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The School of Law, Birmingham City University and Modern Law Review

JUDICIAL RECUSAL: 21st Century Challenges

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Judicial recusal is the principle that judges may recuse (disqualify) themselves from proceedings if they decide that it is not appropriate for them to hear a case. In Blackstone's time judges were only required to recuse themselves in cases of actual bias. Subsequently Lord Hewart, C.J.'s much-quoted dictum: 'It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done' has been relied on to extend the scope of the requirement to include cases of apparent bias.

This special issue publishes the seminar papers of a pre-eminent panel of serving and former judges from Australia, New Zealand, the United Kingdom and the United States assembled for the first time in Birmingham 26th September 2014 and chaired by Mark George QC to discuss problems of recusal, the reasons for its recent rise in significance, and to identify unresolved issues.

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JUDICIAL RECUSAL: 21st Century Challenges

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JUDICIAL RECUSAL: DIFFERENTIATING JUDICIAL IMPARTIALITY AND JUDICIAL INDEPENDENCE?[*]

The Hon. Michael Kirby AC CMG[**]

ABSTRACT

This article examines the concepts of impartiality and independence governing judicial and other formal decision makers. Earlier English decisions (including Dimes *and* Pinochet*) treated the concepts as separate. A more recent decision of the High Court of Australia in* Clenae *(and some recent decisions in England) appear to subsume the two requirements and treat them as conducing to a trial of manifest fairness. The author questions this analysis and explains why, in his opinion, each requirement is important. This is recognised by international and regional human rights law; earlier judicial analysis; and appropriate conceptualisation. Impartiality refers to what goes on, and appears to go on, in the mind of the decision maker. Independence concerns the relationship of the decision maker to government, the parties and external influences. Dangers lie in merging or ignoring the dual requirements.*

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[*] This article is based upon a paper presented to Modern Law Review Seminar: Judicial Recusal: 21st Century Challenges, Birmingham City University, Birmingham U.K. 29 Sept. 2014. The author acknowledges the assistance of Jack Fogl (UTS, Sydney) with recent materials.

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I. CONTESTED QUESTION

The law relating to recusal deals with the circumstances in which a judge (or other independent decision-maker), acting under legal power, should take no part, or no further part, in a decision or in the steps leading to a decision, although he or she has been initially empowered to decide it:[1]

> It rests on the fundamental proposition that a court should be fair and impartial, and that sometimes a judge's personal or prior 'connection' with that case should lead to him or her not sitting on it, notwithstanding the initial lawful allocation.

In his foreword to Justice Hammond's book on the subject, Lord Justice Sedley observed that: [2]

> Save in a handful of plain cases, the public and the legal profession will not, of course, know of the occasions when judges, without even entering court, have asked to be taken off a case because some connection they have with it makes them uncomfortable about adjudicating on it. Equally often, however, a judge who feels no such discomfort will disclose a connection (shares in a particular company; knowing someone; belonging to a particular club: the reasons are endless) simply so that it is in the open. Usually no one objects; but occasionally one party or the other does, and it's then that the problems start to arise…: when should a judge withdraw, who decides and how do they decide? The short answer is that, save in a handful of plain cases, there is no short answer. What there is is a modest body of principle, some of it conflicting, and a very substantial body of case-law, not all of it reconcilable.

In this article, I explore a contested question that arose before me judicially in the High Court of Australia. By doing so, I do not, of course, intend to doubt the legal effect, within Australia, of the principle established by that decision. With the severance of the last remaining appeals from Australian courts to the Judicial Committee of the Privy Council in 1986,[3] there are no more occasions where a challenge can be brought concerning Australian law from the High Court of Australia to the United Kingdom, even to the respected pages of the *British Journal of American Legal Studies*. Instead, this is an examination of a question, relevant to recusal, upon which experienced and well briefed minds have differed. It is therefore a legitimate issue for further reflection and consideration.

The question arose in the decision in *Clenae Pty. Ltd. and Ors. v. Australia and New Zealand Banking Group Ltd.*[4] That was one of two appeals, heard at the same time, concerned with aspects of the law of judicial recusal in Australia. They were heard by the High Court of Australia and decided in December 2000. The companion decision was *Ebner v. Official Trustee in Bankruptcy.*[5] In *Ebner*

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[1] GRANT HAMMOND, JUDICIAL RECUSAL – PRINCIPLES, PROCESS AND PROBLEMS Preface, xi (2009).
[2] Stephen Sedley, in HAMMOND, *supra* note1, at x.
[3] Australia Act 1986 (UK and Cth), s11.
[4] (2000) 205 CLR 337; [2000] HCA 63.
[5] (2000) 205 CLR 337 at 346-347; [2000] HCA 63, [13]-[16].

the Court unanimously dismissed an appeal from the Federal Court of Australia.[6] It affirmed the decision of that Court rejecting an obligation for recusal. However, in *Clenae* the Court was divided.[7] By majority it held that the judge in question in that case, (Mandie, J., in the Supreme Court of Victoria) had not been disqualified so that his decision (and that of the Court of Appeal of Victoria affirming it[8]) should stand. I dissented.

In reaching their conclusion in *Clenae,* the majority held that there was no separate rule of automatic disqualification that applied where a judge had a direct pecuniary interest in a party to a case over which the judge was presiding. Instead of applying a principle framed in terms of the *independence* of the judge from the parties, *Clenae* held that the proper approach was to apply the 'apprehension of bias principle' to all cases of suggested recusal. Thus, the test for all cases in which it was suggested that a judge was disqualified, by reason of interest, conduct, association, extraneous information or other circumstance, was whether the judge might not bring an impartial mind to the resolution of the question which the judge was required to decide. It was thus a test of *impartiality*. Not *independence*.

In my reasons in *Clenae,* I concluded otherwise. I did so, in part, by reference to a long standing legal principle expressed by the House of Lords in 1852 in *Dimes v. Proprietors of the Grand Junction Canal.*[9] That principle had been reaffirmed and expanded in the more recent decision of that court in *R. v. Bow Street Magistrate; ex parte Pinochet Ugarte [No.2]*[10]. Each of those decisions gave effect, in necessarily dramatic circumstances, to the disqualification respectively of a Lord Chancellor and a Law Lord. They did so even after judgment had been given. They acted as they did because of an undisclosed relevant interest in a party which was held to be an impediment to true *independence* of the relevant decision-maker from the proceedings. Absence of *independence,* not absence of *impartiality* as such, was the criterion that the Law Lords applied.

Because decisions of common law courts respond to particular fact situations and because judicial pronouncements and binding precedents tend to arise in response to such situations, it is not uncommon for later courts of high authority to look back at earlier attempts to express principles, thought proper at the time, so as to subsume the earlier endeavours into a later, broader or more conceptual, expression. This is the way that the common law moves from precedent to precedent, evolving in the process towards a more general proposition that is usually simpler and less fact specific. The most famous instance of this evolution is probably *Donoghue v. Stevenson*;[11] but there are many more in every common law jurisdiction.

One cannot therefore criticise the attempt of the majority of the High Court of Australia in *Clenae* to search for a higher principle and more simple criterion

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[6] Ebner v. Official Trustee in Bankruptcy, (1999) 91 FCR 353.
[7] Gleeson, C.J., Gaudron, McHugh, Gummow, Hayne & Callinan, JJ.; Kirby, J., dissenting.
[8] Clenae Pty. Ltd. v. ANZ Banking Group Ltd., [1999] 2 VR 573.
[9] (1852) 3 HLC 759; [10 Eng. Rep. 301].
[10] [2000] 1 AC 119.
[11] [1932] AC 562. This point is made in *Clenae* (2001) 205 CLR 337, 352; [2000] HCA 63, [42], and 379, [134]-[136].

for the guidance of trial and intermediate courts grappling with contested questions of recusal. However, the issue remains whether the attempted reconfiguration of principle was justifiable in principle and successful. Or whether it effectively attempted to conflate two similar but different ideas: that of judicial *independence* (including from the parties) and that of *impartiality* in the discharge of the judicial office.

This is the issue that I wish to explore. An appropriate starting point is an understanding of the facts in *Clenae*. They were not contested by the time the matter came before the High Court of Australia.[12]

II. Facts and Decision in *Clenae Pty. Ltd. v. ANZ Bank*

In February 1994, the Australia and New Zealand Banking Group (the Bank) commenced proceedings in the Supreme Court of Victoria against Clenae Pty Ltd and members of the Quick family. The latter were pursued personally and as executors of the estate of their late father. The Bank sought repayment of loans alleged to total more than $AUD3 million. The defendants counter-claimed against the Bank alleging negligence and unconscionable conduct. The trial was heard over 18 days in the Supreme Court of Victoria between March and May 1996. The judge then reserved his decision on all issues, other than quantification of damage on the counter-claim, should that later become relevant.

On 14 July 1996, whilst the matter stood for judgment, the judge's mother died. By her will, she bequeathed her residuary estate to the judge and his brother as tenants in common in equal shares. That estate included 4,800 shares in the Bank and also a debenture for $200,000 secured over the assets of a subsidiary wholly owned by the Bank. On 1 September 1997, whilst judgment was still pending, a principal witness for the Bank, who had given evidence at the trial, died.

The judge did not disclose his inheritance to the parties before delivering judgment in favour of the Bank in October 1997. Thereafter, by an online search of the share register of the Bank, the defendants discovered the facts of the judge's shareholding and interest. They appealed to the Court of Appeal of Victoria contending, amongst other arguments, that the judge was disqualified by reason of his undisclosed shareholding. The foundation of this argument in the Court of Appeal and, when special leave to appeal was granted in the High Court of Australia, was the decision in the House of Lords in *Dimes*' case.[13]

The appellant submitted that this strict authority had been applied in Australia.[14] It had also been reaffirmed more recently by the House of Lords itself.[15]

[12] (2000) 205 CLR 337, 346-7 [13]-[16], [17]-[18] per Gleeson, C.J., McHugh, Gummow & Hayne, JJ. (joint reason) and at 369, [107] per Kirby, J. [2000] HCA 63.
[13] (1852) 3 HLC 759; [10 Eng. Rep. 301].
[14] Dickason v. Edwards, (1910) 10 CLR 243, 259; R. v. Watson; *ex parte* Armstrong, (1976) 136 CLR 248, 263; Webb v. The Queen (1994) 181 CLR 41, 75.
[15] R. v. Gough, [1993] AC 646 and R. v. Bow Street Magistrate; *ex parte* Pinochet Ugarte, [No.2] [2000] 1 AC 119.

It was submitted that it had not been subsumed in a broad principle of apprehension of bias which, the defendants (now appellants) claimed, was addressed to a separate question. Even if as a matter of law a judge's shareholding, once disclosed, could be waived as immaterial, that issue did not arise in the instant case. There had been no disclosure and no waiver. Referring to United States authority, it was urged that the judge's failure to disclose his interest alone rendered the judgment in favour of the Bank liable to be set aside on the application of the appellants.[16]

Counsel for the Bank successfully argued that the apprehension of bias test was adequate to address cases that went beyond circumstances where the judge had, as a matter of fact, an *actual* interest in the outcome of the litigation. Because the appellants had conceded that the value of the judge's family interest in the Bank would not have been affected, one way or the other, by his decision in their case, it was held that the judge was not obliged to recuse himself either before delivering judgment (for want of waiver) or thereafter.

The joint reasons of the plurality of judges in the majority in *Clenae*[17] declared that the concept of 'interest', that would disqualify a judge, was 'protean'.[18] They read the *Dimes case*, in which the Lord Chancellor had been disqualified for interest in a party, as having been limited to direct pecuniary or proprietary interest in the outcome of the litigation. However, they noted that such a limitation on the concept of interest had been "reconsidered and rejected, or at least modified" by the House of Lords in *Pinochet [No. 2]*.[19] Nevertheless, the plurality concluded that there was "no justification for having different principles for interest and association". The difficulty of listing cases in Australia where a bank was a party, particularly in the context of bankruptcy practice and in a country having but four major banking groups, made it unwise, in the view of the plurality, to adopt a rigid rule on 'interest'. The majority concluded that the common law had developed in Australia along lines different from that in England. They held that, in Australia, an issue such as had arisen in *Pinochet [No.2]* would have been resolved by applying the 'apprehension of bias test'; not a test addressed to the judge's 'interest' or lack of independence from the parties.

As to the failure of the trial judge in *Clenae* to disclose his supervening interest in the Bank, the plurality judges conceded that "as a matter of prudence and professional practice, judges should disclose interests and associations if there is any serious possibility that they are potentially disqualifying".[20] However, they concluded that it was "neither useful nor necessary to describe this practice in terms of rights and duties… A failure to disclose is relevant (if at all) only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias".[21] In this way, the majority of the High Court of Australia held that the failure of the trial judge to disclose his acquisition of

[16] Commonwealth Coastings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).
[17] Gleeson C.J., McHugh, Gummow & Hayne, JJ.
[18] (2000) 205 CLR 337; [2000] HCA 63, 349 [25].
[19] *Id.* at 349 [25] referring to *Pinochet [No.2]*, [2000] 1 AC 119.
[20] (2000) 205 CLR 337, 349; [2000] HCA 63 [28].
[21] *Id.* at 360 [69].

shares in the Bank was of "no legal consequence". He had a "clear duty" to deliver the judgment that he had reserved. His silence on the shares "could not reasonably support an inference of want of impartiality." [22] In these last words, and in their general approach, the plurality of the Court embraced an overall and single criterion of *impartiality*. They were not persuaded of a separate and different criterion of the *independence* of the judge from the parties (absent circumstances of actual interest in the judicial outcome).

In an article of this kind, it is not necessary to examine the somewhat differing views of two other judges who joined in the orders proposed by the plurality in *Clenae*. They took a slightly different view from the plurality as expressed in the joint reasons.[23] Nor is it necessary for me to re-express all of the reasoning that led me to dissent in *Clenae*. Suffice it to say that my disagreement was based upon the following considerations, viewed in combination:

* The longstanding principle of the common law of England on disqualification for pecuniary interest, as stated in *Dimes;* [24]
* The fact that this principle had not been subsumed in the doctrine of apprehended bias in England. It had actually been reaffirmed as necessary to avoid shaking "public confidence in the integrity of the administration of justice"; [25]
* The recent reaffirmation of that principle in *Pinochet [No.2]*, most emphatically by Lord Gough of Chieveley, who pointed out that "[A] judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous *Dimes* case itself";
* The repeated application of *Dimes* in Australia over 150 years, both before and after Federation, including emphatically by Isaacs, J. in *Dickason v. Edwards*[26] when he said that if a "pecuniary interest exists… there is an end to the matter at once and the Court goes no further";
* Although some practical reasons could be suggested for modifying such a strict rule, larger reasons applied to suggest adherence to it. These included:

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[22] *Clenae*, (2000) 205 CLR 337; [2000] HCA 63, 361 [73].

[23] In *Clenae*, Gaudron, J. adopted a constitutional analysis derived from Ch III of the Australian Constitution. Applying *Dimes*, she held that any holding or financial interest by a judge in a public company, which could not be fairly described as modest, should be regarded as substantial. Having a substantial shareholding or financial interest automatically resulted in the judge's disqualification if the company was a party to the litigation: (2000) 205 CLR 337, 366; [2000] HCA 63 [94]. Callinan, J. added observations on matters of practice, *Id.at* 396- 98 [183]-[185].

[24] (2000) 205 CLR 337; [2000] HCA 63, 373 [118]-[122].

[25] R. v. Gough, [1993] AC 646, 661, cited *Clenae*, (2000) 205 CLR 337; [2000] HCA 63, 373 [123].

[26] (2010) 10 CLR 243, 257, cited *Clenae*, (2000) 205 CLR 337; [2000] HCA 63, 376 [127].

(a) The separate treatment of *independence* and *impartiality* in international statements of universal human rights;[27]

(b) The different subject matters with which each of these requirements is taken to deal;

(c) The maintenance of the distinction between impartiality of attitude and action and independence from the parties had been observed in Scotland,[28] Canada,[29] South Africa,[30] and New Zealand.[31] The lesson to be derived from the move to legislative regulation in the United States of America, which had occurred because "judges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge's decision – a standard believed to be too nebulous and unjust";[32] and

(d) The adequacy of considerations such as necessity, waiver and *de minimis* to cover and excuse otherwise hard cases;[33]

* The existence of residual policy reasons for adhering to the strict rule:

(a) It is simple, clear and pragmatic and understood by litigants and the public alike because of their high expectations that judges must be entirely separated from the parties and their causes;[34]

(b) It maintains and promotes, in itself, manifest integrity in the judicial institution; [35]

(c) It avoids considerations of appearances to others and concentrates on the fact of the integrity of the adjudicator as such;[36]

(d) It helps reduce the risk that judges might "adopt the mentality of business" or of other powerful interests to the detriment of other litigants;[37] and

(e) It conduces to acceptance of both the independence and impartiality of a nation's courts, tribunals and other formal decision-makers, difficult to regain once lost and important for economic reasons in a time of global business and other disputes.[38]

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[27] (2000) 205 CLR 337; [2000] HCA 63, 382 [144], referring to Art 14.1 of the ICCPR, to which Australia is a party and also to the European Convention on Human Rights, *Id.* at 382-83 [147]-[148].
[28] Sillar v. Highland Ry. Co., [1919] SC (HL) 19, cited *Clenae* at [151].
[29] Chirardosi v. Minister of Highways for British Colombia, [1966] SCR 367, 373 [152].
[30] Moch v. Nedtravel (Pty) Ltd., 1996 (3) SA 1, 13 [153].
[31] Auckland Casino Ltd. v. Casino Control Auth., [1995] 1 NZLR 42, 148 [154].
[32] Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 714 (7th Cir. 1986) (Posner, J.).
[33] *Clenae*, (2000) 205 CLR 337 [2000] HCA 63, 386 [157]-[160].
[34] *Id.* at 387-88 [161.1].
[35] *Id.* at 388 [161.2].
[36] *Id.* 388-89 [161.3].
[37] *Id.* 388-89 [161.4], citing R. Cranston, *Disqualification of Judges for Interest or Opinions*, [1979] PUBLIC LAW 237, 238.
[38] *Id.* 389-90 [161.5].

One of the judges in the Court of Appeal of Victoria in *Clenae* (Callaway J.A.) rested his reasoning on the view that the trial judge, in the circumstances of the case, was obliged by "necessity" to decide the case. The other judges in that court also embraced this alternative or additional construction. [39] I could not accept that view. While it was true that there would be significant disadvantages to all parties of a costly retrial, some of these difficulties had been reduced or eliminated in *Clenae* by a concession of the parties. Thus the appellants agreed that the testimony of the Bank's witness, who had died in the supervening period, as recorded in the transcript of the first trial, should be received in the retrial. Although it was true that the costs of a retrial would be expensive, inconvenient and burdensome for the courts, the parties and the community true necessity was missing. Thus, I concluded: [40]

"Retrial is the price which is paid by our system of law for upholding fundamental legal and civil rights. It is a price worth paying if it reinforces the community's confidence in the administration of justice and demonstrates the important principle that judges, under our law, do not participate in the determination of the rights of parties in which they have a direct, significant and, in this case, undisclosed interest."

III. Later Judicial Developments

Whilst the respective positions of the highest court of the United Kingdom and of the High Court of Australia remain as stated above, it is worth noting that other courts in those jurisdictions have revisited the overlap and differences between the judicial requirements of impartiality and independence.

A number of recent cases in the Court of Appeal of England and Wales have seen instances of alleged judicial disqualification analysed by reference to the requirement of impartiality. Thus, in *R. v. C and Ors*.[41] a question arose as to whether jurors were prejudiced against the minority 'traveller' community, relevant to the case, on the basis of a letter received by the trial judge from a juror suggesting that other jurors were so prejudiced. An appeal challenging the trial judge's refusal to discharge the jury was rejected by the Court of Appeal. The issue for decision was examined by reference to whether there was a "real possibility or danger of bias".[42] The question was resolved on the basis, in part, of an analysis of the jurors' engagement with the trial, and, in part, on the basis of the fact that the judge had given the jurors a very clear direction on the importance of impartiality on their part.

In another case, it was argued that a judge ought to have recused himself because, prior to the substantive trial, he had found one of the parties to have been in contempt of court, sentenced him to imprisonment and criticised him. The Court of Appeal again analysed the case by reference to the requirement of

[39] *Clenae*, [1999] 2 VR 573 at 603.
[40] (2000) 205 CLR 337; [2000] HCA 63, 396 [179].
[41] [2013] EWCA Crim 368.
[42] *Id.* at [33] (applying *R. v. Heward*, [2012] EWCA Crim 990).

impartiality;[43] not independence from the parties. The Court applied the remarks of Lord Bingham of Cornhill in *Davidson v. Scottish Ministers,*[44] in which he had said that "A judge will be disqualified from hearing a case… if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question." Notwithstanding these references to aspects of independence, in the sense of dissociation from the parties, the criterion applied to resolve the appeal was one of *impartiality*. The question was whether a fair minded and informed observer would conclude, objectively, the presence of apparent bias.[45] The requirement of *independence* of the parties (in the sense of having had no relevant connection with them) was not analysed.

A similar approach was taken by the Court of Appeal in *Resolution Chemicals Ltd. v. H. Lundbeek A/S.*[46] The appeal in that case concerned the validity of the defendant's patent. A witness, called by the claimant as an expert, had been a research supervisor of the judge when he had been a student at university. The judge rejected an application for recusal on the basis that there was no real possibility of actual or imputed bias. This conclusion was attributed to the recognition that the general training and experience of English judges enabled them to "recognise and avoid" partiality, whether subconscious or otherwise. The Court took the opportunity to stress that, where application was made for a judge's recusal on the ground of apparent bias, by reason of past professional or other relationships, it was incumbent on the judge to explain in sufficient detail the content of such associations so that they could be dealt with both at trial and on any appeal.[47] The Court of Appeal concluded that there was "no difference between the common law test of bias and the requirements under Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* of an independent and impartial tribunal."[48] The analysis, however, was offered in terms of the requirement of manifest *impartiality*; not *independence*.

In *Mengiste v. Endowment Fund for the Rehabilitation of Tigray*; *Chubb v. Endowment Fund for the Rehabilitation of Tigray* [49] the trial judge had strongly criticised the appellant's solicitors for the poor quality of expert testimony tendered by them at trial. The judge then proceeded to consider and uphold an application for a 'wasted cost order' against the solicitors. He declined to recuse himself from participating in the cost hearing. When that refusal was brought on appeal to the Court of Appeal, the issue of judicial independence was considered. In her reasons, Arden, L.J. remarked that, normally a judge who had heard the substantive application would be the most suitable decision-maker to hear and decide an application for a 'wasted costs order'. However, a point could be

[43] JSC BTA Bank v. Ablyazov (Recusal), [2012] EWCA Civ. 1551.
[44] [2004] HRLA 948.
[45] Porter v. Magill [2002] 2 AC 357 at [103] applied.
[46] [2013] EWCA Civ. 1515.
[47] *In re* L-B (Children), [2011] 1FLR 889 [22].
[48] Applying Lawal v. Northern Spirit Ltd., ICR 856 [14](Lord Steyn).
[49] [2013] 5 Costs L. Rep. 841.

reached where the trial judge's remarks in the earlier hearing were expressed in "extreme and unbalanced terms".[50] Her Ladyship went on:[51]

> Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Judges who have a financial interest in a case are automatically disqualified. Depending on the circumstances, judges can also be disqualified by other matters, such as an involvement with one of the parties in the past.

In *Mengiste,* the Court of Appeal acknowledged that mere criticism of parties or witnesses would not necessarily indicate partiality. Such criticisms were often part of the performance of the judicial function.[52] However, in the circumstances of the case, the criticism voiced by the trial judge in the earlier proceedings had been expressed in such absolute terms (failing to leave the door open for the possibility that there might be some other explanation) and so repeatedly, that the judge should have recused himself from deciding the special costs application that followed. A requirement for recusal was upheld. But although *independence* of the judge from the parties was mentioned in the appellate reasoning, the ultimate determinant appears to have been the judge's demonstrated lack of *impartiality* towards the party who then complained.

The highly fact-specific nature of the cases involving judicial involvement in consecutive proceedings affecting the same parties was illustrated in the same year by a case that reached the Supreme Court of the United Kingdom: *O'Neill v. Her Majesty's Advocate [No.2].*[53]

That was a case where the appellants were charged with a number of sexual offences against minors. Later they were charged with murder. The trial judge ordered separate trials of the respective charges, before different juries. At the conclusion of the first trial, in which the appellants were found guilty and convicted, the judge described the appellants as "evil, determined, manipulative and predatory paedophiles of the worst sort". The judge then proceeded to preside in the second trial at the end of which the appellants were also found guilty and convicted of murder. A ground of appeal relied on by the appellants asserted that the judge should have withdrawn from the second trial because the comments made in the first meant had deprived them of their right to a fair trial.

Once again, the analysis followed the line of examining the sequence of events against the criterion of perceived lack of *impartiality*.[54] When the second trial began, no objection had been taken to the participation of the same judge. Unsurprisingly therefore, the Supreme Court analysed the proceedings not by reference to the principle of judicial *independence* of the parties but by reference to the requirement of *impartiality* towards the parties. The comments made by the

[50] Locabail (UK) Ltd. v. Bayfield Properties Pty. Ltd., [2000] QB 451 applied; [2000] 2 Costs L. Rep. 169.
[51] *Mengiste*, [2013] 5 Costs L. Rep. 841 at [3].
[52] *Id.*
[53] [2013] UKSC 36.
[54] By reference to O'Hara v. H.M. Advocate, 1948 JC 90 and Helow v. Secretary of State for the Home Dep't, [2008] 1 WLR 2416.

judge at the conclusion of the first trial were held to have been relevant to the issue of sentencing in that trial. They had not been objected to at the time they were made. They failed to give rise to a perception that the judge lacked impartiality towards the appellants.[55]

Reference was made in this appeal to the way in which (it was suggested) judicial independence, training and the terms of the judicial oath promoted impartiality, so as to deprive earlier remarks of any capacity to suggest bias or to indicate lack of impartiality towards the parties subject to them. In the circumstance of limited judicial resources, reasoning by reference to an entitlement to an independent judge (one who had no prior association whatsoever with the appellants or their cause) did not attract the court.

It can probably be inferred from these cases that the tendency, now apparent both in United Kingdom and Australia, is normally to analyse contested cases, where a judicial requirement of recusal is argued, in terms of the *impartiality* principle. *Independence* is sometimes mentioned in passing. However, save for cases of financial involvement with a party, little attention is generally paid to the latter concept in deriving the answer to the suggested need for recusal. How does this conclusion square with the fact that international human rights law suggests that the concept of *independence* of the judge is a separate pre-condition that should be considered and applied in addition to *impartiality*?

IV. Human Rights Law and Analysis

If the qualities of 'independence' and 'impartiality' on the part of a judge are properly viewed as attributes of the one concept, of a want of actual or apparent bias, the expression of the relevant provisions of international and regional human rights law would appear to be anomalous. Both refer to notions of independence and impartiality as if they were intended to refer to different attributes.

Viewing the relevant human rights instruments in the order in which they were adopted, the dual requirement appears for the first time in the *Universal Declaration of Human Rights* (UDHR) which came into operation in 1948[56]. Article 10 of that *Declaration* states:

> Everyone is entitled in full equality to a fair and public hearing by an *independent* and *impartial* tribunal, in the determination of his rights and obligations and in any criminal charge against him.

The *European Convention on Human Rights* (ECHR) came into force on 23 September 1953. On 8 March 1951 the United Kingdom became the first state to ratify that Convention.[57] Article 6 contains the requirements of a "Right to a Fair Trial".[58] Relevantly, Article 6.1 provides:

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[55] *Id.*

[56] Adopted and proclaimed by General Assembly Res. 217A(III) of 10 Dec. 1948.

[57] A. Lester, D. Pannick & J. Herberg, Human Rights Law and Practice 7 [1.22] (3d ed. 2009).

[58] *Id.* at Chapter 4 [4.6.1]. Emphasis added.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing… by an *independent* and *impartial* tribunal established by law.

The *International Covenant on Civil and Political Rights* (ICCPR) entered into force in March 1976.[59] It went further than the two preceding statements. Article 14.1 introduced the additional prerequisites of "competence" on the part of the tribunal and the obligation that it should be "established by law":

> 14.1 All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent* and *impartial* tribunal established by law…

Each of the added requirements of *competence* and *legality* is important. But neither is relevant to the issue in hand. That issue relates to the inclusion in each of the foregoing statements of fundamental rights of the differentiated necessity that, to measure up to the universal standard, the tribunal in question must be both *independent* and *impartial*.

On the face of things, the repeated inclusion of the two requirements suggests that each of them was viewed by the drafters as distinctive and separately applicable. If all that were meant by the notion of *independence* were that the tribunal must be, and appear to be, free of bias (and thus manifestly *impartial*), it would have been simple for the drafters, or at least one of them, to have deleted the separate criterion of *independence*. Clearly a tribunal that lacks independence of, say, the government (such that members receive and act upon telephone instructions from a minister or requests from governmental officials) this idea would arguably have been adequately covered by confining the criteria in the successive instruments to *impartiality*. Upon ordinary interpretive principles, having regard to the language repeated in the instruments coming into force in the 1940s, 1950s and 1970s, the use of the two stated qualities suggest that something additional was intended by adding "independence" to the essential criteria of formal decision-making in a tribunal measuring up to universal standards.

The contents of the requirement of *independence*, in the case of the judiciary, was further elaborated in the *Basic Principles on the Independence of the Judiciary* endorsed by the General Assembly of the United Nations in 1985.[60] That instrument includes, in its second recital, a reference to the UDHR and its requirement of the right to a "fair and public hearing by a competent independent and impartial tribunal established by law". In fact, as has been shown, the reference to the requirement of competence does not appear in Article 10 of the UDHR. It was first introduced by Article 14.1 of the ICCPR.

However, the 1985 *Basic Principles* contain seven paragraphs elaborating what the drafters then felt was necessary to "assist member states in their task of

[59] Adopted and opened for signature, ratification and accession by General Assembly Res. 2200 A(XXI) of 16 Dec. 1966; (entered into force on 23 March 1976). Emphasis added.

[60] Adopted by the 7th UN Congress on the Prevention of Crime and Treatment of Offenders held in Milan, Italy on 26 August 1985 – 6 September 1985 and endorsed by the General Assembly in Resolution 40/32 of 29 November 1985 and 40/146 of 13 Dec. 1985.

securing and promoting the independence of the judiciary."[61] These "principles" were stated to be "formulated principally with professional judges in mind." [62] They were also said to apply "as appropriate to lay judges where they exist". The ensuing principles appear mostly appropriate to the notion of the independence of the judiciary from "inappropriate or unwarranted interference with the judicial process".[63] The principle of the independence of the judiciary is said, in the *Basic Principles*, to be that:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, any improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.

As well, the principle is said to entitle and require:

> … the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.[64]

Again, an overlap between *independence* and *impartiality* is expressly envisaged. But in dealing with the criterion of *independence*, many of the basic principles are addressed to conduct by other branches of government affecting the judiciary. They deal with such matters as qualification, selection and training;[65] conditions of service and tenure; and secrecy and immunity and;[66] discipline, suspension and removal.[67] All of these are matters involving potential activities of the legislature and executive as they might impinge upon judicial independence. The entitlements vis-à-vis other parties or their interests are reflected in few of the basic principles. In some, they are mentioned only indirectly and not by name.[68]

Against this background, it is not surprising that most of the consideration of the meaning of the requirement of *independence* appearing in Article 6(1) of the ECHR has been addressed to the constitutional or governmental posture of the relevant tribunal in its relations with the other branches of government.

Thus, several cases have concerned the procedures for the appointment of members to courts and tribunals, to their term of office and to the existence of their guarantees against outside pressures and to the question whether the body presents an appearance of independence, as required by Article 6(1).[69] Considerations that had arisen in this context have included the acceptability of short-term or part-time judicial officers and whether such tenure is compatible with the

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[61] Independence of the Judiciary, par 4. *See also* [8]: "… conduct themselves in such a manner as to preserve the dignity of the office and the impartiality and independence of the judiciary."
[62] *Id.* at 2.
[63] *Id.* at [6].
[64] *Id.*, Art.15-16.
[65] *Id.*, [17]-[20].
[66] *Id.*
[67] *Id.* at [15]-[16].
[68] *Id.* at [2].
[69] Bryan v. United Kingdom, 21 EHRR 342, [37] (ECtHR, 1995). *See also* R. (Alconbury Dev. Ltd.) v. Secretary of State for the Env't., [2001] UK HL 23; [2003] 2 AC 295.

requirement of independence. In the United Kingdom, the post of temporary sheriff in the High Court of Judiciary in Scotland was held incompatible with Article 6 of the ECHR.[70] Whilst I followed this reasoning in a later Australian case, it was not applied (admittedly in a different constitutional setting) when the validity of the appointment of short-term State District Court judges fell for decision.[71]

So far as the provision in the ICCPR for tribunal *independence* is concerned, the jurisprudence of the United Nations Human Rights Committee (HRC), established by the ICCPR, is likewise substantially (but not wholly) addressed to the requirement of independence from other branches of government. In General Comment No.32, addressed to Article 14.1 of the ICCPR, the HCR observes that:[72]

> The requirement of competence, independence and impartiality of the tribunal… is an absolute right which is not subject to any exception. Requirement of independence refers, in particular, the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until the mandatory retirement age or the expiry of their term of office, where such exists, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.

It will be noted that the foregoing General Comment treats the requirement in Article 14.1 as a composite one in which each of the qualities of "competence, independence and impartiality" is interdependent upon the others. Nevertheless, the HRC proceeds to deal separately with "the requirement of independence". Most of the communications that have been determined by the HRC on this issue have concerned instances of oppressive or inappropriate conduct by the executive government in relation to the judiciary.[73] Nevertheless, the treatment by the HRC of the criterion of *independence* has not been confined to governmental intrusions. In one matter, involving observations on a communication from Brazil, the HRC insisted that the judiciary must be protected from threats and reprisals from discontented litigants.[74] In a like manner, the European Court of Human Rights, whilst repeatedly insisting on the independence of tribunals from the executive and parliament, has also observed that "independence" extends to independence from the parties.[75] Because of the generality in which the adjective "independent" is used in the text of the ECHR, this broader ambit seems unarguable.

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[70] Stavis and Chalmers v. Procurator Fiscal, [2000] HRLR 191 followed by Privy Council in *Millar v. Dickson*, [2001] UKPC 24; [2002] 1WLR 165.

[71] Forge v. Australian Securities and Investments Comm'n., (2006) 228 CLR 45; [2006] HCA 44 at 128-130 [212]-[215].

[72] General Comment 32 of the Human Rights Committee. *See* S. JOSEPH AND M. CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – CASES, MATERIALS AND COMMENTARY 460 [14.48] (3d ed., 2014).

[73] Bahamonde v. Equatorial Guinea (468/91), *Id.* at [14.49] and Bandaranayake v. Sri Lanka (1376/05) *Id.* at [14.50].

[74] UNHRC, Concluding Observations on Brazil (1996) UN doc DCPR/C/79/ADD.111, para [10].

[75] LESTER ET AL, *supra* note 57, at 324 [4.6.55] referring to Application 17178/91, *Bryan v. United Kingdom*.

V. ACADEMIC AND OTHER COMMENTARY

In light of the extension of the obligations of tribunal independence to independence from the parties and other actors, and beyond independence from the executive government and the legislature, the failure to elaborate, and contrast, the different functions that *independence* and *impartiality* are respectively intended to perform for the purposes of recusal is striking. Certainly the vast majority of the elaborations of the notion of judicial independence are addressed to aspects of governmental independence whereas in all of the international treaties the word is used in its generality.[76] Only a few sources can be found that latch on to the differential purpose of the requirement of *independence* and seek to elaborate and isolate that word and the work it is intended to perform.

In the context of the independence of a tribunal (as distinct from a court) a number of decisions of the Supreme Court of Canada have addressed the issue in the course of elaborating the meaning of the guarantee of an "independent tribunal" in section 11(d) of the *Canadian Charter of Rights and Freedoms*. Thus, in *Valente v. The Queen*,[77] Le Dain, J. derived from this requirement a number of elements which, he said, were commonly reduced to an individual and a collective aspect.[78] He said:[79]

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, is reflected in its institutional or administrative relationship to the Executive and legislative branches of government.

In *R. v. Lippé*[80] the Supreme Court of Canada had to decide whether the guarantee of an "independent tribunal" in the *Canadian Charter*, meant that it had to be independent only from the government or also from the parties to the dispute. Three of the participating judges (Lamer CJ; Sopinka and Cory JJ agreeing) concluded that, in the context of Canada's constitutional tradition, the principle of "independence" was limited to independence from "the government". This included the legislative and executive branches and any person or body acting under the authority of the state.[81] However, a majority of the judges (Gonthier J, with La Forest, L'Heureux-Dubé and McLachlin JJ agreeing) contested this view. They held that such a narrow opinion was not consistent with the unlimited ambit of word in the text of the *Charter*; international usage; and the broader view stated by Dickson CJ in *R. v. Beauregard:*[82]

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[76] REBECCA ANANIAN-WELSCH & GEORGE WILLIAMS, JUDICIAL INDEPENDENCE FROM THE EXECUTIVE (2013). *See also* B. O'CONNOR, TRIBUNAL INDEPENDENCE 6-7 (2013).
[77] [1985] 2 SCR 373.
[78] [1985] 2 SCR 673 at 685, 687.
[79] R. v. Beauregard, [1986] 2 SCR 56 [23] applied.
[80] [1991] 2 SCR 114.
[81] [1985] 2 SCR at 673, 685, 687.
[82] [1991] 2 SCR 114.

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, *pressure group, individual or even another judge* – should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision.

Australian judges have also generally favoured the broader view, whilst acknowledging that, in practice, the largest dangers to judicial independence usually come from other branches of government, principally the executive.[83] Whereas Professor Stephen Parker perceived judicial independence as "a set of arrangements designed to promote and protect the perception of impartial adjudication",[84] Le Dain, J. in *Valente* insisted that impartiality and independence were conceptually distinct values. This was so however closely related the two notions might be in their functional purposes. Thus, *impartiality* referred to a state of mind on the part of the decision-maker which is free of actual or perceived bias. *Independence*, on the other hand: [85]

> … Connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.

I agree with this view. It is also reflected in the *Bangalore Principles of Judicial Conduct,*[86] adopted by the Judicial Integrity Group (JIG) on which I served as a member. Those principles were developed in a series of meetings involving leading judges from both common law and civil law countries. In the result, six values were identified as essential to judicial integrity. These were Independence; Impartiality; Integrity; Propriety; Equality; and Competence and Diligence. In a *Handbook*, issued by the JIG, the principle of judicial independence is stated as "a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects" This classification cites the opinion of Le Dain, J. in *Valente*. The JIG then attempts a differentiation of independence and impartiality: [87]

> The concepts of "independence" and "impartiality" are very closely related, but are yet separate and distinct. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived. The

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[83] J.J. SPIGELMAN, *Judicial Appointments and Judicial Independence*, 17 J. OF JUD. ADMIN. 139, 141 (2008); M. WARREN, *Does Judicial Independence Matter?*, 150 VICTORIAN BAR NEWS 12, 12-14 (2011).

[84] STEPHEN PARKER, *The Independence of the Judiciary*, in THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM, 62, 71 (B. Opeskin & T. Wheeler, eds. 2000) *Id.* at 40 [24].

[85] [1985] 2 SCR 56 [23].

[86] UNITED NATIONS OFFICE OF DRUGS AND CRIME, COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2007). The *Bangalore Principles* were adopted at the second meeting of the Judicial Integrity Group (JIG) held in Bangalore, India, in February 2001. The author was Rapporteur of the JIG.

[87] *Bangalore Principles.* Commentary, *supra* note 86, at 57 [51].

> word "independence" reflects or embodies the traditional constitutional value of independence. As such it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive branch of government, that rests on objective conditions or guarantees.

The way in which "independence" expresses a vital feature of courts and tribunals was further explained by Chaskalson P. in *S. v. Makwanyane*.[88] That distinguished South African judge suggested that the notion went even beyond independence from government and parties. It included independence from public opinion. Unless the relationship of judges to the state, to the parties and to public opinion were at once detached and separated, an essential attribute of a manifestly independent decision-making would be missing. The judges in question might feel (or even might actually be) impartial in their own minds. However, they would lack an imperative requirement, essential to the authority and acceptability of judgments, orders and decisions. By the same token, the JIG has pointed out that judicial independence does not demand complete isolation from society. However, an essential severance from other branches of government, lobby groups, political parties, parties to litigation and influential personalities, was critical to allowing one group of individuals to decide legal disputes affecting others without the need for bloodshed, violence or disaffection.

Summing up the relationship between the respective principles of *independence* and *impartiality*, the JIG, observed:[89]

> "Independence and impartiality are separate and distinct values. They are nevertheless linked as mutually reinforcing attributes of the judicial office. Independence is the necessary precondition to impartiality and is a prerequisite for obtaining impartiality. A judge could be independent but not impartial (on a specific case by case basis); but a judge who is not independent cannot, by definition, be impartial (on an institutional basis)."[90]

VI. CONCLUSION: SEPARATE VALUES

On the basis of the foregoing analysis, the preferable view (it is suggested) is that, in understanding the core values of a fair trial of contested issues in a rule of law society, both *independence* and *impartiality* are essential characteristics of the decision maker established by law to resolve conflicts (courts, tribunals and like decision-makers). Whilst independence and impartiality are mutually reinforcing, they represent separate and distinct obligations. Each must be present at the same time if a fair trial is to be attained. They do not merge into a single notion requiring only that such office-holders be free of bias. Applying an impartiality analysis alone would lose an element essential to the attainment of the necessary standards. These standards are required not only by the text of so many international statements of human rights but also by a functional analysis that is

[88] 195 (3) SA 391.
[89] Bangalore Principles, Commentary, *supra* note 86, at 57 [51].
[90] Citing reference *Re Territorial Court Act NWT,* North West Territories Supreme Court Canada, (1997) DLR 4th, 132, 146 (Vertes, J.).

responsive to community expectations and the manifest attainment of the rule of law.

I conceive of the distinction between independence and impartiality spatially. *Impartiality* refers to what goes on (and appears to go on) in the mind of the decision-maker, sitting in the judgment seat. *Independence* on the other hand, concerns the actual and apparent positioning of that seat. In order for the decision to enjoy the requisite quality and acceptability to the parties, the community and the world, the judgment seat must be separated from all material connections with other branches of *government* (legislative, executive, military or official); with the *parties* (financial, associational or empathetic); and with other outside *influences* (political parties, lobby groups, incompatible associations and even public opinion).

All of which is to reach the same conclusion as was expressed by Lord Justice Sedley in his foreword to Grant Hammond's excellent book on *Judicial Recusal*,[91] with which I opened this article. The comment derives a little help from the text of the oath (or affirmation) that judicial officers throughout the common law world commonly take before embarking on judicial, tribunal and other significant forms of independent and impartial decision-making:

> The … office … is to do justice "without fear or favour, affection or ill-will". Fear and favour are the enemies of independence, which is a state of being. Affection and ill-will undermine impartiality, which is a state of mind. But independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them. This makes the law relating to recusal a serious business.

[91] Sedley, *supra* note 2, at ix.

JUDICIAL RECUSAL: THE LEGISLATURE STRIKES BACK?

Hon. Sir Grant Hammond KNZM, LL.D.*

Abstract

The common law procedure managing the recusal of judges has historically had marked deficiencies. In New Zealand, this has resulted in the introduction to Parliament of the Register of Pecuniary Interests of Judges Bill, which proposes a financial register of judges' interests alongside some prospective amendments to the Judicature Act 1908 relating to senior courts on recusal issues. This article tracks the events leading to the resignation of Wilson, J. from the Supreme Court of New Zealand, which provided the backdrop for the introduction of the Bill. Difficulties with the legislative model are highlighted by reference to the federal recusal law of the United States of America. The author concludes with a number of observations informing the development of recusal law, but suggests that the appropriate way forward should remain with the judiciary rather than Parliament.

Key words

Recusal; Judiciary; *Saxmere*; *Caperton*; Legislation; Case law development

CONTENTS

I. INTRODUCTION

A central tenet of the due administration of justice in all common law-derived jurisdictions is the requirement of a fair trial in a fair tribunal. That principle is to be applied by judges who exhibit what Hugo Young once described as an "impeccable repository of detachment".[1] But what if that

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characteristic, or something close to it, cannot be identified in the actions of the particular judge in the particular case, in that she is actually biased,[2] or may be perceived to have been less than appropriately detached?

In such circumstances, a judge is expected to "recuse", that is, stand down from hearing the case, even though he or she was lawfully appointed to do so. It is, at root, a voluntary standing aside by a judge, triggered by his or her own appreciation of inappropriateness.

That said, there is common law as to when a judge should recuse. In England the early common law was "simple and highly constrained": a judge could only be disqualified by reason of a direct pecuniary interest in the case.[3] This was never going to be enough. Eventually the law expanded: it came to cover something we today call "bias", and something which could reasonably be seen to be giving rise to the possibility of inadequate detachment. As Sir Stephen Sedley has put it, "[The law] asks whether a sensible observer, knowing what the case was about, who the parties were and what connection the judge had with any of them or with the issues in the case, would think that the judge might be influenced by these things."[4]

This is judge-made law, and is to be applied by the very judge whose conduct is called in question. This alone might be thought to subvert the fair trial principle.

A further major difficulty with the doctrine as it has developed in all the common law jurisdictions is its very level of generality. The construction of this "sensible person" is not at all easy: what kind of link does she think should be required; and how robust is this self-reviewing judge to be?

Leaving these substantive principles to one side, the procedure to be adopted in recusal cases has historically had marked deficiencies. In 2008 I suggested guardedly that if the common law jurisdictions did not more effectively address these procedural aspects then Parliament might well step in.[5] That possibility has now been raised in New Zealand with a Bill in Parliament, awaiting determination, as to whether there should be a financial register of judges' interests and also some prospective amendments to the Judicature Act 1908 relating to senior courts on recusal issues.[6]

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of Appeal (2004-present). He presently serves as President of the Law Commission of New Zealand. This article is based upon a paper presented to Modern Law Review Seminar: Judicial Recusal: 21st Century Challenges, Birmingham City University, Birmingham U.K. 29 Sept. 2014.

[1] H. YOUNG, *The Compromising of Lord Hoffmann,* in SUPPING WITH THE DEVILS: POLITICAL WRITING FROM THATCHER TO BLAIR 212, 213-14 (2003).

[2] Cases of actual bias are mercifully very rare in common law jurisdictions.

[3] GRANT HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS 11 (2009).

[4] Stephen Sedley, *Standing Down: When Should a Judge Not Be A Judge*? 12 (2010), Annual lecture delivered at Cardiff University Law School on 4th November 2010. This lecture was substantially reproduced in 33(1) LONDON REVIEW OF BOOKS 9 (2011)

[5] HAMMOND, *supra* note 3.

[6] Register of Pecuniary Interests of Judges Bill 2010 (240-1). For the amending Bill *see* Judicature Modernisation Bill 2013 (178-1).

I suggested that the judiciary is not yet beyond self-redemption. I ran the argument that it were better if reform was to come from within the judiciary rather than being imposed from without. But the fact that the Parliament of a Commonwealth country with a respectable common law tradition has seen fit to at least entertain the possibility of legislation in relation to recusal should give pause for reflection.

An alternative model for law development is to proceed somewhat along the lines of federal recusal law in the United States of America. From the very outset of that jurisdiction Congress has not seen fit to leave this subject area to the common law. There are two very important statutory federal recusal provisions, although they are somewhat "glossed" by subsequent case law, coupled with certain other rigorous statutory provisions under which judges must publicly disclose their "pecuniary interests".

The purpose of this article is to consider further the issue of whether the law of recusal is better left to the judges; or whether legislative development is appropriate and even necessary.

It is useful to proceed in the common law manner, and examine two leading cases in context for the insights they yield on the common law/statute dilemma, before examining what a reform agenda might look like.

II. The Justice Wilson Saga

What has become known as the "*Saxmere*" litigation has seen, in New Zealand, an extraordinary series of cases which have tested the boundaries of most aspects of judicial bias and disqualification in that jurisdiction. These cases were further highlighted by intense media interest and professional editorialising. In the end, the litigation led to Wilson, J. resigning from the Supreme Court of New Zealand shortly before a Judicial Conduct Panel was due to pronounce its views on his conduct. This could in turn have led to his impeachment. This appears to have been the first final court resignation on a recusal matter since that of Lord Cottenham LC in the *Dimes* litigation in the 1850s in the United Kingdom.[7]

It is not easy, but necessary, to follow the events as they unfolded over several years. The starting point is *Muir v. Commissioner of Inland Revenue*.[8] There had been something of an argument in New Zealand as to the test for apparent bias. In that case the New Zealand Court of Appeal bought New Zealand law into line with that in the United Kingdom and Australia.[9] *Muir* was not appealed to the Supreme Court, so it became the (then) leading authority in New Zealand and was applied as such. As it transpired, Wilson, J. had just joined the Court of Appeal and sat on this appeal. So he was well acquainted with the recent law.

Turning to *Saxmere*, that company marketed merino wool. It sued the Wool Board for refusing to provide it with marketing subsidies. The High

[7] Dimes v. Proprietors of Grand Junction Canal, (1852) 10 Eng. Rep. 301.
[8] [2007] 3 NZLR 495.
[9] As it happens, the judgment of the court was written by the present author.

Court held that the Wool Board had acted negligently and breached its statutory duty.[10] The Court of Appeal, comprising William Young P., Glazebrook and Wilson, JJ., all of whom were later to be elevated to the Supreme Court, unanimously overturned the High Court decision.[11]

At that point Saxmere unsuccessfully applied for leave to appeal to the Supreme Court. Having exhausted its substantive appeal options, it sought leave to appeal on the basis that the Wool Board's lead counsel in the Court of Appeal, Alan Galbraith Q.C., had a longstanding friendship and financial relationship with Wilson, J. Leave was granted to apply to the Supreme Court on the question of associational bias. The Supreme Court found no such case was made out. This case is generally referred to as "*Saxmere No. 1*".[12]

The issue for the Supreme Court at that time was the correct legal test for determining apparent bias (as distinct from some form of presumptive bias). In *Muir*, Hammond, J. had held that the appropriate test requires the court to:

> (a) establish the actual circumstances that have a direct bearing on the suggestion that the judge was or may be seen to be biased; and
>
> (b) ask whether those factual circumstances might lead a fair minded lay observer reasonably to apprehend that the judge might not bring an impartial mind to the resolution of the instant case.[13]

This two-stage test was derived from the leading Australian authority, *Ebner v. Official Trustee in Bankruptcy*.[14] In the Supreme Court, in *Saxmere No.1*, Blanchard J. also adopted this formulation.[15] McGrath, J. reviewed the position in the Commonwealth jurisdictions. Like Blanchard, J., he confirmed that the mere existence of an association between counsel and a judge is, in itself, insufficient. In His Honour's view the crucial factor is a clearly articulated connection between the association or the circumstances that give rise to a concern about impartiality, and the reasonable apprehension of bias that the observer finds as a result.

There was some discussion as to how the fair-minded lay observer is to be perceived. In Blanchard, J.'s view, such a person would be intelligent, capable of viewing matters objectively, neither unduly sensitive nor suspicious, a non-lawyer but nonetheless well informed about the workings of the judicial system, and knowledgeable about the issues in the case and the facts which were said to give rise to apparent bias. It might be said that, as such,

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[10] Saxmere Company Ltd. v. The Wool Board Disestablishment Co. Ltd., HC Wellington CIV-2003-485-2724, 6 Dec. 2005.
[11] Wool Board Disestablishment Co. Ltd. v Saxmere Company Ltd., [2007] NZCA 349.
[12] Saxmere Company Ltd. v. The Wool Board Disestablishment Co. Ltd., [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere No. 1*].
[13] *Muir*, [2007] 3 NZLR 495[62].
[14] (2000) 176 ALR 644.
[15] *Saxmere No. 1*, [2009] NZSC 72, [2010] 1 NZLR 35.

this is a construct: it does not altogether accord with the persons one encounters on the Karori bus in Wellington, New Zealand; and who might not have a seat on the Clapham omnibus either.

In any event, the critical factual question, as the Supreme Court put it in *Saxmere No. 1*, was whether Wilson, J. was "beholden" to Mr Galbraith as a result of their mutual business activities, which could have created "unconscious bias"[16] on the part of Wilson, J. towards the party represented by Mr Galbraith. Mr Galbraith and the judge had long been personal friends and jointly owned Rich Hill Limited (RHL), an investment vehicle for thoroughbred horse breeding on rural land they owned. Prior to the Court of Appeal hearing, Wilson, J. had orally disclosed the fact of his business relationship with Mr Galbraith to Saxmere's (then) counsel, but not, it seems, the full extent of their activities.

On the facts as they were then known, in the Supreme Court Blanchard, J. concluded that there was nothing to indicate that Wilson, J. was indebted to counsel. Accordingly there was no "link" between the personal friendship, or for that matter the business association. Essentially the Supreme Court decided that the relationship between the two men would not divert the judge from deciding the case on its merits.

Some of Wilson, J.'s behaviour had been unwise, particularly in his lack of specificity in his disclosures and the highly unusual course of his having chosen to speak to one of the counsel in the case prior to the hearing without other counsel being present. But on the law as accepted by the Supreme Court, the judgment in the Court of Appeal would stand.

The *Saxmere* litigation now appeared to have run its course. But the appellant and its advisers were nothing if not determined. They kept digging. It came to light that the nature of Wilson, J. and Mr Galbraith's relationship was rather more extensive than what Wilson, J. had previously intimated. On the basis of the fresh understandings, and very unusually, Saxmere applied for a recall of *Saxmere No. 1*. It was suggested that at the time of *Saxmere No. 1* it had appeared that the judge's financial involvement with Mr Galbraith in RHL was in the nature of a roughly equal partnership in a passive investment vehicle. But Wilson, J. had, following the first Supreme Court judgment, made certain further disclosures.

As at 31 March 2007, which was shortly before the relevant Court of Appeal hearing, due to Mr Galbraith having advanced more funds to RHL than Wilson, J., there was an imbalance in their shareholder accounts. The net effect of this was that the judge was "beholden" (to use the language of the Supreme Court)[17] to Mr Galbraith in the amount of $74,249. On the accounts it appears that the sum was $242,804, if the fact that Wilson J. had not made any repayments of the company's bank loan for which he had assumed exclusive responsibility was taken into account.

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[16] A troublesome concept slowly creeping into appellate decisions; and one which deserves much closer research and discussion.

[17] Saxmere Company Ltd. v. Wool Board Disestablishment Co. Ltd. [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere No. 2*] at [17].

The Supreme Court held that this imbalance was well above any level of indebtedness from judge to counsel that could be regarded as "so minimal as to be immaterial". There was a further complicating factor in that RHL was about to finalise a (financed) land purchase. This would have required "mutual co-operation" between the judge and Mr Galbraith to finance and complete the transaction. In the circumstances the Supreme Court decided to recall its judgment in *Saxmere No. 1*.

Under the relevant rules in New Zealand, the senior courts have developed three bases for a recall:

> (a) where there has been a legislative change or a new judicial decision of relevance and higher authority since the hearing;
>
> (b) where counsel failed to bring a legislative provision or authoritative decision of plain relevance to the court's attention; or
>
> (c) where, for some other very special reason, justice requires recall of the judgment.[18]

The legal effect of a recall is to render the judgment of no effect. In this case, because the Supreme Court was satisfied with its own clarification of the test for apparent bias in *Saxmere No. 1* following on from *Muir*, in *Saxmere No. 2* the Court stated that its judgment was to be read "in conjunction" with the recalled first judgment.[19] This was unusual and has caused some disquiet for the commentators: the argument is that a judgment of such significance is said to only make sense by reference to another judgment that is now a legal nullity, issued by a differently comprised Supreme Court.[20]

Leaving the recall issues to one side and reverting to the narrative, applying the test adopted in *Saxmere No. 1* to the facts as they had now become known, the Supreme Court held that the true nature and extent of the financial relationship between the Judge and Mr Galbraith would raise doubt in the mind of an informed lay observer as to whether the Judge would bring an impartial mind to the particular case. If Wilson, J. had disclosed the more active extent and nature of the business relationship before the Court of Appeal hearing, a case of apparent bias would have been made out. The Supreme Court was led to the inexorable conclusion that the threshold for apparent bias had been met. And these circumstances constituted the "very special reason"[21] why justice required a recall of the Court's first judgment, and the setting aside of the orders which had been made therein.[22]

The substantive proceedings were subsequently reheard by a panel of the Court of Appeal comprising Hammond, Chambers and Ellen France, JJ.

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[18] Horowhenua Cnty. v. Nash (No. 2), [1968] NZLR 632.
[19] [2010] 1 NZLR 35, [1].
[20] *See* A. Beck, *Litigation: Bias and Recall,* 97 N.Z. L J. 97 [2010].
[21] *See* category 3 at text to note 19 *supra*.
[22] *Saxmere No. 2*, [2010] 1 NZLR. 35, [19].

in June of 2010. The Wool Board's appeal was allowed; it was held not to be liable in damages for breach of statutory duty and in negligence.[23]

As if all this was not enough, whilst the fresh rehearing in the Court of Appeal was proceeding, a new round of "litigation" had commenced before the Judicial Conduct Commissioner, who in New Zealand exercises a statutory jurisdiction.[24] He had recommended the constitution of a Judicial Conduct Panel.[25]

Three complaints about Wilson, J. had been made to the Judicial Conduct Commissioner, Sir David Gascoigne: one from the Saxmere interests; one from an anonymous complainant; and another from former Court of Appeal and Acting Supreme Court Justice, Sir Edmund Thomas. The Commissioner had concluded that aspects of Wilson, J's conduct prior to the first Supreme Court judgment raised unresolved questions of fact: essentially these related to prompt disclosure requirements, and there were some differences between aspects of the accounts of Wilson, J. and Mr Galbraith. There was also an issue as to the extent to which Wilson, J. was responsible for the Supreme Court having been under a "significant misapprehension" as to the nature and finances of RHL at the time of the first judgment. The Judicial Conduct Commissioner took the view that a full inquiry into Wilson, J's conduct was therefore justified.

Under the New Zealand legislation, if the Judicial Conduct Panel recommended that the Attorney-General should commence proceedings for the removal of Wilson, J, this could only be done through a parliamentary process instigated by the Attorney-General. This is because the power to recommend parliamentary proceedings for removal of a judge is the only disciplinary power vested in the Panel. Unlawful or inappropriate judicial action that does not warrant removal from office cannot be sanctioned in any meaningful way. This is a feature of the legislation that some commentators have criticised.[26]

That panel was due to conduct its inquiry, with a mandatory public hearing, in late 2010. But Wilson, J. commenced a judicial review of the Commissioner's recommendation on the ground that his recommendation was in error of law.[27] In the event, Wilson, J. succeeded in his judicial review

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[23] [2011] 2 NZLR 442.

[24] Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

[25] To demonstrate the difficulties of recusal in a relatively small and unitary jurisdiction, that officer had been appointed by the Hon Judith Collins MP as acting Attorney-General. She had assumed Attorney-General responsibilities in respect of the Commissioner and the Panel in this instance. This because Justice Wilson and the Attorney-General, the Hon Christopher Finlayson Q.C. M.P. had been partners in a large Wellington law firm during the 1990s.

[26] B.V. Harris, *Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?* [2008] N.Z. L. REV. 485, 507.

[27] The proceeding also sought judicial review of the acting Attorney-General's decision to appoint a panel under §21 of the Act on the basis that that decision was, it seems consequentially, also in error of law. The exercise of the Commissioner's power to recommend the appointment of a panel under §18 of the Judicial Conduct Commissioner

application.[28] While agreeing that the Judge's alleged misconduct passed the threshold of conduct warranting further investigation, a full bench of the High Court held that the Commissioner's report recommending the appointment of a panel was inadequate in the degree of specificity as to the aspects of Wilson, J.'s conduct into which the Panel was to enquire. In the result, that Court instructed the Commissioner to revisit the complaints and specify the particular conduct that warranted investigation by the Panel, in accordance with the requirements of the Act.

The whole affair mercifully came to an end shortly after that determination: Wilson, J. resigned from the Supreme Court. As the Act requires the Commissioner to dismiss a complaint where the person who is the subject of it is no longer a judge, the consequence of the resignation was that the procedures under that Act were statutorily concluded. There were those who lamented that this particular episode had not run its course, not least for the guidance that it might have afforded for future cases.[29]

The Judge chose not to go "gentle into that good night".[30] He has given television interviews and statements to leading newspapers. He has said in print: "I did not resign, let me make it absolutely clear, because of any impropriety on my part. There was none."[31] He maintains that it was accepted practice in 2007 for judges to have friendships and business relationships with counsel appearing before them, notwithstanding some 2003 guidelines for judges on disclosure of conflicts of interest at the time of the relevant case.

It might have been supposed that thereafter the whole saga would have faded away to the subject of academic debate, rather than the national headlines it had occasioned over many months. But no, it instead became further elevated into an issue of constitutional significance by the introduction into the New Zealand Parliament of a Register of Pecuniary Interests of Judges Bill in the name of a Green M.P., Dr. Kennedy Graham.[32]

On introduction Dr. Kennedy Graham said (outside the House):

> The messy situation around former Justice Bill Wilson could have been avoided had New Zealand had a register [of interests]. … The primary purpose is to protect the judiciary by relieving each judge of the onerous,

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and Judicial Conduct Panel Act 2004 is an exercise of a discretionary statutory power for the purposes of §4 of the Judicature Amendment Act 1972 (which governs judicial review proceedings in New Zealand).

[28] Wilson v. Attorney-General, [2011] 1 NZLR 399.

[29] *See*, e.g., Editorial, *The Wilson Resignation* [2010] N.Z. L.J. 361.

[30] Dylan Thomas, *Do Not Go Gentle into That Good Night*, 8 BOTTEGHE OSCURE 208 (1951).

[31] A. Young, *Former Top Judge Regrets Disclosing Link to QC* (2011) at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&object=10732993 (last accessed 17 August 2014).

[32] *Supra* note 6.

> and somewhat subjective, burden of determining whether [there is] a conflict of interest … with regard to each particular case.[33]

The Explanatory Note to the Bill states:

> Recent developments within New Zealand's judicial conduct processes suggest that application of the same practices by the other two branches of government might assist in the protection of the judiciary in the future.[34]

The reference to "the other two branches" is that in New Zealand Members of the Executive have been required to provide statements of pecuniary interests since 1990, and Members of Parliament, since 2006. Those measures were not set up by legislation. Rather they had been voluntarily adopted by those two branches of government.

Dr. Graham took the view – entirely realistically – that there was no prospect of the judiciary voluntarily adopting such a scheme in New Zealand. But what would the House of Representatives make of it? The Attorney-General, the Hon Christopher Finlayson Q.C., M.P., was concerned that before the measure was considered by Parliament there should be an independent report to assist members in their consideration. The New Zealand Law Commission already had on foot a reference for a review of the Judicature Act 1908.[35] So with the concurrence of the Minister Responsible for the Law Commission it undertook an urgent exercise to assist the House. In March 2011 it released an Issues Paper.[36] In the usual way it consulted on and received submission on the Bill; it set out the present law in New Zealand, and England and Wales, and described key features of financial registers for judges in the United States of America, India and South Africa.

In the result, the Commission recommended that a register of judges' pecuniary interests not be established by statute in New Zealand, because it did not consider this to be the best solution for managing judicial conflicts of interest.

The Commission noted:

> 8.67. First, the present substantive law on when a judge should not sit by reason of a pecuniary interest is satisfactory, and in line with the law in other common law jurisdictions. No legislative correction would seem to be presently warranted.

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[33] K. Graham M.P., *Judges Pecuniary Interests Bill Pulled From Ballot* (Green Party of Aotearoa New Zealand, 2010) at https://home.greens.org.nz/press-releases/judges-pecuniary-interests-bill-pulled-ballot (last accessed 17 Aug.2014).

[34] *Supra* note 6, at 2.

[35] On which it has since reported and in respect of which there is legislation presently before Parliament for a consolidation and revision of New Zealand's law relating to its courts: New Zealand Law Commission, *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, Wellington: Law Commission, 2012).

[36] New Zealand Law Commission, *Towards a Consolidated Courts Act: A Register of Judges' Pecuniary Interests?* (NZLC IP21, Wellington: Law Commission, 2011).

> 8.68. Second, the procedural law as to a recusal of a judge is much less satisfactory, and in need of attention. In particular there is a real issue of principle as to whether an impugned judge should sit on a recusal application. This is more easily dealt with in appellate courts, but is a particularly difficult issue to manage in very busy trial courts. …
>
> 8.69. Third, the critical issue is: notwithstanding the adequate present substantive law, should there be super-added, is it where, a requirement for a register of judges' pecuniary interests? If there is to be such a register, we note it may have to be more rigorous than the present Parliamentary register to achieve the stated objective of avoiding conflicts of interest, and thus very intrusive. American experience shows this may raise problematic questions.[37]

The two key components of Dr. Graham's Bill would require returns of pecuniary interests from judges, and establish a public register of them. "Pecuniary interests" in this context was defined as "anything [that] reasonably gives rise to an expectation of a gain or loss of money for a judge, or their spouse or partner, or child or step-child or foster child or grandchild".[38] A clause in the Bill provided that nothing in it should be interpreted as compromising the constitutional principle of judicial independence which in New Zealand is guaranteed by the Constitution Act 1986 and in any event was always respected by constitutional convention. The Bill would apply to all judges of all courts of New Zealand, from coroners through to the Supreme Court judges.

The Law Commission paper on the register proposal was tabled in Parliament on 27 November 2012. On 17 April 2013 (under Cabinet Manual directives relating to Law Commission reports)[39] the government responded that it would not itself pursue a register of pecuniary interests. It gave as reasons the risks to judges' privacy, a lack of focus on important non-pecuniary interests, and that the administrative burden of operating such a register outweighed any potential benefit. The government agreed with the Law Commission's recommendation that the Heads of Bench for each court should publish clear guidelines as to when recusal from hearing a case is appropriate.

Subsequently, the government introduced into Parliament the Judicature Modernisation Bill,[40] which very largely adopted the Law Commission's report for restructuring and modernisation of the New Zealand courts, including a requirement for recusal guidelines.[41] In the particular circumstances as disclosed to and reviewed by it, on 21 February 2014 the relevant

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[37] *Id.*

[38] *Supra* note 6, at cl. 5.

[39] Cabinet Office, *Cabinet Manual* (Wellington: Department of the Prime Minister and Cabinet, 2008) at [7.18]. *See also* Cabinet Office, 'Law Commission: Processes for Setting the Work Programme and Government Response to Reports' (Wellington: Department of the Prime Minister and Cabinet, CO (09) 1, 2009) at http://www.dpmc.govt.nz/cabinet/circulars/co09/1 (last accessed 17 Aug. 2014).

[40] Judicature Modernisation Bill 2013 (178-1).

[41] *Supra* note 35, at [6.68]-[6.84], R23 and R24.

Select Committee of Parliament recommended that Dr. Graham's Bill should not be passed.

However, as matters now stand, the Bill still stands in the Order Paper for a second reading. It seems unlikely that the measure will pass; there are even some suggestions that it may be withdrawn. But such have been the twists and turns of this particular saga that, with a General Election pending and some concern about judicial accountability in other respects, it would be unwise to entirely write off the possibility of its resurrection.

III. The American experience

If *Saxmere* was a long-running serial, the critical decision in American federal jurisprudence – the decision of the United States Supreme Court in *Caperton v. A. T. Massey Coal Co.*[42] – has been a soap opera. It also had the "distinction" of inspiring John Grisham's best-selling 2008 novel, *The Appeal*. Again the issues migrated from the generally dry dust of the law relating to recusal into the public domain, and have left an unhappy patina about a final court.

Two critical features of United States federal jurisprudence on recusal need to be always kept in mind.

First, the fundamental basis of the U.S. federal jurisdiction has always been legislative. The first federal judicial disqualification statute in the United States was passed as early as 1792. That statute largely reflected the then-English common law: there was to be disqualification when a judge had a pecuniary interest in a proceeding over which he or she was to preside. And the rule was absolute: it did not matter if only a few dollars were at stake. After the Civil War there was a wave of ethics reform legislation, largely because of wide-scale influence pedalling and procurement fraud during the Civil War. Then after Watergate a major driver of the relevant U.S. federal law was the passage of the Ethics in Government Act 1978. In broad terms, this Act required many employees of the Federal Government including all federal judges to disclose, amongst other things, their personal finances.

The disclosure regime for federal judges is extensive and detailed. This leads to the second regime characteristic: it has had more than its fair share of difficulties and is constantly requiring legislative amendments.

In particular, the U.S. scheme threw up both legal issues and functional problems in the area of judicial security. As it now stands a judge's personal financial report may be redacted: "(i) to the extent necessary to protect the individual who filed the report; and (ii) for so long as the danger to such individual exists." The U.S. Judicial Conference, in consultation with the Department of Justice, has the task of submitting to the House and Senate Committees on the Judiciary an annual report documenting redactions. An audit of more than 10,000 judges (only a part of the large U.S. judicial empire) showed 10 per cent of them requesting redactions. The relevant considering Committee granted 592 of the 661 redaction requests in a three-

[42] 556 U.S. 868 (2009).

year period. Failure to correctly complete the forms itself spawns all sorts of problems and litigation.

As to the substantive law, in *Caperton* the U.S. Supreme Court was divided five to four. In the result it held that a judge's failure to recuse himself violates the Due Process Clause of the Constitution. The question is now whether, "under a realistic appraisal of psychological tendencies and human weakness" the judge's interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented".

On that standard, the majority concluded that the failure of Justice Benjamin of the West Virginia Supreme Court of Appeals to disqualify himself in a high profile case involving the company of an individual who had donated $3 million in an attempt to defeat Benjamin's opponent in a judicial election, ran foul of due process considerations.

A major doctrinal difficulty was that the majority resorted to a "probability of bias" test. Chief Justice Roberts expressed distinct scepticism about such a formula. Addressing his "slippery slope" concerns, the Chief Justice listed no less than 40 "uncertainties" which he believes the majority opinion opens up for lower courts.[43] Subsequently, there has been an avalanche of commentary on *Caperton*.[44]

It can hardly be said that U.S. federal law is in any better shape than the law and practice in the Commonwealth. It is quite unlikely that the U.S. Supreme Court, or any court, will be able to develop something approaching a qualitative or quantitative framework for analysing judicial bias and recusal claims. Neither does it advance a solution to the central problem of recusal motions being determined (at least in part in appellate courts) by the very judge whose conduct is under scrutiny.[45]

IV. WHERE TO NOW?

The overarching question for recusal law is, where to now? For it is in something of a bind.

As to the law, under modern regimes judges have a right to free speech, even extra judicially, on the law. That law may be relevant to a case they will later have to decide. And some degree of "showing the ball" is pragmatically necessary by judges for the due advancement of litigation in regimes in which judges are abjured to get on and advance the real merits of a case.

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[43] *Id.* at 893-98.

[44] *See*, *e.g.*, Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80 (2009); Caperton v. A.T. Massey Coal Co.: *Due Process Limitations on the Appearance of Judicial Bias,* 123 HARV. L. REV. 73 (2009); J.J. Sample, *Court Reform Enters the Post-*Caperton *Era*, 58 DRAKE. L. REV. 787 (2010); J.J. Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE. L. REV. 293 (2010); and G.J. Clarke, Caperton*'s New Right to Independence in Judges,* 58 DRAKE L. REV. 661 (2010).

[45] 'In part', because routinely the impugned judge still sits on the determining panel in many jurisdictions.

As to outcomes, it is surely significant that the senior final courts have found themselves in real difficulties with the application of recusal law even to their own cases. One thinks of *Pinochet*,[46] *Saxmere*, and *Caperton*.

Neither legislation nor judicial doctrine as presently conceived appear to afford adequate or durable solutions.

As to the common law, Sir Stephen Sedley has fairly remarked that, "… at least in countries where judges are appointed and not elected, the [recusal] road has not turned out to be a highway to hell; but neither is it a yellow brick road to contentment. … [I]t is … a tortuous and sometimes stony road which is worth following even if its destination is uncertain."[47]

As to legislation, Frost has perceptively noted:

> The [legislative] development of the law of judicial disqualification in the United States has followed a recognisable pattern. First, Congress sets the standard governing when judges must remove themselves from sitting on cases in which they are not able, or might not be able, to be impartial. That standard is then narrowly construed by the judges who must apply it to decide whether they themselves should be disqualified from a case. Eventually, a particularly egregious situation arises in which a judge sits on a case when most outsiders think that she should have stepped aside. The situation comes to the attention of the press, the public, and ultimately Congress, which amends the law to provide stiffer standards for recusal. And then the whole process begins anew.[48]

One way of evaluating the alternative paths is to enquire whether it is people, institutions, or the state of the law which is the root of the current predicaments.

As to the first matter, in his memorable Reith Lectures,[49] Lord Radcliffe of Werneth suggested:

> Constitutional forms and legal systems are very well in their way, but they are the costumes for the men who wear them. Their sober shapes can be seen performing the strangest antics unless the people inside them have a real grasp of the civil ideas which they are designed to express. … It would be a fatal thing … if we were in the course of time to lose our character, which we have prized too little, and to preserve our institutions, which we greatly overpraise.

The question can legitimately be asked: has (sadly) the "character" of our judges failed us too often in potential recusal situations?

As to institutions, in his 2012 Reith Lectures,[50] the distinguished historian Niall Ferguson suggested it is "institutions" (the intricate frameworks,

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[46] R. v. Bow Street Metropolitan Stipendiary Magistrate, *ex p.* Pinochet Ugarte (No. 2) [2002] 1 A.C. 119.

[47] HAMMOND, *supra* note 4, at 7.

[48] Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 KAN. L. REV. 531, 538 (2005).

[49] Published in 1952 as THE PROBLEM OF POWER: THE REITH MEMORIAL LECTURES 1951 (1952).

[50] NIALL FERGUSON, THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES DIE (2012).

including the rule of law, within which a society can flourish or fail) which are degenerating. He suggests the rule of law has "metamorphosed" into "the rule of lawyers". Regrettably it is the unwarranted activities of too many lawyers with premature or insufficient recusal applications which have contributed significantly to recusal problems.

These are high-level perspectives. They (rightly) remind us of the ultimate drivers in matters of this kind. What though, are we to suggest to those "in the field" of the operation of the law, as it were? The following relatively modest observations might assist.

1. As a matter of overall perspective, we should recognise that recusal law is about what it means to be a judge.

2. There is no absolute rule that, once scheduled, a judge *must* sit. The rule is better expressed thus: a judge is under a duty to sit, save where there is a juristically sound reason why she should not do so.

3. This is necessary to support public confidence in a legal system. Little is known empirically about how recusal decisions affect public perceptions of judicial impartiality. There is some quality U.S. academic work which suggests that "recusal is only a weak palliative for conflicts of interest" and the public's confidence is only partially restored by it.[51] This is consistent with the continued expressions of public concern over the "final court" cases. Practically it suggests early steps are required in recusal cases; not ex post decisions after much public angst.

4. Cardozo observed that Judges "may try to see things as objectively as we please. Nonetheless we can never see them with any eyes except our own."[52] That said, Lord Hailsham's sage advice is worth repeating: "Impartiality does not consist in having no controversial opinion or even prejudices … Impartiality consists in the capacity to be aware of one's subjective opinions … to weigh evidence and argument and to withhold concluded judgment until the case is over."[53]

5. If the foregoing is accepted, it behoves legal systems to avoid, to the extent reasonably possible, the dangers to the legal system and litigants of poorly designed procedures and ill-conceived declinatures to recuse. There are at least three potential avenues of improvement of importance here.

6. The first is the advancement of judicial understanding of cognitive science, and unconscious bias. Everybody – including judges – relies on mental shortcuts ("heuristics") to make complex decisions. The law (as with most disciplines) is full of them. We often turn to rules of thumb, intuitive

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[51] James L. Gibson & Gregory Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of the Courts Be Rescued by Recusals?* 3 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491289 (last accessed 17 Aug.2014).
[52] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).
[53] LORD HAILSHAM, THE DOOR WHEREIN I WENT 256-257 (1975).

judgments, and common sense. This facilitates necessary and efficient decision making. But unconscious mental shortcuts to evaluate facts can create misperceptions which can skew decisions.[54]

The five most common heuristics which influence judicial decision making (common also to other fields of human endeavour) are: anchoring (making estimates based on irrelevant starting points); framing (treating equivalent gains and losses differently); representativeness (treating an instance as representative, notwithstanding inconsistent statistical information); above all in law, hindsight bias (perceiving past events to have been more predictable than they actually were); and egocentric bias (over-estimating one's own abilities, including the ability "to put something to one side"). These phenomena extend even to a judge's decision to recuse/or not recuse. Much more could be done in the way of judicial education to inform judges on these phenomena.[55]

7. Secondly, the procedures for recusal challenges should be reviewed – by the judges themselves. It is not beyond the wit of working judges to come up with sensible procedures and for them to be promulgated whether by rules of court or protocols. Recusal procedures should be promulgated – not necessarily in formal rules, but at least in published protocols, as has happened in New Zealand,[56] and the U.S. Supreme Court.[57] Potential recusal situations should be "flushed out" early, within the courts own advancement to hearing procedures. Late recusals routinely create problems, both for efficiency and the appearance of things.

In particular, it is critical to avoid the impugned judge sitting on the determination of the recusal application. This is relatively easily avoided at the appellate level. Appellate courts can, after all, sit with one of their number not present. Most Judicature Acts explicitly provide for this.[58] At the trial level it has to be acknowledged that this is not nearly as easily obtained a result. But again it is not beyond the wit of the judiciary itself to address this issue.

Reasons – if only short reasons – should always be given for the recusal decision.

8. The third avenue is that the tactical use of recusal motions needs to be distinctly and firmly addressed. It is a fundamental principle of the rule

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[54] Chris Guthrie et al., Inside the Judicial Mind, 86 Cornell L. Rev. 777, 778 (2001).

[55] See also, Sande L. Buhai, Federal Judicial Disqualification: A Behavioural and Quantitative Analysis, 90 Or. L. Rev. 69 (2011).

[56] See Courts of New Zealand, 'Guidelines for Judicial Conduct' (2013); Court of Appeal of New Zealand, 'Court of Appeal Recusal Guidelines' (2013); and Supreme Court of New Zealand, 'Conflict of Interest Protocol' (2008) at http://www.courtsofnz.govt.nz/business/guidelines/confli§cts-of-interest (last accessed 22 August 2014).

[57] Press Release, U.S. Supreme Court, 'Statement of Recusal Policy' (Nov. 1, 1993) reprinted in RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES app. D, 1101-03 (2d ed. 2007); *see* HAMMOND, *supra* note 3, App. D.

[58] In New Zealand, *see* Judicature Act 1908, § 58; and Supreme Court Act 2003, § 30.

of law that one judge is as good as another. Errors are corrected on appeal. It is of the utmost importance that no party may choose its tribunal. This cannot be achieved by insisting on a particular judge or by objecting to one who has been appointed, without sufficient cause. There are well-established mechanisms available in the existing law to address groundless challenges, which should not be costless.

9. A growing problem – perhaps an off-shoot of the belief that judges too have strong rights of expression and belief – is the judge with a distinct commitment to some cause, or to a principle of law, which she espouses publicly.

As to the first point, in *Pinochet* the Law Lords stressed that simply supporting a cause is not a disqualification. Lord Hutton however added the surely necessary qualification: there could be cases where "the interests of the judge in the subject matters of the proceedings arising from his strong commitment to some cause or belief … could shake public confidence in the administration of justice".[59]

As to the second concern, judges are today relatively prolific producers of speeches, articles and even books on the law. Should they sit when the particular point they have publicly professed upon is squarely before them? A lively debate has emerged on this topic in Australia in recent times.[60]

V. CONCLUSION

If I am correct in my identification as to where the real problems arise, is legislation likely to provide the answer to legitimate public concerns over judicial (non)recusals? Thus far, my response has been a cautious "no". Fundamentally, this is an area for quality final court judgments; and enlarged and appropriate lower court understandings of the problems which arise in this area. If appropriate principles (for that is all they can be, in this sort of area) are not, or will not be laid down, then there is a case for parliamentary intervention. So it is a case of "Physician, heal thyself".[61]

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[59] Should a judge who had written or spoken strongly on the need for capital punishment, sit on (say) a Caribbean death appeal?

[60] For a negative response, *see* Susan Bartie & John Gava, *Some Problems with Extrajudicial Writing,* 34 SYD. L. REV. 637 (2012); for the affirmative side, *see* Chris Finn, *A Reply to Bartie and Gava,* 34 ADEL. L. REV. 267 (2014); *see also* LORD NEUBERGER, *The Remedial Constructive Trust – Fact or Fiction* (2014) at https://www.supremecourt.uk/docs/speech-140810.pdf (last accessed 14 Feb. 2015), arguing (in opening) for extra-judicial writing.

[61] LUKE 4:23, King James Version. The New Zealand Parliament has, since this article was prepared, adopted this biblical advice. Debate on the second reading of the Bill (*see supra* note 6) began on 3 December 2014 (Hansard, Vol 702) and concluded on 25 February 2015 (Hansard, Vol 3 at page 1956). It was defeated 104/16, with several political parties on the left and the right conjoining to defeat it.

GIVING UP APPEARANCES: JUDICIAL DISQUALIFICATION AND THE APPREHENSION OF BIAS

Raymond J. McKoski*

ABSTRACT

Judicial disqualification rules define the point at which a judge cannot be trusted to decide a case fairly. Because the disqualification of judges corrodes the presumption of impartiality and undercuts the sanctity of the judicial oath, recusals should be based on facts, not appearances. But both the British Commonwealth and the United States remove judges not only for bias, but also when circumstances create an "appearance" of bias." The United States disqualifies a judge when the judge's "impartiality might reasonably be questioned." The British Commonwealth bars a judge's participation in a case when the circumstances create an "apprehension of bias." Since the same hypothetical, reasonable lay person is the arbiter under both tests, the tests produce similar results. Unfortunately, permitting appearances to dictate when a judge may sit fails on a theoretical and practical level.

This article details the failures of appearance-based disqualification and proposes a new, fact-based standard for determining the propriety of a judge remaining on a case. The new test removes a judge for actual bias and when the circumstances create a probability or real possibility of bias on the part of the average judge. Appearances play no role in decision. The new test also replaces the hypothetical average lay person with the hypothetical average judge. The average judge rather than the average lay person determines whether the circumstances likely will cause the judge to abandon the role of the impartial magistrate. If so, the judge is disqualified. If not, the judge stays on the case. In this way, facts, not elusive, ephemeral appearances dictate the disqualification decision.

CONTENTS

I. Introduction

To a large extent appearances and perceptions govern our lives. This is certainly true in the business world where "managing the corporate image is the key to security and maintaining public trust."[1] In many cases the best image for a business is the promise to provide its customers with a new appearance. For example,

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the businesses "New Image Weight Loss Centers"[2] and "New Image Family Medicine,"[3] brand their products, not with the promise of better health, but with the promise of a better appearance. And appealing to the average consumer on the basis of looks rather than on the basis of health is well-founded. In one study, more young people reduced their use of indoor tanning devices if they were warned of the risk of developing leathery, wrinkled skin than if they were warned of the risk of cancer. [4] One of the study's authors put it this way, "[t]hey're not worried about skin cancer, but they are worried about getting wrinkled and being unattractive ... . The fear of looking horrible trumped everything else."[5] And to dispel the notion that only sun worshippers overvalue appearances, a recent survey found cigarette smokers more concerned with the effect of tobacco on their appearance than with the effect of tobacco on their hearts and lungs.[6]

Public officials know all too well that appearance trumps substance. In 1960, United States Vice-President Richard Nixon lost the first televised presidential debate because of his pale complexion, beard stubble, and grayish-pallor.[7] Although equally competent on the issues with his opponent John F. Kennedy, he was no match for Kennedy's tanned, finely coffered, and youthful look.[8] Years later, Nixon admitted that in preparing for the debate he "had concentrated too much on substance and not enough on appearance."[9]

Franklin Delano Roosevelt employed props like his cigarette holder, eye glasses, and cape to create the image of a confident, capable, yet approachable leader. As explained by Hugh Gregory Gallagher in *FDR's Splendid Deception*:

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to Modern Law Review Seminar: Judicial Recusal: 21st Century Challenges, Birmingham City University, Birmingham, U.K. 29 Sept. 2014.

[1] Russell Abratt, *A New Approach to the Corporate Image Management Process*, 5 J. MKTG. & MGMT. 63, 63 (1989).

[2] NEW IMAGE WEIGHT LOSS CENTERS, http://www.newimageweightlosscenter.net (last visited Sept. 4 2014).

[3] NEW IMAGE FAMILY MEDICINE, http://www.newimagefm.com (last accessed 4 Sept. 2014).

[4] Joel Hillhouse et al., *Effect of Seasonal Affective Disorder and Pathological Tanning Motives on Efficacy of an Appearance-Focused Intervention to Prevent Skin Cancer*, 146 ARCHIVES DERMATOLOGY 485 (2010). Another study showed a greater increase in the use of sunscreen when participants learned that sunscreen reduces the risk of wrinkled skin than when the participants learned that sunscreen reduces the risk of cancer. William Tuong & April W. Armstrong, *Effect of Appearance-Based Education Compared with Health-Based Education on Sun Screen Use and Knowledge: A Randomized Controlled Trial*, 70 J. AM. ACAD. DERMATOLOGY 6665 (2014).

[5] Marla Paul, *Wrinkles Rate Worse than Cancer for Tanners*, NW. UNIV. (May 17, 2010), http://www.northwestern.edu/newscenter/stories/2010/05/tanning.html (quoting Professor June Robinson).

[6] *Smokers More Worried About Their Looks Than Their Health: Half Who Gave Up or Intend to Did So Because of Fears Over Appearance*, DAILY MAIL, Jan. 14, 2014, http://www.dailymail.co.uk/health/article-2538961/Smokers-worried-looks-health-Half-gave-intend-did-fears-appearance.html.

[7] *See* History.com, The Kennedy-Nixon Debates, HISTORY.COM, http://www.history.com/topics/us-presidents/kennedy-nixon-debates (last visited Sept. 4, 2014) (including a video of the debate).

[8] *Id. 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, 1916 (2010).

[9] RICHARD M. NIXON, SIX CRISES 340 (1962).

> [Roosevelt] used his cigarette holder to suggest confidence and good cheer; his old-fashioned pince-nez glasses reminded people of their schoolteachers and of Woodrow Wilson. They bespoke stability, responsibility. His old fedora campaign hat was as familiar as an old shoe; his naval cape expressed dignity and drama. The complete package of props, together with the characteristic tilt of the head, the wave of the hand, the laugh, the smile, made FDR seem to the American people as familiar, as close as a family member.[10]

Appearances also mattered to Margaret Thatcher and her public relations advisors.[11] In addition to modifying her form of dress and hairstyle, Mrs. Thatcher took lessons from a voice coach at the National Theatre to "enhance the statesmanlike character of her talk."[12] The highest paid advisor to the John McCain presidential campaign during the first half of October 2008, was not the campaign chairperson but the make-up artist who accompanied vice-presidential candidate Sarah Palin on the campaign trail.[13]

While in political campaigns "appearance conquers substance"[14] the same should not hold true in the administration of justice. The courthouse should be one place where judgments are based on reality, not perception. Cross-examination, public trials, the right to counsel, and the right to compel the attendance of witnesses are all designed to cut through appearances to uncover the truth.[15]

But reliance on appearances has infiltrated the legal system in one important respect. A judge can be removed from a case, not on the basis of bias or partiality, but on the basis that to someone, somewhere, the judge might appear to be biased or partial. Declaring a judge unfit to carry out her sworn duty on vague perceptions rather than fact, is inimical to the idea of a justice system geared to uncover the truth. Perhaps the promise of an attractive body can draw more customers to health clubs and smoking cessation centres than the promise of a healthy body. But a promise of an impartial appearing judiciary cannot build public faith in the courts. Only judges who exhibit actual impartiality can accomplish that goal.

Although the precise wording of appearance-based recusal rules varies, the test for a judge's removal from a case is essentially the same in the British Commonwealth and in the United States.[16] Statutory provisions and court rules in the United States require recusal whenever a judge's "impartiality might reasonably be questioned."[17] In the United Kingdom, the test is labelled an "apprehension of bias" or "apparent bias" test and asks "whether the informed observer would

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[10] HUGH GREGORY GALLAGHER, FDR'S SPLENDID DECEPTION 93 (1999).

[11] HUGO YOUNG, THE IRON LADY: A BIOGRAPHY OF MARGARET THATCHER 428 (1989) (stating that Mrs. Thatcher willingly submitted to her "image-makers" including Gordon Reece).

[12] *Id.* at 428-29.

[13] Maureen Dowd, *A Makeover with an Ugly Gloss*, N.Y. TIMES, Oct. 26, 2008, at A14.

[14] John Corry, T.V. View; *In the Debates, Appearance Conquers Substance*, N.Y. TIMES, Jan. 24, 1988, available at http://www.nytimes.com/1988/01/24/arts/tv-view-in-the-debates-appearance-conquers-substance.html.

[15] *See* McKoski, *supra* note 8, at 1995.

[16] *See* text accompanying notes 121-33, below. The terms "recusal" and "disqualification" are used interchangeably in this article to refer to the removal of a judge on the basis of actual, presumed, or apparent bias.

[17] *See* 28 U.S.C. § 455(a); ABA, MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

find a "real possibility of bias on the part of the judge."[18] In Canada "one standard has now emerged as the criterion for disqualification . . . the reasonable apprehension of bias" which mandates recusal when the ordinary observer finds it "more likely than not" that the judge is biased.[19] In Australia and New Zealand, the standard is the existence of a "reasonable apprehension of bias."[20] Disqualifying judges on the basis of appearances is intended to give meaning to the axiom that "justice should not only be done but should manifestly and undoubtedly be seen to be done."[21] Because under each of these tests, the fair-minded, lay member of the public determines whether an apprehension of bias exists, the tests produce similar results.[22] Unfortunately, permitting appearances to dictate when a judge may sit has failed on both a theoretical and practical level.

This article first examines the historical underpinning of the idea that judges must not only avoid actual bias but also avoid the appearance of bias. The examination discloses that modern day appearance-based recusal finds its origin in the purported biblical admonition to "abstain from all appearances of evil"[23] and in the aspirational advice given by Lord Hewart and his American disciples that justice must satisfy the appearance of justice.

After classifying the forms of bias, Part II introduces the apparent bias tests employed in the British Commonwealth and in the United States together with the rationale for the tests. Part II concludes by laying the responsibility for the failure of appearance-based recusal at the feet of arbiter of disqualification issues—the hypothetical lay observer. Part III discusses the attributes of the lay observer with special emphasis on the unlimited factual and legal knowledge assigned to the hypothetical observer, the similarity between the challenged judge and the observer, and the dissimilarity between the observer and the average member of society. Part IV highlights the fatal flaws in appearance-based disqualification including its failure to bring uniformity and predictability to the recusal process and its inability to build public confidence in the judiciary.

Finally, Part V proposes replacing the appearance of bias test with a new standard for judicial disqualification. Unconcerned with appearances, the new test requires removal of a judge only when the circumstances create a probability or real possibility of actual bias on the part of the average judge. Additionally, while the hypothetical lay person might be great at judging how things look to the public, he lacks the training and experience to determine when circumstances are likely to cause the average judge to lose impartiality. Therefore, the proposed test replaces the hypothetical average lay person with the hypothetical average

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[18] Porter v. Magill, (2002) 2 AC 357 [103].

[19] Wewaykum Indian Band v. Canada, (2003) 2 SCR 259 [60].

[20] Ebner v. Official Trustee in Bankruptcy, (2000) 205 CLR 337 [6] and [11]; Muir v. Comm'r of Inland Review, [2007] 3 NZLR 495 [62].

[21] *See Wewaykum*, 2 SCR at [67] ("[T]he oft-stated idea that 'justice must be seen to be done' . . . cannot be severed from the standard of reasonable apprehension of bias.").

[22] *See* Jacob Rowbottom, *Homes for Votes, Bias and Political Purposes*, 118 L.Q.R. 364, 366-67 (2002) (stating that the apprehension of bias test and the real danger of bias test "will often lead to similar results"). See *also* cases cited in note 120, below.

[23] 1 THESSALONIANS 5:22 (King James).

judge. In short, the new test would require recusal when the circumstances demonstrate a probability or real possibility of actual bias on the part of the average judge. And the circumstances surrounding the recusal issue would be evaluated through the lens of the average judge instead of the lens of the average lay person

II. THE FOUNDATION OF APPEARANCE-BASED RECUSAL

The idea that judges must not only avoid impropriety but also the appearance of impropriety, including the appearance of bias, originated with the purported biblical admonition by St. Paul to "[a]bstain from all appearances of evil."[24] Three judges picked up on this theme and popularized the concept that judges should avoid the appearances of bias so that justice could be done and also be seen to be done. These three judges, Lord Hewart, Chief Justice William Howard Taft, and Justice Felix Frankfurter, viewed their admonition as aspirational rather than as a fundamental component of justice. But the idea that justice must satisfy the appearance of justice has been transformed from its hortatory origins into a principle of disqualification jurisprudence in the British Commonwealth and the United States. Some even erroneously claim that protecting the public from bad appearances is mandated by the doctrines of due process and natural justice.

A. FAULTY FOUNDATION

As characterized by early English and American judges and commentators, the idea that impartial judges must also appear impartial has its roots in St. Paul's professed admonition to the Thessalonians to "[a]bstain from all appearances of evil.[25] Applying St. Paul's directive in 1733, Lord Hardwicke found that an arbitrator should not take money from a party before making an award because the matter was "so tender a nature that even the appearance of evil in it is to be avoided[.]"[26] In the mid-1800s, a New York judge observed that "[a] referee . . . should not only avoid all improper influences, but even the appearance of evil."[27] An ethics advice column in the May 1882 issue of the *Canadian Law Times* similarly advised lawyers against practicing before a judge who was a "near kinsman," not because judges were weak, "but to avoid the very appearance evil."[28]

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[24] *Id.*

[25] *Id. See* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey-Or Revived Everywhere Else?* 28 SETON HALL L. REV. 315, 316 (1997) (relating the exhortation to "avoid the appearance of impropriety" to the exhortation to "abstain from all appearances of evil").

[26] Sheppard v. Brand, (1733) 94 Eng. Rep. 1057, 1057.

[27] Dorlon v. Lewis, 9 How. Pr. 1, 1 (N.Y. Cnty. Ct. 1851).

[28] John F. Hageman, *Professional Ethics: Should a Lawyer Practice in a Court in Which the Judge is His Near Kinsman?*, 2 CAN. L. TIMES 247, 247 (1882). *See also In re* Duncan, 42 S.E. 433, 441 (S.C. Sup. Ct. 1902) (advising lawyers to avoid the appearance of evil).

By the beginning of the twentieth century, the terms "suspicion of partiality," "suspicion of bias," and "appearance of evil" began to be used interchangeably.[29]

Avoiding the appearance of evil also formed the foundation for the first model code of judicial conduct promulgated by the American Bar Association (ABA) in 1924.[30] Canon 4 of the Canons of Judicial Ethics (1924 Canons) advised judges that their "official conduct should be free from impropriety and the appearance of impropriety" and that their personal lives should be "beyond reproach."[31] Substituting the secular word "impropriety" for the word "evil" did not disguise the biblical origin of the admonishment. Justice Robert Shaw of the Illinois Supreme Court accurately summarized the import of the ABAs first model judicial conduct code by observing that "[the 1924 Canons] were all succinctly summed up by St. Paul centuries ago when he advised the Thessalonians to abstain from all appearance of evil."[32]

But the courts, commentators, and ABAs reliance on the King James translation of St. Paul's remarks to the Thessalonians carried risks. The greatest risk, of course, was that St. Paul never made the statement attributed to him. And, indeed, the King James rendition of Paul's admonition is incorrect. Every major translation of the biblical text since King James recounts Paul's exhortation to be "abstain from every *form* of evil"[33] or the comparable "avoid every *kind* of evil."[34] St. Paul never assigned anyone the impossible task of refraining from evil appearances. Paul's statement was meant to emphasise that "while the good is one, evil has many forms." [35] Biblical scholars stress that while "every form of evil" is the correct translation, if the word "appearance" is used "care must be taken not to impart into the word the idea of semblance as opposed to reality: it is rather appearance in the sense of outward show; visible form" that Paul intended.[36] Thus, the prohibition against evil or improper appearances had a less

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[29] *See, e.g.,* Current Topic, 45 S.J. & R 417, 419-20 (1901) (stating that "any suspicion of partiality should be scrupulously avoided" and that "every appearance of evil should be removed from the administration of justice"); McCrory v. Rivett, 16 AUSTL. L. TIMES 174, 174 (1895) (equating a suspicion of bias with an appearance of evil).

[30] ABA, CANONS OF JUDICIAL ETHICS (1924).

[31] *Id.* at Canon 4.

[32] *In re* Harriss, 4 N.E.2d 387, 388 (Ill. Sup. Ct. 1936). At the time, lawyers were also subject to the appearance of evil prohibition. *See* United States v. Trafficante, 398 F.2d 117, 120 (5th Cir. 1964) ("The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hairsplitting nicety. We have found no exceptions to the exhortation to "abstain from all appearance of evil." 1 Thessalonians 5:22."); ABA Committee on Professional Ethics and Grievances, Formal Opinion 49 (1931) ("If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil.").

[33] *E.g.,* 1 THESSALONIANS 5:22 (New Revised Standard Version) ("abstain from every form of evil"); 1 THESSALONIANS 5:22 (American Standard Version) (same); 1 THESSALONIANS 5:22 (English Standard Version) (same).

[34] 1 THESSALONIANS 5:22 (New International Version) ("Avoid every kind of evil.").

[35] GEORGE MILLIGAN, ST. PAUL'S EPISTLES TO THE THESSALONIANS: THE GREEK TEXT, WITH INTRODUCTION AND NOTES 76—77 (1908).

[36] *Id.* (internal quotations omitted).

than auspicious beginning growing out of a non-existent, but often cited rule of conduct for Christians.

B. THE FATHERS OF THE APPEARANCE OF BIAS STANDARD

In 1924, Lord Hewart coined the often repeated phrase that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[37] In that same year, United States Chief Justice William Howard Taft served as chairman of the ABA committee that drafted the 1924 Canons.[38] The 1924 Canons "held firmly to one useful and durable theme: judges must not only do justice, it must *appear* that they do justice."[39] In 1954, probably borrowing from Lord Hewart and Chief Justice Taft, United States Supreme Court Justice Felix Frankfurter commented in *Offutt v. United States,* that "justice must satisfy the appearance of justice."[40] But the three jurists appear to have intended their laudable sentiment as an aspirational guide rather than as a rule of judicial disqualification. This conclusion is supported by the fact that no member of the triumvirate felt personally bound by the "standard" they set.

1. Lord Hewart

Lord Hewart failed to live by his maxim that judges must do justice in a manner that appears fair and impartial. Described as "biased and incompetent,"[41] "terrible,"[42] the "worst English judge within living memory,"[43] "the worst chief justice ever,"[44] and not having a "grain of judicial sense,"[45] he exhibited the inability to assume the role of the impartial decision-maker in either fact or appearance. As a judge, he continued to act as an advocate taking sides, improperly influencing juries, and effectively destroying any appearance of justice.[46]

James Spigelman, a former Chief Justice of New South Wales, described Lord Hewart's misconduct during a defamation trial to include:

- Ruling against the plaintiff without submissions from plaintiff's counsel;

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[37] R v. Sussex Justices, *ex p.* McCarthy, (1924) 1 KB 256, 259.
[38] ABA, Final Report and Proposed Canons of Judicial Ethics, 9 A.B.A. J. 449, 449 (1923).
[39] JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 190 (1974) (emphasis in original).
[40] 384 U.S. 11, 14 (1954).
[41] JOHN R. SPENCER, JACKSON'S MACHINERY OF JUSTICE 375 (8th ed., 1989).
[42] Michael Taggart, *From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century*, 55 U. TORONTO L.J. 575, 578 (2005).
[43] RICHARD MEREDITH JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 384 (6th ed., 1972).
[44] LORD PATRICK DEVLIN, EASING THE PASSING: THE TRIAL OF DR JOHN BODKIN ADAMS 92 (1985).
[45] *Id.*
[46] *See* Jackson, *supra* note 43, at 377-78 fn 3 (noting that Lord Hewart sometimes failed to remember "that he was on the bench and not still at the Bar")*; Taggart, supra* note 42, at 578 ("He never took off his advocate's garb as a judge, he took sides early and antagonized counsel.").

- Accusing the plaintiff, in the jury's presence, of concealing documents and failing to withdraw the charge when informed that the documents had been disclosed;
- Permitting improper cross-examination;
- Receiving ex parte communications from the jury;
- Orchestrating an early end to the trial when the jury indicated a tentative view in the defendant's favor;
- Failing to sum up and give a limiting instruction to the jury;
- Failing to leave issues to the jury. [47]

Off the bench Lord Hewart fared no better in maintaining the image of an impartial judge. In an address before the Fiftieth Annual Meeting of the American Bar Association, he pulled no punches in attacking an "invisible multi-millionaire dictator" who ran newspapers as "mere commercial commodities" with the "purpose to increase and inflame the already deplorable power of mere money in public affairs."[48] Lord Hewart further accused his target of a "kind of treason" by deliberately misleading the public by "active misrepresentations or by calculated suppression[.]"[49] In the same speech, the Lord Chief Justice foreshadowed the premise of his upcoming book, *The New Despotism*,[50] by condemning the overreaching of the administrative bureaucracy in England. His criticism of the bureaucracy before the ABA, however, was restrained compared to the "blistering attack" levied in his book against the "sinister conspiracy by officials and ministers to covertly sabotage the Constitution."[51]

Finally, Lord Hewart omitted any mention of the "appearance of justice" in his writings describing the essential elements of the court process. In *The New Despotism*, Hewart listed four "important ingredients in the work of the court": (1) an identified judge who is responsible for his decisions; (2) public access to court hearings; (3) decisions dictated by the impartial application of established principles; and (4) a full and fair hearing.[52] Similarly, Hewart omitted any reference to "appearances" in his definition of justice: "The idea of justice contemplates at least an independent and impartial judge who founds his judgment on evidence and reason."[53] Apparently, Lord Hewart considered his aphorism that

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[47] James Jacob Spigelman, *Seen to be Done: The Principle of Open Justic*e, OPEN TRIAL (Oct. 9, 1999), http://www.opentrial.info/images/2/20/SEEN_TO_BE_DONE_THE_PRINCIPLE_OF_OPEN_JUSTICE.pdf.

[48] ABA, REPORT OF THE FIFTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 210-11 (1927) . Chief Justice Taft introduced Lord Hewart to the ABA membership. Taft praised Hewart's ability, adaptability, learning, culture, skill, and knowledge of the law. Impartiality was not included in the list. *Id.* at 201.

[49] *Id.* at 210.

[50] GORDON HEWART, THE NEW DESPOTISM (1929).

[51] Taggart, *supra* note 42, at 576.

[52] Hewart, *supra* note 50, at 36.

[53] *Id.* at 44-45.

justice should not only be done but also be seen to be done an aspirational guide rather than a hard and fast rule.

2. Chief Justice William Howard Taft

Chief Justice William Howard Taft served as chairperson of the committee that drafted the 1924 Canons which repeatedly instructed judges to avoid the appearance of impropriety. In presenting the Canons to the ABA membership, Taft stated that the first model judicial code, "is not intended to have the force of law; it is the statement of standards, announced as a guide and reminder to the judiciary and for the enlightenment of others, concerning what the bar expects from those of its members who assume judicial office."[54] Taft also demonstrated his belief in the aspirational, non-binding nature of the 1924 Canons by ignoring Canon 28 and continuing his partisan political activities while on the United States Supreme Court.

Canon 28 cautioned that the public would inevitably suspect that a judge who actively promoted the interests of a political party would be "warped by political bias."[55] To avoid such suspicion, Canon 28 prohibited judicial participation in partisan political activity.[56] This prohibition reflected Taft's publically stated position that "a Judge should keep out of politics and out of any diversion or avocation which may involve him in politics."[57] But Taft did not feel obligated to practise what he preached or abide by the terms of Canon 28.[58] As observed by his biographer, "it is difficult to square Taft's partisan political activity with the canons formulated by the [American] Bar Association's Committee on Judicial Ethics which Taft himself headed." [59] Politics was never off-limits for Chief Justice Taft as he played a political role unmatched by any Chief Justice since Salmon P. Chase.[60] For instance, Taft successfully lobbied the editor of a Connecticut newspaper to editorialize against legislative changes to President Coolidge's tax plan in order to persuade the state's senators to vote against any changes.[61] He also "bluntly" instructed the vice-chair of the executive committee of the Republican National Presidential Nominating Convention of 1924 to pack the Resolutions Committee with supporters of the proposed world court to ensure a strong plank on the issue.[62] He wrote to the *New York Times* praising the nomination of Calvin Coolidge for President[63] and continuously "exerted enormous influence on legislators, Presidents, Cabinet members, editors, lawyers, and

[54]ABA, *supra* note 38, at 449.
[55] ABA, CANONS OF JUDICIAL ETHICS Canon 28 (1924).
[56] *Id.*
[57] Julius Marshuetz Mayer, *The Lawyer and the Judge*, 8 A.B.A. J. 441, 443 (1922) (quoting a letter authored by Taft dated July 13, 1921).
[58] *See* MACKENZIE, *supra* note 39, at 16 ("Taft rode roughshod over the canons' injunctions against political activity[.]").
[59] ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 279 (1983).
[60] *Id.* at 283.
[61] *Id.* at 279-80.
[62] *Id.* at 281.
[63] *Id.*

friends."[64] In short, any "[r]ight-thinking Republican could usually look to [Taft] for a helping hand."[65]

The father of the first model code of judicial ethics demonstrated his belief in the hortatory, non-binding nature of the 1924 Canons including its prohibitions against political activity and conduct creating an appearance of impropriety.

3. Justice Felix Frankfurter

Unauthorized ex parte communications between the court and a litigant improperly "awaken the suspicion" that certain individuals hold a special position of influence over the judge.[66] In addition, clandestine exchanges with a judge violate the tradition of open and public judicial proceedings,[67] and the duty to treat all litigants fairly. As observed by Lord Cottenham:

> Every private communication to a Judge, for the purposes of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is, to be treated as, what it really is, a high contempt of Court.[68]

One would assume that the author of the often-quoted axiom that "justice must satisfy the appearance of justice,"[69] would fastidiously avoid ex parte communications. But to the contrary, Justice Felix Frankfurter frequently conducted one-sided, private conversations concerning pending cases with assistant United States solicitor general and longtime friend, Philip Elman.[70] According to Elman, the two friends "fully discussed" the landmark desegregation case of *Brown v. Board of Education* while it was pending before the Court in 1954, the same year Frankfurter penned that "justice must satisfy the appearance of justice."[71] In 1955, Elman advised a lawyer that it would be a mistake to appeal a state ruling upholding a statutory prohibition against interracial marriage to the Supreme

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[64] *Id.* at 287. *See also* Donald F. Anderson, Building National Consensus: The Career of William Howard Taft 68 U. CIN. L. REV. 323, 347 (2000) (referring to Taft's successful attempt to have Pierce Butler appointed to the United States Supreme Court as "a breathtaking behind-the-scenes tour-de-force of a politicking that skirted all the traditional rules of judicial propriety . . . ."); David J. Danelski, Book Review "Brandeis and Frankfurter" 96 HARV. L. REV. 312, 326-27 (1982) ("Chief Justice Taft – who, among other things, used intermediaries for political purposes, drafted legislation, gave political advice to presidents, and urged newspaper editors to publish his views on matters of public concern - surpassed Brandeis in political activism.").

[65] Mason, *supra* note 59, at 279.

[66] ABA, CANONS OF JUDICIAL ETHICS Canon 33 (1924); *Id.* at Canon 17 (barring ex parte communications).

[67] Meinzer v. Buhl, 584 N.W.2d 5, 6 (Minn. Ct. App. 1998).

[68] *In re* Dyce Sombre (1849) 41 Eng. Rep. 1207, 1209.

[69] Offutt v. United States, 348 U.S. 11, 14 (1954).

[70] *See* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 624-45 (1987).

[71] Phillip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 844 (1987).

Court. Elman discussed the impending appeal with Frankfurter who agreed with Elman's assessment that it was the wrong time to bring the case to the Court.[72] Notwithstanding Elman's and Frankfurter's advice, the appeal was filed and, not surprisingly, dismissed by the Supreme Court.[73] On another occasion Elman "talked to" Frankfurter about voting to grant a petition for a writ of certiorari.[74] Indeed, Elman and Frankfurter conversed over the telephone almost every Sunday. During the conversations, Frankfurter used "code names" for the other justices when discussing their positions on pending cases.[75]

Frankfurter further violated the appearance of evil standard set by 1924 Canons by advising President Franklin Delano Roosevelt on political matters and on matters that would eventually come before the Court.[76] In 1940, he consulted with the President on his decision to run for a third term and provided a paper to Roosevelt detailing why a third presidential term would be in the country's best interest.[77] Frankfurter also consulted with Secretary of War, Henry Stimson, about the constitutionality of a special Military Commission created to try eight German saboteurs who landed on American soil in June 1942.[78] A month later, after the eight Germans were convicted by the Military Commission, the Supreme Court upheld the constitutionality of the tribunal.[79]

In sum, the idea that justice must satisfy the appearance of justice and that judges must avoid every appearance of impropriety initially served an inspirational rather than a doctrinal purpose. Lord Hewart cited no authority for his axiom, did not live by it, and did not refer to appearances as an essential component of justice in his later writings. The first model code of judicial ethics promulgated by the ABA in 1924 championed the appearance of impropriety standard, but considered it a non-binding guide for judges.[80] The author of the 1924 Canons, Chief Justice Taft, saw no need to comply with the Canons especially in the political arena. Like Lord Hewart, Justice Frankfurter cited no authority for his dicta in *Offutt v. United States* that justice must satisfy the appearance of justice and declined to incorporate the sentiment in his professional or personal life.

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[72] *Id.* at 845-46.
[73] *Id.* at 847.
[74] *Id.* at 849.
[75] *Id.* at 844.
[76] *See* JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 77 (1974) (stating that Frankfurter was a frequent "off-the-record" visitor to the White House and that his counsel was a great help to President Roosevelt).
[77] *Id.*
[78] Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 37-38 (2006).
[79] *Ex p. Quirin*, 317 U.S. 1, 48 (1942).
[80] ABA, CANONS OF JUDICIAL ETHICS (1924) Preamble.

C. APPEARANCES AND DUE PROCESS

Notwithstanding its humble, hortatory beginnings, the idea that justice must satisfy the appearance of justice took on a life of its own as judges and commentators transformed the ideal into a tenet of fundamental justice.[81] This transformation occurred because although Justice Frankfurter never claimed that due process protects against appearances of injustice, his dicta in *Offutt v. United States* seems to imply that due process mandates proper appearances.[82] This fact together with the Supreme Court's frequent repetition of the phrase, "justice must satisfy the appearance of justice,"[83] led lower courts and even some Supreme Court Justices to convert Frankfurter's aspirational maxim into a rule of constitutional law. So, in 1971, Justice John M. Harlan could state that "the appearance of even-handed justice ... is at the core of due process,"[84] and twenty years later Justice Blackmun could remark that "[d]ue process demands more than that the sentencer actually be impartial; rather "justice must satisfy the appearance of justice."[85] Lower federal courts and state courts began to echo the idea that due process demanded that a judge appear impartial [86] even though the Supreme Court had never held that the Constitution protected against the appearance of bias.[87]

Fortunately, in *Caperton v. Massey*, the United States Supreme Court dispelled the notion that an appearance of bias violates the constitution.[88] In *Caperton* the Court found that due process barred a judge from a case involving a litigant who had contributed nearly three million dollars to the judge's election campaign.[89] The Court held that the Due Process Clause disqualifies a judge when (1) the judge suffers from actual bias or (2) "the probability of actual bias on the

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[81] *See, e.g.*, Pederson v. State, 649 N.W.2d 161, 164 (Minn. 2002) ("In considering Pederson's due process claim, we are mindful that "justice must satisfy the appearance of justice."); Federal Deposit Ins. Corp. v. F & A Equipment Leasing, 800 S.W.2d 231, 243 (Tex. Ct. App. 1990) ("The [United States] Supreme Court stated that under the due process clause "justice must satisfy the appearance of justice . . . .").

[82] 348 U.S. 11, 14 (1954).

[83] *See, e.g., In re* Murchinson, 349 U.S. 133, 136 (1955); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988).

[84] Mayberry v. Penn, 400 U.S. 455, 469 (1971) (Harlan, J. concurring).

[85] Robertson v. California, 498 U.S. 1004, 1005 (1990) (quoting *In re* Murchison, 349 U.S., at 136).

[86] *See, e.g.,* Franklin v. McCaughtry, 398 F.3d 955, 961 (7th Cir. 2005) ("[T]he Supreme Court has decided that both actual bias and the appearance of bias violate due process principles."); Scott v. Anderson, 405 So. 2d 228, 236 (Fla. Ct. App. 1981) ("[T]he courts have ruled that disregard for the appearance of impartiality is a due process violation ... ."); Aiken County v. BSF, 866 F.2d 677, 678 (4th Cir. 1989) ("The due process clause protects not only against express judicial improprieties but also against conduct that threatens the "appearance of justice.").

[87] Del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363, 1371-72 (7th Cir. 1994); United States v. Rodriquez, 627 F.3d 1372, 1381-82 (11th Cir. 2010).

[88] Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009); Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 66 (2010).

[89] *Caperton*, 556 U.S., at 873.

part of the judge or decisionmaker is too high to be constitutionally tolerable."[90] The Court distinguished the due process test for disqualification from the more stringent appearance of bias test incorporated in state and federal rules that require recusal whenever a judge's "impartiality might reasonably be questioned."[91] Lower courts quickly adopted the distinction set forth in *Caperton* between disqualification constitutionally required and disqualification required by the appearance-based test adopted by state and federal courts.[92]

Caperton acknowledged that both due process and natural justice include the right to an impartial decision-maker.[93] This safeguard serves one purpose—to maximize the likelihood of an accurate decision.[94] There can be no due process or natural justice when a judge's conscious or unconscious bias dictates an outcome. So, when actual bias infests the judge's mind or the probability of actual bias is too high to be tolerated, justice requires removal of the judge.[95] *Caperton* confirmed that disqualification protects the accuracy of the fact-finding process and the objectivity of the judicial judgment. It does not protect against improper appearances or faulty perceptions.[96]

Thus, while proponents may continue to argue the desirability of appearance-based disqualification, they can no longer legitimately contend that constitutional law or natural justice requires the removal of a judge based on an apprehension or appearance of bias.

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[90] *Id.* at 877.
[91] *Id.* at 890.
[92] *E.g.*, People v. O'Neal, 2014 WL 231911, *5 (Mich. App. Jan. 21, 2014); Cook v. Smith, 2014 WL 527175, *7 (Cal. App. Feb. 11, 2014).
[93] R v. Gough, [1993] AC 646, 654 ("There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause... . [T]he rule has been extended . . . and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires.") (quoting R v. Altrincham Justices, *ex p*. Pennington, [1975] QB 549, 552); Johnson v. Johnson, (2000) 201 CLR 488 [38] ("It is a "fundamental rule" of natural justice and an "abiding value of our legal system" that every adjudicator must be free from bias."); Randall v. Brigham, 74 U.S. 523, 529 (1868) ("The words, the "law of the land," mean "due process of law," and this implies . . . the opportunity . . . be heard . . . by an impartial judge.").
[94] Addington v. Texas, 441 U.S. 418, 425 (1979) ("[W]e must be mindful that the function of legal process is to minimize the risk of erroneous decisions."); J. Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 48 fn 260 (1992) ("Indeed, all of procedural due process can be reduced to this interest in accuracy.").
[95] *Cap*erton, 556 U.S. at 877.
[96] *See* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard* 56 ARIZ. L. REV. 411, 431-33 (2014).

III. THE FORMS OF JUDICIAL BIAS

Recognizing the inherent limitations of any bias classification system,[97] this article categorizes the forms of bias as (1) actual bias, (2) presumed bias, and (3) apparent bias.

A. ACTUAL BIAS

The root meaning of judicial impartiality is the "lack of bias for or against either party to the proceeding."[98] Bias exists where a judge harbours a predisposition or prejudice for or against a litigant or litigant's case based on matters extraneous to the evidence and the law.[99] Because it is virtually impossible to prove that the deliberative process of a judge is infected with a personal prejudice, disqualification for actual bias is exceedingly rare.[100] Throughout the centuries, however, some judges have clearly demonstrated their actual bias. For example, during the trial of Sir Nickolas Throckmorton for treason in 1544,[101] one judge openly expressed his predisposition by advising Throckmorton that "since this matter is so manifest, and the evidence so apparent, I would advise you to confess your fault, and submit yourself to the queen's mercy.[102] Reaffirming his blatant partiality, the same judge later declared that he was "for the queen" as Throckmorton was for himself.[103] Dispelling any lingering doubt about the court's lack of impartiality, the judges fined and imprisoned the jurors after they returned a not guilty verdict.[104] Of course, at the time even a deeply held bias against a party did not constitute cause for the disqualification of a judge.[105]

Berger v. United States[106] provides the modern "classic example" of the extreme hostility and prejudgment necessary to justify the removal of a judge on

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[97] GRANT HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS 16 (2009). ("Classification debates can cause real confusion and be very misleading. They are sometimes very arid debates, and even unproductive.").

[98] Republican Party of Minnesota v. White, 536 U.S. 765, 775 (2002); *see* R v. Gough, [1993] AC 646, 670 (stating that bias exists where a judge regards "with favour, or disfavour, the case of a party") (Lord Goff).

[99] *See* Flaherty v. National Greyhound Racing Club Ltd., [2005] EWCA Civ 1117 [28] (citing R v. Inner West London Coroner, *ex p.* Dallaglio, [1994] 4 All ER 139, 156).

[100] Locabail (UK) Ltd. v. Bayfield Properties Ltd., [2000] QB 451, 472 (stating that cases of actual bias are rare because proving actual bias is difficult); James Goudkamp, *Facing up to Actual Bias*, 27 C.J.Q. 32, 32 (2008) ("[C]ases in which actual bias is alleged let alone proved are rare.").

[101] *Trial of Nickolas Throckmorton* in 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANOR FROM THE EARLIEST PERIOD TO THE PRESENT TIME 896 (Thomas Bayly Howell ed. 1809).

[102] *Id.* at 877.

[103] *Id.* at 891.

[104] *Id.* at 899-902.

[105] *See* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?,* 97 CORNELL L. REV. 191, 250 (2012) (stating that at common law bias did not constitute a ground for disqualifying a judge).

[106] 255 U.S. 22 (1921).

the basis of actual bias.[107] In *Berger,* three defendants charged with violating the United States Espionage Act moved to disqualify the trial judge because of his bias against persons of German heritage. The disqualification motion alleged that the judge made the following statements during the sentencing of a German-American in an unrelated case three months earlier:

> If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. ... One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda ... until it has affected practically all the Germans in this country. ... You have become a citizen of this country ... and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. ... I know a safe-blower . . . who is making a good soldier in France. He was a bank robber ... and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.[108]

Disqualification for actual bias is an ineffective method of ensuring judicial impartiality because it requires (1) evidence, usually from the judge's own mouth, of a pervasive personal bias, or (2) a statement by the judge declaring that she will ignore the evidence to achieve a predetermined result.[109]

B. Presumptive Bias

To compensate for the extreme difficulty in proving actual bias, courts interpret the doctrines of due process of law and natural justice to require recusal anytime there is a serious risk of actual judicial partiality.

In *Tumey v. Ohio,* the United States Supreme Court held that due process demands a judge's recusal, not only when the judge suffers from an actual bias, but also when the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."[110] Sixty years later, the Supreme Court characterized the *Tumey* test as requiring disqualification when circumstances create a "probability of actual bias . . . too high to be constitutionally tolerable."[111]

In *R v. Gough,* Lord Goff articulated a nearly identical sentiment. He found that it was not necessary to prove actual judicial bias if the possibility of bias rose to such a level that justice could not let the judge's decision stand.[112] Only a significant likelihood of bias sufficed. A mere suspicion of bias on the part of the

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[107] United States v. Wisecarver, 644 F.3d 764, 771 (8th Cir. 2011).
[108] *Berger*, 255 U.S. at 28-29.
[109] *See, e.g.,* Leighton v. Henderson, 414 S.W.2d 419, 419 (Tenn. Sup. Ct. 1967) (finding actual bias in the judge's statement, "I don't care what proof is in the record, if the Governor doesn't pardon this man, I am going to grant the [habeas corpus] petition . . . .").
[110] 273 U.S. 510, 533 (1927).
[111] Caperton v. A T Massey Coal Co., 556 U.S. 868, 877 (2009).
[112] R v. Gough, [1993] AC 646, 661, 668.

public was insufficient.[113] According to Lord Goff, "after ascertaining the relevant circumstances, the court should determine whether "there was a real danger of bias on the part of the [judge], in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."[114]

These presumptive bias tests assess the risk that the circumstances would cause the average judge to harbour an actual bias for or against a party. If the risk reaches an unacceptable level, the judge is disqualified even if no actual bias exists. This test is fact-based and has nothing to do with public perceptions. Whenever the circumstances create an unacceptable probability or likelihood of bias, the judge is disqualified under the fundamental precepts of constitutional law and natural justice. Thus, in *Caperton v. Massey*, the United States Supreme Court found that a three-million dollar contribution by a litigant in support of a judge's election campaign created a serious risk of actual bias on the part of the average judge.[115] As a result, the judge was disqualified as a matter of constitutional law whether or not he actually suffered from bias. Similarly, the disqualification statute applicable to federal judges in the United States mandates recusal when a judge possesses a financial interest in litigation or in a litigant.[116] This statutory prohibition is premised on the presumption that possession of an economic interest in litigation will likely diminish the average judge's objectivity. Similarly, the rule of automatic disqualification serves to uphold the maxim of natural justice that "no man is to be a judge in his own cause."[117] In effect, it is a rule of presumptive bias prohibiting a judge from deciding his own case because the judge would likely be biased in his own favour. Lord Vaughan Williams put it this way:

> If [a judge] has personally a pecuniary interest or an interest capable of being measured pecuniarily, the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go to the question whether he in fact acted partially or impartially. A bias is presumed from the mere fact of the existence of the interest.[118]

Due process and natural justice mandate the presumptive form of bias in order to protect the right to an impartial and unbiased decision. Presumptive bias is not concerned with appearances, apprehensions, or public perceptions. A reasonable lay person's suspicion of bias does not equate with a probability or a real possibility of bias.[119] The suspicions of the hypothetical lay observer find expression in another form of bias—apparent bias.

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[113] *Id.* at 665.
[114] *Id.* at 668.
[115] *Caperton*, 556 U.S. at 886.
[116] 28 U.S.C. § 455(a). *See also* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(1) (e) (2013).
[117] Dimes v. Proprietors of Grand Junction Canal, [1852] 10 Eng. Rep. 301, 315 (Lord Campbell).
[118] R v. Sunderland Justices, [1901] 2 KB 357, 371. *See also* Resolution Chemicals Ltd. v. H. Lundbeck, [2013] EWAC 3160 (Pat) [38] (employing the classification of "[a]pparent bias implied by operation of law" rather than "automatic disqualification").
[119] *See* R v. Gough, [1993] AC 646, 665.

C. *Apparent Bias*

The legal profession recognized that requiring recusal for actual and probable bias would, as far as humanly possible, ensure litigants an impartial decision-maker. But the profession wanted to do more—it wanted to use the disqualification process to build public confidence in the integrity and impartiality of the judiciary. Enhancing the judiciary's image would necessitate creating a new form of bias. The new image-enhancing bias rule would disqualify a judge, even a judge free from actual or probable bias, if the circumstances created the appearance that the judge lacked impartiality. While this "apparent bias" test takes different forms in common law jurisdictions, the courts consider the tests "essentially the same."[120]

In the United States, a federal or state judge must be removed when her "impartiality might reasonable be questioned"[121] by the fully informed, reasonable lay observer.[122] This standard protects against the appearance of judicial bias.[123] In Australia, "the well-settled"[124] appearance-based disqualification test is whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind" to the case.[125] New Zealand employs this same apprehension of bias formulation.[126] In the United Kingdom the test is referred to as an "apprehension of bias" test[127] or "apparent bias" test[128] but is defined in terms of possibilities: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." [129] Judge Hammond describes the United Kingdom's approach as "something of a hybrid" because it requires a possibility of bias instead of an apprehension of bias but assigns a non-judge, lay observer to make the decision.[130] While the English courts' use of the terms, "possibility of bias," "appearance of bias," and "apprehension of bias," is confusing, as a practical matter the recusal decision is dictated by the appearance of bias

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[120] Saxmere Co. v. Woolboard Disestablishment Co., [2010] 1 NZLR 35 [3] ("After some semantic differences, the [apparent bias] test in the United Kingdom and the test in Australia have become essentially the same."). *See also* Porter v. Magill, [2002] 2 AC 357 [100] ("[T]he reasonable apprehension of bias test, is in line with that adopted in most common law jurisdictions."); HAMMOND, *supra* note 97, at 36 (stating that the law around the Commonwealth "is broadly agreed as too the apparent bias test").

[121] 28 U.S.C. § 455(a); ABA, MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (A) (2007).

[122] Midwest Generation EME, L.L.C. v. Continuum Chemical Corp., 768 F. Supp. 2d 939, 945 (N.D. Ill. 2010) ("The Supreme Court is quite insistent on the "fully informed" component of the inquiry."); United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998) (describing the reasonable observer as someone outside of the judicial system).

[123] E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 61 (1973).

[124] Tedja v. Sony, [2014] FamCAFC 111 [11] (describing the apprehension of bias test announced in Ebner v. Official Trustee in Bankruptcy as "well settled").

[125] Ebner v. Official Trustee in Bankruptcy, (2000) 205 CLR 337 [33].

[126] Muir v. Comm'r of Inland Review, [2007] 3 NZLR 495 [62].

[127] Porter v. Magill, (2002) 2 AC 357 [103].

[128] BAA Ltd.. v. Competition Comm'n, [2010] EWCA Civ 1097 [31]-[33].

[129] Porter v. Magill, (2002) 2 AC 357 [103].

[130] HAMMOND, *supra* note 97, at 38.

rather than the possibility of actual bias. Like the United Kingdom, Canada labels its disqualification test as "the reasonable apprehension of bias"[131] but requires the reasonable observer to conclude that it is more likely than not that [the decision-maker] . . . would not decide fairly."[132] The Canadian Supreme Court finds no inconsistency in labelling the test as one of apprehension of bias but defining the test in terms of possibilities or likelihoods because in its view there is "no real difference" between apprehensions, suspicions, and likelihoods.[133] And this is the heart of the matter. When the lay observer renders the recusal decision, the test, however formulated, becomes one of appearances and not one of possibilities or probabilities.

Proponents argue that appearance-based recusal enhances public confidence in the judiciary in two ways. First, it increases public trust because the reasonable person decides disqualification issues. This objective standard, as the argument goes, is far superior to a subjective disqualification test in which a judge examines his own thoughts to determine whether to remain on a case.[134] Even better, the test defines the reasonable person as the average member of society. Who better to ensure public credibility in the recusal process than a lay person not associated with, or beholden to, the legal establishment? Second, it was hoped that the recusal decisions rendered by the reasonable lay observer would be more uniform and "less dependent on judicial caprice."[135]

Unfortunately, the reasonable apprehension of bias test has failed to accomplish its objectives. The primary fault for this failure lies with the test's spokesperson, the reasonable lay observer.

IV. THE REASONABLE PERSON

The ordinary, reasonable person decides whether apparent bias requires the disqualification of a judge in the British Commonwealth and United States.[136] Only through an objective appraisal of the circumstances, it is claimed, can public confidence in the judiciary be maintained. The whole idea of employing the reasonable person standard in judicial ethics is to "bring the public into the room."[137] Therefore, the arbiter of judicial recusal issues has been characterized

[131] Wewaykum Indian Band v. Canada, (2003) 2 SCR 259 [60] ("In Canadian law, one standard has now emerged as the criterion for disqualification . . . the reasonable apprehension of bias.).
[132] *Id.* (quoting Comm. for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369 [40]).
[133] Comm. for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369 [41].
[134] McKoski, *supra* note 96, at 415-16.
[135] RICHARD E FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.1, at 105 (2d ed. 2007).
[136] HAMMOND, *supra* note 97, at 38, 61.
[137] Lori Ann Foertsch, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 466 (2006).

as the "average citizen,"[138] the "average person on the street,"[139] and "a reasonable member of the public."[140] Lord Greer provided the most memorable description of the hypothetical observer as "the man in the Clapham omnibus" or "the man who takes magazines at home, and in the evening pushes the lawnmower in his shirt sleeves."[141] But the knowledge and personal traits attributed to the reasonable person of disqualification jurisprudence hardly compare to those of ordinary men and women. The hypothetical observer is more accurately described as a supernatural being who shares few characteristics with mere mortals.[142] And that exalted status should not come as surprise since the reasonable person was conceived, birthed, and raised by judges.[143]

A. THE REASONABLE PERSON'S PSYCHE

The reasonable person is, of course, reasonable,[144] fair-minded,[145] objective,[146] prudent, and disinterested.[147] He and she[148] is thoughtful, neither sensitive nor suspicious, not compliant or naïve and able to distinguish the relevant from the irrelevant.[149] Lord Hope summarized the mind-set of the hypothetical observer of judicial conflicts:

> The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. . . . [B]efore she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fairminded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.[150]

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[138] Gibson v. United States, 792 A.2d 1059, 1068 (D.C. 2002).
[139] Moran v. Clarke, 296 F.3d 638, 648 (8th Cir. 2002).
[140] R v. Abdroikov, [2007] 1 UKHL 37 [81] (Lord Mance).
[141] Hall v. Brooklands Auto Racing Club, [1933] 1 KB 205, 224 (Lord Greer).
[142] *See* Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough,* 68 C.L.J. 388, 395 (2009) (describing the fair-minded observer as more like the Archangel Michael than the person in the street).
[143] *See* Randy T. Austin, *Better Off with the Reasonable Man Dead or the Reasonable Man Did the Darndest Things,* ? BYU L. REV. 478, 482 (1992) (speculating that the reasonable person was probably the son of a judge).
[144] Johnson v. Johnson, (2000) 201 CLR 488 [2].
[145] Porter v. Magill, (2002) 2 AC 357 [103] (Lord Hope).
[146] Pepsico v. McMillien, 764 F.2d 458, 460 (7th Cir. 1985).
[147] State v. Carlson, 833 P.2d 463, 467-68 (Wash. Ct. App. 1992).
[148] Helow v. Advocate General for Scotland, [2008] UKHL 62 [1] (Lord Hope) (referring to the reasonable person as gender-neutral).
[149] R v. Abdroikov, [2007] UKHL 37 [81].
[150] Helow v. Advocate General for Scotland, [2008] UKHL 62 [2]-[3] (Lord Hope). *See also* Olowofoyeku, *supra* note 142, at 394-95 (providing a detailed description of the attributes of the reasonable person).

As expected, this ideal creature possesses an enormous wealth of information and insight.

B. THE KNOWLEDGEABLE, INSIGHTFUL REASONABLE PERSON

As observed by Lord Hope, the fair-minded observer is "informed." And informed means fully informed of all the facts and circumstances bearing on the disqualification issue.[151] The requirement that the observer possess complete knowledge comes easily since judges abhor the thought of anyone deciding a matter on incomplete information or on "what a straw poll of the only partly informed man-in-the-street would show."[152] As a result, the courts impute to the reasonable observer all types of highly specialized legal and factual knowledge far beyond the ken of the average person. In the United States for example, courts assume that an objective observer (1) knows the "facts of life" surrounding the judiciary;[153] (2) has examined the record of the proceedings and applicable law;[154] (3) appreciates the importance of the factual record in the context of the applicable law and accepted judicial practices;[155] (4) comprehends the rules of judicial ethics;[156] (5) is aware of the challenged judge's "jurisprudence over the years";[157] (6) understands the role politics plays in the selection of judges;[158] (7) realizes that

[151] Helow v. Advocate General for Scotland, [2008] UKHL 62 [3] ("[The observer] will take the trouble to inform herself on all matters that are relevant."); Saxmere Co. v. Woolboard Disestablishment Co., [2010] 1 NZLR 35 [76] (Tipping, J.) (stating that the disqualification tests in England and Australia emphasize "the need for the fair-minded observer to be fully informed of all relevant circumstances"); Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., 535 U.S. 229, 232–23 (2002) (stating that the federal disqualification statute assumes that the reasonable person knows all the circumstances); United States v. Holland, 519 F.3d 909, 914 (9th Cir. 2008) (imputing knowledge of all the circumstances to the reasonable person).

[152] *In re* Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988). *See also* R v. National Assembly for Wales, [2006] EWCA Civ 1573 [50] ("The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.").

[153] Kirby v. Chapman, 917 S.W. 2d 902, 909 (Tex. Ct. App. 1996).

[154] *Holland*, 519 F.3d at 914; E. I. Du Pont de Nemours & Co. v. Kolon Industries, Inc., 847 F. Supp. 2d 843, 862 (E.D. Va. 2012) ("The reasonable person also would know that the record confirms the presiding judge's recollection that [as a lawyer] he did not participate in the . . . case.").

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

[156] *In re* Jacobs, 802 N.W.2d 748, 754 (Minn. Sup. Ct. 2011) (assuming that the reasonable person understood Rules 2.2 and 2.4 of the Minnesota Code of Judicial Conduct).

[157] Miles v. Ryan, 697 F.3d 1090, 1091 (9th Cir. 2012).

[158] *See In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (appointed judges); Storms v. Action Wisconsin, Inc., 754 N.W.2d 480, 487 (Wis. Sup. Ct. 2008) (elected judges).

some litigants attempt to orchestrate a judge's recusal;[159] (8) recognizes the "realities of the practice of law";[160] and (9) knows that a judge would not risk impeachment or criminal prosecution by failing to disqualify himself when required by law.[161]

English authority exists for the proposition that the informed observer cannot be imputed with knowledge not possessed by the average person, or with facts exclusively within the judge's knowledge, or with a complete understanding of the law and the legal system.[162] But this proposition is honoured mainly in its breach. The reasonable person is presumed to be familiar with English legal traditions and culture including the fact that close relations between a lawyer and a judge enhances the administration of justice.[163] Moreover, courts assume that the observer puts great weight on the presumption of judicial integrity and the obligations imposed by the judicial oath.[164] Similarly, the personal circumstances of the judge including the judge's reputation are consistently attributed to the observer. In *JSC BTA Bank v. Ablyazov,*[165] for example, the court credited the man on the street with knowing that for years the challenged judge proceeded cautiously and judicially in the case and that "there can be few judges whose scrupulousness and conscientiousness and fairness have been more put to the test and not found wanting than this judge."[166] In *Bolkiah v. The State of Brunei Darussalam,* the court assumed that the reasonable person would know of the judge's close proximity to retirement, "unblemished reputation" and lack of any personal or professional ambition. [167]

The fine points of the law, an insider's understanding of the legal system, and the backgrounds of witnesses also lie within the knowledge of the hypothetical individual charged with the task of deciding recusal issues.[168] For example, the lay observer in the United Kingdom is assumed to be highly conversant with the background of expert witnesses and the rules governing the admission of expert testimony. In *Resolution Chemicals Limited v. H. Lundbeck,* the court charged the reasonable person with knowing that expert witnesses are "obligated

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[159] Brown v. Brown, 2011 WL 1888201, *3 (Conn. Super. Ct. 2011).
[160] *Ex p.* Ellis, 275 S.W.3d 109, 116-17 (Tex. Ct. App. 2008).
[161] *See* Central Telephone Co. v. Sprint Communications, Inc., 2011 WL 6178652 (E.D. Va. Dec. 12, 2011).
[162] Locabail (UK) Ltd. v. Bayfield Properties Ltd., [2000] QB 451, 477 (stating that matters outside the ken of the ordinary member of the public should not be relied upon); J. Hughes & D.P Bryden, *Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification*, 36 DALHOUSIE L.J. 171, 183 (2013) ("A number of judges in England and New Zealand have expressed concern that courts should not attribute knowledge to the "reasonable observer that would not be shared by members of the general public.").
[163] Taylor v. Lawrence, [2003] QB 528 [61] (Lord Woolf).
[164] *See* Robertson v. HM Advocate, [2007] SLT 1153 [63].
[165] [2013] 1 WLR 1845.
[166] *Id.* at 1873.
[167] [2007] UKPC 62 [21].
[168] *See* Finín O'Brien, Nemo Iudex in Causa Sua*: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies*, 2 IR. J. LEGAL STUD. 26, 48 (2011).

by CPR Part 35" to assist courts by providing unbiased opinions. [169] Other facts attributed to the observer in that case included (1) that the expert was an "eminent scientist," a fellow of the Royal Society, and knighted for service to chemistry; (3) that the expert had testified in "over 884 parallel proceedings"; (4) that any issue concerning the expert's credibility was unlikely; and (5) what mattered to the judge was not the expert's opinions but the reasons for the opinions.[170]

BAA Ltd. v. Competition Commission,[171] illustrates the difficulty in relying on the average person as the arbiter of recusal decisions. Simply put, no ordinary, everyday observer could possess, much less understand, the information attributed to him by the Court of Appeal.

In 2007, the Office of Fair Trading asked the Competition Commission (Commission) to investigate the supply of airport services in the United Kingdom. The Office of Fair Trading believed that if an adverse effect on competition existed, it could be remedied if BAA sold off some of its airports. The Commission created a six member panel, including Professor Peter Moizer, to conduct the investigation. Two years later the Commission found that BAAs ownership of multiple airports adversely affected competition and suggested that BAA divest itself of three airports.[172] BAA challenged the Commission's finding claiming that Professor Moizer's membership on the investigatory panel created an appearance of bias because he also served as an advisor to the Greater Manchester Pension Fund (Fund) which was owned by ten local authorities that were shareholders of the Manchester Airports Group (MAG), a competitor of BAA.[173] In considering whether Professor Moizer's affiliation with the Fund created an appearance of bias, the Court of Appeal attributed the following information to the lay observer:

- Professor Moizer, a chartered accountant and professor of accounting, recognized the importance of the investigatory panel members' impartiality in fact and in appearance;
- The Fund had no separate corporate status and was owned by the ten local authorities that made up the MAG;
- One of the ten local authorities administered the Fund and further delegated the Fund's management to a Management Panel consisting of councilors from the ten local authorities;
- The Management Panel was assisted in its duties by an Advisory Panel;
- Fund administrators were required to consider advice from others before making decisions;
- Professor Moizer was a paid advisor to the Fund since 1987, attended joint meetings of the Management Panel and Advisory Panel

[169] [2013] EWHC 3160 (Pat) [57], appeal dismissed (2014) 1 WLR 1943.
[170] *Id.*
[171] [2010] EWCA Civ 1097.
[172] *Id.* at [1].
[173] *Id.* at [2].

and provided advice "as a matter of course" on investments such as the Gatwick Airport;

- Moizer was a trusted, highly influential, "wise man" and possessed a virtual veto power over a proposed investment;
- The ten local authorities owned all the shares in MAG which in turn owned Manchester Airport and other United Kingdom airports.
- The ten local authorities appointed two members to the MAG board and exercised control over MAG business through a shareholder committee which received reports from MAGs board on business plans, investments, and finances;
- MAG made substantial pension contributions to the Fund;
- The connection between the Fund and MAG was close;
- In 2002, Moizer raised the issue of his connection to MAG with the Competition Commission.
- In 2002, the Competition Commission's legal advisor considered Moizer's connection with MAG problematic in that he might influence the outcome of the investigation involving MAG;
- The Office of Fair Trading identified BAAs ownership of five airports as likely adversely impacting competition and its customers;
- MAG and other airport operators in the United Kingdom, including BAA, were competitors.[174]

This and other information was attributed to the ordinary observer, the gentleman who subscribes to magazines and mows the lawn in his shirtsleeves. In fact, only one person could know and understand the complicated facts as recited in the opinion—the judge who wrote the opinion. In the *BAA* case, as in all cases employing the appearance of bias test, the judge looks in the mirror and sees the reflection of the fair-minded, lay observer.[175]

C. *The Reasonable Person is Not an Insider*

Because the rationale underpinning the reasonable person disqualification standard is to build public confidence, the observer cannot, in theory at least, be a judge or a lawyer.[176] Notwithstanding this fact, the courts imbue the lay observer with precisely the same factual and legal information possessed by the

[174] *Id.* at [8].

[175] *See* Johnson v. Johnson, (2000) 201 CLR 488 [49] (Kirby, J.) (observing that attributing all the judge's knowledge to the hypothetical observer would in effect be holding a mirror up the judge and seeing the reasonable person); Olowofoyeku, *supra* note 142, at 404 (positing that by attributing detailed information to the observer, "this impartial observer might as well be a judge").

[176] *See* Johnson v. Johnson, (2000) 201 CLR 488 [53] (Kirby, J.) (stating that the reasonable person is not a lawyer); United States v. De Temple, 162 F.3d 279, 287 (4th Cir. 1998) ("[T]he

challenged judge. Moreover, the observer understands the legal system, legal traditions, judicial ethics, and the importance of the judicial oath on a par with the judge. In other words, the observer possesses every bit of information the challenged judge thinks the observer needs to correctly decide the recusal issue.[177] The danger that the reasonable person and challenged judge might be the same individual has not escaped notice. In *Saxmere Company Ltd. v. Wool Board Disestablishment Company Ltd.*, Justice McGrath hinted at the potential morphing of the objective observer into the challenged judge:

> The Commonwealth case law does recognize that in this area attributing knowledge of information to the hypothetical observer may transform the process from one of ascertaining the perception of a member of the general public, so that it becomes that of an insider in the legal world. I accept that common law technique of looking at an issue through the eyes of a reasonable person is amenable to that sort of transformation.[178]

Under appearance-based recusal, the transformation of the reasonable person into the challenged judge is inevitable.

D. THE ULTIMATE INSIDER DECIDES RECUSAL ISSUES

If bringing the public into the recusal process remains a goal of the reasonable person standard, a jury might be the best method of litigating disqualification claims.[179] Alternatively, a judge other than the challenged judge could hear recusal requests. At least in that way a judge not embroiled in the controversy would apply the fair-minded observer test. But under current practice, neither a jury nor an outside judge decides recusal issues. As a general rule, judges in the British Commonwealth and in the United States decide their own disqualification motions.[180] This rule prevails because courts consider the challenged judge to be in the best position to (1) know the relevant facts;[181] (2) weigh the interest of enhancing public confidence against the possibility that a litigant seeks recusal to secure a more favourable judge;[182] and (3) consider the consequences of the delay inherent in transferring the case to another judge.[183] In sum, the reasonable person standard is applied by the ultimate insider, the judge whose impartiality is being questioned.

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hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system."); Olowofoyeku, *supra* note 142, at 393 (stating that the reasonable person is outside the judiciary and legal profession).

[177] *See* Olowofoyeku, *supra* note 142, at 404.

[178] Saxmere Co. v. Woolboard Disestablishment Co., [2010] 1 NZLR 35 [97] (McGrath, J.).

[179] *See* Olowofoyeku, *supra* note 142, at 407-408.

[180] *See* HAMMOND, *supra* note 97, at 42 ("[I]n the British Commonwealth, the practice has been that it is the judge who is sought to be recused who determines this issue."); *id.* at 61 ("The general practice in the United States, both in federal and state jurisdictions, is that it is the judge to whom the application to recuse is directed who determines the application."). Exceptions to this general rule exist. *See, e.g.*, ARIZ. RULES OF CRIMINAL PROCEDURE R 10.1(c) (2014) (providing that motions to disqualify shall be heard by a judge other that the challenged judge).

[181] HAMMOND, *supra* note 97, at 83.

[182] *Id.*

[183] United States v. Mitchell, 377 F. Supp. 1312, 1315-16 (Dist. Ct. D.C. 1974).

V. The Flaws in Appearance–Based Disqualification

Stripping a judge of authority to hear a case on the word of the hypothetical observer is flawed in several respects. First, contrary to its intended purpose, appearance-based disqualification has failed to reduce the arbitrariness or increase the predictability of recusal decisions. Second, while purporting to assign the person on the street as the arbiter of disqualification issues, the hypothetical observer turns out to be anything but an ordinary member of society. Third, no evidence supports the claim that appearance-based disqualification enhances public confidence in judicial impartiality. Finally, the doctrine that permits litigants to waive an appearance of judicial bias severely undercuts the fundamental proposition that disqualification on the basis of apprehensions or appearances protects the public, not the parties.

A. The Failure to Foster Uniformity and Predictability

Appearance-based disqualification has not brought uniformity, consistency, or predictability to recusal decisions.[184] In 1995, Professors Shaman and Goldschmidt identified this failure during an empirical study of judicial disqualification in the United States.[185] After observing the difficulty that judges face in interpreting and applying "disqualification rules that are often extremely general, ambiguous or conflicting," the study's authors concluded that "judicial disqualification frequently is subjective, random and arbitrary."[186] Shaman and Goldschmidt specifically highlighted the futility of attempting to apply an appearance of bias recusal rule: "In particular, cases that involve only the appearance of partiality pose a special dilemma for judges, who believe that they are in fact impartial but must make the difficult determination of whether in the public eye they appear to be biased."[187]

Fifteen years later, after surveying Canadian judges on common recusal situations, Professors Bryden and Hughes similarly concluded that:

> Our findings demonstrate that there is a wide divergence of opinion among respondents in their attitudes toward recusal in a number of reasonably common marginal scenarios. We identified a number of factors that seem to have some influence on the response of judges to some scenarios ... though it seems evident to us that there is no single approach that is likely to produce dramatic improvements in the overall level of consistency in marginal cases.[188]

The lack of consistency in recusal decisions is less than surprising because of the inherent vagueness of a legal standard that requires a judge's removal when

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[184] McKoski, *supra* note 96, at 433-34.

[185] Jeffrey M. Shaman & Jona Goldschmidt, Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes 4-5 (1995).

[186] *Id.*

[187] *Id.*

[188] Philip Bryden & Jula Hughes, *The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification*, 48 Alberta L. Rev. 569, 609 (2011).

an apprehension of bias exists or when a judge's impartiality might reasonably be questioned. Judgments are bound to vary significantly when interpreting and applying rules that are "frighteningly empty of content."[189] In addition, a legal standard dependent on perceptions and impressions prevents a recusal jurisprudence from developing because each matter is "highly fact-specific."[190] Consequently, judges can hope for little guidance from previous court decisions because each depended upon its own highly particularized facts. Indeed, some courts have gone so far as to caution judges against consulting case law for assistance with recusal issues.[191]

B. THE REASONABLE PERSON SHARES NOTHING IN COMMON WITH MEMBERS OF THE PUBLIC

Investing the fair-minded lay observer with the authority to make recusal decisions is premised on the notion that public confidence in the judiciary is "more likely to be maintained through a test which reflect[s] the reaction of ordinary members of the public to the irregularity."[192] But as demonstrated in Part III.B., the level of knowledge attributed to the ordinary lay observer "produces an extraordinary and wholly unrealistic creature" who shares more in common with the Archangel Michael than with a person sitting in a church pew.[193]

The hypothetical observer's evaluation of the circumstances surrounding a recusal issue enhances public trust in judges only if the observer bears some resemblance to an ordinary member of the public. The objective observer standard works so well in automobile negligence lawsuits because the hypothetical person is in complete sync with the person on the street. Both understand and accept the proposition that an automobile driver breaches his duty of care by disregarding a traffic control signal or by violating another mandatory rule of the road. Unfortunately, there are no similarly well-accepted ground rules, or rules of the road, when it comes to the appearance of improper judicial conduct. Because the

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[189] U.S. SENATE, JUDICIAL DISQUALIFICATION: HEARING BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE COMMITTEE ON THE JUDICIARY ON S. 1064 (1971 &1973) (statement of John P. Frank).

[190] Wewaykum Indian Band v. Canada, (2003) 2 SCR 259 [77] (stating that the reasonable apprehension of bias test is "highly fact-specific"); Richard E. Flamm, *History of and Problems with the Federal Disqualification Framework*, 58 DRAKE L. REV. 761 (2010) ("[E]xisting judicial disqualification jurisprudence does not provide much guidance to parties and their counsel as to whether disqualification is warranted in a particular case.").

[191] *See, e.g.,* United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008) ("Disqualification . . . is necessarily fact-driven and may turn subtleties in a particular case. Consequently, "the analysis of a particular [disqualification claim] must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue.").

[192] Saxmere Co. v. Woolboard Disestablishment Co., [2010] 1 NZLR 35 [62] (Tipping, J.) (citing Webb v. The Queen, (1994) 181 CLR 41, 50-52).

[193] Olowofoyeku, *supra* note 142, at 393-95. Although it is unlikely that even Archangel Michael would possess the knowledge and understanding of the internal workings of the Competition Commission, pension funds, and airport authorities attributed to the observer in BAA Ltd. v. Competition Comm'n. *See* text to notes 171-74 *supra*.

appearance of partiality, like beauty is in the eye of the beholder,[194] members of the public share no common understanding of what constitutes an improper appearance.

C. *Relying on Appearances to Build Public Confidence*

The major selling point for the appearance of bias test is that it "will be capable of engendering the necessary public confidence in the integrity of the judicial system."[195] But no empirical data supports the conclusion that removing a judge on the basis of a bad appearance increases public esteem for the judiciary. Some commentators posit that disqualifying judges on perception instead of reality actually damages public confidence.[196] Supporting this view, some public opinion surveys show a slight decline in trust in the courts since the adoption of the apprehension of bias test in the middle 1970s.[197] Objectively speaking, it is unlikely that a public opinion poll could ever establish a correlation between appearance-based recusal and the degree of trust placed in the judiciary. In order for such a survey to have any meaning the respondents in the United States, for example, would have to know that under federal and state law the test for judicial disqualification is whether a judge's impartiality might reasonably be questioned. And it can be safely assumed that the average American is unaware of this recusal standard because even rudimentary facts about the judiciary and the judicial process remain a mystery to most people in the United States. For example, one study disclosed that only 38% of respondents could name all three branches of government and less than half of the respondents (48%) knew that a 5-4 Supreme Court decision had the same effect as a unanimous decision. The same survey indicated that 15% of Americans could identify John Roberts as the Chief Justice of the Supreme Court which is especially disheartening when contrasted with another poll finding that 79% of Americans could name at least two of the seven dwarfs.[198] The public simply cannot be inspired to place greater trust in the judiciary by a recusal standard it never heard of.

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[194] *See* People v. Diaz, 498 N.Y.S.2d 698, 701-702 (N.Y. Cnty. Ct. 1986) ("Partiality, or the appearance thereof . . . like beauty, is in the eye of the beholder.").

[195] Saxmere Co. v. Woolboard Disestablishment Co., [2010] 1 NZLR 35 [99] (Tipping, J).

[196] *See, e.g.,* Sarah M .R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 18-21 (2007) (questioning the ability of appearance-based disqualification to build public confidence).

[197] Jeffrey Jones, *Low Trust in Federal Government Rivals Watergate Era Levels*, GALLUP NEWS, Sept. 26, 2007, http://www.gallup.com/poll/28795/low-trust-federal-government-rivals-watergate-era-levels.aspx; Jeffrey Jones, Americans' Trust in Government Generally Down This Year, GALLUP NEWS, Sept. 26, 2013, http://www.gallup.com/poll/164663/americans-trust-government-generally-down-year.aspx ("Trust in the judicial branch, though still high compared with the other branches, is now the lowest Gallop has measured by one point.").

[198] *We Know Bart, but Homer is Greek to Us*, L.A. TIMES, Aug. 15, 2006, http://articles.latimes.com/2006/aug/15/nation/na-dwarfs15 (reporting the results of a Zogby International poll of 1,213 people residing across the United States).

D. PERMITTING LITIGANTS TO WAIVE DISQUALIFYING FACTORS

Permitting parties to authorize a disqualified judge to hear a case makes sense when the disqualifying factor is an actual or probable bias on the part of the judge.[199] Both due process and natural justice guarantee an impartial court to protect a party's right to a fair hearing.[200] Since this right belongs to the litigants, the litigants can waive it.[201] But rules mandating a judge's removal for an appearance of bias do not protect the parties but instead serve to promote public confidence in judicial impartiality.[202] When a judge possessing an actual bias hears a case, the litigants sustain the injury. But when a judge suffers from only an appearance of bias the injury is not to the parties but to the judicial system.[203] Therefore, the parties should have no authority to waive a rule prohibiting the appearance of bias.[204] In other words, a litigant cannot waive a right not possessed by the litigant but possessed collectively by the members of society.

But logic seldom prevails in the world of appearances. Waiver rules in the United States illustrate this point. Virtually every state court prohibits a party from remitting a judge's disqualification based on actual bias. [205] Likewise, all federal courts bar waiver in the case of actual bias.[206] Disallowing waiver of an actual bias fails to recognize that the rule against bias protects litigants and so litigants should be able to waive it. But at least state and federal courts uniformly apply this non-waiver rule in cases of actual bias.

On the other hand, no uniformity exists in the state and federal courts' treatment of the waiver of appearance of bias claims. The states permit waiver of any and all appearances of judicial bias.[207] The federal courts, however, permit waiver of some but not all appearance of bias claims. By statute, federal courts may not permit waiver of an appearance of bias claim arising from (1) the judge's personal knowledge of the case; (2) the judge's service as a lawyer in the case or association with a lawyer who served in the case; (3) the judge's financial interest or a close family member's financial interest in the case; or (4) a close family member's participation in the case as a party, lawyer, or witness.[208] All other appearance-based conflicts, such as where a lawyer appears before a judge while simultaneously representing the judge in his divorce case, can be waived by the parties.

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[199] State and federal courts in the United States authorize parties to waive certain disqualifying factors provided that the judge discloses the basis for the disqualification and the parties, without participation by the judge, agree to remit the disqualification. *See* ABA, MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007); 28 U.S.C. § 455(e).

[200] *See* authorities cited in note 93, *supra*.

[201] *See* Bridgette Toy-Cronin, *Waiver of the Rule Against Bias,* 9 AUCKLAND U. L. REV. 850, 874 (2002).

[202] *See* United States v. Balistrieri, 779 F.2d 1191, 1204 (7th Cir. 1985) (stating that disqualifying a judge for an appearance of bias "is not intended to protect litigants from actual bias in their judges but rather to promote public confidence in the impartiality of the judicial process").

[203] *Id.* at 1204-05.

[204] *See* Toy-Cronin, *supra* note 201, at 874.

[205] *See* ABA, MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007).

[206] 28 U.S.C. § 455(e).

[207] *See* ABA, *supra* note 205.

[208] 28 U.S.C. § 455(e).

Authorizing parties to waive all or some forms of apparent bias conflicts with the premise that appearances-based disqualification protects society, not parties. These conflicting appearance of bias waiver rules also send a confusing message to the public. For instance, a state court judge sitting in the city of Chicago, Illinois, may accept a party's waiver of disqualification where the judge's former law partner previously represented a litigant in the same matter that is before the judge.[209] But a federal judge sitting in Chicago cannot accept a waiver in the identical situation.[210] How are these diametrically opposed views, both of which are justified by safeguarding the image of the judiciary, justified or explained to the people of Chicago who serve as litigants, witnesses, and jurors, in both court systems?

VI. THE REMEDY

Recommendations to rectify the short comings of appearance-based recusal include (1) assigning a judge other than the challenged judge to hear the recusal request;[211] (2) requiring judges to explain recusal decisions in written orders;[212] (3) improving the communication of common recusal practices through judicial education;[213] and (4) redefining the apprehension of bias test to require a balancing of the circumstances with the impact of the recusal decision on the operation and reputation of the court.[214] Unfortunately, these proposals fail to address the two fundamental flaws of the recusal regimes in the British Commonwealth and United States—basing recusal decisions on appearances rather than facts and relying on the reasonable lay person to make the decision.

A. BASING RECUSAL DECISIONS ON APPEARANCES.

Just as for other important decisions in life, recusals should be based on facts not appearances. Ephemeral appearances are in the eye of the beholder and every beholder can view differently whether an apprehension or appearance of bias exists.[215] Whether a judge must be removed from a case should be decided on the facts, in other words, on the probability or likelihood that the judge will be influenced by irrelevant matters. If a preponderance of the evidence indicates a probability or likelihood of bias then the judge is disqualified. If the evidence falls

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[209] ILLINOIS CODE OF JUDICIAL CONDUCT, Canon 3E (2014).
[210] 28 U.S.C. § 455(e).
[211] *See, e.g.*, Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances,* 36 FORDHAM INT'L L.J. 136, 160-61 (2013).
[212] *See, e.g.*, Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of* Cheney v. United States District Court, 84 N.C. L. REV. 181, 214 (2005).
[213] Bryden & Hughes, *supra* note 188, at 609 (suggesting that a "promising approach" to improving consistency in marginal recusal situations is the "clearer communication of common [recusal] practices and expectations" through either the promulgation of rules or through judicial education).
[214] Hughes & Bryden, *supra* note 162, at 187, 192.
[215] *See* People v. Diaz, 498 N.Y.S.2d 698, 701-702 (N.Y. Cnty. Ct. 1986).

short, recusal in not required. Under the revised test suggested in this article, probability or likelihood replaces apprehension.

B. REPLACING THE FAIR-MINDED LAY OBSERVER

The reasonable person standard will never increase public trust in the judiciary because the hypothetical person bears no resemblance to any member of the public. Even reconstructing the observer to reflect the characteristics of the average person would not increase public confidence because the public overwhelmingly believes that judges are out of touch with the thinking of the average person. Approximately 80% of the persons responding to the British Crime Survey expressed the opinion that judges were out of touch and 75% of respondents in a Scottish survey "thought judges were out of touch with what ordinary people think."[216] In a 2009 survey, 58% of Australians disagreed with the statement "judges are in touch with what ordinary people think."[217] Therefore, even if the hypothetical observer embodied the precise beliefs, knowledge, intelligence, and attitudes of the average person no increase public trust would result. A public that does not believe in the judiciary's ability to accurately gauge how the person on the street thinks, simply will not have faith in a judge's opinion as to whether the average person would apprehend bias in a recusal situation.

The solution is painful but simple. The fair-minded, reasonable lay observer must be retired and replaced by a new standard bearer—the fair-minded reasonable judge. In other words, the hypothetical observer best equipped to evaluate and decide recusal issues is the reasonable person experienced and skilled in the art of judging.[218]

Assigning the hypothetical, reasonable judge as the arbiter of recusal issues has several advantages. First, while the public does not believe that judges know how lay people think, the public will accept that judges know how the average judge thinks. And for good reason. Judges receive training in the art of judging, deal with judicial colleagues every day at work and while serving on committees and attending conferences. Sometimes their only friends are judges. No one, including judges, knows how the hypothetical lay observer analyzes a situation but judges certainly know how the average judge analyzes a situation. Second, employing the average judge rather than the average lay person solves the problem of how much information to attribute to the observer. The average judge possesses and understands every relevant fact, legal authority, ethical standard, and professional norm. That's the judge's job and the public expects judges to do their job and act on complete information. Third, substituting the average judge for the reasonable person does not make the recusal test any less "objective." The

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[216] Kate Warner et al., A*re Judges Out of Touch?* 25 CURRENT ISSUES CRIM. JUST. 729, 729-30 (2014) (citing studies). *See also* Jack Doyle, *Out-of-Touch Judges to be Given Lessons in Popular Culture (After One Asked Who Are the Beatles?),* DAILY MAIL, June 16, 2012, http://www.dailymail.co.uk/news/article-2160110/Out-touch-judges-given-lessons-popular-culture-asked-Beatles.html ("Historically, judges have been criticized for aloofness and being out of touch with normal people.").

[217] *Id.*

[218] *See* Raymond J. McKoski, *Judicial Disqualification after* Caperton v. A.T. Massey Coal Company: *What's Due Process Got to Do with It?* 63 BAYLOR L. REV. 368, 375 (2011).

judge assessing the facts does not subjectively determine if she can be fair. Instead, the judge determines whether the circumstances present a serious risk of partiality on the part of the average judge. While the average judge may be a hypothetical being, as a construct she is much worldlier than the hypothetical lay observer.

While it might seem unthinkable to abandon the lay observer after so many years of faithful, if not helpful, service the truth is that the average judge rather than the reasonable lay person has been successfully employed to resolve disqualification issues. Under the Due Process Clause of the United States Constitution, it is the average judge, not the average lay person who decides whether a probability of bias exists on the part of the challenged judge.[219] As recognized by the Fifth Circuit Court of Appeals, the arbiter under statutes and court rules mandating recusal for an appearance of bias is different from the arbiter of recusal decisions under the probability of bias standard embodied in due process.[220] The Fifth Circuit held that "[t]he Due Process Clause requires a judge to step aside when a *reasonable judge* would find it necessary to do so" while the determination of whether an appearance of bias exists is made by "*others*" from outside the legal profession.[221] And this distinction makes sense. While the average lay person may be in a position to determine how things appear to the public, the average judge is best equipped to determine the likelihood, danger, or probability of actual bias influencing a judicial decision.

Although the United States Supreme Court employs the average judge to assess recusal issues arising under the Due Process Clause, it does not appear that Lord Goff considered using the average judge as the standard by which to evaluate recusal issues in *Gough*.[222] He considered and rejected the use of the reasonable lay person and chose instead to focus on the subjective mind-set of the "relevant member of the tribunal in question . . . in the sense that he might unfairly regard . . . with favour, or disfavour the case of a party to the issue . . . ."[223] And of course, since *Porter v. McGill*, the reasonable lay person decides recusal issues in the United Kingdom.[224] It is submitted that the United Kingdom should assign the average judge, not the average lay person, to determine if a "real possibility of bias" exists on the part of the challenged judge.

C. *Maintaining Public Confidence in Judicial Impartiality*

Enhancing public confidence in the judiciary is best accomplished by ensuring actual judicial impartiality rather than protecting the appearance of impartiality. To the extent that a jurisdiction wishes to guard against the appearance

[219] *See* Aetna Life Ins Co. v. LaVoie, (1986) 475 U.S. 813, 822 (quoting Ward v. Monroeville, (1972) 409 U.S. 57, 60).
[220] United States v. Couch, 896 F.2d 78 (5th Cir. 1990).
[221] *Id.* at 82 (emphasis added). *See also* Public Citizen Inc. v. Bomer, 115 F. Supp. 2d 743, 745 (W.D. Texas 2000) ("The Due Process Clause requires a judge to recuse himself only if a reasonable judge in his situation would find it necessary to do so.").
[222] R v. Gough, [1993] AC 646, 670 (Lord Goff).
[223] *Id.*
[224] [2002] AC 357 [102]-[103].

of partiality, it may do so by enacting legislation or court rules identifying circumstances that create a bad appearance and then mandating recusal in those enumerated situations.

1. Promoting Actual Impartiality

Keeping up appearances is not the best way to ensure that the judiciary enjoys the public's trust. As recognized by Lord Hale centuries ago, it is actual impartiality that legitimizes a justice system. In his *Rules for Judicial Guidance*, Hale emphasized impartiality in fact by instructing judges to avoid prejudging cases, to set aside personal passions, and not to be influenced by "compassion to the poor, or favour to the rich."[225] Appearances did not concern Hale because he knew that if a judge was partial to a litigant's case, 'his Partiality and Injustice will be evident to all By-standers.'[226] Putting Hale's theory into practice, the best way to enhance actual judicial impartiality is by maximizing the ability of judges to overcome conscious and unconscious biases. Effective methods to increase impartiality include, judicial education focused on recognizing and combating heuristics and subconscious biases that interfere with objective decision-making; increasing discipline for judges who exhibit partiality; placing greater emphasis on the trait of impartiality in selecting and evaluating judges; and arguably, at least, testing judicial candidates for implicit biases.[227]

2. Identifying Circumstances that Create an Appearance of Bias

Jurisdictions that wish to remove a judge to avoid an apparent bias should do so by delineating the circumstances deemed to result in an unacceptable appearance and then mandate recusal in those specific situations. State and federal courts in the United States create lists of appearance-based disqualifying factors. These mandatory recusal situations usually concern a judge's involvement in the matter as a lawyer or witness, or a judge's family member's participation or financial interest in the proceeding. [228] Some states specifically tailor recusal provisions to address particular problems of apparent bias in their states. For example, California mandates recusal from a proceeding when the judge has received a campaign contribution in excess of $1,500 within the past six years from a litigant or litigant's lawyer.[229]

While not stated in mandatory terms, judges in the United Kingdom have identified situations in which an appearance of bias may be presumed. *Locabail (UK) Ltd. v. Bayfield Products Ltd.,* suggests that recusal might be necessary where a personal friendship, or a close acquaintanceship, or a personal animosity

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[225] E. HEWART, MATHEW HALE 67 (1972).
[226] MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 163 (Charles M. Gray ed., 1971).
[227] *See generally,* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis*", 99 KY. L.J. 259, 300-24 (2010-2011).
[228] *See* ABA, MODEL RULES OF JUDICIAL CONDUCT R. 2.11(A)(2)(3)(6) (2007); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1)(b)(c)(d)(e) (2009).
[229] CAL. CODE OF CIVIL PROCEDURE § 170.1(a)9(A) (2014).

exists between a judge and a member of the public involved in a case.[230] The non-binding *Guide to Judicial Conduct* for the judges of England and Wales states that a judge shall not participate in a case in which a judge's family member appears as an advocate or party.[231] Section 7.2.3 of the *Guide* further provides that a "current or recent business association with a party will usually mean that a judge should not sit on a case." [232] Personal friendship or animosity toward a litigant also constitutes "a compelling reason for disqualification" under the *Guide*.[233] The *Bangalore Principles of Judicial Conduct* suggests disqualification when a judge previously served as a lawyer or witness in the case and when a judge's family member has an economic interest in a case.[234]

Admittedly, courts in the British Commonwealth take a dim view of creating a "catalogue of disqualifiers for judges in which a reasonable question of bias may arise."[235] But a list of disqualifying factors would add consistency and predictability to recusal decisions and obviate the need for pages and pages of court opinions detailing the information attributed to the observer and explaining whether the observer would decipher an appearance of bias from that information.

3. The Proposed Remedy in Summary

The disqualification framework proposed in this article requires the elimination of appearance-based recusal standards. That means that judges will no longer suffer disqualification when their impartiality might reasonably be questioned, or upon an apprehension or appearance of bias. Second, recusal decisions will be based on facts instead of appearances. This fact-based test can be the due process test formulated by the United States Supreme Court requiring a judge's removal when the probability of actual bias on the part of the average judge rises to an unconstitutional level.[236] The test could also track the formulation set forth in *R v. Gough* mandating recusal when the circumstances create a "real danger" of actual bias on the part of the average judge.[237] Or the test could track the language of *Porter v. Magill* requiring disqualification when the facts create a "real possibility" of bias."[238] However worded, the test must be fact-based and assess the probability, possibility, or likelihood of actual bias. Appearances, perception, and impressions will play no role in the decision. Third, the proposed test replaces the hypothetical lay observer with the hypothetical reasonable judge

[230] *Supra* note 100, at, [25].
[231] JUDICIARY OF ENGLAND AND WALES, GUIDE TO JUDICIAL CONDUCT § 7.2.1 and § 7.2.8 (2013).
[232] *Id.* at § 7.2.3
[233] *Id.* at § 7.2.2.
[234] THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT § 2.5. (2002).
[235] HAMMOND, *supra* note 97, at 42 (quoting Muir v. Comm'r of Inland Revenue [2007] 3 NZLR 495, [64]). *But see* Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System that Enhances Institutional Integrity,* 38 MELB. U. L. REV. 1, 17-18 (2014) (stating that a "number of well-established grounds for disqualification have been developed . . . that provide guidance as to when a judicial officer's interests . . . demonstrate an unacceptable level of prejudice (real or perceived)").
[236] Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 886-87 (2009).
[237] R v. Gough, [1993] AC 646, 665, 668.
[238] Porter v. Magill, (2002) 2 AC 357 [103].

so that the circumstances will be viewed through the eyes of the average, objective judge. Fourth, a jurisdiction may incorporate appearances into its recusal process by creating a list of situations that create an appearance deemed so detrimental to public confidence that recusal is required. It would be up the legal profession and the public to reach a consensus as to which appearances damage public trust in the courts.

VII. CONCLUSION

Disqualification serves one purpose—to ensure an impartial decision-maker. It cannot do more. Disqualification was not designed to protect vague, transient, moving targets like appearances, perceptions, and impressions. Neither was it designed to increase public confidence in the judiciary other than by providing the public with bias-free judges.

The hypothetical reasonable person serves one purpose — to determine facts in tort, contract, criminal, and other areas of the law. While proficient at determining facts, the reasonable person lacks the ability to gauge appearances, perceptions, or impressions.

The legal profession, in its wisdom, decided that public confidence in the courts could be enhanced by assigning these two stalwarts of the justice system new tasks that they were never designed to perform. It has not worked. The reasonable person cannot tell when the public apprehends bias because appearances do not lend themselves to a uniform interpretation by members of the public. Moreover, even if the public did share a uniform belief as to when a permissible appearance crosses the line and becomes an impermissible appearance, the hypothetical reasonable person would not know it because he bears no resemblance to the ordinary member of society. And even if the public did share a common understanding of what constitutes a bad appearance and even if the reasonable observer did exemplify the ordinary lay person, no one can ensure against bad appearances. That is why axioms like justice must satisfy the appearance of justice work well as aspirational guides but not as rules of conduct.

Disqualification must be restored to its original and only legitimate purpose—to remove a judge when the judge suffers from an actual bias or when the circumstances present a probability or real possibility of actual bias on the part of the average judge. This inquiry is fact- based. Actual bias is a fact. A probability or possibility of bias is also a fact, not an appearance, apprehension, suspicion, or perception. The most qualified person to determine the likelihood of a judicial bias is the reasonable person skilled in the art of judging, in other words, the average judge. If the profession is unwilling to give up appearances completely in the recusal arena, it can create a list of circumstances that create an unacceptable appearance of bias and mandate recusal in those situations. Encouraging decisions based on appearances should be left to marketing and public relations executives. The constituents of the legal system deserve better. They deserve accurate, fact-based decisions and that can only be achieved by giving up appearances.

JUDICIAL RECUSAL: A NEED FOR BALANCE AND PROPORTION

Rt. Hon. Lord Roger Toulson[1]

ABSTRACT

Litigants are entitled to an independent and impartial determination of their claims. Common law decisions on judicial recusal have focussed on objective impartiality but also on judicial independence and sometimes on both. This article discusses leading recusal decisions and comments on the desirability of establishing a pecuniary interests register.

It argues that judges are aware of their duty to disclose circumstances that might call their independence into question. However, a recent perceived increase in applications to recuse has led to a tendency to grant these as a precautionary measure. In cases of real doubt, it would be prudent to recuse but to do so otherwise sets an unfortunate example.

Decisions to recuse often involve questions of proportionality where the professional judge's training to excude the irrelevant must be weighed against appearances. Public perceptions matter but a fair-minded, informed observer will keep a sense of reality and proportion. Applications to recuse for alleged bias are naturally embarrassing for a judge but any temptation to routinely grant such applications should be resisted. The judge should disclose questionable circumstances so that the parties might have the chance to argue the point. This article argues that it is the judge's duty to hear cases put before him unless there is a real risk of bias or apparent lack of independence. Needless recusal is a potential source of forum shopping or delay.

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The entitlement of citizens to have their legal rights and obligations determined by an independent and impartial tribunal is a cornerstone of the rule of law. It is a fundamental precept of the common law and it is also enshrined in article 6 of the European Convention.

The purpose of the principle is not merely to avoid unjust decisions. A judge who lacked both independence and impartiality might nonetheless reach the right decision, but that would not make it legally sustainable. The principle is necessary in order for the public to be able to have confidence in the integrity of the legal system. For that reason appearances count. Neither

[1] The Rt. Hon. Lord Roger Toulson was appointed a Justice of the Supreme Court of the United Kingdom in 2003. He previously served as a judge of the Queen's Bench Division of the High Court (1996-2007), a Lord Justice of the Court of Appeal (2007-2013), and Chairman of the Law Commission of England and Wales (2002-2006). This article is based upon a paper presented to Modern Law Review Seminar: Judicial Recusal: 21st Century Challenges, Birmingham City University, Birmingham, U.K. 29 Sept. 2014.

litigants nor the public can be expected to have confidence in the legal process if the tribunal would appear to a reasonable person to be lacking in the essential qualities of a judge.

As a general principle, this sounds obvious, just and simple to comprehend. But its practical application depends in the nature of things as much on feel or impression as on a process of cognitive reasoning, and it is this feature which gives rise to most of the difficulties experienced by the courts. As is the customary way of the common law, it has developed through case law which provides illustrations or markers combined at times with attempts to lay down more general guidelines.

In many of the cases the emphasis has tended to be on objective impartiality rather than independence, but sometimes the concepts have been considered jointly and on occasions the emphasis has been on the question of independence.

In *Findlay v. United Kingdom* (1997)[2] the Strasbourg court considered that a court martial lacked both independence and impartiality because of its composition and means of administration. The court described the concepts of independence and impartiality as closely linked and considered them together.[3] It emphasised the objective element of both concepts. As to independence, it said that regard must be had to "the question whether the body presents an appearance of independence". As to impartiality, it spoke of the need not only to be free of personal prejudice or bias but to "be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect". It added that "In order to maintain confidence in the independence and impartiality of the court, appearances may be important."

The importance of the appearance of independence and impartiality is highlighted by the decisions of the Privy Council in *Millar v. Dickson* [2002][4] and *Yiacoub v. The Queen* [2014][5]. In *Millar v. Dickson* criminal prosecutions were conducted by the Lord Advocate, who was a member of the Scottish executive, before temporary sheriffs appointed by him. They were appointed for one year, with the expectation but without any right of reappointment, and were subject to recall during their term of appointment at the instance of the Lord Advocate. The Privy Council quashed the resulting convictions on the ground that the temporary sheriffs lacked the necessary appearance of independence and impartiality.

Yiacoub v. The Queen concerned criminal proceedings in the Sovereign Base Area of Cyprus. In that jurisdiction there are two criminal courts, the Resident Judge's Court ("RJC") and the Senior Judges' Court ("SJC"). There are normally nine judges of the SJC, appointed from among the circuit judges of England and Wales, and they sit periodically in panels on a largely ad hoc basis. The most senior judge is the Presiding Judge, who has a number of administrative responsibilities, including the distribution of work among the

[2] 24 EHRR 221.
[3] *Id.* at ¶ 73.
[4] 1 WLR 1615.
[5] [2014] UKPC 22, [2014] 1 WLR 2996.

senior judges. Sometimes senior judges also form the court of trial, sitting as judges of the RJC. In the case in question, the trial court consisted of three senior judges, presided over by the Presiding Judge. Two convicted defendants appealed to the SJC. Following the usual practice of the court, the Presiding Judge nominated the judges to hear the appeal. The appeals were dismissed. There was no suggestion of actual bias on the part of the judges who heard the appeal, but the Privy Council quashed their decision because of the lack of appearance of independence and impartiality inherent in a process by which a judge nominated the panel which was to hear an appeal from himself. Lord Hughes said "The objective observer would, as it seems to the Board, say of such a process 'That surely cannot be right'."[6]

The government argued that the fact that the judges had been independently appointed as full time circuit judges, and enjoyed security of tenure in that office, would have been sufficient to allay any doubt as to their impartiality on the part of a reasonable and well-informed observer. In support of that proposition it relied in particular on *Belize Bank v. Attorney General of Belize* [2011].[7] In that case, shortly after a general election in Belize, the newly appointed Prime Minister exercised a statutory power to appoint two lay members of an appeal board, chaired by a justice of the Supreme Court, to hear an appeal against directives issued by the Central Bank concerning repayment of a bank loan made by the Belize Bank to a company operating a hospital in Belize. The circumstances of the loan and the role played by the previous government in relation to it were the subject of much media and political interest, and during the election campaign in which the new Prime Minister had been the leader of the opposition he had been strongly critical of the financial arrangements made. He had also acted as counsel in legal proceedings which challenged the legality of the loan. After becoming Prime Minister he made a public statement promising to leave no stone unturned to bring to account those who he described as having robbed the people.

The bank argued that the circumstances in which the Prime Minister appointed the lay members of the appeal board were such as would cause a reasonable observer to doubt their impartiality. The Privy Council, by a majority, rejected the bank's argument.

Lord Kerr repeated the well-established formula that the question is whether a fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased.[8] He adopted Kirby, J.'s comment in *Johnson v. Johnson* (2000)[9] that "a reasonable member of the public is neither complacent nor unduly suspicious", and Lord Hope's statement in *Gillies v. Secretary of State for Work and Pensions (Scotland)* [2006] that "[t]he fair-minded and informed observer can be assumed to have access to

[6] *Id.* at ¶15; 3000.
[7] [2011] UKPC 36.
[8] (citing *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357).
[9] (2000) CLR 488, 509.

all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to which matters."[10]

In the *Belize* case there were a number of relevant facts apart from the political background. It was the Prime Minister's statutory responsibility to make the appointments, but the names of the two lay members of the appeal board appointed by him had been put forward by a senior civil servant in the Ministry of Finance. They each had specialist qualifications and experience, and neither of them was a serving member of any financial institution in Belize. The chairman of the board was a justice of the Supreme Court, who had been nominated by the Chief Justice, and under the relevant rules the chairman had what amounted to a blocking vote.

In *Yiacoub* there was no cause to question the general independence and impartiality of the judges of the SJC, but the particular problem arose from the selection of an appeal panel by the judge who presided over the decision which was the subject of the appeal. The selection of the panel was no doubt seen by the Presiding Judge and the members of the panel as a purely administrative function, but members of the public would reasonably have perceived a system by which the judge whose decision was the subject of an appeal picked the judges to hear the appeal as lacking independence.

The cases which I have so far discussed have involved institutional challenges of one kind or another. I now turn to two other categories of case.

First, there are cases where the challenge has been that there is a lack of impartiality by reason of a judge's previous judgments or remarks made in a judicial context. *Porter v. Magill* was itself such a case. In the course of a district auditor's investigation to determine whether local councillors and officers had by wilful misconduct caused loss to the council, the district auditor gave notice of his provisional findings against[10] individuals and offered to hold a public hearing. He held a press conference to announce the findings, which were expressed in strong terms. He was asked to recuse himself from further proceedings on the ground that his conduct gave the appearance of bias and refused to do so. His decision not to recuse himself was upheld by the House of Lords.

The district auditor was criticised for making the statement which he did at the press conference. Lord Hope said that the main impression which it would have conveyed to a fair-minded observer was that its purpose was to attract publicity to himself and perhaps his firm. It was an exercise in self-promotion in which he should not have engaged. A casual observer may have formed the view that there was a possibility of bias, but that was not the test. Looking at the district auditor's conduct in the context of the whole investigation, which had attracted great public interest, the House of Lords did not consider that his words would have led a fair-minded and informed observer to conclude that there was a real possibility that he was biased. He had been at pains to point out that his findings were provisional, and there was no reason to doubt his word on that point, as his subsequent conduct demonstrated.

[10] UKHL 2, ¶17; [2006] 1 WLR 781, 787.

In recent cases the courts have taken a similarly firm approach to complaints about a judge's non-recusal after making statements about one of the parties in a judicial context.

In *JSC BTA Bank v. Ablyazov (No. 9)* [2012][11], the Court of Appeal considered such a question in the context of a long-running and complex case arising from a claim by a Kazakhstan bank that Mr Ablyazov had defrauded the bank, of which he was the former chairman, of almost US$5 billion by entering into specious transactions with companies of which he was the ultimate owner. At the outset of the litigation the bank obtained a worldwide freezing order against Mr Ablyazov and others. A judge was assigned to the case and in due course he heard a large number of applications involving allegations that Mr Ablyazov had failed to make proper disclosure. To assist in uncovering his assets the judge appointed receivers. After a further lengthy hearing the judge found that Mr Ablyazov had committed a number of contempts in failing to disclose assets, dealing with his assets in breach of the freezing order and lying to the court, and that in defending the committal application Mr Ablyazov had relied on false witnesses and forged documents. All this was before the action itself had come to trial. Mr Ablyazov applied to the judge to recuse himself on the grounds that the issues to be determined at the trial overlapped with issues on which he had made findings in the committal proceedings and had done so in trenchant terms regarding Mr Ablyazov's credibility. At one point the judge had said "When Mr Ablyazov says "Black is black", the court has got to consider whether black is truly black". It was submitted that a reasonable observer would have doubt as to the judge's impartiality when it came to the trial.

The judge declined to recuse himself and the Court of Appeal upheld his decision. Rix, L.J., cited the statement of Mason, J. in *In re JRL, ex parte CJL* (1986):

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of the judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[12]

Rix, L.J., noted that in large and strongly fought litigation it is not unusual for the assigned judge to have to decide questions involving the credibility of a party at an interlocutory stage; but such findings are, as he described it, "part of the res gestae of the litigation" or "writings in the wall", which would have to be considered, so far as relevant, in any subsequent proceedings including the trial, whether conducted by the same or any other judge.[13] Similarly, in family proceedings it is common practice for the same judge to try both fact-finding hearings and a subsequent determinative care assessment. Unless the first judge had shown by some judicial error, such as

[11] [2012] EWCA Civ 1551, [2012] 1 WLR 1845.
[12] (1986) 161 CLR 342, 352.
[13] [2012] EWCA Civ 1551¶ 69; [2012] 1 WLR 1845, 1871.

by the use of unjudicial language, that there were grounds for suspicion of bias, a fair-minded and informed observer would be unlikely to think that the first judge was in any different position from a second judge, except that he was more experienced in the litigation.

It was a crucial consideration that what the first judge did, he did as part and parcel of his judicial assessment of the litigation before him; he was not "pre-judging" by reference to extraneous matters or predelictions or preferences.

An additional feature of the case was that Mr Ablyazov, an intelligent man with access to the best quality legal advice, did not make his application to the judge to recuse himself until many months after the contempt judgment and on the eve of the trial, which had been fixed for a long time with a lengthy trial estimate. The Court of Appeal inferred that the timing of the application to recuse was a tactical decision, designed to derail the trial. It held that his failure to object at any time from the delivery of the contempt judgment until the eve of the trial was "an unequivocal, informed and voluntary waiver of any right he had to do so."[14]

In *O'Neill v. H.M. Advocate (No. 2)* [2013] the appellants were charged with various sexual offences against children and murder. Split trials were ordered. They were tried first for the sexual offences and convicted. After seeing a list of their previous convictions the judge said that he would adjourn sentence until after the murder trial and would reserve his observations until then, except to say that they were clearly "evil, determined, manipulative and predatory paedophiles of the worst sort."[15] They were tried for murder before the same judge but a different jury and were again convicted. He was not asked to recuse himself and no complaint was made about actual bias in his conduct of the murder trial, but the appellants appealed against their convictions for murder on the ground that his remarks at the close of the first trial had given an appearance of bias, with the consequence that the second trial before the same judge was a violation of their rights under article 6. The Supreme Court rejected the argument.

Lord Hope cited the *Ablyazov* case with approval.[16] He observed that when the judge made his remarks at the end of the first trial he was addressing the appellants in the performance of his judicial function. A fair-minded and informed observer would appreciate that he was a professional judge who had taken the judicial oath and had years of relevant training and experience. It would only be if the judge expressed outspoken opinions about the appellants' character that were entirely gratuitous, and only if the occasion for making them was plainly outside the scope of the proper performance of his duties, that a fair-minded and informed observer would doubt the judge's ability to perform his duties at the next trial with an objective judicial mind.[17]

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[14] *Id.* at ¶70; 1871.
[15] [2013] UKSC 36¶42; [2013] 1 WLR 1992, 2008.
[16] Id. at ¶¶ 51-53; 2011-2012.
[17] [2013] UKSC 36 ¶¶ 51-53; [2013]1 WLR 1992, 2011-2012.

Lord Hope said that a fair-minded and informed observer would also have taken into account that the appellants' lawyers were present when the judge make his remarks, and that it did not seem to occur to them that the judge had trespassed beyond the proper performance of his duties in his comments on the appellants' character.[18]

Another way of making the same point is that it would be odd to ascribe to a fair-minded observer a higher degree of sensitivity to the possibility of bias than that of the appellants' experienced legal advisers. It is a different point from the doctrine of waiver which the court applied in the *Ablyazov* case.

The biggest category of cases are those where the judge has, or is alleged to have, a personal interest in the subject matter or a connection with a party, its representatives or a witness, of sufficient significance or proximity to compromise or to raise doubt in the mind of reasonable and informed observer as to his independence and impartiality. This can arise in so many ways that it would be impossible to compile a list.

That is one reason why I do not support the suggestion made by some that there should be a public register of judicial interests. This is a topic which Sir Grant Hammond has studied more widely than I have. In 2011 the New Zealand Law Commission invited consultation on the subject as part of its review of the Judicature Act 1908. In 2013 the New Zealand Minister of Justice agreed with the Law Commission's view, reached after considerable media discussion and public consultation, that a pecuniary interests register would not deliver sufficient benefit, as well as presenting practical difficulties. As the Commission pointed out in its report,[19] a pecuniary interests register would in any event not cover the range of possible associations which might give rise to a recusal issue. Public perceptions may be different in different countries; but, as in New Zealand, I do not believe that in the United Kingdom a register of judicial interests is necessary to maintain public confidence in the impartiality and integrity of the judiciary.

Judges are aware of their duty to disclose circumstances which might bring their independence into question. On the comparatively rare occasions when they do not do so, experience tells that it is though oversight or because it simply did not occur to the judge that anyone might think the matter to be relevant. They are not in general likely to be matters which would have featured in a register of interests, and it would be neither practical nor reasonable to require every judicial office holder, permanent or part time, to compile a list of all connections with any person or organisation which might ever have something to do with a case in which he might become involved.

My experience is that there has been an increase in recent years in applications to recuse, sometimes on quite tenuous grounds, and that there has sometimes been a tendency to grant such applications on the basis that it is better to be safe than sorry. Of course if a judge is in real doubt whether a

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[18] Id. at ¶55; 2012.

[19] LAW COMMISSION REPORT NO. 126, REVIEW OF THE JUDICATURE ACT 1908: TOWARDS A NEW COURTS ACT ¶¶6.55-56 (2012) available at http://www.lawcom.govt.nz/sites/default/files/publications/2012/11/nzlc_r126_judicact_web.pdf.

reasonable observer might consider there to be a real possibility of bias, he would be wise to recuse himself, but to do so otherwise sets an unfortunate example. If the judge is concerned about the possible risk of an appeal and a retrial, a possible course is for the judge to abridge the time for appeal and notify the Court of Appeal with a view to any appeal or application for permission to appeal being brought on very quickly. It is my experience that the Court of Appeal will cooperate to ensure that the matter receives appropriate urgency.

Deciding whether a judge should recuse himself often involves a question of proportionality. Should a judge decline to try a case in which one of the parties is a former client? Does it make a difference to the answer whether the client was a private individual, an insurance company, a local authority or the government? Should a judge decline to hear a case in which one of the parties is a firm of solicitors from whom he used to receive instructions – or against whom he regularly appeared? The point that a professional judge is trained to exclude irrelevant matters and can ordinarily be expected to do so is one which merits weight. Appellate judges regularly decide whether to uphold or reverse decisions of close friends and colleagues, and they are trusted to do so dispassionately. Public appearances matter, but the fair-minded and informed observer can be expected to keep a sense of reality and proportion.

Another aspect of growing practical importance is the impact of the need for judges to be seen to be independent and impartial in their own lives. It has long been accepted that judges should play no active part in politics. But judges have long been supporters of a wide spectrum of charitable causes, especially but not only those linked to our justice system, such as prison education and reform, homelessness, domestic violence, mental health, and pro bono representation. A full list would be long. Judges are now having to consider how far such interests are compatible with their professional position or are liable to restrict the cases which they are able to hear.

It sometimes happens that a case casts a wider shadow than its ratio decidendi requires. *Pinochet* [2000] may be regarded as such a case.[20] The basis of the decision was that Lord Hoffmann had an interest in the case which meant that he was automatically disqualified under the principle that no one may act as a judge in his own cause. In other words, he lacked the independence which is an essential requirement of a judge. The reason for the finding was that Lord Hoffmann was the chairman of Amnesty International Charity Limited, a wholly owned subsidiary of Amnesty International Limited which existed for the purpose of promoting the cause of Amnesty International. As such he was a party to that cause, and Amnesty International was a party to the litigation. The facts were very special and unusual, as Lord Browne-Wilkinson emphasised. He said:

[20] R. v. Bow Street Metropolitan Stipendiary Magistrate; *ex p.* Pinochet Ugarte (No. 2 [2000] 1 AC 119.

> It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the [previous] order…would lead to a position where judges would be unable to sit on cases involving charities with which they are involved. It is suggested that because of such involvement a judge would be disqualified. That is not correct. The facts of this present case are exceptional … . Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or to disclose the position to the parties.[21]

A judge is likely to feel a natural sense of awkwardness when asked to recuse himself on the ground of apparent risk of bias, and this may incline him to grant it. The prospect of an appellate court holding that he was wrong not to do so is one which he may naturally prefer to avoid. If he can see that there are circumstances which might be capable of giving rise to such an argument, he should certainly disclose them, but that is simply to give the parties an opportunity to argue the point.

In deciding whether he should recuse himself, he should apply the same test as he would if he were ruling on whether another judge ought to have recused himself in the same circumstances. It is not a matter of discretion. It is the duty of a judge to hear cases allocated to him, unless he considers that a fair-minded and properly informed observer would consider that there was a real risk of bias or apparent lack of independence.

I began by referring to the fundamental nature of the rights of citizens to have their disputes determined by an independent and impartial tribunal. I would end by observing that the right of citizens to have their disputes decided by an independent and impartial tribunal within a reasonable time belongs to the parties on all sides. The courts should therefore be alert not to allow recusal applications on slender grounds to become a tactic for forum shopping or delay.

[21] *Id.* at 136

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