* as a narrow decision regarding due process recusal but exemplifying the Supreme Court’s more expansive and flexible approach. See VIRELLI, *supra* note 17, at 136–37.

216. See McKee, *supra* note 2, at 1712. In a lighter metaphorical vein, the judicial author notes that detecting bias in oneself may be more difficult than defining and identifying the strike zone in baseball. *Id.* at 1723–24.

217. See Geyh, *supra* note 145, at 546. As Justice Brennan remarked in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 829–30 (1986) (concurring op.), a disqualifying interest does not have to be pecuniary. See also Rodriguez, *supra* note 14, at 14 n.65 (author notes that, in the administrative law context, improper self-interest bias is not limited to financial interests).

218. See MENENDEZ & SAMUELS, *supra* note 19 (acknowledging a judge’s personal motivation and interest in vindicating one’s reputation).

219. See Frost, *supra* note 20, at 552.

cern for those judges who are elected.²²⁰ It is certainly plausible that the judge's self-interest is as strong as, or perhaps stronger than, the traditional *per se* disqualifying factor of economic self-interest. Publius's admonition in Federalist No. 10 is instructive: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."²²¹ Self-interest in one's ego and reputation impairs impartiality (and, consequently, the appearance thereof) and should be recognized as a disqualifying factor in the recusal decision-making process.

E. Recusal is a praiseworthy manifestation of judicial morality. Appearance-based disqualification is not a reflection of a judge's competency or integrity.

Aside from the psychological impact upon a judge when confronted by a recusal challenge, recusal might superficially connote something negative about the judge's qualifications, competency, or integrity.²²² Such a negative perception is unfortunate and distorted, especially when recusal is considered in the context of appearances and the imperative of inspiring the public's trust and confidence in the judiciary. Thus, recusal needs to be explained and understood by the public in a more positive and realistic light.

In the self-assessment recusal context, appearance-based recusal can be viewed as multi-dimensional. As previously described, one aspect of looking in the mirror is personal or psychological—it is solipsistic, and impartiality is seriously compromised. At the other end of the spectrum is society's idealized image or

220. See McKee, *supra* note 2, at 1716 (reflections of a federal jurist).

221. See THE FEDERALIST No. 10, *supra* note 147, at 57 (James Madison). Authorship of this essay has been attributed to James Madison. Publius's commentary, offered in the belief that factions produced damaging mischief, reflects the ancient maxim *Nemo debet esse index in propria causa* ("No man ought to be a judge in his own case.") and *Nemo potest esse simul actor et index* ("No one can be both litigant and judge at the same time."). See Vermeule, *supra* note 146 (analyzing the limits and costs-benefits of the *nemo* principle and positing the view that one must consider and assess the risk of self-dealing and self-serving biases regarding individual and institutional decision-makers); and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (noting that no judge can be a judge in his own case or be permitted to try cases where he has an interest in the outcome, concluding that the state justice's participation in the case raised a question regarding his possible financial self-interest justifying disqualification).

222. See Kilimnik, *supra* note 37, at 773, regarding the public's misguided negative perception of recusal. In *Lomas – OISR*, 130 A.3d 107, 148 (Pa. Super. Ct. 2015), Judge Stabile cautioned that his pro-recusal analysis, based on the appearance of impropriety, should not be viewed as casting doubt on the trial judge's ability to reach a fair and impartial verdict.

perception of a jurist. Among the three branches of government, judges possess an almost sacred mystique—elevated, black-robed officials who operate within a framework of stylized procedural rituals. Society places judges on a pedestal as guardians of democracy—fair, impartial, and ideally (albeit mistakenly) infallible in judgment.²²³ The sobering reality is that such an idealized image of the jurist presents another impediment in the recusal context. How can such exalted public figures acknowledge the possibility of bias or prejudice while avoiding the risk of criticism or diminished stature, especially when they believe that they have an equally compelling ethical duty to decide cases assigned to them? The pressures create public and private difficulties. Given the tense relationship between ethical duties and a judge's almost sacred public persona, recusal presents an inherently difficult decision for a jurist.

The dilemma, however, is resolvable if recusal is re-conceptualized.²²⁴ Focusing on the objective appearance aspect of recusal can provide an important shift in perspective and emphasis, one that places a jurist in a more positive light. Recusal should not be perceived as signifying dishonor or a denigration of a jurist's competency and integrity.²²⁵ Quite the contrary—recusal should be viewed as a commendable manifestation of integrity and judicial morality. A coalition of former state chief justices addressed the value of an appearance-based approach to recusal when it stated:

The appearance of impropriety is also an essential basis for recusal because it is difficult and awkward for a judge to admit

223. See *Lomas-OISR*, 130 A.3d at 147 (courts perform a “critical gatekeeping function”). William Howard Taft, who served as President and later Chief Justice of the United States, is reported to have said: “I love judges, and I love courts . . . They [judges] are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God.” BUDIANSKY, *supra* note 3, at 401. Chief Justice Roberts made a passing reference to those who believe in the “oracular sanctity of judges.” See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 456 (2015).

224. Consider the advisability, for example, of taking a fresh look at the presumption of impartiality. See text notes 160–173 and accompanying text; and Bassett & Perschbacher, *supra* note 151, at 161 (discussing perceptions of justice and how to implement changes that will “re-orient” the judiciary’s perspective on disqualification).

225. See Goodson, *supra* note 183, at 218 (to recognize that one’s impartiality might reasonably be questioned does not imply incompetency or unethical conduct); Geyh, *supra* note 31, at 729–30 (addressing the unwarranted stigma of disqualification); Marbes, *supra* note 162, at 286 (noting that in federal court most cases rely on and use appearance of bias standard, which is less critical of a challenged judge’s ethics and does not impugn the judge’s actual motives); *In re Moses W*, 842 N.E.2d 783, 789–90 (Ill. App. Ct. 2006) (court determined that trial judge, who had filed an affidavit in response to the motion for a substitute judge, should have recused and notes that decision is not meant to impugn the trial judge; motion had been referred to another judge for review and decision).

actual bias. Admission of actual bias runs counter to the deeply ingrained obligation to be fair. Recusal based on the perception of impropriety allows a judge to avoid admitting actual bias, making recusal more acceptable.²²⁶

Similarly, another jurist observed: “By transforming a potentially intimately personal dispute into an objective discussion over how a reasonable person might view the situation, a litigant can give voice to concerns without going nuclear by accusing the judge of being unethical.”²²⁷

These viewpoints are consistent with the ABA’s 2008 report, advocating the application of the general or “catch-all” disqualification standard, stating:

The Model Code focuses on the appearance of impartiality, rather than on a judge’s actual impartiality. This concern with appearances has deep roots, dating back to the progressive era, and is animated by the view that if public confidence in the courts is to be preserved, judges must not only act properly but appear to act properly as well. Moreover, if one is concerned about the reluctance of judges to disqualify themselves, there is a strategic benefit to focusing on the appearance of impartiality: judges who are loath to admit actual bias or partiality might be more willing to concede the existence of a perception problem.²²⁸

Reconceptualizing recusal in a positive ethical perspective also requires a re-examination of the disciplinary aspects of recusal. The negative connotations of disqualification are arguably sustained by the fact that the failure to recuse may provide a basis for judicial discipline. The problem is one of emphasis. Pennsylvania’s re-direction of recusal in the 1980s, for example, signaled an inadvisable emphasis on the disciplinary aspects of such judicial conduct.²²⁹ Such a focus on or preoccupation with discipline erects an unnecessary obstacle to recusal reform. Three points, in this regard, are relevant.

First, the disciplinary aspect of recusal should be recognized as separate and distinct from the more commonplace adjudicatory as-

226. Brief Amici Curiae of 27 Former Chief Justices and Justices In Support of Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22), 2009 WL 45979, at *4. The Conference of Chief Justices had also filed a separate *amici* brief. See *infra* note 280.

227. McKeown, *supra* note 18, at 55.

228. See ABA DRAFT REPORT, *supra* note 143, at 18.

229. See text accompanying *supra* notes 121–30.

pects of recusal.²³⁰ Recusal may indeed provide an independent basis for future discipline, but recusal is often not addressed or resolved through the time-consuming and potentially devastating process of disciplinary investigation and enforcement.²³¹ The traditional adjudicatory and supplemental disciplinary dimensions of recusal are distinct.²³²

Second, disciplinary enforcement of recusal infractions should be relegated only to the most egregious cases. Regarding its recommendations for recusal reform, the Institute for the Advancement of the American Legal System (“IAALS”) noted its agreement with the conclusion of the Conference of Chief Justices, namely, that states should not rely on the disciplinary process as a deterrent for handling recusal matters.²³³

Third, in conjunction with the preferred practice of having another jurist assess a recusal motion, the issue of discipline becomes less relevant. As the ABA Model Code emphasizes: “Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline.”²³⁴ In fact, most reported cases on the topic of recusal

230. Pennsylvania caselaw, for example, has acknowledged that the state’s judicial disciplinary authority is separate and distinct. See *In re Zupsic*, 893 A.2d 875, 893, 893 n.6 (Pa. Ct. Jud. Disc. 2005) (noting that reported opinions from intermediate appellate courts regarding recusal do not constitute precedent in disciplinary matters and cautioning that perceived violations of the judicial code of conduct are not within the purview of intermediate appellate courts).

231. See *In re Lokuta*, 964 A.2d 988 (Pa. Ct. Jud. Disc. 2008) (jurist removed from office in connection with, *inter alia*, the jurist’s on-the-record manifestation of bias against plaintiff’s counsel); *In re Zupsic*, 893 A.2d 875 (Pa. Ct. Jud. Disc. 2005) (jurist violated rules of conduct in failing to disqualify himself where record showed his personal contacts with defendant’s father); cf. *In re McCutcheon*, 846 A.2d 801 (Pa. Ct. Jud. Disc. 2004) (Board failed to prove personal bias or prejudice or establish a reasonable question about the judge’s impartiality; failure to recuse assessed in relation to the realities of the administration of justice in small communities and the adventitious nature of a jurist’s contacts with citizens and law enforcement).

232. See, e.g., John P. Freeman, *Appearance of Impropriety, Recusal, and the Segars-Andrews Case*, 62 S.C. L. REV. 485 (2011) (author focuses on a truly unusual case, in the context of appearance of impropriety, in which the disciplinary commission disagreed with *three* prior non-disciplinary adjudications supporting the jurist’s non-recusal).

233. See IAALS REPORT, *supra* note 39, at 11.

234. The ABA MODEL CODE, *supra* note 19, para. 6 of the “Scope” section, continues: “Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.” MODEL CODE OF JUDICIAL CONDUCT Scope, para. 6 (AM. BAR ASS’N 2011).

can be found within the non-disciplinary context of appellate adjudications in which recusal is often one of many issues raised in an appeal from a final judgment.

Thus, the objective appearance standard is beneficial in addressing the inherent tensions of recusal by placing it in a more positive, less critical, and non-disciplinary context, absent egregious circumstances of misconduct. Regarding the perceptions of justice and the understandable “protective impulses” of jurists,²³⁵ in time, with greater focus on the objective appearance standard, “judges will come to recognize that they are not being personally challenged—it is appearance that matters.”²³⁶

IV. PROCEDURAL IMPERATIVES FOR RECUSAL REFORM

Legal literature on the topic of judicial ethics is a fertile field. While the 20th century has concentrated on promoting general rules and codes of judicial conduct, the last few decades have placed particular emphasis on a core feature of the justice system—the integrity of the decision-maker and decision-making process as it applies to the ethical value of impartiality. Many organizations, as well as judicial and legal scholars, have concentrated their criticism and recommendations on disqualification and recusal.²³⁷ The insightful assessments and recommendations of such organizations and commentators have demonstrated substantial consensus that various procedural reforms should be implemented to address the issue of judicial impartiality, and the appearance thereof, in decision-making. Selecting and prioritizing such recommendations can be challenging. But the following procedural norms are essential building blocks for meaningful recusal reform:

1. *Independent judicial assessment and disposition of motions:* Motions to disqualify or recuse a jurist should be transferred to another jurist for an independent and objective assessment and disposition. Self-assessments of impartiality clearly subvert the objective appearance of impartiality standard of recusal.

This recommendation, based on the aforementioned categorical imperatives of impartiality and the appearance of impartiality, is clearly the most important procedural reform urged by many commentators. A survey of the American public indicates that 80 percent believe that disqualification requests should be decided by a

235. Bassett & Perschbacher, *supra* note 151, at 161.

236. *Id.*

237. *See supra* note 23.

different judge.²³⁸ Aside from states that have adopted a peremptory challenge approach to recusal,²³⁹ many states give the jurist autonomy to make a self-assessment of his or her own impartiality and do not require transfer of a recusal motion to another jurist.²⁴⁰ Stressing the paramount importance of an impartial adjudicator²⁴¹ and recognizing that cognitive illusions influence such self-assessments, commentators identify the failure to transfer motions to disqualify/recuse as the major common flaw in how states handle recusal challenges.²⁴² This infirmity has been severely criticized as an ethical and process failure.²⁴³

Transferring the recusal motion, *in the first instance*, to another jurist for an independent determination is an essential recusal reform.²⁴⁴ As one commentator has observed:

Only when it comes to recusal procedure do we tolerate the presence of a decisionmaker who is not neutral or impartial. This is an odd exception because the presence of an impartial arbiter may be more important in the context of recusal proceedings than at other stages of litigation, not less.²⁴⁵

238. See Geyh, *supra* note 145, at 547 n.310. The survey was conducted in 2009.

239. See *supra* notes 54–56.

240. For the practice among other states, see Abramson, *supra* note 39, at 545–58 (identifies 27 states); MENENDEZ & SAMUELS, *supra* note 19, at 21–22 n.43 and 23–24 n.47; Marbes, *supra* note 52, at 837; and Serbulea, *supra* note 15, at 1151–73 (appendix identifying specific state statutes and rules). Generally, the recusal/disqualification procedures vary among the states: many allow the challenged jurist to exercise discretion and decide the motion; others restrict the challenged jurist to determining the sufficiency and timeliness of the motion; and others require the jurist to transfer the motion to another judge. See also ABA RESOLUTION 107, *supra* note 36, at 8–9.

241. See Redish & Marshall, *supra* note 150, at 504 (also linking impartiality to the value of judicial independence); Serbulea, *supra* note 15, at 1141 (process and procedural safeguards are important to judicial independence).

242. See Marbes, *supra* note 52, at 835.

243. See Bam, *supra* note 24, at 653.

244. See James Sample & Michael Young, *Invigorating Judicial Disqualification—Ten Potential Reforms*, 92 JUDICATURE 26, 30–32 (2008); ABA DRAFT REPORT, *supra* note 143; Abramson, *supra* note 39; MENENDEZ & SAMUELS, *supra* note 19. At the least, others have suggested a modified approach, insisting on prompt review by an independent adjudicator or tribunal regarding a jurist's decision not to recuse. See Stempel, *supra* note 213, at 360; RESOLUTION 105C, *supra* note 184. In 2014, the Conference of Chief Justices adopted two resolutions regarding recusal: *Resolution 8—Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions: Ensuring a Fair and Impartial Process* [hereinafter referred to as CCJ RESOLUTION 8A]; and *Resolution 8—In Support of American Bar Association Resolution 105C* [hereinafter referred to as CCJ RESOLUTION 8B]; and see IAALS REPORT, *supra* note 39, at 6 (suggesting that “judges shouldn’t grade their own homework”).

245. See Bam, *supra* note 21, at 1181.

An incisive judicial criticism of the self-assessment disqualification process is particularly noteworthy. In *In re Marriage of O'Brien*, Justice Karmeier stated:

The notion that individual judges have sole and exclusive authority for determining whether they should continue to participate in a given case is untenable. It would enable judges to continue to sit in cases even where their participation in the case would deprive one of the litigants of a fair trial Not only should judges not be the sole and exclusive arbiters of whether they should continue to participate in a case, some have questioned whether they should *ever* be permitted to sit in judgment of requests for their own disqualification. As one recent scholarly work has pointed out: ‘The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of the United States disqualification law—and for good reason. They challenge the fundamental legitimacy of adjudication. They also challenge the judge in a very personal manner; they speculate on her interests and biases; they may imply unattractive things about her. . . .’²⁴⁶

Justice Karmeier’s concurring opinion provides an insight that should be obvious but must be emphasized—the subjective self-assessment disqualification approach subverts the objective standard that a jurist must apply in deciding a recusal motion. Echoing the exhortations of others, the justice explained:

Allowing judges to decide their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with our explicit commitment to objectivity in this arena. “Since the question whether a judge’s impartiality ‘might reasonably be questioned’ is a ‘purely objective’ standard, it would seem to follow logically that the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is ‘necessary’ or required.”²⁴⁷

There is a self-evident conflict between the ethical obligation of impartiality and prevailing recusal procedures. Subjective self-assessments of impartiality collapse the objective “reasonable person” standard of disqualification.²⁴⁸ To justify such an extraordi-

246. *In re Marriage of O'Brien*, 958 N.E.2d. 647, 677 (citing and quoting from Goldberg et al., *supra* note 18, at 530) (emphasis in original).

247. *Id.*

248. See Bassett & Perschbacher, *supra* note 151, at 154; Bam, *supra* note 22, at 1176 (“[I]mposing an objective disqualification standard is futile because, regardless of the substantive test, judges must assess the objective appearances of

nary compromise of judicial impartiality, various reasons have been offered. The belief that appellate review is an adequate corrective to an erroneous recusal decision is a common, superficially satisfying, justification.²⁴⁹ In reality, however, appellate review of recusal decisions is plainly an inadequate, ineffective, and inefficient option—the standard of review is woefully deferential and rarely results in reversals; the record on review is sparse, given the lack of traditional procedural safeguards; and appellate review is substantially delayed (and always costly) for the aggrieved litigant. As the Supreme Court pointedly identified the substantial downsides when it assessed a recusal challenge to Judge Landis:²⁵⁰

To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section [regarding peremptory disqualification] is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.²⁵¹

Likewise, an extraordinary writ represents a procedurally remote alternative when challenging the denial of a motion to recuse.²⁵² Other common justifications for self-assessment include:

their own conduct. And the evidence is overwhelming that this is an impossible task.”) (emphasis in original).

249. Such justifications have been criticized by others. See Stempel, *supra* note 152, at 753–54; Marbes, *supra* note 52, at 854–55.

250. See text accompanying *supra* note 15, regarding Judge Landis.

251. *Berger v. United States*, 255 U.S. 22, 36 (1921). The defendants, charged with espionage, had filed an affidavit under section 21 of the Judicial Code (which required another judge to hear the matter), alleging personal bias and prejudice on the part of Judge Landis. The disqualification was sought because Judge Landis had made prejudicial comments about Germans and German-Americans. *Id.* at 28–29. The defendants were of German ancestry. *Id.* at 28. Landis summarily denied the motion and the defendants were convicted. The Supreme Court held that the defendants’ affidavit was legally sufficient and that Landis was not legally justified in proceeding further in the matter. *Id.* at 36. See also Marbes, *supra* note 162, at 293 (noting the costs of appellate review and appellate leniency in recusal matters); and Bam, *supra* note 22, at 1175 (recognizing the fact that appellate reversals regarding the refusal to recuse are rare).

252. See Redish & Marshall, *supra* note 150, at 504 n.180 (noting the heavy burden on petitioners and the reluctance of courts to grant such extraordinary relief). Nevertheless, there have been instances when a court will grant such review. See *Municipal Publ’n, Inc. v. Court of Common Pleas of Phila. Cty.*, 489 A.2d 1286 (Pa. 1985) (supreme court assumes plenary jurisdiction to review recusal decision erroneously precipitated in the intermediate appellate court by writ of prohibition); *State ex rel. McCullough v. Drumm*, 984 S.W.2d 555 (Mo. Ct. App. 1999) (applying an objective recusal appearance of impropriety standard, court grants state’s writ of prohibition requiring judge, notwithstanding judge’s reputation for

the challenged jurist is in the “best position” to know and assess “the facts,” or self-assessment enhances efficiencies, deters fishing expeditions, or prevents the manipulation of the judicial system.²⁵³ Such rationales are specious and can easily be addressed by procedural safeguards.²⁵⁴ In evaluating costs and benefits, procedures that protect judicial integrity (institutional and individual), promote fairness, inspire public trust and confidence, and safeguard the rights of litigants—all compelling state interests—arguably outweigh countervailing considerations of costs, efficiencies, personal judicial autonomy, and ego.²⁵⁵

2. *Procedural safeguards*: Given the fundamental importance of impartiality and fairness in decision-making, adequate procedural safeguards should be presumptively incorporated in the recusal process regardless of the procedural context.

It is not uncommon to witness a supreme court justice summarily deny a motion to recuse. *Caperton* and *Williams* are prominent examples of how recusal motions are often litigated and denied, often without a hearing or explanation.²⁵⁶ Notwithstanding the crit-

integrity and honesty, to recuse himself where he previously acknowledged on the record that he could not be objective regarding defendant’s mental capacity).

253. Such justifications or concerns were identified, for example, in *Reilly-II*, 489 A.2d 1291 (Pa. 1985). See also *Robinson Nursing Home & Rehab. Ctr. v. Phillips*, 502 S.W.3d 519 (Ark. 2016) and *infra* note 256.

254. See *Serbulea*, *supra* note 15, at 1146–47. Imposing an affidavit requirement or using the threat of sanctions as a deterrent are possible procedural tools to address concerns about the potential abuse of the recusal process. See *infra* section 6.

255. Regarding costs and benefits, see *Marbes*, *supra* note 52, at 859–66; *Vermeule*, *supra* note 146, at 400–420 (suggesting that impartiality of the decision-maker is one institutional good among others); Randall J. Litteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 267 (1978) (administrative concerns of potential increases in judicial disqualification merit only secondary consideration); *Samaha*, *supra* note 178, at 1583 (general discussion of cost, need, efficiency, and institutional competence in justifying appearance-based decision-making); and *Serbulea*, *supra* note 15, at 1143–48 (discussing benefits outweighing administrative burdens in the context of various recusal reform measures).

256. “Summary denial” is used in the sense that the action is arbitrary, i.e. there is an absence of traditional procedural safeguards and articulated reasoning. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 882, 885 (2009) (*Caperton* moved three times for disqualification; Justice Benjamin issued four separate opinions to explain why he harbored no actual bias); and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (recusal motion denied without a hearing). See also *Robinson Nursing and Rehab. Ctr.*, 502 S.W.3d 519 (Ark. 2016), where the Arkansas supreme court referred the disqualification motion to the challenged individual justice, who conducted a self-assessment and denied the motion to recuse, which was focused on contributions to her 2014 judicial campaign. The justice relied, in part, on the “presumption” of her “duty to sit,” see *supra* notes 66 and 93, and the perceived risk of litigants manipulating the make-up of the court through recusal challenges.

ical importance and high stakes in securing a fair tribunal, recusal litigation represents a process that has been blithely diminished and ignored. Professor Amanda Frost forcefully explains the problem as follows:

Ironically, the recusal process is unique in the degree to which it has eschewed the basic procedural elements that have been viewed as indispensable to maintaining the legitimacy of adjudication. Unlike almost any other area of the law, the process by which judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bound by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter. My contention is that it is this very *ad hoc* and informal process, rather than any problem with the substantive standards for recusal, that has led to the recurring dissatisfaction with the law.²⁵⁷

Professor Frost's criticisms have been acknowledged by others to support their contention that the predominant recusal procedures violate the core tenets of our adversarial system of justice.²⁵⁸

While one may quibble whether a recusal challenge is "adversarial" (since the jurist is technically not an opposing "party"),²⁵⁹ the gravity of a recusal challenge certainly necessitates the applica-

See also League of Women Voters v. Commonwealth, 181 A.3d 1083 (Pa. 2018), where the legislative petitioners cited the importance of the public's interest in having a hearing on the recusal motion; Arnold v. Arnold, 847 A.2d 674, 680–81 (Pa. Super. Ct. 2004), where appellant complained of the lack of a hearing or an explanation for the denial of his recusal motion; and Commonwealth v. McCullough, 201 A.3d 221 (Pa. Super. Ct. 2018), where appellant asserted the need for the trial judge's testimony at the recusal hearing and argued that the lack of such testimony constituted structural error, and note 129, *supra*.

257. *See* Frost, *supra* note 20, at 536.

258. *See* Serbulea, *supra* note 15, at 1141–42 (stating that current recusal practice is incompatible with our legal norms); Geyh, *supra* note 31, at 719 ("Having a judge rule on the propriety of his own conduct without the benefit of adversarial argument, without the need to explain his decision, and subject to a deferential standard of review or no review at all, reflects the extent to which disqualification has been marginalized.").

259. *See* Bam, *supra* note 22, at 1141 (maintaining that the typical disqualification process is presumptively unconstitutional and fails to protect the appearance of fairness and impartiality); Serbulea, *supra* note 15, at 1142 (judge plays the role of an adversary in an unfair way); *cf.* Bam, *supra* note 21, at 999 (cautioning about the potential negative effect of placing recusal in a traditional adversarial context).

tion of basic procedural protections, such as a meaningful opportunity to present facts and to be heard,²⁶⁰ a fair resolution of contested record facts, a reasoned explanation for the decision to deny a motion to disqualify, and an opportunity for meaningful appellate review of a factual record developed in the trial court.²⁶¹

Among such criticisms, the absence of a reasoned explanation for the denial of a recusal motion is often singled out as a critical weakness. The deficiency has been referred to as a judicial “black box.”²⁶² To be fair, however, one can probably point to notable examples in state court systems in which a jurist has invested the time and effort to provide a detailed exposition of the facts and law supporting the decision not to recuse, albeit in the problematic context of a self-assessment.²⁶³ Aside from the inherent fairness to the litigants, an on-the-record explanation serves many beneficial purposes: it facilitates more effective appellate review; promotes transparency and accountability to the public; provides valuable guidance to the bench and bar; and contributes to the creation of a body of precedent on the topic of recusal.²⁶⁴ Such rationales sup-

260. See *PA Formal Advisory Op.*, *supra* note 19, which recommends that a judge should hold a hearing when a party moves for disqualification, quoting *Reilly v. Se. Pa. Transp. Auth.*, 489 A.2d 1291, 1299 (1986), and emphasizing the importance of the appearance of fairness in the administration of justice.

261. See Justice Kennedy’s recognition of West Virginia’s (all too typical) recusal process where “there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.” *Caperton*, 556 U.S. at 885.

262. See Goldberg et al., *supra* note 18, at 531 (noting that the failure of a jurist to give reasons violates the basic tenets of liberal democracy, distorts the development of precedent, and deprives the appellate courts of meaningful review, and stymies accountability); and Suzanne Levy, *Your Honor Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 J. OF CONST. LAW 1161 (2014) (critically addressing the justices’ failure to explain their recusal decisions and suggesting that Congressional action regarding the Court’s recusal procedures would be appropriate).

263. Pennsylvania cases are illustrative. See, e.g., *League of Women Voters v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) (Justice Wecht); *Commonwealth v. Spanier*, 2018 Pa. Super. Unpub. LEXIS 2897 (Aug. 10, 2018) (Judge Stabile); *Commonwealth v. Cosby*, No. CP-46-3932-2016, 2018 WL 4608703 (Montgomery Cty. Ct. C.P., Sept. 19, 2018) (Judge O’Neill); *Robinson Nursing and Rehab. Crt.*, 502 S.W.3d 519 (Ark. 2016) (Justice Wood, referring to the ABA’s balancing factors). At the Federal Supreme Court level, detailed justifications for a refusal to recuse have been provided by Justice Scalia in *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913 (2004) (Scalia, J.), (denying recusal motion regarding his duck hunting trip with Vice-President Cheney); Justice Rehnquist’s denial of recusal in *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., memo. op.); *Public Utilities Comm’n v. Pollak*, 343 U.S. 451 (1952) (Frankfurter, J.) and note 108, *supra*.

264. See *supra* notes 262–63 and accompanying text; *Reilly v. Se. Pa. Transp. Authority*, 479 A.2d 973, 1004 (Pa. Super Ct. 1984) (Johnson, concurring and dissenting) (trial court’s opinion is not part of the record; court can only review facts

port the importance of on-the-record explanations for recusal decisions.²⁶⁵

Regarding the importance of procedural protections in the recusal decision-making process, artificial distinctions are also proffered to rationalize superficial (legal and factual) appellate review that often ignores or minimizes alleged disqualification errors. Such artificial distinctions may include that the record reflects that the defendant already had a fair trial (by a judge or jury), which effectively serves to moot any claim of judicial bias; the recusal decision was made by a judge of a multi-member panel or court, thus making any error harmless; or the disqualification challenge was presented in the midst, or after completion, of a trial.²⁶⁶ These jus-

developed on the official record); *Commonwealth v. Darush*, 459 A.2d 727, 732 (notwithstanding the lack of record evidence from the trial judge regarding the allegation of prejudicial statements, the Supreme Court or Pennsylvania remands the case for re-sentencing to a different judge); *In re Marriage of O'Brien*, 958 N.E.2d 647, 675 (Ill. 2011) (noting importance of record facts to subsequent appellate review). See also *Reilly v. Southeastern Pa. Transp. Authority*, 489 A.2d 1291 (Pa. 1985) (noting that the appellate court can only look to the record prepared in the trial court, not facts alleged in a brief which the trial court has not passed on); *Commonwealth v. Cosby*, 224 A.3d 372 (Pa. Super. Ct. 2019) (appellate court refuses to consider supporting affidavit where it was not made a part of the certified record; recusal claims deemed waived as a result of a substantial delay, 167 days, in raising it); *In re D.D.*, 597 A.2d 648, 653 (Pa. Super. Ct. 1991) (citing Pa.R.A.P. 1921; the trial court record is not part of the record on appeal). Nevertheless, a factually deficient trial court record may not be an insuperable barrier to appellate review. See *Commonwealth v. Dip*, 221 A.3d 201, 208 (court reviews recusal issue even though the state failed to place in the record any evidence for its claims).

265. See MENENDEZ & SAMUELS, *supra* note 19; Sample & Young, *supra* note 244; Stempel, *supra* note 152; Marbes, *supra* note 52; Burke, *supra* note 198; James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, JUDGES J., Winter 2007, at 17, 22; IAALS REPORT, *supra* note 37. See also Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 376 (2004) (discussing the “norm of reason-giving,” recognizing that such a norm constrains discretion within the bounds of precedent and logic, facilitates broader discourse among academics, makes judges produce better results, and engages the judge in a more robust civic dialogue with the public); Zygmunt A. Pines, *The Recycling of Justice: Transitions in Criminal Law and the Dilemma of Rationality*, 89 DICK. L. REV. 283, 336 (1985) (discussing the judicial system’s symbolic and functional obligation of dialogue with and justification to the public, as well as the importance of transmitting information and knowledge of the law through the medium of judicial opinions); Zhuang Liu, *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUDIES 83 (2018) (suggesting that biased judgments may be reduced by requiring judges themselves to provide written reasons for their decisions; delegation of writing may reinforce biases).

266. See, e.g., Abramson, *supra* note 178, at 74 (criticizing assessment of disqualification motions that focus on whether a judge or jury decided the case, noting that in a jury trial the judge still exercises a considerable amount of discretion and decides issues that may affect a jury); Slovenko, *supra* note 42, at 662 (maintaining that the common law jury/non-jury distinction no longer has relevance; a

tifications are irrelevant (although a purposeful and inexcusable delay in alleging error may be a procedurally relevant factor in finding waiver). The impartiality of a jurist or tribunal, as well as the appearance thereof, should always be a fundamental consideration, regardless of the procedural context of a case. As the Supreme Court of Pennsylvania succinctly noted: “A tribunal is either fair or unfair.”²⁶⁷

3. *Judicial campaign finance-related regulations*: The appearance of judicial impartiality should be reinforced by regulations addressing judicial campaign contributions and expenditures, specifically through ethical standards mandating recusals (if contributions exceed a specified threshold) and/or requiring meaningful and timely disclosure by attorneys, litigants, and judges.

judge plays an important role even in a jury trial, after the verdict, and in imposing sentence); *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (in the context of discrimination in the selection of grand jury, Court notes that, as in the case when it is believed that a judge had some basis to render a biased judgment, the structural integrity of the process has been undermined and a fair trial does not purge the taint; the systemic flaw requires reversal). In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the Supreme Court, in a five-to-four decision, held that the supreme court justice’s failure to recuse in a death penalty appeal affected the whole adjudicatory framework, constituted a structural error denying due process, and was not harmless error, noting “a multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.” *Id.* at 145. See also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (finding that the appearance of justice required the state justice’s disqualification where the justice cast the deciding vote and authored opinions in the underlying case that implicated his potential financial interests; concurring Justices Brennan, Blackmun, and Marshall disputed that the justice’s alleged deciding vote should be viewed as a dispositive factor in requiring disqualification). For examples where the possibility of partiality is a subordinate concern, see *In re Zupsic*, 893 A.2d 875 (Pa. Ct. Jud. Disc. 2005) (Court of Judicial Discipline noting that, if there was a fair trial, alleged disqualifying factors become moot); *Commonwealth v. Urrutia*, 653 A.2d 706 (Pa. Super. Ct. 1995) (citing *Reilly-II*, 489 A.2d 1291 (Pa. 1985), remarking that the verdict and award of damages were rendered by a jury and not by a trial judge; accordingly, the jury and not the trial judge exercised full responsibility for the fact-finding function). Professor Stempel has noted that harmless error appears to be the norm in a majority of recusal cases in federal court, especially where the appearance aspect of disqualification is at issue. See Stempel, *supra* note 152, at 755–64.

267. In *Interest of McFall*, 617 A.2d 707 (Pa. 1992) (jurist who, in effect, acted as an agent of the judiciary and prosecution during defendants’ trial created a clear conflict of interest justifying recusal on the basis of appearance alone; recusal challenge was made after the conclusion of the trial); *In re Zupsic*, 893 A.2d 875 (disqualification becomes an obligation at whatever point in the proceeding it is evident that the judge’s impartiality might reasonably be questioned). See also Kilimnik, *supra* note 37 (asserting that Pennsylvania caselaw and practice in recusal matters should be returned to ordinary judicial processes).

The infusion of big money (from attorneys, corporations, labor unions, and lobbyists) in judicial campaigns presents a major difficulty for those states that elect their judges.²⁶⁸ In recent years, according to the Brennan Center for Justice, the staggering rise in the costs of judicial campaigns, coupled with the phenomenon of under-the-radar independent expenditures that escape statutory reporting requirements, present a unique threat to the integrity and independence of the judicial system.²⁶⁹ Judicial independence appears to decline in direct proportion to a judge's dependence on others for financial support.²⁷⁰ Judicial campaign contributions may be perceived as a subtle form of judicial corruption.

268. See DOUGLAS KEITH WITH PATRICK BERRY & ERIC VELASCO, BRENNAN CTR. FOR JUSTICE, *THE POLITICS OF JUDICIAL ELECTIONS, 2017-18: HOW DARK MONEY, INTEREST GROUPS AND BIG DONORS SHAPE STATE HIGH COURTS*, THE BRENNAN CTR. FOR JUSTICE (2019); ABA RESOLUTION 107, *supra* note 36 (report noting resistance to judicial campaign contribution reform efforts since *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and the new concerns raised by *Citizens United v. FEC*, 558 U.S. 310 (2009), regarding the potential of large corporations and labor unions contributing to judicial campaigns); and Stempel, *supra* note 152, at 778–88 (viewing money in judicial elections as one of the greatest weaknesses of disqualification law). It has been noted that the factor of elected judges changes the constitutional dynamics of recusal analysis. See VIRELLI, *supra* note 17, at 263 n.88. The author also notes 95% of cases in the American judicial system are in state courts, that 38 states use elections in some capacity to select or retain their judges, and that 19 states have uncontested retention elections for judges in their courts of last resort. *Id.* at 192–93, 199, and 203.

269. See Keith, *supra* note 268; Letter from Kate Berry and Nathaniel Sobel, Brennan Ctr. for Justice, to Diane Fremgen, Clerk of the Supreme Court and Court of Appeals (Mar. 15, 2017), <https://bit.ly/3eFolFT> [<https://perma.cc/4MDS-J86F>] (regarding a petition of Wisconsin's former jurists—see note 277, *infra*—to establish objective rules for recusal when a judge has benefitted from campaign contributions); ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, *WHO PAYS FOR JUDICIAL RACES* (2017), <https://bit.ly/3gqvFGA> [<https://perma.cc/92RT-PXJ4>]. See also Billy Corriher, *Campaign Finance Laws Fail as Corporate Money Floods Judicial Races*, CTR. FOR AM. PROGRESS (2013), <https://ampr.gs/2VKL1hc> [<https://perma.cc/NQ3K-82Y9>]. There is a certain historical irony in the contemporary contretemps of money in judicial elections given that the narrow common law view of recusal focused on a judge's financial interest (direct, substantial) in a matter. See text accompanying *supra* notes 43–47. The ethical problem of financial interests has always been a challenge to our concept of justice and tests the limits of society's tolerance for such financial entanglements.

270. See Barnhizer, *supra* note 3, at 366–67 and 369 (applying Robert Kliggaard's formula for corruption, author concludes that the current rules regarding judicial campaign contributions allow for “legal bribery,” creating both the reality and appearance of impropriety, a problem which is compounded by monopolistic judicial power). See also Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel* (May 26, 2020), 70 DUKE L.J.(2020) (forthcoming), <https://bit.ly/3gH81pA> [<https://perma.cc/438E-FMU4>]. Sukhatme and Jenkins, relying on empirical evidence, contend that campaign finances directly harm defendants, where judges and appointed defense counsel engage in a surprising lucrative arrangement of pay to play.

The problem of judicial campaign contributions was starkly exposed in the egregious case of *Caperton v. Massey Coal Co.*,²⁷¹ in which Justice (later Chief Justice) Benjamin refused repeated requests (three) to recuse notwithstanding the fact that the officer of the defendant coal company contributed \$3 million to his judicial campaign. The contributions were three times the amount spent by Benjamin's own committee.²⁷² As a result, Benjamin defeated an incumbent justice (by 50,000 votes) and then, despite Benjamin's colleagues urging him to recuse, Benjamin participated in his court's three-to-two reversal of a \$50 million verdict against the coal company (two other justices, Maynard and Starcher, had previously recused themselves). To substantiate the necessity of recusal, the movant presented evidence of a public opinion poll indicating that over 67 percent of West Virginians doubted that Benjamin would be fair and impartial.²⁷³ Under these admittedly extraordinary facts, the Supreme Court reversed, in a five-to-four decision, stating that there was a serious risk of actual bias, sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."²⁷⁴

Caperton generated considerable commentary from the judicial, legal, and academic communities.²⁷⁵ The ABA, for example, revised the Model Code of Judicial Conduct to mandate disqualification when a party, a party's lawyer, or a law firm made contributions to the judge's campaign in excess of a threshold, measured by

271. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868. The majority opinion acknowledged that it was addressing an extraordinary situation with facts that were "extreme by any measure." *Id.* at 887.

272. *Id.* at 873.

273. *Id.* at 875.

274. *Id.* at 884 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The majority observed that there is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. *Id.*

275. See, e.g., Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009); Wade Kolb, III, *Caperton v. Massey: The Due Process Implications of Contributions to Judicial Campaigns*, 4 DUKE J. OF CONST. L. & PUB. POL'Y SIDEBAR 315 (2009); Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality after Caperton v. Massey Coal Co.*, 13 CARDOZO L. REV. 441 (urging the high court to commit to the *Caperton* ideal). See also CYNTHIA GRAY, NAT'L CTR. FOR STATE COURTS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS (2016), <https://bit.ly/2Othm8b> [<https://perma.cc/E7BV-AY2Y>] [hereinafter identified as the "NCSC Report"]. Professor Virelli characterized *Caperton*, given its caveats and qualifications, as an enigmatic example of the Supreme Court's apparently more expansive view of due process to support recusal. See VIRELLI, *supra* note 17, at 135–36.

specific amounts or percentages, as determined by each state.²⁷⁶ Only a handful of states, however, decided to adopt the ABA's easy-to-apply *per se* approach to judicial campaign contributions,²⁷⁷ perhaps attributable, as the ABA has surmised, to the concern or fear of the ability of judicial candidates to raise campaign funds and the right of voters to support their candidates.²⁷⁸ Nevertheless, mandatory *per se* disqualification, reasonably calibrated, remains an effective weapon, among others. Such a categorical approach has been recommended as a salutary, convenient, and adaptable reform measure,²⁷⁹ as compared to the difficulties in balancing various fac-

276. MODEL CODE OF JUDICIAL CONDUCT, r. 2.11(A)(4) (AM. BAR ASS'N 2011), which states: "The judge knows or learns by means of a timely motion that a party, party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than \$ [insert amount] for an individual or \$ [insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]."

277. See NCSC Report, *supra* note 275 (identifying five states (Alabama, Arizona, California, Mississippi, and Utah), which have adopted a disqualification rule incorporating a specific amount or percentage). The NCSC report also identifies 11 other state supreme courts that have adopted disqualification rules without the ABA-recommended triggers, but that have expressly or impliedly incorporated the *Caperton* decision. Two states, Nevada and Wisconsin, were identified as expressly rejecting proposals to adopt specific contribution thresholds that would trigger disqualification.

In 2017, 54 retired Wisconsin jurists filed a petition with the Wisconsin Supreme Court urging recusal reform connected to judicial campaign contributions. The petition recommended the following recusal thresholds: Supreme Court (\$10,000); Court of Appeals (\$2500); Circuit Court (\$1000); and Municipal Court (\$500). By a five-two vote, the Wisconsin Supreme Court orally denied the petition without a hearing and, more than two months thereafter, provided a terse and insubstantial written justification, dismissive in tone, for its decision. The Supreme Court of Wisconsin noted that ". . . the petition presumes, as a categorical matter that justices of this state are incapable of fulfilling their oaths . . . This is an entirely unwarranted presumption and we will not entertain it." WIS. SUPREME COURT, IN RE RULE FOR RECUSAL WHEN A PARTY OR LAWYER HAS MADE LARGE CAMPAIGN CONTRIBUTIONS 3 (June 30, 2017), <https://bit.ly/3iAb9F4> [<https://perma.cc/36SM-JXNY>]. In a scathing thirty-page dissent, former Chief Justice Shirley Abrahamson (joined by Justice Ann Walsh Bradley) lambasted the Supreme Court's process and eviscerated the arguments of those opposing recusal reform as unsubstantiated and misguided. *Id.* at 4–34. See also Matthew Rothschild, *Wisconsin Supreme Court Buries Recusal in Feeble Move*, WIS. DEMOCRACY CAMPAIGN (July 5, 2017), <https://bit.ly/2YZwU9B> [<https://perma.cc/6M3U-L4CU>]; Joe Forward, *Supreme Court Dismisses Retired Judges' Petition on Recusal, Campaign Contributions*, ST. B. WIS. (Apr. 20, 2017), <https://bit.ly/31NCRsk> [<https://perma.cc/BR5S-CSET>]; Marbes, *supra* note 162, at 270–71 (noting the reality of limited recusal reforms).

278. See ABA RESOLUTION 107, *supra* note 36, at 2 n.6.

279. See Sample & Young, *supra* note 244 (urging *per se* disqualifications for large contributions); Goldberg et al., *supra* note 18, at 528–29; Serbulea, *supra* note 15. Goldberg et al. have noted the potential of using such automatic disqualification rules as gamesmanship to disqualify a judge, adding, however, this problem could be addressed by permitting the other litigant(s) to waive such a disqualifying

tors (such as the amount, source, and timing of the contribution) on an individualized, *ad hoc* basis.²⁸⁰ The ABA adopted a resolution, later supported by a resolution of the Conference of Chief Justices, urging states and territories to adopt judicial disqualification procedures to address concerns regarding “certain campaign expenditures and contributions, including independent expenditures, made during judicial elections.”²⁸¹

Although the U.S. Supreme Court in *Caperton* resolved the egregious recusal issue in the context of the more stringent constitutional standard of due process,²⁸² using the appearance standard to illuminate the disturbing presence of judicial candidates’ growing reliance on campaign contributors provides a pathway to recusal reform. As a matter of principle and public perception, a judge who receives financial support from a benefactor (attorney or party in a case) should not be considered less potentially disqualifying than a juror who has received a similar financial benefit. The solemn oath of a judge or juror does not necessarily guarantee impar-

factor. Goldberg et al., *supra* note 18, at 529. Rules, however, need to be practical and reasonable. As recognized by Chief Justice Roberts, any rule requiring judges to recuse from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. See also *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 453 (2015).

280. The Conference of Chief Justices (“CCJ”) filed an *amici* brief in *Caperton* that supported neither party. The brief stressed the importance of recusal and evolving notions of disqualification and suggested criteria for evaluating when due process required recusal because of campaign spending. The factors included the size of expenditures, nature of support, timing of support, nature of the supporter’s prior political activities and relationship with the jurist, and relationship between the supporter and litigants. Brief for the Conference of Chief Justice as Amici Curiae in Support of Neither Party, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Pennsylvania has rejected the ABA’s *per se* approach in favor of *Caperton*’s balancing test. See *PA Formal Advisory Op.*, *supra* note 19.

281. RESOLUTION 105C, *supra* note 184, was adopted in 2014. See Geyh et al., *supra* note 18 (summarizing the ABA’s reform attempts regarding judicial campaign contributions). The Conference of Chief Justices’ Resolution 8 in favor of the ABA’s Resolution 105C, see *supra* note 244, stated that the CCJ’s position was consistent with another CCJ resolution, which had urged members “to establish procedures that incorporate transparent, timely, and independent review for determining a party’s motion for judicial disqualification/recusal,” noting particularly the concern about campaign contributions and expenditures during judicial elections in a post-*Caperton* world. See CCJ RESOLUTION 8A, *supra* note 244.

282. Justice Benjamin rejected attempts to have his behavior scrutinized through an appearance lens. The Supreme Court explained: “Justice Benjamin reiterated that he had no ‘direct, personal, substantial, pecuniary interest in the case’ . . . Adopting ‘a standard merely of ‘appearances,’ he concluded, ‘seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.’” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (citations omitted).

tiality nor does it automatically eradicate the suspicion that neutrality and fairness may be compromised through such financial relationships.²⁸³ In commenting upon the efforts of states to promote judicial integrity through their codes of judicial conduct, *vis-a-vis* the more rigorous due process analysis, Justice Kennedy in *Caperton* referred to the appearance of impartiality standard and commented: “The Conference of Chief Justices has underscored that the codes are ‘[t]he principal safeguard against judicial campaign abuses’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”²⁸⁴

The concern about appearance, especially as it relates to elected judiciaries, is a practical one. Survey results are sobering: the public believes that money impacts judicial decision-making.²⁸⁵ The levels of trust and confidence are particularly troublesome when analyzed in reference to skeptical minority populations.²⁸⁶ Thus, the ethical factor of appearance alone is a strong justification for regulation. The problem of funding judicial campaigns has been identified as one of the greatest conflicts with the appearance of impartiality.²⁸⁷

Nevertheless, in the absence of *per se* automatic disqualification rules,²⁸⁸ based on specific judicial campaign contribution

283. See *Williams-Yulee*, 575 U.S. at 446 (involving the constitutionality of a state ban on the personal solicitation of campaign funds by judicial candidates). In *Williams-Yulee*, Chief Justice Roberts noted that “it is regrettable but unavoidable that judges who personally ask for money may diminish their integrity.” *Id.* at 434. Likewise, Justice Ginsburg’s concurring opinion in the matter observed that disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence. *Id.* at 460 (Ginsburg, J., concurring). Justice Scalia’s dissenting opinion noted that “[m]any states allow judicial candidates to ask for contributions even today” *Id.* at 467 (Scalia, J., dissenting).

284. *Caperton*, 556 U.S. at 889.

285. See Letter from Kate Berry and Nathaniel Sobel, *supra* note 269 (letter regarding judges’ petition to reform recusal in Wisconsin); Bam, *supra* note 21, at 966 n.111 and 974–75 (citing a study that found a strong relationship between campaign contributions and judicial decisions); Barnhizer, *supra* note 3, at 371–80 (discussing the decline of the public’s perception of judicial integrity and judicial fundraising being the most dominant contributing factor); Rottman & Tomkins, *supra* note 197. See also Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 622 (2009); Michael S. Kang & Joanna Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011).

286. See Rottman & Tomkins, *supra* note 197.

287. See Bradley Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 218 (1991).

288. See Pines, *supra* note 265, at 290 (in the context of criminal justice in Pennsylvania, author analyzes the utility of selected *per se* rules and their potential advantages, such as protection of litigants’ rights, administrative convenience, uniformity in the application of the law, and prevention of future abuse); Samaha,

thresholds, mandatory disclosure of judicial campaign contributions should also be considered. As one advocate for recusal reform observed, recusal has to go hand in hand with broad disclosure laws.²⁸⁹ Three populations would be important participants in such reforms: attorneys, litigants, and judges.²⁹⁰

First, in litigation matters, the parties and their attorneys should be required to submit disclosure statements (or affidavits) regarding judicial campaign contributions. Such information should also cover contributions made to the presiding judge's opponent(s). The information could be provided by the parties and attorneys upon commencement or assignment of the case. Viewed as a best practice, the disclosure requirement could be easily accomplished through a relatively simple form.²⁹¹ The responsibility of an attorney to provide the verified disclosure statement would be *in addition to* an attorney's professional obligation to provide annual disclosure information, discussed *infra*, given the need to assess the judge's ethical qualification to preside in a particular matter. The

supra note 178 (benefits of general prophylactic rules). The difficult and elusive quest to incorporate social norms (e.g. fairness, morality) into algorithms to promote fair and objective decision-making has been noted. *See* Kearns & Roth, *supra* note 14. The utilization of easy-to-apply prophylactic *per se* rules (to identify or categorically exclude) may be the closest we have come to achieving, in a crude or simplistic sense, the ideals of fairness and the appearance of impartiality. But such an impersonal and mechanical approach to issues of justice has limits—there remains a tensive relationship with our cherished notions of individualized judgment and thoughtful, human decision-making. Nevertheless, in the matter of disqualification, categorical *per se* factors can play an important and beneficial role in promoting the appearance of impartiality.

289. *See* Geyh et al., *supra* note 18, at 533, 546–47.

290. The following commentary is based on a review of a host of helpful commentaries addressing various disclosure reforms, particularly: Siciliano, *supra* note 287 (an especially good perspective that singles out the option of attorney disclosure reform); Geyh et al., *supra* note 18; Serbulea, *supra* note 15; Goldberg et al., *supra* note 18; Marbes, *supra* note 162; Stempel, *supra* note 213; Sample & Young, *supra* note 244; Thomas M. Sussman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions or Judges' Decisions*, 26 J. L. & POL'Y 359 (2011).

291. The form could be prescribed, for example, by the individual judge, the supervising judge of the applicable judicial unit, or ideally by the state's highest court. Former Magisterial District (presently Common Pleas) Judge Bret M. Binder (Chester County, Pennsylvania), for example, initiated a practice whereby a "Conflict of Waiver" form was provided to the parties and counsel to give them the opportunity to identify and waive potential enumerated conflicts, such as prior representation, social and political interactions, etc. The form also included a blank space for the identification of other potential disqualifying factors. MODEL CODE OF JUDICIAL CONDUCT, r. 2.11(C) (AM. BAR ASS'N 2011), provides the opportunity for the parties and lawyers, outside the presence of the judge and court personnel, to consider waiver of disqualification. If there is agreement, the agreement is made a part of the record of the proceeding. *See* text accompanying note 294, *infra*, regarding disclosure responsibilities of a judge under Rule 2.11.

parties would also be in a position to determine whether a waiver of disqualification would be appropriate if permitted under the applicable rules. This protocol would reinforce and facilitate the individual judge's ethical obligations and promote the judicial system's responsibility to be open and transparent.²⁹²

Second, as a general matter, attorneys (as officers of the court) should be required to provide judicial campaign contribution information in their annual attorney registration statements. This information would cover all contributions (including independent expenditures) made to or on behalf of a judicial candidate during the reporting year by the attorney. The disclosure should also include information about aggregate contributions made by the attorney's law firm. The reporting requirement should be incorporated as an ethical requirement in a state's rules of attorney disciplinary enforcement.²⁹³ Such statements should be accessible for public inspection, for example, through a judiciary's web page.

292. The Brennan Center for Justice, in a 2009 letter to the Michigan Supreme Court, recommended such enhanced disclosure, noting that

[F]ederal rules require that nongovernmental corporate parties appearing in federal court to file a statement identifying any parent corporation or publicly held corporation that owns a significant portion of the corporate party's stock early on in a court proceeding. This Court could adopt a similar rule requiring all litigants and their attorneys to file an affidavit at the outset of litigation disclosing specific information relevant to a disqualification decision, including information about campaign contributions and independent expenditures.

Letter from Brennan Ctr. For Justice & Justice at Stake Campaign to Corbin Davis, Clerk, Mich. Supreme Court 9-10 (July 31, 2009), <https://bit.ly/2NR2Ne6> [<https://perma.cc/SUQ4-LZST>].

In addition, in the petition filed by 54 former Wisconsin jurists in the Wisconsin Supreme Court, the jurists proposed that “[o]nce the judge or judges assigned to a case are known, each party or the party's lawyer shall file an affidavit disclosing any campaign contribution exceeding \$250 made by the party or the party's lawyer to any assigned judge during the time periods described in subparagraph 3.” WISCONSIN SUPREME COURT, *supra* note 277, at 37. The jurists' proposed rule defined “campaign contributions” to include: “(a) direct contributions to the judge or the judge's campaign committee; (b) independent expenditures made by the contributor either supporting the judge or opposing the judge's opponent, or otherwise attempting to influence the outcome of a judicial election; or (c) contributions by or to a third party made with the intention or reasonable expectation that the third party would use the contribution to make independent expenditures either supporting the judge or opposing the judge's opponent, or otherwise attempting to influence the outcome of the election. The definition includes monetary or in-kind contributions.” *Id.* at 35.

293. This requirement would be *in addition to* any statutory or court rule requiring the filing of campaign contribution statements with a governmental entity, such as the state's department of state. This requirement would enhance oversight and make information more readily accessible by putting judicial campaign financial information in a separate, open, and transparent silo within the judicial system.

Third, if the judge is aware of campaign contributions from a party or counsel (or counsel's firm) in the specific case before him or her, the judge should disclose such information on the record or in a written statement to counsel and the parties.²⁹⁴ The general refrain that judges cannot personally solicit contributions and are consequently unaware of the identities of contributors is difficult to accept given the realities of campaigning and mandated reporting. For example, judicial candidates are often required to inspect, approve, and/or verify campaign statements regarding expenditures and contributions, which may paradoxically require the identification of the names of contributors and related information. In addition, especially in smaller communities, judges are often well aware of who their "friends" and supporters are.²⁹⁵ Notwithstanding the

294. See MODEL CODE OF JUDICIAL CONDUCT r. 2.11(B) (AM. BAR ASS'N 2011) (requiring a judge to keep informed about his or her personal and fiduciary economic interests). Comment (5) of the rule furthermore states: "A judge should disclose on-the-record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." *Id.* r. 2.11 cmt. 5.

295. See Siciliano, *supra* note 287, at 220–21 (state disclosure laws have essentially rendered useless the Code's policy of anonymity). In Pennsylvania, for example, candidates for public office are required to file a campaign finance report or campaign finance statement that is separate from and in addition to his/her campaign committee. 25 PA. STAT. AND CONS. STAT. ANN. §§ 3246–47 (West, Westlaw through 2020 Regular Session Act 35) (the so-called "Election Code"). The prescribed affidavit provides for signatures of the campaign committee's treasurer and candidate. See *Campaign Finance Report (DSEB-502)*, PA. DEP'T ST., <https://bit.ly/3i0Ex7r> [<https://perma.cc/SN5H-VXBS>] (last visited June 26, 2020). The Supreme Court in *Williams-Yulee*, acknowledged that most donors are lawyers and litigants who may appear before the judge that they are supporting. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015).

It is interesting to note that, whereas the ABA's Model Code, R. 4.4(A), MODEL CODE OF JUDICIAL CONDUCT r. 4.4(A) (AM. BAR ASS'N 2011), states specifically in the rule itself that the "candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law," Pennsylvania places such responsibility for compliance in the Rule's comment (2) rather than in the text of the rule. PA. CODE OF JUDICIAL CONDUCT r. 4.4 cmt. 2. As to the potential significance of such textual nuances and differences, see *supra* notes 97 and 140 regarding the legal status of Pennsylvania's judicial code (and comments thereto) and differences with the ABA Code.

In requiring the judicial candidate to "take reasonable steps to cause the judge's campaign committee . . . to comply with all applicable statutory requirements for disclosure . . . and to file a report with the Secretary of the Commonwealth," Pennsylvania's judicial code of conduct, PA. CODE OF JUDICIAL CONDUCT r. 4.4(A), (B)(3), states that the report will include "the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$250 and the name and address of each person who has made campaign contributions to the committee in an aggregate value exceeding \$50."

The Judicial Conduct Board issued a policy statement to provide some guidance to the judges who are faced with the daunting task of complying with both statu-

idealistic intentions of ethical rules and guidelines regarding judicial campaign conduct, alleged donor anonymity has become a convenient cloak to hide the troublesome aspects of judicial elections, especially in a world saturated by social media. The political reality of campaigning should not demean a jurist's presumed integrity, but it does create serious problem of appearance problems.

Elected judges are consequently placed in a truly untenable and uncomfortable position in dealing with the realities of campaign funding and winning contested elections while maintaining an artificial informational barrier in order to technically comply with their ethical responsibilities. Consequently, whether consciously or unconsciously—and regardless of a judge's sincere beliefs, reputational integrity, or good faith—a judge's impartiality may be subtly influenced (or appear to be influenced) by a debt of gratitude and the realities of political campaigning. Contested judicial elections, which require increasing amounts of funding, inevitably create a deplorable appearance that vitally affects public trust and confidence in the judicial system and rule of law.²⁹⁶ Sensitive to such risks and perceptions, jurists have taken steps to publicly disclose

tory requirements and their ethical obligations. The Board notes that, while judges are not necessarily required to review their campaign finance reports, judges are required to sign their campaign finance reports; furthermore, the Judicial Conduct Board says it will presume that judges know the amounts of contributions reported in the required form. In addition, the Board cautions that judges are required to review their campaign finance reports to determine if they are disqualified from sitting on cases. The Board policy states that judges cannot remain ignorant of contributions to their campaign to avoid compliance with their ethical obligations. To provide some concrete guidance, the advisory statement suggested that a contribution of several thousand dollars will almost always require an analysis of whether disqualification is warranted. *See* PA. JUDICIAL CONDUCT BD., JUDICIAL CONDUCT BOARD STATEMENT OF POLICY REGARDING DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS UNDER RULE 2.11(A)(4) (2016).

296. *See Williams-Yulee*, 575 U.S. at 447, 455 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring)) (holding that Florida's compelling interest in preserving public confidence in the integrity of its judiciary justified the ban on judicial candidates' personally soliciting campaign funds and did not violate the First Amendment, noting that "[e]ven if judges were able to refrain from favoring campaign donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."). Judges in rural areas may face special ethical pressures and constraints given the realities of social intercourse in less populated communities. *See In re McCutcheon*, 846 A.2d 801, *supra* note 231; and Marla Greenstein, *Ethical Relativity*, JUDGES J., Winter 2002, at 38, 38 (2002). Professor Virelli has noted that the politicization of states' legal systems presents a special factor in analyzing recusal given the special pressures that threaten judicial independence, including a sense of indebtedness to campaign donors or special interests. *See Virelli*, *supra* note 17, at 193–95.

judicial campaign contributions from counsel or their parties without any noticeable adverse effect.²⁹⁷

Lastly, in the arsenal of reforms, there is always the possibility that legislatures will attempt intervention and regulation, especially when judicial integrity and judicial campaign contributions become a public issue in a particular case.²⁹⁸ As to the increasing preva-

297. For example, in the Supreme Court of Pennsylvania, written disclosures regarding campaign contributions were filed by Justices Debra Todd and Sally Updyke Mundy in a high-profile clergy sex abuse case. See *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018). See also Navratil & Couloumbis, *supra* note 106. Justice Mundy also provided a written disclosure of campaign contributors on February 5, 2018, to all counsel of record “in the interest of full transparency” in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (2018), a high-profile case involving Congressional re-districting.

298. See Bam, *supra* note 21, at 994 and 1001 (noting the apathy of legislatures and bar associations in recusal reform and concluding that the burden of setting clear, consistent, and appearance-based recusal procedures will necessarily fall to state and federal legislatures). In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (internal citation omitted), the Supreme Court commented: “All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.” See also William Raftery, “*The Legislature Must Save the Court from Itself?*” *Separation of Powers and the Post-Caperton World*, 58 *DRAKE L. REV.* 765, 785 (2010) (commenting that it is important for state judiciaries to address the need for self-reform and to avoid a combative or obstructionist approach to legislative attempts to enact fair and sensible judicial recusal reforms).

In his extended analysis of the constitutional aspects of recusal in the United States Supreme Court, Professor Virelli provides commentary on the particular problem of recusal in state courts of last resort, addressing pivotal issues such as who should establish recusal standards and how to protect litigants—and the court—from the negative consequences of increased political pressures felt by elected justices. He acknowledges at the outset that, with respect to elected justices, there are two competing values: public accountability and judicial independence. In a representative democracy, he notes, legislative control of judicial recusal may appear to be more easily justifiable for elected supreme court justices than for appointed ones. As noted herein, federal statutes have addressed recusal standards and processes for a long time. And states have approached recusal in various ways, through constitutional provisions, statutes, rules of court, procedural rules, and operating procedures. See IAALS REPORT, *supra* note 39, at 18–24. With respect to Virelli’s analysis of recusal at the state level, Professor Virelli straddles the fence in trying to balance competing considerations. He eventually concludes that, as to state courts of last resort, there should be a presumption regarding recusal control, tilting in favor of the judiciary, which prioritizes judicial independence and protects against legislative interference. Integral to Virelli’s analysis is the safety valve of assignment of cases, which he insists should be in the judiciary’s control. In his view, the judicial power of assignment is a constitutional necessity. See VIRELLI, *supra* note 17, at 192–208.

The permissibility or extent of legislative involvement in matters of judicial conduct vis-à-vis recusal standards and processes necessarily depends on the statutes and constitutions of the individual states, including binding judicial pronouncements. Legislative latitude ultimately depends on how and where one draws the line between the blurred boundaries of sacrosanct and jealously guarded govern-

lence of independent expenditures and judicial campaigns, the issue is particularly difficult—legally and politically—but admittedly needs to be addressed.²⁹⁹ Only with the requisite knowledge of fi-

mental powers. Judicial independence and accountability of public officials presents a challenging and tricky separation-of-powers dynamic. Where there is uncertainty or stalemate, when the potential for prudent cooperation and comity has been exhausted, constitutional amendment may be the ultimate, albeit risky, option to effectuate recusal reform.

In an inter-branch conflict, formidable and foundational legal considerations, express and implied, would arise. Consider, for example, *Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008) where the Supreme Court of Pennsylvania asserted that under art. V, sec. 10 of Pennsylvania's constitution, it retains exclusive authority to establish rules of procedure precluding the legislature from enacting procedural law. (The constitutional provision in *McMullen* also gives the supreme court the explicit and inherent power to regulate the admission of the bar, the conduct of attorneys, and the administration of the judicial system). Consider also *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 197 (Pa. 1971) (inherent power of judiciary as a co-equal branch of government exists to protect itself from another branch); *Commonwealth v. Morris*, 771 A.2d 721, 738 (Pa. 2001) (inherent power is not unlimited and can be retracted by the legislature); *Degen v. United States*, 517 U.S. 820, 823 (1996) (in the context of a civil forfeiture suit, Court notes that courts have the inherent power to protect their proceedings and judgments, but that inherent power of the courts, which is limited by necessity, may be controlled or overruled by statute or rule); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 160 n.26, and 164–65 (noting the uneasy relationship between judicial independence and accountability, and viewing recusal as an extra-constitutional functional aspect of judicial independence); Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 693 (1980) (noting that the legislature cannot interfere in the core judicial function of decision-making); Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 985–1011 (2004) (explaining the historical roots of separation of powers and judicial independence); Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 129–30 (2006) (noting the need for definitional clarity of separation of powers and judicial independence); Lewis Kornhauser, *Is Judicial Independence a Useful Concept?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 53–54 (Stephen B. Burbank & Barry Friedman eds., 2002) (critical assessment of the concept of judicial independence); and Suzanne Levy, *supra* note 262 (positing that Congressional action regarding the Court's recusal procedures is constitutionally permissible and requiring the Justices to provide written reasons would bolster the public's understanding and respect for the Court's decisions). Lastly, aside from potential legal arguments, the specter of an inter-branch conflict would necessarily impact the public's trust and confidence in government and the rule of law, a potentially significant cost, especially when core democratic values (such as judicial impartiality) are at stake.

299. See *supra* notes 277 and 292 regarding a petition filed by retired Wisconsin jurists in response to the problem of judicial campaign contributions, including independent expenditures. The Montana legislature, for example, has proposed mandatory judicial disqualification legislation in connection with aggregate campaign contributions, including independent expenditures, that exceed specified limits. See H.R. 157, 66th Leg., Reg. Sess. (Mont. 2019). See also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding provisions of the Federal

nancial relationships between the decision-maker and others can there be a factual foundation for a jurist, counsel, and litigant to make a knowing and intelligent assessment about the proper ethical course of action regarding a judge's participation in a proceeding.³⁰⁰

4. *Data Collection*: Uniform and timely data regarding judicial disqualification filings and dispositions, as well as the identification of contributions and contributors to judicial campaigns, should be collected and readily available by the judiciary for public inspection.

Effective recusal reform requires the collection and dissemination of information so that judges, attorneys, and the public can understand and assess the relevant ethical obligations. In the area of campaign financial disclosure, for example, ethical objectives may be defeated or undermined if information is not readily accessible. Likewise, judges may be disadvantaged if there is inadequate public information about how colleagues have addressed and resolved recusal challenges. To address these concerns, technology can provide vital assistance.

Proponents of recusal reform have recommended that courts take steps to collect and disseminate aggregate data regarding recusal motions and dispositions through their case management systems. The IAALS has identified five states that collect some type of statistical data on recusal and disqualification.³⁰¹ On-the-record explanations for recusal decisions (preferably both grants and denials) would facilitate and reinforce this reform measure.

With respect to the important issue of campaign financial disclosure, the National Center for State Court's survey identified New York State's Unified Court System's "assignment rule" regarding contributors to judicial campaigns. The salutary rule requires the Chief Administrator of the Courts to "publish periodically a listing or database of contributions to judicial candidates, as disclosed by public filings, in a manner designed to assist in

Election Campaign Act that prohibit corporations and labor unions from making "independent expenditures" in support of advertisements that advocate the election or defeat of a candidate for public office are unconstitutional under the First Amendment).

300. Waiver, however, is not permissible with respect to a judge's personal bias or prejudice. MODEL CODE, r. 2.11(C) (AM. BAR ASS'N 2011).

301. See IAALS REPORT, *supra* note 39, at 15 (citing Alaska, Minnesota, North Dakota, Vermont, and Indiana). IAALS recommends that states should consider pilot projects for the collection of such information.

the identification of campaign contribution[s],” which may be pertinent to a motion to recuse.³⁰²

The sources for such campaign information would be the appropriate state entity that receives and files campaign financial disclosure statements, as well as the entity responsible for attorney discipline—that is, if attorneys were obligated to disclose such campaign financial information, as suggested herein, in their annual attorney registration statements. The information could be easily captured and posted on the judiciary’s website. The information provided should be comprehensive, easily accessible for attorneys and the public, and updated in a timely fashion. The fact that such information may already be posted or available at multiple locations (state and local) reveals that public access may be tedious and difficult, thus reinforcing the judiciary’s independent obligation to provide one-stop-information-shopping regarding the financial campaign support that judges have received.

5. *Judicial Education*: Judges should be provided with educational resources on the topic of recusal and disqualification. There should be continuing mandatory ethics education courses on the specific subject of recusal.

Judicial education can be the bridge between abstract ethical precepts and ethical conduct. In the case law and literature on judicial disqualification, a common lament is that judges do not have sufficient guidance about recusal procedures and substantive standards.³⁰³ Both the Conference of Chief Justices and the ABA have stressed the need for adequate judicial training and education about disqualification and recusal.³⁰⁴ Moreover, a survey of judges confirms that the judges themselves want more ethical guidance.³⁰⁵

302. See *NCSC Report*, *supra* note 275, at 10–11 (citing N.Y. CT. RULE § 151.1 (2011)).

303. See *Lomas – OISR*, 130 A.3d 107, 133 (Pa. Super. Ct. 2015); *Lomas-II*, 170 A.3d 380, 393 (Pa. 2017) (dissenting opinion); Abramson, *supra* note 178, at 56 (judges need useful guidance to overcome their uncertainty or unwillingness to apply the catch-all appearance standard); Stempel, *supra* note 213, at 363–64 (noting need for education about cognitive psychology and criticizing the over-emphasis of substantive law and case management in judicial education); IAALS REPORT, *supra* note 39, at 15 (need for continuing judicial education regarding the substantive and procedural rules governing recusal and guidelines for judges concerning disclosure and disqualification obligations as they pertain to campaign contributions).

304. See ABA RESOLUTION 107, *supra* note 36, at 1; RESOLUTION 105C, *supra* note 184; ABA DRAFT REPORT, *supra* note 143, at 79–80; CCJ RESOLUTION 8A, *supra* note 244 (“states and territories should provide guidance and training to judges in deciding disqualification/recusal motions”).

305. See Miller, *supra* note 52, at 608.

Promoting greater knowledge and understanding can be achieved through various methods.

Judicial Ethics Education and Training: Most, if not all, state court systems conduct annual judicial educational and training programs, often through the auspices of their judicial education departments or administrative offices. Some have characterized these educational opportunities as a “soft solution” to recusal reform that could promote a legal culture with a deeper awareness of disqualification law.³⁰⁶ Judicial awareness and sensitivity can be economically and effectively promoted through such forums. These educational ventures are especially important for states that elect their judges.³⁰⁷ The educational programs should address recusal-relevant topics including the psychology of bias,³⁰⁸ gender and race bias,³⁰⁹ and campaign financing.³¹⁰ National or regional educational forums, which involve jurists from various jurisdictions, would enable judicial communities to share their perspectives about the psychology of bias and their experiences, thus promoting greater understanding.³¹¹ Ethics education, especially with respect to recusal and the objective appearance standard, should be continuing and mandatory.³¹²

306. See Goldberg et al., *supra* note 18, at 532. “Soft,” however, should not connote “unimportant.” The term is used in contra-distinction to structural and procedural reforms.

307. See McKoski, *supra* note 27, at 506 (procedural reforms can help reduce the damage done to the appearance of justice in systems that elect judges).

308. See Guthrie et al., *supra* note 212, at 822–25 (discussing various remedies to address the problem of cognitive illusions).

309. See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 44, 58–59 (1994).

310. See IAALS REPORT, *supra* note 39, at 15.

311. See Geyh, *supra* note 31, at 731. In addition to judicial education, there is a need for more empirical research into the psychological aspects of decision-making, including recusal. See, e.g., Mullins, *supra* note 212, at 593, 600 (addressing cultural cognitive bias and the need for more research). Citing the need for a greater understanding of the relationship between psychoanalysis and the law, Professor Dailey says “cognitive research into the mind’s biases, frameworks, and distortions provides the opportunity for reforming the law’s presumption of rationality by drawing on more accurate, scientifically established data about individual decision-making. With a better understanding of human choice, these scholars agree, will come better laws, legal decisions, and attitudes.” See DAILEY, *supra* note 1, at 227–28.

To the judicial community’s credit, judges have been increasingly sensitized, in educational forums and publications, about the problematic psychological aspects of “implicit bias,” which focuses on the unconscious beliefs or attitudes that one may harbor about others with respect to race, ethnicity, gender, sexual orientation, and culture. See JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS* (2009).

312. See, e.g., PENNSYLVANIANS FOR MODERN COURTS, *REPORT AND RECOMMENDATIONS FOR IMPROVING PENNSYLVANIA’S JUDICIAL DISCIPLINE SYSTEM* 43–45 (2017) [hereinafter referred to as the PMC REPORT] (recommending

Literature and guides: The judicial educational programs can be reinforced through written resources such as benchbooks, guides, and monographs. The Federal Judicial Center, for example, has provided an extensive guide on recusal.³¹³ There have also been other helpful examples from states such as California and Michigan.³¹⁴

Judicial Codes of Conduct: One obvious place to guide judges is through the judicial codes of conduct and the comments thereto. Expanding guidance in the commentary of the codes is sensible and beneficial.³¹⁵

Public education: It is easy to overlook the “public” aspect of recusal reform, which would be a mistake given the importance of public trust and confidence in the judicial system. This consideration is especially important to elected court systems. Various suggestions have been made: bar associations taking a more active role in educating the public about the importance of an independent judiciary and the value of non-partisan, impartial judicial decision-making;³¹⁶ judges educating the public through written opinions regarding recusal decisions;³¹⁷ court administrators posting a lay person-oriented explanation of a state’s recusal procedures on a judicial website and providing a standard recusal form to assist self-

mandatory judicial education in ethics education on subjects such as diversity, appearance of impropriety, and recusals through convenient modes of delivery). The Pennsylvania Supreme Court has mandated 12 hours of continuing judicial education for trial and appellate judges, including justices, each year, including three hours in judicial ethics, commencing January 1, 2017. *See* 204 PA. CODE § 31.4 (2016).

313. *See* FED. JUDICIAL CTR., *supra* note 56 (providing substantial commentary and guidance regarding judicial recusal under applicable federal statutes).

314. *See* CENTER FOR CONTINUING EDUCATION, INC., JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (commentary on recusal and disqualification law in California, by noted judicial ethics scholar, Richard Flamm). *See also* MICH. JUDICIAL INST., JUDICIAL DISQUALIFICATION IN MICHIGAN (2018); PA Formal Advisory Op., *supra* note 19 (advisory opinion providing a sample recusal decision “worksheet”).

315. *See* Goldberg et al., *supra* note 18, at 532. Pennsylvania provides a good example of the need for guidance. *See supra* note 97 (uncertainty about the legal status and weight of comments to the Pennsylvania Code of Judicial Conduct); and *supra* note 140 (regarding Pennsylvania’s arguably stricter explanation of the appearance standard).

316. *See* Uphoff, *supra* note 25, at 546–47 (regarding his claim that misjudging is common, author acknowledges importance of educating the public regarding the need for an independent, non-partisan, and impartial judiciary and the bar’s role in educating the public).

317. *See* McKoski, *supra* note 27, at 513–14; *supra* note 265 (regarding the value of on-the-record, reasoned, and transparent decision-making).

represented litigants.³¹⁸ Public education would foster a better understanding and respect for judges who conscientiously grapple with their ethical obligations.

Informal Advice and Assistance: A report from IAALS indicates that there are 40 states that have judicial ethics advisory committees and that a frequent subject of inquiry is judicial disqualification.³¹⁹ Notwithstanding the inherent weakness and limitations of any recusal process that is solely dependent on non-binding advice,³²⁰ such informal non-binding advice and assistance can be a welcomed and valuable resource for judges who are faced with disqualification challenges. The IAALS report notes that Ohio provides a “hotline” for judges who can obtain free confidential guidance from attorneys in three law firms who have been contracted to provide such services.³²¹ These avenues of assistance are

318. See IAALS REPORT, *supra* note 39, at 4. Potentially instrumental in fostering and facilitating recusal reform and education about best practices would be prominent national organizations (such as the National Center for State Courts, Conference of Chief Justices, National Judicial College, American Judges Association, National Conference of State Trial Judges, National Association of Presiding Judges and Court Administrators, National Association of Women Judges, National Association of State Judicial Educators, Conference of State Court Administrators, National Association of Court Management, Institute for the Advancement of the American Legal System, State Justice Institute, the Brennan Center for Justice, and the ABA) as well as the many state judicial education organizations.

319. *Id.*

320. Recusal disputes are not limited to the judicial branch. Consider the public controversies surrounding Attorney General Barr and Acting Attorney General Whitaker regarding their rejection of internal ethics advice that recommended recusal from the probe of alleged Russian involvement in the 2016 U.S. presidential election. See THE MUELLER REPORT, *supra* note 20; Barbara McQuade & Chuck Rosenberg, *Must Bill Barr Abide Ethics Advice on Recusal? A Debate*, LAWFARE (Jan. 22, 2019), <https://bit.ly/3gZhxnN> [<https://perma.cc/VU95-GPT8>]; and Laura Jarret, *Whitaker Rejected Ethics Official's Advice He Should Recuse from Russian Probe*, CNN (Dec. 21, 2018), <https://cnn.it/3913Amz> [<https://perma.cc/U24X-QMYL>]. Regarding the impeachment trial of President Donald Trump, see Zachary Evans, *Democratic Representative Calls on McConnell to Recuse Himself and Threatens Mistrial*, NAT'L REV. (December 18, 2019), <https://bit.ly/2CxNeFW>. At the state level, in Pennsylvania, the supreme court exercised its extraordinary King's Bench jurisdiction to appoint a special master (senior Judge Cleland, see *supra* note 108) to investigate and make recommendations regarding an alleged conflict of interest of the Philadelphia district attorney's office in the ongoing *Abu-Jamal* case. See *In Re: Conflict of Interest of the Office of the Philadelphia District Attorney*, 125 ER 2019 (Pa., Feb. 24, 2020); and Needles, *supra* note 137; and *Abu-Jamal*, 720 A.2d 121 (Pa. 1998) and *supra* note 137. Given the limited efficacy of an advisory process in recusal matters, especially as it may impact the appearance of impartiality and the public's confidence when such advice is not adopted, this article has eschewed the advisory process as a viable mechanism for recusal reform.

321. IAALS REPORT, *supra* note 39, at 14 (free confidential advice limited to two hours per year per judge on matters, including ethical, that have not been the

certainly worth pursuing but are no substitute for meaningful reform of the recusal process.

V. RECUSAL REFORM: A PROCEDURAL TEMPLATE TO ALIGN RECUSAL CONDUCT WITH ETHICAL IDEALS AND FUNDAMENTAL FAIRNESS

Ethical principles and policies are not self-effectuating. Without clear procedures and processes to promote and implement ethical ideals, there is a risk of a chasm between policy and practice.

There has been a woeful lack of recusal procedures—consistent with our notions of fairness and due process—to guide jurists.³²² There is a critical need for rational, fair, and uniform procedures to optimize the realization of ethical ideals regarding the fundamental issue of recusal and disqualification.³²³ The IAALS maintains that having *written* recusal procedures is a minimum requirement.³²⁴ Others agree. In 2014 the states' chief justices urged their colleagues “to establish procedures that incorporate a transparent, timely, and independent review for determining a party's motion for judicial disqualification/recusal.”³²⁵ The chief justices' particular concerns were due process (“one of the most basic values of our justice system”)³²⁶ and the possible effects of judicial campaign expenditures and contributions on the appearance of judicial impartiality.³²⁷

Appendix A proposes a procedure to align the justice system's basic ethical values governing recusal with a predictable, rational,

subject of formal lawsuits or formal complaints). Others have made similar recommendations. See Sample & Young, *supra* note 244, at 33 (suggesting advisory bodies to identify best practices and advice for judges on recusal matters); Serbulea, *supra* note 15, at 1148 (recommending advisory recusal bodies that judges would be encouraged to consult). See also *supra* note 100 (advisory opinions on judicial ethics in Pennsylvania).

322. See Bam, *supra* note 21, at 944. Professor Bam proposes a new role and approach for recusal, acknowledging that legislative intervention or merit selection of judges may be options. He recommends that recusal reform, which may be too little and too late, requires the creation of ethical rules and regulations designed to eliminate the appearance of partiality. See also Lomas-II, 170 A.3d 380, 391 (Pa. 2017) (Saylor, J., dissenting) (regarding Pennsylvania jurisprudence, dissent comments on the lack of statutory or rules-based recusal procedures creating ambiguity and uncertainty in recusal practice); Kilimnik, *supra* note 37, at 773 (fair recusal procedures should be established).

323. See Frost, *supra* note 20, at 535 (recommending a “process-oriented” approach, incorporating core tenets of impartial and fair adjudication, for recusal reform).

324. See IAALS REPORT, *supra* note 39, at 4.

325. See CCJ RESOLUTION 8A, *supra* note 244.

326. *Id.*

327. *Id.*

and fair process, consistent with and responsive to the views and recommendations of many commentators cited *passim*. The procedures in Appendix A incorporate an amalgam of recusal procedures and suggested “best practices” employed in various states.³²⁸ Whether implemented judicially or legislatively, the proposed rule is simply a framework, sufficiently flexible and adaptable for a particular judicial system or entity.³²⁹

The procedural template incorporates the following features: general application to all courts, but special procedural accommodations accorded to courts of last resort;³³⁰ mandatory and prompt

328. Regarding various aspects of the proposed recusal template, herein, some state recusal procedures have been particularly helpful (including California, Colorado, Georgia, Illinois, Kansas, Michigan, Nevada, Tennessee, Texas, Utah, and West Virginia). Recognizably, no one size fits all. For a helpful listing of the states’ recusal statutes and rules, see MENENDEZ & SAMUELS, *supra* note 19, at notes 43, 47, 67; Serbulea, *supra* note 15, at 1151–73; IAALS REPORT, *supra* note 39, at 18–24. The Center for American Progress surveyed and graded state recusal practices with respect to judicial campaign funding. Of the 39 states that elect judges, only eight states passed the Center’s test, and none scored higher than a C. The top states included: California, Utah, Georgia, Michigan, Washington and Alabama. See BILLY CORRIHER & JAKE PAIVA, CTR. FOR AM. PROGRESS, STATE JUDICIAL ETHICS RULES FAIL TO ADDRESS FLOOD OF CAMPAIGN CASH FROM LAWYERS AND LITIGANTS 2–3 (2014).

329. The Conference of Chief Justices acknowledged that “disqualification/recusal rules may require different procedures for trial courts, intermediate courts, and courts of last resort.” See CCJ RESOLUTION 8A, *supra* note 244.

330. Various states were instructive on this sensitive topic: Michigan, Nevada, Tennessee, Texas, and West Virginia. Likewise, the commentary and recommendations in the IAALS report provided sensible advice. See IAALS REPORT, *supra* note 39, at 16. As to courts of last resort, the ABA has observed that disqualification challenges could be reviewed by the other justices or assigned to a special panel of retired judges. See ABA DRAFT REPORT, *supra* note 143, at 71; MENENDEZ & SAMUELS, *supra* note 19, at 9–10, 13 (recommending independent review and noting the option of replacing a disqualifying justice). The appropriate recusal mechanism in state courts of last resort is especially nettlesome and can present significant practical consequences when colleagues have a publicized acrimonious relationship. See e.g., Robert Huber, *War in the Supreme Court: Ron Castille and Seamus McCaffery Just Can’t Get Along*, PHILA. MAG. (June 28, 2013), <https://bit.ly/38Nh0Te> [<https://perma.cc/326H-J2FS>]; *Musmanno v. Eldredge*, 114 A.2d 511, 511–12 (Pa. 1955) (wherein Justice Musmanno, in effect, brought a mandamus action against his colleagues by suing the official court reporter to force the filing and publication of the justice’s improperly submitted dissenting opinion and, at oral argument, accused his colleagues of discrimination against him). With regard to Justice McCaffery, the supreme court ordered an interim suspension; McCaffery thereafter resigned. For a history of the McCaffery episode, see PMC REPORT, *supra* note 312, at 6–10. See also Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <https://bit.ly/2OlnsrB>; Associated Press, *Wisconsin Justice Says Fight Led to Choking*, FOX NEWS (June 26, 2011) (last updated Nov. 29, 2015), <https://fxn.ws/38QuxcB> [<https://perma.cc/86BS-7DWJ>].

This article does not address the difficult and sensitive issue of recusal at the Supreme Court level other than to identify two high-profile refusal-to-recuse con-

transfer of recusal/disqualification motions to another judge for an independent and impartial assessment and adjudication; requiring that motions follow a prescribed procedural channel from the filing of the motion to judicial disposition; affording an opportunity for the parties and the challenged jurist to respond to contested allegations of a motion and record facts; requiring a good-faith affidavit supporting a fact-specific motion to deter the potential for baseless, frivolous or abusive motions, including the option of sanctions and/or referral to attorney disciplinary authorities in the event of suspected ethical misconduct; requiring a written on-the-record explanation when a recusal motion is denied; generally recognizing, and respecting, the independence and distinct responsibilities of the state's highest court and the state's attorney disciplinary authority; requiring prompt reassignment of a matter if a motion to recuse has been granted;³³¹ and requiring the collection and posting (on the

troveries regarding Justices Rehnquist and Scalia. See *supra* notes 20, 183, 263. For an extended treatment of recusal and the Supreme Court, see VIRELLI, *supra* note 17; Rigertas, *supra* note 190; Rambo, *supra* note 275, at 496 (urging greater Supreme Court leadership in recusal matters, i.e. “justices should begin treating themselves as every other judge in the nation is treated: recusing themselves whenever their impartiality is in question, allowing an objective review of their recusal decisions, and avoiding political activity that inflames the public sense of bias rather than relieves it”); Bam, *supra* note 22 (unconstitutionality of recusal procedures); Saidman-Krauss, *infra* note 331; and Levy, *supra* note 262.

331. States generally have statutes or rules of court to provide for the re-assignment or transfer of cases to another jurist. See, e.g., MENENDEZ & SAMUELS, *supra* note 19, at 25–26, note 67 (identifying the replacement practices among the states regarding recused justices); FLA. RULES OF JUDICIAL ADMINISTRATION, r. 2.205 (a)(2)(B)(iii) (2020) (power of chief justice to assign active or retired judges or justices throughout the state); *id.* r. 2.205(a)(3)(A) (power of chief justice to temporarily assign justices and judges to any court); and *id.* r. 2.205(a)(4)(A) (power of chief justice to assign any qualified judge when a justice is unable to perform the duties of office). See also 42 PA. CONS. STAT. ANN. § 325(e) (West, Westlaw through 2020 Regular Session Act 55) (power of president judge to make judicial assignments and re-assignments); and *id.* § 326 (c) (authority to make temporary judicial assignment when—because of vacancy, illness or disqualification—a quorum is not available to conduct business); and PA. RULES OF JUDICIAL ADMINISTRATION 701(C) (2020) (authority of chief justice to assign any active or retired judge or justice to temporary judicial service in any court). For an interesting discussion regarding the powers of the Chief Justice and his unchecked statutory authorization to select and appoint judges to “special courts,” see Ruger, *supra* note 265, at 352–58 (discussing Chief Justice Taft’s modernist vision and reforms in the early 20th century regarding the Chief Justice’s power to allocate judicial resources through assignments and transfers). See also VIRELLI, *supra* notes 17, 298 (regarding the importance of judicial control over assignment of cases); see also Rebekah Saidman-Krauss, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN ST. L. REV. 253 (2011) (discussing Senator Leahy’s legislative proposal for the substitution of justices in the context of recusal).

state's judicial website) of judicial campaign contributions and contributors.³³²

Given the fact that there are already various recusal rules and practices among the states, the proposed procedures should prove to be neither burdensome nor difficult to implement.³³³ As one commentator has noted, a decision's character and quality depend on the structure of the decision process; appearance-based regulations may become a self-fulfilling prophecy and encourage judges to psychologically internalize ethical norms; and, in turn, the behavioral effect may extend to those who perceive the appearance.³³⁴ The recusal procedures herein seek to promote the values of transparency, rationality, and fairness so that the ideal of judicial impartiality—in substance and appearance—will be strengthened.

CONCLUSION

It is difficult to justify, or even understand, an outworn common law recusal process that manifestly undermines basic legal and ethical norms. The prevalent recusal processes in the states are arbitrary and fundamentally unfair.³³⁵ Whether rooted in unintentional hypocrisy, wishful thinking, or a pathological cognitive dissonance, recusal has been historically relegated to the periphery of our administration of justice when its rightful place should be its nucleus.

332. The separate and contentious issue of establishing specific disqualification thresholds for judicial campaign contributions would have to be addressed by separate rules. Hence, that aspect of recusal, while certainly an important one, is not addressed in the template.

333. See *supra* notes 54–56 (noting the option of a peremptory challenge process is a distinct issue that has been neither explored nor recommended herein). See also Stempel, *supra* note 152, at 789–93 (presenting a litigator's perspective in favor of peremptory challenges in the context of disqualification).

334. See Samaha, *supra* note 178, at 1576 n.42, 1578–79, 1598.

335. A multiplicity of factors may explain the largely anemic response to the many calls for meaningful recusal reforms: the comfort of custom and tradition, apathy, a good-faith belief in one's intelligence and competencies, self-defensiveness, hostility to criticism or control, financial dependence on campaign donors, willful ignorance, or perhaps a self-protective desire to maintain independence and power. Consider, for example, Kilimnik, *supra* note 37, at 772 (in the context of Pennsylvania's "backwards" recusal rules, suggests that the supreme court has endeavored to assert and increase its power over the judicial system); Barnhizer, *supra* note 3, at 396–97 (in the context of the corrupting influence of judicial campaign funding, notes that judicial power, in itself, may be a factor in judicial moral corrosion); Samaha, *supra* note 178, at 1597 (commenting about the exercise of power for image control or appearance manipulation, generated for the purpose of hoarding power, without checks, to ensure correspondence with actual performance, the concern being the alignment of appearance and reality).

Impartiality of judgment and the integrity of the judicial process are critical weaknesses of a recusal regime that vests autonomy³³⁶ in a jurist to conduct an *ad hoc* self-assessment of his or her own impartiality. In the face of factual assertions that challenge a jurist's ability to be fair and impartial, belief that one can be impartial about one's own impartiality is misguided and bizarrely delusional. Yet many have refused to question or challenge it. The plain fact is that judges are indeed human. Regardless of their presumed good faith and integrity, judges are susceptible to cognitive weaknesses when their capacity to be fair and impartial in a particular matter, in a public forum, is questioned.

In addition to the dilemma of such biased impartiality, judicial systems often ignore another aspect that is of equal importance—the appearance of impropriety and impartiality—namely, whether a reasonable person would objectively question a jurist's ability to be fair and impartial. It is a concern that is extraneous to the darker and often impenetrable psychological dimension of actual prejudice. The modern recusal practice of autocratic subjective self-assessment subverts the mandatory objective appearance standard of the ABA's Model Code of Judicial Conduct, as adopted by almost all states.³³⁷ These concerns are critically important to the parties and attorneys in a given matter and to the public's fragile trust and confidence in our system of justice. Such concerns are compounded in elective court systems where judicial campaign contributions (often hidden in cumbersome-to-access disclosure reports) taint the judiciary's vulnerable reputation for fairness and impartiality.

The misalignment of recusal processes with our legal and ethical core values requires a transformative, albeit imperfect, process that optimizes the potential for impartiality and fairness. There is a need, especially with respect to the appearance of impartiality standard, to recognize that recusal/disqualification is a positive expres-

336. See, e.g., Ruger, *supra* note 265, at 353, 381 (commenting on the tradition of the independence of judges, that is, from other branches of government and from each other, but later noting that “while the judiciary may be ‘unaccountable’ in this sense [i.e. from other political branches], most important adjudicative decisions that judges make are conditional on the approval of other judges.”). Thus, it is important to distinguish the aspect of judicial autonomy that is being scrutinized, i.e., individual vs. institutional. Judges are not autonomous in matters of judicial ethics, administrative supervision, jurisdictional limitations, or appellate review. Disqualification rules do not dictate or control a judge's decision-making; rather, they precede decision-making and prescribe if it is ethically appropriate for a judge to preside in a particular case. See also *supra* notes 127, 298, *infra* note 339 (addressing the complicating issues of judicial independence and judicial autonomy).

337. See *supra* note 80.

sion of the morality of the justice system and its judges. Entrusting a neutral decision-maker to objectively assess whether the appearance of another's impartiality might be compromised—an assessment made through a decision-making process that is procedurally fair and conducive to meaningful appellate review—would significantly improve the legitimacy and integrity of the recusal process.³³⁸

Some have suggested that serious deficiencies in the judicial system, including recusal, may ultimately require legislative intervention and systemic reform, such as the merit appointment of judges.³³⁹ No system of justice, elected or appointed, is perfect.

338. A cost-benefit analysis should reasonably lead one to conclude that the administrative costs of recusal reform are substantially outweighed by the benefit of promoting public trust in the judicial system on an issue that goes to the heart of the judicial process and ethical judicial conduct. See Geyh, *supra* note 31, at 725; Geyh, *supra* note 10, at 885 (acknowledging that “time and again, when disqualification rules have collided with the needs of judicial administration, the former have yielded to the latter.”); Vermeule, *supra* note 146, at 400–03 (discussing costs and trade-offs in the context of the impartiality principle); Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 305 (2013) (administrative costs of reform outweighed by actual benefits); Samaha, *supra* note 178, at 1582–98 (addressing the need to consider issues of cost, need, efficacy, and institutional competence in justifying appearance-based decision-making). A significant concern is the potential negative impact of prolonged publicity about protracted recusal challenges with respect to the public's trust and confidence. See, e.g., Emily Thorson, *Belief Echoes: The Persistent Effect of Corrected Misinformation* (2013) (unpublished Ph.D. dissertation) (available at <https://bit.ly/30489so> [<https://perma.cc/T75P-A6E4>]) (discussing the negative impact of misinformation on a person's cognitive belief system and how it may reinforce a person's pre-existing negative views; attempts to “correct” such misinformation may not necessarily change the echo effects of such misinformation on citizens' attitudes).

339. See, e.g., Karlan, *supra* note 275, at 101–03 (questioning the value of addressing systemic problems through an *ad hoc* individual rights balancing approach particularly with respect to the post-*Caperton* problem of an elected judiciary that relies heavily on campaign contributions); Raftery, *supra* note 298, at 777–85 (discussing the delicate dilemma of judicial autonomy vis-à-vis the legislature and the pressures for recusal reform); Bam, *supra* note 21, at 1001 (noting that the burden of setting clear, consistent, appearance-based recusal procedures may be on the shoulders of legislatures given judicial reluctance for reform); Stempel, *supra* note 152, at 788 (noting that legislative intervention may be needed given lukewarm judicial response); Thomas R. Sussman, *Reciprocity Denial and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J. L. & POL'Y 359, 382 (2011) (solution may be merit solution and public financing of judicial elections); CTR. FOR AM. PROGRESS, *supra* note 328, at 10–11 (2014) (noting with alarm the negative impact of judicial campaign funding on the public's perception of judicial impartiality, suggesting that, in view of the failure of courts to adopt the ABA's call for mandatory recusal, citizens may need to put pressure on judges and legislatures to assure that litigants receive fair and equal treatment); and Kilimnik, *supra* note 37, at 773 (regarding Pennsylvania recusal, author suggests that the legislature should step in if the su-

Nevertheless, it is clear that the judicial system has the inherent *power* to improve and reform its procedures and practices governing the impartiality of those who sit in judgment. The real question, however, is whether judicial leadership has the *will* to do so. Actions—and appearances—always speak louder than words.³⁴⁰

preme court will not initiate recusal reform). *See also Legislative Assaults On State Courts—2019*, BRENNAN CENTER FOR JUSTICE, <https://bit.ly/2DQU6yF> [<https://perma.cc/5TY8-YRDA>] (updated Jan. 24, 2020) (noting that as of March 25, 2019, there are at least 25 states considering at least 48 bills to diminish the role or independence of the courts).

340. The Introduction to this article offered the Serena Williams' U.S. Open 2018 controversy as a backdrop to explain the parallel and common interests of the justice system and the sports world as they contend with serious ethical challenges of impartiality and fairness. It is appropriate to conclude with an instructive post-script about the U.S. Open's reform efforts undertaken within one year, efforts that remain a work in progress. Although there has not yet been any consensus on specific rule changes, the U.S. Open leadership has adopted the following measures: (1) referees and other officials will appear on TV to explain their rulings; (2) the U.S. Open will explore a collaboration with the University of Pennsylvania to analyze matches for gender bias; (3) a database will be created regarding the circumstances of code violations; (4) a new video-assistance review system will be used to track in real time the umpires' rulings and interactions with the players; and (5) education and training on implicit bias will be initiated for judges and umpires. Whether the focus is the tennis court or the courtroom, it is clear that ethical reforms to achieve fairness and inspire public confidence is a daunting but achievable task. *See* Christopher Clarey, *What Changed After Serena vs. the Umpire? Not Much*, N.Y. TIMES (Aug. 26, 2019), <https://nyti.ms/2CsRQgu> [<https://perma.cc/6TFN-6ETN>].

APPENDIX A

RULE ____: DISQUALIFICATION

APPLICABILITY: This rule applies to all judges within the state's judicial system, including justices of the supreme court [or the state's highest tribunal, hereinafter referred to as the "supreme court"], unless a specific provision is stated to apply otherwise. The word "judge" includes senior judges and justices of the supreme court.

B. PROCEDURES APPLICABLE TO ALL COURTS EXCEPT THE SUPREME COURT: In any proceeding, if an unrepresented party or party's attorney of record believes that the impartiality of the judge may reasonably be questioned, such unrepresented party or counsel of record may file a motion to disqualify the judge ("respondent judge"). The motion must comply with the following requirements:

1. CONTENTS OF MOTION: The written motion shall state with specificity all factual and legal grounds to support the allegations that the impartiality of the judge ("respondent judge") might reasonably be questioned. The motion shall be supported by an affidavit by the counsel of record or by the unrepresented party, under oath (or a declaration under penalty of perjury), affirmatively stating that the motion has been made in good faith, is not being presented for any improper purpose such as to harass or cause unnecessary delay or needless increase in litigation, and is well-grounded in facts sufficient to support the respondent judge's disqualification.

2. ANSWER: Other parties to the litigation may file a written response to the motion to disqualify within five days of the filing of the motion to disqualify.

3. SERVICE: A party who files a motion or response must serve a copy on every other party in accordance with the applicable rules of procedure.

4. TIMELINESS: The motion to disqualify shall be filed at the earliest practical opportunity when facts are discovered to justify a motion to disqualify. The failure to file a timely motion, in the absence of good cause, may constitute a waiver of the right to object to the respondent judge's presiding in the proceeding and may constitute grounds to support the denial of the motion. The timeliness of a motion shall not be determined by the respondent judge except as provided in section B(6) of this rule.

5. TRANSFER OF MOTION: Upon the filing of the motion to disqualify, the respondent judge must immediately refer the motion

and all responses to the president judge (i.e. the judge who has supervisory responsibility over the judge, court or applicable judicial unit) of the applicable judicial district or intermediate appellate court. The respondent judge shall not proceed further in the matter. If the president judge is the subject of the motion to disqualify, or if the president judge voluntarily disqualifies himself or herself, the motion and accompanying filings shall be referred to the chief justice of the supreme court for assignment of a judge who shall proceed to review and rule on the motion to disqualify in accordance with the provisions of this rule.

6. INTERIM MOTION: (A) If the identity of the respondent judge is not disclosed until the day of the proceeding, the counsel of record or unrepresented party may make an oral motion seeking disqualification of the respondent judge at the commencement of such a proceeding. Unless the respondent judge voluntarily withdraws, the respondent judge shall stay all proceedings and grant reasonable leave for the party or counsel to submit a written motion to disqualify in accordance with the provisions of this rule. If the party or counsel fails to submit the written motion to disqualify within the time specified by the respondent judge, the motion shall be deemed denied and the respondent judge may proceed in the matter. If a written motion to disqualify is timely presented, the motion shall be promptly transferred to and decided by the president judge in accordance with the provisions of this rule. (B) If grounds for disqualification are first learned after the respondent judge has commenced the proceeding, but before the respondent judge has completed judicial action in the matter, the respondent judge may continue with the proceeding, subject to a stay by the president judge or his/her designee; if the respondent judge decides to continue with the proceeding, the respondent judge shall contemporaneously provide a brief explanation on the record regarding the grounds asserted to support the disqualification request and the reason(s) for denial.

7. RESPONSE OF RESPONDENT JUDGE: The respondent judge, who is the subject of the motion to disqualify, may voluntarily disqualify (recuse) himself or herself from the matter. A voluntary withdrawal (recusal) by the respondent judge is consistent with a judge's ethical duty to promote public confidence in the integrity and impartiality of the judiciary and shall not be construed as an admission of any allegations contained in the motion to disqualify. In the absence of a voluntary withdrawal, the respondent judge may, but is not required to, file a written verified answer admitting or denying any or all of the allegations contained in the motion to

disqualify and may set forth any additional facts that may be material or relevant to the question of disqualification.

8. DUTIES OF PRESIDENT JUDGE: The president judge or his/her designee shall promptly decide the motion to disqualify. If the motion to disqualify fails to comply with the procedural requirements of this rule, including the failure to file timely, the motion may be summarily denied without a hearing. The president judge may take any action necessary to rule on the motion to disqualify, including, if necessary, conducting an evidentiary hearing, or requesting a response or information from the respondent judge. A hearing, with notice to all parties, may be conducted by telephone on the record. Documents submitted by facsimile or email, otherwise admissible under the rules of evidence, may be considered. The president judge may issue interim or ancillary orders in the pending case as justice may require.

9. DECISION and DISPOSITION: (A) The order of the president judge shall be in writing, shall be made a part of the court record, and shall be supported by written factual findings and legal reason(s) in granting or denying a motion for disqualification. In the event of a summary dismissal, the order shall briefly identify the facts and reason(s) for such dismissal. (B) If the motion to disqualify is denied, the parties shall be promptly notified and the matter shall be returned to the respondent judge for further proceedings. If the motion to disqualify is granted, the matter shall be promptly reassigned to another judge in accordance with the applicable procedures of the judicial unit or intermediate appellate court.

10. APPELLATE REVIEW: All orders relating to the motion to disqualify shall be considered interlocutory in nature and not subject to a direct or immediate appeal. This rule, however, shall not prohibit any party from seeking available redress by writ of prohibition or any other appropriate extraordinary writ in the supreme court (or state's highest court) or by raising a properly preserved issue of disqualification in a subsequent appeal from a final judgment.

11. SANCTIONS: After notice and hearing, the judge who decided the motion to disqualify may order the party or counsel who filed the motion, or both, to pay the reasonable attorney fees and expenses incurred by other parties if the judge determines that the motion was (1) groundless and filed in bad faith, or for the purpose of harassment; or (2) clearly brought to cause unnecessary delay and without sufficient cause. The judge who decides the motion may also make a referral to the appropriate disciplinary authority.

C. PROCEDURES APPLICABLE TO THE SUPREME COURT:

(1) If an unrepresented party or counsel of record believes that the impartiality of a justice might reasonably be questioned, such party or attorney of record may file a motion to disqualify the justice (“respondent justice”) in accordance with the procedural provisions B (1) through (4) of this rule. If the respondent justice’s participation in a case is challenged in a motion to disqualify, the respondent justice may voluntarily withdraw from the case. Such voluntary withdrawal shall not constitute an admission of any of the allegations of the motion and is consistent with a justice’s ethical duty to promote public confidence in the integrity and impartiality of the judiciary. If the respondent justice desires to oppose the motion to disqualify, the respondent justice shall not proceed further in the matter. The respondent justice shall decide the motion and shall provide a written explanation of his or her reasons. The other justices shall be informed prior to the respondent justice’s decision if the decision is to deny the motion.

(2) If the respondent justice denies the motion to disqualify, an unrepresented party or counsel of record may move for the motion to be decided by the entire supreme court. In such circumstances, the respondent justice shall not participate further in the matter, including the consideration or the decision of the motion to disqualify. The supreme court shall decide the motion to disqualify *de novo*. The supreme court’s decision shall include the reason(s) for its grant or denial of the motion to disqualify. The supreme court shall issue a written order containing a statement of reasons for its grant or denial of the motion to disqualify. Any concurring or dissenting statements shall be in writing.

D. INDEPENDENT REVIEW: Nothing in this rule shall preclude a party or counsel from submitting a complaint with the appropriate disciplinary authority pursuant to the Constitution of XXX and applicable legal authority. Nothing in this rule shall prevent the supreme court or appropriate disciplinary authority from exercising its independent constitutional authority as justice may require.

E. CAMPAIGN CONTRIBUTIONS: The state administrative office of the courts shall periodically publish on the state’s judicial website a listing of contributions and contributors to judicial candidates, as disclosed by public filings, in a manner designed to assist the identification of campaign contributions and contributors. Such information shall be regularly updated.

COMMENT

Rule 2.11 of the American Bar Association's Model Code of Judicial Conduct ("MCJC") (2011 ed.) requires a judge to disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, regardless of the application of any of the disqualifying facts and circumstances identified in 2.11.

A judge's obligation to hear and decide a matter is subordinate to the judge's ethical duty to disqualify under MCJC Rule 2.7.

Rule 1.2 of the MCJC 1.2 imposes an ethical duty of a judge to promote public confidence in the independence, integrity, and impartiality of the judiciary and to avoid the appearance of impropriety.

Rule 2.3 of the MCJC 2.3(A) notes that the duty of impartiality also applies to administrative matters.

Rule 2.11(C) of the MCJC provides for the parties and lawyers to waive disqualification other than for bias or prejudice under paragraph (A)(1).